THE JERE BEASLEY REPORT

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Beasley Allen

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Attorneys at law

Celebrating 35 years of helping those who need it most

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1. **CAPITOL OBSERVATIONS**

**JUDGE CHARLES PRICE TO BE GUEST OF HONOR AT MCBA FUNDRAISING EVENT**

Judge Charles Price will be recognized and honored on Nov. 14 at the Montgomery County Bar Association (MCBA) event, “The Distinguishable Judge Roast.” Having been on the receiving end of a roast myself, I can tell you it is a dubious honor! At least in the case of a roast like this, that benefits the community, underneath all the good-natured ribbing that is part and parcel of a roast, there is genuine affection for the person being roasted, and a heartfelt desire to help other folks.

The MCBA event, which is the organization’s ninth annual charity event, will honor Judge Price for his 31 years of service as a circuit judge in Montgomery County. All proceeds from the event will benefit Mary Ellen’s Hearth at Nellie Burge Community Center, Medical Outreach Ministries (MOM) and the Montgomery Volunteer Lawyer Program. If any person is fortunate enough to become a judge—state or federal—I can think of no better example for them than Judge Price.

Judge Price has certainly made a tremendous impact on the Montgomery community, as well as the River Region and beyond, in his many years as a lawyer and a judge. He began his legal career at the Department of Justice, Washington, D.C. He returned to Alabama as an Assistant Attorney General. The Attorney General for the State of Alabama appointed him Acting District Attorney for Escambia County. He later became Deputy District Attorney for Montgomery County, until he entered private practice. Judge Price was appointed Assistant Municipal Judge for Montgomery County, April 4, 1983, Governor George C. Wallace appointed him Montgomery County Circuit Judge. Among his many awards and honors, Judge Price received the 1997 John F. Kennedy Profile in Courage Award of the John F. Kennedy Library Foundation and the Alabama Democratic Conference John F. Kennedy Profile in Courage Award. Judge Charles Price, a truly outstanding jurist, is a great American.

Mary Ellen's Hearth at the Nellie Burge Community Center is a ministry to help homeless women and children through God’s love. The facility offers hope through providing life skills training, help by providing transitional housing, and healing through Christian love and support. Medical Outreach Ministries (MOM) provides free quality health care to the uninsured and medically underserved in Montgomery, Autauga and Elmore counties. As a witness for Jesus Christ, MOM exists to minister to the physical, emotional and spiritual needs of the people it serves. The Volunteer Lawyer Program provides free legal services to low-income Alabamians in civil matters. As lawyers, we are uniquely qualified to provide this type of assistance. If we do not help these folks, who will?

Individual tickets for The Distinguishable Judge Roast are $75 each, and there are a number of sponsorship opportunities available. I’m proud to say Beasley Allen will be a Presenting Sponsor. The roast will be held at the Renaissance Montgomery Hotel & Spa at the Convention Center, with a reception and silent auction beginning at 5:30 p.m. and dinner and the roast beginning at 7 p.m. For sponsorship information or to purchase tickets, contact the Montgomery County Bar Association at 334-265-4793.

**TOM METHVIN TO BE HONORED AS MARCH OF DIMES CITIZEN OF THE YEAR**

For the last 11 years the March of Dimes River Region Citizen of the Year event honors an outstanding individual in the community whose distinguished leadership and devoted service to the community has contributed greatly to the quality of life for Alabama citizens. This event has raised more than $1.8 million for the March of Dimes. Throughout the years, the roles of many respected friends and neighbors have been celebrated and this year is no different. In fact, in 2006 I was honored to be the recipient. I considered it a tremendous honor, realizing full well that there were lots of folks much more deserving.

This year the River Region Citizen of the Year Testimonial Dinner will honor Tom Methvin, our Principal and Managing Attorney. We are pleased to sponsor the event which will take place on the 14th of this month. The River Region Citizen of the Year is organized by a volunteer committee and supported by the March of Dimes staff. The majority of funds for this event will be raised through corporate sponsorships and Fund the Mission. Money raised by the March of Dimes at the River Region Citizen of the Year event will fund medical research, programs of community service, education and advocacy to help the March of Dimes achieve its mission of preventing premature birth, birth defects and infant mortality. If you would like to contribute to this worthy cause, you can contact the March of Dimes directly at 334-515-7380.

**II. THE ONGOING SAGA OF THE GENERAL MOTORS SAFETY PROBLEMS**

**GM’S EFFORTS TO STALL DISCOVERY FAIL**

General Motors (GM) has been doing everything in its power to stall discovery in the multidistrict litigation (MDL) in New York and to completely stop discovery in the Melton case in Georgia. Fortunately, each of those efforts has...
failed. Both U.S. District Judge Jesse Furman (the MDL Judge) and Judge Kathryn Tankersley (the Georgia State Court Judge) have let it be known that discovery will go forward—both in the MDL and in the Melton case—and that’s good news for all of the persons and families who have been victims of GM’s massive cover-up of the ignition switch defect that has killed and injured hundreds.

Judge Furman ruled on Sept. 19 that Plaintiffs in the multidistrict litigation will be allowed to pursue discovery in injury cases that involve accidents that took place after the automaker emerged from bankruptcy in 2009, and in economic loss cases that involve post-2009 vehicles. Judge Furman said in his order that he had consulted the bankruptcy judge considering GM’s bid to invoke its bankruptcy shield to dismiss most suits stemming from the ignition switch defect, and concluded that the discovery in those cases would be required regardless of the bankruptcy court’s decision.

The MDL comprises about 116 cases, roughly 100 of which GM is trying to get dismissed by enforcing the terms of its bankruptcy sale order. A small number of those claims involve post-2009 accidents and post-2009 vehicles. Those claims will require discovery no matter what Judge Robert Gerber in the bankruptcy court decides on whether GM can enforce its sale order. Judge Furman said. He stated in the order:

Moreover, delaying discovery would, in the court’s view, reduce the willingness of courts presiding over related cases to coordinate their efforts with those of this court and to defer to the schedule and orders adopted by this court. That is, proceeding now with discovery on the claims not subject to New GM’s motions to enforce—on a reasonable, but aggressive schedule—is the best way both to advance this litigation and to promote coordination with related cases, two of the primary goals of this court.

The Melton case is going to be a definite asset to individuals who have claims against GM regardless of where their cases are located and that includes death and personal injury cases that are in the MDL. We are now ready to proceed in Melton with document discovery followed by depositions of key individuals who were involved in the massive cover up. A great deal of progress has been made and the future prospects for this litigation appear to be very good.

**NHTSA PUTS BLAME ON GM FOR HIDING IGNITION SWITCH DEFECT**

The hearing in the U.S. Senate on Sept. 16 turned into more than many believed it would. The National Highway Traffic Safety Administration (NHTSA) Deputy Administrator David Friedman had to defend agency probes of air bag failures that were eventually linked to the defective ignition switch defect that has killed and incurred hundreds. He told the Senate panel that General Motors (GM) tried to “hide the ball” from investigators. Friedman disputed lawmakers who attempted to blame GM’s failures on incompetence—the automaker’s own explanation for the crisis—telling a panel of the Senate Committee on Commerce, Science and Transportation that GM had “not silos, but firewalls” in place to block its own employees from providing the agency with information about ignition switch flaws and their link to air bags’ non-deployment.

Lawmakers including Sen. Claire McCaskill, D-Mo., made it clear that GM had the “majority of the blame” for the decade-long delay in addressing a most serious product defect that was causing the ignition switch to slip from the “run” position, stalling the vehicle and turning off its air bags. But Friedman was had difficulty explaining NHTSA’s own lapses that prevented it from identifying the problem. There were at least two separate reports in the agency’s possession that could have shown at a link between the ignition switches and air bag problems. Friedman defended his agency reviews of those GM car crashes, suggesting that the link between ignition switches and air-bag failures was more remote than other possible explanations, making it difficult for the agency to have made that connection without GM’s input. Friedman told the panel:

*GM was trying to hide the ball. This wasn’t simply incompetence. GM had policies in order to hide the word ‘defect.’ NHTSA was trying hard to find the ball, but it was missing key pieces of evidence.*

A significant refrain in the panel’s questioning was why NHTSA did not consider the stalling of a vehicle—even independent of any air-bag failure—a safety problem. GM executives have told lawmakers that one of the main reasons the company reacted so slowly, despite being aware of ignition switch issues, is that it believed the problems caused the vehicle only to stall, but not to shut off air bags. Internal documents from GM will prove without any doubt that lots of key folks at the automaker knew about the defect and its consequences and were involved in a massive cover up.

GM had said it believed that a vehicle merely stalling was a matter of customer convenience, rather than a safety issue. Sen. Ed Markey questioned Friedman about a secret meeting between NHTSA and GM in 2004 regarding vehicles stalling by themselves. Both GM and NHTSA staff agreed at the time that the stalling wasn’t a safety problem, which is unbelievable and totally unacceptable.

Friedman said that although stalling could be a serious problem, it did not automatically qualify as a serious safety concern. If he really believed that statement, this man has no business in a key role at NHTSA. Sen. Markey observed:

*If you’re in a passing lane and you’re mowing at 60 mph, and you have a flat, you’re panicking because you’re four lanes away from where you could pull over, that’s a problem. The same thing would be true if your ignition just stops. Just common sense says that the circumstances in which [a car could stall] can be such that it is a real danger. Whether the air bag deploys or not, it’s a real danger.*

The Senate hearing came after a scathing House report released earlier that same day, in which the House Energy and Commerce Committee cast NHTSA as a bumbling agency that failed to connect the dots between the evidence it already had. It received one such piece of critical evidence as early as 2007, when a Wisconsin State Trooper’s crash investigation report linked air bag failure to the ignition switch. Sen. Amy Klobuchar, D-Minn., brought up the Trooper’s report during the Senate hearing, asking Friedman to explain why the agency did not follow up on it.

Lawmakers also questioned leaders from consumer safety group Advocates for Highway and Auto Safety and the carmakers association Alliance of Automobile Manufacturers, questioning whether the GM crisis shows a need for greater funding for NHTSA. Jacqueline Gillan, president of Advocates for Highway and Auto Safety, noted that the agency receives roughly one percent of the funding for the Department of Transportation. She said also that the agency has continued to receive roughly $10 million yearly for investigations into defects, while the number of vehicles on the road has increased by 23 percent in the past decade.

I have said consistently that NHTSA is both underfunded and understaffed. The agency lacks the expertise to adequately regulate the politically powerful automobile industry. Congress has to take the blame for that situation and it’s something that must be corrected.

Source: Law360.com

III.

MORE AUTOMOBILE NEWS OF NOTE

**NHTSA LOOKS AT CHRYSLER MINIVAN STALLING ISSUE**

The National Highway Traffic Safety Administration (NHTSA) has opened an investigation into whether Chrysler Group LLC minivans with full fuel tanks are stalling. This probe is in
response to a consumer complaint indicating that the stalling could be dangerous. Dodge Grand Caravan owner Brian Rosa of Union, N.J., complained to NHTSA in July in a letter that his 2007 minivan began stalling after it had been refueled.

Mr. Rosa said the problem started in June when his wife and children were traveling on a highway and the engine stalled. His wife was driving around a bend in the road, and when the car stalled, she couldn’t operate the steering wheel, according to Mr. Rosa. He wrote in his complaint to NHTSA:

This only happens when the fuel tank is refueled to capacity. This is a major safety issue, and my hope is that Chrysler makes good on a defective part.

NHTSA’s Office of Defects Investigation has acknowledged that it had received a petition claiming the minivans were stalling when the gas tank was filled to capacity. Chrysler dealt with a similar problem on its Chrysler 300s and Dodge Magnums and Chargers last year, according to NHTSA. According to that investigation, some models of those vehicles would stall when the car was stopped or driving slowly after the fuel tank had been filled to capacity. NHTSA concluded that the condition represented a low risk to drivers and was adequately addressed by the company’s extended warranty. The investigation by NHTSA was closed in February.

Chrysler recalled about 792,000 older Jeep models in July over an ignition-switch defect. That followed an announcement by NHTSA that it had opened two investigations into possible ignition-switch defects in approximately 1.25 million Chrysler Group vehicles. As we have reported, this was a similar problem to the defect that led to a massive General Motors Co. (GM) recall that has caused hundreds of deaths.

A putative class action was filed in California federal court alleging Chrysler concealed from consumers a known defect in the ignition switches of older Jeep models that can lead to engine stalling or air bag failure. In August, the Center for Auto Safety filed a petition with NHTSA, urging the agency to issue a safety recall related to Chrysler’s “totally integrated power module,” (TIPM) a computer that controls a range of systems in millions of Chrysler vehicles.

In the Aug. 21st letter to NHTSA Acting Administrator David J. Friedman, the consumer advocacy group said it has received 70 complaints related to the Chrysler TIPM, and that NHTSA has received “hundreds if not thousands” of complaints detailing vehicle stalling, airbags not deploying and instrument panel failures related to problems with the TIPM. Chrysler owners are paying for their own TIPM replacements and waiting weeks or months for the parts while remaining “at the mercy of a defect which many have likened to the vehicle being possessed and uncontrollable,” the advocacy group wrote in its petition. It will be interesting to see how NHTSA handles this investigation. We will watch it closely.

Source: Law360.com

**NHTSA Looking Into Ford Fiesta Door Latch Problems**

The National Highway Traffic Safety Administration (NHTSA) opened an investigation last month into door latches on certain Ford Fiesta vehicles. The probe followed reports of doors failing to properly latch or stay shut, including complaints about doors opening while the car was already in motion. NHTSA’s Office of Defects Investigation says it has received 61 complaints about the door latches on model year 2011 through 2013 Ford Fiesta vehicles, leading it to initiate the investigation on Sept. 11.

Some of the reports allege the affected Fiesta vehicles have defective door latches, causing the “door ajar” warning light on the dash to appear. NHTSA said, with 12 of the reports claiming the door opened after it was shut and the drivers had already started their route. Examples of the complaints include:

One of the reports detailed an injury that occurred when a door rebounded and struck a person while they were attempting to close it. A consumer said their rear door could not be shut after returning home and parking the vehicle, making the car undrivable. The complaint said the incident occurred on Sunday, when the dealer was closed, and negatively affected the driver, who needed it to get to work at 8:30 a.m. on Monday.

Another report says that while the Fiesta was being driven at 45 miles per hour, the rear driver-side passenger door “flew open” and would not close. The consumer said their 13-year-old daughter was positioned in the rear driver side of the vehicle at the time and nearly fell out. And since they are three miles over the warranty mileage, their local dealership refuses to fix the issue. Another consumer said in an August complaint:

The front passenger door latch broke and failed after my friend had entered the vehicle. We did not realize the door latch failed until after I began driving. The first corner I took, the door flew open and he was nearly ejected from the vehicle. Had it not been for his seat belt holding him in the car, he would have been seriously injured.

NHTSA’s investigation was opened just four months after Ford recalled 582,000 2013 and 2014 Ford Escapes because of flawed door latches. The automaker said at the time that there were no reports of crashes or injuries stemming from the issue. The affected Escape sports utility vehicles were built in its Louisville, Ky., plant from Oct. 5, 2011 to Feb. 14, 2014.

Source: Law360.com

**Silent Recalls Should Never Be Allowed, But Are Still Around**

How many of you have ever heard of the term “silent recalls” as it relates to the automobile industry? Unless you have had a safety issue with a vehicle and took it to a dealer, and were involved with a silent recall, I doubt you are aware of how a silent recall is or how one works. I will give you some history of how silent recalls have been used, but first let’s look at a recent situation. The Chevrolet Volt has had just one recall since its introduction four years ago. The problem, a faulty brake valve that affected just four cars, made it one of the smallest recalls in history. But it appears that General Motors (GM) has fixed other problems on thousands of Volts for free through at least eight customer-satisfaction campaigns, which are less public than recalls and largely unregulated.

The repairs included reinforcing the battery pack and improving the battery coolant system after a government crash test sparked a widely publicized fire, prompting a congressional hearing and an investigation by the National Highway Traffic Safety Administration (NHTSA). Because neither GM nor the regulatory agency determined that the fire was evidence of a safety defect, the automaker didn’t have to use the word “recall,” follow specific requirements for notifying customers or report how many Volts got fixed.

In these customer-satisfaction campaigns, sometimes called “secret warranties” or “silent recalls” consumers aren’t notified about them. They are used frequently by the automobile industry—not just at GM—and often times safety issues are involved. As complex technology leads to more unforeseen problems after a vehicle goes on sale these techniques may well increase.

But it should be noted that the automakers have been using silent recalls for years. Lawyers in our firm first learned of silent recalls in a case we handled several years ago, Johnson vs. General Motors. That case involved a new pick-up truck that stalled in an intersection and was hit broadside by a log truck. A small child was killed in the crash. We tried the case and got a $15 million verdict after a lengthy trial. During the pre-trial discovery we learned that GM was using silent recalls to hide serious safety problems from the public. The automaker had been getting complaints in the hun-
dreds of vehicles stalling, but did not issue a real recall. Instead, GM notified dealers and told them to fix the computer if a customer came in with the problem. The automaker also told the dealers to try and get the customers to pay and if they refused GM would pick up the tab.

Huge recalls recently by GM and Toyota Motor Corp. raise questions about whether dangerous problems could be hidden in little-noticed service bulletins or customer-satisfaction campaigns, which aren't supposed to be used for safety-related defects. Gabriel Shenhar, a senior auto test engineer with Consumer Reports, stated:

There's a ton of stuff that goes under the radar screen in the form of technical service bulletins and goodwill campaigns and customer-service campaigns and hidden warranties. It's to the benefit of the consumer to have it done as a recall, so it doesn't go under the radar screen.

Clarence Ditlow, executive director of the Center for Auto Safety said: ‘[t]here is not a sharp line between a service campaign and safety recall.’ He said the $1.2 billion penalty imposed on Toyota this year over its unintended-acceleration crisis, multiple ongoing investigations of GM's ignition recalls and greater scrutiny by regulators may compel automakers to use recalls for cases in which they might have acted with less urgency in the past. He added:

If you're looking at a billion-dollar fine, it changes your calculus. I think we're going to see more safety recalls and fewer service campaigns, but the service campaign is never going to go away.

I believe that the silent recalls are used for two reasons. One definitely is based on cost to the automaker, with the other being an attempt by the automaker to keep a known defect ‘secret,’ keeping both the public and NHTSA in the dark. The automakers will take a different view on this, but that view won’t pass the ‘smell test.’ In the Johnson case that we handled, even though General Motors had received hundreds of complaints of stalling vehicles, it never had any intention of telling either NHTSA or the public about the hazard caused by the computer-related safety defect. In that case suppliers had furnished defective computer chips. GM used the silent recall effectively until we discovered it in our case.

Documents filed by GM show that at least six of its 65 recalls this year relate to previous, lesser field actions. At least two other recalls initially were proposed to be customer-satisfaction campaigns, but got upgraded by the executives who approve them. A top NHTSA official criticized GM in a 2013 email, which Congress released publicly in April, for repeatedly using customer-satisfaction campaigns and service bulletins to address matters the agency deemed to be safety defects. Automakers frequently have created customer-satisfaction campaigns or extended warranties in response to NHTSA investigations. That often has been enough to satisfy NHTSA so its staff can move on to examine other complaints. In August, NHTSA closed an investigation into braking issues on 100,000 Toyota Camry hybrids after Toyota said it would offer extended-warranty coverage.

In March, NHTSA closed its inquiry of 1.6 million Ford Escapes, Fusions and other vehicles after Ford Motor Co. started a customer-satisfaction campaign for engine throttle-body problems that generated nearly 12,000 complaints. Last year, the agency closed an investigation into sticky accelerators after Ford agreed to a campaign covering throttle cables on nearly half a million Taurus and Mercury Sable sedans. After GM offered Volt owners several “enhancements” in response to NHTSA’s probe into the 2011 crash-test fire, regulators concluded that “further investigation does not appear to be warranted.” But it added this disclaimer, which it also used for the Camry hybrid and Ford throttle-body investigations:

“The closing of this investigation does not constitute a finding by NHTSA that a safety-related defect does not exist.”

Having said all of this, the bottom line is that silent recalls—falling short of a true recall—are not consumer friendly. In my opinion, when a defect is related to safety in any respect they should be prohibited.

Source: National Highway Traffic Safety Administration

IV.

GULF COAST DISASTER

JUDGE BARBIER FINDS BP GROSSLY NEGLIGENCE, EXPOSING OIL GIANT TO BILLIONS MORE IN PENALTIES

For months, residents throughout the Gulf Coast have been waiting to see whether justice would prevail for BP's horrific actions leading to one of the worst environmental disasters in human history. Finally, last month, they got their answer. Judge Barbier issued his Phase 1 order, and found the oil giant grossly negligent in causing the Deepwater Horizon rig to explode and ultimately sink into the Gulf of Mexico. In the order, Judge Barbier apportioned BP's fault at 67 percent, Transocean at 30 percent and Halliburton at 3 percent.

Judge Barbier noted in his 153-page opinion that BP acted with 'profit-driven decisions' that amounted to 'gross negligence' and 'willful misconduct' under the Clean Water Act. 'These instances of negligence, taken together, evidence an extreme deviation from the standard of care and a conscious disregard of known risks,' Judge Barbier wrote. With a gross negligence finding against the company, BP now faces federal Clean Water Act penalties that could total $18 billion. The trial with the federal government to decide the company's liability under the Clean Water Act will occur early next year.

Notwithstanding BP's gross negligent conduct, Judge Barbier acknowledged that BP could not be held liable for punitive damages under Fifth Circuit law. However, Judge Barbier wrote that other circuits' laws could give rise to punitive damages. While the news on punitive damages could be problematic for claimants seeking compensation in Fifth Circuit courts, the State of Alabama's case—which our firm is actively involved in—could benefit greatly from the order given the case originated in and will be tried based on Eleventh Circuit precedent. Punitive damages, therefore, will be allowed in cases in Alabama and Florida.

The fact that BP was found grossly negligent and responsible for the oil spill should come as no surprise to anyone that paid close attention to the trial in New Orleans. For weeks during the trial, expert and fact witness testimony revealed a host of incomprehensible actions and decisions by the company that put profits over human life. Predictably and in the face of the evidence, a defiant BP made it a point to publicly disagree with the order. But isn't that what we have come to expect from BP? Time and time again, the company has whistled past its actions and ignored its obligations—almost hoping that it is too big or rich to be punished for its conduct.

Perhaps the company's leadership believes the public will believe its multi-million dollar advertising campaign designed to control public opinion, or that Gulf residents will forget just how bad the company acted when actions mattered most. Fortunately, the public is not going to forget what BP did before, during and after the oil rig exploded. Even so, BP cannot let time pass without reminding all of us that the company simply cannot be trusted. Case in point: the company is still trying to torpedo its own settlement simply because the company does not want to pay claims pursuant to the terms it negotiated and agreed to.

A CONFIRMATION OF JUDGE BARBIER'S RULING THAT BP WAS GROSSLY NEGLIGENCE

A recent editorial by the Al.com editorial board, an excellent and timely piece, confirms that Judge Carl Barbier was absolutely correct in his findings on the allocation of fault between the wrongdoers that caused the worst oil spill disaster in history. The following is the editorial in its entirety.
In this Wednesday, April 21, 2010 file photo, oil can be seen in the Gulf of Mexico, more than 50 miles southeast of Venice on Louisiana’s tip, as a large plume of smoke rises from fires on BP’s Deepwater Horizon offshore oil rig. An April 20, 2010 explosion at the offshore platform killed 11 men, and the subsequent leak released an estimated 172 million gallons of petroleum into the gulf. (AP Photo/Gerald Herbert, File)

A fair deal. An honest partner. That’s all the people of Alabama and their Gulf Coast neighbors ever wanted from oil giant BP, but it’s not what BP returned in 2010.

After months of trial and testimony, a federal judge ruled Thursday that BP was grossly negligent in the oil well blowout that killed 11 and dumped millions of barrels of oil in the Gulf. BP already has paid $28 billion trying to head off this federal hammer. It will, and should, pay lots more. That number will spiral upward because United States District Court Judge Carl Barbier not only ruled that BP was “negligent,” but it was “grossly negligent.” The difference is more than semantics. Under federal law, BP could face $18 billion more in fines. The last phase of the trial will determine how much more BP will pay. Under the Clean Water Act, the maximum penalty is $1,100 per barrel spilled if the court finds simple negligence and $4,300 per barrel if the court finds gross negligence or willful misconduct.

BP has long said it made mistakes, but the flaws were shared with its business partners—rig owner Transocean and well service provider Halliburton. The court essentially scotched at the position. This was BP’s handiwork, the court said. This ruling is not merely a decision. It’s an indictment that BP rolled the dice with the lives of people who depended on a healthy Gulf, and did so knowing the risks and ignoring them for the sake of profit. Naturally, the next few months will witness more legal appeals. As for payment to those who have suffered damage at BP’s hands, some have been paid fairly, others have tried to finagle a little extra.

All should get what they rightfully deserve and no more. We’ve bad enough greed for a lifetime. BP’s indifference to the people of the Gulf is no cause for reciprocal self-dealing. But the federal judge said it best. “BP was reckless,” he said. That willful disregard cost death aboard the rig, and traumatized the Gulf’s environment for years. What Alabama and its Gulf friends deserve is no less than fairness. The court finally has determined the shape of that fairness. Good.

This editorial is a definite confirmation of Judge Barbier’s findings and resulting order. It’s quite refreshing to see an insightful and absolutely correct appraisal of how truly bad BP was and continues to be.

Source: AL.com

HALLIBURTON REACHES SETTLEMENT ON CLAIMS

Halliburton has reached an agreement to settle a substantial majority of the Plaintiffs’ class claims asserted against the company as a result of the April 20, 2010, Macondo well incident in the Gulf of Mexico. The approximately $1.1 billion settlement, which includes legal fees, is subject to approval by the United States District Court for the Eastern District of Louisiana. It will be paid into a trust until all appeals have been resolved in three installments over the next two years. The company’s previously accrued loss contingency provision relating to the multidistrict litigation (MDL) proceedings is currently $1.3 billion. The agreement includes the following:

- Claims against Halliburton that BP assigned to the settlement class in BP’s April 2012 settlement;
- Punitive damages claims against Halliburton by a class of Plaintiffs who allege damages to property or associated with the commercial fishing industry arising from the Deepwater Horizon Incident; and
- Affirmation that Halliburton has no liability for compensatory damages to the members of the settlement class in the BP April 2012 settlement.

Payments will be held in the trust pending the finalization of this settlement, which is contingent on final Court approval, including any appeals of:

- The BP 2012 settlement with the settlement class;
- The District Court’s earlier determination that the contractual indemnity provided by BP to Halliburton is valid and enforceable; and
- The District Court’s earlier dismissal of economic damage claims against Halliburton.

Additionally, the settlement is subject to an agreed-upon level of participation by the current claimants which, if not achieved, allows Halliburton to terminate the agreement. I believe this goal will definitely be met.

Source: AL.com

HALLIBURTON SANCTIONED FOR DESTROYING DEEPWATER EVIDENCE

In another ruling, involving Halliburton Co., Judge Carl Barbier sanctioned the company for destroying evidence in the 2010 Deepwater Horizon litigation. The sanctions were ordered by Judge Barbier without detailing what they would be. He is allowing motions to supplement the record of the first phase of the trial with details of Halliburton’s guilty plea to the destruction of evidence made last year. Judge Barbier wrote:

The court finds that the deletion of the [evidence] was done intentionally and in bad faith. The court also finds that this sanction does not amount to a default judgment, the dismissal of any of Halliburton’s claims or the disposal of any claims against Halliburton.

This latest blow to Halliburton comes just two days after the company agreed to pay the nearly $1.1 billion settlement we mentioned above. Most private Plaintiffs’ claims against Halliburton for its role in the disaster were resolved. But that settlement didn’t address any claims brought by states or the federal government.

STUDY SAYS OIL SPILL CAUSED $585 MILLION IN LOSSES FOR RECREATIONAL FISHERMEN

The dollar figure recreational fishermen lost as a result of canceled trips after the oil spill in the Gulf of Mexico is around $585 million, according to a report by the Gainesville Sun. The article describes the findings of a study conducted by researchers from a number of universities, including the University of Florida. Scientists used data from the National Oceanic and Atmospheric Administration (NOAA), as well as location preferences to put a dollar amount on the combined loss.

The study may be used for the Natural Resources Damage Assessment, an ongoing process to determine the widespread impact of the 2010 Deepwater Horizon oil spill in the Gulf. The article also mentioned Orange Beach fisherman Troy Frady, who said he lost 38 out of 42 of his scheduled fishing trips in the months following the spill. In an emailed statement, BP refused the finding, claiming that researchers “made a significant mistake in their calculations.” Should we be surprised at BP’s response?

Source: AL.com

U.S. CHAMBER SIDES WITH FOREIGN OIL COMPANY OVER ITS OWN MEMBERS

On the same day when Judge Carl Barbier found BP guilty of gross negligence, reckless
disregard, and willful misconduct, the U.S. Chamber of Commerce sent an amicus brief to the U.S. Supreme Court, siding with the foreign oil giant over its own business members and local Chamber of Commerce affiliates. The Chamber tells the High Court that it ‘represents an underlying membership of more than three million U.S. businesses and organizations of every size, in every industry, and from every region of the country.’

However, as it did in the U.S. Fifth Circuit below, the Chamber intentionally conceals the fact that potentially thousands, if not tens of thousands, of its own members, and perhaps scores of local Chamber of Commerce affiliates, have submitted and are pursuing Business Economic Loss Claims for compensation from BP under the terms of a detailed and agreed-to settlement through the Court-Supervised Settlement Program.

Any business owner who is a member of a local Chamber of Commerce should be made aware that the U.S. Chamber has supported BP’s unjustified and misleading efforts to back out of its commitment to businesses in the Gulf Coast Region. Thousands of business owners along the Gulf Coast are victims of BP’s wrongdoing. They should ask their local Chamber of Commerce why the national favors the limited and selfish interests of a single foreign company over the interests of its own members. The national chamber consistently takes positions that are not in the best interest of local business owners and their employees.

**United Kingdom’s Government Backs BP**

BP Plc got support from the U.K. government in its U.S. court fight over the level of compensation required under a settlement of lawsuits stemming from the 2010 Gulf of Mexico oil spill. The U.K. told U.S. Supreme Court judges in a filing that decisions to authorize payments to people who were not injured by the spill raises ‘grave international comity concerns by undermining confidence in the vigorous and fair resolution of disputes.’ The filing shows the government’s interest in the treatment of one of the country’s most prominent companies. Based on this filing it’s quite apparent that the British government is totally unaware that BP agreed to the terms of the settlement.

BP, the second-largest British oil producer, is trying to get a ruling from the U.S. Supreme Court that would be a miscarriage of justice. The oil giant had failed to persuade a Louisiana district judge and an appeals court to limit payments under a 2012 settlement to compensate victims of the spill. BP says payments are unfairly being made to claimants whose businesses couldn’t have been affected by the disaster. The U.K. government filed an *Amicus Curiae*, or friend of the court, brief dated on Sept. 4 in the Supreme Court.

Source: *Insurance Journal*

**V. PURELY POLITICAL NEWS & VIEWS**

**The National Scene Begins To Generate Interest**

Now that Labor Day is in the review mirror, the races for the U.S. Senate and House of Representatives have moved into a higher gear. It is apparent that record amounts of money will be spent by the candidates and special interest groups in these races. We are experiencing the consequences of the U.S. Supreme Court’s *Citizen United* decision, which opened the corporate vault and changed the political landscape in the U.S. Thus far, polling has shown mixed results, with recent polls indicating that the House and Senate are in play for both political parties. But the Tea Party operatives are working hard in a number of states in hopes that Democrats will lose a majority in the Senate. In a number of states, attacks on President Obama are the sole strategy for GOP candidates and that’s a sad state of affairs. I am convinced that it’s in the best interests of American consumers, workers and senior citizens for Democrats in the U.S. Senate to remain in control. Each of those groups has lots to lose if the GOP takes over the Senate.

**Alabama Campaigns Move Slowly Toward November**

The Governor’s Race Is Moving Slowly Toward The November Vote

Based on recent polling, it doesn’t appear that Gov. Robert Bentley is in any sort of trouble at this juncture. There simply hasn’t been a great deal of interest in the race so far. Even though I strongly disagree with the Governor’s stand on the Medicaid issue, I believe overall that he has done a very good job as chief executive. Governor Bentley inherited a state in deep financial trouble, with some other very serious problems, and has worked hard to head things in the right direction. Unless something drastic happens that will directly affect his office, I believe Gov. Bentley will get a second term.

**Lt. Governor’s Race**

The Alabama Lt. Governor’s race has attracted no attention as far as I can tell. The race for the state’s second highest office has definitely been under the radar screen. I doubt that many Alabamians could even name the candidates in this race without a score card. That’s most interesting considering the race includes the current occupant of the office and a challenger who served in the state legislature. An expected low voter turnout could make the race closer than most experts are predicting that it will be.

**Attorney General’s Race**

The race for Attorney General appears to be the most competitive of all the statewide races at this juncture. The incumbent, Luther Strange, doesn’t appear to be taking anything for granted. His opponent, Joe Hubbard, the Democratic nominee, will be well-financed and has already been on television with what appears to be fairly heavy buys. His approach thus far has been to attack Luther and sources tell me the attacks will intensify.

**Legislative Races**

I really haven’t heard very much at all about the legislative races in Alabama so far. Perhaps things will pick up in a few of the races fairly soon. There could be some developments totally outside the campaigns that could have an effect on some of the races. But since I don’t put any stock in rumors—and what the infamous “they say”—I have to say, I discount that possibility. I don’t see any real changes in either chamber next year. Interestingly, the anti-Obama themes that the GOP operatives enjoy using could actually backfire on their candidates. It could motivate Democratic voters to turn out on Election Day.

**Senator Billy Beasley Deserves Another Term**

I am going to mention one legislative race and it’s one in which I have a personal interest. It involves my brother Billy Beasley, who has served with distinction in the Alabama Legislature for a number of years. He served three terms in the House of Representatives and was elected to the Senate in 2010. Billy represents the people in Senate District 28, and he deserves a second term. While I admit that I am biased, I can say without reservation that Billy has done a truly outstanding job during his time in the House and Senate. He works hard for the folks who sent him to Montgomery to represent them. I believe that his record will assure his reelection. I predict my little brother will get a second term in the Senate.

**Source:** JereBeasleyReport.com
VI.
COURT WATCH

U.S. SENATE CONFIRMS JILL PRIOR TO 11TH CIRCUIT

The U.S. Senate has voted overwhelmingly to confirm Jill A. Pryor, an Atlanta lawyer, to the Eleventh Circuit. This gives the appeals court an almost full complement of judges for the first time in months. Judge Pryor, who was confirmed by a vote of 97-0, will fill the third of four previously empty seats. She had “patiently” waited two years for the vote, longer than any pending current nominee.

Judge Pryor had been a litigation partner at Bondurant Mixson & Elmore LLP in Atlanta. She graduated Phi Beta Kappa with a bachelor’s degree from the College of William & Mary in 1985, after which she acquired her law degree from Yale Law School three years later. After clerking for the Eleventh Circuit, she joined Bondurant Mixson as an associate in 1989 and became a partner eight years later. Her expertise was in complex business litigation.

Judge Pryor has specialized in business torts, corporate governance and shareholder disputes, class actions, trade secrets, intellectual property, fraud and the Georgia and federal Racketeer Influenced and Corrupt Organizations (RICO) Act laws. A highlight of her career has to be a $281 million jury verdict against Turner Broadcasting System Inc. That case involved the breach of an oral contract to sell David McDavid the Atlanta Hawks and Atlanta Thrashers.

ALABAMA SUPREME COURT AFFIRMS CLASS-ACTION STATUS FOR $3.2 BILLION INVESTOR LAWSUIT AGAINST CVS CAREMARK

The Alabama Supreme Court agreed with a Jefferson County judge that a lawsuit against CVS Caremark Corp. can be treated as a class-action to represent about 70,000 investors who claim they lost $3.2 billion in a 1990s securities fraud. The class-action stems from 21 lawsuits filed by investors in 1998 against MedPartners, a health company founded by former HealthSouth CEO Richard Scrushy. Those lawsuits claimed MedPartners made false and misleading statements to the public about its financial condition and prospects.

The lawsuits were combined and settled for $56 million after MedPartners claimed it was tainting the edge of bankruptcy and that $50 million was all its insurance would cover. In 2000, MedPartners changed its name to Caremark and in 2007 merged with CVS.

Investor John Lauriello, one of the original Plaintiffs, filed a new fraud lawsuit in 2003 claiming MedPartners lied about having limited insurance coverage during the settlement negotiations. The lawsuit claims that in October 1998, prior to the settlement being finalized, MedPartners paid for unlimited insurance coverage. If the unlimited insurance coverage had been known at the time, it’s alleged that investors could have negotiated a higher settlement amount. CVS Caremark has claimed that the added insurance was known, or should have been known, to the Plaintiffs prior to the settlement. The company claims the extra insurance was noted in press releases, in communications with Plaintiffs’ lawyers, and within a filing with the U.S. Securities and Exchange Commission (SEC). CVS also has argued the lawsuit was filed beyond the statute of limitations.

CVS Caremark, which took over MedPartners, also opposed efforts to treat the claims as a class action. But the Alabama Supreme Court in last month’s ruling affirmed Circuit Judge Tom King’s certification of the class, with an opt-out provision. If the Alabama Supreme Court had not affirmed the claims as a class action then investors would have been forced to file individual lawsuits. Bruce McKee, one of the lawyers representing investors, said under an opt-out action notices will have to be sent to the estimated 70,000 investors in the class to see if they want to opt out of being represented in the case. Because many of the addresses of investors from 16 years ago may no longer be valid, the opt-out provision will have to be advertised.

Plaintiff’s lawyers had tried to get a mandatory class certified, with no opt-out provision, but the Supreme Court disagreed. The case can proceed on the merits once the opt-out process is complete. Plaintiffs will have to prove there was fraud during the settlement. Hare Wynn Newell & Newton, along with North & Associates and John Somerville, a Birmingham lawyer, were appointed by Judge King as the lawyers to represent the class. This is a most interesting case and it will be watched closely.

Source: Birmingham News

VII.
THE CORPORATE WORLD

BANK OF AMERICA’S MORTGAGE BACKED SECURITIES SETTLEMENT IS THE MOST CONSUMER FRIENDLY DEAL STRUCK THIS FAR

We have published several articles in the last couple of years about the fraudulent conduct surrounding mortgage-backed securities (MBS). The scandal has resulted in billions of dollars in settlement payments to a wide array of state and federal regulators, but there was also a multidistrict litigation (MDL) in the United States District Court for the Central District of California. The most recent settlement out of the MDL involved National Integrity Life Insurance Company’s purchase of $447 million in MBS from Bank of America’s mortgage lending arm—Countrywide Financial Corporation. While the amount of this particular settlement was not disclosed, other recent settlements have been made public.

For example, Bank of America settled with the U.S. Department of Justice (DOJ) on Aug. 21, 2014, for nearly $17 billion. That settlement is the largest related to the 2008 financial crisis and encompasses investigations by other agencies such as the Securities and Exchange Commission (SEC) for the same acts. In the deal, Bank of America will pay a total of $9.65 billion in cash and the other $7.0 billion will be in consumer relief. The cash portion consists of a $5.02 billion civil monetary penalty and $4.63 billion in compensatory remediation payments. The $7 billion for consumer relief will come in the form of mortgage principal and monthly payment reductions, and community improvements such as funds to take over and tear down derelict housing and assistance for building or refurbishing affordable rental properties.

Bank of America, however, is paying much more to consumers than the other major banks involved in MBS investigations. Even when combined, those banks, J.P. Morgan Chase & Co. and Citigroup Inc., paid less to consumers than this deal requires of Bank of America. Another positive difference between the settlements relates to how that consumer relief is calculated. Through the settlement, Bank of America, like Citigroup, is incentivized to reduce mortgage principals. Unlike Citigroup, however, Bank of America will receive a credit toward that $7 billion requirement of $1.75 for every $1.00 it forgives for mortgages insured by the Federal Housing Administration (FHA); Citigroup was not incentivized to reduce FHA loans.

Additionally, in order to receive credit, Citigroup had to reduce a loan balance enough so that the homeowner did not owe more than the home was worth—the homeowner would to end up with no equity, but would no longer be “under water.” Bank of America has to take it a step further and reduce the mortgage amounts to no more than 75 percent of the home’s value. That means that consumers affected by the settlement will actually gain equity.

Some complain that those who were more directly injured by MBS lending, homeowners, will not be fairly compensated by the deal. The bulk of the settlement goes to the government. While the deal will certainly benefit homeowners, more so than any of the previous MBS settlements, analysts claim Bank of America will not really feel the loss of that $7 billion in consumer relief. Most of that comes in the form of reduced principals for underwater mortgages and Bank of America may have already written off some of those “troubled mortgages” years ago. Additionally, Bank of America may have already sold those troubled mortgages to invest-
ment firms, which will provide some shielding to the bank.

So, while the deal is not perfect, it is a step in the right direction and provides more relief than any earlier settlement. The consumer relief is expected to help tens of thousands of homeowners across the country, though Bank of America says the program will not be up and running until well into the fourth quarter.

Regardless of the impact felt by Bank of America, the deal could result in the bank forgiving billions of dollars in mortgage principal, and that is a benefit nobody can complain about. If you need more 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@beasley-allen.com.

Sources: Law360, New York Times, and Wall Street Journal

GSK Fined Record $489 Million for Bribery In China

GlaxoSmithKline PLC has been fined a record 3 billion yuan (488.5 million) for bribing doctors. A verdict was handed down by a Chinese court, which also sentenced several of the drugmaker’s executives to up to four years in prison. A court in Changsha, China, found the Chinese branch of the British pharmaceutical company guilty of paying bribes to doctors to boost sales of its products and ordered it to pay the biggest fine ever imposed by a Chinese court.

Separately, the London-based multinational pharmaceutical and biotechnology company is facing a number of allegations of unethical behavior by its doctors. Investigations are ongoing in Syria, Jordan, Lebanon and Iraq. GSK also disclosed in late May that it is under investigation by the U.K.’s Serious Fraud Office. GSK executives confessed in July 2013 to commercial bribery and tax-related crimes, including paying physicians and hospitals in order to bolster drug sales. Chinese officials said the scheme involved some 3 billion Chinese yuan in payments since 2007. From 2004 to 2010, physicians were allegedly bribed to use GSK drugs for conditions that, in some cases, they weren’t even designed to treat.

Source: Law360.com

MF Global Officers’ Defense Cost Already At $48 Million

When I read that former officers and directors of MF Global Holdings Ltd. had already spent more than $48 million defending themselves in lawsuits, I thought there was a misprint on the amount. But it appears the $48 million was a correct number. U.S. Bankruptcy Judge Martin Glenn called it “staggering.” Considering the taking of depositions hasn’t even begun, the $48 million is shocking. The money is actually coming from the company’s insurance policy. Judge Glenn explained in an opinion why he is obliged to give former MF Global managers almost unlimited access to the remainder of $225 million in directors’ and officers’ liability insurance.

MF Global Holdings and its brokerage unit went into separate bankruptcies in October 2011 after “discovering” a $1.6 billion shortfall in property that should have been segregated for customers. On top of the bankruptcies, a number of securities lawsuits were filed against company executives, which were consolidated in U.S. District Court in Manhattan. In April 2012, Judge Glenn allowed the executives to draw as much as $30 million from the liability policy to cover defense costs. Although Judge Glenn raised the cap to $43.8 million this year, the executives now claim that the judge no longer has the right to limit access to the policy because it’s not property of the bankrupt companies.

In his opinion, Judge Glenn agreed, saying the policy lost status as “estate property” given the advanced stage of the bankruptcies. Since the insurance can’t be considered estate property, Judge Glenn can no longer regulate how it’s used. The judge made this statement in explaining why he said he is not the “overseer” of defense costs:

Even though the rate that money goes out the door is of great concern to the court, it is unlikely that defense costs would entirely exhaust the D&O proceeds. It is not the proper role of the bankruptcy court to police litigation in other courts that does not directly affect the property of the estates. It would be fundamentally unfair for the securities lawsuits to proceed while denying the individual insureds’ coverage for defense costs.

Judge Glenn told the insurance companies to hold back about $15 million to cover the estimated maximum amount of indemnification claims the executives filed against the bankrupt companies. The representative of the holding company’s creditors unsuccessfully urged Judge Glenn to retain control over how the insurance money is spent to ensure most of it remains to pay settlements or judgments. The bulk of Judge Glenn’s opinion explains why the insurance is no longer estate property. In the advanced stage of the bankruptcies, it’s no longer possible to initiate a lawsuit against MF Global that would be covered by the policies.

MF Global Holdings emerged from Chapter 11 in June 2013 while the brokerage, MF Global Inc., is being liquidated by a trustee appointed under the Securities Investor Protection Act (SIPA). Reportedly, customers and secured creditors of the brokerage have been paid in full. The SIPA trustee announced last month that he will be making a first distribution of about 20 percent to unsecured creditors. All of the litigation mentioned above is in the U.S. Bankruptcy Court, Southern District of New York (Manhattan).

Source: Insurance Journal

VIII. WHISTLEBLOWER LITIGATION

As Interesting SEC Whistleblower Case

The Securities and Exchange Commission (SEC) has announced a whistleblower award of more than $300,000 to a company employee who performed audit and compliance functions and reported wrongdoing to the SEC after the company failed to take action when the employee reported it internally. I am told this is the first award for a whistleblower with an audit or compliance function at a company.

Sean McKessy, Chief of the SEC’s Office of the Whistleblower, in a statement said:

Individuals who perform internal audit, compliance, and legal functions for companies are on the front lines in the battle against fraud and corruption. They often are privy to the very kinds of specific, timely, and credible information that can prevent an imminent fraud or stop an ongoing one. These individuals may be eligible for an SEC whistleblower award if their companies fail to take appropriate, timely action on information they first reported internally.

This particular whistleblower award recipient reported concerns of wrongdoing to appropriate personnel within the company, including a supervisor. But when the company took no action on the information within 120 days, the whistleblower reported the same information to the SEC. The information provided by the whistleblower led directly to an SEC enforcement action. The SEC’s whistleblower program rewards high-quality, original information that results in an SEC enforcement action with sanctions exceeding $1 million. Whistleblower awards can range from 10 percent to 30 percent of the money collected in a case. By law, the SEC must protect the confidentiality of whistleblowers and cannot disclose any information that might directly or indirectly reveal a whistleblower’s identity.
**SMITH & NEPHEW AGREES TO PAY $8 MILLION TO THE GOVERNMENT IN FIRST-EVER MEDICAL DEVICE “COUNTRY OF ORIGIN” CASE**

U.K.-based medical device manufacturer Smith & Nephew has agreed to settle a whistleblower lawsuit and pay the United States government $8 million. The relator, Sam Cox, sued Smith & Nephew in the U.S. District Court for the Western District of Tennessee under the whistleblower provisions of the False Claims Act for violating the Trade Agreements Act (TAA).

The TAA requires government contractors to certify that they will only sell products to the government that originate in the United States or a country that has signed a trade agreement with the United States. The law gives a preference to companies that sell products manufactured in the United States or in a country that is a trading partner. In this case, Smith & Nephew violated the TAA by selling products that were manufactured in Malaysia, which is a country that has not executed a trade agreement with the United States. This is believed to be the first TAA settlement involving a medical device company.

The settlement sends a clear message to those medical device companies that routinely violate the Trade Agreements Act by misrepresenting the “Country of Origin” of goods sold under contract to U.S. Government agencies. This inaugural settlement will create a ripple effect for other medical device companies that choose to turn a blind eye to their obligations under the Trade Agreement Act. The government has turned its attention to these flagrant violations and is stepping up enforcement.

The United States Government declined to intervene in this case and Mr. Cox litigated the case without the active assistance of the government. But the U.S. Department of Justice was instrumental in helping the parties to reach a settlement at the end of this hard-fought and expensive litigation. This is another example of the private-public partnership created by the False Claims Act working together to redress fraud. I am told that the government team was essential in securing this result.

Source: PRNewswire

**SHIRE WILL PAY $56.5 MILLION TO SETTLE ADDERALL MARKETING LITIGATION**

Shire PLC has agreed to pay $56.5 million to settle False Claims Act claims arising out of the improper marketing and promotion of five drugs intended to treat both attention deficit hyperactive disorder (ADHD) and ulcerative colitis. The settlement with the U.S. Department of Justice resolves claims raised in two FCA suits filed in Pennsylvania and Illinois that the company had made claims to prescribers about the uses and benefits of its drugs without proper supporting data. Shire was accused of claiming that its ADHD medication Adderall XR would help to prevent certain issues linked to the condition including poor academic performance, criminal behavior, traffic accidents and sexually transmitted disease. U.S. Attorney for the Eastern District of Pennsylvania Zane Memerger said:

"Marketing efforts that influence a doctor's independent judgment can undermine the doctor-patient relationship and shortchange the patient. Where children's medication is concerned, it can interfere with a parent's right to clear information regarding the risks to the safety and health of their child. Shire cooperated throughout this investigation and, in advance of this settlement, began to correct its marketing activities."

The first of the two whistleblower suits was filed in the Eastern District of Pennsylvania in 2008 on behalf of former Shire executive Gerardo Torres. The second was filed in the Northern District of Illinois in 2009 on behalf of three former Shire sales representatives. The suits claimed that the pharmaceutical giant's boasts about Adderall—as well as the medications Vyvanse and Daytrana—caused false claims seeking payment for the drugs to be submitted to government programs including Medicare and Medicaid. Shire was also accused of claiming without supporting data that patients would be less likely to abuse Vyvanse and Daytrana than Adderall.

In addition, the company was accused of promoting ulcerative colitis medications Lialda and Pentasa for uses not approved by the U.S. Food & Drug Administration (FDA). Lialda was promoted for the prevention for colorectal cancer. Pentasa, meanwhile, was marketed without FDA approval as a treatment for indeterminate colitis and Crohn's disease.

In addition to providing compensation to the government and paying windfalls to the relators, officials said that Shire had agreed to work with the U.S. Department of Health & Human Services to put new controls in place to oversee marketing and promotional practices. Companies can’t be allowed to profit using false and misleading claims about their products. That is especially true when it comes to drugs and medicines and is even more compelling when drugs marketed for children are involved.

Source: Law360.com

**ARE PHYSICIAN-OWNED DISTRIBUTORSHIPS ANTI-KICKBACK TRAPS?**

The Department of Justice (DOJ) recently instituted False Claims Act allegations against spinal implant company Reliance Medical Systems, its owners, and two Reliance distributorships because the company allegedly made improper payments to surgeons to induce them to use Reliance devices in their procedures. Assistant Attorney General Stuart F. Delery for the Justice Department’s Civil Division stated:

"Improper payments to physicians can alter a physician's judgment about patients' true health care needs and drive up health care costs for everyone."

Reliance is what is known as a “physician-owned distributorship” (POD)—a type of company that has garnered attention from the U.S. Department of Health & Human Services Office of the Inspector General as “inherently suspect” under the Anti-Kickback Statute. PODs are physician-owned entities that derive their revenue from selling medical devices ordered by their physician-owners for use in the procedures that the physician-owners perform. Patients are put at risk by PODs because they allow doctors to financially profit from the medical devices they use in their patients.

The financial incentives created by PODs can lead to unnecessary and invasive procedures for patients, possibly with a device that is not the best choice. PODs are prevalent in the fields of spinal surgery and joint replacements, and they are increasing in the field of cardiology. All of these fields are areas in which Medicare spends substantial dollars.

Under the anti-kickback statute, any person or entity who receives, pays, offers or solicits anything of value in order to induce or reward the ordering or referral of products and services covered by federal health care programs can face civil penalties and treble damages under the False Claims Act. According to the DOJ allegations, Reliance used its distributorships to funnel improper payments to surgeons for using Reliance devices in their surgeries. For example, the complaints allege that Dr. Aria Sabit (also a defendant) began using Reliance devices only after acquiring an ownership interest in a Reliance distributorship and receiving payments from the sale of Reliance devices.

After acquiring ownership in the company, Dr. Sabit used Reliance devices in nearly 90 percent of his spinal surgeries. The government contends that financial incentives caused Dr. Sabit to perform medically unnecessary or excessive surgeries—even on patients who did not need spinal implants—in violation of the False Claims Act.

The whistleblower provision of the False Claims Act is a key tool in combatting health care fraud such as that perpetrated by PODs. Some of the allegations raised in the DOJ’s recent action were first raised in a separate lawsuit filed under the whistleblower provision of the False Claims Act. The whistleblower provision allows private citizens with knowledge of fraudulent activities to bring suit on behalf of the government and ultimately share in the recovery. The government can intervene in the
whistleblower suit, as it chose to do in this case. Although PODs are not illegal per se, these entities require increased scrutiny in order to prevent fraud and improper billing. As the physician-owned business model becomes more prevalent, the potential for fraud and abuse of federal and state health care programs greatly increases. If you need more information or have questions on this subject, contact Leslie Pescia, a lawyer in our firm’s Consumer Fraud Section, at 800-898-2034 or by email at Leslie.Pescia@beasleyallen.com.


**MINNESOTA MAN SETTLES WHISTLEBLOWER LAWSUIT FOR $990,000**

A Minnesota man who alerted the U.S. Department of Defense (DoD) to a Humvee manufacturing change that could potentially put soldiers at risk won nearly $1 million after settling his whistleblower lawsuit. David McIntosh lost his job at M.K. Battery in 2007. This came after he called defense officials to warn them the manufacturing process on Humvees gun turrets had changed. Mr. McIntosh said the change cut the life span on the battery that turned the turret by about half, which could result in fatal consequences for soldiers involved in a gun fight in Iraq.

Mr. McIntosh tried to persuade his employer to tell the Army about the change. He finally realized the company was not going to report the matter. After 14 months had elapsed, he called the Defense Department himself. Subsequently, he was fired for insubordination. M.K. Battery has denied that the batteries fail to meet the required specifications, but interesting and perhaps telling, the company saw fit to settle with Mr. McIntosh.

Source: Insurance Journal

**MOBILE DOCTOR SETTLES WHISTLEBLOWER RETALIATION CLAIM**

A Mobile, Ala., doctor has settled a whistleblower retaliation lawsuit. In 2011, Dr. Christian Heesch filed the lawsuit under the federal False Claims Act, alleging that Diagnostic Physicians Group improperly compensated doctors based on tests they ordered from Infirmary Health Inc. Specifically, Dr. Heesch alleged that doctors employed by Diagnostic Physicians Group received bonuses based on the number of tests and procedures that they referred to Infirmary Health’s clinics. These bonuses were said to have constituted improper financial compensation in violation of the anti-kickback provision of the Stark Act, which is designed to prevent excess payments from Medicare, Medicaid and other government health programs.

Infirmary Health, two affiliated clinics and Diagnostic Physicians Group settled the False Claims Act claims and will pay the government $24.5 million. As the whistleblower, Dr. Heesch was entitled to receive $4.41 million of that settlement under the False Claims Act. In addition to being compensated for informing the government of fraud committed against it, the False Claims Act also protects whistleblowers from retaliation, harassment or discrimination.

Dr. Heesch alleged that Diagnostic Physicians Group terminated him in 2011 because he began asking questions about potential government fraud and requesting documents related to doctors’ compensation. Recently, Dr. Heesch and Diagnostic Physicians Group reached a settlement on the retaliation claims for an undisclosed amount. Chris Coumanis, a lawyer with Coumanis and York, located in Daphne, Ala., represented Dr. Heesch in this litigation and he did a very good job.

Source: AL.com

**FCA WHISTLEBLOWERS ACCUSE GILEAD OF DEFECTIVE-DRUG FRAUD**

A lawsuit filed against Gilead Sciences Inc. claims that the company cheated taxpayers by selling contaminated and defective drugs to Medicare and Medicaid. Whistleblowers made these charges in the lawsuit that was unsealed last month in a California federal court. This adds to the sharp increase in fraud litigation over manufacturing violations in the industry. The complaint asserts that Gilead since 2001 has sold at least 10 products—including HIV medications Viread, Truvada and Stribild—that lacked potency or were contaminated with filth, metal or microbes, allegedly rendering them nonreimbursable by government health care programs. Gilead committed “serious violations of the laws and regulations designed to ensure the fitness of drug products for use,” according to the complaint, which says damages at least reach into the hundreds of millions of dollars.

The whistleblowers are Jeff Campie, a former senior director for quality control assurance at Gilead who says he was fired for raising objections, and Sherilyn Campie, who was still working as an associate manager for quality control at Gilead when the complaint was filed earlier this year. While selling drugs of suspect quality violates the False Claims Act (FCA), it’s a theory that’s just beginning to be used in whistleblower cases. It should be noted that some of the larger FCA settlements, including a $750 million deal in 2010 with GlaxoSmithKline PLC and a $500 million accord in 2013 with Ranbaxy Laboratories Ltd., rose over quality lapses.

Jeff Campie is also suing over alleged retaliation in connection with his apparent termina-

tion, but Gilead says he hasn’t properly claimed to have been engaged in protected conduct—such as investigation of false claims, as opposed to investigation of GMP violations—or that his dismissal was related to whistleblowing.

Source: Law360.com

**IX. CONGRESSIONAL UPDATE**

**AAJ STATEMENT ON THE FAIR PAY AND SAFE WORKPLACES EXECUTIVE ORDER**

Forced arbitration has been a “thorn in the side” of American consumers for at least the past two decades. It has especially been hurtful in the workplace. There have been lots of folks whose constitutional right to a jury trial were taken away. The following is a statement from American Association for Justice (AAJ) President Lisa Blue Baron on the announcement of the Fair Pay and Safe Workplaces executive order issued by the White House. This order is certainly a step in the right direction.

We are pleased and strongly encouraged by the announcement of the Fair Pay and Safe Workplaces executive order, which will restore access to justice for millions of Americans whose rights have been eliminated by the abusive practice of forced arbitration. For far too long, corporations have used forced arbitration to deny Americans their Constitutional and statutory rights by kicking employees and consumers out of court and sending them to a dispute mill that is rigged, secretive, contains virtually no right to appeal, and consistently favors corporate America. This executive order is a tremendous victory for all employees of big corporations that do business with the government. Now workers will be able to enforce their rights to be employed in a workplace free from discrimination.

Still, there are other fundamental federal and state laws that workers will not be able to enforce in court because of forced arbitration. Forced arbitration also prevents credit card users, nursing home residents, service members, and students from holding corporate wrongdoers accountable. We must continue the fight to ban forced arbitration in all contexts, otherwise there is nothing to prevent corporations from evading Americans’ rights with the fine print.

JereBeasleyReport.com
Trial Lawyers’ Efforts to End Distracted Driving Highlighted in Governors Highway Safety Association Report

The End Distracted Driving (EndDD) program was featured in the Governors Highway Safety Association (GHSA) report highlighting state policy, enforcement, and education initiatives that have been successful at targeting and educating teens on the often life-altering consequences of distracted driving. GHSA, a public-private partnership that includes federal, state, and local governments, is one of the largest and most respected traffic safety organizations in the country. A panel of teen driver experts identified EndDD as a leading program that has had an impact on teen drivers.

EndDD founder Joel Feldman travels across the country along with other trial lawyer volunteers delivering presentations at high schools, colleges, conferences, and independent highway safety programs in an effort to end this risky behavior, not only amongst teens, but everyone who takes to the road. AAJ President Lisa Blue Baron stated:

I am proud to work with Joel and other trial attorneys across the nation, who take the time to educate students, parents, and those who drive, about the dangers of distracted driving. I am even more proud to say that trial attorneys are giving back to their communities and making a difference outside of the courtroom through programs like EndDD.

GHSA’s report highlighted the trial lawyers’ involvement in the EndDD program noting that there are “...900 volunteer speakers, 800 of whom are trial lawyers who have volunteered thousands of hours to the cause.” Feldman observed:

This report is really great news that our program is having an impact in communities across the U.S. and Canada. I am honored to work with other trial lawyers that care for their communities and take the time to make a difference.

EndDD is one of the leading programs of Trial Lawyers Care, which was established after the 9/11 attacks so that trial lawyers could provide free legal services to individuals and families who applied for federal financial help. More than 1,100 lawyers volunteered. That commitment to volunteerism lives on through the present-day Trial Lawyers Care initiative to highlight the community service of trial lawyers who volunteer and give back to help people in need.

Source: AAJ

House Bill Proposes Tougher Auto Safety Rule

House Democrats have introduced another bill to toughen federal auto safety laws. This came after the National Highway Traffic Safety Administration (NHTSA) came under more criticism by lawmakers last month for its handling of the General Motors (GM) ignition switch recalls. The bill, called the “Vehicle Safety Improvement Act,” would expand public access to vehicle defect and safety information, allow NHTSA to levy stiffer fines and other penalties on automakers that violate safety laws, and require automakers to explain potential causes of fatal crashes in communications to NHTSA.

The bill was introduced by Rep. Jan Schakowsky, D-III., a top Democrat on the House Energy and Commerce Committee after the committee’s Republican leadership released a scathing report on NHTSA’s role in the GM ignition switch recalls. Rep. Henry Waxman of California, the top-ranking Democrat on the Energy and Commerce Committee, co-sponsored the bill. This is the latest signal of the growing support on Capitol Hill to revamp NHTSA and to bolster auto safety laws in the wake of GM’s ignition switch crisis.

Under the bill, NHTSA would be required to post technical service bulletins about safety defects on its website. All “early warning report” information not exempted by the Freedom of Information Act would have to be disclosed to the public. Publicly available summaries about NHTSA inquiries to automakers seeking information on fatal accidents would also have to be published every six months.

The bill would require automakers to explain to NHTSA the potential cause of fatal accidents and require automakers to retain records on possible defects for 20 years, compared with the five years currently required. Under the bill, NHTSA would also receive greater power to penalize automakers with bigger civil fines while the cap on penalties would be eliminated “in most cases” for related violations of federal auto safety laws.

As we have reported previously, there have been a number of bills in Congress in an attempt to make our vehicles and highways safer. Sen. Claire McCaskill, D-Mo., introduced a bill in August that would double NHTSA’s funding, remove the $35 million cap on civil penalties for companies that violate auto safety laws, and make auto executives face life in prison for delaying recalls that result in deaths. A May proposal by Sens. Richard Blumenthal, D-Mass., Edward Markey, D-Mass., and Bill Nelson, D-Fla., also sought to eliminate the $35 million fine cap.

A bill introduced by Sen. Jay Rockefeller, D-W.Va., in June would give NHTSA more funding and the power to order dangerous vehicles off the road. In April, Transportation Secretary Anthony Foxx asked Congress to hike the maximum civil penalty for a violation of U.S. auto safety laws more than eightfold to $500 million to push automakers to more quickly issue safety recalls. Hopefully, all of these bills will pass and be signed into law. The American people have become aware of how poor our regulatory efforts have been and expect things to be improved.

Source: Autowebnews.com
X. PRODUCT LIABILITY UPDATE

JURY RETURNS A $4.5 MILLION VERDICT AGAINST FORD

A $4.5 million verdict was returned last month by a Nevada state court jury against Ford Motor Co. The jurors found the roof of an Excursion model SUV to be defectively designed, causing the death of a passenger following a single-vehicle rollover accident. The passenger, Rafael Trejo, died at the scene of the accident in 2009 after suffering a broken neck. The driver, Teresa Trejo, had attempted to change lanes while making room for a vehicle merging into traffic from an entrance ramp. As the Trejos vehicle changed lanes, a trailer attached to their 2000 Ford Excursion XLT began to sway, causing the vehicle to roll over.

Rafael Trejo was killed when the vehicle’s weight crushed the roof onto his head. Ford contended that the roof was not defectively designed and that Mr. Trejo died as a result of the rollover accident itself. The Plaintiff offered evidence that Ford was not acting in a responsible manner in designing this vehicle. The Plaintiff presented evidence that Ford never adequately tested the ability of the Excursion’s roof to support the vehicle’s weight in a rollover scenario. Ford claimed that the roof was designed properly and was not defective.

Teresa Trejo is represented by Jody Mask and Ricardo Garcia of Garcia Ochoa Mask, located in McAllen, Texas, and Larry Lawrence, lawyer from Austin, Texas, and Bill Killep from Henderson, Nev. They did a very good job in this case, which was tried in the Eighth Judicial District Court for Clark County, Nev.

Source: Law360.com

THE GOODYEAR DUNLOP D402 HARLEY-DAVIDSON TIRE

Tires are among the most important components of vehicle safety as they are the only points of contact between vehicle occupants and the ground. Reliable tires are critical on any vehicle, but even more so a motorcycle. While a tire failure can cause a passenger vehicle to be uncontrollable, a motorcycle is much more likely to suffer a loss of control should its tire fail. Severe injuries and death are almost a certainty when a motorcycle tire fails.

One motorcycle tire that has a history of failures due to design and manufacturing defects is the Goodyear Dunlop D402. During a case lawyers in our firm handled last year against Goodyear Dunlop, we learned that numerous serious injuries and deaths were linked to D402 failures. Recently, one of the motorcycle world’s leading safety advocates lost his life when a D402 on his Harley experienced a sidewall blowout. Currently, there are at least five active cases in litigation involving this tire.

The Goodyear Dunlop 402 is made by Goodyear specifically for Harley-Davidson at its Buffalo plant in New York. As you may know, the D402 is a tubeless tire. To form an effective air seal, a tubeless tire relies on intense pressures of the tire bead area against the wheel rim flange to form an effective air seal. This is the area of the tire wheel assembly where the rubber of tire essentially fits to the rim. Even the smallest abnormalities or defects can compromise the air seal and lead to a catastrophic failure. When this tire fails, its loss of air pressure can be so sudden and severe that the sidewall actually blows out. Several of the tire failures that we are aware of occurred due to defects in this critical area.

Even though Goodyear and Dunlop have been aware of the issues with the D402 tires for numerous years, the companies haven’t responded properly. They have failed to take any corrective actions to the design or manufacturing processes of the tire to eliminate these safety issues. If you would like more information on this subject, contact Rick Morrison, a lawyer on our firm’s Personal Injury/Product Liability Section, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com. Rick has successfully handled a number of tire failure cases. He will be happy to discuss tire safety issues with you.

HONDA RECALLS 126,000 MOTORCYCLES WITH DEFECTIVE BRAKES

It has been widely reported that motorcycle use in the U.S. is on the rise. In the last decade, motorcycle ridership has increased more than 50 percent. As a result, the number of fatalities and serious injuries of motorcycle riders has increased steadily. More motorcyclists were killed last year than any year since the National Highway Traffic Safety Administration (NHTSA) began collecting fatal crash data in 1975.

One of the most common motorcycle wrecks occurs when the driver of a vehicle turns in front of a cyclist. In such an emergency, the motorcycle rider needs a reliable braking system. Lawyers in our firm have handled several cases where a motorcyclist was severely injured or killed when the motorcycle’s brakes failed or the tire maker had failed to utilize known safety design features.

We have learned of another safety issue involving a motorcycle’s brakes. Owners and riders of Honda’s GL-1800 need to be aware of Honda’s second recall concerning this motorcycle. The Detroit News recently announced that Honda Motor Co. has recalled 126,000 motorcycles for a second time because their brakes can malfunction. The recall covers Honda’s GL-1800 motorcycles for model years 2001-2010 and 2012. A problem with the secondary brake master cylinder can cause the rear brake to drag, potentially leading to a crash or fire.

Honda received 533 complaints through July 24 of this year, including reports of eight small fires. Thus far, there have been no reports of injuries or deaths as a result of the problem. Honda originally recalled the motorcycles in December 2011 but continued to receive complaints. The company says in documents filed with the NHTSA that the “root cause has not been determined” and that it is continuing to investigate.

Honda is sending a letter to each motorcycle owner explaining how to look for the problem. Motorcycles with the defect can be taken to a dealer for inspection. Owners will get a second letter when repairs and replacement parts are available. Needless to say, owners of this motorcycle need to be aware of and protect themselves from this potentially dangerous safety issue. If you would like more information on this subject, contact Rick Morrison, a lawyer on our firm’s Personal Injury/Product Liability Section, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

FEDERAL APPEALS COURT REVIVES EVENFLO CAR SEAT SUIT OVER INFANT INJURY

The Tenth Circuit Court of Appeals in an important ruling overturned a lower court’s ruling dismissing a failure-to-warn claim against Evenflo Co. Inc. The lawsuit involved serious skull injuries that an infant suffered in a 2005 crash when his Evenflo car seat separated from the base. The ruling calls for a new trial on that issue in the case. A three-judge panel ruled that Tony Hadjih, the father of the child who was 4 months old at the time of the crash, had shown enough evidence to present to a jury his claims that Evenflo should have known, and warned, that the Discovery Infant 316 carriers at issue posed the risk of seats detaching from their bases. The jury found for Evenflo on Hadjih’s design defect claim after a trial.

The lower court in Colorado found for Evenflo on Hadjih’s failure-to-warn claim, ruling that the claim went against the “very nature of what was being sold,” as the product was designed to be used with or without the base. The appeals court panel disagreed, ruling that warning about the configuration of the product would not have compromised its use. “Instead, the warning would simply have allowed consumers to decide based on full information when or whether to trade added safety for added convenience,” the panel ruled.

Evenflo had argued that Plaintiffs bringing a failure-to-warn claim must first show that the warning would have made the product safe, and that in the case of its seat, its warning would not have prevented consumers from
using the seat with the base. But the panel found that the warnings would have made the product at least reasonably safe, which it said was the correct standard. The Colorado Supreme Court has backed the idea that a product can meet that reasonably safe standard as long as consumers are informed about ways the product can be used with less risk, according to the opinion. Plaintiffs also do not have to show that a warning would eliminate all risk from a product, the panel said, adding:

Reasonably safe does not mean free from any danger. Evenflo’s reading of Colorado law would allow sellers to keep silent about any latent dangers that cannot be wholly mitigated. Colorado courts have not condoned such a view.

The panel also ruled that the Plaintiff had shown enough proof that Evenflo had the duty to warn of the alleged base separation defect, by pleading, among other things, that it knew that at least 74 customers had reported the very same problem. Hadjih is represented by R. Douglas Gentile, a lawyer with from Kansas City, Mo. The case is A.H. v. Evenflo Co. Inc. in the U.S. Court of Appeals for the Tenth Circuit. Source: Law360.com

Children’s Clothing Should Never Be Fire Traps

A Texas family has filed suit against Nike after their child suffered burns over 17 percent of his body when his Nike Dri-Fit shorts burst into flames. The suit by Troy and Leslie Patton was filed in Collin County Court on behalf of their son, Hunter, who was gathered with his friends around a campfire when the flames ignited his Nike shorts. The child’s cotton t-shirt and cotton socks were untouched. Even though he was standing farthest away from the fire, Hunter was the only child who caught fire. Hunter attempted to put the flames out by rolling on the ground and burned his hands in the process.

Dri-Fit fabric is made from polyester microfibers designed to quickly absorb sweat from the body. Hunter’s shorts did not contain a warning label stating that this material was highly flammable. In Hunter’s case, that is exactly what the material was—highly flammable. In fact, the Nike shorts burned so quickly and intensely that they melted into Hunter’s skin. Fortunately, his friends were able to save him from further injury by pulling the shorts from around his feet. The complaint alleges that:

Nike has concealed the risk of injuring consumers by producing, marketing and selling unsafe highly flammable garments. Nike has a legal duty to warn purchasers and consumers of the potential flammability of its high-fire-hazard garments. Nike does not label any of its Dri-FIT products despite the clear danger of its melting fabric causing severe burns, scars and pain. Nike provides no warning.

Our firm has successfully handled cases involving clothing manufacturers that failed to warn of their clothing’s highly flammable nature. In 2012, Rick Morrison, a lawyer in our Personal Injury/Product Liability Section, settled a case against a bathrobe manufacturer. In that case, the client’s mother was cooking at her stove when her cotton chenille robe suddenly ignited and burst into flames. The robe burned so intensely and quickly that the mother could not put out the fire and suffered fatal injuries as a result.

The evidence in Rick’s case revealed that other similar incidents had occurred with other consumers using the exact robe. Fortunately, Mr. Morrison was able to secure a favorable settlement for our client and, hopefully, our firm has made a change in how that clothing manufacturer designs and labels its bathrobes. If you have any questions regarding flammable clothing, please contact Cole Portis, Principal & Personal Injury Section Head, at Cole.Portis@beasleyallen.com.

Aurora Shooting Victims Sue Ammunition E-Retailers

The parents of a woman murdered in the 2012 mass shooting in an Aurora, Colo., movie theater have filed a lawsuit in Colorado state court against websites that supplied shooter James Holmes with the ammunition and supplies to carry out the massacre that left 12 dead and scores injured. The complaint was filed by Sandy and Lonnie Phillips, whose daughter Jessica Ghawi was murdered by Holmes on July 20, 2012. The lawsuit seeks injunctions that would require the websites that sold Holmes ammunition, tear gas canisters and high-capacity magazines to reform their business practices.

The Phillips are being represented by the Brady Center to Prevent Gun Violence and the law firm of Arnold & Porter LLP. The lawsuit targets the operators of BulkAmmo.com, BulletproofBodyArmorHQ.com, The Sportsman’s Guide and BTP Arms. The lawsuit asserts negligence and public nuisance claims against the websites and alleges that the websites failed to exercise the level of care necessary to ensure that the weapons and ammunition these companies sold did not wind up with someone like Holmes, who suffers from severe mental illness. The complaint states:

This lawsuit does not in any way challenge the right of law-abiding citizens to bear arms. This lawsuit also does not challenge in any way the right of responsible businesses to operate a business of selling products—even potentially lethal products—to law-abiding citizens. This lawsuit is about the unreasonably dangerous operation of businesses that negligently supply combat supplies and other material to the criminal market. Negligently supplying dangerous people with the means to engage in mass killings not only causes foreseeable harm (such as the shooting incidents underlying this case), it unfairly tarnishes the right of all law abiding citizens to bear arms for lawful purposes, including protection, hunting, or other recreational activities.

The complaint was filed just days after a federal judge ruled that a jury should decide whether Cinemark Inc. should be held liable for failing to have security measures in place to stop the shooting. More than a dozen lawsuits were filed against Cinemark following the shooting and are scheduled to go to trial in February of next year. Sandy and Lonnie Phillips are represented by Jonathan Lowry, director of the Brady Center’s Legal Action Project, said in a statement:

A crazed, homicidal killer should not be able to amass a military arsenal, without showing his face or answering a single question, with the simple click of a mouse. If businesses choose to sell military-grade equipment online, they must screen purchasers to prevent arming people like James Holmes.

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XI. MASS TORTS UPDATE

JUDGE UPHOLDS $9 BILLION ACTOS DAMAGE AWARD AGAINST TAKEDA AND LILLY

U.S. District Judge Rebecca Doherty has rejected the attempt by Takeda Pharmaceutical Co. and Eli Lilly & Co. to get the combined $9 billion punitive-damage award returned by a jury thrown out. As you will recall, the verdict was returned in a case involving claims that the drugmakers hid the cancer risks of their Actos diabetes medicine. Judge Doherty ruled that jurors properly considered evidence showing officials of Osaka, Japan-based Takeda and Indianapolis-based Lilly knew Actos was linked to bladder cancer and failed to properly warn patients and doctors before assessing damages in the case.

The judge’s decision didn’t resolve a defense request for a new trial in Terrence Allen’s case, which was the first federal trial over claims that Actos causes bladder cancer. The verdict is the second-largest in the U.S. in 2014, according to data compiled by Bloomberg. Judge Doherty said in her 101-page decision:

The jury acted within its role and discretion to attach whatever weight and make whatever reasonable inference it deemed appropriate when assessing the defendants’ conduct.

Actos sales peaked in the year ended March 2011 at $4.5 billion and accounted for 27 percent of Takeda’s revenue at the time. This is according to data compiled by Bloomberg. Actos has generated more than $16 billion in sales since its 1999 release. Takeda now faces generic competition from Ranbaxy Laboratories Ltd.

Lilly served as Takeda’s U.S. partner in selling and marketing the drug for seven years starting in 1999. While that partnership ended in 2006, Lilly retained rights to sell Actos in parts of Asia and Europe, as well as in Canada and Mexico. Allen, the Plaintiff in the case, a former hardware-store manager from Attica, N.Y., developed bladder cancer after taking Actos for more than five years starting in 2006. He contended that executives at Takeda ignored or downplayed concerns about the drug’s cancer-causing potential and misled regulators about its risks to protect billions in sales.

The jurors found that Takeda and Lilly acted with “wanton and reckless disregard” in marketing Actos and that the drugmakers should pay a combined $9 billion in punitive damages. It was the sixth-largest punitive award in U.S. history, according to data compiled by Bloomberg. The jury had earlier awarded $1.5 million in compensatory damages to Allen. The jurors ordered Takeda to pay $6 billion in punitive damages with Lilly being responsible for the other $3 billion. Because of indemnity agreements between the two drugmakers, it appears that Takeda will wind up paying the full award. For more information on this subject contact Roger Smith, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

Sources: Claims Journal and Jeff Freely with Bloomberg News

TEXAS JURY AWARDS $73 MILLION VERDICT IN BOSTON SCIENTIFIC TVM LAWSUIT

A Dallas, Texas, jury has returned a $73 million verdict in a lawsuit against Boston Scientific Corporation (BSC) filed by Plaintiff Martha Salazar. Ms. Salazar was implanted with the company’s Obtryx sling device for stress urinary incontinence. This verdict marks the first trial loss for Boston Scientific’s pelvic mesh products and I don’t believe it will be the last one.

One of the most persuasive factors leading to the $23 million compensatory and $50 million punitive damages award was an internal communication between BSC executives that discussed a study published in the December 2009 edition of the American Journal of Obstetrics and Gynecology. The study, conducted by researchers in Canada, concluded that more long-term research was needed on the Obtryx sling to gauge potential health impacts. But, BSC executives sought to shield the study from physicians. The email from BSC executive Alex Robbins said:

I don’t feel this paper would be useful to the sales force in terms of helping defend business or selling more slings. It actually is a fairly negative outcome in terms of our Obtryx sling. I certainly wouldn’t band this out to any physicians.

Internal documents, such as the email admitted into evidence in this case, are often the very best way for a Plaintiff to prove what a company knew or should have known regarding potential problems with its products. We have found emails to be a treasure trove of information in a number of product liability cases.

Lawyers for Boston Scientific attempted to tell jurors that the Obtryx was approved by the U.S. Food and Drug Administration (FDA). But Judge Ken Mollob held a different view, stating: “The FDA did no such thing.” He referenced the FDA’s process for fast tracking new devices to the market under the 510(k) clearance process.

This verdict comes on the heels of two previous bellwether trials against BSC where jurors found that its Obtryx sling and its Pinnacle Pelvic Floor Repair Kit were not defectively designed. Lawyers for Ms. Salazar believe that the verdict in her case will be upheld on appeal, subject to the punitive damages cap in Texas that will likely reduce that portion of the award to approximately $35 million. The next pelvic mesh trial involving BSC is scheduled to begin in Florida federal court in November. For more information on this subject contact Chad Cook or Leigh O’Dell, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Chad.Cook@beasleyallen.com or Leigh.Odell@beasleyallen.com.

Sources: Law 360 and the Dallas Observer

JURY ORDERS J&J TO PAY $3.27 MILLION IN MESH IMPLANT LAWSUIT

In another TVM case, Johnson & Johnson was ordered by a federal court jury in West Virginia last month to pay $3.27 million in a lawsuit involving a defectively designed vaginal mesh implant. The Plaintiff, Jo Huskey, said the implant eroded inside her and that she had to have surgery. The jurors found J&J’s Ethicon unit liable for Ms. Huskey’s injuries. The company’s TVT-O mesh sling, sold as a treatment for incontinence, was the culprit.

This is the second jury finding that J&J’s incontinence slings are defectively designed resulting in harm to women. J&J, based in New Brunswick, N.J., faces more than 30,000 lawsuits accusing Ethicon of making improperly designed vaginal inserts, such as the slings, that damaged women’s organs and made sexual relations very painful. The company reported the number of cases in a securities filing last month. In April, a jury in state court in Dallas concluded the design of the TVT-O sling implanted in Linda Batiste was defective and awarded the 64-year-old woman $1.2 million in compensatory damages. Interestingly, the TVT-O sling remains on the market.

Many of the vaginal-mesh cases against J&J and other implant makers have been consolidated before U.S. District Judge Joseph Goodwin in Charleston, W. Va., for discovery and bellwether trials. Judge Goodwin presided over the trial of Ms. Huskey’s trial. Boston Scientific Corp. (BSX), C.R. Bard Inc. (BCR) and other makers of vaginal inserts targeted in suits had talks this year about settling cases over the devices. But J&J has refused to participate in settlement talks about its inserts.

Ms. Huskey, an assistant physical therapist from Illinois, got her Ethicon sling in 2011 and had surgery to remove the device later that year after suffering pain that made sex very difficult. In Ms. Huskey’s case, jurors found that J&J officials defectively designed the sling and failed to properly warn doctors and patients the device could erode, damaging organs and causing pain. During the trial, Judge Goodwin ruled that Ms. Huskey couldn’t seek punitive damages against J&J over the device maker’s handling and marketing of the sling. The case is
A lawsuit has been filed against Pfizer Inc. alleging that testosterone treatments cause heart problems. The lawsuit accuses the drugmaker of promoting its Depo-Testosterone treatment as safe and effective despite its risks of causing heart attacks, strokes and blood clots. Pfizer and its unit Pharmacia & Upjohn Co. LLC are accused of conducting a “disease mongering” campaign to exaggerate the prevalence of testosterone problems in order to boost sales of Depo-Testosterone, despite its heart health risks. The lawsuit was filed by Alvaro Roman Gutierrez, who alleges that his use of the drug caused him serious physical injury and harm.

The Plaintiff says that the Defendants spent millions of dollars on efforts to expand the consumer base for the treatment. It’s alleged that the Defendants, along with other pharmaceutical companies not named in the suit, have advertised common symptoms including listlessness and increased body fat as possible signs of testosterone deficiency. The complaint states:

As a direct and proximate result of the Plaintiff’s use of Depo Testosterone, also known as Testosterone Cypionate, and Plaintiff’s reliance on Defendants’ representations regarding the character and quality of the products and Defendant’s failure to comply with federal requirements, Plaintiff suffered serious physical injury, harm, damages and economic loss and will continue to suffer such harm, damages and economic loss in the future.

The Plaintiff claims that Pfizer had a duty to warn him or his doctors of the potential heart risks stemming from the drug and that it didn’t do so, in part by failing to update its label since the U.S. Food and Drug Administration (FDA) approved it. Other companies that have been sued over testosterone treatments include Endo Pharmaceuticals Inc. and Prostrakan Group PLC, which were sued in the Pennsylvania court in May over their testosterone-boosting Fortesta gel.

Those suits claim that Fortesta, which was developed by U.K.-based Prostrakan and licensed to Endo for sale in the U.S., is an unnecessary drug pushed commercially to treat a disease that does not exist. In the suits, the plaintiffs claim that their use of the testosterone-enhancing gel led to heart attacks.

Source: Law360.com

XII. BUSINESS LITIGATION

ACCOUNTING FIRMS TO FACE MALPRACTICE CLAIMS IN COLONIAL BANCORP FAILURE

In another lawsuit involving accounting firms, PricewaterhouseCoopers (PwC) and Crowe Horwath will face claims accusing them of professional malpractice and breach of contract. It’s alleged that the firms failed to catch a fraud that led to the 2009 collapse of Colonial Bank. The lawsuit, filed in 2011 by the bank’s parent Colonial BancGroup Inc. and its trustee, accused the accounting firms of making “reckless and grossly inaccurate” reports to the bank’s board, allowing Colonial to conceal a seven-year fraud that drained it of $1.8 billion.

U.S. District Judge Keith Watkins rejected the accounting firms’ motion to dismiss the complaints, saying the bank made “plausible” claims that PwC and Crowe breached their contract with Colonial. PwC was the public auditor for Montgomery, Ala.-based Colonial before its collapse. Crowe provided internal audit services. Judge Watkins’ order will allow the case to go forward.

Crowe said it, an audit firm, was hired to help Colonial with internal services but did not serve as the bank’s internal auditor. The fraud, one of the largest arising out of the last decade’s mortgage crisis, went undetected until a raid by federal authorities on Aug. 3, 2009. One of the largest U.S. regional banks, Colonial was seized by regulators and filed for bankruptcy protection later that month.

PwC and Crowe are facing a similar lawsuit by the Federal Deposit Insurance Corporation (FDIC), receiver for the bank. The 2012 FDIC lawsuit said that PwC and Crowe missed “huge holes” in Colonial’s balance sheet caused by the diversion of money to now bankrupt Taylor Bean & Whitaker Mortgage Corp. Lee Farkas, former chairman of Taylor Bean, was sentenced to 30 years in prison in 2011 for his role in the fraud. Several other officers of Taylor Bean and Colonial pleaded guilty for their roles in the scheme.

In his order, Judge Watkins rejected Crowe’s argument that it had no professional duty to Colonial because it was not the bank’s internal auditor but merely a provider of services, calling that a “reedy thin” distinction. He also rejected PwC’s argument that the negligence claim against it must be dismissed because Colonial’s own negligence played a role in its fate, saying that is a question of fact for a jury to decide. The case is in the U.S. District Court, Alabama Middle District.

Source: Law360.com

XIII. AN UPDATE ON SECURITIES LITIGATION

MORGAN STANLEY SETTLES PENSION FUND MORTGAGE-BACKED-SECURITIES LAWSUITS FOR $95 MILLION

Morgan Stanley & Co. has agreed to pay $95 million to end a putative class action in New York federal court alleging it misled institutional investors about shoddy mortgage-backed securities (MBS). The settlement, reached with a group of pension funds led by the Public Employees’ Retirement System of Mississippi, or MissPERS, and the West Virginia Investment Management Board, ends a consolidated suit accusing the bank of making materially false and misleading statements about the mortgage pools underpinning MBS certificates it had sold to the Plaintiffs. Under the terms of the settlement the bank will pay $95 million to a class of buyers of certain 2006- and 2007-issued MBSs.

The lawsuit arises from a complaint originally filed by MissPERS in December 2008, alleging securities fraud over the marketing and sale of various offerings of MBS pass-through certificates issued by Morgan Stanley Dean Witter Capital I Inc. and several Morgan Stanley mortgage loan trusts. That complaint was consolidated in July 2009 with another newly filed putative class action led by the WVIMB, with the suits accusing the Morgan Stanley units of misleadng investors in offering documentation about the underwriting standards used to evaluate the creditworthiness of the mortgages underpinning the relevant MBS—allegedly poor subprime loans—and failing to warn investors of the potential risk involved in holding those certificates.

Source: Law360.com

JPMORGAN AND INVESTORS PROPOSE $340 MILLION IndyMac MBS SETTLEMENT

The lead Plaintiffs and underwriter banks in a class action accusing JPMorgan Chase & Co. and other financial institutions of misleading investors about the inherent risks of IndyMac Bank’s mortgage-backed securities have reached a proposed $340 million settlement. Banks, including JPMorgan, Credit Suisse Group AG, Deutsche Bank AG, UBS AG, Morgan Stanley and The Royal Bank of Scotland PLC, reached the agreement to pay the investors to
solve claims the banks knew the loans wrapped up in the securities offering weren't as good as promised.

The settlement, if approved, would end the IndyMac litigation that has been ongoing since 2009. This was just a few months after the bank faltered because of unpaid loans after the housing market collapsed. The motion also calls for the participants in an earlier settlement to be given notice of the settlement.

The settlement doesn't include claims on appeal in the U.S. Supreme Court. Those claims, against Goldman Sachs & Co., will be argued before the high court in early October. The Plaintiffs also have agreed to dismiss their claims against the IndyMac unit created to sell the securities, saying that, because the bank is no longer in business and has no assets or insurance to speak of, it wasn't worth pursuing a judgment against it. IndyMac—the Independent National Mortgage Corp.—failed in 2008 and when it was taken over by the Federal Deposit Insurance Corp. (FDIC), it had $32 billion in assets and $19 billion in deposits, according to FDIC regulators.

The case was filed in May 2009 by pension fund Wyoming Retirement System and the Wyoming state treasurer and it was consolidated in July 2009 with a similar suit brought by the Police and Fire Retirement System of the City of Detroit. The pension funds accused a host of banks—underwriters for more than $61 billion in “Alt-A” mortgage-backed securities issued by IndyMac from 2005-07—three credit-rating agencies, several IndyMac units and IndyMac executives and board members of failing to disclose risks inherent to the mortgages underlying the MBs.

In February 2010, U.S. District Judge Lewis A. Kaplan dismissed the three credit-rating agencies from the suit saying they had facilitated the MBs offerings, but had not participated in the sale of the securities and thus were not legally responsible. Those agencies were: Standard & Poor's Financial Services LLC, Moody's Investors Service Inc. and Fitch Inc. The Second Circuit upheld that decision in May 2011.

In August 2012, the lead Plaintiffs reached a tentative $6 million partial settlement with five former IndyMac executives. In July of last year, the court agreed to keep alive class claims over securities in which the Plaintiffs did not actually invest, keeping the Wyoming entities as lead Plaintiffs.

Source: Law360.com

**PSYCHIATRIC SOLUTIONS SETTLES SHAREHOLDER SUIT FOR $65 MILLION**

Psychiatric Solutions Inc. (PSI), a unit of Universal Health Services Inc. (UHS), has reached a settlement with shareholders. PSI will pay $65 million to end shareholders’ claims that the mental health services provider concealed earnings liabilities such as an alleged policy of short-staffing that put patients at risk of abuse. The settlement was announced in an SEC filing, in which UHS also said the litigation would cost it $34 million. That amount will likely be reduced substantially after insurance recoveries. UHS bought Psychiatric Solutions in 2010.

It was alleged that PSI deceived its investors by concealing the information that it kept its facilities understaffed “below levels necessary to assure adequate patient care or protect patients from physical or sexual abuse from other patients,” didn’t properly report safety issues and incidents, and covered up operating problems at older care centers. According to the allegations, Franklin, Tenn.-based PSI provides inpatient behavioral-health services to mostly children and teens at 95 centers.

Source: Law360.com

**CARLYLE GROUP TO PAY $115 MILLION TO SETTLE PRIVATE EQUITY COLLUSION**

Carlyle Group LP has agreed to pay about $115 million to settle a long-running proposed class action brought against it and several other private equity firms for allegedly teaming up to depress prices in leveraged buyouts leading up to the financial crisis. The settlement by Carlyle was with a potential class of shareholders of companies bought out by the private equity firms.

Washington, D.C.-based Carlyle’s settlement, worth approximately $115 million, comes just after its competitors KKR & Co. Inc., The Blackstone Group LP and TPG Capital LP agreed to pay a combined $325 million, the biggest settlement yet in the case. That settlement followed three others by Goldman Sachs Group Inc., Bain Capital LLC and Silver Lake Partners LP in which they paid $67 million, $54 million and $295 million, respectively, which left Carlyle as the only defendant remaining in the case.

The complaint alleges numerous separate deals between 2003 and 2009, in which the firms allegedly followed an elaborate set of bidding rules to artificially deflate prices, costing shareholders substantially in the target companies. Among the buyouts highlighted in the suit are a $21 billion deal for hospital chain HCA Holdings Inc. and a $51 billion purchase of high-end retailer Neiman Marcus Group Ltd. Another six related transactions were also mentioned. The Plaintiffs claim damages from the purported collusion, which is said to amount to billions.

Source: Law360.com

**PwC TO PAY $10.5 MILLION AS PART OF AIG CLASS ACTION DEAL**

PricewaterhouseCoopers LLP (PwC) will pay $10.5 million to settle claims in a consolidated securities class action filed against American International Group Inc. (AIG). It was alleged in the lawsuit that AIG had misinterpreted the value of credit default swaps, costing investors billions. This settlement came after AIG had paid out $960 million in litigation. The investors, led by the state of Michigan, and PwC accepted a mediator’s proposal to settle all claims, with PwC agreeing to pay the $10.5 million in settlement. The Plaintiffs’ claims against PwC were premised on false and misleading statements and omissions in AIG’s 2005 and 2006 financial statement and footnotes.

Following the $960 million settlement with insurer AIG, which was reached on July 15, the lead Plaintiff and PwC had agreed to mediation for the claims brought on behalf of the class before former district Judge Layn R. Phillips. The $10.5 million settlement resolves claims against PwC that were dismissed in an April 2013 order, but which could have been appealed by investors. The agreement with PwC, the professional services company, and the much larger settlement with AIG came after the Supreme Court’s landmark Halliburton decision.

The high court in that case refused to overturn the fraud-on-the-market presumption of reliance that is the backbone of securities litigation. On Aug. 4, the insurance giant disclosed it had reached a mediated settlement with Plaintiffs to end a series of class action claims over its false and misleading statements about its vast exposure to the subprime mortgage market through its CDS business. To end their claims, AIG said in a financial filing that it would pay $960 million in cash.

The settlement ends the 2008 consolidated litigation, but not nine individual suits filed between 2011 and 2013 that are still pending. Those lawsuits assert “substantially similar” claims to the 2008 consolidated litigation. The investors, led by a quartet of Michigan pension systems, alleged the company, over a period of two years, concealed the true value of its credit-default swaps—essentially an insurance policy against potential losses in an investment that itself became a securitized asset that could be bought and sold. The company’s stock plummeted in 2008 when the CDS’ value was revealed to be lower than anticipated.

Source: Law360.com

**LAWSUIT BY BANKRUPT MF GLOBAL AGAINST PwC WILL GO FORWARD**

A lawsuit against PricewaterhouseCoopers (PwC) seeking $1 billion in damages will be allowed to go to trial. It is alleged in the suit that the firm’s bad accounting advice was a substantial cause of the October 2011 bankruptcy of MF Global Holdings Ltd, a brokerage run by former New Jersey Governor Jon Corzine. U.S. District Judge Victor Marrero in Manhattan said JereBeasleyReport.com
PwC's advice on “repurchase-to-maturity” transactions, through which Corzine bought $6.3 billion of European sovereign debt, affected how MF Global implemented its strategy and in turn contributed to its alleged losses. Judge Marrero wrote in his order: “This line of causation gives rise to a plausible claim that PwC proximately caused harm to MF Global.”

MF Global's bankruptcy plan administrator sued PwC on March 28, accusing it of professional malpractice for having provided “flatly erroneous” accounting advice to the company. Corzine is not a defendant. Judge Marrero noted that factors such as how MF Global employees implemented Corzine’s strategy might also have been major causes of the New York-based company’s losses. But he said a jury, not a judge, should sort out who was liable. The judge did dismiss breach of contract and unjust enrichment claims against PwC.

Source: Claims Journal

**XIV. INSURANCE AND FINANCE UPDATE**

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

Lawyers in our firm’s Consumer Fraud Section currently represent Plaintiffs who have been cheated by JPMorgan Chase Bank’s (Chase) practice of force-placing flood insurance on borrowers with home equity lines of credit and home equity loans. Our lawyers have filed a class action against Chase and its preferred flood insurance vendor, American Security Insurance Company, which does business as “Assurant”. The suit alleges that Chase and Assurant engaged in a scheme to wrongfully force-place flood insurance, charge excessive premiums, pay and accept unlawful kickbacks, and force-place more insurance than necessary or required.

Claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act, the Real Estate Settlement Procedures Act (RESPA), and the Truth in Lending Act (TILA), are alleged in the suit. Common law claims are also alleged. If any of our readers or a member of their families had a Chase Home Equity Loan or Home Equity Line of Credit, and flood insurance was force-placed by Chase prior to Jan. 1, 2010, and help is needed, contact Archie Grubb or Andrew Brassher, lawyers in our Consumer Fraud Section, at 800-898-2034 or by email at Archie.Grubb@beasleyallen.com or Andrew.Brassher@beasleyallen.com.

**XV. EMPLOYMENT AND FLSA LITIGATION**

**Judge Rules Latest $3.4 Million Settlement In Lowe’s FLSA Action Is Unfair**

A Florida federal judge has once again rejected a proposed settlement between Lowe's Home Centers Inc. and a class of human resources (HR) managers who accused the chain of misclassifying them as exempt from overtime pay requirements. This time U.S. District Judge Virginia M. Hernandez Covington said the terms of a $3.4 million deal are unfair. Judge Covington denied without prejudice the parties' second joint motion for approval of a collective action settlement in the ongoing Fair Labor Standards Act (FLSA) suit. The parties were given “one final opportunity” to file a new motion for the court’s approval. Judge Covington had just two weeks prior rejected a proposed $9.5 million settlement in the case because it included a provision to reopen the class notice period.

The parties have filed an amended settlement motion to account only for the 891 class members who timely opted in. The 2,854 additional class members who could have joined under the terms of the previous deal, but didn't, were excluded. The latest agreement, which would have awarded less than $2 million to the opt-in Plaintiffs, was still found to be insufficient. Judge Covington wrote in her order:

Upon review of the parties’ proposed settlement agreement, the court finds that the terms are not fair and reasonable. Instead, when the net distribution is divided amongst the 891 opt-in plaintiffs, the amount each opt-in plaintiff is to receive will only compensate them for roughly 20 percent of their alleged damages; roughly $2,150.00 per person. The court finds this amount of recovery to be inadequate.

Lowe’s and the HR managers first sought Judge Covington's approval of the settlement in August with an agreement that would have allowed for another round of class notice. The original notice period ended in May and the parties never asked the court to extend the deadline. On Aug. 26, the judge gave the parties time to confer and redraft the proposed agreement to account for only the class members who had already opted in. She also ordered the HR managers and the home-improvement chain to include in the settlement agreement a detailed itemization demonstrating the compensation each class member will receive individually from the common fund, which she said they failed to provide in their initial approval motion.

The suit was initially filed in August 2012 by lead Plaintiff Lizeth Lytle. She asserted that the company classified its human resources managers as exempt from the FLSA's overtime requirements, but that their duties were not as “sophisticated as their title suggested,” and they should not be classified as exempt. Although given the title of manager, Lowe’s human resources managers lack discretion to make meaningful decisions and do not supervise employees. The managers maintained that the employees’ duties actually include menial tasks such as operating cash registers, cleaning bathrooms, greeting customers and sweeping floors.

In January, Judge Covington conditionally certified the suit as a collective action for the purposes of the FLSA claims. In April, she reduced the scope of the suit, ruling the Plaintiffs did not and could not bring Employee Retirement Income Security Act (ERISA) claims. The settlement rejected last month would have reimbursed class counsel’s litigation costs up to $68,000 and provided incentive payments of $4,000. Judge Covington had given the parties one last chance, until Sept. 19, to file new motions for approval of a settlement that falls in line with her instructions. The case is in the U.S. District Court for the Middle District of Florida, Tampa Division.

Source: Law360.com

**An Update On Settlements In Employment-Related Litigation**

During the past month there have been a number of developments in employment-related lawsuits, including a number of settlements. This has become an active and growing area of litigation. I will give a brief rundown on a few of the cases.

**Daimler Pays $480 Million To End UAW Retiree Benefit Lawsuit**

Daimler Trucks North America LLC has agreed to contribute $480 million to a new employee benefit plan to end a putative class action filed by a group of retirees and the United Auto Workers (UAW). The truck manufacturer was accused of illegally cutting their benefits. The manufacturer and the putative class filed a joint motion, urging the judge to approve the settlement, which requires Daimler to provide “significant funding” for new voluntary employees' beneficiary association trust. The agreed upon settlement will resolve allegations Daimler reneged on a series of deals it made in collective bargaining agreements with the union that said it would provide benefits to workers
during their lifetimes, even after they retired.

Plaintiffs Alan J. Meyers, Rocco H. Colanero, Allen Penley and Eddie Warren Bridges, along with the International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, filed suit in May on behalf of a class of former employees who were represented by the union in collective bargaining and who currently are receiving retiree medical benefits from Daimler Trucks, together with their covered and surviving spouses, according to the complaint. The group claims Daimler told the UAW that it would cut those benefits starting on Jan. 1, because the medical benefits agreed on were not vested, the suit says. The union said in the complaint:

Such changes, if implemented, would cause significant and irreparable hardship for the individual plaintiffs and many members of the proposed plaintiff class, who subsist on fixed incomes and limited means and who depend on their medical insurance coverage for their health, and in some cases, for their survival.

Union and lead Plaintiffs said in the motion that the settlement would cover 1,100 proposed class members. They also said that the agreement is consistent with a recently ratified memorandum of understanding related to the retiree benefits owed to the active and recently retired UAW-represented employees. The memorandum says that the benefits will be provided indefensibly by the beneficiary trust, which will be viable in the long term. It will be funded by hundreds of millions of initial and ongoing contributions from Daimler. The company will make an initial deposit of $450,000 to fund the startup costs, followed by another lump sum contribution of $410 million, which was to be paid by Oct. 1. If the settlement is given court approval, the company will contribute an additional $70 million to the settlement.

Source: Law360.com

COLLEGE FACULTY IN VERMONT SETTLES LAWSUIT FOR $19 MILLION

A class-action federal lawsuit filed by faculty at St. Michael's College against a major financial services company was settled for $19.5 million. Under terms of an order signed last month by U.S. District Judge J. Garvan Murtha, TIAA-CREF, the financial services company, will also pay $3.3 million in attorneys’ fees in the case, which began about five years ago. Retirement accounts of teachers at various private schools are involved in the suit.

The case arose after St. Michael's College, which is located in Vermont, decided to move faculty members’ retirement accounts from TIAA-CREF to another company. Faculty members alleged that their investment accounts failed to be credited with market gains during the lag time between when TIAA-CREF received all the paperwork required for the move and when the accounts were actually redeemed and moved. This lag ranged from days to weeks.

The class of Plaintiffs, formed initially from faculty at St. Michael’s, grew to include teachers and professors all over the country with TIAA-CREF retirement accounts. The $19.5 million will be apportioned among class members based on data they have supplied about their accounts.

Source: Burlingtonfreepress.com

BLACK & DECKER WILL PAY OUT $5 MILLION TO SETTLE WAGE CLASS ACTION

Stanley Black & Decker Inc. and a number of its subsidiaries agreed to pay nearly $5 million to settle a proposed class action that accused the power tool company of depriving field technicians of proper wages, as well as failing to give hundreds of workers accurate pay stubs. Black & Decker, which was listed as a co-defendant with 14 of its affiliated companies, will pay $4.97 million to settle claims that the company failed to properly compensate California field technicians for time spent driving to worksites. The settlement also resolves claims that the company neglected to pay the field technicians minimum wage and overtime payments, or give them appropriate meal and rest breaks.

The agreement will also resolve allegations that Black & Decker neglected to provide California employees with accurate wage statements, including having the wrong name of their employer listed on the pay stub. The class action is divided into two subclasses:

- California field technicians and related employees who worked for Black & Decker from June 27, 2009, to the present; and

- all Black & Decker employees who worked in California from June 27, 2012, to the date of the deal’s preliminary approval hearing and received at least one pay stub.

Source: Law360.com

RUBY TUESDAY PAYS $3 MILLION TO SETTLE FLSA WAGE SUIT

Ruby Tuesday Inc. has agreed to pay $3 million to end a wage-and-hour collective action in New York federal court accusing the restaurant chain of forbidding more than 4,000 tipped employees from logging all of their hours into the company’s time-keeping system. The settlement will resolve claims that Ruby Tuesday violated the Fair Labor Standards Act (FLSA) by implementing policies that discouraged overtime and ultimately forced 4,170 servers, bartenders and buspersons to work “off the clock,” according to a motion for settlement approval filed by the Plaintiffs.

Source: Law360.com

XVI.
PREMISES LIABILITY UPDATE

BANKRUPTCY JUDGE WON’T BLOCK $2.9 MILLION SPILL SETTLEMENT

A West Virginia bankruptcy judge rejected last month a water company’s objection to Freedom Industries Inc.’s $2.9 million class action settlement over a chemical spill that contaminated the drinking water in West Virginia. The court found the agreement is reasonable.

West Virginia American Water Co., (WVAW) which has an unsecured claim against Freedom in the bankruptcy case, objected to a proposed stipulation between Freedom and the Plaintiffs in the district court case outlining the terms of the deal.

Bankruptcy Judge Ronald G. Pearson wasn’t swayed by WVAW’s argument that the stipulation is really a motion for stay relief and that the necessary grounds have not been established for granting any such stay relief. Judge Pearson said in an order approving the stipulation:

The court disagrees. This stipulation has been entered into between the debtor and certain plaintiff representatives in what the court believes, considering the limited resources of the debtor, to be a responsible and economical means of attempting to obtain a determination and treatment of incident claims at a reasonable cost.

The water company also pointed out that no final order on a proposed compromise with
Freedom’s insurer, AIG Specialty Insurance Co., has been entered and that therefore there is no fund in place for a class action. Judge Pearson said there is almost $3 million in insurance coverage that AIG is holding for parties in interest in this case.

Under the July settlement, Freedom will pay out the money it received in a June settlement with AIG Specialty, and half of the net proceeds from asset sales in Freedom’s pending bankruptcy suit after those funds are used to make several other payments. Freedom entered bankruptcy in January shortly after the incident that caused coal-processing chemicals to leak from one of its storage facilities into the Elk River, just a mile above a West Virginia American Water Co. water treatment plant. The Kanawha County facility leaked coal processing chemical 4-methylcyclohexane methanol, or Crude MCHM, into the river on Jan. 9.

The spill prompted the utility to issue a do-not-use order for nine counties, urging customers not to drink, brush their teeth, wash dishes or bathe in the water for days. Freedom Industries was immediately slammed with demands from customers and for payments that it couldn’t meet. Since then, lawsuits have piled up, including several proposed class actions.

Source: Law360.com

**RECORD $1.4 BILLION FINE LEVIED FOR SAN BRUNO EXPLOSION**

The California Public Utilities Commission (CPUC) has issued its largest-ever safety-related fine against PG&E Corp. The company must pay $1.4 billion for its role in a deadly 2010 pipeline explosion and fire in San Bruno. The commission’s administrative law judges issued four decisions last month determining that PG&E committed 3,798 violations of state and federal laws or other measures that regulate the operations and practices of its gas transmission system pipeline, according to a statement by the CPUC.

PG&E is also being fined for violations that went on for several years. The CPUC found that the energy company was in violation for a total of 18.4 million days, according to the commission. PG&E said in a statement:

> Since the 2010 explosion of our natural gas transmission pipeline in San Bruno, we’ve been dedicated to re-earning the trust of our customers and the communities we serve. We are deeply sorry for this tragic event. We are accountable and fully accept that a penalty of some kind is appropriate.

The commission said in a statement that the penalties issued must be paid by PG&E’s shareholders, rather than its customers. The penalty adds to a $635 million fine issued in an earlier decision forcing the company to finance pipeline modernization. That brings the total fines from the commission to more than $2 billion, according to the CPUC. The administrative law judges’ ruling was to become the official ruling of the CPUC in 30 days unless PG&E or another party filed objections.

The September 2010 explosion in a 30-inch diameter underground pipe released 47.6 million standard cubic feet of natural gas, causing a fire that killed eight people, injured 58 others and destroyed 38 homes, according to a June 2011 report by the commission. The city of San Bruno had been asking the CPUC to impose $2.25 billion in fines, calling for a contribution of at least $1.25 billion for the state’s general fund and $1 billion to cover an independent monitor to oversee PG&E’s safety operation, technical pipeline improvements and an emergency response fund.

PG&E settled with San Bruno in March 2012 for a $70 million to end the city’s claims over the pipeline explosion. The payment came on top of PG&E’s agreement to pay $50 million for infrastructure repairs and other city expenses related to the accident. A June 2011 report from the CPUC found that although the utility had not intended to undermine safety issues, it had not adequately monitored or focused on pipeline safety matters.

The National Transportation Safety Board (NTSB) also found problems with PG&E’s approach to safety in its own report issued later that year. The report noted that the utility’s emergency guidelines made no mention of whether the field personnel, dispatch center or the gas control center were to contact emergency services in the event of an explosion. PG&E has pled not guilty to charges that it violated the Natural Gas Pipeline Safety Act and obstructed a federal investigation into the accident.

Source: Law360.com

**CHEMICAL SPILL CLAIMS AGAINST WEST VIRGINIA COMPANY TOP $160 MILLION**

You will recall that we have written in previous issues about the chemical spill in West Virginia involving Freedom Industries. The spill happened in January when coal-cleaning chemicals seeped into West Virginia’s biggest water supply. A sheet of contaminants cruised down the Elk River, into the Kanawha River and hit the Ohio River. Five days after the spill, the City of Cincinnati stopped using the Ohio for its tap water for about two days and relied on other reservoirs. In late March, Greater Cincinnati Water Works sent a $113,484 bill to Freedom Industries for dealing with the company’s spill. The invoice covered testing, worker overtime and chemical costs. Thus far, the City hasn’t been paid on this claim.

Cincinnati’s water utility is one of thousands of agencies, businesses and individuals attempting to collect millions of dollars from the Charleston, W.Va.-based Freedom Industries, which is now a deflated, bankrupt company. About 5,000 groups were expected to file claims in the bankruptcy court, seeking to be compensated because of the spill. The total sought thus far is more than $160 million, and all the claims submitted haven’t yet been counted. Vendors, business partners and the Internal Revenue Service (IRS) are seeking several million more dollars Freedom owes them.

It appears that it will be most difficult to collect money from Freedom. The company does have $5 million in coverage from an insurance policy. But Freedom’s tentative settlement agreement of a class action lawsuit totals $2.9 million, using practically all of the funds provided by its AIG Specialty Insurance Co. policy. The funds will not go directly to the claimants themselves, but the proposal outlines a plan to distribute the funds to non-profit organizations “for the general good of the community of Charleston.” Distribution of funds will be determined by a committee, with long-term health monitoring being mentioned as a possibility.

But in September, West Virginia American Water filed an opposition to the settlement plan in U.S. Bankruptcy Court in Charleston, saying the insurance money should not be used to pay for the various projects. Representatives of the utility company argue that the proposed settlement would keep creditors from recovering on bankruptcy claims. The utility also wants Freedom to cover its potential damages in spill lawsuits. West Virginia American Water is named in a consolidated lawsuit for its part in the chemical spill. That lawsuit will not get a hearing until Sept. 25, 2015.

It is estimated that unsecured creditors’ claims against Freedom may total as much as $8.5 million. Even after liquidating its assets, which brought about $4.5 million in cash, the company only has about $854,000 left after paying professionals and other creditors that have high priority. U.S. Bankruptcy Court in Charleston is handling legal action against Freedom through a claims process.

There are a number of lessons to be learned from this debacle. The regulation of the chemical companies must be stronger and more effective. This industry must be monitored on a regular basis with good inspections carried out. Also, companies must be required to maintain adequate resources and to maintain a higher level of insurance coverage to pay claims. As has been stated before, regulation of the chemical industry is extremely weak and this spill is a prime example of the consequences.

Source: Insurance Journal

BeasleyAllen.com
Mr. French’s hand was stuck in the rollers for 20 minutes and he had to direct others at the plant to manipulate the controls to stop the rollers so he could free his hand. In Alabama, it is illegal to intentionally bypass a safety device on a machine. We filed suit in Sumter County and were able to settle the case for Mr. French and his family. Although he will live the remainder of his life without his index finger and part of his dominant hand, we were able to replace the future income he lost as a result of the egregious conduct of his plant manager and co-employee. It was undisputed that the injury would not have occurred if the safety devices had been operational. Interestingly, the Defendants’ primary defense was to blame Mr. French for his injury. We didn’t believe a jury would accept that defense and apparently those making the settlement decision for the Defendants agreed.

In addition to the monetary settlement, Mr. French was informed that Rock-Tenn made many changes at the facility to ensure that safety devices will not be bypassed in the future. Routine inspections will be made to ensure that all safety devices are operational, and machines that have safety devices inoperable will be shut down until the devices are repaired. Mr. French’s injury and subsequent lawsuit not only benefited him and his family, but it also benefited hundreds of employees who are now working in a much safer environment. Kendall Dunson, a lawyer in our firm’s Personal Injury/Products Liability Section, handled this case and he did a very good job for his client. This case was referred to our firm by former state senator Bingham Edwards, a very good lawyer from Decatur, Ala. The amount of the settlement is confidential.

OSHA Revises Worker Injury Reporting Requirements

The U.S. Occupational Safety and Health Administration (OSHA) has issued a final rule requiring employers to notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation or loss of an eye. Under the revised severe injury rule, employers will be required to notify OSHA of work-related fatalities within eight hours, and work-related in-patient hospitalizations, amputations or losses of an eye within 24 hours.

Previously, OSHA’s regulations required an employer to report only work-related fatalities and in-patient hospitalizations of three or more employees. Reporting single hospitalizations, amputations or loss of an eye was not required under the previous rule.

The rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, will go into effect Jan. 1, 2015, for workplaces under federal OSHA jurisdiction. The new rule maintains the exemption for any employer with 10 or fewer employees, regardless of their industry classification, from the requirement to routinely keep records of worker injuries and illnesses.

The announcement follows preliminary results from the Bureau of Labor Statistics’ 2013 National Census of Fatal Occupational Injuries. U.S. Secretary of Labor Thomas E. Perez, citing Bureau of Labor Statistics that 4,405 workers were killed on the job in 2013, stated:

Workplace injuries and fatalities are absolutely preventable, and these new requirements will help OSHA focus its resources and bold employers accountable for preventing them.

All employers covered by the Occupational Safety and Health Act, even those exempt from maintaining injury and illness records, are required to comply with OSHA’s new severe injury and illness reporting requirements. To assist employers, OSHA is developing a web portal for employers to report incidents electronically, in addition to the phone reporting options. Dr. David Michaels, assistant secretary of labor for occupational safety and health, observed:

Hospitalizations and amputations are sentinel events, indicating that serious hazards are likely to be present at a workplace and that an intervention is warranted to protect the other workers at the establishment.

In addition to the new reporting requirements, OSHA has also updated the list of industries that, due to relatively low occupational injury and illness rates, are exempt from the requirement to routinely keep injury and illness records. The previous list of exempt industries was based on the old Standard Industrial Classification system and the new rule uses the North American Industry Classification System to classify establishments by industry. The new list is based on updated injury and illness data from the Bureau of Labor Statistics.

American Apparel settles worker death suit for $1 million

American Apparel will pay $1 million to settle a lawsuit in California over the death of an employee in a knitting machine accident. The Orange County district attorney’s office, in announcing the settlement last month, said the worker’s daughter will receive $150,000 of the proceeds. The balance covers civil penalties and the cost of the accident’s investigation. The employee, 49-year-old Tuan Phan, was mangled by the machine at the company’s Garden Grove factory in 2011. The machine involved had been turned off, but wasn’t locked and disconnected from its power source for maintenance.
American Apparel claims that no safety laws were violated.

Source: Claims Journal

**Oklahoma Plating Company Fined $341,500 For Workplace Safety Violations**

Pride Plating Inc., located in Grove, Okla., was cited Sept. 4 by the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) for exposing workers to cancer-causing health hazards from hexavalent chromium. The company received 38 violations with proposed penalties totaling $341,550. David Bates, OSHA’s area director in Oklahoma City, stated:

“At Pride Plating, workers were exposed to hexavalent chromium through spray painting and dip tank operations, and in the lunchroom and smoking areas.

Nine repeat violations, with a penalty of $180,180, were mainly cited for chromium violations, including failure to provide safe personal protective equipment for workers exposed to chromium; demarcate regulated areas where chromium was sprayed; prevent ingestion of food and drinks and absorption of cigarettes in chromium-regulated areas; and properly train workers exposed to the facility’s chromium, caustics and corrosives. As we have previously explained, a repeat violation exists when an employer previously has been cited for the same or a similar violation of a standard, regulation, rule or order at any other facility in federal enforcement states within the last five years. Similar violations were cited in 2009.

With a penalty of $161,370, the remaining 29 violations—including 28 serious—were cited for failure to provide adequate walking and working surfaces; separate locker space and storage for street clothing and protective clothing; perform personal protective equipment hazard assessments; and guard power transmission belts. Respirator violations included failing to implement a respiratory program and fit test and ensure respirators were stored in a sanitary location. Chromium violations included failure to inform workers of their exposure records, provide adequate washing facilities and label chemical containers.

A serious violation, as we have mentioned previously, 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.

Source: OSHA

**Tank Crushes Worker At Kansas Worksite**

A worker was killed in an industrial accident in Wichita, Kan. A 6-ton tank shifted unexpectedly and fell on 22-year-old Tony Losey while he was sandblasting it. Losey was under a tarp outside Boardman working on the tank when it fell onto him on Sept. 23. Losey was a subcontractor at the steel plate fabricator. It was reported that the tanks fall several times a year. Most of the time workers are able to get out of the way. Losey was a well-known amateur boxer in Wichita who planned to pursue an Olympic spot in 2016. As of July, USA Boxing ranked Losey third nationally in its 152-pound weight class.

Source: Claims Journal

**XVIII. TRANSPORTATION**

**Victims Of Deadly Church Bus Crash File Suit**

Victims of a deadly church bus crash in Tennessee have filed a lawsuit against the maker of the tire that was found to be the cause of the crash. A lawsuit was filed in Iredell County Court by members of Front Street Baptist Church. A bus from the church was involved in a deadly crash along Interstate 40 last October. Eight people were killed in the collision with six of them being members of the church.

The lawsuit was filed by 12 survivors of the crash and executors of the estates of five people killed in the wreck. The crash occurred Oct. 2 on I-40. The driver of an 18-wheeler and the passenger in a SUV were also killed in the crash. Following an investigation, the Tennessee Highway Patrol announced in April the wreck was caused by a tire blowout.

The lawsuit alleges that the tire was “negligently and defectively manufactured and designed,” saying it “failed to meet the reasonable expectations of an ordinary consumer as to its safety.” The investigation shows that the 1997 Metrotours Europa Motorcoach, owned by Front Street Baptist Church, had a left-front tire failure that caused the driver to lose control.

The maker of the tire, New Jersey-based Hankook Tire, was named as a Defendant in the lawsuit. The lawsuit also names the estate of Randy Morrison, a member of the church who was driving the bus, as a Defendant. His wife, Barbara, was killed in the crash and her estate is listed as one of the Plaintiffs in the case. Twelve other church members were injured.

The lawsuit claims Mr. Morrison “maintained and operated the bus as his ministry to Front Street Baptist Church.” The lawsuit claims Hankook failed to warn consumers about “the dangerous characteristics” of the tire, even though they “had knowledge of such hazards, risks, and dangers.” The group was returning from the 17th Annual Fall Jubilee at the Gatlinburg Convention Center. During the initial investigation, troopers said the bus veered across the median and into oncoming traffic after a tire blew out, hitting a sport utility vehicle and a tractor-trailer, which caught fire. It’s alleged in the lawsuit that the tire, purchased in September 2008:

suffered a sudden, catastrophic, and complete tread/belt separation. The tread/belt separation was caused because the subject Hankook tire, which was manufactured at Hankook’s Geumsan plant in the Republic of Korea, was defective.

The survivors claim in the lawsuit that no one felt any sort of impact with “a road hazard” before the deadly crash. The lawsuit claims the survivors incurred “significant medical expenses” from their injuries and continue to suffer from the injuries they sustained. For the five who died, the lawsuit claims they experienced “pre-impact shock, fright, and terror, and consciously suffered” prior to their deaths.

Source: Charlotte Observer

**Army Helicopter Maker Sued In Fatal Georgia Crash**

A lawsuit has been filed arising out of the crash of an Army helicopter on Jan. 16. It’s alleged in the suit that a tiny missing part caused the helicopter to spin out of control and crash during a training flight in Georgia, killing the co-pilot and seriously injuring two crew members. The lawsuit blames the manufacturer of the MH-60 Black Hawk helicopter, Sikorsky Aircraft Corp., and others that make its components for the crash at Hunter Army Airfield in Savannah.

The mother of Capt. Clayton O. Carpenter, who died, and the two injured crew members are Plaintiffs in the lawsuit. The crew belonged to the elite 160th Special Operations Aviation Regiment. According to Timothy Loranger, a lawyer with Baum, Hedlund, Aristei & Goldman, PC, who represents the Plaintiffs, a missing safety cotter pin caused a malfunction in the helicopter’s tail rotor.

Source: Claims Journal

**Nevada Jury Awards $16 Million To Helicopter Victims’ Families**

A jury in Nevada has awarded $16 million to the families of four passengers who were killed in a December 2011 helicopter crash near Lake Mead. The jurors found against Sundance Helicopters Inc. in a wrongful death case filed by the families. Sadly, the people killed in the crash included a honeymooning couple from India and a couple who were celebrating their 25th wedding anniversary. The 31-year-old pilot was also killed.

Source: Charlotte Observer

BeasleyAllen.com
Last year, the National Transportation Safety Board (NTSB) cited “inadequate maintenance” for the December 2011 crash of the helicopter owned by Sundance Helicopters Inc. The crash occurred during a scenic twilight tour of Hoover Dam and the Lake Mead reservoir on the Colorado River. Investigators found a crucial bolt may have been reused too many times and improperly installed, with the mistake having not been found during inspections. Source: Claims Journal

MORE PILOTS IN CRASHES TESTING POSITIVE FOR PRESCRIPTION AND OTHER DRUGS

A report by the U.S. National Transportation Safety Board (NTSB) will state that four times as many pilots killed in airplane crashes tested positive for drugs in the past two decades. The report will state this tracks a broader societal trend in the use of antihistamines, painkillers and marijuana. While most of the substances wouldn't affect the ability to fly a plane, some of the drugs including pain medication and sleep aids would hurt performance, according to a draft of the report which was released by NTSB on Sept. 10. The most prevalent drugs are antihistamines like Benadryl that can cause drowsiness and decreased mental skills. 

Pilots aren't being adequately warned about the dangers these substances pose, according to accident investigators at the NTSB. The report says that four out of every 10 pilots killed in crashes in 2011 had over-the-counter, prescription or illegal drugs in their systems, a fourfold increase since 1990. The NTSB said:

Some drugs have the potential to significantly impair the user's level of alertness, judgment, reaction time or behavior leading to transportation accidents.

About 23 percent of pilots who tested positive from 2008 through 2012 had taken drugs that impaired performance, according to the NTSB. The percentage more than doubled from 11 percent in the period 1990 through 1997. Since 1990, the Federal Aviation Administration has tested all pilots killed in accidents for drugs. Results for 6,677 pilots involved in 6,597 accidents were included in the study. The following information is taken from the report:

Illicit Drugs

Illegally used drugs were a small portion of those who tested positive. It grew to 3.8 percent in the 2008-2012 period from 2.3 percent in 1990-1997. “The increasing trend in illicit drug results was largely attributed to increasing positive findings for marijuana use among study pilots,” the NTSB said. Marijuana was found in 3 percent of pilots in 2008-2012, or 79 percent of those with illicit drugs, according to the NTSB.

The largest category of drugs found in pilots was over-the-counter sedating antihistamines, according to the NTSB. These drugs include diphenhydramine, known by the trade name Benadryl, used to treat allergies or as a sleep aid. The study found 7.5 percent of pilots who tested positive had taken over-the-counter antihistamines. The rate increased to 9.9 percent in 2008-2012, from 5.6 percent in 1990-1997.

NTSB Recommendations

The FAA doesn’t publish a list of drugs prohibited for pilots. While the agency provides guidance to doctors on classes of banned drugs, it’s difficult for non-medical professionals to understand, according to the agency. The NTSB recommended the FAA do more to educate aviators and said the regulator should develop a clear policy on marijuana use. It also recommended the FAA study drug use among pilots who aren’t in accidents to assess the risks.

States Urged To Come Up With Guidelines

The NTSB also urged U.S. states to develop guidelines to better inform people prescribed pain medication about the risks of operating autos, aircraft and other vehicles. The board, which has no regulatory powers, makes safety recommendations after investigations. Most of the accidents in the study were pilots on private flights, the NTSB found.

About 4 percent involved commercial operations and fewer than 1 percent included major airlines. Alcohol wasn’t included in the study because it can form in body tissue after death even if a person hadn’t ingested any, according to the NTSB. The agency found a link between alcohol intoxication and accidents in fewer than 2 percent of fatal crashes.

Folks who fly commercially expect pilots to be alert and able to handle any situation that might arise. Their performance should not be impaired because of the use of any drugs that might affect the pilots’ state of alertness. Source: Insurance Journal

CONNECTICUT WOMAN AWARDED $15.8 MILLION IN CONSTRUCTION ZONE CRASH

A jury in Connecticut has returned a $15.8 million verdict against Lane Construction Corp. of Cheshire, Conn. Brenda Gump-Schragl, a Pennsylvania woman, had sued for injuries she suffered in a work zone crash that occurred one day before her daughter’s wedding five years ago. Ms. Gump-Schragl, who was 56 years old, sued Lane, claiming the a construction site on Route 51 was dangerous and that the company made no changes despite other crashes having occurred along the construction zone in Pleasant Hills. Another driver involved in the crash and PennDOT had previously settled claims out of court. Ms. Gump-Schragl was in a coma for five weeks, has no short-term memory, and relies on a walker due to her injuries. Her daughter’s marriage was postponed for a year due to the crash. Source: Claims Journal

JURY AWARDS $4.5 MILLION AGAINST NEVADA TRUCKING COMPANY

A jury has awarded $4.5 million against a Nevada trucking company in a case arising out of a 2011 crash with an Amtrak train. Six people were killed and dozens were injured in the crash. A federal court jury in Reno awarded $4.5 million to Amtrak and $210,777 to Union Pacific Railroad as damages resulting from the crash. The jury found a driver for John Davis Trucking Co. at fault when his truck crashed into the passenger train at a rural crossing 70 miles east of Reno. U.S. District Judge Howard McKibben stayed the formal execution of the judgment until Sept. 29 so he can consider awarding attorney fees and prejudgment interest to the railroad companies. The truck driver and five people on the California Zephyr were killed in the crash. The judge had not made the determination when this issue when to the printer. Source: Claims Journal

FAMILY AWARDED $12.3 MILLION BY CONNECTICUT JURY

A state court jury in Connecticut has awarded $12.3 million to the family of a 5-year-old girl who drowned in a 2008 swimming pool accident in Waterbury. Conn. Jurors found the Boys & Girls Club of Greater Waterbury legally responsible for the child’s death. Inadequate pool supervision was an issue in the case. The child died days after slipping under the water during a free swim. Source: Claims Journal

SAFETY COALITION SUES U.S. OVER MISSING TRUCKER TRAINING RULES

The U.S. Federal Motor Carrier Safety Administration (FMCSA) was sued by a coalition of groups seeking to force the agency to issue stiffer rules for training entry-level truck drivers. As we have reported, regulators have missed multiple deadlines set by two laws.
passed by Congress since 1991. The complaint, filed by Advocates for Highway and Auto Safety, is asking a judge to force the agency to propose regulations establishing minimum entry-level training requirements for commercial vehicle operators within 60 days. Henry Jasny, the Washington-based watchdog group’s general counsel, said in a statement: “People are dying needlessly while the agency drags its feet.”

U.S. lawmakers are considering ending federal rules governing the work and rest schedule of longhaul truck drivers. Fatalities in large-truck crashes have increased in recent years, despite a drop in total motor vehicle deaths, the advocacy group said. The FMCSA issued a rule in 2004 that requires 10 hours of classroom work on topics including driver wellness and hours of service. That rule is inadequate because it doesn’t require training for entry-level drivers on how to operate commercial vehicles.

Advocates for Highway and Auto Safety is seeking a court order requiring the agency to issue a final rule within 180 days. The organization filed its complaint with the International Brotherhood of Teamsters and Citizens for Reliable and Safe Highways, a truck safety advocacy group that includes crash survivors. The case was filed in the U.S. Court of Appeals, District of Columbia (Washington).

Source: Insurance Journal

XIX.
ENVIRONMENTAL CONCERNS

MONSANTO CROPS AND CHEMICALS DESTROYING A HAWAIIAN PARADISE

The Hawaiian island of Molokai, a natural paradise and haven for traditional Hawaiian culture, may no longer claim “unspoiled paradise” as its moniker, now that biotech giant Monsanto has moved in. The internationally reviled corporation has cleared 2,000 acres of Molokai land for its genetically modified Bt corn crops and is dousing it with a spectrum of highly toxic chemicals that are not just contaminating the land, but sickening the island’s 7,500 residents in the process.

Monsanto, situated on the southern shore in Ho'olehua, came to the island promising good jobs and a better quality of life. But instead it has turned islanders into unwitting lab rats in its controversial quest to develop genetically altered plants and highly toxic pesticides. Reporter Tami Canal wrote in The Anti-Media:

When the pesticides are sprayed, workers wear head-to-toe protective gear, including respirators. Nearby residents are not provided with such equipment and have no option but to breathe in the toxic dust that comes from the fields. Americans are crying out for help, but the politicians refuse to listen. The desperate pleas go unheard because of insidious collusion—in the government, in the media, and in the biotech industry. No one wants to believe that in this day and age, someone wouldn’t stop Monsanto.

Subsequently, islanders have been afflicted with asthma, cancer, diabetes, and other diseases in growing numbers. Monsanto engineers the genes in plants such as corn to make them resistant to massive doses of pesticides. The number of chemicals the islanders have been exposed to since Monsanto moved in is troubling. While the World Health Organization (WHO) classifies glyphosate, the key chemical in Monsanto’s Roundup, as a low-toxicity chemical, recent evidence has shown the use of accessory chemicals in Monsanto’s glyphosate formulations are extremely toxic.

These extra chemicals, added to enhance the effects of glyphosate, have been linked to severe eye irritation, skin disorders, respiratory distress, lung tissue damage, swelling and inflammation, rapid heartbeat, elevated blood pressure, vomiting, diarrhea, cell damage, pulmonary edema, liver and kidney damage, leukemia and other cancers, central nervous system disorders, gastrointestinal erosion and disease, miscarriage, birth defects, and a spectrum of diseases affecting mental health.

This corporation’s influence in government is so strong that it has even been allowed to write its own federal law—the Monsanto Protection Act—which was signed into law in March 2003. This law, despite any health concerns that could arise in the future, effectively bars federal courts from stopping the planting and sale of genetically modified seeds and crops. That sort of law should never be passed by any legislative body whose members value human life. Hopefully, something can be done to stop what this powerful corporation is doing in Hawaii. It’s shameful to say the least.


EXXONMOBIL PAYS $1.4 MILLION TO SETTLE PIPELINE SPILL SUIT

ExxonMobil has agreed to pay a $1.4 million civil penalty for violating the Clean Water Act in a 2012 crude oil spill near Torbert, La. The U.S. Department of Justice (DOJ) and the U.S. Environmental Protection Agency (EPA) announced the settlement involving the pipeline. The $1.4 million penalty is in addition to the costs incurred by ExxonMobil to respond to the oil spill and to replace the segment of ruptured pipeline, according to the government.

It was alleged by the government that ExxonMobil had discharged at least 2,800 barrels—117,000 gallons—of crude oil, in violation of Section 311 of the Clean Water Act. On April 28, 2012, ExxonMobil’s North Line pipeline ruptured near Torbert, about 20 miles west of Baton Rouge, and oil spilled into the surrounding area and flowed into an unnamed tributary connected to the nearby Bayou Cholpe. Cynthia Giles, EPA assistant administrator for enforcement and compliance assurance, said in a statement:

All businesses have an obligation to protect their workers, the local community and the environment in which they operate. EPA is committed to protecting communities by enforcing laws that reduce pollution in local waterways.

ExxonMobil is currently cleaning up the aftermath of the spill under an administrative order issued by the Louisiana Department of Environmental Quality. The government said the company also continued to do follow-up work and to operate under a corrective action order issued by the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration. Sam Hirsch, Acting Assistant Attorney General for the Justice Department’s Environment and Natural Resources Division, said in a statement:

Oil spills into our nation’s waters endanger public health and the environment and warrant concerted enforcement efforts. Today’s settlement achieves a just result and furthers our enforcement mission.

The Clean Water Act makes it illegal to discharge oil or hazardous substances into the United States’ navigable waters or shorelines in quantities that may harm the environment or public health. The penalty to be paid by ExxonMobil will be deposited in the federal Oil Spill Liability Trust Fund managed by the National Pollution Fund Center. The fund is used to pay for federal response activities and to compensate for damages when there is a discharge or substantial threat of one. The proposed consent decree, filed in the Middle District of Louisiana, is subject to a 30-day public comment period and court review and approval.

Source: Law360.com

OCCIDENTAL TO PAY $190 MILLION IN NEW JERSEY RIVER POLLUTION CASE

Occidental Petroleum Corp.’s chemical unit has agreed to pay $190 million to cover its liability for the cleanup of the Passaic River in northern New Jersey. Occidental Chemical is the legal successor to Diamond Shamrock
Chemical Co., which was found to have intentionally dumped industrial waste in the river for decades, acting Attorney General John Hoffman said in a statement. If approved by a judge and the state Department of Environmental Protection, the Occidental payment will result in New Jersey having recovered $355.4 million.

Part of the settlement will cover costs associated with a $1.7 billion plan by the U.S. Environmental Protection Agency (EPA) to remove 4.3 million cubic yards of contaminated sediment from the lower eight miles (13 kilometers) of the Passaic River—by industrial polluters. Our objective throughout the Passaic River litigation has been to hold accountable those legally responsible.

Eight years ago the state sued companies associated with the former Diamond Shamrock site on Lister Avenue in Newark, the state’s largest city. Diamond Shamrock from the 1940s through 1960s made pesticides and herbicides including the defoliant Agent Orange.

It was reported that OxyChem will seek reimbursement from Maxus Energy Corp., a subsidiary of YPF SA. Maxus is financially responsible for claims against OxyChem in the litigation. YPF is Argentina’s largest company. Reportedly, all of the conduct alleged in the state’s lawsuit occurred while Maxus companies owned, operated or controlled the Lister Avenue plant site. OxyChem never owned this site and bought the stock of Diamond Shamrock from Maxus in 1986, 17 years after the plant closed.

Before the sale, Maxus transferred ownership of the plant to its affiliate Tierra Solutions Inc., which still owns the site. As part of the purchase agreement, Maxus retained liability for the plant and agreed to indemnify Houston-based OxyChem, Moses said. A state court judge last year approved two settlements over the Passaic River cleanup that totaled $355.4 million. Source: Insurance Journal

**Carbon Monoxide Detectors Can Safeguard Your Home**

A disaster was recently averted at a New York Applebee’s when two local emergency medical technicians (EMTs) detected toxic levels of carbon monoxide while being seated at the restaurant. EMTs are required to carry carbon monoxide detectors while on duty. At first, the EMTs thought the carbon monoxide detector was malfunctioning, but when the detector continued to alert after being reset, the EMTs began evacuating the restaurant. Nearly 100 Applebee’s customers and employees were evacuated from the scene.

A faulty water heater was later discovered to be the root cause of the far above average carbon monoxide levels within the establishment. Most homes featuring a properly adjusted gas stove may see carbon monoxide levels at around 15 ppm, according to the Environmental Protection Agency (EPA). The evacuated Applebee’s was experiencing carbon monoxide levels between 80 ppm to 250 ppm, which is high enough to cause both serious injury and death.

Carbon monoxide is called the “Invisible Killer” because it cannot be detected without modern technology, such as carbon monoxide detectors. Carbon monoxide is a colorless, odorless, and poisonous gas that is produced when carbon-based fuels, such as gasoline, natural gas, and oil are burned without enough oxygen present. When these fumes accumulate in enclosed spaces, they become deadly. Accidental carbon monoxide poisoning caused by non-automotive products takes the lives of approximately 170 people per year. This number increases during power outages due to severe weather, largely due to the use of generators. When Hurricane Katrina hit the U.S. in 2005, at least 94 generator-related deaths were reported to the Consumer Product Safety Commission (CPSC).

Symptoms of carbon monoxide poisoning can range from headache, dizziness, nausea and chest pain to loss of consciousness, sometimes resulting in death. However, with a carbon monoxide detector, persons in a home or business will be alerted before the gas reaches a deadly level. There are many different types of carbon monoxide detectors:

- Biomimetic CO detectors have a special gel that changes color as it absorbs CO molecules—an effect that also occurs when blood is exposed to CO. When a sensor detects the color change in the gel, it sounds the device’s alarm.
- Metal oxide semiconductor sensors use a silica chip to determine if CO is in the air. If CO comes into contact with the sensor’s circuitry, the electrical resistance is lowered and will cause the sensor to sound. Considering the amount of electricity semiconductors use, these devices are typically plugged into wall outlets rather than using batteries.
- Lastly, electrochemical sensors utilize changes in electrical currents to sniff out CO molecules. Unlike the chip that a semiconductor uses, the electrochemical sensors use electrodes within a chemical solution that are sensitive to changes in the electrical currents.

In addition to using a carbon monoxide detector, all homeowners should also follow the following recommendations in order to prevent carbon monoxide poisoning:

- Never use a gas range or oven to heat a home.
- Never leave the motor running in a vehicle parked in an enclosed or partially enclosed space, such as a garage.
- Never run a motor vehicle, generator, pressure washer, or any gasoline-powered engine outside an open window, door, or vent where exhaust can vent into an enclosed area.
- Never run a generator, pressure washer, or any gasoline-powered engine inside a basement, garage, or other enclosed structure, even if the doors or windows are open, unless the equipment is professionally installed and vented. Keep vents and air free of debris, especially if winds are high.
- Never use a charcoal grill, hibachi, lantern, or portable camping stove inside a home, tent, or camper.

Our firm has previously won substantial verdicts in cases for folks suffering from carbon monoxide poisoning. One of the most significant verdicts occurred in *Harris v. Sears, Roebuck, and Co.,* a case we tried in the early 1990s. In that case, a grandmother and her three grandchildren were staying overnight in a friend’s mobile home that contained a gas water heater. The next morning, a friend discovered that all four of the family members were suffering from carbon monoxide poisoning. Subsequently, one of the grandchildren died from her injuries.

The water heater manufacturer was sued for violating Alabama’s Extended Manufacturer’s Liability Doctrine, for negligence, and for wantonness. All of the claims were based on the defective design and manufacturing of the water heater. The water heater was defective, in part, because it did not contain a carbon monoxide sensor or carbon monoxide shut-off device. Greg Allen was the lead lawyer in the trial of this case. I helped him and together we were able to obtain a $12 million verdict for our clients.

Carbon monoxide detection has come a long way since we handled the *Harris* case in the early 1990s. If carbon monoxide detectors are available in homes and those detectors are properly designed, injuries and deaths like the ones that occurred in the *Harris* case can be prevented. If you have any questions regarding carbon monoxide poisoning or detection, please contact Greg Allen, Cole Portis or Stephanie Monplaisir, lawyers in our firm’s Personal Injury/Product Liability Section, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com, Cole.Portis@beasleyallen.com or Stephanie.Monplaisir@beasleyallen.com.

Sources: Huffington Post, CDC, Consumer Product Safety Commission, HowStuffWorks
This month we are dividing the Consumer Comments into three parts. In the first part, we will discuss current projects ongoing at Beasley Allen. In the second part, specific cases and subjects will be discussed. The third section will include a few representative settlements. Since we have had so many inquiries relating to ongoing projects in this section of the firm, I felt this approach would be helpful and informative.

I. A Report On Our Consumer Fraud Section

The Consumer Fraud/Commercial Litigation Section of the firm which is managed by Dee Miles, Section Head and a member of the firm's Board of Directors, has been very busy during 2014. The section is currently investigating and/or litigating the following cases:

Pharmaceutical Litigation

The firm handles a wide array of cases dealing with the pharmaceutical industry. These cases include AWP, unapproved drugs, Zoloft, and Granuflo.

A. State Attorney General Representation

AWP

Our firm has represented the States of Alabama, Alaska, Hawaii, Kansas, Louisiana, Mississippi, South Carolina and Utah in a series of cases against pharmaceutical companies, known as the Average Wholesale Price (AWP) litigation. We have completed these cases in the States of Hawaii, Alaska, Alabama, Louisiana and Kansas and we are nearing completion of the litigation in Mississippi and Utah. These States alleged that pharmaceutical companies falsified pricing information, causing state Medicaid agencies to grossly overpay for prescription drugs. The Manufacturers’ false and inflated AWPs (average wholesale prices) caused pharmacies to shop for drugs that offered the highest reimbursement from the State. The inflated AWPs in turn provided more deeper costs for the States. Juries have returned more than $600 million in verdicts for the States of Alabama, Mississippi, Kentucky, Wisconsin, Missouri and Massachusetts. Meanwhile, our firm has obtained verdicts of more than $450 million and settled with many companies in all eight states for approximately $1 billion. The Beasley Allen lawyers litigating these cases are: Dee Miles, Roman Shaul, Clay Barnett and Alison Hawthorne.

Lawyers: Dee Miles, Roman Shaul, Clay Barnett and Alison Hawthorne

Primary Staff Contacts: Beth Warren and Jessica Stapp

Molina

During the AWP case in Louisiana, the State discovered that its data-processing firm, Molina, was allegedly not utilizing the correct reimbursement rate in processing payments to pharmacies. Instead of the computer system automatically calculating reimbursements with the state-approved formulary, Molina programmers apparently input the wrong data points resulting in overpayments. Our firm represents the State in seeking to recoup those overpayments from the party that caused them, in this case allegedly, Molina.

Lawyers: Dee Miles, Roman Shaul, and Alison Hawthorne

Primary Staff Contacts: Beth Warren and Jessica Stapp

Unapproved Drugs

In order for a state to reimburse pharmacies for dispensing drugs to state Medicaid beneficiaries, those drugs must be U.S. Food and Drug Administration (FDA)-approved. By manipulating the system, pharmaceutical manufacturers have apparently been able to sneak certain drugs that have not been FDA-approved into the state Medicaid reimbursement program without alerting anyone. States have reimbursed pharmacies for dispensing these drugs, unaware that they were not FDA approved and, therefore, ineligible for reimbursement. At this time, our firm only represents the State of Louisiana in this litigation, which is seeking to recover Medicaid reimbursements for these ineligible drugs, but other States may file as well.

Lawyers: Dee Miles, Lance Gould, and Alison Hawthorne

Primary Staff Contacts: Holly Busler and Jessica Stapp

Granuflo

Granuflo is a dialysate product used in the hemodialysis process. It appears that several years ago Fresenius, the manufacturer of Granuflo, realized that through a natural biological process, its product created a significantly increased risk of cardiac distress and death when not administered in a different dosage than every other dialysate product on the market. Instead of warning clinics, physicians, consumers, and the states, Fresenius allegedly kept quiet about the risk. Once the risk came to the FDA’s attention, Fresenius notified its own clinics, but it appears not those owned and operated by non-Fresenius companies, to adjust their dosage. Eventually, the true risk information became public. There are several cases filed against Fresenius alleging that the Defendant’s actions caused injuries to individual users. Our firm is representing numerous individual cases, but those cases are being handled by our Mass Tort section (Frank Woodson and Andy Birchfield). In addition, our Consumer Fraud section is representing the State of Louisiana in seeking to recover for the reimbursements the State made and damages it suffered because of the claims submitted to the state’s Medicaid office for this apparent substandard product and Fresenius’ alleged failure, through its marketing to physicians, clinics, and citizens, to inform its customers of the proper dosage requirements.

Lawyers: Dee Miles, Lance Gould, Alison Hawthorne and Rebecca Gilliland

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Lawyers: Dee Miles, Lance Gould, Alison Hawthorne and Rebecca Gilliland
Primary Staff Contacts: Holly Busler and Jessica Stapp

Pay For Delay
Our firm has been researching a developing area of law for a little more than a year that deals with the intersection of Antitrust law and Patent law. The cases have gained attention in the last two years because of the United States Supreme Court’s reversal last year of an Eleventh Circuit decision. The FDA regulates and approves drugs for marketing and sale for human use. When a generic drug manufacturer seeks FDA approval for a new generic version of an already approved brand drug, the generic manufacturer has to certify that the generic either will not infringe on any patents for the brand, or that those patents are invalid. Inevitably, the brand manufacturer objects to the certification and sues the generic for patent infringement. The two manufacturers almost always settle. As part of that settlement, the generic manufacturer typically agrees not to enter the market for that drug for a certain time period.

That agreement, as an agreement not to compete and to extend a monopoly to the brand manufacturer, is in violation of federal and state antitrust laws. Without competition, the prices for the brand drug remain high—well above what the market would dictate absent the agreement between the two manufacturers. As a result, citizens, pharmacies, state Medicaid agencies, and insurance companies have all been paying grossly inflated prices for brand pharmaceuticals when they could and would have purchased generic drugs at much lower prices. The firm has been working with several states to develop a case to recover the damages suffered as a result of those fraudulently and illegally increased pharmaceutical prices. At this time, we are moving forward in preparation for filing claims for one or more states.

Lawyers: Dee Miles, Roman Shaul, Alison Hawthorne, Rebecca Gilliland and Leslie Pescia
Primary Staff Contacts: Beth Warren and Jessica Stapp

B. Class Actions
Our firm’s class action practice continues to rapidly grow. We have cases filed all over the country ranging from consumer fraud, Antitrust, employment abuses, ERISA (Employment Retirement and Income Security Act) to product liability and nuisance cases. This area of the law continues to grow due to the corporate abuses occurring in the business world. Oftentimes the class action is the most efficient legal vehicle to rectify a large scale “wrong” because while corporate abuse may have caused someone or a business harm, the harm is small, yet widespread. Some say a class is appropriate when “nobody gets ‘hit’ for much, but everybody does get ‘hit.’” Well, the “hits” keep coming and the class action cases continue to be filed.

While arbitration clauses have had some limited impact on class action filing, it has not proved to be the effective deterrent corporate America had hoped for. This is mainly due to the courts finally recognizing that arbitration was never intended to be utilized in consumer contracts. It was designed for complex business transactions involving sophisticated parties in specialized areas of business. However, corporations have abused the use of arbitration clauses to frustrate consumer resistance to their fraudulent practices; thus, it has resulted in a profit-making measure for corporate America.

Just because a consumer contract has an arbitration clause, that doesn’t mean a class action on the abusive corporate conduct is barred. There may be ways around the arbitration clause and a lawyer familiar with the ever-changing law on this issue can make that determination. Lance Gould, Archie Grubb, Alison Hawthorne and Andrew Brasher, lawyers in the section, are well versed in this area of the law. We review many potential class actions daily and welcome the opportunity to review more.

Talc
For example, the firm is pursuing a class action for California citizens who claim they were deceived into believing that Johnson and Johnson’s talc-based products were safe and purchased those products for feminine genital hygiene use. Some recent studies have demonstrated a significantly increased risk of ovarian cancer for women who use talc-containing products for genital hygiene. The complaint alleges that Johnson and Johnson has been aware of the risk, or should have been for years, yet the company continues to market its products as safe for daily use. These citizens would not have purchased the baby powder and other talc products had they known of the increased risk of ovarian cancer. Because of Johnson and Johnson’s marketing, they claim they believed they were purchasing and using a safe product. Our firm represents these citizens in an effort to recover the money they spent on these alleged cancer-causing products that they would not have spent absent Johnson and Johnson’s marketing.

Lawyers: Dee Miles, Lance Gould and Alison Hawthorne
Primary Staff Contacts: Holly Busler and Jessica Stapp

Oil and Gas
The firm also recently filed a class-action complaint against XTO Energy, Inc. in Arkansas. The case involves royalties owed to landowners for the sale of natural gas. The landowners allege they signed leases with XTO granting it the right to drill and produce natural gas and constituents. In exchange, XTO was to pay the landowners royalties as a share of the production income. The Plaintiffs claim instead of selling the gas in arms-length transactions on the open market, XTO sells to affiliates at grossly inadequate prices. Landowners’ royalty payments are calculated off that first sale. The XTO affiliate or related entity that first purchased the gas then sells the products at market price. XTO allegedly keeps the difference between what it would have paid in royalties to the landowners had those first sales been made at market price and the fraudulently low royalties it actually did pay the landowners. We are proud to represent the class of landowners and to assist in seeking to recover the money those class member landowners would have received had XTO properly sold the natural gas on the market.

Lawyers: Lance Gould, Archie Grubb, Alison Hawthorne, and Andrew Brasher
Primary Staff Contact: Holly Busler, Jessica Stapp, and Whitney Gagnon

BCBS
In the first of two Blue Cross Blue Shield (“BCBS”) cases the firm is pursuing, the firm deals with an alleged breach of contract between the insurance giant and dentists. Reimbursements to dentists should, according to the contracts, be neither excessively high nor excessively low. Yet, the Alabama dentists contend that BCBS breached their contracts with them and reimbursed for dental services at excessively low rates. They further contend that BCBS fails to regularly review the single fee schedule used for dental reimbursement as it agreed to do in the contracts. We are working with two other law firms, McCallum, Houglund, Cook & Irby, LLP and McCallum, Methvin & Terrell, P.C., as well as our Alabama dentists in an attempt to correct the BCBS fee schedule and recover the amounts that these dentists should have actually received for the services they provided.

Lawyers: Dee Miles, Alison Hawthorne and Leslie Pescia
Primary Staff Contact: Jessica Stapp

General Motors
The consumer fraud section is also involved in the lawsuits against General Motors (GM) for its conduct relating to the ignition switch defect. Unlike claims for personal injury and death, which the firm is also handling in our Product Liability section managed by Cole Portis, we have filed seven separate class actions in different states that are now pending before Federal Judge Jesse M. Furman in the Multi-District Litigation case in federal Southern District Court of New York in New York City. The class action fraud claims are seeking only economic losses as a result of the diminished value of the automobiles as a result of the ignition switch defect, a loss incurred by owners of the now admitted defective GM vehicles.

Lawyers: Dee Miles and Archie Grubb
Primary Staff Contact: Michelle Shaw
Smoke Alarms

Our firm has recently filed a California class action against the company that manufacturers First Alert Smoke Detectors, also known as ionization smoke alarms. The thrust of the class allegations, filed in federal district court in California, claims that ionization smoke detectors fail to perform their sole and intended purpose as an early fire detection warning. When compared to photoelectric smoke detectors, ionization smoke detectors may take as long as 30 minutes or longer to sound an alarm of a slow smoldering fire, the most common household fire. Simply, ionization smoke detectors do not alert home occupants of a fire until the buildup of toxic fumes, gases and smoke inhalation is to the point of a life-threatening stage. Despite knowledge by the Defendants, they continue to sell ionization smoke detectors as an adequate and effective fire safety detection system and they are found in about 90 percent of households.

Our firm has filed at least one class action against First Alert, and is investigating other companies that allegedly conducted themselves in the same wrongful and reckless manner. We are also involved in an international case containing the same allegations, but different manufacturers.

Lawyers: Dee Miles, Lance Gould and Archie Grubb
Primary Staff Contact: Holly Busler and Whitney Gagnon

C. Antitrust Cases

Lawyers in the Section continue to investigate and litigate antitrust cases. Antitrust law is the law of business competition. Society is better off if buyers and sellers act independently, not in concert. Antitrust law focuses on the promotion of competition through restraints on monopoly and cartel behavior. Typical cases involve attempts to monopolize, price fixing, exclusive distributorships, refusals to deal, tying arrangements, and mergers and acquisitions. Antitrust is a growing area of litigation, as corporations increasingly tend to “cross the line” as they seek to gain advantage in this tough economy. The firm is currently involved in antitrust litigation involving several pharmaceutical companies, Blue Cross Blue Shield, and manufacturers of electronic capacitors.

Pay for Delay

As mentioned above, Beasley Allen has been researching a developing area of law related to pay for delay schemes. As a result of the illegal agreements between brand and generic pharmaceutical manufacturers, citizens, pharmacies, wholesalers, the states, and other insurers all paid grossly inflated prices for brand drugs when they otherwise would have paid reduced prices for generics. The firm has been working with several states to develop a case to recover the damages suffered as a result of those fraudulent and illegally increased pharmaceutical prices.

Blue Cross Blue Shield

Lawyers at Beasley Allen are currently involved in an antitrust case dealing with Blue Cross Blue Shield’s alleged illegal actions. The BCBS case involves the insurance providers’ alleged agreement not to compete with each other. BCBS has separate companies that cover different geographical regions of the country. Those individual companies appear to have agreed amongst themselves to stay out of other geographic regions. For example, BCBS of Alabama and BCBS of Mississippi appear to have agreed to not compete with each other for providers (hospitals and physicians) or subscribers (individual and group policyholders). Normally, competition in a certain area drives costs down with each company trying to be the lowest available. Absent competition, the companies were able to set prices for both reimbursement and premiums at any price they chose. This very important case is in the discovery phase in federal court in Birmingham, Ala., before Judge David Proctor.

Capacitors

The electronic capacitor litigation involves an alleged price-fixing scheme. Capacitors are, generally, tiny but are in nearly every electronic device on the market. Apparently the manufacturers agreed amongst themselves to only sell their products at a certain price, one that is above what normal market conditions would dictate. Their actions caught the attention of several United States and foreign agencies, including the Department of Justice, which are investigating the illegal agreements. Our firm, along with other national firms we are working with, moved quickly to recover damages for those directly injured by the price fixing scheme. This case is currently pending in the federal district court in San Francisco, Calif.

Lawyers: Dee Miles and Rebecca Gilliland

D. Qui Tam Cases

A qui tam action involves a private party, called a “whistleblower” or “relator,” who asserts claims on behalf of the government. Although the government is considered the real (named) Plaintiff, if the action is successful, the relator receives a share of the award. Most qui tam actions are brought under the federal False Claims Act (“FCA”), 31 U.S.C. § 3729, et seq., although many States have adopted their own false claims acts. The successful results speak for themselves—more than $34 billion in recoveries since 1986—and that tells us a powerful story. Our firm is currently involved in a number of these qui tam cases throughout the country.

Qui tam actions typically begin with an employee witnessing his/her employer defrauding the government. The employee may later consult with an attorney on another matter, but convey their knowledge of false information being given to the government. Attorneys need to be on the lookout for such information and recognize potential claims.

It takes vigilance and courage for these private individuals, most commonly referred to as “whistleblowers,” to report fraudulent activity; but without them, the vast majority of fraud against our government would go undetected. Recognizing the perils faced by whistleblowers, legislators have passed laws protecting individuals who take a stand against fraud. 31 U.S.C. § 3730 prohibits discrimination and retaliation against whistleblowers and imposes strict penalties, including double back pay with interest, on violators.

Additionally, if a qui tam action is successful, the whistleblower receives between 10-30 percent of the government’s recovery. Damages under the FCA include penalties and “three times the amount of damages which the Government sustains” due to the fraud. 31 U.S.C. § 3729(a)(1)(G). In short, the law protects and rewards whistleblowers for their instrumental role in exposing and prosecuting fraud.

Lawyers in our firm have waged war against corporate fraud for more than 30 years and would welcome the opportunity to assist with any qui tam actions that any of our readers may have.

One such case currently being pursued by our firm that is now out from under seal involves the failure of United States Investigation Services LLC (“USIS”) to perform quality-control reviews when investigating backgrounds of potential U.S. Office of Personnel Management employees. For example, USIS vetted former CIA employee and NSA contractor Edward Snowden before he famously leaked documents. It also vetted Aaron Alexis, who shot 12 people to death at the Washington Navy Yard recently. The complaint alleges that the company used an internal program to automatically release background checks prior to their completion to increase profits; USIS is paid monthly for completed background checks, so those incomplete checks were non-billable. Instead of completing the work, the whistleblower alleges, USIS automatically cleared the background checks in order to submit claims for payment.

The section has many more qui tam cases filed, but because of the statutorily required confidential filing of these cases under seal, we are not able to describe the other cases we are pursuing in courts all over this country. Nonetheless, we look forward to continuing to expand this area of practice in our firm.

Lawyers: Dee Miles, Lance Gould, Larry Golston, Archie Grubb, Clay Barnett and Andrew Brasher Primary Staff Contact: Holly Busler

BeasleyAllen.com
E. FLSA Litigation

We have been handling FLSA (Fair Labor Standards Act) cases for many years. FLSA cases range from mischaracterizing an employee as a “manager” to avoid having to pay overtime wages, to employers having employees “work off the clock” to save on labor cost, but both are violations of the law under the FLSA. We continue to file many such cases.

Lawyers: Lance Gould and Roman Shaul Primary Staff Contact: Holly Busler

Equal Pay/Race Discrimination/Age Discrimination

Several lawyers in the Section also handle other employment cases involving discrimination due to gender, race, age, culture and other factors. We recently settled several cases involving these issues and hopefully bettered the work environment for many others.

Lawyers: Larry Golston and Lance Gould Primary Staff Contact: Holly Busler

Lawyers in the Section will also continue to review general business litigation matters as well as virtually any corporate misconduct case. The Section has been fortunate to experience success in the areas described above and the lawyers and staff maintain their commitment to providing a voice to victims of corporate wrongdoing with the best legal talent providing the best possible service to our clients. Dee Miles, the Section Head, has put together a tremendously talented group of lawyers and support staff. We have been blessed.

II. Other Consumer Related Case Results And Events

Consumer litigation covers a very broad spectrum and is evolving almost monthly. As you saw from ongoing projects being pursued by our firm, it’s a very important area of litigation. The following are a number of events, of interest.

OBTAIN CURRENT RECALL, FOOD AND PRODUCT SAFETY INFORMATION

Consumers should be able to depend on manufacturers, distributors and retailers of products, medicines and food to take the proper steps to make sure their products are safe for use. All of us expect products to be safely designed, be well made and to work the way they are supposed to without causing us harm. Likewise, we confidently purchase groceries or dine out without worrying very much about food safety. However, as is evidenced by the Recalls section in this very publication, all too often our expectations are not met. Products enter the stream of commerce that are both defective and dangerous.

As a result, it is a good idea to take matters into your own hands and keep up with the latest news on recalls and safety alerts. In today’s modern age, this information is pretty easy to find. You can even subscribe to some websites and alerts on your computer or your smartphone.

A good resource for all types of recalls is located at www.Recall.gov. This website is produced by the Consumer Product Safety Commission (CPSC) a federal regulatory agency, as a public service. This site compiles and provides information about food recalls and alerts, consumer products, motor vehicles and boats, medicine, cosmetics, public health issues, and environmental products. It is a “one-stop shop” for recall and safety information.

Recalls.gov draws information from other government agencies including the U.S. Department of Agriculture (USDA), U.S. Food and Drug Administration (FDA), Centers for Disease Control and Prevention (CDC), the Environmental Protection Agency (EPA), the National Highway Traffic Safety Administration (NHTSA), the U.S. Coast Guard (USCG) and the U.S. Department of Health and Human Services (HHS). There are individual websites under the umbrella of Recalls.gov, which you can subscribe to if you are especially interested in one area. For example, www.foodsafety.gov provides the latest information on all food recalls and alerts as well as food illness outbreaks. The site also provides helpful tips you can follow to help ensure food safety, information about food poisoning, and the latest news involving food safety concerns. Here are more links to directly access individual recall and safety alert websites:

• Consumer Products—Recalls & Safety: www.cpsc.gov/Recalls
• Automobile Recalls: www.NHTSA.gov/Vehicle+Safety/Recalls++Defects
• Boating Safety Resource Center: www.uscg-boating.org
• Drug, medical device, and cosmetics Recalls and Safety Alerts: www.fda.gov/Safety/Recalls
• Report a serious problem with a drug or medical device through the FDA’s MedWatch Adverse Event Reporting Program at www.fda.gov/MedWatch/Report
• Public health alerts and information: www.cdc.gov
• Health care resources: www.hhs.gov
• Pesticides, Emission Recalls, Air Quality & Safety: www.epa.gov

Most of these websites have links so you can connect with these agencies on social media by following them on Twitter or ‘friend’ them on Facebook. You can also subscribe to the website’s RSS feed or download an app for your smartphone that will send you the latest government recalls and alerts. You may also be able to sign up for email alerts from many of these agencies that will keep you informed of the latest news.

The CPSC also operates a toll-free Consumer Hotline at 800-638-2772 (TTY 301-595-7054) where you can call to get product safety information and report unsafe products. The hotline operates from 8 a.m.-5:30 p.m. ET, and you can leave a message any time. Likewise, you can call the FDA at 1-888-INFO-FDA (1-888-463-6332).

It’s very important to become knowledgeable about the availability of safety information. The experiences our lawyers have had in litigation make us realize that there is a need to stay informed, to the extent possible, on ways to insure your own personal safety. Take a look at the sites listed above and stay informed. These are good places to start.

Sources: NHTSA, CPSC, Recalls.gov, Foodsafety.gov, FDA, USDA, CDC, HHS

INDIVIDUALS CAN REPORT DANGEROUS PRODUCTS To CPSC

The U.S. Consumer Product Safety Commission (CPSC) is charged with protecting the public from unreasonable risks of injury or death associated with the use of thousands of types of consumer products under the agency’s jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than $1 trillion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical or mechanical hazard. CPSC’s work to ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters and household chemicals—contributed to a decline in the rate of deaths and injuries associated with consumer products in the past 40 years.

Federal law bars any person from selling products subject to a publicly announced voluntary recall by a manufacturer or a mandatory recall ordered by the Commission. To report a dangerous product or a product-related injury go online to www.SaferProducts.gov or call CPSC’s Hotline at 800-638-2772 or teletype writer at 301-595-7054 for the hearing impaired. Consumers can obtain news release and recall information at www.cpsc.gov, on Twitter @USCPSC or by subscribing to CPSC’s free e-mail newsletters.

Source: CPSC Website
E. coli Infection Kills Two Children In Washington

We have written on the dangers associated with E. coli infections in previous issues and have stated frequently that the consequences can be deadly. Brooklyn Hoksbergen, 3, of Lyden, Wash., died on Sept. 5 from an E. coli infection at Seattle Children’s Hospital. Her father, Rob Hoksbergen, said the family doesn’t know how or where she became ill. The family is working with the Whatcom County Health Department to find a potential source of her illness. Brooklyn was the youngest child of Robert and Jennifer Hoksbergen of Lyden, who have three older daughters. None of the rest of the family reported being ill.

Another tragic death linked to an E. coli infection occurred in Portland, Ore. A 4-year-old Oregon girl died on Sept. 8 from medical complications. Serena Profitt of Otis, Ore., died after becoming ill about Aug. 29. Another child, a Profitt family friend, Brad Sutton, 5, of Tacoma, Wash., has been in Mary Bridge Children’s Hospital in Tacoma, where his situation was described as “critical” and he was reportedly on dialysis because of kidney failure. The Washington State Department of Health has said the Profitt and Sutton cases are not related to the Hoksbergen one.

An E. coli infection comes from eating food containing the bacteria, which live in the intestines of healthy cattle. Consuming rare or inadequately cooked ground beef is a common way of getting an E. coli infection, although other sources include drinking unpasteurized milk, drinking or swimming in water contaminated with sewage, or eating unwashed fruits or vegetables fertilized with cow manure. Also, person-to-person transmission of E. coli can occur if infected persons do not wash their hands after using the toilet or after changing the diapers of infected babies.

The symptoms of E. coli infection typically include severe stomach cramps, diarrhea (often bloody), and vomiting. Sometimes there is fever, although it is not usually high. Most people with E. coli infections get better within 5-7 days, but about 5-10 percent of them will develop severe or life-threatening complications such as hemolytic uremic syndrome (HUS). Those who develop HUS need to be hospitalized because their kidneys may stop working and they may develop other serious problems. Most people with HUS recover within a few weeks, but some could suffer permanent damage or die, particularly young children, the elderly and those with compromised immune systems.

Source: foodsafetynews.com

Foster Poultry Has Had Persistent Safety Problems

Foster Poultry Farms Inc., linked to more than 600 salmonella illnesses during the past year, had hundreds of food safety violations. These violations involve feces-contaminated bird carcasses including several after a facility was shuttered for a cockroach infestation. This all came from U.S. Department of Agriculture (USDA) documents released on Sept. 8. Between September 2013 to March, Foster facilities around the U.S. received hundreds of non-compliance reports by USDA safety inspectors, despite the corrective steps the company was purportedly taking after the outbreak of antibiotic-resistant Salmonella the Centers for Disease Control and Prevention (CDC) linked to its plants in California including in Livingston and Fresno, according to the inspection records that environmental group Natural Resources Defense Council (NRDC) obtained through a Freedom of Information Act request.

Foster Farms Livingston facility, which the USDA shuttered temporarily in January because of a cockroach infestation, was cited 154 times after October, when USDA issued a public health alert about its chicken, according to the inspection records. NRDC, referring to the plant’s temporary shut-down in January, said in a statement:

At the time, Foster Farms responded with a statement saying this was an “isolated incident” and pledged a “zero tolerance” policy in tackling food safety violations. Yet, over the next two months, inspectors cited the plant at least 48 more times.

Foster Farms said in October that it was cooperating with the USDA’s Food Safety and Inspection Service and the CDC to limit the spread of the outbreak. The company also said it hired epidemiology and food safety technology experts to examine its food safety system. Despite such assurances, Foster facilities were found to have numerous violations involving mold and cockroaches, as well as fecal matter and so-called unidentified foreign material on bird carcasses that were inspected, according to the reports. Foster Farms says it has cleaned up its act and, hopefully, it has.

The poultry maker also stressed that the CDC in July ended its investigation of the Salmonella Heidelberg outbreak linked to its raw chicken products, and said the Salmonella levels in its raw chicken part products during the past four months was less than 5 percent, compared to the 25 percent industry average, according to its statement.

Source: Law360.com

Jury Verdicts In PCA Criminal Trial

A closely watched criminal trial in Albany, Ga., is now over. Former Peanut Corporation of America (PCA) owner Stewart Parnell, his brother and one-time peanut broker, Michael Parnell, and Mary Wilkerson, former quality control manager at the company’s Blakely, Ga., plant, were all found guilty last month by a federal court jury. Sentencing will come later. Parnell, former chief executive of the now-defunct company with plants in three states producing peanut butter and peanut paste used for its own products and as an ingredient in almost 4,000 others, was convicted by the jury for his role in a deadly Salmonella outbreak that began almost six years ago.

The government accused Parnell, his brother, and the quality control manager of a mammoth conspiracy that involved fraud, wire fraud, obstruction of justice, and knowingly introducing both adulterated and misbranded food into interstate commerce. It was said that food safety took a back seat to getting shipments out, and that Parnell did not care if product contaminated with Salmonella was delivered to customers. While none of the defendants was charged with causing any actual illnesses or deaths, more than 700 people were sickened and nine deaths resulted from the 2008-09 outbreak that led to a four-year criminal investigation and a subsequent 76-count indictment.

The Salmonella outbreak involving PCA was one of the most deadly in modern U.S. history, with three deaths in Minnesota, two in Ohio, two in Virginia and one each in both Idaho and North Carolina. The federal Centers for Disease Control and Prevention in Atlanta reported 714 confirmed cases in 46 states, but unreported cases likely topped 22,000.

Source: foodsafetynews.com

III. Some Settlements Of Interest In Consumer Cases

There have been a number of settlements during September. I will briefly discuss a sampling of those cases.

Lenovo Reaches Settlement Over Defective Laptops

Lenovo Inc. has agreed to settle a class action lawsuit over laptops that allegedly connect to wireless Internet slowly or don’t connect at all. As much as $70 million in repair services and reimbursements are included in the settlement. Lenovo will offer up to $49 million in repairs to members of the settlement class who bought 83,000 specific Lenovo Ideapad computers, as well as up to almost $21 million in cash refunds and credit certificates. In a motion for preliminary approval of the settlement, Plaintiffs
in the lawsuit say the total value of the settlement will be as much as $70 million. Settlement class members would include anyone who bought a Lenovo Ideapad model U310 or U410 Ultrabook computer in the United States through the date of the court’s final approval. Interestingly, Lenovo says it hasn’t agreed to pay any particular amount of money in connection with this case.

In February 2013, lead Plaintiff Kissner-Moran Corp., the makers of malfunctions could be drawn from it. flaws so severe that no reliable conclusion could be drawn from the clinical study cited by the company was filed simultaneously, the FTC said that the settlement, said the retailers repeated language from the products’ labels and advertising for three years after the settlement’s effective date, according to a joint motion filed with the court.

The complaint alleged that the companies’ misleading advertising campaigns and product labeling by the companies fraudulently induced thousands of consumers into purchasing the products. It was alleged that clinical studies of glucosamine hydrochloride and chondroitin sulfate, key ingredients in the supplements, have demonstrated that these agents have no scientific value in the treatment of joint pain or discomfort. The complaint alleged that the companies’ misleading advertising campaigns and product labeling by the companies fraudulently induced thousands of consumers into purchasing the products. It was alleged that clinical studies of glucosamine hydrochloride and chondroitin sulfate, key ingredients in the supplements, have demonstrated that these agents have no scientific value in the treatment of joint pain or discomfort.

REFRIGERATOR MAKERS AGREE TO $33 MILLION SETTLEMENT

Norcold Inc., Thetford Corp. and Dyson-Kissner-Moran Corp., the makers of malfunctioning refrigerators made for motor homes and houseboats, have agreed to pay $35 million to settle with a putative class that alleged a refrigerator part corroded, overheated and in some cases caused fires. The settlement fund will be divided among the would-be class members depending on which refrigerator they purchased and whether they already paid for repairs or replacements, according to the terms of the settlement. The class initially estimated that replacing their refrigerators would have cost $700 million. The settlement applies to consumers who own or owned one of the three series of RV refrigerators included in the suit: the Norcold 1200 Series manufactured between January 2002 and October 2012, or who currently own a Norcold Series N6 or N8 made between January 2009 and December 2013.

SUPPLEMENT MAKERS PAY $3 MILLION IN SETTLEMENT

It’s extremely important that manufacturers and sellers of “supplements” must not only make sure they are safe, but also make sure the supplements will do what they are marketed to do. The makers of several glucosamine-based supplements have agreed to pay $3.1 million to settle a proposed class action in that was filed in a California federal court accusing them of misleading consumers about the products’ supposed joint health benefits despite myriad scientific evidence disputing those claims. The settlement allows members of the proposed class to be reimbursed up to $100 for bottles included in the Wellesse Joint Movement Glucosamine product line. It requires Wellesse makers Botanical Laboratories Inc. and Schwabe North America Inc. to remove allegedly misleading language from the products’ labels and advertising for three years after the settlement’s effective date, according to a joint motion filed with the court.

The complaint alleged that the companies’ allegedly misleading advertising campaigns and product labeling by the companies fraudulently induced thousands of consumers into purchasing the products. It was alleged that clinical studies of glucosamine hydrochloride and chondroitin sulfate, key ingredients in the supplements, have demonstrated that these agents have no scientific value in the treatment of joint pain or discomfort.

USCB TO PAY $2.75 MILLION TO SETTLE DEBT COLLECTION TCPA SUIT

A settlement has been reached in a lawsuit against receivable and resource management company USCB Inc. The company has agreed to pay $2.75 million to approximately 12,000 consumers to settle a Telephone Consumer Protection Act (TCPA) class action lawsuit. It was alleged that USCB used an automated dialer to call Plaintiffs’ cellphones without consent to collect debt. Under the settlement, resolving violations of the TCPA and Fair Debt Collection Practices Act, the company will pay all people in the U.S. who received a pre-recorded call from USCB on their cellphones between November 2009 and May 2014.

MEIJER PAYS $2 MILLION TO SETTLE DISPUTE OVER RECALLED PRODUCTS

Michigan-based retailer Meijer Inc. has agreed to pay a $2 million civil penalty to resolve allegations by the U.S. Consumer Product Safety Commission (CPSC) that it knowingly sold recalled products including infant teether rattles, which the agency recalled in January 2011 for ingestion hazards, according to a statement by the agency. The agency said: Federal law prohibits the sale or distribution in commerce of a consumer product that is subject to voluntary corrective action, such as a recall, that has been publicly announced and taken in consultation with CPSC. The CPSC claimed that Meijer had distributed the recalled products through a system it ran with a third-party contractor and did not act to stop the distribution of the products at issue despite knowing about the recalls. The recalled products also include the Touch Point Oscillating Ceramic Heaters, which the CPSC recalled in November 2010 for a fire hazard, as well as high chairs manufactured by Graco Children’s Products Inc., which were recalled in March 2010 for a fall hazard. The CPSC in August announced the recall of 2.2 million beanbag chairs that were made by Ace Bayou Corp. and sold by retailers including Meijer, following the deaths by suffocation of two children. The CPSC said zippers on Ace Bayou’s round Dealing with infant teether rattles, which the agency recalled in January 2011 for ingestion hazards, according to a statement by the agency. The agency said: Federal law prohibits the sale or distribution in commerce of a consumer product that is subject to voluntary corrective action, such as a recall, that has been publicly announced and taken in consultation with CPSC. The CPSC claimed that Meijer had distributed the recalled products through a system it ran with a third-party contractor and did not act to stop the distribution of the products at issue despite knowing about the recalls. The recalled products also include the Touch Point Oscillating Ceramic Heaters, which the CPSC recalled in November 2010 for a fire hazard, as well as high chairs manufactured by Graco Children’s Products Inc., which were recalled in March 2010 for a fall hazard. The CPSC in August announced the recall of 2.2 million beanbag chairs that were made by Ace Bayou Corp. and sold by retailers including Meijer, following the deaths by suffocation of two children. The CPSC said zippers on Ace Bayou’s round
before the U.S. Consumer Product Safety Commission.

**YAZAKI TO PAY $76 MILLION TO CONSUMERS IN PRICE-FIXING MDL DEAL**

Yazaki Corp. has agreed to pay $76 million to resolve claims brought against it by certain consumers in a multidistrict antitrust class action accusing the Japanese auto parts maker and several others of bid-rigging and fixing prices. The agreement would resolve claims brought by the consumer Plaintiffs against Yazaki in three cases pending before the court. The settlement includes claims brought against Yazaki in cases involving Automotive Wire Harness Systems, Instrument Panel Clusters and Fuel Senders.

Yazaki, which has already paid the U.S. Department of Justice $470 million in fines, said it would settle for an undisclosed amount with indirect purchasers, such as end-payers and dealerships. Yazaki and TRW Deutschland Holding GmbH signaled at the same time that they would seek to resolve some of the claims in the sprawling multidistrict litigation (MDL) consolidated in a Michigan federal court over alleged price-fixing in the auto parts industry. Yazaki and TRW were some of the latest auto parts manufacturers to settle with Plaintiffs in the MDL. In June, Autoliv Inc. also agreed to pay $65 million to settle with direct purchasers, auto dealers and consumers.

Source: Law360.com

### XXI.
#### RECALLS UPDATE

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

**GENERAL MOTORS RECALLS CARS OVER PARKING BRAKE FIRE RISK**

General Motors Co. (GM) has recalled hundreds of thousands of cars over a defect in the parking brake that could cause a fire. The problem occurred with GM’s 2013-2015 Cadillac XTS and the 2014-2015 Chevrolet Impala.

The total number of cars recalled was 221,558, including 205,309 in the United States, and the remainder in Canada and other countries. The problem was that the brake’s indicator light sometimes failed to illuminate while the brake was not fully retracted. The National Highway Traffic Safety Administration said:

*If the vehicle is operated for an extended period of time in this condition, there is a potential for the rear brakes to generate significant heat, smoke and sparks. Brake pads that remain partially engaged with the rotors may cause excessive brake heat that may result in a fire.*

### FORD RECALLS 850,000 SEDANS AND SUVS FOR RESTRAINT SYSTEM ISSUES

Ford Motor Co. has recalled nearly 850,000 2013-2014 C-MAX, Fusion, Escape and Lincoln MKZ vehicles in North America because of a problem with the electric module that controls the cars’ deployable restraint systems. This can cause air bags to not properly deploy during an accident. The affected vehicles’ restraints control modules—which manage the deployments of air bags, seatbelt pretensioners, side curtains and more—have a potential defect that causes short circuiting to occur. This leads to the systems not properly functioning in the event of a crash and increases the risk of injury.


According to a statement by Ford, the short-circuiting potentially causes the air bag warning indicator to illuminate and the deployable restraint systems to not properly function. It also could affect the function of other systems that use data from the restraints control module, such as stability control, the statement said. Ford dealers are instructed to replace the restraints control module at no cost to the customer.

You may recall that in May, the automaker recalled more than 594,000 of its 2013 and 2014 Escape and C-MAX vehicles because of a software defect that delays air bag deployment during rollover crashes. In addition, 582,000 Escapes with flawed door latches were recalled. The defect in the May recall was traced to the vehicles’ restraints control module originating in Mexico. The part provides sensor information used to deploy side-curtain airbags, but malfunctioned because of a software error, according to a May report. Ford said in a letter to NHTSA that an assembly misalignment caused the door-handle issues.

### TOYOTA TO RECALL 690,000 TACOMA PICKUP TRUCKS

Toyota Motor is recalling about 690,000 Tacoma pickup trucks. The automaker told NHTSA on September 29th that faulty rear suspension systems could cause fuel tank leaks and potentially lead to fires. Toyota said the three to four leaf springs in the rear suspension systems for the affected vehicles—Tacoma 4×4 and Tacoma Pre-Runner pickup trucks from model years 2005 to 2011—could fracture due to stress and corrosion. Toyota said in a statement:

*If this occurs and the vehicle continues to be operated, the broken leaf could move out of position and contact surrounding components, including the fuel tank. If the broken leaf contacts the fuel tank repeatedly, it could puncture the tank and cause a fuel leak.*

Obviously, a fuel leak near an ignition source could result in a fire and that makes this a most serious problem. Toyota says it doesn’t know of any fires—or crashes, injuries or fatalities—associated with the defect.

In addition to another Toyota recall mentioned below, on Sept. 11th, the company said it would recall about 130,000 Tundra Crew-Max Cab and Double Cab vehicles because a possible installation problem could cause airbags to improperly deploy. Toyota has already recalled over 7 million vehicles this year involving various safety-related defects.

### TOYOTA RECALLS 20,000 VEHICLES DUE TO FUEL LEAK RISK

Toyota Motor Corp. has recalled about 20,000 vehicles worldwide for possible fuel leaks. Most of the affected vehicles are in the United States but were also shipped to other countries. The recall involves vehicles with its 2GR-FE engine.
The recall pertains to 25,483 of the Fiat 500L models in the U.S. manufactured between March 3, 2012 and July 25, 2014. The automaker said in its July statement that the recall also includes 4,000 models in Canada. The issue was discovered in June when the NHTSA conducted an 25 mile-per-hour crash test on a “fifth percentile female” not wearing a seat belt in a 2014 model year Fiat 500L at a research facility. The test showed that the driver right femur load didn’t meet the minimum injury criteria, prompting the automaker to launch an investigation into the issue.

In early July, Chrysler learned that Fiat Group Automotive tested a 2015 model year Fiat 500L and discovered a similar driver’s knee air bag deployment as the NHTSA’s testing. Fiat and air bag manufacturer TRW Polska Sp. z o.o.’s analysis found that inconsistencies in the driver’s knee air bag manual folding process could result in variations in the deployment of the knee air bag. TRW updated the manual folding process of the air bag July 16, with Chrysler’s investigation establishing which vehicles might have been affected by the folding problem by the end of the month.

Chrysler said that it isn’t aware of any injuries stemming from the issue but that it is conducting a safety recall of cars potentially affected by the issue. The automaker was to start notifying car owners of the problem in September. Dealers will replace the driver’s knee air bag free of charge.

**HONDA RECALLS MOTORCYCLES**

Honda Motor Co. has recalled 126,000 motorcycles for a second time because their brakes can malfunction. The recall covers Honda’s GL-1800 motorcycles for model years 2001-2010 and 2012. A problem with the secondary brake master cylinder can cause the rear brake to drag, potentially leading to a crash or fire. Honda had received 533 complaints through July 24, including reports of eight small fires. There have been no reports of crashes or injuries as a result of the problem.

Honda originally recalled the motorcycles in December 2011 but continued to receive complaints. It says in documents filed with the National Highway Traffic Safety Administration that the “root cause has not been determined” and it is continuing to investigate. Honda will send a letter to each motorcycle owner explaining how to look for the problem. Motorcycles with the defect can be taken to the dealer for inspection. Owners will get a second letter when repairs and replacement parts are available.

**BAD BOY BUGGIES RECALLS RECREATIONAL OFF-ROAD VEHICLES DUE TO CRASH HAZARD**

About 4,460 Bad Boy Buggies off-road vehicles have been recalled by Bad Boy Buggies, of Augusta, Ga. Incorrect parking brake adjustments and improperly bled brake lines can diminish a consumer’s braking ability, posing a crash hazard. This recall involves gas- and electric-powered, four-wheeled recreational vehicles manufactured by Bad Boy Buggies. The vehicles have bench seats for the driver and passenger, a cargo bed in the rear of the two-person model, and a rear-facing back seat in the four-person model. The recreational vehicles were sold in black, camouflage, green and red, and have 1¾-inch tubular steel exterior frames. The recalled off-road vehicles have serial numbers ranging from 8004970 through 8012901. Serial numbers are printed on a plate or label on the steering column. Brand and model names are printed on the side and front panels of the vehicle. For a list of model names included in the recall, click here: http://www.cpsc.gov/en/Recalls/2014/Bad-Boy-Buggies-Recalls-Recreational-Off-Road-Vehicles/

The vehicles were sold at Bad Boy Buggies dealers nationwide from August 2012 through May 2014 for between $9,600 and $14,400. Consumers should immediately stop using the recalled vehicles and contact Bad Boy Buggies or an authorized dealer for a free repair. Contact Bad Boy Buggies toll-free at 855-738-3711 between 8 a.m. and 5 p.m. ET Monday through Friday, or online at www.badboybuggies.com and click on “Recall Information” at the bottom of the page for more information.

**SHIVERS RECALLS COUNTRY CLIPPER RIDING LAWN MOWERS DUE TO FIRE HAZARD**

Shivers Manufacturing Inc., of Corydon, Iowa, has recalled its riding lawn mowers. The ignition module can fail to ground, resulting in overheating and melting, posing a fire hazard. This recall involves model year 2012, 2013 and 2014 Country Clipper riding lawn mowers. The recalled mowers are equipped with 27-horsepower Kohler Command CV740 or Kohler Courage SV740 twin cylinder engines. The Command engine is dark gray and has the name and model number on a label on the side of the engine near the air filter. The Courage engine has a black engine shroud and has the name and model number on a label on the side of the engine near the air filter.
The recalled mowers were manufactured from October 2011 to May 2014 and include the model names Challenger, Charger, Edge, Jazee, Jazee Pro and Jazee Pro DLX. A full list of model years and model numbers being recalled can be viewed here: http://www.cpsc.gov/en/Recalls/2014/Shivers-Recalls-Country-Clipper-Riding-Lawn-Mowers/.
The mowers were sold at Country Clipper lawn mower dealers nationwide from October 2011 to May 2014 for between $5,300 and $9,500. Consumers should immediately stop using the recalled lawn mowers and contact a Country Clipper dealer to schedule a free repair at 800-344-8237 from 8 a.m. to 5 p.m. CT Monday through Friday or online at www.country-clipper.com and click on Recall on the left side of the page for more information.

**CONTEMPORARY RECALLS 8,070 MOTORCYCLE TIRES**

Continental Tire the Americas LLC (Continental) has recalled certain motorcycle tires in sizes 120/70ZR17 and 120/70R17. The National Highway Traffic Safety Administration (NHTSA) campaign ID number is 14T009. The potential number of affected units is 8,070. The tires in question are ContiAttack SM; ContiSportAttack Comp. Soft; ContiRaceAttack Comp. Medium; ContiRaceAttack Comp. Endurance; and ContiRoadAttack 2 GTW.

According to NHTSA’s Office of Defects Investigation, the affected tires may experience a separation between the tread, belt, and carcass resulting in a loss of tire inflation pressure. Continental will notify owners, and dealers will replace the subject tires with new tires, free of charge. The manufacturer has not yet provided a notification schedule. Owners may contact Continental customer service at 800-847-3549 with any questions. For a complete list of affected tire identification numbers and affected dates of production, please see the “Defect Notice (Part 573)” in the Associated Documents area.

**ORBEA RECALLS AVANT BICYCLES DUE TO FALL HAZARD**

Orbea USA, LLC., of Little Rock, Ark., has recalled about 715 Avant Bicycles. The bicycle front fork can crack, posing a fall hazard. This recall involves all Avant bicycles and carbon framesets sold with hydraulic disk brakes and all Avant bicycles and carbon framesets that are capable of being configured with hydraulic disc brakes. The model numbers are not marked on the bicycles and there is also no color or gender designation. The word Avant is in black or white on the top and head tube of the frameset and the word Orbea is in white on the top and down tube of the frameset.

The bikes were sold at authorized Orbea bicycle retailers nationwide from August 2013 to June 2014 for between $1,200 and $9,000. Consumers should immediately stop using the recalled bicycles and contact Orbea for a free replacement and installation of the bicycle front fork. Contact Orbea toll-free at 888-466-7252 from 8:30 a.m. to 5:30 p.m. ET Monday through Friday, online at www.avantsupport.com and click on the “Support” tab located on the upper right section of the home page or e-mail at avantsupport.us@orbea.com for more information.

**HEARTH & HOME TECHNOLOGIES RECALLS GAS FIRES, STOVES, INSERTS AND LOG SETS**

Hearth & Home Technologies has recalled about 20,000 of their gas fireplaces, gas stoves, gas inserts and log sets. The gas valve in the unit can leak, posing a fire hazard. This recall involves Hearth & Home Technologies®, Heat-N-Glo®, Heatlator®, Outdoor Lifestyles® and Quadra Fire® natural or propane gas indoor and outdoor fireplaces, stoves, inserts and log sets. The brand names and serial numbers are printed on the unit rating plate, located near the controls, and in the instruction manual.

Consumers should immediately stop using the gas fireplaces, stoves, inserts and log sets, turn off the gas to the units and contact the fireplace store where the unit was purchased to arrange for a free inspection and, if necessary, valve replacement. The company’s dealers are contacting known purchasers. Contact Hearth & Home Technologies at 800-883-6690 from 8 a.m. to 8 p.m. CT Monday through Friday, or online at www.hearthnhome.com and click on Notices for more information.


**SIEMENS RECALLS AUDIBLE FIRE ALARM BASE DUE TO RISK OF INJURY**

About 9,000 SBGA-34 Audible Fire Alarm Base units have been recalled by Siemens, of Buffalo, Ill. The fire alarm base can fail to sound an alarm, posing a risk of personal injury and property damage. This recall involves the SBGA-34 audible base that is affixed to ceiling-mounted smoke detectors in order to sound an alarm when the fire alarm system is activated. The audible base has part number 554370-F13 and date codes 0113 through 2314 in a WWYY format printed on a white label on the back of the unit part affixed to the wall. “MODEL SBGA-34” is printed on a blue label also affixed to the back of the device. The base is off-white and measures about 6 inches in diameter. For a full list of fire detectors and alarm systems that use these recalled bases, visit the company’s website: http://www.cpsc.gov/en/Recalls/2014/Siemens-Recalls-Audible-Fire-Alarm-Base/

The detectors were sold at Siemens sales offices, authorized distributors and installers nationwide from February 2013 through June 2014 for about $120. Consumers should immediately contact Siemens to schedule a free inspection and replacement of the recalled audible base. Siemens is directly contacting known owners. Contact Siemens at 800-516-9964 from 7 a.m. to 5:30 p.m. CT Monday through Friday, or online at www.usa.siemens.com/buildingtechnologies and click on ‘Product Safety Recall’ for more information.

**KIDDE RECALLS SMOKE AND COMBINATION SMOKE/CO ALARMS DUE TO ALARM FAILURE**

Kidde hard-wired smoke and combination smoke/carbon monoxide (CO) alarms have been recalled by Walter Kidde Portable Equipment Inc., of Mebane, N.C. The alarms could fail to alert consumers of a fire or a CO incident following a power outage. This recall involves Kidde residential smoke alarm model i20105 with manufacture dates between Dec. 18, 2013 and May 13, 2014, combination smoke/CO alarm i20105SCO with manufacture dates between Dec. 30, 2013 and May 13, 2014, and combination smoke/CO alarm model KN-COSM-IBA with manufacture date between Oct. 22, 2013 and May 13, 2014. They are hard-wired into a home’s electric power. The i20105S and i20105SCO come...
with sealed 10 year batteries inside. The KN-COSM-IBA model has a compartment on the front for installation of replaceable AA backup batteries. The alarms are white, round and measure about 5 to 6 inches in diameter. Kidde is engraved on the front of the alarm. Kidde, the model number and manufacture dates are printed on a label on the back of the alarm. ‘Always On’ is also engraved on the front of alarms with sealed 10-year batteries.

The smoke alarms were sold at CED, City Electric Supply, HD Supply, Home Depot, Menards Inc. and other retailers, electrical distributors and online at Amazon.com, HomeDepot.com and shopkidde.com from January 2014 through July 2014 for between $30 and $50. Consumers should immediately contact Kidde for a free replacement smoke or combination smoke/CO alarm. Consumers should keep using the recalled alarms until they install replacement alarms. Contact Kidde toll-free at 844-555-9011 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.kidde.com and click on Recalls for more information.

IKEA Recalls Children's Swing Due To Fall Hazard

The GUNGGUNG child's swing has been recalled by IKEA North America Services LLC, of Conshohocken, Pa. The suspension fittings can break causing a child to fall from the swing, posing a risk of serious injury. This recall involves IKEA GUNGGUNG Swing. GUNGGUNG is intended for indoor and outdoor use by children ages 3-7. It is made of green polyester fabric and hangs from a plastic suspension fitting attached to steel hooks. The full length of the suspension strap, including the sling seat, is 17 feet and the width of the seat is 0.8 feet. A permanent label is attached to one of the suspension straps, showing age recommendation (3-7), IKEA logo, Design and Quality IKEA of Sweden, GUNGGUNG article number (3-7), IKEA logo, Design and Quality IKEA of Sweden, GUNGGUNG article number 30243974, supplier number 17915 and Made in Vietnam. There have been four reports worldwide including one in Germany, two in Austria and one in Canada of the suspension fittings breaking in use. In one incident a child fell and sustained a fractured leg. No incidents have been reported in the US.

They were sold exclusively at IKEA stores nationwide and online at www.ikea-usa.com in August 2014 for $20. Consumers should immediately take down the swing to prevent use by children and return it to any IKEA store for a full refund. Proof of purchase is not required to receive a full refund for the return. Contact IKEA toll-free at 888-966-4532 anytime or online at www.ikea-usa.com and click on the recall link at the top of the page for more information.

AmTRAN Video Recalls To Repair 42-Inch JVC Flat Panel Televisions

About 27,000 JVC 42 inch flat panel televisions have been recalled by AmTRAN Video Corporation, of Irvine, Calif. The neck of the stand can crack and cause the television to tip over unexpectedly, posing a risk of impact injury to the consumer. This recall involves JVC 42-inch, Emerald Series Full HD 1080P LED flat panel televisions, model EM42FTR and serial number beginning with “T”. The flat panel televisions are black with "JVC" printed in the lower center of the television front. Model and serial numbers are located on the bottom left on the back of the television. JVC has received 16 reports of cracked television stand necks. No injuries have been reported.

The televisions were sold at BJ's Wholesale, Costco Wholesale, Sam’s Club, Walmart, and other retail stores nationwide, online at Walmart.com, Costco.com, and other internet retailers from February 2014 through August 2014 for between $370 and $470. Consumers using the recalled television neck of the stand can crack and cause the television to tip over unexpectedly, posing a risk of impact injury to the consumer. Contact AmTRAN Video toll-free at 855-328-6650 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.jvc-tv.com and click on the Safety Notice tab at the bottom of the page for more information.

iDevices Recalls Temperature Probes Due To Ingestion Hazard

Cooking thermometer probes have been recalled by iDevices LLC, of Avon, Conn. The plastic insulator located inside the stainless steel probe is not heat resistant and can melt and fall into food, posing an ingestion hazard. This recall involves all Pro Ambient Temperature Probes and Pro Meat Probes manufactured from May 2014 through June 2014. The probes were sold separately as an accessory for the iGrill, iGrill2, iGrillMini grilling thermometers and the Kitchen Thermometer and Kitchen Thermometer mini cooking thermometers. The meat probe was also sold as a component of the iGrill2 set.

The temperature probes were sold at Ace Barnes Hardware, Alabama Gaslight and Grill, AT Guys, Bass Pro Shops, BBQ Outfitters, Brookstone, Calvert, Chef JJ’s Backyard, Coastal Cupboard, Combined Pool & Spa, Goodwood Hardware & Outdoors, Gourmet Chef, Great News Cookware & Cooking School, Hartville Hardware, Helping U BBQ, Hopp’s Sound and Electric, Kansas City BBQ, Kitchen Window, Orchard Supply Hardware, Palmetto Propane, Shoppers Choice and online at Amazon.com, Firecraft.com, Gilt.com, HBBQSupply.com, iDevicesinc.com, iGet.it, OutdoorCooking.com, SharperImage.com, Some-iCoolThings.com, SpaPartsDepot.com and TouchofModern.com from May 2014 to June 2014. The probes sold separately for about $25. The iGrill2 set sold for about $100. Consumers should immediately stop using the recalled temperature probes and contact iDevices for a free replacement. Contact iDevices LLC toll-free at 888-313-7019 from 9 a.m. to 5:30 p.m. ET Monday through Friday, or visit the company’s website at www.iDevicesInc.com and click on the recall link at the top of the page for more information.

The probes consist of a curved stainless steel rod attached to a mini connector by a steel braided cable. Pro Ambient Temperature probes are about 6 inches long with a metal grate clip on the end. Pro Meat Probes are about 6 3/4 inches long. The stainless steel probe tube where attached to the braided cable. iGrill Pro Meat Probes and iGrill Pro Ambient Probes came with either a red or yellow rubber sleeve and an oval black plastic cord holder.

Kitchen Thermometer Pro Meat Probes and Kitchen Thermometer Pro Ambient Probes came with a green rubber sleeve and a round white plastic cord holder. The iDevices logo is stamped into the top of the cord holder. Recalled probes have only two indentations, or crimps, in the base of the probe tube where attached to the braided cable. iGrill Pro Meat Probes and iGrill Pro Ambient Probes came in red packaging.

Kitchen Thermometer Pro Meat Probes and Kitchen Thermometer Pro Ambient Probes came in green packaging. The iDevices name and logo and either “iGrill Pro Meat Probe,” “iGrill Pro Ambient Temperature Probe,” “Kitchen Thermometer Pro Meat Probe” or “Kitchen Thermometer Pro Ambient Probe” are printed on the front of the packaging. UPC number 852931005148, 852931005193, 852931005162 or 852931005216 is printed on the bottom of the packaging. The firm received 11 reports of the probe overheating and the plastic insulator melting during normal use. No injuries were reported.

The recall involves JVC 42-Inch JVC Flat Panel Televisions sold at Ace Hardware, Sam’s Club and other internet retailers from February 2014 through August 2014 for between $370 and $470. Consumers using the recalled temperature probes and contact iDevices for a free replacement. Contact iDevices LLC toll-free at 888-313-7019 from 9 a.m. to 5:30 p.m. ET Monday through Friday, or visit the company’s website at www.iDevicesinc.com and click on the recall link at the top of the page for more information.

The kitchen thermometers were recalled by iDevices LLC, of Avon, Conn. The stainless steel probe is not heat resistant and can melt and fall into food, posing an ingestion hazard. This recall involves all Pro Ambient Temperature Probes and Pro Meat Probes manufactured from May 2014 through June 2014. The probes were sold separately as an accessory for the iGrill, iGrill2, iGrillMini grilling thermometers and the Kitchen Thermometer and Kitchen Thermometer mini cooking thermometers. The meat probe was also sold as a component of the iGrill2 set.

The temperature probes were sold at Ace Barnes Hardware, Alabama Gaslight and Grill, AT Guys, Bass Pro Shops, BBQ Outfitters, Brookstone, Calvert Retail, Chef JJ’s Backyard, Coastal Cupboard, Combined Pool & Spa, Goodwood Hardware & Outdoors, Gourmet Chef, Great News Cookware & Cooking School, Hartville Hardware, Helping U BBQ, Hopp’s Sound and Electric, Kansas City BBQ, Kitchen Window, Orchard Supply Hardware, Palmetto Propane, Shoppers Choice and online at Amazon.com, Firecraft.com, Gilt.com, HBBQSupply.com, iDevicesinc.com, iGet.it, OutdoorCooking.com, SharperImage.com, Some-iCoolThings.com, SpaPartsDepot.com and TouchofModern.com from May 2014 to June 2014. The probes sold separately for about $25. The iGrill2 set sold for about $100. Consumers should immediately stop using the recalled temperature probes and contact iDevices for a free replacement. Contact iDevices LLC toll-free at 888-313-7019 from 9 a.m. to 5:30 p.m. ET Monday through Friday, or visit the company’s website at www.iDevicesInc.com and click on the recall link at the top of the page for more information.
**Cabrinha Recalls Kiteboarding Control System Due to Risk of Injury**

About 1,700 Cabrinha Kiteboarding 1X and Overdrive 1X Control Systems have been recalled by the Manufacturer: Neil Pryde Limited, Hong Kong. The RecoilTM spring on the control mechanism can jam, leading to a loss of control, which poses a risk of injury. The 1X and the Overdrive 1X control systems are both comprised of a lightweight control bar to control and depower the kite, a set of flying lines and a harness loop/quick release (QR) mechanism. Both products have an orange and black EVA grip and a new QuickLoopTM harness loop/QR. The RecoilTM spring mounted along the depower line is used to maintain the position of the trim adjusters. The 1X control system (model number KS51XSCFX) is a fixed length and is available in two sizes: 45 cm and 55 cm. The Overdrive 1X (model number KS5SSDODO) is adjustable between two bar lengths and comes in sizes: 48-56 cm and 57-62 cm. Model numbers are located on a cloth tab attached to the bungee line restrainers at the end of the bars. Cabrinha has received two reports of the spring jamming. No injuries have been reported.

The systems were sold at Sea & Sky Sports, Scratch Kiteboarding, Watersports West, Wind Over Water and Wind Stalkers Kite Boarding and other specialty watersports stores and websites worldwide in August 2014 for about $570. Consumers should immediately stop using the recalled control system and contact any Cabrinha authorized dealer for a free repair part. A list of authorized dealers can be found at www.cabrinhakites.com/dealers.html. Contact Pryde Group Americas (PGA); collect call at 305-591-3922 from 9:30 a.m. to 4:30 p.m. ET Monday through Friday or online at www.fgxi.com and click on Pro Probe Recall on the bottom of the page for more information.

**More Than 200,000 Pairs Of Children’s Sunglasses Recalled**

Due to the excessive amounts of lead found in the surface paint of the sunglasses, the company FGX International has announced a recall of nearly 215,000 pairs of children's sunglasses. Prolonged exposure to lead in children can cause convulsions, stupor, hyperirritability and even more severe neurological effects that may lead to death. All of the children's sunglasses come in a variety of 20 different styles featuring Disney, Marvel and Sears/Kmart brands. Check the left temple arm of the sunglasses for the style numbers.

According to the Consumer Product Safety Commission and FGX International, no reports of illness or injury have occurred before this recall was announced. The lead-laden children's sunglasses were manufactured in China. From December 2013 to March 2014, the recalled children’s sunglasses were sold at Bon Ton, CVS, K-mart, Rite-Aid, Walgreen and other retail stores across the nation. Each pair was sold for between $7 and $13.

In order to protect any nearby children or adults from the dangerous sunglasses, FGX International asks its consumers to immediately return the sunglasses to FGX International to receive a free replacement or refund, including free shipping and handling. For more information on this recall and how to obtain your free replacement sunglasses, contact FGX International toll-free at 877-277-0104 from 8:30 a.m. to 4:30 p.m. ET Monday through Friday or online at www.fgxi.com and click on "Recall" for more information. If you need a list of the style numbers, contact Shanna Malone at Shanna.Malone@beasleyallen.com.

**FDA Tells Compounder To Recall Contaminated Goods Again**

The U.S. Food and Drug Administration (FDA) has told, for a second time, compounder NuVision Pharmacy Inc. to recall all of its sterile drug products after an agency investigation found continued evidence of contamination since it first requested the recall last year. The agency said that given the high rate of contamination found during its June inspection of the facility owned by Dallas-based Downing Labs LLC, which operates NuVision, there was a high likelihood that contaminated units are currently in distribution. The FDA also said the compounder hasn’t remedied the situation since it last recommended a recall in July 2013. FDA Commissioner Melinda K. Plaisier said in a letter:

> During this inspection, FDA investigators found that you identified nonsterility in several different lots of drug products intended to be sterile that were produced at your facility. At least 19 purportedly sterile drug product lots produced between June 2013 and May 2014 tested positive for microbial contamination. In addition, three lots failed endotoxin testing.

The FDA said the use of a contaminated drug product that is thought to be sterile could lead to infection, hospitalization and potentially organ damage or death. The formal request letter is not the first time the FDA has warned NuVision about problems with its supposed sterile products. The company recalled one of its products in April 2013, but refused to recall more products despite FDA objections. The FDA also said in the letter that Downing Labs’ investigations were not thorough and did not provide “sound scientific data” to support its conjectures regarding the causes of contamination. Additionally, the corrective measures the compounder took were not effective, the agency said. The FDA said:

> The continued failures indicate that Downing Labs has not yet identified and corrected the root causes of the failures. The corrective actions you have implemented are insufficient to address all of the objectionable conditions found at your firm and to assure sterility.

Janet Woodcock, director of the FDA’s Center for Drug Evaluation and Research, said in a statement that the recall was a result of the FDA’s priority on patient safety. She said:

> We recommend health care professionals stop prescribing sterile drugs from Downing Labs because they pose serious potential risks to patients. Patients deserve medications that are safe, effective, and of high quality no matter who makes them, and the FDA will continue to take action to protect patients.

**California’s Taylor Farms Recalls Some Tomatoes And Salad Kits**

No sicknesses have yet been connected to a Taylor Farms recall of several lots of tomatoes and salad kits for possible Salmonella contamination. The Tracy-based Taylor Farms, located in California’s San Joaquin County, is one of the nation’s biggest producers of salad makings.

Taylor Farms has recalled the Expo Fresh Roma tomatoes it shipped to Costco locations in Los Angeles and Hawthorne, Calif.; Tacoma and Lynnwood, Wash., and Las Vegas, N.V. It involves only those tomatoes listed as packed on Sept. 5 or 6, 2014. Also included in the recall is Sicilian Vegetable Salad sold at deli counters at
installed car seats and booster seats reduce the risk of serious and fatal injuries by more than half.

Beasley Allen lawyer Gibson Vance commented, “We are excited to say that this year’s Seat Check Saturday event was a big success. The Safe Kid USA technicians worked non-stop installing almost 50 safety seats. This is, by far, the most successful event we've had in terms of number of safety checks. Beasley Allen Law Firm is proud to encourage safety by promoting Seat Check Saturday. This is a simple way to protect children and we are glad to be a part of it.”

Safety of small children, especially when riding in automobiles, is very important and is a top priority for parents. When you consider the information set out below, you will see how serious this matter is:

- Seven children die each day as a result of improperly fastened child seats;
- Seventy-five percent of child seats are not properly installed or fitted to the child;
- Motor vehicle accidents are the leading cause of death for children ages 3-6 and 8-14;
- Properly installed car seats and booster seats reduce the risk of fatal injury by more than half.

If you missed the most recent Seat Check Saturday event in your area, you can find a safety seat inspection site near you. Visit SafeKids.org. This will provide you with information about Safe Kids Coalition groups in your area, and allow you to search for a seat inspection site near you. National Child Passenger Safety Week is sponsored annually by the National Highway Traffic Safety Administration.

You can find more information about child safety seats and vehicle safety at the NHTSA website. The Centers for Disease Control and Prevention also has a helpful website with information about child safety seats. If you would like more information on this subject, contact Helen Taylor, Public Relations Coordinator for our firm, at 800-898-2034 or by email at Helen.Taylor@beasleyallen.com.

XXIII.
FAVORITE BIBLE VERSES

Mrs. Laurice Kern, who attends St. James United Methodist Church, has been a long-time friend. Laurice worked for years as personal secretary to Dr. Paul Hubbert at AEA. She says the verses in Proverbs are her favorite verse in the Bible.

Trust in the Lord with all your heart, And lean not on your own understanding;

ing. In all your ways acknowledge Him, And He shall direct your paths.

Proverbs 3:5-6

Rebecca Gilliland, a lawyer in our Consumer Fraud Section, furnished a verse for this issue. She says she chose the passage set out below, not for the cliché description of love (and perennial wedding quote) that most read it as, but because of the lessons it gives for all aspects of life. Rebecca says this passage shows that love should be at the root of everything we do.

If I speak in the tongues of men or of angels, but do not have love, I am only a resounding gong or a clanging cymbal. If I have the gift of prophecy and can fathom all mysteries and all knowledge, and if I have a faith that can move mountains, but do not have love, I am nothing. If I give all I possess to the poor and give over my body to hardship that I may boast, but do not have love, I gain nothing.

1 Corinthians 13:1-3

Katy Morgan, who works as a Legal Secretary in our firms’ Personal Injury/Product Liability Section, furnished a verse this month. She says it’s her favorite daily bible verse and one that she says daily.

[In reference to your former manner of life, you lay aside the old self, which is being corrupted in accordance with the lusts of deceit, and that you be renewed in the spirit of your mind, and put on the new self, which in the likeness of God has been created in righteousness and holiness of the truth.”

Ephesians 4:22-24

Cathy Hall, another long-time Beasley Allen employee, also furnished a verse. She says the verse reminds that her that God expects her light to be shining always, no matter the situation or circumstance that faces her. Cathy says since God saved her from darkness, she has an obligation to let her light shine. She has done that!

You were once darkness, but now you are light in the Lord.

Ephesians 5:8

Frank Woodson, a lawyer in our Mass Torts Section, also furnished a verse for this issue. He says that in our business we need to have wisdom (Proverbs 10-11) as we deal with many companies seemingly run by men described in Proverbs 2:12-15

When wisdom enter your heart, and knowledge is pleasant to your soul, dis-
creati on will preserve you: understanding will keep you, to deliver you from the way of evil, from the men who speak perverse things, from those who leave the path of uprightness—to walk in the way of darkness: who rejoice in doing evil, and delight in the perversity of the wicked; whose ways are crooked, and who are devious in their paths.

Proverbs 2:12-15

Rhon Jones, who heads up our Toxic Torts Section and who is leading the firm’s BP litigation, says the verse set out below is his favorite verse.

Whatever you do, do your work heartily, as for the Lord rather than for men, knowing that from the Lord you will receive the reward of the inheritance.


XXIV. CLOSING OBSERVATIONS

PUBLIC CITIZEN STILL WORKING FOR ORDINARY CITIZENS

It’s probable that the name Grover Norquist means very little to the vast majority of persons who will vote in this year’s general election. But I can assure our readers that the GOP candidates for the U.S. Senate know this man very well. Norquist operates under the banner of “Americans for Tax Reform,” But his mission has been and currently is an arena that has little to do with “taxes.” Norquist has been a leader in the efforts to destroy the civil justice system and specifically to do away with the American jury system. He has had the financial support of the Koch brothers and other anti-consumer persons and groups. Norquist has done a masterful job of deceiving the American people, including the news media, about such things as governmental regulation and the litigation climate in the U.S.

The election of GOP candidates for the U.S. Senate is a top priority for Norquist and his allies. It was reported that republicans are already starting to focus on what they could accomplish through a “budget reconciliation process” next year if they win a majority of the U.S. Senate in November’s midterm elections. The “budget reconciliation” is filibuster-proof and could be used to enact a great deal of anti-consumer legislation. Norquist has given warning that Republicans are making plans to use reconciliation to make changes in the civil justice system and to pass legislation to further weaken consumer rights.

As I have mentioned in previous issues, Public Citizen is a group that has done a very good job of defending the civil justice system. Public Citizen has fought very hard for a viable and independent court system. The consumer advocacy group said recently that events over the past few months underscore how vital our civil justice system is—and how Big Business’s pervasive, ongoing efforts are determined to undermine it. Consider these events and there are many more:

• Many business owners harmed by the 2010 BP Deepwater Horizon disaster and still waiting to be made whole. BP has fought to get out of paying claims under the settlement it helped create. Now BP has filed a petition for certiorari to the U.S. Supreme Court challenging the very settlement to which it agreed and worked for originally.

• More than 650 people were injured or died when General Motors made a decision to ignore crucial safety regulations and not issue recalls for defective ignition switches. As of Sept. 1, GM has issued 45 recalls this year, involving 29 million vehicles worldwide, with more than 24.6 million vehicles in the United States being recalled. This battle is ongoing and in high gear.

• Toyota’s handling of its unexpected, sudden acceleration problems caused by a defective computer system is a prime example of how automakers cover up known safety defects. In this case the defect was in the electronic throttle control system. Toyota had known of the defect for years before it notified NHTSA and let vehicle owners know of the problem. Our firm successfully handled the one case in an Oklahoma state court that was the catalyst that brought about a $1.1 billion settlement. Some 450 cases involving deaths and bodily injuries were also settled after the jury verdict in Oklahoma. Our case was the single factor that caused Toyota to change its litigation strategy and elect to reach a global settlement of all cases.

• Earlier this year, a chemical storage facility operated by Freedom Industries spilled into West Virginia’s Elk River an estimated 10,000 gallons of crude MCHM—a chemical mixture used in the coal production process—and poisoned the water supply for 300,000 West Virginians for nearly two weeks.

Most Americans believe access to justice to be extremely important. Unfortunately, many of them haven’t realized how intense the attacks on the system have been. Neither do they fully understand how important the courts really are until they need the system.

The sad truth is that the federal government does a very poor job of regulation insofar as safety issues are concerned. That makes the court system even more important. We know from our experience in litigation involving the automobile, drug and other industries, that the government’s regulation is grossly inadequate.

Greed in Corporate America has caused consumer rights to be put in severe jeopardy. The consequences of allowing corporations to put profits over people have been quite apparent. Public Citizen needs our help to ensure consumers’ rights are represented in Congress and before the courts across the land. We can’t sit back and depend on others to fight our battles.

A MONTHLY REMINDER

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732 - 1802)

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

Louis Brandeis, 1937

U.S. Supreme Court Justice

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
I have asked my good friend Rev. Walter Albritton to allow us to use one of his weekly columns this month. Walter, a pastor at St. James United Methodist Church, where Sara and I are members, is a devoted follower of Jesus Christ and a tremendous preacher of the Gospel. This “preacher” has a definite gift of being able to communicate a message to folks. A big problem in today’s world relates to “giving up” when things don’t go as expected. Walter’s message set out below speaks to this problem.

**WHAT TO DO WHEN YOU FEEL LIKE GIVING UP**

Life is hard. There are times when evil wins. We do the right thing but wrong prevails. Those who lie and cheat have the upper hand. We see a tiny light in the tunnel of our darkness but it turns out to be a train that runs over us. In such times we are tempted to throw up our hands and quit. Why keep trying to do the right thing if we lose? Doubt takes over and we wonder if the way of love really is the winning way. When our faith is tested by the difficulties of life, it helps to remember that God was not surprised. Nothing surprises God. He knows what is coming. Reading the Bible reinforces this truth. God uses the Bible to strengthen our faith.

One way he does that is by inspiring me when I read about people like the prophet Daniel. Reading the story of Daniel reminds me that God will help me if I turn to him. I don’t understand everything I read in the Book of Daniel but I still find great lessons in this small book. Take, for example, that story about the king’s dream. The king’s demand of Daniel and the wise men was impossible. He ordered them to tell him what he had dreamed and what his dream meant. The wise men gave up. It was impossible to know what the king had dreamed.

Daniel, however, turned to the Lord in prayer. He did not turn to his own cleverness; he turned to God. God answered Daniel’s prayer so Daniel could tell the king both his dream and its meaning. The challenge for us is to believe that God will help us like he helped Daniel. When there seems to be no human solution, we can by faith turn to God. The world says, “Give up.” Faith says, “Turn to God.” Daniel believed what Jesus would teach us years later—“Nothing is impossible with God!” We can learn to ask God, and trust God, even when our situation seems hopeless. No matter what the problem, God is able to help us.

Our friends in Zambia, Alfred and Muaume Kalembo, had a problem. Their neighbors begged them to teach their small children to read and write. The only space available was a small room that served as Alfred’s study. So they decided to turn the little room into a school, naming the school the “God Is Able School for Children.” Soon Alfred’s study became a classroom where Muaume would teach ten children. Realizing they could enroll a hundred more children if they had the facilities, Alfred and Muaume believed what Daniel believed—God is able! Today they are operating three schools and building a fourth!

My friend John has been successful in business more than once. In fact, three times he lost everything and had to start over from scratch. But he refused to give up. While he lost everything financially, be did not lose his faith. He continued to believe that God was able to help him succeed—and be has! A sign in a churchyard expresses what John believes: “When you have nothing but God, you have everything you need.” Many people have everything but God and they are miserable. What they fail to see is that what they cannot see is what really matters. Things have no eternal value. The Bible teaches us that what is visible has no lasting meaning; only the invisible lasts forever!

A man in Alabama became so successful that he was considered the state’s most generous philanthropist. He had homes in several states. He had his own private jet. Then his world collapsed. He was fired as CEO of the very company he had built. His success was achieved, his accusers say, through fraud and deception. His “kingdom” of wealth and extravagance crumbled, like a sand castle.

Daniel was not impressed with earthly kingdoms. They have no future. God, however, according to Daniel, is building a kingdom “that shall never be destroyed.” We may lose “the greatest job in the world.” We may lose our dream home. Our worldly treasures may vanish into thin air. But what we have invested in the Kingdom of God we cannot lose. What we have given away, in the service of Jesus, will be ours forever.

When the world’s kingdoms are tottering and falling all around us, we can rejoice that we belong to an eternal Kingdom, the Kingdom that will remain when everything else has been destroyed. Think about Daniel. We do not know if he wore expensive clothes, if he lived in a fine home or if he drove an expensive camel. We do not know if he was a member of a Country Club or if he was privileged to dine in “The Club” of his city. What we do know about Daniel is that he believed God was able to meet his needs and that God’s kingdom could never be destroyed. Should it not be our fervent prayer that we may live with such faith in these days? God is able! To believe that, and to live by it, could be the key to great living until our journey ends.

I join with Walter in his prayer, which reminds us that God is good and that God is able to meet all of our needs. God can also provide for us the means by which to solve any problem on issues that confront us. When we allow God to truly be in control in our lives we will never give up. Instead, we will, with God’s help, deal with any situation, and go forward in our lives. I appreciate Walter giving us this timely message.
No representation is made that the quality of 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 175 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.