I. CAPITOL OBSERVATIONS

NEARLY ONE-THIRD OF ALABAMIANS NEED HEALTH INSURANCE

A new report finds there are 47.3 million people in this country who don’t have health insurance—660,000 in Alabama—and that’s a national tragedy. But they are a part of an even bigger problem. It now appears—based on new U.S. census data—that there are 32 million people who have insurance, but are still spending a major share of their income on medical care. These folks make up the underinsured in our society. Combine those numbers with the uninsured numbers and it means that in 2011 nearly 80 million Americans either have no insurance or don’t have enough. The study was done by Commonwealth Fund, a nonprofit, and its findings shouldn’t come as big surprise.

In Alabama, there are about 580,000 who fall into this underinsured category, defined as spending 5 percent or more of their income on out-of-pocket expenses for health care while earning less than $47,100 a year for a family of four or spending 10 percent or more of their income if the family income was between $47,100 and $94,200. Add that to the 660,000 who are uninsured and you have 1.2 million, or nearly 30 percent of the people in Alabama, who are without insurance or do not have enough, according to the report. That’s slightly above the 29 percent figure for the nation. It was stated in the report:

Historically, states with high uninsured rates have had lower rates of job-based insurance and more restrictive Medicaid eligibility and often high rates of poverty, making it more difficult to expand coverage from state resources alone. To overcome these historic barriers, insurance reforms provide for federal subsidies to reduce premium costs and out-of-pocket medical costs for eligible low- and middle-income families who buy plans through the new state-based insurance marketplaces.

In my opinion, Alabama should participate in the federal offer to help expand Medicaid. By doing so, the underinsured population would be helped. Unfortunately, Alabama is one of the 24 states that has decided not to expand its Medicaid programs to 138 percent of poverty level. Regardless of how one feels about President Obama, it’s very difficult to justify not expanding Medicaid and providing preventive health care to those in Alabama who are currently depending on hospital emergency rooms for their health care needs.

Source: AL.com

II. A REPORT ON THE GULF COAST DISASTER

THE FOURTH YEAR ANNIVERSARY OF THE SPILL

It seems as if it was just yesterday that we woke up to the news on April 21, 2010, that a large oil rig off the coast of Louisiana had exploded and caught fire overnight. Then
day after day, we watched as the rig continued to burn, it listed, and ultimately sank to the bottom of the ocean. Eleven men died on that rig. Ultimately, the explosion and sinking of the Deepwater Horizon set off an environmental disaster that would hurt badly the entire Southeastern United States. Businesses, individuals and government entities lost billions of dollars. As the Multi-District Litigation (MDL) case formed and got off the ground, we learned firsthand that this disaster was not only preventable, but that BP and its contractors engaged in unprecedented conduct by completely ignoring all of the many warning signs that could have saved lives and billions in damages. All the red flags were ignored.

After negotiating for more than a year, with the experts and lawyers that money could buy, BP finally reached a landmark Economic Settlement. All independent observers believed this settlement would bring closure for businesses and individuals along the Gulf Coast. BP even bragged in the media about the Settlement in its early days, lauding its transparent process and objective frameworks that were easily applied to all businesses and individuals who participated in the Settlement Program. Since that time, BP has manufactured argument after argument in an attempt to renegotiate the Settlement and avoid paying what it had negotiated and agreed to. The giant oil company has attacked the Settlement in the media, spending millions in advertising to sway public opinion against the agreed upon settlement. At the same time, BP has sought to taint the Claims Administrator and turn the Program into a witch hunt for fraud as opposed to a system of finality for Gulf Coast individuals and businesses.

After taking all of this in, it strikes me, that John Minge, the BP President, who recently bragged that no company has ever done more to help a region recover from an industrial disaster than BP, is grossly misleading the public. He seems to forget that one company—his own company—stands alone with its contractors as being solely responsible for the worst environmental disaster in United States history. It has caused billions of dollars in losses to our Coastal states. The adverse effects of the oil spill are not over. Most all of the businesses and individuals are still waiting to be compensated, even though a massive settlement was reached. Mr. Minge has declared victory and proclaimed that BP is ending cleanup operations. Large amounts of oil are still washing ashore on Gulf state beaches. By now, we all know, based on BP’s previous exploits, that this company simply cannot be trusted.

In closing, let me say that I am extremely proud of the work lawyers in our firm have done helping hundreds of individuals and businesses to receive compensation in this unprecedented disaster. The work has been extremely difficult, demanding and expensive. Our lawyers have worked around the clock for more than four years making sure our clients are taken care of. All of our Beasley Allen lawyers and staff are to be commended for their work during this very challenging case. As we move into the fifth year of the spill, we must never forget the lives lost and the need to hold BP and its contractors totally accountable.

**The U.S. Chamber of Commerce Proves Once Again Where Its Priorities Lie**

The U.S. Chamber of Commerce has proven, once again, that it is more than willing to sacrifice small businesses for a select few larger and politically powerful corporations. Recently, The Chamber filed an amicus brief backing BP in the company’s efforts to renege on its settlement with Gulf Coast individuals and businesses. At the same time, thousands of smaller businesses, which are Chamber of Commerce members, and numerous local chamber affiliates, have pursued claims in the settlement based on the terms BP and its legion of lawyers and experts agreed to after negotiating those terms for nearly a year. To put it in plain terms, the Chamber is directly opposing the interests of more than 84,000 smaller businesses, for the benefit of one huge and powerful foreign corporation.

The Chamber contends that only businesses that actually can trace economic injury to the spill should be compensated. The Chamber completely ignores the fact that BP specifically negotiated the terms by which a business can trace economic injury to the spill. In fact, not only are the claims identified by BP and the U.S. Chamber “fairly traceable to the spill, but are supported by evidence that BP stipulated and admitted would be sufficient to objectively establish that the damages were ‘caused by’ the spill. The Chamber is backing the position of BP who has gone back on its word and trying to avoid living up to an agreed-upon settlement.

The Chamber often touts the importance of sticking to promises made in contracts. Why not here? Unfortunately, the Chamber is much more concerned with protecting a powerful British corporation over smaller, less influential, U.S. businesses. Maybe it’s time we all ask ourselves why the U.S. Chamber of Commerce fails to uphold the ideals of our local chambers, which are so vital to local businesses. If any of our readers have any connection to the Chamber of Commerce, perhaps they should ask the following questions of their leadership:

- Why did The Chamber refuse to disclose to the Court that some of its members and local chamber affiliates were actively pursuing claims in the Settlement Program?
- Why is the U.S. Chamber favoring a Foreign Oil Company over the interests of thousands of small businesses located in the United States?
- Does the Chamber believe that parties to an agreement should be held to its terms?
- Does the Chamber believe that a company should live up to its word?

If you believe that BP should keep its word, live up to its agreement and be accountable for its gross wrongdoing, let your local Chamber of Commerce officials know how you feel.

**BP Says The Active Gulf Coast Cleanup Is Over**

The fourth anniversary of the blowout on the Deepwater Horizon oil rig, which triggered an oil spill that dumped billions of barrels of oil into the Gulf of Mexico, was on April 20. In an announcement just prior to the anniversary date, the oil giant claimed active cleanup of the Gulf Coast was over. But, the U.S. Coast Guard strongly disagrees and it announced—in response to BP’s claim—that the Deepwater Horizon Response is far from complete. Capt. Thomas Sparks, the Federal On-Scene Coordinator for the Deepwater Horizon Response, had this to say:

*Our response posture has evolved to target re-oiling events on coastline segments that were previously cleaned. But let me be absolutely clear: This response is not over—not by a long shot. The transition to the Middle Response process does not end cleanup operations, and we continue to hold the responsible party accountable for Deepwater Horizon cleanup costs.*

The BP public relations machine is in accelerated attack mode and is attempting to make the American people forget how truly bad BP’s conduct really was. The news media has an obligation to expose BP’s conduct and to let the American people know the truth.

Source: The Washington Post
United States Food and Drug Administration has received Medicaid reimbursement for drugs to combat Medicaid fraud in lawsuits against major pharmaceutical companies. These lawsuits allege that drug manufacturers have submitted false approval information to the FDA and other regulatory agencies, leading to the sale of unapproved drugs. Not only does this cause Medicaid agencies to pay for unapproved drugs, but it also places patients at a significant risk of being exposed to unsafe drugs.

We will continue to update our readers as the litigation progresses.

IV. PURELY POLITICAL NEWS & VIEWS

IS THERE ROOM IN THE TEA PARTY FOR THE GOP ESTABLISHMENT?

The Tea Party, for all practical purposes, is the new GOP and that leaves a burning question unanswered. That question is—is there room in the Tea Party for the Republican Party establishment? Some political observers say no. In fact some are asking the real Republican Establishment to please stand up. In the four years since the U.S. Supreme Court struck down fundraising regulations that effectively gave the Democratic and Republican parties a monopoly on large-scale political activity, a collection of Tea Party-affiliated organizations has arisen in Washington. They now compete with the GOP for campaign contributors, money and influence—and about what legislation to push and which candidates to nominate or defeat. The old-line GOP operatives have been constantly on the defensive.

The groups, including the “Club for Growth,” “FreedomWorks” and the “Senate Conservatives Fund,” have moved aggressively to kill legislation they oppose and to kick out incumbent Republicans they deem “insufficiently conservative.” Like the national Republican Party, which they deride as the “GOP Establishment,” the Tea Party has become an establishment of its own, a confederation of well-financed Tea Party groups that support a web of sister organizations and employ a legion of political professionals—who live and work inside the Beltway. The infamous Koch Brothers are sort of like the Wizard of Oz, calling the shots for the Tea Party behind the scenes. The Tea Party is actually opposing the entrenched interests of a GOP elite mainly based in Washington.

The Tea Party’s exercise of its power on Capitol Hill has taken the form of numerous “key vote” alerts urging House and Senate Republicans to oppose legislation promoted by their caucus’ leadership. In the House, where Republicans hold the majority, the key votes have made it difficult for GOP leaders to pass legislation that isn’t conservative enough for the Tea Party. On the campaign trail, the competition has mainly threatened Senate Republicans.

Led by the Senate Conservatives Fund, the groups are mounting challenges in more than a half dozen Republican primaries, three of which feature senior GOP incumbents: Senate Minority Leader Mitch McConnell in Kentucky, Sen. Thad Cochran in Mississippi and Sen. Pat Roberts in Kansas. It will be most interesting to see how the election—both in the GOP primaries and in the General Election—works out. Frankly, I am convinced that the vast majority of the American people—one they see what the Tea Party is really all about—will vote against Tea Party candidates.

V. COURT WATCH

A FEDERAL JUDGE MAKES STRONG STATEMENT ON TOYOTA’S CONDUCT

When the federal judge in New York took Toyota’s guilty plea on criminal charges, he made some most interesting comments relating to the automaker’s conduct. What U.S. District Judge William T. Pauley had to say had to make some individuals at Toyota pretty uncomfortable. The following was taken from Toyota’s appearance before Judge Pauley in a New York Federal Court on March 20:

THE COURT: And do you understand that under the terms of this deferred prosecution agreement, that Toyota admits that it has misled U.S. consumers by concealing and making deceptive statements about the safety related issues in vehicles, each of which caused a type of unintended acceleration?

MR. REYNOLDS: Yes, I do so understand.

And then:

THE COURT: All right. I must say that having reviewed the parties’ submissions, the statement of facts to which Toyota has agreed are true and accurate, really present a reprehensible picture of corporate misconduct. This,
unfortunately, is a case that demonstrates that corporate fraud can kill, and corporations only act through their agents. So certainly from the Court’s perspective, I sincerely hope that this is not the end but, rather, a beginning to seek to hold those individuals who are responsible for making these decisions accountable, but that will have to abide that event at some later date.

Having been involved personally in the ongoing Toyota litigation, I was glad to see Judge Pauley recognize how truly bad the decision-makers at Toyota had been. It reminded me of an internal email we obtained in discovery where a subordinate involved in the cover-up of a known defect told a top official “if we don't stop lying we are going to jail.” It appears Judge Pauley recognizes that top officials in the company were responsible for Toyota’s criminal conduct.

**JUSTICES LEAVE FCA PLEADING DISPUTE TO CIRCUITS**

The U.S. Supreme Court’s recent refusal to hear a dispute over how precisely whistleblowers must plead their False Claims Act cases gives circuit judges the opportunity to resolve a split in the circuits. By declining to accept the Nathan v. Takeda case, the high court bowed to the wishes of U.S. Solicitor General Donald B. Verrilli, Jr. After being invited to express the administration’s views, the Solicitor General asserted that circuits are getting close to a consensus on what it means to plead an FCA suit with “particularity.”

This was the second time in recent years that the justices agreed with the Solicitor General in a FCA case involving Rule 9(b), an important procedural section. The high court is taking the right approach in letting the circuits settle their differences if that can be accomplished.

At issue is how much detail whistleblowers must provide in order to get to discovery—a crucial moment in FCA litigation. Debate centers on whether it’s enough to describe a scheme that strongly suggests false claims were submitted, as opposed to identifying actual false claims, and if so, how strong the circumstantial evidence must be.

A key dispute in the Takeda case was whether the administration distorted reality when it claimed that circuits have been coalescing on Rule 9(b) interpretation. For example, the Solicitor General noted that the Eighth Circuit recently allowed an FCA complaint to proceed despite an absence of specific false claims, which loosened its historical stance and brought it more in line with some other circuits. The solicitor general wrote:

> Disagreement among the circuits therefore may be capable of resolution without this court’s intervention.

Hopefully, the Circuit Courts of Appeal will collectively recognize that the federal trial judges should be able to exercise discretion when deciding issues under rule 9(b) and then give them the necessary latitude to do their job. I believe that will likely happen. Source: Law360.com

**COURT UPHOLDS $3 MILLION VERDICT AGAINST CHEVROLET DEALER**

A New Jersey appellate panel has upheld a $5 million verdict in a lawsuit filed against a Chevrolet dealer. The suit was brought by a family who suffered serious injuries in a rollover accident after the vehicle’s rear tire blew out. The Appeals Court said in its ruling that the trial judge had not abused his discretion. In a per curiam opinion, the New Jersey Appellate Division rejected Flemington Buick Chevrolet Pontiac GMC’s arguments that it was deprived of a fair trial and that the judge’s reduced $3 million punitive damages award was excessive. The appellate panel found that the trial judge had rightfully denied the car dealer’s request for a mistrial and did not err in imposing the $3 million award.

Carla Ceasar and her parents, Edna Allen and the late Roy E. Allen, sued Atlantic Tire & Service and Flemington after the plaintiffs sustained serious injuries when the 2004 Chevrolet Trailblazer that Ms. Ceasar was driving in April 2009 rolled over multiple times following a blowout of the rear right tire. Atlantic settled with the plaintiffs, and the claims against Flemington went to trial, ultimately resulting in a $5.5 million judgment.

The trial court found Flemington negligent and that its negligence was the proximate cause of the plaintiffs’ damages. Ms. Ceasar was awarded $1.1 million; Erna Allen was awarded $450,000, plus an additional $100,000 on her loss-of-consortium claim; and $350,000 was awarded to Roy Allen’s estate. After Judge Dumont asked the jury to consider whether the evidence demonstrated that Flemington acted with reckless disregard, the jury found that it did and awarded $5.5 million in punitive damages. The trial judge reduced that award to $3 million in post-trial proceedings.

According to the opinion, Flemington had failed to detect the bald spot that caused the tire blowout during three inspections of the vehicle and thus failed to recommend a tire replacement that would have prevented the accident. The plaintiffs are represented by Kevin E. Barber and Christopher W. Hager of Niedweske Barber Hager LLC, located in St. Morristown, N.J. These lawyers did a very good job in this case.

Source: Law360.com

**HIGH COURT WON'T HEAR APPEAL BY EXXON**

The U.S. Supreme Court has declined to hear Exxon Mobil Corp.’s appeal of a $105 million jury verdict for polluting New York City’s groundwater with the gasoline additive methyl tertiary-butyl ether. This decision leaves in place a Second Circuit decision upholding the verdict. The high court denied a certiorari petition by Exxon attempting to appeal the Second Circuit’s January decision. The appeals court had upheld the penalty handed down in 2009 by a federal jury that concluded Exxon had failed to warn people about the dangers of the chemical commonly known as MTBE. The oil giant had argued that its use of the chemical was in response to a federal air pollution mandate.

New York City sued Exxon in 2003 over MTBE-treated gasoline leakage into Queens water wells known as the Station Six Wells, a system that was not operative but which the city said it planned to use in the future. Following a lengthy trial in October 2009, a jury in New York federal court found Exxon liable. The Second Circuit kept the verdict intact, concluding that the Clean Air Act did not force Exxon to use MTBE. The appeals court noted that the jury also found that Exxon failed to “exercise ordinary care” in preventing and cleaning up gasoline spills, along with other improper conduct. The city said it intends to use the wells as a drinking water source in the future and that MTBE will be in the wells when they begin operating.

Source: Law360.com

**IMPORTANT DECISION IN FAULTY WORK COVERAGE LAWSUIT**

In a recent opinion the Alabama Supreme Court ruled that Owners Insurance Co. must cover a lawsuit blaming a general contractor for water leaks at a newly built $1.2 million home. An earlier ruling by the court had said that there had been no “occurrence,” a requirement for coverage, in the construction defect dispute. But the high court in its recent ruling upheld the trial court’s ruling
because Owners bought $4 million in super-
court also held that coverage was available
the location of the property damage. The
offers coverage depending on the nature or
"occurrence" does not specify that it only
time, the court said the policy's definition of
faulty workmanship itself. But at the same
cover the cost of repairing or replacing
cessional general liability policies are not intended
buildings, or in a case where the
exposure to such a condition arising
project that, if damaged as a result of
would be no portion of the
project that, if damaged as a result of
faulty workmanship during a con-
struction or repair project damages property
that is not part of the project itself.
In the revised opinion, the Supreme Court
criticized Owners Insurance' interpretation
for "ask[ing] the term 'occurrence' to do too
much." The opinion reads:

"To read into the term "occurrence" the
limitations urged by Owners would
mean that, in a case like this one, where the insured contractor is
engaged in constructing an entirely
new building, or in a case where the
insured contractor is completely reno-
verting a building, coverage for acci-
dents resulting from some generally
harmful condition would be illusory.
There would be no portion of the
project that, if damaged as a result of
exposure to such a condition arising
out of faulty workmanship of the
insured, be covered under the
policy.

According to the court's ruling, com-
cerual general liability policies are not intended
cover the cost of repairing or replacing
faulty workmanship itself. But at the same
time, the court said the policy's definition of
"occurrence" does not specify that it only
offers coverage depending on the nature or
the location of the property damage. The
court also held that coverage was available
because Owners bought $4 million in sup-
plemental insurance coverage for its com-
pleted operations. The opinion reads:

Thus, because there is no dispute that
JCH's "operations" on the johnsons'
house were completed at the time of
the alleged occurrences, that coverage
applies to the johnsons' claims and,
pursuant to the terms of the Owners
Insurance policy.

The court ruled the insurer must indem-
nify JCH for the judgment entered against it.
Greg Brockwell of Leitman Siegal Payne
Campbell and James Hill of Weathington
Moore & Weisskopf represented the home-
owners in this very important case. Greg had
to say about the decision:

"It is not only a relief to them, but an
important victory for property
owners, policyholders, and contrac-
tors across Alabama. We are very
thankful to the Alabama General Contrac-
tors, Alabama Homebuilders, and Alabama ABC for their
amicus support.

This is an extremely important decision. The lawyers for the Plaintiffs in this case
didn't give up, kept fighting for their clients and ultimately obtained a very good result.

Source: Law360.com

VI. THE NATIONAL SCENE

The Middle Class in America Must Be Saved

I have written in previous issues on the
decline of the middle class in America and
about how it will eventually cause our
Nation to become a much less viable world
power. I am convinced that the shabby treat-
ment of working men and women, which
include the "working poor," by many politi-
cal office holders has caused our Nation to
suffer economically and socially. We have
seen an alarming widening of the gap
between the rich and the poor in this
country. That has caused a sharp increase in
what is referred to as the "underclass." To
put it bluntly, I am convinced that if our
nation is going to maintain its position as a
world power, we must wake up and take the
steps necessary to save the middle class in
this country.

This growing underclass includes not just
those living below the poverty level but also
those in retirement, the unemployed and
underemployed (and there is a difference),
and many at the bottom rung of the middle
class ladder in our society. Those in posi-
tions of authority in government, and also
those in the private sector had best wake up
to this most serious problem and start
seeking solutions to solve it. Surely they
must know that consumer spending is the
lifeblood of our economic system. I am told
that two-thirds of our Gross Domestic
Product (GDP) is consumer spending and I
suspect that is correct.

A recent paper, "The Economic Decline of the
Middle Class and the Widening Gap
between the Rich and the Poor: A Political,
Economic and Moral Dilemma—What It
Means for America," by Morton A.
Harris of Columbus, Ga., does an excellent
job of discussing and explaining the eco-
nomic and social problems facing the U.S.
The problem is fairly easy to spot, but the
available solutions may be somewhat painful
for some to swallow. The most obvious solu-
tion—in simplistic terms—is that we must
reverse the ill-advised and unwelcome
growth of the underclass in our country.

Without any doubt, the middle class in
America must be saved, preserved and
strengthened. We can start this reversal by
stopping the shipping our nation's manufac-
turing jobs out to foreign countries, raising
the minimum wage, and then cutting out the
obscene tax shelters that allow the super
rich and many huge corporations to avoid
paying federal taxes. Hopefully, the Ameri-
can people will wake up, stop voting against
their own interest by for candidates who are
owned by the rich and powerful, and start
actively supporting candidates who under-
stand that the middle class must be saved.

VII. THE CORPORATE WORLD

The Myth Of Too-Much Regulation

The giants in Corporate America have
done a masterful job of selling to the news
media and to the public the myth of too
much government regulation. It’s been that
government overregulates businesses in the
U.S. Based on our law firm’s involvement in
litigation, and my personal observations, I
can tell you that nothing can be further from
the truth. In fact, a prime example of inade-
quate regulation is the fact that one in five
new drugs—that had been approved by the
FDA—had to be removed from the market or
receive a black box warning after FDA
approval. None of the industries listed are
over-regulated: the oil industry, the automo-
tile industry, the drug industry, the medical
device industry, the chemical industry, the
supplement industry, and the tobacco
industry.

I can say—without reservation—that none
of these industries receive even adequate
regulation. Recent events such as the BP oil
spill in the Gulf of Mexico, the Vioxx
debacle, the cover-ups of known safety defects by Toyota and General Motors all drive home that point extremely well. The public should realize by now that the federal government did a very poor job of regulation in each of those instances and the companies involved took full advantage of it. While the giants of Corporate America have profited greatly as a result of poor regulation, the public has suffered greatly from a safety perspective. That must change. In the meanwhile, the court system—which has been under constant attack by the same groups that have successfully sold the myth of too much regulation—must remain open and independent. The availability of the civil justice system is an absolute necessity and quite often the only thing that gives ordinary citizens a chance when disputes with Corporate America arise.

$772 Million Penalty for Bank of America’s Abusive Credit Card Practices

Bank of America has been ordered to pay about $772 million in refunds to customers and fines to federal regulators to settle claims that the bank used deceptive marketing and billing practices involving credit card products. Richard Cordray, director of the Consumer Financial Protection Bureau (CFPB), said that Bank of America had deceived consumers.

The CFPB charged Bank of America with “illegally charging” its customers for credit monitoring and credit reporting services that were not received. As part of a consent order agreed to by Bank of America with the agency, announced on April 9, the bank was ordered to give refunds to more than a million customers who purchased these add-on products for their credit cards. The bank must also pay a $20 million fine to the Consumer Financial Protection Bureau and $25 million to the Office of the Comptroller of the Currency.

Some of the misleading practices, according to the regulators, included the bank’s telemarketers telling customers that the first 30 days of service were free when, in fact, customers were charged. The bank also misled customers to believe that they were merely agreeing to receive additional information about the add-on services. But the bank was actually enrolling these consumers in the products during these calls, the consumer protection agency said.

The products allowed customers to request that Bank of America cancel some amount of credit card debt in case they lost their job or became disabled. Richard Cordray, the director of the consumer agency, had this to say:

Bank of America both deceived consumers and unfairly billed consumers for services not performed. We will not tolerate such practices and will continue to be vigilant in our pursuit of companies who wrong consumers in this market.

The CFPB also cited Bank of America for billing consumers for credit protection services that they never fully received. In some cases, the agency said these practices caused customers to exceed their monthly credit limits, resulting in additional costs. According to the agency, Bank of America engaged in these billing practices from 2000 to 2011, affecting 1.9 million customers.

The bank said in a statement it had already refunded money to a “majority” of the affected customers. This action against Bank of America is the latest by the CFPB, which has gone after a number of banks for selling credit card products to consumers that they never wanted and could not use. In fact, the agency’s first enforcement action against the financial industry centered on this very issue. It came when the federal regulator demanded in 2012 that Capital One reimburse $150 million to more than two million consumers. American Express entered into a similar settlement with the agency last year. Its rival Discover brokered a settlement with the regulator in 2012.

Most recently, JPMorgan Chase, the nation’s largest bank, in a settlement with the Consumer Financial Protection Bureau and the comptroller’s office, agreed to make refunds to 2.1 million customers. These regulatory actions aim at one of lenders’ most questionable profit generators. The products, promoted as a way of shielding borrowers from identify theft or other hardships, including unemployment or disability, have also come under fire from state attorneys general. For example, in 2012 the Hawaii attorney general accused some of the nation’s biggest banks of improperly selling similar add-on products.

Part of the problem with the add-ons, according to consumer advocates, is that they are both expensive and ineffective. The add-on products can lure consumers still trying to dig out from the depths of the recession, because the products promise to protect them from unforeseen economic hardship. The regulatory action comes as the CFPB uses its enforcement authority. The Dodd-Frank regulatory overhaul, passed after the 2008 financial crisis, gave the agency this authority. It’s good to see the law being used to protect and help consumers.

Source: New York Times

VIII. Whistleblower Litigation

Justice Department Recovers $3.8 Billion From False Claims Act Cases in Fiscal Year 2013

The Department of Justice (DOJ) recently announced that it secured $3.8 billion in settlements and judgments from civil cases involving fraud against the government in the last fiscal year alone. This comes from whistleblower lawsuits. It’s the second largest annual recovery in the history of whistleblower lawsuits. This amount brings the government’s total recoveries under the False Claims Act since January 2009 to $17 billion, which is almost half the total recoveries since the Act was amended 27 years ago to allow for qui tam suits. Stuart F. Delery, the Assistant Attorney General for the Civil Division, observed:

The $3.8 billion in federal False Claims Act recoveries in fiscal year 2013, plus another $443 million in recoveries for state Medicaid programs, restores scarce taxpayer dollars to federal and state governments. The government’s success in these cases is also a strong deterrent to others who would misuse public funds, which means government programs designed to keep us safer, healthier and economically more prosperous can do so without the corrosive effects of fraud and false claims.

As we have mentioned in prior issues, the False Claims Act is the government’s most powerful tool in fighting fraud, waste and other wrongdoing. The Act was enacted back in the 19th century and gives the government the capability of seeking liability against those entities that commit fraud against the government. Most commonly, fraud occurs under government contracts, including national security and defense contracts, as well as under government programs such as Medicare, Medicaid, veterans benefits, research grants and other programs that are funded by the government. Out of the $3.8 billion recovered in 2013, Assistant Attorney General Delery stated that, “As in previous years, the largest recoveries related to health care fraud, which reached $2.6 billion.”

Most false claims actions are filed under the Act’s whistleblower, or qui tam, provisions, which allow private citizens who are aware of fraud to file lawsuits alleging false
claims on behalf of the government. If the government prevails in the action, the whistleblower, also known as a relator, may receive up to 30 percent of the recovery. Because the whistleblower may seek a share of the government’s recovery, the qui tam provision of the False Claims Act really incentivizes our citizens to come forward and uncover fraud, which has led to more investigations and greater recoveries.

The number of qui tam suits filed in fiscal year 2013 soared to 752, which is 100 more than the record set the previous fiscal year. The United States Department of Justice reported that recoveries in qui tam cases during fiscal year 2013 totaled $2.9 billion, with whistleblowers recovering $345 million. According to the department it’s been another banner year for civil fraud recoveries. But it’s also been a great year for the taxpayer and for the millions of Americans, state agencies and organizations that benefit from government programs and contracts.

This type of fraud amounts to billions of dollars each year in lost taxpayer money. Recovering this money on behalf of the government not only helps the government, but it helps all the taxpayers as well—because in the end, it’s the taxpayers who are hurt as a result of fraud on the government. If you know of any potential fraud or waste in government spending, then you may have a False Claims Act case. Lawyers at Beasley Allen are committed to fighting this type of fraud on the government and are willing to speak with anyone who may have this type of information. If you need additional information on this type litigation, contact Ali Hawthorne at 800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.

**Source:** The United States Department of Justice, Office of Public Affairs

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**Five False Claim Laws With Rewards To Whistleblowers**

Whistleblower laws allow employees to become the eyes and ears inside companies who uncover evidence of fraud and other wrongdoing. As we pointed out above, in some cases, whistleblower laws allow the person who reports the fraud—called the relator—to recover a portion of any money recovered in a resulting judgment or settlement, up to 30 percent. The term “whistleblower” was developed because the person is drawing attention to fraud, or “blowing the whistle” on foul play. A whistleblower must have first-hand knowledge of the fraud or wrongdoing in order to file a claim. Most whistleblower laws also prohibit retaliation by employers against employees who report possible violations or who assist in investigations.

The five whistleblower laws that provide for awards to the whistleblower are set out and discussed below:

- **Federal False Claims Act**—(31 U.S.C. 3729 et seq.) The federal False Claims Act (FCA) was enacted by Congress in 1863 to hold individuals and companies responsible when they defraud governmental programs. The qui tam provision of the FCA allows citizens to sue on behalf of the government and be paid a percentage of the recovery. Violations of the FCA include any instances where individuals or businesses attempt to solicit a fraudulent claim for payment. This may include payments for good or services. The U.S. Justice Department recently reported that 2013 was the fourth consecutive year that whistleblower cases helped the government recover more than $3 billion in funds taken from government agencies and programs through fraudulent practices.

- **Individual State and Municipality False Claims Acts**—Many states and municipalities also have False Claims Acts that are used to help identify and prevent fraud against state government programs. The most common type of fraud covered by a state FCA involves health care fraud, in particular Medicare fraud. Some state FCAs also cover things like pension, construction, tax, utility, energy and escheatment fraud. For a list of states with False Claims Acts, visit the Taxpayers Against Fraud (TAF) Education Fund website. [http://www.taf.org/states-false-claims-acts]

- **Securities and Exchange Commission (SEC) whistleblower program**—(15 U.S.C. 78u-6) The SEC Whistleblower Law covers cases of fraud within the financial services industry. It is a federal statute officially known as the Dodd-Frank Wall Street Reform and Consumer Protection Act. It was signed into law by President Obama in July 2010. The SEC Whistleblower Act gives the SEC powers of enforcement including a “whistleblower bounty program.” Whistleblowers may receive 10-30 percent of monetary sanctions in excess of $1 million resulting from their complaint. Sean McKessy, the SEC’s whistleblower chief, told the Wall Street Journal that he plans to aggressively pursue employers that retaliate against whistleblowers.

- **Commodity Futures Trading Commission (CFTC) whistleblower program**—(7 U.S.C. 26) This whistleblower law was created by section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Similar to the SEC Whistleblower Law, this law provides rewards to whistleblowers who uncover fraud and wrongdoing in the financial services industry, specifically, in the commodities trading markets. Again, in order to recover a reward, the whistleblower’s information must lead to a recovery in excess of $1 million. The whistleblower will receive 10-30 percent of the recovery.

- **IRS whistleblower program**—(26 U.S.C. 7263) The federal False Claims Act and most state False Claims Acts specifically exclude tax fraud as an area they investigate. However, there is a separate IRS Whistleblower Law that provides payment to people who report tax fraud. The IRS whistleblower law provides an award of 15-30 percent of the amount recovered to the whistleblower who reports the tax fraud. In order to file a claim under the IRS whistleblower law, the amount of the fraud must exceed $2 million. This may include cases involving an individual or business. There are some particular criteria these cases must meet, and some flexibility in filing, although with a lower reward with a maximum of 15 percent of the recovery. Ask your attorney for advice if you feel you have a case involving tax fraud to determine if the case qualifies under the IRS whistleblower program.

Our firm has several lawyers who handle whistleblower lawsuits. We have devoted a significant amount of resources to this part of our practice. Each of these statutes has its own specific requirements. If a whistleblower does not have adequate counsel who is familiar with these laws, then the whistleblower’s efforts could be all for naught. In order to properly navigate the waters of these statutes, a whistleblower should seek experienced counsel who understands the whistleblower laws and who can ensure their potential case is properly handled.

For more information about the different types of whistleblower laws, or to talk about a potential claim, contact Andrew Brashier, a lawyer in our firm’s Consumer Fraud Section, who handles whistleblower claims, at Andrew.Brashier@beasleyallen.com or call him at 334-269-2343.

**Sources:** Wall Street Journal, U.S. Justice Department, TAF Education Fund

**Recent Settlements In FCA Cases**

There were a number of recent settlements around the country in cases brought by whistleblowers. Each of these cases...
recovered money that will benefit both government and the taxpayers who support government. The following are a small sampling of these settlements.

**Medicare False Claims Lawsuit Settled For $150 Million**

Amedisys Inc., a Baton Rouge, La.-based home health company operating in 37 states, has agreed to pay $150 million in a settlement announced last month by Joyce Vance, the U.S. Attorney for the Northern District of Alabama, and Department of Justice officials. A nurse blew the whistle on fraud at the national home health care company where she once worked.

The company made false claims for Medicare and other government health care insurance programs. U.S. Attorney Vance stated in a press release:

*Amedisys made false Medicare claims, depriving the American taxpayer of millions of dollars and unlawfully enriching Amedisys. The vigorous enforcement work by assistant U.S. attorneys in my office, along with their colleagues in North Georgia, Eastern Pennsylvania, Eastern Kentucky and the Civil Division of the Justice Department, has secured the return of $150 million to the taxpayers and stands as a warning to future wrongdoers that we will aggressively pursue them.*

In 2010, April Brown, a nurse in Monroeville, Ala., filed a federal lawsuit in Birmingham against Amedisys. The lawsuit alleged that the company violated the False Claims Act (FCA) by submitting false home health care billings to Medicare for home health services. Ms. Brown was a home health nurse and was seeing patients in the Monroeville area. Amedisys was asking her to bill for services she was not actually providing or that were not necessary. Nurses had to check off boxes on computerized forms during patient visits. The way the electronic forms were set up the patients were always coded for the highest level of service and the forms did not represent the patients’ true condition. They were making the patients look sicker than they really were. Ms. Brown also had patients who were not really home-bound.

Ms. Brown, who was fired after questioning the practice, was the first to file a *qui tam* lawsuit. Her suit and six others filed around the nation against Amedisys alleging improper billing by the company between 2008 and 2010 were consolidated in a federal court in Pennsylvania. The lawsuits were sealed from public view until last month when the settlement was announced.

The whistleblowers who filed lawsuits—primarily former Amedisys employees—will collectively split more than $26 million as fees. Ms. Brown will get $15 million of that amount. The suits by the former employees alleged the billing violations were the alleged result of management pressure on nurses and therapists to provide care based on the financial benefits to Amedisys, rather than the needs of patients.

The settlement also resolves certain allegations that Amedisys maintained improper financial relationships with referring physicians. The Anti-Kickback Statute and the Stark Statute restrict the financial relationships that home health care providers may have with doctors who refer patients to them. The United States alleged that Amedisys’ financial relationship with a private oncology practice in Georgia—whereby Amedisys employees provided patient care coordination services to the oncology practice at below-market prices—violated statutory requirements.

Jim Barger, who is with Frohsin & Barger, a Birmingham firm that specializes in whistleblower litigation, represented Ms. Brown in the most recent case. He and his firm, along with Joyce Vance and her staff, did a tremendous job in this case.

**United States Settles False Claims Act Claims Against Importer**

Bizlink Technology, Inc., an importer of computer cable assemblies located in Fremont, Calif., has paid $1.2 million to settle a civil False Claims Act (FCA) lawsuit. It was alleged that BTI violated the FCA by underpaying customs duties owed on goods imported from China. United States Attorney Melinda Haag and Brian J. Humphrey, U.S. Customs and Border Protection Director of Field Operations, San Francisco, each of whom had been working on the case, announced the settlement.

The United States claimed that BTI had underpaid customs duties on goods that BTI imported into the United States from Bizlink International Electronics Co., Ltd., a factory in Shenzhen, China. It was alleged that BTI obtained two sets of invoices for the period 2006 through 2008 for each shipment from the Chinese factory. It was contended that these invoices, one falsely stating a lower cost, showed an intent to deceive. The false invoices were used to calculate the customs duties that BTI paid on the imported goods, which resulted in substantial underpayments.

The settlement resolves a whistleblower lawsuit filed in the United States District Court for the Northern District of California. A manager who formerly worked at BTI filed the lawsuit pursuant to the qui tam provisions of the False Claims Act. The relator in this case will receive $252,000 as his share of the government’s recovery from BTI.

*Source: Justice.gov*

**Drugmaker Settles Qui Tam Suit For $7.3 Million**

The maker of the intravenous antifungal medication Mycamine has settled a whistleblower action against the company with the U.S. government and several states for $7.3 million. The settlement agreement between defendant Astellas Pharma US Inc. and relator Frank Smith, the federal government and Medicaid-participating states was unsealed last month. The complaint was filed by Smith, the whistleblower, in 2010 in the U.S. District Court for the Eastern District of Pennsylvania, alleging violations of the False Claims Act against Astellas.

According to the settlement agreement, Astellas is to pay about $4.2 million to the government, $3.1 million to Medicaid-participating states, and $708,852 to Smith, a sales representative at Astellas who initiated the suit. The settlement includes an interest rate of 1.25 percent, applied from Dec. 18, 2013, until the day payment is rendered. The Plaintiffs alleged that Astellas sold Mycamine—a drug used to treat fungal infections of the esophagus in adults—for non-approved use for children, according to the agreement.

The U.S. government claimed that Astellas “knowingly marketed and promoted the sale and use of Mycamine for pediatric-
According to the complaint, Astellas “aggressively marketed” Mycamine to children’s hospitals for pediatric and adolescent use and that the drug presented an “increased risk of harm” to children. It was alleged:

Particular pressure was placed on salespersons with children’s hospitals in their sales territories (including duPont Hospital for Children in Wilmington, Del., the Children’s Hospital of Philadelphia, and St. Christopher’s Hospital for Children) to market Mycamine as not only safe for children but superior to its counterpart Candinex, even though Mycamine has no pediatric indication.

According to Assistant Attorney General Stuart F. Delery of the Department of Justice (DOJ) Civil Division and U.S Attorney Z. David Memeger of the Eastern District of Pennsylvania, the settlement showed the DOJ’s willingness to pursue companies that attempt to flout the FDA’s drug approval process. Memeger said in a statement:

It’s a message that should resonate with all drug companies: There are consequences for violating the False Claims Act and putting profit ahead of government safeguards.

The suit was filed under seal in March 2010 by a then-sales representative for Astellas, Frank Smith, and a government free of corruption.

IX.
CAMPAIGN FINANCE REFORM

The U.S. Supreme Court Torpedoes Campaign Finance Reform

For those who believe that “money” really is “the root of all evil,” they are going to get an opportunity to test that theory during the months between now and November. We will see huge amounts of money being put into political races during that span of time. The floodgates have been opened by the U.S. Supreme Court and the money will start to pour in. On April 3, the high court removed another limit on election spending when the justices voted 5-4 to remove the cap on the total amount any individual can contribute to federal campaigns in a two-year election cycle. This follows the 2010 decision in Citizens United that eliminated limits on independent campaign spending by huge corporations. If I told you that decision granted constitutional rights to corporations—lifeless structures—run by humans, would you believe it?

Essentially, this new ruling in McCutcheon v. Federal Election Commission means that a single donor can make huge financial donations in “limited contributions” to political parties, individual candidates, and political action committees (PACs). Those in favor of the ruling say the change upholds donors’ First Amendment right to Free Speech by allowing them to support as many candidates as they feel share their views, literally putting their money where their mouth is. But the voices of ordinary citizens in elections have been pretty well neutralized if not eliminated.

Supporters point out the ruling affects aggregate limits and not base limits on contributions from individuals to candidates. Base limits currently hold individual contributions to $2,600 per candidate, per election; $32,400 to political party committees per year; and $5,000 per PAC per year.

But the ruling did say that overall limits of $48,600 by individuals every two years for contributions to all federal candidates violated the First Amendment. The ruling also says separate aggregate limits on contributions to political party committees, currently capped at $74,600, also violate the First Amendment.

Those in opposition to the decision, which include this writer, say this decision essentially dismantles campaign finance laws and undermines political equality. Political power is put in the hands of the select few people with all of the money. I totally agree with that view. We should be doing everything possible to reduce wild and uncontrolled spending in political races. Instead we are turning the keys to government over to the super rich and powerful. In an excellent and well-reasoned dissent, Justice Stephen Breyer wrote:

It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate’s campaign...Where enough money calls the tune, the general public will not be heard.

Public Citizen, the Consumer Advocacy Group, has fought hard for reasonable campaign finance reform in Congress. Robert Weissman, president of Public Citizen, had harsh words for the ruling. He predicts a dire outcome in the political arena. In a statement, Weissman said:

This is truly a decision establishing plutocrat rights. The Supreme Court today boldly that the purported right of a few hundred superrich individuals to spend outrageously large sums on campaign contributions outweighs the national interest in political equality and a government free of corruption.

The case was brought by an Alabama businessman, Shaun McCutcheon, who challenged the aggregate contribution limits. McCutcheon, who had the strong backing of the Republican National Committee, argued the limits violated his First Amendment rights and served no anti-corruption role.

The majority opinion was penned by Chief Justice John Roberts and joined by justices Anthony Kennedy, Samuel Alito and Antonin Scalia. The dissent was written by Justice Stephen Breyer, joined by Justices Elena Kagan, Sonia Sotomayor and Ruth Bader Ginsburg. The ruling comes at the start of the election cycle, which is perfect timing for those with deep pockets and selective political needs in Washington. Should we just go ahead and hang out the “For Sale” signs on the lawns of the congressional buildings, the national Capitol building, and the White House? What do you think?

Sources: New York Times, Huffington Post, ABC News
X. CONGRESSIONAL UPDATE

PROPOSED LEGISLATION WOULD HELP NHTSA DO ITS JOB

House lawmakers introduced a measure last month that, if passed, would require automakers to make more key disclosures to the National Highway Traffic Safety Administration and it would also increase the agency’s funding. This bill is the result of NHTSA being underfunded and short staffing for years. Resource shortages are to blame for its failure to catch defects that led to the General Motors recall of 2.6 million cars.

Rep. Henry Waxman, D-Calif., who is on the House Energy and Commerce Committee, introduced H.R. 4364, the Motor Vehicle Safety Act of 2014, which will require automakers to provide more information on fatal events related to their vehicles.

The legislation seeks appropriations for NHTSA’s vehicle safety programs, including authorizations for $200 million in 2015, $240 million in 2016, and $280 million in 2017. The bill would also raise NHTSA’s maximum civil penalties from $35 million to $200 million. Rep. Waxman hit the nail on the head when he said in a statement:

“In the course of our committee’s investigation on the GM recall, we have found that GM knew about these problems for over a decade yet did nothing. I hope the committee takes up this bill quickly. On behalf of the victims and families who were hurt by this tragedy, we must improve the law to prevent these types of tragedies from occurring again.”

The legislation also seeks to increase transparency by requiring NHTSA to provide public notice of all its inspections and investigations, according to the bill. The bill would also restrict certain vehicle safety employees from jumping to the private sector to work for the auto industry, it said.

The House bill follows a similar measure in the Senate, introduced in March, to require auto manufacturers to publicly disclose information about fatal accidents. The Senate bill also would provide additional data to NHTSA.

Sens. Edward J. Markey, D-Mass., and Richard Blumenthal, D-Conn., introduced the Early Warning Reporting System Improvement Act, which would require NHTSA to make the information about fatal accidents accessible and searchable by the public. As we wrote last month, GM admitted to knowing about ignition switch defects in the Chevrolet Cobalts and Saturn Ions more than a decade before the recall but failed to investigate the defect. It appears that each day more damaging information comes out relating to GM’s safety problems. This Senate bill would ensure transparency in the future. Sen. Markey observed: “A massive information breakdown at NHTSA has led to deadly vehicle breakdowns on our roads.”

It’s been said that as many as 303 deaths have been linked to the fatal ignition switch defect. Actually, I believe the number is even higher. But GM will only admit to 13. The top flight consumer watchdog Center for Auto Safety has issued a report pegging the true number at more than 300. I don’t believe NHTSA has any idea how many deaths have occurred caused by the defect. That’s just one indication of why the agency should be properly funded and staffed. Hopefully, NHTSA will be adequately funded and given the tools necessary for the agency to do its job. The American people should demand it.

Source: Law360.com

BILL IN CONGRESS WOULD INCREASE RECALL FINES TO $300 MILLION

The Obama administration has asked Congress to raise the maximum fines for automotive recalls to $300 million from the current maximum of $35 million. This is part of a four-year transportation bill the administration introduced last month. The $302 billion transportation reauthorization proposal, labeled the “Grow America Act,” would increase the civil penalties the National Highway Traffic Safety Administration can levy against automakers who fail to timely recall defective vehicles.

The bill would force rental car companies to fix recalled vehicles before renting the vehicles out to customers again. The bill will also give safety regulators the “authority to require manufacturers to expeditiously remove automobiles from the market when a defect is first discovered,” according to a Department of Transportation fact sheet. The transportation bill also addresses the shortfall in the Highway Trust Fund by adding $87 million to fix the nation’s deficient bridges and aging transit systems, as the fund is set to dry up by the end of this summer.

XI. PRODUCT LIABILITY UPDATE

CRASHWORTHINESS DENOTES MAINTAINING OCCUPANT SURVIVAL SPACE

Lawyers, like those in our firm’s Product Liability Section who handle product liability cases, and specifically cases involving motor vehicles, understand the term “crashworthiness.” It certainly isn’t a new term. The present location of the steering wheel was moved from the right to the left in 1915 in order to provide the driver a better view point so as to avoid oncoming vehicles. The president of General Motors (GM) recognized the manufacturer’s duty to design safe vehicles when, in 1965, he stated that it was the duty of the manufacturer “to seek all possible ways in which the built-in protection for car occupants can be improved.”

Crashworthiness is simply the degree to which the manufacturer’s design of the package will protect the occupants from injuries in the event of a collision. Crashworthiness is an engineering term that may more appropriately be referred to in terms of basic occupant safety. Crashworthiness principles apply to virtually all vehicles that carry humans. Our firm has handled crashworthiness cases involving cars, heavy trucks, airplanes, helicopters, tractors, fork lifts and really the list goes on. The design considerations all change for each of those vehicles, but the principle is the same. In the event of a collision, the vehicle safety cage is supposed to protect the occupant by maintaining survival space and reducing the collision forces that the occupants would otherwise be exposed to in that crash.

A correctly functioning occupant protection system reduces the loads exerted on occupants in a crash. That, in turn, has the effect of lowering the severity of the occupant’s injury. Safety advances have raised the bar on the design of vehicles. Today, manufacturers have a responsibility, just as GM’s CEO acknowledged in 1965, to continue to build vehicles that provide the built in protection occupants deserve. Unfortunately, that isn’t always the case. Today we couldn’t imagine a sedan designed without a frontal airbag and seatbelt. We now have side airbags and cars that can avoid crashes altogether. New building materials make vehicle safety cages stronger and more likely to protect occupants. Tomorrow will bring new technologies. Manufacturers have a responsibility not only to provide those technologies, but provide them in a way that

makes those technologies effective in protecting occupants.

The lawyers in our firm’s Personal Injury/Products Liability Section are experienced in handling crashworthiness cases, having handled hundreds of cases involving that concept. We believe that anyone seriously injured while occupying any type of vehicle should have that case evaluated by experienced product liability lawyers to determine if the vehicle was designed with the appropriate level of crashworthiness in mind. If you need more information on crashworthiness, contact Greg Allen, the most senior lawyer in our firm who handles product liability claims. You can contact Greg at 800-898-2034 or by email at Greg.Allen@beasleyallen.com.

SEVEN NEW SAFETY RECOMMENDATIONS TO IMPROVE TRACTOR-TRAILER SAFETY

On April 3, 2013, the National Transportation Safety Board (NTSB) urged the National Highway Traffic Safety Administration (NHTSA) to take action to improve tractor-trailer safety by issuing several recommendations. The recommendations address three areas of concern. We will discuss each area of concern and explain how the NTSB recommends things from a safety perspective can be improved.

Blind Spots

Blind spots around tractor-trailers can result in collisions with passenger vehicles or vulnerable road users because the driver of the tractor-trailer cannot see them. These blind spots are larger than those of passenger vehicles and they exist on the front, sides, and rear of the tractor-trailer. Driver ride height, locations and characteristics of mirrors and windows, and vehicle geometry can all affect the ability of drivers of tractor-trailers to detect passenger vehicles and vulnerable road users. The blind spot on the right side of the tractor-trailer is of particular concern because it impinges on a large portion of the driver’s field of view and is disproportionately involved in collisions involving pedestrians, cyclists, and passenger vehicles.

Technology that can mitigate blind spots already exists and more advanced technology is being developed. Enhanced mirror systems, for example, can greatly reduce tractor-trailer collisions due to blind spots. Pedestrian sensing systems combined with automatic braking that are already installed on some passenger vehicles could also greatly reduce these collisions. One of the most promising technologies is blind spot camera monitoring that will alert the driver when a vehicle or pedestrian is in the side or rear blind spot. NTSB recommends that NHTSA require that newly manufactured truck-tractors weighing more than gross vehicle weight ratings of 26,000 pounds be equipped with visibility enhancement systems. However, NTSB does not specify the type of technology it believes to be best.

Underriding

One reason why collisions with the sides and backs of trailers are so hazardous is that underride may occur in these collisions. Underride occurs when the vehicle is small enough to slide under the trailer upon impact. Side and rear underride collisions are an important safety problem because they defeat crumple zones and prevent air bag deployment, both vital safety advances in improving protection of passenger vehicle occupants during crashes. Most of the fatal injuries associated with these collisions could be mitigated by stronger and lower underride guards. The NTSB recommends that NHTSA require newly manufactured trailers with gross vehicle weight ratings exceeding 10,000 pounds and newly manufactured truck-tractors with gross vehicle weight ratings more than 26,000 pounds be equipped with side underride protection systems. Further, NTSB recommends that NHTSA revise requirements for rear underride protection systems for newly manufactured trailers with gross vehicle weight ratings over 10,000 pounds to ensure that they provide adequate protection of passenger vehicle occupants from fatalities and serious injuries resulting from full-width and offset trailer rear impacts.

Tractor-Trailer Safety Data

Having accurate trailer data is important for evaluating the effects of safety regulations and for determining the safety of trailer designs. About 80 percent of the collisions between passenger vehicles and the rears of tractor-trailers involve the trailer rather than the truck-tractor cab; the corresponding percentage for passenger vehicle collisions with the sides of tractor-trailers is more than 50 percent. Although
According to the complaint, Chrysler offered an optional fuel tank skid plate, but did not provide any information to customers about the safety importance of this option. At the time the car was manufactured, the Plaintiff alleges that alternative designs existed that were safer than the design Chrysler used in the Durangos, but that the automaker chose not to use them. The other designs would have reduced the risk of Ms. Edney’s injury and would not have substantially impaired the product’s utility. It’s contended that Chrysler negligently designed the vehicle’s fuel storage system and “negligently failed to perform adequate failure mode and effects analysis and similar engineering activities to prevent ruptured fuel tanks and associated fire.”

Mrs. Edney is represented by Jeffrey T. Embry of Hossley Embry LLP, a law firm with offices in Tyler and Dallas, Texas, in the case, which is in the U.S. District Court for the Eastern District of Texas.

Source: Law360.com

**TOYOTA SETTLES ANOTHER SUDDEN ACCELERATION LAWSUIT**

Toyoa has settled the lawsuit filed by the family of Guadalupe Alberto, a 77 year old woman, who 2005 Camry crashed into a tree after it suddenly accelerated and could not be stopped. The confidential settlement has been approved by judge Archie Hayman in Flint, Michigan. Ms. Alberto died instantly in the crash. The family was represented by Ben Bailey and Eric Snyder, lawyers with Bailey & Glasser, a Charleston, W. Va. firm. These lawyers did a very good job in this most significant and highly important case.

Source: The Detroit News

**XII. AN UPDATE ON THE GM LITIGATION**

**A STATUS REPORT ON THE WRONGFUL DEATH AND BODILY INJURY CASES**

A Joint Effort By Law Firms Will Take On General Motors

Our firm will join with Lance Cooper, the Atlanta-area lawyer, in handling litigation against General Motors. Lance’s work in a Georgia case uncovered GM’s defective ignition system problems, as well as its fraudulent cover-up of the hazard, and his excellent work triggered the massive vehicle recalls.

Our two firms will consolidate our resources and will work together on death and serious bodily injury cases against GM. We look forward to working with Lance in this important litigation. I will write more on this joint effort in the June issue.

**ANOTHER LAWSUIT FILED—THIS ONE IN INDIANA**

Our firm, along with an Indiana firm, has filed a personal injury lawsuit in Indiana against General Motors (GM) on behalf of Josh Cull and Samantha Zollman. Each of our clients was seriously injured in a single-car crash in Clark County, Ind., on Oct. 31, 2012. Josh Cull was driving his 2006 Chevy Cobalt and was operating his vehicle safely when the defective ignition switch inadvertently moved out of the “run” position. This disabled the power steering, power brakes and airbag system. In the subsequent crash, both driver and passenger front airbags failed to deploy. As a result, both the driver and passenger suffered severe facial injuries. Josh Cull lost his right eye. His passenger, Samantha Zollman, more than a year later, is still undergoing facial reconstructive surgeries.

This lawsuit is the second that we have filed related to the recent recall by GM that addresses the ignition switch problem that allows the key to unintentionally slip from the “run” to “off” or “accessory” position when the vehicle is being operated. The ignition defect causes the sudden loss of engine power, braking and steering, creating a hazardous emergency situation. The air bag system is also disabled and rendered useless. We will be filing additional lawsuits related to the GM ignition defect very soon.

Josh Cull was traveling at the speed limit when he was involved in a single-vehicle accident. It was the type of crash a person ordinarily walks away from with only minimal injuries. But because of the ignition switch defect that disabled the power steering, power brakes and the airbags, Josh and Samantha sustained serious permanent injuries. They are among the hundreds of victims who trusted GM to make and sell safe vehicles.

We called on General Motors to waive any possible defense that may come from Old GM’s filing of bankruptcy. The automaker was bailed out by American taxpayers, and in the process it failed to disclose the ignition defect, the deaths and the knowledge of liability to either the public or the bankruptcy court. Thus the bankruptcy judge was unaware of the known ignition defect that existed in a number of GM vehicles—a defect that has caused the loss of more than 300 lives according to safety experts—and the company should now be held accountable for its grossly bad behavior.

While the lawsuits that we have filed thus far aren’t affected by the bankruptcy, there will be others that occurred prior to the bankruptcy that will be affected unless the bankruptcy judge takes action to protect GM’s victims. It would be a miscarriage of justice to allow GM to hide behind the shield of the bankruptcy court. We are asking GM to do the right thing, both by the taxpayers and the victims of its wrongdoing, and not use any bankruptcy defense.

GM recalled about 780,000 2005-07 Chevrolet Cobalt and Pontiac G5 vehicles on Feb. 13. Twelve days later, it expanded the recall to include an additional 590,000 model-year 2003-07 Saturn Ion, Chevy HHR, Pontiac Solstice, and Saturn Sky vehicles. There have been a total of 2.6 million vehicles recalled. Court documents and other evidence reveal that GM knew about the ignition switch problem as early as 2001. However, GM rejected several design changes and solutions that were recommended by its own engineers on numerous occasions because of the cost and the time it would take to make the changes. The company says it has linked 31 crashes and 13 deaths to the faulty ignition switch, but a new study commissioned by the Center for Auto Safety indicates the death toll could exceed 300.

Defendants named in the lawsuit are General Motors LLC, Delphi Automotive Systems, LLC; Delphi Automotive PLC; Delphi Automotive LLC; Chandler Chevrolet and Jim Hadley Chevrolet. The lawsuit was filed in Clark County, Ind., on April 15, 2014. We will keep you updated as this significant case develops. Mike Andrews, Cole Portis and this writer from our firm, along with David Stewart of the Stewart & Stewart firm, located in Carmel, Ind., will be handling this case.

**THE STATUS OF THE CLASS ACTION LITIGATION**

There have been a number of class action lawsuits filed against General Motors around the country. Each of these cases seeks damages for economic losses sustained by owners of the GM vehicles that have been recalled. The cases will also seek damages for violations of state consumer protection laws. Our firm, along with several other law firms, has filed six individual class action lawsuits. We expect these cases to all eventually go to a MDL judge. An important hearing, scheduled for May 2, will have taken place in the New York bankruptcy court by the time this issue is received. Hopefully, the court will shed some light on
what to expect from the court relating to GM’s ability to hide behind a prior bankruptcy court order.

**GM Attempts To Hide Behind Bankruptcy Shield**

General Motors is attempting to avoid its responsibility to be accountable for its wrongful conduct by hiding behind a 2009 bankruptcy order. The first attempt by GM to hide behind bankruptcy was related to the various class actions that have been filed around the country. Clearly, any protection from lawsuit liability that was obtained when the old GM went into bankruptcy in 2009—as it relates to the 2.6 million vehicles involved in the recent recalls—was fraudulently obtained by GM and its key officers. I do not believe that GM will be able to avoid being held accountable by attempting to claim bankruptcy protection. Fraud is still fraud—even in the bankruptcy court—and it won’t be tolerated by the courts.

**Specific Requests Made To General Motors**

There have been a number of requests made to General Motors from a number of sources asking the automaker to do the right thing by the victims of the automaker’s wrongdoing. Several weeks ago our law firm called on General Motors to waive any possible defense that may come from Old GM’s filing of bankruptcy. As you may recall this automaker was bailed out by American taxpayers, and in the process of a bankruptcy filing, it failed to disclose the ignition defect, the deaths it caused and GM’s knowledge of its liability to either the public or the bankruptcy court. Thus the bankruptcy judge was totally unaware of the known ignition defect that existed in a number of GM vehicles—a defect that has caused the loss of more than 300 lives according to safety experts—and the company should now be held accountable for its grossly bad behavior.

While the lawsuits that we have filed thus far aren’t affected by the bankruptcy, and clearly should not be, there will be others that occurred prior to the bankruptcy that will be affected unless the bankruptcy judge takes action to protect GM’s victims. It would be a miscarriage of justice to allow GM to hide behind the shield of the bankruptcy court. We are asking GM to do the right thing, both by the taxpayers and the victims of its wrongdoing, and not use any bankruptcy defense.

In my letter to Mary Barra, I also requested that GM to set up a court-supervised mone-
tary fund to compensate all of the automak-
er’s victims. There has been no response from Ms. Barra. But based on media reports, GM is considering the setting up of a compensation fund for victims. We will see what transpires in that arena.

**Another Delayed GM Recall**

Based on what all we have seen in the past weeks, we shouldn’t be shocked to learn that General Motors waited years to recall nearly 355,000 Saturn Ions for power steering failures. This recall—which is not directly related to the recall of 2.6 million vehicles involving a defective ignition switch—comes even as GM was getting thousands of consumer complaints and more than 30,000 warranty repair claims. The National Highway Traffic Safety Administration (NHTSA) didn’t seek a recall of the compact car from the 2004 through 2007 model years even though the agency opened an investigation more than two years ago. During the probe NHTSA found 12 crashes and two injuries caused by the problem.

Documents, posted on NHTSA’s website, reveal yet another unbelievable delay by GM in recalling unsafe vehicles and point to another example of government safety regulators reacting slowly to a safety problem. The delay is hard to understand since NHTSA was alerted by consumers and received warranty data submitted by GM. As we know by now, a recall can be initiated by an automaker or demanded by the government.

As you will recall, the Ion was one of a few GM cars included in a March 31 recall of 1.5 million vehicles worldwide to replace the power steering motors. The recall also covered some older Saturn Auras, Pontiac G6s and Chevrolet Malibus. If cars lose power steering, they can still be steered, but with much greater effort. The loss of a vehicle’s steering comes as a surprise and can cause drivers to lose control of the cars and crash. In a statement issued by GM, the automaker admitted that it didn’t do enough to take care of the power steering problem. NHTSA said it closed the investigation into the Ion because GM had decided to recall the cars.

Source: Associated Press

**XIII. THE MASS TORTS SECTION UPDATE**

Because of the many contacts our lawyers are having relating to Mass Torts Litigation, I will set out some of the drugs and medical devices that we are handling. The lawyers in the Section will investigate any medication or device claim involving catastrophic injury or death. The following are some of the drugs and medical devices the lawyers are currently working on:

**Actos®**

The FDA has approved updated warning labels for Actos, a prescription medication used to treat Type 2 diabetes. The updated label states that Actos usage for more than one year may cause bladder cancer. Actos, manufactured by Takeda, has been under FDA review since September 2010. In June 2011, the FDA issued a warning for Actos, while at the same time, drug regulators in France and Germany suspended use of the drug. We are currently investigating claims involving usage of Actos, Actoplus Met, Actoplus Met XR, Duetact and bladder cancer.

Lawyer: Roger Smith
Primary Staff Contact: April Worley

**Transvaginal Mesh**

The FDA has issued an updated safety communication warning doctors, health care professionals and patients that the placement of surgical mesh through the vagina to treat pelvic organ prolapse and stress urinary incontinence may present greater risk for the patient than other non-mesh procedures. This is also called transvaginal mesh (TVM). According to the FDA, reported complications from the transvaginal placement of the mesh include erosion of the mesh into the vaginal tissue, organ perforation, pain, infection, painful intercourse and urinary and fecal incontinence. Often women require surgery to remove the mesh. In some cases, this can require multiple procedures without successful removing all of the mesh. Currently, we are investigating cases involving mesh manufactured by American Medical Systems, Bard, Boston Scientific, Caldera, Coloplast and Johnson & Johnson.

Lawyers: Chad Cook and Leigh O’Dell
Primary Staff Contacts: Tabitha Dean, Melissa Bruner and Kim Owen

**Antidepressants**

SSRI-antidepressants such as Celexa, Lexapro, Luvox, Paxil, Prozac and
Zoloft are prescribed to treat depression. Studies in the last several years have shown an increased risk of heart birth defects in children born to mothers who took SSRIs-antidepressants in the first trimester. Most of the cardiac defects observed in these studies were atrial or ventricular septal defects, conditions in which the wall between the right and left sides of the heart does not completely develop. We are currently investigating claims of birth defects involving children whose mother was taking an SSRI, Wellbutrin or Effexor during pregnancy.

Lawyer: Roger Smith
Primary Staff Contact: Linda Reynolds

**BYETTA®, JANUVIA®, JANUMET® and VICTOZA®**

These drugs are used to treat Type 2 diabetes. They have been prescribed to millions of people in the United States. Since approving the medications, the FDA has issued several warnings about links between them to complications related to pancreatic diseases. Recent studies have linked these two drugs to acute pancreatitis and pancreatic cancer. We are currently investigating claims of pancreatitis, pancreatic cancer and thyroid cancer.

Lawyers: David Dearing or Melissa Prickett
Primary Staff Contacts: Nancy LeGear or Penny Davies

**GRANUFLO®**

Granuflo® and NaturaLyte® are products used in the dialysis process. On June 27, 2012, the FDA issued a Class 1 recall of Granuflo® and NaturaLyte®. A Class 1 recall is the most serious FDA recall, reserved for situations in which the FDA deems “there is a reasonable probability that the use or exposure to a violative product will cause serious adverse health consequences or death.” Use of these dialysis products has been linked to an increase in the risk of cardiopulmonary arrest and sudden cardiac death. The manufacturer, Fresnuius Medical Care, was aware of the dangers and injuries associated with these products but failed to warn patients and doctors until 2012. We are currently investigating death claims as well as claims of heart attack, cardiopulmonary arrest or any other serious injury.

Lawyer: Frank Woodson
Primary Staff Contact: Renee Lindsey

**LIPITOR®**

Lipitor, a statin drug to treat high cholesterol, was approved by the FDA in 1996 and is one the best-selling prescription medications in the world. Recent studies have found a possible link between Lipitor and the risk of developing Type 2 diabetes. A University of Massachusetts study found a potential link in postmenopausal women, particularly those who had a Body Mass Index (BMI) less than 25. Of the 153,840 women evaluated, more than 10,000 had developed Type 2 diabetes by the end of the study.

Criteria: Injured is female; took Lipitor consistently for at least two months; Injured was diagnosed with diabetes while taking Lipitor, or within six months of last dosage of Lipitor; Body Mass Index (BMI) of 30 or less at time of diabetes diagnosis; Injured has no or limited family history of diabetes.

The JPML has granted consolidation of lawsuits involving the cholesterol lowering medication Lipitor in the USDC in South Carolina. U.S. District Judge Richard M. Gergel, based in Charleston, will serve as the judge for the MDL. On March 28, 2014 Judge Gergel appointed Plaintiff lawyers to lead the litigation. Frank Woodson from our firm was appointed as one of the lawyers to serve on the Plaintiffs’ Steering Committee.

The lawsuits allege that women receive little, if any, benefit from Lipitor while subjecting them to the risk of diabetes. There are several hundred lawsuits filed across the country that will be transferred to Judge Gergel’s Court. Our firm looks forward to working with the other members of the PSC on these cases.

Lawyer: Frank Woodson
Primary Staff Contact: Renee Lindsey

**MIRENA® IUD**

Mirena® is an intrauterine device (IUD) that was originally approved by the FDA as an intrauterine contraceptive. It was later approved as a treatment for heavy menstrual bleeding. It works by slowly releasing a low dose of levonorgestrel (a synthetic progestin hormone) directly into the uterus. Serious adverse side effects and potentially life-threatening complications have been reported following the implantation of the device. These complications include organ perforation, migration of the IUD to outside the uterus, expulsion of the IUD, and embedment in the uterus, among others.

**METAL-ON-METAL HIP REPLACEMENTS**

Metal-on-metal hip replacement manufacturers have been under heavy scrutiny in the past few years regarding the dangers of their metal on metal hip devices. The main hip devices under scrutiny are:

- Johnson & Johnson/DePuy: ASR Total Hip Replacement and ASR Resurfacing System hip (Recalled on August 24, 2010);
- Biomet: M2a and 38 Diameter hips;
- Wright: (a) Conserve, (b) Dynasty, (c) Lineage and (d) Profemur (femur fracture) hips; and
- Smith and Nephew: R3 Liner hips (Recalled on June 1, 2012).

Metal-on-metal hip patients from the above manufacturers have similarly reported problems after their initial implant surgery resulting in revision surgery. All have reported a variety of symptoms, including pain, swelling and problems walking. These symptoms are normal for patients following a hip replacement, but can be a sign that something is wrong if they continue or come back frequently. Additionally, metal debris spreading in the hip area has been reported due to the metal-on-metal friction involved from the metal components moving together.

Our lawyers would like to review any cases involving individuals who have had any of the above metal on metal hip devices implanted and all individuals unsure of the type of hip device implanted if the person has had revision surgery, or the person is experiencing hip pain, hip swelling or difficulty walking.

Lawyers: Navan Ward and Melissa Prickett
Primary Staff Contacts: Janet Welch and Donna Puckett

**OXYCODONE**

OxyContin is an opioid pain medication used for moderate to severe pain. It is a controlled substance, meaning the government considers it to have a high potential for abuse. The most common side effects of OxyContin include nausea, vomiting, constipation, dizziness, and feeling light-headed. OxyContin is often prescribed for cancer patients.

**REJUVENATE and ABG II STEMS**

These hip stem replacements have been recalled due to metal debris spreading in the hip area and causing complications such as organ perforation, migration of the IUD to outside the uterus, expulsion of the IUD, and embedment in the uterus. Johnson & Johnson/DePuy: Pinnacle metal-on-metal hip;

**ZIMMER DUROM CUP HIP**

**Stryker Rejuvenate and ABG II Stems (Recalled on July 4, 2012)**

**BIOMET M2A AND 38 DIAMETER HIPS**

**WRIGHT: (a) CONSERVE, (b) DYNASTY, (c) LINEAGE AND (d) PROFEMUR (FEMUR FRACTURE) HIPS**

**SMITH AND NEPHEW: R3 LINER HIPS (Recalled on June 1, 2012)**
Risperdal®

Risperdal® is an atypical antipsychotic drug used to treat schizophrenia and certain problems caused by bipolar disorder and has been linked to the development of gynecomastia in boys and young men. Gynecomastia is a condition that causes boys to grow breasts.

Lawyer: James Lampkin
Primary Staff Contact: Ann Easley

Stevens-Johnson Syndrome

Stevens-Johnson Syndrome (SJS) is an immune complex hypersensitivity reaction that can be caused from an infection or immune response to drugs. It is a severe expression of a simple rash known as erythema multiforme. SJS is also known as erythema multiforme major. It affects all ages and genders including pediatric populations. The most severe form of SJS is toxic epidermal necrolysis (TENS). SJS occurs twice as often in men as in women. Most cases of SJS appear in children and young adults younger than 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as NSAIDs, non-steroidal anti-inflammatory drugs.

Lawyer: Frank Woodson
Primary Staff Contact: Renee Lindsey

Talcum Powder

Johnson and Johnson has known for decades that its talcum products, such as Shower to Shower baby powder, can cause ovarian cancer. But J&J has failed to warn women of the risk of using these products in the genital area. A Harvard medical doctor says that he has studied the link between talc and cancer for 30 years and believes talc is the likely cause for as many as 10,000 cases of ovarian cancer each year.

Lawyer: Ted Meadows
Primary Staff Contact: Katie Tucker

Testosterone Replacement Therapy

Testosterone Replacement Therapy products for men have been linked to an increased risk of death, heart attack and stroke. Researchers found men who used testosterone therapy were 30 percent more likely to have a heart attack, stroke, or die after three years of use. 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. Testosterone therapy, 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. We are currently investigating claims of heart attack, stroke and prostate cancer.

Lawyer: Matt Teague
Primary Staff Contact: Heather Hall

Yaz, Yasmin, Ocella or Beyaz

Yaz is a combination birth control pill containing drospirenone and ethynyl estradiol. It is marketed not only as a contraceptive pill, but as a proven treatment for premenstrual dysphoric disorder (PMDD), a condition with severe emotional and physical premenstrual symptoms. Yaz is also marketed as an effective treatment for moderate acne. However, studies indicate that Yaz poses a particular health hazard because one of its two primary ingredients, drospirenone, is a diuretic, which can cause an increase in potassium levels in the blood and lead to hyperkalemia, which causes heart rhythm disturbances that can cause blood clots leading to sudden cardiac death or pulmonary embolism or strokes. Diuretics can also cause significant problems with the gallbladder, leading to gallbladder removal.

Criteria: Documented use of Yaz with a diagnosis of heart attack, stroke, pulmonary embolism or DVT.

Lawyer: Roger Smith
Primary Staff Contacts: Linda Reynolds and April Worley

Zimmer NexGen Knee Replacements

Since 2003, more than 150,000 Zimmer NexGen Flex-Knee implants have been sold. Several different components used as part of the Zimmer NexGen Flex-Knee replacement system have been associated with increased risk of complications, including pain, swelling, loosening of component parts, and the need for follow-up/revision surgery. Several prominent surgeons want a Zimmer NexGen knee replacement recall to be issued. At a March 2010 conference of the American Academy of Orthopedic Surgeons, two knee surgeons presented data suggesting that the Zimmer NexGen Flex-Knee failure rate could be as high as 9 percent, and that the actual number of complications that require revision surgery could be even higher. The lead author of the study, Dr. Richard Berger, described the failure rate of the Zimmer NexGen CR-Flex Porous Femoral Component as “unacceptably high.”

Our lawyers would like to review any cases involving individuals who have had a Zimmer NexGen knee device implanted, or individuals unsure of the type of knee device implanted, if that individual has had revision surgery.

Lawyers: Navan Ward and Melissa Prickett
Primary Staff Contacts: Janet Welch and Donna Puckett

We will discuss in the next section some of the more recent happenings around the country relating to the Mass Torts Litigation. There have been a number of significant happenings in this most important area of concern. I do not anticipate a slow down in this litigation anytime soon.

XIV. SOME SPECIAL MASS TORTS CASES

Federal Jury Orders Drug Makers Takeda and Eli Lilly To Pay $9 Billion For Actos Cancer Risk

A federal jury in Lafayette, La., last month ordered Takeda Pharmaceutical Co., based in Osaka, Japan, and its partner, Eli Lilly & Co, based in Indianapolis, Ind., to pay a combined $9 billion in punitive damages. The jury determined the drug makers hid cancer risks associated with their Actos diabetes medicine from the public. The drug has been linked to the development of bladder cancer. This was the first federal trial in this litigation.

Mark Lanier of the Lanier Law Firm based in Houston, Texas, was the lead attorney for the Plaintiffs at trial. Paul J. Pennock of Weitz & Luxenberg PC and Richard J. Arsenault of Neblett Beard & Arsenault also represented the Plaintiffs in the lawsuit, Terrence Allen
and his wife Susan. Mr. Allen developed bladder cancer after using Actos.

In addition to the punitive damages, the jury also awarded the Allens $1.5 million in compensatory damages. The punitive damages are to be paid as follows: Takeda was ordered to pay $6 billion, while Lilly will pay $3 billion. Beasley Allen lawyer Andy Birchfield, who is head of the firm’s Mass Torts section, had this to say about the trial:

_Thousands of people have bladder cancer as a result of the egregious conduct of these drug companies regarding Actos. As long as potential drug sales are wildly lucrative, companies will face the temptation to ignore or hide serious safety concerns. This verdict sends a clear message for companies to beware; there is accountability in the courts._

Andy was appointed to the Plaintiffs’ Steering Committee (PSC) by U.S. District Judge Rebecca Doherty, who is in charge of the Actos multidistrict litigation (MDL), and presided over the Allen case. The PSC heads up and supervises the Actos MDL. As a member of the PSC, Andy assisted in pretrial preparation for the Allen trial.

Actos lawsuits filed in federal courts have been consolidated under Judge Doherty in U.S. District Court for the Western District of Louisiana. Lawsuits claim Takeda and Eli Lilly misrepresented and omitted information it held about Actos and “actively concealed its risks.” The lawsuits also claim Plaintiffs were not adequately warned about Actos risks and could have taken several safer alternative drugs had they known about the health risks posed by Actos.

Actos is prescribed to treat Type 2 diabetes. The U.S. Food and Drug Administration (FDA) began a review of Actos and cancer risk in September 2010, when the agency issued a safety announcement suggesting a potential risk with Actos. The FDA reported in its data summary that the risk of bladder cancer increased with increasing dose and duration of Actos use, reaching statistical significance after 24 months of exposure. The FDA later updated its safety label for Actos to state that the use of the drug for more than one year may be associated with an increased risk of bladder cancer. In June 2011, the FDA issued a warning for Actos.

This bellwether trial for allegations the companies hid the cancer risks of diabetes drug Actos to keep sales high was the first federal jury decision in multidistrict litigation against Asia’s largest drug company and its American partner Eli Lilly. Eli Lilly partnered with Takeda to market the drug from 1999 to 2006. The companies, which jointly marketed the drug, were the only Defendants in the case.

The jury found Takeda hid the results of clinical studies it has known about since before the drug was approved by the FDA that showed that using the drug can cause bladder cancer. Mr. Allen, a former shopkeeper in New York, sued the company in 2011, saying the company’s executives knew the drug caused bladder cancer in animals and humans, but kept it hidden from the public because the drug was profitable for the company.

The Allens alleged that even before Takeda applied for approval from the FDA, it knew from the results of animal testing that the drug could cause bladder cancer, according to the original complaint. Later, in the early 2000s, clinical trials in humans had shown it would induce the cancer. But the executives at Takeda said nothing, and instead made more than $16 billion in sales since Actos’ release. The drug represented more than a quarter of Takeda’s total sales in 2011, at its peak. In June of that year, the FDA alerted the public that use of the drug for longer than a year could cause bladder cancer, and the agency discouraged doctors from prescribing it to patients with active bladder cancer.

Thousands of lawsuits have been filed related to the drug’s carcinogenic side effects. More than 6,000 of them were sent to multidistrict litigation in Louisiana. Takeda’s lawyers argued that bladder cancer wasn’t caused by Actos, but by other factors, such as age, gender and smoking habits. Takeda claims it properly warned consumers as the information became better understood that prolonged consumption of the drug could be harmful.

Before the federal bellwether trial began, Takeda faced the possibility of sanctions for a potential breach of duty to preserve evidence. Takeda put a litigation hold on documents and electronic data related to Actos in 2002, yet repeatedly destroyed emails and other documents with information about the drug during much of the next decade. Judge Doherty, who is overseeing the multidistrict litigation, made a ruling on Jan. 27 that said the documents Takeda destroyed were relevant to the Plaintiffs’ claims and would likely prove beneficial to their case. Takeda’s failure to preserve the evidence was likely to prejudice the Plaintiffs, she said in the order.

Eli Lilly was accused of perjury during the trial when a former employee was said to have lied on the stand during testimony. The Allens on March 3 sought a default judgment against Eli Lilly for willfully disobeying the court’s authority during the trial, which has been ongoing since Feb. 3. The motion for sanctions targets the testimony of Ronald Hoven, a former senior director for global marketing at Eli Lilly. According to the Plaintiffs, Hoven “expressed a stunning lack of knowledge” about the company’s marketing of Actos during hours of testimony before the jury. The result in this important case had to get the attention of the bosses at the two drug companies. We will see if it changes their attitude toward the Actos’ victims.

Sources: Reuters and Bloomberg News

_Has Inadequate Oversight of the Cosmetic Industry Played a Role in Talcum Powder Ovarian Cancers?_

Recently, the U.S. Food and Drug Administration (FDA) accused the cosmetic industry of refusing to cooperate in updating antiquated cosmetic safety regulations, claiming that an industry proposal would further undermine the minimal oversight that currently exists. An FDA official criticized the cosmetic industry for proposing a bill that would make it easier to include harmful chemicals in products by hindering the FDA from verifying company claims regarding the safety of cosmetics and prevent the regulatory agency from removing potentially dangerous products from the market. The official also claimed that the proposal would strip states of power to regulate when FDA regulation is limited.

Cancer prevention groups have long wanted the FDA to increase watch over the cosmetic industry claiming that such products are some of the least regulated under the 1938 Food and Drug Cosmetic Act. The Cancer Prevention Coalition says that the National Institute of Occupational Safety and Health (NIOSH) has found that close to 1,000 chemicals used in cosmetics have been reported to be toxic.

Lawyers in our firm’s Mass Torts Section have been investigating and filing lawsuits on behalf of women who have been diagnosed with ovarian cancer following the use of talcum powder in the genital area. In the course of our investigation, we have learned that companies have known for decades of the risk of ovarian cancer from the use of talcum powder in the genital area yet continue to market those products without any warning in that regard. Such companies have even gone so far to form a task force for the purpose of defending the use and sale of talcum powder and to prevent regulation of their industry.

It seems that adequate regulation of this industry is long overdue. The lawyers in our firm are learning much more about the
talcum powder, including the role a lack of regulation played. Clearly talcum powder induced ovarian cancers. We will publish more information as our investigation continues. I predict our readers will be shocked at some of the materials we uncover in discovery as the litigation proceeds. If you have any questions regarding the talcum powder litigation, or if you would like to have us review a potential claim, contact Ted Meadows, a lawyer in our Mass Torts Section, at 800-898-2034, or by email at Ted.Meadows@beasleyallen.com.

**ENDO AGREES TO $830 MILLION SETTLEMENT IN VAGINAL-MESH CASES**

Endo International Plc has agreed to pay $830 million to resolve about 20,000 lawsuits filed by women who were injured by transvaginal mesh devices. The company said in a statement that the settlement agreement will resolve what it called a substantial majority of the mesh litigation brought against its American Medical Systems subsidiary.

Endo is among several major medical-device manufacturers that have been hit with tens of thousands of lawsuits over the mesh devices, which are used to treat pelvic organ prolapse and stress urinary incontinence. As we have reported in prior issues, women have alleged they suffered pain during sex, bleeding and other complications from the devices. The Endo settlement agreement is subject to several conditions, including confirmation of medical records for plaintiffs. Endo said it had previously set aside $520 million to cover all legal claims arising from the mesh devices.

Source: Law360

**DALLAS JURY FINDS THAT J&J’S BLADDER SLING IS DEFECTIVE**

A jury in a Dallas state court has ordered health care giant Johnson & Johnson (J&J) and its Ethicon subsidiary to pay $1.2 million in compensatory damages to a woman who alleged she was injured by a transvaginal mesh (TVM) implant used to treat stress incontinence. Jurors decided the design of the TVT-O mesh sling, often referred to as a “bladder sling,” was defective or unreasonably dangerous. As a result of the defective design of the sling, they found Linda Batiste suffered pain and serious injury when the mesh eroded through her vaginal wall. Ms. Batiste was represented Tom Cartmell of Wagstaff, Cartmell and Rich Freese of Freese and Goss.

The jury’s decision in this case is significant because it was the first occasion where a jury has had opportunity to render a decision after hearing evidence regarding the defective nature of a bladder sling product. The case highlights the substantial evidence that has been gathered establishing the risks of these products, the limited benefits, and the safer alternatives that are available.

More than a million women have been implanted with bladder slings. Thousands of these women have experienced life-altering injuries as a result of the defective design of these implants, creating a public health problem of enormous proportions. The full size and scope of the problem will not be known for years to come. Many women begin to experience pain and other complications years after implant. In addition, women are continuing to be implanted with bladder slings and pelvic organ devices composed of synthetic mesh.

Transvaginal mesh side effects include erosion of the mesh into surrounding tissue and organs (including the vagina, bladder, and rectum), chronic pain, hemorrhaging, infections, incontinence, and painful sexual intercourse. Reports of complications led the U.S. Food and Drug Administration (FDA) to issue a safety announcement warning that injuries with transvaginal mesh were not uncommon and could lead to multiple surgeries, hospitalizations and even death. The injuries associated with these products are often quite difficult to treat. For women like Ms. Batiste who experience erosion into the vaginal wall, removing the mesh can be very difficult or impossible. For those that experience nerve damage or have significant scarring, treatment options are very limited. As a result, many women who experience chronic pain following a transvaginal mesh implant or revision of a transvaginal product are unable to find relief.

Transvaginal mesh injuries are particularly regrettable when you consider they could have been avoided. Neither device used in the treatment of pelvic organ prolapse or stress urinary incontinence was studied in actual women prior to being placed on the market. J&J and other manufacturers failed to test the materials used in the products to determine if it was appropriate for a permanent implant. Yet Johnson & Johnson and other manufacturers still marketed these dangerous products. Moreover, after the products were placed on the market and manufacturers were notified of complications and serious adverse events, the manufacturers failed to provide information to physicians about the potential problems.

J&J and Ethicon, which is the women’s health and urology division of the company, face more than 12,000 pending lawsuits regarding the mesh implants. Most of these cases are consolidated before Judge Joseph Goodwin in West Virginia, while other cases, like Ms. Batiste’s, are being heard in state courts.

In addition to Johnson & Johnson/Ethicon, other transvaginal mesh manufacturers that are facing litigation surrounding the devices include American Medical Systems, C.R. Bard Inc., Boston Scientific, Cook Medical, Inc., and Caldera. Leigh O’Dell and Chad Cook, lawyers in our firm's Mass Torts Section, lead a team of Beasley Allen lawyers who represent women injured by transvaginal mesh. Our lawyers represent a number of women injured by products manufactured by J&J, as well as the other manufacturers listed above. Leigh can be reached at Leigh.Odell@beasleyallen.com; and Chad at Chad.Cook@beasleyallen.com. You can also call these lawyers at 800-898-2034.

**J&J SETTLES 76 TOPAMAX BIRTH DEFECT SUITS**

Janssen Pharmaceuticals, Inc., a Johnson & Johnson (J&J) unit, has agreed to settle with plaintiffs in 76 suits pending in Pennsylvania court over alleged birth defects in the babies of women who took the anti-epilepsy and migraine drug Topamax during their pregnancies. Judge Arnold New, who is coordinating a mass tort docket of Topamax cases in the Philadelphia County Court of Common Pleas, filed an order on April 1 marking 76 cases in the program as discontinued after he received word that Plaintiffs had reached settlement deals with Janssen.

Judge New’s order comes a month after a Philadelphia County jury returned a $3 million verdict in favor of the family of 5-year-old Payton Anderson, who claimed that Janssen didn’t update Topamax’s label to reflect data showing that the drug resulted in increased incidents of cleft lips and cleft palates in newborn babies. It was the third such jury verdict since cases in the Topamax mass tort program, which was set up in 2011, began going to trial in autumn 2013.

A jury returned a $4 million verdict against Janssen in a similar suit in October. Another family won $10 million in damages after a jury returned a verdict in their favor in December. Trial in a fourth Topamax case began in late February, but Janssen announced it had reached a settlement in the suit the same day that the jury returned its verdict in the Anderson case. Also the same day, Janssen announced it had reached settlements in several other Topamax cases but
declined to say precisely how many it had disposed of. Judge New’s recent order, however, sheds light on the breadth of Janssen’s work to settle the suits.

There are an additional 60 cases pending as part of the Topamax mass tort docket in Philadelphia. In 2010, Janssen agreed to pay more than $81 million to put to settle a U.S. Department of Justice inquiry into off-label marketing of Topamax. Federal prosecutors accused Janssen of improperly marketing the drug for off-label psychiatric uses, causing false claims to be submitted to government health care programs such as Medicaid.

The government claimed that the company marketed Topamax for off-label uses through a program known as “Doctor-for-a-Day,” under which the company hired outside physicians to visit doctors’ offices along with company sales representatives, or to speak at meetings and dinners about prescribing Topamax for unapproved uses. The Plaintiffs in this case are represented by Clark Love & Hutson, Motley Rice, Matthews & Associates, Meyerson & O’Neill and the Branch Law Firm. They did a very good job in this matter.

Source: Law360.com

**Updated Warnings For Generic Drugs**

On March 27, 2014, the New York Times published an editorial in support of a proposed change to the U.S. Food and Drug Administration’s (FDA) rules governing labeling of generic drugs. The editorial acknowledged that the FDA had proposed changes that would permit a generic drug manufacturer to change the warnings provided for the generic drug. Currently, FDA regulations require the label for a generic drug to be the same as the label for the brand-name drug.

Under the current regulations and court interpretations of those regulations, a consumer harmed by a generic drug cannot recover for failure to warn of new dangers, while a consumer harmed by a brand name drug can recover from the brand name manufacturer. The editorial recognized that the use of generic drugs has soared in recent years and 80 percent of prescriptions are now filled with generic drugs instead of brand name drugs. Once a generic drug comes on the market, brand name drug use diminishes and the brand name manufacturer does not have an incentive to warn of new dangers.

On April 1, 2014, the Subcommittee on Health in Congress held a hearing on the proposed rule change. During the hearing, Dr. Janet Woodcock, M.D., who is director of the Center for Drug Evaluation and Research (CDER) with the FDA, testified concerning the effect of the proposed rule change but noted that the proposed changes were not final. She noted that the current state of the law “alters the incentives for generic drug manufacturers to comply with current requirements to conduct robust post-marketing surveillance, evaluation, and reporting, and to ensure that the labeling for their drugs is accurate and up to date.” Ms. Woodcock testified that the proposed rule change “is intended to improve the communication of important drug safety information about generic drugs to both prescribers and patients.” At press time for this issue, a final rule has not yet been adopted.

If you need more information on this subject, contact James Lampkin, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at James.Lampkin@beasleyallen.com.

Source: New York Times

**Jury Returns $1.3 Million Verdict Against Honeywell**

A Dallas jury has returned a $1.3 million verdict against Honeywell International Inc., finding the company liable for fraud. The plaintiff, Hunt Consolidated Inc., claimed Hunt well failed to adequately disclose risks associated with an engine part defect in a Learjet 40 plane Hunt owned. The jury found Honeywell had committed fraud through an intentional misrepresentation and by also failing to disclose or concealing a material fact.

Hunt claimed it wasn’t told about a problem with the blade retainers in its engines in time to repair them before one of the engines malfunctioned at takeoff on a 2011 flight. Hunt, the oil and real estate company, contended that Honeywell had a responsibility to do more to notify customers that its blade retainers—thin metal pieces about an inch long that keep engine blades in place—were likely to break and could damage other parts of the engine.

The jury awarded about $877,000 for repairs to the Hunt plane and another $518,000 for the rental costs Hunt incurred while its plane was out of service. But the jurors did not find Hunt was owed about $1 million for what it claimed was the diminution of value to the plane as a result of the engine malfunction. This case is just another example of how a corporate, finding it has been the victim of wrongdoing by another corporation, will use the court system to make things right.

Source: Law360.com

**Banks Sue Olympus In $1.7 Billion Accounting Scandal**

Six Japanese banks have filed suit against medical device and camera maker Olympus and are demanding 27.9 billion yen ($273 million) for losses related to a $1.7 billion accounting scandal that rocked the company in 2012. The lawsuit arises from losses State Street Trust and Banking Co Ltd., Mitsubishi UFJ Trust and Banking Corp., and other banks suffered due to allegedly fraudulent financial statements published by Olympus in a period spanning 11 years.

A former banking executive at Olympus, Chan Ming Fon, has admitted that he helped conceal hundreds of millions of dollars in off-the-books loans made to two Olympus-controlled companies. Chan entered a plea at a hearing before U.S. District Judge Laura Taylor Swain in September and admitted his guilt. Chan, speaking through an interpreter, said at the time:

*I and the Olympus Corp. planned and carried out a series of transactions designed to conceal loans that were to two companies. These loans were worth hundreds of millions of dollars. I acknowledge that my conduct was wrong.*

Prosecutors first charged Chan in December 2012, claiming his money laundering formed part of a larger accounting scandal that in late 2012 shook confidence in the company and led to investigations in Japan and the U.S. At the time, Chan said he had also signed a false confirmation letter in a fake name that he knew would go to Olympus’ auditors in order to aid the fraud. He agreed to cooperate with prosecutors and the FBI in their ongoing case.

The prosecutors said in a plea agreement that they would recommend leniency provided Chan offered substantial assistance. Three former Olympus executives pled guilty to accounting fraud in Japanese court in 2012, after the company admitted to hiding massive losses through a series of sham transactions, including a $687 million payment it made for financial advice on its $2 billion takeover of British device company Gyrus Group PLC.

The executives, the ex-chairman of Olympus and two others received suspended prison sentences in Tokyo court in July. The fraud was first revealed by former Olympus...
CEO Michael Woodford, who later filed and settled claims that the company had fired him in retaliation for blowing the whistle. Olympus was forced to restate five years of financial earnings in order to remain listed on the Tokyo Stock Exchange.
Source: Law360.com

$106 MILLION VERDICT FOR BREACH OF Paxil GENERIC CONTRACT

A New Jersey federal jury has returned a $106.7 million verdict against GlaxoSmithKline LLC (GSK) in a suit brought by Mylan Inc. The jury found that GSK breached an exclusive contract by allowing Apotex Inc. to sell generic versions of its antidepressant Paxil as part of an antitrust settlement. The jury also found that GSK breached a 2007 agreement granting Mylan an exclusive right to market and sell paroxetine hydrochloride, the generic name for Paxil, when it allowed Apotex to sell generics of the drug in 2010.

The jury found that Mylan had been damaged by the breach of contract and awarded $106.7 million. GSK’s claim that the award should be reduced because it claimed Mylan failed to make a reasonable effort to lessen its damages was rejected by the jury. The dispute stems from a 2007 settlement between GSK and Mylan, which allowed Mylan to sell generic paroxetine tablets for nine years, in exchange for large royalty payments to GSK.

Because the Federal Trade Commission was concerned about the contract’s long exclusivity period, the companies inserted a provision entitling GSK to sell its own authorized generic beginning two years after Mylan launched its version. Several years later, GSK settled a separate suit with intermediary drug seller Apotex Inc., the first company to gain FDA approval for a generic version of the drug.

To resolve claims that the company improperly kept generics off the market, GSK paid $300 million in cash to Apotex as part of a 2010 settlement. GSK also guaranteed that Apotex would earn $180 million by selling GSK products, including generic paroxetine, which GSK manufactured and supplied to Apotex. It appears that when Mylan learned from a customer that Apotex planned to sell generic Paxil, the company sued Apotex and GSK. Mylan claimed that its licensing agreement with GSK did not permit the drug giant to provide its own form of paroxetine to another company, which would be sold in direct competition with Mylan’s product.

A New Jersey district court dismissed the suit in 2012, saying there was no limit in the 2007 contract on GSK’s rights to sell to other companies. But the Third Circuit partly overturned that decision in 2013, reversing Mylan’s breach of contract claim against GSK. Although the appeals court agreed that Apotex did not tortiously interfere with the 2007 agreement, the panel ruled that the district court wasn’t free to reject Mylan’s evidence. That was because the appeals court panel found the settlement agreement to be unambiguous. The appeals court ordered the contract claim against GSK to go before a jury.

In a pretrial brief filed in February, GSK argued that it had a clear right to sell generic Paxil to Apotex for resale, because GSK’s contract with Mylan guaranteed nothing more than two years of generic paroxetine exclusivity. GSK argued in its brief that “After the two years expires, GSK has an unrestricted right to sell to whomever it wishes.”

Mylan argued in its own pretrial brief that during its settlement negotiations, GSK had agreed not to provide its generic paroxetine product to a third party to sell. Mylan also argued that New Jersey law dictated that all relevant evidence be considered when a contract is interpreted, including the contract’s negotiations. The company claimed that as a result of GSK allowing Apotex to market generic paroxetine tablets, Mylan had lost sales and been forced to reduce the price of its own generic drug. Mylan sought $119.7 million in damages for lost profits, about $13 million more than the amount the jury awarded. The case was in the U.S. District Court for the District of New Jersey.
Source: Law360.com

$30 MILLION VERDICT AGAINST NuVasive IN NEUROVISION TRADEMARK SUIT

A California federal jury last month found in favor of Neurovision Medical Products Inc. in its second trial over claims that NuVasive Inc. infringed its rival’s trademark, and returned a $30 million verdict against NuVasive. This came after the Ninth Circuit’s reversal of a previously awarded $60 million verdict against NuVasive. This was Neurovision’s second attempt to collect on its claim that NuVasive willfully infringed the trademark for the word “neurovision” and concealed its knowledge of Neurovision’s patent from U.S. Patent and Trademark Office (USPTO). The jury found that Neurovision had proved that NuVasive had fraudulently obtained the Plaintiff’s trademark and used it in a manner that was likely to cause confusion among relevant consumers. The jury verdict is the most recent development in the long-running litigation, which began when Neurovision filed suit about five years ago.

The original suit, filed by Ventura, Calif.-based Neurovision in 2009, alleged that NuVasive had started using the “neurovision” mark to purposely rip off Neurovision’s established brand of nerve-monitoring equipment. Neurovision claimed it had a common-law right to the mark, having used it since the early 1990s, which long predated NuVasive’s registration of the mark with the USPTO in 2003. Neurovision alleged NuVasive had started to use the neurovision mark without authorization and failed to tell the USPTO that it knew about Neurovision’s prior use, according to court documents.

In October 2010, a jury awarded the $60 million verdict to Neurovision, finding that NuVasive had willfully infringed the trademark and purposely deceived the USPTO by not disclosing the other company’s use of the mark. The jury barred NuVasive from using the neurovision mark in the future, prompting NuVasive’s 2011 appeal to the Ninth Circuit. The Ninth Circuit vacated the $60 million verdict in September 2012, saying the lower court misled the jury and improperly excluded evidence, and remanded the case back to the California federal court for a new trial.

In the second trial, the jury still found against NuVasive. Now NuVasive says it will file post-trial motions in the U.S. District Court for the Central District of California seeking judgment as a matter of law, and, in the alternative, a new trial. Then, if necessary, the company says it will appeal the verdict to the Ninth Circuit.

Keith J. Wesley, a lawyer with the California-based firm of Browne George Ross, represented the Plaintiff in this case. He did a very good job for his client.
Source: Law360.com

XVI. AN UPDATE ON SECURITIES LITIGATION

SECURITIES LAWSUITS FILED AGAINST BP

At least six securities lawsuits have been filed against BP PLC. In these suits groups of foreign businesses and U.S. retirement funds are alleging the oil company’s actions and response to the Deepwater Horizon oil spill cost them millions of dollars. German and Singaporean businesses, as well as pension funds in at least seven U.S. states, allege BP

It’s alleged that BP should have known about the oil rig’s disaster potential because of several earlier incidents, including a blowout in the Nile River Delta and a 2005 hurricane-triggered disaster at the Gulf of Mexico-based rig Thunder Horse. It’s alleged further that BP failed to reveal the risks to investors.

The investors alleged that BP’s alleged deceit caused investors who were buying shares in BP—or in the cases of the foreign investors, American depositary shares in BP—to lose millions of dollars when the company’s stock price dropped after the Deepwater Horizon explosion, which led to the world’s largest accidental marine oil spill.

U.S.-based entities Pension Reserves Investment Management Board of Massachusetts and the Illinois State Board of Investments have each filed their own separate complaints. The Virginia Retirement System, Nebraska Investment Council, Public School and Education Retirement Systems of Missouri, Public Employee Retirement System of Idaho, and Indiana Public Retirement System all joined on a similar complaint, issuing claims that investors and the public were lied to, according to their suit.

Source: Law360.com

TRADING IN SPEED—IS IT LEGAL?

Thanks to a new book, Flash Boys, by Michael Lewis and an expose on 60 Minutes, the investing public is now much more aware of an ongoing scheme that affects hundreds, if not thousands, of transactions on the stock exchange a day. I watched the 60 Minutes show and to say the scheme is complicated is an understatement, to say the least. As an example, say an investment management company, company A, purchases large numbers of stocks at a time on behalf of the funds it manages. That purchase order is transmitted along fiber optic cables from company A’s computers, along a circuitous route, until it reaches the exchange and the transaction can be finalized.

Along the way, the purchase passes through a hub of sorts. At that point, high-frequency trading companies (also called high-speed traders), like company “B,” that have no other purpose than to monitor the system for large purchases, essentially jump to the front of the line. These companies become aware of the pending purchase made by Company A once the transaction begins to process, but before it is finalized by the exchange. Awareness alone, however, does them no good.

High-frequency trading companies operate in one of two ways. Some paid hundreds of millions of dollars to lay their own fiber optic cables that run in a straight line, rather than a circuitous route, from the hub to the exchange. Others paid premiums to have their servers placed directly next to the exchange servers. Because of the shorter routes (either by physical proximity or by strategic placement of fiber-optic cables), company B’s purchase beats company A’s to the exchange by milliseconds.

Once Company B’s purchase is finalized, the demand for that stock has increased, so the cost automatically increases. Company B then immediately sells the stocks to Company A, fulfilling Company A’s earlier placed, but later arrived purchase. Even if that increase in price is nominal, $0.01 for example, when that one penny is added on to each share and is attached to millions of purchases a day, Company B makes a sizeable profit just by being faster or closer.

This scheme all began once the Securities and Exchange Commission (SEC) allowed stock exchanges to share all of the unexecuted, incoming orders with traders. Tradebot, one of the biggest high-frequency companies, said a few years ago that the company had “not had a losing day of trading in four years.” Yet, the company’s average holding period for stocks is a mere 11 seconds. Logically, that seems impossible. After all, it isn’t called “playing the market” without reason—it is a statistical certainty that a percentage of trades will be losers.

High-frequency trading companies, like Tradebot, succeed because, in reality, they are not actually trading. They are “skimming” by beating would-be stock purchasers to the exchange, driving up the cost, and then re-selling those same stocks to the very people they just jumped in line.

High-frequency traders account for approximately half of share volume in the U.S., a statistic that shows their pervasiveness and also hints at the obstacles faced by proposals to rein them in. Of course, the high-frequency traders disagree that their actions are anything but legitimate. Bats President Bill O’Brien said in an e-mail:

We completely disagree with allegations that the U.S. equity market is rigged. While we should never stop trying to improve our market structure, it is unfair and irresponsible to accuse people simply because they use technology and enhance competition. This has helped make our market the most competitive and liquid in the world, greatly benefiting individual investors.

New York’s Attorney General, Eric Schneiderman, disagrees and he is investigating these processes. Officials at the U.S. Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) have said market rules may need to be examined. An SEC commissioner, Daniel Gallagher, agrees that the perception of unfairness in the market needs to be addressed. In fact, the SEC announced on April 1 that it is investigating the high-frequency trading companies to determine if they are engaged in unlawful trading practices.

The Federal Bureau of Investigation (FBI) has also announced that it is investigating whether high-frequency traders are engaging in insider trading by taking advantage of market information that is not available to other investors. The difficulty for the FBI will be proving intent and that’s because the trades at issue are initiated by computers.

Currently, high-frequency traders’ profits are gained by increasing the costs to nearly every other purchaser on the market by falsely flooding the market with fake demand. Hopefully there is a solution on the horizon. For now, unfortunately, high-frequency traders have a legal means of taking millions of dollars from legitimate investors by doing nothing other than being faster or closer, through no skill of their own—just proximity and shorter cables. If you need additional information on this subject, contact Rebecca Gilliland, a lawyer in our firm’s Consumer Fraud Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Sources: Bloomberg View and Wall Street Journal

FDA CONSIDERING REDUCING WARNINGS CONTAINED IN DTC ADVERTISEMENTS

The U.S. Food and Drug Administration is considering reducing the risks portion of direct to consumer (DTC) advertisements. In a recent request for comments, the FDA recognized that there are conflicting viewpoints at work. Some making comments, primarily pharmaceutical manufacturers, argue that the “major statement”—the currently required disclosure of a drug’s major risks—is often quite long. They say this “may result in reduced consumer comprehension, minimization of important risk information, and, potentially, therapeutic noncompliance due to fear of side effects.” But it appears that each of the above objections to the current standard on an individual basis, that shows is minimal. Let’s take a look at each:
• Reduced consumer comprehension: This issue is, hopefully, addressed when consumers talk with their doctors about the potential use of a prescription drug. After all, the DTC commercials at issue are for drugs that must be prescribed by a physician and therefore require a conversation with a doctor. Consequently, removing the warnings from DTC advertisements would result in more consumers asking for particular drugs—a result that pharmaceutical manufacturers would certainly like to achieve.

• Minimization of important risk information: This issue is a red herring. After all, the alternative is to completely remove some risks from the advertisement and leave only the “serious and actionable” risks. That begs the question: who will decide which risks are “serious and actionable”? Is it the seriousness of the risk or the likelihood of the risk that matters? At what point does a rare but deadly risk cross that threshold? As the only players involved in the promulgation of DTC ads, the likely answer is either the manufacturer or the FDA, but the FDA’s request for comments provides no indication how these questions would be resolved.

• Therapeutic noncompliance due to fear of side effects: This only applies to patients already taking the drug (a patient cannot be noncompliant regarding a medication he is not taking), so again, it seems like either the patient has spoken with his physician or has decided on his own that the side effects are not worth the risk. Removing risks from advertisements for this reason would remove the ability of consumers to make their own medical decisions.

The other side is concerned that DTC ads “do not include adequate risk information or leave out important information,” and the FDA recognized that to be true. That’s a valid concern because the FDA has minimal oversight of DTC advertisements. While the FDA does review DTC ads, its focus is on whether the drugs themselves are safe and effective. The FDA wants to be sure that the advertisements do not misbrand those drugs. The agency is not determining whether the advertisements are true, false, or deceptive. The Government Accountability Office recognized that the FDA only reviews a “small portion of the DTC materials it receives.” Interestingly, the FDA admitted this to be true. The GAO said the FDA cannot insure that it even looks at every DTC advertisement, much less assess whether those ads satisfy the current rules.

This move by the FDA could have dangerous consequences to consumers. In an area that is already under constant criticism because of the deceptive nature of DTC advertisements, it’s inconceivable that the FDA would be looking to make commercials less informative. Add the obvious and logical assumption by consumers that fewer warnings in new ads, as compared to those in the recent past, means that the drugs are safer, and the deceptive nature of DTC advertisements will increase exponentially. Consumers need to be aware of these potential changes so they can avoid being fooled into assuming that fewer advertised risks equates to safer drugs. If you need additional information on this subject, contact Rebecca Gilliland, a lawyer in our firm’s Consumer Fraud Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com. Sources: Law360.com, www.federalregister.gov, and www.gao.gov

Hospira To Pay $60 Million To Settle Shareholder Class Action

Hospira Inc., a global pharmaceutical company, has agreed to pay $60 million to settle a class action lawsuit accusing the company of violating securities laws. It was alleged that by providing misleading positive statements share prices were artificially inflated despite problems at the company’s manufacturing plant. The lead Plaintiffs in the class action are asking for court approval of the settlement in an Illinois federal court. This settlement came with Hospira after negotiations before a mediator. The agreement, if approved by the court, will end the litigation that has been ongoing since 2011. Hospira agreed to pay $60 million into a fund benefiting the class members.

The lawsuit was filed by a group of pension fund investors, including Sheet Metal Workers’ National Pension Fund, KBC Asset Management NV, Heavy & General Laborers’ Locals 472 & 172 Pension & Annuity Funds, and Roofer’s Local No. 149 Pension Fund. The Plaintiffs alleged that Hospira, which has a portfolio of more than 200 generic injectable products, issued materially false and misleading statements. It was alleged further that Hospira “touted to investors [its] ability to streamline its process and practices in order to boost the company’s long-term profitability and increase the return for Hospira shareholders.”

Source: Law360.com
USD). There are a number of Alabama cases that indicate that for public policy considerations, insurers cannot exclude punitive damages in wrongful death cases in Alabama. There is an Alabama Attorney General's opinion that dates back many years that basically prohibits insurers from excluding punitive damages in death cases in Alabama. Otherwise, there would be no recovery in death cases even though policy would pay for a bodily injury. In essence, it would be in the interest of the wrongdoer to cause death rather than injury if the punitive exclusions were upheld.

L.F. Kronoberg appealed the judgment to the 11th Circuit Court of Appeals. We settled the case while the case was pending in the 11th Circuit for a confidential amount. This most interesting case was handled by Greg Allen and Kendall Dunson, lawyers in our firm’s Personal Injury/Product Liability Section. They did a very good job for their client in this extremely challenging case.

**Have You Been A Victim Of Force-Placed Flood Insurance By JPMorgan Chase?**

Lawyers at Beasley Allen are currently representing individuals who have been victimized by JPMorgan Chase Bank’s practice of force-placing flood insurance on borrowers with home equity lines of credit and home equity loans. The class-action is currently before the Eastern Division of the Southern District of Ohio. In 2002, the Plaintiffs in our case refinanced their home in Mississippi and obtained a Home Equity Loan that was eventually acquired by JPMorgan Chase Bank (Chase). At the time the Plaintiffs entered into their loan, their home was not considered to be in a flood zone. In 2011 the area was rezoned. The map change resulted in the Plaintiffs’ home being reclassified as one located within a flood hazard area. Pursuant to federal laws, homes located in a flood hazard area must maintain flood insurance as a condition of any loan or line of credit secured by the property.

The Plaintiffs soon learned that their neighbors, other homeowners, had appealed the flood hazard determination for their properties and had been successful. Instead of immediately obtaining flood insurance, the Plaintiffs chose to appeal the flood hazard determination just as their neighbors had done. In the meantime, Chase sent a letter to the Plaintiffs informing them that if they did not purchase flood insurance, then flood insurance would be forced upon them. In May of 2011, Chase informed the Plaintiffs that it had force-placed flood insurance on their home in the maximum amount of coverage available through the National Flood Insurance Program.

During our investigation of this case, we have learned that an affiliate of Chase received kickbacks in the form of so-called “commissions” from Chase’s insurance vendor, American Security Insurance Company (doing business as “Assurant”). Moreover, Chase’s flood insurance requirements exceeded federal flood insurance requirements, forcing borrowers to pay for more coverage than necessary. The class-action is pursuing claims for Chase’s violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), the Real Estate Settlement Procedures Act (RESPA), and the Truth in Lending Act (TILA) as well as claims based on common law.

If any of our readers have a Home Equity Loan or Home Equity Line of Credit and have been a victim of Chase’s force-placed flood insurance scheme, contact Archie Grubb at Archie.Grubb@beasleyallen.com, or Andrew Brasher at Andrew.Brasher@beasleyallen.com or by phone at 800-898-2034. We would also like to talk with any of our lawyer-readers who have clients who have such a claim and would like for us to help them.

**Federal Agencies Increase Capital Requirements For Eight Largest U.S. Banks**

The Federal Reserve Board, Federal Deposit Insurance Corp., and the Office of the Comptroller of the Currency released new rules on April 8, 2014. According to the agencies, maintenance of a strong base of capital among the largest, most interconnected U.S. banking organizations is particularly important because capital shortfalls at these institutions have the potential to result in significant adverse economic consequences. As the chairman of the FDIC, Martin Gruenberg, said, "In my view, this final rule may be the most significant step we have taken to reduce the systemic risk posed by these large, complex banking organizations.”

The final rule, which goes into effect Jan. 1, 2018, applies to U.S. top-tier bank holding companies with more than $700 billion in consolidated total assets or more than $10 trillion in assets under custody and their insured depository institution (IDI) subsidiaries. In an effort to prevent another financial crisis, the new rules would limit banks’ ability to rely on debt. Instead, banks will need to rely more on other funding sources such as shareholder equity. The agencies’ intent is to strengthen the leverage ratio

1 Those eight banking organizations are: JPMorgan Chase, Citigroup, Bank of America, Wells Fargo, Goldman Sachs, Morgan Stanley, Bank of New York Mellon and State Street.

**Premises Liability Update**

Our firm recently settled an Alabama case involving the failure of a smoke detector in a house fire that occurred on Nov. 28, 2011. Three young children: 4-year-old twins, and a 1-year-old girl, died during the fire as a result of inhaling toxic smoke, chemicals and carbon monoxide. The claim was brought against Walter Kidde and United Technologies Corporation, among others, as a result of the ionization smoke detector in the house failing to alarm.

Lawyers in our firm have handled cases of this sort in the past and will continue to handle them in the future. It’s most unfortu-
nate that the manufacturers of ionization detectors have known for more than 30 years that a standalone ionization smoke detector is not adequate to protect a home involving a slow growth or slow smoldering fire. Testing reveals that ionization smoke detectors do not even detect smoke. They detect submicron particles, which may or may not be in sufficient quantity in certain types of smoke.

Smoldering fires tend to put off larger and cooler particles that may not set off an ionization detector even if the particles reach the detection chamber. Ionization detectors are also dangerous because they lull people into a false sense of security. An ionization detector is often the detector that goes off when someone opens an oven door or burns toast. In such cases, there may be no visible smoke whatsoever. The sad truth is that folks who have these types of detectors assume that if their detector sounds in the absence of smoke, that it would certainly go off in a fire. That is a terrible misconception.

Another problem with the ionization design is that a person who has a battery operated detector may actually take the battery out to prevent nuisance alarms. This obviously can result in a dangerous and hazardous condition. The detector housings are made out of plastic so that when the fire does flame up and spread, the evidence is destroyed. The detector melts and burns. It may be impossible to determine the manufacturer of the detector or even whether there was a detector actually in the home.

There has been an alternative technology that makes the home much safer from smoldering fires. That’s the photoelectric design, which does sense the presence of smoke. This technology has been around for years and has been proved to be effective. In our case, there was sufficient evidence to trace the detector to Walter F. Kidde, the largest manufacturer of smoke alarms in the world. Our client’s home was equipped with a hardwired standalone ionization detector, which is inadequate for a smoldering fire. There was evidence that the fire may have burned for as long as 30 minutes without the alarm sounding. Numerous witnesses, including three different people who went into the apartment trying to rescue the children, testified they never heard an alarm sound.

Needless deaths, like those in this case, will continue until the manufacturers of these devices are forced to move away from standalone ionization detectors. There are currently dual detectors on the market, which have both photoelectric and ionization sensing in the same smoke detector. Photoelectric detectors are extremely good at detecting smoldering fires. Photoelectric detectors may be slightly delayed with a fast flaming fire from ionization detectors, but you are only talking about a delay of seconds.

On the other hand, on the slow smoldering fire, the ionization detector may delay from 30 minutes to an hour or it may never sound.

Interestingly, there are states such as Vermont that do not allow new buildings to be sold with ionization detectors being the only device. New homes must have at least a photoelectric-type smoke detector in the home. There are certain cities around the country, including Boston and Cincinnati, that do not allow standalone ionization detectors. The U.S. is slowly waking up to the problem, but it is taking far too long for those in authority to do something about it. Folks are dying as a result of these detectors not functioning properly.

Some of the most damaging evidence in our case came from witnesses, who are experts in the field, but were not paid consulting experts for us in the case. Two of these witnesses were going to travel all the way from Australia to testify for us in the case as fact witnesses. One was Adrian Butler, a consumer advocate, who at one time was in the business of selling smoke detectors. Mr. Butler discovered that the ionization detectors did not work properly and he is extremely concerned about the hazards they present.

Also, David Isaac, a former employee of one of the United Technologies Corporation’s Australian subsidiaries that sells ionization smoke alarms, was going to testify as a witness for us. Mr. Isaac was asked by his company to sit on the committee whose purpose was to keep a separate standard in place for ionization detectors. That standard allowed the ionization design to pass a test, but significantly it was not a smoke test!

The photoelectric was required to pass a smoke test in Australia, but the ionization detector was allowed to pass a mic-x test. The mic-x test had nothing to do with smoke detection. While he was a member of the FP-2 committee, Mr. Isaac learned that the ionization detectors were unsafe and that his company was selling a dangerous product that created a serious hazard. Rather than following the company line, and doing what needed to be done to protect the industry, Mr. Isaac started a campaign within the company to try and eliminate this dangerous design from its product line. While this man, who was concerned about safety, was not successful in doing that, he was successful in helping to set new standards for Australia.

In addition, Dean Dennis, from Ohio, lost his daughter in a fire as a result of an ionization detector failing. Mr. Dennis is a self-taught expert and is very knowledgeable with respect to the dangers of the ionization smoke detectors. His goal is to save lives of unsuspecting persons. Mr. Dennis was also going to testify for us at trial.

Our lawyers, in developing this case, also discovered Russell Ashe, who was willing to come and spend his time testifying as a fact witness. Mr. Ashe, a fire fighter in Vermont, was called to a fire scene several years ago where four innocent family members perished with only the father surviving. This gentleman lost his wife, son and three daughters because of the numerous ionization detectors in the home failing to sound an alarm.

Because of what happened in that fire, and wanting to make a difference, Mr. Ashe wrote a book titled, “The Fire That Changed Everything.” (L. Brown and Sons, Printing, 2010). He was instrumental in having the Vermont law passed that has, without any doubt, saved lives. The governor of Vermont actually signed the bill into law in Mr. Ashe’s home.

The smoke detector industry would like to have these four men simply go away. Fortunately, that will not happen until the industry changes its ways. These are brave individuals who are willing and able to take on this industry in an effort to try and save lives. They were ready to testify for us in our case and wanted to get the word out that ionization smoke alarms do not provide adequate fire protection. They are to be commended for their concern and willingness to help others.

Prior to the trial date, the case settled for a confidential amount. This case was handled by LaBarron Boone, Stephanie Monplaisir, and Greg Allen from our firm, along with Myron Penn and Shane Seaborn of the Penn & Seaborn Firm, located in Clayton and Union Springs, Ala., and Walter McGowan, a lawyer from Tuskegee, Ala. We also appreciate very much Richard Taylor, a Mobile, Ala., lawyer, for his assistance in this case. Richard provided us with valuable information from his prior smoke detector cases.

Greg has handled previous cases involving smoke detectors, which gave us an advantage in the investigation and preparation of this case. The case was pending before Circuit Judge Burt Smithhart in Bullock County, Ala. Judge Smithhart, who handled this case in his usual effective style, is well-respected by both sides of the bar.

Unfortunately, we are well aware that this will not be our last case against the ionization smoke detector manufacturers. But they may change their ways and change over to the detectors actually work. If that happens, lives will be saved and that would be great news for us. We would know that our lawyers have made a difference!
$12.4 MILLION JURY AWARD FOR APARTMENT OWNERS

A Florida jury has awarded $12.4 million to the owners of a West Des Moines, Iowa, apartment complex in a premise liability lawsuit. The owners sued the apartments’ builders over leaks and mold that the owners said took years to correct. This is believed to be one of the largest jury verdicts of its kind in state history. The verdict marked the culmination of almost decade-long litigation involving the construction of the Westlake apartments and condos, a 300-unit complex built at on the Dallas County side of West Des Moines during the pre-recession housing boom.

The jury found that National Surety, which insured the companies that built the apartments, had to pay the insurance claim to Westlake Investments LLC, a West Des Moines company that is owned by a father-and-son team, Maurice and James Sinclair. National Surety is expected to appeal the verdict.

Construction of the Westlake apartments began in 2002. A St. Louis-based company called CCC/MLP built the complex. Upon completion in 2003, the company sold it to the Sinclairs’ company for $23 million, and the Sinclairs intended to sell the units as condos. At the time, demand for condos was strong and banks were most eager to provide financing. Westlake Investments took control of the property in November 2003 and by the following spring noticed water leaking into more than 100 units. It was alleged that the water ruined carpets, walls and furniture, caused mold and prompted the removal of entire sections of outer walls in the units. Two factors were believed to have led to the apartments being constructed in a way that did not properly repel water:

• The general contractor Pioneer Construction, an arm of CCC/MLP, had not built apartments in an area with winters as harsh as Iowa’s and did not use the appropriate materials for the climate. That included exterior stone that uses no mortar and can be permeated by water.

• There was such a demand for housing at the time that the contractors and subcontractors were in a rush to move on to other jobs. Eckley said subcontractors improperly installed the material behind the outer stone walls that should have repelled water.

Westlake is a mix of apartments and condos. The Sinclairs sold about 80 units before the leaks derailed their plans. It appears the owners were unable to find where the leaks were coming from and it took more than three years to repair the leaks. In 2008, Westlake Investments filed suit against several entities involved in the construction, including CCC/MLP and Pioneer Construction.

In 2011, CCC/MLP and Pioneer Construction agreed to a settlement with Westlake for $15.6 million and they assigned responsibility for the payment to National Surety, which had provided excess liability insurance for CCC/MLP and Pioneer Construction during the construction of the apartments. But National Surety denied that it was responsible for the claim. Of the $15.6 million settlement, $3.2 million has already been satisfied from other sources, according to the verdict. The settlement covers about $3 million in previous repairs, about $6 million in expected repairs and maintenance, and about $6 million in lost revenue.

Source: Desmoinesregister.com

SETTLEMENT REACHED IN ESCALATOR DEATH LAWSUIT

The family of a 4-year-old Massachusetts boy who was killed in an escalator accident at a mall has reached a settlement in their lawsuit. The child, Mark DiBona, fell about 18 feet from a second-floor escalator onto a display case located below inside a department store at a mall in March 2011. He had been with his family who were shopping at the mall. The child suffered head injuries and died the next day.

The parents sued the mall’s owner, the store, the escalator’s manufacturer and the contractor that installed it. It was alleged in the suit that the escalator was in “dangerous and defective” condition. The Plaintiffs, Laura and Eric DiBona, filed the lawsuit. The terms of the settlement are confidential. It was reported that the child’s death led to a crackdown on escalator safety across the state.

Source: Claims Journal

FALLING SHELVES INJURE EIGHT CUSTOMERS AT A DOLLAR STORE

We have written in previous issues about the safety hazards caused by the collapse of tall shelving units in retail stores. A recent example of such an occurrence was in New York City. Eight people were injured—seven seriously—when shelving units packed with merchandise collapsed on April 7 at a Bronx dollar store. The collapsing shelves created a cascading effect, burying people under piles of merchandise. Responding firefighters had to remove the goods by hand and cart them onto the sidewalk.

It appears from all reports that there was no structural damage to the building. Fortunately, none of the injuries, which included broken bones, were life-threatening. A person who observed the incident told the New York Post:

All the shelves just started falling over. I was walking toward the back and all I heard was this thunderous loud noise. I turned and shelves fell onto one gentleman.

The cause of the collapse of the shelving is under investigation. Based on our experience, improper shelving is a most serious problem and creates hazards for customers in retail stores.

Source: Claims Journal

$110 MILLION JURY VERDICT RETURNED OVER NEGLECTED MOBILE HOME PARK

A California jury has found real estate investment trust Equity Lifestyle Properties Inc. guilty of breach of contract, negligence and nuisance for failing to maintain one of its mobile home developments and awarded a total of more than $110 million to 61 residents of the property. The jury’s verdict consisted of a $15.3 million verdict in compensatory damages and $95.8 million in punitive damages. Equity Lifestyle, the Chicago-based real estate investment trust, was found to have improperly maintained sewage, electrical and water systems at the California Hawaiian mobile home property in San Jose, Calif.

The verdict came nearly five years after a group of residents filed suit in late April 2009. In their second amended complaint, filed in April 2012, the residents alleged negligence, nuisance and breach of contract against Equity Lifestyle. The Plaintiffs contended that the mobile home park owner had ignored Plaintiffs’ notifications of open sewage spills near the Plaintiffs’ homes, an “unbearable stench” throughout the park, discolored water and inadequate lighting and security for the grounds.

The compensatory damages were awarded per site, covering rent paid and emotional distress, ranging from $75,000 to $1.4 million per site, and the punitive damages were evenly awarded at $1.57 million for each of the 61 Plaintiffs. The Plaintiffs were represented by Henry E. Heater, James C. Allen and Linda B. Reich of Endeman Lincoln Turek & Heater LLP. They did a very good job in the case which was tried in the Supe-
An employee of Atlantic Coast Asphalt, a part of Hubbard Construction Co., entered a hot liquid asphalt tank to cut out a section of part of Hubbard Construction Co., entered a hot liquid asphalt tank to cut out a section of pipe at the company’s plant in Jacksonville, Fla. The employee suffered severe burns to his legs and feet. His rescue took eight hours to complete. As a result of the September 2013 incident, the Occupational Safety and Health Administration (OSHA) cited the company with 10 serious safety and health violations, carrying proposed penalties of $63,360. Brian Sturtecky, OSHA’s area director in Jacksonville, had this to say:

This incident could have been prevented if the employer followed OSHA’s standards for lockout/tagout and permit-required confined space procedures. When employers take short-cuts related to safety and health they are gambling with employees’ lives.

The citations were issued for the employer’s failure to follow permit-required confined space entry and lockout/tagout procedures to ensure all hazards were identified, documented, measured and controls put in place prior to the employee entering the space. The employer also exposed workers to entrapment, thermal and chemical burn hazards. 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.

Atlantic Coast Asphalt manufactures and distributes hot-mix asphalt to various residential and commercial customers. The company had 15 business days from receipt of the citations and proposed penalties to comply, request a conference with OSHA’s area director or contest the findings before the independent Occupational Safety & Health Review Commission. According to Bureau of Labor Statistics preliminary data from the Census of Fatal Occupational Injuries, fatal work injuries in Florida accounted for 209 of the 4,383 fatal work injuries reported in 2012.

Source: OSHA

California officials have fined a steel company nearly $37,000 in connection with the death of a worker at the site of the San Francisco 49er’s new stadium. Edward Lake II, a truck driver with Gerdau Reinforcing Steel West, was crushed in October by a bundle of rebar that fell from his truck as it was being unloaded at the stadium site in Santa Clara. Lake was the second worker to die during construction of the roughly $1.2 billion stadium.

The State Division of Occupational Safety and Health said that Gerdau failed to implement procedures to verify that truck drivers and other employees were in a safe position while trucks were being unloaded. On April 10, the agency issued three citations against the company totaling $36,750.

Source: Claims Journal

OSHA estimates that nearly 100 workers suffer serious injuries from forklift accidents every single day. Workers die in a forklift accident every four days. According to available data, about 90 percent of all forklifts will be involved in an injury-causing accident during their service life. That is extremely bad news for working men and women.

It is recognized that the vast majority of these deaths and injuries, as well as billions of dollars in facility and inventory damages, can be avoided. Basic forklift safety rules must be enforced and workers fully apprised of what is required of them. Unfortunately, even though safety managers know how critical forklift safety training is, quite often they are too busy and lack the time to develop an adequate training program. Also, the availability of resources can be a problem.

Source: Law360.com

XX.
TRANSPORTATION

BUS CRASH HIGHLIGHTS LAGGING SAFETY STANDARDS

Safety standards to make large buses easier for passengers to escape after a crash still have not been adopted. Fifteen years have passed after accident investigators called for new rules. The need for standards became evident when a tractor-trailer truck and a bus transporting high school students collided on April 10 near Orland, Calif. Ten people were killed in a raging fire that consumed both vehicles. A person kicked out a bus window, allowing many of the 40 or so students aboard to get out through the opening before the vehicle burst into flames.

The National Transportation Safety Board (NTSB), which investigates transportation accidents, recommended back in February 1999 that federal regulators issue new standards for large buses, also known as motorcoaches, so that after an accident passengers can easily open windows and emergency exits.

NTSB Chairman Deborah Hersman raised the issue again at a 2011 congressional hearing, saying at the time that the recommendation was one of many related to motorcoaches that regulators hadn’t acted upon. Legislation passed by Congress the following year asked the Transportation Department to conduct research and testing on ways to prevent or mitigate fires in motorcoaches, as well as improve evacuation. The law leaves it up to the secretary of transportation whether new standards are needed.

The National Highway Traffic Safety Administration, which as we all now know, has the responsibility to set vehicle safety standards, has been working on bus evacuation regulations since 2007. But thus far NHTSA has not offered a single proposal. According to NHTSA, the aim of the regulations the agency is working on is “to ensure evacuation in adequate time under different emergency situations for various occupant groups, including children and the elderly.”

The accident board made its recommendation on easy-to-open windows and exits after a tour bus following the trail of the Underground Railroad used by American slaves before the Civil War drifted off Interstate 95 near Petersburg, Va., in 1997, rumbled down an embankment and overturned in a river. Because the bus was overturned and partially submerged, passengers had to evacuate by standing on the seats, pushing up on the windows.
emergency windows, and climbing out and onto the top of the bus.

In that incident each of the emergency windows on the bus was hinged at the top, allowing the window to swing open when the emergency release bar was activated. Tests performed by the manufacturer after the accident indicated that an upward force of 85 pounds was needed to fully open an emergency exit window with the coach lying on its side. Some passengers said that, because of their height or the window weight, they were unable to push the windows open after unlatching them. Safety advocates have stated that NHTSA has historically been slow to respond to safety recommendations involving motorcoaches.

NHTSA issued a rule last November requiring seat belts on new motorcoaches for the first time. Accident investigators first recommended all large buses be equipped with such belts 45 years earlier in response to a fiery crash that killed 19 passengers near the Mojave Desert town of Baker, Calif. Jim Hall, the former accident board chairman who signed the 1999 recommendation, observed:

"Unfortunately, motorcoach safety has historically been an orphan at NHTSA. This is the transportation that carries primarily older people, students and low-income people. It hasn't been a priority (for regulators)."

Former NHTSA Administrator Joan Claybrook, a strong safety advocate and my longtime friend, said the bus industry fought with safety advocates "like cats and dogs" to prevent "hard deadlines" in the 2012 law for regulations on things like easy-to-open windows and exits. In NHTSA's defense, Joan said that "if they aren't told it has to be done, they are going to put it on the back burner because they have 400 other things to do today." Joan said the agency is severely underfunded with a budget of $134 million a year to do research, testing and drafting of regulations for all vehicles, including passengers cars and trucks.

Victor Parra, president and CEO of the United Motorcoach Association, said the NHTSA must act before the bus industry can make upgrades to windows and doors since buses are built to the agency's specifications. The nation's fleet of 29,000 motorcoaches carry about 700 million passengers a year, comparable to the domestic airline industry. NHTSA needs to get busy and come up with a needed standard.

Source: Claims Journal

**Texas Jury Awards $4.6 Million in Deadly Truck Crash Lawsuit**

A jury has awarded a West Texas family $4.6 million in a lawsuit they filed against three trucking companies arising out of a 2010 crash that killed two men. The jury found the companies were responsible for the fiery crash that killed 39-year-old Lorenzo Muñoz and 32-year-old Roger Francewear. The two men died August 2010 after the 18-wheeler they were in crashed at a location east of El Paso. The lawsuit, filed by Muñoz's family against Moore Freight Service Inc., XMex Transport LLC and Trans Front Inc., claimed the men were given an unreasonable schedule that forced Muñoz to drive even though he was fatigued.

Source: El Paso Times

**Crash Statistics For Alabama For 2012**

The Alabama Department of Transportation (DOT) compiles data each year on road collisions and crashes in the State of Alabama. This information is compiled mostly from Alabama Uniform Crash Reports that are prepared by law enforcement officers investigating vehicle crashes. While the compiled and analyzed data typically runs a full year behind, it's still informative and helpful. The most recent release of data is for the calendar year 2012. The data published by the Alabama DOT is both revealing and instructive.

In total during 2012 in Alabama, there were 128,307 crashes, a 0.49 percent increase from the prior year. There were 813 fatal crashes involving 870 fatalities, a decrease of 0.12 percent and 3.23 percent from the prior year. Reported injuries, which totaled 40,202, increased by 5.75 percent from 2011 numbers. Interestingly, the number of registered vehicles, the number of licensed drivers, and the number of miles travelled in Alabama stayed essentially unchanged.

The big changes that have been seen are reflected in 10-year crash data analysis for the period of 2003 to 2012. The total number of crashes decreased in that period by more than 9 percent. The number of reported injuries has decreased by more than 8 percent, and the number of reported fatalities has decreased by more than 13 percent during that 10-year period. The decreases of injuries and deaths over the prior 10 years is significant considering that:

- the number of licensed drivers increased by 6.34 percent;
- the number of motor vehicle registrations increased by 15.19 percent; and
- the vehicle miles travelled increased by 10.79 percent.

In other words, even though there were more drivers in more cars who were traveling more miles, there was no increase in the number of crashes, injuries or fatalities. In fact, just the opposite occurred. The questions most of us would ask are why this is so and how can Alabama continue this trend of fewer accidents, injuries and fatalities?

Analyzing crash data by month, day of the week and time of the day is also revealing. The percentage of total collisions does not significantly vary from month to month. The fewest number of crashes occur in November (6.6 percent) and the most occur in June (10.8 percent). March, November and December join June as being the four months that represent more than 9 percent of the total crashes in a given month. Not surprisingly, most crashes occur on Saturday (21 percent), followed by Sunday (15.2 percent) and Friday (14.5 percent). The fewest number of crashes occur on Monday (11.6 percent), followed closely by Wednesday (11.7 percent).

Not surprisingly, speed and alcohol/drugs were significant contributing factors in a large number of crashes and fatal crashes. Other significant factors were:

- failing to yield right of way;
- failure to see or observe an object, person or vehicle;
- misjudging stopping distance; and
- tailgating.

The State DOT’s analysis looked at factors such as crash environment, whether a traffic control device was used, road curvature and grade, road condition, light condition, number of lanes, and weather. It’s noteworthy that almost 68 percent of collisions and a corresponding number of fatalities occurred when the weather was clear. The analysis also broke down the number of collisions and fatalities based upon the road type, such as interstates, U.S. highways, state highways, county and city roads, and other roadways. Interestingly, dating back to 2003, a significantly greater number of fatalities have occurred in rural settings as compared to urban areas of the state.

Passenger cars, for example, account for 53.4 percent of all vehicles that are involved in crashes; SUVs and pickups account for 36.9 percent; and motorcycles account for less than 1 percent of all crashes. The study also broke down the data by pedestrian inju-
ries/fatalities, bicycle injury/fatalities, railroad/highway crashes by injuries and fatalities, and work zone crashes by injuries and fatalities. There was only one death from a railroad/highway collision in 2012 in Alabama. Work zones continue to be an area of high collisions with corresponding injuries and deaths that are disproportionate to other crash areas.

Motorcycle crash fatalities have fluctuated in the past 10-year period. In 2003, there were 52 people killed in a crash involving a motorcycle. In 2012, there were 92 people killed in motorcycle collisions (or about 11 percent of all fatal collisions). The number of motorcycle collision fatalities peaked in 2006 with 105 people killed. The peak number of motorcycles involved in crashes occurred in 2008 (2,106) and has fluctuated as well in the 10-year period, with 1,912 recorded in 2012. When one considers that the total number of motorcycles involved in crashes in 2012 was less than 1 percent of all vehicles but the total number of fatalities represented 11 percent of all motor vehicle crash fatalities, it is not surprising that a disproportionate number of deaths occurred involving persons on motorcycles.

Heavy trucks also continue to play a large role in vehicle crashes, injuries and deaths in Alabama. Fortunately, that number seems to be on a downward trend in the 10-year period between 2003 and 2012. For example, in 2003, there were 9,995 crashes involving large trucks, with 2,565 injuries and 161 fatalities reported in these collisions. In 2012, there were 5,798 crashes involving large trucks, with 1,562 injuries and 90 fatalities reported in these collisions.

The analysis provided by the Alabama DOT is invaluable to Alabama motorists and the general public. The analysis goes into much more depth than space in this issue will allow it to be addressed here. The DOT evaluation helps us to identify where the greatest issues are in Alabama. This helps track areas that have been a concern throughout the years. Those areas include the use of safety restraints, work zones, and the like. This analysis helps our highway department, law enforcement officers, emergency responders, safety experts, and motorists take measures that will assist in reducing the number of motor vehicle collisions and the resulting injuries and deaths in Alabama.

If you need more information on this subject, or you would like a copy of the report, contact Ben Locklar at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com. Ben is a lawyer in our firm’s Personal Injury/Product Liability Section.

Source: Alabama Traffic 2012: Crash Facts, Alabama Department of Transportation

XXI.
ENVIRONMENTAL CONCERNS

ANADARKO PAYS $5 BILLION TO SETTLE TRONOX CLAIMS

Anadarko Petroleum Corp. has agreed to pay a record $5.15 billion to settle pollution claims with a litigation trust of Tronox Inc. Tronox emerged from bankruptcy in 2011 and accused Anadarko subsidiary Kerr-McGee Corp. of dumping environmental liabilities on the company as part of a fraudulent transfer scheme. The settlement agreement resolves all claims against Kerr-McGee and gives Anadarko contribution protection from third-party claims seeking reimbursement from more than 4,000 sites covered by the settlement. The company was facing up to $14.1 billion in damages following a federal bankruptcy judge’s ruling in December that Kerr-McGee stripped Tronox of healthy assets before spinning it off. According to reports, the $5.15 billion settlement is the largest sum for environmental contamination cleanup in the history of the U.S. Department of Justice. Deputy U.S. Attorney General James M. Cole made this observation:

This announcement is more than merely the settlement of a bankruptcy case. Kerr-McGee’s businesses all over this country left significant, lasting environmental damage in their wake. It tried to shed its responsibility for this environmental damage and stick the United States taxpayers with the huge cleanup bill.

The massive lawsuit stems from the 2005-06 initial public offering and spinoff of Oklahoma City-based pigment maker Tronox from Kerr-McGee before that company went to Anadarko in a nearly $19 billion deal. The litigation trust claimed that Anadarko had looked into acquiring Kerr-McGee in 2002, balked at the idea of taking on billions of dollars in legacy costs, and then conspired with Kerr-McGee to structure a spinoff that could dump the liabilities onto Tronox and keep the valuable oil and gas assets for itself. The trust said the spinoff and sale constituted a fraudulent transfer because the Tronox entity was essentially insolvent at the time, thanks to the partitioning of the good assets from the bad. According to the litigation trust, each member of Kerr-McGee’s “inner circle”—CEO Luke Corbett, Chief Financial Officer Bob Wohleber and general counsel Greg Pilcher—displayed “callous indifference,” and their conduct amounted to fraudulent intent. U.S. Bankruptcy Judge Allan L. Gropper ruled in favor of the Tronox trust in December, finding that:

Kerr-McGee acted with intent to ‘bind and delay’ the debtors’ creditors when they transferred out and then spun off the oil and gas assets, and that the transaction, which left the debtors insolvent and undercapitalized, was not made for reasonably equivalent value.

Judge Gropper said he would enter damages of at least $5.1 billion and as much as $14.1 billion against Kerr-McGee, but the federal government and the trust agreed to take the $5.15 billion offered by Anadarko.

The Justice Department said more than $4.4 billion from the settlement will cover environmental remediation and settle pollution claims across the country. The agreement must be approved by the bankruptcy court and the federal district court in New York. The Tronox adversary proceeding will likely be stayed until the settlement receives final approval process, which is expected by the end of the third quarter of this year, according to the company.

Source: Law360.com

XXII.
THE CONSUMER CORNER

NHTSA TO REQUIRE REAR CAMERAS ON CARS BY 2018

The National Highway Traffic Safety Administration has finalized a new rule that will require rearview cameras on all new vehicles under 10,000 pounds by 2018. The agency says the measure will improve safety by curtailing “backover” accidents. The new rule—which applies to buses and trucks, as well as passenger cars manufactured beginning in May 2018—mandates “rear visibility technology” that expands the driver’s field of view to help avoid crashes, according to a statement from NHTSA. U.S. Transportation Secretary Anthony Foxx observed:

Safety is our biggest priority, and we are committed to protecting the most vulnerable victims of backover accidents—our children and seniors.

Under the rule, the camera’s field of view must cover a 10-foot-by-20-foot zone directly behind the vehicle, and the systems must
also meet standards for image size, longer time, response time, durability and deactivation. Each year, on average, backover accidents result in 210 fatalities and 15,000 injuries in the U.S., with children younger than 5 and adults older than 70 accounting for 31 percent and 26 percent of the deaths, respectively, according to NHTSA studies.

The agency said it had moved deliberately on the new rule to make it “flexible and achievable,” noting that many automakers have decided on their own to add such camera systems in response to consumer demand. Factoring in cars that already have the cameras, NHTSA estimates that as many as 69 lives will be saved each year once all new vehicles comply with the rule. David Friedman, the Acting Administrator at NHTSA, said in a statement:

Rear visibility requirements will save lives and will save many families from the heartache suffered after these tragic incidents occur.

However, equipping the roughly one-quarter of the U.S. vehicle fleet that is expected to still be without rearview cameras in 2018 will come at a significant cost to auto manufacturers. According to NHTSA, it will cost as much as $142 per vehicle to install both cameras and in-dashboard displays, or up to $45 per vehicle for just the cameras, with total costs for carmakers running between $546 million and $620 million annually.

The Alliance of Automobile Manufacturers, a leading trade group for the automobile industry, said in a statement that it hopes the new rule will open the door for expanded use of cameras. The group said it’s petitioning the NHTSA to allow car manufacturers to offer cameras as an option to replace traditional rearview and side-view mirrors. The Alliance had this to say:

Today’s mirrors provide a robust and simple means to view the surrounding areas of a vehicle. Cameras will open opportunities for additional design flexibility and innovation.

Prior to finalizing the rule, the NHTSA had already been promoting the technology through its New Car Assessment Program (NCAP), which recommends advanced safety technologies for consumers to consider when shopping for a new car. NHTSA says the NCAP program—best known for its five-star safety ratings—is also touting features such as forward collision warning and lane departure warning systems.

Source: Law360.com

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**Staffing Cuts At NHTSA Linked To Inadequate Recall Tracking**

I am fairly certain we should all be able to agree that the National Highway Traffic Safety Administration, in its role as the federal regulatory agency that oversees the powerful automobile industry, has an awesome responsibility. Actually, that shouldn’t even be a subject of debate. While NHTSA should be fully capable of carrying out that responsibility, however, I can tell you from experience that it is not doing so. Monitoring and regulating the automakers, and dealing with safety defects in cars, requires that the regulatory agency be adequately funded and properly staffed. But the regulatory agency has had its share of budget and staffing problems in the past several years. NHTSA has seen its budget cut one-fifth from highs more than a decade ago. Congress tried to strengthen NHTSA at that time, but in recent years the agency has been under funded and as a result under staffed. The end result is that NHTSA can’t do the adequate job of regulation that the public not only expects, but deserves.

This situation came to light recently because of the failure by General Motors (GM) to order recalls earlier of millions of its defective vehicles. According to safety advocates, NHTSA investigators don’t have enough resources to keep up with data and detect patterns. Sally Greenberg, president of the Washington-based National Consumers League, observed:

*They’re getting information, and they’re not following up. They’re not capturing the information in a way that’s useful. They’re not responding quickly to a litany of similar complaints.*

Legislation passed in 2000 during a Ford Explorer SUV tire recall was supposed to boost NHTSA’s defects-investigation team, adding people and giving it direct access to manufacturer data. Since then, however, defects that weren’t pinned down for years have occurred in Toyota Motor Corp. models and most recently now, at GM. As the number of registered cars in the U.S. rose to 248 million, NHTSA’s Office of Defect Investigations was reduced to 51 employees, from 64 in 2002. The agency’s budget has been about $10 million annually since 2005. Jackie Gillan, president of Advocates for Highway and Auto Safety, a Washington-based group that works with the insurance industry, had this to say:

*The idea of $10 million for an office that’s in charge of the safety of all these vehicles, undertaking investigations and doing the recalls, it’s just ridiculous. You look at the number of people working on this, you look at their inadequate funding, and you think to yourself, no wonder this is happening over and over again.*

The public is totally unaware that NHTSA is not able to do its mandated responsibilities because of its budgeting problems. If folks were made aware of this, they would demand that Congress remedy the funding crisis. Let’s take a look at what has transpired relating to NHTSA.

**Senate Legislation**

Nathan Naylor, a spokesman for NHTSA, has defended the agency’s track record, saying its investigations have led to 929 recalls involving more than 55 million vehicles in the past seven years. Vehicle-related fatalities are at historic lows, and automakers have paid more than $85 million in fines since 2009 for delays in reporting defects. Naylor said in an e-mail. The agency “pursues investigations and recalls wherever our data justifies doing so,” Naylor said in response to questions about the agency’s staffing. “NHTSA is constantly looking for ways to improve our process so we can better identify serious safety defects.” NHTSA has said it didn’t force a recall sooner because the automaker failed to provide timely information that connected defective ignition switches with failing air bags.

**Tread Act**

Legislation introduced in the Senate—if passed—would require NHTSA to publish information it collects now and do so in a searchable, user-friendly format. That would open the door for analysis of an automaker’s safety data by watchdog groups, competing car companies and lawyers for accident victims. NHTSA has been down this road before. The Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act that emerged in 2000, amid media reports that Ford Motor Co.’s Explorer SUVs were rolling over and killing people after their Bridgestone Corp. Firestone tires fell apart, led to a doubling of the spending on defects investigations. The law also gave the regulators more information about emerging defects through quarterly reports compiling warranty claims, death and injury data from every automaker.
The TREAD Act was supposed to give NHTSA the raw data that companies compile and scan for anomalies that would indicate a defect. The system didn't catch the reports of sudden unintended acceleration incidents in Toyota vehicles that became a focus of congressional hearings in 2010. Neither did it catch the GM ignition-switch defect. “A massive information breakdown at NHTSA has led to deadly vehicle breakdowns on our roads,” said Senator Edward Markey of Massachusetts, who along with fellow Democrat Richard Blumenthal of Connecticut introduced the legislation in the Senate to make more defect data available to the public.

Wade Newton, a spokesman for the Alliance of Automobile Manufacturers, a trade group in Washington, said the current warning system has led to more than 5,500 recalls. He added:

*It seems premature to assume there are systemic problems, much less to identify specific legislative fixes, before investigations are complete and the data necessary for thoughtful decision-making are gathered.*

Inspector General Calvin Scovel’s review will be the fourth into the effectiveness of NHTSA's defects-screening process since 2002. A report in 2011 found the office failed to meet its own timeliness goals in more than half the cases and didn’t even document meetings with manufacturers. Interestingly, the report found no evidence that the office’s handling of the Toyota investigation was influenced by former employees who had gone to work for automakers. Having been directly involved in the Toyota litigation, I totally disagree with that finding. Evidence clearly showed that the former employees played a definite role in keeping NHTSA's emphasis away from Toyota’s computer problems. I suggest that the folks at NHTSA look at the internal email exchange that was seen by the Oklahoma jury in the Bookout case.

Of NHTSA’s $851 million budget request for fiscal 2015, $199 million is for enforcement. Only about half of that—$10.6 million—is for investigating defects, according to government budget documents. That’s the same amount the agency is spending in fiscal 2014, up from $10.1 million in 2013. Ms. Greenberg made this observation: “It’s patently obvious that NHTSA isn’t doing its job in protecting the American consumer. There seems to be a disconnect at the agency.”

Congress—after the Toyota and GM cover-ups and subsequent exposures—must properly fund NHTSA so that the agency can do its job properly. More staffing with experience in a number of areas requiring both expertise and experience is definitely needed. Also, the revolving door between NHTSA and the automobile manufacturing industry must be slammed shut. The American people should have seen enough in the past two years, especially from the Toyota and GM safety problems, to now realize that the industry has to be properly regulated. It’s important for the American people to show their concern by contacting their senators and members of the U.S. House of Representatives and let them know how they feel.

Source: *Clubs Journal*

**NHTSA Opens Probe of the Chevrolet Impala Auto-Braking System**

The National Highway Traffic Safety Administration has launched an investigation into the 2014 Chevrolet Impala’s emergency braking system. This came after a consumer complaint that the car’s computer repeatedly slammed on the brakes for no reason. NHTSA opened the investigation on April 15, three weeks after receiving the complaint from a consumer who allegedly got into a fender-bender after his rented Impala’s braking system went awry. The Agency said on its website:

*The consumer alleges that the driver assist system inappropriately activated emergency braking bringing the vehicle to a complete stop under what the driver considered to be full braking force.*

According to the complaint, the rented Impala’s brakes first engaged automatically when the Impala was traveling at 20 mph, after which the car appeared to function normally. Then, the next day, the brakes seized up again at 40 mph, causing a minor accident with no injuries, the consumer alleged.

The second incident followed a series of warning beeps from the Impala’s “forward collision avoidance system,” even though there was no traffic directly in front of the car, which had only 2,500 miles on it, according to the complaint. The 2014 Impala—made by General Motors Co.—is a relatively popular model in the U.S., with 60,580 vehicles on the road.

Source: Law360.com

**GM Halts Sales of Some Chevrolet Cruze Models**

General Motors Co. sent an urgent order last month to Chevrolet dealers telling them to stop selling some 2013 and 2014 Cruze cars. This was most unusual and came as the company was dealing with a massive recall of vehicles with defective ignition switches linked to deaths. The stop sale order affects all 2013 and 2014 Chevrolet Cruze compact cars with 1.4-liter gasoline turbo engines, amounting to about one-third of the current inventory of the Cruze currently on dealership lots.

The affected cars cannot be sold or delivered to a customer until the order is lifted. The Chevrolet Cruze’s 1.8- and 2-liter engine models are not affected by the order. The stop order—coming in the midst of the crisis GM faces over the massive recalls of several of its older model cars—is not a good sign.

Source: Law360.com

**Spiders Are Again Back at Work at Mazda**

As our readers may recall, spiders have in the past been known to create safety problems at Mazda. It was reported that spiders may be able to weave webs that block the fuel tank vent lines of some Mazda Motor Corp. vehicles. This has caused the second recall in three years of Mazda6 models. The National Highway Transportation Safety Administration made the “spider” announcement last month. The recall, which is intended to reduce the risk of a fuel tank fire, affects about 42,000 model year 2010-2012 year Mazda6 vehicles equipped with 2.5 liter engine built from Sept. 14, 2009, through May 2, 2011, according to documents posted by NHTSA. Mazda said in a letter to NHTSA:

*On certain Mazda6 vehicles, a certain type of spider may weave a web in the evaporative canister vent line, potentially causing a restriction in the line. If this occurs, the fuel tank pressure may become excessively negative when the emission control system works to purge the vapors from the canister.*

As the canister is purged repeatedly during normal operation, the stress on the fuel tank may eventually result in a crack, potentially leading to fuel leakage and an increased risk of fire. Mazda says it’s not aware of any fires related to this condition.

In February 2010, Mazda began adding a spring to the canister vent line in order to prevent a spider’s intrusion, and in March

Source: Law360.com
2011, a recall campaign was launched for the vehicles not equipped with the spring. Then in May 2011, an additional countermeasure was implemented. That involved modifying the Power Control Module software to minimize negative pressure of the fuel tank. The first report in the United States describing a crack of the fuel tank on a vehicle that was equipped with the spring to prevent a spider’s intrusion was submitted in November 2011, according to Mazda. But, the company said that since the parts could not be returned, the root cause could not be identified. Mazda then decided to monitor for occurrence of the situation in the field.

In September 2013, a second report of a crack of a fuel tank arose. Mazda confirmed there was a crack, and says it found a spider web was present in the canister vent line. Ultimately, nine such cases were confirmed. Mazda said in a statement:

*All of the nine cases occurred on vehicles that have only the spring to prevent spider’s intrusion. There were no defects on the vehicles which had the revised Power Control Module software to minimize negative pressure in the fuel tank.*

Mazda said while the spring was effective to an extent, an unnamed species of spider could possibly intrude even with the expanding spring. The PCM software change to control the tank pressure, according to Mazda, is effective to avoid the possibility of the tank cracking. Mazda says the change works even under such a severe condition as the canister vent line being clogged by a spider web. That has resulted in cars that have PCMs without modified software being recalled for updates. Source: Law360.com

**FREE ENGINE REPLACEMENT FOR 2006-2009 HONDA CIVICS**

Honda has offered a new engine block or completely new engine for 2006 to 2009 Honda Civic vehicles to owners of 2006 through 2008 and some early 2009 Civics that have developed a coolant leak coming from the engine block. The free service applies to all Civics except the Hybrid and the Civic Si. It effectively extends the original warranty to eight years, regardless of mileage.

The leak can allow coolant to drain away, leading to overheating or a total engine failure. Honda alerted known owners back in 2010, but lots of folks probably didn’t get the message, especially second or third owners of the cars. For Civics that have developed one or more cracks in the engine block and started leaking coolant, Honda dealers will replace the engine block, or the entire engine if the head has warped too, at no charge. The offer applies to affected Civics that have been on the road the eight years or less, regardless of mileage.

If a Civic is seeping coolant from the engine (not the radiator or hoses), or overheating, owners should take it to a Honda dealer and mention technical service bulletin 10-048. If the engine had been replaced at the owner’s expense, the owner can apply for a refund from Honda Customer Service (800-999-1009) as long as the work was done at a Honda dealer or if the owner can prove that the repair was done with genuine Honda parts.

Source: Fox News

**VOLKSWAGEN STOPS SALE OF FOUR MODELS**

Volkswagen Group of America Inc. has stopped the sale of approximately 25,000 Jetta, Beetle, Beetle Convertible and Passat vehicles due to a possible transmission oil cooler leak. This came shortly after the National Highway Traffic Safety Administration (NHTSA) acknowledged its separate recall of 150,000 Passats. The automaker has asked its dealers to immediately halt the sale of about 25,000 Jetta, Beetle, Beetle Convertible and Passat vehicles that have a 2014 model year and are equipped with a 1.8-liter engine and automatic transmission. The cars were made after Feb. 1 of this year, according to the automaker.

Volkswagen says that it “found an O-ring [mechanical gasket] that connects to the automatic transmission cooler to be defective.” According to the company, it will replace the faulty O-rings with new ones. It has notified NHTSA about the defect. Separately, NHTSA’s Recall Management Division said in a letter to Chris Sandvig, general manager of compliance at Volkswagen Group of America, that it had acknowledged the automaker’s notification of a recall of 150,201 Passats that had a 2012-2013 model year and were sold in the U.S. and Canada.

In those cars, manufactured January 2011 through November 2012, the low beam headlight bulb may become loose and lose electrical contact, according to NHTSA. The letter from NHTSA said: “A loss of low beam headlights may reduce the driver’s visibility and increase the risk of a crash.” VW said no fires, accidents or injuries have been reported related to either the automatic transmission oil leak or headlight bulb issues. The recall, which adds to a growing list of car defects this year, is expected to start this month.

Source: Law360.com

**NHTSA WON’T RECALL FORD F-150s FOR ACCELERATION ISSUE**

The National Highway Traffic Safety Administration has closed an investigation into an acceleration problem with some 400,000 Ford Motor Co. F-150 trucks. The agency announced that it won’t require a recall. As you may recall, we reported in May of last year that NHTSA’s Office of Defects Investigation was looking into nearly 100 complaints that recent model year F-150s were losing power when accelerating at high speeds. Obviously, that would create a safety hazard when the truck passed other vehicles on the highway.

It appears that the problem—which arises from moisture buildup in the F-150 engine’s turbocharger—has been addressed by Ford through the installation of a deflector shield on the charge air cooler (CAC). This is according to a summary of the investigation posted on the NHTSA’s website. This is what the agency said:

*Given these circumstances, further use of the agency resources in this matter does not appear to be warranted. Accordingly, this investigation is closed.*

The investigation involved F-150s model year 2011-2013, which all have 3.5-liter “EcoBoost” engines with twin turbochargers. According to NHTSA, Ford told the agency during the investigation that rainy and humid conditions can lead to condensation in the CAC that can cause misfires in up to three of the engine’s cylinders at once, particularly during hard acceleration. In the past year, Ford has issued a series of technical service bulletins instructing dealers to install CAC deflector shields. In January, the company told NHTSA that the fix has been 100 percent effective in 2013 F-150s, and 95 percent effective in 2011 and 2012 models.

NHTSA has said that it is not aware of any crashes linked to the problem. The agency stressed that the closing of an investigation is not a definitive finding that a defect doesn’t exist, saying it will continue to monitor complaints and take action in the future if necessary. The news came just days after the automaker issued two separate recalls for 435,000 vehicles, the larger one covering older model Escapes with rusting subframes that could affect the drivers’ ability to steer.
The company also recalled nearly 50,000 model year 2013-2014 Ford Fusion, Lincoln MKZ, Ford Escape and C-Max vehicles to replace seat back frames that failed to comply with an NHTSA standard. In July, Ford paid $17.3 million to NHTSA to settle claims that it was slow to recall one of its SUVs with suspected “sticky throttles.” Ford had delayed recalling its 2001-2004 Escape models after learning of a speed-control defect. The throttle wouldn’t return to idle when the accelerator pedal was released. Ford paid NHTSA in that settlement after the agency notified the carmaker that it was prepared to investigate the timeliness of its recall.

Source: Law360.com

**FDA Finalizes Board Member Conflict Of Interest Policies**

In an effort to shore up its conflict-of-interest policies, the Food and Drug Administration has finalized policies for publicly disclosing the financial ties of advisory board members whose votes can prove crucial to approval of new drugs and medical devices. In its guidance, the FDA included a pair of templates that it intends to use when screening members and releasing information about business relationships that could cast doubt on their impartiality.

- One template—an acknowledgment of financial interests—would require members to consent to having information disclosed about investments, consulting contracts, patents, speaking arrangements and expert witness work, as well as high-level details on any income stemming from those dealings. That template would also cover so-called impugned interests that technically belong to a separate entity but are connected to board members because of their work for that employer.

- A second template relates to the waivers that the FDA can grant when it deems financial relationships to be too small to affect a member’s integrity or concludes that the member’s expertise is important enough to outweigh the risk of his or her potential bias. The FDA doesn’t typically disclose detailed information about members’ financial holdings on a proactive basis unless a waiver is required, in which case some information is included as part of advisory panel meeting materials.

The agency essentially stuck to that policy, making clear that though some details may be disclosed, they will remain under lock and key if they are exempt from the Freedom of Information Act. As an example, the FDA said it wouldn’t provide any financial ties that could reveal confidential commercial information. The overarching goal, according to the guidance, is to “increase the transparency, consistency and clarity of the advisory committee process,” which provides nonbinding recommendations prior to FDA approval decisions.

A draft version of the guidance emerged in March 2012, shortly after reports that three members of an advisory panel found that the benefits of Bayer AG oral contraceptives outweighed their risks. Interestingly, none of them publicly disclosed having worked for Bayer in various roles. That support proved key to securing a 15-11 vote in favor of the pills. In response, the FDA said it had been aware of the members’ ties but that it “did not identify any financial interests that would have precluded their participation.” Not included in the new guidance was a separate process that vets members for certain “covered relationships,” such as a spouse’s work for a company or past financial ties, which the FDA screens separately. We will watch future developments on this front.

Source: Law360.com

**Target Data Breach Cases to Be Heard In Minnesota**

The U.S. Judicial Panel on Multidistrict Litigation has ordered that all of the lawsuits that accuse Target Corp of failing to protect customers from a data breach will be consolidated in the retailer’s home state Minnesota. The order brings together 33 lawsuits across 18 districts, and potentially many more tag-along actions, before U.S. District Judge Paul Magnuson in Minnesota.

The centralization will eliminate duplicative discovery, prevent inconsistent pre-trial rulings, and conserve the resources of the parties and the judiciary, according to the transfer order. Target, the third-largest U.S. retailer, faces several class-action lawsuits and action from banks that could seek reimbursement for millions of dollars in losses due to fraud and the cost of card replacements.

The case is in re: Target Corporation Customer Data Security Breach Litigation; case number 02522, U.S. District Court, Minnesota. If you need additional information on this litigation, contact Larry Golston, a lawyer in our Consumer Fraud Section, at 800-898-2034 or by email at Larry.Golston@beasleyallen.com.

Source: Law360.com

**XXIII. RECALLS UPDATE**

We are again reporting a fairly large number of safety-related recalls. We have included some of the more significant recalls that were issued in late March and during April. If more information is needed on any of the recalls, our 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.

**GM Ignition Switch Recall Now Includes 2.6 Million Cars**

General Motors Co. has now recalled 824,000 cars with faulty ignition switches, adding to the already massive recall of 1.6 million vehicles that have been linked to deaths. According to GM, about 5,000 of the defective switches may have been used to repair Chevrolet Cobalt and HHR, Pontiac G5 and Solstice, and Saturn Ion and Sky cars made between 2008 and 2011. GM says it will replace the switches in all of those cars because finding the 5,000 cars would not be feasible. GM recalled the 2003 through 2007 models of the cars last month, which have faulty ignition switches that can slip out of the “run” position when the car hits a bump, which can cause the airbags to fail.

**Toyota Recalls 6 Million Vehicles For Airbag And Seat Hazards**

Toyota Motor Corp. has issued two recalls covering 6.4 million vehicles worldwide for cable assemblies that can deactivate driver’s side airbags and weak rail springs that can allow seats to shift. Of the recalls, 1.77 million of the vehicles are in the U.S. Toyota said electrical connections linking the spire cable assembly in 1.3 million Corolla, Matrix, Highlander, Tacoma, Rav4 and Yaris models could become damaged when the steering wheel is turned, causing the airbag warning lamp to go on and potentially prevent the bags from deploying in a crash. The faulty cable assemblies are found in various models from years 2006 to 2010.
Separately, Toyota called back 472,500 Yaris hatchback and sedan and Scion xD vehicles from model years 2006 to 2010. Springs used to lock in the seat rail in the driver’s side seat and the passenger’s side seat in three-door models of the cars can break if the seat is adjusted forward or backward too much, the automaker said. If the springs break, the seats may not lock into their adjusted positions and can move in the event of a crash, purportedly increasing the risk of injury to occupants.

Toyota said it had not linked any accidents, injuries or fatalities to either safety issue and will have a fix for both that will be provided to customers free of charge.

**Ford Recalls Escapes and Other Vehicles For Rust And Seat Back Issues**

Ford Motor Co. has issued two separate recalls for 435,000 vehicles, including for older model Escapes with rusting subframes that could affect the drivers’ ability to steer. The company is recalling 385,750 model year 2001-2004 Escapes, most of which were sold in the U.S., because their rusting underbellies could cause the lower control arm to separate from the vehicle’s subframe, hurting the driver’s ability to steer, according to a report in The Detroit News.

The company has also recalled nearly 50,000 model year 2013-2014 Ford Fusion, Lincoln MKZ, Ford Escape and C-Max vehicles to replace seat back frames that don’t comply with a National Highway Traffic Safety Administration (NHTSA) standard, according to the report. The Escapes that were rusting were sold or are registered in states in the midwestern and northeastern U.S. and in eastern Canada, in what is known as the “Salt Belt,” where salt is used to melt ice on roads.

The seat back problem was caused when the manufacturer did a substandard job of welding the seat backs’ recliner mechanisms to the seat backs’ frames, according to the report. The welding problem could potentially increase the risk of injury in some collisions, according to the report.

**More Than One Million Nissans Recalled Due To Airbag Issue**

Nissan Motor Co has recalled 1,053,479 vehicles globally, mostly in the United States, to fix software that could deactivate the front passenger airbag. The vehicle occupant classification system software may incorrectly classify the passenger seat as empty, deactivating the airbag and increasing the risk of an injury in a crash, according to documents filed with the U.S. National Highway Traffic Safety Administration (NHTSA). Nissan identified two accidents in which the passenger airbag did not deploy, according to the NHTSA documents. But a Nissan spokesman said the company could not draw any conclusions about that being related to the software issue.

The recall, which entails updating the software free of charge, is expected to begin about the middle of this month. Affected vehicles include the 2013-2014 Altima sedan and Sentra small car and Pathfinder SUV; 2013-2014 Leaf electric car; the 2013 Infiniti JX35 crossover vehicle; and the 2014 Infiniti Q50 sedan and QX60 crossover; as well as the 2013 Nissan NV 200 cargo van, according to the NHTSA documents. Of the vehicles recalled, 989,701 were sold in the United States, about 60,000 in Canada and the rest in other markets, according to NHTSA and Nissan.

**Chrysler Recalls 870,000 SUVs**

Chrysler has recalled nearly 870,000 SUVs worldwide to fix a problem with the brake system. The recall affects certain Jeep Grand Cherokees and Dodge Durangos from model years 2011-2014. An estimated 644,354 of the recalled SUVs are in the United States. The automaker, owned by the recently renamed Italian company Fiat Chrysler Automobiles, will install a shield on the recalled vehicles that protects brake boosters from undue water corrosion. The problem can cause excessive brake pedal firmness.

Chrysler is recalling nearly 870,000 SUVs to install a shield to protect brake boosters from water corrosion. Jeep Grand Cherokee and Dodge Durango SUV models from 2011 through 2014 will be inspected and will have the boosters replaced where necessary. Chrysler says joints in the brake boosters can corrode, making the vehicles’ brakes more difficult to use.

Chrysler says it’s aware of one related accident and no injuries. When customers bring the vehicles to dealers, the brake boosters may be replaced if their capability has been compromised. A shield will be installed in all of the SUVs brought to dealers. Chrysler is the latest U.S. automaker to issue a recall. General Motors has recalled nearly 7 million vehicles so far this year and CEO Mary Barra testified before a Congressional committee about how the company handled some of those recalls.

**BMW Recalls 156,000 US Cars Over Engine Defect**

BMW AG has recalled more than 156,000 vehicles in the U.S. because of a potential defect that causes some 2010 to 2012 vehicles with six-cylinder engines to stall or suffer engine damage. The German automaker had initiated a similar recall in China. BMW said there may be a defect that causes some engine bolts to loosen or break. The problem is usually signaled by a “Check Engine” or “Service Engine Soon” alert. The recall affects model year 2010 to 2012 5 Series Gran Turismo and the 2012 6 Series, among others. BMW also recalled more than 232,000 vehicles in China earlier this month for the same defect. BMW said in its statement that the problem is “very rare,” and that owners can continue to drive recalled vehicles, as long as their car does not display a “Check Engine” or “Service Engine Soon” alert. The automaker has never recalled its vehicles for this defect until April this year, according to a BMW spokesman.

**Mercedes Recalls 284,000 Sedans To Fix Rear Lights**

Mercedes-Benz has recalled more than 284,000 C-Class sedans in the United States and Canada because the rear lights can fail, increasing the risk of accidents. The recall covers model year 2008 to 2011 C-Class vehicles, including C300, C350 and C63 AMG cars, because the contact between the tail lamp bulb carrier and tail lamp connector can become deteriorated, the unit of Germany’s Daimler said. The company said in a statement:

Mercedes-Benz says that it is not currently aware of any accidents, injuries or deaths. Almost 253,000 of the recalled are in the U.S. and the other 31,000 are in Canada, the company said. According to NHTSA, Mercedes-Benz will replace the rear bulb holders and any rusted connectors free of charge, although the necessary parts are not currently available.

Last July, the NHTSA’s Office of Defect Investigations launched a preliminary investigation into the rear brake light issue after several consumers reported smoke or fire in connection with the problem. The evaluation only covered C-Class vehicles from 2008 and 2009. The failures typically occur in just one tail lamp assembly, although in some cases both lights have experienced problems, the ODI said last year. According to a study by research firm iSeeCars.com, Mercedes-Benz has the lowest recall rate in the U.S. For every 100,000 vehicles sold in the U.S., Mercedes has recalled about two vehicles, the report said.

**TEXTRON UNIT RECALLS 30K GOLF CARTS OVER STEERING DEFECT**

E-Z-GO, a unit of aviation conglomerate Textron Inc., has recalled some 30,000 golf carts and buggies because of a steering wheel defect that can cause drivers to lose control of their carts. The Georgia-based golf cart maker has recalled Cushman and Bad Boy Buggies, among others, which were sold from August 2012 to February 2013. The defect is a steering wheel nut that has not been tightened enough. It has not caused any serious accidents, according to the CPSC. The defect has so far caused only a minor injury in which a passenger chipped a tooth after the cart went over a curb, the agency said.

The recalled carts cost between between $6,650 and $10,650, according to the agency. The agency alerted customers to immediately stop driving the vehicles and take them to an E-Z-GO dealer for repairs. A representative for the company could not immediately be reached for comment Wednesday. The recalled carts include the E-Z-GO TXT Fleet golf cars, the E-Z-GO Freedom TXT, Shuttle 2+2 TXT and Valor personal golf cars, which all have one bench seat and one rear-facing seat, according to the agency. Other vehicles affected by the recall include the E-Z-GO Express, the Cushman Shuttle vehicles and certain models of Bad Boy Buggies, the CPSC said.

**MORE THAN 1.3 MILLION EVENFLO CHILD SAFETY SEAT BUCKLES RECALLED**

Evenflo Company Inc. has recalled more than 1.3 million child safety seat buckles due to the risk children could not be removed quickly in an emergency. The National Highway Transportation and Safety Administration (NHTSA) said that the recall includes buckles used in a number of children’s convertible and booster seat models manufactured between 2011 and 2014. Not all seats made during that time are included. The recall includes some of Evenflo’s Momentum, Chase, Maestro, Symphony, Snugli, Titan, SureRide and SecureKid models. The affected seats have model number prefixes of 306, 308, 310, 329, 345, 346, 371 or 385.

The buckle may become stuck in a latched position, making it difficult to remove a child from the seat. This could prove critical to a child’s safety in the case of an emergency. Evenflo will alert registered owners this month and provide replacement buckles and instructions for installation. The company said on its website that the harness crotch buckle may become resistant to unlatching over time, due to exposure to food, drink and other common contaminants. It said there is no risk if the buckle is functioning normally.

Evenflo, based in Piqua, Ohio, says it has received no reports of injuries to children in connection with the recalled buckles. NHTSA began investigating several models of Evenflo seats in January. Regulators said they are still investigating the safety of one of Evenflo’s rear-facing infant seats. It’s one of several recent recalls involving children’s car safety seats that can trap children due to faulty buckles. Graco announced in February that it was recalling 3.8 million car safety seats for the same reason. The company did draw the criticism of federal safety regulators at the time, who felt the recall should include another 1.8 million rear-facing car seats for infants.

**REMINGTON ANNOUNCES RECALL**

Remington Arms Company, LLC has recalled Model 700™ and Model Seven™ rifles with X-Mark Pro® (“XMP®”) triggers, manufactured from May 1, 2006 to April 9, 2014. Senior Remington engineers determined that some Model 700 and Model Seven rifles with XMP triggers could, under certain circumstances, unintentionally discharge. Remington’s investigation determined that some XMP triggers might have excess bonding agent used in the assembly process, which could cause an unintentional discharge. Therefore, Remington is recalling ALL affected products to fully inspect and clean the XMP triggers with a specialized process.

Remington has advised customers to immediately cease use of recalled rifles and return them to Remington free of charge. The rifles will be inspected, specialty cleaned, tested, and returned as soon as possible. Do not attempt to diagnose or repair recalled rifles. Remington established a dedicated website and toll-free hotline to help consumers determine whether their Model 700 or Model Seven rifle(s) are subject to recall. Website: http://xmprecall.remington.com, Toll-Free Hotline: 1-800-243-9700 (Prompt #3 then Prompt #1) Monday through Friday, 9 a.m. to 5 p.m. EDT.

**DYSON RECALLS BLADELESS PORTABLE ELECTRIC HEATERS DUE TO FIRE HAZARD**

Dyson Inc., of Chicago, has recalled its portable electric heaters. The heaters can develop an electrical short and overheat, posing a fire hazard to the consumer. This recall is for all Dyson Hot heaters and Dyson Hot+Cool heaters having model number AM04 and all Dyson Hot+Cool heaters with model number AM05. The heaters are 23 inches tall with a round base and an upper body shaped like an elongated ring. The heaters have no external fan blades. They are made of plastic and were available in the colors silver, black and silver, blue and gray, gray and silver, pink and gray, purple and gray, and white and gray. Each heater came with a remote control. The model number is found above the Dyson logo on the
product information sticker on the underside of the heater's base. Dyson says it's aware of 82 incidents of the recalled heaters short-circuiting and overheating, including four reports of heaters with burned or melted internal parts. No injuries or property damage have been reported, according to the company.

The heaters were sold at Bed Bath & Beyond, Best Buy, Costco, Fry's, Kohl's, Lowe's, Macy's, Sears, Target and other retailers nationwide, and online at Abt.com, Amazon.com, Dyson.com, Groupon.com, HSN.com, QVC.com and Walmart.com from September 2011 to March 2014 for about $399. Consumers should immediately stop using and unplug the recalled heaters and contact Dyson for a free repair toll-free at 866-297-5303, 8 a.m. to 8 p.m. CT Monday through Friday and 9 a.m. to 6 p.m. Saturday and Sunday or online at www.dyson.com and click on Safety Recall at the bottom of the page for more information. Photos available at http://www cpsc.gov/en/Recalls/2014/Dyson-Recalls-Bladeless-Portable-Electric-Heaters/

The recalls listed above are only a part of the total number of recalls since the last issue. While we weren't able to include all of the 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 above, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

XXIV.
FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

DEBBIE CUNNINGHAM

Debbie Cunningham, who has been with the firm about six years, is a Legal Secretary in the firm. She works with Gibson Vance, Roman Shaul and Clay Barnett. In her role as Gibson's secretary, Debbie helps to make contacts with lawyers around the U.S. Debbie is also responsible for scheduling the topics and guests for The Beasley Allen Report, a weekly law program that airs Sunday nights in Montgomery on WSFA. Since Debbie hasn't worked on the litigation side of the firm, working with the lawyers allows her to learn about that side of the law practice.

Originally from Chesapeake, Va., Debbie moved to Alabama in 1983. Debbie has had an interesting work history. She has held the following securities licenses: Series 6, Series 63, and Series 26. She has also held an insurance license for the State of Alabama. Debbie has been married to Jeff, who works for Hyundai Motor Manufacturing Company, for almost 28 years. They have two grown children. Debbie says her favorite thing to do is spending time with her family. She also enjoys traveling with Jeff in the southern states. Debbie is a hard-working and dedicated employee who says she enjoys working for a firm that really helps folks. We are blessed to have Debbie with us.

NIALL DAVIES

Niall Davies, who has been with the firm for a little more than six years, is a Legal Secretary, working for Leigh O'Dell in the Mass Torts Section. Currently, he is involved in working on the Transvaginal Mesh (TVM) litigation. That work includes deposition preparation and document review in the TVM multi-district litigation (MDL). Niall has also been involved in the Medtronic Lead Wire, Gardasil, and AndroGel litigation.

Niall received a Bachelor of Commerce in Management, specializing in Human Resource Management, from the University of Otago in Dunedin, New Zealand. His wife, Penny, also works at Beasley Allen as Legal Secretary to Melissa Prickett. Niall has a stepson, Benjamin. He comes from a large family, which includes five brothers and five sisters. Niall says he also has two dogs (Bella and Rocket) and one cat (Ninja). He enjoys spending time with his family, reading, walking/running, and playing with his dogs. Niall is a very good employee, and he is constantly attempting to make things better in the Mass Torts Section. We are fortunate to have Niall with us.

DANA SIMON

Dana Simon has been with our firm since May 2008 as a Legal Assistant to shareholder Parker Miller in our Toxic Torts Department. Parker is co-counsel to Governor Bentley in the State of Alabama's civil case against BP. Dana has been working on a daily basis with Parker to assist in the many tasks that case requires. Parker is also heavily involved in assisting various business, seafood, personal injury and subsistence clients in the private BP settlement released by the PSC members. Dana works extensively with Parker to make sure these clients are taken care of and their claims are processed and resolved. In addition, Dana is also working in the Hot Fuel Multi-District litigation in Kansas and in a waste water treatment dispute that is ongoing. On most days, Dana works directly with Parker's clients. She assists in research, handles correspondence, calendars scheduling deadlines and performs document review in these cases.

While stationed in Charleston, S.C., Dana traveled to Dhahran, Saudi Arabia, as an enlisted member of the United States Air Force, an experience she says she will never forget. Dana worked as a shift supervisor in the Command Post. Prior to her military service and after graduating from Lancaster High School in South Carolina, Dana received her degree in Liberal Arts from Wingate College in North Carolina, after attending Albuquerque Community College in New Mexico.

Dana has been employed as a paralegal/office manager for our 10 years in several Montgomery law firms. Dana was married to Tom Simon, a former Montgomery police officer, who also practiced law in Montgomery, for more than 10 years. Tom died much too young in 2004. Dana assisted Tom in opening his law practice and she also assisted the trustee in the closing of his practice.

Dana has two daughters, Shelby English (20), and Leslie English (16). Shelby, who is the assistant manager at Massage Envy, plans to attend AUM in the Fall of 2014. Leslie is a junior at Wetumpka High School. Dana, along with her children, enjoys a variety of musical events, camping, relaxing weekends at Lakes Martin and Jordan, and reading. Dana is a very good and dedicated employee, who says she enjoys her work, and that she realizes how important it is to help folks who need the help of a law firm like Beasley Allen. We are fortunate to have Dana with us.

INVESTIGATORS PROVIDE CRITICAL PIECES OF THE PUZZLE IN INJURY AND DEATH CASES

Our firm decided over 25 years ago to conduct accident investigations in-house. We then started to employ qualified investigators and we now have 7 full time investigators with the firm. A properly conducted accident investigation provides important, detailed information about the scene and other important aspects relating to the accident. This investigation allows our lawyers to form their own views of what might have caused the accident or come up with another explanation of how the accident happened.

The investigators, on the majority of the cases, go into action at the onset to gather information about what happened by obtaining copies of accident reports, incident offense reports, driver and criminal history reports and other reports as they relate to the particular case. Usually, the investigator will meet with the lawyer at this point as well, to discuss areas of concern and where investigative efforts need to be focused. The investigators usually communicate with the lawyer’s legal or assistant secretary to obtain Letters of Preservation to be sent to insurance companies, potential defendants, and other parties associated with the storage of evidence.

The investigators visit the accident or incident location to photograph the scene and surroundings to gather information for the attorney who is assigned the case. The investigator will then travel to other areas to gather information. This may include insurance storage lots and wrecker lots to photograph and inspect all vehicles involved; or travel to a business to inspect the scene/equipment where the accident occurred. In addition, interviews are conducted on all parties involved and any witnesses to the accident/incident to gather as much information as possible to assist the attorneys in the decision to move forward or close a case.

Oftentimes, the utilization of equipment to download information from vehicles provides valuable information to the lawyer assigned to the case—things like vehicle speed, seatbelt usage, braking, etc. The investigators provide inspection reports and memorandums to the attorneys describing the inspections and any findings of significance. An investigator may also have to video the scene or a specific piece of equipment for informational purposes for the attorney or for use in trial. During the inspection process, photographs are made and uploaded into our database to be used by the attorney assigned to the case.

The lawyers use all this information to decide whether or not there is a case, and they usually call for an expert/engineer in the specific field of interest based on the case. Evidence is usually collected, documented and stored until it can be inspected by an expert in the particular field. The evidence is then transported to the expert utilizing a chain-of-custody form, and photographs are normally taken to document the chain of custody.

In addition to the above, investigators assist other employees documenting evidence utilizing video and photographs, which may be used in case preparation and to document chain of custody. We learned very early in our firm’s existence that having in-house investigators is a definite advantage for the firm and the clients we represent. This section of the firm employs six full-time investigators. Each of our investigators was professionally trained as a law enforcement officer before coming with the firm. I will give a brief look at the investigators.

- **Bruce Huggins** heads up our firm’s Investigative Section. He has been with the firm for 25 years. Only Greg Allen, Mike Crow and this writer have been with the firm for a longer time. Bruce came on board in April of 1988 from the Montgomery County Sheriff’s Office. During his tenure with the Sheriff’s office, Bruce won numerous awards, including Officer of the Year. He was the first person from the Sheriff’s Office to attend and graduate from the prestigious FBI National Academy in Quantico, Va.

- **Bobby Mozingo** has been employed with the firm for 20 years. Before coming with us, Bobby was employed by the Montgomery Police Department for 10 years, including five years in the Detective Division. Most of Bobby’s work is in our firm’s Personal Injury/Products Liability Section.

- **Ricky Moore** has been an investigator with our firm since 1995. He currently works in the Personal Injury/Products Liability Section and stays very busy. Before coming to work with us, Ricky was with the Montgomery Police Department from 1978 until he retired after 20 years of service. During his time with the MPD, Ricky worked for 19 years in the Detective Division. Ricky comes from a family with a strong background in law enforcement. After retiring from the MPD, Ricky’s father became the Chief of Police in Roanoke, Ala. He later served as Sheriff of Randolph County.

- **Charles Duffee** has been with the firm as an investigator for 12 years. Charles retired as a Major from the Montgomery Police Department after 20 years of service. He worked most of those years in either patrol or training division. Patrol were first responders to the majority of calls for service, while Training trained and certified all new recruits for Montgomery, as well as conducting a separate training academy for smaller Alabama agencies. He was division commander of the Training division when he retired. Charles has a Bachelor’s degree in Criminal Justice from Auburn University in Montgomery.

- **Keith Scott** has been an investigator with the firm for 11 years. He does accident investigation follow-up, which includes officer and witness interviews, vehicle and scene inspections and any other specific request in a case by Personal Injury-Product Liability lawyers or Legal Assistants. Keith is retired from the Montgomery Police Department, where he worked in the Detective Division. He graduated from Autauga County High School in 1976 and from Troy State University in 1980.

- **Marc McHenry** came to work at the firm in March 2013 as an investigator. Marc retired from the Alabama Department of Public Safety after 26 years of service. His last position with DPS was Chief of the Administrative Division, holding the rank of Major. In that capacity, Marc was responsible for the oversight and management of the Homeland Security Liaison, the Financial Services, and Human Resources among other areas within the Department. Marc is a graduate of the FBI National Academy. One of his areas of work at DPS was in connection with the Alabama Criminal Justice Training Center where Marc provided direction and oversight for training of State Troopers and other law enforcement officers. Previously, Marc had served as Assistant Chief of the Highway Patrol Division.

- **Mike Bush** joined Beasley Allen’s team of investigators in 1999, after retiring from the Montgomery Police Department. He spent 18 of his 20 years in the Traffic Division. Mike was assigned to the Accident Investigation and Reconstruction Bureau for 16 years until his retirement. Mike took over firm security in addition to his investigative duties. His new title is Chief of Security at Beasley Allen. He is doing a very good job in his new and most important role.

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**XXV. SPECIAL RECOGNITIONS**

**A TRIBUTE TO MAC DOWELL LEE**

My longtime friend MacDowell Lee died last month. During the time that I served as Lt. Governor, Mac was Secretary of the Senate. He was a mentor and to me advisor and friend. During that time Mac and I became very good friends. Mac was a good man and he will be missed. Needless to say, this man was a true legend who leaves a tremendous legacy. I will write more on Mac’s life story in the June issue.
DEAN CHARLES NELSON IS RETIRING

Charles I. Nelson joined the faculty at Faulkner University’s Jones School of Law 10 years ago, taking the helm as the school’s Dean. Dean Nelson announced last month that he will retire on June 1. He has left an indelible mark both on the school and on its many students who have graduated and entered the field of law. Dean Nelson has prepared a path for those who will pursue their studies at Jones in the years to come.

Jones Law School has enjoyed significant growth and excellence under Dean Nelson’s direction. Perhaps among the most significant accomplishments was securing American Bar Association (ABA) accreditation. It was announced in December 2009 that Jones had been granted full approval by the ABA Council of the Section of Legal Education and Admissions as an accredited institution of legal education. Full accreditation means Jones graduates are eligible to sit for the bar exam in any state. The majority of the highest courts of the states rely upon ABA approval of a law school to determine whether the jurisdiction’s legal education requirement for admission to the bar is satisfied.

Dean Nelson’s administration also saw significant expansion on the campus, including the addition of the Allen Law Center in December 2011. The center was named in honor of our own Greg Allen, a Jones alumnus, who has been a strong supporter of the school. Greg served as chairman of the steering committee in Jones’ efforts to obtain its ABA accreditation. The Allen Law Center added approximately 17,000 square feet of space to the existing law school building and included additional study space in the library, a classroom, faculty office space, a courtroom, and space for the school’s three law clinics.

In addition to facilities, Jones School of Law added several new programs. The Advocacy Program, which has received national accolades, provides practice-oriented advocacy training focused on the skills necessary for every phase of litigation. Additionally, Jones hosts three intra-school advocacy competitions every year: the J. Greg Allen Intra-School Mock Trial Competition, the Closing Argument Competition and the First-Year Moot Court Competition. Jones students also participate nationally in a variety of mediation, moot court and trial advocacy competitions.

Students also gain valuable hands-on experience through the school’s service-oriented Clinical Programs, which provide a service to the oppressed and vulnerable in the community. They include the Elder Law Clinic, Family Violence Clinic, and Mediation Clinic. Through these programs, students move from the study of law to the practice of law, working with real people with real problems, not just ideas.

In 2012, the National Jurist named Jones School of Law as one of the 15 best law schools in the United States when it comes to preparing students for public service in government. The law school trains students for careers in public service, preparing them to both engage critically with difficult legal and policy questions and to deal practically with the challenges of public service. Nearly 30 percent of the 2010 graduating class went on to choose public service careers. A remarkable 98.6 percent of Jones graduates passed the Alabama bar last July. Needless to say, Dean Nelson has done a tremendous job at Jones and he will be missed. We wish him the very best in his future endeavors.

PARKER MILLER SELECTED TO LAW 360’S RISING STARS LIST

Parker Miller, a lawyer in the firm’s Toxic Torts Section, has been selected as a Law 360 “Rising Star” for 2014, in the Environmental category. Law 360 describes this honor as including “attorneys younger than 40 whose legal accomplishments belie their age.” The editors at this legal publication typically review more than 1,000 lawyers in order to narrow it down to about 100 to be included on this prestigious list. Twenty-three different practice areas are included, with 3 to 6 lawyers chosen as the best in each practice area.

Parker’s practice focuses primarily on complex litigation and property owner and business-on-business environmental litigation. During the course of his career, Parker has counseled some of the largest business entities in the Southeast, and has served as co-counsel to Alabama Governor Robert Bentley in the valuation of the State of Alabama’s oil spill claims. In 2012, Beasley Allen selected Parker as Environmental Section “Lawyer of the Year” for his efforts on behalf of his clients.

Parker has dedicated a significant portion of his practice in the past four years to the BP oil spill litigation—a tragic consequence of the April 20, 2010, fire and explosion aboard the Deepwater Horizon drilling rig off the coast of Louisiana. The explosion sent off the largest environmental disaster in United States history and what is considered to be the most significant litigation in recent history.

Parker served as Second Chair to Beasley Allen’s position on the Plaintiffs’ Steering Committee (PSC), and participated in numerous strategy meetings and projects on behalf of the PSC in New Orleans, La. Ultimately, the PSC reached a landmark uncapped, multi-billion dollar settlement with BP for private claimants throughout the Gulf of Mexico. Additionally, Parker oversees the Firm’s fishermen and personal injury client base. He also represents hundreds of businesses located throughout the covered region. To date, Parker has recovered millions in compensation for his clients in the BP litigation.

Parker was raised on a cattle farm in Dayton, Ala., and is the son of Mary and Tommy Miller. He is married to the former Ashley Brownberger of Tampa Bay, Fla. Parker graduated high school from Marengo Academy in 2001. He attended Auburn University and received a Bachelor of Science in Business Administration in 2005. He then received his law degree from Jones Law School at Faulkner University in 2008. While attending law school, Parker studied international law abroad in conjunction with Tulane University at the Universiteit van Amsterdam. He was recognized as one of the nation’s finest student advocates after receiving the Lewis F. Powell Jr. American College of Trial Lawyers Medal of Excellence in Advocacy. We are extremely fortunate to have Parker in the firm and it’s good to see him being recognized by Law360.

XXVI. FAVORITE BIBLE VERSES

Jamie Collins Doss, a long-time friend of Sara’s, and who now lives in Tennessee, sent in a verse for this issue. Incidentally, Jamie is the owner of Bethesda Skincare, a company that makes and sells a soap that is both therapeutic and restorative. Sara says this soap is the best she has ever used and she recommends it highly. More importantly, Jamie is a devoted follower of Jesus.

Beloved, now we are children of God; and it has not yet been revealed what we shall be, but we know that when He is revealed, we shall be like Him, for we shall see Him as He is.

1 John 3:2

Phil Bradford, a lawyer from Newport News, Va., sent in a timely verse for this issue. Phil, a very good lawyer, is also a strong Christian.
The wicked flee when no one pursues, But the righteous are bold as a lion.
Proverbs 28:1

Loretta Williams, who works in our firm’s Accounting Department, furnished some timely and instructive verses for this issue. She says the scripture that stands out to her the most is 1 Corinthians 13:4-7. Loretta says the love that comes from our relationship with Jesus is perfectly described in these verses.

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

1 Corinthians 13:4-7

Jo Hancock, who is associated with the Montgomery-based His Vessel Ministries, sent in two verses this month.

Thus says the Lord: Stand in the ways and see, and ask for the old paths, where the good way is, and walk in it, Then you will find rest for your souls...

Jeremiah 6:16

Repent therefore and be converted, that your sins may be blotted out, so that times of refreshing may come from the presence of the Lord.

Acts 3:19

Ronnie Holliday, from Tyler, Ala., wrote last month to tell me how much he enjoys the report each month. Sara and I are fortunate to have had Ronnie and his wife Mitzie as our friends. We first met them back in the 1970s. Ronnie sent some verses from the Old Testament for this issue.

The Mighty One, God the Lord, Has spoken and called the earth. From the rising of the sun to its going down, I know all the birds of the mountains, And the wild beasts of the field are Mine. Call upon Me in the day of trouble; I will deliver you, and you shall glorify Me.”

Psalm 50:1, 11 & 15

XXVII. CLOSING OBSERVATIONS

A MOST INTERESTING BIT OF INFORMATION ABOUT A SPORTS LEGEND

Marc McHenry, one of our firm’s investigators, gave me some information about Paul William Bryant, Sr., of which I was unaware. While this name means nothing to our readers, the name Bear Bryant certainly will to any sports fan. I had the good fortune of knowing Coach Bryant back in the 1970s, while I was in public office. Without any doubt, he was a great coach and a most interesting man. A close friend of Coach Bryant’s told Marc that the Coach read the same written message, which is set out below, at the start of each day. Here is what it said:

This is the beginning of a new day, God has given me this day to use as I will. I can waste it or use it for good. What I do today is very important. Because I am exchanging a day of my life for it. When tomorrow comes, this day will be gone forever. Leaving something in its place I have traded for it. I want it to be gain, not loss—good not evil. Success, not failure in order that I shall not forget the price I paid for it.

Anybody who has kept up with college football, especially during the period from 1958 through 1981, knows that Coach Bryant was more than highly successful. In my opinion, he is the very best college football coach of all time and that assessment comes from an Auburn man. It’s not surprising to learn that the legendry figure also recognized the need to make the most of each day that God gave him. That is a good recommendation for each of us.

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

Louis Brandeis, 1937 U.S. Supreme Court Justice

The dictionary is the only place that success comes before work. Hard work is the price we must pay for success. I think you can accomplish anything if you’re willing to pay the price.

Vincent Lombardi

We know not what we shall be but we may be sure we shall be more, not less, than we were on earth. Our natural experiences (sensory, emotional, imaginative) are only like the drawing, like penciled lines on flat paper. If they vanish in the risen life, they will vanish only as pencil lines vanish from the real landscape, not as a candle flame that is put out but as a candle flame which becomes invisible because someone has pulled up the blind, thrown open the shutters, and let in the blaze of the risen sun.

C.S. Lewis

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.

2Chron7:14

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

Edmund Burke

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

Isaiah 10:1-2

I considered trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.

Thomas Jefferson

The civil jury is a valuable safe guard to liberty.

Alexander Hamilton

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

Martha Washington (1732—1802)

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

Louis Brandeis, 1937 U.S. Supreme Court Justice

The dictionary is the only place that success comes before work. Hard work is the price we must pay for success. I think you can accomplish anything if you’re willing to pay the price.

Vincent Lombardi

We know not what we shall be but we may be sure we shall be more, not less, than we were on earth. Our natural experiences (sensory, emotional, imaginative) are only like the drawing, like penciled lines on flat paper. If they vanish in the risen life, they will vanish only as pencil lines vanish from the real landscape, not as a candle flame that is put out but as a candle flame which becomes invisible because someone has pulled up the blind, thrown open the shutters, and let in the blaze of the risen sun.

C.S. Lewis

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XXVIII.
PARTING WORDS

I write this part of the Report with a heavy heart. All of us at Beasley Allen were shocked and saddened by the news last month of the sudden and untimely death of a lawyer in our firm. Chad Stewart, who was only 41, passed away on Saturday, April 26th. He leaves behind a wife, Becky, and three children, Cate, Ann Presley and Bo. I am very sad over Chad’s death, but also thankful to have had him as a part of my life. I am grateful to God for bringing Chad into our firm.

Chad joined our firm in 2011 and practiced in our Consumer Fraud Section. He was a devout Christian, a devoted family man and a great lawyer. Chad was named a Shareholder in the firm in April 2012. He was a Martindale Hubbell AV Rated attorney. Because of his exceptional work, Chad was selected as the Fraud Section Lawyer of the Year for 2013.

Chad distinguished himself as a dedicated, hard-working and outstanding lawyer. His work focused primarily on Medicaid Fraud Litigation, representing state Medicaid programs. This fraud by drug manufacturers harmed the poorest and most vulnerable people and also cheated the taxpayers. In seeking justice on their behalf, Chad was involved in several multi-million dollar settlements, as well as a $38.2 million jury verdict. He also worked on a number of other commercial fraud and class action cases protecting the rights of fraud victims.

Everybody who dealt with Chad in any capacity respected him for his intelligence, ability, work ethic and integrity. He was a devoted husband and father and set an example for his children that is so very important. Chad’s Christian walk is his greatest legacy. He truly loved the Lord and each of us who knew Chad will verify that fact. His Christian walk has been and will continue to be an inspiration to all of us at Beasley Allen.

Chad attended Troy University on academic scholarship where he served as SGA Chief Justice. He graduated Magna Cum Laude and Phi Kappa Phi in 1995. Chad earned his Juris Doctor degree from Cumberland School of Law in 1999, graduating Magna Cum Laude in the Top 10 of his class. At Cumberland, Chad was selected to Curia Honoris, Cumberland’s Highest Honor Society, and was Senior Associate Editor of the Cumberland Law Review.

Chad was an active community servant, involved in legal and social organizations. He was chairman of the Alabama State Bar’s 2014 Law Day Committee, a program he was active in for the past several years. He particularly enjoyed helping to judge the poster and essay contests, with entries from children throughout the state. He served on the Board of Directors for the Boys & Girls Club of Montgomery, Enterprise YMCA, Wiregrass United Way, and The TransMission Ministry. Chad was Founder and President of the Bo Harrell Christian Athletics Award, as well as serving with the Enterprise Lions Club, Coffee County Youth Leadership Program, Jimmy Hitchcock Christian Athletics Selection Committee, Children’s Hospital Committee for the Future, Wounded Warrior Project, and Hope for the Warriors Project. Chad also helped coach several youth league sports teams.

Chad attended First Baptist Church, where he was active and a leader in his Sunday school class. The thing about Chad that stands out the most is how his faith in Christ overflowed in every aspect of his life. He had his priorities in order, putting his faith first, family second and work third. Chad practiced law in the same way he lived his faith. Watching Chad handle cases, you would see that he genuinely cared about his clients.

Chad will be missed and his death leaves voids at Beasley Allen—in the legal profession—in his church—certainly in his home—and in his wide circle of friends. My prayer is that God will provide for Becky and her children and that He will supply them during these very tough days with the peace and comfort that can only come from Him. Becky, also a very strong Christian, knows that she is and always will be a member of the Beasley Allen family. I praise God for sharing Chad Everett Stewart with us.

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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.