I.
CAPITOL
OBSERVATIONS

BEASLEY ALLEN LAWYERS HAVE A LONG REACH WITH SIGNIFICANT VERDICTS NATIONWIDE

While our firm’s only offices are based in Montgomery, Ala., we represent clients and work with lawyers in all states throughout the country. Lawyers in our firm represent claimants in areas including Personal Injury and Product Liability, Business Litigation, defective Medical Devices, unsafe Drugs, Consumer and Commercial Fraud, Whistleblower Litigation, Employment Law and Environmental Law. Our lawyers have been involved in complex litigation in courtrooms in all parts of the U.S., including state and federal courts.

Our firm is in the national spotlight quite often because of the work done on the Plaintiffs Steering Committees in such multidistrict litigations as the BP Oil Spill, Actos, Granuflo, Vioxx, DuPuy, and many others. But the firm also handles individual cases in state and federal courts throughout the country. We have made it a policy to always involve local counsel in cases handled both in Alabama and in other states.

The folks in our firm—lawyers and support staff—are our true strength. The firm has four sections—Personal Injury/Products Liability, Mass Torts, Toxic Torts and Consumer Fraud—and that framework has worked well for us. Since the lawyers work in sections, they are able to focus on a specific area of law. Our support staff includes legal assistants, investigators, nurses, computer specialists and technologists. We have a public relations department and a comprehensive trial graphics department.

Beasley Allen has been recognized in several publications as one of the country’s leading firms involved in civil litigation on behalf of claimants, having represented hundreds of thousands of people throughout the country. The firm’s goal is to do our very best to make sure that our clients leave our office in much better condition than when we first met them. We strive to make the interests of our clients the top priority in every aspect. The firm has been truly blessed and we are most thankful for that.

ALABAMA CRASH DEATHS INCREASED IN OCTOBER

The Alabama Department of Public Safety reported last month that more people died in highway crashes in Alabama in October than in the month before. Fifty-three people died in highway crashes in October in the state. That’s an increase from 42 deaths investigated by state troopers in September. Of the 53 who were killed in October, troopers say 28 people weren’t wearing seat belts. That compares to 15 in September who reportedly weren’t using restraints when they died. It should be noted that quite often a victim in a highway crash is reported as being “unrestrained,” when in fact a seat belt buckle failed, resulting in the belt being released. We have seen that to be the case on numerous occasions in litigation through the years. Traffic wrecks have killed 421 people so far this year on Alabama highways compared to 427 during the same period last year.

II.
A REPORT ON THE GULF COAST DISASTER

BP MUST BE HELD ACCOUNTABLE

What we all have witnessed from BP during this past year is nothing short of remarkable. BP was responsible for the deaths of 11 men and the oil giant caused billions of dollars in economic damages along the Gulf Coast. The shameless media campaign BP has undertaken in the wake of the massive oil spill has been a gross insult to the entire coastal region. In case anyone has forgotten how much of a sideshow BP has become and how this company has mocked the judicial system and insulted the public’s intelligence, let’s take a look:

• After bragging about the Deepwater Horizon’s safety record, only days later the rig suffered a catastrophic explosion that would ultimately be traced to systematic safety failures that reached all the way to BP upper management. The company would later suffer criminal penalties, plead guilty to felony manslaughter charges, and be responsible for billions in damages.

• BP intentionally covered up the spill’s flow rate in hopes that government agencies wouldn’t discover how much oil was truly spilling into the Gulf. The cover up would later be discovered, and BP employees would be criminally charged.

• While the spill devastated the Gulf fishing industry in 2010, BP spent millions on television ads proclaiming that the company would pay all legitimate claims and take
care of the Gulf. In actuality, BP had dispatched its henchmen to the fishing villages of the Gulf Coast in order to obtain releases from fishermen desperate for money. Outrage ensued when politicians learned of the “release for pennies” campaign, and BP was forced to rescind the releases.

- Even though BP knew of the dangerous chemicals present in dispersant and the crude oil spilled, the company failed to provide most workers with gear to protect their lungs and skin. Many of the workers are still sick to this day as a result of BP’s failure to provide basic equipment to its employees.

- Even though BP knows that thousands of pounds of oil and tar balls continue to wash up on the Gulf Coast, the company has proclaimed that the beaches are clean and the oil is gone.

- The company stated in open court that the economic settlement’s objective and generous causation standards made it a good deal. The company reaffirmed its support of the causation framework as applied by the claims administrator in open court. Now, the company is changing its position and claiming that the objective standards actually required subjective causation questions.

- BP claims the settlement agreement requires a “smoothing” of spikes in revenues even though the company never mentioned anything about a “smoothing” analysis during settlement negotiations, nor was there any provision in the settlement agreement about a “smoothing” analysis.

- BP has publicly accused the claims administrator of mismanaging the claims process even though the claims administrator is following the exact terms of the settlement agreement BP agreed to and bragged about in court. What’s more, on most of the issues BP now complains about, the claims administrator requested input early in the process and BP did not acknowledge any issue. It was only after the company learned it undervalued the settlement that it then turned on the claims administrator.

- BP brags about its new drilling operations monitoring center, but the company fails to mention that it was required to implement the program as part of its criminal probation for killing 11 people.

Felons typically exercise genuine remorse for their actions, and one would expect this felon to show some humility and learn its lesson. Obviously, this is no ordinary felon—it’s BP. If BP were a real person, the company would be facing a “three strikes and out” sentence because of the North Slope and Texas City Explosion disasters it caused prior to the tragic event in the Gulf of Mexico. When we analyze BP’s previous disasters, the multi-billion-dollar ads, the misinformation campaign, and the “intentional confusion” BP has tried to create in the settlement program, we see without a doubt that this company has not changed. BP is still a greedy, heartless organization that cares only for its bottom line.

JUDGE BARBIER COMES DOWN HARD ON A DEFANT BP

After months of BP twisting the truth, mocking a settlement agreement it previously agreed to, and continually trying to destroy the credibility of a respected claims administrator, a man the company had previously picked, it appears that Judge Barbier finally has had enough. Recently, he issued a blistering order that accused BP’s lawyers of “deeply disappointing” actions, and for making a “startling” reversal of its previous statements made under oath and in open court.

The Court’s frustration is borne in part out of the oil giant’s bad faith attempts to destroy the settlement it not only agreed to but had actually negotiated during a period of months. Previously, BP sought to change the way claims were calculated under an expense and revenue “matching” theory, even though BP’s suggested “framework” was nowhere to be found in the 1,000-page settlement agreement. Simply put, the company is not satisfied with how much a settlement it created is costing. Now, the company has turned its attention to completely undoing a causation framework that it has repeatedly reaffirmed and supported in open court for months—even when previously questioned by Judge Barbier specifically on whether the company supported the framework.

When commenting on BP’s recent actions, Judge Barbier noted: “BP accuses the claims administrator of ‘rewriting’ and ‘systematically disregarding’ the settlement agreement … To the contrary, when it talks about causation, if anyone is attempting to rewrite or disregard the unambiguous terms of the settlement agreement, it is counsel for BP. Frankly, it is surprising that the same counsel who represented BP during the settlement negotiations, participated in drafting the final settlement agreement, and then strenuously advocated for approval of the settlement before this court, now come to this court and the 5th Circuit and contradict everything they have previously done or said on this issue.” Judge Barbier said. He added that “such actions are deeply disappointing…”

Judge Barbier pointed out that during settlement negotiations, all parties agreed requiring direct causal proof for thousands of businesses would be too difficult a task. As a result, Judge Barbier reasoned, the parties agreed to objective, causation rules that would apply to the covered regions of the settlement. He cited a litany of quotes from BP’s own lawyers confirming the approach, but now BP has returned to court demanding a new causation framework that the company claims always existed. That is simply not true. Judge Barbier could not have disagreed more with BP:

In the context of a class-wide settlement program, involving claims by tens of thousands of claimants, it would be infeasible to expect or require every claimant to prove actual, or factual, causation … Doing so would require thousands of individual trials of causation, defeating the whole purpose and intent of the class settlement.

Judge Barbier even questioned whether the company had standing to appeal the causation provision, considering the company also agreed to “support the final approval and implementation of th[e] agreement and defend it against objections, appeal or collateral attack.” Frankly, based on our experience with BP, I don’t trust BP and put nothing past them. The company is desperate and that’s quite evident from its actions. The American people, especially those who live and work in the states of Florida, Alabama, Mississippi, Louisiana and Texas will not tolerate the shameful performance by BP. Neither should anybody regardless of where they are located.

RHON JONES SPEAKS OUT ON BP’S CONDUCT

Rhon Jones, who heads up our firm’s BP litigation efforts, wrote an op-ed piece last month. Rhon pointed out in the piece how the oil giant has operated in the past several years. He specifically takes aim at BP’s handling of the aftermath of the massive oil spill in the Gulf of Mexico.

**BP Is A Bully And We Don’t Have To Take It**

I am convinced that BP thinks they are smarter than everyone in our state, especially those who love our coast and the Gulf of Mexico. The definition of “bully” is a blustering, quarrelsome, overbearing person who habitually badgers and intimidates smaller or weaker people; or who is loudly arrogant and overbearing. The definition of a hypocrite is one who feigns some virtue or ability he or she does not possess. These describe BP perfectly.
BP has spent millions of dollars on ads across the Gulf Coast and beyond telling us how great their company is and how committed they are to safety. I am sick and tired of their slick ad campaign touting the focus off the facts and who they really are. Let’s take just a brief look at recent history.

BP was responsible for the Texas City Refinery Explosion in 2005 that killed 15 hard-working employees and injured 170 more. BP was cited for hundreds of safety violations and the U.S. Chemical Safety Board said the explosion was “caused by organizational and safety deficiencies at all levels of BP.”

In 2006 BP was involved in the worst oil spill ever on the North Slope of Alaska resulting in 267,000 gallons of oil released and pled guilty to negligent discharge of oil.

In 2010, BP was squarely in the middle of the largest blowout and oil spill in U.S. history, which led to some 100 to 200 million gallons of oil flowing into our Gulf. More importantly, 11 hard-working men were killed. Those men did not have to die. They left behind widows and children who live with the impact of BP’s conduct every single day.

BP pled guilty to 11 felonies as a result of those deaths, as well as pleading guilty to obstruction of justice. Let that sink in—a guilty plea to 11 felonies and obstruction of justice.

I noticed in one of BP’s recent ads they tout their creation of a state-of-the-art monitoring center to watch over all their drilling activity. Guess what, BP’s felony guilty plea required them to maintain this monitoring center! So BP pleads guilty and part of the plea is doing something they should have been doing all along, and on top of that they want to take credit for it in an advertisement!

The hypocrisy does not stop there. As a result of the 2010 disaster in the Gulf, BP agreed to a historic settlement that was not capped and they themselves said was fair and transparent. Once it became clear their estimates for the cost of the settlement would exceed their projections, BP became the very definition of a bully listed above using every resource available to them to try and attack the very settlement they wrote and agreed to.

I may not know much, but I know a giant corporate bully and a hypocrite when I see one. BP fits the bill on both counts. The lawyers at Beasley Allen, along with lawyers from other firms involved in the BP litigation in New Orleans, are fighting hard to make sure the oil giant is held accountable for their wrongdoing.

Source: Rhon Jones is head of the Toxic Torts Section at Beasley Allen. He is one of the lead lawyers in the BP litigation, serving on the PSC, having been appointed by Judge Carl Barbier.

MEDICAL BENEFITS SETTLEMENT OBJECTORS DROP THEIR APPEALS

As this Report was going to print, a major development was in the works with the Oil Spill Medical Benefits Settlement. While the Economic and Property Damages settlement has gotten most of the media attention, the PSC also reached a separate Medical Benefits Class Settlement to compensate those who lived directly on the coast, or participated in the cleanup, and were sickened as a result of their exposure to crude oil and dispersant chemicals. The Settlement is a one of a kind, landmark settlement that provides compensation and long term monitoring to thousands of affected class members.

After the Settlement was reached, a fierce battle ensued when objectors, led by two lawyers, Darrell Palmer and Ted Frank, sought to destroy the Settlement. An appeal was taken to the Fifth Circuit Court of Appeals. As serial objectors, Frank and Palmer were not strangers to the class settlement objection process. They have faced serious criticism for their objections before other federal courts, and Mr. Palmer in particular has been singled out by courts for “bad faith” and “vexatious” behavior in filing his appeals.

In the present case, the PSC moved for Rule 11 sanctions, alleging bad faith against the lawyers due to questionable representations about facts surrounding their clients’ cases, including whether the clients even had standing to bring the appeals in the first place. While the Rule 11 sanctions are still pending, there is no question that these serial objectors have held this settlement hostage for way too long. The lawyers even objected to the Economic class, but they are now facing increasing pressure because their clients may not be class members for those claims either.

It is with this backdrop that the objector clients filed a motion late last month dropping their appeals and calling into question the lawyers’ representation and communications with them. In the motion, the three objectors said they fired their prior lawyers due to their “unauthorized and unapproved actions and conduct taken during the course of their former representation.” Ronnie Penton, a solo practitioner in Bogalusa, La., who now represents the three objectors—Florida property owners—said in court papers that the “appealants now realize, much to their extreme chagrin, prior counsel’s machinations and subterfuge, of which they were unaware and do not countenance.”

Because these objectors have dropped their appeal, we believe the Medical Settlement will now go forward and thousands of injured folks will be compensated. The compensation structure is based on whether a claimant is a clean up worker or a resident within the compensable zone, the symptoms sustained and the proof supporting the claim. Of particular importance is the 21 year medical consultation program, which monitors the health of class members to hopefully catch later-manifesting illnesses (like cancer) early. Class members will also be entitled to a back-end litigation option, so if a claimant develops a condition later in life related to the oil spill, they can sue BP for that illness.

Our firm has helped hundreds of injured clients in this litigation, and we are happy that this landmark settlement will go forward. Parker Miller is spearheading representation of these clients for the firm. If you have any questions about the Medical Settlement, please contact Parker at Parker.Miller@beasleyallen.com, or at 800.898.2034.

Source: The National Law Journal

III. DRUG MANUFACTURERS FRAUD LITIGATION

AN UPDATE ON THE AWP LITIGATION

Our firm continues to wind down the Average Wholesale Price (AWP) litigation in the eight states that we are representing across the nation. We have completed the litigation in Alabama, Hawaii, South Carolina, and, as of last week, the State of Louisiana. We are still pursuing cases in the States of Mississippi (three cases remaining), Kansas (four cases remaining), Alaska (one case remaining), and Utah (22 cases remaining). To date, we have collected for these eight states just under $1 billion. With the cases remaining, our firm should most definitely collect more
than a billion dollars for the states we have represented in this important litigation. I will mention the work done in Mississippi below, and Louisiana later in the Report.

We recently obtained a $12.4 million verdict in the State of Mississippi against Watson Laboratories/Watson Pharmaceuticals, Inc. This verdict only represented the compensatory phase of the case. A punitive damage hearing had been scheduled for December 20 for the Court to assess any punitive damages to be awarded against these defendants. Sadly, Judge Thomas L. Zeber, who presided over the AWP litigation and heard the trial, died after a brief illness in November. A new judge has been assigned to the case. The punitive phase hearing will be rescheduled. Based on the evidence presented during the trial in the liability phase of the Watson case, we fully expect a punitive award.

Our lawyers previously obtained a $31 million judgment against Sandoz in Mississippi. That case is currently on appeal to the Mississippi Supreme Court. Based on the strong evidence presented during the trial of that case, we believe this case will be affirmed on appeal.

These average wholesale price cases have had a tremendous positive impact on Medicaid Agencies throughout the country. As a result of the AWP litigation, the federal government and the State Medicaid programs have recognized the reality of the gross abuse of price reporting by the pharmaceutical manufacturers in the marketplace. The effect of this fraudulent price reporting was in millions of dollars being literally taken from the Medicaid agencies. Hopefully, the excessive costs to the Medicaid programs have been rectified by this litigation.

In fact, as a result of the AWP litigation, the price measure known as “AWP” will no longer be used by the federal government and most states to reimburse pharmacists in the Medicaid and Medicare programs. A new pricing measure, Actual Acquisition Costs, known as “AAC,” will most likely be the replacement for “AWP.” But it should be noted that not even this price term is immune from potential abusive practices. Only the future will tell if the pharmaceutical industry can resist price reporting abuses with the “AAC.” The most needy in our society rely on Medicare and Medicaid programs. Hopefully, the AWP litigation has taught the pharmaceutical industry a badly needed lesson. They must now resist the temptation to cheat the government and all the taxpayers.

We will publish updates on the success of the remaining cases in the States of Mississippi, Kansas, Alaska and Utah. Dee Miles, who heads up our Consumer Fraud Section, has led this very important litigation. Other lawyers in the Section who have worked hard and effectively in the AWP litigation are Roman Shaul, Clay Barnett, Chad Stewart and Alison Hawthorne. It has been an honor to have been selected to represent the attorneys general in the states.

**Louisiana Sets Medicaid Fraud Litigation For $88.4 Million**

Louisiana Attorney General Buddy Caldwell announced $88.4 million in settlements with 25 pharmaceutical companies in his state’s ongoing Medicaid Fraud litigation. Beasley Allen lawyers Dee Miles, Clay Barnett, Roman Shaul, Chad Stewart, and Alison Hawthorne, along with in-house counsel from the Attorney General’s office, represented Louisiana in this significant litigation. It began three years ago involving Average Wholesale Pricing (AWP). The lawsuit accused 100 drug makers and their subsidiaries of fraudulently inflating the price of drugs sold to states and reimbursed by Medicaid, overcharging the state.

Included in the recent settlements in Louisiana are Abbott Laboratories, which will pay $6.2 million; Sanofi, $7 million; Novartis and its Sandoz unit will pay a combined $20 million; Johnson & Johnson, $10 million; Par Pharmaceutical, $6 million; and Ranbaxy Laboratories, at $5 million. Including the latest settlement, since beginning the litigation Louisiana has had AWP settlements totaling $238.1 million. Louisiana has recovered nearly $300 million when costs and attorneys’ fees are included. In a statement, Attorney General Caldwell had this to say:

*These companies took advantage of the state and its taxpay ers by fraudulently over-pricing and marketing prescription drugs, thereby forcing the state’s Medicaid program to grossly over-pay for those prescriptions. This kind of success sends a clear message to companies who do not do business honestly.*

Dee Miles, from our firm, who led the litigation for the Attorney General, observed:

*This is another huge victory for the State of Louisiana. Pharmaceutical companies overcharging for drugs to the state’s Medicaid program—a program designed to assist the state’s neediest citizens—is egregious conduct.*

The complaints were brought under the Louisiana Unfair Trade Practices and Consumer Protection Act and Louisiana’s Medicaid Assistance Programs Integrity Law. Attorney General Caldwell should be commended for taking the lead in this important litigation and for standing up for the people of Louisiana. He did his state a tremendous service by leading this litigation.

Source: News Release from Attorney General’s office

**Johnson & Johnson To Pay $2.2 Billion In Drug Marketing Penalties**

Johnson & Johnson has agreed to pay more than $2.2 billion to settle criminal and civil claims that it marketed the antipsychotic drug Risperdal and other medications for off-label uses and paid kickbacks to a large pharmacy. The agreement, one of the largest health care fraud settlements in history, largely centered on Risperdal, an antipsychotic drug that Johnson & Johnson marketed to treat elderly dementia patients, as well as children with behavioral problems. The civil settlement also resolved claims related to Invega, a similar antipsychotic drug, as well as the heart medication Natrexor.

The pharmaceutical giant and its subsidiaries agreed to pay $485 million in criminal fines and forfeiture, and $1.72 billion in civil settlements with the federal government and several states. The agreement also requires the company to change business practices related to drug marketing. Attorney General Eric Holder, when announcing the settlement, had this to say:

*These companies lined their pockets at the expense of American taxpayers, patients and the private insurance industry as they drove up health care costs and hurt the solvency of health care programs such as Medicare, U.S. The settlement also addresses allegations of conduct that recklessly put at risk the health of some of the most vulnerable members of our society—including young children, the elderly and disabled.*

Risperdal was approved by the Food and Drug Administration (FDA) to treat schizophrenia. But in 2002 and 2003, sales representatives for Janssen Pharmaceuticals, a Johnson & Johnson subsidiary, urged physicians and others to prescribe the drug to treat symptoms such as agitation, hostility and confusion in elderly dementia patients. Sales materials emphasized those symptoms and downplayed any mention of the FDA-approved use. It was said in the criminal charges that company representatives received incentives for promoting the drug’s off-label uses.

Pursuant to its criminal plea, Janssen will pay a total of $400 million to settle the claims and plead guilty to a misdemeanor misbranding charge. In a related civil complaint, the Justice Department says that Janssen marketed Risperdal to control the behavior of elderly nursing home patients, children and people
with mental disabilities. It was said that the company made “false and misleading statements” about Risperdal’s benefits and minimized the risks. The government repeatedly warned Janssen that marketing Risperdal as safe and effective would be misleading and that the drug posed an increased risk of stroke, among other “serious health risks” for the elderly. The company also downplayed or failed to publish studies that confirmed the dangers of the drug, according to the Justice Department’s report.

From 1999 to 2005, despite the FDA’s repeated warnings, Janssen created an “ElderCare sales force” that targeted nursing homes and doctors who treated the elderly in a campaign to promote off-label uses. During that period, the company told its sales force to market Risperdal to child psychiatrists and others to treat children with illnesses such as attention deficit disorder, obsessive-compulsive disorder and autism. The Justice Department says that Risperdal increased the risk in children of elevated levels of a hormone that can stimulate breast development, among other side effects. The settlement also resolves allegations that Janssen marketed Invega, another drug to treat schizophrenia, for off-label uses.

It was alleged that Johnson & Johnson and Janssen paid millions of dollars in kickbacks to Omnicare, the nation’s largest pharmacy, which caters to nursing homes, to induce it to promote Risperdal and other drugs in the facilities. It was contended by the Justice Department that Janssen also paid doctors “speaker fees” to get them to prescribe Risperdal. Under the agreement, the companies have agreed to pay a total of $1.39 billion to resolve claims related to off-label marketing and kickbacks for Risperdal and Invega.

The settlement also resolves claims that Johnson & Johnson and Scios, another subsidiary, improperly marketed Natrecor, which was approved to treat an acute form of congestive heart failure. Contrary to the approved use, Scios launched an aggressive campaign to persuade doctors and clinics to use the drug to treat less severe heart failure. Brian Stretch, first assistant U.S. attorney for the Northern District of California, has this to say:

“This case is an example of a drug company encouraging doctors to use a drug in a way that was unsupported by valid scientific evidence.

The settlement will require Johnson & Johnson to abide by a five-year corporate integrity agreement. Under one provision, the company will have to change its bonus program to allow for recouping payments made to executives found to have engaged in misconduct. It appears that the company will also be required to be more transparent about research, publication policies and payments to physicians.

Source: USA Today

IV. PURELY POLITICAL NEWS & VIEWS

WARNINGS FOR THE TEA PARTY AND FOR DEMOCRATS IN 2014

In the aftermath of last month’s elections, many political leaders are saying that there were some strong warning signs for the Tea Party forces and also for the Democratic Party from the voting. I am not sure that either side will openly admit that any real messages were sent by the voters, but privately they have to know the voters are not happy about the state of U.S. politics. In any event, it will be interesting to see how the mid-term elections, which are about one year away, will follow any patterns seen from the November elections. There were a number of outcomes where Democrats did very well in areas that were considered good for GOP candidates. For example, the win in the mayor’s race in New York City was huge for Democrats in that state and will have national implications.

Based on the results in two gubernatorial races that got lots of attention, the staying power of the Tea Party, the well-financed movement that burst onto the scene four years ago, was clearly called into question. Chris Christie, who is no favorite of the Tea Party bosses, swept to a landslide re-election as governor in New Jersey. His was said to be a case study in how more moderate Republicans can reject the Tea Party and carry even Democratic-leaning states. It’s most evident that the Tea Party bosses won’t support a candidate they can’t control and Gov. Christie is a classic example of such a candidate.

Tea Party favorite Ken Cuccinelli lost his race for governor in Virginia against Democrat Terry McAuliffe. This was a contest that establishment Republicans believed they had a good chance to win. But now the party bosses are claiming a more mainstream GOP candidate, instead of one supported by the Tea Party, could have won that race. This win was huge for Democrats in a key state.

While the Tea Party took a beating in these two important races, Democrats should also look carefully at some of the factors involved in the November elections. They will have problems of their own down the road if they ignore the lessons sent their way by the November voters. The severely flawed rollout of the federal health care exchange gave the GOP leadership a much-needed diversion from the fallout from the government shutdown.

Democratic hopes for 2014 had been buoyed when voters heavily blamed Republican lawmakers for the 16-day government shutdown. Approval ratings for the GOP were driven to new lows. As a result of the shutdown, and its adverse effect on thousands of folks and on our nation’s economy, the non-partisan Cook Political Report shifted the ratings on 15 House races, moving 14 of them in the Democrats’ direction. In the House, Democrats need a net gain of 17 seats to regain control.

A number of Democratic senators are also in potentially competitive re-election races next year. Republicans need a net gain of six seats to win control in the Senate. The two most endangered Senate Democrats running for re-election could be Mark Pryor of Arkansas and Mark Begich of Alaska. While each of these senators has done a good job, they may be hurt by the “Obamacare” issue. The GOP will try hard to pick up seats where Democratic incumbents are retiring in Montana, South Dakota and West Virginia.

It’s quite evident that Republicans are counting on Obamacare as being the defining issue of 2014. The bumbling start to a badly needed health care plan has given the GOP a new lease on life. The controversy surrounding the president’s signature legislative achievement is gaining traction, not as a result of Republican attacks, but because of the administration’s own fumbles. It’s difficult to understand how smart folks could have made such a mess of the start-up of the Affordable Care Act.

It will definitely be a real issue in next years’ mid-term elections. Ironically, what should have been a huge plus for Democratic candidates could wind up being their major obstacle. The Affordable Care Act could be an advantage for Democrats next year, but the Obama White House has lots of work to do in order to make the health care issue a plus for Democratic candidates. The enrollment snafus with the launch of the HealthCare.gov website can be overcome, but whether it will depend on how quickly things can be fixed.

The mid-term elections will be a test for the Tea Party, the dominant force in the Republican Party, and they have an uphill battle. Voter outrage about passage of the Affordable Care Act helped Republicans gain control of the U.S. House of Representatives in 2010. Now, once again, it’s become an issue that the Tea Party zealots can take full advantage of in the mid-term elections. To really determine how strong that issue is, we will have to wait to see how things play out next year primarily in races for the U.S. House of Representatives. The Republican Party is badly split at the juncture and the split likely will grow wider in the

www.BeasleyAllen.com
months ahead. The fallout from Obamacare is the only thing that could save the GOP from a Democratic sweep.

The 36 gubernatorial races around the country will get lots of attention next year as well. These races include contests in some of the states that play big roles in presidential elections, among them Florida, Iowa, Nevada, Ohio, Pennsylvania and Wisconsin. Those races are very important and each will be hotly contested. The state Legislative races next year will also fall into that category.

Having looked at all the recent polls, it appears that the issue of Obamacare pretty much splits the electorate down the middle. Surveys of voters as they left polling places also show this very clearly. In Virginia, slightly less than 50 percent supported the Affordable Care Act, with a little more than 50 percent opposing it. Significantly, Democrat McAuliffe got nine of 10 votes of those who supported it. On the other hand, Republican Cuccinelli got eight of 10 votes among those who opposed it. There was an onslaught of negative news about the Affordable Care Act in the last week or so before the votes were counted in Virginia. It was one possible explanation analysts gave for a closer-than-expected race even though the Democrat won.

A LOOK EVEN FURTHER DOWN THE ROAD TOWARD 2016—AND THE NEXT PRESIDENT

Even though the mid-term elections are more in focus at this juncture, pollsters are already looking ahead to 2016. One poll released last month showed a four-way tie at the top of the pack among Republican presidential contenders, while a clear favorite continues to post strong numbers among Democrats. Public Policy Polling shows Gov. Chris Christie and Sen. Rand Paul are tied with 16 percent among possible GOP presidential contenders, followed by Sen. Ted Cruz at 15 percent and Former Gov. Jeb Bush at 14 percent. That’s about as close as things can get.

On the Democratic side, Hillary Clinton remains the clear favorite. Sixty-seven percent of Democrats said she’s their choice for president in 2016. Hillary garnered more than 60 percent support from liberals, moderates, men, women, whites, African Americans, young voters and seniors alike. Vice President Joseph Biden, who has to be considered a potential strong contender if he runs, received only 12 percent.

Another poll, this one by NBC, revealed more about how Gov. Christie and Hillary would fare if each received their party’s nomination. The survey of 1,003 adults, released on Nov. 12, had Hillary at 44 percent, with Gov. Christie trailing at 34 percent. While this polling is much too early to be taken as “gospel,” nevertheless, it’s most significant and is a pretty good indicator of where things stand in 2013, looking ahead to 2016. While this race is in its very early stages, it’s quite evident that it has already started in a big way. Sources: AL.com and Newsmax.com

V. LEGISLATIVE HAPPENINGS

SOME ALABAMA LAWMAKERS LOOKING AT SHORTER 2014 SESSION

It is being reported that the leadership in the Alabama Legislature wants to speed up the pace of the 2014 regular session. The session starts in January, as it always does during an election year, and lawmakers must meet on no more than 30 legislative days within 105 calendar days. Usually, both the house and senate meet on Tuesdays and Thursdays, with Wednesdays being reserved for committee meetings. I really can see no legitimate reason to change that schedule. In fact, I believe such a change could prove to be very bad and not in the best interest for Alabama citizens.

Some of the legislative bosses reportedly want to make at least some Wednesdays legislative days in order to end the session more quickly. It will be interesting to see if their plan works out. I find it hard to justify putting less emphasis on the work of committees. It would be a big mistake to reduce the effectiveness of the committees. Persons and groups who are interested in specific pieces of legislation should be allowed access to the legislative process. Obviously, that includes the work of committees. Legislators should use the committee structure to learn more about the bills they will be called on to vote for or against. All legislation should be studied carefully before bills are voted on for final passage on the floor in the house and senate.

Rushing important legislation through the process without adequate study and debate is not in the best interest of the people of Alabama. Those in control of the house and senate should let the legislative process work as it is intended to work. There are many important problems facing our state that must be addressed in the next legislative session. It’s high time for those in state government to face up to these lingering problems and find workable solutions. Short-cutting the legislative process, without allowing full and adequate study in committee and debate on the floor, can only result in the problems facing our state once again being ignored. There is one thing for certain and that is rushing through the session is not the answer.

Source: Timesdaily.com

It’s Time For The Don Quixote Approach In Alabama To Stop

Over the years our political leaders in Alabama have avoided having to deal with some real serious problems that have hindered our state’s economic and social growth. Many of those politicians were real good when it came to tilting with windmills, much like the legendary knight, Don Quixote, and also with setting up straw men and doing battle with them for political gain. Gov. George C. Wallace started the trend back in the 1960s and he was very good at it. Unfortunately, many other politicians followed his lead, and as a result, the State of Alabama has suffered greatly.

VI. COURT WATCH

FEDERAL COURTS SHOULD NOT BE RIGGED IN FAVOR OF CORPORATIONS

The judicial system has been under constant and relentless attack in the past two decades. As we all know, most of the attacks have been leveled on state courts. Now there is a shift that involves the federal judiciary. The rights of all Americans to access justice and accountability are at risk. American Association for Justice (AAJ) President Burton LeBlanc and other top civil justice advocates testified last month before the Judicial Conference of the United States. They are concerned about proposed changes to the Federal Rules of Civil Procedure that would dramatically alter our legal system. There is a movement working to make it much more difficult to hold corporations that injure and kill Americans accountable in court. AAJ President LeBlanc had this to say:

These changes would devastate Americans’ access to justice and rig the courts in favor of corporations that violate our rights. This will further stack the deck against American citizens and small businesses seeking accountability in court.

The Federal Rules of Civil Procedure establish how civil lawsuits are filed, pursued and tried in federal courts. The proposed Rules changes would limit discovery, decrease the number and length of depositions and remove
incentives to preserve critical documents. This will have a chilling effect on civil rights, employment discrimination, bank fraud, defective products claims and environmental cases. That’s because the information needed to develop and prove these types of case is often in the sole possession of the corporation.

These changes will also directly impact taxpayers. Cases that allege fraud in government programs would be more difficult to prove. For example, in a case against Momence Meadows Nursing Home and its owner, Jacob Graff, a whistleblower claimed Graff and the nursing home defrauded the federal government and the state of Illinois by billing Medicare and Medicaid for services that were done so poorly they were essentially worthless to patients.

This case required the review of approximately 350 boxes of patient files and company records, all of which were necessary to prove proper care was not documented or provided. Under the proposed Rules, obtaining these documents would be extremely burdensome, maybe even impossible. LeBlanc made this observation concerning the proposed changes:

This will force cases to be decided before all the facts are found and brought to light. If Americans can’t seek justice in the courtroom, what safety information could corporations hide from the public? If no one is accountable, no one is safe.

The federal court system is too important to allow that system to be rigged in order to favor huge corporations ahead of people who seek justice. Lawyers who represent victims of corporate wrongdoing and abuse have an obligation to get involved in this important battle. Source: Atlanta Journal Constitution

A U.S. Supreme Court Decision Will Affect State Attorney General Lawsuits

A case now before the U.S. Supreme Court involves an issue that could affect all states and the people in those states nationwide. The question of whether certain suits brought by state attorneys general can be removed to federal court could have huge implications for consumers in the states. Companies facing multijurisdictional litigation about anything from price-fixing to product liability will also be interested in this issue.

The justices will determine whether so-called parens patriae cases—suits brought by state attorneys general to recover damages on behalf of consumers—met the definition of mass actions under the Class Action Fairness Act (CAFA). This Act defines these cases as suits that would jointly try the “monetary relief claims of 100 or more persons.” The key question for the justices will be whether that means cases must involve at least 100 separate Plaintiffs to qualify as mass actions or that cases filed by a state attorney general, designed to recover damages for more than 100 individuals, can qualify even if the state is the only named Plaintiff.

The case before the Supreme Court arises out of long-running litigation accusing a group of electronics companies of fixing the price of liquid crystal display panels. As did many other attorneys general, Mississippi’s Jim Hood sued on behalf of state residents after a 2006 U.S. Department of Justice investigation revealed that AU Optronics Corp. and other LCD makers orchestrated a global conspiracy to fix prices on the displays. These displays are widely used in laptops, monitors and other electronic devices. Although the other states reached a $539 million settlement, Mississippi, California, Illinois, South Carolina and Washington opted to pursue “parens patriae cases” in their respective state courts. The defendants removed each of the cases to federal court, but each state successfully fought to have the cases sent back to state court.

The U.S. District Court ruled in the Mississippi case that the attorney general’s suit was a mass action, but concluded that the case fell under an exception in CAFA for suits brought on behalf of the general public. This meant the case was improperly removed from state court. In November 2012, the Fifth Circuit Court of Appeals disagreed, determining that individual consumers, in addition to the state, are the real parties in interest. That meant the claims were not asserted on behalf of the general public.

The court’s ruling said Attorney General Hood was essentially a class representative. The Supreme Court agreed in May to take the case. The high court will resolve a circuit split over whether CAFA applied to parens patriae cases. The result in this case will be very important to not only the citizens of Mississippi but also to folks in all of the show.

Attorney General Hood has received support from 46 other states in this case. The dispute that has wound up before the high court involves a question of a state’s ability to protect its own interests. Attorney General Hood wrote in a brief filed with the court:

Ultimately, this is a case about federalism and respect for the institutional sovereignty of the states and their chief legal officers, legislatures and judicial systems. Whatever “abuses” may have been CAFA’s targets, they did not include parens patriae actions to vindicate the states’ sovereign and quasi-sovereign interests, filed by their politically accountable chief legal officers.

This case will be watched closely by the attorneys general of all states and by the big bosses in Corporate America. In my opinion, a successful outcome for Attorney General Hood is very important to the citizens of all states. A state court should be allowed to hear a lawsuit filed on behalf of the people in that state by the state’s attorney general. Hopefully, the U.S. Supreme Court will agree!

Source: Law360.com

Alabama Supreme Court Hands Down An Important Decision

The Alabama Supreme Court issued an opinion recently in a complex commercial fraud case. The case, arising out of Jefferson County, involved a claim for fraudulent suppression. The jury returned a verdict for the Plaintiff consisting of $3.8 million in compensatory damages and $7.6 million in punitive damages. The Supreme Court affirmed the judgment for the Plaintiff without any reductions. The following will describe the claim and briefly explain the court’s decision.

The Claim. The gravamen of the claims of Ligon and Hydraulic Technologies, LLC, based on fraudulent-suppression, is that CNH decided in approximately September 2007 to replace HTI as a supplier of cylinders and then fraudulently suppressed that fact from Ligon and HTI for approximately eight months, inducing them to take actions and expend funds in an impossible attempt to foster an ongoing relationship between HTI and CNH. CNH denies that it made a definitive decision to terminate its relationship with HTI in September 2007 and that it had any duty to disclose to Ligon and HTI that it was terminating its relationship with HTI before it did so in May 2008.

Duty to Disclose. To determine whether a duty to disclose arose, the Court used the test from Freightliner, L.L.C. v. Whatley Contract Carriers, L. L. C., 932 So. 2d 883, 892 (Ala. 2005), under which in a commercial transaction involving arm’s length negotiations, the parties have no general obligation to disclose any specific information to the other, but each has an affirmative duty to respond truthfully and accurately to direct questions from the other. Thus, whether CNH had a duty to disclose to Ligon and HTI, before May 2008, that it had decided to terminate its relationship with HTI depends on:

• whether Ligon and HTI ever asked CNH direct questions regarding the
status of HTI's ongoing relationship with CNH, and

• whether CNH answered any such questions truthfully and accurately.

The Court held there was sufficient evidence for the jury to determine that Ligon articulated with “reasonable clarity” its question, and that the answer provided was cleverly worded half-truths. Even under Frentliner, “once a party elects to speak, he or she assumes a duty not to suppress or conceal those facts that materially qualify the facts already stated.” The evidence supported the conclusion that the decision had already been made to replace HTI, and thus statements to the effect that CNH was “committed” to HTI were not fully and fairly disclosing, thus giving rise to a duty to disclose and non-disclosure.

Failure to Preserve a Judgement as a matter of Law (JML) Issue. The court also held that CNH failed to properly raise entitlement to JML as to the claims of Ligon (as opposed to and distinguished from its subsidiary HTI) because the JML at the close of all evidence essentially lumped the claims into one, and did not specifically articulate a separate request as to the claim of Ligon (for a failure by anyone at Ligon to make a request triggering a duty to disclose).

Reliance. In holding there was sufficient evidence of reliance, the Court dropped an important footnote about the effect of disclaimers on reliance issues:

CNH emphasizes that its forecasts always included a disclaimer indicating that they were not binding. However, we must view the evidence in the light most favorable to Ligon and HTI and entertain such reasonable inferences as the jury would have been free to draw. Waddell and Reed, 875 So. 2d at 1152. The jury certainly could have concluded that Ligon and HTI reasonably understood the forecasts to be good-faith estimates of future orders, subject to change based on CNH’s customer requirements—not false projections CNH had no intention of using HTI to fill. Although the disclaimer on the forecasts might defeat a breach-of-contract claim, Ligon and HTI are not arguing breach-of-contract here.

Punitive Damages. The Court rejected each of the punitive damage challenges of CNH. First, CNH argues that no punitive damages are warranted because, it argues, Alabama has no interest in punishing CNH, an Illinois corporation, for harm caused to HTI, an Ohio company. The Court rejected that challenge on the basis that Ligon (an Alabama-based company) was purportedly harmed as well, and CNH failed to preserve for appeal issues relating to liability running to Ligon. The court also upheld the 2:1 punitive damage verdict in light of the evidence, which supported a finding that defendant acted consciously.

The case was handled successfully by Michael D. Mulvaney, a Birmingham lawyer with Maynard, Cooper & Gale. He did a very good job in the case. The case is CNH America, LLC v. Ligon Capital, LLC, No. 1111204 (Ala. Nov. 8, 2013).

VII. THE NATIONAL SCENE

Railroads Back Retrofitting Flammable Liquid Cars

U.S. railroads are supporting new safety standards for rail cars that haul flammable liquids to address flaws that can allow crude oil, ethanol and other substances to leak during accidents. The Association of American Railroads (AAR) asserted last month that railroads support making upgrades to the fleet of 92,000 tank cars that carry flammable liquids.

The Pipeline and Hazardous Materials Safety Administration is considering a plan intended to fix a dangerous design flaw in a rail car commonly used to haul oil and other hazardous liquids from coast to coast. Safety experts say the soda-can shaped car, known as the DOT-111, has a tendency to split open during derails and other major accidents.

Two explosive oil-train derailments that occurred in Alabama this year have brought into focus the need for some needed changes. The last derailment occurred recently in a rural county in central Alabama. The derailments raised new questions about the safety of the crude-by-rail boom. The questioning surfaced following an earlier tragedy that took place in Quebec. You will recall that incident involved a runaway train that careened into the center of town, bursting into a fireball that killed 47 people and leveled buildings.

The train in Alabama, owned and operated by Genesee & Wyoming Inc., was traveling on relatively flat terrain at below the 40-miles-per-hour limit. The tank cars on the 90-car Genesee train were T108s, not the DOT-111s that have been faulted by regulators. The train carried North Dakota crude, a type that tends to be very low-density or “light,” meaning it contains more volatile compounds that may account for its explosive properties. Rapid proliferation of crude-by-rail shipments started more than three years ago, as pipeline infrastructure lagged booming U.S. and Canadian crude production. In the third quarter, U.S. shipments rose 44 percent to 93,312 carloads, equivalent to about 740,000 barrels per day or almost a tenth of U.S. production. The increase has been a boon for U.S. railroads, which have lost coal shipments as more U.S. power plants move over to natural gas.

According to the AAR, about 92,000 tank cars are moving flammable liquids, with about 78,000 of those requiring retrofit or phase out. It appears that 14,000 newer tank cars complied with the latest industry safety standards, but it was said that those should still be modified. Many of the proposed changes are meant to prevent explosions of the kind seen in the recent accident in Alabama. Safety experts say the new cars should include a steel jacket, thermal protection and pressure relief valves. It appears that even cars built since October 2011, when the rail industry brought in its latest design standards, will need modifications. Many safety experts don’t see crude-by-rail transport as a safe option. But the railroads will push hard on this issue. In any event, the debate about the relative safety of pipelines versus rail will continue—stay tuned!

Sources: Reuters and Insurance Journal and Claims Journal

VIII. AN UPDATE ON WHISTLEBLOWER LITIGATION

SEC Whistleblower Actions

The Dodd-Frank Act was passed in July 2010, establishing the Securities Exchange Commission (SEC) Office of the Whistleblower in 2011. The program was designed by Congress to provide monetary incentives for anyone with knowledge of fraudulent activities to step forward and report possible violations of federal securities law. The program entitles eligible whistleblowers to an award between 10 and 30 percent of the recoveries collected in actions by the SEC. Eligible whistleblowers are individuals with original infor-
mation of a possible violation. One or more individuals are allowed to act as a whistleblower.

The information provided by a whistleblower must lead to a successful action of more than $1 million to be eligible for an award. See 17 C.F.R. § 240.21F-3(a). Common types of SEC violations are market manipulation, financial statements fraud, offerings fraud, insider trading, violations of the Foreign Corrupt Practices Act and municipal securities fraud. It is not necessary that the whistleblower provide all facts necessary to prosecute the violation; only enough information to lead to a successful enforcement action.

The whistleblower enjoys statutory protection that prohibits employers from retaliating for reporting suspected violations. These protections are not contingent upon successful prosecution; they apply to all SEC whistleblowers who reported in good faith, even if no violation is ultimately established. Additionally, the SEC is required by law to protect the confidentiality of whistleblowers and cannot disclose any information that might reveal their identity.

On October 1, 2013, the SEC reported the largest whistleblower award to date where an unnamed whistleblower received more than $14 million. This whistleblower's information led to an enforcement action by the SEC that recovered substantial investor funds. Mary White, SEC Chair, stated that the whistleblower program has had a “big impact on [SEC] investigations by providing us with high quality, meaningful tips.” Sean McKessy, the Chief of the SEC's Office of the Whistleblower, has stated that he is grateful that individuals are coming forward with information to help stop fraud because the program is ultimately about protecting future investors from harm.

Lawyers in the Consumer Fraud Section at Beasley Allen will be glad to assist any persons who are entitled to pursue a legitimate SEC whistleblower claim. If you have a claim or need more information on this subject, contact Chad Stewart, Larry Golston, Archie Grubb, Lance Gould or Andrew Brashier, lawyers in our Consumer Fraud Section, at 800-898-2034 or email Chad.Stewart@beasleyallen.com, Larry.Golston@beasleyallen.com, Archie.Grubb@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

Sources: www.SEC.gov, and Wall Street Journal

A GOOD INVESTMENT IN HEALTH CARE CASES

The Taxpayers Against Fraud Education Fund has released a new report concluding that every dollar the government invests in the investigation and prosecution of federal health care fraud returns at least 20 dollars back to the American people. In the report, "Fighting Medicare and Medicaid Fraud: The Return on Investment from False Claims Act Partnerships," Dr. Jack Meyer, a health care economist, looked at the total costs of federal health care investigation and compared them to the amount of money returned to the United States treasury.

Dr. Meyers concluded that in the five-year period from 2008 to 2012, the Federal government has spent $574.6 million to investigate and prosecute civil health care related fraud. According to the report, this has resulted in a total of $9.384 billion being recovered. This calculation does not include the $9 billion recovery from criminal fines or from state recoveries under the False Claims Act cases.

When considering the federal and state criminal charges brought under the False Claims Act, Dr. Meyers concluded that the benefit-to-cost ratio of False Claims Act law enforcement exceeds 20 to 1. It's very clear that civil health care fraud is an area where the federal government is recovering a great deal more than it is spending.

With returns like the ones listed above, the impact of the False Claims Act can't be underestimated. Major settlements under the False Claims Act work as a deterrent. The possibility of fraud in the Medicare and Medicaid programs is lessened. Since 1986, when the penalties under the False Claims Act were strengthened, cases involving health care fraud whistleblowers have increased. In 2012, whistleblowers received $284 million of the $2.5 billion recovered in health care fraud settlement involving whistleblowers.

Lawyers in the Consumer Fraud Section at Beasley Allen continue to investigate fraud committed against both the federal and state governments. Anyone who knows of fraudulent activities should step forward and become a whistleblower. Potential whistleblowers have the right to not be retaliated against for doing the right thing and reporting the fraud they have witnessed. Anyone considering doing the right thing and blowing the whistle are strongly urged to seek legal advice before doing so. Lawyers in our Consumer Fraud Section are very familiar with the federal False Claims Act and its state counterparts and can guide whistleblowers through the process. If you have any information and would like to speak with a lawyer, contact Larry Golston, Lance Gould, Archie Grubb, Chad Stewart or Andrew Brashier, lawyers in our Consumer Fraud Section, at 800-898-2034 or 334-269-2343.

Sources: www.taf.org

PIPE MAKER FOUND LIABLE FOR SHODDY PIPES IN FCA SUIT

A California federal jury determined last month that pipe maker J-M Manufacturing Co. Inc. knowingly made and sold substandard plastic pipe that was later used to build water and sewer systems in several states. The ruling made J&M liable to pay damages in a whistleblower False Claims Act (FCA) suit. Meanwhile, the company’s former owner, Formosa Plastics Corp. USA, has agreed to pay $23 million to settle its part of the FCA suit. That settlement was reached in September, but it was not announced until Nov. 14. The jury found that the pipe maker, which now does business as JM Eagle, will have to pay damages to Nevada, New Mexico, Virginia and 42 cities and water districts that joined in the suit. One of the Plaintiffs’ lawyers, Eric Havian, said in a statement:

The jury obviously decided that JM Eagle management cared only about the amount of pipe JM produced, not the quality of that pipe. JM Eagle deceived outside inspection agencies and ignored over a decade of failing test results. The jury’s conclusion that JM Eagle committed fraud was based on a lot of evidence.

The case arose from a qui tam whistleblower suit brought in 2006 by former JM quality assurance engineer John Hendrix, who alleged that PVC pipes used across the country will rupture far earlier than expected because JM used shoddy manufacturing processes and substandard materials to produce the pipes.

According to the complaint, the company lied about the quality of JM pipe and failed to make improvements despite knowing the pipes didn't meet government standards. The suit also accused JM’s previous owner, Formosa, of having explicit knowledge of the pipes’ shortcomings. According to the complaint, Formosa’s director of finance and risk management received reports and test results showing that the JM pipe failed tensile strength test requirements mandated by the government. But JM was allowed to continue claiming that its pipe qualified for the necessary Underwriter Laboratories Inc. marking, according to allegations in the suit. Without the UL mark, it’s alleged that the pipe wouldn’t have been eligible for government purchase.

JM says it will appeal the decision, calling the suit part of a “smear campaign” brought on by a disgruntled former employee. The Plaintiffs are represented by Eric R. Havian and Mary A. Inman of Phillips & Cohen; Kirk D. Dillman of McKool Smith Hennigan; and Elizabeth J. Sher of Day Pitney. The case is U.S. et al. v. J-M Manufacturing Co. et al. in the
FOLLOWING ON THE FLIGHT OF DR. JEREMIAH MCKENNA, A FORMER MEMBERS ASSOCIATE OF THE UNIVERSITY OF MISSOURI’S LABORATORY, A FORMER UNIVERSITY LAB DIRECTOR FILES WHISTLEBLOWER LAWSUIT

A former University of Kansas lab director claims he was fired for reporting what he says are improper uses of grant funds. This was the second lawsuit brought against the school recently alleging misuse of research money. David S. Moore’s lawsuit, brought in part under the Kansas Whistleblower Act, was filed in a Kansas state court and was made public on Nov. 14. The suit alleges Moore was fired in October as retaliation for “persistently expressing good faith concerns” about the improper financial management and accounting for the University’s Microscopy Analysis and Imaging Laboratory in Lawrence, as handled by the research and graduate studies program’s business office. Defendants include the Kansas Board of Regents, the university and several employees.

Moore alleges the university inappropriately charged administration, overhead and related expenses to the lab that did not comply with federal rules for spending grant money. He also contends the university discriminated against him as a disabled person suffering attention deficit disorder. Moore seeks his reinstatement as laboratory director along with back pay, damages and attorney’s fees. The lawsuit is said to be limited to claims under state law for wrongful suspension and termination. Additional claims will likely be filed with federal and state agencies for violating whistleblowing and disability discrimination laws.

Moore was appointed in 2005 as assistant scientist and director of the university’s microscopy analysis and imaging laboratory, one of 11 core labs at the university, according to the complaint. He was first hired as a research assistant in 1996. He contends in the lawsuit that after his appointment as lab director he became increasingly concerned about the financial management of the lab. Billing practices resulted in uncollected revenues for the use of the lab’s electron microscope or were charged to the federal grants of other researchers.

The Moore lawsuit comes shortly after longtime professor Curtis Klaassen filed an unrelated lawsuit in federal court in Kansas against the university and its School of Medicine. That suit also claims the university retaliated against him for his assertion that the school misappropriated federal research grants. Daniel Cofran, a lawyer located in Kansas City, Mo., represents Moore in his lawsuit.

SUTTER TO PAY $46 MILLION TO SETTLE CALIFORNIA ANESTHESIA CASE

One of the California’s largest hospital chains has agreed to pay $46 million to settle allegations that its method for billing for anesthesia services was false and misleading. Sutter Health’s decision to settle came just as a trial was scheduled to start last month. The agreement arises from a lawsuit originally filed in 2009. In addition to paying the fine, Sutter has agreed to make changes to its billing procedures. Those changes include billing for anesthesia on a flat-fee basis rather than on time and more clearly disclosing its anesthesia charges and services to its patients, insurers and other payers. Sutter officials claimed the chain had followed the appropriate billing regulations and protocols. The Sacramento-based company operates more than 20 hospitals in Northern California.

Source: Law360.com

IX. THE CORPORATE WORLD

JPMORGAN AGREES TO $13 BILLION SETTLEMENT

JPMorgan Chase agreed last month to a mortgage settlement that will cost the bank $13 billion. While that amount is a record for a single company, a closer look at what the bank had done suggests that JPMorgan may actually have made a good deal for itself. The government’s investigation, and subsequent claims, centered on billions of dollars of subprime and Alt-A mortgages—loans that often required little documentation—that were made in the years leading up to the 2008 financial crisis. While JPMorgan made some of the loans itself, other loans were originated or sold into the markets by Washington Mutual and Bear Sterns, two firms that JPMorgan bought in 2008. JPMorgan assumed many of those firms’ future costs, including mortgage liabilities, and in doing so, ran a giant risk with tremendous exposure. This was a classic example of corporate greed.

The Justice Department’s main allegation is that many of those loans should never have been packaged into the mortgage bonds that were sold to investors. The government contends that the mortgages often fell short of the standards that JPMorgan and the other two firms legally agreed to when selling the bonds to investors. Attorney General Eric H. Holder, Jr., said in a statement issued when the settlement was announced:

No firm, no matter how profitable, is above the law, and the passage of time is no shield from accountability.

Separate from the government-led settlement, JPMorgan recently reached an agreement to pay $4.5 billion to a group of investment firms that bought its mortgage-backed bonds. This settled more of the bank’s liabilities. Sadly, what JPMorgan did hurt many folks. From 2004 through 2007, JPMorgan, along with Washington Mutual and Bear Sterns, sold around $1 trillion of mortgages, according to Inside Mortgage Finance, an industry publication. Obviously, that’s a huge number and it puts the settlement in the proper perspective.

Thus far, JPMorgan has paid or set aside about $25 billion to meet claims that the loans should not have been bundled and sold. That sum, while quite large, is only 2.5 percent of the total amount of the loans. While the $25 billion could actually increase as the bank reaches other settlements, it will still be a small percentage of the table. Some mortgage market experts contend that 2.5 percent is too low given the suspected number of loans that should never have been made and certainly should not have been sold to investors. The New York Times, in an article, explained the situation:

Since the crisis, many attempts have been made to assess how many of the subprime and Alt-A mortgages inside the bonds were below underwriting standards. The estimates are staggering. These analyses focus on crucial features of the loans that often determine the likelihood of default. One important indicator is whether borrowers were taking out the loans to buy properties they were not going to live in. Mortgage firms such as Bear Sterns were supposed to properly assess owner occupancy, but often they failed to do so. Defaults on second-home mortgages were particularly high. “The most egregious mistake was allowing borrowers to lie about their occupancy,” Guy Cecala, publisher of Inside Mortgage Finance, said.

Occupancy was a focus of one of the lawsuits that was wrapped into the government settlement. The suit, brought by the Federal Housing Finance Agency, contended that in one bond deal, 15 percent of the loans were for a second home, five times the level stated in the deal’s prospectus. The borrowers of most of those loans probably defaulted, which means the ultimate loss rate on the bond was probably far higher than 2.5 percent. Other lawsuits allege far
worse abuses. Some plaintiffs even assert that practically all the loans should never have been included in some bonds issued in 2006 and 2007. For instance, in litigation against Bear Stearns, private investors, after analyses of the underlying mortgages, have asserted that 80 to 100 percent of the loans did not meet minimum standards, according to a survey of court filings by Nomura.

These numbers may be exaggerated, given that they come from plaintiffs trying to maximize their chances of legal success. Still, Paul Nikodem, an analyst of mortgage-backed securities at Nomura, said that the surveys might have some validity. “There is evidence of multiple breaches within loans,” he said. The relative size of JPMorgan’s payouts also seems to depend on who is suing the bank. The bank, for example, agreed to pay the Federal Housing Finance Agency $4 billion. That is 12 percent of the $33 billion of bonds identified in the agency’s lawsuit—a high payout rate for a set of securities that, according to bond analysts, probably had low losses compared with subprime securities identified elsewhere in the $13 billion settlement.

As we have written in prior issues, Bear Stearns and Washington Mutual were among the worst offenders in the subprime market. But unfortunately they weren’t alone. There were plenty of other big subprime players—Countrywide Financial, Merrill Lynch and even foreign institutions like Deutsche Bank and Royal Bank of Scotland—among them. After the settlement details emerged, and the media started analyzing the settlement and reporting, other banks appeared to be worried that they might be next in line.

This settlement by J.P. Morgan is a sad reminder that banks aggressively made loans to folks who did not actually qualify for the loans. Corporate greed clearly drove this train. Admittedly, some people did take advantage of the way the banks were operating and purchased houses they could not afford. Many were less calculating and ended up victims of foreclosure. The settlement sets aside $4 billion in mortgage relief for struggling borrowers. Advocates for struggling homeowners contend that this relief needs to be directed primarily at writing down the value of mortgages. That makes sense because that is likely to do the most to ease debt burdens. Bruce Marks, chief executive of Neighborhood Assistance Corporation of America, observed: “If this settlement is to have teeth to help homeowners, 100 percent of it has to go to principal reduction.”

Hopefully, this settlement will actually help both the homeowners who were victimized and the investors who bought the so-called mortgage securities. But if the settlement winds up being better for J.P. Morgan than for its victims, then a settlement that favored wrongdoers instead of their victims would serve to encourage other corporate cheaters to cheat, pay a fine or settlement, and then keep on cheating. Time will tell whether this settlement was a “good one” for victims.

Source: New York Times

**UTAH MORTGAGE COMPANY TO PAY $13.2 MILLION IN SETTLEMENT**

A Utah mortgage company, along with two of its top officers, will pay $13.2 million in refunds and fines to settle a lawsuit filed in July. Salt Lake City-based Castle & Cooke Mortgage LLC was sued for paying bonuses to its staff for directing clients to mortgages with higher interest rates. The company agreed to pay $9.2 million to refund customers in the suit filed by the Consumer Financial Protection Bureau.

Under the settlement, company president Matthew Pineda and senior vice president Buck Hawkins will pay $4 million in fines. The federal rule barring bonuses for loan officers based on terms of the mortgage was promulgated in April 2011. As usual, even though they settled the case, the company and its officers didn’t acknowledge any wrongdoing in the settlement.

Source: Salt Lake Tribune

**BANK AGREES TO $2.5 MILLION SETTLEMENT OF DEBIT CARD FEE LAWSUIT**

A bank in Scranton, Pa., has agreed to pay $2.5 million to settle a class-action lawsuit that alleged it manipulated the posting of debit card transactions to increase chances customers would overdraft their accounts so it could maximize its profits from fees. First Liberty Bank & Trust, a division of Community Bank N.A., agreed to pay the funds to 48,976 members in the class-action suit who were charged overdraft fees between July 20, 2006, and Aug. 15, 2010. The lawsuit was filed in federal court in Scranton in 2012 by two customers.

The suit challenged First Liberty’s policy relating to multiple debit card transactions posted on a single day. It was claimed in the lawsuit that the bank posted the transaction with the highest dollar amount first, rather than posting transactions in the chronological order they were made. That allowed it to increase chances the charge would overdraft the account, earning the bank a fee of $32 per overdraft.

The lawsuit is among dozens of class action complaints relating to debit card fees that have been filed against banks nationwide. In November 2011, Bank of America settled one of the lawsuits for $410 million. A proposed settlement in the First Liberty case was reached in June and approved by U.S. District Judge Robert Mariani. The settlement of this case was approved last month by Judge Mariani.

In addition to the monetary settlement, First Liberty agreed to continue the policy of posting from lowest to highest for at least two more years, to limit the number of overdraft fees charged on any single day to four and to refrain from charging a fee unless an account has a negative balance of $5 or more. Jeffrey Ostrow, a lawyer with Kopelowitz, Ostrow, located in Fort Lauderdale, Fla., represented the Plaintiffs in the case. He did a very good job for the class.

Source: The Times-Tribune

**ACCOUNTING FIRM HIT WITH $99 MILLION FRAUD JUDGMENT**

A judgment has been entered against Grant Thornton LLP, a large Chicago-based accounting firm, in the amount of $99 million. The judgment arose from a fraud lawsuit brought by a Kentucky family that owns dozens of hotels and more than a half-dozen casinos around the country. Last month, Circuit Judge Patricia Summe found that the accounting firm was negligent in the way it handled taxes for William J. Yung and his family. Yung is the owner of Columbia Sussex, a Crestview Hills-based hotel company.

Judge Summe ordered Grant Thornton to pay William and Martha Yung $4.7 million in compensatory damages and $55 million in punitive damages, as well as pre-judgment interest on $900,000 at a rate of 12 percent from June 11, 2007, to the day of the ruling. Grant Thornton was also ordered to pay the 1994 William J. Yung Family Trust $14.6 million in compensatory damages and $25 million in punitive damages.

It was contended that Grant Thornton, which handled the Yung family’s finances from 1996 through 2007, was selling products knowing that they were not legal and would not survive scrutiny by the Internal Revenue Service (IRS). Judge Summe found that Grant Thornton intentionally misled the Yungs about various financial instruments and their taxes. The result was the Yungs settling tax liabilities with the IRS for $18.4 million in taxes, fines and fees. Judge Summe wrote in a 300-page decision:
The infliction of economic injury is clear in this case not only as to taxes, interest and penalties, but as to the reputation of Yung individually as a businessperson and as a shareholder, especially when done intentionally through affirmative acts of misconduct. Therefore these actions can warrant a substantial penalty.

Kevin Murphy, the lawyer who represented Yung and his family, said in a statement that in the late 1990s numerous accounting firms began selling “tax strategies,” which included a letter that gave the opinion of the legality of the tax strategy. Murphy called Grant Thornton’s actions “unconscionable,” saying:

Multiple families around the United States suffered greatly as a result of Grant Thornton’s actions. What they knew at the time they sold this ‘strategy’ and what they told their customers were two very different things.

Yung, through Columbia Sussex of Crestview Hills, Ky., operates 41 hotels under eight different brands, including Marriott, Crowne Plaza and Hilton hotels. Yung also has a stake in casinos in Louisiana, Mississippi, Nevada and the Caribbean island resort of Saint Maarten. Grant Thornton says it will appeal.

Source: Insurance Journal

X. CONGRESSIONAL UPDATE

CONGRESSIONAL APPROVAL SINKS TO A RECORD LOW

It appears that the Republicans and Democrats in Congress have finally found something on which they can agree. At first glance, it appears that’s real good news. But the bad news is that what they agree on is that Congress isn’t doing a good job. A new Gallup poll, released last month, shows only 9 percent of Americans approve of the way Congress is handling its job. That’s the lowest rating in the company’s 39 years of asking the question.

The poll, taken between Nov. 7-10 among 1,039 adults, showed bipartisan disapproval for the job being done by Congress. Republicans give Congress a 9 percent approval rating while Democrats give it 10 percent. Only 8 percent of independents approve of Congress’ job performance. Gallup officials said:

The government shutdown in October clearly didn’t help Congress’ image, and it appears that the impact of that incident may linger, given the record-low approval this month. Having a divided Congress—with Republicans controlling the House and Democrats controlling the Senate—means there are complaints among partisans on both sides, reflected in similarly low congressional approval ratings among Republicans and Democrats.

The Gallup poll on Congress’ standing came just days after a Pew Research Poll showed 41 percent of the people approve of the job President Barack Obama is doing. The figure was among the lowest of his presidency and represented a drop of 14 points since January. The message to both the president and to members of Congress is that folks are pretty well fed up with what has been going on in Washington. Hopefully, we will see more bi-partisan cooperation between the two political parties and move between the White House and Congress.

The U.S. Senate passed a bill designed to tighten government oversight of pharmacies that custom-mix prescription drugs. This comes in the wake of last year’s deadly meningitis outbreak tied to contaminated pain injections distributed by New England Compounding Center (NECC). The legislation, previously passed by the House in September, also creates a national system for tracking prescription drugs from manufacturers to retail pharmacies. President Obama promptly signed the bill into law.

Compounded medicines have been tied to contamination problems for years. But jurisdiction over them has been murky. Pharmacies are typically regulated through state boards, but the federal Food and Drug Administration (FDA) has the duty to regulate manufacturers of medicines. This new law attempts to sort out that legal gray area, which allowed NECC and other large pharmacies to avoid both state and federal regulations. Specifically, the measure clarifies when the FDA can intervene against compounding pharmacies.

Pharmacies that operate as traditional compounders, producing small batches of medications to fill doctors’ prescriptions, will continue to be regulated by state pharmacy boards under the new law. Pharmacies that expand into shipping drugs without doctors’ prescriptions can voluntarily register with the FDA and submit to federal inspections and quality standards similar to manufacturers. But the bill won’t require these large-scale compounders to register with the FDA. This is a step that the agency’s leaders have consistently said is crucial to preventing future outbreaks. Safety advocates also say the voluntary approach leaves consumers vulnerable to more rogue pharmacies like NECC, which operate like manufacturers under the guise of compounding.

The compounding industry’s chief lobbying group opposed the bill, claiming it would further complicate pharmacy regulations. Despite complaints about the bill’s shortcomings, it garnered broad support, in part because it contains a separate measure for tracking prescription drugs. The so-called “track-and-trace system” is designed to help authorities catch counterfeit or stolen drugs, which have increasingly been making their way into the U.S. supply chain from overseas.

Under the track and trace legislation, drug makers will be required to add serial numbers to all drug containers within four years. After 10 years, the industry will have to upgrade to...
電子登錄碼可以追溯藥品從工廠到藥房。

電子追蹤碼可以被使用來從工廠追蹤藥品到藥房。

這是一個非常重要的判例在汽車業業界，因為這起判例是關於一個成分級別的製造商（Key Safety Systems）而不是汽車製造商。這位律師的判決發送一個訊息給所有汽車製造商。

我們在上個月為一個涉及Web感應器座椅的案件達成和解。這些車輛是設計和製造由Key Safety Systems，我們確保了在車輛的車廂中看到一個Web感應器座椅。

我們在Natchez，Mississippi，颶風後に車両の急激な加速が発生した。テクトリオンはテクストロンを訴えました。

テクトリオンはテクストロンを訴えました。

この案件は先進的な制御システムを備えた車両が起きる危険を示しています。
Garrett from The Finley Firm, which has offices in Atlanta and Columbus; and Houser Pugh, a Columbus lawyer. The case was settled on the eve of trial with the amount being confidential. The case was before U.S. District Judge Clay Land, an excellent Jurist. Greg and his team did a tremendous job, especially in pretrial discovery, in this case.

**Lawsuit Filed By Family Of Man Killed In Toyota Sudden Acceleration Incident**

Lawyers from our firm have filed a significant lawsuit against Toyota that involves Toyota’s defective electronic throttle control system. The wrongful death claim was filed in Superior Court of New Jersey, Bergen County, on behalf of the family of Robert Kitrys, who was killed July 20, 2013. Mr. Kitrys’ 2004 Toyota Camry suddenly and without warning surged out of control, accelerating at high speeds and he was unable to stop the vehicle. As the uncontrollable Camry approached an intersection and concrete barrier, Mr. Kitrys jumped from the vehicle. He received injuries that caused his death. Graham Esdale and Ben Baker, from our firm, along with Don Caminiti with Breslin and Breslin, in Hackensack, N.J., will handle the case for Mr. Kitrys’ family.

Mr. Kitrys was only two blocks from his house when the car suddenly surged toward a busy intersection at a major highway and he couldn’t stop it. The man jumped out of the car, but he was badly injured and died. This is a very tragic event, and one that could have been prevented had Toyota properly designed its electronic throttle control system that has been found to be defective in an Oklahoma court. The jurors in that case, Bookout v. Toyota Motor Corp., found that Toyota had a reckless disregard for human life. Such recklessness caused Mr. Kitrys’ death in this case.

Toyota recalled more than 8 million vehicles worldwide in 2009 and 2010 after reports that sudden unintended acceleration resulted in crashes involving serious injury and death. However, Toyota never recalled the 2002 through 2006 model year Camrys. The software problems in a 2005 Camry resulted in a jury verdict against Toyota in the three-week Bookout trial held in Oklahoma about a month ago. The jury in that case returned a multi-million dollar compensatory damages award and determined that punitive damages were warranted. However, the case was settled before the jurors had a chance to determine the amount of punitive damages to be awarded. The amount of that settlement was confidential.

The jury in the Oklahoma City case also determined that defects in the Camry’s electronic throttle control system (ETCS) were directly responsible for the Camry’s sudden acceleration and resulting crash where the driver was seriously injured and a passenger killed. Toyota has long blamed the problem on faulty floor mats, sticky accelerator pedals and even driver error. But the real problem has been a defective electronic throttle control system.

**A Report On Tire Aging**

Tire aging is a safety issue that many consumers are unaware of. However, tire manufacturers and automobile manufacturers have become more aware of the issue since the Explorer/Firestone Wilderness ATX tire catastrophe that led to Congressional hearings in the late 1990s. As our lawyers have learned during litigation, a tire that is too old for safe use can fail with catastrophic results.

Most consumers are unaware that a tire’s DOT number provides users with the date of manufacture for the tire. A tire’s DOT number provides information about the manufacture of the tire and the year and year of the tire’s manufacture. For example, if the last four digits of the DOT number were “4809”—this would mean that the tire was manufactured in the 48th week of 2009. Unfortunately, most people believe the safety of their tires relates solely to the amount of tread depth. But tires can sit on the shelf for years or be stored as a spare tire for years, without ever being used. The tread on those tires will look safe. Tread depth, however, is not the only factor to consider in terms of tire safety.

As tires age, the rubber components of the tire are susceptible to degradation or thermo-oxidative aging that has been documented for years. This oxidative aging has an impact on the natural life of rubber products. Sean Cain, president of Safety Research and Strategies Inc., compares an aging tire to an old rubber band. He says:

*If you take a rubber band that’s been sitting around a long time and stretch it, you will start to see cracks in the rubber.*

The same thing can happen to a tire that has aged past its useful life. Cracks in the rubber can begin to develop and be visible along the surfaces of the tire. This cracking can also lead to a separation of the steel belts from the carcass of the tire even though the tread depth appears to be safe. Our lawyers know from experience in litigation that thread separations can lead to vehicle loss of control at highway speeds. The results are quite often death or serious injury.

Automakers and tire manufacturers have not reached consensus on when tires should be replaced based on age. While some tire manufacturers have said that a tire should be replaced once it reaches 10 years of age, other tire manufacturers have recommended that tires older than six years should be replaced. Additionally, automakers have started putting recommendations in the owner’s manuals of their vehicles. In most instances, automakers have recommended that tires older than six years should be replaced.

Additionally, many folks purchase “used” tires that appear to have safe tread depth. Again, these consumers are unaware of the age of “used” tires and can be purchasing unsafe tires. Most manufacturers discourage the sale and purchase of used tires due to aging issues and other reasons. Unfortunately, the “used” tire market is not regulated. Therefore, consumers can be purchasing tires that are unsafe, but have been made to appear safe for use. For this reason, it’s very important that tire manufacturers make a better effort to educate the public regarding the aging issue, including warnings and perhaps expiration dates stamped on their tires.

However, with little consensus in the industry and no government oversight on this issue, it does not appear that consumers will be provided with the necessary information they need to make intelligent choices about tire selection in the near future. If you need more information on this subject, contact Ben Baker or Rick Morrison, lawyers in our firm’s Personal Injury/Products Liability Section, at 800-898-2034 or by email at Ben.Baker@beasleyallen.com or Rick.Morrison@beasleyallen.com.

**Class Action Lawsuit Filed Against Kia For Gas Tank Defect**

A putative class action lawsuit was filed against Kia Motors Corp. and its subsidiary last month. The suit was filed in a California federal court by consumers who say that one of the company’s vehicle models features gas tank defects that put passengers at risk of serious injury or death. The lawsuit was filed on behalf of consumers who purchased, leased or currently own a Kia model with a gas tank that is either not connected to the underside of the vehicle with reinforced straps or is not protected by a whole-tank shield. The suit also attempts to represent owners of Kia vehicles that have a plastic fuel pump service cover that is accessible from the passenger compartment of the car, according to the complaint.

It’s alleged in the lawsuit that the vehicles are defective and that their design can lead to gas tanks dislodging and rupturing in an accident, putting passengers at risk of a tank fire invading the passenger cabin. It’s contended that “the placement of the gas tanks, combined with the lack of standard safety mea-
sures such as reinforced straps, effectively mean that rear-seat passengers are sitting atop what amounts to a gas-fed bomb.’

A tragic incident in Texas is said to be an example of the potential risk that the Kia problem presents. In that incident, three passengers were driving in a Kia Soul and were completely engulfed in flames when the car’s gas tank exploded. It’s believed by some that the defects alleged in the California lawsuit were to blame for the incident. The lawsuit, which also names Kia Motors America Inc. as a Defendant, calls into question Kia’s marketing tactics that ‘heavily emphasize vehicle safety,’ saying they mislead customers into purchasing or leasing vehicles of a quality different than they were promised, as well as paying more than they would have had they been aware of any gas tank defects, according to the complaint.

The named Plaintiffs in the suit, Constance Sims and Sammy Rodriguez, own versions of the Kia Soul. They reported the vehicles were selected in part because they wanted safely designed and manufactured vehicles. Both Plaintiffs say they saw advertisements before purchasing the vehicles and that safety and quality were “consistent themes” in the ads. The Plaintiffs contend that Kia has violated California’s Unfair Competition Law and the Consumer Legal Remedies Act and False Advertising Law, as well as committed a breach of implied warranty of merchantability and fraudulent concealment.

Steve W. Berman, managing partner of Hagens Berman, is the lead lawyer for the Plaintiffs in this case. Other lawyers representing the Plaintiffs are Elaine T. Byszewski, and Sean R. Matt of Hagens Berman Sobol Shapiro and Mark P. Robinson Jr. of Robinson Calcagnie & Robinson. The case is pending in the United States District Court for the Central District of California.

Source: Law360

XII.
M A S S T O R T S
U P D A T E

D E P U Y O R T H O P A D E I C S ’ S $ 2 . 4 7 5 B I L L I O N G L O B A L S E T T L E M E N T A P P R O V E D B Y C O U R T

DePuy Orthopaedics, a subsidiary of Johnson & Johnson, has agreed to pay $2.475 billion to settle thousands of claims related to injuries suffered as the result of defective ASR hip implant parts. The settlement has been approved by U.S. District Judge David A. Katz in the Northern District of Ohio, who is overseeing the consolidated litigation, along with the other state court judges where cases were filed. DePuy faced more than 10,000 cases in the U.S. related to its ASR XL Acetabular and ASR Hip Resurfacing Systems, which it recalled in August 2010 amid reports that unusually high rates of the devices failed after just five years. Beasley Allen attorney Navan Ward, Jr., a lawyer in our firm’s Mass Tort’s Section, was selected to the Plaintiffs Steering Committee for the consolidated litigation for cases against DePuy Orthopaedics in the hip implant products liability litigation.

Since the DePuy ASR hip device was pulled from the market in August 2010, our firm and several lawyers around the country have worked hard to expose the problems with the DePuy ASR hip device. Many of the clients represented by our firm have suffered and will continue to suffer negative outcomes resulting from their ASR hip implant. Many have had premature hip revision surgeries. We are looking forward to resolving their ASR claims as soon as possible in order to provide our ASR clients the much needed compensation that they deserve. Settlement of the ASR claims will most likely have a significant influence on the other metal-on-metal hip litigation. The manufacturers of the other hip implants will have to take steps toward resolving claims against them as well.

An estimated 95,000 people worldwide are affected by the DePuy ASR recall. Patients are reporting problems within as little as five years after receiving the hip implants that used the metal-on-metal parts. Patients are reporting problems including pain, swelling and problems walking. The ASR hip implant has shown that it may loosen from the bone. The devices also are linked to a condition called metallosis, or metal poisoning resulting from metal shavings from the devices entering the bloodstream. If you need additional information on the settlement, contact Navan Ward at 800-898-2034 or by email at Navan.Ward@beasleyallen.com.

J U R Y A W A R D S S $ 1 0 M I L L I O N I N T O P A M A X S U I T

A Philadelphia state jury returned a verdict against Janssen Pharmaceuticals Inc. in a Topamax lawsuit last month. The company will have to pay more than $10 million to the parents of a child who suffered birth defects due to the company’s epilepsy drug Topamax. The jury found that the Johnson & Johnson unit didn’t sufficiently warn doctors about the risk of birth defects stemming from the use of the drug. Janssen knew about the risks years before the drug was prescribed to patients. The family’s 5-year-old child developed a cleft palate and other defects after being exposed to Topamax during his mother’s pregnancy.

This verdict came less than three weeks after another Philadelphia state jury returned a $4 million verdict against Janssen in a related suit alleging Topamax caused another family’s child to develop similar injuries. The U.S. Food and Drug Administration (FDA) has approved Topamax as an anti-epileptic drug and to prevent migraine headaches. In 2010, Janssen agreed to pay more than $81 million to settle a U.S. Department of Justice inquiry into off-label marketing of Topamax.

The following year, the FDA issued a warning that Topamax increased the risk of development of certain congenital defects, particularly oral clefts in babies who were born to women who ingested Topamax during their pregnancy. Data from the North American Antiepileptic Drug Pregnancy Registry linked an increased risk of cleft lips and cleft palates to infants who are exposed to Topamax and its generic versions during the first trimester of pregnancy.

Cleft lips and cleft palates are birth defects that occur when parts of the lip or palate do not completely fuse together early in the first trimester of pregnancy. The problem can range from a small notch in the lip to a groove that runs into the roof of the mouth and nose and can cause ear infections as well as problems with eating and talking, according to the FDA. The agency also said that the pregnancy category for Topamax would be changed to Pregnancy Category D, meaning there is “positive evidence of human fetal risk based on human data,” but that the potential benefits of the drug in pregnant women may outweigh the risks in certain situations.

Plaintiffs in the Pennsylvania suits alleged the company didn’t fully, truthfully or accurately disclose Topamax data to the FDA, to them and to their doctors. It was alleged further that Janssen intentionally and fraudulently misled the medical community, the public and Plaintiffs about the risks to a fetus associated with the use of Topamax during pregnancy. Janssen argued that it adequately warned health care providers of the potential side effects for women who use the medicine during pregnancy after introducing the drug to the market in 1996, but the jury disagreed. Janssen says it will appeal. The Plaintiffs are represented by Shelley V. Hutson, Blake A. Deady and Scott A. Love of Clark Love & Hutson, a firm located in Houston, Texas.

Source: Law360

M O R E L I P I T O R S U I T S B E I N G FILED

Lawsuits are continuing to be filed for Plaintiffs that allege the use of Lipitor caused patients to develop new-onset Type 2 diabetes. Recently 36 Lipitor lawsuits filed in West Virginia State Court were transferred to U.S.
District Court, Southern District of West Virginia. There have been several filings in the U. S. District Courts throughout the State of Alabama. It’s difficult to determine how many lawsuits have been filed to date, but we estimate the number to currently be as many as 170 filings in both State and Federal Courts. We believe the filings will continue to increase at a fairly rapid rate.

In 2012, the FDA asked Pfizer, Inc. and other statin manufacturers to add new warnings to their label regarding an increased risk of new-onset diabetes in patients who took the cholesterol-lowering statins. Plaintiffs in the federal Lipitor lawsuits have filed a second request with the U.S. Judicial Panel on Multi-district Litigation seeking the transfer of all federally filed claims involving similar allegations to a single federal court for pretrial proceedings. If their request is granted, all pending and future lawsuits involving Lipitor and diabetes could be transferred to that proceeding. Plaintiffs have proposed that the federal Lipitor litigation be established in U.S. District Court, District of South Carolina, where at least 14 Lipitor lawsuits are pending.

A number of similar Lipitor lawsuits have been consolidated in U.S. District Court, Southern District of Illinois, for the purposes of discovery and other pretrial proceedings. Our firm is currently investigating Lipitor claims. If you have questions, contact Frank Woodson or Matt Munson, lawyers in our firm’s Mass Torts Section, at 800-898-2034 or Frank.Woodson@beasleyallen.com or Matt. Munson@beasleyallen.com.

**The Actos Litigation Moves Forward**

Actos lawsuits filed on behalf of patients who developed bladder cancer linked to use of the Type 2 diabetes drug continue to move forward in a multi-district litigation (MDL) underway in the U.S. District Court, Western District of Louisiana. The first Bellwether trial in the MDL is scheduled to begin Jan. 27, 2014.

In June 2011, the U.S. Food and Drug Administration (FDA) warned that use of Actos for more than a year had been linked to a doubling of the risk of developing bladder cancer. Since then, more than 2,500 Actos lawsuits involving bladder cancer allegations have been filed in the Louisiana federal court.

More than 3,000 cases are also pending in Cook County, Ill. Two lawsuits over Actos bladder cancer claims have gone to trial. In September 2013, the second Actos lawsuit trial concluded in Maryland State Court with $1.7 million being awarded to the family of a man who died of bladder cancer. But the trial court in that case set aside the verdict in accordance with Maryland law because the jury also found that the decedent’s decades-long smoking habit contributed to the development of the disease.

The first trial of an Actos lawsuit concluded in April 2013 in Los Angeles Superior Court. The jury in that case awarded $6.5 million to a Plaintiff who was diagnosed with bladder cancer after taking Actos for four years. But Takeda Pharmaceuticals’ request to set aside the verdict was granted. The Plaintiff has appealed the decision. The jury in the cases tried thus far believed the evidence presented by the Plaintiffs on both causation and liability.

Our firm has an Actos case set for trial in April 2014. Andy Birchfield, who heads up our firm’s Mass Torts Section, was appointed by Judge Doherty to the Plaintiff Steering Committee in the Actos MDL in Louisiana. Andy and Roger Smith, another lawyer in the section, have been heavily involved in the Actos litigation. If you have any questions regarding any aspect of this litigation, or if you would like for us to review a potential claim, contact either Andy or Roger at 800-898-2034 or by email at Andy.Birchfield@beasleyallen.com or Roger.Smith@beasleyallen.com.

**Low Testosterone Drugs Associated With Increased Risks Of Cardiovascular Disease and Mortality**

On November 6, 2013, the *Journal of the American Medical Association (JAMA)* reported that “a recent randomized clinical trial of testosterone therapy in men with a high prevalence of cardiovascular diseases was stopped prematurely due to adverse cardiovascular events raising concerns about testosterone therapy safety.” Rates of testosterone therapy are increasing, but the effects of the therapy on cardiovascular outcomes and mortality were, until this report, largely unknown.

Researchers at the University of Texas at Southwestern Medical Center in Dallas reviewed records from more than 8,700 men with low-Testosterone (low-T) levels who underwent coronary angiography—a procedure that uses dye and X-rays to peer into heart arteries—in the Veterans Affairs system between 2005 and 2011.

Of nearly 7,500 men who did not get extra testosterone, about 1 in 5 had bad cardiovascular outcomes, including stroke, heart attack or death. In the more than 1,200 men who got testosterone, nearly 1 in 4 had those terrible problems, an increased risk of nearly 30 percent. The researchers concluded that taking testosterone came with an increased risk of an adverse outcome.

Testosterone supplements, such as the prescription topical treatments Androgel, Testim and Axiron, are used to help boost testosterone levels in men who have a deficiency of the male hormone. Symptoms of low testosterone include decreased libido and low energy. In recent years, sales of testosterone therapy drugs have skyrocketed, fueled by pricey marketing campaigns that encourage men to talk to their doctors to see if testosterone therapy is right for them. As a result, testosterone supplementation has grown to a billion-dollar industry that has increased more than five-fold from 2000 to 2011. More than 5.3 million prescriptions are written for testosterone products each year. Nearly 5 percent of all men in the United States older than 40 use the drugs.

Little was known about the long-term effects of testosterone therapy until researchers with a University of Colorado study revealed their findings. Not only did they find that men who used testosterone supplements for three years or more were at greater risk of cardiovascular problems or death, they also found other disturbing evidence.

Fourteen percent of men who started testosterone therapy after undergoing an angiography were mostly younger and slightly healthier than the 86 percent who did not use the hormones. However, after an average of three years, the men who used testosterone supplements were nearly 30 percent more likely than those who did not take the hormones to have a stroke, heart attack, or die from any cause. Furthermore, men who started the study with clear, unobstructed coronary arteries were just as likely to have a heart attack, stroke or die as men who entered the study with established coronary artery disease. Researchers say the study raises definite concerns about testosterone supplementation that men should discuss with their doctors.

Testim and Androgel already carry a warning to users to wash their hands thoroughly after applying the gel, and to cover the area of the body where the gel was applied because unintended exposure to women, children, and even pets has resulted in adverse reactions. For example, children who have been accidentally exposed to the gel have shown signs of premature puberty that could have long-term effects such as inappropriate enlargement of the penis or clitoris, premature development of pubic hair, increased erections, aggressive behavior and advanced bone age.

Lawyers in our firm’s Mass Torts Section are currently investigating cases involving testosterone therapy drugs. If you or a family member have experienced any adverse effects or you need more information, contact Melissa Prickett or Matt Teague, lawyers in our firm’s Mass Torts Section, for more information at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com or Matt.Teague@beasleyallen.com.
FDA Rule Change Would Allow Generics To Update Labels

In June, 2011, the United States Supreme Court ruled in *Pliva, Inc. v. Mensing* that a generic drug manufacturer could not be liable for failing to warn of injuries as a result of taking a generic version of a name-brand drug. The court said that was because generic drug manufacturers are not permitted to make any changes to the labeling for name-brand drugs.

The U.S. Food and Drug Administration (FDA) recently proposed a major new rule that would allow generic drug manufacturers to independently change their labeling if the companies become aware of a dangerous propensity of their drugs. The current FDA regulations require generic manufacturers to notify the FDA and the brand name manufacturer of proposed label changes and wait until the brand name label change has been approved. The proposed changes would allow both brand and generic manufacturers to use the Changes Being Effectuated (CBE) process to add new warnings to their drug labels. The proposed regulations would also require generic manufacturers to update their labels within 30 days to conform to a label change made by the manufacturer of the name-brand drug. They are now only required to do so “as soon as possible.”

More than 80 percent of prescriptions filled in the U.S. are for generics. Based on *Mensing*, a person injured by a generic drug cannot sue a generic drug manufacturer, no matter how severely injured or how bad the manufacturer’s conduct was. The new regulations would allow consumers harmed by a generic drug to have their day in court when a generic manufacturer puts a defective product on the market with no warning of a known hazard or danger. If you need more information on this subject, contact Melissa Prickett, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

Source: Law360

Does Big Pharma Control the FDA?

Congress passed a series of legislative acts, beginning in 1992, known collectively as the Prescription Drug User Fee Acts (PDUFA). This legislation sought to expedite the U.S. Food and Drug Administration (FDA) drug-review process. Interestingly, drug companies are required to pay fees with their new drug applications, essentially making them a customer of FDA. Let’s look at a recent approval of a drug that puts in focus the power of the drug industry and brings into question the FDA’s independence.

According to extensive advertising by the drug company Noven, menopausal women will now have access to “the first and only FDA-approved non-hormonal therapy for moderate to severe hot flashes associated with menopause.” The phrase “non-hormonal” alludes to the practice of hormone replacement therapy (HRT), a menopause treatment primarily involving estrogens, which was widely in vogue until its many dangers to women’s health were discovered and documented. Lawyers in our firm’s Mass Torts Section represented a number of women who suffered from breast cancer as a result of HRT use.

Because of these dangers, few women now use HRT. So up steps Noven to fill the void with its new drug BRISDELLE, a drug also sold by GlaxoSmithKline as PAXIL (generic name: paroxetine), which is approved by the FDA to treat depression, obsessive compulsive disorder, panic disorder, social anxiety disorder, generalized anxiety disorder and post-traumatic stress disorder.

In March 2013, an advisory committee of the Food and Drug Administration reviewed the evidence for the effectiveness and safety of BRISDELLE to treat hot flashes. Public Citizen testified against its approval, pointing out that the clinical trials failed to demonstrate any evidence of clinically significant benefits for paroxetine in comparison to placebo. Public Citizen presented evidence of previously documented dangers of paroxetine, including seizures or convulsions, manic episodes, agitation, sexual problems, and other adverse events found in studies of the drug.

The FDA advisory committee concluded, by a 10 to 4 vote, that BRISDELLE did not provide a clinically meaningful improvement in hot flashes compared to a placebo. An identical 10 to 4 vote also supported the conclusion that the drug’s benefits did not outweigh its risks and that it should not be approved. Nevertheless, the FDA overrode the advice of the committee and approved the drug. Public Citizen categorizes Brisdelle as a DO NOT USE drug. You have to wonder why the FDA would categorizes this drug as a DO USE drug? This poses an important question and that is does Big Pharma control the FDA and run the show?

Source: Public Citizen

XII.

BUSINESS LITIGATION

Supreme Court Upholds $11.5 Million Proposal System Patent Claim Against Hyundai

The U.S. Supreme Court last month rejected a Hyundai Motor Co. unit’s appeal of an $11.5 million award in a patent lawsuit over a means of creating customized printed proposals for prospective customers. The justices let stand a federal appeals court ruling that upheld the award in favor of Clear With Computers LLC. That company had sued Hyundai Motor America Inc. in the lawsuit.

Hyundai contended that faulty jury instructions given by a federal trial judge undermined the company’s bid to invalidate the Clear With Computers patent. According to Hyundai, similar electronic proposal systems were already available in the marketplace when the patent application was filed.

Source: Insurance Journal

Patent Infringement Lawsuit Filed Against Huntsville Biotech Firm

An Austin-based company has filed suit against a Huntsville, Ala., biotech firm, Diatherix, claiming that the defendant is infringing on its patents for rapid testing of a number of medical conditions. The lawsuit filed by Luminex Corp. of Austin, Texas, alleges that Diatherix has infringed on three of its patents that are connected with Luminex’s patented xMAP technology, which the company says is capable of performing up to at least 500 tests on a single sample. The lawsuit was filed on Nov. 8 in federal court in the Northern District of Alabama. Diatherix and its CEO Frank Grimaud are named as defendants in the lawsuit.

Diatherix is a testing lab company which offers technology capable of identifying multiple infectious agents or infectious diseases at the same time. Last year, an Ohio hospital announced Diatherix had saved it nearly $4 million using a Diatherix tool to diagnose infectious diseases faster and more accurately than traditional testing. In the complaint, Luminex alleges Diatherix and CEO Grimaud were familiar with the Luminex patents. It was alleged that:

*In November 2008, after Mr. Grimaud became Diatherix’s Chief Executive Officer, Diatherix was in discussions with Luminex regarding a license to Luminex’s intellectual property, but...*
Diatherix never took a license, leading Luminex to believe that Diatherix had decided not to use Luminex’s technology. Luminex recently learned that Diatherix did adopt Luminex’s technology but without a license—thus willfully infringing Luminex’s patents for quite some time unbeknownst to Luminex.

Luminex contends that the Huntsville company violated at least one claim in each of its U.S. patents 5,981,180, 6,432,526 and 6,411,904 through testing, selling and other uses of the commercial testing panels. The lawsuit also alleges breach of contract and seeks unspecified damages and an order barring the company and its employees from use of the patents.

Source: Huntsville Times

XIII.
AN UPDATE ON SECURITIES LITIGATION

Political Disclosure Rulemaking At The SEC

At a recent Senate briefing, lawmakers, prominent pension fund leaders, investors and securities law experts joined together and built a very strong case for the Securities and Exchange Commission (SEC) to issue a rule requiring publicly traded companies to disclose their political spending. Sen. Robert Menendez, who sponsored and keynoted the briefing, said that “Investors have a right to know how corporate executives are spending investors’ money.” That’s a position that should be impossible to derail, but we have to consider who the opposition is.

The Supreme Court’s ruling in Citizens United v. Federal Election Commission that corporations are people and can spend unlimited money to influence elections has triggered a flood of secret money that undermines our democracy and often occurs without shareholders’ knowledge or consent. Basic disclosure would bring much needed transparency and accountability and help ensure that corporations’ political spending accurately reflects the will of the shareholders who own them.

Sen. Menendez has consistently called on the SEC to use its authority to require companies to disclose to shareholders how they spend shareholders’ money to influence elections. In the wake of the Supreme Court’s Citizens United decision, Menendez authored the Shareholder Protection Act, which not only would require full disclosure of any political spending by any public company, but would require shareholder authorization of this spending. Sen. Elizabeth Warren, who also keynoted the briefing said:

Disclosure of corporate political spending is good for investors, good for business, and good for the American public. Shareholders have a right to know how the companies they own are spending their money. More disclosure would make the democratic process more accountable by making sure citizens know who is backing candidates. The SEC should require publicly traded companies to disclose secret political spending—and it should do it now.

The rulemaking petition has garnered more than 640,000 supportive comments from the general public and investors alike—more than any other petition in the SEC’s history—including supportive commentary from hedge fund investors and John Bygle, the CEO of Vanguard. That support has made an impact. As a result, the SEC added the proposal last year to the agency’s regulatory agenda. Lisa Gilbert, director of Public Citizen’s Congress Watch division, who served as moderator of the briefing, had this to say:

We applaud the SEC and encourage the agency to continue to act decisively to protect investors by providing them with material information. Securities and Exchange Commission Chair Mary Jo White has lately stressed the independence of the SEC, saying they should use their expertise to mandate transparency requirements when information about companies is truly needed by investors. This rule fits that necessity perfectly, as the information has been loudly demanded by a wide-range of investors for that reason.

Robert J. Jackson, Jr., a professor at Columbia Law School who co-chaired the group of legal experts that petitioned the SEC to take up these rules in 2010, added:

Although investors have long asked public companies to disclose when shareholder money is spent on politics, most corporate political spending remains hidden from investors. The SEC should act immediately to adopt rules that would give investors the information they need to evaluate political spending at the companies they own.

The rulemaking has robust support from the investor community. Since 2010, the number of shareholder resolutions pertaining to political spending filed at companies has climbed from 58 to 128, according to the Sustainable Investments Institute. Average support for these proposals has steadily increased in the past two years. New York State Comptroller Thomas P. DiNapoli, trustee of the $160.7 billion New York State Common Retirement Fund, said in a statement:

Investors should know how corporate dollars are being spent on politics so they can evaluate whether that spending is advancing the corporation’s best interests. I urge the SEC to take up rulemaking to create a uniform standard for disclosure of corporate political spending.

The business community is also trending toward disclosure. More than 16 companies received top scores for their disclosure policies from the Center for Political Accountability-Zicklin Index, an increase of 150 percent from 2012. And 150 companies of the 195 surveyed received improved scores from 2012. In addition, a survey released earlier this year by the Committee for Economic Development showed that 90 percent of surveyed business leaders supported full disclosure of individual, corporate and labor contributions to political committees.

Professor John Coates from Harvard Law School, a prominent author of many studies on corporate governance and securities law, made this astute comment:

Political activity creates distinct and difficult-to-model risks. Dozens of studies have produced results inconsistent with political activity generally serving shareholder interests. Instead, they support the view that political activity can harm shareholder interests. These harms can flow through many channels—from reputational harm to dilution of strategic focus, from politically risky acquisition bets or capital investments to state laws deterring takeovers. To adequately assess those risks, shareholders need basic, standardized information about political activity—before investing, and afterwards, to monitor corporate performance and make informed decisions. Disclosure of such information is squarely within the SEC’s charge, and would deliver significant benefits to investors at a low cost.

Laura Berry, executive director of the Interfaith Center for Corporate Responsibility, added this observation:

As investors and active shareowners, the members of ICCR have been instrumental in encouraging our companies to agree to full disclosure for nearly a
decade. Disclosure allows investors to make the best possible decisions by underscoring a company’s strategic priorities. There is good reason that so many citizens align with investors in their conviction that corporations can and should disclose their political contributions.

Hopefully, the SEC will take the needed action and issue the requested rule. In my opinion, it’s badly needed. Some say the very existence of our Democracy depends on it to a large degree. I agree with them.

Source: Public Citizen News Release

SUPREME COURT WILL DECIDE FUTURE OF SECURITIES CLASS ACTIONS

The U.S. Supreme Court has accepted a case which has the potential to have a profound effect on securities litigation. The justices agreed to reconsider a precedent that has served as the foundation for shareholder suits which has the potential to have a profound large degree. I agree with them.

Under the Basic decision, judges now presume that investors will take any publicized, significant misstatements into account before buying shares. That approach, also known as the fraud-on-the-market presumption, “springs from the very concept of market efficiency,” Justice Ruth Bader Ginsburg said for the majority in the February ruling.

Halliburton’s appeal contends that research in recent years has shown the market to be much less efficient than the court thought in the Basic case. The company points to the 2008 economic crisis and the technology bubble a decade earlier as examples. Houston-based Halliburton, the world’s largest provider of hydraulic-fracturing services, is also making a narrower argument. The company says it at least should have a chance to rebut the presumption by proving that the alleged misrepresentations didn’t distort the market price of the stock. The case marks the second time the Supreme Court has intervened in the Halliburton litigation. The court ruled in favor of the shareholders on a separate issue in 2011. The shareholders, led by the Erica P. John Fund, contend that Halliburton from 1999 to 2001 falsified earnings reports, played down estimated asbestos liability and overstated the benefits of a merger.

The former SEC commissioners backing Halliburton are Paul Atkins, Edward Fleischman, Joseph Grundfest and Laura Unger. In a brief filed along with scholars and other former SEC officials, they said the Basic presumption “revolutionized private securities litigation and made it the massive multi-billion-dollar industry that it is today.” It appears that the court will hear arguments in the Halliburton case early next year and rule by July.

Sources: Greg Stohr and Bloomberg News

INSURERS SETTLE REGLAN INJURY INSURANCE COVERAGE SUIT

The outcome of a most interesting case was reported last month involving Reglan claims. It was reported that Alaven Pharmaceutical LLC settled its claims that First Specialty Insurance Corp. (FSIC) should pay $5 million of excess coverage relating to the defense of litigation involving Alaven’s brand versions of Reglan, the digestion medication. U.S. District Judge Amy Totenberg was notified that the parties had reached a settlement in principle and would file the final settlement documentation with the court at a later date. Judge Totenberg administratively closed the case awaiting that filing.

As we have previously reported, there have been a large number of Reglan lawsuits filed around the country. Alaven, a defendant in many of these lawsuits, filed its own lawsuit in 2012, challenging the decision of FSIC and primary carrier Columbia Casualty Co. to deny a combined $10 million in liability insurance coverage. That decision was based on the insurers’ conclusion that, when the policies were issued in 2009, Alaven had reason to know it would become involved as a defendant in thousands of claims based on Reglan.

As previously reported, Reglan has been linked to the neurological disorder tardive dyskinesia and carries other serious side effects. It was reported that Columbia settled with Alaven in April. Alaven says the Columbia policy provided $15 million in defense and indemnity coverage, consisting of a $10 million loss limit and a $5 million each-claim limit which was added by endorsement. Alaven also contended that FISC’s policy furnished an additional $5 million excess layer of coverage.

Shortly before Alaven exhausted the first $10 million of coverage under the Columbia policy, the insurer gave notice that it would not provide the additional $5 million. That was said to have been because Alaven misrepresented its probable exposure to Reglan injury suits when it purchased the policy. It was alleged further that FSIC subsequently informed Alaven that it would adopt the same position and disclaim its obligations on the $5 million excess layer.

Alaven contended that the position taken by the insurers was unsupported by the facts, the policy language and by Georgia insurance law. Alaven filed suit against Columbia for breach of contract and bad faith. It reserved its rights to sue FSIC as well once the $10 million

Sources: Greg Stohr and Bloomberg News

FINANCE UPDATE
Columbia limit was exhausted and its claim against FSIC became ripe. In addition, Alaven sought a reformation of the FSIC policy, which it contended was issued with a definition of “ultimate net loss” that mistakenly failed to include the costs of defending any claim or suit covered under the policy.

It was alleged by Alaven in the complaint that as a result of the “mutual” error of Alaven and FSIC, the incorrectly worded policy would never be triggered if the underlying Columbia policy paid even a single dollar in defense costs. Alaven maintained this outcome was prohibited under state law because it would render the policy coverage illusory. Columbia settled with Alaven and was dismissed from the lawsuit in April, but Alaven continued with its claim against FSIC.

In August, FSIC issued a subpoena to Alaven’s insurance broker BB&T Insurance Services Inc. for documents, notes and phone logs related to Alaven’s policy purchases. The case went to mediation in October and a settlement was reached.

Alaven, which became part of Sweden-based Meda AB in 2010, acquired the rights to manufacture and distribute brand-name Reglan in 2008 from Schwarz Pharma Inc. As you may recall from previous reports, that company had obtained the rights in 2001 from Wyeth LLC, the original developer of Reglan.

As a matter of interest, it should be noted that the Judicial Panel on Multidistrict Litigation declined in 2009 to create a centralized Reglan injury case. This case is an example of the tangled web of insurer-insured litigation involving coverage issues.

Sources: Andrew Scurria and Law360.com

**Toys R Us Says Pool Slide Insurer Owes For $25 Million Verdict**

Toys R Us filed a lawsuit last month claiming that Colony National Insurance Co. should be forced to cover a $25 million wrongful death verdict against the retailer. It was alleged that the insurer had refused to help Toys R Us settle with the family of a woman who died using a pool slide sold by the retailer. In the complaint, filed in New Jersey federal court, Toys R Us alleges that Colony breached its contract with the manufacturer of the slide. Manley Toys Ltd. Toys R Us says that it was covered under the policy. But Colony told Toys R Us that it had only agreed to cover Manley’s American subsidiary and that Toys R Us did not qualify as an insured party. Toys R Us alleges in the complaint:

*In breach of its duty to exercise good faith in attempting to settle the wrongful death suit on behalf of TRU* ...

**Colony never offered or made available its policy limit.**

The suit comes seven years after a 28-year-old woman died using the Banzai Falls In-Ground Pool Slide sold by Toys R Us. Her family sued Toys R Us for negligently certifying the product and a jury awarded a $25 million verdict. On appeal, the Massachusetts Supreme Judicial Court found that Toys R Us demonstrated a “substantial degree of reprehensibility” when it imported and sold close to 4,000 of the inflatable poolside slides made in China. The slide didn’t meet federal consumer safety laws, though it did include clear warning labels and user instructions indicating it was noncompliant, the appeals court said.

But Toys R Us says Colony should have helped it settle the case like it did with the manufacturer’s subsidiary, potentially avoiding the verdict. Colony paid $800,000 from a $4 million policy to settle the case, according to the complaint. Toy R Us says that once it learned of the wrongful death lawsuit it asked Manley to indemnify and defend it from all liability. Manley allegedly agreed and added Toys R Us as a “certificate holder” to its general liability policy and told Toys R Us that it had an additional umbrella policy with Colony. The complaint alleges that even though the underlying insurer agreed to defend Toys R Us, Colony waited three years before claiming its umbrella policy did not cover Toys R Us. But Colony said it did not agree to insure the manufacturer’s Hong Kong-based parent company, which had agreed to add Toys R Us to its policies.

Toys R Us claims Colony’s policy includes terms that it will “follow the form” of the underlying policy, and that the underlying policy agreed to defend vendors of Manley’s products. Toys R Us is represented by Lisa M. Campisi of Morgan Lewis & Bockius, a firm located in New York City. The case is pending in the U.S. District Court for the District of New Jersey.

Source: Law360

**NEGLIGENCE MISREPRESENTATION MAY BE A COVERED “OCCURRENCE” IN SOME STATES**

The question may arise under a policy of insurance—either a homeowners policy or a liability insurance policy—whether a negligent misrepresentation can be an “occurrence” and covered under the policy. It goes without saying that the question of available insurance coverage when claims arise can be very important. Generally there is a split among the jurisdictions as to whether negligent misrepresentation generally constitutes an “occurrence.” Steven Plitt and Jordan R. Plitt, Practical Tools for Handling Insurance Cases, § 13-2(B)(4), pp. 13-28 through 13-30 (Thomson Reuters) (2011 and 2013 Supplement). Those courts holding that negligent misrepresentation does constitute an “occurrence” generally reach one of three conclusions:

• the insured lacks intent to misrepresent;
• the insured lacks intent to cause injury; and/or
• the injury is not foreseeable by the insured.

For those jurisdictions that hold that negligent misrepresentation is not an “occurrence” they typically find one of the following:

• the insured intends to induce reliance on the statement;
• the negligent misrepresentation is a form of fraud; and/or
• the injury is foreseeable by the insured.

Lawyers must check the law in their states to determine if a negligent misrepresentation is a covered incident.

Source: Claims Journal

**XVI. EMPLOYMENT AND FLSA LITIGATION**

**JUDGE APPROVES $50 MILLION SETTLEMENT IN NFL RETIREE CASE**

A federal judge in Minnesota has given final approval to a $50 million settlement in the complicated court fight surrounding publicity rights for retired NFL players. U.S. District Judge Paul Magnuson called it a “one-of-a-kind, and a remarkable victory for the class as a whole.” The NFL and the retired players reached the agreement in March. Judge Magnuson gave the settlement preliminary approval in April. But 19 players filed objections to the settlement, with some saying direct payments won’t be made to the former players, and that varying benefits will be unfairly distributed.

Judge Magnuson said in his order that those who objected because they were lured by the prospect of a lucrative personal payout have strayed from the initial goal of the lawsuit—to help those players with dire physical, mental and financial needs. He said the majority of the class—more than 25,000 players—recognized the settlement would help thousands of former players because a large financial
nearly all of the objections boil down to what is, in the court’s view, the objectors’ very mistaken belief that they could reap significant financial benefits from continuing this case.

He said those who believe a settlement that doesn’t directly benefit players is impermissible “are wrong.” More than 2,000 players opted out of the settlement, and will have the opportunity to pursue their own claims against the NFL. Those cases will be allowed to immediately go forward. Some of the Plaintiffs opposed the settlement and will appeal. There was no discovery that revealed the value of NFL Films, which means there’s no way to know if the settlement is fair. The settlement doesn’t provide direct payments to those who have given up publicity rights.

Under the agreement, some $42 million will be distributed to a “common good” trust over eight years to help retired players with issues like medical expenses, housing and career transition. The settlement will also establish a licensing agency for retirees to ensure compensation for the use of their likenesses. The league will pay another $8 million in associated costs, including startup money for the licensing agency. The trust will be administered by a group of retired players approved by the court. The licensing agency will for the first time market retiree publicity rights in conjunction with the NFL, thereby making it easier for retired players to work with potential sponsors and advertisers.

The settlement only covers those players who are currently retired, but players who retire in the future will have the chance to utilize the newly formed licensing agency. Judge Magnuson wrote that while the objections were “especially vociferous,” only one-tenth of one percent of the class objected and less than 10 percent requested to opt out. He said the objections were without merit. He wrote: “This fund will provide substantial benefits to the class as a whole.”

The lawsuit was filed in 2009 by NFL Hall of Famer Elvin Bethea, Fred Dryer, Dan Pastorini, Joe Senser, Ed White and Jim Marshall, as Plaintiffs. They claimed that the NFL is exploiting retired players’ identities in films, highlight reels and memorabilia to market the league’s “glory days” without compensating the players. That same year, a group of more than 2,000 retirees reached a $26.25 million settlement with the NFL Players Association for the use of their likenesses in video games, trading cards and other sports products. Pastorini, Marshall and Senser objected to the settlement and are part of an appeal. The other three original Plaintiffs opted out and will be included in other litigation.

The settlement gives retired players an opportunity to monetize the value of their images through the licensing agency. The lawsuit against the league was similar to a still-pending lawsuit filed against the NCAA by Ed O’Bannon and other former college athletes seeking damages for the use of former players’ likenesses in video games and other material.

Source: Claims Journal

A FAVORABLE RULING IN A LAWSUIT BY FEMALE MANAGERS AGAINST FAMILY DOLLAR

A federal appeals court panel has given new life to a nationwide lawsuit against Family Dollar. In that case, thousands of current or former female store managers were claiming they were paid less than their male peers. By a 2-1 vote last month, the three-judge panel from the 4th Circuit U.S. Court of Appeals in Richmond, Va., overturned a 2011 ruling by a Charlotte federal judge that had effectively ended the case. The decision pumps new life into a nationwide, gender-discrimination claim against the Charlotte-based business.

The company has asked to have the ruling reviewed by the full appeals court. The case could end up before the U.S. Supreme Court. The complaint against Family Dollar, which operates 7,500 stores in 44 states and employs more than 50,000 workers, was filed in 2008. The 4th Circuit panel, reviewing a district court ruling, said that the complaint, as amended, met the “Walmart” standards.

The case will be allowed to proceed. In a prepared statement, the company said it “works hard to maintain a workplace free of discrimination” and expressed pride “that the majority of our store managers are women.” Family Dollar believes the “class treatment of the lawsuit is not appropriate,” the statement said, while pointing out that the appeals court did not address whether the claims of gender discrimination are true.

A year ago, Family Dollar settled a lawsuit with 1,700 store managers in New York who claimed that the company failed to pay them overtime. In 2009, following a class-action lawsuit in Alabama, Family Dollar paid $48 million to company managers who did not receive overtime pay. It’s likely the 4th Circuit’s ruling in the case will be reviewed by the U.S. Supreme Court.

Source: Charlotte Observer

EXXON’S $2.7 MILLION PEGASUS PIPELINE FINE SECOND HIGHEST IN FIVE YEARS

A letter posted detailed U.S. regulators’ finding that Exxon Mobil Corp. should pay a $2.7 million fine for alleged safety violations on its 850-mile Pegasus pipeline that poured some 19,000 barrels of oil in Mayflower, Ark., in March. The proposed fine, first posted in a notice on Nov. 6, is the second-highest fine issued by the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA) in five years. It appears the fine was triggered by Exxon’s alleged violation of nine regulations.

The letter outlines the inspections that took place along the pipeline, which extends from Illinois to Texas. The regulators note that safety inspections weren’t prioritized properly, and weren’t done often enough. The regulators said in the letter that the risks for pipe failure weren’t properly outlined by Exxon. The regulators wrote in the letter:

The integrity assessment schedule established by the operator did not include consideration of certain manufacturing information in their determination of risk factors as required. The operator did not present an acceptable engineering analysis to PHMSA to demonstrate that the pre-1970 [electric-resistance welded] pipe in the Pegasus pipeline was not susceptible to seam failure.

The regulators are authorized to issue fines of up to $200,000 per day, up to a maximum of $2 million for each infraction. The current record holder in the last five years is Enbridge Energy Partners LP, which was slapped with a $3.7 million potential fine in September 2012, according to PHMSA records. In all, Exxon was assessed some $2.7 million in fines, including two for $737,000. Exxon will have an opportunity to contest the fine. The company shut down the pipeline until safety measures are taken.

A proposed class action lawsuit was filed against Exxon in Arkansas federal court in April. It was alleged that Exxon had caused significant environmental and economic damage as a result of the Pegasus oil spill. The pipeline, which originates in Patoka, Ill., runs about 850 miles through Missouri and Arkansas, terminating in Nederland, Texas, on the Gulf Coast. It was originally built to carry oil from Texas to Illinois, but its direction was reversed in 2006 to carry Canadian oil and tar

Source: Claims Journal

A proposed class action lawsuit was filed against Exxon in Arkansas federal court in April. It was alleged that Exxon had caused significant environmental and economic damage as a result of the Pegasus oil spill. The pipeline, which originates in Patoka, Ill., runs about 850 miles through Missouri and Arkansas, terminating in Nederland, Texas, on the Gulf Coast. It was originally built to carry oil from Texas to Illinois, but its direction was reversed in 2006 to carry Canadian oil and tar.

Source: Claims Journal

A proposed class action lawsuit was filed against Exxon in Arkansas federal court in April. It was alleged that Exxon had caused significant environmental and economic damage as a result of the Pegasus oil spill. The pipeline, which originates in Patoka, Ill., runs about 850 miles through Missouri and Arkansas, terminating in Nederland, Texas, on the Gulf Coast. It was originally built to carry oil from Texas to Illinois, but its direction was reversed in 2006 to carry Canadian oil and tar.
sands south, maximizing profits but placing stress on the already unsafe pipeline from both the direction switch and the added corrosion from the abrasive tar sands.

This stress was increased by the company reactivating several pump stations along the route in 2009, increasing capacity by about 50 percent, and the company chose not to adequately inspect or maintain the line to keep up with these added stresses, the complaint alleges. The March rupture, which resulted in more than 19,000 barrels spilling into the area around Mayflower, was the worst oil spill in the state's history.

Sources: Kat Green and Law360

One Dead As Fire Hits Chevron Refinery In Mississippi

A Chevron Corp. worker was killed last month in a fire at a cracking unit at the U.S. oil company’s 330,000-barrel-per-day refinery in Pascagoula, Miss. Tonya Graddy, an “operator” with 5 years of service, was killed after a fire broke out at a furnace in a gasoline-making unit known as the “Cracking II area.” All other workers were accounted for after the plant’s unit known as the “Cracking II area.” All other workers were accounted for after the plant’s emergency teams put out the fire that started after midnight on Nov. 15.

The fire, which is under investigation, happened a day after a Chevron pipeline unrelated to the refinery exploded in rural Milford, Texas—shooting flames high into the air and prompting evacuations but causing no injuries. The mishap was the latest in a string of accidents in the booming U.S. energy sector. Chevron’s board trimmed Chief Executive John Watson’s 2012 bonus in a bid to hold managers accountable for “operational incidents” such as a major refinery fire in California, according to a filing with the U.S. Securities and Exchange Commission (SEC) earlier this year.

The Pascagoula refinery has received few citations for safety violations from the U.S. Occupational Safety and Health Administration (OSHA). But in 2008, OSHA cited the refinery for 10 serious violations and one other violation as part of a nationwide effort to improve refinery safety after a deadly explosion in 2005 at what was then BP Plc’s Texas City plant.

The refinery appeared to have been undergoing some maintenance work before the fire, according to energy intelligence group Genscape, which reported on the day before the fire that a unit had shut down and then had begun restarting with another unit. Genscape, which monitors activities at refineries by camera, said on Nov. 15 the restart of the 55,000-bpd catalytic reformer, which turns naphtha into gasoline components, was halted at the time of the fire. It said the restart of a 29,000-bpd hydrocracker, which uses hydrogen to break down molecules into other refined products, had been completed and that all other units were online.

The refinery, which began operating in 1963, is the largest of three in Mississippi.

The plant can process and treat low-grade heavier, sour, foreign crude oil. It produces about 130,000 bpd of motor gasoline, 50,000 bpd of jet fuel and 68,000 bpd of diesel fuel, according to Chevron’s website. The Gulf Coast refinery network has started to emerge from seasonal work that drained stockpiles after plants cranked up runs to bing on cheap domestic feedstock and ship products abroad. Since the start of September, distillate stockpiles in the region have fallen by 3.5 million barrels to 38.5 million barrels, nearly 2.8 million barrels below the five-year seasonal average. Gasoline inventories are off 5.2 million barrels during a recent nine-week period, but at nearly 73 million barrels the inventories are 1.1 million barrels above the five-year average.

Source: Claims Journal

Workers Recall Texas Six Flags Coaster Safety Issues

It has been reported that workers who were operating a Six Flags Over Texas roller coaster when a woman fell to her death in July were aware of problems with the safety features on the cars. Rosa Ayala-Goana died when she was ejected from the Texas Giant roller coaster on July 19. One employee told police in the aftermath that the safety restraint on the car from which the Dallas woman fell 75 feet to the ground was “a little high, or not as tight as it should be.”

The worker checked a safety light, determined the lap bar was secure on the woman and allowed the coaster train to leave, according to the police report.

Another employee reported the train had problems in the days previous, including “a trouble light” the week before. The police report says: “The sensors were not working properly and they had to have Maintenance come out and fix it.” The death has been ruled an accident by police. The woman’s family has filed a wrongful death lawsuit against Six Flags and Gerstlauer Amusement Rides GmbH, the German company that made the roller coaster train. In a statement made last month, Six Flags officials renewed their condolences to the woman’s family and said that “safety is our highest priority and at the heart of everything we do.” The roller coaster was closed for two months before it was reopened with redesigned lap bar pads and seatbelts.

Sources: The Dallas Morning News and The Insurance Journal

Federal Government Proposes $400,000 Fine For Philadelphia Building Collapse

The U.S. Occupational Safety and Health Administration (OSHA) has proposed nearly $400,000 in penalties for two companies involved in a botched building demolition that killed six people in Philadelphia. The fines, announced by OSHA, stem from the collapse of a large masonry wall onto a thrift shop.

According to OSHA, Campbell Construction and S&R Contracting committed willful and serious breaches of standard demolition practices.

We wrote about this incident previously. As you may recall, the two companies were knocking down a vacant structure in June when an unsupported four-story wall crashed down onto the store, trapping shoppers. Violations include failure to demolish the building from the top down and leaving an unsupported wall more than one story high.

In a separate development, the contractor who oversaw the demolition has been charged with murder, manslaughter and reckless endangerment by the local district attorney’s office.

Source: Claims Journal

XVIII. WORKPLACE HAZARDS

OSHA Releases New Resources To Better Protect Workers From Hazardous Chemicals

Each year in the United States, tens of thousands of workers are made sick or die from occupational exposures to the thousands of hazardous chemicals that are used in workplaces every day. Recently, the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) launched two new web resources to assist companies with keeping their workers safe. While many chemicals are suspected of being harmful, OSHA’s exposure standards are out-of-date and inadequately protective for the small number of chemicals that are regulated in the workplace.

The first resource OSHA has created is a toolkit to identify safer chemicals that can be used in place of more hazardous ones. This toolkit walks employers and workers step-by-step through information, methods, tools and guidance to either eliminate hazardous chemicals or make informed substitution decisions in the workplace by finding a safer chemical, material, product or process. The toolkit is available at http://www.osha.gov/dsg/safer_
OSHA Proposes New Rule To Improve Tracking Of Workplace Injuries

The U.S. Occupational Safety and Health Administration (OSHA) recently issued a proposed rule to improve workplace safety and health through improved tracking of workplace injuries and illnesses. The announcement follows the Bureau of Labor Statistics’ release of its annual Occupational Injuries and Illnesses report, which estimates that three million workers were injured on the job in 2012. Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, observed:

Three million injuries are three million too many. With the changes being proposed in this rule, employers, employees, the government and researchers will have better access to data that will encourage earlier abatement of hazards and result in improved programs to reduce workplace hazards and prevent injuries, illnesses and fatalities. The proposal does not add any new requirement to keep records; it only modifies an employer’s obligation to transmit these records to OSHA.

The public will have 90 days, through Feb. 6, 2014, to submit written comments on the proposed rule. On Jan. 9, 2014, OSHA will hold a public meeting on the proposed rule in Washington, D.C. A Federal Register notice announcing the public meeting will be published shortly. The proposed rule was developed following a series of stakeholder meetings in 2010 to help OSHA gather information about electronic submission of establishment-specific injury and illness data. OSHA is proposing to amend its current recordkeeping regulations to add requirements for the electronic submission of injury and illness information employers are already required to keep under existing standards, Part 1904. The first proposed new requirement is for establishments with more than 250 employees (and who are already required to keep records) to electronically submit the records on a quarterly basis to OSHA.

OSHA is also proposing that establishments with 20 or more employees, in certain industries with high injury and illness rates, be required to submit electronically only their summary of work-related injuries and illnesses to OSHA once a year. Currently, many such firms report this information to OSHA under OSHA’s Data Initiative. OSHA plans to eventually post the data online. Timely, establishment-specific injury and illness data will help OSHA target its compliance assistance and enforcement resources more effectively by identifying workplaces where workers are at greater risk, and enable employers to compare their injury rates with others in the same industry. Additional information on the proposed rule can be found at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=24002 and http://www.osha.gov/recordkeeping/proposed_data_form.html.

Source: OSHA

OSHA Fines Trucking Company $113,000 After Worker Fatality In Arkansas

Sherman Brothers Trucking Inc., doing business as Team Transport Inc., has been cited by the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) for 11 safety and health violations and fined $113,400 following the death of a worker at its Crossett, Ark. The OSHA citations include one willful, for deficiencies of its permit-required confined space program, and other workplace hazards at its Crossett facility. An inspection began in April after a temporary worker, who was cleaning the inside of a tanker trailer without proper training, was found unconscious and later died from an oxygen-deficient atmosphere. The following is an explanation of the two types of violations:

As we have written previously, a willful violation was cited for failing to maintain air monitoring equipment and evaluate permit-required confined space conditions prior to entry. A willful violation is one committed with intentional, knowing or voluntary disregard for the law’s requirements, or with plain indifference to worker safety and health. The seven serious violations cited include failing to guard open floor holes to prevent falling into the next level; stabilize a platform used to access a tanker cleaning area with railings or posts to prevent fall hazards; and train workers on confined spaces and hazard communications. The employer also failed to implement respirator, confined space and hazard communications programs.

A serious violation occurs when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known. The three other-than-serious violations involve the availability of confined space training certifications and ensuring drums and totes containing chemicals were properly labeled with identity and hazard warnings. An other-than-serious violation is one that has a direct relationship to job safety and health.
but probably would not cause death or serious physical harm.

Team Transport is part of the S.B. Inc. family of companies, headquartered in Harrisburg, Ore. The companies include Sherman Brothers Heavy Trucking and Lee’s Trucking and Sound Transportation. The employer had 15 business days from receipt of the citations and penalties to comply, request an informal conference with the area director, or contest the findings before the independent Occupational Safety and Health Review Commission.

Source: OSHA Release

UTAH SIGN COMPANY OWNER DIES IN WORK ACCIDENT

The owner of a Salt Lake City sign company died in an accident last month while taking down a business sign in Bountiful. Richard Gillies, the owner of Signs and Design Inc., was working from the bucket of a cherry picker crane at a closed Blockbuster video store when the truck-mounted crane malfunctioned.

An additional malfunction caused Gillies to be crushed against the building and to fall 10 to 15 feet to the ground. He was taken to a hospital, but was pronounced dead on arrival. According to the company website, Gillies was involved in the sign business for more than 35 years. The Occupational Safety and Health Administration (OSHA) is investigating the accident.

Source: Claims Journal

DALLAS EMPLOYERS FACE $97,000 IN PENALTIES FOLLOWING FORKLIFT DEATHS

The Occupational Safety and Health Administration (OSHA) has cited Georg Fischer Central Plastics LLC and Nationwide Plastics Inc. for 16 safety and health violations at the plastic manufacturing facility located in Dallas, Texas. A worker and a self-employed truck driver were struck and killed by a forklift at the facility in June. The proposed penalties total $97,200. When they were fatally injured, the Georg Fischer employee and the truck driver were caught between a forklift and a flatbed trailer being loaded with plastic pipe. Georg Fischer and Nationwide Plastics occupy the same commercial space.

The 16 serious safety violations for both companies include failing to ensure that the manufacturer-provided safety latch was intact on the hook of the overhead hoist; ensure that buildings or other structures used for storage purposes had load ratings; guard platforms with standard railing; provide a lockout and tagout program to control energy sources; and ensure all workers complete required forklift training. Other safety violations include failing to block wheels of powered industrial trucks parked on inclines; plainly mark the rated loads on each side of the crane; provide tongue guards on bench grinders; and train workers and ensure familiarity with safety-related work practices and lockout or tagout parts of fixed electrical equipment or circuits. One serious health violation was cited for failing to administer a continuing and effective hearing conservation program.

Source: OSHA Release

$8.5 MILLION SETTLEMENT IN LAWSUIT INVOLVING DEATH OF POLICE OFFICER

The widow and child of an Oakdale, Calif., police officer who was killed in a traffic accident last year have reached an $8.5 million settlement in their wrongful-death lawsuit. The family of Paul Katuszonek agreed to the settlement last month with Gold Star Foods Inc. The food distribution and long haul trucking company employed the driver responsible for the fatal accident in which the officer was killed last year.

The driver, Jose Santos Hermosillo, was charged with vehicular manslaughter, and with gross negligence, a felony. He also was charged, as a truck driver, for driving more than allowed under federal guidelines. Hermosillo had been driving for nearly 23 hours with only four and a half hours’ rest when his truck ran into the back of officer Katuszonek’s car at 55 mph.

According to the National Highway Transportation Safety Administration (NHTSA), drowsy driving causes more than 100,000 crashes a year, resulting in 40,000 injuries and contributing to 1,550 deaths. The driver in this case, Hermosillo, had falsified his driver logs to make his drive times comply with the law. Records from the GPS system on the Gold Star truck proved that Hermosillo actually was driving when he reported he was resting. It appears that on the day when he said that he was in his camper berth resting at 7:30 a.m., the driver was actually already on the highway. Four hours later, Officer Katuszonek was on his way to work after dropping off his daughter at his mother-in-law’s home. He stopped on Highway 132 for a road closure and that’s where the tragic accident occurred.

Witnesses reported that Hermosillo’s truck was weaving as it approached the construction zone, and that he never attempted to stop until he was about 100 feet from the Katuszonek car. This was a clear case of driver fatigue. The impact killed Katuszonek instantly. His car propelled the car stopped in front of him into Brian Smith, a state Department of Transportation worker who was flagging motorists to stop. Smith was also injured.

The $8.5-million settlement came just nine days before a jury trial was scheduled to begin. Steven A. Fabbro, a lawyer with offices in Modesto and San Francisco, represented the Katuszonek family in the civil case. He did a very good job for them.

Source: The Modesto Bee

**Fatal Crashes Involving Large Trucks Is On The Rise**

According to the most recent data from the Federal Motor Carrier Safety Administration’s (FMCSA) Large Truck Crash Overview report, the number of large trucks (trucks weighing more than 10,000 pounds) involved in fatal crashes is on the rise. In 2011, 3,608 large trucks were involved in fatal crashes, which is a 3 percent increase from 2010 and 12 percent increase from 2009. Statistics show 3,757 people were killed in 2011 and 80,000 injured.

The FMCSA reports also show that truck drivers are more likely than drivers of smaller vehicles to comply with seat belt laws and less likely to be under the influence of drugs or alcohol. In fatal collisions, 83 percent of truck drivers, compared with 65 percent of drivers of passenger cars, were reported to be wearing their seatbelts. In 1 percent of the fatal collisions, truck drivers had a blood alcohol content of 0.08 percent or higher. Additional data from the FMCSA report shows the following:

- Most collisions occurred during daylight hours.
- Tractors pulling a semi-trailer accounted for 61 percent of large trucks involved in fatal crashes and 47 percent of those in nonfatal collisions.
- In fatal crashes involving large trucks, driver-related factors were recorded for 34 percent of the drivers. Speed was the top driver-related factor (8 percent), followed by distraction/inattention (6 percent), impairment (4 percent), failure to stay in the proper lane (4 percent) and blocked vision (3.5 percent).
- There were 174 large trucks involved in fatal work zone crashes.

Lawyers in our firm are currently handling several cases involving large trucks. If you would like more information or have questions concerning this topic, contact Sloan Downs, the Section Head Administrator in the firm’s Personal Injury/Products Liability Section, by email at Sloan.Downs@beasleyallen.com, or by phone at 800-898-2034. Sloan will put you in touch with one of the section’s lawyers.

**Kentucky Bus Had Scrap Bin TIres**

A federal safety report reveals the bus that crashed on a Kentucky interstate and injured more than 30 students had tires taken from a scrap bin. It was also revealed that the maintenance and inspection records for the bus had been burned. The report was read in discovery in two lawsuits against Commonwealth Bus Service, which operated the bus in the June accident.

The report led to the Federal Motor Carrier Safety Administration (FMCSA) placing the bus company on probation. The Courier-Journal has filed a Freedom of Information Act request with the federal safety administration for copies of the full report. Jefferson County Public Schools has temporarily halted its use of the bus service.

Source: Claims Journal and Insurance Journal

**Government To Require Seatbelts On Large Buses**

New tour buses and buses that provide service between cities must be equipped with seat belts starting in late 2016 under a federal rule issued by the National Highway Traffic Safety Administration (NHTSA) on Nov. 21. This is a safety measure that was sought by accident investigators for nearly a half century. Beginning in November 2016, all new motorcoaches and some other large buses must be equipped by manufacturers with three-point lap-shoulder belts. Unfortunately, the rule doesn’t apply to school buses or city transit buses.

An average of 21 people in large buses is killed each year in crashes, and nearly 8,000 others are injured annually, according to NHTSA. It’s estimated that seat belts could reduce fatalities and moderate-to-severe injuries by nearly half. About half of all motorcoach fatalities are the result of rollovers, and about 70 percent of those killed in rollover accidents were ejected from the bus. David Strickland, head of NHTSA:

Adding seatbelts to motorcoaches increases safety for all passengers and drivers, especially in the event of a rollover crash.

The nation’s fleet of 29,000 motorcoaches transports about 700 million passengers a year in the United States, roughly equivalent to the domestic airline industry, according to the United Motorcoach Association. Since buses are typically on the road for about 20 to 25 years, it will likely be many years before most motorcoaches have seat belts.

Source: Claims Journal

**Federal Safety Regulators Criticized For Missing Bus Safety Hazards**

Representatives from the National Transportation Safety Board (NTSB) believe U.S. bus regulators are overlooking or not catching serious safety hazards before fatal crashes and need to change their auditing practices. The U.S. Federal Motor Carrier Safety Administration (FMCSA) repeatedly has known about deficiencies before deadly fatal accidents and not shut carriers down until afterward. NTSB Chairman Deborah Hersman said in a statement that summarized an investigation by NTSB. The report reinforces what board officials have said is a years-long pattern of lax oversight before accidents and some bus companies treating safety citations and temporary orders to take vehicles off the road as costs of doing business. Chairman Hersman had this to say in the statement:

They need to crack down before crashes occur, not just after high visibility events. Our investigators found, that in many cases, the poor performing company was on FMCSA’s radar for violations, but was allowed to continue operating.

The safety board released a November letter to Transportation Secretary Anthony Foxx that asks for a comprehensive audit of FMCSA’s company oversight process, identifying why inspectors aren’t finding all safety violations and why the agency hasn’t done complete and accurate reviews. The NTSB is currently investigating two bus crashes on the West Coast that killed a total of 17 people. Each of these companies were given a clean review prior to their crashes. When FMCSA later inspected them they were found to have serious safety violations. The following were given as examples:

Scapadas Magicas LLC was shut down by the federal agency after one of the California-based company’s three buses careened down a mountain road because the driver couldn’t stop, crashing into a car and a pickup truck on Feb. 3. Seven bus passengers died, as did the truck driver, and 36 people were injured, according to the NTSB. The FMCSA had completed a compliance review of the company less than a month before the crash, giving it a top “satisfactory” rating, meaning the company was free to carry passengers without restriction.

No buses were inspected during the review, according to the safety board report. Many company records also went unchecked because they were in offices in Tijuana, Mexico, not at the site auditors visited. It’s hard to believe that Scapadas Magicas won its rating even though FMCSA inspectors found brake flaws, evidence of drivers working excessive hours, and failed

---

**www.BeasleyAllen.com**
alcohol and drug tests. Company owners told investigators they hadn’t reviewed U.S. regulations even after being audited five times since 2007. It appears that a pledge to be more attentive was enough to earn a “satisfactory” rating and that’s not good.

The NTSB also cited the agency’s shortcomings related to a Dec. 30, 2012, crash involving Canadian carrier Mi Joo Tour & Travel in Pendleton, Ore. The bus slid on ice, off the roadway and down an embankment. A subsequent review found the driver had been on duty 92 hours in a seven-day period. The shortcomings extended to truck safety, according to the safety board’s report.

In March, a truck operated by Troy, Mich.-based Highway Star failed to brake in time before crashing into stopped traffic, killing six people in a Ford Expedition that caught fire. The FMCSA had completed a limited review five days before the crash without inspecting the company’s compliance with regulations on how long drivers could be on duty, even though it had been cited before for such violations. After the fatal crash, Highway Star was declared an imminent hazard to public safety because it hadn’t monitored driver hours and falsified records.

The regulator also conducted a limited review of H&O Transport, a Louisville, Ky.-based trucker with a history of driver violations, before one of its rigs plowed into eight other vehicles in slowed traffic in June. Two people died after their vehicle overturned and caught fire.

Hopefully, there will be some significant changes in how the federal regulators do their job. The public—if they become aware of how things have worked in the past—would demand it.

Sources: Bloomberg News and Insurance Journal

---

**Legislation Proposes Hair Testing Of Truckers For Illegal Drugs**

Legislation was recently introduced on Capitol Hill that, if passed, would allow trucking companies to use hair testing as a method of screening truck drivers for illegal drugs. Following current federal regulations, only urinalysis is recognized by the U.S. Department of Health and Human Services for mandatory pre-employment drug and alcohol exams of truck driver applicants. According to supporters of the legislation, the number of truck drivers who pass a pre-employment urine test but fail a subsequent hair test is alarmingly high.

The Alliance for Driver Safety & Security (Alliance) seems to be on board with the proposed legislation. Gary Salisbury, a member of the Trucking Alliance board of Directors, recently said:

Passing this much needed legislation will give trucking companies the option of conducting either urinalysis or a hair test or both methods, and will also allow positive hair tests to be reported to the soon-to-be created national drug and alcohol clearinghouse that Congress adopted last year.

This clearinghouse database will be able to identify any person who has previously tested positive on a pre-employment drug exam required by the federal government before being employed as a truck driver. However, until this legislation is passed and hair testing is an approved method, no positive hair test results can be reported to the database. The legislation appears to be a step in the right direction, given that the rate of large trucks involved in fatal crashes is on the rise. Hopefully this legislation will be passed very soon. When that happens, it will help keep many drug users out of freight trucks and off our nation’s highways.

Source: Truckinginfo.com

---

**FAA Issues New Airline Pilot Training Rules**

The government has issued new airline pilot training requirements to address safety issues raised by past accidents. A regional airline crash that happened nearly five years ago that killed 50 people got the ball rolling that resulted in the needed change. The rule, issued by the Federal Aviation Administration (FAA), requires pilots to receive more training on preventing and recovering from an aerodynamic stall in which a plane slows to the point that it loses lift.

The rule also requires airlines to track data on how well pilots perform and orders remedial training for pilots deficient in flying skills. Other areas addressed by the rule include the monitoring of aircraft systems by pilots, enhanced runway safety procedures and expanded training for dealing with crosswinds. The changes are among the most significant to pilot training requirements in decades.

Source: Claims Journal

---

**Pilots Said To Need Training After Losing Skills To Automation**

A U.S. government and industry report has concluded that airline pilots have lost flying skills as automation takes over mundane tasks and may be startled when systems don’t behave as expected. It was said that both of these have contributed to crashes. The report, commissioned by the Federal Aviation Administration (FAA), said that airlines need to improve pilot training in autopilots and other automation in the cockpit. The report stated that the issue is growing in importance as the U.S. installs the $42-billion satellite-based navigation system known as NextGen.

Without a doubt, auto-throttles, computer navigation systems and other automation on planes have improved safety. Because of the advances in technology, airline safety is at an all-time high, according to accident statistics. The downside of these new technologies, however, is that they may be incorrectly programmed more than previous systems and are so complex that pilots don’t always understand their actions. The report’s findings, reported in the Wall Street Journal, included the following:

**Recent Accidents**

The report, entitled “Operational Use of Flight Path Management Systems,” studied 26 accidents from 1996 to 2009 in which automation played a role. The authors also relied on incident reports, cockpit audits and anonymous pilot accounts gathered by airlines and government agencies. Several recent accidents that weren’t considered in the report, including the Feb. 12, 2009, crash of a regional turboprop approaching Buffalo operated by Pinnacle Airlines Corp.’s former Colgan unit, are also related to how pilots are trained on cockpit automation. The Colgan accident killed all 49 on the plane and a man on the ground.

A pilot on an Asiana Airlines plane that struck a seawall while attempting to land in San Francisco July 6 said he thought the plane’s auto throttle was maintaining speed. The Boeing Co. 777 had slowed to almost 40 miles (64 kilometers) per hour below its target speed before losing altitude and striking the seawall. The National Transportation Safety Board has yet to concluded what caused the accident.

**Failure Situations**

Pilots accustomed to having autopilots and other devices to keep a plane on
course and at the correct speed have allowed basic manual skills to erode. Pilots also have greater difficulty handling malfunctions of automated systems because they may not understand the systems or haven’t been adequately trained. “This is a particular concern for failure situations which do not have procedures or checklists, or where the procedures or checklists do not completely apply.”

In other cases, pilots have accidentally put the wrong information into an airplane’s guidance system, leading to flying the wrong path or even accidents. Eighteen recommendations were made for better training on how cockpit devices work, improved design of the systems and new procedures to minimize the impact of malfunctions or mistakes.

The FAA has taken action on the 18 recommendations. The agency on Feb. 5, 2013, issued new regulations changing pilot training to emphasize more realistic simulator sessions. That action addresses several of the report’s recommendations. Industry officials met on Nov. 21 with the FAA and described additional steps the airlines can take to voluntarily improve training.

Source: Bloomberg News

XX.
THE CONSUMER CORNER

NHTSA PROBES VOLKSWAGEN SUV LIGHTING PROBLEM

The National Highway Traffic Safety Administration is investigating thousands of Volkswagen SUVs because the headlamps and other outside lights can fail with little warning. The probe, announced by NHTSA, affects an estimated 61,000 VW Tiguans from the 2009 through 2011 model years. NHTSA said in documents posted on its website that 26 drivers have complained about headlights, tail lights and turn signals going dark. Many said they found an overheated and melted fuse under the hood. The safety agency said the fuse controls several exterior light circuits. The complaints say the problem gets worse over time.

According to NHTSA, the problem hasn’t caused any fires, crashes or injuries. Investigators will determine if the problem is bad enough to prompt a recall. Volkswagen said it’s committed to building safe vehicles and will comply with the NHTSA investigation. In one complaint from August, a driver told NHTSA that the headlights and brake lights stopped working. In making the complaint, the driver wrote:

The danger is that this has happened three times, and once at night, to where my car was like a Christmas tree blinking on and off. I almost got rear-ended when brake lights don’t work.

The driver said the Tiguan was taken to a dealership, where mechanics couldn’t find the source of the problem. Many other drivers reported melted fuse boxes after the lights failed. It will be interesting to see what NHTSA does concerning this matter.

Source: Insurance Journal

NHTSA TO INVESTIGATE TESLA’S CAR DESIGN

The U.S. National Highway Traffic Safety Administration (NHTSA) will investigate the design of Tesla Motors Inc.’s electric car, Model S. This comes after two vehicle fires. NHTSA’s Office of Defects Investigation said it is aware of two incidents in which vehicles caught fire after an underride hit some type of metallic roadway debris, which may cause a thermal reaction and fire if it intrudes the propulsion battery. The resulting damage to the propulsion battery tray, or baseplate, sparked the fire, the ODI said. The ODI said:

In each incident, the vehicle's battery monitoring system provided escalating visible and audible warnings, allowing the driver to execute a controlled stop and exit the vehicle before the battery emitted smoke and fire.

About 13,100 Tesla Model S cars are subject to the investigation. In a blog post published last month, Tesla CEO Elon Musk criticized the scrutiny his company is getting. Musk said:

Reading the headlines, it is ... easy to assume that the Tesla Model S and perhaps electric cars in general have a greater propensity to catch fire than gasoline cars when nothing could be farther from the truth.

Musk said there are now more than 19,000 Model S vehicles on the road, making an average of one fire per 6,333 cars, and added that a gasoline tank has 10 times more combustion energy than the battery pack. He added:

Moreover, the Model S battery pack also has internal firewalls between the 16 modules and a firewall between the battery pack and passenger compart-

ment. This effectively limits the fire energy to a few percent that of a gasoline car and is the reason why [one victim] was able to retrieve his pens and papers from the glove compartment completely untouched after the recent fire (caused by a high-speed impact with a tow hitch).

The U.S. Fire Administration said in a report issued this year that between 2008 and 2010, there were about 194,000 highway vehicle fires each year. Last month, Tesla was hit with a putative securities action in California federal court by an investor who said Tesla and other executives made false statements regarding the safety of a vehicle’s battery pack, leading to a $6.5 billion market loss in six weeks. The suit said Tesla, which designs, develops, manufactures and sells electric vehicles, had called its Model S vehicle “The Safest Car In America” before reports that consumers’ battery packs were catching fire and bursting into flames during use.

Source: Law360

NHTSA FAST TRACKS NEW SAFETY SYSTEMS FOR CARS

Federal officials say they will “aggressively accelerate” research on safety systems that automatically prevent drivers who are drunk or who don’t have their seatbelts buckled from operating cars. According to the National Highway Traffic Safety Administration, a decision should be made before the end of the year on how to encourage automakers to include safety systems in cars that warn drivers ahead of a forward collision and can automatically brake to prevent a crash. Such systems are available on some high-end cars now. According to NHTSA, it’s responding to final traffic fatality data for 2012, which shows the first increase in deaths since 2005. There were 33,561 traffic deaths in 2012, which were 1,082 more fatalities than the previous year.

THE FDA MUST FIX A BIG PROBLEM

The withdrawal of a U.S. Food and Drug Administration advisory panel member from a pharmaceutical industry conference is welcome, according to Public Citizen. But the FDA still has not instituted policies to ensure that such a conflict of interest does not happen again. Public Citizen made this very clear in a letter to the FDA. Dr. Lynn Drake, the current chairperson of the FDA Dermatology and Ophthalmic Drugs Advisory Committee, was scheduled to participate in a pharmaceutical industry conference in Febru-
ary 2014, speaking in a session on “Pitfalls to Avoid as You Prepare for, and Present to, an Advisory Committee.”

Dr. Sidney Wolfe, founder and senior adviser to Public Citizen’s Health Research Group, wrote to the FDA in October, saying Dr. Drake’s participation in the event undermines the FDA advisory committee process. They called for Dr. Drake to revoke participation or remove herself from the advisory panel. Participation in such a conference, particularly in a role giving advice to pharmaceutical companies, raises concerns that the advisory committee member is approaching the work of the committee from a pro-industry perspective, Dr. Wolfe said.

Dr. Drake withdrew from the event. News reports revealed that the FDA had approved her participation, even though the agency didn’t know exactly what it was approving. The FDA had this to say:

Dr. Drake did contact FDA prior to accepting an invitation to the conference; FDA did not signal a concern, but our response was based on limited information.

This episode shows that the agency does not have adequate policies in place to prevent conflicts of interest that can undermine public confidence in FDA advisory committees. Dr. Wolfe stated:

If a policy exists that covers this kind of circumstance, it is grossly inadequate, since it allowed a green light for Dr. Drake’s participation in this meeting—participation that likely would have occurred had we not brought these details to the FDA’s attention. It is essential that current FDA policy regarding the ethics of such programs be explicit so that this situation does not recur.

The letter to FDA Commissioner Margaret Hamburg is available at http://www.citizen.org/hrgr2167. Public Citizen is a national, non-profit consumer advocacy organization based in Washington, D.C. For more information, please visit www.citizen.org.

Source: Public Citizen News Release

CARD ACT NEEDS TO BE EXTENDED TO PROTECT SMALL BUSINESSES

After the disastrous financial meltdown of 2008, the federal government passed the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) to limit credit card companies from doing things like jacking up customers’ rates with no warning and then slamming them with huge penalty fees if they couldn’t make their new payments. By most accounts, although not perfect, the law has achieved its objectives. The newly created Consumer Financial Protection Bureau (CFPB) calculates that Americans paid $1.5 billion less in late fees and $2.5 billion less in overlimit fees following the passage of the CARD Act.

The CFPB was created to give consumers information they need to understand various terms of consumer agreements entered into with financial companies. The CFPB also works to make regulations and guidance as clear and streamlined as possible so providers of consumer financial products and services can follow the rules on their own. Among other things, the CFPB is required to:

• Write rules, supervise companies, and enforce federal consumer financial protection laws;
• Restrict unfair, deceptive, or abusive acts or practices;
• Take consumer complaints;
• Promote financial education;
• Research consumer behavior;
• Monitor financial markets for new risks to consumers;
• Enforce laws that outlaw discrimination and other unfair treatment in consumer finance.

Unfortunately for many, neither the CARD Act nor the CFPB is focused on helping out small business owners. Importantly, the CARD Act doesn’t cover business credit cards. Many industry watchdogs believe that certain credit card companies are taking advantage of a CARD loophole by adding terms and conditions it wouldn’t be able to get away with in a consumer cardholder agreement. For example, one card company can still raise cardholders’ interest rates whenever and by however much it wants, and cardholders who don’t make the payments can get hit with a 30 percent penalty APR.

Another insidious practice that is often criticized is a situation where a cardholder has two different APRs on the same card. It is policy for this particular card company to not allow the small business to pay down the

Techsmart Settles With Governor’s Office Of Consumer Protection

John Sours, Administrator of the Georgia Governor’s Office of Consumer Protection (GOCP), announced last month that Smart Industries, LLC doing business as “Techsmart” and its principal, Guru Dharam Khalsa, have entered into a settlement with GOCP. The settlement was based on the company failing to disclose hidden finance charges in violation of the Truth-in-Lending laws. As a result consumers didn’t get the true cost of the company’s products. Techsmart, whose offices are headquarters in San Diego, Calif., resells products, such as electronics, primarily to military personnel via kiosks located near U.S. military bases and via the Internet.

It was alleged that Techsmart sold a number of its products for at least two times the price charged for the identical products at most retail and online stores. It represented that these prices were the items’ “original” prices when, in fact, they contained a significant additional amount allegedly attributable to the military person’s lack of credit history. Instead of disclosing this markup as part of its finance charge, the company allegedly represented that military personnel were actually paying lower interest rates.

Techsmart advertises itself as the “number one choice for military financing” and encourages its customers to pay for their merchandise in installments by financing their purchase through the company. That made Techsmart a particularly appealing option to those service members with either no credit or bad credit, who may have had no other financing options. GOCP alleges that Techsmart falsely claimed that purchasing its products would automatically improve consumers’ credit and that military personnel were entitled to claim an income tax deduction for products purchased from the company.

In resolution of these allegations, the company and its principal have entered into a settlement with GOCP, requiring the company to cease doing business in the state of Georgia, to offer customer restitution in the amount of $171,335.57, and to pay $25,000 in penalties and investigative expenses. Administrator Sours had this to say:

While the law does not limit what a business can charge for its products, a business is not allowed to assess finance charges, unless it clearly discloses those charges to consumers. This settlement encourages a level playing field for businesses in Georgia and shows our commitment to protecting service members and their families from being preyed upon by merchants who resort to unscrupulous practices.

It’s really good to see a government agency going after companies that are taking unfair advantage of consumers and, in this case, members of our armed services. John Sours, a well-respected public servant, as well as his staff, are to be commended for their actions.

Source: ocp.ga.gov

Techsmart Settles With Governor’s Office Of Consumer Protection

John Sours, Administrator of the Georgia Governor’s Office of Consumer Protection (GOCP), announced last month that Smart Industries, LLC doing business as “Techsmart” and its principal, Guru Dharam Khalsa, have entered into a settlement with GOCP. The settlement was based on the company failing to disclose hidden finance charges in violation of the Truth-in-Lending laws. As a result consumers didn’t get the true cost of the company’s products. Techsmart, whose offices are headquarters in San Diego, Calif., resells products, such as electronics, primarily to military personnel via kiosks located near U.S. military bases and via the Internet.

It was alleged that Techsmart sold a number of its products for at least two times the price charged for the identical products at most retail and online stores. It represented that these prices were the items’ “original” prices when, in fact, they contained a significant additional amount allegedly attributable to the military person’s lack of credit history. Instead of disclosing this markup as part of its finance charge, the company allegedly represented that military personnel were actually paying lower interest rates.

Techsmart advertises itself as the “number one choice for military financing” and encourages its customers to pay for their merchandise in installments by financing their purchase through the company. That made Techsmart a particularly appealing option to those service members with either no credit or bad credit, who may have had no other financing options. GOCP alleges that Techsmart falsely claimed that purchasing its products would automatically improve consumers’ credit and that military personnel were entitled to claim an income tax deduction for products purchased from the company.

In resolution of these allegations, the company and its principal have entered into a settlement with GOCP, requiring the company to cease doing business in the state of Georgia, to offer customer restitution in the amount of $171,335.57, and to pay $25,000 in penalties and investigative expenses. Administrator Sours had this to say:

While the law does not limit what a business can charge for its products, a business is not allowed to assess finance charges, unless it clearly discloses those charges to consumers. This settlement encourages a level playing field for businesses in Georgia and shows our commitment to protecting service members and their families from being preyed upon by merchants who resort to unscrupulous practices.

It’s really good to see a government agency going after companies that are taking unfair advantage of consumers and, in this case, members of our armed services. John Sours, a well-respected public servant, as well as his staff, are to be commended for their actions.

Source: ocp.ga.gov
higher-rate balance until they’ve finished paying off whatever they owe at the lower rate, which virtually guarantees a longer period of indebtedness.

At a time when the country is relying more and more on small businesses, something should be done in Congress to extend the protections of the CARD Act to all those that need it. Protecting consumers was a great first step, but if a practice is “predatory” it shouldn’t be allowed on any entity, consumer or otherwise. If you need more information on this subject, contact Roman Shaul, a lawyer in our Consumer Fraud Section, at 800-898-2034 or by email at Roman.Shaul@beasleyallen.com.

Source: http://business.time.com/2013/10/14/small-business-credit-cards-may-lack-consumer-protections/

XXI. RECALLS UPDATE

We are again reporting a number of safety-related recalls. We have included some of the more significant recalls that were issued in November. 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 33,000 VEHICLES GLOBALLY TO FIX ENGINES

Toyota Motor Corp has recalled 33,000 cars, pickup trucks and commercial vehicles worldwide to replace a defective part that may cause engine failure. Most of the recalled models are in Japan. About 4,000 four-cylinder Tacoma pickup trucks are being recalled in the United States. The vehicles, which were all built this year, have engine valve springs that may develop cracks and break over time. This could lead to noisy, rough engine performance and, in some cases, the engine could stop while the vehicle is in motion. That can create a safety hazard.

The problem arose because the equipment used to make the part was not properly maintained, according to Toyota. The engine valve spring was built by Japanese company Chuo Spring Co Ltd, Hansan said. Other models affected by Toyota’s global recall include the Land Cruiser Prado mid-size SUV and several larger vehicles.

HONDA RECALLING MORE THAN 344,000 ODYSSEY MINIVANS FOR BRAKE PROBLEMS

Honda has issued a recall for its Odyssey minivan, a model that is produced at the Japanese automaker’s Alabama factory, for a problem that may cause unexpected braking. The recall covers more than 344,000 Odysseys, model years 2007 and 2008. In June, the National Highway Traffic Safety Administration (NHTSA) opened an investigation into complaints of unexpected braking on the minivan. In its recall notice sent to NHTSA, Honda blamed the problem on a combination of system components and software that could cause the vehicle to “suddenly and unexpectedly brake hard, and without illuminating the brake lights, increasing the risk of a crash from behind.” Parts to fix the problem will not be available until next spring, according to Honda. In the interim, the automaker said it will send owners a letter instructing them how to prevent unintended braking.

CHRYSLER RECALLS 1.2 MILLION RAM TRUCKS

Chrysler has recalled about 1.2 million Ram trucks to fix front-end problems that could lead to steering troubles. The company announced three recalls last month. It wants to inspect the trucks and says only 453,000 will likely need repairs. Chrysler said in a statement that it knows of six crashes and two injuries involving the 2008 to 2012 Ram 2500 and 3500 trucks that are being recalled, and one crash with no injuries from the other recalled models. The trucks are being recalled because tie-rod ends in the steering system may have been installed improperly, which Chrysler says stemmed from technicians misinterpreting instructions. Those tie-rods could be out of alignment, which Chrysler says can lead to steering failures.

The company has since updated the instructions and the parts involved. The first case covers 842,400 Ram 2500 and 3500 trucks from 2003 through 2008. Chrysler says 116,000 were repaired with tie-rods in the steering system that could be out of alignment. The other two involve trucks with tie-rod assemblies that were replaced in previous recalls. They cover 294,000 Ram 2500 and 3500 trucks from the 2008 through 2012 model years, and 2008 Ram 1500 four-by-four mega cabs. Also included are 43,000 Ram 4500 and 5500 four-by-four chassis cabs from 2008 through 2012.

Customers will be notified this month by letter and work could begin in January, the company said. Owners of Ram 4500 and 5500 models can take their trucks to dealers for interim repairs because parts may not be available until late next year, the company said. The interim service would involve realignment of the front ends. Chrysler said about 968,000 of the affected trucks are in the U.S., with another 157,000 in Canada, 37,100 in Mexico and 18,000 from other countries. Owners with questions can call 800-853-1403.

VOLKSWAGEN RECALLS 2.6 MILLION VEHICLES

Volkswagen AG has recalled 2.6 million vehicles over defects risking lighting failures, transmission malfunctions and fuel line leaks. Investigations by Volkswagen safety officials in China and Southeast Asia found that the power supply of 7-speed dual-clutch gearboxes in its vehicles were susceptible to malfunctioning if synthetic gearbox oil had been used, the company said, sometimes causing vehicle transmissions to fail.

Volkswagen, Europe’s largest carmaker, acknowledged that up to 1.6 million vehicles worldwide could be affected and said that changing the gearbox lubricant to mineral oil is an effective preventative countermeasure. Owners can get a free oil exchange at their local car shops. At least 18 Volkswagen models were made with the suspect DQ200 gearboxes, including versions of company’s popular Golf, Passat, Polo, Beetle and Audi marques. Of the affected vehicles, 640,000 are in China, according to a concurrent announcement from the nation’s Administration for Quality Supervision, Inspection and Quarantine, which claimed credit for identifying the defect. Vehicles currently in production or available for sale were not found to be vulnerable, according to the company.

The company has made expanding into China a priority amid flat demand for autos in Europe, opening up two new Chinese production facilities since September. That followed a high-profile run-in with AQSIQ in March in which the agency threatened to order a recall over separate gearbox issues if the company did not conduct one itself. Volkswagen soon recalled more than 380,000 vehicles without further explanation. But the incident earned the company an unflattering profile in an annual state-run tele-
Separately, Volkswagen recalled 800,000 Tiguan model compact sport utility vehicles built between 2008 and 2011 after reports that fuses protecting their exterior vehicle lights overheated following prolonged exposure to high air humidity, rapid temperature changes or vibrations. The defect caused certain exterior lights to shut down, the company said. Drivers would be immediately informed of any lighting malfunction on their instrument clusters, and says the problem can be fixed in “a few minutes” by replacing the fuse with one with a tougher surface coating.

**FORD RECALLS ESCAPE SUVs AGAIN FOR OIL AND FUEL LEAKS**

Ford has recalled the Escape small SUV. This recall was to fix oil and fuel leaks that could cause engine fires. The very popular SUV has been recalled seven times since it was redesigned and went on sale in the spring of 2012. The first of two recalls announced on Nov. 26 affects more than 161,000 Escapes worldwide from the 2013 model year with 1.6-liter four-cylinder engines. Ford says the cylinder heads can overheat and crack, causing oil leaks. Of those SUVs, fuel lines on about 12,000 may have been installed incorrectly. They could become chafed and leak gas. Many were repaired under a previous recall.

According to Ford, the oil leaks caused 13 fires but no injuries. It says there haven’t been any fires from the fuel line problems. In documents filed with the National Highway Traffic Safety Administration (NHTSA), Ford said it began to get engine fire reports on Escapes in late August, and began investigating. Eventually it was able to duplicate the cylinder head cracking and decided to do a recall. During the investigation, Ford also found warranty claims of fuel line leaks and decided to repair them as well. In some cases, the fuel lines may have been installed incorrectly by technicians in a previous fuel line recall.

The redesigned Escape has been recalled seven times since July of 2012 to fix carpet padding that can interfere with the brake pedals, fuel lines that can crack, coolant leaks, and child safety locks. Dealers will fix cooling and control systems or inspect and replace fuel lines for free.

**BAJA MOTORSPORTS RECALLS MINI BIKES DUE TO FALL AND CRASH HAZARD**

Baja Inc. doing business as Baja Motorsports, of Anderson, S.C., has recalled about 23,000 of their Mini Bikes. The front fork can separate from the wheel, posing fall and crash hazards to riders. This recall involves Baja Motorsports MB200 gas-powered mini bikes manufactured from August 2010 through August 2012. The recalled mini bikes have a black frame with a black padded seat, a gas tank and fenders that are black, red or yellow, side reflectors and a headlight. A decal with the words “Baja” and “Warrior” and the number 200 inside a circle with wings attached is on both sides of the gas tank. “Baja 200cc” is on the engine cover on the right side of the minibike. This mini bike may also be known as WR96, WR200, Baja Heat, Baja Carbon and Mini Baja. The date of manufacture is on the bottom right of the Vehicle Emissions Control Information label in the MM/YY format. The label is attached to the front side of the engine. The company has received 13 reports of front forks separating from the wheel. Minor injuries have been reported.

The bikes were sold at Northern Tool Equipment, Pep Boys and Tractor Supply Company from February 2010 to September 2013 for about $650. Consumers should immediately stop using the recalled mini bikes and contact Baja Motorsports to schedule a free repair. Contact Baja Inc., toll-free at 888-863-2252 from 8 a.m. to 5 p.m. ET Monday through Friday, or online at www.baja-motorsports.com and click on Safety Information for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/Baja-Motorsports-Recalls-Mini-Bikes/

**ELLIPTIGO RECALLS ELLIPTICAL CYCLES DUE TO FALL HAZARD**

ElliptiGO outdoor elliptical cycles have been recalled by ElliptiGO Inc., of Solana Beach, Calif. The front fork on the ElliptiGO cycles can separate and the drive arm axles can detach during use, posing a fall hazard. The ElliptiGO 3C, 8C and 11R models are outdoor elliptical cycles used by adults for exercise. It is a scooter-like device that combines an elliptical trainer with a bicycle. The ElliptiGO cycles have an aluminum frame, drive arms, two 20” spoke-wheels, an internally geared hub, front and rear brakes and adjustable-height steering column. All cycles have the word “ElliptiGO” along the outside of the frame. The 3C and 8C model cycles have a “C-Series” decal toward the rear of the frame and aluminum drive arms.

The recalled 11R cycles are matte black with white markings and the “11R” decal is found toward the rear of the frame. The serial numbers on all models are located on the frame in front of the back wheel near where the kickstand attaches to the frame. Serial number ranges for the recalled 3C and 8C models are from 11-010-001 through 13-028-102, and for the 11R model from 12-003-069 through 12-020-035. ElliptiGO has received one report of the fork separating and 10 reports of the drive arm detaching. One injury consisting of minor abrasions caused by a drive arm detaching has been reported.

The cycles were sold at ElliptiGO Inc. online at elliptigo.com and through various specialty bicycle and specialty fitness retailers nationwide from April 2011 through October 2013 for about $1,800 to $3,500. Consumers should stop using recalled ElliptiGO cycles until they have the fork upgraded with a safety retrofit and/or upgraded replacement drive arm axles installed. Consumers with affected cycles can contact ElliptiGO online at www.elliptigo.com/safety to locate the authorized repair center closest to them, call ElliptiGO toll-free at 888-551-0117 from 9 a.m. to 4 p.m. PT Monday through Friday or go online at www.elliptigo.com and click on the “Model 3C, 8C and 11R Recall” link for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/ElliptiGO-Recalls-Elliptical-Cycles/
Duo has a twin size mattress frame on top and a full size mattress frame on the bottom. The solid wood bunk bed was sold in cherry, eastern maple or pacific coast maple. A warning label on the end rail of the top bunk has model number “5702” and “Duo Bunk” printed on it.

The furniture was sold at Dania Furniture and Room and Board Furniture stores nationwide and online at Roomandboard.com from January 2008 through December 2011 for between $1,500 and $1,700. Consumers should immediately contact Wood Castle Furniture for a free repair. Either the consumer or a company representative can determine if the guardrails spacing is too wide. Consumers with young children should discontinue use of the bunk bed until the hazard has been remedied. Contact Wood Castle Furniture collect at 571-754-9304 from 8 a.m. to 5 p.m. PT Monday through Friday or online at www.woodcastle.com and click on Product Recall for more information. Photos available at http://www.cpsc.gov/en/Recalls/2014/Wood-Castle-Furniture-Recalls-Bunk-Beds/

**Burley Design Recalls Tailwind Racks For Trailercycles Due To Fall Hazard**

Burley Design LLC, of Eugene, Ore., has recalled its Tailwind bicycle racks for trailercycles. The top portion of the tailwind rack that connects trailercycles to a towing bicycle can break and allow the trailercycle to disconnect, posing a fall hazard. The Tailwind Racks are used for hitching children’s trailercycles to adult size bicycles. The aluminum racks were sold individually, in black or silver, or with Kazoo or Piccolo brand trailercycles in black only. The individual racks have stock code numbers 939001 for black and 939002 for silver, which was printed on the original packaging. The racks have double side rails. Burley is printed on the curved back plate of the rack. The firm received 11 reports of Tailwind Racks breaking, including one report of a minor leg injury in the U.S. and one report of a broken leg in the UK.

The cycles were sold at Independent bicycle retailers and specialty outdoor retailers nationwide and online at Amazon.com, Biketailershop.com and other websites from November 2011 through September 2013. Individual racks sold for $65 and Kazoo and Piccolo trailercycles with Tailwind Racks sold for $300 and $350 respectively. Consumers should stop using the Tailwind Racks immediately and contact Burley to receive a free replacement rack. Burley will replace recalled Tailwind Racks with a steel Moose Rack. Contact Burley Design at 800-311-5294 between 8 a.m. and 5 p.m. PT Monday through Friday or online at www.burley.com and click on Recall Information for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/Burley-Design-Recalls-Tailwind-Racks-for-Trailercycles/

**Avalanche Airbags Recalled By Backcountry Access Due To Risk Of Injury**

Avalanche airbags have been recalled by Backcountry Access, Inc., of Boulder, Colo. The trigger assembly can fail resulting in the airbag not deploying, posing a risk of death and injury in the event of an avalanche. This recall involves BCA Avalanche airbags, models Float 18, 22, 30, 32, 36 and Throttle. The airbags are used for skiing, snowmobiling and mountain climbing to help keep the user above the surface if an avalanche occurs. The airbags are yellow and are housed in a blue, red or black pack. The packs have the model name printed on them. “Float” and the “bc” logo are printed in black lettering on the airbag. Lot letters A through E are included in the recall. The lot letter can be found on the trigger handle.

The airbags were sold at specialty outdoor stores worldwide and online at www.backcountryaccess.com from August 2011 through October 2013 for between $499 and $750. Consumers should immediately stop using the recalled airbags and contact BCA for a free replacement trigger assembly. Contact Backcountry Access (BCA) at 800-670-8735 from 8 a.m. to 5 p.m. MT Monday through Friday or online at www.backcountryaccess.com and click on Safety Alert under Customer Service at bottom of the page for more information. Consumers can also send an e-mail to warranty@backcountryaccess.com. Photos available at: http://www.cpsc.gov/en/Recalls/2014/Avalanche-Airbags-Recalled-by-Backcountry-Access/

**Dream On Me Recalls Cradle Gliders Due To Infant Fall Hazard**

About 700 Lullaby Cradle Gliders have been recalled by Dream on Me Inc., of South Plainfield, N.J. The mattress support board can fall out or slide out of the bottom of the cradle glider posing a risk that babies can fall out and suffer injuries. This recall involves the Lullaby Cradle Glider manufactured by Dream On Me Inc. The cradle is made of solid pine with slats on all four sides and a base that has a gliding side-to-side motion. The inner dimensions of the cradle measure 34.5 inches by 20.5 inches and includes a mattress pad and four wheels for easy movement. The cradle is sold in one design, four colors 640-C; cherry, 640-W; white, 640-E; espresso, and 640-N; natural. A label identifying the date of manufacture as October 2011 is located on the mattress support board. Dream On Me and the Consumer Product Safety Commission (CPSC) have received reports of two incidents while infants were asleep inside the cradle. A 1-month-old infant fell to the floor when the mattress support board partially fell out, but the child was uninjured. A second report involved a 4-month-old infant who did not fall out of the cradle after the mattress support board became partially disengaged.

Consumers should immediately stop using the recalled cradles and contact Dream On Me to obtain a free repair kit. Instructions for assembly will be included in the repair kit. Contact Dream On Me toll-free at 877-201-4312 from 9 a.m. to 5 p.m. ET Monday through Thursday and 8 a.m. to 4 p.m. Friday or online at www.dreamonme.com and click on the Recalls tab for more information. Photos available at http://www.cpsc.gov/en/Recalls/2014/Dream-On-Me-Recalls-Cradle-Gliders/

**Calphalon Recalls Blenders Due To Injury Hazard**

Calphalon Corporation, of Atlanta, Ga., has recalled its blenders. A piece of the blender’s mixing blade unit can break off during use, posing an injury hazard. This recall involves Calphalon XL 9-speed blenders, model 1832449, also identified as model ME600BL. The model number is located on the underside of the blender’s base. The blender consists of a 5-inch tall, brushed-aluminum base with cord storage, the Calphalon logo in black letters at the front, and nine black/white speed selectors with labeling, plus the power button. It also has a clear 56-ounce glass pitcher with a handle and U.S. and metric volume measurement markings; a black plastic lid with a removable clear plastic lid stopper/measure cup; and a metal blade assembly with six-sided, stainless steel blades. Calphalon has received four reports of a
HEATHCO RECALLS MOTION-ACTIVATED OUTDOOR LIGHTS DUE TO ELECTRICAL SHOCK HAZARD

Motion-Activated Outdoor Lights have been recalled by HeathCo, LLC, of Bowling Green, Ky. The internal fixture wiring can energize the entire surface and fittings of the fixture, posing an electrical shock hazard. This recall includes multiple Heath®/Zenith Motion Activated Outdoor Lights used for porch lighting. The product comes in 21 designs with a variety of finishes and is designed to turn on at night when motion is detected. The product replaces a standard outdoor wall-mounted light fixture.

The lights were sold at large home improvement retailers; lighting, electrical and other retail stores nationwide and online from December 2006 to July 2013 for between $50 and $120. Consumers should immediately stop using the lights and turn off the power switch before removing the light from its mounting. Contact the company for instructions on how to return the light fixture and receive a free replacement. Contact HeathCo toll-free at 855-704-5438 between 8 a.m. and 5 p.m. CT Monday through Friday, email hzproductnotice@heathcollc.com, or visit the company’s website at www.heath-zenith.com and click on “Recall” for more information. Photos are available at http://www.cpsc.gov/en/Recalls/2014/Calphalon-Recalls-Blenders/.

VIKING RECALLS BUILT-IN SIDE-BY-SIDE REFRIGERATOR FREEZERS WITH IN-DOOR DISPENSERS DUE TO FIRE HAZARD

About 750 Viking built-in side-by-side refrigerator freezers with in-door dispensers have been recalled by Viking Range LLC, of Greenwood, Miss. Electrical connectors in the refrigerator freezer wiring harness can overheat, posing a fire hazard. This recall involves Viking 42-inch and 48-inch built-in side-by-side refrigerator freezers with in-door water and ice dispensers. The recalled refrigerator freezers come in a variety of colors, stainless steel or a custom finish. They were manufactured between October 2012 and May 2013 and have the model numbers listed below. The first six numbers in the serial number are the manufacture date of the unit in MM/DD/YY format. Both sizes of refrigerator freezers have a serial number/date code range from 101712 through 052913. The model and serial numbers are located inside the refrigerators on a label on the ceiling behind the light housing. See affected Models online at: http://www.cpsc.gov/en/Recalls/2014/Viking-Recalls-Built-In-Side-By-Side-Refrigerator-Freezers-with-In-Door-Dispensers/

The freezers were sold at appliance and specialty stores nationwide from November 2012 through May 2013 for between $5,400 and $6,400. Consumers should immediately stop using the recalled refrigerator freezers and contact Viking to schedule a free, in-home repair. Contact Viking toll-free at 877-266-1086 from 8 a.m. to 5 p.m. ET Monday through Friday, or online at www.vikingrange.com and click on Safety Recall Information on the bottom right side of the page. Photos available: http://www.cpsc.gov/en/Recalls/2014/Viking-Recalls-Built-In-Side-By-Side-Refrigerator-Freezers-with-In-Door-Dispensers/

GREE RECALLS 12 BRANDS OF DEHUMIDIFIERS DUE TO SERIOUS FIRE AND BURN HAZARDS

Four additional models of SoleusAir dehumidifiers have been added, several date code ranges have been expanded and 160 additional incidents and 25 more fires reported. The dehumidifiers can overheat, smoke and catch fire, posing fire and burn hazards to consumers. This recall involves 20, 25, 30, 40, 45, 50, 65 and 70-pint dehumidifiers with brand names Danby, De’Longhi, Fedders, Fellini, Frigidaire, Gree, Kenmore, Norpole, Premiere, Seabreeze, SoleusAir and SuperClima. Recalled model numbers and date codes are listed below. The brand name and the pint capacity are printed on the front of the dehumidifier. The model number and date code are printed on a sticker on the back, front or side of the unit. The dehumidifiers are white, beige, gray or black plastic and measure between 19 and 24 inches tall, 13 and 15 inches wide, and 9 and 11 inches deep.

ONE WORLD TECHNOLOGIES RECALLS RYOBI BATTERY CHARGERS DUE TO FIRE AND BURN HAZARDS

Ryobi P113 Dual Chemistry Battery Chargers have been recalled by One World Technologies Inc., of Anderson, S.C. The chargers can malfunction, posing fire and burn hazards to consumers. This recall involves Ryobi model P113 dual chemistry battery chargers designed for use with both NiCd and Li-Ion portable power tool batteries. Battery chargers included in this recall are green and grey and have “Ryobi” printed in white lettering on the front of the charger. The model number and date code can be found on the data plate located on the bottom of the charger. Model P113 chargers with year/week (YY/WW) date codes between 0731-0852, without a nine digit part number, are included in the recall. One World Technologies has received 25 reports of the P113 charger overheating, resulting in reports of property damage to the charger and its surroundings such as workbenches, countertops and carpeting.

The chargers were sold at Direct Tools Factory Outlet, The Home Depot and other retail stores nationwide and online at Homedepot.com from September 2007 to December 2009 individually and as part of a kit for between $30 and $270. Consumers should immediately remove any battery from the charger, stop using the recalled charger, unplug it and contact One World Technologies for a free replacement charger. Contact One World Technologies toll-free at 800-597-9624 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.ryobitools.com and click on Important Safety Information at the bottom of the page for more information. To see photos of the recalled products, go to http://www.cpsc.gov/en/Recalls/2014/One-World-Technologies-Recalls-Ryobi-Battery-Chargers/.

HEATHCO RECALLS MOTION-ACTIVATED OUTDOOR LIGHTS DUE TO ELECTRICAL SHOCK HAZARD

Motion-Activated Outdoor Lights have been recalled by HeathCo, LLC, of Bowling Green, Ky. The internal fixture wiring can energize the entire surface and fittings of the fixture, posing an electrical shock hazard. This recall includes multiple Heath®/Zenith Motion Activated Outdoor Lights used for porch lighting. The product comes in 21 designs with a variety of finishes and is designed to turn on at night when motion is detected. The product replaces a standard outdoor wall-mounted light fixture.

The lights were sold at large home improvement retailers; lighting, electrical and other retail stores nationwide and online from December 2006 to July 2013 for between $50 and $120. Consumers should immediately stop using the lights and turn off the power switch before removing the light from its mounting. Contact the company for instructions on how to return the light fixture and receive a free replacement. Contact HeathCo toll-free at 855-704-5438 between 8 a.m. and 5 p.m. CT Monday through Friday, email hzproductnotice@heathcollc.com, or visit the company’s website at www.heath-zenith.com and click on “Recall” for more information. Photos are available at http://www.cpsc.gov/en/Recalls/2014/Calphalon-Recalls-Blenders/.


33
The dehumidifiers were sold at AAFES, HH Gregg, Home Depot, Kmart, Lowe’s, Menards, Mills Fleet Farm, Sam’s Club, Sears and other stores nationwide and in Canada, and online at Amazon.com and Ebay.com, from January 2005 through August 2013 for between $110 and $400.

The company says it has received reports of 325 incidents, including 71 fires and $2,725,000 million in property damage. Consumers should immediately turn off and unplug the dehumidifiers and contact Gree to receive a full refund. Contact Gree toll-free at 866-853-2802 from 8 a.m. to 8 p.m. ET Monday through Friday, and on Saturday from 9 a.m. to 3 p.m. ET, or online at www.greeusa.com and click on Recall for more information. Photos are available at http://www.cpsc.gov/ en/Recalls/2014/12-Brands-of-Dehumidifiers/.

NANTUCKET DISTRIBUTING RECALLS CLAY BOWL OUTDOOR FIREPLACES

About 1,200 Clay Bowl Outdoor Fireplaces have been recalled by Nantucket Distributing LLC, Middleboro, Mass. When fire is lit, pieces of the clay fireplace bowl can blow off of the bowl posing impact and burn hazards. The product is an outdoor fireplace made of clay and steel. A black metal bowl sits in a clay bowl, which sits in a steel bowl frame. The complete fireplace has a circumference of 72 inches and stands 24 inches high. The recalled model number CTFB215 is located on the color label, which is on the box that the product comes in. The model number also appears in the assembly instructions. Product comes with a screened, domed lid that sits on top of the bowl, and a fire poker. The firm received three reports from consumers stating that while a fire is lit, pieces of the exterior clay bowl blew off into the surrounding area. No injuries have been reported.

The fireplaces were sold at Christmas Tree Shops and And That! stores from July 2013 through October 2013 for about $70. Consumers should immediately stop using the recalled fireplace and return it to any Christmas Tree Shops or And That! store to receive a full refund. Contact Christmas Tree Shops toll-free at 888-287-3232 any time, or online at www.christmastreeshops.com and go to the “Product Recalls” link at the bottom of the homepage for more information. Photos available at http://www.cpsc.gov/en/Recalls/2014/Nantucket-Distributing-Recalls-Clay-Bowl-Outdoor-Fireplaces/.

CUISINART RECALLS FOOD PROCESSORS DUE TO LACERATION HAZARD

About 25,000 Cuisinart 7-cup food processors have been recalled by Cuisinart, a division of Conair Corp., of Stamford, Conn. The reversible slicing/shredding disc can loosen when in use and the blade can strike and break the food processor’s cover. The cover’s broken plastic pieces can hit consumers, posing a laceration hazard. This recall involves models of Cuisinart food processors including, MFP-107, MFP-107BC, MFP-107BCWS, MFP-107BK, MFP-107BKWS, MFP-107DCWS, MFP-107MGS, MFP-107MR or MFP-107WS. The model number is on the underside of the food processor base. The food processors were sold in white, black, brush chrome, metallic gray, metallic red and silver colors. They have a seven cup plastic work bowl and three push buttons “On,” “Pulse” and “Off.” Cuisinart is stamped on the front. Cuisinart has received one report of an incident involving a consumer being struck on the cheek by a piece of the food processor’s plastic cover that cracked off while the reversible slicing disc was being used. No medical attention was sought.

The food processors were sold at Belk, Best Buy, Dillard’s, J.C. Penney, Macy’s, Sears, Williams-Sonoma and other stores nationwide; and online at Amazon.com and Zappos.com from October 2012 through June 2013 for about $100. Consumers should immediately stop using the recalled food processors and contact Cuisinart to receive a free replacement lid and reversible slicing/shredding disc. Contact Cuisinart toll-free at 877-339-2534 from 7 a.m. to 11 p.m. ET Monday through Friday, and from 9 a.m. to 5:30 p.m. ET Saturday or Sunday, or online www.cuisinart.com and click on Recall for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/Cuisinart-Recalls-Food-Processors/.

ANGELCARE RECALLS MOVEMENT AND SOUND BABY MONITORS AFTER TWO DEATHS DUE TO STRANGULATION HAZARD

Angelcare Monitors Inc., of Quebec, Canada, has recalled cord covers for 600,000 Angelcare Movement and Sound Monitors with Sensor Pads. The cord attached to the baby monitor’s sensor pad is placed under the crib mattress, which poses a strangulation risk if the child pulls the cord into the crib and it becomes wrapped around the neck.

Angelcare and the Consumer Product Safety Commission (CPSC) have received reports of two infant cord strangulation deaths. In November 2011, a 13-month-old female died in San Diego, Calif., and, in August 2004, an 8-month-old female died in Salem, Ore. In both fatalities, the cord from the sensor pads was pulled into the crib by the infant. In addition, there have been two reports of infants who became entangled in cords of Angelcare baby monitor models that did not result in fatalities. In these incidents, it could not be determined if the “sensor pad cord” or the “monitor cord” was involved in the incident.

The recall involves the Movement and Sound Monitor manufactured by Angelcare. This design of baby monitor includes a unique sensor pad placed inside the crib, under the mattress, to monitor movement of the baby. An electrical cord about 11 feet long is permanently connected from the sensor pad to the nursery monitor unit. The hazard is created by a cord within reach of a baby inside the crib. The cord can be pulled into the crib and can wrap around the child’s neck. The recall involves all versions of Angelcare sensor monitors including model numbers: AC1100, AC201, AC300, AC401, AC601 and 49255 that did not include rigid cord covers, offered in the remedy. The model number is located on the back of the nursery monitor unit. The monitors were manufactured between 1999 and 2013.

Angelcare is providing consumers with a repair kit that includes rigid protective cord covers through which the sensor pad cords can be threaded, a new, permanent electric cord warning label about the strangulation risk, and revised instructions. The recalled baby monitors were sold at Babies R Us/Toys R Us, Burlington Coat Factory, Meijer, Sears, Walmart, Amazon.com, Target.com, Overstock.com and nearly 70 small baby specialty stores, from October 1999 through September 2013 for about $100 to $300.

Consumers should immediately make sure cords are placed out of reach of the child and contact Angelcare toll-free at 855-355-2643 between 8 a.m. and 8 p.m. ET Monday through Friday or visit the company’s website at www.angelcare.com to order the free repair kit.

In February 2011, CPSC issued a safety alert warning consumers that industry-wide there had been seven reports of strangulation in baby monitor cords since

www.BeasleyAllen.com
2002. Since that alert, the number of death reports has risen to eight, of which two involved the Angelcare monitors with sensor cords. CPSC has a safety alert, *Infants Can Strangle in Baby Monitor Cords* and conducted an information and education campaign with JPMA in which Angelcare has taken an active role to raise awareness of the hazards associated with baby monitor cords. Parents and caregivers should visit CPSC’s Crib Information Center at www.cpsc.gov/cribs for additional baby monitor cord safety information and they should make sure all cords are out of arm’s reach of children.

**STEP2 RECALLS RIDE-ON WAGON TOYS**

About 14,000 Step2® Whisper Ride Touring Wagons™ have been recalled by The Step2® Company, LLC of Streetsboro, Ohio. The removable blue seat backs can detach and allow the child in the wagon to fall out, posing a fall hazard. This recall involves Step2® Whisper Ride Touring Wagons. The two-seat plastic wagon is 25 inches wide by 41.25 inches long by 20 inches high with blue seats, a tan wagon base and a red canopy. The Step2 logo appears on the canopy and on the side of the wagon base. Step2 has received 29 reports of the seat back detaching, 28 of which resulted in children falling out of the wagon. Fourteen of these resulted in bumped heads and nine resulted in bruises, scratches or lacerations.

The wagons were sold exclusively at Toys R Us stores nationwide and online at ToysRUs.com from February 2013 to August 2013 for about $130. Consumers should immediately stop using the wagon and inspect it to determine if the seat belt is attached to the removable blue seat back. If so, the wagon is included in this recall. Consumers with the recalled wagons should contact Step2 to obtain a free repair kit. Contact Step2 toll-free at 866-860-1887 between 8 a.m. and 5 p.m. ET Monday through Friday or visit the company’s website at www.step2.com and click on “Product Recall” for more information. Photos available at http://www.cpsc.gov/en/Recalls/2014/Step2-Recalls-Ride-On-Wagon-Toys/.

**CHILDREN’S PAJAMAS RECALLED BY THE BAILEY BOYS DUE TO VIOLATION OF FEDERAL FLAMMABILITY STANDARD**

The Bailey Boys, Inc., located in Saint Simons Island, Ga., has recalled about 2,000 Boy’s Loungewear Pants. The pajama pants fail to meet federal flammability standards for children’s sleepwear, posing a risk of burn injuries to children. This recall involves The Bailey Boys’ children’s 100 percent cotton loungewear pants, sold in sizes toddler 2 through boys’ 12. All of the pajama pants have an elastic waistband with a white drawstring and a garment label that states "J. Bailey clothing for young men." The pajama pants were sold in multiple prints including Chad-Ball red baseball print, Chad-Base two colored red baseball print, Chad-Boat light blue boat print, Chad-Crab grey crab print, Chad-Golf light gray print, Chad-Santa green Santa Claus print, Chad-Sea grey blue seahorse print, Chad-Turtle dark blue turtle print and Chad-Turtle light blue turtle print. The website www.thebaileyboys.com is printed on a hangtag attached to the garment.

The pants were sold at children’s boutiques nationwide from September 2012 through August 2013 for about $25. Consumers should immediately take the recalled pajama pants away from children, and return them to The Bailey Boys, Inc. for a full refund. Contact The Bailey Boys, Inc. toll-free at 855-809-4400 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.thebaileyboys.com and click on the Product Recall link on the bottom of the page for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/Childrens-Pajamas-Recalled-by-The-Bailey-Boys/.

**VANS RECALLS BOY’S HOODED JACKETS WITH DRAWSTRINGS**

About 2,400 Boy’s hooded jackets have been recalled by Vans Inc., of Cypress, Calif. The jackets have drawstrings in the hood around the neck area that pose a strangulation hazard to young children. In February 1996, the Consumer Product Safety Commission (CPSC) issued guidelines about drawstrings in children’s upper outerwear. In 1997, those guidelines were incorporated into a voluntary standard. Then, in July 2011, based on the guidelines and voluntary standard, CPSC issued a federal regulation. CPSC’s actions demonstrate a commitment to help prevent children from strangling or getting entangled on neck and waist drawstrings in upper outerwear, such as jackets and sweatshirts. This recall involves Vans’ AV Edict hooded jackets for boys. They were sold in boy’s sizes S, M, L and XL and made from black cotton or black canvas with a drawstring through the hood. “Vans®” is printed on a tab above the jacket’s left front pocket. An intertwined “AV” logo is embroidered in black beneath the lower right pocket and also appears on the jacket’s snaps. “Vans®, "OFF THE WALL®” and an intertwined “AV” logo is sewn on a label inside neck of the jacket.

The jackets were sold at Vans stores nationwide and online at vans.com from September 2012 through September 2013 for about $90. Consumers should take the recalled jackets away from children and return them to the place of purchase for a full refund or for a repair. Contact Vans Inc. at 800-817-0618 anytime or online at www.vans.com and click on Recall Info for more information. Photos available at http://www.cpsc.gov/en/Recalls/2014/Vans-Recalls-Boys-Hooded-Jackets-with-Drawstrings/.

**L.L. BEAN GIRL’S PAJAMAS RECALLED**

About 800 L.L. Bean girl’s pajama sets have been recalled by L.L. Bean Inc., of Freeport, Maine. The pajama sets fail to meet the federal flammability standard for children’s sleepwear, posing a risk of burn injuries to children. The recall includes Girl’s or Little Girl’s jersey knit aurora purple pajama sets sold by L.L. Bean. The sets have a solid purple top with long sleeves and purple pants with a pattern and a solid purple waistband. The pajamas were sold in girls sizes small (size 8) through extra large (size 18) and little girls sizes small (size 4) through large (6X/7). The pajamas product ID numbers included in the recall are 284889 and 284890 printed on the second side seam label under the care label. GPU#6 is also printed on the garment label located on the inside left seam near the bottom of the pajama top. L.L. Bean is printed inside the back of the neck of the garment.

The pajamas were sold at exclusively at L.L. Bean retail stores nationwide from June 2013 through September 2013 for about $30. Consumers should immediately take the recalled pajama sets away from children and contact L.L. Bean to receive a free replacement, a full refund or store gift certificate. Contact L.L. Bean at 800-555-9717 from 8 a.m. to 10 p.m. ET Monday through Friday or online at www.llbean.com and click on the bottom right of the homepage “Product Recall & Safety Info” for more information. Photos available at http://www.cpsc.gov/en/Recalls/2014/LL-Bean-Girls-Pajamas-Recalled/.
**CHILDREN’S PAJAMAS RECALLED BY BABYCOTTONS**

About 1,100 Children’s nightgowns have been recalled by Babycottons, of Miami, Fla. The nightgowns fail to meet federal flammability standards for children’s sleepwear, posing a risk of burn injuries to children. This recall involves Babycottons children’s 100 percent cotton nightgowns sold in sizes 24 months through toddler size 6. The nightgowns were sold in six prints including Alphabet (style 1413W245), BC Flowers (style 1413S220), Fairies (style 1413W125), Fairies Dots (style 1413W127), Mei Mei (style 1413S200) and Summertime (style 1413S190). The style numbers are printed on a hangtag attached to the garments. The white Alphabet gown has long sleeves with an alphabet print and image of an item beginning with that letter. The white and peach BC Flowers gown has the initials “BC” printed in the middle of the chest with a flower vines print. The white Fairies gown has long sleeves white pink fairies. The Fairies Dots gown has long sleeves with a white polka dot and solid pink background and a fairy applique in the center with a white ribbon. The white and pink polka dots Mei Mei gown has short sleeve with two girls printed on the center of the chest. The white Summertime gown has short sleeves with girls swimming in a coral and fish print. All of the gowns have ruffles on the sleeves, neck or bottom.

The nightgowns were sold exclusively at Babycottons boutiques nationwide from February 2013 through July 2013 for $48. Consumers should immediately take the recalled nightgowns away from children and return to Babycottons for a full refund. Contact Babycottons toll-free at 855-922-2437 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.babycottons.com and click on the Product Recall link on the bottom of the page for more information. Photos available at http://www.cpsc.gov/en/Recalls/2014/Childrens-Pajamas-Recalled-by-Babycottons/.

**AMERICAN BOY AND GIRL RECALLS INFANT SANDALS DUE TO CHOKING HAZARD**

American Boy and Girl (ABG), of Elizabeth, N.J., have recalled infant sandals. The top strap can be pulled loose from the shoe, posing a choking hazard to the child. This recall involves infant girl sandals sold under the Falls Creek Baby brand. The “Susan” style was sold in infant sizes 3 to 6 months, 6 to 9 months and 9 to 12 months. The white leather sandals have three pink, purple and yellow flowers on the top and a top strap that attaches to a hook and loop fastener on each side of the shoe. “Falls Creek Baby” and the size are printed on the inside of the shoe.

The shoes were sold exclusively at Mejier Stores in Illinois, Indiana, Kentucky, Michigan and Ohio from April 2013 to July 2013 for between $6 and $9. Consumers should immediately take the recalled sandals away from children and contact American Boy and Girl for a refund or replacement. Contact American Boy and Girl at 800-689-9237 from 9 a.m. to 4 p.m. ET Monday through Friday, or online at www.abgny.com, and click on “Recall Information” for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/American-Boy-And-Girl-Recalls-Infant-Sandals/.

**LITTLE WILLY’S RECALLS HOODED SWEATSHIRTS DUE TO STRANGULATION HAZARD**

About 200 Little Willy’s Hooded Sweatshirts have been recalled by Little Willy’s of New York, N.Y. The hoodies have drawstrings through the hood or neck, which pose a strangulation hazard to young children. In February 1996, the Consumer Product Safety Commission (CPSC) issued guidelines about drawstrings in children’s upper outerwear. In 1997, those guidelines were incorporated into a voluntary standard. Then, in July 2011, based on the guidelines and voluntary standard, CPSC issued a federal regulation. This recall involves Little Willy’s brand children’s hooded sweatshirts sold in sizes XS (2 years), S (3 years), M (4-5 years), L (6-7 years), XL (8-9 years) and XXL (10 years). The cotton fleece sweatshirts were sold in two color patterns: dark grey with light grey stripes and a red hood, and purple with navy blue stripes and a green hood. The sweatshirt has an elbow patch on the right arm and the Little Willy logo on the front.

The sweatshirts were sold online at Zulily.com and Gilt.com from January 2012 to May 2012 for about $20. Consumers should immediately take the garments away from children. Consumers can remove the drawstrings to eliminate the hazard or return the garments to Little Willy’s to have the drawstring removed. Contact Little Willy’s collect at 212-680-0107 from 11 a.m. to 7 p.m. ET Tuesday through Saturday, or online at www.littlewillys.com. In addition, consumers can email mr.wilcox@lordwillys.com for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/Little-Willys-Recalls-Hooded-Sweatshirts/.

We are not including all of the recent recalls in this issue; we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm’s web site at www.BeasleyAllen.com/recalls. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@BeasleyAllen.com for more recall information or to supply us with information on recalls.

**XXII. FIRM ACTIVITIES**

**MORE THAN 2,000 LAWYERS PRE-REGISTERED FOR SEVENTH ANNUAL LEGAL CONFERENCE IN MONTGOMERY**

More than 2,000 lawyers pre-registered for the seventh annual Legal Conference & Expo put on by our law firm last month. The event, held at the Renaissance Montgomery Hotel convention center, was a tremendous success. The two-day event provided continuing legal education credits and was open to all Alabama lawyers in private practice. The conference is one of the top five legal conferences in the United States. Dawn Hathcock, Vice President of the Montgomery Area Chamber of Commerce Convention and Visitor Bureau, had this to say about the meeting of lawyers:

> With its annual legal conference, the Beasley Allen Law Firm brings in lawyers from all over the state, providing them an opportunity to see everything Montgomery has to offer as a meeting destination. This is the largest conference of its kind within the state of Alabama and not only showcases the city, but provides a huge economic impact in the River Region of roughly a million dollars. Events of this stature are extremely important, as we continue to market Montgomery as a true meeting destination.

Practice areas addressed at the conference included product liability, mass torts, whistleblower litigation and fraud. Special programs featured the topic of legal ethics. The meeting also featured some outstanding speakers, including Charles Price, the Presiding Judge for the 15th Judicial Circuit; Gov. Robert...
Bentley; Chief Justice Roy Moore; Dr. David G. Bronner; Senator Cam Ward; Rich Raleigh, Jr., president-elect, Alabama State Bar; Josh Wright from the Alabama Association for Justice; and Jeremy McIntire, assistant general counsel, Alabama State Bar. Rev. Jay Wolf, Pastor at First Baptist Church, was the speaker at the prayer breakfast held on Nov. 22. The prayer breakfast attracted a capacity crowd and was a highlight of the event.

At the Legal Services Expo, vendors provided demonstrations of products and answered questions about how lawyers can best enhance their practice. Event platinum sponsors were Jackson Thornton Valuation & Litigation Consulting Group; LexisNexis; Freedom Court Reporting and Baker Reporting Services.

Legal and community groups involved included the Alabama State Bar Volunteer Lawyer Program, Alabama State Bar Lawyer Referral Program; The Alabama Law Foundation, The Alabama Civil Justice Foundation, The Alabama Association for Justice and Jones School of Law. Our firm’s Managing Shareholder, Tom Methvin, had this to say about the two-day event:

We are extremely pleased to be able to offer this conference as a service for lawyers throughout the state of Alabama. This is a valuable opportunity for continuing education, as well as providing the chance for networking with other attorneys.

Hopefully, all of the lawyers in attendance learned something during the expo that will help them in their practices. I know that I did. We were honored by the presence of the speakers and the lawyers in attendance.

Beasley Allen Provides Help for the Holidays

Every year, I am amazed and proud when I see the many projects our employees participate in to bring a Blessed Christmas to those who would otherwise be left out in the cold—sometimes quite literally! Our employer-sponsored service projects change from year to year, but always they have a mission in mind of bringing cheer and joy, and sharing the spirit of Christ our Lord with those in need. Especially at this time of year, it means so much to be able to model the love of Jesus. Projects our folks are doing this year include:

Capitol Hill Nursing Home

Capitol Hill is a nursing home in the downtown area. Each Christmas they put up an Angel Tree for the residents. Each Angel contains a resident’s Christmas wish list. There are usually not more than one or two small items on the list, like lotion and/or slippers. Our employees “adopt” an angel and fill the resident’s wish list. Often, this is the only Christmas present or remembrance some of these residents receive. Our employee Theresa Perkins is leading this program.

Friendship Mission

We are blessed to have homes to go to with all kinds of conveniences; we enjoy these benefits without thinking about what is would be like to be homeless. Many homeless people face life without the hope of having a home, but we can give them some comfort by providing some of the necessities of life while they are out there. Things like blankets, warm-up suits, caps, gloves, jackets, and socks to keep them warm. Things like hygiene items to keep clean, and over-the-counter medicines to help with aches, pains, and cold symptoms. Friendship Mission gives refuge to the homeless, as well as hope through the teaching of God’s Word. If we help the poor, we are lending to the Lord, and He will repay you. Proverbs 19:17. Leading this drive is our own sweet Ms. Willa Carpenter.

Adullum House

In past years our staff has sponsored a wonderful Christmas party for the children at Adullum House, which provides a home, love and care for children whose parents are incarcerated. This year the kids voted to go on a trip to Gatlinburg instead of having presents. This will be the first time many of the children have been on a vacation or family trip. They are taking 57 kids and adults on this trip and asked if we could donate to their fund for food, kid activities, etc. “I can’t even begin to imagine how much it takes to travel with that many people … How many bathroom breaks, how many ‘Are we there yet?’” says program organizer Angela Talley. Money raised by the firm will be used to purchase a gift card to be used for groceries and other needs while on the trip.

United Cerebral Palsy Christmas Casual Day

Beasley Allen employees helped raise funds and awareness for United Cerebral Palsy of Central Alabama by participating in Christmas Casual Day on Dec. 13, 2013. For a $20 donation, employees received a t-shirt and could wear it with jeans on the designated day. The project was organized by Mandy Cook, for whom the effort is near and dear to her heart. Her son was diagnosed with diplegic cerebral palsy. Mandy says the doctors, nurses and office staff involved with the UCP organization are wonderful people who have made dealing with the disease an easier process.

Family Sunshine Center Thanksgiving

In addition to our many Christmas projects, we once again provided the ingredients for a full Thanksgiving dinner to six families from the Family Sunshine Center who needed our blessing. Employees donated non-perishable food products, or even donated a turkey or ham to fill the Thanksgiving tables of these families in need. The Family Sunshine Center provides a safe haven for women and their children who are victims of domestic violence. Angela Talley led this effort.

I am thankful for all our employees who work at this firm and for their desire to help others. Their outpouring of love and support for those in our community always touches my heart. Their generous support will brighten Christmas for lots of folks in the River Region.

XXIII.
SPECIAL RECOGNITIONS

Alabama Veteran Awarded Congressional Gold Medal

An Alabama man who served in World War II and was one of the nation’s first black Marines has been awarded one of the federal government’s highest honors. Robert Freeman, 87 years old, was presented the Congressional Gold Medal on Nov. 8 for military service dating back to the 1940s. Mr. Freeman trained alongside other African-American recruits to the Marines Corps at the segregated Montford Point Camp in North Carolina. Afterward, he deployed with his fellow Marines to World War II. During a ceremony in Tuskegee, where Freeman has lived since leaving the military, the medal was awarded. Mr. Freeman worked for four decades at the VA Medical Center. He said the award came “a few years behind, but I really appreciate it.” It’s very good to see our veterans being recognized and Mr. Freeman is certainly deserving of his high honor.

Source: Montgomery Advertiser
FLYNN MOZINGO RECEIVES PRO BONO AWARD

The Montgomery County Bar Association has awarded Flynn Mozingo, a very good lawyer with Melton, Espy & Williams, with the Pro Bono Award. Flynn has been enrolled in the Volunteer Lawyers Program (VLP) since 2004. He has dedicated significant time to his current VLP case, which involves a client who has a very complicated probate matter that involves her great-uncle’s estate in Chicago and her mother’s estate here in Alabama.

In addition to volunteering his time to represent clients, Flynn is also very active in publicizing the Bar’s pro bono work, serving on the State Bar’s Pro Bono Week Task Force since 2011. Flynn served as chair of the subcommittee that presented a very successful poverty simulation in Birmingham, which received a lot of favorable coverage and wonderful reviews by the participants.

Lawyers in Montgomery recently participated in the nationwide Pro Bono Week Celebration. This annual celebration recognized the valuable work lawyers do throughout the year, without being paid, to represent those who cannot afford civil legal assistance. Without this pro bono service, these folks would have nowhere to turn for help. We commend Flynn for his service, and congratulate him on his outstanding commitment to upholding the creed of our profession, “Lawyers render service!”

XXIV. FAVORITE BIBLE Verses

Susan Baker, a legal assistant in our firm’s Personal Injury/Products Liability Section, says she has several favorite scriptures, but none more so than Psalms 46:10. Susan says life is so hectic with everybody in such a rush, that we all need to slow down and listen to God and seek wisdom. There are lots of folks in need and Susan says this allows us to respond to the needs of others with a servant’s heart. She says we would be better prepared if we would just be still, listen and find our confidence and strength from God.

Be still and know that I am God; I will be exalted among the nations, I will be exalted in the earth.

Psalms 46:10

Ben Baker, a lawyer in our firm’s Personal Injury/Products Liability Section, also furnished a verse for this issue.

The Lord is my strength and my song.

Exodus 15:2

Cole and Joy Portis are the proud parents of eight children. As our readers will already know, Cole is the head of our firm’s Personal Injury/Products Liability Section. His wife, Joy, is a very busy stay-at-home mom. She sent in several of her favorite verses for this issue. Joy says her desire is to constantly keep her eyes on Jesus Christ. Joy says the Lord tells us children are truly blessings. Parenting is a great responsibility and Joy says, as a mother of eight, it can be overwhelming. But she says Isaiah 55:8 always encourages her to see each of her children as the Lord sees them—as blessings. Joy says each of her children, each uniquely wonderful, are blessings from the Lord! These are Joy’s verses:

I beseech you therefore, brethren, by the mercies of God, that you present your bodies a living sacrifice, holy, acceptable to God, which is your reasonable service. And do not be conformed to this world, but be transformed by the renewing of your mind, that you may prove what is that good and acceptable and perfect will of God.

Romans 12:1-2

Bebold, children are a heritage from the Lord; The fruit of the womb is a reward. Like arrows in the hand of a warrior, so are the children of one’s youth. Happy in the man who has his quiver full of them.

Psalm 127:3-5

For my thoughts are not your thoughts; Nor are your ways My ways, says the Lord.

Isaiah 55:8

Kelli Alfreds, a lawyer in our firm, also furnished several verses for this issue. She says the verses have been her favorites during challenging times. According to Kelli, these verses contain promises she constantly leans on. Kelli says her favorite verse is Phil. 4:13, which is the one she says was repeated over and over while she was studying for the bar exam:

I can do all things through Christ who strengthens me.

Phil. 4:13

So do not worry, saying, ‘What shall we eat?’ or ‘What shall we drink?’ or ‘What shall we wear?’ For the pagans run after all these things, and your heav-

enly Father knows that you need them. But seek first his kingdom and his righteousness, and all these things will be given to you as well.

Matthew 6:31-33

So do not fear, for I am with you; do not be dismayed, for I am your God. I will strengthen you and help you; I will uphold you with my righteous right hand.

Isaiah 41:10

XXV. CLOSING OBSERVATIONS

Dr. Greg Beasley, a pastor from Colbert County, Alabama, sent in a good and timely message for this issue. Greg says to first read Psalm 55:4-7, 22 and then to follow up with reading the following message which:

The eagle is a fascinating bird. Did you know they can have up to a seven-foot wingspan. No that’s long. He can glide at altitudes of more than 2,400 ft. He can cruise at a speed of 120 miles per hour. Twelve pounds is about his weight. But, talk about his strength, he can carry objects twice his weight over a distance of several miles. I don’t know about you, but to me that’s incredible.

Have you ever thought about having wings that long that you could soar far, far, far, above life’s difficulties? When bad things happen, and things come up that we don’t expect, life gets hard. We could just fly away from it all. But listen to what David said in verse 6, “Oh that I had wings like a dove! For then would I fly away, and be at rest.”

Here is the beauty of our Lord found in verse 22. “Cast your burden upon the Lord and He will sustain you; He will never allow the righteous to be shaken.” You know, God does not always deliver us from life’s problems and adversities. However, He will always supply His grace and mercy to see us through.

So now, “Lord, forgive me for wanting wings to fly away. Instead, we should ask for grace and mercy to carry us through.” We know that whatever God allows us to go through (notice I said go through) He is doing that to prepare us
Some Monthly Reminders

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732—1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

XXVI.
PARTING WORDS

The holiday season, which now is in full swing, can be viewed in several ways. The most evident to each of us is the commercialization of Thanksgiving and Christmas. During this time of year, we are bombarded with all sorts of marketing ploys on a daily basis. In fact, the term ‘Black Friday’ has become one that we hear during the weeks leading up to Thanksgiving much more than we hear the term ‘thankful.’ Frankly, I would prefer another descriptive term for the biggest shopping day of the year. Black is not exactly a word that denotes happiness or good cheer. But that day is an important time for retail merchants and that’s a good thing. But there is much more to the holidays and that also is a very good thing. This time of year should lead us to reflect on that which is truly important and lasting.

The holiday season is a time for families to get together and have quality time. That is very important, especially when many families are separated during the year, living in different parts of the country. There is nothing like having all of the children and grandchildren home for the holidays. I can attest to that for certain.

Unfortunately, some families, for various and sundry reasons, find the holidays to be a difficult time for them. They are searching for relief because of their circumstances. Those situations give us the opportunity to be an encourager. We should find ways to help others during this time of the year. Just a word of encouragement to a person who is down and depressed could change that person’s life.

We should all be thankful for the many blessings that we have had this year. Sometimes we take our blessings for granted, and while that’s a natural thing, it’s not a good thing. To have a good family situation is truly a blessing for those who fall in that category. To have good friends is a definite blessing. Another blessing is good health and obviously that is very important. To have a job is a blessing and to enjoy working at that job is a double-blessing. You can count many more blessings of all sorts.

However, as mentioned above, there are many of us who are facing some sort of difficulty and we may be having a hard time finding that difficulty to be a blessing. But we must find a way to deal with any sort of problem or adversity that we face. Fortunately, there is a proven way and one that is readily available to us.

The most important thing for each of us during the holidays is to focus on the source of all of our blessings. We must be thankful that there is a God of mercy and grace who loves us and who is available to us regardless of our circumstances. God is our strength and we must recognize and acknowledge that reality. We must simply take advantage of all that He has promised. Remember, God always delivers on His promises and that’s really good news. But at the same time, we must be patient and not try to speed things up, which I am prone to do. God’s timing and ours may not always be the same.

But in any event, our real focus during the Advent Season must be on the birth of Jesus. Without any doubt, Jesus is the answer to whatever we face or whatever comes our way. That’s the good news during the holiday season for each of us.

I wish for each of you a blessed Christmas and a happy, healthy and prosperous New Year. May God bless you all!
No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

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.