



THE  
**JERE BEASLEY REPORT**

MARCH 2013

# Beasley Allen

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# I. CAPITOL OBSERVATIONS

## **THE TIME HAS COME FOR SENSIBLE GUN CONTROL**

It appears the vast majority of Americans have come to realize that we badly need sensible gun control in this country. Last year, according to a report, guns killed 10,728 people in the U.S. The country with the second-highest number killed last year was Israel, with 58 deaths. Japan was third with 48. A recent poll, conducted by an independent and well respected pollster, revealed that 52% of Americans now support stricter gun control laws. What we learned from that poll is not totally unexpected. The Sandy Hook Elementary School mass murders clearly ignited a national discussion on gun safety, one that is long overdue, and folks are finally demanding action. The following are some of the significant findings from the poll:

- 56% support a nationwide ban on the sale of assault weapons.
- 56% support a nationwide ban on the sale of high-capacity ammunition magazines that hold more than ten bullets.
- 92% support requiring background checks for all gun buyers.

These numbers clearly indicate that Americans are ready for reasonable gun control even though some key members of Congress seem not to have gotten the message. Perhaps the most significant finding from the survey is from American households that own guns. From that group the poll revealed that:

- 91% support background checks for all gun buyers
- 52% support a ban on assault weapons
- 45% support the ban on the sale of high capacity magazines

All of the above positions are contrary to the public pronouncements by NRA Chief Wayne LaPierre. His allegiance is clearly to the gun manufacturers and not to rank-and-file NRA members. LaPierre has made a number of illogical statements concerning the current situation in this county. The more he talks, the more NRA members realize that LaPierre is hurting them. No longer is LaPierre protecting the 2<sup>nd</sup> Amend-

ment right for citizens to own guns. Instead, he is speaking for and protecting those who make and sell assault rifles and ammunition. The time has come for reasonable gun control that makes sense.

I believe members of Congress—once they start listening to the American people—will pass the needed legislation. The obvious place to start is with universal background checks. We must then go on to enact a ban on assault weapons and high-capacity magazines. Passage of those items would protect the American people and would do nothing to keep citizens from owning handguns, shotguns, and rifles, which are the weapons that should be protected under the 2<sup>nd</sup> Amendment. The time has come for Congress to take action.

## **PUTTING THE STATE'S FISCAL HOUSE IN ORDER SHOULD BE A TOP PRIORITY**

An excellent article dealing with issues facing the regular session of the Alabama Legislature, written by Bob Gambacurta, appeared in the *Montgomery Independent* on February 7<sup>th</sup>. It was extremely well done and squarely on target. Bob had several timely and accurate assessments concerning the state's fiscal problems. Clearly, the most important items on the legislative agenda are passing balanced budgets for the State's General Fund and for the Educational Trust Fund. The budgets will have to be balanced this year without resorting to borrowed money or federal funds. The legislators' task, when it comes to budgets, will be even more difficult than usual this year.

The Legislature began this year to pay back some of the more than \$1 billion either borrowed or diverted from the Alabama Trust Fund in recent years. I have always considered borrowing from the Trust Fund to be poor fiscal policy. The Fund was never intended to be used like a finance company. Neither did the borrowed money come from a savings account. Instead, it came from a Trust Fund that has specific restrictions on how its money can be spent.

There is another major problem, one which isn't mentioned very often by the legislative leadership, and that concerns the use in recent years of federal funds to help patch budgets. Federal stimulus funds, which were used to bail out state government finances over the past few years, are no longer available. That creates a major problem since those funds were quietly used to balance the state's budgets. Also, the two rainy day accounts in the Alabama Trust Fund have lit-

erally been drained, making it impossible to borrow any more money from those sources.

In addition to the \$162 million owed to the General Fund Rainy Day Account and the \$437 million owed to the Education Trust Fund Rainy Day Account, another \$437 million was borrowed from the Alabama Trust Fund to be paid to the state's general fund over three years. I have to wonder where the money will come from to repay these loans. Having said all of this, I am hopeful that the legislators will get down to work on solving our state's fiscal problems on a permanent basis. Failing to take the necessary action, and continuing to borrow and patch, will only make things worse for the people of Alabama.

Source: *The Montgomery Independent*

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## **DUELING REPORTS ON ALABAMA'S MEDICAID PROGRAM**

It's an unfortunate fact that many hard-working Alabamians in low-wage, economically essential jobs have no health coverage. As a result, those folks struggle with health problems that reduce their productivity and add stress to their households. These health problems get worse without timely preventive healthcare. Imagine what it would mean to the state's business community to have a work-force with access to regular health care. Imagine the effect on the state's education system if all children came to school healthy, ready to learn and prepare for their future.

Hundreds of thousands of Alabamians are caught in the health coverage gap. Working at low-wage jobs that often don't offer health insurance, these folks earn too much to qualify for Medicaid and too little to afford private insurance. Therein lies the problem—one which creates a very bad situation for all Alabamians—and ignoring it makes no sense.

Fortunately, the Patient Protection and Affordable Care Act passed by Congress bridges this gap by helping states expand Medicaid to people with incomes up to 133% of the federal poverty level, which is just under \$15,000 a year for an individual and \$31,000 for a family of four. Folks who are uninsured and who earn above this amount and up to 400% of the poverty level will qualify for sliding-scale tax credits to help buy insurance through a state health insurance exchange, or marketplace, which is the healthcare law's other main tool for expanding coverage.

It appears that lots of folks, including some politicians, don't really understand Medicaid—its purpose, how it works, or who is covered. Alabama Medicaid has been successful in providing health care for children in low income families, seniors living in nursing homes, and folks with disabilities. The program can build on these successes and make coverage affordable for more working families. Despite the tight limits on direct Medicaid coverage, all Alabamians benefit from the services and facilities that Medicaid funding makes possible. Without Medicaid, many hospitals, doctors' offices and specialized treatment centers would go out of business. Without Medicaid, hundreds of thousands of Alabamians would have little, if any, access to healthcare.

After months of studying Medicaid programs in other states, the Alabama Medicaid Advisory Commission created by Gov. Robert Bentley voted to recommend expanding an existing care coordination pilot

project now operating in four Alabama regions. The Commission is made up of health care providers, insurers, governmental officials and one consumer. The Governor had given the commission a deadline of January 31<sup>st</sup> to propose reforms that would control costs and improve quality in the program.

Under the Commission's plan, Alabama Medicaid would divide the state into ten or more regions, using the patient care network (PCN) model to coordinate care tailored to local needs. Jim Carnes, Alabama Citizens' Policy Project team leader, holds the lone consumer seat on the 33-member coalition. Jim, who is quite knowledgeable on healthcare issues and on Medicaid specifically, had this to say: "We're pleased with the plan to make Medicaid's care delivery more effective and efficient while keeping the savings in-state."

But there is another group working on Medicaid and it appears they are taking a totally different approach. The Legislative Joint Committee on Medicaid Policy, which is also looking at how to improve the programs, will issue a report fairly soon. I read a draft from the committee last month. It concerns me and should concern all Alabamians. In the draft, the committee basically recommends a cap on spending for the Medicaid program. That, in my opinion, is the wrong approach to take and will make matters much worse.

To broaden consumer input on the Medicaid reform process, the group Alabama Arise, an organization that works hard for low-income Alabamians, convened a coalition of 17 groups representing current and potential Medicaid recipients. For a list of coalition members, and to read the principles of consumer-centered Medicaid reform the coalition submitted to the Commission, you can go to [arisecitizens.org](http://arisecitizens.org).

Dr. Don Williamson, Commission chairman and State Health Officer, put a target date for statewide operation of the new structure that came out of the Governor's Commission for sometime in 2015 if both Gov. Bentley and the Legislature agree on the plan. The Medicaid-run pilots now serve multi-county regions centered in Huntsville, Mobile, Opelika and Tuscaloosa. Significantly, only one member of the Commission voted against the proposal. Patient Care Networks have two inter-related goals:

- Improving health outcomes, and
- Holding down costs.

It should also be noted that Alabama Medicaid, with its 2% to 3% overhead, has the third lowest cost-per-recipient of any state

Medicaid program. That has received very little attention by the Medicaid naysayers. As stated above, I find that many folks are confused about exactly who Medicaid serves. I am convinced that the Legislature should adequately fund the Medicaid program. Dr. Williamson has made it very clear that we will face a fiscal disaster in the program very soon if corrective action isn't taken.

Late in 2012, Gov. Bentley announced that Alabama would not expand Medicaid "under the current structure" to cover everyone up to 133% of federal poverty level. That's what the Patient Protection and Affordable Care Act encourages states to do. Even though I like and respect Gov. Bentley, I believe that he is wrong on the Medicaid issue. Hopefully, the Governor's Commission and the Joint Legislative Committee on Medicaid Policy will get together and work to restructure the program in a sensible manner. Then I believe the Governor would approve expansion. To find out more about the Commission's Medicaid reform study and recommendations, visit [Medicaid.alabama.gov](http://Medicaid.alabama.gov), and click on "Newsroom."

Sources: Arise Citizens' Policy Project, Associated Press, and *The Montgomery Advertiser*

## **AGRICULTURE, AGRIBUSINESS AND FORESTRY ARE VERY IMPORTANT TO ALABAMA'S ECONOMY**

Findings from the economic impact study released last month by John McMillan, Commissioner of the Alabama Department of Agriculture & Industries, point to a brighter economic future for the people of Alabama. A collaborative effort between Auburn University's research division, the Alabama Cooperative Extension Service, and the Alabama Agribusiness Council, the study shows that agriculture, agribusiness and forestry impact the state's economy by \$70.4 billion a year. Commissioner McMillan had this to say:

*This study clearly indicates that agriculture, forestry and agribusiness are the backbone of Alabama's economy, amounting to some 40% of the state's \$175 billion gross domestic product.*

*In addition, the study, entitled "Economic Impacts of Alabama's Agricultural, Forestry, and Related Industries," reports that 580,295 Alabamians—roughly 22% of all workers in the state—work in agriculture, forestry and related industries. A strong foreign demand for farm commodities has been steady and the outlook is positive. The goal of the state Agricultural*

ture Department is to support the growth of agriculture and agribusiness.

Source: [agi.alabama.gov](http://agi.alabama.gov)

### **THOUSANDS OF RED SNAPPER ARE BEING KILLED IN THE GULF OF MEXICO**

A federal mandate to remove old, abandoned oil and gas rigs in the Gulf of Mexico is blowing up a lot more than just the rigs. Recently, video obtained by a Mobile television station showed thousands of pounds of dead fish, mostly red snapper, floating to the surface after one of the controversial demolitions in the Gulf. It was reported that the demolitions are frequent, sometimes three a week, in the Gulf of Mexico, and have been going in for some time. The demolitions are not only killing lots of snapper, but their habitats are being destroyed.

The old rigs are under the surface and have developed into artificial reefs with rich coral habitats. On some of the older rigs, those habitats have grown over a period of 30 to 40 years. The killing of the red snapper will badly hurt charter boat captains and anglers. Federal restrictions keep cutting the length of the red snapper season, and quotas are also shrinking in an effort to protect the species from over-fishing. Maybe somebody can explain it, but it makes no sense to tell the fishermen not to fish red snapper and then for the government to continue blowing up the fish.

It has been estimated that 10,000 pounds of fish, mostly red snapper, were killed after the most recent demolition. The killing of red snapper has both environmental and economical ramifications. The red snapper is the most valuable fish species in the Gulf of Mexico. Tourism, industry and restaurants depend on these fish. The federal actions are destroying a very valuable resource. Hopefully, members of the House and Senate from the Gulf Coast states will get actively involved and work to stop the massive fish kills in the Gulf.

Source: *Mobile Press Register*

## **II. A REPORT ON THE GULF COAST DISASTER**

### **LIMITATION TRIAL IN OIL SPILL LITIGATION**

As this issue was on the way to the printer, one of the most significant trials in United States history had just started in New Orleans. Opening statements in the first phase of the Limitation of Liability trial have been given by the opposing sides. The court will determine the parties responsible for the Deepwater Horizon rig explosion that killed 11 people and inundated the Gulf of Mexico with millions of gallons of oil. As the trial date got nearer, it became evident to our lawyers who were involved that a settlement was unlikely. While it would have been good to have a settlement, there is a definite silver lining to the prospects of a trial. The landmark economic and medical settlements reached between the Plaintiffs' Steering Committee and BP last year were good for victims of the spill. That was a tremendous accomplishment.

The refusal by the Defendants to settle this part of the litigation should only benefit the Gulf Coast states and the federal government. Billions of dollars are at stake in this trial. The court will determine whether the parties were grossly negligent in causing the disaster, thereby setting the stage for punitive damages against the Defendants. The court is set to apportion fault between the parties involved in the disaster, and also will determine whether Transocean is entitled to limit its liability to the value of its interest in the Deepwater Horizon, or about \$27 million. Importantly, proof that suggests Transocean was grossly negligent would destroy Transocean's ability to limit its liability, and could make the company responsible for billions in damages.

Judge Carl Barbier wisely set the trial up to be held in separate phases. As reported previously, he divided the Limitation trial into three distinct phases. Those are:

- Blowout Liability
- Source Control
- Containment

In the Blowout Liability phase, the court will determine culpability for the initial explosion and sinking of the Deepwater Horizon rig. The Source Control phase will then evaluate efforts to seal the well, and

collaterally, the total volume of oil that spilled into the Gulf of Mexico. The federal government is particularly concerned with Source Control. That's because the total volume of oil spilled significantly impacts the fines and penalties that can be assessed against the responsible parties. Finally, the Containment phase evaluates response and recovery activities after the spill, and addresses liability issues created by those activities, including the application of chemical dispersant.

The Plaintiffs' Steering Committee has done a tremendous job balancing one of the most significant settlements in U.S. history while preparing for one of the most significant trials ever in this country. The PSC and governmental entities have worked hard and are ready for trial. We fully expect a positive outcome. This is one thing for sure: America (and perhaps even the court) will be shocked when the complete story behind the Defendants' actions leading up to the disaster are revealed.

Alabama Attorney General Luther Strange has had a key role in the prosecution of this case. Rhon Jones, who serves on the PSC, says he has done a very good job. I am going to set out his opening statement in the case for your edification:

May it please the Court:

I am Luther Strange, the Attorney General of the state of Alabama and Liaison Counsel for the Gulf States in this historic litigation. It is my privilege to stand before you today to represent Alabama and its nearly 5 million citizens. In due course, I will have the opportunity to detail the lingering economic and environmental devastation the Defendants inflicted on Alabama. And I will have a great deal to say about our damages, for they are indeed great. But today, I will be brief.

In this Phase One, we address just one issue: Who is at fault for the explosion and spill that caused such unprecedented and catastrophic damages to the Gulf Coast? On this issue, Alabama's interests align perfectly with the interests of the United States and the private plaintiffs. Alabama therefore supports and affirms the description of the facts and law so well outlined by Mr. Roy and Mr. Underhill, and I will not duplicate their efforts.

Instead, I offer two points that summarize our collective case against BP:

One: The Spill was both predictable and preventable.

Two: BP's culture of corporate callousness towards the Gulf caused the Spill.

On the first point, the evidence will show that BP knew that the risk of a deepwater blowout in the Gulf was great; in fact, it was 9 times greater than in the North Sea.

BP also knew—and certainly should have known—before the blow-out that:

- The centralizers would not centralize
- The cement would not cement
- The controllers would not control, and
- The blowout-preventer would not prevent

We will show that BP knew all of this; but BP was blinded by their bottom line, which leads me to my second point: The Spill was tragically inevitable due to BP's **corporate culture**.

The evidence will show that, at BP, money mattered most.

- Money mattered more than the environment.
- Money mattered more than the thousands of jobs and businesses they destroyed along the Gulf Coast.
- Money even mattered more than the lives of the 11 workers who died on the Horizon rig.

Money mattered more to BP than the Gulf. A lot more.

Your honor, the evidence will be clear and unmistakable: Greed devastated the Gulf.

Finally your Honor, I agree with Mr. Roy that, in the coming weeks, we will prove that BP acted with **gross negligence** and **willful misconduct**—and that we will prove the same level of fault against two of BP's partners, Transocean and Halliburton. For that reason, we will ask the Court at the end of this trial to rule that all three—BP, Transocean, and Halliburton—are liable for **punitive damages** to the State of Alabama.

Again, it is a privilege to stand here before you as this historic case gets underway. Thank you.

If you have any questions about any aspect of the trial phase, contact Parker Miller, a lawyer in our firm who has been working virtually fulltime on this litigation, at 800.898.2034 or Parker.Miller@beasleyallen.com.

### **BP OBJECTS TO OIL SPILL PRICE TAG SOUGHT BY STATES**

BP says the separate claims made by states and local governments on the U.S. Gulf Coast for economic and property damages from the oil spill, when combined, all totaled \$34 billion. The oil giant said the claims were “substantially” overstated. The \$34 billion total was provided last month for disclosure reasons with the company's financial results. BP said the total stated was based on claims made last month by Alabama, Mississippi and Florida, as well as claims made by Louisiana and others from local governments.

Citing the Oil Pollution Act (OPA) underpinning the claims, BP said it considers the methods used to calculate them to be “seriously flawed, not supported by the legislation and to substantially overstate the claims.” BP Finance Director Brian Gilvary claimed that proving a loss of tax revenue by these governments would be difficult. I disagree with his assessment and know for a fact that Alabama will be able to prove its claim. BP has consistently tried to downplay the significance the oil spill has had on the Gulf Coast states. The company has misrepresented the amount of oil spilled on numerous occasions. It also has waged a well-financed public relations campaign designed to make things look good in the Gulf.

Source: *Claims Journal*

### **CLAIMS CONTINUE TO COME INTO THE OIL SPILL CLAIMS FACILITY**

Claims continue to come into the Oil Spill Claims Facility. As of February 20<sup>th</sup> fully completed claims stood at 131,055 and claims started were at 11,387, for a total of 142,442 claims. These numbers are almost double the number of claims received by the facility last November (70,000 fully completed plus 10,000 started, or 80,000 total claims). Individual economic loss claims remain as the largest category of claims filed at 17,486, but business claims (16,856) continue to be filed at a heightened pace, and may catch the individual claims before the facility closes.

Payments and determinations are another closely tracked statistic in the facility. As of February 20, 2013, the claims facility had

issued payment offers for almost 28,000 claims in the amount of nearly \$2.2 billion—nearly half of which were business claims. Of those offers, \$1.94 billion in claims (almost 24,000 total) have been accepted. In comparison, November totals suggest 6,460 claimants had accepted a total near \$500 million in claims. While these numbers demonstrate significant progress that Claims Administrator Pat Juneau can build upon, the claims facility is working hard in processing claims to payment in order to keep pace with the volume of claims coming into the facility.

Lawyers in our firm continue to assist businesses and individuals throughout the Gulf Coast in preparing and submitting claims to the facility, and we have been happy with the results we have obtained for our clients. We have learned from experience that these claims are not a simple accounting exercise. BP is closely monitoring every claim that is filed in the facility, and has exercised its right to appeal hundreds of claims where it sees deficiencies in either claim preparation or settlement interpretation. We believe that advocacy for the client in these appeals is critical if the client is ever to obtain the full amount they are entitled to under the settlement's terms.

If you have any questions about the claims process, contact Sandra Walters, Toxic Torts Administrative Secretary, at 800.898.2034 or Sandra.Walters@beasleyallen.com. Sandra will put you in touch with one of the Section's lawyers who are working on this litigation.

### **JUDGE APPROVES \$4 BILLION BP OIL SPILL CRIMINAL SETTLEMENT**

The Justice Department's criminal probe of BP's role in the Deepwater Horizon disaster and Gulf oil spill has come to an end. U.S. District Judge Sarah Vance agreed to let the London-based oil giant plead guilty to manslaughter charges for the deaths of 11 rig workers to and pay a record \$4 billion in penalties. The plea deal approved by Judge Vance doesn't resolve the federal government's civil claims against BP. The company will have to pay billions more for environmental damage from its 2010 spill. The settlement of the criminal charges has no “legal effect” on the civil matter.

The criminal settlement calls for BP to pay nearly \$1.3 billion in fines. The largest previous corporate criminal penalty assessed by the Justice Department was a \$1.2 billion fine against drug maker Pfizer in 2009. The plea deal also includes payments of nearly \$2.4 billion to the National Fish and Wildlife

Foundation and \$350 million to the National Academy of Sciences. The two groups will administer the money to fund Gulf restoration and oil spill prevention projects.

Interestingly, the \$4 billion in total penalties is 160 times greater than the \$25 million fine that Exxon paid for the 1989 *Valdez* spill in Alaska. But the damage in the Gulf are much greater than those in the Alaska spill. The April 20, 2010, blowout was the result of a combination of rush-to-production, time-saving, cost-cutting decisions by BP and its partners on the drilling project. The corporate wrongful conduct is as bad as anything I have ever seen.

Source: Associated Press

#### **FEDERAL JUDGE APPROVES \$400 MILLION TRANSOCEAN CRIMINAL PLEA DEAL**

Transocean Ltd.'s agreement with the Justice Department to plead guilty to a misdemeanor charge and pay \$400 million in criminal penalties for its role in the 2010 Gulf of Mexico oil spill has also been approved. U.S. District Judge Jane Triche Milazzo accepted Transocean's plea and imposed the agreed-upon sentence during a hearing on February 14<sup>th</sup>. Judge Milazzo said she had received no letters objecting to the settlement. Transocean has agreed to plead guilty to a misdemeanor charge of violating the Clean Water Act.

Transocean owned the rig Deepwater Horizon, which exploded and sank over BP's Macondo well in April 2010. The accident killed 11 men and sparked the nation's worst-ever offshore oil disaster. Much of the \$1.4 billion total that Transocean agreed to pay will fund environmental-restoration projects and spill-prevention research and training. The court filing says the failure by BP rig supervisors and Transocean crew members to properly investigate abnormally high pressure readings during a crucial safety test, called a negative test, was a "proximate cause" of the blowout and spill. But it was BP that determined whether and how the testing would be conducted. It was stated in the court filing:

*BP, through its (supervisors) stationed on the Deepwater Horizon, was responsible for supervising the negative testing, and had the ultimate responsibility to ensure all operations, including the negative test, were conducted safely and according to the industry standard of care.*

The \$400 million in criminal penalties Transocean agreed to pay would be the sec-

ond-highest criminal environmental recovery in U.S. history, trailing only BP's \$4 billion payment. Transocean has two years to pay the \$1 billion civil penalty.

Source: AL.com

### **III. DRUG MANUFACTURERS FRAUD LITIGATION**

#### **WISCONSIN APPEALS COURT AFFIRMS \$16 MILLION AWP VERDICT**

We reported in the March 2009 issue of the Report on the successful outcome of an AWP trial in Wisconsin. The state won the case at the trial court level and the verdict was appealed by Pharmacia. The Wisconsin Court of Appeals has now affirmed the verdict in its entirety. The Appeals Court found that Pharmacia was guilty of fraud and that the jury's decision was correct in every respect, including the amount of the monetary awards.

Interestingly, Pharmacia made an argument in the Wisconsin appeal that had been used successfully in the Alabama Supreme Court. The drug company argued that the State of Wisconsin had not proved "reasonable reliance," and contended that the state could not have "reasonably relied" on the drug company's "false statements." The Appeals Court correctly rejected this argument in summary fashion. The total amount to be paid by Pharmacia to the State of Wisconsin is now \$19,750,000 plus interest at 12%. Chuck Barnhill, who is with the Chicago firm Miner, Barnhill & Galland, represented the state in this case. He and his firm did an outstanding job for the state of Wisconsin and the citizens of that state.

#### **\$12.6 Million Award In Whistleblower Lawsuit**

A New Jersey cardiologist will receive \$2.4 million for his role in a whistleblower lawsuit against Cooper Health System and Cooper University Hospital. Following an investigation by the US Department of Justice and the New Jersey Attorney General's Office, Cooper agreed last month to pay \$12.6 million to settle Medicare and Medicaid fraud allegations. The federal qui tam lawsuit was originally filed by Delaware Valley cardiologist Nicholas L. DePace, who claimed that Cooper paid illegal kickbacks to physicians for patient referrals. In the suit Dr. DePace claimed:

*Cooper funneled illegal kickbacks to referring physicians through an advisory board known as the Cooper Heart Institute Advisory Board... with the stated purpose of utilizing prominent New Jersey physicians to advise the Cooper Heart Institute regarding innovative technologies, new management strategies, community needs, and appropriate educational and research initiatives. The board was a sham, in which Cooper paid physicians with high-volume medical practices upwards of \$18,500 each to do little more than watch four lectures per year hosted at an elegant banquet facility. These lectures consisted mostly of a marketing presentation on cardiac care at Cooper. Additional lectures included generic subjects that were irrelevant to the stated mission of the CHIAB, including a 2008 lecture entitled: 'The Healthcare Plans of the Two Presidential Candidates.' There were no advisory services being given in exchange for the physicians payments they were receiving.*

*According to the New Jersey Attorney General's office, Cooper is said to have taken responsibility for its past misconduct. Even though Cooper paid \$12.6 million, the president and CEO of Cooper University Hospital said in a media statement that Cooper did not admit to any wrongdoing in the settlement. Maybe so, but it's my hope that a lesson was learned by those in charge of running Cooper. It shouldn't pay to cheat the government.*

Readers of this Report should keep their eyes open for theft of government funds. These whistleblower actions are becoming more frequent and are needed to help expose fraud and corruption involved in government programs. Lawyers in our firm are pursuing qui tam cases on a frequent basis. We believe entities that take advantage of and cheat the government should be held accountable. Should you have information concerning a potential case, contact Dee Miles, Clay Barnett or Scarlett Tuley, lawyers in our firm's Consumer Fraud Section, at 800-898-2034 or by email at [Dee.Miles@beasleyallen.com](mailto:Dee.Miles@beasleyallen.com); [Clay.Barnett@beasleyallen.com](mailto:Clay.Barnett@beasleyallen.com); or [Scarlett.Tuley@beasleyallen.com](mailto:Scarlett.Tuley@beasleyallen.com).

Source: *Forbes*

## IV. LEGISLATIVE HAPPENINGS

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### THE START OF THE 2013 LEGISLATIVE SESSION

The 2013 Legislative Session of the Alabama Legislature began on February 5<sup>th</sup> with a bang. From all accounts, this promises to be a busy and lively session. Hopefully, it will also be productive. All of the many problems carried over from last year are still around, and they must be dealt with. Most observers believe it will be a tough session. The legislators will have to address numerous issues that will require additional funding. All too many of the problems facing legislators have been around for much too long without being worked out. Hopefully, the approach of kicking the old can down the road will be a thing of the past. The following are areas of concern that should be addressed during the session:

- Our state's tax code must be revised and made fair and equitable.
- Any real problems in the state's Medicaid program must be "fixed" and the program properly funded.
- Providing adequate funding for the state's court system is a must.
- Public education at every level must be made a top priority by action and not merely by words.
- Reasonable pay raises for public school teachers, especially in grades K-12, and for state employees are long overdue and badly needed.
- Alabama's weak consumer protection laws must be improved and made stronger.
- The evils of predatory lending must be dealt with and the necessary legislation to protect borrowers passed.
- Any needed changes in Alabama's immigration law should be made to make it both fair and constitutional. Otherwise, this issue should be left to the federal government. Hopefully, those in control have learned a lesson and won't further politicize this issue.
- Critical needs in our state's road system must be addressed.
- Reform of the 1901 Constitution should be a priority, but it's very clear that only

limited reform can be expected during the session.

- Cutting out any "waste" found in state government programs in a planned and selective manner should be addressed.

Being in control of both the House and Senate, Republicans will have control over how these issues are dealt with. Hopefully, they will exercise control in a bi-partisan manner. The Democrats should be given input in coming up with solutions to the many problems facing our state. Shutting them out of the process would be a mistake. Budgets have been balanced with federal funds and borrowed money over the past nine years, but those days are over.

It's time for our Governor and legislators to face reality, realize that additional revenues are needed and work together to solve our state's fiscal problems on a permanent basis. Righting the ship of state will take a combination of additional revenues and cutting out those loopholes in our tax laws that are unreasonable and can't be justified. An effort to reduce costs, without reducing essential services, should also be a part of this effort. But doing what needs to be done will take considerable political courage!

### SENATE DEMOCRATS ASK GOV. BENTLEY TO EXPAND ALABAMA MEDICAID PROGRAM

Alabama Senate Democrats have called on Gov. Robert Bentley to reconsider his decision opposing the expansion of the state's Medicaid program under the Patient Protection and Affordable Care Act. The Democrats announced Medicaid expansion as their legislative agenda for 2013 at a State House news conference held last month. They see this as an "opportunity for 300,000 additional people to get adequate medical care in Alabama." Sen. Vivian Davis Figures, D-Mobile, leader of the Senate minority, said expansion would also build the state's economy. She observed:

*It is projected that the State of Alabama would generate \$20 billion in new economic activities and almost a billion in state tax revenues over the next six years.*

*Gov. Bentley announced in November he would not expand Medicaid in its current structure under the Act. At that time he also announced the state would not set up a health insurance exchange under the law. So far, the Governor hasn't changed his mind, but there is always hope. I have tre-*

*mendous respect for Gov. Bentley, and really like him, but I believe his stand on Medicaid is wrong. We have an opportunity to not only make Medicaid work better in Alabama, but also to greatly improve healthcare in our state. In my opinion, we can't afford to let the opportunity pass us by.*

Source: AL.com

## V. COURT WATCH

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### ALABAMA'S COURT SYSTEM MUST BE ADEQUATELY FUNDED

Alabama Chief Justice Roy Moore is absolutely correct when he says the state's judicial system is in danger. The Chief Justice made that very clear in a letter to Gov. Robert Bentley. He says that conditions will worsen if the Legislature approves a budget recommended by Gov. Bentley. Chief Justice Moore pointed out that the court system already is badly understaffed because of long-standing budget problems and that the proposed budget will mean more layoffs. The Chief Justice told the Associated Press: "We are basically being cut out of existence." While that statement may sound harsh—and some may even say the Chief Justice is "crying wolf"—I believe it's true.

A state General Fund budget has been proposed that would give the entire court system \$100.3 million for the new fiscal year starting Oct. 1. That's down from \$102.8 million for this fiscal year. In fact, the current budget is nearly \$23 million less than the prior year's budget.

The Alabama Constitution mandates that the judicial system shall receive "adequate and reasonable funding." That is very clear and the Governor and Legislature are bound to honor this provision of the constitution. It will be a huge mistake for the Legislature to fail to properly fund the court system. Nobody can really dispute the fact that the proposed budget would cripple the system at every level. Circuit clerks across the state are already grossly short on personnel and are trying very hard to meet the daily demands on their offices. To cut their budgets further will cause tremendous problems in every county. The burdens on circuit and district court judges caused by losing needed personnel can no longer be tolerated. These judicial officers must have needed staffing, including law clerks, in order to perform their duties.

It was pointed out that court system employees haven't had a cost-of-living raise since 2008, and the system has cut 261 positions, mostly court clerks and juvenile probation officers. That leaves 1,818 employees on board. Chief Justice Moore told the Associated Press: "Our judges and judicial employees continue to make Herculean efforts to maintain the justice system with ever-decreasing funds and staff."

Hopefully, Gov. Bentley and the legislative leaders will revisit the issue and decide to adequately fund the court system. If they refuse to do so, the people of Alabama will be the losers. It certainly appears that there is a duty to act under the constitution.

Source: Associated Press

## VI. THE NATIONAL SCENE

### **U.S. ACCUSES STANDARD & POOR AGENCY OF FRAUD**

A lawsuit has been filed by the U.S. government against the Standard & Poor Agency (S&P). It's alleged in the complaint that S&P purposely inflated its ratings on risky mortgage investments, which helped to spark the financial crisis in 2008. The suit, filed by the Justice Department in federal court in Los Angeles, alleges that the credit rating agency gave high marks to mortgage-backed securities because it wanted to earn more business from the banks that issued the investments. The government has demanded that S&P pay at least \$5 billion in penalties as a result of its alleged wrongdoing.

This case marks a milestone for the Justice Department since it's the government's first major action against one of the credit rating agencies which stamped its approval on Wall Street's soon-to-implode mortgage bundles. The Justice Department has been widely criticized for failing to act aggressively against those companies which contributed to the financial crisis. As expected, Standard & Poor, a unit of the New York-based McGraw-Hill Cos. Inc., referred to the lawsuit in a statement as being "meritless."

The lawsuit alleges that S&P was aware that home prices were falling, and borrowers were having trouble repaying their loans. Conversely, those realities were not reflected in S&P's safe ratings that it gave to complex real-estate investments known as collateralized debt obligations and mortgage-backed securities. There was at least one S&P execu-

tive who had raised concerns about the company's proposed methods for rating investments, but that executive's concerns were ignored. The government contends that the majority of S&P's executives expressed concern over lowering the ratings on some investments in that it would anger the clients selling those investments and would drive new business to S&P's rivals. It's alleged further that this was why S&P ultimately made its decision to provide high marks to those mortgage-backed securities. In a news conference addressing the case, Attorney General Eric Holder had this to say: "Put simply, this alleged conduct is egregious—and it goes to the very heart of the recent financial crisis."

The case is an important step forward in the federal government's ongoing efforts to investigate and punish the conduct that is believed to have contributed to the worst economic crisis in recent history. Joining the Justice Department in announcing the lawsuit were Attorneys General from California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa and Mississippi. Each Attorney General has either filed a lawsuit or will file separate fraud lawsuits against S&P. The Justice Department has said it expects more states to sue.

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

Source: Associated Press

### **ATTORNEYS GENERAL TO JOIN LAWSUIT CHALLENGING DODD-FRANK**

Eight state Attorneys General are joining a lawsuit challenging the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Dodd-Frank, which became law in 2010, aims to prevent another financial crisis and protect individual consumers from abusive financial products. Those certainly seem like good things and worthy objectives. The lawsuit, filed in June 2012, attacks several aspects of the law.

The lawsuit was filed in U.S. District Court for the District of Columbia by a group of Plaintiffs including the Competitive Enterprise Institute, a Washington-based non-profit libertarian think tank. Three states — Oklahoma, South Carolina and Michigan — later joined the suit. The eight states now requesting to join are Alabama, Georgia, Kansas, Ohio, Nebraska, Montana, Texas and West Virginia.

It's interesting that attacks on Dodd-Frank took place first in Congress and now in the

courts. The powerful financial institutions don't like this new law, but all consumers and investors need it and should resist any efforts to weaken the bureau. It will be interesting to see how the lawsuit plays out. It would be a tragic mistake to undo the progress that has been made in the ongoing battle to protect American consumers. The huge financial institutions have powerful lobbyists fighting for them. The playing field between Corporate America and consumers needs to be level and that is why it's so important to defend Dodd-Frank and the consumer watchdog agency. If you agree, let your members of Congress know how you feel.

Source: AL.com

### **U.S. ROLLS OUT CYBER PLAN AND REPORTS THAT THREAT IS ESCALATING**

Reports on February 19<sup>th</sup> that the Chinese government has been involved in an intensive on-going cyber-espionage campaign aimed at the U.S. government and a number of American companies were most alarming. President Obama's top security officials last month said they are struggling to defend the nation from attacks on its private computer networks. It appears the problems are massive and both our economy and national security are threatened. While Congress was urged to pass legislation that would close regulatory gaps, it appears that much more needs to be done. The President signed an executive order in early February that relies heavily on participation from U.S. industry in creating new voluntary standards for protecting information. The order also expands the government's effort to share threat data with companies. Gen. Keith Alexander, head of the National Security Agency and U.S. Cyber Command, had this to say:

*The government is often unaware of malicious activity targeting our critical infrastructure. These blind spots prevent us from being in a position of helping critical infrastructure defend itself and it prevents us from knowing when we need to defend the nation.*

President Obama said that America's enemies are "seeking the ability to sabotage our power grid, our financial institutions and our air traffic control systems." That should get the attention of all Americans and specifically those in positions of leadership. The President made this assessment of the problem:

*We cannot look back years from now and wonder why we did nothing in*

*the face of real threats to our security and our economy. Now, Congress must act as well by passing legislation to give our government a greater capacity to secure our networks and deter attacks.*

The President's executive order has been months in the making and is the product of often-difficult negotiations with private sector companies that oppose any increased government regulation. Under the President's new order, the National Institute of Standards and Technology has a year to finalize a package of voluntary standards and procedures that will help companies address their cybersecurity risks. The package must include flexible, performance-based and cost-effective steps that critical infrastructure companies can take to identify the risks to their networks and systems and ways they can manage those risks. The order also calls for agencies to review their existing regulations to determine whether the rules adequately address cybersecurity risks.

Congress has been struggling for more than three years to reach a consensus on cybersecurity legislation. Given that failure and the escalating risks to critical systems, President Obama turned to the executive order as a stopgap measure with the hope that lawmakers will be able to pass a bill this year. Obviously much more must be done. A White House spokesman said that cybersecurity legislation is necessary to address gaps in the executive order. The latest reports concerning the actions by China's military make it extremely urgent for Congress to become more involved and to take all necessary action required. This is a highly technical and complex issue, but one that must be addressed immediately. Unfortunately, it hasn't received the attention that it obviously deserves. That must change!

Source: *Claims Journal*

## VII. THE CORPORATE WORLD

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### **DISCLOSURE OF CORPORATE POLITICAL SPENDING IS NEEDED**

In one of the last actions of departing Securities and Exchange Commission Chair Mary Schapiro's term, the agency put on its agenda that it will consider requiring public companies to disclose to shareholders the use of corporate resources for political activ-

ities. A petition requesting this rule was filed in 2011 by a bipartisan committee of leading law professors. The push for increased disclosure is part of an effort led by the Corporate Reform Coalition, which has been spearheaded by Public Citizen.

The adoption of such a rule would represent an important step in combating the growing influence of corporate money in politics. Since the infamous U.S. Supreme Court decision in 2010 (*Citizens United v. Federal Election Commission*), corporations and the super-rich have been able to spend unlimited amounts to influence elections. As we have written on several occasions, much of this money has been difficult to trace because so few disclosure rules exist for independent election spending.

Unfortunately the rules that are available—such as those stemming from the 2002 McCain-Feingold campaign finance law—have been largely ignored by the FEC. This has allowed corporations to secretly funnel money through third-party groups such as the U.S. Chamber of Commerce and Karl Rove's Crossroads GPS. These organizations refuse to disclose the underlying donors who provide financial resources for their political activities. The U.S. Chamber and Crossroads GPS spent more than \$36 million and \$70 million on the 2012 elections, respectively.

The petition for the SEC to consider this new rule has garnered more than 320,000 favorable comments, which is a record. The wide breadth of supporters include the Maryland State Retirement Agency; 43 members of the U.S. House of Representatives; 12 U.S. Senators; John Bogle (former CEO of the Vanguard Group), five state treasurers; US SIF: The Forum for Sustainable and Responsible Investment; the Sustainable Investments Institute, and many more.

A recent poll conducted by the Corporate Reform Coalition showed that 80% of the American people believe corporations should spend money on political campaigns only if they disclose their spending immediately. This included 77% of Republicans and 88% of Democrats. Significantly, 80% of Americans interviewed for the poll agreed that the secret flow of corporate political spending is bad for democracy, while 84% agreed that corporate political spending drowns out the voices of average Americans. Three-quarters of respondents said they would sign a petition to the SEC in support of corporate disclosure. Lisa Gilbert, director of Public Citizen's Congress Watch division, observed:

*We applaud the SEC for listening to investors and the public in moving*

*forward on a measure to protect investments and democracy. We will be pushing the chair to move the rule forward to completion this year.*

Individuals can file a comment to support the effort by visiting [www.citizen.org/sec-disclosure-action](http://www.citizen.org/sec-disclosure-action). Hopefully, the SEC will do the right thing on this important issue and adopt the proposed rule.

Source: Public Citizen

### **STATE PENSION FRAUD IS POTENTIAL GROUND FOR WHISTLEBLOWER LAWSUITS**

Lawyers in our firm are currently investigating how state pension funds have been affected by fraud committed by several banks on federal home insurance programs. Recent False Claims Act (FCA) cases which allow a Plaintiff with original knowledge to sue on behalf of the federal government have brought in a recovery of over \$1.6 billion in settlements. These settlements result in the Plaintiff obtaining a fee of 15%-30% of the amount the federal government recovers. There are potentially billions of dollars not yet collected by state pension funds due to the underlying fraudulent activity conducted by Bank of America, Citigroup, Deutsche Bank, and Flagstar. The state pension funds were potentially ripped off by these companies and others who knew the ratings of mortgage-backed securities sold by the companies were inaccurate.

If companies sold mortgage-back securities to state pension funds when they knew their ratings were incorrect, they have committed a fraud on the taxpayers. Anyone with direct knowledge of this fraud can possibly recover millions of dollars on behalf of states that have a False Claims Act or on behalf of the federal government through the False Claims Act, a federal law. States without a False Claims Act are at a huge disadvantage compared to states which have the legal ability to recover millions from corporations that defraud them. Currently, the Alabama Senate has a bill proposed to give Alabama its own False Claims Act and to recover millions of taxpayers' dollars.

States with a state-version of the False Claims Act should examine how their state pension funds were affected by Standard & Poor's fraudulent ratings of mortgage-backed securities. Recently, as we mentioned in another section of this issue, several states and the Department of Justice sued Standard & Poor's for its fraudulent ratings that misinformed and defrauded investors, companies, consumers, and the public at large. California filed a suit against Standard & Poor's

under its state False Claims Act with the theory that, had it not been for S&P's fraudulent ratings, then the California teachers and public employees funds would have never purchased toxic assets like mortgage-backed securities.

A separate California False Claims Act lawsuit has recently been unsealed, alleging that county pension funds were defrauded when BNY Mellon used the least advantageous prices in foreign exchange transactions despite promising to use "best practices" in formulating such transactions. The Attorneys General of New York, Virginia, and Florida are also investigating allegations similar to those in the California lawsuit.

State pension funds were also potentially damaged by the recently discovered Libor scandal. Libor is a daily number submitted by banks across the globe to determine how much it costs for those banks to borrow money. Deliberate manipulation of the numbers submitted to Libor by several banks has potentially impacted financial contracts around the world. North Carolina's State Treasurer, Janet Cowell, has stated:

*The Libor scandal could be as big as the mortgage crisis settlement. This could be a really high impact situation, and we should be aggressive on this.*

For reference, the mortgage crisis settlement that Treasurer Cowell mentioned resulted in a \$25 billion settlement with state Attorneys General. Lawyers in our firm continue to vigorously investigate fraud against both the federal and state governments. We encourage anyone who knows of fraudulent activities to step forward. Potential whistleblowers have the right to not be retaliated against for doing the right thing and reporting the fraud they have witnessed. Anyone considering doing the right thing and blowing the whistle are strongly urged to seek legal advice before doing so. Lawyers at Beasley Allen are very familiar with the federal False Claims Act and its state counterparts and can guide whistleblowers along the process. If you have any information and would like to speak with a lawyer, contact Andrew Brashier, a lawyer in our firm's Consumer Fraud Section, at [Andrew.Brashier@beasleyallen.com](mailto:Andrew.Brashier@beasleyallen.com), or at 1-800-898-2034 or 334-269-2343.

Sources: [www.taf.org](http://www.taf.org), *Bloomberg* and *New York Times*

## VIII. CONGRESSIONAL UPDATE

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### **A BRIEF UPDATE ON CONGRESS**

To say that the American people are fed up with the lack of bi-partisan cooperation in Congress is a gross understatement. Most folks outside of Washington, D.C., can't comprehend how things work—or fail to work—in our Nation's Capitol. According to all polling, the public continues to have a very poor opinion of Congress. Ratings are at an all time low, and if things don't change, they will get lower.

This issue went to the printer two days before the March 1<sup>st</sup> sequestration deadline. Hopefully, members of Congress came to their senses and avoided the disastrous consequences that the massive cuts would bring about if they failed to act. By the time this issue is received, the deadline will have passed. I shudder to think what will happen to our nation's economy and to national security if Congress fails to avoid sequestration.

In addition to the sequester issue, Congress has its plate full and will be very busy when the members come back from recess. Such issues as gun control, immigration reform, the passage of budgets, deficit reduction, and dealing with our national debt await them. Hopefully, the time spent at home by members of the House and Senate was good for all concerned. If they listened, I suspect things will improve in the halls of Congress when they return to Washington.

## IX. PRODUCT LIABILITY UPDATE

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### **BEWARE OF POTENTIAL BOLT AND CONNECTION PROBLEMS IN YOUR CAR**

General Motors recently announced that it has recalled 8,519 model-year 2013 versions of the Chevrolet Malibu sedan due to suspension bolt problems. The affected vehicles may have one or more suspension bolts that weren't adequately tightened. This could lead to a sudden change in handling, increasing the risk of a crash. GM in a letter to NHTSA said:

*Initially, noise and a minor handling effect may be noticed. As the condition progresses, sudden changes in the vehicle handling could occur and the driver may not be able to control the vehicle.*

According to GM, no accidents or injuries have resulted from the inadequately tightened suspension bolts. The recall also affects another 1,060 of the cars in Canada, Mexico and overseas. This particular recall seems very limited, but problems with suspension bolts or connections in vehicles are more common than one might think.

Greg Allen, the most experienced products liability lawyer in our firm, settled a case recently with a car manufacturer that involved these issues. In that case a ball joint broke, causing a driver to lose control of his car. A family was traveling through Alabama on Interstate 20 while returning to Florida after visiting relatives. As they were driving along the highway, there was a loud pop and the car pulled hard to the left. Our client was trying to correct the path of the vehicle when it went off the road and hit a concrete ditch.

When the car struck the ditch, our client's seat bottomed out and he suffered a burst fracture in his lower spine. The car was traveling at highway speed when they heard the sound which our clients thought was a tire explosion. But, in actuality, the left front ball joint of the car broke. During his investigation, Greg learned that this car had been subject to a recall for having loose ball joints. He also discovered that there had been a large number of complaints of these ball joints breaking, even after the recall.

Consumers should be aware of these problems and look for the signs of problems with bolts or joints in their cars. Strange noises or problems with handling raise red flags for drivers. When this happens, have your car checked out. Do not ignore any recalls received on your vehicle, even if they appear only minor. The consequences could be deadly. If you need additional information on any of the above, contact Greg Allen or Dana Taunton at 800-898-2034, or by email at [Greg.Allen@beasleyallen.com](mailto:Greg.Allen@beasleyallen.com) or [Dana.Taunton@beasleyallen.com](mailto:Dana.Taunton@beasleyallen.com).

### **SIDE IMPACT CRASHWORTHINESS IS AN IMPORTANT SAFETY ISSUE**

Lawyers in our firm have handled a number of side impact cases that involved the issue of "crashworthiness." All of the cases involved either death or severe disabling injuries. According to the Insurance

Institute for Highway Safety (IIHS), about one third of vehicular deaths occur in side impacts. Providing protection for vehicle occupants in side impact collisions presents a challenge to vehicle engineers. That's because compared with frontal impacts, there is a relatively shallow crumple zone for deformation between the occupants and the closest vehicle side-structure.

A stiff side and roof structure combine to protect the occupant from injury by maintaining survival space, and dissipating the force of the collision away from the occupant. Safety cage designs, such as those used by Mercedes, Volvo, and Subaru for decades, are the forefront of side impact occupant protection. In addition to energy absorbing side structures, the side impact airbag has proven to be one of the most effective methods of improving vehicle crashworthiness in side impact collisions.

Widespread implementation of side impact airbags began in the 1990s and was not limited exclusively to luxury manufacturers. More than 95% of passenger vehicles sold in the U.S. in 2012 were equipped with side impact airbags as standard equipment. Side impact test procedures and performance targets have been dictated by Federal Motor Vehicle Safety Standard 214 (FMVSS 214) beginning in 1973. Starting in 1994, dynamic testing with a Moving Deformable Barrier (MDB) was phased into fleet certification requirements. Since its inception, the ability of the MDB to relate to real-world collisions has been subject to debate due to its "bumper" profile height of 13 to 21 inches. That is several inches lower than a typical truck or SUV bumper. FMVSS 214 was changed in 2009 to include:

- An oblique angle pole impact;
- New Anthropomorphic Test Devices (ATD or crash test dummies) with upgraded bio-fidelity in side impacts; and
- New injury metrics. The new FMVSS 214 is being phased into the fleet certification requirements, with full implementation in the 2015 model year.

A manufacturer can also test its vehicle using the same setup, but at a higher MDB velocity (62 kph versus 54 kph) to attain a star rating under the New Car Assessment Program (NCAP). These star ratings are used to help customers compare the crashworthiness of different vehicles.

The Insurance Institute for Highway Safety (IIHS) is a non-profit organization that operates independently of the automobile manufacturers and the federal government. In response to its own research, the Institute

devised a side impact test and ratings criteria and began using it in the evaluation of vehicles in 2003. The IIHS test regimen differs from the FMVSS 214 in the test speed, impact angle, and MDB design.

The IIHS MDB design was modeled to simulate a light truck or SUV. The "bumper" profile is 4 inches higher off the ground, the "face" of the MDB is 12 inches taller, the MDB replaceable "face" is stiffer, and the MDB weighs an additional 300 pounds as compared to the NHTSA MDB used in certification testing.

The IIHS rates each vehicle's performance in its side impact testing based on injury criteria to the ATD and the performance of the vehicle's structure as measured by the intrusion profile. If a vehicle has optional side airbags, the IIHS will test a vehicle without the side airbags, testing the same vehicle with side airbags if the manufacturer petitions it to, and reimburses the IIHS for the purchase price of the vehicle. If you would like to have more information on this subject, contact Greg Allen, who has handled more crashworthiness cases than any lawyer in the firm, at 800-898-2034 or by email at [Greg.Allen@beasleyallen.com](mailto:Greg.Allen@beasleyallen.com).

Source: IIHS

#### **TOYOTA SETTLES TWO SUDDEN-ACCELERATION CASES**

Toyota has settled two high-profile cases involving sudden unintended acceleration that had been set for trial in February. The settlements came a few weeks after the company agreed to the \$1 billion settlement agreement in which Toyota agreed to install a brake-override system in over 3 million cars, create a \$250 million fund to compensate owners who aren't eligible for the override system, and create a separate \$250 million fund to compensate Toyota owners who lost value in their cars because of the bad publicity and sold them at a reduced price between September 1, 2009 and December 31, 2010.

The two bellwether cases in the recent settlement involved a lemon law claim brought by a retired police officer in Los Angeles and a wrongful death claim by the family of a driver and passenger killed when their 2008 Camry accelerated and crashed into a wall in Utah. Toyota still faces over 300 lawsuits in federal and state court. The next potential trial is set for April 15 in Los Angeles in a wrongful death action by the family of a woman claiming that her 2006

Camry suddenly accelerated, hit a telephone pole, flipped over and crashed into a tree.

Source: CPSC

#### **\$18.9 MILLION VERDICT AGAINST WAL-MART**

A Maryland jury returned a verdict of \$18.9 million last month against Wal-Mart Stores Inc. The case involved a Wal-Mart employee putting a new tire on an eroded rim, causing a vehicle roll-over, which led to the death of a woman and her two children. The three victims were part of a group of eight persons who were returning from a trip to California in a minivan when the left rear tire on the vehicle went flat in Iowa. After a new tire was mounted by Wal-Mart on the rim, the family drove about eight hours before the rim failed in Indiana, killing the mother and her two children. The personal representative of the three estates, in addition to three other people who were injured in the crash, sued Wal-Mart and the car's driver alleging negligence. At the conclusion of the trial, the jury found the driver not to be responsible for the deaths.

The group of eight had traveled to California to visit relatives and they were returning on November 7, 2009, when the tire went flat. A good Samaritan stopped and agreed to take the driver and the car's rim to the Wal-Mart store in Creston, Iowa, where mechanics installed a new tire on the eroded rim. It's well known in the industry that new tires are never put on a rusted rim. While training materials and industry standards make that very clear, it was done by Wal-Mart in this case. The group was traveling east on an interstate highway in Indiana when the driver swerved to avoid debris in the road. The rim failed and the tire deflated, causing the driver to lose control of the minivan, which rolled over multiple times. Three of the passengers were killed.

One of the passengers lost his right leg below the knee and suffered a brain injury in the crash. Another suffered severe injuries to her right hand. The other survivors suffered less serious injuries. The suit was filed in Prince George's County Circuit Court on November 4, 2011. The minivan had been scrapped before the victims hired a lawyer in the case, which made the case more difficult. In the absence of the vehicle and the rim and tire, photos taken by police and family members after the accident were used at trial. An expert also was able to analyze a GPS from the van that provided second-by-second information on the car's location, angle and speed.

Wal-Mart contended that because the minivan and the tire and the rim were not

available, the case should not go forward. Iowa substantive law was applied to the wrongful-death claims and Indiana substantive law applied to the personal injury claims. It was contended that the amounts of non-economic damages awarded should remain intact because neither of those two states cap damages. The jury had awarded the Plaintiffs about \$17 million in non-economic damages. Matthew P. Maloney, a lawyer from Kensington, Md., represented the Plaintiffs. He did a very good job for his clients in the case.

Source: *Lawyers USA Online*

### **SAFETY BELTS SHOULD BE PUT ON COMMERCIAL BUSES**

Each year, commercial buses transport more than 750 million people between cities, for long and short distance tours, field trips, commuter, and entertainment-related trips. In fact, about 65% of these trips are made by children and senior citizens. Buses are generally thought of as a comparatively safe form of travel. However, between 1999 and 2008 there were 54 fatal commercial bus crashes that resulted in the loss of 186 lives. During this time period, an average of 16 deaths occurred annually to passengers on buses in crash and rollover events.

One of the biggest concerns in a bus crash is the possibility of the bus rolling over. This is because passengers on the bus may survive the initial impact but then be ejected from the bus, which can cause serious and fatal injuries. The National Highway Transportation Safety Administration (NHTSA) recently announced that an upcoming rule will address this concern and focus on the need for seat belts on buses. The NHTSA hopes to finalize regulations that will require seat belts on buses by the end of this year.

Both Congress and the NHTSA have been debating requiring seat belts on buses since 1977. Recent bus crashes have renewed interest in the need for seat belts on buses. In 2009, a bus overturned and killed seven passengers. Of the 17 total passengers, 15 were fully or partially ejected from the bus. Last year, Congress told the NHTSA to require seat belts on buses as part of the Transportation Reauthorization bill. Although the new rules developed by the NHTSA will not require the current 29,000 commercial buses on U.S. highways to be retrofitted with seat belts, the NHTSA has not ruled out taking that type of action at a later date. The new rule will make seat belts mandatory on new commercial buses and is

expected to cost about \$25 million annually, which is about \$13,000 per bus.

Although the NHTSA has the authority to require buses to be equipped with seat belts, it does not have the authority to require passengers to use them. Just like seat belts in vehicles, only the individual states have the authority to pass laws that would require the use of the seat belts on buses. However, research shows that these new seat belts should be worn, because seat belts on commercial buses can reduce the death risk for passengers in a rollover crash by as much as 77% and save as many as eight lives each year.

Sources: *NHTSA.gov, The Detroit News.*

### **JUDGE APPROVES SETTLEMENTS IN CHINESE DRYWALL CASE**

A federal judge has approved five class-action settlements that call for a Chinese drywall manufacturer and others to pay hundreds of millions of dollars to repair homes damaged by the product. U.S. District Judge Eldon Fallon in New Orleans last month approved the settlements with manufacturers, builders, suppliers and installers of the drywall and their various insurers. The settlements are estimated to be in excess of \$1 billion, most of which will be paid by Knauf Plasterboard Tianjin Co. Chinese drywall was used in the construction of homes, mainly in the South, after a series of destructive hurricanes in 2005. The problems it has caused range from a foul odor to corrosion of pipes and wiring. Arnold Levin, a New Orleans lawyer, represented the Plaintiffs in this case. He did a very good job in a very difficult and complex case.

Source: *Associated Press*

## **X. MASS TORTS UPDATE**

### **JURY AWARDS \$3.35 MILLION IN VAGINAL MESH CASE AGAINST J&J**

A New Jersey jury on February 25<sup>th</sup> returned a \$3.35 million verdict against Johnson & Johnson in the first phase of a Transvaginal surgical mesh case. The jury found that the drug company failed to adequately warn the women's doctor of the dangers of a vaginal mesh implant made by the company's Ethicon subsidiary. The jury also found that the company misrepresented

the product in brochures that it furnished to doctors.

This is the first verdict among some 1,800 vaginal mesh cases pending in New Jersey against Ethicon and J&J. This should have an impact on thousands of lawsuits against other manufacturers of vaginal mesh implants. The jury verdict in state Superior Court in Atlantic City, New Jersey, followed a six-week trial. The verdict in the first phase of the trial was only for compensatory damages.

The Ethicon product, before being taken off the U.S. market last year, was used to treat urinary incontinence and pelvic organ collapse, a condition for which Linda Gross, a nurse, was treated in November 2008. That condition happens when tissue that holds the pelvic organs in place is weak or stretched and bulges into the vagina. There are different types of this prolapse condition, which usually occurs after menopause, childbirth or a hysterectomy.

The lawsuit, tried in the court of Judge Carol Higbee, was brought by Ms. Gross, 47, of Watertown, South Dakota, in November 2008. She alleged that J&J and Ethicon were responsible, among other things, for "their defective design, manufacture, warnings and instructions" and that the Gynicare Prolift vaginal mesh was not safe.

Ms. Gross filed her lawsuit following a 2006 surgery to install a Gynicare Prolift for pelvic prolapse. She alleged the surgery led to a variety of complications, including mesh erosion, scar tissue, inflammation and "neurologic compromise to ... structures and tissue." Ms. Gross had to seek medical treatment and 18 operations to repair the damage caused by the mesh.

After the jury delivered its verdict in the first phase, the judge heard arguments on whether to allow the jury to decide on punitive damages. She sent that phase to the jury on February 26<sup>th</sup>. Since we had to send this issue to the printer on the 27<sup>th</sup>, and the jurors had been sent home for the day, we don't know the outcome of the punitive damages phase. Based on the evidence presented, however, I believe the jurors will award punitive damages.

Ben Anderson, a lawyer from Cleveland and Adam Slater, a lawyer with the New Jersey firm Mazie Slater Katz & Freeman, represented Ms. Gross in her case. They did a very good job for her in the case. The verdict in this case, which I believe will include punitive damages in some amount, should send a very strong message to the companies manufacturing the mesh products. I will give a brief overview of this litigation below.

Source: *Reuters*

## **THOUSANDS OF WOMEN SUE OVER SURGICAL MESH**

We have written in prior issues about all of the heartbreaking problems women across the U.S. are having because of the transvaginal implantation of polypropylene mesh to correct pelvic organ prolapse or stress urinary incontinence. As we have reported, the mesh is used to repair pelvic organ prolapse, or when muscles in the area weaken, causing organs to bulge or slip down into the vagina. Pelvic organ prolapse can be the result of age, childbirth, obesity, or hysterectomy. Mesh is also implanted transvaginally to treat stress urinary incontinence, which occurs when a woman experiences involuntary leakage of urine during exercise, coughing, or laughing. The Food and Drug Administration has warned that women can suffer complications, stating that in the case of pelvic organ prolapse all other alternatives should be explored prior to a decision to have a transvaginal mesh procedure. Based on all we have learned, I don't believe transvaginal mesh should be used at all by doctors.

There are more than 14,000 federal lawsuits against some of the largest manufacturers of transvaginal mesh products. The cases have been consolidated in a federal court in West Virginia. More trials are upcoming—against Bard in June and American Medical Systems in December. These lawsuits accuse the companies of inadequate testing, failing to disclose potential risks, and fraudulently promoting the mesh as a safe medical device. The manufacturers deny those allegations, but they will have difficulty proving a defense to their actions and failures to act, based on what we have learned during discovery. The lawsuits seek compensation for pain and suffering, reimbursement of medical costs and punitive damages.

When pelvic mesh products were introduced, they were seen as an improvement over traditional surgery using stitches and a woman's own body tissue, which also can have complications. Transvaginal mesh procedures were portrayed as more effective and having a much shorter recovery period. Since similar mesh was already used in other types of surgery, including for repairing hernias as far back as the 1950s, the products received fast-track approval from the FDA without the tests that the agency requires for first-of-a-kind devices.

The FDA cleared the mesh — often a soft, lightweight porous plastic — for pelvic organ prolapse in 2002. The agency said in a 2008 public notice that problems were “rare.” But in July 2011, the FDA admitted that it erred in its initial assessment and esti-

mated the most common problems occur in 10% of women within a year of surgery. The mesh can be inserted through the vagina or through an incision in the abdomen. The problems involve shifting and erosion of the mesh, as well as infections. A year ago, the FDA ordered several dozen manufacturers to conduct rigorous studies to track the complication rates with their surgical mesh products over time. Some companies have undertaken those studies, while others chose to stop producing certain products.

The mesh manufacturers have a responsibility to educate doctors about their products, but they failed to do so. Doctors were not aware of the very serious problems caused by transvaginal mesh or the rate at which those problems were occurring. Rather than doctors being the problem, the real culprit is the mesh product itself. Lawyers in our firm don't sue doctors in these cases and we believe that is the proper course of action. Doctors have been victims themselves.

Most transvaginal mesh cases have been consolidated in the United States District Court for the Southern District of West Virginia before Judge Goodwin. However, several thousand lawsuits have also been filed in state courts around the country. In the first lawsuit of this type to go to trial, a California jury in July awarded a California woman \$5.5 million in her case against C.R. Bard. Then the verdict in New Jersey following. These are two very big victories for all women who have been victimized by the manufacturers.

Our firm is heavily involved in the mesh litigation. If you have questions or need more information, contact Leigh O'Dell, a lawyer in our Mass Torts Section who handles this litigation for the firm, at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com.

Source: Associated Press and ABC News

### **INTERNAL REPORT REVEALS DEPUY ASR HIPS WERE BARELY TESTED BEFORE MARKETING**

An engineering report and related testimony given during the first DePuy ASR hip implant case to go to trial revealed that developers failed to adequately assess the device's risks before they hit the market in 2003. Johnson & Johnson's orthopedic device unit, DePuy, completed the engineering report in November 2010, three months after it recalled its metal-on-metal ASR implants, the XL Acetabular and Hip Resurfacing systems. The assessment concluded that DePuy used improper engineering controls and standards in evaluating the risks the ASR hips might have in patients. The

devices, which consist of a metal ball inserted into a metal cup, were then fast-tracked through the U.S. Food and Drug Administration 510(k) approval process and implanted in about 93,000 patients worldwide, including about 37,000 Americans.

During testimony given in California Superior Court in Los Angeles, DePuy Engineer Graham Isaac told the Court that the ASR devices were only tested at one angle of implementation, so their performance in a broader spectrum of people was largely unknown. The ASR's metal cup can be implanted at a number of angles depending on a patient's build and the surgical techniques used. This essentially meant that critical design flaws went undetected in DePuy's labs. In the real world, variances from the single angle DePuy tested made friction between the metal ball and cup more likely to release metal particles into the patient's tissue and blood.

Court documents unsealed before the trial started revealed that DePuy executives knew in 2008 that the ASR hip implants were failing early at unusually high rates, but the company continued to make the devices for several more months before finally recalling them in August 2010. Newly released documents also show that an internal DePuy review completed in 2011 found the devices failed within five years in about 40% of patients. Nevertheless, DePuy officials withheld that information while disputing similar findings from external sources.

Internal DePuy records also document “that the product is more likely to experience contact between the head and rim” than metal implants made by other manufacturers. But company officials still failed to anticipate the wear this would have on the implant's metal components and the potential harm it could do to patients.

Johnson & Johnson and DePuy face more than 10,000 lawsuits in the U.S. alleging injuries caused by the faulty metal implants. About 2,000 of those are consolidated in California Superior Court, while the vast majority of lawsuits have been combined for multidistrict litigation in U.S. District Court for the Northern District of Texas under Judge James Kinkeade.

If you need more information on this subject, contact Navan Ward, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Navan.Ward@beasleyallen.com. Navan has been working very hard in this area for a good while and is heavily involved in the MDLs.

Source: *New York Times*

## TYLENOL AND LIVER FAILURE CASES

Lots of folks take Tylenol on a regular basis with no real concern over any risks or dangers. Actually, few see any real danger when taking the medication. Perhaps, a closer look by consumers is in order. The question is how deadly can Tylenol (acetaminophen, or paracetamol in the rest of the world) be? The short answer is: VERY. Consider these facts:

- Tylenol is the number one cause of liver failure in the US (more than alcohol). Over 40,000 people overdosed on Tylenol in 2011 resulting in over 16,000 cases of liver failure.
- About half of acetaminophen-related overdoses are accidental.
- Over 600 over-the-counter and prescription medications contain acetaminophen—many times listed as “APAP.”
- The difference between therapeutic and toxic doses is very small.

Tylenol is the brand of acetaminophen made by McNeil Consumer Healthcare, a subsidiary of J&J. It has been estimated that approximately 50% of Tylenol overdoses result from the fact that so many drugs contain Acetaminophen. This, coupled with the facts that 30% of consumers do not realize the active ingredient in Tylenol is acetaminophen. Many medications list Acetaminophen as “APAP,” which is a recipe for disaster. The maximum recommended dosage is 3000 mg/24 hour period. Liver failure may occur at lower doses, but is most often reported at exposures of 4000mg/24 hours or greater. Consider the action taken by the FDA:

*In order to reduce the incidence of overdoses, the FDA in 2011 required manufacturers of prescription drugs to reduce, over a 3 year period, the amount of acetaminophen in their drugs to no more than 325 mg per pill. This, however, does not apply to over-the-counter medications like extra-strength Tylenol which contains 500mg. Additionally, dosing recommendations have been lowered from 4 to 6 hours down to 6 hours and warnings have been added concerning the possibility of liver damage at more than 4000 mg/24 hours. The FDA also required Black Boxed Warnings about acute liver failure on all prescription medications containing acetaminophen.*

The warnings on Tylenol also advise against taking Tylenol if you consume three or more alcoholic drinks per day. Alcohol use activates enzymes that transform acetaminophen into chemicals that can cause liver damage. Unfortunately, this can also happen with binge drinking. The higher the alcohol consumption, the more likely Tylenol, whether taken to prevent or treat a hangover, will cause liver failure and death. Several college students have died from this combination.

If any of our lawyer-readers have any clients or potential clients who have suffered liver failure while taking Tylenol, they can contact Roger Smith, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com for assistance if needed. Roger would welcome the opportunity to review cases for anyone. He can also answer any other questions that our readers might have on this subject.

## JURY AWARDS \$63 MILLION TO TEENAGE GIRL IN MOTRIN CASE

A jury has awarded a Massachusetts teenager and her parents \$63 million in a lawsuit against Johnson & Johnson and its McNeil-PPC Inc. subsidiary. Nearly a decade ago, Samantha Reckis suffered a life-threatening drug reaction that caused her to lose most of her skin after taking Motrin, Johnson & Johnson’s pain reliever for children. The jury ordered the companies to pay Samantha and her parents a total of \$109 million, including interest.

Samantha was only seven years old when she was given Motrin brand ibuprofen. She suffered a side effect known as toxic epidermal necrolysis (TEN) and lost 90% of her skin and was blinded. She suffered brain damage that involved only short-term memory loss. Surgeons had to drill through her skull to relieve some pressure. The disease also seared Samantha’s respiratory system. As a result, she now has just 20% lung capacity.

The family filed the lawsuit in January 2007, alleging that Samantha was blinded by Motrin and alleging that Johnson & Johnson failed to warn consumers that the drug could cause life-threatening reactions. The five-week trial ended when the jury awarded \$50 million in compensatory damages to Samantha and \$6.5 million to each of her parents.

Samantha, now 16 years old, had previously taken Motrin without suffering any side effects. Her parents began giving her the medication to reduce fever that began the day after Thanksgiving in 2003. The

resulting toxic epidermal necrolysis — a potentially fatal skin disease that inflames the mucus membranes and eyes and is marked by a rash that burns off the outer layer of skin—inflamed Samantha’s throat, mouth, eyes, esophagus, intestinal tract, respiratory system and reproductive system, forcing her physicians to put her into a coma.

TEN is a more severe form of Stevens-Johnson syndrome (SJS). Medications, including nonsteroidal anti-inflammatory drugs (like ibuprofen), anti-gout drugs, penicillins and anticonvulsants most commonly cause the condition, according to the Mayo Clinic. Other infections like herpes, influenza, HIV, typhoid, and hepatitis can also trigger SJS. TEN is an absolutely devastating condition.

Samantha is an honor student, but she has had to work twice as hard as other students to retain the same amount of information. The Reckis family issued the following statement after the trial:

*The Reckis family is forever grateful that this courageous and wise jury of twelve citizens of Plymouth County saw and declared the truth about what happened to Samantha in 2003: that Children’s Motrin caused Sammy’s life-altering injuries. Drug companies like Johnson & Johnson can no longer hide behind an approval by the overworked FDA as an excuse not to warn consumers about known, devastating drug reactions like SJS and TEN. Parents like us have a right to know. It was an historic day for consumer safety.*

In a similar case in Pennsylvania, a girl was awarded \$10 million in 2011 after an adverse reaction to Children’s Motrin caused her to lose 84% of her skin, suffer brain damage and go blind. Brad Henry, a lawyer with the Boston firm Meehan, Boyle, Black & Bogdanow, represented the Plaintiffs in Samantha’s case. He did a very good job for his clients in this case.

Sources: *The Boston Globe* and *CBSNews.com*

## DIALYSIS PROVIDER FACES WRONGFUL DEATH LAWSUITS LINKED TO GRANUFLO

Fresenius Medical Care, the world’s largest provider of dialysis services and products, is facing hundreds of lawsuits alleging that one of the company’s products caused sudden cardiac deaths in patients. It is contended in these lawsuits that the company knew the instructions for using GranuFlo, its dry acid concentrate, were confusing and could

cause life-threatening toxicity to patients, but withheld this information from its customers and drug regulators. GranuFlo is a product used to help balance chemicals in the blood during dialysis treatment. It contains an ingredient that metabolizes in the body as bicarbonate. GranuFlo has more of this ingredient in it than competitor products. Studies have shown that elevated bicarbonate levels in dialysis patients increase the risk of patient death.

It appears that a top executive of Fresenius was the first to suspect that the instructions for the company's GranuFlo could be misunderstood. This led to an internal review during which it was discovered that 941 patients in 667 Fresenius dialysis clinics died from cardiovascular-related incidents between Jan. 1, 2010 and Dec. 31, 2010. Fresenius sent a memo to doctors at its clinics warning them that the instructions for GranuFlo could be confusing and to consider this when prescribing the product to patients. But Fresenius did not make patients aware of this risk. Neither did the company inform doctors or other clinics who purchase and use GranuFlo of the risk. Fresenius also failed to inform the Food and Drug Administration of these serious adverse events even though it's required to do so by law.

It wasn't until a person anonymously sent a copy of the internal memo to the FDA three months later that federal drug regulators began to investigate the matter. Fresenius was required to notify patients and recall its products in order to update its labels. Currently, there are more than 5,700 dialysis centers and about 400,000 dialysis patients in the United States. An estimated 3,300 clinics use GranuFlo formulations and approximately 260,000 patients are using the product. About half of these patients are using GranuFlo in non-Fresenius clinics. Late last year, a group of Plaintiffs filed a petition to form a federal multidistrict litigation (MDL) and consolidate wrongful death lawsuits against Fresenius, alleging that inadequate labeling and warnings for Fresenius dialysate concentrate product GranuFlo and its similar product NaturaLyte caused harm to patients.

Lawyers in our Mass Torts Section are investigating and evaluating potential claims involving GranuFlo. If you need more information on this subject contact Frank Woodson, a lawyer in the Mass Torts Section, at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com.

Source: *Alabama Journal of Medical Sciences*

#### **MERCK LOSES BELLWETHER FOSAMAX TRIAL**

Merck, the maker of Fosamax, lost its second bellwether Fosamax side effects lawsuit last month. The drugmaker faces thousands of lawsuits in state and federal court alleging a link between Fosamax and osteonecrosis of the jaw. In addition, there are another 800 lawsuits alleging a link between Fosamax and femur fractures. A federal court jury awarded the Plaintiff, Rhoda Scheinberg, \$285,000 in her Fosamax lawsuit. She contended that Fosamax was a defective product and that the drug caused her to develop jaw bone disease after dental surgery. Although the jury rejected the argument that Fosamax is defective, the jurors did find that Merck failed to adequately warn about the risks associated with the medication.

Osteonecrosis of the jaw is a serious condition in which the jawbone fails to heal properly after minor trauma—such as tooth extraction—causing the tissue in the bone to die. Patients who develop osteonecrosis of the jaw may require long-term antibiotic therapy and surgery to remove the dead tissue. Symptoms of osteonecrosis of the jaw include pain or swelling in the jaw, numbness or infection. Fosamax has also been linked to non-traumatic femur fractures.

In January 2011, the US Food and Drug Administration issued a warning that bisphosphonates (a class of drug that includes Fosamax) have been linked to atypical femur fractures. The FDA recommended that patients taking bisphosphonates, especially those taking the drugs for more than five years, periodically evaluate whether continued therapy is needed. The agency did note, however, that it was not clear the bisphosphonates caused the thigh fractures, but that they may be linked. The drugs' warning labels were updated to reflect this potential link.

Bisphosphonates are typically prescribed to strengthen a patient's bone density, especially in women with osteoporosis. Some critics are concerned that the drugs are being used more frequently on patients who do not have osteoporosis as a preventive measure, putting them at unnecessary risk of side effects. If you need more information on this subject contact Chad Cook or David Dearing, lawyers in our firms Mass Torts Section, at 800-898-2034 or by email at Chad.Cook@beasleyallen.com or David.Dearing@beasleyallen.com.

Source: *Lawyersandsettlements.com*

#### **AN UPDATE ON ASTRAZENECA AND NEXIUM**

AstraZeneca, facing declining revenues last year, sold the marketing rights to its over-the-counter (OTC) version of Nexium to Pfizer Inc. for \$250 million. AstraZeneca will be in line for milestone and royalty payments from Pfizer for the OTC version, as well as retention of exclusive rights to manufacture and market the prescription version. But the latter will become less lucrative once the US patent expiry occurs in 2014 and generic competition appears on the horizon.

The problems could happen even sooner if a New Jersey-based pharmaceutical company wins approval from the U.S. Food and Drug Administration for a new, generic version of Nexium. It was reported recently in the New York edition of *Newsday* that Amneal Pharmaceuticals LLC has partnered with Hanmi Pharmaceutical Co. to produce a version of Nexium and have it ready for market within the second half of this year. That will give them a jump on other generic competitors. *Newsday* did not identify whether or not the new drug would be geared for the OTC or prescription market.

With all this activity involving Nexium, it should be noted that a class-action lawsuit is pending against AstraZeneca. It was filed in 2004 on behalf of third-party payers. It was contended in the suit that AstraZeneca aggressively promoted Nexium as superior when compared to a competitor, whose patent was about to expire. The lawsuit claimed that AstraZeneca failed to disclose flaws in its studies. This lawsuit could definitely have an effect on Nexium's future. AstraZeneca derives about \$6 billion in revenue from Nexium each year, according to the IMS Health news service.

There is another serious problem and that involves a risk known to the drug's maker. For women who take Nexium or other proton pump inhibitors (PPI) to combat the symptoms of acid reflux, there exists a rise in the risk of hip fracture as high as 50%. This was revealed by researchers at Harvard Medical School and Massachusetts General Hospital in Boston. Results from the study were published online in the *British Medical Journal* last year. The highest risk is tied to PPI patients who are current or former smokers. But, according to researchers who studied more than 80,000 women as part of the exhaustive Nurses' Health Study, any woman having used a PPI drug on a regular basis for two years or longer faced a 35% higher risk of hip fracture. It was stated by the study that smoking drove that statistic up to 50%.

PPI drugs such as Nexium are suspected of inhibiting calcium absorption, thereby

lending itself to brittle bones. Researchers call the evidence “compelling.” Dr. Hamed Khalili, a clinical and research fellow in gastroenterology at Massachusetts General Hospital in Boston, notes that the FDA was right to mandate a change to a stronger warning on the prescribing label. He added:

*Our data supports the recent decision by the U.S. Food and Drug Administration to revise labeling of PPIs to incorporate concerns about a possible increase in risk of fractures with these drugs.*

We will continue to watch all of the above closely. If you need additional information on Nexium, contact Melissa Prickett, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at [Melissa.Prickett@beasleyallen.com](mailto:Melissa.Prickett@beasleyallen.com).

Source: [Lawyersandsettlements.com](http://Lawyersandsettlements.com)

#### **JUDICIAL PANEL CENTRALIZES MENINGITIS LITIGATION IN MASSACHUSETTS**

A judicial panel ruled on February 12<sup>th</sup> that all suits filed against the New England Compounding Center (NECC) pharmacy linked to a multi-state fungal meningitis outbreak will be heard in federal court in Massachusetts. The U.S. Judicial Panel on Multidistrict Litigation has assigned Judge F. Dennis Saylor in Boston the more 120 suits filed against the Center. The fungal meningitis outbreak, discovered in Tennessee in September, has been blamed on a steroid produced by the NECC. The outbreak has spread to 20 states, sickening more than 650 and killing 46.

Some Plaintiffs had requested the cases be centralized in Minnesota. But in its ruling, the panel said that was best done in Massachusetts, because that’s where the alleged contamination occurred and the federal and state investigations into the Framingham-based NECC are focused there. The panel’s ruling read:

*Thus, the primary witnesses, physical evidence, and documentary evidence likely will be located in Massachusetts. Additionally, Defendant is headquartered in Massachusetts, and Defendant’s bankruptcy case is pending in this district.*

NECC filed for Chapter 11 bankruptcy in December for the purpose of setting up a compensation fund for victims. It later listed \$400,000 in net assets, which Plaintiffs’ attorneys say isn’t nearly enough to cover the claims. A bankruptcy court judge has frozen

the assets of NECC’s four owners, so creditors can determine what remains of the millions of dollars the owners have received from the company.

Source: *Insurance Journal*

#### **LAWSUITS ON THE INCREASE IN SKECHERS TONING SHOE MDL**

More than 50 product liability suits involving Skechers toning shoes have been consolidated in a Kentucky federal court. The suits all claim that these shoes cause leg, ankle and foot injuries. The U.S. Judicial Panel for Multidistrict Litigation reported Jan. 14 that there were 54 separate product liability actions in the Skechers toning shoe MDL. This litigation is currently before U.S. District Judge Thomas B. Russell in the Western District of Kentucky. More than 100 Plaintiffs have been added to the litigation since the middle of January.

The Manhattan Beach, Calif. shoe company manufactures toning shoes, including Skechers Shape-ups and Tone-ups. The shoes have a pronounced rocker bottom sole. The lawsuits against Skechers generally allege that the shoes are defective because the rocker bottom soles alter a person’s gait and causes severe lateral instability. In addition to alleging physical injury, Plaintiffs typically allege that Skechers violates consumer protection laws by falsely claiming its toning shoes confer multiple health benefits.

The complaints contend that “Skechers places consumers at increased risk for chronic injuries such as stress fractures and tendon ruptures, as well as acute injuries from falling.” The federal MDL panel centralized the Skechers product liability cases in a December 19, 2011 order that transferred the 12 lawsuits pending in federal court at that time to the Western District of Kentucky. Last year, Skechers agreed to pay \$40 million to settle Federal Trade Commission charges that the company made unsupported claims about the health benefits of its toning shoes.

Source: *Lawyers USA Online*

## **XI. AN UPDATE ON SECURITIES LITIGATION**

#### **MERCK SETTLES VYTORIN SUIT**

Merck recently announced that it will pay \$688 million to settle two class action lawsuits brought by pension funds and other shareholders. The investors accused the company of withholding negative data from the ENHANCE clinical trial. During that trial, Vytorin (a combination of the generic cholesterol drug Zocor and the new drug Zetia) was compared to simvastatin alone in preventing the progression of atherosclerosis. The suits asserted that Merck had known for nearly two years that the clinical trial failed to show that Vytorin was any better than the statin alone at limiting the buildup of plaque in arteries, but they did not make the results public until 2008.

Vytorin and Zetia were heavily promoted despite skepticism by cardiologists. Approximately 800,000 prescriptions for these drugs were written each week in 2007, which made up nearly 20% of the market for cholesterol-lowering medications. Upon the release of the clinical trial results, prescriptions fell and Vytorin has never recovered.

Source: *The New York Times*

#### **LOCKHEED TO PAY \$19.5 MILLION TO SETTLE LAWSUIT**

Lockheed Martin Corp. has agreed to pay \$19.5 million to settle a securities fraud class-action lawsuit accusing the company of misleading investors about the prospects for its information technology division. The settlement, which requires a judge’s approval, was detailed by the Plaintiffs in documents filed in U.S. District Court in New York last month. The accord would resolve more than two years of litigation by shareholders who blamed misstatements by Lockheed for a decline in its stock price.

The lawsuit was filed in July 2011 by the City of Pontiac General Employees’ Retirement System, the public employees’ pension fund for Pontiac, Mich. It named as Defendants Lockheed and company executives, including Chief Executive Robert Stevens. The Plaintiffs alleged that Lockheed overstated the financial projections for its information systems and global services division for 2009. The case is *City of Pontiac General Employees’ Retirement System v.*

*Lockheed Martin Corporation, et al.*, U.S. District Court, Southern District of New York, 11-05026. Samuel Rudman, a lawyer with Robbins Geller Rudman & Dowd, a national firm represented the plaintiffs. He did a very good job for them in the case.

Source: Reuters

## XII. INSURANCE AND FINANCE UPDATE

### **INSURANCE AGENT WINS FRAUD CASE AGAINST FARMERS**

An insurance agent last month received a \$2.4 million verdict in his favor against Farmers Insurance Group in a trial held in Mobile, Ala. The company was accused of lying about its policy regarding independent agents. Kyle Morris, who had been working for his family's independent insurance agency for a number of years, sought to become a Farmers agent in 2006. Morris told Farmers that he did not want to de-affiliate from the Morris Insurance Agency. Testimony at trial indicated that Farmers told Morris that would not be a problem and that his association with the agency would not violate any Farmers' policies or procedures. But, that representation was false.

Farmers had an internal policy, in place at least since 2003, that prohibited any Farmers agent from associating with an independent insurance agency. Morris worked diligently for Farmers over the course of two years, building a book of business, establishing relationships with clients, and quadrupling the premiums he earned for Farmers. In December 2009, Farmers fired Morris without warning. Farmers' internal documents revealed that Farmers fired the agent because of his relationship with the Morris Insurance Agency—the very thing they assured him would be no problem when he started to work for the company.

Morris said at trial he never would have accepted the offer from Farmers had he known about the company's policy. In December 2009, after a management change at Farmers, the company sent him a termination letter without explanation. The company told Morris, after he pressed for an answer, that the termination was due to the policy.

The lawyers representing Farmers argued at trial that it did not matter what the company's managers had told Morris because he signed a contract giving them the right to

terminate him with 90 days' notice. Morris' lawyer argued that the company committed fraud, which negated that provision of the contract. Farmers not only took all of the clients that Morris had built up over 2½ years, but also the clients he brought with him when he came with Farmers. That was a total of 250 customers, with 310 policies worth some \$630,000 a year in premiums, according to testimony during the trial.

The contract had a non-compete clause prohibiting Morris from contacting his former clients for a year. He went back to the family insurance agency, where he now works, but essentially lost three years of his career. The Mobile County Circuit Court jury awarded Morris \$600,000 in compensatory damages to compensate him for lost commissions and \$1.8 million in punitive damages. Brian Duncan and Lucy Tufts, lawyers with the Mobile firm Cunningham Bounds, represented Morris. They did a very good job for him in the case.

Source: AL.com

## XIII. EMPLOYMENT AND FLSA LITIGATION

### **EEOC REPORT INDICATES FEWER LAWSUITS FILED IN 2012**

The U.S. Equal Employment Opportunity Commission has published its Fiscal Year (FY) 2012 Performance and Accountability Report. The report details activities from October 1, 2011, to September 30, 2012. Created by the Civil Rights Act of 1964, the EEOC enforces federal laws that prohibit employment discrimination on the basis of race, color, national origin, sex, religion, age disability, and family medical history or genetic information. The EEOC's jurisdiction to enforce employment antidiscrimination laws and promote equal employment opportunity extends to private, state and local government, and federal sector employment.

As a result of last year's budget cuts, the EEOC developed a plan "to make meaningful progress toward a more strategic and focused use" of resources. The report discusses the EEOC's proposed Strategic Plan for Fiscal Years 2012-2016, which established three objectives:

- combating employment discrimination through strategic law enforcement;
- preventing employment discrimination through education and outreach; and

- delivering excellent and consistent service through a skilled and diverse workforce and effective systems.

This year's report is framed largely in how the EEOC has made progress in achieving these three objectives in its strategic plan and discussing its progress toward further enforcement of the strategic plan moving forward. The report explains that the EEOC obtained a record recovery of \$365.4 million through the administrative process in FY 2012. This represented an increase of \$700,000 over what it recovered on behalf of parties it represented in FY 2011. The report also noted that the EEOC achieved an overall reduction in the pending administrative charge inventory by over 9%. This marked the second consecutive year of significant reduction in inventory since FY 2002.

The report indicates that in FY 2012, the EEOC resolved a total of 111,139 private sector charges and the total number of unresolved charges was again reduced by nearly 10%. The report points out that these results were achieved despite receiving nearly 100,000 private sector charges for three years in a row. The report also notes that in FY 2012, the EEOC's federal sector programs achieved similar success. The federal sector hearings program resolved a total of 7,538 complaints securing more than \$61.9 million in relief for federal employees and applicants who requested hearings.

Additionally, the agency resolved 4,265 appeals of decisions in the federal sector, including 52.9% of them within 180 days of their receipt. As a result of these efforts, the EEOC reduced the average processing time for all resolutions from 378 days in FY 2011, to 361 days in FY 2012—a 4.5% decrease. The EEOC legal staff resolved 254 merits lawsuits for a total monetary recovery of \$44.2 million and substantial equitable relief.

The agency's outreach programs reached 318,838 persons in FY 2012 through participation in 3,992 no-cost educational, training, and outreach events. Additionally, in FY 2012, the Training Institute trained 23,119 individuals at 473 events, including 417 field Customer Specific Training events with 16,932 attendees. The report also detailed a significant reduction in the number of lawsuits filed in FY 2012. The report explains that the EEOC filed only 122 lawsuits in FY 2012, down from 261 merits lawsuits in FY 2011. Although the report characterized the EEOC's efforts as "enforcing the law more effectively" in furtherance of its strategic objectives, these numbers also illustrate a response to growing criticism by federal courts over the EEOC's litigation tactic.

The decrease in overall lawsuits demonstrates the EEOC's focus on pursuing systemic discrimination lawsuits under the new strategic plan. "Systemic cases" are defined as "pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area." The report acknowledges that its performance measure in this area provides incentives for the agency to conduct systemic investigations whenever it finds evidence of such potential widespread discriminatory practices.

In FY 2012, the EEOC filed 12 systemic lawsuits. Systemic suits comprised 8% of all merits filings. The report pointed out that by the end of the year systemic suits represented 20% of all active merit suits—the largest proportion since tracking started in FY 2006. Under the new strategic plan, the report states that the EEOC anticipates that systemic filing will account for 22% to 24% of all pending lawsuits by FY 2016. The EEOC also resolved 240 systemic investigations, which resulted in monetary damages of \$36.2 million for 3,813 individuals, and 21 systemic cases, which resulted in multiple million dollar recoveries.

Finally, the report indicates that the EEOC is succeeding in its goal to focus enforcement efforts on the "vulnerable worker and underserved communities." The report states that the EEOC has identified approximately 90 significant partnerships in this area, with goals to increase such partnerships by 10% in both FY 2013 and FY 2014. If you need additional information or need help with employment-related claims, contact Lance Gould or Larry Golston, lawyers in our firm who handle these cases, at 800-898-2034 or by email at [Lance.Gould@beasleyallen.com](mailto:Lance.Gould@beasleyallen.com) or [Larry.Golston@beasleyallen.com](mailto:Larry.Golston@beasleyallen.com).

Source: *Alabama Law Weekly*

#### **DEPARTMENT OF LABOR SEEKS COMMENTS ON WORKER-CLASSIFICATION SURVEY**

When employees are misclassified as independent contractors, everyone—except for the company doing the misclassifying—loses. Workers are deprived of wage-and-hour protections, such as the minimum wage and overtime, and are denied access to programs such as unemployment insurance and workers' compensation. Competing companies face an unfair competitive advantage that the misclassification creates. And the federal government and state governments lose billions in unpaid Social Security, unemployment insurance, and income taxes.

The Department of Labor recently announced its plan to survey workers about their employment experiences and gauge their knowledge about basic employment laws. Gathering this information will allow policymakers to learn whether workers understand their employment classification and the implications of their classification status.

The survey is critical, in part, because many speculate that it could be a prelude to "right-to-know" regulations. Pushed early during the Obama Administration, a right-to-know rule would update the recordkeeping requirements to enhance transparency and disclosure of worker classification. The rule would achieve this perhaps by requiring employers to provide written analysis to workers that justifies employment classification, and by requiring employers to maintain a copy of the analysis for potential inspection by the Department of Labor.

Regardless of the worker-classification survey's purpose, the Department of Labor during the Obama Administration has recognized the rampant misclassification of workers. The survey is another step in the direction of curtailing misclassification. If you would like to have more information on this subject, contact Brad Smelser, a lawyer in our Consumer Fraud Section, at 800-898-2304 at [Brad.Smelser@beasleyallen.com](mailto:Brad.Smelser@beasleyallen.com).

Source: [www.federalregister.gov](http://www.federalregister.gov)

## **XIV. PREDATORY LENDING**



#### **TITLE LOANS AND PAYDAY LOANS ARE BAD NEWS FOR BORROWERS**

Our firm deals with litigation involving "defective products" on a regular basis, and most of these cases involve motor vehicles. But there are two products on the market in Alabama and in other states that fit the description of "defective" and are hurting

thousands of folks. Those "defective" products are payday loans and automobile title loans. In my home state of Alabama, the Legislature badly needs to rein in these faulty, yet all-too-often "legal" products. These two lending products, without question, are damaging Alabama consumers who use them. Based on our firm's involvement in predatory lending litigation, I know first-hand that Alabama's laws on both pay-day loans and title loans are very weak.

The lending industry, including banks, credit unions and finance companies, consider loans as "products," each with its own varying characteristics. Such things as amounts, target audiences, repayment plans, and the like are involved with the products and vary insofar as these elements are concerned. Of the "loan products" on the market today, payday and title loans are the ones that in my opinion are the most hurtful. A person with a financial emergency is often forced to take out a loan using another product, a car, as collateral. Alabama law allows a person to pawn their car title in exchange for a loan, which will vary in size depending on how much is needed and the value of the vehicle.

This type transaction is legally the same as pawning a product such as a watch. If a loan secured by a watch is not paid back, a working man or woman will still be able to drive to work the next day. He or she would lose the watch but they would still have their car. But defaulting on a title loan is quite different. In a title loan, default results in repossession of the borrower's vehicle. As a result, default on a title loan by a worker puts the worker's paycheck in jeopardy. There is also the matter of the cost of these title loans. Any person desperate enough to pawn the title to their vehicle is punished for that vulnerability by being charged a staggering 300% annualized percentage rate. Compare the Annual Percentage Rate (APR) associated with other kinds of consumer loans to the APR on a title loan. You will then see how bad title loan rates are.

The absurdity of triple-digit interest is why a number of states and the U.S. military have capped rates on these types of loans at 36%. While this is still very high, it's considered "reasonable" by some observers. But one thing is certain: the only winner when it comes to payday or title loans is the lender. Nobody wins when borrowers get pulled into the inescapable financial quicksand of a title or payday loan—except for the lender and the owner of the used car lot where the repossessed car will be sold.

But let's also take a look at payday loans. A title loan's 300% APR looks good compared to the 456% legal interest rate in Alabama on

payday loans. These loans are for very short terms, but carry astronomical interest rates. There are also huge fees each time the loan is rolled over. Purporting to throw borrowers an emergency lifeline, it was written in an article in the *Montgomery Advertiser* that these loans actually throw the borrowers an anchor. The average borrower takes out eight or nine such loans a year. Instead of solving emergencies, borrowers often use payday loans for recurring regular expenses and that is a sure path to destitution.

Payday loans are designed to encourage repeat borrowing. Barring some kind of windfall, a person in desperate need of funds for an unexpected expense is unlikely to have the money a few weeks later. When time to pay comes the loan is rolled over and the deadline extended. The cycle — with another round of fees—is then repeated. Only a handful of borrowers pay off the payday loan as soon as they reach their next pay period. Industry documents show that lenders recognize the vast profitability of cultivating repeat borrowers. In fact, payday and title loans may be the only defective products that work exactly as designed. We have seen actual internal documents from a supervisor for one lender who said to the employees: “Get them in debt, and keep them in debt.” The company actually laid out specific instructions on how to lure folks into their trap and to keep them there.

Hopefully, the Alabama Legislature will consider bills in the regular session to curb these lending practices. Alabama could join other states like Arkansas, Georgia and North Carolina in capping interest rates on small-dollar consumer loans. Usury isn't just unethical, it strips wealth out of communities at a time when elected officials have been adamant about protecting working families from economic distress.

The Alabama Legislature should take a strong stand—and resist the powerful lobbyists—and make needed changes in our state's laws. But outcry from consumer advocates won't be enough to move Alabama's political machinery — especially when the well-funded payday and title loan lobby is pushing in the opposite direction. Many folks who don't even use payday loans still consider usury as “evil” and they don't like to see storefronts clustered along Alabama roadways and in our cities and towns.

If the public would take a stand, its voice would be sufficient to push the Alabama Legislature into leveling the lending playing field. The legislators might even take these “defective loan products” off the market once and for all. My preference would be to ban “title loans” and to put a reasonable cap on the interest rates for “payday loans.”

Hopefully, our Alabama readers will see a need for “citizen involvement” and contact their House members and Senators and ask them to take action.

Source: *Montgomery Advertiser*

## XV. PREMISES LIABILITY UPDATE

### **WEST PENN SETTLES FATAL POWER LINE CASE FOR \$105 MILLION**

West Penn Power Co. has agreed to dismiss its appeal of a \$109 million verdict in the death of Mrs. Carrie Goretzka, who was fatally burned by a falling power line in front of her two young daughters. The company will pay \$105 million to settle the case. It will also inspect its lines for the kind of dangerous splices that caused the deadly line failure in 2009. As previously reported, an Allegheny County jury in December found West Penn workers had failed to properly splice a power line over the backyard causing it to fall on the woman while her daughters and mother-in-law looked on helplessly.

The settlement of the wrongful death case came a week after West Penn settled a related enforcement action by the Pennsylvania Public Utility Commission (PUC). That agreement includes an \$86,000 fine and requires West Penn to retrain its workers about how to splice power lines and to inspect any current splices for potential problems. The PUC in June accused West Penn of not properly maintaining the Goretzka power line, and others similarly spliced, but that happened only after the law firm representing the Goretzka family turned over evidence uncovered while investigating the Goretzka case. Shanin Spector, a lawyer who is with the Philadelphia firm Kline & Spector, represented the family. He did a very good job for them in this most important case.

Sources: Joe Mandek with Associated Press and *Claims Journal*

### **\$15 MILLION JURY VERDICT AGAINST CONVENIENCE STORE THAT SOLD ALCOHOL TO MINOR**

A jury in Bessemer, Ala., returned a verdict last month of more than \$15 million in damages against a convenience store. A 2007 crash killed a 13-year-old boy and

injured three others. The lawsuits filed were brought under Alabama's Dram Shop Act because the store sold alcohol to an underage driver. The jury returned the verdict against The Nineteenth Street Investments Inc., former owners of the 14<sup>th</sup> Street BP in Bessemer, after a week-long trial before Jefferson County Circuit Court Judge Eugene Verin. The four separate lawsuits had been consolidated for trial to be heard before Judge Verin. The verdicts were as follows:

- Michael Waldrop was awarded \$750,000 in compensatory damages and \$3 million in punitive damages.
- Sharon Robertson, the mother of 13-year-old Drew Robertson, a passenger, who was killed in the crash, was awarded damages of \$7 million.
- Jennifer Vickery, another passenger, was awarded \$3.9 million in compensatory and punitive damages.
- Tammy Hardin, the mother of Brittany Caffee, the driver of the car, was awarded \$500,000 in punitive damages.

The crash happened about 9 p.m. on May 2, 2007, on a public highway in Tuscaloosa County. The driver, Brittany Caffee, was intoxicated when the crash happened. The jury found that the convenience store, owned by The Nineteenth Street Investments, Inc., had sold the alcohol to the driver, who at the time was under the age of 21. The 14<sup>th</sup> Street BP had been known for selling alcohol to underage children, according to Ashley Peinhardt, one of the lawyers in the case. Ashley said: “Everbody knew that was the place to go if you are underage and don't have an ID.” The convenience store is no longer owned by The Nineteenth Street Investments.

Alabama's Dram Shop Act allows lawsuits to be filed against stores or restaurants that sell alcohol to minors when injuries or damages occur as a result of the sale. The driver of the car in this case could not file a lawsuit, but her mother could under Alabama law.

Several lawyers from Jefferson County, each representing a different Plaintiff, were involved in the trial of this case. Ashley Reitz Peinhardt, a lawyer with the Hare, Wynn firm, represented Michael Waldrop; Pat Lavette, a lawyer with Davenport, Levertte, & Cledele, represented Ms. Roberts; Ralph Bohanan represented Jennifer Vickery; and Ed Tumlin represented Ms. Hardin. Each of these lawyers did good work in this case for their client.

Source: AL.com

## **CALIFORNIA ATTORNEY GENERAL SUES BP AND ARCO OVER GAS STATIONS**

California Attorney General Kamala D. Harris filed a civil lawsuit last month against BP West Coast Products, BP Products North America Inc. and Atlantic Richfield Company for allegedly violating state laws governing hazardous materials and hazardous waste by failing to properly inspect and maintain underground tanks used to store gasoline for retail sale at more than 780 gas stations in California. Attorney General Harris said in a statement:

*Safe storage of gasoline is not only common sense, it is essential to protecting the integrity of California's groundwater resources. California's hazardous waste laws safeguard public health and this lawsuit ensures proper maintenance of the tanks that store fuel beneath California's communities.*

The Attorney General filed the BP and ARCO complaint in Alameda County Superior Court. The complaint alleges that since October 2006, the BP companies and ARCO have improperly monitored, inspected and maintained underground storage tanks used to store gasoline for retail sale.

The complaint alleges that the Defendants tampered with or disabled leak detection devices, and failed to test secondary containment systems, conduct monthly inspections, train employees in proper protocol, and maintain operational alarm systems, among other violations. The lawsuit also alleges that the Defendants improperly handled and disposed of hazardous wastes and materials associated with the underground storage tanks at retail gas stations throughout the state.

The complaint follows a recent statewide investigation led by the Attorney General's office, which found violations of hazardous materials and hazardous waste laws and regulations at BP gas stations in 37 counties across the state. In January 2012, Attorney General Harris's office filed a similar lawsuit against Phillips 66 and ConocoPhillips.

Source: *Insurance Journal*

## **NARCONON SETTLES WRONGFUL DEATH SUIT**

Narconon of Georgia has settled a wrongful death lawsuit brought by the family of a former patient at the facility. The settlement was reached three days before jury selection was to begin in the case. The settlement agreement was sealed and the amount to be paid is confidential. Patrick Desmond died

four years ago of a lethal combination of alcohol and opiates while a patient at the Norcross drug treatment facility.

A pre-trial ruling on November 5<sup>th</sup> by DeKalb County State Court Judge Stacey Hydrick had to help get the case settled. In the order, Judge Hydrick said that Narconon of Georgia "intentionally, willfully and repeatedly provided false and misleading responses to Plaintiff's discovery requests." The drug treatment facility's responses to the allegations in the lawsuit were stricken by the judge.

The suit, filed nearly three years ago in DeKalb County, alleged the rehab clinic duped Desmond's parents and a Florida drug court into believing it provided in-patient care even though it lacked the proper license. Desmond had been sentenced to six months in a residential facility by a Florida court. Information obtained in the lawsuit and reported by the *Atlanta Journal-Constitution* caused the state to reopen an investigation into Narconon of Georgia. In late December, the Department of Community Health informed the clinic its license was being revoked for misrepresenting itself as a residential treatment facility.

Narconon of Georgia appealed the ruling, requesting a hearing as provided by state law. The program's international arm Narconon International, based in Los Angeles, was also named in the suit. That company denied any linkage to the Norcross facility. Judge Harris said Narconon International had assumed a contractual duty to address problems at clinics bearing its name. She said that the company was "on constant notice there are problems at the housing (component) and they never do anything about it." Narconon of Georgia remains open pending its appeal.

The program is also being investigated by State Insurance Commissioner Ralph Hudgens after a former patient's mother alleged her insurer was billed \$166,275 for doctor visits that never occurred and treatment that was never provided. Jeff Harris, an Atlanta lawyer who represented the Plaintiff, says further legal action against the Church of Scientology-affiliated clinic is being prepared. Jeff, who is with the firm Harris, Penn Lowery DeCampo, said his "investigation into claims of insurance fraud, illegal housing operations and other potentially illegal activities committed by Narconon of Georgia is ongoing." Jeff did a very good job in this case. It will be interesting to see what further action will be taken.

Source: *Atlanta Journal Constitution*

## **CHEVRON SHOULD HAVE REPLACED LEAKY PIPE**

Government investigators have reported that a decades-old pipe that leaked and fed a massive fire at a Chevron refinery in California was corroded. It was said that the company should have known it and replaced the pipe. The report issued by the U.S. Chemical Safety Board and California Division of Occupational Safety and Health found the 8-inch steel pipe was installed in 1976 and ruptured due to corrosion. The report confirmed previous findings by both the agencies and the company.

The fire created a large plume of black smoke, sending more than 15,000 nearby residents to hospitals complaining of eye irritation and breathing problems. The cloud also engulfed 19 Chevron employees, who escaped severe injuries. Rafael Moure-Eraso, board chairperson, said in a statement: "The corroded pipe should have been replaced when opportunities arose years earlier."

The report said there was wall thinning in the pipe because naturally occurring sulfur reacted with the steel, creating a specific type of corrosion. The study found the oil processed in that unit of the refinery was high in sulfur and especially damaging to the pipe. If the pipe had been replaced with one higher in silicon, which protects against sulfur-related corrosion, the leak would likely not have occurred, according to the report. The Chemical Board said its investigation into what caused the fire and the safety procedures involved is ongoing.

Cal-OSHA has fined Chevron nearly \$1 million after finding willful, serious violations. Chevron is appealing those citations. San Ramon-based Chevron said some of the report's findings were consistent with its own, and that the company is inspecting every pipe susceptible to the same type of corrosion. A Chevron spokesman said the company doesn't agree with some of the characterizations in the report. He added that Chevron is doing its own investigation and will take some corrective actions.

Source: *Claims Journal*

## **XVI. WORKPLACE HAZARDS**

### **OIL WELL DEATH LAWSUIT SETTLED**

A wrongful death lawsuit involving Marathon Oil has been settled. The suit was filed by the mother of a 21-year-old Montana man

found dead at a western North Dakota oil well in 2012. Trista Juhnke filed the suit in Yellowstone County, Mont. The amount of the settlement is confidential. Dustin Bergsing was found unresponsive on an oil storage tank's catwalk near Mandaree in Dunn County, N.D., on January 7, 2012. The cover of the tank was open. North Dakota's medical examiner ruled that Bergsing died from hydrocarbon poisoning due to inhaling petroleum vapors.

Bergsing had no health problems and the coroner's report showed there were no drugs or other toxic substances in his system. Bergsing worked for Across Big Sky Flow Testing, which was contracted by Marathon Oil. According to Eric Brooks, assistant area director for the Occupational Safety and Health Administration, OSHA found no violations of federal standards during its investigation. Fred Bremseth, a lawyer with offices in Minneapolis and Montana, represented the Plaintiff. He did a very good job in this most interesting case.

Source: Associated Press

#### **VERDICT FOR MICHIGAN TEENAGER IN FARMING VEHICLE LAWSUIT**

A \$645,388 jury verdict was returned in favor of Colton Brooks, a 17-year-old farm worker, who suffered leg and knee injuries in a farming vehicle accident. The predominant industry in the county where the suit was heard is farming. In July 2011, Colton Brooks was a volunteer worker at Stanton Orchards. His left leg was crushed when a 4,000-pound cherry catcher (a specially-made tractor for cherry collection) he was operating lost control and rolled down a hill. It was contended that Brooks had not received adequate training from the orchard's management. It was also alleged that the brakes on the 30-year-old cherry catcher had not been properly maintained.

Gary VanEe, a retired Michigan State University agricultural engineering professor, who has strong experience in farm equipment hydraulics, testified for the Plaintiff at trial. He inspected the machine and testified that the brake system, if properly maintained, would have stopped on the hillside when the brake was pressed. He further explained that the brakes gave the wheels more power because of their placement. During discovery, it was learned that the machine had broken free and rolled downhill twice in 2010. One of those incidents was with the 19-year-old son of the orchard's mechanic operating it. The mechanic testified at trial that he told the orchard owners that the machine should be replaced after

the 2010 harvest. He also said during his testimony that a cage should be welded around the seat to protect the occupant if the machine did roll downhill again.

The jury allocated 15% of fault to Brooks. The verdict was broken down as follows: \$134,888 in past and future medical expenses and \$510,500 in past and future non-economic damages. R. Jay Hardin, a lawyer with the Michigan firm of Smith, Haughey, Rice, Roegge, represented the Plaintiff. He did a very good job in the case for his client.

Source: *Lawyers USA Online*

#### **FARMWORKER'S INJURY CASE SETTLED**

A settlement has been reached by a former farmworker and farm machinery operator in a lawsuit filed against three companies. The worker's left arm was badly mangled in a machine that processed harvested watermelons. Robert Ramirez Lopez, 57, had only been on the job for three days in September 2009 when the incident happened. He was tapping a watermelon that had become stuck in the machine when his arm was crushed in the dumping mechanism.

Lopez was employed by a company other than the company that owned the machine. Had Lopez been employed by the company that owned the machine, it would have become a worker's compensation claim. Under the state worker's compensation law, Lopez's benefit would have been limited to \$135,000. Lopez had only worked sporadically during the three years before the accident, earning just \$8,000. He was hired by a farm labor contractor to work at a produce cooling facility.

Lopez was working for VMJ Professional Services (VMJ), a farm labor contractor, at a facility owned by organic grower Double D Farms at a location near Coalinga. The machine that Lopez was working on when he was injured was "designed, manufactured and maintained" by TMJMB Holdings, formerly known as Timco Worldwide. The case went to mediation. Two weeks before the trial was scheduled to start, the case was settled for \$1,000,000. Under the settlement agreement, TMJMB will pay \$905,000 of the total settlement, VMJ Professional Services \$90,000 and Double D Farms \$5,000.

Lopez began working for VMJ on Sept. 24, 2009, at Double D's produce cooling facility. He was working around a machine that was part of the watermelon harvesting process. During the automated process, watermelons routinely became lodged or "stuck" in the conveyor belt area after having been

dumped by the machine. Lopez estimated it happened about 50 times a day.

Each time, Lopez would tap the melon with his hand to dislodge it. On his third day on the job, at the same time he tapped the melon, a co-worker activated a "dumper" on the machine. Lopez's left arm was crushed when it was pulled into the machine. Lopez now has limited use of his left arm, which was repaired in surgery, but likely can never again do manual labor. He has only an 11<sup>th</sup>-grade education. Butch Wagner, a lawyer with in Fresno, represented Lopez and did a good job for him in this case.

Source: *fresnobee.com*

#### **FORMER BNSF EMPLOYEE AWARDED \$1.7 MILLION IN LAWSUIT**

A jury has awarded a former BNSF Railway Co. employee \$1.7 million in damages in a civil lawsuit. Jurors found that BNSF negligently injured Robert Dannels' spine by assigning him work that caused trauma over the course of his career. His career was ended when the skid steer he was driving struck a metal pole as he was removing snow in March 2010. Dannels said he was thrown against the cab and he felt a popping sensation in his back.

It was contended that railroad workers are entitled to a safe place to work and should have the proper tools, equipment and manpower to do the job. The defendants argued Dannels' injuries were caused by mild degenerative changes consistent with his age and lifestyle outside the workforce.

Source: *Billings Gazette*

#### **OSHA CITES BRIDGE PAINTER FOR A SECOND TIME**

Federal workplace safety regulators have proposed \$460,000 in new fines for a southwestern Pennsylvania painting company that was cited two years ago over allegations that its workers are exposed to high levels of lead and other hazards on PennDOT bridge projects. The Occupational Safety and Health Administration cited Panthera Painting Inc. for 38 violations—including 14 willful and 11 repeat offenses—for exposing workers to dangerous levels of lead and not doing enough to monitor their health in relation to the poisonous metal. The citations stem from bridge painting jobs in Harrisburg, Slatington and Slatedale. Panthera, which is based in Canonsburg, near Pittsburgh, is a subcontractor for PennDOT on bridge maintenance.

OSHA recommended \$130,000 in fines in March 2011 for similar violations, and entered into a settlement to pay roughly half that, according to OSHA. It appears that Panthera has yet to pay the entire amount from the earlier case. Panthera has 15 days to appeal the new citations, which OSHA deemed especially serious because of the 2011 enforcement action. MaryAnn Garrahan, OSHA regional administrator in Philadelphia, stated:

*The employer's refusal to correct the hazards, along with its history of failing to correct hazards, demonstrates a clear resistance to worker safety and health and leaves workers vulnerable to potential illnesses and injuries from overexposure to lead and other hazards. Employers have a legal responsibility to provide workers with safe and healthful workplaces. Anything less is unacceptable.*

The willful violations carry proposed fines totaling \$365,750 for failing to properly protect workers from lead exposure and falls. The repeat violations, carrying \$63,294 in proposed fines, include a lack of warning signs in lead exposure areas, failing to ensure workers showered after shifts and failure to provide medical evaluations, including blood tests every two months for workers exposed to lead. The other 13 lesser violations account for the rest of the proposed fine.

Source: *Claims Journal*

#### **ALABAMA PLANT CITED FOR SAFETY VIOLATIONS**

Federal labor officials have cited a South Alabama manufacturing plant for 15 safety violations. According to Department of Labor spokesman Michael D'Aquino, Tenax Manufacturing Alabama LLC was cited for safety violations after an August 2012 inspection of its plant in Evergreen. The company manufactures construction netting and fencing products. Officials have proposed a fine of nearly \$55,500 for the plant failing to have an emergency action plan, handrails on staircases, allowing employees to use forklifts without wearing seatbelts, and other infractions.

Source: Associated Press

## **XVII. TRANSPORTATION**

### **514 PEOPLE DIED IN ALABAMA HIGHWAY WRECKS IN 2012**

Preliminary figures show that 514 people died in highway accidents in Alabama in 2012. The numbers were released recently by the Alabama Department of Transportation and the Alabama Department of Public Safety. According to state officials, in 59%, or 251 of the statewide fatalities investigated by State Troopers, the victims were not wearing seatbelts.

Alabama State Troopers investigate traffic wrecks that occur on our state's rural, state, U.S. and interstate highways. Wrecks in cities are handled by local police and are not included in the preliminary figures. Data from crashes investigated by local law enforcement won't be compiled until later this year. Therefore, the total number of fatalities, including the percentage not wearing seat belts, is expected to climb even higher.

Source: *The Tuscaloosa News*

### **PARENTS WIN \$10.5 MILLION VERDICT IN TEXAS MONSTER TRUCK DEATH**

A Texas jury returned a verdict last month in favor of the parents of a 23-year-old woman killed when she was struck by a "monster truck" in a Dallas "gentlemen's club" parking lot. A \$10.5 million verdict was returned against the driver and the club for serving him alcohol. The verdict in favor of Gary McKenzie and Karen McDonald, parents of Kasey McKenzie, who died in March 2011 after she was run over by an SUV elevated on "monster" tires.

Kasey had been talking with a friend in the parking lot of the club when she was hit by the truck. The driver of the truck, Eric Crutchfield, was legally intoxicated. Employees at the Spearmint Rhino club sold Crutchfield alcohol even though it was clear he was already intoxicated, according to media reports. Crutchfield pleaded guilty to manslaughter and got three years in prison. Michael T. Schmidt, a lawyer with the Schmidt law firm in Dallas, represented the plaintiffs. He did a good job in this case for his clients.

Source: Associated Press

### **\$1.6 MILLION AWARDED IN AUTOMOBILE CRASH CASE**

A jury in Lansing, Michigan, last month returned a \$1.6 million verdict in a traumatic brain injury (TBI) case. The plaintiff was hit by a police cruiser and suffered this very serious injury. Four medical experts appeared at trial and testified. About the TBI and how it affects Carl Mennare, the plaintiff. The doctors were all treating physicians and included a family practitioner; a neuropsychologist; a psychologist; and a physical medicine and rehabilitation specialist. This testimony helped the jurors understand TBI and how the brain functions. The case was *Mennare v. Charter Township of Lansing*. Lawrence P. Nolan a lawyer with Nolan, Thomsen & Villas in Eaton Rapids, Mich., represented the plaintiff. He did a very good job in this case.

Source: *Lawyers USA Online*

### **DRIVER FATIGUE CREATES SAFETY HAZARDS ON THE HIGHWAYS**

Driver fatigue is a foreseeable risk for all drivers. But for drivers of commercial vehicles, it's an occupational hazard which has been recognized by the Occupational Safety and Health Administration (OSHA) and the Federal Motor Carrier Safety Administration (FMCSA), which must be managed. Fatigue is the result of physical or mental exertion that impairs performance. Driver fatigue may be due to a lack of adequate sleep, health issues, extended working hours, strenuous work or non-work activities or a combination of other factors.

In recent years there has been an increase in attention given to the fact that fatigued drivers are dangerous to themselves and others on the road. Studies have been conducted measuring drivers' performance when they are tired. These studies have suggested that driving while fatigued impairs reaction times just as much as alcohol use. The risk involved with fatigued drivers is only amplified when introduced into the context of commercial trucking, because of the extremely large motor vehicles transporting a variety of materials.

The federal government is aware of the underlying safety issues involving commercial trucks and there are several specific rules in the FMCSR (Federal Motor Carrier Regulations) that address impaired drivers, hours of service, a driver and trucking companies, and managing truck schedules to conform with the Regulations. Every year truck crashes kill over 5,000 people and injure almost 150,000 more on the nation's

roads and highways. Large trucks are involved in multiple vehicle fatal crashes at twice the rate of passenger vehicles.

A driver of a commercial motor vehicle may drive a maximum of 11 hours after ten consecutive hours off duty. These hours are reduced for any driver who is carrying passengers to a maximum of ten hours after eight consecutive hours off duty. Under the current rule it permits fatigued drivers to spend 15 hours driving in a 24-hour period. There are new proposals that work/rest hours be based on a 24-hour circadian clock period instead of a 24-hour period. This would require longer rest periods for drivers.

The sleep-wake cycle is governed by both homeostatic and circadian factors. Homeostatic relates to the neurobiological need to sleep. The circadian pacemaker is an internal body clock that completes a cycle approximately every 24 hours. These processes create a predictable pattern of two sleeping peaks, which commonly occur about 12 hours after the mid-sleep period (in the afternoon for persons who sleep at night) and before the next consolidated sleep period (most commonly at night or early morning hours).

Studies have shown the most consistent factor influencing driver fatigue and alertness was time of day. Night driving from midnight to dawn was associated with the worst performance. The time of day was a much better predictor of decreased driving performance than hours of service. There is no quick fix or single solution to the fatigue problem. Sleep is a principle counter-measure to fatigue. All drivers need to insure that they obtain adequate sleep and they must be afforded an opportunity to obtain adequate sleep. If you need more information of this subject, contact Mike Crow, a lawyer in our Personal Injury/Products Liability Section, at 800-898-2034 or by email at Mike.Crow@beasleyallen.com. You can also go to [www.FMCSA.gov](http://www.FMCSA.gov); [www.DOT.gov](http://www.DOT.gov); or [www.NHTSA.gov](http://www.NHTSA.gov) for more information.

Sources: [www.FMCSA.gov](http://www.FMCSA.gov), [www.DOT.gov](http://www.DOT.gov), and [www.NHTSA.gov](http://www.NHTSA.gov)

### **NTSB BLAMES CREW ERROR FOR 2010 MINNESOTA TRAIN CRASH**

Crew error was likely to blame for a head-on collision between two Canadian National freight trains that injured all five crew members in northeastern Minnesota in 2010. This was the conclusion reached in a report issued last month by investigators from the National Transportation Safety Board. The September 30, 2010 crash occurred north of Two Harbors derailing

three locomotives and 14 rail cars. An estimated \$8.1 million in damages resulted. The NTSB concluded the probable cause was the southbound train crew's error in leaving a siding before the northbound train had passed.

The southbound train, pulling 116 cars loaded with iron ore pellets, did not have authority to operate on the single main track. The northbound train, pulling 118 empty cars, did have authority to operate on the track. The southbound train was supposed to wait until the northbound train had passed, but failed to do so, according to the report.

The trains, according to the report, were operating on a track with no wayside signals to tell engineers whether the track ahead is clear or occupied by another train or work crews. Engineers operating in so-called "dark territory" must rely solely on train dispatchers. The NTSB also noted crew fatigue and "inadequate crew resource management" contributed to the crash. The board said the use of cellphones by crew members on the southbound train and by the engineer on the northbound train "was a distraction to the safe operation of both trains and an indication of a clear disregard" for Canadian National rules and Federal Railroad Administration regulations.

The report said neither the mechanical condition of the trains, the weather, drug or alcohol impairments, nor the actions of the northbound train crew were factors in the accident. Canadian National says it will review the NTSB's recommendations and prepare a response.

Source: *Claims Journal*

### **U.S. LAGS ON FULFILLING AIRLINE SAFETY LAW**

It was reported last month that federal regulators have been struggling to overcome substantial industry opposition and implement a sweeping aviation safety law enacted after the last fatal U.S. airline crash which happened nearly four years ago. The Federal Aviation Administration is having a hard time putting in place rules required by the law to increase the amount of experience necessary to be an airline pilot, provide more realistic pilot training, and create a program where experienced captains mentor less experienced first officers. This is according to the report issued by the Department of Transportation's Inspector General.

The FAA is also running into problems creating a new, centralized electronic database that airlines can check prior to hiring pilots, according to the report. The database is supposed to include pilots' performance

on past tests of flying skills. In each case, the report indicates that the FAA has run into significant opposition from the airline industry. The report reads "To effectively implement these initiatives in a timely manner, (the) FAA must balance industry concerns with a sustained commitment to oversight."

As you may recall, Congress passed the law about 18 months after the February 12, 2009, crash of a regional airliner near Buffalo, N.Y., that killed all 49 people aboard and a man on the ground. A National Transportation Safety Board investigation of the accident found weaknesses in pilot training, tiring work schedules, lengthy commutes and relatively low experience levels for pilots at some regional carriers. The crash was due to an incorrect response by the flight's captain to two key safety systems, causing an aerodynamic stall. That caused the plane to crash into a house below, the NTSB investigation concluded.

The family members of the victims lobbied for passage of the safety law. Many are disappointed in the delays in carrying out the intent of the law. Driven by the accident and the new safety law, the FAA substantially revised its rules governing pilot work schedules to better ensure pilots are rested when they fly. It was the first modification of the rules since 1985 and "a significant achievement" for the FAA, the report said.

Hopefully, the FAA will meet the deadlines later this year for issuing new regulations on pilot training and qualifications. Responding to the report, the FAA said in a statement that more than 90% of air carriers now use voluntary programs in which pilots and others report safety problems with the understanding that there will be no reprisals for their conduct or computer-assisted programs that identify and report safety trends. The FAA believes this "has led to significant training, operational and maintenance program improvements." The agency also noted that it has "delivered seven reports to Congress, initiated five rulemaking projects and continued rulemaking efforts for another four final rules" as a result of the new safety law.

The Inspector General's report, however, details how the FAA has missed deadlines and run into complications trying to issue regulations necessary to implement key portions of the law. For example, the FAA is behind schedule on rules to substantially increase the experience required to become an airline pilot from the current 250 flight hours to 1,500 flight hours. The agency currently estimates it will issue the rules in August, a year after the deadline set in the law. Airlines oppose the increase, claiming

that a pilot's quality and type of flying should be weighed more heavily than the number of flight hours.

The FAA has proposed a compromise that would allow military pilots with 750 hours of flight experience or pilots with 1,000 hours and a four-year aviation degree to qualify to be hired as an airline pilot, but airlines remain opposed. If the FAA doesn't act by the August deadline, the increase to 1,500 hours will take effect without the exceptions offered in the FAA's compromise proposals. But the FAA and its inspectors haven't taken steps to ensure that regional airlines, which will be most affected, will be able to meet the new requirements, according to the report. It was reported by Associated Press that at two regional carriers visited by the Inspector General's office, 75% of the first officers didn't have an air transport certificate—the highest level pilot's license issued by the FAA—which will be required for all airline pilots by the August deadline.

Sources: Associated Press and *Claims Journal*

#### **REPORT QUESTIONS SAFETY OVERSIGHT OF SMALLER AIRLINES**

The federal government hasn't kept a promise made after a deadly airline crash in 2009 to make sure that major airlines are holding their smaller partners to the same safety standards that they have to follow. The Transportation Department's Inspector General faults the Federal Aviation Administration for not taking steps to encourage the big airlines "to consistently share safety information and best practices" with regional airlines that operate flights under contract for them. That business link is known as code-sharing. The way that works is that one airline sells tickets for seats on a flight operated by another airline. The relationship between United and United Express is an example. More than half of all airline flights in the U.S. are operated by regional airlines using names such as United Express, Delta Connection, American Connection and US Airways Express under code-sharing arrangements.

As was widely reported, a flight operated by regional carrier Colgan Air for Continental Airlines under the name Continental Express crashed in February 2009 near Buffalo, N.Y., killing 50 people. After that crash, officials at the Department and the FAA said they would begin reviewing code-share contracts to see if they impinged on safety. Investigators cited pilot training lapses by Colgan as a factor. Colgan ended flying in September as part of its parent company's restructuring.

A National Transportation Safety Board investigation and Congressional hearings after the Colgan crash pointed out the differences in safety cultures that sometimes occur between the two types of airlines. For example, at that time, some regional carriers were hiring pilots with as few as 250 hours of flight experience, which FAA rules allow. Major airlines typically hired pilots with about ten times that much experience. After the crash, pilot unions and safety advocates said regional carriers were driven to cut corners on safety, including hiring inexperienced pilots at low wages, in part to meet performance goals required under the code-sharing contracts. Airlines that met their goals often earned more money under the agreements, while those that failed to meet such goals were sometimes penalized.

It appears that the FAA, despite earlier promises, has failed to review any code-share contracts for their safety implications. The Transportation Department reviews only a small share for their potential economic impact, not safety, according to the report. It was made very clear in the report that "most domestic code-share agreements go into effect without being reviewed by any federal regulatory entity." The Associated Press obtained a copy of the report before its public release. The FAA also doesn't have procedures in place "to advance the agency's commitment to ensure the same level of safety between mainline air carriers and their code-share partners," the report said. Responding to the report, Robert Rivkin, the Transportation Department's general counsel, said the FAA "believes that all carriers ... meet an appropriate level of safety" regardless of whether they are in a code-share agreement.

After the Colgan crash, Transportation Secretary Ray LaHood and then-FAA chief Randy Babbitt announced an industry-government "call to action." In fact, they held a well-publicized safety summit. An airline safety "action plan" released by FAA officials at the time promised that the FAA and the Department would "develop the authority and processes to review agreements" between major carriers and their regional partners. That plan said one of its short-term goals was that "major carriers should seek specific and concrete ways" to ensure that their smaller airline partner carriers adopt and implement the larger company's most effective practices for safety. That was to include periodic meetings to review safety data gathering programs and "to constantly emphasize their shared safety philosophy."

The Inspector General's report said that although the FAA sponsors biannual information-sharing events for the airline indus-

try, "it has not taken steps to encourage mainline carriers to consistently share safety information and best practices with their code-share partners." The FAA dropped its plans to review code-sharing agreements because agency officials felt the largest airlines had taken steps to increase their safety sharing with their regional partners, the report said. But the Inspector General found that while that was true of one large airline, it wasn't the case for others.

The report reviewed four major and eight regional carriers who participate in code-share agreements, but did not identify the airlines. In a letter to the Inspector General, Rivkin replied that the FAA doesn't make a distinction between "major" and "regional" carriers because "all of those carriers meet the same standards." It's obvious that the FAA needs to keep its promise and make sure the smaller airlines follow the required safety rules and standards.

Sources: Associated Press and *Insurance Journal*

## **XVIII. HEALTHCARE ISSUES**

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#### **STERILE DRUGS OFTEN CONTAMINATED**

As deaths continue to climb in the ongoing outbreak of fungal meningitis infections caused by contaminated pain shots, a new survey of hospital pharmacists shows that they believe it could happen again. About 13% of pharmacists, pharmacy technicians and others who responded to a poll from the Institute for Safe Medication Practices said that they believed contamination had occurred in the compounded sterile drugs made by their shops last year. Those are the same types of drugs that have been blamed for 45 deaths and nearly 700 infections in people who received tainted injectable steroids made by the New England Compounding Center of Framingham, Mass. This outfit has been shut down, according to the Centers for Disease Control and Prevention.

ISMP officials wanted to understand if the problems of properly managing high-risk compounded sterile preparations—known as CSPs—were as widespread as they believed it to be. Unfortunately, they were right and the answer is yes. The poll, which included mostly pharmacists, but also pharmacy technicians, doctors and nurses, was conducted last November and December. This was at the height of the meningitis

investigation, which was first detected in September. It focused on how hospitals are managing CSPs, which are either made on-site by trained staff, or purchased from external compounding pharmacies, which includes companies such as NECC.

As we have previously reported, sterile injectable drugs are particularly difficult to produce. That's because they require mixing non-sterile drugs and other ingredients, which must be then terminally sterilized to ensure that no contamination such as bacteria, mold or fungi get into the final products. In the case of NECC, federal inspectors found significant contamination throughout the site, including in the company's so-called clean room.

But the new poll shows that problems may be present in other places, too. Eleven percent of the pharmacists and 29% of pharmacy techs in the study reported they believed there had been contamination of CSPs on site in the previous year. It's not clear from the poll whether the contamination was detected before distribution, or whether the drugs made it to patients. Nor is it clear whether they reported the problems to hospital authorities or others.

The poll also showed that half of the pharmacists were confident that contamination had not occurred on their watch, but that dropped to 38% when the pharmacy technicians were asked. Of the quarter of respondents who said that contamination could not occur in their facility, most noted that it was because high-risk CSPs were not prepared in their hospital pharmacies.

As you may recall, Food and Drug Administration Commissioner Margaret Hamburg faced harsh questioning by Congress in November about the agency's handling of the fungal outbreak. In December, FDA officials recommended changing the way compounding pharmacies are regulated, in part to keep a closer eye on high-output pharmacies like NECC.

Hopefully, Congress will pass the legislation required to give the FDA all of the authority it needs to regulate this industry. While it seems that Congress would do this, the industry's lobbyists have done a good job over the years in defeating attempts to pass the needed legislation. Perhaps, the public having become more informed will demand action in both the House and Senate.

Sources: NBC News and Associated Press

## **A REPORT ON THE USE OF SIMPLYTHICK FOR INFANTS**

The Food and Drug Administration issued a caution last year that SimplyThick, a thick-

ening agency, should not be fed to premature infants because it may cause necrotizing enterocolitis (NEC), a life-threatening condition that damages intestinal tissue. It was reported that experts can't say exactly how the product may be linked to NEC. But, it appears that a number of children have died after receiving SimplyThick. An FDA investigation of 84 cases, published in *The Journal of Pediatrics* in 2012, found a "distinct illness pattern" in 22 instances that suggested a "possible link" between SimplyThick and NEC. Seven deaths were cited and 14 infants required surgery.

Last September, after more adverse events were reported, the FDA warned that the thickener should not be given to any infants. But the fact that SimplyThick was widely used at all in neonatal intensive care units has resulted in a number of lawsuits. Questions have also been raised about regulatory oversight of food additives for infants. SimplyThick is made from xanthan gum, a widely-used food additive on the FDA's list of substances "generally recognized as safe." But since SimplyThick is classified as a food, the FDA did not assess it for safety.

John Holahan, president of SimplyThick, which is based in St. Louis, has acknowledged that the company marketed the product to speech language pathologists who in turn recommended it to infants. The product's patent touted its effectiveness in breast milk. Interestingly, Mr. Holahan made this observation:

*There was no need to conduct studies, as the use of thickeners overall was already well established. In addition, the safety of xanthan gum was already well established.*

Since 2001, SimplyThick has been widely used by adults with swallowing difficulties. A liquid thickened to about the consistency of honey allows the drinker more time to close his airway and prevent aspiration. It was reported that doctors in newborn intensive care units often ask non-physician colleagues like speech pathologists to determine whether an infant has a swallowing problem. Those auxiliary feeding specialists often recommended SimplyThick for neonates with swallowing troubles or acid reflux.

The thickener became popular because it was easy to mix, could be used with breast milk, and maintained its consistency, unlike alternatives like rice cereal. Dr. Steven Abrams, a neonatologist at Texas Children's Hospital in Houston, told the *New York Times*:

*It was word of mouth, then neonatologists got used to using it. It became adopted. At any given time, several babies in our nursery — and in any neonatal unit — would be on it.*

But in early 2011, Dr. Benson Silverman, the director of the FDA's infant formula section, was alerted to an online forum where doctors had reported 15 cases of NEC among infants given SimplyThick. In May, the agency issued its first warning about its use in babies. Dr. Silverman, in explaining the FDA's position, had this to say:

*We can only do something with the information we are provided with. If information is not provided, how would we know?*

It should be noted that most infants who took SimplyThick did not become sick. Also, NEC is not uncommon in premature infants. But most infants who develop NEC do so while still in the hospital. Some premature infants given SimplyThick developed NEC later than usual, a few after they went home, a pattern the FDA found unusually worrisome. Even now it is not known how the thickener might have contributed to the infant deaths. One possibility is that xanthan gum itself is not suitable for the fragile digestive systems of newborns. The intestines of premature babies are "much more likely to have bacterial overgrowth" than adults, according to Dr. Jeffrey Pietz, the chief of newborn medicine at Children's Hospital Central California in Madera. Dr. Pietz observed:

*You try not to put anything in a baby's intestine that's not natural. If you do you've got to have a good reason.*

A second possibility is that batches of the thickener were contaminated with harmful bacteria. In late May 2011, the FDA inspected the plants that make SimplyThick and found violations at one in Stone Mountain, Ga., including a failure to "thermally process" the product to destroy bacteria of a "public health significance." The company, Thermo Pac, voluntarily withdrew certain batches. But it appears some children may have ingested potentially contaminated batches.

The authors of the FDA report theorized that the infants' intestinal membranes could have been damaged by bacteria breaking down the xanthan gum into too many toxic byproducts. Dr. Qing Yang, a neonatologist at Wake Forest University, is a co-author of a case series in the *Journal of Perinatology* about three premature infants who took SimplyThick, developed NEC and were treated. This paper states that NEC was "most likely

caused by the stimulation of the immature gut by xanthan gum.” Dr. Yang said she only belatedly realized “there’s a lack of data” on xanthan gum’s use in preemies. She added that the lesson learned “is not to be totally dependent on the speech pathologist.” I suspect there will be much more said by the medical community on this subject. We will continue to monitor the situation.

Source: *New York Times*

#### VITAMIN D SUPPLEMENT DOSAGE WARNING

Lots of folks take vitamin D, having been told it keeps bones strong, improves heart health, and may even prevent cancer. Most all of us have heard or read the reasons we need more vitamin D. But the amount of vitamin D folks are taking in those over-the-counter supplements may not be what they believe it to be. In a new study by Kaiser Permanente, researchers performed an independent analysis of several over-the-counter vitamin D supplements. The results from the study were startling: vitamin content varied from as low as 9% to as high as 146% of the amount of vitamin D listed on the bottle. Dr. Erin S. LeBlanc, a researcher with the Portland, Ore.-based Kaiser Permanente Center for Health Research and lead author of the study, had this to say:

*I was just surprised that there was so much variability between pills, and how low some of the pills were. Since supplements aren’t regulated, consumers can’t be sure what listed on the label is what’s in the bottle.*

The study was published last month in the *Journal of the American Medical Association: Internal Medicine*. Dr. LeBlanc and colleagues tested 55 bottles of vitamin D from 12 different companies bought in five Portland-area stores and one compounding pharmacy. Differences in vitamin D content were noted not only among different manufacturers, but even between pills within the very same bottle. Dr. David Katz, a board-certified specialist in Preventive Medicine and Public Health at the Yale School of Medicine, who was not involved in the study, observed:

*Some variance is given, but the larger variances here are the surprise. In fact, most of us have heard that with regard to vitamin D in particular, choice of brand is not all that important. That appears to be untrue.*

The study was not the first time such supplements have been scrutinized. Dr. Tod Cooperman of ConsumerLab.com, an inde-

pendent tester of vitamins and supplements, remarked:

*We did an independent survey involving 10,000 people who use supplements, and reportedly 55.5% of people were taking vitamin D daily, making it the third most popular supplement.*

Fish oil and multivitamins are the most common supplements. Several nutrition specialists contacted by ABC News said that vitamin D has a wide range of doses and that it is unlikely to have any dangerous health impact. That is—unless you’re taking doses that exceed the upper tolerable limit of 4,000 International Units (IU). Dr. Cooperman had this to say:

*For adults, the daily requirement is 600 to 800 IU, and most products provide about 1,000 IU. If people are taking a supplement that has 2,000 IU and really has 4,000 IU, they may be doing harm and not know it.*

Still, many consumers might be left wondering if there is any way they can ensure they get what they paid for. Researchers noted that manufacturers whose product was voluntarily tested annually by the U.S. Pharmacopeial Convention or USP — an independent, nonprofit organization that sets standards for quality and safety of vitamin supplements — was more precise in listing the correct amount of vitamin D than those that didn’t go through USP tests. Once tested and approved, the USP verification mark is placed on the bottle. And approval for one doesn’t mean approval for all. Francine Pierson, a spokesperson for USP, explained:

*We don’t grant a blanket verification for all of a manufacturer’s products; we verify each one individually. Before earning the mark, USP tests samples of products but also does a manufacturing facility audit and manufacturing and quality control/product document review — so the program is very thorough and involves more than just testing to help ensure quality.*

It should be noted that in Kaiser’s review, barely half of the products tested, and only one-third of the compounding pharmacy’s product, met USP standards. The findings beg the question as to whether more should be done to police the multi-billion dollar a year dietary supplements industry. In a statement by Kaiser, quoting a recent editorial in the *New England Journal of Medicine*, “The

U.S. Food and Drug Administration is considering new safety guidelines for some supplements but, for the most part, the industry remains unregulated.” Dr. Katz believes this should change. He had this to say on the subject:

*I favor oversight of supplements like drugs. Minimally, random batch sampling is necessary to ensure what’s being promised is actually in the bottle. In the meantime, clinicians will need to know which brands have the highest quality standards, and recommend them preferentially.*

I believe that supplements should be regulated by the FDA. Consumers are entitled to know what they are actually taking and that the product is safe. There is far too much room for error and even deception under the current system to allow supplements to remain free of regulation.

Source: *ABC News*

## XIX. THE CONSUMER CORNER

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### NHTSA PROBES 725,000 FORD VEHICLES FOR ENGINE FLAW

The National Highway Traffic Safety Administration is investigating 725,000 Ford Motor Co. sedans and crossover vehicles after receiving reports of possible fuel system problems that could cause a sudden loss of engine power. The vehicles under investigation are the Ford Fusion and Mercury Milan sedans and Ford Escape and Mercury Mariner crossovers. According to NHTSA’s Office of Defects Investigation (ODI), “consumers have reported incidents of electronic throttle body failure while driving, resulting in sudden reduction of engine power.” Ford said it’s “cooperating fully with the government on this investigation.”

NHTSA’s initial report on the investigation said ODI had received 123 complaints and that Ford had received 1,472 complaints. NHTSA also said 27,505 warranty claims had been filed relating to “repair or replacement of the subject component.” As you probably know, the electronic throttle body is part of the engine’s fuel delivery system. We will continue to monitor this investigation.

Source: *Claims Journal*

## **MILLIONS OF RECALLED CARS ARE SOLD WITHOUT NEEDED REPAIRS**

Every year millions of recalled cars are sold to unsuspecting buyers without needed repairs. Vehicle history website Carfax just completed a study that reports in 2012 just over 2 million unrepaired recalled vehicles were offered for sale online. But that is just online and involves only the sites Carfax catalogued. So the actual number is probably much higher. Carfax singled out Iowa, Missouri, Kansas, Illinois, Indiana, Wisconsin and Michigan because its data shows the number of recalled vehicles for sale in those states has gone up 25% in the past year.

You might ask, how can Carfax tell that the vehicles have been recalled but not repaired? It can because the federal government makes recall notices for certain makes and models available. Also, manufacturers and dealers track the VIN numbers of the individual vehicles that are brought in for the needed fix. The fact that recalled vehicles are offered for sale is bad news if a person doesn't know it. The very definition of a federal vehicle recall is that there is a safety problem with that make, model and year. So a person buying a car subject to an open recall could mean he or she is putting themselves and others at risk. Two examples from just last month: one SUV was recalled because of a problem that could cause it to roll away when parked. Another make was recalled because a faulty sensor could cause the passenger airbags to fail to deploy.

On the other hand, if a person knows the car he or she is looking at has been recalled, that can be used as a bargaining chip in price negotiations because the needed repairs can be done for free at a dealership. Larry Gamache, communications director at Carfax, had this to say:

*Before a car changes hands, there are lots of opportunities for everyone involved to check for open recalls. Yet this data is proof that it's not happening enough.*

Fortunately, it's easy to check. In fact, you can try NHTSA's own website, though some say it's "notoriously difficult to navigate." That is where NHTSA posts recall summaries from the past six months. The government portal for broader vehicle safety information is [www.SaferCar.gov](http://www.SaferCar.gov). But, an easier resource is the FREE recall check Carfax itself offers: [recall.carfax.com](http://recall.carfax.com). Another free resource about recalls and auto safety is the website of the nonprofit Insurance Institute for Highway Safety.

Some legislators in California—the state with the biggest population and the most

cars—are introducing legislation that would require sellers to repair recalled vehicles before selling them. And last year, California U.S. Senators Barbara Boxer and Dianne Feinstein sponsored federal legislation to require rental car companies to repair recalled vehicles before putting them on the road again.

Owners of vehicles should never ignore recall notices. Unfortunately, some second owners of vehicles don't always receive these recall notices. That's another good reason for folks to use the resources mentioned above to check up on their vehicles.

Source: *ABC News*

## **THE PUBLIC DESERVES A STRONG CONSUMER WATCHDOG**

Have you ever wondered why a number of Republicans in Congress are trying so hard to shut down the Consumer Financial Protection Bureau? Could it be because the Bureau is doing a good job? Could campaign contributions play a role in monitoring the opponents? What has the Bureau done to provoke the opposition? Let's take a look at three things the agency has already accomplished in its first 18 months:

- The Bureau called a halt to predatory practices by mortgage lenders, ensuring that borrowers are not saddled with loans they can't afford and preventing brokers from earning higher commissions for higher interest rates.
- It secured a \$85 million settlement from American Express, which the Bureau accused of deceptive and discriminatory marketing and billing practices.
- The Bureau opened an investigation into questionable marketing practices by banks and credit card companies on college campuses, which often take place after undisclosed financial arrangements are made with universities.

It surely seems like each of these accomplishments was good for the American people. I believe it's also a good thing that the Bureau has taken seriously its mandate to protect the public from the kinds of abuses that helped lead our nation into the 2009 recession. Fortunately for the American people, the Bureau has not been intimidated by the financial industry's army of lobbyists. Those lobbyists have been hard at work in Congress and they aren't looking out for the interests of consumers.

Why would the existence of a strong consumer watch dog be of such great concern to some Republicans in Congress? Could it be

that it's because they can't prevent the Bureau from regulating huge companies that contribute to political campaigns? Having failed to block the creation of the Bureau in the 2010 Dodd-Frank financial reform bill, some in Congress are now trying to take away its power. Unfortunately, they may well succeed and if so the American people will be the losers.

Obviously, the Bureau can't operate without a director. Under the Dodd-Frank law, most of the Bureau's regulatory powers — particularly its authority over nonbanks like finance companies, debt collectors, payday lenders and credit agencies — can be exercised only by a director. Realizing that to be the case, in 2011 Republicans used a filibuster to prevent President Obama's nominee for director, Richard Cordray, from reaching a vote. The President then gave Mr. Cordray a recess appointment.

A federal appeals court recently ruled in another case that the Senate was not in recess at that time. That opinion, if upheld by the U.S. Supreme Court, will likely apply to Cordray and his appointment as well. If that happens, it could invalidate the rules the Bureau has already enacted. President Obama has renominated Cordray, but Republicans have made it clear that they will continue to filibuster in an effort to hold up his confirmation. That will keep the Bureau from operating and doing its job.

Last month, 43 Senate Republicans wrote a letter to the President, vowing to block any nominee until "key structural changes" are made, including a bipartisan commission to run the Bureau instead of one director. They also want Congressional control of the Bureau's appropriations. Under the law, as it now stands, the Bureau is financed with bank fees paid to the Federal Reserve. It's very clear that the lobbyists are trying to get Congress to stop financial regulation. We don't need a consumer watch dog that is controlled by politics and politicians.

The Federal Election Commission is a prime example of an agency that is controlled by politicians. That has virtually made the Commission a "toothless tiger." Hopefully, the Bureau can remain intact and independent. Being free of political pressures is an absolute necessity if the Bureau is to carry out its mandated duties and responsibilities. The American people deserve a consumer watch dog—one that is independent of political pressures and influence—and for that reason Congress should back off and let the Bureau do its job.

Source: *New York Times*

## **ALABAMA TO RECEIVE \$1,039,078 IN MULTI-STATE SETTLEMENT**

The State of Alabama will receive \$1,039,078 in a multi-state settlement with a Florida company, according to Attorney General Luther Strange. Alabama's share of the settlement will be used for consumer protection. Lender Processing Services, based in Jacksonville, Fla., and its subsidiaries, will pay a total of \$120 million to 46 states and the District of Columbia. Attorney General Strange had this to say about the settlement in a news release:

*I am pleased that this settlement will set high standards for proper servicing of mortgages and will protect consumers from harm that could result from potentially abusive practices. This agreement provides important safeguards and provides a process to seek remedy for erroneous actions that may have occurred.*

Our sister states of Georgia and Florida were also involved in the settlement. Georgia will receive about \$4.1 million with Florida's share of the settlement being about \$8.6 million. The settlement resolves allegations that the company "robo-signed" documents and engaged in improper conduct related to mortgage loan default servicing. The company provides technological support to banks and mortgage loan servicers.

Lender Processing Services had previously reached similar settlements with Missouri, Delaware and Colorado, leaving the state of Nevada with the only unresolved lawsuit. The settlement also requires Lender Processing Services and its subsidiaries—LPS Default Solutions and DocX—to reform their business practices. The company is required to review documents executed between Jan. 1, 2008, and Dec. 31, 2010, to determine which ones need to be redone or corrected.

Source: AL.com

## **ALABAMA TO RECEIVE \$641,995 IN MULTI-STATE SETTLEMENT WITH TOYOTA**

The State of Alabama will receive \$641,995 as part of a \$29 million settlement with Toyota Motor Corporation over safety concerns caused by unintended acceleration in some of the company's vehicles. Attorney General Luther Strange announced Alabama's involvement in the settlement last month. Under the settlement, Toyota also will be restricted when advertising the safety of its vehicles, unless reliable engineering data supports its safety claims. The

New Jersey Attorney General led the multi-state investigations assisted by Attorneys General from Connecticut, Florida, Louisiana, Michigan, Nevada, Ohio, South Carolina and Washington.

Alabama is among 29 states and one U.S. territory that will receive money from the settlement. The states alleged that Toyota engaged in unfair and deceptive practices when it did not disclose in a timely manner safety defects with accelerator pedals. I am not sure who all will benefit from this settlement. I am told that car dealers are the main beneficiaries.

Toyota's mass recall and sales stop on certain models hurt sales for dealers across Alabama and slowed output at the company's engine factory in Huntsville. In 2010, Attorneys General across the country created a multi-state group to investigate Toyota's business practices. It was determined that poor communication between Toyota's headquarters in Japan and its U.S. offices were partially responsible for the company's failure to report the safety issues. During settlement negotiations, the state Attorneys General asked that Toyota amend its corporate culture and improve communication within its chain of command in order to comply with U.S. regulatory agencies. Toyota agreed to change the safety culture of its U.S. operations to improve its responsiveness to safety concerns.

For one year, Toyota must consider customer requests for reimbursement and provide restitution on a case-by-case basis, according to the judgment. The settlement also prohibits Toyota from reselling vehicles with alleged safety defects without informing the purchaser and certifying that the vehicle has been fixed; prohibits the company from misrepresenting the purpose of an inspection or repair when directing consumers to bring their vehicles to a dealer for inspection or repair; and requires the company to exclude from its certified used vehicle programs any vehicle acquired through lemon law proceedings or voluntarily repurchased by Toyota to ensure customer satisfaction.

Source: *The Birmingham News*

## **WHALEN FURNITURE TO PAY \$725,000 CIVIL PENALTY FOR FAILING TO REPORT DEFECTIVE CHILDREN'S BEDS**

The U.S. Consumer Product Safety Commission (CPSC) announced recently that Whalen Furniture Manufacturing Inc., doing business as Bayside Furnishings, of San Diego, Calif., has agreed to pay a civil penalty of \$725,000. The penalty agreement

was provisionally accepted by the Commission in a 3 to 0 vote. The settlement agreement resolves CPSC staff allegations that the company knowingly failed to report to CPSC immediately, as required by federal law, a defect involving two models of its boat-style children's beds with toy chests.

The two models included LaJolla boat beds and Pirates of the Caribbean twin trundle beds. The beds include a toy chest with a lid that weighs 20 pounds. The lid supports on the toy chests fail to prevent the lid from closing too quickly, posing an entrapment and strangulation hazard to young children. Whalen sold the defective children's beds between January 2006 and May 2008.

In November 2007, Whalen learned that a 22-month-old boy from Roseville, Calif. had died after the lid of a LaJolla bed's toy chest fell on the back of his head, entrapping his neck on the edge of the toy chest. The firm failed to report the death or hazard with its bed to the CPSC until March 2008, after being contacted by agency staff and directed to do so. About 7,700 LaJolla boat beds and Pirates of the Caribbean twin trundle beds were recalled in July 2008. The beds were sold at Costco stores, furniture stores and online at Costco.com for between \$700 and \$1,000.

Federal law requires manufacturers, distributors, and retailers to report to the CPSC immediately (within 24 hours) after obtaining information reasonably supporting the conclusion that a product contains a defect that could create a substantial product hazard, creates an unreasonable risk of serious injury or death, or fails to comply with any consumer product safety rule or any other rule, regulation, standard or ban enforced by the CPSC. Federal law also bars any person from selling products subject to a publicly-announced voluntary recall by a manufacturer or a mandatory recall ordered by the Commission.

Source: PRNewswire.com

## **BP GAS PRICE MANIPULATION ALLEGED BY EX-EMPLOYEE IN LAWSUIT**

A former BP worker has accused his former employer of manipulating gas prices. Drew Sickinger, BP's former head of gas liquids trading, has sued BP, claiming that the company fired him so that it could manipulate the market and gouge prices. The suit doesn't specify how BP allegedly manipulated prices, only noting that the company tried to establish a dominant and controlling position in the market. BP has denied the allegations in the complaint.

This is not the first rodeo for the oil giant. BP has been accused of rigging gas prices before. U.S. regulators are investigating claims that BP manipulated the gas market in 2008. The company was also fined by the Justice Department for allegedly rigging the propane market in 2004. Other companies have also faced allegations of gas market manipulation. In November, the United Kingdom's top financial regulator began investigating the possibility that traders were rigging prices for natural gas. Senator Maria Cantwell (D-Wash.) said in November that she would ask the Justice Department to investigate whether artificial shortages were responsible for prices surging to more than \$4 per gallon on the West Coast in October.

Sources: *Huffington Post, Bloomberg & Reuters*

### **FDA AGAIN WARNS ABOUT FAKE AVASTIN**

The Food and Drug Administration is warning doctors about another counterfeit version of the cancer drug Avastin distributed in the U.S., the third case involving the best-selling Roche drug in the past year. The FDA said in an online post that at least one batch of the drug distributed by a New York distributor does not contain the active ingredient in real Avastin, which is used to treat cancers of the colon, lung, kidney and brain. The drug was distributed by Medical Device King, which also does business as Pharmaceutical. The vials are packaged as Altuzan, the Turkish version of Avastin that is not approved for use in the U.S. The agency warned doctors last April about a similar case of fake Turkish Avastin distributed by a United Kingdom distributor.

Source: Associated Press

### **IDENTITY THEFT IS A MOST SERIOUS PROBLEM**

Identity Theft has become a most serious problem throughout the United States. A prime example of what can happen when a person's identity is stolen involved a recent Alabama case. In that case, U.S. District Judge Myron Thompson sentenced Angelina Austin of Montgomery to 65 months in federal prison for stealing the identities of hundreds of persons by accessing a Troy Hospital database. One of the victims was Zane Purdy, a National Guard major, who was earning more than \$100,000 a year working for a defense contracting company. Major Purdy's identity was stolen by Ms. Austin and sold to a tax fraud ring. Now Major Purdy makes \$7.25 an hour at a Krystal Restaurant in Trussville, Ala. to support his wife and two children.

The identity theft has left Major Purdy thousands of dollars in debt and fighting to clear his credit report. His job with General Dynamics Information Technology required a top secret security clearance. This is something Major Purdy could not maintain as the theft of his identity had destroyed his credit. His security clearance was suspended. He lost his job with General Dynamics and he is also blocked from active duty with the Air National Guard while his security clearance is suspended.

Ms. Austin worked for Southern Records Management at Troy Regional Medical Center during parts of 2010 and 2011. The job gave her access to the personal information of current and former patients, including names, social security numbers and dates of birth. Ms. Austin stole the personal information of more than 800 patients and sold that information to the tax fraud ring. The identities were used to file fraudulent tax returns and collect false tax refunds. The stolen identity ring was responsible for the theft of about \$1.6 million in taxpayer money according to governmental officials.

Major Purdy found out in early 2012 from the U.S. Attorney's office that some person had gained access to his personal information. He then received notice from the IRS that he owed more than \$10,000. Tax liens were also filed against his property. The U.S. Attorney's office and IRS agents are helping Major Purdy clear his reputation. But it will be a long struggle. According to reports, the criminal case involved numerous people. Identities had been stolen from Montgomery high schools and other hospitals in both Montgomery and Atlanta.

Source: *Montgomery Advertiser*

### **FTC SAYS ONE IN 20 CREDIT REPORTS HAVE ERRORS**

One in 20 American consumers had mistakes on their credit reports that would have increased their interest rates on loans or caused them to pay more for insurance, according to the Federal Trade Commission. Experian, Equifax and TransUnion are the leading consumer credit reporting agencies. The FTC has encouraged folks to check the three reports annually in order to catch mistakes. Some 26% of consumers found a mistake in one of their three credit reports and 21% requested and got their report changed, the FTC said in a 370-page report written at the request of Congress and released on February 11<sup>th</sup>.

For about 5% of the consumers surveyed, the change in the credit score was big enough to affect how risky a potential lender

would view the consumer and what interest rate they would offer, the report said. Howard Shelanski, director of the FTC's Bureau of Economics, believes the data drove home the need for consumers to keep tabs on their credit history. He said in a statement:

*These are eye-opening numbers for American consumers. The results of this first-of-its-kind study make it clear that consumers should check their credit reports regularly.*

In response, Experian claimed that while there were mistakes in the reports, in most cases they did not change credit scores enough to matter. It says further that in a small percentage of cases a mistake would accidentally raise a credit score in the recipient's favor. The company says it believes that "consumer credit reports are predominately accurate and serving lenders and consumers well." But folks should check their credit reports on a regular basis to make sure that no errors have been made.

Source: *Insurance Journal*

### **THE CONSUMER PRODUCT SAFETY COMMISSION**

The Consumer Product Safety Commission (CPSC) is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of consumer products under the agency's jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than \$900 billion annually. The CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. The agency's work to ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters, and household chemicals—contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

## **XX. RECALLS UPDATE**

I was in a meeting last month in Montgomery attended mostly by women. It was totally unrelated to law or government. One of the women told me she reads the *Report* every month and always starts with the Recalls section. She said it helps her keep up with the recalls being issued. I hope that one of these days we will be able to report that

safety-related recalls of products have sharply declined. But that won't happen this month. We again are reporting a large number of safety-related recalls in this issue. As has been the case for months, serious safety-related recalls have become commonplace. The following are some of the more significant recalls since those reported in the February issue. If more information is needed on any of the recalls mentioned below, readers are encouraged to contact Shanna Malone, the Executive Editor of the *Report*. We would also like to know if we have missed any safety recalls that should have been included in this issue.

#### **CHRYSLER RECALLS PICKUPS AND SUVs**

Chrysler has recalled 278,000 pickups and SUVs because their rear axles can lock up unexpectedly. The recall covers many Ram 1500 pickups from the 2009-12 model years as well as Dodge Dakota pickups from 2009-11. Also included are Chrysler Aspen and Dodge Durango SUVs from 2009.

According to the National Highway Traffic Safety Administration, a nut in the rear axle can come loose because of a missing adhesive patch. If that happens, the axle can lock and the driver could lose control of the vehicle. Chrysler said there have been 15 reported accidents but no injuries because of the problem. Chrysler will install a retainer to keep the nut in place.

This is the second time Chrysler has recalled trucks for this problem. Last October, the company recalled about 44,000 Rams and Dakotas that were made between July and November of 2009. Chrysler later found that vehicles made as early as February 2008 and as late as October 2011 were also affected.

#### **GM RECALLING 12,800 VEHICLES FOR SUSPENSION AND AIR BAG PROBLEMS**

In two actions General Motors has recalled about 12,800 vehicles because of a rear suspension problem or a possible air bag malfunction. The suspension problem, which could make the vehicles difficult to control, covers about 8,500 2013 Chevrolet Malibus, the automaker told the safety agency in a letter. The problem is the failure to properly tighten "one or more" rear suspension bolts. GM said the effect would vary depending on the number and location of the bolts, but initially "noise and a

minor handling effect may be noticed." If the problem is not repaired the driver could lose control of the vehicle, "particularly at higher speeds," according to the automaker. GM said the problem was discovered by a test fleet driver.

The air bag recall covers about 3,896 2012 Buick Veranos and Chevrolet Camaros, Cruzes and Sonics. Last May, GM recalled about 4,300 2013 Malibus because of a possible air bag malfunction. GM says a flaw in the air bag system could keep the bag from properly inflating in a crash. This is an expansion of a recall last year for almost 3,000 Veranos, Cruzes and Sonics, which GM originally didn't intend to recall until NHTSA asked about a possible problem. The automaker says it isn't aware of any accidents or injuries related to the problems.

#### **BMW RECALLS 570,000 CARS THAT NEED CABLE FIX**

BMW has recalled almost 570,000 cars in the U.S. and Canada because a battery cable connector can fail and cause the engines to stall. The recall affects the popular 3-Series sedans, wagons, convertibles and coupes from the 2007 through 2011 model years. Also included are 1-Series coupes and convertibles from 2008 through 2012, and the Z4 sports car from 2009 through 2011.

The cable connectors and a fuse box terminal in the cars can degrade over time, and that can break the electrical connection between the trunk-mounted battery and the fuse box at the front. If that happens, the cars could lose electrical power, causing the engines to stall unexpectedly, the U.S. National Highway Traffic Safety Administration said in documents posted on its website. The company says in documents sent to the NHTSA that the problem stems from movement between the battery cable and the fuse box. BMW says it knows of one collision in Canada due to the problem, but no injuries.

The German automaker says dealers will replace the battery cable connector and secure it for free. It will start notifying owners this month. The 3-Series is BMW's most popular car in the U.S., dominating the small luxury car market. The company sold nearly 100,000 of them in the U.S. last year.

The recall affects more than 504,000 cars in the U.S. and another 65,000 in Canada. BMW, Toyota and other automakers have experienced large recalls in recent years because they use common parts on multiple models in order to save money. Owners can call BMW with questions at (800) 525-7417.

#### **TOYOTA RECALLS 1.29 MILLION VEHICLES FOR AIR BAGS AND WIPERS**

Toyota has recalled over one million cars around the world for faulty air bags and defective windshield wipers. The company recalled 907,000 cars, mostly Corollas, due to air bags that can improperly inflate when the vehicle's electronic signals damage a chip in the part that controls the air bags. It also is recalling 385,000 Lexus IS luxury cars with wipers that can get stuck if there is heavy snowfall.

Initially, the Japanese automaker had said there were no accidents related to either problem, but according to Toyota Motor Corp. spokesman Naoto Fuse, that two crashes were reported in the U.S. related to the air bag problem. Toyota has also confirmed 18 cases in the U.S. of abrasion-type injuries from the air bag problem. In total, the automaker has received 46 reports of problems involving the air bags from North America, and one from Japan, and 25 reports of problems related to the windshield wipers.

As part of the air bag recall, Toyota is recalling some 752,000 Corolla and Corolla Matrix cars in the U.S., about 141,000 vehicles in Canada and thousands of similar vehicles in Japan and Mexico that were manufactured between December 2001 and May 2004. The part will be corrected to be able to block damaging signals, said Fuse. The problem wipers affect three kinds of Lexus IS models, manufactured from May 2005 to October 2011, including 270,000 vehicles in the U.S. and nearly 17,000 vehicles in Canada. The recall also affects the Lexus IS sold in Europe, the Middle East and China.

#### **BRP RECALLS CAN-AM SIDE-BY-SIDE VEHICLES DUE TO FIRE HAZARD**

BRP Mexico S.A. de C.V., of Juarez, Chihuahua, Mexico, has recalled about 25,000 2011, 2012 and early 2013 model gas-powered Can-Am Commander side-by-side vehicles. The model name is

printed on the vehicle's side panel. The firm has received 18 reports of fires related to accumulated debris in the exhaust pipe area, including one report of minor burns to the hand. Consumers should immediately stop using the recalled vehicles, check their exhaust for accumulated debris as described in the Cleaning Procedure of Exhaust Area guide and contact a BRP dealer to schedule a free update kit repair. The guide is available to consumers at their local BRP dealer or online at [www.can-am.brp.com](http://www.can-am.brp.com). BRP has notified registered consumers directly about this recall and the vehicle's cleaning guide. The vehicles were sold at Can-Am dealers nationwide from April 2010 through November 2012 for between \$11,700 and \$21,000.

#### **SEVERAL MOTOR HOMES ON RECALL LIST**

The National Highway Traffic Safety Administration has recalled several 2011-2013 Entegra motor homes because an installed windshield wiper link is too short. Driver visibility could be reduced, increasing the risk of crashing. The Aspire, Cornerstone and Anthem models are affected. Entegra will notify owners and dealers will replace the wiper link for free.

#### **YAKIMA RECALLS BIKE RACKS TO FIX FAULTY BOLTS**

Yakima is recalling about 7,000 bicycle racks used on vehicles with rear-door spare tires. According to documents posted on the National Highway Traffic Safety Administration website the mounting bolts can break and the bikes can fall from the vehicles and cause a hazard. The recall affects SpareTime two-bike racks made from November 1, 2011 through October 30, 2012. The manufacture date is printed on a white label on the rack's mounting plate. Yakima says that only bolts without markings on the heads are affected by the recall. Yakima says it found the problem after getting complaints from two customers. It's asking dealers for a list of buyers and says it will send new mounting bolts free of charge. According to Yakima, the problem hasn't caused any injuries. Customers can call Yakima at (888) 925-4621.

#### **CLUB CAR RECALLS GOLF AND TRANSPORT VEHICLES DUE TO FIRE HAZARD**

Club Car, LLC, of Augusta, Ga. has recalled Precedent i2 and Signature gas golf and transport vehicles. The fuel hose could separate from the fuel tank, posing a fire hazard. The cars were sold at Authorized Club Car dealers nationwide in October 2012 for between \$5,000 and \$8,000. Consumers should contact any Club Car dealer for a free inspection and repair of the fuel hose system. Club Car is contacting consumers directly.

#### **MUTSY USA RECALLS EVO STROLLERS DUE TO STRANGULATION HAZARD**

About 340 EVO strollers have been recalled by Mutsy USA Inc., of Newark, N.J. The manufacturer is Mutsy BV., of Goirle, Netherlands. The opening between the grab bar and seat bottom of the stroller can allow an infant's body to pass through and become entrapped at the neck, posing a strangulation hazard to young children when a child is not harnessed. This recall includes EVO strollers manufactured between February 2012 (01.02.12) and November 2012 (30.11.12) with the following model numbers: MT12-03, MT12-11, MT12-14, MT12-31, MT12-34, MT12-37, MT12-39, MT12-42, MT12-43 and MT12-48. The model number and date code can be found underneath the stroller seat on a white sticker. The strollers have black or silver-colored metal frames with brown, navy blue, black, or white seats. "EVO" is printed on the lower back frame of the stroller.

Consumers should stop using the strollers immediately and contact Mutsy USA to receive a free replacement seat unit and grab bar. Contact Mutsy USA toll-free at (877) 546-9230 from 8 a.m. to 4 p.m. ET Monday through Friday, e-mail at [usa@mutsy.nl](mailto:usa@mutsy.nl), or visit the company's website at [www.mutsy.com](http://www.mutsy.com) for recall information.

#### **FDA WARNS OF MAJOR RISK WITH ST. JUDE HEART DEVICE**

The Food and Drug Administration says that the tool recalled by St. Jude Medical Inc. used to insert heart implants could potentially cause serious injury or death if used in patients. The company's Amplatzer TorqVue delivery system is used to mend a type of heart defect that causes holes in the upper chambers of

the heart. St. Jude recalled all batches and models of the device Jan. 13 after a small number of incidents where the delivery system's wire fractured during surgery. The devices affected by the recall were manufactured between Aug. 24 and Sept. 24, 2012.

The FDA issued a statement last month that said it classified the company's action as a Class I recall, meaning patients treated with the devices could be seriously injured or killed. St. Paul, Minn.-based St. Jude Medical makes a variety of medical devices, including pacemakers and implantable defibrillators, which correct dangerous irregular heartbeats. The company has struggled in recent years to address quality issues with wires that are used to attach its defibrillators to the heart.

St. Jude stopped selling its Riata wires in late 2010 because of concerns about their insulation, and it recalled the devices in late 2011. Last year the company recalled two other wires, QuickSite and QuickFlex. Around 79,000 Riata leads are implanted in U.S. patients, and the FDA ordered St. Jude to conduct a three-year study to learn more about the risk of insulation failure.

#### **PLAY YARD SHEETS RECALLED BY 4MOMS DUE TO ENTRAPMENT HAZARD**

Thorley Industries LLC, d/b/a 4moms, of Pittsburgh, Pa., has recalled about 1,440 4moms® breeze™ Cotton Jersey Playard Sheets. The sheets are too small for the play yards. A sheet that does not properly fit the play yard poses an entrapment hazard that could lead to suffocation. The recalled play yard sheets are cream-colored, cotton jersey fabric. They were sold as an accessory to the 4moms breeze play yard. "4moms" is printed on a black tag sewn onto the sheet. Item number 4M-009-10-000101 is printed on the packaging. UPC 817980011137 is printed on the sheet's packaging and on a white warning tag sewn onto the sheet.

The sheets were sold at Buy Buy Baby and other juvenile product stores nationwide and online at [www.buy-buybaby.com](http://www.buy-buybaby.com) from December 2012 through January 2013 for about \$15. Consumers should stop using the recalled play yard sheets immediately and return them to 4moms for a full refund. Consumers can contact 4moms, toll-free at (888) 977-3944 from 9 a.m.

to 5 p.m. ET Monday through Friday or online at [www.4moms.com](http://www.4moms.com) and click on Recall for more information.

#### ***NATART CHELSEA DRESSERS RECALLED BY GEMME JUVENILE***

Gemme Juvenile Inc., of Princeville, Quebec, Canada has recalled 300 children's three-drawer dressers. If a young child climbs up open dresser drawers, the dresser can tip over and pose the risk of entrapment. CPSC and the Company have received a report of a two-year-old boy from Barrington, Ill. who reportedly suffocated when he climbed on or up an open lower drawer into the second dresser drawer, causing the dresser to fall and entrap him between the unit and the floor.

When the dresser drawers are pulled all the way out and then the additional weight of a young child is applied, the dresser's center of gravity can be altered and result in instability of the product and consequently tip over. A child can become injured in the fall or suffocate under the weight of the fallen dresser.

This recall involves the Chelsea three-drawer windowed dresser bearing model number 3033. The dressers were sold in five finishes Cappuccino, Cappuccino with a brown top, Ebony, Ebony with a brown top, and Antique or French White. A sticker with the word "Natart" and the firm's logo is affixed to the inside of the top drawer. In addition, most dressers will have the model number, "Natart Juvenile," "Made in Canada" and "Chelsea 3 Drawer Dresser" printed on another label located on the back of the dresser.

The recalled dresser measures 35-inches high by 21-inches deep by 39-inches wide and is part of the Chelsea children's bedroom furniture collection. The dresser is composed of engineered wood, solid wood and wood veneers. The top drawer has two clear plastic windows in front.

The dressers were sold at Furniture Kidz and other independent juvenile specialty stores and at Baby.com from January 2005 to December 2010 for between \$600 and \$900. The Chelsea three-drawer dresser met applicable standards when produced, but was manufactured prior to the existence of the May 2009 voluntary industry standard. That standard requires tip-over

restraints that attach to the interior wall, framing or other support be included with all dressers to help prevent tip-over entrapment hazards to young children.

The dressers were manufactured in Canada. Consumers should immediately stop using and place the dresser out of a child's reach. Free retrofit kits that contain wall anchor straps are being offered to consumers to help prevent the dresser from tipping. The kits can be ordered by visiting [www.chelseawallanchors.com](http://www.chelseawallanchors.com), [www.NatartJuvenile.com](http://www.NatartJuvenile.com), emailing the firm at [safety@chelseawallanchors.com](mailto:safety@chelseawallanchors.com) or calling toll-free at (855) 364-2619 between 9 a.m. and 5 p.m. ET, Monday through Friday. Important Message from CPSC: Every two weeks a child dies when a piece of furniture or a television falls on him or her. Anchor all furniture and TVs.

#### ***SAMSONITE RECALLS DUAL-WATTAGE TRAVEL CONVERTER KITS***

About 20,000 Dual-Wattage Travel Converter Kits were recalled by Samsonite LLC, of Mansfield, Mass. The converter can overheat if a load in excess of 50 watts is applied to the converter while in the 50-watt setting. This poses a fire and burn hazard to consumers. Samsonite is aware of three converters overheating. No injuries or property damage have been reported. The converters were sold at retail stores nationwide and at the Samsonite on-line store from January 2011 through December 2012 for approximately \$35.

This recall involves the Samsonite Dual-Wattage Travel Converter Kits used to make standard U.S. and Canadian appliances usable abroad. The kit includes one black converter to change 220-volt AC electricity to 110-volt AC, two adapter plugs with round prongs, two with flat prongs and one grounded adapter plug with three flat prongs. The converter has a red switch to adjust the wattage of the appliance from 50 to 1600 watts. The words "Dual-Wattage Converter" and "Do Not Use 50W on Hair Dryer" appear on the front of the converter. The Samsonite logo appears on each piece in the set. Consumers should immediately stop using the recalled travel converters and contact Samsonite to return the product for a full refund. Consumer Contact: Samsonite; toll-free at (800) 382-7259 from 9 a.m. to 5 p.m. ET Monday through

Friday; at e-mail [recall@samsonite.com](mailto:recall@samsonite.com) or online at [www.samsonite.com/recall](http://www.samsonite.com/recall). Photos are available at <http://www.cpsc.gov/en/Recalls/2013/Samsonite-Recalls-Dual-Wattage-Travel-Converter-Kits>.

#### ***BLUESTAR WALL OVENS RECALLED BY PRIZER PAINTER STOVE WORKS DUE TO FIRE HAZARD***

About 940 BlueStar™ residential gas wall ovens have been recalled by Prizer Painter Stove Works Inc., of Reading, Pa. Some of the wall ovens have been improperly installed and/or have damaged flexible gas appliance connectors, posing a fire hazard. This recall involves all colors of three models of BlueStar gas-powered stainless steel wall ovens manufactured prior to November 23, 2012. Oven sizes include 24-, 30- and 36-inch wide units. Each of the three sizes was available for use with natural gas or liquid propane. The propane version is designated by the letter "L" at the end of the model number. Model numbers and date codes are located on the rating plate inside the control panel. There is a BlueStar logo on the upper left front of the oven, above the door.

The ovens were sold at appliance stores and authorized kitchen equipment dealers nationwide between January 2008 through November 2012 for between \$2,250 and \$3,900. Consumers should immediately stop using the recalled ovens, and contact BlueStar for instructions on identifying affected units and to schedule a repair at (800) 449-8691, from 9 a.m. to 5 p.m. ET Monday through Friday, or online at [www.bluestarcooking.com](http://www.bluestarcooking.com) and click on "Recall" for more information.

#### ***TRAMPOLINE RECALLED FOR FALL HAZARD***

Sportspower BouncePro 14' Trampolines sold exclusively at Walmart, have been recalled. The recall includes 120,000 trampolines sold from February of 2009 through March of 2011. According to company officials, the enclosure netting surrounding these trampolines can break, allowing children to fall through the netting and be injured.

The recall follows up on another one from May of 2012. Sportspower reports five additional injuries including broken bones, neck and back injuries, and con-

tusions. Customers are advised to stop using the product immediately and contact the company for a replacement netting. You can contact Sportspower, toll-free at (888) 965-0565, from 9 a.m. to 5 p.m. ET Monday through Friday, online at [www.sportspowerltd.net](http://www.sportspowerltd.net) and click on "Recall Information" at the bottom of the page for more information, or email the firm at [customerservice@sportspowerltd.net](mailto:customerservice@sportspowerltd.net).

#### **WORLD IMPORTS RECALLS BUNK BEDS FOR SAFETY STANDARD VIOLATION**

World Imports, LTD., of Philadelphia, has recalled their Bunk Beds. The openings between the metal rails of the end structures are greater than allowed in the safety standard and pose a risk of entrapment or asphyxiation hazard. The bunk beds were sold at independent juvenile and other furniture stores in the eastern United States between August 2009 and February 2012 for about \$250 to \$300. Consumers should immediately stop using the product and contact the company for a free repair kit with instructions.

#### **CRAMER RECALLS FOLDING STEP STOOLS DUE TO FALL HAZARD**

About 6,500 Task\*It 1-UP folding step stools have been recalled by Cramer LLC, of Kansas City, Mo. The folding step stool can crack or break and collapse, posing a fall hazard to the user. This recall includes grey Task\*It 1-UP folding step stools. The stools are plastic and have a 9.5 x 14.5 top step and feature two 11.5 inch legs that fold inward for storage. The top of the folding step stool is covered with black rubber treading imprinted with an asterisk symbol. "1-UP step" is printed on the product packaging. The Task\*It name is imprinted on the legs. The stools were sold at Office supply stores such as SP Richards, United Stationers and Staples nationwide and online at [Amazon.com](http://Amazon.com) from January 2012 through December 2012 for between \$30 and \$40.

Cramer has received 14 reports of the step stools breaking or cracking. Of the 14 reports, two reported injuries including head, neck and back pain. Consumers should immediately stop using the folding step stool and contact Cramer LLC for a free replacement step stool. Consumers should stop using this product, which is being recalled volun-

tarily, unless otherwise instructed. It is illegal to resell or attempt to resell a recalled consumer product. Contact Cramer LLC at (800) 366-6700 from 8 a.m. to 4:30 p.m. CT Monday through Friday or visit its website at [www.cramerinc.com](http://www.cramerinc.com) and click on the recall link.

#### **COLUMBIA SPORTSWEAR RECALLS SEVEN MODELS OF HEATED JACKETS**

Columbia Sportswear Company, of Portland, Ore., has recalled seven models of men's and women's 2012 Columbia Omni-Heat™ electric heated jackets. They are polyester and have the Columbia name printed on the front upper left side. The jackets have two battery packs located in inner pouches. Jackets with the following names and style numbers are being recalled:

##### **MEN'S**

Circuit Breaker™ II Jacket SM7051  
Electro AMP™ Jacket SM7061  
Electro™ Interchange Jacket SM7886  
Electric Big Game™ Interchange Jacket HM7198

##### **WOMEN'S**

Circuit Breaker™ II Jacket SL7022  
Electro AMP™ Jacket SL7021  
Electro™ Interchange Jacket SL7885

The style number can be found on both the large white care label and the small white security tag sewn into the left inside seam of the jacket. The jackets were sold at Bass Pro Outdoor World, Dick's Sporting Goods and other major retailers and sporting or outdoor stores nationwide; and online at [Amazon.com](http://Amazon.com) and [Columbia.com](http://Columbia.com) from May 2012 to January 2013 for between \$250 and \$1,200.

Incidents of jacket wrist cuffs overheating were reported in the U.S. The firm said it received reports of one incident in Europe and one in Canada, but that no injuries were reported. Consumers should immediately stop using the heated jackets and check the style number to determine if they are part of the recall. Those with recalled jackets should disconnect both batteries from the electrical connections inside the battery pouches and contact Columbia Sportswear for a full refund with proof of purchase. The Firm's Media Contact can be reached at (503) 985-4584.

#### **PURR-FECTION STUFFED ANIMALS WITH FLASHLIGHTS RECALLED BY MJC RD**

About 7,200 Beamerzzz™ Stuffed Animals with LED Flashlight were recalled by Purr-Fection by MJC, Inc., of Tualatin, Ore. LED flashlight wires can protrude through the stuffed toy, posing a laceration hazard. The recalled Beamerzzz stuffed toys come with LED flashlights sewn into the left paw. The toys are 12 inches high and come in five animal types. The model number can be found on the hang tag on the left ear. Affected toys are marked with manufacturing code 111208-02 on the sewn in label located in the left rear portion of the toy. The lights were sold at Cabela's stores and online at [Cabelas.com](http://Cabelas.com) from September 2012 through November 2012 for about \$15.

One incident was reported involving a consumer who noticed an exposed wire. No injuries were reported. Consumers should immediately take the recalled toys away from children and contact Purr-Fection by MJC for a replacement toy. Contact Purr-Fection by MJC at (800) 359-0254 from 9 a.m. to 4 p.m. PT Monday through Friday, or online at [www.purr-fection.com](http://www.purr-fection.com) and click on the orange product recall tab at the top of the page for more information. Photo available at <http://www.cpsc.gov/en/Recalls/2013/Purr-Fection-Stuffed-Animals-with-Flashlights-Recalled-by-MJC>

#### **PROGRESSIVE INTERNATIONAL RECALLS CANNING JAR LIFTERS**

Progressive International Corporation, of Kent, Wash., has recalled their Canning Jar Lifter. The jar lifter handle can detach over time due to a missing stainless steel core in the hinge. This can cause the tongs to fail to grip and allow a jar being lifted to fall, posing a laceration hazard to the user. The recall involves the One Handed Jar Lifter. The jar lifter is a pair of tongs designed for lifting canning jars out of boiling water. The lifter is red with white handles. It is made of plastic and metal with a nylon coating.

The jar lifters were sold at AC Sales Co., Ace Hardware, Amazon, Americas Gardening Resources, Bi-Mart, Blain Supply Inc., Chef Central, Cole Hardware, DeNault's True Value Hardware, Heart of America, Home Shopping Club, InterBond Corp. of America, Kitchen Kaboo-

dle, Kitchen Krafts Inc., Lehman Hardware & Appliance Inc., Metropolitan Markets, Marmaxx, Reading China & Glass/Calvert, Supermarket Associates, Sur La Table, Williams-Sonoma, Winners Merchants International, World Kitchen Ltd., Zulily Inc. and other retailers nationwide from February 2012 to October 2012 for about \$10. Consumers should immediately stop using the jar lifter and contact Progressive International Corporation for a free replacement.

**ALL LOTS OF REUMOFAN PLUS TABLETS ARE RECALLED**

Reumofan Plus USA, LLC and Reumofan USA, LLC has recalled "Reumofan Plus" Tablets, Lot# 99515, exp. 09/16, because they contain undeclared active pharmaceutical ingredients: methocarbamol, dexamethasone, and diclofenac. Use of this product could result in serious and life-threatening injuries. Reumofan Plus is used as a treatment for muscle pain, arthritis, osteoporosis, bone cancer and other conditions.

This product comes in thirty (30) tablet containers and is packaged in a green and gold box. Reumofan Plus was distributed nationwide through internet sales. One illness has been reported to date in connection with this problem.

The recall was initiated after it was discovered that the product was distributed in packaging that did not reveal the presence of the active pharmaceutical ingredients, making it an unapproved drug. Distribution of the product has been completely terminated by Reumofan Plus USA, LLC and Reumofan USA. Consumers that have Reumofan Plus should be aware that the product may pose a serious health risk. Adverse reactions or quality problems experienced with the use of this product may be reported to the FDA's MedWatch Adverse Event Reporting Program either online, by regular mail or by fax.

Consumers who are taking these products or who have recently stopped taking Reumofan Plus should immediately consult a health care professional. Consumers who have purchased the thirty (30) tablet containers of Reumofan Plus are urged to return them, to Reumofan Plus USA, LLC & Reumofan USA, LLC, 737 Buttonwood Drive, Springfield, Pa. 19064, where they will

be exchanged for a new all-natural supplement of herbs only. This product was independently lab-tested to contain only all-natural herbs. Consumers with questions may contact the company at (610) 544-9761, Monday thru Friday, between 10:00 a.m. and 2:00 p.m. EST.

**TRIAMINIC AND THERAFLU PRODUCTS RECALLED DUE TO RISK OF POISONING**

About 2.3 Million Triaminic® Syrups and Theraflu Warming Relief® Syrups have been recalled by Novartis Consumer Health Inc., of Parsippany, N.J. These child-resistant caps can fail to function properly and enable the cap to be removed by a child with the tamper-evident seal in place, posing a risk of unintentional ingestion and poisoning. These products contain acetaminophen and in some cases diphenhydramine which are required by the Poison Prevention Packaging Act to be sealed with child-resistant packaging. Novartis Consumer Healthcare toll-free at (866) 553-6742 from 8 a.m. to midnight ET, Monday through Saturday, or online at [www.novartisOTC.com](http://www.novartisOTC.com) for more information.

There are 24 types of these two products included in the recall. A complete list of products, lot numbers and National Drug Codes (NDC) can be found at [www.novartisOTC.com](http://www.novartisOTC.com). Lot numbers are located on the bottom panel of the box and on the left side of the label on the bottle. The NDC number is located on the upper right corner of the front panel of the Triaminic Syrups box and the upper left corner of the Theraflu Warming Relief Syrups bottle. The firm has received 12 reports of children unscrewing the locked caps, including four reports of children ingesting the product. One child required medical attention. The product was sold at food, drug, mass merchandise and club stores nationwide between May 2010 and December 2011 for about \$5. Consumers should immediately stop using the recalled product and contact Novartis for instructions on how to return the product for a full refund.

**FOODSTATE RECALLS BOTTLES OF MEGAFOOD ONE DAILY SUPPLEMENTS**

FoodState Inc., of Derry, N.H., has recalled MegaFood One Daily Supplement Bottles. The packaging is not child-resistant as required by the Poison

Prevention Packaging Act. The supplement tablets inside the bottle contain iron, which can cause serious injury or death to young children if multiple tablets are ingested at once.

Consumers should stop using this product unless otherwise instructed. It is illegal to resell or attempt to resell a recalled consumer product. The recalled supplement bottles are brown glass bottles that contain MegaFood One Daily Tablets. The bottles have a yellow label on the front with the words "MegaFood," "Fresh From Farm To Tablet," "One Daily," "Nourish," "Balance" and "Replenish" printed above a picture of vegetables. Recalled bottles have the following amounts, product codes and lot numbers:

Amount	Product Code	Lot Numbers
60 tablets	51494 10151	10613, 10724 through 10728, 11246 and 12191
90 tablets	51494 10152	
180 tablets	51494 10153	

The amount is on the bottom right of the front label. The product code and lot numbers are on the left side of the front label. Consumers should immediately place bottles of this product out of reach of children and return any recalled bottles to the original place of purchase for a full refund or replacement. Contact FoodState d/b/a MegaFood, toll free at (866) 234-2668, from 9:30 a.m. to 6 p.m. ET Monday through Friday, or by e-mail at [productintegrity@megafood.com](mailto:productintegrity@megafood.com); or online at <http://www.megafood.com>, then click on "Read More" in the Safety Notice section of the page.

**Giant Food Alerts Customers To Voluntary Recall of Gold Coast Fresh Crab Spread**

Giant Food LLC, following a recall by GoldCoast Salads, announced last month that it removed from sale Gold Coast Fresh Crab Spread due to possible contamination by listeria monocytogenes. The following product is included in this recall: Gold Coast Fresh Crab Spread, UPC 83355500325, 8 oz., expiration date of 1/31/2013 to date, Giant says it has received no reports of illnesses. Customers who have purchased the product should discard any unused portions and bring their purchase receipt to Giant for a full refund.

As previously reported, Listeria is a common organism found in nature. Consumption of food contaminated with Listeria monocytogenes can cause listeriosis, an uncommon but potentially fatal disease. Healthy people rarely contract listeriosis. However, listeriosis can cause high fever, severe headache, neck stiffness and nausea. Listeriosis can also cause miscarriages and stillbirths, as well as serious and sometimes fatal infections in those with weakened immune systems, such as infants, the elderly and persons with HIV infection or undergoing chemotherapy.

Consumers looking for additional information on the recall may call Gold Coast customer service at 1-239-513-0430. In addition customers may call Giant Customer Service at 1-888-469-4426 for more information. Customers can also visit the Giant website at [www.giantfood.com](http://www.giantfood.com).

#### **GLASS FRAGMENTS IN LEAN CUISINE SPUR RECALL**

Some packages of Lean Cuisine ravioli, made by Nestlé, are being recalled because they may contain fragments of glass, the Food and Drug Administration said today. The recall applies only to packages of Lean Cuisine Culinary Collection Mushroom Mezzaluna Ravioli, with the production codes 2311587812 or 2312587812, and the “best before by” date of December 2013, the FDA said. Nestlé issued the recall after three customers reported they had found glass in the ravioli. None of the customers reported injuries, according to the FDA.

The recalled packages were made in November 2012, and Nestlé believes that few remain on store shelves, but could still be in customers’ freezers at home. Customers who have purchased the recalled product should not eat it, and should contact Nestlé.

#### **SMITHFIELD RECALLS 38,000 POUNDS OF PORK SAUSAGE**

The Smithfield Co. has recalled 38,000 pounds of pork sausage because it may contain small pieces of plastic. According to the company, the plastic is likely from gloves employees wore during the processing and packaging of the sausage. The company is recalling certain containers of its “Gwaltney mild

pork sausage roll.” The recalled product bears the establishment number “Est. 221-A” inside the USDA mark of inspection.

The sausage was produced on Jan. 11 and was distributed in Alabama, District of Columbia, Florida, Georgia, Louisiana, Maine, Maryland, North Carolina, New Jersey, New York, Pennsylvania and Texas. For more information, consumers should call the company at 877-933-4625.

#### **NESTLE RECALLS CANISTERS OF NESQUICK**

Nestle has recalled more than 200,000 canisters of “Nesquik” because of possible salmonella contamination. Nestle said the problem occurred on batches of the mix produced in October. The bottom of the canisters include a “best to use by” date of October 2014. Nestle says that there have been no reports of illness, and consumers can return the product where they bought it for a full refund.

#### **NESTLE ISSUES RECALLS IN ITALY AND SPAIN AFTER HORSE DNA FOUND IN PRODUCTS**

The Nestle food corporation has recalled all products in Italy and Spain that include beef in the ingredients list after horse meat was found in the meals. The company stressed that there are no recalls for its beef products sold in America. The Swiss-based company is recalling two chilled pasta products—Buitoni Beef Ravioli and Beef Tortellini—plus a lasagna product sold to French catering businesses.

According to the company, its own tests have found traces of horse DNA in two products made from beef supplied by H.J. Schypke. The levels found are above the one percent threshold the United Kingdom’s Food Safety Agency uses to indicate likely adulteration or gross negligence. The company says while there is no food safety issue, the mislabeling of products means they fail to meet the very high standards consumers expect from the company.

#### **COSTCO RECALLS GOLD COAST CRAB DIP**

Costco has sent warning letters to nearly 200,000 customers about possible contamination in a popular crab dip. The dip is made by Gold Coast of Naples, Fla. Costco sells it in many of its warehouse stores in the Southeast and

the Northeast. Costco sent a letter to about 180,000 customers warning of the possibility of Listeria contamination. So far, Costco and the FDA said they have no reports of serious illness. A spokesperson at Costco’s corporate headquarters near Seattle said the company is not sure if it will restock Gold Coast dip in the future. If you have any of that dip left in your refrigerator, throw it out and do not eat it.

#### **BABY SPINACH IN SEVERAL STATES GETS RECALLED**

A California company is recalling some baby spinach because it could be contaminated with E-coli. The company, Taylor Farms Retail, says no illnesses have been reported. The spinach was sold in several states with five different labels. The labels include Central Market Organics, Full Circle Organic, Simple Truth Organic, Marketside Organic and Taylor Farms Organic.

#### **UNITED SUPERMARKETS RECALLS CHICKEN PRODUCTS**

United Supermarkets has recalled 13 products due to a possible food safety issue with steamed chicken provided by a single provider. According to information released by United, there has been no evidence of any foodborne illness in connection to the recall so far, but the company is being proactive as a precaution. The products affected by the recall would have been available for purchase at United, Market Street or Amigos locations, and would bear a United, Market Street or Amigos label and generally have a four-day shelf life. For a list of products subject to recall visit [www.unitedtexas.com](http://www.unitedtexas.com). Persons who have purchased the products can return the product for a full refund or replacement.

#### **KELLOGG’S SPECIAL K RED BERRIES RECALLED FOR GLASS FRAGMENTS**

Folks who like Kellogg’s Special K Red Berries need to check the UPC code on their cereal boxes. The company announced on its website last month that it had recalled lots of three sizes of the cereals because they may be contaminated with glass fragments. The packages affected by the recall are:

- \*11.2 ounce packages, with a UPC Proof of Purchase Code: 38000 59923 Better if Used Before: DEC 02 2013

KNC 105 00:13 through DEC 02 2013  
KNC 105 02:30

- \*37.0 ounce packages with a UPC Proof of Purchase Code: 38000 20940  
Better if Used Before Date: NOV 30 2013 KNB 107 17:31 through NOV 30 2013 KNB 107 20:05
- \*22.4 ounce twin pack with a UPC Proof of Purchase Code: 38000 78356  
Better if Used Before Date: Nov 30 2013 KNA 105 07:00 through NOV 30 2013 KNA 105 08:51  
Better if Used Before Date: NOV 30 2013 KNB 105 15:00 through NOV 30 2013 KNB 105 17:05

The company says that sizes other than these packages are not affected by the recall, nor are packages with the letter codes KXA, KXB or KXC which are found after the "Better if Used Before Date." No other Kellogg products have been included in the recall. There have been no reports of injuries associated with these products, the company said. People who have these packages could contact Kellogg's for a coupon for a replacement at [www.Kelloggs.com](http://www.Kelloggs.com).

It should be noted that Nestle Prepared Foods had previously recalled boxes of Lean Cuisine frozen ravioli due to possible glass shards in products. Last year, Kellogg's issued a recall of its Frosted Mini-Wheats Bite Size Original and Mini-Wheats Unfrosted Bite Size products due to the possibility of flexible metal mesh fragments in the products.

#### **HARTZ RECALLS CHICKEN JERKY DOG TREATS OVER ANTIBIOTIC CONCERNS**

The Hartz Mountain Corporation has recalled Hartz Chicken Chews and Hartz Oinkies Pig Skin Twists wrapped with Chicken due to the ongoing problem with unapproved antibiotic residue in dog treats produced in China. The company is the latest to pull treats off the shelf following reports of illnesses in animals who consumed jerky pet treats. No illness was reported from Hartz products, and the company says no residue was found in its products.

The trace amounts of antibiotics found in some earlier recalled treats are from antibiotics that are not approved for use in food products in the United States. No other Hartz products are affected by this recall. If you have these products contact the Hartz Consumer Affairs

team (24 hours/day 7 days/week) at 1-800-275-1414 for a refund.

#### **NATURE'S VARIETY RECALLS ONE BATCH OF INSTINCT® RAW ORGANIC CHICKEN FORMULA FOR DOGS & CATS**

Nature's Variety has recalled one batch of Instinct® Raw Organic Chicken Formula with a "Best if Used By" date of 10/04/13. This action is being taken because pieces of clear plastic may be found in some bags and could cause a potential choking risk to pets. The source of plastic has been identified and the issue has been resolved. The affected product is limited to a single batch of Organic Chicken Formula with the "Best if Used By" date of 10/04/13. This includes:

- UPC# 7 69949 60137 1—Instinct Raw Organic Chicken Formula medallions, 3 lbs. bag
- UPC# 7 69949 70137 8—Instinct Raw Organic Chicken Formula medallions, 27 lbs. case
- UPC# 7 69949 60127 2—Instinct Raw Organic Chicken Formula patties, 6 lbs. bag
- UPC# 7 69949 70127 9—Instinct Raw Organic Chicken Formula patties, 36 lbs. case

The "Best if Used By" date is located on the back of the package below the "Contact Us" section. The affected product was distributed through retail stores and internet sales in the United States and Canada. No other products were impacted.

Consumers feeding the affected product should discontinue use and monitor their pet's health, and contact their veterinarian if they have concerns. Consumers who have purchased one of the above products can obtain a full refund or exchange by either returning the product in its original packaging or bringing a proof of purchase back to their retailer. Consumers with additional questions can call the Nature's Variety Consumer Relations team at 1.888.519.7387 Monday through Friday, 8:00 a.m. to 5:00 p.m. CST. Or, questions can be emailed directly to [cservice@naturesvariety.com](mailto:cservice@naturesvariety.com).

Once again, as you have already figured out, there have been a very large number of recalls. As a result, we weren't able to include all of them in this issue. We tried to

include those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm's web site at [www.BeasleyAllen.com/recalls](http://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](mailto:Shanna.Malone@beasleyallen.com) for more recall information or to supply us with information on recalls.

## **XXI. FIRM ACTIVITIES**

### **EMPLOYEE SPOTLIGHTS**

#### **VICTOR COYLE**

Victor Coyle, who has been with the firm for 15 years, currently serves as our Network Administrator. In this position, Victor handles tech support and networking issues, as well as researching new products and software. Victor started with us as a mail clerk, and worked as a runner for the firm before moving to our Information Technologies Section. Victor has a Bachelors degree from Auburn University Montgomery in marketing and a Masters degree from Auburn University Montgomery in general business. He does a very good job for the firm in a most important and challenging position. We are fortunate to have Victor with us.

#### **CHARLES DUFFEE**

Charles Duffee has been with the firm as an investigator for almost 12 years. Charles is one of six investigators we have on staff. Our investigators are responsible for vehicle and scene inspections, interviewing witnesses and law enforcement officers' reference to accident investigations, and assisting lawyers with any other requests related to investigations. Charles is retired as a Major from the Montgomery Police Department. He worked most of those years in either patrol or training division. Charles has a Bachelors degree in Criminal Justice from Auburn University in Montgomery.

Charles and his wife Linda have two children. Their son Brian is married to Brittany and they have one child, Haleigh, who is four. Their daughter Brittany attends AUM and is majoring in Physical Education. Brian is in the U.S. Army Reserves and served one year in Afghanistan in 2010. Linda has been a nurse for over 25 years at Montgomery Pediatrics in Montgomery. Charles enjoys

hunting and fishing, but he mostly enjoys spending time with Haleigh, his grandchild. Charles is a very good employee who takes his work seriously. He believes in what our firm does and we are most fortunate to have him with us.

#### GENIE PRUETT

Genie Pruett has been with the firm for 15 years. She currently serves as Legal Secretary for both Andy Birchfield, section head of our Mass Torts Section, and Leigh O'Dell. Genie has three children, Patti, Michael and Jennifer, seven grandchildren and two great-grandchildren. The family has recently moved to Verbena, Ala. Genie says her three wonderful "canine buds," Lucy, Daisy and Gabbie, allow her to share their space.

Genie loves working in the yard, taking walks with the dogs, and best of all, she loves for the family to come and spend time with her. Genie's dear friend, Carolyn, taught her to crochet and she has grown to love that, too. She says it really fills the time on cold and dreary days. Genie is a dedicated employee who works very hard and does excellent work. We are fortunate to have her with us.

## XXII. SPECIAL RECOGNITIONS

#### ROSA PARKS STATUE UNVEILED IN WASHINGTON

Mrs. Rosa Parks now has a permanent place in the U.S. Capitol — the first black woman to be honored with a statue there. This came more than half a century after Mrs. Parks made history as she sat defiantly on an Alabama city bus. President Barack Obama, congressional leaders and more than 50 of Mrs. Parks' relatives took part on February 27<sup>th</sup> in the unveiling of a 9-foot bronze statue of Mrs. Parks in Statuary Hall. Her close friend and long time confidant Ms. Elaine Eason Steele participated in the actual unveiling of the statue. President Obama had this to say during his remarks:

*This morning, we celebrate a seamstress slight in stature but mighty in courage. In a single moment, with the simplest of gestures, she helped change America and change the world.*

Rep. James Clyburn, D-S.C. and the highest-ranking black member of Congress, called Mrs. Parks "the first lady of civil rights, the mother of the movement, the

saint of an endless struggle." Mrs. Parks is depicted sitting, hands folded across her lap, a fitting tribute to her legacy.

On December 1, 1955, Mrs. Parks, then a 42-year-old seamstress, broke the law by refusing to give up her seat to a white passenger on a fully loaded bus in Montgomery. Her arrest touched off a 381-day boycott of the bus system, a seminal moment in the civil rights movement. In 1956, the Supreme Court banned segregation on public transportation. This great and courageous lady died in October 2005 at age 92. Six days later, she lay in honor in the Capitol Rotunda. The next month, President George W. Bush directed Congress to commission a statue of Mrs. Parks for the Capitol.

Mrs. Parks was given the Presidential Medal of Freedom in 1996 and the Congressional Gold Medal in 1999. The Statuary Hall honor in our nation's capital is a permanent recognition of a person who made a lasting mark on our nation's history. We all have benefited from Mrs. Parks' courage, her selfless sacrifice and her willingness to stand up and fight for a most worthy cause. I agree with President Obama this lady helped change things for good in this country and I am proud to say that Rosa Parks was from Alabama.

Source: *NBC News*

#### THE FCA DOES GOOD WORK WITH OUR YOUNG FOLKS

The Fellowship of Christian Athletes faced a challenge during 2012 and that was to live its Christian life "In the Zone." With God's help, the organization rose to that challenge! The year brought about incredible impact and true victory for the FCA. Some of the 2012 highlights are:

- FCA Camp conducted a record 363 camps in 37 states and 21 countries. 52,010 attended a camp with over 5,000 individuals making first time commitments to Christ and over 7,300 rededicating their lives to Christ.
- Campus ministry has spread to 9,048 campuses across the nation.
- 9,131 coaches attended FCA Bible studies throughout the country.
- FCA staff grew to 999.
- Over 142,000 Bibles were distributed.

The impact of what the FCA has done has been great. Thousands of coaches and athletes were brought to faith in Jesus Christ

and now disciple in their daily walk. These victories are taking place everyday all over the U.S. The 2012 FCA Ministry Report has more information on FCA's ministries and impact. You can get a copy by going to [http://www.fca.org/assets/2012/06/2012FCAAnnualReport\\_Digital.pdf](http://www.fca.org/assets/2012/06/2012FCAAnnualReport_Digital.pdf).

Source: FCA Report

#### LILLY LEDBETTER WILL BE THE SUBJECT OF A MOVIE

It was reported last month that a movie will be made about the Alabama factory worker who was the driving force behind President Barack Obama's 2009 fair-pay legislation. Lilly Ledbetter has signed up with a Hollywood filmmaker to make a movie about her fight to guarantee equal pay for women. Rachel Feldman, whose credits include episodes of the TV series "Sisters," "Picket Fences" and "Dr. Quinn, Medicine Woman," will be the producer-director and is developing the screenplay. The movie has yet to be cast. Jon Goldfarb, the Birmingham lawyer who represented Ledbetter in her discrimination case and has continued to advise her, had this to say about the choice of Ms. Feldman:

*Rachel Feldman has a passion for Lilly Ledbetter and her story. She understands how it is to be a woman and be discriminated against, and after talking to her, Lilly Ledbetter decided she would be the perfect person to push this forward and make it into a movie. People have been after this story to put it on the screen for a long time. She (Ledbetter) went with Rachel because she bonded with her.*

Ms. Ledbetter worked as a supervisor at the Goodyear Tire & Rubber Co. plant in Gadsden from 1979 until she retired in 1998. She later sued the company for paying her significantly less than her male contemporaries. Ms. Ledbetter won a \$3.8 million verdict that was subsequently overturned by an appeals court because the court said she waited too long to file her lawsuit.

In 2007, the Ledbetter case reached the U.S. Supreme Court, which, in a 5-4 decision, agreed with the appeals court that she had not met the 180-day deadline for filing her claim. But in a dissenting opinion Justice Ruth Bader Ginsburg urged Congress to amend the law to correct the Court's "parsimonious reading" of the existing law. That led to the Lilly Ledbetter Fair Pay Restoration Act, which President Obama signed into law in 2009. Significantly, this was the first bill

signed into law by the President. The Act loosens the time restriction that the Supreme Court imposed in the Ledbetter v. Goodyear case for filing a discrimination lawsuit.

As you will recall, Ms. Ledbetter spoke about her fight for equal pay at the Democratic National Convention in 2008 and again in 2012. Last February, she released *Grace and Grit*, a memoir that she co-wrote with Birmingham author Lanier Scott Isom. Ms. Ledbetter has been very active in her fight for women's rights, speaking all over the country about this issue. She has become known as the "voice of equal pay for women."

The movie is still early in the developmental stages. Hopefully, it will be filmed in Alabama. While it's clearly an Alabama story, it's one that affects women across the U.S. It was not known at press time whether the movie will be a theatrical release or a cable television movie. But one thing is certain: this is a story that will resonate with the American people. Women have been treated like second-class citizens in the workplace—when it comes to pay—for years. While progress was made for women workers in 2009, it's now time to remedy the situation once and for all. Lilly Ledbetter, a brave lady, is an American hero!

## XXIII. FAVORITE BIBLE VERSES

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Les Steckel, Executive Director of the FCA, sent in a verse for this issue. Les was a highly successful coach before joining FCA in 2005.

*Now to Him who is able to do above and beyond all that we ask or think—according to the power that works in you.*

Ephesians 3:20

Cathy Givan, who works hard in her role as Administrative Chief of Staff with the Alabama Association for Justice, sent in her favorite verse this month. Cathy is dedicated to helping preserve the nation's judicial system.

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

Proverbs 3:5-6

Pastor Vincent Rosato, who is with The Friendship Mission in Montgomery ([www.friendshipmission.org](http://www.friendshipmission.org)), sent in a timely scripture for this issue. As folks in the Capital City know, the Mission is a beacon of light for folks in need.

*He who has pity on the poor lends to the Lord, And He will pay back what he has given.*

Proverbs 19:17

My good friend, Helen Johnson, sent a verse this month. Helen and her husband Guy attend St. James United Methodist Church. She says there are times in life when all of us learn that life is not always fair. Helen points out that we can be victimized by false accusations and have all sorts of problems. She says the passage set out below has served her well in determining the manner in which a believer should act when situations occur that can be unpleasant and hurtful.

*The Lord's bond-servant must not be quarrelsome, but be kind to all, able to teach, patient when wronged, with gentleness correcting those who are in opposition, if perhaps God may grant them repentance leading to the knowledge of the truth, and they may come to their senses and escape from the snare of the devil, having been held captive by him to do his will.*

II Timothy 2:24-26

## XXIV. CLOSING OBSERVATIONS

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### HEALTH SECURITY FOR ALABAMA'S WORKING FAMILIES

I have emphasized healthcare in this issue because of its extreme importance in Alabama, as it is in every state. Special attention has also been given to Alabama's Medicaid Program. The new federal healthcare law provides full federal funding to cover newly eligible Medicaid recipients for three years, beginning Jan. 1, 2014. In 2017, states will pick up a small share that grows to a maximum of 10% for 2020 and after. Delaying the decision to expand Medicaid means failing to take advantage of maximum federal funding. It puzzles me that Alabama would walk away from billions of federal

dollars that could revitalize our health care system and our state's economy.

Medicaid expansion in Alabama would likely bring health coverage to 300,000 new enrollees, according to a new study by researchers at the University of Alabama at Birmingham (UAB) School of Public Health. Analysis of Census data further reveals that nearly 60% of Alabama's uninsured adults who fall within the new income limits are workers. An expanded Medicaid would provide:

- Health coverage for hardworking families who can't afford private coverage;
- Access to regular care/ preventive checkups;
- Earlier detection and treatment;
- Less dependence on costly emergency care;
- Regular OB/GYN visits without referral; and
- Coverage for 27,000 low-income uninsured Alabama veterans.

Many, including this writer, believe Medicaid expansion will mean a healthier Alabama. The whole state will benefit as access to regular care improves the health of working families and more of our sickest residents. Most parents want to take responsibility for their health and that of their children. Healthier families mean better outcomes at school, on the job and at home. A more productive workforce means a growing state economy, more jobs and a better future for our state.

A great deal has been written in the media, both good and bad, about the Patient Protection and Affordable Healthcare Act passed by Congress. I find that many folks have no concept of what the new law really does. Today in Alabama, nearly 750,000 Alabamians lack health insurance. Thousands of those persons are unemployed workers who lost their coverage when they lost their jobs. Now that the economy is improving many people are discovering that the "pre-existing condition" such as asthma or diabetes stands in their way of getting back into health coverage. Fortunately, because of the new law, that will not be the case for very much longer.

Less than a year from now, in January 2014, insurance companies will no longer be able to deny a person coverage because he or she already had a health problem. This is just one of the many protections guaranteed by the new law. Hopefully Alabama will take full advantage of the new law. Governor

Robert Bentley's Medicaid Advisory Commission has offered what appears to be the right plan for reform of Medicaid. Restructuring Medicaid to focus on primary and preventive care will set the stage for expansion to cover 300,000 uninsured Alabamians. But Alabama must accept the offer to expand Medicaid if our state is to get the benefits provided. I am still hopeful that Gov. Bentley will change his mind and do what I believe is the right thing for Alabama. He is a good man and I don't question his motives on the Medicaid expansion issue. For those reasons, I believe the Governor will ultimately wind up on the right side of this issue.

#### **A MONTHLY REMINDER**

*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 bear from heaven and will forgive their sin and will heal their land.*

2 Chron7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Louis Brandeis, 1937  
U.S. Supreme Court Justice

## **XXV. PARTING WORDS**

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I was asked to speak at our firm's weekly devotion last month and I was given the topic, "How do we deal with life's trials and tribulations?" I was specifically asked to discuss how Christians, who live in the real world, relate to issues and problems that we all face. I started the discussion by excusing all of those present who had never dealt with anger, anxiety or stress issues. I was not at all surprised when not one person left the room. After an opening prayer, I reminded the folks in attendance that we as Christians are not exempt from life's trials and tribulations. We have all had in the past, and will experience in the future, problems of all sorts. The manner in which we deal with those issues, however, is directly related to how closely we walk with Jesus Christ. Our relationship with Him will allow us to deal with whatever comes our way.

It has been said that we live in an "age of rage" and that is a pretty good assessment. There is too much anger and hate all around us in today's world. As we look at the world situation, we see wars, both civil and international; we are experiencing terrorist threats in all parts of the world; there have been numerous severe weather-related disasters; and extreme poverty and hunger exists in many parts of the world. We can add much more to this list with little effort.

In our own country, we are forced to deal with political divisions that are growing wider and meaner in Washington. In 2008 and 2009, we experienced the near total collapse of our nation's economy; the federal government operates on borrowed money and is deeply in debt; we have a most serious nationwide drug problem; we are facing serious problems relating to illegal immigration; severe storms are being more frequent and more violent; many of our financial institutions are still in trouble; we now face severe economic problems caused by something in Washington called "sequestration;" and this list goes on.

When a person constantly is reminded about all of these monumental problems, it is very easy to become angry, become stressed out, and even get depressed. When our anxiety and stress levels are reaching the upper limits, one might ask "is there any hope?" The answer is a resounding "yes!" So, where can we turn in times like that? It took me a fairly long time to realize that there is always hope for me because of the relationship I have with my Lord and Savior Jesus Christ. I finally learned that I could always trust Him, and by relying on His promises, could deal with any problem or issue that came my way.

All we have to do is read Psalm 23:1-6 and realize that the answer to the question posed above is there for us. The Bible also is full of verses that are available to help us deal with anger, stress and depression. My prayer is that each of us will come to realize that we can handle life's trials and tribulations by simply putting our focus on Jesus Christ, trusting Him and obeying His commandments. It's not always easy to do that, but it always works. The reassuring thing is that God really loves us and is concerned about our lives and that will never change!

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