I. CAPITOL OBSERVATIONS

THE EIGHTH ANNUAL BEASLEY ALLEN LEGAL CONFERENCE

Our firm is sponsoring the eighth annual Beasley Allen Legal Conference and Expo this month. We believe it to be the premiere annual event for Alabama lawyers who are in private practice. Based on registrations so far, more than 1,500 lawyers are expected to attend the two-day event. It starts on Nov. 20 at the Renaissance Montgomery Hotel & Spa at the Convention Center. This is the largest gathering of its kind in the state, and we are told one of the largest legal conferences in the nation.

Lawyers who haven’t already signed up can still register ONLINE by visiting expo.beasleyallen.com. This annual event for Alabama lawyers has been highly successful. Lawyers can enhance their knowledge of current legal issues while earning Continuing Legal Education credits. Again this year, we will offer a full 12 hours free CLE credit, including one hour of Ethics.

The Conference is a valuable opportunity to hear from lawyers who are knowledgeable in specific areas of law. Relationships can be established that will help lawyers develop their practice. Practice areas to be addressed will include Product Liability, Mass Torts and Fraud. We have put together a program that should be both interesting and instructive. I have always learned something new at every singe one of the previously held conferences. At this one, we will put a special emphasis on the ongoing GM litigation.

A legal services expo will feature a very limited number of the nation’s top legal services providers. This will provide lawyers the opportunity to learn more about the leading products and services that can support their litigation efforts. Vendors will also be on hand with a wealth of information about the latest technologies and strategies to help in the investigation and preparation of cases. They will provide live demonstrations of new products, and answer any questions about the best way to utilize these resources to enhance a law practice. The support of our sponsors makes it possible for our firm to provide a program that we believe will benefit all attendees. We believe the conference this year will be a good one. Our Platinum Sponsors this year are Jackson Thornton Valuation and Litigation Consulting Group, and Freedom Reporting, Inc. We appreciate their support.

You can follow us on Twitter @BeasleyAllen for updates about conference activities before, during and after the conference! Use #BALegalCon to follow the conversation and add your voice. Registration and hotel reservation information is available at the conference website, expo.beasleyallen.com. You can also download a copy of the Agenda.

AN EXPLANATION OF HOW BEASLEY ALLEN IS STRUCTURED

I thought it might be good this month to take a look at how Beasley Allen is set up from an organizational perspective. We currently have 85 lawyers and 225 support staff working at Beasley Allen. The firm is divided into several sections: Consumer Fraud, Mass Torts, Personal Injury/Products Liability and Toxic Torts. Lawyers and support staff in each section concentrate in litigation that falls within their specific area of experience. They do nothing other than that which falls within the parameters of their section. We believe this approach helps us do a better job for our clients. It definitely has worked for us. Each section has a lawyer as the Head with a staff person designated as the Section Administrator. The Sections each have legal assistants, legal secretaries and clerical personal. The firm’s law clerks and investigators work with the Sections as needed.

Personal Injury and Product Liability

When considering a personal injury or product liability lawyer, we believe that experience and a proven track record are critical to a successful outcome in a case. Lawyers at Beasley Allen in our Personal Injury/Product Liability Section have acquired the reputation of being one of the most successful personal injury and product liability law firms in the country. Our lawyers in this Section have built this national reputation by working hard and handling clients’ cases with skill and diligence. The lawyers work closely with their support staff to provide thorough and detailed evaluations, investigation and research for each case. We have learned that there is no substitution for planning and carrying out the plan in each case in order to adequately represent our clients.

For our non-lawyer readers, a personal injury occurs when a person has suffered some form of injury to the body, either physical or psychological. In every case, the claim involves our client’s injury having been caused by the wrongful conduct of another person, corporation or entity. The claims are generally based on negligent or wanton conduct. Occasionally the conduct will have been intentional. The most common type of personal injury claims arise out of traffic crashes, incidents in the workplace, assaults, accidents in the home, aviation accidents, nursing home neglect and abuse, and sexual abuse.

The lawyers in this Section also handle product liability cases. When individuals are harmed, injured or killed by an unsafe or defective product, there will as a general rule be a cause of action against the manufacturer, supplier, distributor or retailer of

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that product. This area of law is known as Product Liability Litigation. According to the U.S. Consumer Product Safety Commission, deaths, injuries and property damage from consumer product incidents cost more than $700 billion each year.

In the United States, the claims most commonly associated with product liability are negligence, strict liability, breach of warranty and various consumer protection claims. The majority of product liability laws are determined at the state level and vary widely from state to state. Each type of product liability claim requires different elements to be proven in order to present a successful claim. A products liability claim is usually based on one or more of the following: a design defect; or a manufacturing defect; a failure to warn of a defect and hazardous condition. Product liability claims require the utilization of expert witnesses. We make it a rule to use experts who are highly trained and qualified in this field of expertise.

Fraud Litigation

Lawyers in our Consumer Fraud Section handle cases in a number of specific areas. Originally, the section dealt primarily with consumer fraud litigation. It has grown over the years into other areas. There are a number of situations covered under the area of law known as Consumer Fraud. These may touch industries such as banking and finance, insurance, securities and investments, and other areas of business. Fraud claims of all sorts are handled by lawyers in our Consumer Fraud Section.

Our firm enjoys a national reputation for excellence in the area of consumer fraud litigation. Lawyers in the Section handle individual cases as well as class actions. Our firm has been involved in litigation throughout the country. We have also been a national leader in the ongoing battle against mandatory binding arbitration in consumer contracts. We have led the fight to preserve the constitutional right to trial by jury. Arbitration has been used by the giants in Corporate America to make it difficult for consumers to receive justice when they are victims of corporate wrongdoing and abuse. For further information, contact Dee Miles at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Roman Shaul at Roman.Shaul@beasleyallen.com or Alison Hawthorne at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Roman.Shaul@beasleyallen.com or Alison.Hawthorne@beasleyallen.com.

Whistleblower Litigation

Beasley Allen lawyers continue to handle various types of whistleblower lawsuits. Our primary focus is suits under the Federal False Claims Act, which allows private citizens to bring lawsuits on behalf of the United States to recover monies owed to the government. The law provides citizen-plaintiffs, called “relators,” with powerful incentives—sometimes up to 30 percent of the amount recovered—to report instances of fraud against the federal government. The relator must have first-hand knowledge of the alleged fraudulent activity.

Government health care programs, such as Medicare and Medicaid, are common targets of fraud. Studies have shown as much as 10 percent of Medicare and Medicaid charges are fraudulent. Government contracts, particularly in the defense industry, are another area where fraud is prevalent. We also see a tremendous amount of fraud in the for-profit education industry, which relies on federal student loans and grants. For further information, call 800-898-2034 and ask for either Lance Gould, Archie Grubb or Andrew Brashier, lawyers who handle whistleblower claims. You can also email them at Lance.Gould@beasleyallen.com, Archie.Grubb@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

Business Litigation

Lawyers in the Consumer Fraud Section also handle cases that fall under the umbrella of Business Litigation. Lawyers in the Section are dedicated to representing individuals and businesses in all sorts of disputes and claims they may have relating to business transactions. Areas of practice for the lawyers in this section include fraud claims, breach of contract, antitrust price-fixing, patents, and theft of trade secrets where a business is the victim of wrongdoing by another business. Many businesses have found that representation by our firm on a contingency fee basis is the best way for them to resolve their business litigation claims against other companies.

When business disputes occur between a business and an individual or between two business entities, resolution without resorting to litigation may be preferable for all parties involved. In cases where that just isn’t possible, a good business litigation lawyer is needed. In order to protect the rights and interests of a company, an experienced lawyer who has successfully handled business-related claims is an absolute necessity. We don’t do any defense work in this type litigation, handling only cases for the victim’s side of a case. In other words, we don’t defend cases. For further information, contact Dee Miles, Roman Shaul, or Alison Hawthorne at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Roman.Shaul@beasleyallen.com or Alison.Hawthorne@beasleyallen.com.

Employment Law

Labor and employment law is a most complex area of law. Our firm has lawyers in our Consumer Fraud Section who handle these cases on a regular basis. These lawyers’ practice is confined only to employment cases. Their cases are based on both federal and state statutes, as well as administrative regulation and judicial precedent. The U.S. Department of Labor is the national regulatory agency that oversees employment laws. This area of law examines the actions of both the employer and the employee, the rights and responsibilities of each, and their relationship with one another. Situations that may be addressed under the umbrella of Labor and Employment Law include minimum wage and overtime pay, unfair labor practices, discrimination, employee benefits, worker’s compensation, workplace safety, and whistleblower claims. If you need more information on any of the subjects listed above, contact Lance Gould or Larry Golston, lawyers in our Consumer Fraud Section, at 800-898-2034 or by email at Lance.Gould@beasleyallen.com or Larry.Golston@beasleyallen.com.

The Mass Torts Section

The lawyers in the firm’s Mass Torts Section handle cases that involve multiple claimants who have suffered harm from a single source. For example, that source can be a manufacturer of medications and drugs or it can be a manufacturer of medical devices. The lawyers in the Section have been privileged over the years to represent individuals who have been harmed by the pharmaceutical and medical device industry. Our lawyers are honored to be among an exclusive group of trial lawyers who are willing and able to stand up against huge pharmaceutical companies and the manufacturers of medical devices. These two industries know all too well that their industries are inadequately regulated and the companies have taken full advantage of it.

It has been recognized by several organizations that Beasley Allen is one of the largest and most technologically advanced Mass Torts practices in the country. Our team of experienced lawyers represents individuals located in all areas of the country. Furthermore, they represent victims with a wide range of claims against many different companies that manufacture and market defective pharmaceuticals and medical devices.

Persons trust their health and safety to the makers of drugs and medical devices.
They rightly expect that products have been properly tested and have passed all types of screenings to make sure the products are safe prior to them being placed on the market. Unfortunately, in some situations, this is simply not true. There have been a huge number of unsafe drugs and medical devices put on the market. All too often we find that the top priority of drug and medical device makers is profit, not patient health and safety, and therein lies a major problem. Rather than eliminating potential safety problems, the manufacturers are slow to examine and even slower to admit that a drug or device is defective and dangerous.

Environmental

As most all of us know, protection of people and their property from large corporate polluters is extremely important. Lawyers in our Toxic Torts Section handle cases for individuals, businesses, government agencies and other entities where pollution has caused damage and injury. A unique feature of our firm’s environmental toxic tort practice is our ability to represent a large number of people harmed by damage to their property. There are many types of major environmental pollutions. Examples include air pollution, water pollution, and soil contamination. The effect pollutants have on human health is serious and sometimes deadly. A brief explanation may be in order:

- Air pollution is the release of chemicals and particulates into the atmosphere. Common examples include carbon monoxide, sulfur dioxide, chlorofluorocarbons (CFCs).
- Water pollution occurs via surface runoff, leaching to groundwater, liquid spills, or wastewater discharges.
- Soil contamination—among the most significant are hydrocarbons, heavy metals, MTBE, herbicides, pesticides and chlorinated hydrocarbons. Soil can become infertile and unsuitable for plants.

Lawyers handle all sorts of environmental litigation in our Toxic Torts Section. Our lawyers have a great deal of experience in these type cases. In fact, the firm was involved in the largest private environmental settlement in U.S. history involving PCB contamination—$700 million.

Lawyers in the Section are currently heavily involved in the ongoing BP litigation, which is a monumental undertaking. We have dedicated a tremendous amount of resources to this battle. As we all know, BP and other corporate wrongdoers were responsible for the worst oil spill in history. These wrongdoers must be held accountable for the massive damage done to people, businesses, and government entities.

Our Lawyers and Support Staff

The lawyers and support staff in each of the sections in our firm are ready and willing to do all we can to assist by giving people who or which has a potential claim in any of the categories described above. If you believe you have a claim, a lawyer in the appropriate section will be glad to talk to you. You can contact the firm for a free, no-obligation legal consultation. Our toll free number is 800-898-2034 or you can go to our web page at www.beasleyallen.com.

II. THE ONGOING SAGA OF THE GENERAL MOTORS SAFETY PROBLEMS

GM Recall Numbers Are Staggering

The recall numbers for General Motors Co. continue to rise and the public has to be wondering how any carmaker could get itself into such a monumental mess. GM has recalled nearly 524,400 Cadillac, Saab and Chevrolet vehicles in North America for mechanical issues that have caused at least three crashes and two injuries. This brings the total number of GM vehicles recalled in the U.S. so far this year to 30 million. Just over 290,000 Cadillac and Saab SUVs were recalled because of concerns that the toe adjuster lock nut could malfunction, causing the vehicles to sway or wander on the highway. GM has also recalled nearly 90,000 Chevrolet Sparks because erosion to a latch could make the hood fly up unexpectedly. This obviously would create a safety hazard.

I don’t believe the public really understands the magnitude of GM’s safety-related problems. During the first nine months of 2014, GM had recalled more than 30 million vehicles because of a safety-related defect. That is seven years worth of GM’s entire production. That’s a shocking revelation. GM reported the problems with its model year 2010 through 2015 Cadillac SRX and 2011 through 2012 Saab 9-4X SUVs to the National Highway Transportation Safety Administration (NHTSA) on Sept. 17. Improper torquing, according to GM, is the cause of the problems with the lock nuts. GM says that “dealers will inspect for the condition.” If necessary, the dealers will remove them and install a new link assembly. GM also said that unsold vehicles would be checked for proper torquing before being sold. GM says it is aware of three crashes and two injuries as a result of the issues with its Cadillac and Saab SUVs. But it says that no injuries have been reported in relation to the recent recalls.

About 15,000 of the unsold model year 2013 through 2015 Sparks are being held at U.S. dealerships and will not be delivered until repairs are made. Dealers will replace the hood latch on cars already sold when parts are available. The cars were imported from South Korea and manufactured with the potentially faulty hood latches.

The latest recalls followed the automaker’s announcement a day before that it would recall 117,651 cars and trucks in North America due to potential problems starting or stalling when metallic slivers get into their chassis control modules. Vehicles involved include certain Chevrolet Tahoes and Suburbans, GMC Yukons and Cadillac Escalades, among 10 other GM models. GM says it is not aware of any crashes, injuries or fatalities related to that recall. It should be noted that these three recalls brought GM’s total number of recalls this year to 71.

Latest GM Victim Compensation Fund Report Lists 30 Eligible Death Claims

According to the latest report released Oct. 27 by General Motors Victim Compensation Fund administrator Kenneth Feinberg, there have been a total of 192 death claims submitted since the fund began accepting claims on August 1. A total of 1,580 claims, including those for deaths and injuries, have been submitted to the Fund for consideration. The numbers break down as follows as of Oct. 20: 192 death claims; 102 Category One claims; and 1,286 Category Two claims. The fund has determined 30 death, four severe injury, and 27 lesser injury claims to be eligible thus far. As we have mentioned previously, Category One covers claims for serious injuries, which may include quadriplegia, paraplegia, double amputation, permanent brain damage or pervasive burns. Category Two covers claims for less serious injuries.

Our firm, along with The Cooper Firm, have been generally satisfied with the progress made on the claims we have submitted...
GM’s defective ignition switch has prompted the recall of more than 17 million vehicles to date. Drivers, passengers and pedestrians killed or injured by one of the defective GM vehicles may file a claim with the fund through Dec. 31. Our firm and The Cooper Firm selected representative claims to be filed with the fund, claims that would meet the eligibility criteria. Therefore, we expect each of our submitted claims to be paid. GM has earmarked $400 million in its budget to cover potential payments through the fund, and has told investors the total payout may be even higher. Fortunately, there is no cap on the fund.

The fund covers a range of GM vehicles including the Chevrolet Cobalt and Saturn Ion. However, the fund does not cover a good number of vehicles affected by similar ignition switch problems. Frankly, I don’t understand why GM refuses to include all of these vehicles in the fund. It remains to be seen if GM will address issues arising from those vehicles in a similar fashion. The ignition switch problem can leave a vehicle without power and the driver unable to control the vehicle in sudden and dangerous situations. Investigations have revealed GM knew about the ignition switch defect for more than 10 years before being forced to disclose it to safety regulators and the public. Without any doubt, all of the recalls came about as a direct result of work done in the Melton case.

The suits were filed by co-lead counsel Hagens Berman Sobol Shapiro LLP and Lieff Cabraser Heimann & Bernstein LLP, among others, in the U.S. District Court for the Southern District of New York. As we have reported, hundreds of lawsuits have been consolidated against so-called “New GM” in the federal court in New York. Judge Jesse Furman, an experienced jurist, is in charge of this massive litigation.

The proposed class action seeks damages for a class of consumers and used-car dealers, including those who own or have owned or leased a new or used GM-branded vehicle sold between July 11, 2009, and July 3 of this year. The second consolidated suit, also a class action, was filed over cars bought or leased before GM’s bankruptcy. It’s alleged in the putative class action:

GM’s unprecedented abrogation of basic standards of safety, truthfulness and accountability to the detriment of tens of millions of consumers and the public at large. … The systematic concealment of known defects was deliberate, as New GM followed a consistent pattern of endless ‘investigation’ and delay each time it became aware of a given defect.

The primary class action covers all GM vehicles sold after its bankruptcy proceedings, accusing the auto maker of misrepresentation, concealment and non-disclosure of a slew of safety defects. The second consolidated complaint seeks compensation for owners of GM cars with ignition-related safety defects that can cause their ignition switches to change from the “run” position to the “accessory” or “off” position while driving, causing a loss of power, vehicle speed control and braking, and a failure of the vehicle’s airbags to deploy.

The Plaintiffs filed the consolidated complaints pursuant to the pre-trial schedule established by Judge Furman in the MDL litigation pending in New York. Both complaints say the vehicles at issue started losing value in February 2014 and are continuing to do so through the present. It’s alleged that those vehicles include Chevy Camaros with model years 2010 and 2011 that lost $2,000 in value, and the 2009 Pontiac Solstice, which has lost almost $3,000 in value.

Source: Law360.com

III. MORE AUTOMOBILE NEWS OF NOTE

TOYOTA-HONDA AIRBAG CRISIS UNDERMINES CONFIDENCE IN AUTO SAFETY

A deepening crisis involving deadly airbags has shaken confidence in the ability of automakers, including Toyota Motor Corp. and Honda Motor Co., to ensure the safety of millions of U.S. drivers. When you consider that Toyota has advised owners of these vehicles to keep passengers out of front seats until defective Takata Corp. airbag parts are replaced, the magnitude of the problem is made very clear. This comes months after Toyota did the very same thing in Japan.

Takata faces investigations into whether exploding shrapnel from its flawed parts is to blame for at least four deaths involving vehicles made by Honda, including a Florida crash that was initially investigated as a homicide because of deep gashes to the victim’s neck. The ever-increasing number of airbag recalls is a clear indication that automakers are not addressing defects quickly and comprehensively. NHTSA’s failure to adequate monitor the industry has become quite apparent. The sudden acceleration and ignition switch recalls at Toyota and GM are prime examples of defects being addressed in a dilatory manner. The fact that these two defects were actually hidden from the public and NHTSA for years is appalling. Currently, Honda is under separate probes about whether it underreported fatalities and injuries in the U.S.

I fear that the consequences from the airbag safety issues are going to get much worse. There have been recalls of at least 4.7 million vehicles in the U.S. during the last two years associated with the Takata airbags. In addition to Toyota and Honda, the recalls also involve Nissan Motor Co., Mazda Motor Corp., Mitsubishi, Subaru, Bayerische Motoren Werke AG (BMW), Chrysler, Ford and GM. At press time, none of the other automakers had yet to follow Toyota in issuing warnings against sitting in front-passenger seats, but they may be forced to do if they fail to do so voluntarily. Toyota extended the approach it had taken in Japan to the U.S. after Takata shared data that showed the inflators sent back to the supplier as part of its customers’ recalls were performing improperly.
Toyota, the world’s largest automaker, recalled 247,000 vehicles last month, including some models of the Toyota Corolla, Matrix, Sequoia and Tundra, made from 2001 to 2004. Most of the vehicles were subject to recalls by Toyota in June this year or May 2013, according to a U.S. spokesman for the company.

To put the hazards created and the obvious dangers involved in perspective, NHTSA issued a statement on Oct. 22 telling owners to “act immediately on recall notices to replace defective Takata airbags,” adding there should be particular urgency in areas of high humidity such as Florida, Hawaii, Puerto Rico and the Virgin Islands. Honda says it’s still examining airbag inflators that have been replaced as part of its recalls of 2.8 million vehicles in the U.S. tied to Takata air bags the past two years. Honda is Takata’s biggest customer and has called back 6 million vehicles for problems with airbags in nine recalls since 2008. Incidentally, the carmaker owns 1.2 percent of Tokyo-based Takata.

While Takata is at the center of the U.S. government’s airbag investigation, NHTSA also is probing how the car companies responded to defects with the airbags supplied as components. The Center for Auto Safety, a watchdog group in the U.S., has accused Honda of failing to report all airbag-related injuries and deaths to a government database as required. The Center has called for the U.S. Justice Department to conduct a criminal investigation into Honda’s reporting practices.

Honda had asked a third party to begin an audit in September of potential inaccuracies in the quarterly Early Warning Reports the automaker is required to file to NHTSA. Honda said in an Oct. 16 statement that it will “soon” share results of the audit with the regulator. We are aware of one death in Florida involving the airbags in Honda Accord. We are told there have been at least two similar incidents involving Honda vehicles. Honda said on Oct. 16 that it’s also examining whether a faulty airbag was to blame for the death of a man who crashed his Acura sedan in a California parking lot.

This airbag safety crisis is far from over. It’s important for folks to find out if their cars have defective airbags. Motorists wondering whether their cars are subject to a recall can type their vehicle identification numbers into the government’s website, www.safercar.gov. I encourage each of our readers to do so.

Source: Claims Journal

**NHTSA Investigating Ford Vehicles Over Steering Complaints**

The National Highway Traffic Safety Administration (NHTSA) is investigating nearly a million Ford Motor Co. vehicles over potential problems with their electronic power steering systems. Some drivers have said this defect made them lose control of their vehicles. NHTSA said its Office of Defects Investigation has received more than 500 complaints claiming that the steering assist feature on certain Ford Fusion, Lincoln MKZ and Mercury Milan models failed, making it harder for drivers to steer the vehicle, and easier to lose control of it, according to documents posted on NHTSA’s website. NHTSA said in the document posted on its website:

> Many of the complaints indicated observing a power steering warning message as the failure occurred. In some cases, the condition was corrected by turning the vehicle off and restarting. However, many reports indicate the condition returned again after restart. A Preliminary Evaluation has been opened to assess the scope, frequency and safety consequences of the alleged defect.

The investigation includes some 938,000 vehicles of model years 2010 to 2012 for the Ford Fusion, Mercury Milan and Lincoln MKZ. Ford was sued in California federal court in June over the power steering in its Focus and Fusion models, where a proposed class of consumers claimed it knew that the defective system suddenly and prematurely fails during normal driving conditions. The suit claims Ford touted the ability of its power steering system’s “pull-drift compensation” in marketing materials, telling consumers that the system would detect road conditions and adjust the steering system to help drivers compensate for pulling and drifting. The system was also allegedly marketed as increasing fuel economy and protecting driver safety.

However, the system suffers from design and manufacturing defects in the wiring, sensors and gear assembly that leads to loss of connections within the system, as well as corrosion and breakage of critical wiring, the suit says. When the system fails while the vehicle is on the road, drivers are unable to turn the vehicle, exposing those in the car, as well as those in surrounding vehicles and pedestrians, to the risk of accidents and potentially fatal bodily harm, according to the complaint.

Ford, in late May, announced recalls of its Ford Escape, Mercury Mariner and Ford Explorer vehicles over power steering issues. The company told NHTSA at the time that it knew of five accidents and six injuries linked to the potential defect.

Source: Law360.com

**Safety Group Requests Defect Probe of Chrysler Vehicles**

The Center for Auto Safety, a noted and highly respected safety advocate group, has petitioned the National Highway Traffic Safety Administration to open an investigation into an estimated 4.9 million Chrysler vehicles for issues that could lead to engine stalls and other problems. NHTSA said in documents posted online that it would decide whether to grant or deny the Center’s petition, which involves a range of Chrysler, Dodge and Jeep SUVs, pickup trucks and minivans from model years 2007 through 2014. NHTSA has offered no timetable for its decision, but if it opens an investigation, that could lead to a recall.

Chrysler Group, a unit of Fiat, said that it was investigating customer complaints and analyzing parts from the field. The Center for Auto Safety, in an Aug. 21 letter, asked NHTSA to open a probe into failures of a part called the totally integrated power module. The safety advocate group said the failures resulted in engine stalls, air bag non-deployment, unintended acceleration, fires, and random horn, headlight, door lock, instrument panel and windshield wiper activity.

Located in the engine compartment near the battery, the totally integrated power module manages power for multiple systems in the vehicle. It is designed to detect an electrical fault and activate such equipment as windshield wipers and headlights. The Center for Auto Safety’s petition included a list of 70 complaints it had received. According to NHTSA, its review would focus on the Totally Integrated Power Module 7.

Of the 63 complaints about that specific part, 51 cited engine stalls or not starting, while three reported smoke or fire, according to NHTSA documents. In a supplement to its letter, the Center for Auto Safety identified 24 crashes from NHTSA’s Early Warning Reporting database that it believes are related to the failure of a totally integrated power module. The Center for Auto Safety said in its letter:

> The (power module) is in millions of 2007-14 Chrysler vehicles and fails at such high frequency that Chrysler has run out of replacement parts. Consumers are faced with a terrible
dilemma—park the vehicle until parts are available or ride at risk of being in (a) deadly crash.

As we reported previously, Chrysler recalled an estimated 230,760 Jeep and Dodge SUVs globally from model year 2011 because of the potential failure of fuel-pump relays within the power module that could cause the vehicles to stall or not start.

Source: Claims Journal

NHTSA Investigating Michelin Tires in Crashes

The National Highway Traffic Safety Administration (NHTSA) is investigating at least seven truck crashes involving a specific 2014 model of Michelin tire that are believed to have failed. NHTSA is investigating the model 2014 Michelin XZA 295/60/R22.5 tire, which is used on auto haulers. The agency’s Office of Defects Investigation (ODI) said that tire “may fail catastrophically when used on the steer axle.” NHTSA said in its notice:

ODI has opened this [preliminary evaluation] to gather information and assess the frequency and scope of the alleged safety defect.

Michelin says it’s aware of the preliminary evaluation by NHTSA regarding several complaints about a tire identified as a 2014 Michelin XZA 295/60/R22.5 tire used on auto haulers. The company says it’s cooperating fully with the agency. There have been no injuries or fatalities due to the crashes, according to NHTSA.

IV. A REPORT ON THE GULF COAST DISASTER

Oil Spill Seafood Settlement Second Distribution On The Horizon

As we reported previously, the Economic Class Settlement contained a guaranteed $2.3 billion for Gulf Coast commercial fishermen and deckhands. While some criticized the capped nature of the seafood program, we believed that the $2.3 billion would be enough to compensate those impacted by the oil spill—and that there might be a second distribution of funds to seafood claimants. Now, with very few claims remaining to be paid and nearly $1.1 billion remaining in the seafood fund, it seems that a second distribution will indeed take place.

The Court is currently working with Daniel Balhoff, the court-appointed neutral presiding over the seafood settlement, to propose a fair distribution of the fund’s remaining balance. Mr. Balhoff has submitted his recommendations to the Court, and all objections to Mr. Balhoff’s recommendations were to have been filed by Oct. 20, 2014. Once the mechanism for payments is determined, lawyers in our Toxic Torts Section will provide an update. Just judging by the payments made, and the fact participants should receive more, this settlement has proven to be a very fair and efficient process for commercial fishermen.

Deepwater Horizon Economic Settlement Program Trying To Make Up For Lost Time

Given the flurry of objections, appeals, threats, and stall tactics by BP, Administrator Pat Juneau has had his hands full trying to keep the Economic Settlement Program on track. As a result, Program payments of any meaning to businesses eligible in the settlement have slowed considerably in the wake of BP’s antics. Also, the Program has been grappling with Policy 495, otherwise known as the “matching” policy, which added 80 plus pages of “matching” criteria to business claims. The policy seeks to match a business’s revenues with its corresponding expenses, but implementation of the policy with the Program’s accountants has been a major challenge.

It is understandable that many may be frustrated with the Program’s ability to process claims. Our lawyers and clients are dealing with those same frustrations. We must all remember, however, that BP has worked every angle to destroy this program, and Mr. Juneau professionally. BP has said and done, and will say and do, anything to keep from having to pay claims under the very rules it created. Thankfully, the Plaintiffs’ Steering Committee (PSC) is working day and night to keep BP from eroding the settlement, while simultaneously working with the program to help improve its efficiency processing claims.

The Program will continue to improve as its accountants become more comfortable working with Policy 495. Based on program statistics after the lifting of the injunction, improvement appears to already be occurring as the Program has steadily been increasing payments to claimants. If you have any questions about the claims process, please contact Beasley Allen Toxic Torts Section Head Rhon Jones by phone at 800.898.2034, or by email at Rhon.Jones@beasleyallen.com.

BP Seeks Reconsideration Of Judge Barbier’s Gross Negligence Finding

Recently, BP asked Judge Carl Barbier to reconsider his previous ruling that the company acted recklessly leading up to the Deepwater Horizon oil spill. BP contends that Judge Barbier considered expert witness testimony concerning the amount and impact of compressive forces on the Macondo well’s cement production casing. The company claims that Judge Barbier used the testimony, which BP claims should have been excluded, to develop a key theory that buckling in the metal pipe on the well put pressure on the cement casing, thereby preventing the casing from stopping the oil leak.

BP is asking Judge Barbier to set aside his finding that the company engaged in gross negligence, and reapportion blame among BP and its contractors. In the alternative, BP has requested a new trial so it could introduce opposing evidence to the theory. We would be surprised to see Judge Barbier reverse his previous order and find for BP. He clearly considered all of the facts and applicable law before issuing this order. What’s more, the record was clear—BP acted with extreme disregard for human life and property leading up to the oil spill, causing Judge Barbier to conclude that the company acted with “profit-driven decisions” that amounted to “gross negligence.”

Source: NOLA.com and The Times-Picayune

BP Must Face Foreign Investors in Texas Court

Foreign investors who sued BP PLC over stock losses they suffered after the 2010 Deepwater Horizon disaster have been allowed to continue with their claims in U.S. District Court. Judge Keith P. Ellison, the Texas federal judge who has this case, ruled in an order made public on Oct. 1. In a memorandum and order made under seal. Judge Ellison wrote that while he could dismiss the claims brought by Avalon Holdings Inc. and other overseas investors and “relieve congestion” on his own docket, other factors weigh against such a move, which would send the litigation to an English court. That is because the parties are litigating under English law about
shares that trade on the London Stock Exchange. Judge Ellison wrote:

"[T]he private and public interest factors must weigh heavily in favor of England to disrupt the foreign plaintiffs' choice of forum. Because it does not, the court once again declines to dismiss English law, securities fraud claims asserted in this MDL under the doctrine of forum non conveniens."

The decision is considered a significant one because of the U.S. Supreme Court's ruling in *Morrison v. National Australia Bank*. It was believed by many that the decision all but closed U.S. courts to overseas securities claims. Judge Ellison's ruling has been called a landmark decision. That is because it permits foreign investors who purchased securities traded in London to pursue English law claims in the Texas court.

Judge Ellison last year rejected a similar motion by BP seeking to move other related litigation to England, though that case involved U.S.-based pension funds that owned BP shares trading on the LSE. Texas was an appropriate forum for the cases considering that BP is actively involved in multidistrict litigation (MDL) and that two of the U.S. pension funds are pursuing claims related to domestic trading losses under the Securities Exchange Act that cannot be heard in the U.K.

The claims in the MDL before Judge Ellison involve allegations that BP and individual executives made material misrepresentations about the company's commitment to safety in the run-up to the 2010 Deepwater explosion. They also involve plaintiff's ability to clean up the massive spill. The extent of BP's likely responsibility once the disaster occurred is also a part of the MDL. Judge Ellison has also denied a separate motion by BP to dismiss a complaint brought by Plaintiffs including the New York City Employees' Retirement System on the basis that they had exceeded the five-year statute of repose for certain claims.

Source: Law360.com

**BP DEEPWATER SECURITIES CLAIM NOT TIME-BARRED**

In another order, U.S. District Court Judge Keith P. Ellison, who as we stated above is the Texas federal judge overseeing multidistrict securities litigation against BP PLC over the Deepwater Horizon disaster, ruled favorably for the Plaintiffs. The issue before the court involved a question about statutes of repose that the U.S. Supreme Court had been slated to take up last month in a case known as *IndyMac*. Judge Ellison did dismiss claims against two BP executives. In his order, Judge Ellison denied BP's motion to dismiss the complaint brought by the Plaintiffs—including the New York City Employees' Retirement System—on the basis that they had exceeded the five-year statute of repose covering claims based on statements made before April 2008.

BP in its motion argued that the Plaintiffs could not take advantage of the tolling provisions established in *American Pipe & Construction Co. v. Utah*, a landmark 1974 Supreme Court ruling. In that case, the Supreme Court held that if a class action is filed on time, the statute of limitations is suspended for all class members until the class is denied certification. Recognizing that there was a split of appellate opinions on the question, Judge Ellison relied in his order on the Tenth Circuit's reading of *American Pipe*. In that case, the court said the tolling provision applied equally to the Securities Act of 1933's statute of repose.

The Second Circuit had taken a different view in 2013, when it dismissed a shareholder class action against IndyMac Corp. and other banks over their mortgage-backed securities business. In the BP case, Judge Ellison wrote:

> Viewing the filing of a class action as a "prefiling" of all unnamed class members' claims means that the concern identified by the Second Circuit in *IndyMac*—that applying *American Pipe* tolling somehow abridges a defendant's substantive right to be free from suit after a specific period of time—is illusory. So long as the defendant has fair notice of the type and number of claims that could be asserted against it, which should be required for *American Pipe* tolling in the first instance, then there is no unfair surprise when a class member assumes responsibility for its own individual claim during the course of the class action, or after class status has been denied.

The Plaintiffs filed their suit against BP in April 2013, alleging that the oil giant and individual executives had made material misrepresentations about the company's commitment to safety in the run-up to the 2010 Deepwater explosion, as well as its ability to clean up such a spill and the extent of its likely responsibility once the disaster occurred. It was alleged that their misstatements cost Plaintiffs tens of millions of dollars when BP's stock price plunged in the wake of the disaster. Because of the Supreme Court's decision to strike its previously granted *writ of certiorari* to the Public Employees' Retirement System of Mississippi, this ruling is significant.

Judge Ellison is also dismissing all shareholder claims against David Rainey, BP's vice president of exploration for the Gulf of Mexico, on the grounds that the Plaintiffs had failed to state viable claims against him under Section 20(a) of the Securities Exchange Act of 1934. The judge also dismissed 20(a) claims against Andrew Inglis, who was chief executive of BP Exploration & Production Inc. between 2007 and 2010, on the same grounds, though other claims against him survived.

Source: Law360.com

V. DRUG MANUFACTURERS FRAUD LITIGATION

**TEXAS SUES ASTRAZENECA OVER SEROQUEL MARKETING**

The state of Texas and two former AstraZeneca LP employees have filed suit against the pharmaceutical giant in a Texas state court, accusing the company of cheating the state's Medicaid program by fraudulently marketing powerful antipsychotic drugs and paying kickbacks to doctors and state officials. In their suit, filed last month, the state and former AstraZeneca sales specialists Allison Zayas and Tracy Mikkelsen-Branch contend that the company misrepresented the efficacy of Seroquel IR and Seroquel XR, downplayed the drugs' side effects and promoted their unauthorized use to treat children.

AstraZeneca also allegedly paid a pair of state officials $465,000 to ensure the drugs were included on a list of pharmaceuticals approved for use in the state hospital system, which would make them eligible for later Medicaid reimbursement. "As a result, AstraZeneca obtained the benefit of virtually unfettered Medicaid reimbursements for Seroquel IR and Seroquel XR on the basis of fraudulent and unlawful misrepresentations, and in doing so, AstraZeneca violated [the Texas Medicaid Fraud Prevention Act] and Texas common law," the suit says.

Source: BeasleyAllen.com

BeasleyAllen.com
Texas says that AstraZeneca targeted the state’s Medicaid program after concluding that patients with bipolar disorder or schizophrenia are likely unable to afford Seroquel and will turn to public health programs. Understanding the need to obtain significant government buy-in to achieve their financial goals for the Seroquel franchise, defendants set their sights on Texas Medicaid, according to the complaint. Among other things, the lawsuit alleges that AstraZeneca forced its sales representatives to minimize the risks associated with Seroquel and market unsubstantiated benefits and impermissible uses of the drug to maximize profits.

The complaint alleges that AstraZeneca paid “sham promotional speaking fees” to two state mental health officials with the power to influence formulary decisions in the state hospital system. It was stated:

“This conduct continued into 2009, when defendants were able to obtain a formal recommendation from one of the AstraZeneca-paid state mental health officials to request addition of Seroquel XR to the [Department of State Health Services] formulary.

AstraZeneca is no stranger to states pursuing the company for its illegal sales and marketing practices, considering it was a central player in the nationwide AWP litigation. Our firm was the recognized leader in that litigation.

Source: Law360.com

**Texas Collects $40 Million From Ranbaxy In AWP Settlement**

Texas Attorney General Greg Abbott announced on Oct. 16, 2014 that his office settled an enforcement action against Ranbaxy, a generic drug manufacturer, for fraudulently reporting inflated drug prices to the Medicaid program. The case against Ranbaxy is one of hundreds filed by Texas and fellow AWP prosecuting States across the nation in the last 15 years.

According to the State, in September 2012 Texas filed a lawsuit against the defendants alleging violations of the Texas Medicaid Fraud Prevention Act (“TMFPA”). The State’s investigation found that since 1997, Ranbaxy violated Texas law when it misreported the prices of various drugs to the Medicaid program. As a result, Medicaid reimbursed pharmacies more than it should have for certain of the companies’ products.

Under Texas state law, drug manufacturers must file reports with the Medicaid program that disclose the prices they charge pharmacies, wholesalers and distributors for their products.

When manufacturers improperly report inflated market prices for their drugs, Medicaid reimburses pharmacies at vastly inflated rates. The difference between the reimbursement amount and the actual market price is referred to as the “spread.” The Attorney General’s office accused Ranbaxy of illegally misreporting prices to Medicaid in order to create spreads that would induce pharmacies and other providers to purchase Ranbaxy’s products over its competitors’ products.

Under the settlement agreement, Ranbaxy must pay the State of Texas a total of $17.875 million for the State’s general revenue fund. Because the Medicaid program is jointly funded by the State and U.S. taxpayers, the federal government is entitled to a percentage of the proceeds. The federal government’s share is also $17.875. Additionally, the Texas Attorney General’s Office will receive $4 million in attorneys’ fees and costs. The payments will be made in four installments, beginning this November and ending next year.

Source: Texas AG Press Release

**Organon To Pay $31 Million In Medicaid-Related Settlement**

Drug manufacturer Organon USA Inc. has agreed to pay $31 million to settle claims from the federal government and several states, including New York and Kentucky, that it underpaid rebates to state Medicaid programs. Organon faced two separate lawsuits in Texas and Massachusetts federal court, claiming the company underpaid Medicaid rebates, offered improper financial incentives to nursing home pharmacy companies, misrepresented drug prices and promoted drugs for off-label uses.

Under the terms of the settlement, New York’s Medicaid program will receive nearly $2.5 million of the $31 million settlement. Kentucky will receive nearly $350,000, while in Idaho almost $53,000 of the funds will go to its Medicaid program. New York Attorney General Schneiderman said in a statement:

*Preserving the integrity of our Medicaid Program and weeding out those who seek to defraud it is a top priority for my office. We will keep fighting to ensure that companies that skirt the law for financial gain will be held accountable.*

It should be noted that Organon’s assets are now owned by Merck & Co. The New York attorney general also pointed out that a National Association of Medicaid Fraud Control Units team helped the parties reach this settlement agreement, and that group included representatives from New York, California, Texas and Ohio’s state Attorneys General offices. Kentucky Attorney General Jack Conway said in a statement:

*Drug companies that engage in illegal or fraudulent practices to sell their products will not be tolerated in Kentucky. I am pleased that this settlement allows us to recover funds for our vital state Medicaid program.*

The drug industry cannot be allowed to cheat the Medicaid programs run by state governments. The courts have been very active in the litigation involving this type fraud. I am pleased to say that our firm got this litigation started when we filed suit on behalf of the State of Alabama in January of 2005. Since that time, a number of states have successfully filed suits against the drug companies that had cheated their states.

Source: Law360.com

**Class Action Update**

**10th Circuit Dow Ruling Shows Class Actions Alive And Well**

The Tenth Circuit’s recent decision to uphold a $1.06 billion class action judgment against Dow Chemical Corp. again demonstrates that class actions are not dead. The Dow ruling demonstrates that class action attorneys, in carefully selected and well-litigated cases, can achieve class certification by providing a detailed analysis that connects class members’ injuries to the alleged wrongdoing.

The Dow Plaintiffs alleged that the company orchestrated a conspiracy to raise the price of polyurethane products sold to industrial clients. After losing at trial, Dow sought to decertify the class based on the U.S. Supreme Court’s decision in Comcast v. Behrend (2013), which held Plaintiffs to a more rigorous standard when trying to
prove class-wide damages, and *Wal-Mart v. Dukes* (2011), which denied class certification because class members didn’t have enough in common to constitute a certifiable class.

Dow argued that the same problems that kept the Plaintiffs from tying their theory of the case to their damages calculations in Comcast plagued the urethane buyers. Dow further argued that, like Wal-Mart, variances in determining class-wide liability and impact undermined class certification. But the Tenth Circuit upheld the trial court’s ruling, stating that unlike Wal-Mart there were “two common questions that could yield common answers at trial: the existence of a conspiracy and the existence of impact. The district court reasonably concluded that these questions drove the litigation and generated common answers that determined liability in a single stroke.

The unusual circumstances of Dow’s class certification challenge mean that the Tenth Circuit’s reasoning may have limited application to other cases. In particular, because Dow waited until after the trial to seek to decertify the class, the trial court didn’t have to guess whether individual issues would predominate over common ones but instead had the benefit of a trial that proved otherwise.

Lawyers at Beasley Allen continue to investigate and successfully prosecute class action lawsuits. For further information on the firm’s class action practice, or for information on a specific issue, contact Lance Gould, Archie Grubb, Dee Miles, Roman Shaul and Alison Hawthorne, lawyers in the firm’s Consumer Fraud Section, at 800-898-2034 or at Lance.Gould@beasleyallen.com, Archie.Grubb@beasleyallen.com, Dee.Miles@beasleyallen.com, Roman.Shaul@beasleyallen.com or Alison.Hawthorne@beasleyallen.com.

**Another Financial Benchmark Manipulated**

A recent class action lawsuit was filed last month by the small Alaska Electrical Pension fund against several major banks, including Bank of America Corp. The banks were accused of conspiring to fix a leading benchmark for interest-rate derivatives. An investigation by the U.S. Commodity Futures Trading Commission (CFTC) into possible abuses is currently ongoing. The banks are accused of manipulating the ISDAfix rate, which determines valuations for complex derivative products.

Does this sound familiar? If you’ve followed the London Interbank Offered Rate (LIBOR) rigging scandal, which we have written on recently, it should. The new suit, which echoes the LIBOR scandal, also names as defendants Barclays Bank PLC, Citigroup Inc., Credit Suisse AG, Deutsche Bank AG, Goldman Sachs & Co., HSBC Bank PLC, JPMorgan Chase & Co., Nomura Securities International Inc., Royal Bank of Scotland PLC, UBS AG, BNP Paribas SA, and Wells Fargo NA, as well as interdealer broker ICAP PLC.

The banks worked closely with ICAP, which until January was tasked by the International Swaps and Derivatives Association (ISDA) with managing the daily setting of the U.S. dollar-rate version of ISDAfix. ISDA removed ICAP as the rate-setter in January, after the CFTC began investigating possible manipulation of the rate. The CFTC, the United Kingdom’s Financial Conduct Authority, and Germany’s BaFin are all investigating the same or similar allegations, but no charges have yet been filed.

The ISDAfix benchmark—a daily measure of the fixed rate for interest rate swaps that affects the price of trillions of dollars of derivatives—is a reference rate that, like Libor, relies on submissions from panel banks. ISDAfix is also used to set interest rates for commercial real estate, making it the CRE analog of Libor. ICAP used to set the ISDAfix dollar rates by taking an average reference rate and then having the banks either validate the rate or submit their own rate. The banks were responsible for submitting rate quotes, which ICAP essentially compiled.

The suit, which includes allegations of antitrust violations, claims that the parties worked together to set the rate at the point where it was most profitable for them. According to the suit, ICAP calculated the rate during the time period at issue in the suit taking into account the average trading rate of interest rate swaps at 11 o’clock every morning. The banks involved in the ISDAfix-setting process are alleged to have conspired with each other and ICAP to manipulate the trading rate through (among other things) engaging in high-volume, coordinated buying or selling just before ICAP’s daily 11 a.m. assessment (“banging the close,” according to the complaint).

ISDAfix rate quote submissions go to five decimal points, a thousandth of a basis point. As the complaint points out, “The odds against contributors unilaterally submitting over an extended period the exact same quotes down to the thousandth of a basis point, without colluding, are astronomical. Yet this happened almost every single day between (at least) 2009 and December 2012. Just as conspicuously, this obvious coordination only stopped when the defendant banks learned that their benchmark-setting efforts were under investigation. Defendants’ manipulation of ISDAfix—even if sometimes only by a few basis points—impacted trillions of dollars of financial instruments.” The Plaintiff’s analysis also found a 70 percent reduction in the practice of “banging the close” after December 2012.

Judge Naomi Reice Buckwald in a hearing let the parties know that she needed more information before she could approve the settlement. She indicated that some of the claimants’ claims may well be time-barred. In a prior order, the judge had ruled that some claims had been filed too late and were barred. She pointed out that money paid to folks who have no claims, it would “come out of the pockets of those who do have claims.” Once this issue is cleared up Judge Buckwald is expected to approve the settlement.

Sources: Law360.com and Reuters

**BARCLAYS REACHES $20 MILLION SETTLEMENT IN LIBOR RIGGING SUIT**

Barclays PLC has agreed to pay nearly $20 million to settle a class action accusing the British bank of manipulating the LIBOR benchmark interest rate. In a letter to District Judge Naomi Reice Buchwald, in a New York federal court, lawyers for the Plaintiffs said that Barclays has agreed to pay $19,975,000 and provide class members with additional information to use in their remaining claims against other defendants.

The settlement is the first in the case which accuses several banks of manipulating the London Interbank Offered Rate (LIBOR). This came more than two years after Barclays in 2012 paid U.S. and U.K. regulators a total of $450 million to settle claims it rigged the LIBOR and the Euro Interbank Offered Rate. In a motion accompanying their letter to Judge Buchwald, lawyers for the Plaintiffs urged Judge Buchwald to grant preliminary approval to the settlement. They believe this will serve as an “ice breaker” to encourage other Defendants to settle with the class.

The settlement will resolve all claims between Barclays and class members who transacted in LIBOR-based Eurodollar futures contracts or options on exchanges such as the Chicago Mercantile Exchange between Jan. 1, 2005, and May 31, 2010. The Plaintiffs stated in a motion filed with the court:

*The settlement involves a unique combination of consideration. This includes substantial, all-cash mone-
The case arises from a series of lawsuits first filed in 2011 and consolidated before Judge Buchwald in 2012. Although the Plaintiffs had initially alleged violations of the Sherman Antitrust Act, Judge Buchwald dismissed the antitrust claims from the consolidated suit in March 2013. At that time, the judge said that the Plaintiffs couldn’t point to any actual competition-related injuries, pointing out that the BBA-rate submission process was not designed to be a competitive one. She later ruled in August the Plaintiffs should not be able to revive their antitrust allegations because their lawyers already had the opportunity to strengthen their claims when filing their consolidated complaints.

After the Second Circuit refused to hear appeals concerning the dismissed antitrust claim, another group of LIBOR Plaintiffs filed a petition with the U.S. Supreme Court, asking the high court to decide whether a dismissed suit in a consolidated action can be immediately appealed, even if claims still remain in the larger case. Arguments in that case are set for Dec. 9. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

**Ford’s Explorer Exhaust Defect Lawsuit Will Go Forward**

A federal judge has refused to dismiss a putative class action lawsuit against Ford Motor Co. In the case, filed in Florida, Ford is accused of installing a defective exhaust system in its Explorer models. It’s alleged that passengers were caused to be exposed to carbon monoxide and other gases. U.S. District Judge William P. Dimitrouleas denied Ford’s motion to dismiss the suit involving an allegedly hazardous exhaust system in the SUVs.

Angela Sanchez-Knutson, the lead Plaintiff, filed suit in June, claiming she and her daughter suffer from chronic headaches as a result of exposure to dangerous levels of carbon monoxide in her 2013 Ford Explorer. She said the car was brought to the dealership for repair several times because of a sulfuric smell in the car but she was never informed that the odor actually signifies exposure to the gas. It’s claimed that the gas seeps into the Explorer cabin when the air conditioning is in use.

Ms. Sanchez-Knutson asked the judge for class certification two weeks after filing her suit. Judge Dimitrouleas had rejected her request in early July, saying the motion was premature.

In his latest ruling, the judge rejected the automaker’s contention that its warranty “expressly excludes” coverage for design defect claims. Judge Dimitrouleas also said that the fact the woman purchased the vehicle from a Ford dealership and not the automaker itself does not mean she can’t recover on a breach of warranty claim. The vehicles’ warranties, according to Judge Dimitrouleas order, include coverage of design defects.

In his order, Judge Dimitrouleas also said Ford can’t escape the Magnuson-Moss Warranty Act claim at this stage in the litigation, saying it would be premature to determine whether participation in Ford’s informal dispute settlement procedure fits with the statutory criteria for the claim to survive. Judge Dimitrouleas also rejected Ford’s argument that the Florida Deceptive and Unfair Trade Practices Act fails, saying the automaker wrongly argued that the National Highway Traffic Safety Administration (NHTSA) had jurisdiction over the claim. Judge Dimitrouleas said further in his order:

Ford’s argument of deferral to NHTSA because Plaintiff’s claims implicate vehicle safety issues has been offered and rejected.

The lead Plaintiff is represented by Michael A. Hersh, Jordan M. Lewis and John J. Uustal of the Kelley Uustal law firm. Mr. Uustal, one of the lawyers, told Law360 that any person who currently owns a 2011-2014 Ford Explorer should take precautions to protect against carbon monoxide. This case will be watched and closely monitored. It will be interesting to see how it develops as it goes through the motion and discovery phases of the litigation.

Source: Law360.com

**AT&T Pays $45 Million To Settle TCPA Class Action**

AT&T Mobility LLC has asked a Montana federal judge to approve a $45 million settlement that would resolve a proposed class action alleging the company violated the Telephone Consumer Protection Act (TCPA) by making unsolicited calls to individuals who purported not to be AT&T subscribers. In a joint motion filed with lead Plaintiff Joel Hageman, the parties ask U.S. District Judge Dana L. Christensen to approve the proposed settlement, arguing that it presents guaranteed benefits to the 16,000-member settlement class without the risks and costs associated with a trial, while also absolving AT&T of all liability.

The joint motion asks for the law firms Bishop and Heenan, Keogh Law Ltd., and Bingham and Lea PC to be appointed as settlement class counsel. The proposed settlement would allow members of a settlement class to receive up to $500 per call, with the actual size of the per-call payment being determined on a pro rata basis, according to the motion. The parties say they reached the agreement after a mediation session with former U.S. Magistrate Judge Morton Denlow of JAMS Resolution Centers. The joint motion states:

*The parties’ agreement to settle this litigation reflects well-informed and engaged arm’s-length bargaining with the assistance of a highly experienced mediator. Plaintiff’s counsel have litigated numerous class actions, including cases involving the legality of calls made to cellular telephone numbers under the TCPA. For its part, ATTM is represented by experienced counsel who have thoroughly investigated plaintiff’s claims and assessed their potential value.*

According to the complaint, Hageman received multiple recorded calls from AT&T that began with this message: “This is an important message from AT&T to discuss your wireless service.” AT&T claims the customers contacted had consented to receiving the calls by providing their cellular telephone number as a can-be-reached number for AT&T’s customer accounts. I have a hard time believing that customers intended for that to happen. What do you think?

The $45 million agreement is one of the largest proposed settlements to resolve a TCPA suit in recent memory. A California federal judge on Sept. 2 approved a $32 million settlement resolving a class action alleging Bank of America Corp. violated the Telephone Consumer Protection Act, an amount the parties claim is the largest recovery ever obtained in a finalized TCPA settlement. Capital One Financial Corp. and three collections agencies agreed in August to pay almost $75.5 million to settle a consolidated class action TCPA suit, but that agreement has yet to receive final approval.

Source: Law360.com
JUDGE REFUSES TO APPROVE THE DEFECTIVE REFRIGERATOR CLASS ACTION SETTLEMENT

We wrote last month about the $33 million settlement in a class action lawsuit filed against Norcold Inc., Thetford Corp. and Dyson-Kissner-Moran Corp. involving refrigerators that were alleged to be defective. Since then a California federal judge has refused to grant preliminary approval for the settlement. U.S. District Judge Josephine L. Stanton denied the Plaintiffs’ motion for approval of the settlement terms without prejudice, saying the court lacks adequate information to determine the incentive amounts for named Plaintiffs, who would receive $100 per hour for their assistance, with a suggested $5,000 minimum award. Judge Stanton wrote:

Because settling plaintiffs have not provided the court with any estimates of the number of hours the proposed class representatives have expended, the court cannot determine whether or not the incentive awards corrupt the proposed class representatives. Consequently, the court cannot conditionally certify the class.

Judge Stanton said in this case there is nothing inherently improper about a class representative settling an individual claim with a defendant, but added this agreement provides that consideration for the release of reserved claims will be paid only in the event the entire settlement is approved. Judge Stanton wrote:

There is no compelling reason to link the two settlements, and doing so provides those plaintiffs releasing their reserved claims with a substantial reason to support the settlement separate and apart from any interest they have solely as members of the settlement class. This conflict destroys the adequacy of those eight plaintiffs releasing their reserved claims.

Judge Stanton said the settlement class could not be certified. The Plaintiffs were given 60 days to file an amended motion addressing the deficiencies outlined in Judge Stanton’s order. I believe that this settlement will ultimately be approved.

Source: Law360.com

VERIZON TO PAY $64 MILLION IN FAMILY PLAN OVERBILLING CLASS ACTION

Verizon Communications Inc. has agreed to pay $64.2 million to settle a class action claiming it improperly billed Family SharePlan participants for overtime minutes and in-network and in-family calls. U.S. District Judge Jose L. Linares, a New Jersey federal judge, is being asked to approve the settlement. Payments pursuant to the settlement include a $36.7 million cash payment from Verizon. Also that will be $27.5 million in “calling units” that will be accessible via personal identification number. The proposed settlement—which was reached after multiple mediation sessions facilitated by retired U.S. District Judge Layn Phillips—calls for the certification of over 2 million settlement class members. Class members can obtain PINs allowing them to make free phone calls in an amount to be determined by a court-appointed claims administrator.

Pursuant to the notice plan, potential settlement class members will be notified by way of Facebook, Internet banner ads and an ad in People Magazine. The litigation goes all the way back to 2006 and involves Verizon’s alleged undisclosed billing practice of charging Family SharePlan customers for overtime minutes resulting from calls made on the primary line at a higher rate applicable to calls made on the secondary line. It also involves the company’s allegedly improper practice of charging customers for in-network or in-family calls it had promised would be free.

It was alleged in the suit that Verizon initiated a nationwide marketing plan in 2001 to promote its Family SharePlan, which advertised a monthly allotment of minutes that could be shared among up to four phones for a single fixed monthly charge. But the suit claimed the company failed to disclose that it would charge overtime minutes at a higher rate associated with the plan’s secondary phones, as opposed to the additional minute rate associated with the primary phones, even if the overtime minutes were made on the primary and not on a secondary phone.

It was alleged that Verizon was aware that its overtime minutes billing practice was inadequately disclosed to and that the customers didn’t understand the practice. Family SharePlan customers. A deadline of Feb. 27, 2015, was requested for objections to be filed to the proposed settlement. A final approval hearing was requested to be held on March 20, 2015.

Source: Law360.com

COURT WATCH

JUDGE VANCE Lifts TEMPORARY RESTRAINING ORDER Preventing Publication of Alagasco Documents

I had intended to write last month on an issue related to public safety. But I got sidetracked due to the GM litigation and I didn’t do so. So I will write on it now. It involves the battle between the Alabama Gas Company (Alagasco) and the Montgomery Advertiser over whether some extremely important safety-related information should be made available for the people of Alabama. Alagasco fought hard to keep this information out of public view.

On Tuesday, Sept. 23, Jefferson County Circuit Judge Robert Vance issued an order to dissolve his previous temporary restraining order restricting the Montgomery Advertiser from publishing Alabama Gas Company documents that included plans for gas pipelines. The company’s Distribution Integrity Management Plan (DIMP) was released to the Advertiser by the Public Service Commission (PSC) as a matter of public record. But Alagasco objected to the report’s release, saying it was protected as a “matter of homeland security,” because it would reveal locations of critical natural gas infrastructure.

In his ruling lifting the restraint, Judge Vance called Alagasco’s fears that the documents might be used to aid plans for terrorism or sabotage “vague phantoms.” He said the court had made an error in issuing the restraining order, which he said was a prior restraint on free speech in violation of the First Amendment.

Following Judge Vance’s ruling, the Advertiser published information contained in the DIMP on its website as part of a story detailing the findings of a local and national investigation into the safety of cast-iron gas pipes. The paper, along with parent company Gannett and sister paper USA Today, is examining whether these types of pipes are at risk of cracking, which can result in fires and explosions. Alagasco maintains hundreds of miles of pipelines in service of its estimated 425,000 customers, mostly in central Alabama.

Alagasco offered to provide the Montgomery Advertiser with a redacted version of the DIMP, which it said still contained about 90 percent of the information found in the original document, but not information it felt was a risk to security. The newspaper rejected that offer, with Advertiser
President and Publisher Robert Granfeldt, Jr., noting that it came too late, the night before the court’s hearing date. Evidently the Advertiser decided to take its chances in court. That was a good strategy for the paper, and it prevailed.

Dennis Bailey and Beth Bolger, lawyers with the Montgomery firm Ruston, Stakely, Johnson & Garrett, represented the Advertiser in the case. In a release issued by the Alabama Press Association, Dennis had this to say:

"It was the first case in the 143-year history of the Alabama Press Association where a member newspaper had been subject to an order not to publish. The order issued by Judge Vance will be important and helpful to newspapers and media organizations for years to come."

"The information the Advertiser sought and was able to publish dealt with an extremely significant safety issue affecting citizens of Alabama. Hopefully, Alagasc will remedy any hazardous conditions that potentially put lives at risk in Alabama. Judge Vance should be commended for correcting his error. The people of Alabama were the winners!"

Sources: Al.com, Montgomery Advertiser, Insurance Journal, Google News, Alabama Press Association

$28 Million Verdict Upheld in Wyoming Carbon Monoxide Case

A federal judge has upheld a jury’s $28.2 million damage award to a woman who suffered a permanent brain injury from carbon monoxide poisoning due to a faulty furnace in the apartment she was renting in Casper, Wyo. Amber Lompe filed suit against apartment owner Sunridge Partners LLC and Apartment Management Consultants of Salt Lake City. It was alleged in the suit that the defendants knew about a previous carbon monoxide leak and failed to repair or replace the furnaces before she was poisoned in February 2011. A jury awarded Ms. Lompe $2.7 million in compensatory damages and $25.5 million in punitive damages in December 2013. The apartment owners and managers appealed, claiming that the jury reached a "runaway verdict" based on evidence and witnesses they shouldn’t have been allowed to consider.

U.S. District Judge Alan B. Johnson rejected those claims, stating in his order that the damages awarded were significant, but not shocking or unconstitutional. Judge Johnson stated further in his order:

The harm here was not mere economic harm or injury. The injury was physical. If the plaintiff had been in her apartment even minutes longer, she likely would have lost consciousness and the carbon monoxide poisoning could have disabled her for the rest of her life or could’ve been fatal. It is unquestioned that the jury viewed the defendants’ conduct as egregious, warranting a greater award of punitive damages.

Ms. Lompe suffered brain injuries that affect her memory, concentration, processing speed, attention and ability to multitask. The defendants, in their appeal, argued that jurors did not hear that Ms. Lompe failed to maintain the detectors in her apartment and had she done so, could have prevented her own injuries.

Ms. Lompe’s response points out that semi-annual inspection reports disclosed missing carbon monoxide alarms in many apartments and that weeks after she was poisoned, the majority of the apartments did not have functioning alarms. The defendants plan to appeal.

Sources: Insurance Journal and The Casper Star Tribune

JPMorgan and RBS secretly colluded between March 2008 and July 2009 to rig the benchmark in an effort to distort the pricing of derivatives indexed on it, the EU said. The second violation focused on JPMorgan, RBS, UBS and Credit Suisse in their role as leading market makers in Swiss franc interest-rate derivatives. It was reported that the banks agreed to quote wider, fixed spreads to third parties on certain categories of derivatives while maintaining narrower spreads among themselves.

According to the EU, one objective of the collusion “was to prevent other players from competing on the same terms in this market.” The new penalties are smaller than the fines of 1.7 billion euros ($2.2 billion) that the EU imposed in December on six banks for manipulating Euro (Euribor) and Japanese yen (Libor) benchmarks.

Source: USA Today

IX. WHISTLEBLOWER LITIGATION

Texas Jury Finds Against Trinity in Guardrail FCA Suit

A Texas federal jury found last month that Trinity Industries Inc. defrauded the U.S. government out of $175 million by selling dangerous guardrails to the U.S. Federal Highway Administration (FHWA). The jury found in favor of relator Joshua Harman in the case based on violations of the False Claims Act case. He had accused Trinity of making dangerous alterations to its guardrails after a previous design without the alterations was approved by the FHWA. It was claimed that Trinity misrepresented the modified ET-Plus as the same as the approved version when it is actually more dangerous. The jury awarded $175 million, which after trebling amounts to damages of $525 million. Statutory penalties can also be awarded.

Trinity has said that it will stop shipping its ET-Plus guardrail system. According to Trinity, the highway administration has requested additional crash testing of the guardrail system. It was alleged in the complaint that the system had failed numerous times, killing or injuring drivers. At least one state, Virginia, has returned guardrails to Trinity.

Source: Law360.com
DEFRAUDING THE MILITARY IS ALL TOO COMMON

The men and women who serve our nation in the military have long been respected for the sacrifices they make not only on the battlefield, but also to their families and own livelihoods. The average American soldier makes well below the average American civilian, and yet engages in a daily risk of their life to defend the freedom and liberty that American civilians enjoy. One would expect that at least American soldiers are well-equipped and well-armed to protect themselves while protecting our own country. Sadly, this is all too often not the case due to greedy and selfish defense contractors and sub-contractors who seek to make an extra buck off of the taxpayer and risking the lives of American soldiers.

Defense contractors can defraud the federal government in multiple ways. Kaman Precision Parts, a Florida-based defense contractor, paid $4.75 million to resolve allegations of selling non-conforming fuses for the Army's bunkerburst bombs. The government's complaint alleged that Kaman substituted motors and parts that did not conform to the contract's specifications. These non-conforming parts could cause misfires and potentially would harm servicemembers.

Defense Contractor DRS Technical Services of Virginia agreed to pay $13.7 million to settle allegations of overbilling the government earlier this year. DRS is accused of billing for work hours performed by DRS employees who lacked the required qualifications. The work DRS was performing involved supplies, services, and materials to assist the Army's operations in the wars in Afghanistan and Iraq. This highly important work for our nation's military did not faze DRS from charging the government for work performed by its unqualified employees.

There are a variety of ways that defense contractors can defraud the federal government. Common schemes defense contractors utilize include inflating costs and charges in cost-plus contracts, or lying about costs to the government in violation of the Truth-In-Negotiations Act. Contractors have been caught utilizing worthless or substandard products and services and in improperly allocating costs to the federal government. Additionally, the improper substitution of a product and cross-charging occur.

When defense contractors defraud the federal government, they not only are obtaining money not due to them, they are fleecing the American taxpayer and putting American soldiers in danger. However, American citizens can combat this fraud thanks to the False Claims Act (FCA). The submission of shoddy and sub-par materials for payment by the government is a violation of the FCA. In fact, any false claim for payment submitted by contractors to the government is a violation of the FCA. Citizens are empowered by the FCA to file a suit on behalf of the government when they have knowledge of the fraud being conducted by companies seeking taxpayer dollars through fraudulent means.

The FCA's strength is that it rewards whistleblowers who step forward and relate the information they have to the government. Whistleblowers, known as relators, can receive between 15-30 percent of what the government recovers overall. Additionally, the FCA protects whistleblowers from harassment and retaliation by their employers for stepping forward and revealing the fraud.

Lawyers at Beasley Allen continue to vigorously investigate fraud committed by defense contractors and encourage anyone who knows of fraudulent activities to step forward. Potential whistleblowers have the right not to be retaliated against for doing the right thing and reporting the fraud they have witnessed. Anyone considering doing the right thing and blowing the whistle are strongly urged to seek legal advice before doing so.

Lawyers at Beasley Allen are very familiar with the federal False Claims Act and its state counterparts and can guide whistleblowers along the process. If you have any information and would like to speak with a lawyer, contact either Lance Gould, Archie Grubb, Larry Golston, or Andrew Brashier lawyers in our firm's Consumer Fraud Section at Lance.Gould@beasleyallen.com, Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com or Andrew.Brashier@beasleyallen.com at 800-898-2034 or 334-269-2543. You may also contact one of these lawyers if you simply need more information on this subject.

X. PRODUCT LIABILITY UPDATE

BESSEMER JURY RETURNS $9.9 MILLION VERDICT IN MAZDA FIRE CASE

A Bessemer, Ala., jury returned a $9 million verdict last month in favor of Sydney McLemore and John and Barbara Hurst in a case against Mazda Motor Corporation. The verdict allocated $6 million for Sydney McLemore and $3.9 million for Mr. & Mrs. Hurst. Ben Baker, a lawyer in our firm, represented Ms. McLemore in the case. She was burned over 15 percent of her body when the 2008 Mazda 3 sedan she was driving was involved in a crash and caught fire. Jefferson County lawyers Bruce Petway, Janet Olsen, and A.W. Bolt represented Mr. and Mrs. Hurst. Their daughter, Natalie Hurst, was killed in the fire when she was trapped in the burning vehicle.

The Mazda vehicle was defectively designed with the fuel tank placed adjacent to a hard metal muffler with a sharp edge and no proper shield. As a result, the muffler ruptured the fuel tank, causing a fuel-fed fire. Mazda should have been aware that this design would lead to the likelihood of a post-collision fuel-fed fire because the placement of the muffler next to the fuel tank violated industry design standards.

Because Mazda chose not to follow industry standards, Ms. McLemore was seriously burned and required multiple painful skin grafts. Sadly, Natalie lost her life. All of this could have been avoided if Mazda had placed the safety of its customers first. Evidence showed that it was industry practice to place the muffler behind the rear axle and not next to the fuel tank.

The occupants of this car would have escaped with minor injuries had a proper design and placement of the muffler been done by Mazda. We were pleased to have had the opportunity to help these clients. The result in the case was certainly justified based on the facts and law applicable to this case. The trial lasted three weeks, under the direction of Judge Eugene Verin in the Circuit Court of Jefferson County, Ala., Bessemer Division. Ben and the other lawyers did an outstanding job in this most significant case.

VIRGINIA WOMAN PARALYZED IN MIATA CAR CRASH AWARDED $20 MILLION

A Virginia jury awarded $20 million last month to a woman in a lawsuit she had filed against Mazda Motor Corp. The convertible sports car driven by plaintiff, Shannon Walters, crashed and left her paralyzed. The incident occurred in June 2006 in Bedford County, Va. Ms. Walters swerved to avoid a plastic swimming pool that slid out of the bed of a pickup truck. Her Mazda Miata overturned onto its roof. It was contented in the lawsuit that the Miata had a defective design—that a latch system supposed to hold the windshield to the con-

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vertebral canvas top failed when the car overturned. Even though the windshield collapsed on Ms. Walters, Mazda claimed the design wasn’t defective. Mazda will likely appeal.

Source: The Roanoke Times

CONTINENTAL RECALLS 170,000 DEFECTIVE MOTORCYCLE TIRES

We wrote last month about Goodyear’s 402 motorcycle tire, a tire with a history of failures causing injury and death. When a tire fails on any vehicle, the vehicle is very difficult to control. On a motorcycle, when a tire fails, it is almost impossible to control the bike and a wreck is virtually a certainty.

Unfortunately, there are other motorcycle tires currently experiencing serious safety issues. Those include the Continental Conti Attack, Road Attack, Sport Attack and Race Attack tires. Continental admits that these motorcycle tires are defective in design and the company has implemented a “construction change” that it claims will fix the defect. The National Highway Traffic Administration (NHTSA) has confirmed that these tires may experience a separation between the tread, belt, and carcass, which results in a loss of tire inflation pressure that could lead to failure and a crash. All of these defective tires were made by Continental at its plant in Kobach, Germany.

Continental is recalling 170,000 of these motorcycle tires in sizes 120/70ZR17 and 120/70R17. The defective tires were sold as original equipment and replacement tires from 2007-2014. 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) 847-3349 with any questions. If you need additional information on the above or on tire-defect litigation generally, contact Rick Morrison, a lawyer in our Personal Injury/Products Liability Section, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

NHTSA CONSIDERS VEHICLE ELECTRONICS RULE

The National Highway Traffic Safety Administration (NHTSA) recently announced that it is considering imposing vehicle electronic requirements on vehicles. This announcement shouldn’t be a surprise to any lawyer who has been involved in litigation involving Toyota vehicles. In fact, NHTSA is required to do this. In response to the investigation into Toyota’s Sudden Unintended Acceleration problems related to the electronics in Toyota’s vehicles, Congressional action back in 2012 requires NHTSA to report to Congress on its “progress on examining the need for safety standards.” But this announcement comes at an interesting time as NHTSA is just weeks removed from having faced intense scrutiny from Congress for its role in the GM ignition recall fiasco. Congress felt NHTSA should have known more about the problem and helped to prevent it. It was even shockingly determined that NHTSA, as an organization, didn’t possess advanced knowledge of how air bags work.

The 2012 law requires NHTSA to report to Congress on the highest-priority areas for safety for electronic systems. Even though vehicles have a growing number of electronics systems, they really aren’t governed by any performance rules. NHTSA’s rules focus on performance of the car rather than electronics. The notice takes note of the sea-change in automotive systems in the last three and a half decades, enumerating the transformation with the kinds of statistics that emerged during the agency’s February 2010 assessment of Toyota Unintended Acceleration problems and the tragic results associated with this problem.

NHTSA must do a better job of regulating the constantly advancing field of electronics involved in motor vehicles. NHTSA seems mindful of the dire consequences that could happen if an electrical problem occurred while driving down a highway. NHTSA currently has research underway that is “evaluating the hazards associated with electronic control systems that could impact a vehicle’s steering, throttle, braking and motive power first because they can impact the fundamental control functions that a driver performs.”

According to NHTSA, its intention was to determine “whether there are emerging gaps in the functional safety assurance processes of motor vehicles.” Sean Kane, the founder and president of Safety Research and Strategies, who has been at the forefront of research into the systemic problems in the automotive industry with its electronic control systems, stated in response to NHTSA’s recent announcement:

The concerns about and the gaps around the functional safety and reliability of today’s automotive electronics are present, specific and abundant. In 2011, The Safety Record (his publication) examined 12 months of recalls to determine the prevalence of recalls related to electronic defects. After reviewing 722 recall campaigns, The Safety Record found that electronics recalls comprised more than a quarter; of those, 24 recall campaigns addressed software defects.

Mr. Kane further pointed out that just in the last 30 days alone NHTSA listed three investigations related to electronic defects—low-speed unexpected acceleration in Toyota Corollas; loss of Electric Assisted Power Steering in Ford Fusion, Mercury Milan and Lincoln MKZ vehicles; and failures of the Totally Integrated Power Module (TIPM) installed in Chrysler SUVs, trucks, and vans. We fully expect there to be more safety-related problems involving vehicle electronics. NHTSA must get prepared to deal with these problems. Our experience in the Toyota litigation alone was enough to let our lawyers know to expect widespread problems relating to vehicle electronics in the coming months and years.

More on the Ionization Smoke Detectors

We reported on the dangers of ionization smoke detectors in the August 2014 issue of the Report. Testing reveals that ionization smoke detectors do not adequately detect slow growth or smoldering fires. What makes these detectors so dangerous is that they sound at the slightest bit of certain types of smoke, like the smoke produced from cooking toast. Folks who have these types of detectors assume that if their detector sounds in this type of smoke, that it would certainly go off in a fire. That is a terrible misconception.

As previously reported, three of the world’s leading fire safety advocates recently visited our firm in Montgomery, Ala., and participated in an open forum on LaBarron Boone’s radio talk show, The Law and You. During this discussion, Adrian Butler, an Australian consumer advocate who once sold smoke detectors, discussed the number of people who have died in Alabama this year due to house fires. This number was misreported in our August issue.

The original article reported that 62 people had died in Alabama due to defective ionization alarms. While it is true that 62 people have died in Alabama from house
fires this year, not all of those deaths have been directly linked to defective ionization alarms at this time. However, Ed Paulk, the Alabama Fire Marshal who provided this statistic to Mr. Butler, says that scientific data held by the Australian Government’s Commonwealth Scientific and Industrial Research Organization (CSIRO) proves the ionization smoke alarms in most U.S. and Australian homes are defective. In any event, smoke detector manufacturers are well aware of the ionization alarm’s defects. They have known for more than 30 years that ionization alarms do not provide adequate protection in a slow, smoldering fire. Even worse, manufacturers know that there is an alternative technology that will detect a slow, smoldering fire, but they refuse to take the defective alarms off the market. Fortunately, fire safety advocates, like Adrian Butler, have dedicated their lives to removing these detectors from the market. Lawyers at Beasley Allen, led by Greg Allen and LaBarron Boone, have helped to lead that fight and they will not stop until standalone ionization alarms are no longer offered to the American public. Hopefully, that will become a reality in the not-too-distant future.

XI.
MASS TORTS UPDATE

$9 BILLION VERDICT AGAINST TAKEDA ELI LILLY ACTOS VERDICT REDUCED TO $37 MILLION

A Louisiana federal judge has reduced the $9 billion punitive damages award against Takeda Pharmaceutical Co. Ltd. and Eli Lilly & Co. over the diabetes drug Actos to $36.8 million. U.S. District Judge Rebecca Doherty said the jury “should bow” to the Constitution’s due process clause. She said the jury’s April verdict was not unreasonable, ruling that punitive damages in the case should be roughly 25 times the amount of compensatory damages and no more.

The companies, which jointly marketed the drug, were to split the payment of $1.5 million in actual damages to plaintiffs Terrence and Susan Allen. Judge Doherty’s ruling reduced the plaintiffs’ $6 billion damages award against Takeda to roughly $27.7 million and the $3 billion dollar award against Eli Lilly to $9.2 million. The total compensatory damages were previously reduced slightly to $1.3 million.

Judge Doherty said in her ruling that the punitive damages verdict was too disproportionately large to be constitutional, but she also stressed that she did not believe the jury was motivated by “passion or prejudice” in arriving at the verdict. Judge Doherty said in her ruling that the jury was merely following instructions to issue a verdict that would have a deterrent effect on such multibillion corporations. Judge Doherty wrote:

Within the context of this financial reality, and when repeatedly, fines, penalties and settlements calling for the payment of billions of dollars by these huge multi-national companies are a financial reality, it would be short-sighted not to recognize that corporations boasting sales of one product of almost $24 billion and a value of $40 billion are financially capable of simply absorbing losses that might seem large to the lay public, but are, in fact, small when compared to the profits made and degree of wealth involved.

Judge Doherty denied the drugmakers’ request for a new trial. Sales of Actos over the period relevant to the litigation amounted to $24 billion, according to the court’s opinion. The verdict sustained the plaintiffs’ claims that Actos manufacturer Takeda and its U.S.-based marketing partner Eli Lilly had concealed the risks of bladder cancer carried by the drug from physicians and consumers.

A PHILADELPHIA JURY ORDERS TAKEDA TO PAY MORE THAN $2 MILLION

In another Actos case, a Philadelphia state court jury, ordered Takeda Pharmaceuticals to pay more than $2 million for failing to warn doctors that its diabetes drug Actos could cause bladder cancer. The case is the seventh Actos case to go to trial nationwide and it comes on the heels of the $9 billion verdict referred to above. In 2013, juries in California and Maryland ordered Takeda to pay more than $8 million in damages, but those verdicts were overturned by the judges for technical reasons. Juries in three trials, two in Las Vegas and one in Chicago, have returned verdicts in favor of Takeda. There are still more than 8,000 cases pending against Takeda Pharmaceuticals and its co-marketer of Actos, Eli Lily, in both federal and state courts. These cases allege that Actos causes bladder cancer. More trials are scheduled for late 2014 and continue throughout 2015.

The Philadelphia jury found that Takeda failed to warn the doctors of 79-year-old Plaintiff Frances Wisniewski that Actos increases the risk of developing bladder cancer. The jury heard testimony—which was presented during the federal trial in Louisiana—about Takeda’s destruction of key employees’ documents. Even though it heard that testimony, the jury failed to order Takeda Pharmaceuticals to pay punitive damages.

Andy Birchfield and Roger Smith, lawyers in our firm’s Mass Torts Section, continue to investigate claims on behalf of individuals and families injured by Actos. Thus far the lawyers and support staff have investigated 2,100 separate Actos claims. If you need more information on the Actos litigation, contact Andy Birchfield or Roger Smith at 800-898-2034 or by email at Andy.Birchfield@beasleyallen.com or Roger.Smith@beasleyallen.com.

POWER MORCELLATOR SAFETY CONCERNS

I must confess that the term “morcellator” had little meaning to me until lawyers in our Mass Torts Section alerted me to a most serious problem. Recently, the U.S. Food and Drug Administration (FDA) issued a Medical Device Safety Communication for “Laparoscopic Uterine Power Morcellation” in hysterectomy and myomectomy procedures. I have learned that laparoscopic power morcellators are used in procedures to treat and/or remove uterine fibroids and for hysterectomy procedures. Morcellation is the process of dividing tissue into small fragments and the removal of that tissue through a small incision site.

Some women who undergo a hysterectomy or myomectomy for the treatment of fibroids are found to have metastatic leiomyosarcoma cancer, a form of uterine cancer, after pathology is complete. If a laparoscopic power morcellator is used during this procedure in a woman who has undetected uterine cancer, there is a risk that the procedure will spread the cancerous tissue within the abdominal and pelvic area, promoting the cancer and impacting the chance of long-term survival. I have seen video presentations that show how this procedure works and how cancerous tissue can be spread. It’s evident that a most serious problem is created.

Since the FDA first warned about the potential for power morcellators to spread uterine cancer, several women have filed lawsuits against the manufacturers. In July, Johnson and Johnson withdrew three of its morcellators from the market. Lawyers in
VIAGRA LINKED TO INCREASED RISK OF MELANOMA

A recent study published in JAMA Internal Medicine has found that men who use—or have used—Viagra have a significantly greater risk of developing melanoma compared to men who have never used the drug. Since Viagra hit the market 16 years ago, followed by similar erectile dysfunction (ED) drugs Cialis and Levitra, the ED drug market has soared into the billions of dollars. The years have not only taken the sting out of the stigma, they now offer more insight into the risks associated with the drugs.

Viagra, which contains the active ingredient sildenafil, affects the same genetic pathway that allows skin cancer to become more invasive, which led scientists to explore whether men who use the drug were at greater risk for developing skin cancer. Their research involved nearly 32,000 men, about 1,600 of whom reported using Viagra. Researchers found that men who used Viagra were at an 84 percent greater risk of developing melanoma—the deadliest form of skin cancer—compared to men who never used the drug. Researchers also found that if men had ever used Viagra, they still had twice the risk of developing the disease even after discontinuing use.

Scientists say more research is needed to draw a stronger link between Viagra use and skin cancer. But in the interim, it’s strongly advised that men—especially older men—protect themselves from getting too much sun and have regular checks by a doctor to look for skin cancer. Melanoma can be curable if caught early, but if undetected it can rapidly spread throughout the body, making it more difficult to treat. More than 8,000 die from melanoma each year.

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

Sources: NPR and Righting Injustice

XII. AN UPDATE ON CLASS ACTION LITIGATION

CLASS ACTION LITIGATION INVOLVING CORN FARMERS

Lawyers at Beasley Allen are pursuing claims on behalf of those harmed by Syngenta Corporation’s destruction of the corn export market to China. Part of Syngenta’s business involves developing and selling corn seed that possesses certain genetically engineered traits. Two of its developments, Viptera corn and Duracad, contain a genetically modified trait known as MIR162 that helps make the plant resistant to numerous pests. Though this trait is approved for sale in the United States, China (one of the key importers of United States corn) has not approved the trait.

In November of 2013, Chinese regulatory officials found traces of MIR162 in corn shipments from the United States. As a result, China has rejected shipments of United States corn causing farmers and grain handlers across the country to suffer significant economic losses. These lawsuits focus on allegations that Syngenta released MIR162 into the marketplace knowing it lacked approval in China and knowing that commingling of corn is essentially inevitable. Release of the trait led to the contamination of the United States corn supply and is continuing to foreclose the United States export market to China.

Further, the North American Export Grain Association (NAEGA) and the National Grain and Feed Association (NGFA) have urged Syngenta to stop selling its genetically modified corn. In a joint statement, the agencies said “NAEGA and NGFA are gravely concerned about the serious economic harm to exporters, grain handlers and, ultimately, agricultural procedures—as well as the United States’ reputation to meet its customers’ needs—that has resulted from Syngenta’s current approach to stewardship of Viptera. Further, the same concerns now transcend to Syngenta’s intended product launch plans for Duracad, which risk repeating and extending the damage. Immediate action is required by Syngenta to halt such damage.”

China’s rejection of United States corn shipments has influenced the entire grain market causing corn prices to drop lower than they have been in years. If you or your business suffered injury as a result of the crippled corn export market, or for more information on this litigation, contact Dee Miles, Roman Shaul, or Leslie Pescia, lawyers in our firm’s Consumer Fraud Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Roman. Shaul@beasleyallen.com or Leslie.Pescia@beasleyallen.com.

Sources: www.ngfa.org

SUZUKI SUED OVER FIRES IN CARS BUILT BY GM KOREA

A putative class action was filed in an Oklahoma federal court last month against Suzuki Motor of America Inc. It was alleged that the automaker concealed from consumers a defect in certain General Motors LLC-manufactured Forenza and Reno compact cars that can cause the running lights to overheat and cause a fire. The Korean automaker was said to have known about the electric lighting defect as early as April 2007. However, it didn’t issue a recall for the 184,244 affected model year 2008 to 2008 Forenza and 2005 to 2008 Reno vehicles until this past July. Instead, the automaker opted to continue to sell the defective cars, to the detriment of consumers, and still has not informed car owners when the repairs will be made available. The complaint said:

Plaintiff contends that said delay was deliberate and calculated for the purpose of depriving consumers of knowledge of a dangerous defect and the lack of a solution for it.

The automaker notified the National Highway Traffic Safety Administration of the recall in May, saying that heat may be generated in the headlamp switch or daytime running light module, which could melt the switch or module. The Forenza and Reno vehicles included in the recall were manufactured by General Motors Co. in South Korea. Suzuki didn’t inform the car owners of the recall until July, even though it allegedly knew about the defect as early as 2007. That was when consumers began filing complaints with NHTSA over the issue.

The court is being asked to certify a class in the case of all individuals in the U.S. who purchased or leased one of the affected Forenza or Reno vehicles. The complaint alleges generally that “Plaintiff and class members have suffered an ascertainable loss of money, property and/or value of their vehicles subject to the recall notice, including diminution of value to such vehi-
BMS AND SANOFI LOSE REMAND CHALLENGE IN PLAVIX MDL

A New Jersey federal judge has remanded 57 cases claiming injuries over the blood thinner Plavix to state courts. Bristol-Myers Squibb Co. and Sanofi-Aventis U.S. LLC had argued that the suits fraudulently included drug distributor McKesson Corp. and unrelated Plaintiffs to avoid federal jurisdiction. Partially granting the Plaintiffs’ motion in the multidistrict litigation (MDL), U.S. District Judge Freda L. Wolfson remanded 12 cases to California state court after finding that the one-time Plavix users presented a colorable claim against California-headquartered McKesson. Judge Wolfson also remanded another 45 cases in declining to adopt a “fraudulent misjoinder” doctrine.

In asserting that doctrine, BMS and Sanofi wanted to carve out the Plaintiffs in the 45 suits that they said had little connection to other Plaintiffs in each case but who reside in the companies’ home states, which prevented the kind of complete diversity among the parties that could keep the suits in federal court. Judge Wolfson said the state court should resolve the issue of misjoinder, citing “considerable reasons against adopting the fraudulent misjoinder doctrine.” The judge said:

Conducting fraudulent misjoinder analysis in this case necessarily requires the court to wade into a thorny thicket of unsettled law; indeed, disagreements exist as to numerous questions about the doctrine, and the last thing the federal courts need is more procedural complexity.

Judge Wolfson did express concerns, however, about complaints made by the Plaintiffs that seemingly have “little in common” except for their use of Plavix. She stated in that regard:

While I am aware that California’s joinder rules are particularly liberal, these factual matters will nevertheless necessarily have an impact on the outcome of the dispute over joinder of claims by plaintiffs. In my view, in pharmaceutical cases like the ones here, courts should be steadfast in guarding against plaintiffs’ attempts at forum shopping by employing questionable procedural mechanisms, including misjoinder of claims.

The Plaintiffs contended that Plavix was marketed as a better alternative to an aspirin regimen when, in reality, the drug isn’t more effective in preventing heart attacks and strokes with its risks outweighing any benefits. The 60 suits at issue—three of which will remain in federal court—involve Plaintiffs from 45 states, Canada and Puerto Rico, and were filed between 2012 and 2014 in California state court in San Francisco. BMS and Sanofi removed the cases to California federal court, and they were later transferred to the MDL. There are no federal claims in the suits.

In arguments over remand, BMS and Sanofi contended that McKesson was only named as a defendant in the suits, which include several California residents, to prevent diversity among the parties. They said that the court should ignore that company’s location in determining jurisdiction. According to BMS and Sanofi, the Food Drug and Cosmetic Act should preempt the claims against McKesson, but Judge Wolfson said courts are restricted from making a “merits determination” in weighing the allegedly fraudulent inclusion of a defendant.

Judge Wolfson also said that California law doesn’t bar failure-to-warn claims against drug distributors and that Plaintiffs had demonstrated a “colorable claim” against McKesson over the allegedly marketing and distribution of Plavix without proper warnings. The three cases remaining in federal court involve parties with complete diversity. The order stated that the Plaintiffs couldn’t get them remanded based on the “forum defendant rule,” which blocks the removal of a suit when a properly joined and served defendant is a citizen of the state where the litigation is filed. McKesson wasn’t served at the time BMS and Sanofi removed the cases.

In his order, Judge Wolfson agreed with a majority of courts in deciding that a “nonforum defendant may remove before a properly joined forum defendant has been served.” The decision was said to be consistent with California and Ninth Circuit case law. The companies were accused of “unnecessary procedural delays, including improper removal to federal court.” The case is in the U.S. District Court for the District of New Jersey.

Sources: Reuters and Law360.com

Fannie Mae to Pay $170 Million to Settle Clear Investors’ Subprime Suit

Fannie Mae has agreed to pay $170 million to shareholders to settle a consolidated class action alleging the federal mortgage giant misrepresented its exposure to subprime loans in the runup to the 2008 mortgage crisis. The Massachusetts Pension Reserves Investment Management Board and State Boston Retirement Board, the lead plaintiff, representing a class of common stockholders, and Tennessee Consolidated Retirement System, representing a class of preferred stockholders, filed a motion for preliminary approval of the settlement, which would clear Fannie Mae and its overseers at the Federal Housing Finance Agency of the claims that it violated the Securities Exchange Act of 1934. The settlement will be divided 73 percent to 27 percent between the groups, with $123.76 million going to the common stock class, and $46.24 million to the preferred stock class.

The consolidated suit traces its origin to September 2008, when FHFA Director James Lockhart announced that Fannie would be placed under conservatorship. Shortly thereafter, a complaint was filed by named plaintiff John A. Genovese against individual Fannie Mae directors and officers, alleging it violated the 1934 act. In March 2009, the court appointed the three pension boards as co-lead plaintiffs in the suit, and in April 2012, the three boards filed their operative second amended consolidated class action complaint.

It was alleged in the complaint that Fannie Mae downplayed its exposure to subprime and Alt-A loans, and that its gamble on the risky loans directly lead to its being placed under conservatorship. Alt-A loans are loans that were approved for borrowers with slightly higher credit scores than subprime borrowers but that had little to no documentation. The day after the announcement of Fannie Mae’s conservatorship, its stock price plummeted 90%, from $7.04 to $0.73, causing billions of dollars in losses to investors.

Sources: Reuters and Law360.com

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XIII. BUSINESS LITIGATION

$467 Million Verdict Returned Against Philips In Masimo Patent Trial

A Delaware federal jury awarded Masimo Corp. $466.7 million last month against Philips Electronics North America Corp. for its infringement of two patents for measuring blood oxygen levels. Philips’ arguments that the patents were invalid were rejected. Philips admitted it directly and indirectly infringed all of Masimo’s asserted claims, but argued the patents were not valid. But the jury found for Masimo finding that its patents were valid. The jury found the patents not anticipated, indefinite, obvious, enabled or improperly written.

The jury also found that Philips had not proved that Masimo literally or indirectly infringed Philips’ own patent for measuring medical signals. Philips had denied infringement for 13 years, before finally admitting it just before a pretrial conference in August. U.S. District Judge Leonard P. Stark instructed the jury that:

Philips admitted that it knew about Masimo’s patent claims and knowingly caused third parties to use Philips’ oxygen measurement technology in a way specifically meant to cause infringement.

Philips’ IntelliVue line of patient monitors and MMS X2 line of transport monitors contained that technology, called FAST Sp02, according to Masimo. Masimo first accused Philips in February 2009 of infringing 10 patents focusing on the use of the technology in pulse oximeters. A fixture in clinics and hospitals, pulse oximeters are medical devices that measure the level of oxygen in a patient’s blood. Masimo said its units are made of two parts linked by a patented connection technology: an inexpensive sensor, which shines light through a patient’s tissue, and a more costly monitor, which provides the actual readings.

After Masimo filed suit in 2009, Philips responded with antitrust counterclaims that Masimo allegedly employed a proprietary system in its devices, with no purpose other than to hamper competition in contravention of the Sherman and Clayton acts. The Masimo patents-in-suit are U.S. Patent Numbers 6,263,222 and 7,215,984. The Philips patent-in-suit is U.S. Patent Number 6,725,074. The case is in the U.S. District Court for the District of Delaware. According to reports, Philips plans to appeal.

Source: Law360.com

$9 Million Verdict Returned Against Beef Supplier In E. Coli Row

A $9 million verdict was returned by a Nebraska federal jury in favor of Cargill Inc. in its dispute with a beef-packing company that accused of selling it beef products tainted with E. Coli that put Cargill on the hook for $26 million in costs, including victim settlements. After a jury trial that began in early September, Cargill received the verdict on its breach of contract claims against Omaha, Nebraska-based Greater Omaha Packing Co., whose raw beef trim was alleged to have contributed to an outbreak that sickened at least 54 people. Cargill mixed the allegedly tainted Greater Omaha beef with meat from three other suppliers and used it for so-called American Chef Burgers sold nationwide.

During the outbreak, some unfinished burgers also tested positive, forcing Cargill into a massive recall of 845,000 pounds of meat. In the aftermath, Cargill and its insurance carrier American Home Assurance Co. filed suit against Greater Omaha, alleging contract and warranty breaches. The complaint demanded the supplier to indemnify them for recall-related costs. Cargill and American Home claimed they were owed indemnification because Greater Omaha promised in a June 2006 guarantee that its meat would not be adulterated or misbranded within the definition of the Federal Meat Inspection Act or the Federal Food, Drug and Cosmetic Act.

Greater Omaha had claimed one of Cargill’s lawyers damaged Greater Omaha’s reputation by mentioning its potential liability—before the lawsuit was filed—in an interview with a reporter from The New York Times about the outbreak. But U.S. District Judge Lyle E. Strom rejected those counterclaims in April, finding that Greater Omaha failed to prove its claim of tortious interference with a business relationship because it couldn’t show an intentional interference that would have caused a breach of its relationship with Cargill. The case is in the U.S. District Court for the District of Nebraska.

Source: Law360.com

Asiana To Pay $55 Million To Settle Cargo Price-Fixing Claims

Asiana Airlines Inc. has agreed to pay a class of Plaintiffs $55 million to settle claims it conspired with other airlines to raise cargo rates during much of the 2000s. The preliminary settlement was filed in a New York federal court last month. In this settlement, the Seoul, South Korea-based airliner joins dozens of other airlines that have settled in the long-running antitrust multidistrict litigation (MDL) over allegations the companies colluded to fix prices. Asiana will put $55 million into a settlement fund for a class of direct purchasers of air freight services and has agreed to cooperation provisions, such as providing executives as witnesses for depositions.

The proposed agreement is the result of a series of settlement discussions that began in July 2010 between class counsel and Asiana’s lawyers. The parties met twice for daylong mediation sessions in November 2013 and in the surrounding time period engaged in numerous phone conversations. Kenneth Feinberg was the mediator and I am told he assisted the parties in reaching this settlement.

While the mediation was ongoing the court granted final approval to direct-purchaser Plaintiffs in the MDL for more than $800 million in settlements with 18 companies for their roles in the alleged scheme. Preliminary approval was given to four more airlines. China Airlines Ltd. paid $90 million in May, among the largest amounts so far in the MDL. Asiana was to have put another $37.5 million into the settlement fund as of Oct. 31. It will pay the remaining balance on or before April 30, 2015.

Asiana will also pay an additional $200,000 for notice and administration costs, according to the settlement. Those eligible for the funds are those who purchased air freight services between Jan. 1, 2000, and Sept. 11, 2006. In addition to the payment, the agreement calls for Asiana to provide four witnesses - current or former directors, officers or employees - for interviews, deposition and testimony.

The settlement agreement also requires Asiana to provide qualified experts who can authenticate documents and information related to the antitrust case. Another provision of the settlement calls for Asiana to make its lawyers available for up to three meetings with the settlement class counsel to provide additional information concerning various facets of the case, assuming the information isn’t covered by privilege or other protections.

The agreement gives Asiana the power to rescind the deal if an unspecified number
of class members opt out of the settlement. The Plaintiffs agreed to release all claims against Asiana. The multidistrict litigation dates to 2006, when consumers brought more than 90 lawsuits against more than two dozen airlines after the U.S. Department of Justice (DOJ) and the European Commission began investigating the air freight industry.

According to the DOJ, the conspirators used meetings, conversations and other communications to determine the rates the airlines should charge for various routes. It was alleged that the airlines and former executives then imposed the agreed-upon rates and participated in subsequent meetings in the United States and other countries to enforce the price-fixing plots. Although both direct and indirect purchasers initially brought suits, the Second Circuit upheld the dismissal of indirect purchaser Plaintiffs in 2012, saying that federal aviation law preempted price-fixing claims brought against foreign carriers under state antitrust statutes.

In addition to the Asiana and China Airlines’ settlements, several other settlements were reached this year. In September, Nippon Cargo Airlines reached an unspecified settlement. Korean Air Lines and Singapore Airlines gained preliminary approval for their $115 million and $92.4 million settlements, respectively. Cathay Pacific Airways Ltd. agreed to pay $65 million to settle the case in February. The case is in the U.S. District Court for the Eastern District of New York.

Source: Law360.com

XIV.
AN UPDATE ON SECURITIES LITIGATION

CORPORATE SCIENTER IN SECURITIES CASES

The Sixth Circuit recently decided a case wherein the Court purports to have clarified the rule for determining whether a complaint satisfies the pleading requirements of corporate knowledge in securities fraud cases. See In re: Omnicare, Inc. Securities Litigation, No. 13-5597 (6th Cir. October 10, 2014). In 2007, the Supreme Court interpreted the higher standard created by Congress in 15 U.S.C. § 78u-4(b) (2) for securities cases, creating a three-part test for lower courts to apply in assessing the sufficiency of the pleadings. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007).

As the Sixth Circuit stated it, the question is, “must the person misrepresenting a material fact in the name of the corporation have also done so with scienter, or is it enough that some person in the corporate structure had the requisite state of mind?” If the latter, how high up the corporate structure must the person with scienter be: CEO, CFO, or is a lower-level accountant enough? Several courts, including the Fifth, Eleventh, and Seventh Circuit Courts of Appeal, have crafted more specific rules within the Supreme Court’s guidelines, but with wide variations.

The issue, sometimes referred to as “collective scienter,” was split even before the Supreme Court entered the fray. In 2004, the Fifth and Eleventh Circuits utilized a narrow view allowing scienter to be imputed to the corporation only under respondeat superior theories. In those circuits, the corporation can only be imputed the knowledge where the officer with the knowledge also was the person making or approving the statement that is alleged to be fraudulent. A year later, the Sixth Circuit allowed an officer’s knowledge to be imputed to the corporation regardless of whether the officer made any allegedly fraudulent statement—if any officer knew the statements were fraudulent, regardless of whether they played any part in making or approving those statements, the corporation was deemed to have the required scienter.

Shortly thereafter, the Second, Seventh, and Ninth Circuits chose a slightly different tack than the earlier courts. The Seventh allowed a “strong inference of corporate scienter” even where the Plaintiffs did not name any individuals who “concocted and disseminated the fraud.” Makor Issues & Rights, Ltd. v. Tellabs, Inc., 513 F.3d 702, 710 (7th Cir. 2008). The Second Circuit created a similar rule because it did not believe Congress intended “that in no case can corporate scienter be pleaded in the absence of successfully pleading scienter as to an expressly named officer.” Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 196 (2d Cir. 2008).

The Ninth Circuit justified the rule because “there could be circumstances in which a company’s public statements were so important and so dramatically false that they would create a strong inference that at least some corporate officials knew of the falsity upon publication.” Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736, 744 (9th Cir. 2008) (emphasis in original). In this most recent case, the Sixth Circuit recognized that its original rule could very easily lead to corporate liability well beyond what Congress intended. Going forward, the Sixth Circuit laid out a specific list of person(s) whose state of mind would be probative in determining corporate scienter, adopting a portion of the test in Patricia S. Abril & Ann Morales Olazábal’s The Locus of Corporate Scienter. 2006 Colum. Bus. L. Rev. 81, 113–14 (2006). Specifically, the Court “clarified” its earlier rule and held that the state of mind of the following persons are probative on the issue of corporate scienter:

• The individual agent who uttered or issued the misrepresentation;

• Any individual agent who authorized, requested, commanded, furnished information for, prepared (including suggesting or contributing language for inclusion therein or omission therefrom), reviewed, or approved the statement in which the misrepresentation was made before its utterance or issuance;

• Any high managerial agent or member of the board of directors who ratified, recklessly disregarded, or tolerated the misrepresentation after its utterance or issuance.

In practice, at least in this case, the Sixth Circuit narrowed the rule even further, requiring the Plaintiff to demonstrate in the complaint allegations that the corporation “or an Individual Defendant filed the Form 10-K statements, knowing they were false, with the intent to defraud the public, or that they knowingly failed to correct them with the same intent.” The Court required the Plaintiff to tie the Individual Defendants to the Form 10-K statements and fit those individuals into a category described above before imputing knowledge to the corporation, which the Plaintiffs failed to do satisfactorily. While the change seems to be nearly identical to the Second, Seventh, and Ninth, the Sixth Circuit recognizes that the old rule is still controlling, but argues that the In re: Omnicare decision fits within that framework.

In the future, Plaintiffs and their counsel should be aware of these newly clarified requirements. Ideally, as always, the complaint should specifically tie identified individuals at the corporation to the creation of a fraudulent Form 10-K and to the approval for dissemination of that Form 10-K with facts beyond “information and belief.” If a complaint successfully demonstrates these two factors, the case for imputing knowledge to
the corporation is strongest in any jurisdiction.

If you need more information of the matters described above, contact Rebecca Gilliland, a lawyer in our firm’s Consumer Fraud Section, at 800-898-2034 or Rebecca. Gilliland@beasleyallen.com.

Sources: Law360.com

**GOLDMAN AND OTHERS AGREE TO $590 MILLION LBO SETTLEMENTS**

A Massachusetts federal judge has granted preliminary approval to $590 million in settlements involving a class of shareholders who had sued Goldman Sachs Group Inc., Carlyle Group LP and several other private equity firms. It was alleged by the shareholders that the companies had teamed up to keep leveraged buyout prices low. U.S. District Judge William G. Young gave preliminary approval on a series of settlements the firms have reached with the Plaintiffs in the antitrust class action. A February 2015 date was set for the hearing to determine if the settlements should receive final approval.

The decision comes just a month after Carlyle became the last defendant to resolve the suit with a $115 million settlement to avoid a November trial in the case. The suit was brought by shareholders of the firms underpaid for by agreeing not to compete with one another for several major leveraged buyouts. The case had been pending in federal court in Boston for more than five years. In the complaint 19 separate deals between 2003 and 2009 are alleged in which the firms allegedly followed an elaborate set of bidding rules to artificially deflate prices, short-changing shareholders in the target companies. Among the buyouts highlighted in the suit are a $21-billion deal for hospital chain HCA Holdings Inc. and a $5.1 billion purchase of high-end retailer Neiman Marcus Group Ltd., and another six related transactions.

Plaintiffs claim damages from the collusion will be in the billions. This was the factor that was said to have led to the recent settlements. The standard method for calculating treble damages calls for the deduction of partial settlement amounts only after tabulating the enhanced damages, rather than before – resulting in a higher total divided among fewer players. Goldman and Bain Capital Partners LLC were the first to reach a settlement with the Plaintiffs in June, agreeing to pay $67 million and $54 million, respectively, to exit the case. Silver Lake Partners LP followed suit in July with a $29.5 million settlement.

In early August, KKR & Co. Inc., Blackstone Group LP and TPG Capital LP then agreed to pay a total of $325 million, leaving Carlyle as the sole remaining defendant with a looming trial.

Source: Law360.com

**$76 MILLION JUDGMENT RETURNED AGAINST RBC OVER BOTCHED RURAL/METRO SALE**

A Delaware judge ordered RBC Capital Markets LLC last month to pay nearly $76 million to a class of former Rural/Metro Corp. shareholders for its role in what was described as the ambulance company’s “hasty and lowballed sale” to Warburg Pincus LLC. Vice Chancellor J. Travis Laster found that the class of shareholders had suffered $91.3 million in damages, amounting to $4.17 per share. The judgment against RBC represents 83 percent of the total damages in the case, according to the court’s opinion. The argument by RBC that breaches of their duties by Rural/Metro directors and their other financial adviser, Moelis & Co. LLC, should reduce RBC’s liability. The order stated on that issue:

RBC forfeited its right to have a court consider contribution for these matters by committing fraud against the very directors from whom RBC would seek contribution.

A shareholder of the ambulance company filed suit in 2011, challenging the consideration for the Warburg sale as much too low, given Rural/Metro’s value. RBC allegedly provided false information to the board in a financial presentation, manipulated financial analyses, gave false justifications for certain charges, failed to disclose issues and made misrepresentations throughout the merger process, the judge wrote, citing his liability opinion issued in March.

Rural/Metro’s director-defendants and Moelis agreed to a settlement in 2013. The individuals agreed to pay $6.6 million and Moelis $5 million in that settlement. That only left claims against the investment bank for trial. Vice Chancellor Laster had ruled that RBC had given faulty advice to Rural/Metro’s board before the sale. In his liability opinion, which was issued in March, the vice chancellor criticized RBC for undershooting the company’s valuation to make Warburg’s offer look better than it actually was. He blasted the investment bank for hiding from the Rural/Metro board that it was also in the running to help finance a takeover by Warburg. He called RBC’s actions “behind-the-scenes maneuvring” that came to light only after the parties finalized their deal.

The vice chancellor found that Moelis played a secondary role in the matter. During final negotiations in the merger process, while RBC pushed hard to be included in Warburg’s financing package, it appears that Moelis did not. The judge found that Moelis was not shown to have provided Rural/Metro with materially false or misleading statements.

The Rural/Metro lawsuit almost ended in early 2012. The parties had reached a settlement that would have covered fees tied to the proceedings. But Vice Chancellor Laster struck down that settlement, finding that the lawyers representing shareholders at the time had overlooked or ignored valuable claims in the deal. Warburg’s ownership of Rural/Metro had been stripped in late 2013. At that time, a Delaware bankruptcy judge approved a restructuring plan months after the ambulance company had filed for Chapter 11 protection. When filing, Rural/Metro said it had a debt load of $735 million. The current case is in the Delaware Court of Chancery.

Source: Law360.com

**XV. EMPLOYMENT AND FLSA LITIGATION**

**CHASE AGREES TO $12 MILLION SETTLEMENT IN BANK TELLER OVERTIME SUIT**

JPMorgan Chase Bank NA has reached an agreement to pay up to $12 million to settle a putative class action alleging its tellers and other bank employees in 12 states worked off the clock. About 145,000 current and former Chase tellers, bankers, assistant branch manager trainees and sales specialists will be eligible for the settlement. The Plaintiffs are asking for preliminary approval of the settlement.

The suit, originally filed in 2011, accuses Chase of not paying its workers proper wages or overtime because of not counting some hours worked, not giving duty-free meal or rest breaks, and not paying for employee uniforms, among other claims. In addition to Fair Labor and Standard Act (FLSA) violations, the suit alleges Chase violated state labor laws in Arizona, California, Florida, Illinois, Kentucky, Louisiana, Michigan, New York, Ohio, Texas, Washington and Wisconsin. The Plaintiffs moved for class certification in October 2013, but both sides agreed to mediation following

JereBeasleyReport.com
Chase’s opposition in March. In July, the parties agreed to a settlement and advised the court.

The litigation against Chase involves five suits that have been consolidated. Employees had to work off the clock before and after shifts and during breaks, and though employees regularly worked overtime, Chase discouraged them from accurately reporting their hours, the Plaintiffs said, adding that managers actually would alter time records. In addition, Chase used an accounting system that converted worked minutes into fractions of an hour, and then converted that fraction into decimals, which translated to employees not being paid for all the time they worked, according to the Plaintiffs.

Chase required branch employees working at the end of the day to stay inside their banks when there were cash shortages, up to 30 minutes per shift, according to the most recent amended complaint, filed last month. The Plaintiffs further claimed that Chase’s policy of converting the number of minutes worked into a decimal system also cut down their wages because fractions such as one-third cannot accurately be converted to decimals. Chase has countered that the practice doesn’t necessarily hurt employees because an employee’s time is just as likely to be rounded up as rounded down. The case is in the U.S. District Court for the Central District of California.

Source: Law360.com

**CVS Pays $2.8 Million To Settle Pharmacists’ Overtime Claims**

A California judge has approved a $2.8 million settlement by CVS Pharmacy Inc. CBS had been sued in a class action lawsuit, alleging that the chain improperly forced hundreds of Southern California pharmacists to work seven days straight without overtime. This is the first settlement involving six separate suits that the retailer is facing over the practice. The suit was filed in August 2012, alleging CVS was improperly forcing its pharmacists to work seven days in a row without paying overtime for the seventh. This is a violation of a state law that mandates pharmacists be given a day off after six days of work.

Los Angeles Superior Court Judge John Shepard Wiley gave final approval to the settlement which involves claims of 627 CVS pharmacists working in one region. There will likely be settlements now in the remaining lawsuits that involved pharmacists in the other CVS regions.

Source: Law360.com

**XVI. PREMISES LIABILITY UPDATE**

**OSHA Announces Initiative To Prevent Exposure To Hazardous Chemicals In The Workplace**

The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) announced it is launching a national dialogue with stakeholders on ways to prevent work-related illness caused by exposure to hazardous substances. The first stage of this dialogue is a request for information on the management of hazardous chemical exposures in the workplace and strategies for updating permissible exposure limits (PELs).

OSHA’s PELs, which are regulatory limits on the amount or concentration of a substance in the air, are intended to protect workers against the adverse health effects of exposure to hazardous substances. Ninety-five percent of OSHA’s current PELs, which cover fewer than 500 chemicals, have not been updated since their adoption in 1971. The agency’s current PELs cover only a small fraction of the tens of thousands of chemicals used in commerce, many of which are suspected of being harmful. Substantial resources are required to issue new exposure limits or update existing workplace exposure limits, as courts have required complex analyses for each proposed PEL.

“Many of our chemical exposure standards are dangerously out of date and do not adequately protect workers,” said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels. “While we will continue to work on updating our workplace exposure limits, we are asking public health experts, chemical manufacturers, employers, unions and others committed to preventing workplace illnesses to help us identify new approaches to address chemical hazards.”

OSHA is seeking public comment regarding current practices and future methods for updating PELs, as well as new strategies for better protecting workers from hazardous chemical exposures. Specifically, the agency requests suggestions on:

- possible streamlined approaches for risk assessment and feasibility analyses and;
- alternative approaches for managing chemical exposures, including control banding, task-based approaches and informed substitution.

This is an area of concern that badly needs attention. If you agree, contact your U.S. Senators and House members and ask them to get involved and help to bring the changes that are badly needed.

Source: OSHA

**Farmers Awarded $3.6 Million In Minnesota**

A jury in Minnesota has awarded $4.6 Million in a lawsuit against Crow Wing Power, a utility company. The Plaintiffs Randy and Peggy Norman, whose milk cows were injured or killed by “stray voltage” on their dairy farm, sued the utility company for damages. Their claim was that the utility was negligent in the delivery of electricity to the farm. The Plaintiffs lost their entire dairy herd due to electricity coursing through the farm for 20 years. Crow Wing had been asked repeatedly to help address the problem with the herd and its diminished milk production.

An independent test for strong voltage was performed in 2011 and the tests came back positive. It appears that a “buried line” designed to carry “current” back to a substation, was causing the problem. At the plaintiffs’ request, Crow Wing had made some upgrades to their system, but failed to replace the buried line. The tests revealed that the buried line was working improperly and carrying current through the ground and into the “grounding system” of the dairy farm. The plaintiffs had closed their businesses in 2012.

Source: Claims Journal

**XVII. WORKPLACE HazARDS**

**No Punitive Damages Allowed In Maritime Lawsuit**

The Fifth Circuit has ruled in a split en banc decision that survivors of a worker killed in a barge-mounted drilling rig accident cannot collect punitive damages under general maritime law. The majority, in reversing an earlier panel decision, ruled
that it doesn’t matter if the claim is for personal injury or wrongful death. In a 9-6 decision, the appeals court’s majority cited and relied on the U.S. Supreme Court’s 1990 decision in *Miles v. Apex Marine Corp.*, which limits a seaman’s recovery to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness. The majority opinion said punitive damages are by definition “non-pecuniary losses,” and thus are not recoverable.

Estis Well Service LLC had asked the appeals court to grant an en banc rehearing on the earlier ruling that the heirs of Skye Sonnier, the decedent, could assert claims for punitive damages in personal injury or wrongful death cases alleging unseaworthiness under general maritime law. The 30-year-old worker, Sonnier, was killed in 2011 when a derrick toppled over on barge in Louisiana. Other workers injured in the accident have also sued, seeking compensatory and punitive damages.

The Plaintiffs contended the *Miles* decision only applies to wrongful death claims. But the majority rejected that argument, finding there is “no meaningful distinction” between a wrongful death action and a personal injury action in such cases. U.S. Circuit Judge W. Eugene Davis wrote for the majority, saying:

> On the subject of recoverable damages in a wrongful death case under the Jones Act and the general maritime law, [Congress] has limited the survivor’s recovery to pecuniary losses. Appellants have suggested no reason this holding and analysis would not apply equally to the plaintiffs asserting claims for personal injury.

The majority said, based on *Miles* and other Supreme Court and circuit authority, that pecuniary losses are designed to compensate an injured person or his survivors, whereas punitive damages are designed to punish the wrongdoer rather than compensate the victim. That, according to the majority opinion, automatically rendered them non-pecuniary and therefore excluded under the Jones Act. The law, formally known as the Merchant Marine Act of 1920, protects American workers injured at sea.

The Supreme Court ruled in 2009 in a case, *Atlantic Sounding v. Townsend*, that punitive damages are available for arbitrary and capricious denial of maintenance and cure. That, according to the court, was because this remedy had been available prior to the passage of the Jones Act in 1920. But the plaintiffs failed to convince the Fifth Circuit majority that it meant they could recover punitive damages based on “a claim of unseaworthiness.” In a concurring opinion, Judge Edith Brown Clement said despite the *Townsend* ruling that punitive damages are available in maintenance and cure cases, the court cannot “blithely assume that because they are available in a wholly different type of maritime action that pre-dates the Magna Carta,” that they are available now.

Judge Clement wrote that: “If *Miles v. Apex Marine Corp.* stands for anything, it at the very least signals that all damages are not automatically available in all maritime cases.” Judge Stephen A. Higginson, joined by five other members of the court, dissented from the majority opinion, saying that punitive damages should be available in all cases. Judge Higginson said Congress did disallow punitive damages for the Jones Act, but that conclusion should not be binding with regards to an unrelated unseaworthiness claim. The dissenting judges also stated that the *Miles* decision is limited to wrongful death claims and that personal injury claimants should be allowed to recover broader damages. Judge Higginson wrote in the dissent:

> Like maintenance and cure, unseaworthiness was established as a general maritime claim before the passage of the Jones Act, punitive damages were available under general maritime law, and the Jones Act does not address unseaworthiness or limit its remedies.

The Plaintiff plans to ask the U.S. Supreme Court to review the en banc decision. It was alleged by the Plaintiff that the accident occurred as the result of “countless” safety violations and a barge that was in such “deplorable” condition that the employer cut it up and sold it for scrap immediately after the incident. Hopefully, the Supreme Court will accept this case and reversing the 5th Circuit ruling on punitive damages.

Source: Law360.com

**South Carolina Jury Awards Employee $1 Million In Defamation Claim**

A former Orangeburg, S.C., nursing home employee has won a defamation lawsuit against his former employer. Ralph C. Williams, Sr., 58, was awarded $1 million after being cleared of charges that he sexually assaulted a resident at the Orangeburg home. The plaintiff was awarded nearly $900,000 in punitive damages and about $100,000 in actual damages.

The jury’s verdict was against UniHealth Post Acute Care LLC and two employees at the home. The company is to pay $600,000 of the total. Williams had been charged with third-degree criminal sexual conduct and abuse of a vulnerable adult in 2010. The sexual conduct charge was dropped and a jury cleared him on the abuse charge in 2012.

Sources: The Times and Democrat of Orangeburg and The Insurance Journal

**Dollar Tree Stores Was Fined $262,000 For Safety Hazards In Texas**

The national discount chain Dollar Tree Stores Inc., based in Texas, was recently cited by the U.S. Department of Labor’s Occupational Safety and Health Administration for willfully and repeatedly exposing workers to serious hazards at its store in Watauga, Texas. The proposed penalties total $262,500. Across the nation, Dollar Tree Stores have been cited for more than 200 safety and health violations since 2009. Dr. David Michaels, assistant secretary of labor for occupational safety and health, stated:

> In the past five months, OSHA has issued more than $800,000 in fines to Dollar Tree Stores for the same or similar violations. This latest incident yet again demonstrates the company’s deliberate and ongoing refusal to effectively address hazards that have been cited multiple times at their stores across the country. OSHA will not tolerate such blatant disregard for worker safety.

At the Watauga store, two willful violations, with a penalty of $130,500, were cited for failing to ensure exit doors were kept clear and unobstructed and that products were stored in a stable and secure manner. Four repeat violations, carrying a penalty of $132,000, were cited for failing to keep passageways clean and clear and to secure compressed gas cylinders and prevent blocking of portable fire extinguishers and electrical panels.

OSHA has received complaints from Dollar Tree Stores employees in 26 states since 2009, and it has cited the company for 234 safety violations in that time period. This includes willful violations found during 2014 inspections in Delaware, Massachusetts and Montana. Dollar Tree Stores, headquartered in Chesapeake, Va., employs approximately 17,600 full-time and 69,800 part-time workers.
Tens of thousands of brake inspections were performed during this initiative by roadside inspectors to verify compliance with safety standards. Nearly half of the out-of-service roadside inspection violations on commercial vehicles are due to brake system violations, being outnumbered only by violations relating to hours of service regulations. Improperly installed or poorly maintained brake systems can reduce the braking capacity and stopping distance of trucks and buses, which poses a serious risk to drivers and those around them. Lawyers in our firm have handled a number of lawsuits where lives could have been saved if only the brakes had been properly in service.

Brake violations can be greatly decreased with the proper preventative maintenance and driver training. Any time a vehicle is taken in for scheduled maintenance or for any repair, the brake system should be checked by a qualified technician. Part of this inspection should include the “at the wheel” components, including the slack adjuster for condition and free play; all connecting hardware for looseness, damage and excessive wear; the brake chamber for leaks, mounting and condition; the airline(s) supplying the chamber for condition, cuts, wear and rubbing; the brake linings/pads for wear; and the brake drum or rotor for wear and cracks.

An operational check of the overall system should also be conducted to ensure that the system does not leak air; the low-air warning indicators function; the parking/emergency brake system will activate should air pressure fall below minimums; and the “tractor protection valve” (unique to tractor-trailers) functions correctly.

Proper driver training is another important part of maintaining a good brake system. The drivers should be performing their own inspections, including “at the wheel” inspections. Drivers should be properly trained on checking components such as airlines, tanks, hoses and fittings; and they should know what is considered “passing” and “failing.” Drivers should also be taught how to conduct a “system check” that includes a leak check, a check of the low-air warning device, a test of the emergency brakes, a check of the compressor build-up rate, a check of the parking brakes, and a rolling check of the service brakes. These inspections are essential to brake system safety and performance.

Properly functioning brake systems are critical to improving roadway safety and trucking companies have an obligation to make sure safety systems on their trucks, like brakes, are fully operational. Lawyers in the Personal Injury/Product Liability Section at Beasley Allen have the experience and knowledge to uncover all manner of truck driver and company operational violations, including those related to improper maintenance. Chris Glover, a lawyer in our firm’s Personal Injury/Products Liability Section, handles commercial truck cases and can be reached at 800-898-2034 or by email at Chris.Glover@beasleyallen.com. If you need more information, contact Chris.

NO TRAINING STANDARDS FOR COMMERCIAL TRUCK DRIVERS

On Sept. 18, 2014, several advocacy groups filed a most important lawsuit against the Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA) for not promulgating rules for minimum training standards for entry level truck drivers which was mandated by Congress in 1993. In the past 20 years, the Department of Transportation and Federal Motor Carrier Safety Administration have failed to or put off issuing minimum training requirements for entry level truck and bus drivers.

This saga began in 1991 when Congress passed the Intermodal Surface Transportation Efficiency Act, which required the Secretary of Transportation to report to Congress on the effectiveness of private sector training of entry level commercial motor vehicle drivers by Dec. 18, 1992, and to complete a rule-making proceeding on the need to require training of all entry level drivers of commercial motor vehicles by Dec. 18, 1993.

The report was submitted to Congress on Feb. 5, 1996, concluding that training of new commercial motor vehicle drivers was inadequate. The report found, for example, that only 31 percent of heavy truck drivers and 18 percent of bus drivers with five or less years of driving experience had received adequate training. In the next six years, however, the agency took those steps toward issuing a rule on entry-level driver training.

In November of 2002, advocacy groups concerned about vehicle safety filed a lawsuit seeking an order directing the Department of Transportation to fulfill its statutory duty to promulgate overdue regulations relating to vehicle safety, which included the regulation of entry-level driver training. After the filing of the lawsuit, the parties entered into a settlement agreement in which the Department of Transportation agreed to issue a final rule on minimum training standards for entry level commercial motor vehicle drivers by May 31, 2004. On May 31, 2004, the Department of Transportation published a final rule in which it acknowledged that training for entry-level drivers was inadequate and stated that a 320 hour curriculum with behind-the-wheel training would be an acceptable training model. However, the rule did not require any of the skills and knowledge training that formed the focus of the model curriculum. Instead, it required training in four areas:

- Driver qualifications;
- Hours of Service;
- Driver wellness; and
- Whistleblower protection.

The Department of Transportation estimated that the required training would take only 10 hours. Several advocacy groups petitioned the Court to review the final rule arguing that because the rule did not require entry-level drivers to receive training in how to operate commercial vehicles that the Court should not give final approval to the rule.

On Dec. 2, 2005, the Court determined that the agency had adopted a final rule that had nothing to do with adequate training for commercial motor vehicle drivers. On Dec. 26, 2007, after the Court’s decision the Federal Motor Carrier Safety Administration issued a proposed rule, proposing new training standards for entry-level
drivers that would include behind-the-wheel as well as classroom training. This proposed rule was based on the Federal Highway Administration model curriculum proposed in May of 2004.

After four years passed without the Department of Transportation issuing a final rule on entry-level training for commercial motor vehicle operators, Congress again directed the Department of Transportation to issue a final regulation establishing minimum entry-level training requirements for an individual operating a commercial motor vehicle. Congress specified that the final regulation must:

- Address the knowledge and skills necessary to safely operate a commercial vehicle;
- Address the specific training needs of drivers seeking passenger or hazardous material endorsement;
- Require effective instruction to acquire the knowledge, skills, and training to safely operate a commercial vehicle, including classroom and behind-the-wheel instruction;
- Require certification that operators meet the requirements that are established; and
- Require training providers to demonstrate that their training program meets the required regulations.

Congress directed the Department of Transportation to issue the entry-level driver training final rule on or before Oct. 1, 2013. On Sept. 19, 2013, less than two weeks before the deadline for issuing the final rule, the Federal Motor Carrier Safety Administration published a notice announcing that it was withdrawing its December 2007 proposed rule. The Federal Motor Carrier Safety Administration concluded that a new rule-making procedure should be initiated in lieu of completing the 2007 rule-making. In doing this, the Federal Motor Carrier Safety Administration did not indicate when it expected to complete its new rule-making.

When the deadline passed, plus an additional 10 months without the Federal Motor Carrier Safety Administration taking any action on the entry level driver training rule, advocacy groups filed the current lawsuit to force the agencies to put in place training rules that Congress mandated back in 2001.

Hopefully, the Courts will force the Department of Transportation and the Federal Motor Carrier Safety Administration to publish entry-level training standards for commercial motor vehicle drivers so that the public will not have to suffer another 20 years of inadequately trained truck drivers on the road. If you need additional information on this subject, contact Mike Crow, a lawyer in our firm’s Personal Injury/Products Liability Section, at 800-898-2034 or by email at Mike.Crow@beasleyallen.com.

Sources: FMCSA website and New York Times

**OIL AND RAILROAD INDUSTRIES OPPOSE NEW FEDERAL OIL TRAIN SAFETY RULES**

The Oil and Railroad Industries are claiming that proposed federal rules to make hauling crude oil by rail safer and avoid fiery wrecks would drive up costs and put the U.S. energy revival at risk. You probably won’t be surprised to learn that these claims were made by the American Petroleum Institute (API), joined by the Association of American Railroads. The two groups proposed keeping older tank cars, which investigators say are vulnerable to puncture, in service for twice as long as envisioned by regulators drafting rules for carrying flammable liquids like oil on trains.

The Transportation Department proposal to phase out older cars known as DOT-111s in two years is “not feasible,” said Jack Gerard, executive director of the Washington-based API, which represents companies including Exxon Mobil Corp. and Chevron Corp. He calims the rules “could stifle North America’s energy renaissance and curtail substantial volumes of U.S. and Canadian oil production.”

As we previously reported, U.S. regulators drafted the rule after several accidents of oil tank cars, including a July 2013 derailment in Quebec that killed 47 people, and fiery explosions that rattled communities in North Dakota, Virginia and elsewhere. Oct. 2 was the deadline to file comments with the agency, which may issue a final rule this year.

Source: Insurance Journal

**PILOT ERROR AND FATIGUE CAUSED DEADLY GEORGIA JET CRASH**

Federal investigators have found that a pilot failed to follow procedures during landing, and that fatigue from lack of sleep contributed to a fiery jet crash that killed a Georgia vascular surgeon and four colleagues from a vein care practice. In a report released last month, the National Transportation Safety Board determined that the probable cause of the Feb. 20, 2013, crash was the pilot’s failure to follow procedures. The report said his lack of knowledge about the aircraft and fatigue contributed to the accident near an airport in Thomson, Ga. According to the report, the pilot only slept five hours the night before and later slept for about four hours in a chair in a pilot lounge in Nashville, Tennessee. The pilot and co-pilot survived, but were severely injured. All five passengers, seated in the back, were killed.

Source: NTSB

**HANDS FREE TECHNOLOGY WHILE DRIVING IS DISTRACTING**

I am fairly certain that most folks believe that hands-free technology is safe to use while driving. Those folks will be surprised to learn that these popular new vehicle features may actually increase mental distraction, according to new research by the AAA Foundation for Traffic Safety. It appears three out of four drivers believe hands-free use is safe. This research can serve as guidance to manufacturers who increasingly market hands-free systems as safety features. The good news for consumers is that the research suggests that it is possible to design hands-free technologies that are less cognitively distracting.

In the study, a participant drives while research equipment monitors reaction times and gathers other data. A set of new University of Utah studies for the AAA Foundation for Traffic Safety found that hands-free, voice-controlled infotainment systems in vehicles can distract drivers more than was previously believed.

The results, which build on the first phase of the Foundation’s research conducted last year, suggest that developers can improve the safety of their products by making them less complicated, more accurate and generally easier to use—a point AAA hopes to use in working with manufacturers to make hands-free technologies as safe as possible for consumers. While manufacturers continue their efforts to develop and refine systems that reduce distractions, AAA encourages drivers to minimize cognitive distraction by limiting the use of most voice-based technologies. Bob Darbelnet, chief executive officer of AAA, stated:

We already know that drivers can miss stop signs, pedestrians and other cars while using voice technologies because their minds are not fully focused on the road ahead. We now
understand that current shortcomings in these products, intended as safety features, may unintentionally cause greater levels of cognitive distraction.

Using instrumented test vehicles, heart-rate monitors and other equipment designed to measure reaction times, Dr. David Strayer and researchers from the University of Utah evaluated and ranked common voice-activated interactions based on the level of cognitive distraction generated. The team used a five-category rating system, which they created in 2013, similar to that used for hurricanes. The results show:

- The accuracy of voice recognition software significantly influences the rate of distraction. Systems with low accuracy and reliability generated a high level (category 3) of distraction.
- Composing text messages and emails using in-vehicle technologies (category 3) was more distracting than using these systems to listen to messages (category 2).
- The quality of the systems’ voice had no impact on distraction levels—listening to a natural or synthetic voice both rated as a category 2 level of distraction.

The study also separately assessed Apple’s Siri (version iOS 7) using insight obtained from Apple about Siri’s functionality at the time the research was conducted. Researchers used the same metrics to measure a broader range of tasks including using social media, sending texts and updating calendars. The research uncovered that hands- and eyes-free use of Apple’s Siri generated a relatively high category 4 level of mental distraction. To put all of this year’s findings in context, last year’s research revealed that:

- listening to the radio rated as a category 1 distraction;
- talking on a hand-held or hands-free cell phone resulted in a category 2 distraction; and
- using an error-free speech-to-text system to listen to and compose emails or texts was a category 3 distraction.

Peter Kissinger, President and CEO of the AAA Foundation for Traffic Safety, had this to say:

“Technologies used in the car that rely on voice communications may have unintended consequences that adversely affect road safety. The level of distraction and the impact on safety can vary tremendously based on the task or the system the driver is using.

To assess “real-world” impact, Dr. Joel Cooper with Precision Driving Research evaluated the two most common voice-based interactions in which drivers engage—changing radio stations and voice-dialing—with the actual voice-activated systems found in six different automakers’ vehicles. On the five point scale, Toyota’s Entune system garnered the lowest cognitive distraction ranking (at 1.7), which is similar to listening to an audio book. In comparison, the Chevrolet MyLink resulted in a high level of cognitive distraction (rating of 3.7).

Other systems tested included the Hyundai Blue Link (rating 2.2), the Chrysler Uconnect (rating 2.7), Ford SYNC with MyFord Touch (rating 3.0) and the Mercedes COMAND (rating 3.1). Mr. Darbelnet with AAA stated:

“It is clear that not all voice systems are created equal, and today’s imperfect systems can lead to driver distraction. AAA is confident that it will be possible to make safer systems in the future.

This phase of the research highlights the variability in demands across all the systems tested. AAA is calling for developers to address key contributing factors to mental distraction including complexity, accuracy and time on task, with the goal of making systems that are no more demanding than listening to the radio or an audio book. AAA also plans to use the findings to continue a dialogue with policy makers, safety advocates and manufacturers. To view the full report, ‘Measuring Cognitive Distraction in the Vehicle II: Assessing In-Vehicle Voice-based Interactive Technologies,’ and other materials on distracted driving, visit NewsRoom.AAA.com.

Source: AAA Foundation for Traffic Safety

**DISTRACTION SAID TO BE A FACTOR IN FATAL OKLAHOMA CRASH**

The driver of a tractor-trailer that crashed into a bus and killed four college students on Interstate 35 in southern Oklahoma reportedly told investigators that he was distracted. The driver, Russell Staley, was traveling northbound on Sept. 26 before crossing a 90-foot median into the southbound lanes. The tractor-trailer cashed into a bus carrying the women’s softball team from North Central Texas College in Gainesville. Capt. Ronnie Hampton, who is with the Oklahoma Highway Patrol, said at a news conference: “We know the semi was in the median for quite some time. He made a statement that he was distracted in the vehicle.”

The investigation of this incident could take months, according to Capt. Hampton. He says the investigation will include a review of the driver’s log books and precise measurements at the accident scene. It’s significant that the collision took place about 9 p.m. in dry and clear weather. Four students were killed and 11 passengers and the bus driver were injured. In the crash, the tractor-trailer crushed the side of the 2008 Champion Motor Coach, which was carrying the students.

The truck, a 2013 Peterbilt, showed no signs of braking or trying to avoid crossing the median, according to Robert Sumwalt, a member of the National Transportation Safety Board (NTSB). It was significant that investigators didn’t find any skid marks on a slight curve where the truck was being driven. Mr. Sumwalt said:

“There was no indication of skidding or braking or evasive maneuvers. The truck did not follow the curve. We intend to find out why the truck did not follow the roadway.

The driver of the 2013 Peterbilt truck worked for Quickway Transportation Inc., located in Nashville, Tenn. Quickway, which operates about 300 trucks, according to its website, issued a statement offering condolences and saying that the company was cooperating with the investigation. Before the crash, Quickway had a good overall safety record in comparison to most trucking companies, according to data from the Federal Motor Carrier Safety Administration (FMCSA).

For each of five publicly available categories tracked by the agency, including moving violations, Quickway was ranked better than average and below the threshold that would be considered a safety risk. In each of the five categories, there were no serious violations. This appears to be a classic case of a truck driver being distracted for some reason. Sadly, the consequences were tragic.

Source: Insurance Journal

**Source:** Insurance Journal
A Cascade County, Montana jury has awarded $4.3 million in damages to a BNSF Railway employee who was injured in a July 2011 train collision caused by a switching error. It was reported that Michael Schnittgen, who was a conductor, was injured when the train he was on was mistakenly routed to a siding southeast of Great Falls, where it collided with a parked maintenance train. Schnittgen sustained severe back injuries and a head injury. BNSF admitted that it was negligent in the collision, but its lawyers questioned the extent of Schnittgen’s injuries. It was claimed that some of his injuries weren’t due to the train crash. They also claimed that Schnittgen failed to take action to mitigate some of his injuries. The only issue in the civil trial was a determination of the damage amount.

Source: The Great Falls Tribune

THE IMPACT ACT REQUIRES MORE ACCURACY IN REPORTING NURSING HOME CARE

President Obama has signed into law the Improving Medicare Post-Acute Care Transformation Act (the IMPACT Act). This Act provides $11 million in funding to establish an electronic collection system to help improve the “five-star rating program” that has been used to evaluate the quality of care of nursing homes for the last few years. The system previously required self-reporting of certain critical information (such as staffing levels and patient events) among the approximately 15,000 nursing homes in this country. That self-reporting system has resulted in the number of nursing homes receiving four and five stars (the highest level of quality of care per the system) increasing from 37 percent in 2009 to almost half in 2013.

So the question is whether the nursing home care in this country has improved that much in four years or whether the information being self-reported is skewed by the nursing homes themselves. The IMPACT Act hopes to establish a system that requires verification of the data that is being reported by the nursing homes. For example, no longer can nursing homes simply say they employ “x” number of nurses, certified nurse assistants, therapists, etc., now they are required to verify that with payroll information that must be provided electronically into the system.

The hope is that the new verified data will provide a better picture for people who have to go into nursing homes, their families and their physicians. It is hoped that the system will eventually allow those looking at such information to determine important factors such as:

- staff levels;
- number of deaths for a reporting period;
- number of lawsuits or arbitration proceedings currently pending against facility; and
- any negative reports against the facility by governmental agencies, such as Medicare, Medicaid, or Public Health Departments.

The law also allows Medicare to review hospice programs in which a large proportion of patients receive care for six months or more, which is considered a long hospice stay. The changes come as the number of hospices has grown rapidly in recent years, from 2,500 organizations caring for about 870,000 patients in 2005 to 3,600 caring for about 1.2 million in 2011. For-profit hospices now dominate the field, and many are affiliated with national chains.

Nursing home facilities should also be required to report the number of new admissions who signed arbitration clauses. The arbitration provision in nursing homes, while unconscionable, has been sanctioned by many of our courts. Potential new residents and their families should be able to determine how many new patients or family members (based upon the total population) are signing arbitration agreements. This type of information could assist greatly in determining how serious a facility is about providing quality of care to its patients.

Beginning in January, nursing homes’ ratings will also be based partly on the percentage of its residents being given antipsychotic drugs. Nursing homes must already report this statistic—20.3 percent of long-term nursing home residents currently receive such medications—but until now it has not figured into a facility’s rating. Plans to add other measures are also underway, the officials said, including the percentage of residents who are readmitted to the hospital, and the percentage discharged to the

Beasley Allen Lawyers Continue To Handle Nursing Home Litigation

Lawyers in our firm have been handling nursing home litigation for a number of years. We have been seeing a large increase in this litigation and there has to be a reason for it. As our population continues to age in this country, more and more people are being admitted to long-term care facilities. We know that one of the greatest challenges that a family may face is when and where to place a loved one in a long-term care facility.

Because most individuals who are admitted to nursing homes and other similar facilities are not able to make well-reasoned decisions, it is imperative that the family members watch and monitor their care as closely as possible. When situations arise that necessitate the need for further inquiry, lawyers in our firm available to investigate potential claims. When necessary, they will file lawsuits against nursing homes that fail to provide the level of care required by law. When nursing homes fail to provide adequate care, it can result in serious injuries to their residents. We have seen some cases where the care provided was absolutely horrendous.

Ben Locklar, a lawyer in our firm’s Personal Injury/Products Liability Section, reviews a large number of potential nursing home cases every month. Our firm currently has cases filed in state and federal courts as well as before arbitration tribunals. We will continue to investigate these cases, and where we determine that wrongdoing has occurred, we will aggressively pursue the cases. That includes taking the steps necessary to investigate and evaluate the claim. If you need more information on nursing home litigation, contact Ben at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

JereBeasleyReport.com
community. Brian Lee, executive director of Families for Better Care, a nursing home watchdog group, said the next step the federal government should take is to improve the requirements for what nursing homes report about their ownership. Although basic information is available on the federal website where the ratings are available, the names of the chains that own or manage the homes are rarely listed because of the companies’ complex business structures. He observed: “It could be some company that is 10 states away. You have no idea.”

Lastly, the facilities should be required to report whether they have liability insurance to cover negligence of their staff and the amount of that insurance. While nobody wants to have to sue the facility, they need to know that if their loved one is seriously hurt, injured or killed because of the negligence of the healthcare provider that there is coverage available to pay a claim, if filed.

Marilyn Tavenner, the administrator of the Centers for Medicare and Medicaid Services, which oversees the rating system, said she hoped that higher-quality reporting would lead to better health outcomes for patients. She said:

*We are focused on using as many tools as are available to promote quality improvement and better outcomes for Medicare beneficiaries.*

Greg Crist, a spokesman for the American Health Care Association, the lobbying group that represents for-profit nursing homes, said many of the changes would capture data reflecting quality improvements that the industry had already been working on. He stated:

*We’ve seen the improvements in quality across the board. Some questions that a few weeks ago. Yet ibis push for greater accuracy should help reassure patients and families those improvements are both real and making a difference in improving lives.*

Although the federal health care law, passed in 2010, required that nursing homes’ staffing data be collected electronically, the provision was never adopted. Instead, nursing homes reported their staffing levels on a form during their annual inspection, which was rarely audited. The homes will begin reporting the data electronically in 2015, but the information will not be reflected in the ratings until 2016, officials said Monday.

Advocates for residents of nursing homes said improving the reporting was crucial. Mr. Lee, of Families for Better Care, observed:

*Nursing home quality hinges upon high staffing levels. If we are able to get better information on staffing levels, the higher the quality is going to be in the long run.*

While the IMPACT Act is a move in the right direction, it falls short to fully arm new patients and their families with the information needed to ensure their loved ones are getting the best care available. Our firm applauds Congress and the President for taking measures to ensure that the information provided is more accurate and that nursing homes are held accountable for being truthful in their reporting.

Source: *New York Times*

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**XX. THE CONSUMER CORNER**

**FEDERAL REGULATIONS NO LONGER ALLOW REFILLS OF PAIN MEDICATION**

The Obama administration in August of 2014 moved to restrict prescriptions of narcotic painkillers in our country in an attempt to reduce the abuse of such medication. This change became effective on Oct. 6, 2014. The Drug Enforcement Administration (DEA) reclassified hydrocodone combination products (HCPs) as a Schedule II controlled substance (from previous Schedule III).

With the new federal rule, this means that refills will not be allowed for prescriptions for narcotic painkillers such as Lortab, Lorcet, Elixir, Vicodin, Hycet and many other drugs that contain hydrocodone. Instead, a patient must have a new handwritten prescription from his or her doctor before getting the prescription filled by a pharmacist. A pharmacy can no longer accept a called-in or faxed prescription for these type medications. However, there are exceptions for emergency treatment and for a limited quantity. Under the new rule, only a doctor can write the prescription (for a 30-day supply). Neither a nurse practitioner nor a physician’s assistant can do this. DEA Administrator Michele Leonhart stated:

*Almost seven million Americans abuse controlled-substance prescrip- tion medications, including opioid painkillers, resulting in more deaths from prescription drug overdoses than auto accidents. Today’s action recognizes that these products are some of the most addictive and potentially dangerous prescription medications available.*

According to the DEA, “[h]ydrocodone combinations, including Vicodin, Lortab and Norco, now account for more prescriptions than any other drug, with more than 130 million filled each year.” Etowah County Sheriff Todd Entrekint, stated that “[h]ydrocodone is probably the most abused prescription medication out there.”

Although this new restriction will hopefully help cut down on the misuse of these narcotic medications, it will probably create frustration for patients who need this type medication. These prescriptions are medically necessary for many people with cancer or disabling injuries, who undergo surgery, and who suffer chronic pain, to name a few. However, as we all should know, narcotic painkillers are easily addictive. Those who misuse these prescription drugs will make it much harder for those whose quality of life may depend on this type medications.

The purpose of the new hydrocodone regulation is to reduce the amount of HCPs available for those who abuse the system and for those who take these narcotic painkillers as a recreational drug. The adverse consequences that come with the abuse of prescription medications are many. For example, there are many drivers involved in motor vehicle accidents whose toxicology reports test positive for hydrocodone, and whose conduct often results in a death or devastating injuries for other motorists or passengers. Let’s hope this change will be effective in accomplishing its intended purpose and reduces the number of overdose deaths and also reduces the number of fatalities and life-altering injuries from car accidents.

Sources: SLTToday.com and Gadsden Times

**ASBESTOS IN WOMEN’S MAKEUP CAN POSE A HAZARD**

According to reports, the vast majority of confirmed mesothelioma cases are in men. As you may know, mesothelioma, a life-ending form of cancer, is most commonly found in the lungs and chest. Occasionally, it appears in the brain, the stomach, and the sex organs of men and women. Most experts agree that the primary cause of mesothelioma in the United States comes...
from asbestos exposures. In fact, it may be the sole cause.

Men are believed to have the highest rates of mesothelioma because asbestos was used so prevalently in the industrial workplace in the United States from the early 1900s until the mid-1980s. Asbestos was a very good heat insulator and was used in a host of products. The list is as long as you can imagine, but included paint, shingles, insulation for homes, sprayed insulation for ovens, concrete, work gloves, face masks, and even Kent cigarette filters. The exposure-to-disease time has been determined to be as much as 60 years, meaning that once a person ingested asbestos fibers, they may not develop mesothelioma until 60 years later.

Despite the predominant disease rates among men, some women are also diagnosed with the disease. Determining the source of their exposure is not always easy. In some of the cases lawyers in our firm have reviewed, we have even looked at second-hand exposure possibilities. These would occur when men in the family would bring home their dusty clothes and the wife would be exposed to the fibers on the clothes.

Recently, however, scientists have begun to unlock the mystery of sources of the disease in women. Asbestos in talcum powder, which was found in baby powder and women’s makeup, has been determined to be a cause of mesothelioma in women. It is also believed to be a causative factor in other diseases in women, including ovarian carcinomas and gynecological tumors.

Ronald E. Gordon, Sean Fitzgerald, and James Millette recently conducted an extensive study in this area, which confirms the growing body of research in this area. These three scientists have published their findings in the International Journal of Occupational and Environmental Health. They concluded in their study that: “Our findings indicate that history talcum powder exposure is a causative factor in the development of mesotheliomas and possibly lung cancer in women.” The authors were able to specifically identify the type of asbestos in the talcum powder discussed, which they were able to trace the source of the asbestos in the talcum powder back to the mine from which it originated. They were also able to find this form of asbestos in a woman known to have used the brand of talcum powder they were testing and who died from mesothelioma.

Asbestos exposure among industrial workers has been greatly reduced since the mid-1980s, when the Occupational Safety & Health Administration (OSHA) required that the product be eliminated, that warnings be posted in all work areas known to have or use asbestos, and that appropriate protective equipment be worn to avoid exposure to dangerous fibers. Unfortunately, women were not afforded this same protection, since it now appears that asbestos continued to be included in some talcum powders, face powders and makeup. The article did not indicate whether it was possible to determine if the talcum powder our wives and daughters may be using includes asbestos, nor did it name the type of talcum powder being tested.

The American Cancer Society (at www.cancer.org) also discusses this identified carcinogen, but it does not provide any guidance on how one may determine if the products he or she is using include asbestos. Hopefully, more information will become available as further research is done. Until then, women should be careful about using products that include talcum products. If you need more information on this subject, contact Ben Locklar, a lawyer in our firm who handles nursing home cases, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.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 September and in October. If more information is needed on any of the recalls, readers are encouraged to contact Shanna Malone, the Executive Editor of the Report at Shanna.Malone@beasleyallen.com. We would also like to know if we have missed any safety recalls that should have been included in this issue.

GM ISSUES TWO GLOBAL RECALLS OF 524,384 VEHICLES

General Motors Co. (GM) has recalled 524,384 cars and sport utility vehicles globally in two actions dealing with potential latch and loose part issues. The recalls of Cadillac and Saab SUVs and Chevrolet Spark small cars raise GM’s total number of recalls this year to 71, affecting 30 million vehicles. The 430,550 Cadillac SRX and Saab 9-4X SUVs were recalled for possible loose joint and worn threads in the rear toe link assembly that could cause the vehicle to wander at highway speed. If it separates, that increases the risk of a crash. GM said it was aware of three crashes and two injuries as a result of the issue.

Dealers will replace the SUVs’ rear toe link assembly as needed. The recall affects SRX SUVs from model years 2010 through 2015 and 9-4X SUVs from 2011 and 2012 model years. Of the recalled SUVs, 290,107 are in the United States and the rest are in Canada, Mexico and are exports.

GM also recalled 93,834 newer Chevrolet Spark cars because corrosion can cause the secondary hood latch striker to stick in the open position, increasing the risk of the hood opening unexpectedly during driving and increasing the risk of a crash. Those cars are built in South Korea. GM said it was not aware of any crashes, injuries or deaths related to this issue, but in documents filed with NHTSA it cited two cases in the United Kingdom and one in Denmark where the vehicle hood opened while the customer was driving.

During its investigation, GM said it discovered the suspect secondary hood latch failed a 10-year component level corrosion test in November 2013. By February 2014, GM said it determined that the anticorrosion coating was deficient and it began applying a different coating in late July. GM’s investigation revealed 10 warranty cases in the United States with premature corroding of secondary hood latches. The cars affected by the recall are from the 2013 through 2015 model years. GM said about 13,000 of the affected cars are still at U.S. dealers and will not be sold until they are repaired. Of the cars recalled, 89,294 are in the United States, with the rest in Canada, Mexico and exports. Customers will be notified and dealers will replace the cars’ hood strikers when parts are available, according to GM.

AIRBAG DEFECT SPURS RECALL OF 4.7 MILLION VEHICLES

The National Highway Traffic Safety Administration (NHTSA) last month put out a recall notice for defective
airbags and urged people whose cars are equipped with them to take action immediately. More than 4.7 million vehicles are involved in the recall. At least four people have died when inflator mechanisms ruptured on the airbags, spraying the passengers with metal fragments. NHTSA warned drivers whose cars have been recalled as a result of faulty inflators to take them to the dealer immediately. Safety experts said about 12 million vehicles worldwide have been recalled because of the problem.

As we have reported previously, and in this issue, the airbags are made by Takata and are in place in some Toyota, Honda, Mazda, BMW, Nissan and General Motors models. NHTSA said it was particularly urgent for vehicles owners in Florida, Puerto Rico, Guam, Saipan, American Samoa, Virgin Islands and Hawaii to take immediate action. NHTSA said car owners uncertain about whether their vehicle is equipped with a Takata airbag can check at http://www.safercar.gov/. Using the site requires that owners enter their vehicle identification number (VIN). If you need a list of the vehicles recalled by the six automakers is needed, you can contact Shanna Malone at Shanna.Malone@beasley-allen.com.

**Toyota Recalls Tacomas Amid New Unintended Acceleration Probe**

Toyota Motor Corp. has recalled 690,000 pickup trucks. Toyota recalled Tacoma trucks to fix suspension parts that could break down. The Tacoma recall covers trucks with model years 2005 through 2011. While Toyota said in a statement it isn’t aware of any crashes, injuries or fatalities associated with the defect, several truck owners have filed complaints with NHTSA about faulty leaf springs damaging the brakes of their vehicles.

Toyota also recalled as many as 1.69 million Toyota Corollas with model years from 2006 to 2010. Owners said they experienced unintended “low-speed surging,” according to NHTSA.

The Corolla complaints are reminiscent of the sudden, unintended acceleration episodes that led Toyota, the world’s largest automaker, to recall more than 10 million vehicles in 2009 and 2010.

**Toyota Recalls 1.7 Million Vehicles Over Brake And Fuel Issues**

Toyota Motor Corp. has also recalled 1.67 million vehicles globally after it identified three defects that make the cars unsafe to drive without repairs, including faulty brakes and fuel components. The company says it isn’t aware of any accidents or injuries related to the defects, which affect just over 1 million vehicles in Japan and another 615,000 in other areas of world.

The automaker has identified 759,000 total vehicles globally that had problems with their fuel delivery pipes and 802,000 with brake issues, according to Toyota. Additionally, 190,000 Corolla Rumion and Auris models in Japan will be recalled because of faulty emission control components. Of the recalls announced on Oct. 1, 423,000 affect car buyers in the United States. All of those are Lexus sedans that have potentially leaky fuel pipes, which can increase the cars’ chances of catching fire.

The fuel delivery pipe problems stem from a plating used to prevent corrosion that may have been produced with particles on its seating surface where the fuel pressure sensor is. When this occurs, the gasket between the pressure sensor and the pipe will not seal effectively and when the car is running fuel could leak past the gasket. U.S. customers with impacted Lexus LS, GS and IS luxury sedans will receive a notification from the company and Lexus dealers will repair the fuel delivery pipes that are at issue, the company said.

Brake problems were identified in Toyota Crown Majesta, Crown, Noah and Voxy models manufactured between 2007 and 2012 and involve a rubber seal ring that the manufacturer has said it will replace to prevent brake fluid from leaking. The recalls announced on Oct. 15 are the latest in a spate of product safety issues Toyota has faced this year.

The automaker had previously announced plans to recall about 690,000 Tacoma pickup trucks over concerns that faulty rear suspension systems could cause fuel tank leaks and potentially lead to fires and about 20,000 Avalon, Camry, Highlander, Sienna and Lexus RX vehicles over fears that the fuel delivery pipe in the engine compartment could leak and potentially increase the risk of fires. In April, Toyota issued recalls covering 6.4 million vehicles worldwide over cable assemblies that can deactivate driver’s-side air bags and weak rail springs that can allow seats to shift.

The automaker has faced litigation for hiding defects from its customers. In March, it agreed to pay a record $1.2 billion penalty in connection with criminal allegations that it hid two defects from consumers, regulators and lawmakers that caused vehicles to accelerate suddenly and unintentionally. Our firm was actively involved in the civil litigation that led to the criminal fine.

**Nissan Recalls 2013 Altimas For Hood Latch Problem**

Nissan has recalled more than 238,000 Altima midsize cars worldwide because a secondary latch can fail and allow the hoods to fly open while the cars are in motion. Only Altimas from the 2013 model year are covered by the recall so far, but Nissan is investigating whether other models could be involved, according to documents posted Friday by U.S. safety regulators. While it appears the problem is limited to Altimas, Nissan is checking other latches with similar designs, spokesman Steve Yaeger said.

On the Altima, Nissan’s top-selling vehicle in the U.S., debris and rust can combine with interference between the secondary latch lever and the hood, causing the latches to bind. That could keep them unlatched when the hood is closed. If the primary latch is inadvertently released, the hood could open while the cars are being driven.

Nissan says dealers will modify the latch lever, as well as clean and lubricate the secondary latch joint. The latch assembly could be replaced. The company hasn’t come up with a schedule to notify owners. The problem was discovered when Nissan received reports of a small number of hoods coming open and damaging the cars. Nissan says no injuries have been reported to them. Just over 219,000 Altimas are affected in the U.S., with 10,049 in Canada, 5,267 in Mexico, 2,042 in South Korea and a small number in Latin America, Guam and Saipan, Yeager said. The cars were...
made at Nissan’s factories in Smyrna, Tenn., and Canton, Miss. Toyota says long as owners don’t release the main hood latch and drive cars, there won’t be any problem.

**Chrysler Recalls Nearly 907,000 Vehicles**

Chrysler is recalling nearly 907,000 Chrysler, Dodge and Jeep SUVs and cars for failing alternators and heated power mirrors that can cause minor fires. The largest of Thursday’s recalls covers nearly 470,000 Jeep Grand Cherokees, Chrysler 300s, and Dodge Chargers, Challengers and Durangos from 2011 through 2014. The alternators can fail, causing the 3.6-liter V6 engines to stall unexpectedly. Chrysler says it knows of one crash but no injuries or fires. It will replace alternators for free. Owners will be notified this month.

The second recall covers nearly 457,000 Jeep Wranglers from 2011 through 2013. Water can enter the heated power mirror wiring and cause a short. Chrysler knows of no fires or injuries. Dealers will move the move the wiring and install a water shield starting in December.

**Acura Recalls Vehicles**

Acura has recalled 43,000 vehicles to replace front seat belts. Acura says the seat belts might not release in temperatures below zero degrees Fahrenheit. Acura says no injuries have been reported related to the issue. The recall covers 7,000 2014 RLX and 36,000 2014 and 2015 MDX models. Acura will mail notices to owners later this month.

**VW Recalls 442,000 Jetta and Beetles For Suspension Defect**

Volkswagen of America Inc. has recalled around 442,000 Jetta, Beetle and Beetle Convertible vehicles because of an issue with the trailing arms of the cars’ rear suspension that could cause the part to suddenly fracture, resulting in a loss of vehicle stability in the event of a rear or side-rear collision. The automaker is recalling 400,602 2011-2013 model year Jetta cars, as well as 41,663 2012-2013 model year Beetle and Beetle Convertible vehicles. The cars come equipped with trailing arms on the torsion beam rear suspension that can become damaged during a rear or side-rear collision, the statement said. If the damage is not detected or repaired, the trailing arm could potentially fracture suddenly, which could affect the stability of the vehicle and possibly lead to a crash.

Volkswagen said no injuries or accidents relating to the defect have been reported as of yet, and that it will notify all owners of the affected vehicles and instruct them to arrange for an appointment with an authorized dealer. The dealers have been instructed to inspect the rear suspension of vehicles that have been involved in rear or side-rear collisions to determine if the trailing arms have been damaged, the automaker said. Inspected cars that do not have damaged trailing arms will be fitted with a sheetmetal inlay on the rear trailing arms, according to the statement. “This will emit a distinctive sound if the car is later involved in a rear-end collision, which will be a signal for the owner to take the car to an authorized Volkswagen dealership for inspection. These actions will be performed free of charge to the customer,” Volkswagen said.

In August, the automaker recalled more than 18,500 Routan minivans for an ignition defect similar to the one that affected General Motors Co. this year, where the ignition key may inadvertently slip into the “off” or “accessory” position in bumpy road conditions, turning off the vehicle and disabling air bags and other safety systems.

In April, Volkswagen stopped the sale of approximately 25,000 Jetta, Beetle, Beetle Convertible and Passat vehicles due to a possible transmission oil cooler leak, just a day after the National Highway Traffic Safety Administration (NHTSA) acknowledged a recall of 150,201 model year Passats. In those Passats, the low beam headlight bulb may become loose and lose electrical contact, the NHTSA said in April.

**Mercedes-Benz Recalls More Than 10,500 Of Its C-Class Models**

Mercedes-Benz has recalled more than 10,500 Alabama-made C-Class vehicles from the 2015 model year in the U.S. due to a potential steering problem. The German automaker said a production error could cause steering wheels to squeak and resist turning. The problem was said to affect two European models. The automaker said there’s “no reason to think our vehicles have this problem.” Mercedes manufactures the C-Class, which was redesigned for 2015, at four factories around the world, in Germany, South Africa, China and Alabama. Those produced at the Tuscaloosa County plant are for the U.S. market. The company also is recalling 28,500 C-Class models in Germany. Customers are being advised to take their vehicles to dealers to check out the steering.

**Mitsubishi Recalls Most of US Fleet of Electric Cars**

Mitsubishi Motors North America Inc. has recalled 1,810 of its i-MiEV electric cars. This is nearly all of the vehicles sold by the Japanese automaker in the U.S. The cars were recalled because improper programming and corrosion to the brake pump caused by road spray could lead to sluggish braking and a heightened crash risk, according to National Highway Traffic Safety Administration (NHTSA). All 2010 through 2014 i-MiEV models are cited as potentially problematic. The recall goes back even to the first demo models the company made in 2009.

In August, Mitsubishi submitted a defect report to the NHTSA alerting it to the fact that improper programming of the EV ECU, which controls the brake vacuum pump, may cause the ECU to falsely judge that the relay contact point is stuck. Additionally, the report said, mud containing road salt could enter and adhere to the brake vacuum pump exhaust hole, causing it to be blocked from corrosion of the aluminum portion. Japan-based Mikuni Corp. was identified by NHTSA documents as the supplier of the faulty brake parts. Mitsubishi said that it plans to notify owners about the recall and dealers will either reprogram the brake vacuum pump controller, replace the brake vacuum pump or do both.

Mitsubishi issued a similar recall of 1,400 model year 2012 i-MiEVs last year due to faulty brake pumps, also made by Mikuni. The cause of the defect was different, though. It was blamed on “a vane built with compromised structural integrity due to an
inappropriate manufacturing process,” a letter from the automaker to the NHTSA said. More than 30,000 i-MiEV and i-MiEV-based production vehicles have been sold worldwide and 1,846 have been sold in the U.S., according to its maker. It is unclear whether recalls have been implemented in other countries in which the cars were sold. The recall announced Wednesday includes model year 2010-2014 i-MiEV electric vehicles manufactured Sept. 15, 2009, to March 25, 2014.

**Ford Recalls 205,000 Edge And MKX SUVs For Fuel Tank Issue**

Ford Motor Co. has recalled 204,447 2007-08 Ford Edge and Lincoln MKX SUVs for rust under the reinforcement brackets where the fuel tank is mounted. The automaker said the condition could cause a fuel odor, leak or potential check engine light, and could lead to a fire. Ford said it's aware of one fire related to the condition, but it says no injuries or accidents have been reported. The SUVs are being recalled in Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia, Wisconsin and Washington, D.C. Also covered are the Canadian provinces of New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and Quebec.

The affected vehicles include 2007-08 model year Edge and MKX vehicles built at Ford's Oakville Assembly Plant in Ontario from June 15, 2006 to Sept. 22, 2008. Dealers will inspect the fuel tanks and repair or replace them at no cost to owners.

**Arctic Cat Recalls Single Rider And 2 UP Style All Terrain Vehicles**

Arctic Cat of Thief River Falls, Minn., has recalled about 40,000 single-rider and 2 UP style all-terrain vehicles (ATVs). Components in the front gear case can fail, posing a risk of loss of control and crash hazard. The company has received 44 reports of components in the front gear case failing, including 10 reports of the vehicle stopping abruptly or the operator losing control of the ATV. There have been 4 reports of injury, including 1 involving a consumer sustaining broken ribs and injuries to a knee and back.

This recall involves model year 2008 and 2009 Arctic Cat single-rider and 2 UP style ATVs. Single-rider ATVs have one seat and one set of footrests for the operator. 2 UP ATVs have an elongated seat designed to hold one passenger behind the operator, a set of hand-holds mounted to the rear frame for the passenger and two sets of footrests. The recalled ATVs came in a variety of colors and have the name Arctic Cat on each side of the fuel tank and on the front above the grill opening.

All model year 2008 Arctic Cat ATVs with 400 cubic centimeter (cc) and larger engines are being recalled. Model year 2009 Arctic Cat ATVs with 400 cubic centimeter (cc) and larger engines and with production numbers within the following ranges are being recalled: 200001 through 203861, 808001 through 808137, and X25082 through X30243. The engine size is printed on the back of the instrument cluster between the handle bars. The vehicle identification number (VIN) in the format 4UF09****XXXXXX is on the frame tube near the driver’s side rear wheel and contains the model year and production number of the vehicle. The model year is the fourth and fifth characters of the VIN in the YY format. The production number is the last six characters of the VIN.

The ATVs, Manufactured in the U.S., were sold at Arctic Cat dealers nationwide from May 2007, to October 2014, for between $5,500 and $12,000. Consumers should immediately stop using the recalled ATVs and contact an Arctic Cat dealer to schedule a free repair. Consumers may contact Arctic Cat at (800) 279-6851 from 8 a.m. to 5 p.m. CT Monday through Friday.

**Evenflo Recalls Infant Seats To Fix Sticky Buckles**

Evenflo has recalled more than 202,000 rear-facing infant seats because the buckles can become difficult to unlatch. The recall affects Embrace 35/9999 models with an AmSafe QT1 buckle. Documents posted by U.S. safety regulators say that if the buckles don’t release easily, it may be difficult to get a child out of the seat in an emergency. The recall comes after an investigation by NHTSA. It should be noted that not all Embrace 35 models are covered by the recall. For those under the recall, the company will provide replacement buckles if requested by customers. Affected model numbers include 30711365, 31511040, 31511323, 3151400, 315198, 315195, 31521138, 46811205, 46811237, 48111200, 48111215, 48111215A, 48111218, 48111234, 48111235, 48111235A, 48111462, 48411391, 48411391D, 48411392, 48411504, 48411504D, 52911307A, 52921040, 55311138, 55311238, and 55311292. The seats were made at various times from December 2011 through May of 2013.

**Louis Garneau Recalls Aerodynamic Bicycle Helmets**

About 1,180 helmets bicycle helmets have been recalled by Louis Garneau USA Inc., of Derby, Vt. In cold temperatures, the helmet can fail to protect the wearer from impact injuries. This recall involves Louis Garneau P-09 aerodynamic bicycle helmets with model number 1405362. The helmets are shaped like tear drops with a rounded front and a short, tapered tail. The outer shells of the helmets are made of polycarbonate and have a built-in visor system, dimples on the top like those on a golf ball, a small rectangular vent in the front and a triangular vent in the rear. The helmets came in three color schemes: black with red and white designs, white with blue and gray designs, and white with silver and white designs. The word “Garneau” is located on both sides of the helmet and the Louis Garneau logo is on the front under the vent. Recalled helmets have the manufacture date “Jan. 2014” on a sticker inside the helmet.

The helmets were sold at independent bicycle dealers nationwide and online at lousigarneau.com from January 2014 through September 2014 for between $280 and $350. Consumers should immediately stop using the recalled helmets and return them to Louis Garneau USA for a refund or replacement with a similar helmet. Contact Louis Garneau USA at 800-448-1984 from 8 a.m. to 6 p.m. ET Monday through Friday, email customerserviceusa@louisgarneau.us or online at www.louisgarneau.com/
**Franklin Fueling Systems Recalls Hardwall Fuel Curb Hose**

About 6,700 Hardwall Fuel Curb Hose have been recalled by Franklin Fueling Systems Inc., of Madison, Wisc. The crimp on the fuel hose can loosen causing fuel to leak, posing a fire and explosion hazard. The FLEX-ING™ FLEX-ON hardwall curb hose is 1 inch in diameter ranging in lengths from 9 inches to 100 feet, including various made-to-order lengths, with fixed and swivel fittings. The product is used in conjunction with the gas station nozzle to dispense or transfer refined fuels such as gasoline, diesel, ethanol blends and biodiesel blends (up to E15). The recalled hoses come in black, green, blue, yellow or red. A date code of M1014 through M3014 in WWYY format, is on the fitting with model numbers starting with FLHFR3XX XXX or FLXHW3XX XXX. On the products with a fixed fitting, the model number is on a label on the crimp ferrule. On products with a swivel fitting, the model number can be found on the label of the box in which it was shipped. “FLEX-ING™ FLEX-ON” or “FLEXSTEEL FUTURA” are printed on the hoses.

They were sold exclusively at Costco from July 2013 to September 2014 for about $125. The company is contacting consumers and providing a free repair kit. Consumers should follow the instructions to do the repair provided in the letter and contact Milestone if they have any questions or concerns. Contact Milestone toll-free at 877-277-3707 from 8:00 a.m. to 9:00 p.m. CT Monday through Friday and 10:30 a.m. to 7:00 p.m. CT Saturday and Sunday or online at www.milestone.com and click on Recall Information at the lower right corner for more information.

**Fiskars Recalls Bypass Lopper Shears**

Fiskars 32-Inch Bypass Lopper Shears have been recalled by the distributor Fiskars Brands Inc., of Madison, Wis. The lopper handles can break when attempting to cut branches, posing a risk of serious injury and laceration. This recall involves Fiskars Titanium Bypass Lopper shears with model number 6954. The lopper shears have 32-inch dark orange steel handles and black rubber grips with a gray strip. Plastic gears connected to the pruning blades allow the consumers to open and close the pruning blades by moving the handles. FISKAR is printed on one handle and product identification information, including model number 6954, is printed on a label on the opposite handle above the barcode. The firm has received 11 reports of incidents involving lopper handles breaking, including reports of bruising and lacerations, some required stitches to the head and face.

They were sold exclusively at Home Depot stores nationwide and online at HomeDepot.com from May 2011 through June 2014 for about $40. Consumers should immediately stop using the recalled lopper shears and contact Fiskars to receive a replacement lopper. Contact Fiskars toll-free at 855-544-0151 anytime or visit Fiskars website at www2.fiskars.com and click on Product Notifications for more information.

**Michaels Stores Recalls Folding Tables Due To Fall Hazard**

Michaels Stores, Inc., of Irving, Texas, has recalled 8,400 of its folding tables. The folding tables can collapse under excessive weight, posing an impact or falling hazard. The Ashland Summer Living Vintage Wood Folding Table has a 14-inch round tabletop made of red medium density fiberboard. The table legs are brown metal, and the table stands about 22.5 inches high. A latch on the underside of the tabletop secures the table in an upright position when the table legs are separated forming an “X” position. When the table leg is released from this latch, the legs fold together and the tabletop folds down against the legs in a flat position. SKU 309950 and UPC 886946388804 are printed on a hangtag on the tables. Phase MDF and M0126 are printed on a black and white label under the table. There have been four reports of consumers sitting on the tabletop and falling when the tables collapsed, resulting in injuries to the back, leg or hip.

They were sold exclusively at Michaels Stores nationwide from April 2014 to May 2014 for about $30. Consumers should immediately stop using the tables and return them to any Michaels store for a full refund. Contact Michaels at 800-642-4235 from 9 a.m. to 7 p.m. CT Monday through Friday and 9 a.m. to 6 p.m. CT Saturday, or online at www.michaels.com and click on “Contact Us.”

**Toys R Us Recalls Toy Toaster Sets**

Just Like Home Toy Toaster Sets have been recalled by Toys R Us, of Wayne, NJ. The plastic toast, under pressure, can crack and break into small pieces creating sharp edges and posing a
choking hazard. The recall includes the Just Like Home brand toy toaster sets. The teal blue plastic toy toaster has silver trim around the sides opening on top, with an orange slider handle on the side and orange three-dimensional adjustment button outlined with orange dots in a half moon shape on the face of the toaster in the left bottom corner. “Just like home” is printed in white on the front right bottom corner of the toaster. The toaster measures about 4 inches in height by 5-1/2 inches in length by 2 inches in width. The toaster set was sold with two plastic toast slices and two plastic half bagel slice accessories. Model number 5F60589 is printed on a white label on the bottom of the toaster and above the UPC bar code in the lower right hand corner of the product packaging.

They were sold exclusively at Toys R Us stores nationwide and online at www.toysrus.com from July 2013 through August 2014 for about $10. Consumers should immediately take this product away from children and return it to any Toys R Us to receive a full refund. Contact Toys R Us at 800-869-7787 anytime or online at www.toysrus.com and click on News/Press Room under the About Us tab at the bottom of the page then click on the Safety tab and Product Recalls for more information.

**Women’s Scarves Recalled By Zazou Scarves**

About 3,800 Zazou women’s silk scarves have been recalled by Zazou Scarves, of Berkeley, Calif. The scarves fail to meet the federal flammability standard for wearing apparel and pose a burn injury hazard to consumers. This recall involves Zazou women’s sheer 100 percent silk scarves. They were sold in 20 different solid colors including black, burgundy, celery, chili red, coral, espresso, fuchsia, grey, indigo, iris blue, mist blue, olive, peacock, periwinkle, pink, purple, ruby, sea foam and white. The scarves measure 72 inches long by 20 inches wide. Zazou Luxe is printed on a tag sewn into the side seam of the scarf.

The scarves were sold at Specialty boutiques nationwide and online at www.zazou.com and other websites from August 2012 through August 2014 for about $30. Consumers should immediately stop using the recalled scarves and contact Zazou Scarves to return them for a full refund. The company is providing a pre-paid postage label to consumers for shipping. Contact Zazou Scarves at 800-472-2783 from 9 a.m. to 5 p.m. PT Monday through Friday, online at www.zazou.com and click on “Recall” for more information or email the firm at monique@zazou.com.

**Trimfoot Recalls Children’s Soft-Soled Sneakers**

About 5,300 Children’s soft-soled shoes have been recalled by Trimfoot Co. LLC., of Farmington, Mo. A small metal eyelet can detach from the inside of the sneaker, posing a choking hazard to infants. The recall involves First Impressions high-top, soft-soled sneakers for infants that are crawling or standing. The recalled shoes have blue denim soles and uppers, brown canvas tongues, tan shoe laces and white polyurethane toes. Each upper has eight 3/16 inch eyelets for the laces. The shoes came in sizes 0, 1, 2 and 3. Style number 42090 is on a cloth tag inside of shoe.

The shoes were sold exclusively at Macy’s stores nationwide from February 2014 to August, 2014 for about $17. Consumers should immediately take the recalled shoes away from children and return the shoes to Macy’s or contact Trimfoot for a full refund. Contact Trimfoot at 800-325-6116 from 8 a.m. to 8 p.m. Monday through Friday, or online at www.trimfootco.com, then click on Recall on left side of the page for more information.

**Active Apparel Recalls Boys Fission Zipper Hooded Sweatshirts**

About 7,800 Boys Zipper Hooded Sweatshirts have been recalled by Active Apparel, Mira Loma, Calif. The sweatshirts have drawstrings around the neck area which pose a strangulation hazard to children. Drawstrings can become entangled or caught on playground slides, hand rails, school bus doors or other moving objects, posing a significant strangulation or an entanglement hazard to children. In February 1996, the Consumer Product Safety Commission (CPSC) issued guidelines about drawstrings in children’s upper outerwear. In 1997, those guidelines were incorporated into a voluntary standard. Then, in July 2011, based on the guidelines and voluntary standard, CPSC issued a federal regulation. CPSC’s actions demonstrate a commitment to help prevent children from strangling or getting entangled on neck and waist drawstrings in upper outerwear, such as jackets and sweatshirts.

This recall involves boys Fission zipper hooded sweatshirts made of 100 percent cotton. The sweatshirts come in black, green, royal blue, true red and turquoise color. There is a white drawstring tie that is attached on each side of the neck area. There are two pockets and a white zipper on the front of the garment. The recalled sweatshirts were sold in boys sizes small (size 8-10) and medium (size 12-14). The size can be found on the label that is sewn into the seam of the neck area. There is also a white label sewn into the lower left seam inside the garment. On the label, it states Karachi Pakistan, Active Apparel, has the manufacture date “MAY, 2014,” and batch number 61271,159.

The sweatshirts were sold at Fred Myer and Kroger stores nationwide from June 2014 through August 2014 for about $18. Consumers should immediately take the sweatshirt away from children. Consumers can remove the drawstring from the sweatshirt to eliminate the hazard or return it to the place of purchase for a full refund and a $10 gift card. Contact Active Apparel toll-free at 844-861-5308 from 9 a.m. to 5 p.m. PT Monday through Friday or online at www.activeapparel.net and click on the Recall tab located at the top of the home page.

**Pure Baby Organics Boys Hoodie Recalled By Chantique’s Corp.**

Chantique’s Corp., Los Angeles, Calif., has recalled about 60 Boy’s Zipper Hooded Hoodies. The sweaters have a drawstring around the neck area which poses a strangulation hazard to children. Drawstrings can become entangled or caught on playground slides, hand rails, school bus doors or other moving objects, posing a significant strangulation or an entanglement hazard to children. In February 1996, the Consumer Product Safety Commission (CPSC) issued guidelines about drawstrings in children’s upper outerwear. In 1997, those guidelines were
incorporated into a voluntary standard. Then, in July 2011, based on the guidelines and voluntary standard, CPSC issued a federal regulation. CPSC’s actions demonstrate a commitment to help prevent children from strangling or getting entangled on neck and waist drawstrings in upper outerwear, such as jackets and sweatshirts.

This recall involves a Pure Baby Organic boy’s hoodie made of 100 percent cotton. It comes in solid gray with a red drawstring that is inside the lining of the hood that surrounds the face. They have a zipper front closure. The recalled hoodies were sold in toddler boy’s sizes 2t to boy’s size 3.

There is a white label sewn into the neck line that has the name Purebaby on it. There is also a label underneath that has the size printed on it and states Made in India. A label with style number PB1613.B12 is sewn into an inside side seam of the garment under the washing instruction label.

The shirts were sold at Children’s boutiques nationwide and other stores such as Elephant Ears, Pumpkin heads, Sprouts and on-line at www.Nordstromrack.com from January 2014 through August 2014 for about $62. Consumers should immediately take the hoodie away from children. Consumers can remove the drawstring from the garment to eliminate the hazard or return it to the place of purchase for a full refund. Contact Chantique’s Corp collect at 213-629-3222 from 9 a.m. to 5 p.m. PT, Monday through Friday or email at info@chantiquesshowroom.com for more information.

**Toys R Us Recalls Children’s Sandals**

Toys R Us Inc., of Wayne, N.J., has recalled about 19,000 of its Koala children’s sandals with butterfly wings. The butterfly wings on the children’s sandals can rip and detach, posing a choking hazard to young children. This recall involves Koala Baby girl’s plastic sandals with butterfly wings attached to the toes with rhinestones and hard or soft cork-type soles. Sandal colors include white or combination pink, gold and blue. They were sold in baby sizes 0 to 3 and girl’s sizes 2 to 10. “Koala Baby” and the size are printed on the soles.

White soft-soled sandals have model number GNL 43633BR and item number 795267 printed on a tag sewn into the sandal’s ankle strap. White hard-soled sandals have model number GNL 43706BR and item number 795313. Combination pink, gold and blue soft-soled sandals have model number GNL 45634BR and item number number 795275. Combination pink, gold and blue hard-soled sandals have GNM 41761BR and item number 845795. Toys R Us has received a report from a consumer who found a piece of the shoe’s butterfly wings in their child’s mouth. No injuries have been reported.

The sandals were sold at Toys R Us and Babies R Us stores nationwide and online at toysrus.com and babiesrus.com from February 2014 through September 2014 for about $13. Consumers should immediately take the recalled sandals away from young children and return the sandals to any Toys R Us or Babies R Us for a full refund. Contact Toys R Us at 800-869-7787 anytime or online at www.toysrus.com and click on Safety for more information.

Once again there have been a large number of recalls since the last issue. While we weren’t able to include all of them in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm’s web site at www.BeaasleyAllen.com/recalls. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

**XXII. FIRM ACTIVITIES**

**Employee Spotlights**

**DAVID DEARING**

David Dearing, who joined Beasley Allen in April 2012, practices in our Mass Torts section. He initially worked on the firm’s Hormone Replacement Therapy (HRT) litigation team, focusing on drugs such as Premarin, Prempro and Provera, which were shown to cause breast cancer in some women. David is now primarily working on two other classes of drugs in multidistrict litigation. Fosamax (alendronate sodium) was released on the U.S. market in 1995 and was prescribed to prevent and treat osteoporosis. However, prolonged use can actually lead to bone deterioration and consequential low-energy fractures, particularly of the femur. David is representing many clients who suffered spontaneous femur fractures as a result of Fosamax use.

David also represents clients injured from taking Januvia, Byetta, Janumet and Victoza. These four diabetes drugs are in a class of drugs known as incretin mimetics, and are intended to help diabetics regulate blood sugar levels. However, studies have shown these drugs can cause pancreatic and thyroid cancer.

David received his law degree in 1991 from Cumberland School of Law at Samford University, where he served as Associate Editor of the Cumberland Law Review. Prior to law school, he attended Furman University, earning a Bachelor’s degree in Economics.

David is from Jacksonville, Fla. He has been a trial lawyer for more than 20 years. He served four years as an Assistant State Attorney in both the Fourth and Eighth Judicial Circuits in Florida. After his time as a criminal prosecutor, David’s practice areas on the civil side have included Wrongful Death, Personal Injury, Products Liability, Workers Compensation, and Criminal Defense. He was named one of Florida Trend Magazine’s Florida Legal Elite, as well as a Jacksonville “Top Lawyer” by 904 Magazine. David is rated AV Preeminent, the highest possible rating in both Legal Ability and Ethical Standards by Martindale-Hubbell.

David is a member of the Alabama State Bar, the Montgomery County Bar Association, the Montgomery County Association for Justice, The Florida Bar Association, Florida Justice Association, American Inns of Court, The Million Dollar Advocates Forum, and The Christian Legal Society. He has been admitted to the United States District Court, Middle District of Alabama and Middle District of Florida. David has litedigated in Federal and State Courts throughout the country.

David met his wife, the former Vicki Millo, in law school, and they have been married more than 20 years. Vicki recently joined the Beasley Allen team as a litigator in our Mass Torts Section after having spent the majority of her career as a Law Professor.

David and Vicki have two teenage children, 18 and 16. The family are members of Frazer United Methodist Church. Between
attending their children’s various sporting events, David and Vicki enjoy traveling and spending time on the water. Sadly, David’s mother Norma Dearing died last month after a lengthy illness. The Dearing family needs our prayers.

We are blessed to have David in our firm.

He is a very good lawyer who takes the work for his clients very seriously. He is dedicated to the truth and getting good results for them.

ROBIN PARKhurst

Robin Parkhurst, who has been with the firm for one year, serves as an Accounting clerk I. In this position, she handles all non-case related accounts payable for the Firm. Robin had worked at a Nursing Home for 14 years prior to coming to the firm. She works hard and is a valuable member of the Beasley Allen family.

I will give a little bit of Robin’s family history. Unfortunately, in 1987, when Robin was 12 years old, she lost her mother to breast cancer. Her father, who suffered with heart disease died in 2001. Robin has one sister who is in the process of moving back to Alabama.

Robin has two children, 10-year-old Austin who in the fourth grade at Dalraida Elementary; and Danielle is 17 and in the 11th grade at Brewtech Magnet school.

Robin is married to John Parkhurst, who has a 2-year-old granddaughter, Callista.

John’s daughter died this year and John and Robin are now helping to take care of Callista. Robin enjoys attending Church, spending time with her family, watching movies, cooking, gardening, and watching Alabama football. We are fortunate to have Robin with us.

SUSAN ANDERSON

Susan Anderson, who is assigned to our Toxic Torts Section, came to work at the firm in January of 2013. She works closely with lawyers in the Section to assisting our clients who are recovering damages resulting from the BP Oil Spill. Susan has daily contact with the Deepwater Horizon Claim Center and also with our clients to make sure the Claim Center requests are understood and the imposed deadlines met. This is very important work and requires dedication to the process. Susan is working hard and doing a very good job.

Susan previously lived in the Daphne/Fairhope area of Baldwin County, Ala., for 15 years. She moved to Montgomery when she re-married two years ago. Susan has a son and three grandchildren who live in Mobile, and a daughter from Daphne, who is set to give birth this month. Another son and grandson live in the Baton Rouge, La., area.

Susan worked for more than 20 years in accounting and financing and has now worked seven years as a Certified Paralegal. She graduated from Lee High School in Montgomery and spent six years in the Air Force, with four of those years in Anchorage, Alaska. Susan lived there for 13 years after separating from the service. She worked as Regional Credit Manager for a Tractor/Equipment company, and opened and successfully ran her own coffee shop in Daphne, Ala., before obtaining her Paralegal Certification from Faulkner Community College. Susan picked up sewing about a year ago and loves to make custom pillows. She says she has always enjoyed a good mystery/crime novel, cooking, and Jazzercise. We are most fortunate to have Susan with the firm.

XXIII. SPECIAL RECOGNITIONS

BIG OAK RANCH MAKES A DIFFERENCE FOR CHILDREN

This month we are going to feature Big Oak Ranch. John Croyle, founder and executive director of Big Oak Ranch, together with his wife, Tee, believes the key to providing a loving, safe and Christian home for children needing a chance is simple. The familiar refrain is their motto and the mission of the Ranch:

A hundred years from now it will not matter what kind of house we lived in, the kind of car we drove or how much money we had in the bank, but the world may be different because you and I were important in the life of a child.

Big Oak Ranch has been the living and growing embodiment of this concept for 40 years, helping thousands of abused, neglected or abandoned children since 1974. The Ranch—through three branches: The Boys’ Ranch in Gadsden, Ala.; the Girls’ Ranch in Springville; and Westbrook Christian School, Inc., in Rainbow City— works to give these children a second chance and a normal life.

On Big Oak’s website, John says, “Our children are not bad kids. They come from bad circumstances. The commitment we make to the children placed in our care is love.” While the Ranch does indeed provide the necessities of food, clothing, shelter and education, what’s most important is that it gives these children hope. John had this to say:

We give them a chance at a new way of life, a life that is different from the cycle of pain they have known. We make a promise to every child that comes to the Ranch. I love you. I’ll never lie to you. I’ll stick with you until you’re grown. There are boundaries, don’t cross them. From that foundation, we raise every child to know God’s love.

The vision for this safe haven grew from John’s feeling that he was being called to minister to children. A star player on the 1973 University of Alabama National Championship football team, John had lots of offers to play in the NFL after college. But since age 19, he had felt drawn to working with youngsters in need. John felt he had been given a special gift in this area. After talking with his coach, the legendary Paul “Bear” Bryant, who encouraged him to follow his heart and calling, John turned down a life of professional football. Instead, he began to establish what would become the Big Oak Ranch. The name is drawn from scripture, Isaiah 61:3, “And they shall be called oaks of righteousness, the planting of the Lord that He may be glorified.”

As each child comes to the Ranch as a tiny acorn of potential, the good folks who become their family help to nurture them, excited to help them put down roots while they discover how high they can reach with a solid foundation. There are currently more than 100 children living on the two Ranches. Westbrook Christian School provides a quality Christian education to the children from the Big Oak Ranch, as well as children from the local community.

The Big Oak Ranch, a 501(c)3 organization, welcomes contributions to help support its mission. There are a number of ways you can help. Visit www.bigoak.org/ways-to-help to learn more. You can make a financial donation through the website. You can also pray for the Ranch, the children and all of the adults affiliated with the Ranch, and that’s as important as anything we can do.

Sources: Yellowhammer News, BigOak.org
Marc McHenry is one of our firm’s in-house investigators. Before coming to Beasley Allen, Marc rose to the rank of Major with the Alabama State Troopers. Marc, a dedicated Christian, says there are several scriptures that he uses daily.

Don’t ask yourself who will go up to heaven,” (that is, to bring Christ down). “Don’t ask who will go down into the depths,” (that is, to bring Christ back from the dead). Romans 10: 6-7

“This is the message of faith that we spread.” “That if you confess with your mouth Jesus as Lord, and believe in your heart that God raised Him from the dead, you will be saved.” Romans 10: 8-9

“Let your light shine before men, that they may see your good works, and glorify your Father which is in heaven.” Matthew 5:16

Pam Sexton, who is the senior Interior Director at Pickwick Antiques located in Montgomery, furnished one of her favorite verses for this issue. Pam is recognized as one of the best in her field of work and, more importantly, she is a dedicated Christian.

Be anxious for nothing, but in every thing by prayer and supplication, with thanksgiving, let your requests be made known to God. Phil 4: 6

Estee Morrison, who is married to Rick Morrison, a lawyer in our firm, supplied two verses this month. Estee says they love to read in their house and that she finds herself explaining to their 5 and 7 year olds the meanings of a good number of words throughout the course of a day. Several years ago, Estee says she found a wonderful verse in Colossians that constantly reminds her of the impact of her words. She says it lets her know that speaking with thoughtfulness helps her to give better answers to her children.

Let your speech always be with grace, seasoned with salt, that you may know how you ought to answer each one. Colossians 4:6

Estee says that Rick works hard to help make sure the products we all use are safe.

She says as she watches Rick work to help his clients who are seriously injured or have lost loved ones, she’s reminded that God sees our daily struggles. Estee adds that God gives us all the strength to get things done each day. Estee reminds us that during tough times on his missionary journeys, the apostle Paul wrote encouraging messages to the church in Corinth.

We are hard pressed on every side, yet not crushed; we are perplexed, but not in despair; persecuted, but not forsaken; struck down, but not destroyed...that the life of Jesus also may be manifested in our body: 2 Corinthians 4:8-10

Estee says that these verses in Corinthians have been great encouragement to her and to her family. She says they help her remember that God’s plan is always the best plan for her life!

My friend Rev. Walter Albritton, a pastor at St. James United Methodist Church, furnished some verses this month. Walter says that his favorite Old Testament verse is found in Isaiah. Whenever fear knocks on his door, Walter says this Word of the Lord reminds him that he need not be afraid for his heavenly Father is with him. He will strengthen him and hold him up with His strong hand.

So do not fear, for I am with you; do not be dismayed, for I am your God. I will strengthen you and help you; I will uphold you with my righteous right hand. Isaiah 41: 10

Walter says his favorite New Testament verse is in Ephesians. When his children were young Walter says he and Dean put this verse on the refrigerator, the mantle, the bathroom mirrors, and over the sink in the kitchen. No family can survive unless the members learn to be kind to one another and to forgive each other. Then as a pastor, Walter says he discovered church families cannot survive without kindness and forgiveness!

Be kind and compassionate to one another, forgiving each other, just as in Christ God forgave you. Ephesians 4:32

Jamie Collins Doss, a resident of Tennessee, sent in a favorite verse this month. Sara and I have known Jamie for a long time. She and Sara have been prayer partners for several years. Jamie also manufactures a great line of soaps. Her company is Bethesda Skincare and you can get more information on Jamie and her products at Bethesdaskincare.com.

And the King will answer and say to them, ‘Assuredly, I say to you, inasmuch as you did it to one of the least of these My brethren, you did it to Me.’ Matthew 25: 40

Jason King, who works in our firm’s IT Department, also furnished a timely verse for this issue. It’s always good to get verses from Beasley Allen employees.

I will say of the Lord, “He is my refuge and my fortress; My God, in Him I will trust.” Psalm 91: 2

XXV.
CLOSING OBSERVATIONS

THE RED MASS WAS QUITE IMPRESSIVE

I attended the Red Mass last month at St. Peters Church in Montgomery and was blessed. The ceremony was quite impressive. It was containing a moving experience. For our readers who may not be familiar with a Red Mass ceremony, I will provide some history. The tradition of the Red Mass goes back many centuries in Rome, Paris and London. It is the Solemn Votive mass of the Holy Spirit (the word votive indicating that the Mass is offered for a special intention) celebrated generally near the beginning of the judicial year and attended by judges, lawyers and court officials of all faiths for the purpose of invoking God’s blessing and guidance in the administration of justice. Its traditional name, the Red Mass, is derived from the color of the vestments worn by the officers of the Mass, symbolizing the Tongues of Fire representing the Holy Spirit. Moreover, in ancient days, the robes of the justices were bright scarlet. This provided an additional reason for naming the Red Mass.

From the time immemorial, this beautiful ceremony has officially opened the judicial year of Sacred Roman Rota, the tribunal of the Holy See. During the reign of Louis IX, St. Louis of France, La Sainte Chappelle was designated as the chapel for the Mass. This magnificent edifice, erected in 1246, was used but once that year and that was for the celebration of the Red Mass.

In the United States the tradition was inaugurated in New York City in 1928. The Guild of Catholic Lawyers met with judges...
and members of the law faculties for the Votive Mass in old St. Andrew Catholic Church in the shadow of the state and federal courts. Since then, the Red Mass has been celebrated in that church and many cities in this country, attended by justices of the highest courts and people of all faith. In the District of Columbia, the Red Mass is attended by the President of the United States, the Chief Justice, members of the Supreme Court, Congress, judges and all branches of the government and foreign diplomats.

St. Peter’s Parish in Montgomery has carried on the tradition of the Red Mass. At the ceremony a warm welcome was extended to members of the Judiciary as well as Court staff and guests who were in attendance. It was a moving and most impressive ceremony, which had to have a good effect on the judges and court staff members who attended. Hopefully, the tradition of the Red Mass should continue in coming years. The people of Alabama were blessed when prayers were made on behalf of the courts and all who are involved in the system.

I believe it’s very important for people to pray earnestly on a daily basis for our courts and for all persons who work in the judicial system all across the United States. While some may disagree, I believe this is an absolute necessity in order for complete justice to be done by our judges and so that the courts will be independent and fair in all of their work and decisions handed down by judges will be just.

**Some Monthly Reminders**

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

2Chron7:14

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

Edmund Burke

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

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

*That widows may be their prey, And that they may rob the fatherless.*

Isaiah 10:1-2

*The concept of costly discipleship makes no sense to us when we are children. We can easily embrace Jesus as our Friend or Shepherd. But as we mature it dawns on us that following Jesus is very demanding. Total commitment is required. Without that we are playing a game of sham and pretense.*

I know about the pretense. I grew up in the church. My kindergarten teacher pinned a little lamb on the calendar on each Sunday I was present. I felt good about Jesus. He was my Friend. He was kind and gentle. He loved people, especially sinners.

*I learned in Sunday school that God wants me to treat people like Jesus treated them. That is what being a Christian is all about—or so I thought. Be a good boy and always ask, “What would Jesus do?”* Then in my teen years I began to realize my rotten, sinful nature. I realized I was not fully surrendered to Jesus nor was I ready to take that step. I wanted people to think that I was a Christian but in my heart I knew the cold truth. I wanted control of my life. I wanted to be a Christian on my own terms.

*What followed were several years of inner struggle and turmoil. I did not share my feelings with anyone but inwardly I was tormented by doubt. Perhaps the stories of Jesus were mostly myth. I had no doubt that he was crucified but the resurrection of a dead man from a grave seemed most unlikely. Perhaps what Christianity offers us are ethical principles drawn from the teachings of Jesus that provide the framework for a Christian “way of life.”* Then I began to bear people talk of “knowing” Jesus personally. They had a contagious joy. I wanted what they bad but I had to admit my own experience was head knowledge. Jesus was not a real person to me but an historical figure much like Moses, David or Jeremiah. I had no sense of his actually being “with” me. I could sing about him and read about him but I did not “know” him.

*Then all that changed. In a moment of time Christ became real for me. I admitted I was a sinner, helpless to*
save myself. I invited Jesus to forgive me of my sins and come into my heart, and for the first time I felt an inward assurance that he had done exactly that. My doubts melted away and the marvelous reality of the living Christ flooded my whole being. John Wesley described it this way: “I felt my heart strangely warmed!” And that’s how it was for me too as his joy overwhelmed me and his presence within me transformed my life. Getting to “know” Jesus changed everything!

The Apostle Peter and the other disciples experienced this same life-changing power. At first they followed Jesus because they admired him. As they listened to Jesus teach they must have wondered, “Who is this man? Is he only a man or is he more than a man? Can he possibly be the Messiah?” Then that shining moment came for Peter on the day Jesus asked the question, “But who do you say that I am?” It must have seemed like the sky had parted and Peter knew, beyond any doubt, that Jesus was indeed the Messiah! He was the Son of the living God, the Savior of the world! His heart was strangely warmed!

But Peter had more to learn—as we all do after our initial surrender. At first we simply want the benefits of being a Christian—the forgiveness of our sins, peace with God and the respect of others. Then our “peace” is jolted by the discovery that to become a genuine follower of Jesus requires nothing less than our total surrender. We must practice self-denial, take up our cross daily and deny ourselves comforts we thought we deserved.

The more I follow Jesus the more I realize that I can only get home by “the way of the cross.” I must continue to give up “my rights” and value nothing only so far as it can be used to honor Christ.

I valued the love and respect of my dad and mother. I value the respect and affection of my family and my friends. But more than anything I want to live my life so that God my Father will never be ashamed of his investment in my life. I was never ashamed to be the son of my earthly father and I want never to be ashamed to be known as a fully devoted follower of Jesus Christ.

The people I admire the most are the ordinary people who have given their all in absolute surrender to Jesus. If I am to be such a follower I must be willing every morning to make a new total surrender of my life to him. So when I say to my friends, “Pray for me,” that is the prayer I want them to pray—that Walter will be totally surrendered to Jesus until his last breath!

My prayer is that each of us will—if we haven’t done so already—surrender totally to our Lord and Savior Jesus Christ. Walter, a true follower of Jesus, has been a real inspiration for Sara and me over the past several years. He is a good man in every respect and I might add, the man is a great preacher of the Gospel. May God continue to bless and use him.

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