I.
CAPITOL
OBSERVATIONS

ALABAMA SHOULD EXPAND MEDICAID

Dr. David Bronner believes that Alabama is making a big mistake in not accepting the federal government’s pending offer relating to the state’s Medicaid program. I too am convinced that expanding the Medicaid program in our state is the proper course of action and is in the best interest of all Alabamians. Dr. Bronner, who is widely recognized as a highly respected financial expert, gives eight good reasons why Gov. Robert Bentley should change his mind and approve the expansion. Those reasons are:

• New Jobs—Georgia is projected to create 70,000 new jobs from Medicaid expansion. Since Alabama has half the population of Georgia, Medicaid expansion could possibly generate 35,000 new jobs for Alabama. Even if expansion of Medicaid only created 17,500 jobs, that would still be the largest influx of new jobs in Alabama’s history.

• Helps Counties—Adding $15-17 billion, about $1.5 billion per year, to Alabama’s economy is a big deal that helps all 67 counties with the federal government paying 90 percent of it.

• Good Return—If someone comes to you and says invest $1 billion ($771 million is supposed to be the number) and gives you $15 billion back, it is a great deal. I will take the deal all day long. Alabama pays nothing for $1.5 billion in each of 2014, 2015 and 2016. It is not until 2020 that Alabama pays its 10 percent share.

• Women & Kids—Alabama’s $771 million to $1 billion investment will generate more than $1.7 billion in tax revenue, create tens of thousands of jobs and help over 300,000 women and children in need. These are the Alabamians I am speaking up for.

• GOP on Board—Major critics of Obamacare were Republican governors—including Florida’s Rick Scott, Arizona’s Jan Brewer, Michigan’s Rick Snyder and New Jersey’s Chris Christie (who will likely be the Republican frontrunner in 2016)—and all have now agreed to take the money! Governor Scott said, “Looking at the numbers, there’s no way to pass this up.”

• Helps Black Belt—Everyone talks about wanting to help poor people in the Black Belt. Hello! That is where most of the new jobs would be going.

• Unmatched—Alabama invested $380 million in Mercedes for an initial 1,000 jobs, which has now grown to around 4,000 to 5,000 jobs. The state invested $180 million in Airbus, creating an initial 1,000 new jobs. No economic development investment in the world would bring the state 35,000 new jobs. Even if Alabama only received 10,000 to 15,000 new jobs that would still be the largest influx ever in Alabama’s history. Only government has the ability to produce jobs on that scale.

• Do the Right Thing—Get over it. Let’s do what is right and responsible for Alabama and its citizens. Alabama starts to lose federal funds and rejects thousands of new jobs starting January 1, 2014.

I am in total agreement with Dr. Bronner. While I have great respect for Gov. Bentley, I believe he is making a mistake on the Medicaid expansion issue. Hopefully, the governor will reconsider his decision, change his mind and do what I believe is the right thing for the people of Alabama. I have to believe that our state will eventually wind up joining the ranks of the other states accepting the federal funds. It makes sense both economically and from a healthcare perspective.

Source: Birmingham News

LAW SUIT FILED CHALLENGING ALABAMA ACCOUNTABILITY ACT

The Southern Poverty Law Center has filed a lawsuit challenging the state’s new controversial school choice law. The lawsuit, filed August 19th, contends the private school transfers allowed by the act are inaccessible to Alabama’s poor families and will take away millions of dollars from the public schools they do attend. Richard Cohen, president of SPLC, says poor parents can’t afford private school tuition even with the help of the new tax credit. He says further that even if they could, the parents often don’t have a participating private school near them. The lawsuit, filed in Montgomery federal court, seeks to permanently block the implementation of the Alabama Accountability Act approved by the Alabama Legislature in the last session. Richard called the promise by sponsors of the Legislation that the law would help all students regardless of location and income an “empty promise.” He had this to say:

The reality is just the opposite. Children in Alabama’s Black Belt, most of them African-Americans, are still trapped in failing schools, still being given the short end of the stick.

The lawsuit makes an equal protection claim, contending that the Accountability Act creates two classes of students. These claims, which certainly appear to have merit, are:

• Those that can transfer because of their parents’ wealth, and
• Those who cannot transfer.

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The lawsuit alleges that “the schools in which plaintiffs are trapped are likely to deteriorate further as their funding is continually diminished over time as a result of the Act.” The Alabama Accountability Act will give tax credits—estimated at $3,500 per year per child—that families at “failing” schools can use to offset the cost of tuition at a private school or a non-failing public school. The law also authorizes up to $25 million in tax credits for donations to scholarship programs designed to help lower income students bridge the gap between the $3,500 tax credit and private school tuition.

In the lawsuit, the SPLC represents eight students in Black Belt counties that are assigned to failing schools.

Even if parents could afford the private school tuition through a scholarship, many parents won’t find a participating private school near them to attend. It should be noted that only a very few private schools are participating. Reportedly, there are 56 private schools that are accepting transfers under the new law. As I understand it, the state has named 78 public schools as failing under the Accountability Act because of recent test scores.

It will be interesting to see how this lawsuit fares in the federal court system. When this legislation was passed I did not believe that it was good for our state and nothing has happened since then that changes my belief. Instead of abandoning a “failing” public school, those in positions of power in state government should be working to correct the problems that allow that school to fail. The definition of “failing” doesn’t appear to be workable based on what school officials have been saying. I believe the governor and legislative leadership need to take a look at what this Act, unless it’s changed, will do to hurt public education in Alabama. I believe repeal is the best solution. While private schools have a definite place in our state, a strong public education system is absolutely essential. That shouldn’t even be subject to debate. The sad truth is we have never made public education the top priority for government planning and spending in Alabama and that must change. This Act, the subject of the SPLC lawsuit, is definitely not the answer. In fact, if it remains the law, things will only get worse for public education in Alabama.

Source: AL.com

367 Dogs Rescued From The Pits Of Hell

Nearly 370 pit bulls have been rescued as the result of a federal dog fighting raid carried out in Alabama, Mississippi and Georgia. The raid followed a three-year investigation and it’s the second-largest dog-fighting raid in U.S. history. U.S. Attorney George Beck, members of the Federal Bureau of Investigation, The American Society for the Prevention of Cruelty to Animals (ASPCA), The Humane Society of the United States, the Coffee County Sheriff’s Office, the Lee County Sheriff’s Office, the Auburn Police Department and others announced the raid of the multi-state dog fighting ring at a press conference August 26th.

The investigation, which I understand was started by the Auburn Police, grew into a full-blown probe and remains ongoing. Tim Rickey, vice president of field investigations and response for the ASPCA, called the raid a “monumental event.” He said 260 of the pit bulls were rescued on one day at 13 separate properties. Rickey described what the law enforcement team found:

The conditions were consistent of what we see in other illegal dog fighting rings. The dogs were living in horrendous conditions, with the majority tethered to heavy chains. They were infested with fleas and bad no fresh water or food. Many of the dogs had wounds, scars or other conditions consistent with dog fighting. The dogs are now being taken care of in undisclosed shelters.

I agree with George Beck, who says the investigation was more than just “the inhuman treatment of dogs.” He correctly stated at the news conference that it’s a “sad commentary” on an affluent society that allows this underground culture and indulgence of violence which is “spreading over onto streets and into our homes.” It’s time for the public to demand that our elected officials give law enforcement officers at every level the tools they need to do their job. This raid is a step in the right direction.

Twelve suspects were arrested following the execution of 13 search warrants on a 30-count indictment. It appears that between 2009 and 2013, the suspects conspired to promote and sponsor dog fights, and conspired to possess, buy, sell, transport and deliver dogs that were involved in dog fighting. The indictment also charges the suspects with promoting or sponsoring a dog fight and with possessing, buying, selling, transporting and delivering a dog for fighting purposes. Additional charges also relate to conducting an illegal gambling business. U.S. Attorney Beck, in explaining the magnitude of the operation, stated:

These defendants were betting between $5,000 and $200,000 on one dog fight. The number of dogs seized and the amount of money involved in this case shows how extensive this underworld of dog fighting is. These dog fighters abuse, starve and kill their dogs for the supposed ‘fun’ of watching and gambling on a dog fight. Their behavior is deplorable, will not be tolerated, and will be punished to the full extent of the law.

In addition to the dogs, federal and local officials also seized firearms and drugs in the raid. More than $300,000 in cash was seized from dog fighting and gambling activities that took place during the course of the investigation. Remains of dead animals were discovered on some properties where dogs were housed. Any person who would participate in such horrendous and immoral activities must pay a harsh penalty for their wrongdoing. Treating animals like they did is inexcusable. Actually, it’s a pretty good indication that those involved in this activity would also do harm to humans. Simply put, we cannot tolerate shameful conduct of this sort to continue anywhere in this country. The prosecution and conviction of the wrongdoers must serve as a lesson to others who are involved in dog-fighting enterprises. It’s too bad we can’t just chain each one of these criminals to a metal dog house, keep them under the same conditions the dogs were kept in, and let them experience the hell they subjected these dogs to. But neither is that sort of conduct acceptable amongst civilized folks. So let’s let the criminal justice system take care of them.

Source: AL.com

II.
A REPORT ON THE GULF COAST DISASTER

BP Claim Statistics

Despite BP’s latest attempts to stop or slow payments of Business Economic Loss (BEL) claims filed with the Deepwater Horizon Economic Claims Center (DHECC), the court-administered program continues to plow forward and pay claimants located throughout the Gulf Coast region. A review of the mid-August statistics reveals the success of the program in detail. In mid-August, more than 212,000 claims had been
submitted to the Claims Center, with Florida residents filing the most claims (31 percent), followed by Louisiana (26 percent), Alabama (19 percent), Mississippi (12 percent) and Texas (4 percent).

If there is any one true indicator for claimant satisfaction with a settlement of this magnitude, it is the rate at which claimants accept the amounts they are offered on claims. Given that the Claims Center is more than one year old, and the complex calculations that are required to generate offers, the acceptance rate is nothing short of astounding. Specifically, the Claims Center has issued nearly 54,053 notices for payment for a total value of $4.504 billion. Of these offers, 48,655 were accepted for a value of $4.030 billion. Actual funds physically paid to claimants at press time was at $3.262 billion. Business loss claims comprise the largest share of filings to date at 66,330 (or 31 percent of total filings), followed by individual economic loss claims (18 percent), coastal real property (14 percent), subsistence (13 percent) and seafood claims (12 percent).

BP has also continued its aggressive appeal tactics in the Claim Center. In total, the company has filed 2,795 of the 3,550 appeals, and from everything we are seeing, the appeals appear to be increasing at a rapid rate. Many of these appeals are not supported by the Settlement Agreement, and we suspect they are another desperate attempt by BP to save as much money as possible on the backend.

Based on the statistics, Pat Juneau and his staff are doing a remarkable job administering this Settlement in a completely independent and unbiased way. It is simply ridiculous, although not entirely surprising, that BP has blasted Mr. Juneau, a man they steadfastly supported just a few months ago, and the Claims Center in a very public manner. However, BP’s public perception is eroding with every negative article they print. We fully expect the Program to continue paying claims well into 2014.

**The Total Pay-Out Of Claims**

BP’s current estimate of the total cost of those elements of the PSC settlement that can be estimated reliably, which for business economic loss (BEL) claims only includes claims for which eligibility notices have been issued by the DHCSSP, is $9.6 billion. This provision excludes any future business economic loss claims not yet received or not yet processed by the DHCSSP. If BP is successful in challenging the claims administrator’s interpretation of the EPD Settlement Agreement, the total cost of the PSC settlement will, nevertheless, be significantly higher than the current estimate of $9.6 billion. That’s because the current estimate does not reflect business economic loss claims not yet received, nor those claims not yet processed.

There are a significant number of business economic loss claims that have been received, but have not yet been processed. And further claims are very likely to be received. If BP is ultimately unsuccessful in challenging the claims administrator’s interpretation of the EPD Settlement Agreement, a further significant increase to the total cost of the PSC settlement will be required. In addition to the current challenge before the Fifth Circuit, BP is continuing to evaluate further available legal options to challenge the District Court’s rulings and their effect.

However, there can be no certainty as to how the dispute will ultimately be resolved or determined. To the extent that the costs of the PSC settlement cause the aggregate amounts provided for under the Trust to exceed $20 billion, such costs will be charged to the income statement. The PSC settlement is uncapped except for economic loss claims related to the Gulf seafood industry. If you need any additional information relating to this subject, contact Sandra Walters at 1-800-898-2034, and she will have a lawyer contact you.

**Judge Barbier Refuses To Halt Gulf Oil Spill Payments**

BP PLC has lost a renewed bid to suspend payments from the court-supervised program administering its settlement of claims tied to the 2010 oil spill. Judge Carl Barbier ruled that an investigation of alleged wrongdoing at the Mobile, Ala., claims assistance center didn’t find “any credible evidence of fraud.” He also rejected BP’s allegations that the company’s ability to appeal payments was tainted. That issue earlier was brought to the attention of Magistrate Judge Sally Shusman, who investigated and is currently handling the matter.

It should be noted that Judge Barbier last month had rejected BP’s request to stop the payments while Louis Freeh, former director of the Federal Bureau of Investigation, probes allegations of misconduct in the claims program. BP renewed the request on August 5th. The oil giant is combining its efforts in the courts with the massive public relations campaign that is mentioned in this issue.

*Source: Insurance Journal*
would result in a duplication of efforts, the order said. The panel’s order said:

Given this extensive overlap, we find it quite impossible to see how a new Deepwater Horizon MDL would not result in duplicative discovery and pretrial motion practice, as well as other redundant pretrial procedures. In our considered opinion, creation of another Deepwater Horizon MDL is not a solution to whatever challenges the current litigation may present. The panel does not aspire to the role of an appellate court for disaffected MDL litigants.

The lawyers in our firm, who are working virtually full time on BP issues believe the decision made by the JPML is the correct one. I also believe that to be the case. If you need more information on this subject, contact Parker Miller, one of our lawyers who has been in the BP litigation from the outset, at 1-800-898-2034 or by email at Parker.Miller@beasleyallen.com.

BP Engineer Cannot Hide Deepwater Meeting From Trial

A Louisiana federal judge has refused to bar prosecutors from arguing at a former BP engineer’s upcoming obstruction trial that he sat idly at a government meeting while knowing his bosses were lying about the Deepwater Horizon response effort. U.S. District Judge Stanwood R. Duval Jr. ruled last month that prosecutors in the criminal case could point to a meeting two months after the offshore rig disaster—dubbed the “Kill the Well on Paper,” or KWOP, meeting—at which Kurt E. Mix allegedly sat “passively” while other BP executives misled federal agencies about the rate of oil escaping from the well and the chances that a response plan known as “Top Kill” would succeed.

The court’s order stated that the executives’ statements in that meeting are “intrinsic” to charges that Mix later deleted text messages and voicemails from his iPhone in an effort to thwart government investigators, rendering the statements admissible under federal rules of evidence, according to a order. Judge Duval said:

Defendant’s alleged passive adoption of the allegedly misleading or false statements made by others at BP during the KWOP meeting is relevant as his action or during the KWOP meeting is relevant to his state of mind at the time of the deletions. Thus, the statements and representations made by others at BP concerning flow rate and Top Kill at the KWOP meeting are ‘inextricably intertwined’ with the deletion of the text message strings which form the basis for the obstruction of justice charges.

Judge Duval also ruled that prosecutors can’t use false public statements the energy giant made following the incident, agreeing with Mix that the company’s admittedly false claims regarding the severity of the spill were not admissible as evidence. A former drilling and completion projects engineer for BP, Mix was the first individual charged in the government’s investigation of the April 2010 explosion that touched off the catastrophic oil spill.

Mix was involved in efforts to stop the leak, including the so-called Top Kill project, a failed effort by BP to pump heavy mud into the blown-out wellhead to stop the oil flow. Mix received numerous notices that he was required to retain all information related to the efforts, including electronic communications, according to the government. He was charged with deleting text messages in the aftermath of the blast and later hit with a superseding indictment alleging he also scrubbed 350 voicemails. Facing a December trial date, Mix petitioned Judge Duval in April to exclude evidence regarding the supposed misconduct of others at BP, arguing that prosecutors were attempting to leverage a criminal settlement with the corporate entity to prove Mix’s guilt by association.

Judge Duval granted the motion in part, prohibiting prosecutors from pointing to false statements BP made to Congress and the media concerning the oil flow rate and the Top Kill project before Mix’s alleged deletions. Judge Duval said:

Such public statements made by others far in advance of the defendant's alleged criminal activity are not inextricably intertwined with defendant’s alleged obstruction of justice. Nor are the challenged public statements made by other BP personnel and the alleged deletions from defendant’s iPhone part of a ‘single criminal episode.’

Even if the statements were relevant to the context in which Mix acted, their probative value was outweighed by the likely prejudice to Mix, according to the order. Judge Duval said further:

The scope of such evidence is potentially broad, and admission of such evidence is likely to result in bias against BP. There is a real possibility that prejudice arising against BP could overshadow the alleged acts of defendant and taint him with unfair prejudice.

But Judge Duval allowed prosecutors to reference the KWOP meeting and Mix’s par-
that washed ashore on beaches along Florida's west coast. Dr. Weisberg perserved oil off the Panhandle and then caught hold of the underwater plumes of discharge. He says that the upwelling could have begun in May—upwelling—a swirling current of cool water is a colleague of Dr. Paul, found a major immigrant. “That’s not good news. That’s been a problem. While the thick globs of BP oil had this to say:

Dr. Paul and his colleagues collected samples along the shelf, as well as closer to the site of the Deepwater Horizon disaster off Louisiana. They found nothing in 2010, but when they went back in 2011 and 2012, they found exactly what Dr. Weisberg had predicted. The oil did not reach the southern end of the shelf until last year. Water samples collected off the shelf were toxic to bacteria, phytoplankton and other small creatures, the report said. The USF discovery shows that scientists continue to grapple with measuring the full impact of the 2010 disaster.

The 1.8 million gallons of Corexit sprayed into the Gulf broke the oil down into small drops, creating underwater plumes of oil. This is something no one had ever seen before in an oil spill. Corexit is banned in Great Britain because it is believed to cause cancer. Combined with the oil, the mix is deadly. The discovery of the plumes raised questions about how they would affect sea life in the Gulf. During the three years since the spill, scientists have uncovered ongoing damage—deformed crabs, dying dolphins and other woes. Hotel owners, restaurateurs, anglers, beachgoers and other businesses, as well as individuals, should be concerned with the findings of this study. Hopefully, there won’t be a major storm in the Gulf, which is certainly not probable, and the plumes won’t be disturbed. But the question remains—what can be done about them?

Source: Law360

**Florida shelf down around the Dry Tortugas.**

When he put forward his theory in 2010, Dr. Weisberg called for sampling to be done along the shelf to test whether he was right. But, unfortunately, that proposal did not get any funding. Eventually, though, as part of a series of 12 trips into the Gulf for their own research, Dr. Paul and his colleagues collected samples along the shelf, as well as closer to the site of the Deepwater Horizon disaster off Louisiana. They found nothing in 2010, but when they went back in 2011 and 2012, they found exactly what Dr. Weisberg had predicted. The oil did not reach the southern end of the shelf until last year. Water samples collected off the shelf were toxic to bacteria, phytoplankton and other small creatures, the report said. The USF discovery shows that scientists continue to grapple with measuring the full impact of the 2010 disaster.

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Source: Law360

**Update on BP Oil Spill Cleanup**

With more than 100 miles of coastline remaining to be cleaned up following the Gulf of Mexico oil spill, the states most impacted by the disaster believe it’s too soon for BP to stop clean up efforts. That’s because the environmental damage to the coastal areas is still ongoing. Garret Graves, Chair of the Coastal Protection and Restoration Authority of Louisiana (CPRA), has said that the response should only end “when conditions on the ground dictate such actions.” He stated recently that the cleanup is not even close to finishing right now and that is most evident. CPRA is a state agency that is leading hurricane protection and eco-system restoration in Louisiana. Many experts believe that the cleanup process, considering that more than 200 million gallons of crude oil was released into the Gulf, will never be fully completed.

Thus far, cleanup efforts have been overseen by the U.S. Coast Guard, which reported in June that cleanup of the shorelines of Florida, Mississippi and Alabama were complete, leaving most of Louisiana still in the process of cleanup. Patrols are still actively looking for oil in that state. According to the Coast Guard, there are 90 responders currently working in Louisiana, compared with the 19,000 people who were dispatched in July 2010 to comb the beaches, marshes and barrier islands searching for tarballs, sheen and oil. Those efforts have been disappointing to many state officials because locating submerged oil is often tedious, labor-intensive work that does not guarantee successful results. According to the Coast Guard, of the 2.9 million pounds of sand, shells and water dredged to date, the vast majority—85 percent—did not contain oil. Hopefully, that information is accurate.

The Coast Guard released a report August 13th that says just 95 miles of coastline are left to clean. But the report did not project exactly how long it will take to complete the process. Chief Petty Officer Pat Howell, the Louisiana branch director for the Coast Guard’s Gulf Coast Incident Management Team, had this to say:

We don’t have an end date. Once there is an agreement made that clean is clean, that’s when we will depart. I’m sure there will be a lot of data to back that up and to say we’re ready for the next phase of response.

Chief Howell says that next phase “depends on the public to be our eyes.” Instead of an active and ongoing search, the Coast Guard will dispatch crews only if they receive a report on their hotline of an oil sighting and then only if a forensics investigation proves the oil can be traced back to the Deepwater Horizon. If that proves to be the case, he says BP, the oil giant largely responsible for the disaster, will pay the bill.

Louisiana officials believe their state’s delicate coastline of marshes and reefs received the most oil. State officials have been fighting to prevent a winding down of the cleanup effort and they believe that a more comprehensive approach is needed to mitigate oil that remains deeply embedded into the coastal environment. David Muth, director of the Mississippi River Delta Restoration Program for the National Wildlife Federation (NWF), observed:

Source: Law360

**Oil from BP spill pushed onto shelf off Tampa Bay**

Many folks in the Tampa Bay area have a real problem. While the thick globs of BP oil that washed ashore on beaches along Florida’s Panhandle in 2010 never reached Tampa Bay, oil from the Deepwater Horizon spill, floating beneath the surface after being sprayed with dispersant, settled on a shelf 80 miles from the Tampa Bay region within a year of the spill’s end. This information comes from a scientific study published last month. There is evidence this may have caused lesions in fish caught in that area, according to Dr. John Paul, the University of South Florida oceanography professor who is lead author on the study, published in *Environmental Science & Technology*. It should be noted, however, that research is continuing on that question.

The study reported that tests of the samples from those areas on bacteria and other microscopic creatures found in that part of the Gulf discovered that “organisms in contact with these waters might experience DNA damage that could lead to mutation.” Dr. Paul says the oil that landed on the shelf, which extends miles into the Gulf, will likely stay there a long time. He pointed out that “once it’s in the sediment, it’s kind of immobile.” That’s not good news.

Bob Weisberg, a USF oceanographer, who is a colleague of Dr. Paul, found a major upwelling—a swirling current of cool water from deep in the Gulf—had begun in May 2010 and continued through the rest of that year. He says that the upwelling could have caught hold of the underwater plumes of dispersed oil off the Panhandle and then pushed them southward onto the shelf that lies off the state’s west coast. Dr. Weisberg had this to say:

*It made its way southeast across the bottom and eventually it gets to the beach. A little bit probably got into Tampa Bay, and a little bit probably got into Sarasota Bay, and it exited the...*
Louisiana has made a very strong case why they don’t want their state taken out of response. They probably have a fear that it’s going to get harder and harder to get anyone to come in and respond because it becomes harder and harder to prove the chemical signature of the material over time.

Environmental groups are also greatly concerned because they say the oil-soaked environment continues to damage wildlife reproduction cycles, which will receive less attention once the recovery effort ends. A NWF report, released in April, uses data from the National Oceanic and Atmospheric Administration (NOAA) to show that dolphin deaths are above average since the spill and that infant dolphins were found dead at six times the average in January and February. The report says that Killifish, sea turtles and coral species have also been badly damaged. Frankly, I don’t believe that BP can be trusted. For that reason, I give little, if any, credence to their public statements. Just because BP discontinues their active response doesn’t mean that the coast has been cleaned up. All of the coastal states, as well as the federal government, must keep pressure on BP to continue clean-up operations.

The State of Louisiana says the recovery efforts so far have primarily focused on beaches, creating a problem since the majority of that state’s coast consists of wetlands. Beach remediation in Louisiana is largely unnecessary. Graves, who is leading Louisiana’s efforts to restore its wetlands, stated:

**BP has refused to do any type of proactive oil reconnaissance effort in Louisiana. They are refusing to go find the oil in areas adjacent to our wetlands, yet they walked and drove entire shorelines in Mississippi, Alabama, and Florida for years—where relatively little oil shored.**

Louisiana is also wary of the relationship between BP and the Coast Guard. Chief Howell says that while his agency “has federal oversight to oversee all operations,” the shoreline crews are BP contractors hired largely from Danos, a Louisiana company whose relationship with the company dates back to 2009, one year before the spill. It appears that BP has run the show relating to the cleanup efforts. That resulted in BP dictating federal agency actions. When you get down to it, BP supervising their cleanup contractors is like putting the proverbial fox in charge of the hen house. It was noted by Frank Galgano, an expert on coastline ecology at Villanova University, that one of the difficulties in treating oil in a wetlands environment is that exposure could cause more damage than letting it degrade naturally over time.

Dr. Galgano added that “if it never gets exposed again, it’s just going to decay.” He added that the fragility of the wetlands means “it’s not a very responsive or resilient environment.” So active dredging and other recovery techniques can actually create damage. Dr. Galgano stated further:

**There’s always unintended consequences when you change the natural system. While walking away from an active recovery phase may sound like someone is trying to get out of their obligation, maybe not. Sometimes the cure is worse than the disease.**

Louisiana’s wetlands may never fully recover, which creates a most serious problem for Louisiana since the wetlands are critically important in many respects. While Alabama has been severely damaged by the oil spill, our state doesn’t have the same amount of outlets as Louisiana. But the oil on our beaches and that still in the Gulf has caused severe economic and environmental damage and that damage will continue. The Gulf Coast Ecosystem Restoration Council, which includes the governors of all five coastal states, met in New Orleans August 28th to vote on a restoration plan that was finalized in May. The council will oversee the spending of 60 percent of any BP oil spill fines, 30 percent of which will be administered according to the plan.

Source: CSMonitor.com
Transocean, which has settled with the federal government, has filed a brief which pretty much supports the government’s position. The brief says that the CWA interpretation proffered by BP and Anadarko would unfairly shift all offshore spill liability to drilling contractors and upend the economics of the offshore industry.

Source: Law360

III. DRUG MANUFACTURERS FRAUD LITIGATION

AN UPDATE ON THE AWP LITIGATION

As we have periodically reported in prior issues, our law firm continues to pursue AWP (Medicaid fraud) litigation for the States of Alabama, Mississippi, Louisiana, Kansas, Utah, South Carolina, Hawaii and Alaska. This AWP (Average Wholesale Price) Litigation involves drug manufacturers cheating the states on prices charged for their drugs. Fortunately, we have successfully tried a number of these cases and we are now settling most of the remaining cases with numerous Defendants in the individual States. We are pleased to announce that the firm has recently completed the AWP cases in the States of Alabama and Hawaii and we are closing in on wrapping up the cases in South Carolina and Alaska. Our lawyers are still in full swing in the States of Louisiana, Mississippi, Kansas and Utah and hope to wind those cases up over the next few months.

We are pleased to announce that our firm recently has obtained new settlements totaling more than $112 million during the past several months. We are in the process of finalizing those settlements for several of the eight states listed above. To date, our firm has had settlements totaling more than $800 million in the AWP litigation for the eight states we represent. Also, we have a $31 million judgment on appeal. At the time of this writing, we are awaiting a verdict in an AWP case that has been tried in Mississippi.

These recent settlements vary in amounts depending upon the states’ usage of a particular company’s drugs in the Medicaid program. These settlements involve numerous companies, but each state’s claim is negotiated separate and independent of the claims of any other State. In addition, some states require attorney’s fees and costs to be completely separate negotiations. Therefore, these settlements can sometimes be very complex and become complicated.

Our firm views the representation of the Attorneys General in each of these eight states as a great honor. It is also a tremendous responsibility to insure that the claims of each State are adequately compensated by the drug companies that have falsely reported prices to the states’ Medicaid Programs. These cases have proven to be a tremendous public service for the citizens of each of the eight States we represent. It’s never acceptable for any corporation to cheat on government contracts. That’s especially true when it comes to a state’s Medicaid program. We will continue to represent each state until it is fully compensated for the alleged wrongdoing by the pharmaceutical companies involving the States’ Medicaid Programs.

In addition to the pharmaceutical companies reporting of false prices to the Medicaid Programs, of these eight states, our firm also handled litigation against a pharmaceutical wholesaler, McKesson, which allegedly increased prices an additional five percent on some 1,900 different types of drugs during a given time period that was within the same timeframe as the pharmaceutical companies were reporting false prices. We have settled with McKesson in the States of Kansas, Louisiana, Alaska and Hawaii. As is evident, the above-listed Medicaid Programs for these states were taken advantage of on the prices being reported by the pharmaceutical industry, and by some wholesalers, during the time periods from 1991-2010. As we have previously reported, these cases are just one example of why health care costs are spiraling out of control in this country. We believe these cases are a huge step in the right direction toward curing the abuse of inflated costs that we all must pay for in the health care industry.

At the moment, there is a flurry of settlement activity occurring in the States of Louisiana, Mississippi, Utah, and Kansas, where the bulk of the cases remain pending. Because of the favorable litigation history of these AWP cases, the trial courts are getting involved in pushing the parties to settle these cases, which has proven to be successful. We currently have AWP trials set in October 2013 and another five cases set for trial calendar 2014.

Our firm has had a number of lawyers working on the AWP litigation. In addition to Dee Miles, who has led the effort, those lawyers include Clay Barnett, Alison Hawthorne, Roman Shaull and Chad Stewart. We will keep our reader’s posted on any new developments that occur with this litigation by way of settlement or verdicts. In the meantime if you need any information on the AWP litigation, contact Dee Miles, who heads up our firm’s Consumer Fraud section. You can contact Dee at 1-800-898-2054 or by email at Dee.Miles@beasleyallen.com.

IV. LEGISLATIVE HAPPENINGS

ALEC TURNS BACK THE CLOCK ON PROSPERITY AND PROGRESS

We have written in several prior issues about the American Legislative Exchange Council (ALEC) and have attempted to expose this group for what it really is. A recent report sheds more light on ALEC. The Center for Media and Democracy (CMD) released this new report last month. The report, “ALEC at 40: Turning Back the Clock on Prosperity and Progress,” is most interesting. The report identifies and analyzes 466 ALEC bills that were introduced in the state legislatures so far in 2013. You won’t find any bills that are pro-consumer in any respect.

ALEC celebrated its 40th anniversary at a meeting in Chicago last month. At this meeting—as in all ALEC meetings—lobbyists from U.S. and foreign corporations were able to vote as equals alongside state legislators from around the country to adopt ALEC so-called “model” bills. These bills from ALEC will be distributed nationwide with little or no disclosure of their ALEC roots. For years, corporate America has worked through ALEC to get anti-consumer and anti-worker legislation passed in legislative bodies in several states.

This year, ALEC has gone to new lengths to hide its lobbying of legislators from the public eye. For example, it has taken to stamping all its documents as exempt from state public records laws, dodging open records with a “dropbox” website, among other tricks. After Watergate, many states strengthened their laws regarding open meetings and open records, but real sunshine on government is anathema to ALEC.

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Nick Surgey, CMD Director of Research, made this most astute observation:

When ALEC was born, Richard Nixon was president. Gasoline was 40 cents a gallon and the minimum wage was $1.60 an hour. Forty years later, ALEC legislators seem to be bankering for this bygone era, pursuing an agenda to roll back renewables, expand the...
use of fossil fuels, and suppress wages and benefits for even the lowest paid American workers.

In this recent report, the CMD identifies 466 ALEC “model” bills introduced so far in 2013, which pursue a “retrograde agenda.” Some of the key findings from the report are set out below:

- CMD identified 466 ALEC bills from the 2013 session. Eighty-four of these passed and became law. ALEC bills were introduced in all 50 states and the District of Columbia in 2013. The top ALEC states were West Virginia (25 bills) and Missouri (21 bills).

- Despite ALEC’s effort to distance itself from Voter ID and Stand Your Ground by disbanding its controversial Public Safety and Elections Task Force, 62 of these laws were introduced. Ten were Stand Your Ground bills and 52 were bills to enact or tighten Voter ID restrictions. Five states enacted additional Voter ID restrictions, and two states passed Stand Your Ground.

- CMD identified 117 ALEC bills that affect wages and worker rights. Fourteen of these became law. These bills included so-called “Right to Work” legislation, part of the ALEC agenda since at least 1979, introduced in 15 states this year. Other bills would preempt local living or minimum wage ordinances, facilitate the privatization of public services, scrap defined benefit pension plans, or undermine the ability of unions to organize to protect workers.

- CMD identified 139 ALEC bills that affect public education. Thirty-one of these became law. Only seven states did not have an ALEC education bill introduced this year. Among other things, these bills would siphon taxpayer money from the public education system to benefit for-profit private schools, including the “Great Schools Tax Credit Act,” introduced in 10 states.

- CMD identified 77 ALEC bills that advance a polluter agenda. Seventeen of these became law. Numerous ALEC “model” bills were introduced that promote a fossil fuel and fracking agenda and undermine environmental regulations. The “Electricity Freedom Act,” which would repeal state renewable portfolio standards, was introduced in six states this year.

- CMD identified 71 ALEC bills narrowing citizen access to the courts. Fourteen of these became law. These bills cap damages, limit corporate liability, or otherwise make it more difficult for citizens to hold corporations to account when their products or services result in injury or death.

- CMD identified nine states that have been inspired by ALEC’s “Animal and Ecological Terrorism Act” to crack down on videographers documenting abuses on factory farms. These so-called “ag-gag” bills erode First Amendment rights, and threaten the ability of journalists and investigators to pursue food safety and animal welfare investigations.

- CMD identified 11 states that introduced bills to override or prevent local paid sick leave ordinances, such as the one recently enacted in New York City. At least eight of these bills were sponsored by known ALEC members. Although ALEC has not adopted a preemption bill as an official “model,” the National Restaurant Association, an ALEC member, brought a bill to override local paid sick leave ordinances to an ALEC meeting in 2011, along with a target map and other materials.

ALEC has faced increasing scrutiny since CMD launched its ALEC Exposed project in July 2011, making the entire ALEC library of more than 800 “model” bills publicly available for the first time. Since that time, groups including Color of Change, Common Cause, Progress Now, People for the American Way, the Voters Legislative Transparency Project and others have put ALEC in the spotlight like never before.

One can learn lots about a group by checking out its supporters, its funding sources and its agenda of activities. When the corporate and legislator members of ALEC met last month they worked from a set agenda that in large part was very much anti-consumer and anti-worker. The corporate-sponsored workshops adopted legislative priorities for the coming year. Incidentally, some of the workshops carried a $40,000 pricetag for corporate sponsors. The following items were on the agenda:

- New ways were discussed to thwart local democratic control by prohibiting city or county governments from regulating genetically modified plant seeds. Members of the Agriculture Subcommittee—which is chaired by Jeff Case of CropLife America—promoted a bill to thwart local democratic control by prohibiting city or local governments from regulating genetically modified plant seeds. It should be noted that the bill would benefit many members of CropLife’s trade association and other big agri-business companies. Contrary to Jeffersonian principles of local democracy, for years ALEC has promoted bills to preempt local efforts to establish everything from paid sick days to municipal broadband.

- Presentations were made on how fracking America can lead to increased profits through exporting America’s natural gas. American Petroleum Institute representatives Jon Shore and Rebecca Heimlich gave a presentation on “Local Bans on Hydraulic Fracturing: Coming Soon to Your District.” Jason French of energy company Cheniere Energy presented to the Energy Subcommittee about “LNG [Liquid Natural Gas] exports: A Story of American Innovation and Economic Opportunity.”

- Nuclear energy and offshore drilling were discussed. Other energy-related agenda items included a presentation on “Nuclear Energy’s Continuing Role in Providing Baseload Electricity;” and another on “Developing America’s Offshore Energy Potential: Good Sense and Good Cents.” ALEC also considered a “Resolution in Opposition to a Carbon Tax.”

- More climate change denial was quite evident at the meeting. Members of the Energy, Environment, and Agriculture Task Force were part of a breakfast plenary session called “A Thoughtful Approach to Climate Science.”

- There were redoubled efforts to undermine renewable energy initiatives and continue to rely on coal and other fossil fuels. One workshop, which cost $40,000 to sponsor, was titled “The Economic Benefits and Political Challenges to Coal Exports.” Also on the docket was another bill to repeal renewable energy standards, the “Market Power Renewables Act,” which comes after the failure of the ALEC “Electricity Freedom Act” in 2013.

- Discussions took place about blocking GMO labeling laws and ordinances that would allow consumers to know if they are buying genetically engineered food. This is one of the goals of agribusiness and chemical firms that bankroll ALEC.

- There were updates to some of ALEC’s long-standing anti-union policies.

- Objections were renewed to linking the minimum wage to the consumer price index. ALEC renewed its “Resolution Opposing Increases in Minimum Wage Linked to CPI.”
• Privatization and outsourcing of toll roads were discussed. Members of the Transportation Subcommittee discussed “ALEC Principles on Toll Roads,” which backs privatization of toll rolls, and is particularly relevant to ALEC members Cintra, Macquerie, and Transurban (all foreign firms). Cintra and Macquerie have teamed up to cut multi-billion dollar contract deals to take control of highways in places like Indiana, basically granting companies a monopoly to help state government raise quick revenue in the short term, but in the long-term saddling consumers with higher fees and the state with lost revenue.

• New efforts were discussed to eliminate occupational licensing for any profession, which help ensure that people who want to call themselves doctors, long-haul truckers, accountants, or barbers meet basic standards of training and expertise to guarantee that consumers are safe and get what they pay for.

• Expanding virtual “schools,” which enriches ALEC’s online school corporate funders, such as K12 Inc. was discussed. The Illinois Policy Institute (IPI)—the State Policy Network affiliate in the state—made a presentation on “digital education.” IPI employees had pushed a Virtual Charter School plan in Illinois, apparently in collaboration with ALEC member K12 Inc., the nation’s largest provider of online charter schools (which has become notorious for poor educational outcomes and high profit margins). Additionally, at least two “workshops”—which carry a $40,000 pricetag—dealt with online education: “Modeling State Funding Formulas, K-12 Online Course Providers” and “Statewide Full-Time Virtual Schools: The Case for Parent Choice vs. Local Control.”

• More flawed testing for colleges was on the agenda. ALEC has long promoted increased reliance on high-stakes testing for elementary and high school students, which many educators say has altered the classroom dynamic and interfered with teaching. A bill discussed at the Chicago meeting would impose that same costly testing regime to the college level with “The Collegiate Learning Assessment Bill.”

In the past year, at least 49 global corporations have dropped their ALEC membership, apparently recognizing that they don’t want their brands publicly associated with an organization that pushes such things as discriminatory voting laws and anti-worker legislation. ALEC has operated far under the radar of public opinion for far too long. It’s time for this powerful group to face the “light of day” and have its agenda fully disclosed for all to see. When you consider that most state legislatures, because of inadequate resources and staffing, have to depend on lobbyists for information, advice and counsel, it opens the door for groups like ALEC to have tremendous influence with them.

Sources: CMD Release and Report

V. COURT WATCH

JUDGE ORDERS SETTLEMENT IN D.C. METRORAIL CRASH UNSEALED

U.S. District Judge Reggie Walton has ordered the unsealing of settlement agreements involving a deadly Metrorail crash in Washington D.C. Judge Walton says the 2009 Red Line crash, which killed nine people, represents “a matter of significant public concern” and that the public should have access to court records. The Washington Post, which reported on Judge Walton’s decision, sought access to the settlement agreements and other documents. The crash killed the train operator and eight passengers and reportedly is the deadliest in Metro’s history.

The transit agency settled lawsuits by families of the crash victims, but had refused to reveal the dollar amounts and fought to keep the settlement agreements under seal. Certain details, such as private medical information, are subject to redaction. A Metro spokesman says the transit agency is reviewing the Court’s ruling. I believe that the court’s position is correct. Confidentiality in settlements dealing with significant safety issues that affect the public are not good. However, when insurance companies make confidentiality a condition of settlement, that makes it tough for an injured person or the family of a deceased breadwinner to say no to a good monetary offer of settlement. We have clients on a regular basis who are put in that position.

Sources: Insurance Journal and The Washington Post

$11 MILLION OIL RIG COLLAPSE AWARD UPHeld ON APPEAL

A Texas appeals court last month rejected Stewart & Stevenson LLC, an oilfield equipment manufacturer, which had contended that a jury should have been allowed to consider Apache Corp.’s contribution to a Louisiana oil rig collapse that resulted in an $11 million judgment in favor of an injured worker. The First District Court of Appeals said that Stewart & Stevenson had not shown Apache exercised enough control over independent contractor Key Energy Services Inc.’s operation of the rig prior to the accident at issue to be considered a “responsible third party” for liability purposes. The appeals court said in its opinion:

[To] be liable for exercising actual control, a premises owner or general contractor must have had the right to control the means, methods or details of the independent contractor’s work to the extent that the independent contractor was not entirely free to do the work its own way. The control must relate to the injury that the negligence causes.

Brady Foret, an employee of Key Energy, who was 25 at the time of the incident, fell more than 80 feet from the rig, which had been slowly sinking in Louisiana swamps in the days leading up to the collapse. Although Apache owned the well that was being developed at the site, under Louisiana law it could not be held responsible for the accident. Foret had sued Stewart & Stevenson in Houston on the theory that the company performed shoddy work on the rig’s support mast, which failed during the accident. Key Energy, which had been providing well completion services at the site, was also named in Foret’s suit.

Stewart & Stevenson argued that even though Apache couldn’t be named as a defendant in the suit, a jury ought to nonetheless be able to consider the extent of Apache’s alleged role in the accident when apportioning liability. According to Stewart & Stevenson, Apache was aware of deteriorating conditions at the well site before the accident but refused to shut down operations to adjust the teetering oil rig because of the expected cost of repairs.

Stewart & Stevenson claimed that Apache knew that Key Energy employees were attempting a risky maneuver to redistribute weight on the rig by adjusting guy wires in an effort to stabilize the mast when the collapse occurred. But the trial court refused to grant Stewart & Stevenson’s requested jury instruction, and the jury found that the company was largely responsible for the accident, leaving it responsible for the entire $10.7 million jury verdict. The appeals court upheld the lower court’s decision, saying that Apache’s ability to start or stop work and receive progress reports from subcon-
tractors was not enough to prove it controlled the specific negligent activity that caused the accident. The court, in its opinion, said:

Here, although several witnesses testified that it was improper to adjust the guy wires to correct a rig misalignment, there is no evidence in the record that Apache... directed or controlled Key Energy's use of the guy wires.

The appeals court also noted that problems with the rig's sinking foundation were obvious to Key Energy, which was included in the trial court's charge as a potentially responsible third party. In that regard, the appeals court said:

[A]n independent contractor is generally expected 'to take into account any open and obvious premises defects in deciding how the work should be done, what equipment to use in doing it, and whether its workers need any warning.'

The case is Stewart & Stevenson LLC v. Foret, which is in the First District Court of Appeals for the State of Texas. Source: Law360

**FLORIDA TO FILE SUIT OVER GEORGIA’S WATER USE IN THE U.S. SUPREME COURT**

The state of Florida is filing suit in the U.S. Supreme Court “to stop Georgia’s unchecked consumption of water that threatens the existence of Apalachicola fisheries and the future economic development of this region.” Gov. Rick Scott made the announcement in a news release August 13th. The suit, which Gov. Scott said will be filed this month, will seek injunctive relief from Georgia’s use of water from the Chattahoochee and Flint River basins. Gov. Scott, explaining the purpose of the lawsuit said:

This lawsuit will be targeted toward one thing—fighting for the future of Apalachicola. This is a bold, historic legal action for our state. But this is our only way forward after 20 years of failed negotiations with Georgia. We must fight for the people of this region. The economic future of Apalachicola Bay and Northwest Florida is at stake.

According to a release from the Florida Department of Environmental Protection (FDEP), the metro Atlanta area primarily gets its water from the Chattahoochee River with withdrawals totaling 360 million gallons per day. FDEP said that rate is expected to nearly double to 705 gallons by 2035. Significantly, the National Oceanic and Atmospheric Administration (NOAA) declared a fisheries disaster last month for Apalachicola Bay oysters, which traditionally supplies 90 percent of Florida’s oysters and 10 percent of the U.S. harvest. The NOAA declaration cited lack of fresh water to the Bay as the primary cause for the poor oyster harvests, which have declined nearly 60 percent this year. Alabama and Florida have each previously challenged Georgia’s use of water from Lake Lanier and the river basins unsuccessfully. I have wondered why this matter hasn’t been resolved by a court since it’s been going on for a long time.

Jennifer Ardis, press secretary for Alabama Gov. Robert Bentley, said that “Alabama will consider all available options to protect our right to a fair share of the water in the Chattahoochee River.” The governor said he couldn’t “comment on any future actions that Alabama may take,” but that he would “continue to work to ensure that our citizens get their fair share of the water.” This is an extremely important matter for Alabama and especially for the counties in Southeast Alabama. Source: AL.com

**MEDTRONIC LOSES PREEMPTION BID IN SUIT OVER BONE GRAFT DEVICE**

An Arizona federal judge last month rejected Medtronic Inc.’s arguments that federal law preempted a personal injury lawsuit involving claims that the company promoted off-label use of its bone graft substitute. U.S. District Judge G. Murray Snow granted in part and denied in part Medtronic’s motion to dismiss Cristina Ramirez’s lawsuit. It was contended in the lawsuit that she has suffered from back pain since undergoing a lumbar fusion procedure involving the company’s Infuse bone graft substitute. Ms. Ramirez sued Medtronic in March for fraud, failure to warn, defective design, misrepresentation, negligence and breach of express warranty. The judge found that the refill, however, contained a mixture of her medication and another drug contained in similar pills. Ms. Morgan experienced physical problems, including swallowing of her face, hives, painful scales and hyperpigmentation around her mouth and eyelids. About two weeks after the prescription was filled, an employee of the pharmacy informed Ms. Morgan that her last refill had been partially filled with another medication.

Ms. Morgan sued Publix Super Markets, Inc. Publix moved for summary judgment, arguing that Morgan could not meet her burden of proof under the Alabama Medical Liability Act (AMLA) because she had not identified any expert qualified to testify that the Publix pharmacist breached the applicable standard of care. Ms. Morgan argued that Publix’s negligence was so apparent that a layperson could understand it without the assistance of expert testimony. The trial court granted the motion, and Morgan appealed.

The Supreme Court reversed and sent the case back to the trial court. The Court stated in the opinion that any person who has ever had a prescription filled has a general understanding that the law requires that certain medications be dispensed by licensed pharmacists. The Court held that “it is unnecessary for a Plaintiff prosecuting an AMLA claim based on a pharmacy’s filling his or her prescription with the incorrect medication to put forth expert testimony establishing the standard of care and a breach thereof because the want of skill or lack of care in incorrectly filling a prescription is so apparent as to be within the comprehension of the average layperson without the assistance of expert testimony.” The case is Morgan v. Publix Super Markets, Inc.

**EXPERTS NOT ALWAYS NEEDED IN AMLA CASES**

The Alabama Supreme Court issued an opinion last month, in a case of first impression, that dealt with a misfilled prescription. The Plaintiff in the case before the court, Michelle Morgan, went to the pharmacy at a Publix store to refill her prescription for amlodipine, a medication used to treat hypertension. The refill, however, contained a mixture of her medication and another drug contained in similar pills. Ms. Morgan experienced physical problems, including swelling of her face, hives, painful scales and hyperpigmentation around her mouth and eyelids. About two weeks after the prescription was filled, an employee of the pharmacy informed Ms. Morgan that her last refill had been partially filled with another medication.

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Medtronic sought to have the complaint dismissed on the grounds all of Ms. Ramirez’s claims are preempted by the Medical Device Amendments to the Food Drug and Cosmetic Act (FDCA), which give the FDA extensive control over how an FDA-approved medical device is manufactured and marketed. The judge found that the majority of the Plaintiff’s claims are not preempted by federal law. Manufacturers who violate federal safety laws should not be allowed to evade state tort liability to injured patients.
Judge Snow ruled that while physicians can legally use medical devices for purposes other than their FDA-approved use—known as “off-label” uses—a medical device’s manufacturer can’t actively promote those off-label uses. In her complaint, Ms. Ramirez accuses Medtronic of inducing physicians to employ Infuse for off-label uses by promoting them in journal articles and advertisements, despite being aware of potentially severe side effects. Medtronic argued that the MDA and FDCA preempted all of Ms. Ramirez’s state common law claims. But Judge Snow concluded that Ms. Ramirez’s claims that trace her doctor’s use of Infuse to the company’s promotion of off-label uses for the product are not preempted by federal law because the FDA explicitly prohibits off-label promotion. The judge’s order stated that those claims can be pursued under state law. The order said:

When Medtronic allegedly violated federal law by engaging in off-label promotion that damaged the plaintiff and thereby misbranded the Infuse device, it departed the realm of federal regulation and returned to the area of traditional state law remedies.

But Judge Snow ruled that Ms. Ramirez’s theory of negligence that relies on Medtronic’s alleged failure to comply with MDA and FDCA standards is preempted because the responsibility for enforcing those laws lies exclusively with the federal government. The judge also dismissed all the portions of Ramirez’s claims that contain allegations of harm solely based on her doctor’s off-label use of Infuse, absent any off-label promotion by Medtronic. The order said:

Without the core allegation of off-label promotion, Ramirez’s claims that the labeling and information provided with Infuse were incomplete and should have contained additional health or safety information amount to attacks on the FDA approval process.

Judge Snow dismissed Ms. Ramirez’s breach of express warranty claim without prejudice, saying she did not adequately plead that Medtronic targeted her directly with its off-label promotions for Infuse.

Ms. Ramirez is represented by Kent L. Klaudt, Cecilia Han, Lisa J. Cisneros, Michael P. Stark and Wendy R. Fleishman, lawyers with the Lieff Cabraser Heimann & Bernstein law firm. The case is Ramirez v. Medtronic Inc. et al., which is in the U.S. District Court for the District of Arizona.

Source: Law360

**NFL SETTLES PLAYERS’ CONCUSSION LAWSUITS**

The NFL has reached a tentative $765 million settlement over concussion-related brain injuries among its 18,000 retired players, agreeing to compensate victims, pay for medical exams and underwrite research. A federal judge announced the agreement Aug. 29, which came after months of court-ordered mediation. More than 4,500 former athletes—some suffering from dementia, depression or Alzheimer’s that they blamed on blows to the head—had sued the league, accusing it of “concealing the dangers of concussions and rushing injured players back onto the field while glorifying and profiting from the kind of bone-jarring hits that make for spectacular highlight-reel footage.”

The NFL has long denied any wrongdoing and insisted that safety has always been a top priority. Under the settlement, individual awards would be capped at $5 million for men with Alzheimer’s disease; $4 million for those diagnosed after their deaths with a brain condition called chronic traumatic encephalopathy; and $3 million for players with dementia. Any of the approximately 18,000 former NFL players are eligible under the terms of the settlement.

Senior U.S. District Judge Anita Brody in Philadelphia will have to approve the settlement. Apparently, the terms of the settlement mean the NFL won’t have to disclose internal files about what it knew about concussion-linked brain problems and when they knew it. The workings of the league’s Mild Traumatic Brain Injury Committee, which was led for more than a decade by a rheumatologist, may remain with the NFL. Interestingly, the NFL has taken the position in this case that individual teams bear the chief responsibility for health and safety under the collective bargaining agreement, along with the players’ union and the players themselves.

Riddell and related entities such as Easton-Bell Sports Inc. are not part of the NFL settlement. The NFL’s settlement, if approved, will leave Riddell Inc. as the litigation’s sole remaining target. Any damaging discovery revelations in this case would hurt the helmet manufacturer, not just in this case, but in all current and future lawsuits brought by college and high school players, as well as players at the youth-league level. The Plaintiffs claim that Riddell, like the NFL, failed to warn them that concussions present long-term risks to brain health. I would not be too surprised if Riddell settles with the Plaintiffs in the current case.

Sources: Bigstory.ap.org and Law360

**VI. THE NATIONAL SCENE**

**HILLARY CLINTON URGES LAWYERS TO FIGHT VOTER-RIGHTS SETBACKS**

Former Secretary of State Hillary Clinton is taking a strong stand against restricting the rights of U.S. citizens to vote. In a speech to the American Bar Association (ABA) last month, she urged the members of the Association to fight legislation restricting voting access. The lawyers were urged to represent voters who face discrimination following the U.S. Supreme Court ruling that overturned a key section of the Voting Rights Act. This call to action was made at the ABA’s annual house of delegates meeting, during which Ms. Clinton received the 2013 ABA medal for her service to jurisprudence. She pointed out that in the months following the Supreme Court’s June decision to strike down Section 4 of the Voting Rights Act, which determined which states and counties had to seek federal review before changing their voting procedures, there has been an “unseemly rush” to enact laws that will make it harder for millions of Americans to vote.

Ms. Clinton told the group of lawyers that this year alone, 80 bills that would restrict voting rights have been introduced in 30 states. Although not all of them are based on race, many will disproportionately affect black, Latino and young voters. Lawyers were urged to fight back. Ms. Clinton had this to say to the ABA delegates:

You know the law. You speak the language. You can harness its authority. No country has a richer tradition of lawyer-citizens. Tell [legislators] that our government cannot fully represent the people unless it has been fairly elected by them.

I agree with Ms. Clinton that lawyers around the country can scrutinize those proposed bills, look at what’s happening in their communities and work with their local bar associations to defend voter rights. The ABA was also commended for filing an amicus brief in the Supreme Court case, which urged the justices to fully uphold the Voting Rights Act. We have a duty to protect folks in this country who are being discriminated against because of their race.

In her tenure as Secretary of State, Ms. Clinton said she “saw firsthand that how we protect our freedoms here at home gives us
standing ... to defend human rights and democracy abroad.” As many nations are holding democratic elections for the first time and citizens in those nations are risking their lives to visit the polls, she pointed out that they look to the U.S. as a model. Meanwhile, in the United States, one-fourth to one-third of Americans aren’t registered to vote—a situation that would only be made worse by imposing further obstacles, Ms. Clinton was critical of such moves as the plan to purge Florida’s voter rolls and regulations that would allow a gun license, but not a college-issued student ID card as a valid form of voter identification. She added:

**Unless the hole opened up by the Supreme Court ruling is fixed ... citizens will be disenfranchised and victimized by the law. It’s up to citizens and those lawyers who are willing to stand with them. Persuading a grid-locked Congress will not be easy, but it doesn’t mean we should walk away.**

Lots of folks don’t realize, or may have forgotten, that Hillary Clinton was once a very good and successful lawyer. In 1979, she became the first female associate at the Rose Law Firm in Little Rock, Ark. In the 1980s, she was named chair of the ABA’s commission on women, which led to greater equality for women in the legal profession. ABA President Laurel Bellows, before awarding Ms. Clinton the ABA Medal, said:

_She transformed the legal profession for women. That committee’s work led to the law-firm environment we expect today, including equal pay, parental leave and the greater possibility for advancement among women attorneys._

In addition to speaking out on this most significant issue before the ABA, Ms. Clinton has also been critical of the Supreme Court’s ruling during other recent public appearances. She is absolutely correct when she says the high court’s ruling will have an adverse effect in local and state elections. By invalidating “pre-clearance” she pointed out that the high court has effectively shifted the burden back onto the citizens alleging discrimination.

Source: Law360

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**VII. THE CORPORATE WORLD**

**JPMorgan Is Being Investigated By The Justice Department**

JPMorgan Chase is currently under federal criminal investigation over its sale of mortgage securities. This makes the bank, which is the biggest U.S. bank by assets, the first large financial institution to face criminal sanctions over securitization practices that contributed to the 2008 financial crisis. The Justice Department had previously told JPMorgan in May that prosecutors had “preliminarily concluded” that the bank violated civil securities laws related to mortgage securities it packaged and sold from 2005 to 2007. JPMorgan has already been sued over similar practices by the New York Attorney General’s office, and has settled similar cases brought by the Securities and Exchange Commission (SEC).

Other large financial groups also have disclosed in securities filings they are under U.S. investigation for their dealings in mortgage securities. Criminal investigations are underway against some banks, introducing the possibility that criminal charges against a major financial institution for mortgage-related conduct could be filed. This is most significant because prosecutors’ and securities regulators’ past statements had suggested that pre-crisis bad behavior didn’t necessarily “equate to criminal wrongdoing.”

JPMorgan has disclosed a number of expected enforcement actions that have been broadly mentioned by the bank and its chief executive and chairman, Jamie Dimon. But the recent disclosure gives much more detail. Once finalized, the enforcement orders may further damage the bank’s already-battered reputation and lead to heightened scrutiny of its practices. The Consumer Financial Protection Bureau (CFPB) is investigating JPMorgan’s collection and sale of delinquent consumer credit card debt, including its use of sworn documents to pursue bad debts. The California Attorney General’s office has sued the bank over similar practices.

The Office of the Comptroller of the Currency (OCC) told JPMorgan it will punish the lender for its credit card collections practices and use of allegedly dubious documents, including for potentially cheating active-duty members of the military under the Servicemembers Civil Relief Act. JPMorgan has previously settled cases under the servicemembers act related to home mortgages. But that isn’t the end of problems for the big bank. The OCC and CFPB have also told JPMorgan that they will formally discipline the bank for “unfair or deceptive” practices related to identity theft products it previously sold to consumers. Interestingly, JPMorgan has increased its estimate of possible legal losses in excess of its reserves by $800 million to $6.8 billion.

Efforts by JPMorgan to settle the Department of Justice (DOJ) lawsuit may be complicated by a 2003 settlement the bank reached with federal securities regulators. In July of that year, JPMorgan settled claims by the SEC involving violations of securities laws in connection with its dealings with Enron, the failed energy company. As part of that settlement, the bank pledged to refrain from violating federal securities laws. A federal lawsuit alleging violation of federal securities laws that JPMorgan had pledged not to break in the years immediately following a previous settlement should really complicate things for the bank. It does not bode well for the bank and its bosses.

Source: HuffingtonPost.com

**Pharmaceutical Insiders Are Encouraged To Report Drug Company Kickbacks Or Bribery For Statutory Whistleblower Rewards**

When most folks think of a whistleblower, they often think of governmental employees exposing alleged government corruption. But, there are many different types of whistleblowers, and the most common of them come from the private sector, rather than from the government. In fact, private sector whistleblowers actually have a greater opportunity for financial gain than those exposing government misconduct.

Through a _qui tam_ action, filed under the False Claims Act, a qualifying whistleblower with evidence of fraud against the government can sue the wrongdoer on behalf of the United States and collect a substantial portion of statutory damages and penalties as a result of bringing the fraudulent conduct to light. In _qui tam_ actions, the government has the right to intervene and get actively involved. But, if the government declines to get in, the private Plaintiff may proceed with the lawsuit on his or her own.

The Corporate Whistleblower Center is now urging pharmaceutical company insiders to come forward and report fraud against the federal government. Based on what we have learned in litigation, the drug companies are prime suspects for fraudulent conduct in governmental contracts.

Due to the success of the Federal False Claims Act, a growing number of states have
enacted state versions of the False Claims Act, which permit whistleblowers to recover a fee for reporting fraud against a particular state. You might ask, who can be a whistleblower? Any person who is an original source, having independent personal knowledge of the false claims against the government may qualify as a whistleblower. Specifically, physicians, pharmaceutical representatives, and any other drug industry insider make excellent qui tam Plaintiffs in the right set of circumstances.

For example, a person who possesses significant and documented proof of a drug maker or pharmaceutical company engaging in any type of kickback or pricing scheme to persuade medical doctors and other health care providers to prescribe or dispense a medication at the expense of a state or the federal government may qualify as a whistleblower.

If any of our readers are aware of this type fraud or of any kind of fraud that’s being perpetrated on either the state or federal government, they can contact Alison Hawthorne, a lawyer in our firm’s Consumer Fraud section, at 1-800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.

Source: PR Web

**PHILIPS SUBSIDIARY SAID TO HAVE DISCRIMINATED AGAINST WHISTLEBLOWER WHO REPORTED PRODUCTS LINKED TO FIRES**

Denise Rock, a former salesperson with Lifeline Systems, has sued the company claiming that she was unfairly terminated for raising concerns over allegedly fatal product faults. It’s alleged that the Philips subsidiary began discriminating against her when she reported to company lawyers that a medical alert device manufactured by another subsidiary, Health Watch, was likely the source of a fire that killed a number of users.

In this suit, filed last month in U.S. District Court in Boston, Ms. Rock says she was let go from the Framingham-based company in June 2012 shortly after filing discrimination charges with the Massachusetts Commission Against Discrimination (MCAD) and with the US Equal Employee Opportunity Commission (EEOC).

The complaint contends that in September 2007, Ms. Rock learned from a manager at Health Watch about a user of the medical alert device dying in a fire likely caused by the equipment. There were also reports that six other persons (subscribers) had died under similar circumstances. The complaint states further:

Ms. Rock discovered that there were problems with the transmitting devices. For a variety of reasons, the transmittal devices bad (and may still have) a tendency to overheat, catch fire and cause the homes of elderly residents to be engulfed in fires. On many occasions these fires have resulted in the deaths of the elderly subscribers. However, in many cases the cause of the fires was hidden by the fact that the home and the device had been destroyed by the fire.

The complaint alleges that Ms. Rock immediately reported the issue relating to the death to company lawyers, one of whom was the Philips Ethics Officer. Ms. Rock was allegedly subjected to discriminatory practices for a period of time before she was finally let go. Before her being fired, she had complained to Philips’ lawyers that she was being retaliated against for reporting the fire deaths to the company.

After first reporting her findings to company lawyers, it appears that Ms. Rock continued to receive reports of injuries. The complaint claims that in early 2009 she “became aware that at least one patient had died due to being strangled by a Lifeline cord.” It’s alleged that in October 2009, another salesperson informed her that units owned by Philips LifeLine’s (another subsidiary) “also had issues with catching fire” and were the subject of a report. It appears further that Ms. Rock made other attempts to inform the company that Philips LifeLine units were causing fires, and deaths. Ms. Rock was ultimately fired. It will be most interesting to see how this case works out. If the allegations in this suit are true, this company may be in “serious trouble.”

Stay tuned!

Source: openmediaboston.org

**MORE JUSTICE DEPARTMENT CASES OVER FINANCIAL CRISIS MAY BE ON THE WAY**

It appears that in the coming months U.S. Attorney General Eric Holder will be filing more cases related to the economic meltdown. The Justice Department is near to reaching decisions on a number of probes involving large financial firms. The Wall Street Journal reported last month on the prospects of this new wave of litigation. “Anybody who’s inflicted damage on our financial markets should not be of the belief that they are out of the woods because of the passage of time,” the Attorney General told the Journal in an interview. But he declined to discuss specific cases or say when the cases would be announced, the Journal’s report said. It has been reported that Attorney General Holder may be leaving office before the end of his term. But he told the Journal that he wouldn’t leave the job before making major charging decisions on cases stemming from the 2008 financial collapse.

Attorney General Holder’s comments came as the U.S. government was taking steps to hold companies responsible for breaking the law in financing the housing bubble that led to the financial crisis. He had said last month that the Financial Fraud Enforcement Task Force he set up would continue to take an aggressive approach to combating financial fraud and uncovering abuses in the residential mortgage-backed securities market.

Recent disclosures from some of Wall Street’s biggest financial firms, including JPMorgan Chase & Co and Bank of America Corp, have shown that the federal government is pursuing new prosecutions of possible abuses in the mortgage-backed securities industry. Attorney General Holder said in the Journal interview:

> *These are complex cases that require enormous amounts of effort to put together, but we are at a point—as you’ve seen, I think, recently—where the results of that difficult work is starting to bear fruit. No individual, no company is above the law. We don’t investigate companies based on who a CEO is, but we don’t avoid investigating companies based on who the CEO is, either.*

It will be interesting to see what ultimately comes out of the Department of Justice and whether more suits will be filed. It’s quite obvious that there have been a number of companies that played fast and loose with the law. Those companies that broke the law should be held accountable.

Source: Wall Street Journal and The Claims Journal

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**VIII. PRODUCT LIABILITY UPDATE**

**FIRST TOYOTA SUDDEN UNINTENDED ACCELERATION CASE CAUSED BY ELECTRONIC MALFUNCTION TO BE TRIED IN OKLAHOMA**

The first trial involving personal injury and wrongful death claims related to Toyota’s sudden unintended acceleration (SUA) problems is set for October 7th in a state
court in Oklahoma City, Okla. This will be the first case to be tried involving SUA caused by electronic throttle control defects in the United States. Lawyers from our firm will try this case. We contend that the SUA was caused by a malfunction of the vehicle’s electronic throttle control system. The lack of a brake override system that would have allowed the driver to slow or stop her vehicle from speeding out of control is also a part of the Plaintiffs’ contentions in this case.

Jean Bookout was driving her 2005 Toyota Camry on September 20, 2007, when the vehicle suddenly accelerated out of control. Ms. Bookout sustained severe injuries when the sudden unintended acceleration resulted in a crash. Barbara Schwarz, a passenger in the car, who was one of Ms. Bookout’s best friends, was killed in the crash. We represent both Ms. Bookout and the Schwarz family in the case.

It’s significant that this case will be the first personal injury and wrongful death case to go to trial where there is a claim based on electronic throttle malfunction. We are making that claim in the case along with the claim involving the lack of a brake override system. The trial will also be the first where both of these claims are involved. Incidentally, our firm was one of the first in the country to file a lawsuit against Toyota alleging that SUA caused a personal injury and wrongful death.

As a background for the Oklahoma case, it might be good to do a brief review. Beginning in 2008, Toyota recalled millions of vehicles worldwide when drivers began reporting vehicles would suddenly speed out of control and they were unable to slow down or stop. This resulted in numerous crashes resulting in serious injury and deaths. Toyota tried to blame the problem on faulty floor mats that they said trapped the accelerator pedal, and also sticky accelerator pedals. We are convinced based on our investigation that the problem is related to a defect in the vehicles’ electronic throttle control system.

There are primarily three types of ongoing cases involving Toyota and its SUA problem. Those are the Multidistrict Litigation (MDL) consolidated under U.S. District Judge James Selna in Santa Ana, Calif.; a Judicial Council Coordinated Proceeding (JCCP) for California State cases, which was under the direction of Judge Anthony Mohr, but now is being overseen by Judge Lee Smalley Edmon of the Los Angeles Superior Court; and the individual personal injury, product liability and wrongful death cases, some of which are part of either the MDL or the JCCP, with the rest being litigated in various state courts on an individual case basis.

Consolidating the cases into a multidistrict litigation (MDL) allows the committee overseeing the process to put more pressure and focus on moving the case forward, resulting in the cases moving more quickly to resolution. Lawyers coordinate the litigation and work together on issues of science and discovery. Lawyers involved in the Toyota SUA litigation can use evidence uncovered in the MDL discovery process in individual state cases and in the JCCP cases. Judge Selna has invited Judge Mohr and Judge Edmon, and occasionally other judges, to sit at the bench with him during hearings involving significant issues.

A settlement agreement was reached in December 2012 between Plaintiffs’ lawyers and Toyota valued at $1.6 billion to settle consumer claims of economic losses stemming from the SUA problems. This settlement is awaiting final approval by Judge Selna. The Plaintiffs Steering Committee (PSC) recently asked for permission to add four more lawyers to its ranks. Most of the new PSC lawyers are representing Plaintiffs in state courts. Judge Selna approved the Steering Committee’s request.

A few other lawyers involved in the litigation will join the short list of those already approved to access the automaker’s highly secretive source code software, which many believe could explain the cause of sudden unintended acceleration in Toyota vehicles. Toyota keeps the source code under tight surveillance at a facility in Columbia, Md. Toyota’s lawyers say the code holds sensitive trade secrets that must be kept out of the hands of competitors. The PSC originally asked that seven firms be granted access to the source code. But Judge Selna restricted access to one individual from each of those firms in order to protect the code and increase accountability.

Graham Esdale was the first member from our firm to be granted access to the source code. Since then he has been inside the source code room in Maryland. In an effort to help with trial preparation, we asked that another of our lawyers be allowed access, and Judge Selna granted our request and approved Ben Baker for access. Our main focus at the juncture is getting ready for the case to be tried in Oklahoma. Cole Portis, Ben Baker, Graham Esdale and this writer, along with Larry Tawwater from Oklahoma City, will try this case for our clients. At press time, the Toyota trial team consisted of eight very good lawyers and their support staffs, all from different firms. We learned long ago that spending money for defense of cases by Toyota is no problem for the carmaker.

**Anti-tank Weapon Case Filed By The Firm**

Our firm is handling a very interesting case arising out of the death of an American soldier in Afghanistan. We represent the widow and mother of a young soldier from Florida who was stationed in Afghanistan and who was killed during a live-fire training exercise in the Afghan mountains. The young soldier was receiving instruction and training on the use of an AT4 anti-tank weapon when it malfunctioned. The AT4 is a shoulder-fired rocket that comes pre-installed in a fiberglass launch tube. Manufactured for the U.S. military in Sweden by Saab Bofors Dynamics, the AT4 launch tube is built to only be used one time and then discarded. In our case the tube exploded upon launch of a rocket during a training exercise and killed our clients’ husband and son.

This case will be particularly complex, not only because of the explosive design of this weapon, but because of the logistics of obtaining evidence and because the manufacturer will surely seek protection from liability under what is referred to as the “government contractors defense.” Manufacturers claiming protection under this defense typically must show that a product was manufactured strictly according to government specifications and that the government was aware of all the potential hazards and failure modes. Mike Andrews, a lawyer in our Personal Injury/Products Liability Section, is the lead lawyer in this case. We will keep you updated as this case progresses through the judicial system.

**Jeep Grand Cherokee Rollover Death Case Filed In Arkansas**

Lawyers in our firm are preparing a very important case for trial in Benton County, Arkansas. We represent the parents of a 17-year-old girl who was killed in a tragic car wreck on her way home from an after-school activity. She was driving a 2002 Jeep Grand Cherokee along an interstate in Benton County when another driver merged onto the interstate and cut her off. When the other driver (who was speeding as he entered the interstate) struck our client’s Grand Cherokee, both vehicles rotated into a grass median and across into oncoming traffic. Although the other driver’s car spun and came to a stop without injuring the driver, the Grand Cherokee rolled over.
several times. Our client’s daughter was wearing her seatbelt, but was ejected from the Jeep and died when she struck the pavement.

We filed suit against the at-fault driver and his employer (a local real estate company) based on his reckless conduct, and also against Chrysler and Key Safety Systems for the defective design of the seatbelt buckle installed in the Grand Cherokee. The primary complaint with the seatbelt buckle is that it is capable of unlatching in a rollover accident as a result of inertial forces. After removing buckles from several vehicles in salvage yards, we discovered that there are two versions of the buckle installed in the Grand Cherokee: one like the one in our vehicle, and another that includes a device to prevent inertial unlatching.

Although Chrysler and Key Safety claim the design worn by our client’s daughter is safe, we look forward to presenting evidence to a Benton County jury in October that a safer alternative design existed that would have prevented this tragedy. This case is being handled and will be tried by Mike Andrews from our firm, along with Sean T. Keith and Anna Betts, who are with Keith, Miller, Butler, Schneider & Pauline, based in Rogers, Arkansas.

**Accident Reconstruction is an Usef ul Litigation Tool**

Accident reconstruction is very important in litigation involving severe motor vehicle crashes and is used on a regular basis by lawyers in our firm’s Personal Injury/Products Liability Section. Vehicular accident reconstruction is the scientific process of investigating, analyzing, and drawing conclusions about the causes and events during a vehicle collision. Reconstructionist are employed to conduct in-depth collision analysis and reconstruction to identify the collision causation and contributing factors in different types of collisions. They look at the role of the driver(s), vehicle(s), roadway and the environment.

The accident reconstruction provides rigorous analysis that he or she, as an expert, can present at trial. Accident reconstructions are done in cases involving fatalities and when serious personal injury is involved. These reconstructions are often conducted by forensic engineers, specialized units in law enforcement agencies, or by private consultants who are usually engineers or former law enforcement officers.

In our cases, we hire qualified expert witnesses who reconstruct the accidents and then testify at trial. While there are times when an expert is not needed, a qualified Reconstructionist, who has specialized knowledge in this field, can really help the jury understand how the crash occurred in certain cases. Accident reconstruction experts are trained to map and diagram the scene, perform speed analysis, time and distance analysis, and vehicle crash analysis. They recreate the actual crash using data, gouge marks, evidence at the scene, as well as performing their own tests with vehicles or tractor trailers. Scene inspections and data recovery involves visiting the scene of the accident and investigating all of the vehicles involved in the collision.

Investigations involve collecting evidence such as scene photographs, video of the collision, measurements of the scene, eyewitness testimony, and considering depositions that have been taken. Additional factors include steering angles, braking, lengths of skid marks, use of lights, turn signals, speed, acceleration, engine rpm, cruise control and anti-lock brakes. Witnesses are interviewed during accident reconstruction, and physical evidence such as tire marks are examined.

Vehicle speeds are frequently underestimated by a driver, so an independent estimate of speed is quite often essential in accidents. Inspection of the road surface is also very important, especially when traction has been lost due to black ice, diesel fuel contamination or obstacles such as road debris. Data from an event data recorder also provides valuable information such as speed of the vehicle prior to a collision.

Accident reconstruction software is regularly used to analyze a collision and to demonstrate what occurred in an accident. Examples of types of software used by accident reconstructionist are CAD (computer aided design) programs, vehicle specification databases, momentum and energy analysis programs, collision simulators, and photogrammetry software.

After the analysis is completed, forensic engineers compile report findings, diagrams, and animations to form their expert testimony and conclusions relating to the accident. Forensic animation typically depicts all or part of an accident sequence in a video format so that juries can easily understand the expert’s opinions regarding that event. To be physically realistic, an animation needs to be created by someone with knowledge of physics, dynamics and engineering. When animations are used in a courtroom setting, they should be carefully scrutinized. A reliable animation must be based on physical evidence and calculations that embody the laws of physics, and the animation should only be used to demonstrate in a visual fashion the underlying calculations made by the expert analyzing the case.

Many of the big trucks operated on the highways today have the ability to record data from certain events with an Electronic Control Module (ECM). Trucks often have different engines, such as Cummins and Caterpillar, but most of the heavy trucks have electronic engine controls. A qualified and trained expert can analyze the electronic data that is recorded in the engine of the big truck. This information can be key evidence regarding the manner in which the driver applied the brakes and the speed of the truck, and can be used to reconstruct the collision.

The ECM is designed to warn the driver of problems and to prevent the engine from being damaged. Data is recorded if a “fault” occurs that indicates a sensor is below normal, such as oil temperature, fuel pump, coolant level and other levels that can ruin an engine if not noticed and corrected. This information or data can be recorded before a collision occurs.

Some of the diagnostic data can also be recorded when these sensors are damaged in the collision. The data must be downloaded by someone who has proper vehicle electronic diagnostic training. Such information can provide evidence of hard braking, trip history, speed, maintenance history and other data. The data recorded in the ECM and later downloaded can provide valuable information to safety directors of truck companies on a daily basis. It also can reveal data that is key evidence in Court for an expert witness who has reconstructed an accident.

If you need any additional information relating to accident reconstruction and the use at trial, contact Julia Beasley, a lawyer in our firm’s Personal Injury/Product Liability section, at 1-800-898-2034 or by email at Julia.Beasley@beasleyallen.com.

**IX. MASS TORTS UPDATE**

**Jury Returns a $2 Million Verdict In Vaginal Mesh Bellwether Case**

A West Virginia federal jury has found C.R. Bard Inc. responsible for injuries a woman suffered from a defective vaginal mesh implant. The jurors returned a $2 million verdict against Bard in the case. This was a bellwether trial in the multidistrict litigation (MDL). The jury found that Donna
Cisson had proven her design defect and failure-to-warn claims related to Bard's Avaulta Plus Posterior BioSynthetic Support System, which had eroded and caused severe internal injuries to Ms. Cisson after it was implanted to treat a pelvic organ prolapse. The jury awarded her $1.75 million in punitive damages in addition to a $250,000 compensatory award. The jurors found that Bard, the device maker, had shown a conscious indifference to patient consequences in developing the product.

Bard failed to convince the jury that Ms. Cisson knew and understood the dangers of the Avaulta Plus product implanted when she consented to the procedure. Bard claimed she knowingly assumed those risks, which is absolutely absurd. The verdict was reached after a 13-day trial. Bard says it will appeal.

The Cisson lawsuit is one of four bellwether cases in the West Virginia MDL and is the first to go to trial in federal court out of a group of suits brought by thousands of women over injuries caused by the Avaulta transvaginal mesh implants. These implants are used in the treatment of pelvic organ prolapse or stress urinary incontinence. Johnson & Johnson unit Ethicon Inc., Boston Scientific Corp. and Endo Pharmaceuticals unit American Medical Systems Holdings Inc. also face separate multidistrict litigation in West Virginia over their own implants. Ms. Cisson claimed that after being implanted with the Avaulta Plus product to treat her rectal prolapse, she suffered bleeding, spotting, rectal pain, bladder spasms and pain during sexual intercourse.

The symptoms were tied to Bard's use of pig-skin collagen in the mesh products, which the company knew increased the likelihood of chronic inflammation and adverse tissue reactions. Additionally, a thermoplastic polymer called polypropylene used in the products is prone to degradation and shrinkage once inside a patient. Ms. Cisson and other bellwether Plaintiffs each required invasive follow-up procedures to remove loose pieces of mesh that damaged their pelvic region. It should be noted that none of the manufacturers ever tested the transvaginal mesh implant products before putting them on the market. That, while true, is actually unbelievable!

In June, U.S. District Judge Joseph R. Goodwin had dismissed Ms. Cisson's claims for manufacturing defect, breach of express and implied warranty, and negligent inspection, marketing, packaging and selling, but he declined to dismiss her failure-to-warn claim under the learned intermediary doctrine. Judge Goodwin ruled that a jury would have to decide if Bard had properly advised Ms. Cisson's physician of the mesh product's risks. As we reported, the first trial of Ms. Cisson's case ended in a mistrial July 10 after an expert witness entered improper testimony regarding the removal of the products from the U.S. market. The second jury found in Ms. Cisson's favor on all but one count, and that being a ruling in favor of Bard on the husband's claim for loss of consortium.

Ms. Cisson is represented by Henry G. Garrand, Gary B. Blasingame, James B. Matthews III, Andrew J. Hill III and Josh B. Wages lawyer, with Blasingame Burch Garrard & Ashley. These lawyers did an excellent job for Ms. Cisson in this very important case. The case is Cisson et al. v. C.R. Bard Inc. in the U.S. District Court for the Southern District of West Virginia. For your information, the MDL is In re: C.R. Bard Inc. Pelvic Repair System Products Liability Litigation, which is in the same court.

Source: Law360

**BARD SETTLES SECOND VAGINAL MESH BELLWETHER CASE**

Shortly after the Cisson trial, C.R. Bard reached a settlement in the second bellwether case in multidistrict litigation (MDL) over the company's defective vaginal mesh implants. This came less than a week after the $2 million verdict in the trial mentioned above. The settlement took place on the first day of the scheduled trial before a jury was selected.

Ms. Queen was implanted with an Avaulta Solo Anterior Synthetic Support System. The device left her deformed, caused her significant mental and physical pain, and caused her other problems. The case was before U.S. District Judge Joseph Goodwin. The terms of the agreement are confidential.

The third bellwether trial in the litigation, involving plaintiff Linda Rizzo, is slated to begin in early October. A fourth bellwether trial is scheduled to start in November. Ms. Queen is represented by Henry Garrard III, Gary Blasingame, James Matthews III, Andrew Hill III and Josh Wages, lawyers with Blasingame Burch Garrard & Ashley, a firm located in Athens, Ga. The case is Queen et al. v. C.R. Bard Inc., in the U.S. District Court for the Southern District of West Virginia.

Source: Law360

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**AN UPDATE ON MEDTRONIC INSULIN PUMP PROBLEMS**

Beginning in April 2013, the Medtronic Paradigm® Insulin Pump has been the subject of a number of medical device safety alerts and recalls issued by its manufacturer and the U.S. Food and Drug Administration (FDA). The most serious of these notices include recalls of Medtronic MiniMed Paradigm Insulin Infusion Sets and Infusion Set Reservoirs.

During the week of April 17, 2013, the FDA issued a Class II recall of certain models of the Medtronic MiniMed Paradigm Insulin Infusion Pump, intended for use to deliver insulin to people with diabetes. Medtronic recalled the pumps because the pump's drive support cap may become detached from the pump case and protrude from the lower right side of the pump. When the pump is exposed to water, it may result in damage to the pump's internal electronics, which can prevent the pump's buttons from working properly or can cause the pump to alarm. The recall includes about 428,000 units distributed worldwide.

On June 7, 2013, the FDA issued a Class I Recall on certain models of the Medtronic MiniMed Paradigm Infusion Sets. A Class I recall is the most serious type of recall and involves situations in which there is a reasonable probability that use of these products will cause serious adverse health consequences or death. If insulin or other fluids come in contact with the inside of the tubing connector, it can temporarily block the vents that allow the pump to properly prime.

If the pump's vents are blocked, this can result in too much or too little insulin being delivered, which may cause hypoglycemia or hyperglycemia. In extreme cases, these conditions may cause loss of consciousness or death. The Paradigm infusion sets are intended for use with the Paradigm insulin infusion pump. Infusion sets are used by patients with diabetes who require administered insulin to maintain acceptable blood glucose levels.

On July 3, 2013, Medtronic sent an urgent medical device recall notice to its customers alerting them of problems with certain lots of MMT-326A and MMT-332A Reservoirs used with Paradigm Insulin Pumps. According to the notice, the recall was issued because of the potential for the reservoirs to leak. A leak in the reservoir may result in delivery of less insulin than intended. Also, a leak may lead to an insulin blockage in the infusion set, and a failure of the device to sound an alarm to notify patients. Medtronic says the defect is caused by abnormal wear.
on a tool used to manufacture reservoir stoppers. They are recalling all lots of reservoirs that contain stoppers manufactured with this tool.

Lawyers in our firm are currently investigating claims of serious injury or death as a result of a defective Medtronic Paradigm Insulin Pumps, Medtronic MiniMed Paradigm Insulin Infusion Sets and Medtronic Infusion Set Reservoirs. As a side note, some of those potential claims involve folks who were injured as a result of automobile accidents possibly caused by these devices. If you would like more information about this, please contact, Ted Meadows, a lawyer in our firm’s Mass Tort’s section, at 1-800-898-2034, or at Ted.Meadows@beasleyallen.com.

TYPE 2 DIABETES DRUGS MAY INCREASE RISK OF PANCREATIC CANCER

It has been reported that a commonly prescribed class of Type 2 diabetes drugs, known as incretin mimetics, may put users at risk for developing pancreatic cancer. This is according to new research published in the British Medical Journal. Incretin mimetics include medications known as GLP-1 receptor agonists and DDP-4 inhibitors. These drugs work by increasing the release of insulin after meals and by slowing absorption of food in the gastrointestinal tract. Brand name GLP-1 drugs include Byetta (exenatide), and brand name DDP-4 drugs include Januvia (sitagliptin).

Researchers at Johns Hopkins University found last February that people using the incretin mimetics Januvia and Byetta were twice as likely to be hospitalized for a serious pancreatic inflammation known as acute pancreatitis than those who used another class of type 2 diabetes medication. Two months later, a group of researchers analyzed data from the U.S. Food and Drug Administration (FDA) and discovered an increasing number of cases of pancreatitis, pancreatic cancer and thyroid cancer among patients taking various incretin mimetics.

The latest research, conducted by Dr. Peter Butler, chief of the division of endocrinology at the University of California, Los Angeles, involved studying the pancreases of people who had died of non-pancreas-related disease. Dr. Butler found that the pancreases of people who had used incretin mimetics were more likely to have precancerous abnormalities than the pancreases of people who used another class of type 2 diabetes drugs. Dr. Butler says what prompted him to conduct the study on human pancreases was an earlier study of his in which he and UCLA colleagues discovered that laboratory mice that were treated with Januvia developed enlarged pancreases and cellular changes in their pancreas that could result in cancer.

Type 2 diabetes drugs have included a number of warnings. In 2011, the FDA warned that studies showed that Actos increased the risk of bladder cancer, in particular in patients who used the drug long term. Actos is in a class of type 2 diabetes drugs known as thiazolidinediones, or TZDs. Avandia is another TZD, which in 2010 was severely restricted by the FDA after the drug was linked to fatal heart attacks.

The FDA announced in July that the safety labels for drugs Tradjenta and Jentadueto, both incretin mimetics, would be updated to include a warning that the medications have been associated with pancreatitis that in some cases has been fatal. Lawyers in our firm’s Mass Torts section are currently investigating cases involving pancreatic cancer in patients who have taken the drugs Byetta or Januvia. If you need more information, contact Frank Woodson or David Dearing, lawyers in the section, at 1-800-898-2034 or by email at Frank.Woodson@beasleyallen.com or David.Dearing@beasleyallen.com.

AN UPDATE ON THE BYETTA/JANUVIA LITIGATION

Our firm recently filed suit against the manufacturers of two popular medications used to treat Type 2 Diabetes Mellitus, Januvia and Byetta. Januvia (sitagliptin phosphate) is an oral medication first brought to market by Merck and Company in 2006. Byetta (exenatide synthetic) is an injected medication first released by Amylin Pharmaceuticals in 2005, and presently manufactured by Bristol-Myers Squibb Company. Both drugs have been associated with an increased risk of pancreatic cancer and thyroid cancer, yet neither drug warns of these risks.

The human body breaks down ingested sugars and starches into glucose, which is the basic fuel that energizes cells in the body. Insulin then delivers the glucose from the bloodstream into the cells. Type 2 Diabetes is a disease whereby the body either fails to produce enough insulin to deliver the glucose, or the cells for some reason refuse to receive the insulin. This breakdown in the insulin delivery system causes the blood to accumulate unhealthy levels of glucose (hyperglycemia), which can lead to a myriad of serious and potentially life threatening diabetic complications.

Januvia and Byetta both attempt to regulate blood sugar levels by increasing insulin production by the pancreas when blood sugar is high, such as after a meal, while at the same time attempting to reduce the amount of sugar produced by the liver. But stimulating the pancreas to create additional insulin can lead to serious pancreatic inflammation, known as pancreatitis. According to a study published in 2010 in Gastroenterology, the official publication of the American Gastroenterological Association, patients taking Januvia or Byetta were six times more likely to develop pancreatitis compared to those taking other drugs. Pancreatitis is a serious condition that can be fatal. It has also been shown to be a precursor to pancreatic cancer. This study also noted a marked increase in other cancers, including thyroid cancer among sitagliptin and exenatide users.

The Code of Federal Regulations requires a pharmaceutical manufacturer to warn of a drug’s potentially dangerous side effect “as soon as there is reasonable evidence of a causal association with the drug.” See: 21 CFR 201.57(c)(6). The manufacturers of Januvia and Byetta failed to adequately warn of the known and extremely dangerous cancer risks of these drugs and that put users at great risk. If you need more information on any of the above, contact David Dearing, a lawyer in our firm’s Mass Torts section, at 1-800-898-2034 or by email at David.Dearing@beasleyallen.com.

AN UPDATE ON THE MIRENA LITIGATION

Lawyers at Beasley Allen continue to evaluate and file Mirena claims involving migration with uterine wall perforation. Mirena, which is manufactured and sold by Bayer Healthcare Pharmaceuticals, Inc., is an intrauterine device (IUD) that is inserted into the uterus to release hormones to prevent pregnancy. Although Bayer has promoted Mirena as being safe and effective, more than 60,000 complaints have been made to the U.S. Food and Drug Administration (FDA) about Mirena since it was approved for use in the United States in December 2000.

Hundreds of Mirena lawsuits are currently pending in the Mirena multidistrict litigation (MDL), which is being presided over by the Judge Cathy Seibel in the United States District Court Southern District of New York. Roger Smith, who is in our firm’s Mass Torts section, serves on the Plaintiffs Steering Committee (PSC), was appointed by Judge Seibel. The PSC for the Mirena MDL is charged with overseeing the Mirena litigation as it progresses through the MDL/
federal court system. The next court conference is scheduled this month and will be held September 26th and it will address litigation issues, including the discovery process. We are extremely pleased with the progress being made so far in the Mirena MDL.

In addition to the Mirena MDL, other litigation is pending in state courts across the country as well. More than 175 Mirena lawsuits have been filed in state courts in New Jersey, which is where Bayer is headquartered. The Supreme Court of New Jersey designated all pending and future litigation involving Mirena as multi-county litigation and assigned the cases to Judge Brian R. Martinotti of the Superior Court for Bergen County. The next case management conference there is set for the 25th of this month.

If you need more information relating to the Mirena litigation, or you have a claim you would like for us to review. You can contact Roger Smith at 1-800-898-2034 or by email at Roger-Smith@beasleyallen.com. The Mirena litigation is on track and we will keep you updated on its progress.

A CLASS OF ANTIBIOTICS POSES SEVERE NERVE DAMAGE RISK

The U.S. Food and Drug Administration (FDA) has warned that severe nerve damage can result from drugs in a popular class of antibiotics, including those produced by Bayer AG and Johnson & Johnson. This warning expands a previous alert that regulators said was too vague about potential harm. In its recent announcement, the FDA said it would require label updates for all fluoroquinolone antibacterial drugs, including Bayer’s Cipro and J&J’s Levaquin. This came after the FDA found that earlier cautions about the risk of peripheral neuropathy failed to fully inform doctors and patients of the risks.

The possible nerve damage has been included on fluoroquinolone labels since 2004. But a recent analysis found a “continued association” between the drugs and neural harm. This has led regulators to conclude that the “potential rapid onset and risk of permanence were not adequately described” in the original warning. Because of the “spontaneous” nature of adverse event reporting, the FDA said it could not calculate the rate of side effects. The agency said there also were no identifiable risk factors, with patients of all ages developing peripheral neuropathy at far different stages of treatment, from a few days to more than a year.

According to the Mayo Clinic, peripheral neuropathy is characterized by painful burning or tingling, typically in the hands and feet, and is often accompanied by diminished sensitivity much like a person wearing a thin glove or stocking. It should be noted that the warning only applies to oral and injectable fluoroquinolones. Topical versions are not thought to pose such risks. In 2011, more than 23 million patients used an oral fluoroquinolone, and nearly 4 million more received an injection. Cipro and Levaquin, known generically as ciprofloxacin and levofloxacin, accounted for the overwhelming majority of prescriptions in both formulations.

Fluoroquinolones have been the subject of unrelated warnings from the FDA, which in 2008 put a “black box” warning on the drugs because of their potential to cause tendon tears. There have been numerous lawsuits against J&J, including multidistrict litigation, over the issue. The FDA has previously advised doctors to avoid turning to fluoroquinolones unless an infection is strongly believed to be bacterial. If symptoms of peripheral neuropathy arise in patients, the drug should be discontinued in favor of a different type of antibacterial, unless the risks of change outweigh the benefits, according to the agency.

Source: Law360

PUBLIC CITIZEN URGES FDA TO PUT BLACK BOX WARNING ON PLAVIX

Public Citizen has requested that the U.S. Food and Drug Administration (FDA) warn that stent implant recipients can suffer fatal bleeding if they take the Bristol-Myers Squibb Co. and Sanofi SA blood-thinning drug Plavix for more than a year. Public Citizen said in a petition to the agency, the FDA should put its most dire warning for a drug, a so-called black box warning, on labeling for brand-name and generic versions of Plavix to alert physicians and patients to the bleeding risk. Doctors wrote more than 25 million prescriptions for Plavix and its generic form, known as clopidogrel, in the past year in the U.S., the consumer advocacy group said.

Physicians prescribe Plavix to patients after they have been implanted with a drug-eluting coronary artery stent in order to reduce the risk of a heart attack or another cardiac issue, according to Public Citizen. However, data shows that after a year of use, any benefits of taking the drug dry up, and users become more likely to suffer a major bleeding episode, Public Citizen said. In addition to a black box warning, Public Citizen wants Plavix users to receive a medication guide with information about the risks when they fill their prescription. It also wants the makers of the drug to send letters to physicians warning of the long-term use of Plavix by stent recipients.

The warning should only pertain to Plavix recipients who received a drug-eluting stent, according to Public Citizen. It should be noted that the FDA added a black box warning to the Plavix label once before, in March 2010, after it concluded that approximately 3 percent of the U.S. population cannot properly metabolize the drug. The Public Citizen petition was also signed by Dr. Neil Holtzman, a Johns Hopkins University School of Medicine emeritus professor. Dr. Holtzman’s wife died of a cerebral hemorrhage in 2011 after taking Plavix for more than two years. Dr. Holtzman said in a statement:

It’s absurd that doctors are now still prescribing and people are still taking this drug for more than a year after a stent when it turns out the research shows this is putting people at serious risk unnecessarily.

It should be noted that Bristol-Myers Squibb and Sanofi face a number of Plavix-related personal injury suits in courts across the country, including multidistrict litigation in New Jersey. The suits accuse the companies them of failing to warn patients about the drug’s injury risks and violations of the False Claims Act stemming from alleged off-label marketing of the drug. Sanofi revealed in March that the U.S. Department of Justice was investigating the company over its disclosures to the FDA about patient responses to Plavix. But it did not make any further information available at the time. It will be interesting to see what the FDA does relating to Public Citizen’s petition.

Source: Law360

FDA SAYS CLINICAL TRIAL OVERSIGHT MUST FOCUS ON MAJOR RISKS

The U.S. Food and Drug Administration (FDA) advised drugmakers and medical device firms last month to fine-tune their oversight of clinical trials by focusing on the most important risks. Manufacturers were advised to consider making greater use of remote monitoring instead of on-site inspections. In a guidance document, the FDA described several pieces of data as almost always critical to the integrity of a study, including verification of informed consent and adherence to criteria meant to exclude participation by patients who might be uniquely susceptible to a product’s potential side effects.
It’s vital that there be reliable documentation of adverse events and that researchers ensure preservation of a study’s blinding. That means patients and sometimes doctors are kept in the dark about aspects of the drug or device each person receives. The FDA’s guidance said that directing extra resources toward the most common and serious threats to a trial’s trustworthiness and ethics is a sounder strategy than trying to avoid every conceivable shortcoming. The FDA wrote:

There is a growing consensus that risk-based approaches to monitoring, focused on risks to the most critical data elements and processes necessary to achieve study objectives, are more likely than routine visits to all clinical sites and 100 percent data verification to ensure subject protection and overall study quality.

While the FDA recommended that drug and device sponsors pay extra attention to the most consequential aspects of a trial, at the same time the agency also cautioned that it wasn’t calling for tunnel vision. The agency wrote:

A risk-based approach to monitoring does not suggest any less vigilance in oversight of clinical investigations. Rather, it focuses sponsor oversight activities on preventing or mitigating important and likely risks to data quality and to processes critical to human subject protection and trial integrity.

The guidance also nudged manufacturers in the direction of “centralized monitoring” that relies on remote data collection. In the FDA’s view, such oversight “can provide many of the capabilities of on-site monitoring as well as additional capabilities,” the guidance says.

Assuming a drugmaker has a strong electronic record-keeping system in place, one major advantage of remote monitoring is that it can more easily accommodate trials that are dispersed across many geographic areas, the FDA said. Despite its stated preferences, however, the agency conceded that it lacks certainty about the best approaches to monitoring, saying that there are “limited empirical data to support the utility of the various methods employed to monitor clinical investigations.”

As a result, simply put, there isn’t a one-size-fits-all approach, and manufacturers need to take many factors into account before settling on a method of oversight. Those factors include the study’s complexity, the severity of disease or condition being studied, the amount of professional experience of the clinical trial’s investigators and a product’s relative riskiness, the FDA said. Also, trials being conducted in countries with less mainstream standards of medical practice could warrant stronger scrutiny, according to the guidance. The guidance comes at a busy time for clinical trial regulation. Device companies, for example, recently torched the FDA’s proposed overhaul of standards for clinical trials conducted overseas.

Also, the Centers for Medicare & Medicaid Services last month laid out new criteria for when it will reimburse certain costs of clinical trials involving Medicare patients, saying that some of the new standards were developed in response to “egregious misconduct in the past in endeavors to conduct clinical research by placing individuals at the risk of harm for the good of others.” That’s a strong indictment of the system and hopefully all concerned will get the message.

Source: Law360

SSRI Antidepressants Pose Risk To Unborn Babies

More than one in 10 people older than age 12 in the United States take antidepressants, and more than half of them are women, according to a new report from the Centers for Disease Control and Prevention (CDC). The study, conducted by the National Center for Health Statistics, involved data from 2005 to 2008 and showed that use of antidepressants soared nearly 400 percent in the United States since the late 1980s, when the first SSRI hit the market.

SSRIs (selective serotonin reuptake inhibitors) are a type of antidepressant. Some of the brand names are Zoloft, Paxil, Celexa and Lexapro. As you may recall, Prozac was the first SSRI to be approved by FDA. Interestingly, the report found that only one-third of people with severe depression take antidepressants. That means many people with severe depression are going untreated. It may also indicate that many people with more mild forms of the condition are taking SSRIs.

I am of the opinion that SSRIs are overly prescribed, exposing thousands of people to unnecessary side effects. Considering that women make up most of the users of SSRIs, they should also be aware that SSRIs can cause birth defects in developing fetuses if taken by the mother while she is pregnant. Studies have shown that SSRI use during pregnancy can cause babies to be born with heart defects, defects of the brain and spine, and even lung defects including a life-threatening condition known as persistent pulmonary hypertension in newborns.

Unfortunately, drug companies that sell SSRIs do not properly warn users of these serious risks. This has resulted in many of these companies being sued by women who contend their babies were needlessly harmed by the drugs. It is an absolute necessity that the drug companies furnish adequate warnings to both the medical community and the public.

Source: Law360 and Jennifer Walker-Journey

X.
AN UPDATE ON SECURITIES LITIGATION

Mississippi Secretary Of State Claims SEC Ignoring Fraud Victims

It has been more than two years since the Securities and Exchange Commission (SEC) and other state regulators settled fraud allegations with Morgan Keegan involving certain inflated mortgage-backed securities. Morgan Keegan misrepresented and overstated the value of certain mortgage-backed investments during the housing collapse, resulting in more than 39,000 investors nationwide losing over $1 billion. Since then the states have distributed $100 million, their portion of the $200 million settlement, but it appears the federal government has failed to even approve a plan for disbursement. According to Mississippi Secretary of State Delbert Hosemann, many investors have died waiting to get the settlement money owed to them. He had this to say about the delay:

Many of these investors are elderly and on fixed incomes. It is inexcusable they have to wait over two years after the settlement agreement to receive their own money from their own government. It is unconscionable to have come this far to have a federal agency bottleneck millions of dollars owed to Mississippi investors. As a last resort, I find this lawsuit necessary and support this action to order distribution.

Secretary Hosemann had filed an Amicus Curiae in support of a lawsuit filed by several Morgan Keegan victims against the SEC to compel them to release the victim’s
money. As Securities regulator for the State of Mississippi, Secretary Hosemann made repeated requests for payment in February of this year. All four Mississippi Congressmen—three Republicans and a Democrat—also requested distribution of these funds in February 2013. A demand for payment was made April 1st by Mississippi Attorney General Jim Hood. So far all of these requests have been ignored. Secretary Hosemann, at a news conference last month, said:

Injured Mississippi investors have been stopped from receiving their own money by their own government. What we have is yet another example of the federal government not following its own laws at the expense of hard working Mississippians. There is no reasonable excuse for this.

While all of the above might seem strange and totally illogical, it appears the settlement’s purpose—payment of legitimate claims—has not been achieved. In fact, many observed the settlement as a whole benefited Morgan Keegan more than it did the victims of the bank’s wrongdoing. Hopefully, this action by Secretary Horsemann will send a message to those who have control over the settlement.

Source: Memphis Business Journal

XI.
INSURANCE AND FINANCE UPDATE

FEW TECH FIRMS HAVE CYBER LIABILITY COVERAGE

It was reported recently that a majority of technology companies have experienced data breaches and other cyber incidents, yet only one in 10 has cyber liability insurance. That revelation came from the Stratton Agency, Risk and Insurance Specialists, in a report issued last month. James Marek, co-owner of the Stratton Agency, which is based in San Carlos, California, made this observation:

Ironically, technology companies are among the companies most vulnerable to cyber-attacks. Even when tech companies are well protected, hackers can often find a way in. LinkedIn, Yahoo!, Dropbox and eHarmony are just a few of the companies hit by attacks that exposed private information from millions of user accounts.

Cyber-attacks are increasingly common, with 46 percent of all companies experiencing a data breach each year. Cyber incidents may also include contamination from viruses or malware, theft of laptops or mobile devices, denial of service attacks, insider abuse and negligence. While larger companies make the news, small companies are especially vulnerable, according to Marek, because it’s assumed that it is easier to breach their security systems. Analysts estimate that damages from the average data breach exceed $5 million, but costs can run much higher. The U.S. government recently indicted a group of hackers who netted hundreds of millions of dollars by hacking personal information from several companies.

Since it appears even the best security systems can be hacked, companies need cyber liability insurance in addition to tight security to protect themselves from losses that can reach catastrophic levels. For comprehensive cyber liability coverage, it’s recommended by the Stratton Agency that tech companies need to add cyber liability coverage to both their general liability (GL) and their errors & omissions (E&O) policies. With cyber liability coverage added, the agency says a GL policy should cover:

- Data breach services, including consulting, fraud alert and identity restoration.
- Data breach expenses, including cost of notification, forensic analysis and proactive monitoring services.
- Legal services, public relations, data breach ransom and more.

Cyber liability coverage on an E&O policy should include protection for:

- Transmission of a computer virus.
- Failure to protect a third party’s data or information, including unauthorized access, use or theft.
- Inability of an authorized party to gain access to products and services.
- Coverage for media and content infringement, including software and computer code.
- Security breach event notification and management expenses.

Cyber liability coverage varies significantly among carriers. Premiums vary greatly, based on factors such as company size and the level of risk, but the cost for a small company can be as low as a few thousand dollars. Companies can reduce their premiums by adopting strong security measures, according to Marek. A logical place to begin is with strong password protection. Passwords should be encrypted and should change regularly.

It is recommended that companies should also conduct regularly scheduled risk audits to identify areas of vulnerability. Firewalls, anti-virus and anti-malware software, and virtual private networks should be used and updated frequently. Since hackers look for the weakest link, make certain that all electronic devices, including mobile devices, are secure. A written IT security policy should define individual responsibilities, and a plan should be in place for reacting if and when a cyber-attack takes place. The policy should cover all aspects of IT, including social media. Security policies should be strictly enforced and all employees should be trained to understand them.

Source: Claims Journal

MISSOURI SETTLES WITH MAJOR HEALTH INSURER OVER CLAIM DENIALS

Missouri insurance regulators have reached a million-dollar settlement with a major health insurer over alleged violations that include denying childhood immunizations and cancer screening claims. The Missouri Department of Insurance settled with Time Insurance Co., Union Security Insurance Co. and John Alden Life Insurance Co. State insurance regulators allege that the three health insurance companies that issue policies for Assurant Health violated Missouri law in how claims were being handled.

According to the DOI, market conduct examination into the three companies found several instances where the companies denied claims for childhood immunizations, colon cancer screenings, mammograms, Pap smears and prostate screenings. In some cases, claim payments were denied or reduced because the companies imposed waiting periods, copayments or deductibles for these preventive care procedures, the department said. Under the settlement agreement, the three companies will:

- Agree to provide childhood immunizations to Missouri residents without copayments, coinsurance, deductibles or waiting periods.
- Review all denied claims for childhood immunizations, colon cancer screenings, mammograms, Pap smears, prostate screenings and paid claims for short-term major medical submitted to each company since January 1, 2004.
• Pay those claims that should have been paid along with interest at a rate prescribed by law.

• Modify their processes to comply with state law in the future.

• Pay a $500,000 fine to the Missouri State School Fund.

• Donate $500,000 to a Missouri charitable or nonprofit organization or organizations selected by the companies and approved by the department.

Source: InsuranceJournal.com

XII. EMPLOYMENT AND FLSA LITIGATION

WARRANTLESS GPS TRACKING OF EMPLOYEES

A New York Court of Appeals ruled recently that the state can use GPS tracking to monitor employees during work hours without a warrant. The state attached a GPS tracking unit to the personal car of a state labor department employee and used the information obtained as evidence to prove that the employee had falsified travel records and time sheets. Based on this evidence, the employee was terminated. Subsequently, the employee filed a lawsuit claiming that his termination was improper because the warrantless use of GPS tracking invaded his privacy and amounted to unreasonable search and seizure.

The Judges issuing the decision were in conflict over whether the government should be allowed to electronically monitor the movements of its workers without judicial supervision. But the court’s majority determined the state can use GPS tracking to monitor its employees during work hours without a warrant. In one Judge’s opinion, however, the decision went too far and established a “dangerous precedent.” If you need more information on this subject, contact Lance Gould, a lawyer in our Consumer Fraud section, at 1-800-898-2034 or by email at Lance.Gould@beasleyallen.com.

Source: Daily Report

MERRILL LYNCH SETTLES BIAS CASE FOR $160 MILLION

Bank of America Corp.’s Merrill Lynch unit has agreed to pay $160 million to settle a discrimination lawsuit filed by American-American financial advisers. The case, filed in 2005, was brought on behalf of one employee. It grew to as many as 1,200 class representatives before the case was settled. The settlement agreement is scheduled to be considered for approval by a federal judge in Chicago September 3rd.

The central claim of the suit was that blacks weren’t given the same business opportunities as whites in participating on investment teams and in account distribution. The formation of adviser teams is said to be one of Merrill’s most important business strategies. It was alleged that black advisers were segregated and excluded from the teams and the benefits and business resources afforded to team members.

Interestingly, U.S. District Judge Robert Gettleman in Chicago rejected the case as a class action three times before a federal appeals court finally approved it. The black advisers won class certification based on a 2011 U.S. Supreme Court ruling. In that case women suing Wal-Mart Stores for gender bias on behalf of 1.5 million co-workers failed to prove the company had a “nation-wide policy” that led to gender discrimination. But that was not the situation in the Merrill Lynch case. The advisers’ suit was based on claims that the discrimination was due to “very centralized control by Merrill Lynch.” Without the class certification, individual claims would have to be tried repeatedly in federal courts across the U.S. After the February 2012 appeals court ruling, Judge Gettleman issued an order certifying the class of “all African-Americans employed by Merrill Lynch at any time since July 10, 2004, as financial advisers or financial adviser trainees” in the U.S. retail brokerage unit of the firm’s global private client division. Susan A. Bish, a lawyer with Stowell & Friedman, a Chicago firm, represents the plaintiffs. She did a very good job in the case.

Source: Insurance Journal

XIII. PREDATORY LENDING

ONLINE PAYDAY LENDERS THAT TARGET THE POOR ARE UNDER INVESTIGATION

At least six federal agencies including the Justice and Treasury departments are coordinating a broad probe of online payday lenders that charge enormous interest and fees to low-income borrowers who need quick cash. It was reported that last month the Justice Department and the Consumer Financial Protection Bureau (CFPB) sent civil subpoenas to dozens of financial companies, including the online lenders, many of which are located on Indian reservations to avoid complying with consumer protection laws. Also subpoenaed, according to reports, were banks and payment processors doing business with the companies.

The government is using a range of tools—anti-money-laundering laws, routine oversight of banks’ books, subpoenas and state laws—that could bring into the open an entire category of lenders that contend they are operating lawfully. The federal agencies involved include: Civil Division of the Justice Department; the CFPB; the Federal Deposit Insurance Corp.; the Office of the Comptroller of the Currency; and the Treasury’s Financial Crimes Enforcement Network.

Attorneys general and financial regulators from several states are also involved. A number of banks, lenders, payments companies, marketers and others appear to be caught up in the multi-pronged investigation.

The investigation is being coordinated by the Financial Fraud Enforcement Task Force, a working group originally created by President Barack Obama, whose mission is to “investigate and prosecute significant financial crimes and other violations relating to the current financial crisis and economic recovery efforts.” The task force is led by the Justice Department and includes more than two dozen federal and state regulators and law enforcement entities. Michael Bresnick, a former federal prosecutor, is directing the task force. He said recently that “If we can stop the scammers from accessing consumers’ bank accounts—then we can protect the consumers and starve the scammers.”

The task force is no longer focused only on companies with a clear connection to the financial crisis. The group wants to protect consumers from “mass marketing fraud schemes—including deceptive payday loans.” I believe that’s a very good thing and something that is badly needed. Payday lenders prey on folks, who in most cases are already in a financial bind, and take unfair advantage of their circumstances.

Referring to online payday lenders repeatedly as “mass market fraudsters,” Bresnick has said that the working group is focused on banks and payment processors that make it possible for online lenders to operate in states where their loans would be illegal. Bresnick compared the online “deceptive payday loans” with more clear cut fraudulent conduct such as fake health care discount cards and phony government grants.

Payday lenders have a long and sordid history of taking advantage of folks, primar-
ily the poor. Until about five years ago, the lenders operated mainly out of storefronts that offered a range of money services to folks who can’t or won’t use traditional banks. Consumer advocates have been calling for stricter limits on the payday lending industry for a long time. A number of states, including New York, have tried to eliminate the practice by capping interest rates. But the industry has proven resilient and has fought back with high-powered lobbyists. Storefront lenders exploit loopholes by tweaking the terms of their loans, reclassifying themselves as other types of companies and lobbying aggressively for friendly legislation. Payday lenders keep their borrowers in a vicious cycle of repeated loans with extremely high interest rates and fees, interest rates that exceed 1,000 percent.

State efforts to regulate the loans have pushed many consumers online, where state laws have so far carried little weight. The Internet allows payday lenders to reach folks living in cities or states where their products are illegal. Many companies in this growing market have evaded state and federal consumer protections by operating from Indian reservations. They contended that Tribal sovereignty puts them beyond the reach of U.S. regulators.

Some lenders that claim sanctuary on Native American land operate for the profit of outside businessmen who run them through a labyrinth of shell companies, according to an earlier investigation by the Center for Public Integrity. The Center found in 2011 that millionaire Scott Tucker operated and profited from payday businesses that were owned on paper by small Indian tribes—a practice known as “rent-a-tribe.” It was reported that Tucker’s businesses are not affiliated with the NAFSA, the trade group representing tribal lenders.

Earlier this year, the Justice Department subpoenaed more than 50 financial companies, mainly banks and the payment processors that connect consumers to online lenders and other companies that Justice thinks may be operating fraudulently. Banks that hold accounts for payment processors “aren’t always blind to the fraud,” according to Bresnick, the fraud task force chief. He said those banks are ignoring red flags like large numbers of transactions by the processors being rejected by other banks.

These banks may be violating laws requiring them to report incidents of possible fraud to the Treasury Department—laws designed originally to prevent money laundering and later updated to combat financing of terrorist organizations. Those laws require them to know what kinds of businesses their depositors are operating or affiliated with—a duty known as “know your customer.”

The approach has proven effective. In November, a Delaware bank paid a $15 million penalty to settle charges that it worked with payment companies to make fraudulent withdrawals from consumers’ accounts. More than half of the debits were rejected by consumers and their banks. The overall rate reported by the Federal Reserve is about one half of one percent. The bank lost its charter and was dissolved. Regulators also are using bank oversight examinations to drive a wedge between banks and the online payday lenders they serve. They are warning banks during routine examinations to avoid the “reputational risk” of being tied publicly to an unpopular industry, whether by financing loans or processing payments for lenders.

The tactics are similar to those the government used in its successful campaign in 2011 to quash the online poker business, whose revenues had mushroomed to billions of dollars a year. The effort culminated in raids of the three biggest gambling sites and the arrests of their owners. The government shut down about 76 bank accounts in 14 countries and eliminated five domain names. The companies were charged with bank fraud and money laundering.

Sources: Bob Wagner and The Huffington Post

XIV. PREMISES LIABILITY UPDATE

LAWSUIT FILED IN FOURTH OF JULY ELECTROCUTION AT LAKE OF THE OZARKS

The mother of two Boone County children electrocuted in a 2012 Fourth of July boat dock accident at Lake of the Ozarks have filed suit against Ameren Missouri, the utility company that owns the popular recreational lake. The wrongful death lawsuit was filed in Morgan County by the mother, Angela Anderson, contending that Union Electric Co. failed to notify lake dock owners of the need to install electrical protection devices, known as ground fault interrupters, at the dock’s juncture with the seawall to prevent shocks in case of short circuits.

Thirteen-year-old Alexandra Anderson and her 8-year-old brother Brayden Alexander died while swimming at the family’s vacation home in the lake’s Gravois arm. It should be noted that a 26-year-old Hazelwood woman died in an unrelated but similar incident several days later. Ameren has filed a motion to dismiss the Ameren lawsuit, claiming immunity under state law. A hearing on that motion is scheduled for September 12th.

Lake property owners who build new docks must pass a safety inspection by a local fire district in order to receive a construction permit from Ameren. But subsequent inspections are not required if docks aren’t moved or modified. This leaves out countless docks first built decades ago along shoreline collectively larger than the California coast. The newer requirement has only been in place since 2006. In 2009, a Jefferson County civil jury found Ameren liable in a 2006 incident in which one teen died and three others were injured while swimming in Spring Lake near DeSoto. The utility blamed faulty dock wiring in that case, but the jury awarded the victims’ families $2.3 million.

The 2006 code changes at Lake of the Ozarks came only after 22-year-old Tyler Deeds of Olathe died two years earlier when he was shocked by a dock cable and fell into the water while helping to remodel a lake house. The latest lawsuit filed by Mrs. Anderson contends that the dangers at the Anderson family dock were exacerbated by Ameren’s approval of a large marina and a waterfront restaurant located nearby. The complaint states that increased boat traffic from the business subjected the family’s dock and others to increased “wear, tear and stress.” Bogdan A. Susan, a lawyer with Holder Susan Slusher Oxehandler located in Columbus, Mo., represents Mrs. Anderson in the lawsuit.

Source: Kansascity.com

SEAWORLD IS TRYING TO COMPLY WITH SAFETY GOALS

It appears that SeaWorld Orlando has made a good faith effort to comply with new workplace safety goals established following the death of a trainer who was drowned by an orca, or “killer whale” in 2010. This was the finding set out in an order from Judge Ken Welsch, an administrative law judge, last month. SeaWorld met a deadline to have new safety procedures in place that were recommended by the federal Occupational Safety and Health Administration. Those measures include allowing trainers to only work with killer whales if there’s a physical barrier between them and creating a minimal distance between trainer and whale. SeaWorld officials had asked for an extension so they could consult outside experts, but the request was denied by federal workplace safety officials.
Dawn Brancheau, the trainer, was killed in February 2010 when the six-ton killer whale, Tilikum, grabbed her and pulled into the water. Separately, in another order written by Judge Welsch, it was said that SeaWorld couldn’t keep its new safety protocols a secret. SeaWorld officials had asked that the protocols on working with killer whales be kept sealed, claiming they were proprietary business records. But Judge Welsch ruled against them, writing that members of the public who see SeaWorld’s killer whale shows will be able to figure them out. The judge said the protocols would remain sealed until a review of his ruling by the Occupational Safety and Health Administration (OSHA) Review Commission.

Last year, Judge Welsch ruled that physical barriers between trainers and killer whales are a viable way to prevent hazards to workers at SeaWorld. He issued the order in response to Sea World Orlando’s appeal of two citations issued by OSHA for the death of Brancheau. Judge Welsch also reduced OSHA’s fine against SeaWorld Orlando to $12,000 from $75,000 and changed a “willful” citation to “serious.” SeaWorld has appealed last year’s ruling to a federal appellate court in Washington, D.C. SeaWorld and federal work-safety officials are engaged in court-ordered mediation as part of SeaWorld’s appeal. Based on the order, it appears that SeaWorld isn’t limited to the minimal distance and physical barrier recommendations by OSHA if officials can come up with other methods to protect trainers interacting with whales.

Source: The Claims Journal

### Miami Couple Sues Bar Over Deck Collapse

There have been a number of reports in the past several months of decks collapsing at commercial buildings, causing injuries and deaths. In one such incident, a Miami couple has sued the owners of a local sports bar for failing to properly maintain a waterfront deck that collapsed in June while patrons were watching the Miami Heat play Game 5 of the NBA Finals. In the suit, filed in Florida’s 11th Judicial Circuit Court, Francisco Mayorga Garcia and Solange del Castillo accused Inn on North Bay Ltd.—which does business as Best Western Plus on the Bay Inn & Marina—and 1819 Inc. of negligently failing to maintain the waterfront deck at Shuckers Bar & Grill in North Bay Village and causing the incident that sent the deck—and dozens of patrons—into Biscayne Bay on June 13th. It was alleged that the defendants “knew or should have known that its waterfront deck was not properly maintained, was not in a safe condition and was not safe from dangers.” With this knowledge, the Plaintiffs allege that the restaurant owners “purposely chose not to repair or remedy the dangerous, hazardous and debilitating waterfront deck.”

The couple was eating dinner on the deck, which they say was overcrowded, June 13. They were watching the Miami Heat play the San Antonio Spurs in the NBA Finals when the deck collapsed into the water. Mayorga Garcia suffered back, head and knee injuries in the fall, according to the complaint. Garcia said that he first rescued his wife, who does not know how to swim, and then went in to help people who were in the water below the collapsed deck. Garcia lifted tables, chairs and other debris off patrons who were stranded in the shallow water, according to the suit, and ultimately had to be rescued himself by rescue personnel, lost consciousness and was transported to a trauma center, where he spent the next four days, according to the complaint.

At the time of the accident, the Miami Herald reported that about 100 people were on the deck, and 15 had to be transported to local hospitals. The lawsuit filed by the couple seeks damages to cover Garcia’s medical costs, as well as loss of income due to his injuries. Both plaintiffs are seeking damages for mental anguish and pain and suffering, among other claims. The plaintiffs are represented by Stuart N. Ratzan and Stuart J. Weissman, lawyers with the Ratzan Law Group in Miami, Fla. The case is Mayorga Garcia et al. v. Inn on North Bay Ltd. et al. in the Circuit Court of the 11th Judicial Circuit of Florida.

Sources: Law360 and The Miami Herald

### XV. WORKPLACE HAZARDS

#### CONTRACTOR BLAMED FOR FATAL BLACK ELK RIG BLAST

Our readers may recall reports last year of the deadly explosion in November of last year at an oil platform in the Gulf of Mexico, involving a company called Black Elk Energy LLC. A third-party report, commissioned by that company and released August 21st, suggested that the explosion was the result of contract workers’ failure to follow the company’s standard safety protocols. The report by ABSG Consulting Inc., after an eight-month investigation, was undertaken in cooperation with the U.S. Bureau of Safety and Environmental Enforcement (BSEE). ABSG found that contract workers welding a flange onto open piping connected to an oil tank neglected to secure the piping per Black Elk safe work practices, resulting in the ignition of flammable oil vapors and a series of explosions that left three workers dead and several injured.

Black Elk said the report raises a “serious issue” concerning apparent failures by contractor Grand Isle Shipyard to train and supervise contract welders in order to ensure they followed company safety protocols. Company CEO John Hoffman said in a statement:

*We owe it to [the victims] and their families to understand how this accident happened. With this ABSG report, I am confident we now know the causes of this tragedy and how to prevent such an accident from ever happening again.*

The consultant noted that Grand Isle Shipyard had contracted with Black Elk to perform construction work through an agreement under which it would not to farm out work to subcontractors, and its decision to hire subcontractor DNR Offshore and Crewing Services without informing Black Elk “was one of several causes of the incident,” according to the company.

Black Elk said since the accident it has instituted enhanced oversight of all drilling, major well work and construction projects, and improved its contractor oversight as well. The company says it has “worked to provide support for the victims and their families and cooperated with government officials to analyze the causes of the incident and to implement policy and procedural improvements to minimize the risk of similar incidents in the future.” Following the explosion, the BSEE threatened to shut down Black Elk’s offshore operations if it didn’t improve its safety conditions and submit a performance improvement plan. According to BSEE, Black Elk had been cited for violating federal safety regulations at its offshore platforms 315 times since 2010.

The agency considered about half of the so-called incidents of noncompliance to be minor infractions, but 145 of the violations were labeled “severe or threatening,” requiring a shutdown of pieces of offending equipment. BSEE records indicated. Twelve of those incidents were considered so life-threatening that Black Elk was forced to shut down entire facilities, according to the BSEE. Black Elk was ordered by the BSEE to cease all welding and other “hot work” at its 98 offshore platforms until the agency deemed the
company has reduced fire hazards, and barred Black Elk from resuming operations at offline facilities until it took “corrective actions” to address safety deficiencies.

Black Elk had been sued by its shareholders in a Texas state court in January. It was alleged that the explosion, the history of safety violations and the board of directors’ supposed “long history of mismanagement” negatively impacted the company, reducing the potential acquisition price of a company unit and leading Standard & Poor’s Financial Services LLC to downgrade the company’s credit rating.

Source: Law360

XVI.
TRANSPORTATION

WRONGFUL DEATH LAWSUIT ALLEGES DESIGN
DEFECTS IN AIR TRACTOR PLANE

Lawyers in our firm are representing the family of Greg Arnold, who was killed July 29, 2010, when the plane he was piloting crashed in a wooded area near Canton, Miss. The lawsuit alleges the plane, an Air Tractor AT-602, was defectively designed, ultimately leading to the crash that killed Mr. Arnold. The defendant in the case is Air Tractor, Inc. The lawsuit is filed in the U.S. District Court for the Middle District of Alabama, Northern Division. At the time Greg Arnold was killed, the aircraft he was flying was defective and unreasonably dangerous in its design. It was not flight worthy, and as a result Mr. Arnold, an experienced pilot, lost his life. This is a crash that should never have happened.

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

Statistics indicate mechanical failures cause up to 22 percent of aviation crashes. Historically, aircraft manufacturing defects, flawed aircraft design, inadequate warning systems and inadequate instructions for safe use of the aircraft’s equipment or systems have contributed to numerous aviation crashes. In such cases, the pilot may follow every procedure correctly but still be unable to avert disaster. Mike Andrews, a lawyer in our firm’s Personal Injury/Products Liability section, is the lead lawyer representing the family in this lawsuit. For more information about aviation litigation, you can visit the Aviation Accidents section of the Beasley Allen website (www.beasleyallen.com).

FMCSA LAUNCHES NATIONWIDE TWO-WEEK BUS
INSPECTION STRIKE FORCE

The U.S. Department of Transportation’s Federal Motor Carrier Safety Administration (FMCSA) has begun a two-week strike force of passenger bus safety inspections across the country. This is part of the agency’s Motorcoach Safety Initiative designed to remove high-risk buses and drivers from our nation’s highways. In addition to surprise inspections, investigators will also visit new bus companies to assess their levels of safety. U.S. Transportation Secretary Anthony Foxx, in making the announcement, said:

Buses are a convenient, inexpensive way to travel, and we are committed to keeping them safe. During this two-week crackdown, we are removing dangerous vehicles and drivers from our roads and ensuring that companies who make a business of transporting passengers are also meeting the necessary safety standards.

Law enforcement and specially trained investigators are inspecting buses for overall vehicle maintenance including brakes, tires and exhaust systems. They are also verifying driver qualifications and compliance with hours-of-service requirements. Companies found to be violating safety regulations could be put out of service. Federal Motor Carrier Safety Administrator, Anne S. Ferro, had this to say:

Aggressive strike force inspections help save lives on our roadways and protect people who travel by bus. Strong enforcement efforts will increase safety and reduce serious crashes that result in death and injury.

The work of this strike force, a complement to a broader, ongoing safety effort launched in April 2013, is taking place in all 50 states, the District of Columbia and U.S. territories. The strike force, which included special training for 50 FMCSA safety inspectors, targets the 250 highest-risk carriers. It has resulted in 18 bus companies being ordered out of service for safety violations. The operating authority of 10 additional bus companies was revoked, following compliance review investigations that resulted in an “unsatisfactory” safety rating. As part of the effort, the FMCSA launched a SaferBus mobile app to give bus riders a quick and free way to review a bus company’s safety record before buying a ticket or booking group travel. The SaferBus app, available for iPhone, iPad and Android phone users, can be downloaded for free by visiting FMCSA’s “Look Before You Book” webpage at www.fmcsa.dot.gov/saferbus.

Source: FMCSA Release

AIRBUS PLANE CRASHES IN ALABAMA AFTER THE
STATE GAVE THEM IMMUNITY

As has been widely reported in the national media, an Airbus A300-600F operated by UPS crashed in Birmingham, Ala., last month breaking into pieces, and killing the pilot and a co-pilot. The crash occurred around 4:45 a.m. in an open field near a street that runs parallel to the airport. The majority of the debris from the crash was spread over an area of about 300 yards. The accident is being investigated by the National Transportation Safety Board (NTSB) and the black boxes have been recovered. Reportedly, there were distress signals to the pilots about 16 seconds before the crash.

The first of two descent warnings were given about 16 seconds before the end of the recording. The pilots had been cleared to land two minutes before the crash. About 13 seconds out one of the pilots reported the runway in sight. The plane that crashed was built in 2003 and had 11,000 hours in the air spread over 6,800 flights, according to Airbus. It appears that only UPS and FedEx now fly the A300 in the United States. While it was once used for commercial passenger flights in the United States, the A300 is now used only for cargo flights. Reportedly, UPS has 53 of the planes. This crash is the second involving an A300 in the United States. In 2001, an American Airlines A300 crashed in the Belle Harbor neighborhood of Queens, in New York City, shortly after takeoff from John F. Kennedy International Airport. All 260 people on board that plane, as well as five people on the ground, were killed.

Ironically, the Alabama legislature passed a bill recently providing Airbus with a 12-year statute of repose in our state, beginning from the date of manufacture of a plane. It was reported that the legislation was part of a package and was passed in exchange for bringing an Airbus manufacturing facility to Mobile, Ala. So once a plane, designed to last and be flown at least 30 years is 12 years old, passengers or crew who die or are injured in a crash of that
plane will have no cause of action in Alabama. I find it difficult to believe that if an Airbus plane crashes outside of Alabama, any court would enforce that law against the families of persons killed in such a disaster simply because Alabama passed a 12-year limitation on lawsuits. I hope we never have to find out the answer to that question.

Source: AL.com and Birmingham News

**AsiaN CRASH UNDERSCORES SAFETY DEFICIENCIES IN MANY FOREIGN-BASED AIRLINES**

Much has been written in the national media about the crash of an Asiana Airlines plane in California on July 6. The plane crashed upon touchdown at San Francisco International Airport (SFO), killing three and injuring some 180 others. It was reported recently by the *San Francisco Chronicle* that SFO officials and other aviation authorities were concerned about Asiana Airlines’ unusually high rate of aborted landings or “go-arounds” at SFO.

The incident, and Asiana’s poor SFO landing record, underscore what aviation officials say is a big disparity between U.S. aviation safety standards and those of most other countries. According to a *Los Angeles Times* report, “a wide range of U.S. aviation experts” believe that “the United States and a handful of European nations, by a wide margin, have better-trained pilots, more sophisticated regulatory agencies that closely monitor operations, and airlines that vastly exceed minimum government requirements.” The *Los Angeles Times* report made this observation:

> Although all commercial airlines that fly into the U.S. must meet minimum international standards, only a few rise to the same level as the domestic industry.

In Asiana’s case, one deficiency may be in pilot training requirements. Some U.S. aviation experts contend that the crash of Asiana 214 and the operator’s poor SFO-landing record indicate that its pilots may be too dependent on automatic controls and not adequately trained to land an airplane manually. It’s a necessity that pilots be fully trained on landing commercial planes manually. Any deficiency of skill in operating an airplane manually could spell disaster, especially in takeoff and landing procedures, which is more complicated and require greater skill than autopilot may provide.

Investigators are still trying to understand why the three pilots aboard Asiana 214 failed to notice the airplane’s improper landing speed and altitude until it was too late. So far, according to reports, they have found no evidence that the Boeing 777 had any electronic or mechanical problems that could have contributed to the disaster. That means the training, experience and qualifications of Asiana 214’s pilots remain at the center of the investigation. Asiana Airlines claims that it meets or exceeds U.S. and international standards, but company officials have said they are “in the process of reexamining our procedures and training.”

Of the nearly 300 aviation crashes worldwide involving large passenger airplanes since 1990, according to the LA Times, 87 percent involved foreign carriers. That’s most significant considering they represent a substantially smaller share of air traffic. The Federal Aviation Administration has restricted or banned airlines from 23 countries from entering U.S. airspace. Most of the banned airlines are based in Asia and Africa.

**FAMILY MEMBERS OF CRASH VICTIMS FILE A $45 MILLION CLAIM**

The family of Dennis and Judy Schulte have filed a $45 million claim against the City of Seattle, claiming that the city failed to supervise a driver who was on probation for a DUI conviction. The driver ran over members of the family. Prosecutors say the driver, Mark Mullan, was drunk on March 25 when his pickup hit four members of the Schulte family as they walked across a street in Seattle. Dennis and Judy Schulte were killed and their daughter-in-law and her newborn baby were severely injured.

It’s contended that Mullan, because he was on probation, should not have been driving without an interlock device on his truck. Mullan has pleaded not guilty to vehicular homicide, vehicular assault and reckless driving. This is a most tragic case involving a drunk driver. But the case goes further and involves the role of a city government in the crash. It will be most interesting to see if the theory of likeability against the city will be successful.

Source: Claims Journal

**FAMILY OF DUI VICTIMS SUES MONTANA BAR**

A Montana woman whose mother and daughter died in a drunken driving crash has filed a lawsuit against a Helena bar, alleging the driver was served alcohol shortly before the crash, despite being visibly intoxicated. Heather Smith, the plaintiff, filed the lawsuit against O’Toole’s Bar and Lounge, the estate of Joyce O’Toole, (the former owner), and the bar employee who served the alcohol. The driver, 22-year-old Arielle Michelle Scheschke, has pleaded guilty to two counts of vehicular homicide for the April 30 deaths of 51-year-old Mildred Richard and 16-year-old Justine Smith. Scheschke is to be sentenced this month and the civil lawsuit will proceed against all defendants.

Source: *Insurance Journal* and *The Independent Record*

**LAWSUIT FILED OVER DEATH OF CHILD HIT BY SPEEDBOAT**

We have written in prior issues about the dangers created by drunk operators of boats on lakes and other waterways. Recently, the family of a 10-year-old boy who was killed after being struck by a speedboat while tubing on Petite Lake in Illinois, filed a wrongful death suit against the Fox Waterway Agency and Spring Lake Marina. The lawsuit, filed by the parents of Tony Borcia, alleges that the Fox Waterway and Spring Lake Marina operators knew the dangers posed by “alcohol-fueled boaters” on the heavily traveled Chain O’ Lakes, but failed to take action or warn the family about the dangers.

A boater, who according to authorities was drunk and also had cocaine in his system, ran over the boy, who died instantly, in July 2012. In June, David Hatyina was sentenced to 10 years in prison after pleading guilty to aggravated DUI. Mathew Dudly, a lawyer with Dudley & Lake, a firm in Libertyville, Ill., represents the family in this case. He had this to say:

*Petite Lake is really a small lake known for a sandbar where people congregate and drink. On a weekend, that is not a safe place to take your family. This is not information that is passed on to anybody.*

Spring Lake Marina is a private facility where the boy’s father rented the boat and tubing equipment. It’s alleged in the lawsuit that Petite Lake has been the location of 11 accidents resulting in nine injuries since 2009, and that the injuries represent at least 20 percent of the boating accidents and injuries on the entire Chain over that period.

It’s contended that Fox Waterway Agency, a tax-funded entity, should have implemented restrictions on boat size and speed, as well as designated areas for tubing on the Chain O’ Lakes. The family also claims that
A LOOK AT MOTORCYCLE AND BICYCLE HELMET USE LAWS

The history of motorcycle helmet laws in the United States can be characterized as one of change. In 1967, to increase motorcycle use, the federal government required the states to enact helmet use laws in order to qualify for certain federal safety programs and highway construction funds. The federal incentive worked and by the early 1970s, almost all the states had universal motorcycle helmet laws. Michigan was the first state to repeal its law in 1968, beginning a pattern of repeal, reenactment and amendment of motorcycle helmet laws. In 1976, states successfully lobbied Congress to stop the Department of Transportation from assessing financial penalties on states without helmet laws. That was a victory for the industry.

Currently, laws requiring all motorcyclists to wear a helmet are in place in 19 states and the District of Columbia. Laws requiring only some motorcyclists to wear a helmet are in place in 28 states. There is no motorcycle helmet use law in only three states: Illinois, Iowa and New Hampshire. Not one state has a universal bicycle helmet law. Only 21 states and the District of Columbia have statewide bicycle helmet laws, and they apply only to young riders, and that usually includes riders younger than 16. Local ordinances in a few other states require bicycle helmets for some or all riders. Some bicyclists are required by law to wear a helmet in 21 states and the District of Columbia. There is no bicycle helmet use law in 29 states.

Low-power cycle is a generic term used to cover motor-driven cycles, mopeds, scooters and various other two-wheeled cycles excluded from the motorcycle definition. While state laws vary, a cycle with an engine displacement of 50 cubic centimeters or less, brake horsepower of 2 or less, and top speeds of 30 mph or less typically is considered a low-power cycle. Twenty-three states have motorcycle helmet laws that cover all low-power cycles. Twenty-four states and the District of Columbia have laws that cover some low-power cycles.

Source: Claims Journal

EXXON MOBIL AGREES TO $2.4 MILLION IN FINES AND IMPROVEMENTS

Exxon Mobil Corp. has agreed to pay nearly $2.4 million in fines, improvements and other payments to settle violations at Baton Rouge-area plants. About $2.3 million will resolve violations occurring from 2008 into this year at four plants, including the company’s Baton Rouge refinery. Another $62,000 relates to a release of naphtha in June 2012 at the Baton Rouge Complex. The naphtha leak prompted the federal Environmental Protection Agency (EPA) to inspect the plant. The EPA found violations including corroded pipes and under-developed emergency procedures.

The settlement includes at least $1 million for beneficial environmental projects and another $1 million in improvements at the Baton Rouge Complex. The state agency and Exxon Mobil also agreed to penalties for future pollution, with different amounts for different violations—increasing with time or amount of pollution. It appears that this is a good settlement for Louisiana.

Marylee Orr, executive director with Louisiana Environmental Action Network, said proposed contributions to local community projects are good, but the penalty list is really significant. She had this to say:

With the establishment of stipulated penalties, Louisiana, for the first time ever, has created an objective and transparent system for enforcing environmental regulations.

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The Louisiana Department of Environmental Quality announced the settlement August 27th. Before it’s final the state’s Attorney General must approve the settlement, which is expected to happen.

Source: Claims Journal

HALF OF SMALL CARS SCORE BADLY ON TOUGHER U.S. CRASH TESTS

The automobile industry continued its poor performance in the Insurance Institute for Highway Safety (IIHS) new crash test as half of the small cars tested did not fare well. Six of the cars tested, most of which were 2013 models, were rated “poor” or “marginal.” General Motors Co.’s Chevrolet Sonic and Cruze each received marginal scores, while Kia Motors Corp.’s Soul and 2014 Forte were rated “poor” in the results released. Nissan Motor Co.’s Sentra also was rated “poor,” while Volkswagen AG’s Beetle was ranked “marginal.”

The IIHS increased the rigor of its tests last year to include crashes that involve only a front corner of a vehicle. The insurance group said nearly one-fourth of U.S. front-of-vehicle crashes that result in serious injury or death involve only a single corner that strikes another vehicle or an object like a tree or utility pole. The IIHS continues to score vehicles on side, rollover and front-end crashes that impact more than just a corner. “This is a challenging new crash test and it’s not surprising that some vehicles are earning marginal and poor ratings,” IIHS spokesman Russ Radar said of the small overlap front crash test. He added:

This crash scenario doesn’t lend itself to a Band-Aid fix so for most manufacturers the countermeasure will have to be built in when there’s a full redesign.

Vehicle manufacturers in the U.S. market often design and engineer their models to score well on IIHS safety tests and use the results in their marketing. In today’s world cars are so competitive that all you need is a small flaw and your competition can exploit it. Most of the 12 small cars tested were already in production before the IIHS increased the rigor of its front crash test last year. But IIHS had alerted the companies to the work the group was doing on small overlap research in 2009. The specifications of the test were not finalized until the last year, which is late in a car’s development process.

According to Kelley Blue Book senior analyst Karl Brauer, all automakers will eventually redesign their cars to meet the standards to pass the new crash test. In the tests,
IIHS crashes a vehicle at 40 mph into a 5-foot-high barrier on the driver’s side that overlaps one-quarter of the vehicle’s width. The IIHS small overlap crash test goes well beyond federal requirements.

David Zuby, IIHS chief research officer, said that in the worst cases with the small cars that did not score well, safety cages collapsed, driver airbags moved sideways and the crash dummy’s head hit the instrument panel, and side curtain airbags did not deploy or provide enough protection. The small car segment was the fourth group of cars rated using this new test, and most of the groups have fared equally badly. Last summer, seven of 11 luxury sedans evaluated rated “marginal” or “poor,” and 12 of 15 small SUVs tested also failed to score well in results released in May. Family sedans scored the best, with only five of 18 scoring “marginal” or “poor” in results released last December.

As a group, the small cars fared worse than the mid-sized family sedans, but better than the small SUVs, according to IIHS. Results on the new crash test for minicars will be released later this year. The other six small cars tested included two- and four-door versions of Honda Motor Co. Ltd.’s Civic, which both received “good” ratings. The Civic was tested earlier this year and the results were released in March. Receiving “acceptable” ratings were Chrysler’s Dodge Dart, Ford Motor Co.’s Focus, Hyundai Motor Co.’s Elantra and Toyota Motor Corp.’s 2014 Scion tC.

All the cars scoring well received “Top Safety Pick +” ratings by the insurance trade group. Vehicles earning the institute’s “Top Safety Pick +” award have received “good” ratings in the four traditional tests plus “good” or “acceptable” ratings in the small overlap test. IIHS said it did not test the Toyota Corolla because the automaker plans to release a redesigned 2014 model this month.

Source: Claims Journal

NHTSA Investigates Ceiling Fires in Jeep Model

The National Highway Traffic Safety Administration (NHTSA) is investigating complaints that the ceilings can catch fire in 2012 Jeep Grand Cherokee SUVs. The probe covers an estimated 146,000 of the popular sport utility vehicles. Three customers complained to the government that their ceilings caught fire near the passenger-side sun visor while they were driving, starting with a burning smell, then smoke and flames. In all three cases, customers lowered their windows to clear the smoke, but that increased the fire’s intensity, according to NHTSA.

In all three cases, the fires continued after the SUVs had been shut off and flames had to be put out with fire extinguishers or by firefighters. The flames caused a sunroof to shatter in one instance, while in another, a burning sun visor fell to the passenger seat and spread the flames, according to NHTSA. The safety agency said it had no reports of any injuries. Investigators will decide whether the problem is serious enough to cause a recall. Chrysler said its engineers are working with the government. The automaker said no determination has been made about the cause and the investigation is in its early stages.

Source: Montgomery Advertiser

NHTSA Upgrades Safety Probe Of 2005-2007 Corvettes

The National Highway Traffic Safety Administration (NHTSA) has upgraded an investigation of 103,000 older Chevrolet Corvettes. This comes after drivers reported instances of the low-beam headlights failing. The vehicles under investigation are from model years 2005 through 2007, but NHTSA has also received complaints from drivers of the 2008 Corvette. There have been no reports of injuries or deaths related to the defect, according to NHTSA.

The headlight outages occurred after driving for five to 30 minutes. The lights went out because of a fractured circuit wire, according to NHTSA. The agency said the wire “is located in a high heat area near the engine, and the low beam circuit wire routing …makes it susceptible to cyclical stress caused by thermal expansion.” NHTSA opened its initial investigation in May. As we have stated previously, NHTSA performs a preliminary evaluation if there is an indication that there may be a safety defect. After the initial evaluation, it either upgrades or closes the investigation. An engineering analysis may lead to a recall or NHTSA may decide to dismiss the investigation. General Motors Co., in a statement, said that it is cooperating with the investigation.

Source: Claims Journal

NHTSA Needs Procedures To Monitor Recalls

Ford Motor Co. was recently fined $17.35 million by the National Highway Traffic Safety Administration (NHTSA) for taking too long to recall 2002-2004 Ford Escapes and Mazda Tributes. Unfortunately, the path to this fine followed a long route of fatalities, each of which could have been prevented if Ford had properly recalled the vehicles or if NHTSA had adequately monitored Ford’s recall procedures.

In early 2004, Ford issued a recall on 2002-2004 Ford Escapes and Mazda Tributes to fix a throttle that could get stuck open, causing an unexpected and sudden unintended acceleration of the vehicles. Later, Ford realized the repair procedures required by the recall were actually increasing the odds that the throttle could become stuck in the wide-open acceleration position. In 2005, Ford sent a bulletin warning dealers and informing them that federal law required them to do a new repair. Instead of Ford re-notifying customers that their original repairs were in need of correction, Ford took a “let’s wait and see approach,” and that proved to be a bad decision.

In August 2005, Marta Baier was severely injured after her 2003 Escape suddenly accelerated and collided with another vehicle. In December 2005, Mary Delvasco was involved in a fatal collision with a school bus aft her 2004 Escape’s throttle system became stuck open. Each of these vehicles had the original recall repair but not the second, which was the corrected one.

In 2012, NHTSA finally opened an investigation after the death of Saige Bloom, a 17-year-old driver. Ms. Bloom was driving her newly acquired used car home, with her mother following her in another car. She had purchased a 2002 Ford Escape. While Ms. Bloom was heading home, the Escape suddenly accelerated, crashed, and Ms. Bloom later died as a result of her injuries. In defending itself to NHTSA, Ford stated that “the condition resulted from damage induced by improper service,” but there was not enough information for “identification of a cause.” This was even though Ford clearly knew about the cause and problem back in 2005 when it first issued the service bulletin. Ford ultimately accepted the $17.35 million penalty to avoid possible litigation.

These events raise an obvious question: Why didn't NHTSA act quicker? The answer lies in the fact that NHTSA has yet to establish procedures for determining whether a manufacturer has adequately met its recall obligations. The NHTSA does not monitor data in the short term to see whether deadly defects are actually being fixed—which is the purpose of a recall. Unfortunately, until the NHTSA does act to set procedures for their own monitoring of recalls, it will con-
NHTSA Requires Automakers To Streamline Recall Searches

The National Highway Traffic Safety Administration (NHTSA) is now requiring car and motorcycle manufacturers to allow consumers to search online for recall information for a specific vehicle using its identification number. The agency issued a final rule mandating that all major manufacturers make the search feature available to consumers for free within a year. It will allow consumers to determine whether the vehicle is or was part of a recall, and whether it was fixed, according to NHTSA. Automakers such as Ford Motor Co., Toyota Motor Corp., and Chrysler Group LLC already allow consumers to search for recall information on their websites using the vehicle identification number, known as a VIN. NHTSA Administrator David Strickland said in a statement:

*By making individual VIN searches readily available, we're providing another service to car, light truck and motorcycle owners and potential owners—the peace of mind knowing that the vehicle they own, or that they are thinking of buying, is safe.*

The feature will also be on the NHTSA website www.safercar.gov. Previously, consumers were only able to search for recall information by vehicle make and model year on the site, according to the agency. NHTSA said that the companies are required to update the recall information on the sites weekly.

The Alliance of Automobile Manufacturers (AAM)—a trade group representing 12 major manufacturers, including BMW Group, Chrysler, Ford and General Motors Co.—said in a statement that it supported the rule. The group said:

*We all want speedy repair of recalled vehicles, and the goal here is to increase recall completion rates through greater consumer awareness. Providing safety recall information on the websites of automakers is both effective and saves duplication of efforts by government and manufacturers.*

Earlier this year, the NHTSA proposed a new direct final rulemaking procedure that would allow it to expedite the adoption of rules it considers “noncontroversial.” The agency said that the procedure will allow it to save time and agency resources by issuing a direct final rule adopting new amendments via an expedited process. It noted that the Administrative Procedure Act does not require notice and comment on rulemaking procedures when an agency “has good cause not to use them,” such as when it believes them to be unnecessary. That rule prompted outcry from the AAM about the potential threat to agency transparency, with the group saying that the agency’s willingness to dispense with transparency protections “raises eyebrows.”

Source: Law360

FDA LINKS ACETAMINOPHEN TO FATAL SKIN DISEASE

The U.S. Food and Drug Administration (FDA) warned consumers last month of a link between the widely used fever and pain reliever acetaminophen and a number of rare but potentially deadly skin diseases, alerting users to be on the lookout for rashes, blisters and adverse skin reactions. The FDA said it has identified evidence of a connection between use of acetaminophen—one of the most widely used medicines in the U.S.—and the skin diseases Stevens-Johnson Syndrome (SJS) and toxic epidermal necrolysis (TEN). Both diseases typically require hospitalization and can be fatal, according to the agency.

The FDA will now require all prescription drugs containing acetaminophen to contain a warning about the diseases and will seek to add a similar warning to over-the-counter medicines. Acetaminophen is present in common over-the-counter products like Johnson & Johnson’s Tylenol and is also sold in generic form under various names. FDA deputy director Sharon Hertz, in a statement, had this to say:

*This new information is not intended to worry consumers or health care professionals, nor is it meant to encourage them to choose other medications. However, it is extremely important that people recognize and react quickly to the initial symptoms of these rare but serious side effects, which are potentially fatal.*

Initial symptoms of adverse reactions to acetaminophen include rashes and blisters, according to the FDA. All consumers using the medicine were urged by the FDA to discontinue use and seek medical attention immediately if they develop any skin reactions. SJS and toxic epidermal necrolysis typically begin with flu-like symptoms and are followed by skin reaction and damage, sometimes taking months to recover from and leaving users with scarring, organ damage, altered skin pigmentation and blindness, according to the FDA. A third possible condition, known as acute generalized exanthematous pustulosis, is less severe and typically resolves within two weeks of discontinuation of use, the agency said.

The FDA noted that alternative fever and pain treatments—like ibuprofen-containing Advil and Motrin and naproxen-containing Aleve and Midol Extended Relief—already contain warnings about the risk of serious skin reactions. The warning follows an FDA review of medical literature and its own Adverse Event Reporting System database through which it uncovered more than 100 cases between 1969 to 2012 that resulted in a dozen fatalities. Most of those cases involved products where acetaminophen was the sole ingredient and were categorized as “probable” or “possible” associations with the medicine. Hertz said:

*FDA’s actions should be viewed within the context of the millions who, over generations, have benefited from acetaminophen. Nonetheless, given the severity of the risk, it is important for patients and health care providers to be aware of it.*

In addition to Tylenol, acetaminophen is used in many prescription products with other ingredients, such as Endo Pharmaceuticals Inc.’s Percocet combined with oxycodone and Abbott Laboratories’ Vicodin combined with hydrocodone. The FDA has previously sought to reduce potentially harmful side effects associated with acetaminophen, notably moving in 2011 to force makers of prescription drugs containing the painkiller to include warning labels alerting users to the risk of severe liver injury and to limit the amount of the ingredient in each tablet to 325 milligrams.

Source: Law360

PUBLIC CITIZEN WANTS A TEXAS COMPOUNDING PHARMACY SHUT DOWN

Public Citizen last month requested the U.S. Department of Health and Human Services (HHS) to halt operations at Specialty Compounding LLC after at least 15 patients were sickened by one of the Texas compounding pharmacy’s products, saying the government had known of problems at the company. The consumer advocacy group
said in a letter to HHS Director Kathleen Sebelius that the U.S. Food and Drug Administration (FDA) should permanently enjoin the company from producing medical products until it’s found to be complying with federal health regulations. I agree with Public Citizen that the FDA should have taken swifter action after a March 2013 inspection when the agency criticized the company for poor quality-control standards.

Public Citizen said in the letter that the pharmacy may have violated federal requirements requiring it to “follow good manufacturing practices and obtain FDA premarket approval before selling the product.” The letter, citing the March 2013 report, said:

*The quality and volume concerns that FDA inspectors identified at Specialty Compounding during the March 2013 inspection, combined with the recent reports of bacterial infection potentially associated with Specialty Compounding products, suggest that the facility violated one or both of these federal requirements.*

Specialty, a subsidiary of Peoples Pharmacy Inc., had in early August recalled all of its sterile medications after reports of bacterial infection affecting 15 patients at two Texas hospitals, Corpus Christi Medical Center Doctors Regional and Corpus Christi Medical Center Bay Area, whose treatment included intravenous infusions of calcium gluconate from Specialty Compounding. The FDA said that cultures from an intact sample of calcium gluconate compounded by Specialty Compounding showed growth of bacteria consistent with Rhodococcus, which, according to the U.S. Centers For Disease Control and Prevention (CDC), can cause infections in people with compromised immune systems.

Specialty has said there is a potential association between the infections and the medication, and if there is microbial contamination in products intended to be sterile, patients are at risk of serious infections that may be life-threatening. In the March inspection, the FDA alleged Specialty violated good manufacturing practices. During one visit to the company’s plant, an inspector saw employees wipe their foreheads and then continue filling vials without changing gloves, according to an agency report.

In another instance, a pharmacist was spotted on hands and knees trying to retrieve fallen vials, and after grabbing them, returned to work in a so-called clean room, according to the report. Other alleged violations included a lack of written procedures for sterilization of gowns, insufficient sampling of work surfaces to ensure sterility and an unsatisfactory approach to cleaning and disinfecting. Public Citizen said in its letter that the FDA may have been able to prevent the recent outbreak had it taken more decisive action against the company after the March inspection. The letter said:

*The FDA could potentially have prevented the current outbreak linked to Specialty Compounding products by taking swift action against the company after the FDA inspected its facility in March 2013. It can prevent future injuries by exercising its authority more aggressively when it identifies problems during an inspection.*

The Alabama Department of Public Health has warned health care professionals in the state not to use any sterile products from Specialty Compounding. This came after the nationwide recall of medications by the company. Some supplies have been shipped directly to patients in Alabama. Those patients were supposed to be contacted directly by the company. An alert was sent to Alabama providers, including hospitals and pharmacists, on August 19th. The Department's release states:

*Individuals should contact their health care provider if they have used any sterile medications shipped from this pharmacy since May 9, 2013, and are experiencing any symptoms that may be related to taking these medicines. Even in the absence of symptoms, these patients should stop using these products and contact their health care providers to get replacement medications.*

It will be most interesting to see how Congress reacts to another serious health risk caused by an industry that is virtually unregulated. It appears Public Citizen’s request for a shutdown has merit and the FDA should do so. In the meanwhile, to return product or request assistance, users should contact Specialty Compounding at 512-219-0724, Monday through Friday, between 10:00 a.m. and 5:00 p.m. CDT.

Sources: Law360, AL.com and Public Citizen

**For-Profit College Settles Class-Action Lawsuit**

Chester Career College, a for-profit college in Richmond, Va., has agreed to pay $5 million in a class-action settlement filed by eight former students who said the training they received was a sham. The agreement, which has been approved in the U.S. District Court for the Eastern District of Virginia, settles claims that the college, formerly known as Richmond School of Health and Technology, targeted minorities for enrollment and did not provide them an adequate education. The complaint, filed in 2011, also estimated that the college has received approximately $5 million a year in federal student loan programs. The sad truth is actually that in effect the federal government funded the school’s scheme. More than 4,000 former students may be eligible to...
receive funds from the settlement, according to reports.

In addition to $5 million in monetary relief, the settlement provides for continued reporting by the School regarding its students’ success and career placement. These measures will improve and strengthen the School as it continues its mission of educating, graduating and assisting in the employment of hundreds of students in various medical fields in and around Richmond. A website for the college provides program information for several health-related fields, including nursing, radiology and medical billing.

The complaint described a pattern of behavior in which the college encourages students to take out federal loans, and then fails to provide adequate training. The college advertised on the BET (Black Entertainment Television) channel and other programming that reaches predominantly African-American audiences. Sade Battle, one of the eight lead Plaintiffs, said she was talked into joining a program for community home health care workers, but was never taught basic skills such as how to change catheters and make beds. She eventually withdrew from the program and later defaulted on her loans. The court awarded her $10,000 plus reimbursement of more than $16,000 to cover loans and other expenses.

It was reported that a number of former employees said the school engaged in “dishonest” and “fraudulent” practices. For example, one instructor described practices such as “falsifying loan applications and changing grades to keep failing students in school.” A 2012 Senate investigation found similar practices across the for-profit education industry, costing taxpayers more than $30 billion. That investigation found for-profit colleges educate about 10 percent of college students and account for nearly half of student-loan defaults. That’s not a good ratio and those schools must be held accountable. John Relman, a lawyer with Relman, Dane & Colfax, based in Washington, D.C., represented the plaintiffs in the case and he did a very good job.

Source: USA Today

**Drugmakers Miss Pediatric Study Deadlines**

The U.S. Food and Drug Administration (FDA) last month accused Genzyme Corp. and two other drugmakers of failing to satisfy obligations to study previously approved products in children. This is the first example of “public chidings” mandated recently by Congress. In letters send to the companies and posted on its website, the FDA complained about incomplete pediatric clinical trials involving Renvela, a Genzyme kidney drug, and Hecortol, Amedra Pharmaceuticals’ allergic shock medicine Twinject and Cleviprex, the Medicines Co.’s blood pressure treatment.

All the letters, which Congress directed the FDA to post last year in a user-fee law, concerned drugs for which pediatric studies that had been deferred until after a drug’s initial approval were supposed to have been finished years ago. It has been more than seven years ago in the case of the Hecortol drug. That may come as a shock to many of our readers, but I must confess that I wasn’t surprised at all when I learned of the delays.

But interestingly, none of the letters from the FDA made any mention of penalties. Under the user-fee legislation, failure to comply with pediatric study requirements can lead to a drug being deemed “misbranded,” but the failure cannot result in approval being revoked. The FDA did make it clear, however, that the drugmakers were running afoul of their legal duties by not completing the studies. The circumstances surrounding each shortcoming were similar. The companies failed to seek a time extension or neglected to finish a study after the FDA declined to grant an extension. The requirement to study safety and effectiveness in children in certain circumstances was a provision of the Pediatric Research Equity Act of 2003. Perhaps Congress needs to revisit this matter and make the law tougher.

Source: Law360

**XIX. Recall Update**

Another very large number of safety-related recalls is being reported in this issue. We have included some of the more significant recalls that were issued in August. If more information is needed on any of the recalls, readers are encouraged to contact Shanna Malone, the Executive Editor of the Report. We would also like to know if we have missed any safety recalls that should have been included in this issue.

**Toyota Recalling 342,000 Pickups To Fix Seat Belts**

Toyota Motor Corp. has recalled 342,000 Tacoma pickup trucks to fix defective seat belts. The models involved are Tacoma Access Cabs equipped with rear-hinged rear doors, built from 2004 to 2011. Toyota said a screw could come loose in the front seat belts on some of those trucks, causing the belts to malfunction. Toyota will notify customers of the recall by mail.

**Nissan Recalls More Than 13,000 Versa Notes**

Nissan has issued a pair of recalls for its new Versa Note compact hatchback to fix problems with bolts installed on several areas of the car. The first recall is for 7,707 Notes from the 2014 model year for loose or missing bolts for the lower body sill. A second recall concerns 7,782 cars—also from 2014—in which a rear seat latch bolt may have been “manufactured incorrectly,” according to the National Highway Traffic Safety Administration (NHTSA). In both instances, loose or defective bolts could cause injury in the event of a crash. No accidents or injuries have occurred as a result of either of these recalls.

NHTSA has confirmed that a total of about 13,000 cars are affected by the recall. The recalls were the result of a “supplier issue that has since been corrected,” the automaker said in a statement. Owners with cars included in these recalls should contact their dealer, who will fix the issue free of charge. The Versa Note is a small hatchback that recently went on sale to compete against vehicles such as the Honda Fit, Ford Fiesta and Hyundai Accent.

**BMW Has Recalled More Than 143,000 Vehicles In China**

BMW’s China joint venture has recalled 143,215 vehicles due to a problem related to their electric power steering system. The recall by BMW Brilliance Automotive Ltd. involves some of its 5-series cars produced between 2009 and 2012. The announcement came a week after the German luxury carmaker failed to win approval from China’s environment ministry for a plan to expand one of its plants in the country. The ministry said it had sent back the application, citing inadequate wastewater analysis and the plan’s failure to meet the government’s anti-pollution targets.
**Hyundai Recalls Big Sonata and Azera To Fix Rust Problem**

Hyundai has recalled about 239,000 Sonata and Azera sedans because the rear suspensions in the cars can rust and fail. The automaker also will recall 20,300 Santa Fe Sport SUVs from the 2013 model year because a manufacturing flaw could cause the right front axle shaft to fracture. The first recall includes 2006-2010 model year Sonatas and 2006-2011 Azera vehicles.

Hyundai is focusing on cars originally sold in, or currently registered in, Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia, Wisconsin and the District of Columbia. It said road salt and water can enter portions of the rear crossmember—a portion of the vehicle’s frame—leading to corrosion and the possible detachment of one of the rear control arms. That would suddenly change the rear wheel alignment, affecting the handling of the vehicle and increasing the risk of a crash.

The National Highway Traffic Safety Administration (NHTSA) launched a probe into corrosion issues in March after hearing complaints that the rear suspension frames on some Sonatas can rust and fail. In documents on its website, the NHTSA said it had received six complaints of suspension failures. Three of the cases involved failures at highway speeds, but no crashes or injuries were reported. In one case, the owner of a 2006 Sonata reported a loss of control in the rear wheels, which triggered the car’s electronic stability control system. Hyundai will ask owners of the vehicles to take the cars back to dealers for repairs. Hyundai customers with questions can contact the automaker at 1-734-337-9499.

**Hyundai Recalls Santa Fe SUVs**

In a separate recall, Hyundai has recalled about 20,000 Santa Fe SUVS to replace the rear right axle shaft. Those involved are model year 2013 Sport editions, with 2.4 liter engines and produced from July 11, 2012, to March 12, 2013. Hyundai said a portion of the axle shaft may have been improperly manufactured and that could result in a fracture and a loss of power, increasing the risk of a crash. The vehicle also may move unintentionally when parked without a fully applied parking brake. Dealers will make the fix at no cost to owners.

**Husqvarna Recalls Closed-Course/Competition Off-Road Motorcycles Due To Crash Hazard**

About 260 Husqvarna closed course/competition off-road motorcycles have been recalled by Husqvarna Motorcycles North America LLC, of Corona, Calif. The motorcycle’s throttle cable can malfunction so the rider loses speed control, posing a crash hazard. This recall involves four 2013 models of Husqvarna closed course/competition motorcycles, including CR125, WR125, WR250 and WR300. The Husqvarna two-wheeled off-road motorcycles are white, red and black. The model number is printed on the rear fender on both sides of the motorcycle just below the tail end of the seat. “Husqvarna” is printed on both sides of the shrouds covering the fuel tank. Consumers can identify the model year by checking the letter in the 10th position of the vehicle identification number (VIN) on the right side of the steering head. The letter D is a 2013 model.

The motorcycles were sold at motorcycle shops nationwide from October 2012 through June 2013 for between $6,300 and $7,100. Consumers should immediately stop using the recalled Husqvarna motorcycles and contact an authorized Husqvarna dealer to schedule a free repair. Contact Husqvarna Motorcycles toll-free at 1-888-985-6090 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.husqvarna-motorcyclesna.com and click on Support/Aftersales for more information.

**Some Blue Brake Fluid Recalled Due To Wrong Color**

A company is recalling about 488,000 units of brake fluid because its color is wrong. Each type of brake fluid has a color requirement so it can be identified. The brake fluid being recalled is blue, rather than in the range of colorless to amber that is required. According to documents posted on the National Highway Traffic Safety Administration (NHTSA) website, Continental Aftermarket GMBH is recalling some ATE Super Blue Racing DOT 4 brake fluid because it could be misidentified and improperly mixed in the braking system. Highway safety officials say that could lead to brake damage or failure. The company is notifying distributors and will offer to buy back all of the affected units held by distributors, retailers and consumers. Consumers can contact Continental Aftermarket at 1-800-265-1818 or at techsupport@vdo.com.

**GIANT Bicycle Recalls XTC Bicycles and Seatposts Due to Fall Hazard**

About 200 Giant brand bicycles and carbon seatposts have been recalled by Giant Manufacturing Co. Ltd., of Taiwan. The bicycle seatposts on the affected bicycles and the after-market seatposts can crack, posing a fall hazard. This recall includes 2013 model year Giant XCR Advanced SL 29er 0 and 29er 1 series bicycles and 27.2 mm carbon fiber seatposts sold separately. The SL 29er 0 model bicycle is white, black and blue. The SL 29er 1 model is white, black and red. The letters ‘XTC’ appear on the down tube of the frame on both bicycles. The name “Giant” and “Contact SLR” appear on the 27.2 mm carbon fiber seatposts. Giant Bicycles received five reports of the bicycle seatposts breaking. No injuries have been reported. According to the company, the bicycles were sold at bicycle stores nationwide between November 2012 and May 2013 for between $4,300 and $7,700 for the bicycles and $200 for the seatpost sold separately.

**IKEA Recalls 40,000 Faulty Children’s Beds In North America**

Ikea, the world’s largest furniture retailer, has recalled two models of junior beds in the U.S. and Canada on concern they can break and cause laceration injuries. The recall of Kritter and Sniglar beds follows reports of incidents where a metal rod that connects the guard rail to the bed frame has snapped, the Swedish company said in a statement. Ikea said: “this can result in partial detachment of the guard rail and exposed sharp metal edges that present a laceration hazard.” No injuries have been reported, according to the retailer, which sells the beds on its U.S. website for $89 and $59, respectively. Owners of the faulty prod-
ucts will receive a free repair kit containing a replacement metal rod, tools and instruction sheet, Ikea said in the statement. The recall concerns 22,000 beds in the U.S. and 18,000 in Canada. The products were made in Poland, Bosnia Herzegovina and Romania, according to Ikea.

**Far East Brokers Recalls Ladybug-Themed Kids’ Outdoor Furniture**

About 14,000 Leisure Ways® Brands Kids Outdoor Furniture have been recalled by Far East Brokers and Consultants Inc., of Jacksonville, Fla. The red surface paint on the furniture contains excessive levels of lead, a violation of the federal lead paint standard. This recall involves red ladybug-themed kids’ metal-framed outdoor furniture sold under the Leisure Ways brand. The recalled items have large ladybug images on the fabric and include a camp chair, folding chair, moon chair, double-seat swing chair and patio set that includes two chairs, a table and an umbrella. A tracking label sewn into the seat of each chair includes the production date “December/2012” and the words, “Distributed by: Far East Brokers and Consultants, Inc.”

The furniture was sold at Weis Markets, wholesale distributors, grocery and drug stores nationwide from January 2013 to May 2013 for between $10 and $50, depending on the item. Consumers should immediately take the recalled outdoor furniture away from children and return them to the place of purchase for a full refund. Contact Far East Brokers and Consultants Inc. toll-free at 1-888-753-9040 anytime or online at www.fareastbrokers.com and click on “Recalls” at the left of the page for more information.

**Char-Broil Recalls Patio Bistro Gas Grills Due To Burn Hazard**

Char-Broil® Gas Patio Bistro® Grills have been recalled by Char-Broil, LLC, of Columbus, Ga. The electronic ignition on the grill can ignite unexpectedly, posing a burn hazard. The recall involves two Char-Broil® Gas Patio Bistro® Grills: the model 240 Full Size grill and the model 180 Table Top grill. Both are single-burner propane gas grills equipped with a battery-operated integrated electronic ignition and intended only for outdoor use. The grills have round black bodies with silver/aluminum trim. The words “Char-Broil®” and “Patio Bistro®” are printed near the thermometer on the grill’s lid and near the control knob on the front of the grill.

The grills have a rating label on the bottom support on the back of the unit that states “Char-Broil, LLC,” the model number and other information. Char-Broil has received 26 reports of the burner flame going out and then unexpectedly reigniting when the consumer turned the control knob to “OFF.” The 26 reports include four reports of burns, including one with burns to the nose, chin and hair, and seven other reports of “burned” or “singed” hair.

The grills were sold at hardware stores and other retailers nationwide, including Ace Hardware, Home Depot, Sears, Target, True Value and online from Amazon.com from September 2010 to June 2013 for about for about $175 for the full size grill and $135 for the table top grill. Consumers should immediately stop using the grills and contact Char-Broil for instructions on how to order and install a free repair kit toll free at 1-866-671-7988 from 8 a.m. to 6 p.m. ET Monday through Friday and 10 a.m. to 3 p.m. ET Saturday, or online at www.charbroil.com and click on Recalls at the bottom of the page.

**Philips Lighting Recalls Endura and Ambient LED Bulbs Due To Shock Hazard**

About 99,000 Endura and Ambient LED dimmable light bulbs have been recalled by Philips Lighting Co., of Somerset, N.J. A lead wire in the bulb’s housing can have an improper fitting, which can electrify the entire lamp and pose a shock hazard. This recall involves Endura 12-watt and Ambient 12.5-watt LED dimmable light bulbs. The bulbs are orange in color and have “MADE IN CHINA,” “Fabricque in Chine” followed by a slanted “S,” and the model number 9290001829 printed on the blue plastic band on the neck of the bulbs. The date codes, 2L for the Endura bulbs and 2K or 2L for the Ambient bulbs, are printed on the metal screw base. The bulbs give off a white light and are used indoors to replace incandescent bulbs.

The fixtures were sold by Home Depot, grocery and home center stores nationwide, online retailers, including Amazon.com and through electrical distributors between October 2012 and May 2013 for between $15 and $30. Consumers should immediately stop using the recalled LED bulbs, unplug the fixture, remove the bulb and contact Philips for free replacement bulbs. Contact Philips Lighting Co. at 1-800-295-5147 between 9 a.m. and 5 p.m. ET Monday through Friday, online at www.recall.philips.com, choose United States/English and click on the Endura and Ambient LED bulb recall for more information or email the firm at led-princcelamp@philips.com for more information. Photos are available at http://www.cpsc.gov/en/Recalls/2013/Philips-Lighting-Recalls-Endura-and-Ambient-LED-Bulbs/
TOYSMITH RECALLS TOY LIGHT-UP FROGS AND DUCKS DUE TO CHOKE-HAZARD

About 30,000 Light-up toy frogs and ducks have been recalled by Toysmith, of Sumner, Wash. The metal conductor pin on the bottom of the toys can come out, posing a choking hazard. This recall includes light-up soft plastic toy frogs and ducks. The toys light up when the sensors on the bottom of the product are touched or placed in water. The frog comes in green and the ducks come in yellow, pink and clear. The toys are approximately 2.25 inches in length and 1.5 inches in height. There is a round tag attached to the product with the UPC number 24245159. No injuries have been reported.

The toys were sold exclusively at Cost Plus World Market between July 2012 and December 2012 for around $3. Consumers should immediately stop using the recalled products, put them away from children and return them to place of purchase for a full refund. Contact Toysmith at 1-800-356-0474 from 8 a.m. to 5 p.m. PT Monday through Friday or online at www.toysmith.com and click on Safety on the left side of the page for more information.

HALO SLEEP SACKS WEARABLE BLANKETS RECALLED DUE TO CHOKE-HAZARD

About 27,000 HALO® SleepSack® Wearable Blankets with Pink Satin Flowers have been recalled by Halo Innovations, of Minnetonka, Minn. Petals from the floral embellishment on the blankets can detach, posing a choking hazard to infants. The recalled HALO SleepSack wearable blankets are 100 percent white cotton with pink-edged ruffles and a pink satin rose embellishment on the front. These sack-shaped wearable blankets have cut-outs for the baby’s arms, a zipper down the center, a sewn bottom and were sold in small and medium sizes. Only SleepSack products with GPU numbers 2701, 2781, 2886, 2887, 3007, 3035 and 3142 printed on a neck label under the primary neck label are included in the recall. The firm has received six reports of the petals detaching from the blankets, including one report of an infant found gagging on a detached petal.

The blankets were sold exclusively at Babies R Us and www.babysrus.com from December 2011 through July 2013 for about $25. Consumers should immediately stop using the wearable blankets and contact HALO Innovations for a pre-paid envelope containing instructions to remove and return the flower and order a free replacement product. Contact Halo Innovations toll-free at 1-866-819-8118 from 8 a.m. to 5 p.m. CT Monday through Friday, e-mail at halorecall@nrmsinc.com or online at www.halosleep.com and click on the product recall link on the home page for more information. Photos are available at http://www.cpsc.gov/en/Recalls/2013/HALO-SleepSacks-Wearable-Blankets-Recalled/.

As has become fairly routine, there were a large number of recalls since the August issue. While we weren’t able to include all of them in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm’s web site at www.BeasleyAllen.com/recalls. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more information on any of the recalls listed above, visit our firm’s web site at www.BeasleyAllen.com/recalls. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more information.
therapy trial. This verdict was selected by the National Law Journal as No. 30 on its list of Top 100 Verdicts of 2011. Ted received the 2009 award for Beasley Allen Mass Torts Lawyer of the year, and the 2012 award for Beasley Allen Litigator of the Year.

Ted is a frequent speaker on mass tort issues. He has been a guest speaker at National Lawyer Conventions held in Montgomery, Philadelphia, New Orleans, Miami, Key West, Aspen, Los Angeles, San Francisco, Boston, Atlanta, Alabama, and Puerto Rico. Ted received the Alabama State Bar Continuing Legal Education Award in recognition of efforts to continue and enhance professional competence. He has been recognized as an “advocate” by the National College of Advocacy. Ted has spoken at the Mississippi Judicial College on the subject of Electronic Discovery. He has spoken regarding Hormone Therapy (Prempro) litigation in a conference sponsored by the American Association for Justice. Ted has been interviewed by Legal Talk Network regarding the latest in the Vioxx (2006) and Hormone Therapy (2012) litigation. He is mentioned in the 2007 through 2010 editions of The Legal 500—a book carrying independent editorial commentary on the leading law firms in the United States.

Ted was the principal Beasley Allen lawyer who handled the Lotronex, Meridia, Guidant Ancure Stent, Sulzer and Smith & Nephew Knee Replacement litigations, as well as Hormone Therapy (Prempro) cases. He was selected to serve on the Plaintiffs’ Steering Committee in the Prempro Multi District Litigation. Ted is currently investigating other potential Mass Tort claims including those pertaining to Medtronic Insulin Pumps.

Ted is married to the former Carla Musgrove of Eufaula, Ala. They have two children, Nathan and Amanda. The Meadows family attend Saint James United Methodist Church, where Ted is actively involved in the Music Ministry. He has also served on the Board of Trustees and as a lay helper in Haiti during the months following the 2010 earthquake. Ted is an avid triathlete and enjoys following his children in their athletic pursuits including soccer, dance, swimming, running and triathlon. We are blessed to have Ted with us.

**FLORA JOHNSON**

Flora Johnson, who has been with the firm since July 2002, is currently working as an Administrative Assistant in the Toxic Torts Section. In this position, she helps oversee and maintain the main BP database for all BP clients, pulls notices from the Deepwater Horizon Claim Center, and helps with BP settlement payments. Flora previously worked in the Accounting Department for the firm.

Flora is married to Leon Johnson and they have three children. Their oldest, Sandy, is married to Josh Cullars and has two children, son Landon, daughter Ansley and stepson Tyler. Sandy is pursuing her education in teaching. Jeremy is a 25-year-old who is in the U.S. Air Force, stationed in Dover, Del. Jeremy just returned to Dover from deployment in Manas, Kyrgyzstan. Hannah, who is 18 years old, just graduated from Cornerstone Classical Christian Academy and was the class valedictorian. Hannah is now attending Auburn University Montgomery (AUM) pursuing a nursing degree. Flora enjoys mission trips, mission work and her grandchildren. She is a very good and hard-working employee. We are fortunate to have her with us.

**NANCY LEGEAR**

Nancy LeGear has been with the firm more than 10 years in our Mass Torts Section. She currently is working on the Januvia, Byetta and Fosamax litigation as the Legal Assistant to David Dearing. She assists David with legal research, trial preparation, drafting and filing legal documents and case management.

Nancy has 18-year-old twin daughters, Danielle and Morgan, each of whom is an honor student at Prattville High School. While Nancy’s father, sister and three nephews reside in Alabama, her brother resides in Georgia. Nancy graduated from South University with an Associate of Science in Paralegal Studies degree. She enjoys spending time with her family and friends, running and reading. Nancy is also a very good employee and a hard worker. We are fortunate to have her with us.

**XXI. SPECIAL RECOGNITIONS**

**PUBLIC CITIZEN WORKS TO MAKE DRUGS SAFER**

I have written on several occasions about the excellent work that has been done by Public Citizen relating to drug safety. Without any doubt, that work was badly needed and the need continues. Each year, more than 100,000 people die from adverse drug reactions and another 2,000,000 people are seriously injured. Unfortunately, the U.S. Food and Drug Administration (FDA) hasn’t always done its job when it comes to drug safety. In large part, that’s because the agency has been grossly underfunded and not adequately staffed. The FDA has even had to depend on the drug industry for part of its funding. It’s most interesting that a regulatory agency has to look to the industry it regulates as a funding source.

A prime example of why Public Citizen’s work is so important involves the drug Rezulin. By the time the FDA banned Rezulin, the drug had caused hundreds of cases of liver damage, including 63 reported deaths. A publication, *Worst Pills, Best Pills News*, put out by Public Citizen, had warned of Rezulin’s potential danger a full 18 months before the FDA finally took the drug off the market.

*Worst Pills, Best Pills News* was started by Dr. Sidney Wolfe at Public Citizen to warn consumers about dangerous prescription drugs, sometimes years before they are finally taken off the market. It should be noted that Public Citizen has helped to remove 23 dangerous drugs from the market. That really should have been the FDA’s job, but for a number of reasons, the agency doesn’t always act promptly to protect folks against the dangers of unsafe drugs.

The most recent example was when the FDA dropped the ball on regulating a large compounding pharmacy company, allowing it to continue to manufacture fungus-contaminated steroid injections that so far have sickened at least 745 people in 20 states, resulting in 58 deaths. What is particularly tragic for those who have been sickened or killed by the tainted drug, and for their loved ones, is that this situation was completely avoidable.

Readers were warned about compounding pharmacies in *Worst Pills, Best Pills News* back in 2001. Subsequent articles appeared in the publication’s reports in 2006 and 2007. Even earlier, Public Citizen had tried to get FDA to act. And since the outbreak began, Dr. Sidney Wolfe has issued several letters to the Secretary of Health and Human Services, the Food and Drug Administration, and Congress criticizing the FDA and the Centers for Medicare and Medicaid Services for years of oversight failures that led to this public health catastrophe and calling for an independent investigation of these failures.

The work of Dr. Wolfe and Public Citizen has been widely covered by numerous media outlets including *The New York Times, The Washington Post, USA Today, CNN, National Public Radio’s “The Diane Rehm Show”* and “NBC Nightly News.” Many believe Public Citizen is doing work that the FDA should be doing. Unfortunately, the FDA is not the gold-standard agency it once was. For that reason, Public Citizen has had to step up its...
efforts to keep consumers safe. Public Citizen, among other things, has:

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

- Closely monitored the FDA where the drug review process is heavily dependent on industry financing. In fiscal year 2011, total drug industry user fees to the FDA central drug office—where drugs are reviewed—were $619 million. This means that approximately 60 percent of the total budget for reviewing drugs came directly from these “regulated” companies. Because of this unhealthy financial relationship, we have had to further increase the speed and intensity of our challenges to the safety of many drugs by petitioning the FDA to ban or relabel them. This responds to the urgent need to supplement the inadequate FDA (and Congressional) oversight of the drug industry.

- Had Medical experts from PC testify regularly at FDA advisory committee meetings about the safety of drugs, trying to stop dangerous drugs from being approved or arguing for them to be banned.

- Taken an active role in stopping Congress from destroying Medicare and that work is very important.

Unlike most other publications or websites, Public Citizen does not accept money or advertisements from drug companies. This ensures that Public Citizen can remain independent and do its work without worrying about offending Big Pharma. Their judgment is not clouded by commercial interests and that’s very important. The only obligation Public Citizen has is to people and not to powerful corporations and that is also critically important.

I have encouraged our readers in prior issues to support Public Citizen. I again make that request. One way you can help is by subscribing to Wost Pills, Best Pills News. You can actually become an advocate for your own health and that of your family and friends. Public Citizen can be your advocate for safe drugs. One way you can help support this work to keep dangerous drugs off the market is by sending in a financial contribution, large or small, today to Public Citizen. You can write Public Citizen at 1600 20th Street, NW, Washington, D.C. 20009 or call 1-202-588-1000. Public Citizen’s email address is member@citizen.org and their website is www.citizen.org. For more information on Worst Pills, Best Pills News you can go to www.worstpills.org.

Source: Public Citizen

Michael Jackson Named Alabama’s District Attorney of The Year

Michael Jackson, who represents Bibb, Dallas, Hale, Perry and Wilcox counties, has been named District Attorney of the Year by the Alabama District Attorneys Association. This high honor was announced at the Association’s annual conference. Mr. Jackson is the first African-American to win this award. He is also the only African-American District Attorney currently serving in Alabama. Mr. Jackson serves in the 4th Judicial Circuit, which incidentally is the state’s largest geographical district. He was elected in 2004 and is now serving his second six-year term.

Mr. Jackson received national attention for his work on a case reaching back to the Civil Rights movement. In 2010, he was able to re-open a case against James Bonard Fowler, a former Alabama State Trooper who was accused of murdering 26-year-old Jimmie Lee Jackson (no relation), a civil rights protestor, in 1965. The murder inspired the Selma to Montgomery marches, which eventually paved the way for the passage of the Voting Rights Act of 1965. Two weeks before he was scheduled to go to trial, and 45 years after the murder, the now 77-year-old Fowler pleaded guilty to the killing.

Other notable cases handled by District Attorney Jackson and his staff include a 2012 capital murder case that involved the drive-by-shooting of a 3-year-old child; and the trial and conviction of a former state representative and high school principal charged with sexual misconduct with a student in Wilcox County. In my opinion, which obviously is shared by his peers, Michael Jackson has done an outstanding job in his role as District Attorney.

When presented with the District Attorney of the Year Award, Mr. Jackson said that he was very honored that his colleagues picked him for this award. He gave much of the credit to what he described as a really good staff. He also said that they have very good relationships with the law enforcement agencies in his circuit. Mr. Jackson added that this relationship “helps everything come together to get justice for victims.” Michael Jackson clearly deserves the honor bestowed on him by his peers. We commend him and wish him the very best in all of his future endeavors.

Sources: Tuscaloosa News, WSFA, and DemocracyNow.org

Beasley Allen Continues To Work For Safety

For the past four years our law firm has sponsored Seat Check Saturday events to bring awareness to National Child Passenger Safety Week. We have partnered with Safe Kids USA and the Alabama Department of Public Health to offer parents and child caregivers the opportunity to have their child safety seats installed or inspected at no cost. This year, the event will be held Saturday, September 28th. Qualified seat installation experts will be on hand to inspect and install child safety seats from 9 a.m.-noon at The Shoppes at EastChase in Montgomery. As we have previously reported, motor vehicle accidents remain the leading cause of death for children ages 3 to 14. Properly installed car seats and booster seats reduce the risk of serious and fatal injuries by more than half. The information set out below indicates how serious this matter is:

- Seven children die each day as a result of improperly fastened child seats;
- 85 percent of child seats are not installed according to manufacturers specifications;
- Nearly one-third of child seats are not suitable for the vehicles in which they are installed;
- Motor vehicle accidents are the leading cause of death for children ages 3-14;
- Properly installed car seats and booster seats reduce the risk of fatal injury by more than half.

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

National Child Passenger Safety Week is sponsored annually by the National Highway Traffic Safety Administration (NHTSA). You can find more information about child safety seats and vehicle safety at the NHTSA website. The Centers for Disease Control and Prevention (CDC) also has a helpful website with information about child safety seats. If you would like more information on this subject, contact Helen Taylor, Public Rela-
Law Students To Offer Free Legal Advice In Foreclosure Cases

The University of Alabama School of Law has opened a foreclosure clinic to offer free legal assistance to clients in seven nearby counties. The clinic will be staffed by current law students and supervised by a full-time lawyer and a part-time supervising lawyer, according to a UA press release. The clinic formally opened August 19th. Hugh Lee, director of the school’s Foreclosure Relief Clinic and the Elder Law Clinic, said in a news release:

Because foreclosure is generally a non-judicial process, consumers often do not understand how a lawyer can help resolve their situation. Furthermore, because attorney’s fees are not generally available to most consumers facing foreclosure due to a financial crisis, few can afford counsel to help them. Thus, even those who try to seek counsel often go without help.

The foreclosure clinic will be one of eight free legal assistance clinics currently being offered by the School of Law. The clinics are Capital Defense, Community Development, Criminal Defense, Mediation Law, Domestic Violence, Elder Law, Civil Law, and Foreclosure. The clinics provide a service to folks who badly need help and give them access to the judicial system. The law school and all involved with these projects should be commended.

XXII.
Favorite Bible Verses

Rev. Jay Wolf, the lead pastor at the First Baptist Church in Montgomery, sent in a verse for this issue. Jay also included some information about his father. Jay, a dedicated man of God, says his father was his chief cheerleader. He also described him as a true Texas cowboy. In fact, Jay said his dad reminded him of John Wayne. Jay says he carried his dad’s name and received his lavish love and encouragement. Jay had this to say about his dad:

Dad called me in January of 1996 and sadly explained that the cigarettes be unwise smoked for 50 years now yielded the horrible harvest of lung cancer which bad spread into his liver and bones. The doctor told him to get his affairs in order. The news bit me like a ton of bricks. I went before the Lord on Dad’s behalf and activated God’s invitation in Luke 11 to “ask, seek and knock.”

The cancer ravaged Dad’s earth suit. My Heavenly Father tied my heart to His anchor of assurance in Hebrews 12:1-2 which instructs, “Therefore since we are surrounded by such a great cloud of witnesses, let us set aside every sin that does so easily entangle us and run with endurance the race that is set before us, fixing our eyes upon Jesus who is the author and the finisher of our faith. Who for the joy set before Him endured the cross and is now seated at the right band of God.”

On my birthday, September 11, 1996, My Father joined the “great cloud of witnesses.” I believe Dad still cheers for me from the grandstands of glory. So I will faithfully run the race of serving King Jesus until the day He calls me to the great reunion with my earthly and heavenly Fathers!

The following verse that Jay furnished for this issue is most insightful and has a message for each of us. It explains things very well!

Therefore we also, since we are surrounded by so great a cloud of witnesses, let us lay aside every weight, and sin which so easily ensnares us, and let us run with endurance the race that is set before us, looking unto Jesus, the author and finisher of our faith, who for the joy that was set before Him endured the cross, despising the shame, and has sat down at the right band of the throne of God.

Hebrews 12:1-2

George Littleton, who resides in Auburn, sent in a verse for this issue. George is not only a good friend, but a talented writer and historian. He is also a person who cares deeply about our state and its people.

For I know the thoughts that I think toward you, says the Lord, thoughts of peace and not of evil, to give you a future and a hope. Then you will call upon Me and go to Me, and I will listen to you. And you will seek Me and find Me, when you search for Me with all your heart. I will be found by you, says the Lord, and I will bring you back from your captivity; I will gather you from all the nations and from all the places where I have driven you, says the Lord, and I will bring you to the place from which I cause you to be carried away captive.

Jer. 29:11-14

Tammy Griffin, owner “A Catered Affair,” a business in Montgomery, sent in two verses this month and asked us to select one. Tammy said God gave her these verses as she started her career and allowed her “love for cooking” to be her life’s work. After reading them, I decided that both needed to be in this issue.

Commit to the Lord whatever you do, and your plans will succeed.

Proverbs 16:3

Honor the Lord with your wealth, with the firstfruits of all your crops; then your barns will be filled to overflowing and your vats will brim over with new wine.

Proverbs 3:9-10

Gary Soriano, the Owner and operator of the Chick-fil-A locations in EastChase and RSA Tower in Montgomery, also sent in two verses for this issue. Gary has had the opportunity to travel to Southeast Asia several times in the past six years to speak on leadership from a biblical perspective. His messages were all based on the techniques and teachings of Jesus and the examples He gave us. Gary points out that Jesus is the ultimate model of a servant-leader in a person’s business life, as well as their personal life, and that is absolutely true.

Not so with you. Instead, whoever wants to become great among you must be your servant.

Matthew 20:26

Now that you know these things, you will be blessed if you do them.

John 13:17

Joe Bill Campbell, a lawyer with the firm of Hughes & Coleman, located in Bowling
Green, Ky., also sent in a timely verse this month. Joe Bill, who has been a trial lawyer for 45 years, attributes his success in law to his relationship with his Lord and Savior, Jesus Christ. He says making God a priority in his life, seeking His Will, and sharing time with God daily through Bible reading and prayer have been the keys for his personal and professional well-being, inner peace and success in life.

Open your mouth and taste, open your eyes and see—how good God is. Blessed are you who run to Him. Worship God if you want the best; worship opens doors to all His goodness.

Psalm 34: 8-9

Allen Newton, lead Pastor at St. James United Methodist Church, furnished the final verse for this issue. In John 15: 5-8, Jesus explains the relationship between Jesus and all true believers. It’s a simple, but profound relationship, and fortunately it’s one that can easily be understood.

I am the vine, you are the branches. He who abides in Me, and I in him, bears much fruit; for without Me you can do nothing. If anyone does not abide in Me, be is cast out as a branch and is withered; and they gather them and throw them into the fire, and they are burned. If you abide in Me, and My words abide in you, you will ask what you desire, and it shall be done for you. By this My Father is glorified, that you bear much fruit; so you will be My disciples.

John 15:5-8

XXIII.
CLOSING OBSERVATIONS

BP’s Track Record On Safety In The Past Decade Is About As Bad As It Gets

In the past month, the American people have been bombarded with a vast public relations effort by BP. This effort, which includes paid advertisements and news releases, is obviously designed by BP to change the public’s opinion about a massive settlement that the oil giant negotiated and agreed to. BP now wants out of its settlement. During the past 3 years, I have learned that BP is a master at the public relations game. But during that time I have also learned that BP’s safety performance, as well as its overall corporate conduct, has been unbelievably bad. I will give you a timeline that tells the story of how BP has performed relating to safety. Suffice it to say, it’s not a good record. In fact, it’s a terribly bad record and one that indicates a corporate mindset that puts profits first, with safety falling far down the list of priorities.

The BP Safety Record

• September, 1999. BP dumped hazardous wastes in Alaska, resulting in tremendous damage. BP paid $22 million in fines and penalties.

• May-June, 2000. In Grangemouth, Scotland, there were three separate incidents that resulted in two criminal charges. BP pled guilty and was fined $1 million.

• March, 2005. The Texas City Refinery Explosion occurred, resulting in 15 deaths, with another 180 injured. BP pled guilty to felony violations.

• In 2005, BP pays $60 million as a result of Air Pollution violations in California.

• March, 2006. BP pipeline corrodes and dumps largest spill ever on Alaska’s North Slope. The damage was severe and intensive.

• April, 2006. BP was fined for unsafe conditions at a Oregon-Ohio Refinery.

• 2007-2010. BP refineries in Texas and others accounted for 97 percent of all Petroleum Industry Occupational Safety and Health Administration (OSHA) violations (760 BP violations) in the U.S. BP was cited for “egregious, willful” misconduct.

• 2007. BP paid $300 million in fines and penalties relating to an illegal price fixing scheme. While it didn’t relate to safety issues, it tells us lots about BP’s mindset.

• October, 2009. BP had 270 safety violations, paid fines and penalties, and pled guilty to felony violations.

• April, 2010. As the world knows, the Deepwater Horizon Semi-submersible explodes, kills 11 people, injures 16, and sets off the largest oil spill in the history of the Petroleum Industry.

• December, 2012. BP pleads guilty to 11 counts of felony manslaughter (Misconduct or neglect of Ship Officers), 2 misde-
I consider trial by jury as the only anchor yet devised by man, by which a government can be held to the principles of its constitution.

Thomas Jefferson

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

XXIV.
PARTING WORDS

COMMON GROUND MONTGOMERY IS MAKING A DIFFERENCE

I am writing this month about the tremendous work being done in Montgomery by Common Ground Montgomery (CGM). This work is making a real difference in the lives of hundreds of youngsters in our city. The mission statement of CGM, which is to “create a ‘safe haven’ of love and grace along with structure and discipline for the children of our community when they are most vulnerable to the destructive influences of our streets,” is being carried out. Staff and volunteers who work in the program at CGM provide a lot more than lip service in carrying out the mission goal. The staff members live and work in the community they serve, opening their homes to children who need guidance, direction, friendship and love. Folks at CGM not only “talk-the-talk,” but they really “walk-the-walk!”

CGM Founder, Bryan Kelly, his wife, Delta, and their four boys are convinced they have been called to become part of the fabric of the Washington Park community, located in West Montgomery, to help bring about its transformation. They, along with staff members and neighbors, provide what they call “life on life” training for young people through Biblically based “discipleship” relationships. These relationships allow youngsters to develop character, social and life skills, and this also provides guidance for them to work on the skills they need to be successful in academics, arts, sports and entrepreneurship.

In 2011, CGM created the Urban Seed Exchange, a relationship-based entrepreneur and mentorship program. Our firm, community volunteers and local media partnered with CGM for a four-week renovation project. An old 4,300-square-foot double storefront located in the community was converted to house the program. Since the summer of 2012, “Urban Seed” has started a screen-printing shop that produces T-shirts, hats, bags and other items. The goal is to involve interested high school students and help them learn basic job skills and marketable talents aimed at future employment. The program is working.

CGM also helps connect children, starting at the fourth-grade level, with Christian mentors from throughout the city. These relationships continue throughout a youngster’s life up to high-school graduation. In addition to the Mentor Program, CGM also provides an After School Program, Christmas Store, House to House outreach to help renovate homes, and a Summer Camp. Each of these programs is badly needed and there also have been successful.

In addition to Bryan and Delta, the CGM staff includes Program Director Kevin King, Chaquana Townsend, Justin Hampton and Dr. Leslie Cowell. The Administrative staff includes Amy Lynne Blake, Ken Austin, Matt Wolfe, Rachel Fisher and Jamie Welch. After School Program Teachers are Cedreanna Stafford, Marilyn Greer, Ava Conley, Abigail Hunter, Latosha McBryde and Tontalea Horne. Common Ground Montgomery depends on community donations to do its work and lots of folks have helped out. CGM needs help to allow them to continue their very important work.

Lots of folks in our firm have helped out in a number of ways. They want to see that the youngsters being ministered to by CGM have a bright future. For more information on CGM, you can visit their website at www.cgmlife.org. Regardless of where you live, there are opportunities to participate in efforts such as those carried out by CGM in Montgomery. I encourage our readers to seek out those opportunities. My hope and prayer is that more folks will get involved with groups such as CGM. Not only will you be helping folks who badly need help, but you will be blessed by helping them.

May God bless each of our readers, their families, co-workers and friends!
Jere Locke Beasley, founding shareholder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley’s law firm, established in 1979 with the mission of “helping those who need it most,” now employs over 75 lawyers and more than 200 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 30 years.