I. CAPITOL OBSERVATIONS

THE ROLE OF A TRIAL LAWYER

I am very proud to be called a trial lawyer. I know that trial lawyers have made a tremendous difference in a number of areas that are of concern to the public. For example, many products are safer today because of the dedication of lawyers who have represented victims of wrongdoing and abuse and have forced needed changes in Corporate America. Those changes would never have happened without the involvement of trial lawyers and the judicial system.

In addition, wrongful conduct, including fraud in corporate America, has been exposed through litigation. A prime example is the whistleblower litigation that has exposed massive frauds in government contracts. Payday lenders' outrageous interest rates and huge fees of all sorts have been successfully challenged in the courts.

While there is much yet to be done, tremendous progress has been made on a number of fronts. I believe the area where results can be readily seen is in the automobile manufacturing industry. The National Highway Traffic Safety Administration—or NHTSA—has been almost totally ineffective in regulating this industry. A prime example is in the area of safety-related recalls. As we all know, over 60 million vehicles with safety defects have been recalled in the U.S. this year. Over 20 million of the recalled vehicles were made and sold by General Motors. Millions of vehicles with the defective Takata air bags are now being recalled and that saga is far from over. None of this would have happened had it not been for trial lawyers and the courts.

As most of you should know by now, the Federal government does a poor job of regulating industries. I am not aware of a single industry that has been adequately regulated. I know from experience that the automobile, pharmaceutical, medical device, oil and chemical industries are not adequately regulated. In most instances, it's sorta like the "tail wagging the dog." The public—and unfortunately even the media—has been led to believe that government at both the national and state levels has overregulated industry and that it has cost jobs in the U.S. That's a myth that has to be overcome every time a victim files a lawsuit against a corporation that is regulated by the government.

We have seen in case after case corporations putting their profits over safety. The corporate bean-counters actually do an analysis in many cases to see what it will cost their company to keep a product known to be defective on the market. The costs of litigation are weighed against the costs related to fixing a known safety problem. Prime examples of that sort of thing involve Toyota and General Motors.

It is absolutely essential to keep the nation's courts independent, open, and accessible. Without an independent court system that is accessible, victims of corporate wrongdoing and abuse would be left without a remedy when they are damaged. Lawyers who are totally dedicated to helping victims obtain justice must also be available. Those lawyers must be willing to take on powerful interests. To represent clients effectively, a trial lawyer must possess both skill and courage. I know from experience that the arena in which trial lawyers work is no place for the weak of heart. We must also be willing to take risks and have the resources available that are required when taking on corporate giants. Perhaps the most important requirement for a trial lawyer is not to be afraid to lose in court.

The judicial system, while an essential part of government at both the national and state levels, has been under constant attack. Smart folks in corporate America coined the term "tort reform" years ago and set out to destroy the civil justice system. Sadly, trial lawyers and consumer groups were all "asleep at the switch" and allowed that term to set an agenda for the following decades. The use of the term "reform" indicated something in the court system was broken and in need of a fix. I have to give those who devised this strategy an "A-plus," but that doesn't make what they did right. In fact, it was morally reprehensible. Fortunately, trial lawyers and some brave politicians fought back and kept the judicial system alive.

The right to jury trial is guaranteed by the U.S. Constitution. However, corporate America has done its dead-level best to take this fundamental right away from the American people. I believe we have made a real mistake in not making our defense of the judicial system, a defense grounded on the Seventh Amendment to the U.S. Constitution. We could have learned a valuable lesson from the National Rifle Association.

Courts that are independent of undue influence and political pressures are absolutely necessary if justice is to be done when disputes arise between individuals and powerful corporations. Trial lawyers must take an active role in the political arena, be willing to take a stand for that which is right, and oppose all that is wrong in America.

The judicial system has been under constant attack by groups such as the U.S. Chamber of Commerce, The American Tort Reform Association and other groups that share a common agenda. Their agenda is to protect corporate wrongdoers in America. A prime example of how our opponents operate is the recent unjustified attack on the Alabama Supreme Court that received national attention. Our Court was singled out as being a bad court simply because it ruled in one case contrary to what one special interest in corporate America wanted.

If our nation is to remain strong and free, the American jury system must be protected and preserved. If the jury system is weakened, the American people will suffer. The jury is the one place where politics and political pressure should have no effect. We all have a moral duty to work hard to make sure our courts remain open for all people. This is a battle that requires each of us to get involved and to stay involved. We are facing opponents that are well-financed and dedicated to their mission. We must be just as dedicated and willing to engage in the ongoing battle. Ordinary folks depend on trial lawyers to fight the battle for them. It's a battle they can't afford to lose.

As I mentioned at the outset, I am very proud to be called a trial lawyer. Looking back over the years, I can say without hesitation that I tried my very best to make a difference.
To 42

Anybody who has visited the City of Eufaula left there having seen a beautiful area of the City that is a storied part of its historic past. The houses on the street that leads into town on the northern side are both beautiful and historic. The beautiful shorter mansion is only one of them. Sadly, Eufaula is under attack and the attack is being waged by none other than the State of Alabama. An ill-advised highway project, if allowed to proceed, will literally destroy this historically important part of Eufaula. At press time, Alabama officials had agreed to delay a highway widening project through Eufaula’s historic district through the end of the year.

That was to give U.S. District Judge Myron Thompson time to consider a lawsuit filed by Eufaula officials trying to stop the project. Judge Thompson issued an order saying he would rule on Eufaula’s request for a temporary restraining order on Dec. 31. The state Department of Transportation agreed to delay construction until the judge can rule. The department plans to spend nearly $1.3 million to widen U.S. 431 from two lanes to four lanes through Eufaula’s historic district. The project will permanently damage the historic district and the entire city. Hopefully, this project can be stopped.

II. THE ONGOING SAGA OF THE GENERAL MOTORS SAFETY PROBLEMS

GM IGNITION SWITCH DEFECT DEATH TOLL RISES TO 42

As of December 15, four more deaths had been linked to General Motors ignition defect, raising the total to 42 fatalities that GM now admits to. This new number was released in a report from Ken Feinberg, who as you know is running the compensation fund for victims of crashes caused by the faulty ignition. GM has received a total of 2,326 claims—251 for deaths, 156 for catastrophic injuries and 1,919 for less-serious injuries that required hospitalization—according to the latest report from Mr. Feinberg. Of the 251 death claims the fund has received so far, 46 have been deemed ineligible and the fund is seeking additional information in 83 other cases. Thus far the fund has found seven claims for serious injuries to be eligible and approved 51 other lesser injury claims, according to the report.

This latest report showed an increase of death claims from 38 to 42. Payment for eligible death claims is at least $1 million, according to the fund’s protocol. Payouts for severe injuries are calculated individually and take into account whether a long-term care plan is required. The fund began accepting claims in August, but GM said in November that it extended the deadline for applications to its ignition switch compensation fund from Dec. 31 to Jan. 31.

It was reported that GM has sent notices to more than 4 million current and past owners of eligible GM cars. GM says it’s extending the deadline “out of an abundance of caution.” Based on our handling of claims, we know that GM knew all about the serious safety defect and engaged a massive cover-up for over ten years. We also know that hundreds of innocent people were killed and hundreds more injured because of the defective ignition switch and GM’s cover-up.

Source: Law360.com

IGNITION-SWITCH CLAIMANTS ATTACK GM’S BANKRUPTCY SHIELD

General Motors Co. customers whose vehicles dropped in value after the automaker was forced to admit that millions of vehicles had a serious safety defect. The Plaintiffs in a lawsuit are contending that GM’s bankruptcy does not stop them from suing what is now referred to as ‘New GM’ for damages. In a brief filed in New York bankruptcy court, the Plaintiffs objected to GM’s attempt to use a court order from its bankruptcy to defeat the class action litigation spawned by the a publicized ignition-switch defect that was found to have ‘infected’ millions of vehicles. Steve Berman of Hagens Berman Sobol Shapiro, a lawyer representing the class plaintiffs, said in a statement:

GM continues to keep consumers from receiving the remedy they deserve. When standing before the American people, GM claims to take responsibility, but in the courtrooms of America, it seeks the opposite, attempting to evade responsibility for its illegal acts.

The Plaintiffs filed their brief in the court for the Southern District of New York. U.S. Bankruptcy Judge Robert Gerber. The so-called New GM emerged from Chapter 11 in 2009 and purchased the good assets of GM, which has basically the same folks revising the company and took with them all of the good assets of the company.

The underlying suits against GM allege violations of state consumer protection statutes, breach of implied warranties, fraud by concealment, unjust enrichment and other claims over more than 60 recalls affecting GM-branded vehicles sold in the U.S. from model years 1997 to 2014. GM has spent much of 2014 dealing with the deadly defect, which affected millions of older vehicles in the Chevrolet Cobalt family. In Congressional hearings, GM executives had great difficulty trying to explain how the defect was allowed to persist for so long when engineers reported problems as early as 2004. The overwhelming evidence on that issue will destroy GM’s credibility with the judges involved in the litigation on several fronts.

U.S. District Judge Jesse Furman, who is presiding over the federal litigation against GM, has kept most of the consumer-fraud suits before him in a holding pattern until Judge Gerber has rendered a decision.

It’s most interesting to put this entire litigation into perspective. GM was forced to admit safety problems and to recall millions of cards because of a lawsuit filed in Cobb County, Georgia, by a courageous family (the Meltons) represented by Lance Cooper. The National Highway Traffic Administration should have done something long before the Melton case was ever filed, but the agency dropped the ball. Certainly, GM had a legal duty to report the defect years before the Melton case discovered the defect. Instead, GM covered up the defect, its knowledge of deaths and elected to run a tremendous safety risk.

Source: Law360.com
III.
THE TAKATA AIRBAG SAFETY ISSUES CONTINUE TO EXPAND

TAKATA REFUSES TO EXPAND RECALL OF ITS EXPLODING AIR BAGS, FORCING AUTO MANUFACTURERS TO CARRY THE BURDEN OF THE DEFECT

We have previously written on the very serious issues involving Takata’s exploding airbags. When these air bags inflate on the driver’s side, they send pieces of shrapnel into the driver’s body, causing serious injuries in minor car accidents. These defective air bags have been linked to at least five deaths and numerous injuries.

Takata has been apathetic to the injuries and deaths its air bags are causing. Instead of issuing a nationwide recall, Takata insisted that the recall only cover areas with high humidity. The National Highway Traffic Safety Administration (NHTSA) sent a letter to Takata in November, which stated as follows:

Recent information indicates that the unreasonable risk posed by the subject driver’s side air bag inflators may exist outside of the areas with high absolute humidity and therefore would not be mitigated by the current regional recall.

An auto manufacturer may limit the geographic scope of a safety recall only when it can justify with sufficient evidence and data that the limitation is appropriate. Here, Takata has provided no justification for limiting the geographic scope to the high absolute humidity region.

In November, after Takata’s refusal to expand its recall, the U.S. Senate held congressional hearings to investigate the defective air bags. Takata’s Senior Vice President of Global Quality Assurance denied reports that Takata had concealed defects in its air bags before issuing a massive set of recalls beginning in 2008. The executive also admitted that Takata knew about the exploding air bags as early as 2005 but considered the explosion to be an “anomaly” that did not require further investigation. However, the Japanese Ministry of Transport did not consider this defect to be an anomaly and ordered Takata to thoroughly investigate the defect and report to the government. Takata, as usual, felt that it had done enough.

After Takata ignored NHTSA’s first request to expand the recall, NHTSA had no choice but to give Takata an ultimatum. After the agency “tentatively concluded” that Takata’s air bags were not just failing in high-humidity areas (the only areas covered by Takata’s recall), NHTSA commanded that Takata could either expand its recall nationwide, or Takata would be hit with further legal action and civil penalties. NHTSA gave Takata a deadline of Dec. 2, 2014, to make its decision.

On Dec. 2, Takata once again rejected NHTSA’s call for a nationwide recall. A defiant Takata claimed that the evidence did not support a nationwide recall of the air bags. Adding to the tension already existing with NHTSA, Takata said NHTSA did not have the authority to force Takata to expand the recall.

Takata’s defiance leaves auto manufacturers in a very tough situation. The defective air bags are currently in cars made by Ford, Honda, BMW, Chrysler and Mazda. So far, these manufacturers have recalled 14 million vehicles worldwide for Takata airbag problems and will now be forced to either expand their recalls to pick up Takata’s slack, or suffer the consequences if these airbags cause more injuries. As of mid-December, Honda decided to make its recalls nationwide. Just as this issue went to press, Ford announced it is expanding its Takata air bag recall nationwide. Chrysler and BMW have only expanded it’s recalls in areas with high absolute humidity, just as Takata has done.

The battle between Takata and NHTSA is far from over. Currently in a standoff, it remains to be seen how many more deaths and injuries must occur before Takata takes responsibility for its defective product. As for now, auto manufacturers will have to bear the burden of correcting Takata’s mistakes. Ongoing litigation involving the automakers and Takata over the defective and highly dangerous air bags will determine when the automakers first learned of the air bag problems.

Sources: Law360.com and Reuters

AUTOMAKERS ASK PANEL TO MOVE AIR BAG SUITS TO A PENNSYLVANIA COURT

Ford Motor Co. and other automakers being sued over the recall of faulty Takata Corp. air bags in millions of vehicles have asked the U.S. Judicial Panel on Multidistrict Litigation to consolidate the class actions in the Western District of Pennsylvania. The automakers opposed the requests made several weeks prior by different sets of Plaintiffs to consolidate the suits in both California and Florida, saying that the other venues are inconvenient and that Pennsylvania has more favorable docket conditions.

The automakers’ motion stated:

Given the broad geographic dispersion of the defendants, witnesses and relevant documents, Pittsburgh would be far more convenient than the destinations proposed by the competing groups of plaintiffs,” the motion stated. “In addition, the docket conditions in the Western District of Pennsylvania are very favorable—clearly superior to those in plaintiffs’ main candidates, the Southern District of Florida and the Central District of California.

The group of automakers, including American Honda Motor Co., Inc., BMW of North America LLC, Subaru of America Inc. and others, said in its motion that both of Takata’s U.S. subsidiaries have headquarters, testing and manufacturing facilities close to the Western District and that all the other U.S. defendants have headquarters or substantial facilities close by. In addition, they argued that Pittsburgh is centrally located and cost-effective and that the district enjoys favorable case-load conditions as well as the fewest pending cases or weighted filings compared with the other proposed venues.

The cases bring claims against Takata, its affiliated entities and dozens of auto manufacturers that installed and distributed to consumers defective air bags contained in their vehicles. More than 14 million vehicles with Takata air bags have been recalled worldwide because of a defect that causes the air bags to explode in humid conditions, with most of those recalls coming just in the past year. But it now appears that automakers knew of the defect as early as 2008, when Honda first notified regulators of a problem with its Takata air bags. Instead, the automakers and Takata elected to not address the issue, leading to multiple deaths and injuries stemming from the defect.

The manufacturing defect in the air bags dates back to at least April 2000, and Takata became aware of it as early as 2001, when it issued its first recall relating to the exploding air bags in Isuzu vehicles. But the defect wasn’t disclosed to federal regulators until 2008, despite incidents happening involving exploding air bags that put automakers and Takata in a very tough situation. The defective air bags have been recalled worldwide because of a defect that causes the air bags to explode in humid conditions, with most of those recalls coming just in the past year. But it now appears that automakers knew of the defect as early as 2008, when Honda first notified regulators of a problem with its Takata air bags. Instead, the automakers and Takata elected to not address the issue, leading to multiple deaths and injuries stemming from the defect.

The manufacturing defect in the air bags dates back to at least April 2000, and Takata became aware of it as early as 2001, when it issued its first recall relating to the exploding air bags in Isuzu vehicles. But the defect wasn’t disclosed to federal regulators until 2008, despite incidents happening involving exploding air bags that put automakers and Takata on notice of a most serious problem. In November 2008, Honda finally informed NHTSA that it had a problem with some of the Takata air bags in its vehicles, but at the time only recalled 4,000 Accords and Civics.

Source: Law360.com

IV.
MORE AUTOMOBILE NEWS OF NOTE

U.S. AUTO RECALLS SET RECORD AT 60 MILLION FOR YEAR

The American people should be shocked to learn that U.S. automobile recalls have surpassed the 60 million mark for the first time in a single year. This record number of recalls is due in large part to the defective General Motors Co. ignition switches and Takata Corp. air bags. The total of 60.5 million came with about a week left in 2014. This comes from an
analysis of data on the website of the National Highway Traffic Safety Administration. The number will rise further as recent recalls that have been announced by automakers are recorded in the database. Neil Steinkamp, a managing director at Stout Risius Ross who studies warranty and recall issues, said: ‘I don’t think we’re going to see a year like this for a long time.’

GM alone has recalled almost 27 million cars and trucks in the U.S. this year, a record for any single automaker. The Detroit-based company has issued 10 safety actions of more than 1 million vehicles each, according to the NHTSA database. Defective GM ignition switches in small cars have been linked to at least 42 deaths and 58 injuries.

Other recalls of more than 1 million vehicles this year included those related to steering, cruise control, engines and seat belts, according to the NHTSA data, which is compiled from automaker filings to the agency. NHTSA plans to release its official recall numbers for 2014 next year. The Takata air-bag flaw investigation led to the recall of more than 8 million vehicles. As we have reported, unstable propellant in air-bag inflators can cause the devices to explode with too much force and spread shrapnel through the car in a crash. Takata on Nov. 6 widened an annual loss forecast and said it can’t estimate the full financial liability of the defect.

GM claims that its ignition-switch recalls have cost about $2.7 billion through the first three quarters of this year. GM has said the switches, which it knew were defective for more than a decade, can shut off when bumped, disabling the vehicle air bag and increasing the risk of death or injury in a crash. Of course, we know that the vehicles can shut off for a number of reasons, including hitting a ‘bump’ in the road and GM knows this as well. Hopefully, 2015 will see a reduction in recalled vehicles. NHTSA appears to be doing a better job and perhaps Congress will join in and help too.

Source: Law360.com

**ATV and ROV Deaths Exceed 500 For 2014**

According to the Consumer Federation of America (CFA), there have been at least 508 all-terrain vehicle and recreational off-highway vehicle deaths this year. As part of its ongoing work to educate consumers on using ATVs and ROVs safely, the CFA has been tracking and posting ATV and ROV fatalities on its ATV coalition webpage: http://consumerfed.org/ATVUnsaferoads. Most of our readers already know what ATVs and ROVs are, but for those who don’t, I will give a brief description of each. ATVs are off-road, motorized vehicles having three or four low-pressure tires, a saddle seat for the operator, and handlebars for steering control. ROVs are off road vehicles that have 4 or more wheels, bench or bucket seating, automotive type controls, rollover bars, occupant restraints and a maximum speed over 30 mph.

The data is compiled from news reports and other sources collected by CFA’s ATVs on Roads coalition, composed of ATV safety advocates, academics and medical professionals. From this data, CFA was able to further document that:

- The majority of deaths took place on roads: Of the 508 fatalities documented, 475 could be coded as on or off road. Of those 475 fatalities, 272, or 57 percent, took place on roads.
- ROVs are a significant percentage of fatalities: Of the 508 fatalities, it was possible to determine the vehicle type in 505 of those fatalities. Of those 505 fatalities 89, or 18 percent, took place on an ROV.

Nearly 20 percent of those killed were under the age of 16 and approximately 10 percent were under age 12: Of the 508 fatalities it was possible to determine the age of the victim in 503 of the cases. Of those 503 victims, 93, or 18 percent, were under the age of 16 and 46, or 10 percent, were under the age of 12. Rachel Weintraub, legislative director and general counsel for CFA, said:

*This new data reinforces key safety messages that CFA has been making for many years: do not operate ATVs or ROVs on roads; these vehicles are not toys; do not let children operate vehicles that are too large and powerful for them to operate.*

In March of 2014, CFA released a report, ‘ATVs on Roadways: A Safety Crisis’ which evaluates laws from all fifty states and the District of Columbia. The report finds that, in spite of warnings from manufacturers, federal agencies and consumer and safety advocates that ATVs are unsafe on roadways, for several years an increasing number of states have passed laws allowing ATVs on public roads. In this report CFA also analyzes recent research on ATV fatalities on roadways and provides recommendations to reverse this dangerous trend.

The U.S. Consumer Product Safety Commission’s most recent release of data on ATV fatalities and injuries, released in April 2014, showed an increase in injuries from 107,500 in 2011 to 107,900 in 2012. The estimated number of ATV-related fatalities for all ages decreased from 771 in 2010 to 684 in 2011. The agency notes, however, that the 2011 data are not considered complete. Michael Best, policy advocate at CFA, observed. The combination of the results from our March 2014 report on the disturbing trend of state and local lawmakers sanctioning ATV use on roads and the fatality data we are sharing today should be considered as further evidence that ATVs do not belong on roads.

In addition, CFA urges the U.S. Consumer Product Safety Commission (CPSC) to consider CFA’s 2014 fatality data during its ROV rule-making process in 2015. “This data supports the need for a strong CPSC mandatory standard that addresses the serious risks posed by ROVs. CFA’s 2014 fatality data may show a dramatic increase in ROV fatalities,” Weintraub said. As part of the ROV Proposed Rule dated September 24, 2014, the CPSC reported that it was aware of 335 ROV fatalities reported between January 1, 2003 and April 5, 2013. Those reports span over a decade while CFA found that in 2014 alone, there were 89 ROV fatalities, which is 27 percent of the previous fatality number documented over a much longer time frame.

Source: Consumer Federation of America

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**NHTSA Is Investigating Graco**

A number of experts believe that the National Highway Traffic Safety Administration (NHTSA) investigation into the timeliness of Graco Children’s Products Inc.’s recall of more than 6 million car seats was an attempt to bolster the agency’s reputation. The probe came after U.S. lawmakers questioned NHTSA’s effectiveness during the General Motors Co. and Takata Corp. recalls. NHTSA is investigating whether the child-seat maker waited too long to report a defect that causes the buckles of child and infant car seats to get stuck and difficult to unlatch from food, juice or formula seeping into the latch.

NHTSA published a series of reports on the car seats this year, saying it had been investigating the buckles since 2012. There were a number of problems relating to the car seats. For example, the buckles would get so impene-trable that parents would end up having to pick up the child and the seat—which could together weigh more than 70 pounds—to lift it out of the car in an emergency. The defect has led to the recall of some 6 million car seats since February, the largest child seat recall in U.S. history, according to NHTSA. U.S. Transportation Secretary Anthony Foxx said in the statement:

*The department is committed to ensuring that parents have peace of mind knowing that the car seat in which they are placing their child and their trust is safe and reliable. Any delays by a manufacturer in meeting their obligations to report safety issues with the urgency they deserve, especially those that impact the well-being of our children, erodes that trust and is absolutely unacceptable.*

A number of experts say NHTSA’s move is likely also motivated by increased public and congressional scrutiny over the agency’s effectiveness. The GM and Takata recalls this year have shown clearly that NHTSA has had its own potential lapses. In the GM case, for example. NHTSA failed to connect the dots between stalling vehicles and air bag nondeployment, even though outside researchers did make that link.
Investigating the timeliness of Graco’s reporting of the safety defect could also allow the agency to pursue civil penalties up to $35 million, the maximum penalty for failures to notify NHTSA about safety defects. The agency has leveled that maximum fine against GM as part of a settlement over the ignition switch defect. The GM ignition switch defect led to the recall of millions of vehicles this year, and caused hundreds of deaths and injuries.

As has been widely reported, the Takata defect involves an air bag defect that causes them to explode in high humidity, exposing passengers to wounds by shrapnel-like pieces. We know that the defect has caused deaths and injuries. NHTSA is currently playing a high-stakes game of catch-up in the Takata debacle.

Under the National Traffic and Motor Vehicle Safety Act, car product manufacturers have up to five business days to inform the agency after noticing a safety-related problem. The agency’s move to pursue such penalties is a sign that it might be attempting to flex its muscles after a difficult year, experts say. “The agency has traditionally placed a greater focus on child seat safety,” said Allan Kam, a former senior enforcement attorney at the agency. “But the intense focus on NHTSA by the media and Congress this year certainly makes the agency more sensitive to accusations or suggestions that the agency is not on top of things. So I’d think that the agency would want to err in favor of looking more vigilant.”

Graco, an Atlanta-based unit of Newell Rubbermaid Inc., announced in February that it was pulling 3.7 million car seats manufactured from 2009 to 2013 from the market. NHTSA had recommended that the company recall from 2009 to 2013 from the market. NHTSA is currently playing a high-stakes game of catch-up in the Takata debacle.

The Supreme Court’s Order was the right decision, and we are thrilled for our clients and those that call the Gulf of Mexico home. One has to wonder how BP must feel now. After spending millions of dollars in advertising to improve its company image, BP changed course and spent many millions more to deflate residents and businesses of the Gulf, their lawyers, the Court presiding over it, the claims administrator the company hand-picked for the Settlement, along with any and everything capable of forcing the company to make good on its word. Now, after reinforcing to even the most skeptical observer that BP is truly a corporate villain (and spending millions of dollars to do so), look what the company has to show for its efforts over the past two years:

• Enforcement of the Settlement that the Company should have adhered to in the first place;
• Claimants were effectively granted an additional year to file claims because of BP’s appeals;
• BP just recently lost its effort to oust Claims Administrator Pat Juneau for an “undisclosed” conflict of interest, but records reveal that BP expressly acknowledged knowing the facts it claimed were undisclosed when the company was selecting Juneau to be the Claims Administrator;
• BP now awaits trial in the multi-billion dollar Clean Water Act Phase, the oil industry test cases that could expose the company to billions more, the state government damage cases and the Court’s ruling on Phase II liability; and
• BP still faces lawsuits from businesses that either did not qualify or chose to opt out of the company’s Settlement.

The High Court’s ruling was an enormous victory for Gulf residents and businesses, and we are hopeful that the ruling will usher in a new day at the Claims facility. Businesses and individuals have endured years of BP’s self-serving advertising, delays, and denials, and the ruling should provide Administrator Juneau with the certainty he needs to compensate businesses fully and efficiently. While BP’s efforts to renege on its settlement with the Gulf took a major blow from the Supreme Court, we must all remain vigilant. The company has proven time and time again that it will do whatever is possible to avoid, or at the very least, delay paying claims.

The deadline for filing claims under the Economic and Property Damages Settlement was extended to June 8, 2015. This was because of the U.S. Supreme Court’s refusal to hear BP’s appeal. This extension does not apply to claims under the Medical Benefits Settlement. Any person or business having a claim under the Economic and Property Settlement can still file their claims. If any person or business needs more information relating to filing claims, contact Sandra Walters, Section Administrator, and she will have a lawyer contact you. Sandra can be contacted at 800-898-2034 or by email at Sandra.Walters@beasleyallen.com.

The United States Chamber of Commerce was a key ally to BP in the media and at the Supreme Court level. Time and time again, the Chamber sides with the few mega corporations that bankroll the organization as opposed to the members that compose the vast majority of the Chamber’s constituency. In this case, the Chamber sided with a British-based company over thousands of smaller American businesses. These same American-based businesses were seeking compensation from the worst environmental disaster in United States history under the terms of a settlement that BP voluntarily negotiated for nearly one year, papered and agreed to.

In other words, the Chamber was sacrificing American-based businesses (the majority of its constituency) and long-standing contractual principles that the Chamber itself has supported for years for a foreign convicted felon, on probation for killing American employees before causing the unprecedented disaster at issue. If the Chamber’s recent efforts do not wake our country up on how the organization will sacrifice its own in the name of a mighty, powerful few, nothing will.

The United States is preparing its Clean Water Act (CWA) case against BP and others that owned the Macondo Project. The case is set to begin January 20, 2015, and will be the most significant, one-off case in the Deepwater Horizon oil spill litigation. The case will determine the value of CWA penalties that BP and its partners will have to pay as a result of the oil spill. In general terms, the calculation is based on the barrels of oil spilled and the per-barrel fine attributed to those barrels. In the Phase II trial, United States experts estimated that nearly 4.2 million gallons, or approximately 176 million gallons, spilled into the water before BP sealed the well 86 days after April 20, 2010. Predictably, BP countered with a much lower estimate of 2.45 million barrels, or nearly 103 million gallons.

The government wants BP Plc to pay $16 billion to $18 billion in water-pollution fines for the worst offshore oil spill in U.S. history while seeking more than $1 billion from the co-owner of the blown-out well that caused the 2010 Gulf of Mexico disaster. The federal government said BP deserves the maximum fine, which BP said would be the biggest Clean Water Act penalty ever and called it a “gross outlier” compared to other cases. U.S. District Judge Carl Barbier in New Orleans ruled in
September that London-based BP acted with gross negligence in drilling the well, a finding that quadruples the per-barrel penalty. As of Oct. 28, the company had set aside $3.51 billion for the penalties, saying that’s a reliable estimate of its liability if it wins an appeal of the judge’s ruling. Barbier will conduct a non-jury trial next month to set pollution fines for BP and its well partner, Anadarko Petroleum Corp., after weighing multiple factors including the spill’s size and the level of responsibility each company bears for the disaster. APC’s culpability is minimal compared to that of BPXPC, the government said in today’s filing, referring to Anadarko and BP’s exploration unit.

Anadarko paid BP $4 billion to resolve its portion of spill cleanup, response and damages costs, which it was obligated to share as co-owner of the well, under the Oil Pollution Act. The U.S. said that settlement with BP should be disregarded because it represents a “resolution of cross-claims arising from the incident between business partners” and would leave APC paying no government pollution penalty.

Source: Law360.com

BP Is Using Every Conceivable Argument In An Attempt To Reduce Its Fines In The Massive Clean Water Act Penalty Trial Between The Federal Government

The United States has argued that per-barrel CWA fines range between $1,100 and $4,500 per barrel spilled depending on the culpability of the actor and the seriousness of the event. With Judge Barbier already finding BP grossly negligent in the Phase I trial, the company faces an uphill battle even before the CWA trial begins. United States prosecutors are seeking $18 billion in fines and penalties—the maximum fine based on the number of barrels the Government believes were spilled. On November 17, 2014, BP asked Judge Barbier to cap penalties at $12.3 billion, arguing that the EPA could not adjust CWA violations up to $4,300 under the Inflation Adjustment Act.

Instead, BP believes that only the United States attorney general could adjust CWA penalties for inflation, and he did not do so in this case. As a result, the company contends that, at the most, per-barrel penalties should be capped at $3,000 per barrel. At the least, BP contends the cap should be $4,000 per barrel. The United States countered that the executive branch authorized the EPA and the Coast Guard with certain authorities under the CWA, including the ability to issue an inflation adjustment to CWA penalties. In addition, the United States pointed to the fact that these same entities had issued similar inflation adjustments in previous instances.

The stakes do not get any higher than the CWA trial. Billions are at stake. As we draw closer to the January trial date, much pressure will be on federal prosecutors and BP to resolve the case. Whether a resolution actually happens is anyone’s guess, but one thing is for sure: the United States must send a message that there are serious consequences when a company puts profits over the lives and well-being of American citizens.

Source: Law360.com

**OIL FROM BP SPILL STILL PRESENT ON ALABAMA COAST**

A new study says oil from the Deepwater Horizon disaster is still trapped in Alabama’s beaches four years later. The report was released by Auburn University researchers who’ve been studying the BP oil spill since shortly after it occurred. A team from Auburn collected oil on Alabama’s coast as recently as August. The research found that oil is still trapped in the sand, mostly as tar balls.

Test results also show the oil degrades much slower when it’s submerged than when it’s exposed to air or water. The report says the latest findings and other research show that oil could remain an ecological threat for years. The Deepwater Horizon rig exploded in April 2010, killing 11 workers and spewing millions of gallons of oil into the Gulf of Mexico. Rhon Jones serves on the Plaintiffs Steering Committee for the litigation.

Source: Insurance Journal

**JUDGE BARBIER APPROVES SECOND DISTRIBUTION OF REMAINING SEAFOOD CLAIM FUNDS**

U.S. District Court Judge Carl Barbier has approved a second round of payments to eligible commercial fisherman who filed claims with the Deepwater Horizon Economic Claims Center. To date, claimants have been paid just over $1 billion of the agreed upon $2.3 billion Seafood Compensation Program fund. Judge Barbier accepted the recommendations of a seafood neutral to release $500 million at this time while the remaining seafood claims are currently being resolved. Payments will be awarded on a pro rata basis based on the size of a claimant’s original claim. Any funds remaining after this second distribution will be distributed in a manner later determined by Judge Barbier.

Although BP agreed to pay the entire $2.3 billion fund, it expectedly challenged aspects of this amount and sought to delay payment to those commercial fishermen who were clearly impacted by the oil spill. First, it tried to lower the fund amount by claiming it was based on fictitious claimants. Second, it argued that the Settlement Program failed to establish sufficient oversight procedures to prevent the payment of what BP perceived to be fraudulent claims. Most recently, BP attempted to postpone the second distribution while only a handful of claims remain unsettled.

This is yet another example of a corporate giant searching for any way to save a few bucks and prevent compensating victims it agreed to pay. Fortunately, Judge Barbier concluded that BP would not be harmed by a second round of payments that represent less than one-half of the remaining funds. We believe the second distribution will begin sometime this year and look forward to obtaining this compensation on our clients’ behalf.

Source: The Times-Picayune

VI.

**PURELY POLITICAL NEWS & VIEWS**

**THE 2016 PRESIDENTIAL RACE**

It’s rather interesting that with all of the problems facing our nation—both at home and abroad—many in Washington are more interested in the 2016 presidential race. While the Democrats have a very strong contender in Hillary Clinton, the Republicans don’t really have a true leader at this juncture. According to most “political experts,” there are at least 16 possible presidential contenders on the GOP side. One strategist describes this as the “most open field we’ve ever seen” for the Republican Party. So let’s take a look at the GOP contenders for the class of 2016:

- **Mitt Romney**—The more Gov. Romney says he isn’t running, the more likely he will run. I don’t believe the man has gotten over his loss in 2010.
- **Sen. Rand Paul (Ky.)**—One of the most recognizable names in the field, Paul seems to be still comfortable in front of the camera. His positions are extreme, but are very clear. He is still seen as somewhat of an outsider, which helps him, too.
- **Gov. Chris Christie (N.J.)**—Gov. Christie is still a name to be reckoned with even as his image has taken hits from his own home state. He still comes across as a “playground bully” on occasion. His credibility has been severely damaged in my opinion.
- **Former Gov. Jeb Bush (Fla.)**—There’s no better name recognition than “Bush” in the U.S. Gov. Bush has the family legacy on his side, but he faces tough questions from GOP stalwarts on his immigration stance. He may not be “conservative” enough by Tea Party standards.
- **Former Arkansas Gov. Mike Huckabee**—The favorite among staunch conservatives, Gov. Huckabee has become more well-known through his Fox News show. He did fairly well in 2008 and may believe he will do better in 2016. Unfortunately, this fella comes across sort of like a “snake oil salesman.”
- **Sen. Ted Cruz (Texas)**—Sen. Cruz has proven successful at getting his conservative message out to voters. He’s likely to do
well in his own home state and throughout the South. If he gets the nomination, which is certainly possible, he would be very much like Barry Goldwater was in 1964.

- Sen. Marco Rubio (Fla.)—The Senator from Florida could see his star power drained by Jeb Bush. Two candidates from Florida might be seen as ‘one too many.’ But Sen. Rubio projects a very good image and would be a strong candidate.

- Gov. Scott Walker (Wis.)—The name “Scott Walker” is not one of the well-recognized names. But Gov. Walker is a conservative dark horse and he plays that ‘game’ very well.

- Gov. Rick Perry (Texas)—Gov. Perry is another candidate who some believe could show some resurgence. The Democrats won’t be so lucky, however, to face Gov. Perry in 2016.

- Dr. Ben Carson—Dr. Ben Carson, a conservative favorite, has been a vocal critic of President Obama. But come to think of it, who in the GOP ranks hasn’t been a critic. Dr. Carson might wind up on the ticket, but in the second slot.

There are several other “wanna-bees,” including: Gov. Mike Pence (Ind.), Gov. Bobby Jindal (La.), Sen. Rob Portman (Ohio) and Gov. John Kasich (Ohio).

Even though the election is still a long way off, polls are already being run by a number of groups. A recent Quinnipiac survey shows former Mitt Romney topping the list of potential candidates for the 2016 Republican nomination for president. Former Florida governor Jeb Bush came in second. New Jersey Gov. Chris Christie tied for third place with retired surgeon Ben Carson. Sen. Rand Paul (R-Ky.) was in the fourth spot, according to the Quinnipiac University poll.

On the Democratic side, Former Secretary of State Hillary Clinton is firmly in the lead with U.S. Sen. Elizabeth Warren (D-Mass.) second and Vice President Joseph Biden third. If Clinton does not run, the Vice President leads Sen. Warren 34 percent to 25 percent. In a head-to-head match-ups, the survey says Romney would beat Hillary 45 percent to her 44 percent; Hillary would top Christie 45 percent to 42 percent; Jeb Bush 46-41 percent and Rep. Paul Ryan 46-42 percent.

Personally, I believe that Jeb Bush would be the strongest opponent for Hillary Clinton. The Democrats won’t be so fortunate as to have either Mitt Romney or Gov. Rick Perry as the GOP’s standard bearer. But “hope springs eternal” and the Clinton camp may get its wish for an opponent named either Romney, Perry, Cruz, Rand or some of the others who may seek the nomination. But they also know that a Clinton-Bush battle would be a barn-burner.

Source: AL.com

VII.

LEGISLATIVE HAPPENINGS IN ALABAMA

ALABAMA ARISE HAS AN AGENDA FOR THE ALABAMA LEGISLATURE TO CONSIDER

I am not sure that the majority of Alabama citizens would agree with a legislative agenda that came from Alabama Arise, one of my favorite groups. Members of Alabama Arise have selected a number of issues as policy priorities for 2015. The first two are permanent priorities with the remaining five reflecting member voting. Let’s take a look at the priorities and consider them:

- **Adequate state budgets**
  
  Education, child care, health care and other human services help ‘the least of these’ climb the economic ladder. Adequate state funding for these services is vital to help families build a better life.
  
  • Arise will urge the state to close the coverage gap by expanding Medicaid.
  
  • Arise will build the case for new General Fund revenue, oppose harmful cuts to essential public services, and support common-sense prison reforms.

- **Tax reform**
  
  It’s hard for low-income Alabamians to build better lives when they are taxed deeper into poverty. Low-income families pay twice as big a share of their incomes in state and local taxes as top earners do. And Alabama is one of four states with no tax break on groceries.
  
  • Arise will seek to untax groceries and make our income tax more balanced.

- **Repeal the Accountability Act**
  
  Public education is crucial to fight poverty. But under the Alabama Accountability Act (AAA), dollars that would have supported public schools go to private schools instead. AAA tax credits for scholarships to private schools divert money that is critical for schools in low-income communities.
  
  • Arise will work to repeal the AAA.

- **Payday lending reform and title lending reform**
  
  The gap between low wages and the real cost of living is vast for many Alabamians. Payday and auto title loans can exacerbate that gap. With maximum annual interest rates of 456 percent for payday loans and 300 percent for title loans in Alabama, these loans sap wealth and resources from too many of our state’s families and communities.
  
  • Arise will pursue tighter regulations on payday and title lending in Alabama.

- **Public transportation**
  
  Part of meeting basic needs is the ability to get where you need to go, when you need to get there. Alabama is one of five states with no state funding for public transportation. The result is a patchwork system that fails to meet the needs of low-income Alabamians in both rural and urban areas.
  
  • Arise will build support for state funding for public transportation.

- **Dedicated revenue for the state Housing Trust Fund**
  
  Everyone needs a place to call home. But too many hard-working Alabamians can’t find safe, affordable housing. The Alabama Housing Trust Fund (HTF) was created in 2012 to build, rehabilitate and maintain housing for low-income families. Permanent HTF funding would create jobs and make home a reality for thousands of Alabamians.
  
  • Arise will seek dedicated state funding for the HTF to expand affordable housing.

- **Lifting lifetime SNAP ban for people with drug convictions**
  
  We all deserve a second chance. Alabama is one of the few states to forbid people with a felony drug conviction from ever receiving benefits under the Supplemental Nutrition Assistance Program (SNAP), formerly known as food stamps. Most states have modified the ban or opted out of it entirely.
  
  • Arise will urge Alabama to end its lifetime SNAP eligibility ban for people with a felony drug conviction in their past.

- **Other legislative action**
  
  Arise monitors all proposed legislation to evaluate its potential impact on low-income Alabamians. The Arise board may approve membership action on other emerging issues.
  
  It will be most interesting in the 2015 Regular Session to see how the Alabama Legislature deals with the many problems facing our state. Hopefully, members of the House and Senate will consider recommendations from groups like Alabama Arise. There is one thing for certain—the priorities set out above won’t be on any agenda submitted by the
special interest lobbyists—and that’s not good for Alabama citizens.
Source: Alabama Arise

VIII.
COURT WATCH

NCAA CONCUSSION SETTLEMENT REJECTED BY FEDERAL JUDGE

An Illinois federal judge has rejected a $75 million settlement to resolve lawsuits brought by ex-NCAA (National Collegiate Athletic Association) athletes claiming they have suffered long-term damage from concussions. U.S. District Judge John Z. Lee told the parties to resume negotiations because he has concerns about the fairness of the deal.

Judge Lee deplored without prejudice motions for preliminary approval of the settlement, saying a $70 million fund wouldn’t be enough to fully fund a 50-year medical monitoring program to examine former players for neurological ailments. The settlement also would have made major changes to the NCAA’s approach to concussion treatment and prevention, and would have created a $5 million fund for concussion research. But Judge Lee ruled Wednesday that the $70 million amount didn’t include athletes who—despite participating in noncontact sports like baseball, water polo, cross-country and golf—might still be subject to head injuries. The memorandum opinion and order said:

The risks of suffering a concussion while playing NCAA-sanctioned sports are scattered along a continuum with football on the highest end and sports such as riflery on the lower end. The class representatives as a group must adequately represent this continuum as a whole so that the various interests along the continuum can be voiced as part of the settlement process.

A spokesman for the NCAA told Law360 on Wednesday they are reviewing Judge Lee’s decision. Some class members have objected to the fact that the settlement neither covers treatment nor compensates players for their injuries. It allows them to file individual claims against the NCAA or their schools for damages, but forecloses the possibility of pursuing personal injury claims on a classwide basis. Judge Lee suggested at a previous hearing in October that the scope of the settlement may need to be limited to contact sports such as football and ice hockey, where the risk of concussions is most severe, or that class representatives from noncontact sports might need to be added to the mix.

Lawyers for the Plaintiffs said that they complied with the judge’s request that they ask current and former student-athletes in noncontact sports what they thought about the settlement, and ensure that the proposed class representatives had a chance to review and understand the settlement’s terms. But Judge Lee ruled that while the proposed settlement contained a provision requiring medical personal with concussion expertise to be present at contact sports, the deal didn’t have a similar measure for noncontact games and practice. The judge’s order reads:

This is not to say that the student-athletes who play or played noncontact sports would demand (or even desire) such protections as part of a negotiated settlement. But, in light of the undisputed data that more than half of the approximately 4.2 million potential class members play or played noncontact sports, the current class representatives simply are not qualified to make that decision for them.

I believe this settlement will have to be revised drastically before it receives final approval.
Source: Law360.com

WORKER’S $2.4 MILLION JUDGMENT AGAINST EXXON REVERSED IN LOUISIANA

The Supreme Court of Louisiana has reversed a $2.4 million judgment for punitive damages against Exxon Mobil Inc. A former pipeyard employee claimed the oil giant had negligently exposed him to radioactive material that caused his cancer. The court found that the worker had already unsuccessfully litigated the claim in a previous suit. Therefore, according to the opinion, the award was barred because a jury in another lawsuit had previously failed to award the Plaintiff, John Oleszkowicz, punitive damages for his increased risk of cancer. He and 15 other Plaintiffs had filed suit against Exxon and Intracoastal Tubular Services Inc., the operator of the pipeyard, in the previous case. The jury concluded in that case that Exxon had not engaged in wanton or reckless conduct in the storage, handling or transportation of hazardous or toxic substances.

The Plaintiff had not yet contracted cancer before the first suit was concluded, and the court in that case instructed the jurors that a Plaintiff could file a new lawsuit if any of them developed cancer. Several months after that verdict, Oleszkowicz was diagnosed with prostate cancer and he filed suit. He sought both compensatory and exemplary damages from Exxon in the second suit. In a most “interesting” conclusion, the Supreme Court said that Plaintiff had the right to bring a future cancer claim against Exxon, but since he had already unsuccessfully prosecuted his punitive damages claim, that claim was barred under the res judicata doctrine. The judgment of the court of appeals that had affirmed the award of punitive damages was reversed. Justice Guidry wrote for the Supreme Court:

While we acknowledge the facts of this case are somewhat unusual, it does not involve a complex procedural situation or an unanticipated quirk in the system. Allowing Mr. Oleszkowicz to raise the issue of Exxon’s conduct for purposes of exemplary damages would simply amount to another bite at the proverbial apple and frustrate the purposes of the res judicata doctrine.

The Plaintiff filed the instant suit in Louisiana state court in December 2010 based on Exxon’s failure to warn of a known danger and strict liability for engaging in ultrahazardous activity. He based his claims on a stint working at Intracoastal Tubular Services Inc.’s Harvey, La., pipe yard from 1979-86, where he said he was exposed to the radioactive material while cleaning pipe and tubing belonging to Exxon. Exxon then filed a motion for partial summary judgment, claiming that the exemplary damages claim was barred because the jury had ruled it out in the previous litigation. But the district court disagreed, finding that the Plaintiff’s claim was separate and apart from what had been litigated in the first trial.

Following a trial, the jury awarded him $850,000 in compensatory damages after finding Exxon was negligent in not being aware of the so-called naturally occurring radioactive material, and in its failure to prevent Oleszkowicz’s exposure. The jury also awarded $10 million in punitive damages. On appeal in December of 2013, Louisiana’s Fifth Circuit Court of Appeal affirmed the lower court’s denial of Exxon’s motion for partial summary judgment based on res judicata, applying the “exceptional circumstances” exception based on “the complexity of and convoluted circumstances involved in the instant case.” The appeals court reduced the award to $2.37 million.

The litigation stemmed from a suit filed by Warren Lester and hundreds of other plaintiffs against Exxon and others in Louisiana state court in 2002, seeking personal injury damages for negligent exposure to naturally occurring radioactive material and other hazardous materials at various Louisiana pipe yards operated by Intracoastal Tubular Services Inc. Along with 15 other Plaintiffs, Oleszkowicz’s claim was transferred to another court on an exception of improper venue. In January 2010, the case proceeded to trial. The jury returned a verdict in favor of the Plaintiffs against Exxon and awarded damages to each Plaintiff for an increased risk of cancer.
Source: Law360.com

JereBeasleyReport.com
The SEC had sought a disgorgement of $500 million with $37.4 million in prejudgment interest, civil penalties ranging from $679 million to $1.5 billion and reimbursement of $13.3 million in alleged bonuses and other compensation from Pardo under the Sarbanes-Oxley Act. Judge Nowlin reduced the disgorgement request to $15 million, ruling that shareholders made money based on retail investors’ ignorance and that it would be unfair to repay so much money just to shareholders who later suffered when LPHI’s faulty disclosures were revealed. The judge wrote: “The SEC offers a meat cleaver when a scalpel is required.”

The civil penalties were also lowered to $23.7 million and Judge Nowlin ruled Pardo was not required to pay anything back under Sarbanes-Oxley because there was not enough evidence to show LPHI’s restated financials were caused by the company’s misconduct.

Source: Law360.com

WELLS FARGO SUED FOR BIASED LENDING IN CHICAGO AREA

Wells Fargo & Co. has been sued for biased lending by Cook County, Ill. The largest U.S. mortgage lender was accused of targeting black, Hispanic and female borrowers with predatory and discriminatory lending in the Chicago area. The lawsuit is the latest accusing major banks of biased mortgage lending that harmed major American cities, such as Los Angeles, Miami and Baltimore, and prolonged the nation’s housing crisis. These lawsuits have mixed success.

The lawsuit was filed in the U.S. District Court in Chicago, which is part of Cook County, Ill. The largest U.S. city, filed suits against Wells Fargo, Bank of America Corp and Britain’s HSBC Holdings Plc. Los Angeles, the second most populous U.S. city, filed suits against Wells Fargo, Bank of America, JPMorgan Chase & Co and Citigroup Inc. The Fargo case is in the U.S. District Court, Northern District of Illinois.

Source: Reuters

CITIBANK SUED BY SHAREHOLDERS OVER RMBS DEALINGS

Shareholders of Citibank NA have filed suit against the bank in a new derivative class action of misrepresenting the health of mortgage-backed securities (MBS) in some $17.4 billion worth of pools of loans that the bank trusted. Plaintiffs Transamerica Life Insurance Co., units of Prudential Financial Inc., Kore Advisors LP, Pimco, Sealink Funding Ltd., and TIAA-CREF Bond Fund — and many of their affiliates — contend that the bank knowingly “ignored pervasive and systemic deficiencies” in the loans, which were packaged into 27 trusts, selling them with the aid of misleading representations and warranties. It was alleged in the complaint:

Citibank knew that the pools of loans backing the trusts were filled with defective mortgage loans. Citibank must at all times act in the best interests of the trusts. As alleged herein, Citibank failed to discharge its duties and obligations to protect the trusts. Instead, to protect its own business interests, Citibank ignored pervasive and systemic deficiencies in the underlying loan pools and the servicing of those loans.

Citibank sold $69 billion in loans total over the course of its MBS business dealings, the suit says. The loans at issue here were securitized and collateralized from 2004 to 2007, it says. The Plaintiffs, who are seeking “billions of dollars” in damages, alleged:

The fundamental role of a trustee in an RMBS securitization is to ensure that there is at least one independent party, free from any conflicting self-interest, to protect the trust corpus.

The Plaintiffs contend that Citibank broke that trust. They said, among many other things in the complaint, that Citibank failed to issue “event of default” notices within 90 days, which the agreements allegedly required. The causes of action in the complaint include breach of contract, violation of the Trust Indenture Act, negligence, breach of fiduciary duty, and breach of the post-default duty of independence. The Plaintiffs say that the bank needs to implement governance reforms.

Citibank is defending other suits over its RMBS activities. In August, a New York state judge declined to dismiss a $157 million put-back action against Citigroup Global Markets Realty Corp. arising from its alleged failure to live up to contractual promises surrounding
the sale of more than $900 million in mortgage loans to a securitization trust.

And in April, Citigroup Inc. argued that a lawsuit brought by Deutsche Zentral-Genossenschaftsbank A.G. over alleged fraud in its sale of $362 million in residential mortgage-backed securities should be dismissed, saying the German lender waited too long to bring the suit.

Source: Law360.com

**OtitMed Settles Criminal Charges**

OtitMed, a unit of Stryker Corp., will pay more than $80 million to settle both criminal charges and civil claims relating to distribution of its knee replacement surgery devices. The company was charged with distributing the devices without proper federal clearance. OtitMed's former chief executive officer, Charlie Chi, pleaded guilty as a part of the agreement. Paul Fishman, U.S. Attorney for the District of New Jersey and other federal officials announced the guilty pleas of both OtitMed and its former CEO Chi. The pleas involve the intentional shipping of OtitKnee orthopedic cutting guides in September 2009. That came after the U.S. Food and Drug Administration (FDA) had denied the company's 501(K) application for permission to market the device. The FDA refused to find that OtitKnee was substantially equivalent to another legally marketed product. U.S. Attorney Fishman said in a statement:

> It is vital that products like the OtitKnee are subjected to the appropriate level of scrutiny. Patients seeking medical care are vulnerable; they are often afraid, and in pain. They should be able to trust their doctors. And they should be entitled to trust that the devices their doctors are using are safe, effective, tested, and approved. OtitMed and Charlie Chi betrayed that trust.

OtitMed had already generated $27.1 million through the sale of more than 18,000 OtitKnee devices between May 2006 and September 2009. About 75 percent of those devices were sold in conjunction with a Stryker knee replacement system. Stryker acquired OtitMed in November 2009 and it should be noted that the criminal conduct occurred while OtitMed was still a privately held company. OtitMed admitted to violating the Food Drug and Cosmetic Act (FDCA) by distributing adulterated medical devices into interstate commerce with the intent to defraud and mislead. U.S. Judge Claire Cecchi imposed a $54.4 million fine and $5.16 million in criminal forfeiture. Those sums are in addition to $40 million plus interest that OtitMed will pay to settle a whistleblower's False Claims Act suit in New Jersey federal court over the marketing and distribution of OtitKnee without FDA clearance starting in 2006. The settlement covers false claims submitted to Medicare, Medicaid and other programs in connection with the product. Joel D. Hesch, a lawyer with The Hesch Firm LLC, who represented Richard Adrian, the whistleblower, said in a statement: "This is a textbook example of how the whistleblower reward program is supposed to work."

The OtitKnee cutting guide was marketed as a tool to help doctors make accurate bone cuts as part of knee replacement surgeries. The prosecutors said none of the claims surrounding the device were evaluated by the FDA before the company used them in advertising materials. OtitMed did make a 501(K) submission to the FDA in October 2008. The company had been telling buyers that the product was a Class I device that was exempt from FDA pre-market approval and clearance requirements.

But the company never sought a statement from the regulator confirming that classification. The FDA's eventual denial the following year put OtitMed on notice that distributing OtitKnee without its approval would violate the FDCA. However, the government says Chi, concerned with inconveniencing surgeons and harming the company's reputation, directed employees to arrange a mass shipment of manufactured OtitKnee devices that the company had yet to distribute. It appears that Chi also suggested ways to hide the shipments from the FDA.

Some 218 OtitKnee devices were ultimately shipped after the FDA denied the company's clearance request, according to prosecutors. As part of the settlements, OtitMed will be excluded from participating in federal health care programs for 20 years. Stryker will be required to undertake compliance efforts that include an audit of whether other marketed devices have appropriate FDA approvals. Chi pleaded guilty to three counts of introducing adulterated medical devices in interstate commerce, which are misdemeanor charges.

Source: Law360.com

**Microsoft Will Face Investor Suit Over $732 Million Antitrust Fine**

A federal judge has refused to dismiss a suit filed by shareholders against Microsoft Corp. The suit is over the actions that led to a $732 million antitrust fine in the European Union. U.S. District Judge John Coughenour said in his ruling that Microsoft's alleged decision not to interview a European Commission official while investigating shareholder claims suggests unsound business judgment. The derivative suit filed by stockholders alleges that the executives breached their fiduciary duties by willfully violating a European Commission official while investigating shareholder claims suggests unsound business judgment. The derivative suit filed by stockholders alleges that the company and executives breached their fiduciary duties by willfully violating a European Commission official while investigating shareholder claims suggests unsound business judgment. The derivative suit filed by stockholders alleges that the company and executives breached their fiduciary duties by willfully violating a European Commission official while investigating shareholder claims suggests unsound business judgment. The derivative suit filed by stockholders alleges that the company and executives breached their fiduciary duties by willfully violating a European Commission official while investigating shareholder claims suggests unsound business judgment. The derivative suit filed by stockholders alleges that the company and executives breached their fiduciary duties by willfully violating a European Commission official while investigating shareholder claims suggests unsound business judgment.

Judge Coughenour said there was enough reason to think the company should have done things like interview the European Commission's antitrust chief, Joaquin Almunia, in response to a pre-suit demand. Judge Coughenour said:

> Plaintiffs argue that the fact that the DRC and board did not interview Mr. Almunia or any other European Commission official regarding the company's violation of the 2009 settlement agreement with the EU is sufficient grounds for calling into question the reasonableness and good faith nature of the board's investigation. This court agrees. It is plausible that Mr. Almunia or another member of the commission could reasonably have been expected to hold highly material information on topics such as the EU's expectations of Microsoft's internal compliance methodology, the content of the summer 2012 noncompliance warning, the reactions of the company to such warning, [and] promises that were made in response to this warning.

Judge Coughenour also denied the individual Defendants' motions to dismiss. In October, Microsoft's directors and officers had asked Judge Coughenour to reject arguments made by shareholders Kim Barovic and Stephen DiPhilipo in opposition to two August motions to dismiss the case filed by Microsoft and the individual executives. The defendants' argued in their brief that the shareholders had failed to sufficiently state claims against the executives for inadequate oversight, failure to disclose and unjust enrichment. Barovic and DiPhilipo filed individual suits in April, and the cases were later consolidated. The two filed a consolidated shareholder derivative complaint in June.

The shareholders are accusing the company's board of directors, including ex-CEO Steve Ballmer and founder Bill Gates, of "blatantly and continuously" violating a 2009 antitrust settlement with EU regulators that required Microsoft to offer consumers a choice of 11 rival Web browsers with its Windows operating system. In February 2011, Microsoft purportedly eliminated the 'choice screen' that allowed consumers to select their default Web browser from at least 15 million installations of Windows 7 in Europe, making its own Internet Explorer the only browser available on those installations, according to Barovic's complaint. That led Almunia to fine the company $752.2 million.

The Plaintiffs contend they made a pre-suit demand that Microsoft's board of directors investigate and commence an action against the executives responsible for the breach of the settlement agreement, but that Microsoft summarily denied the demand without interviewing witnesses who could corroborate the allegations of wrongdoing, such as Almunia. The Microsoft executives had contended that the law does not impose a responsibility on executives of the company for software coding mistakes by rank and file employees without proof showing the executives knew about and intentionally disregarded the errors or "utterly
**THE FIRST “PAY-FOR-DELAY” TRIAL SINCE THE ACTAVIS RULING: WHAT DOES THIS MEAN FOR PLAINTIFFS?**

A closely watched landmark trial that many hoped would help clarify a contentious battle over access to generic drugs ended in a mixed bag of rulings. This was the first class action trial since the U.S. Supreme Court agreed that patent settlement agreements could face antitrust scrutiny. While the jury ultimately ruled for the Defendants on a unique issue, they did determine that these agreements to delay generic entry amounted to a “large and unjustified” payment, which was a key factor established by the U.S. Supreme Court.

The jury also determined that the anticompetitive harms of the deals outweighed the benefits under the rule-of-reason analysis. These arrangements termed “pay-for-delay” agreements have been the topic of much debate that has embroiled the pharmaceutical industry, regulators, and the courts for years. These rulings, despite the ultimate verdict, provide for a positive outlook for Plaintiffs in future “pay-for-delay” cases.

In these “pay-for-delay” agreements, a brand-name drug maker and a generic rival locked in patent litigation reach a settlement. The brand-name drug maker may offer cash or something else of value to the generic drug maker and, in return, gains more time to sell its brand drug without encountering lower-cost generic competition. The generic drug maker, meanwhile, also comes away with a large payment and an agreement to sell its generic equivalent at a specified future date.

These “pay-for-delay” agreements have raised antitrust concerns at the U.S. Federal Trade Commission (FTC), which has estimated that these deals cost Americans $3.5 billion annually in higher health care costs. The issue went before the U.S. Supreme Court in *FTC v. Actavis, Inc.*, which ruled that such deals can face greater antitrust scrutiny. The case decided early this month before a federal jury in Boston with AstraZeneca and Ranbaxy Laboratories were accused of illegally delaying a generic version of AstraZeneca’s Nexium hearth pill, offered the prospect of some much-needed clarity since it was the first to go to trial since the Actavis ruling.

Instead of the much needed clarity, the jury offered a mixed bag of rulings. The jury agreed with the Plaintiffs that AstraZeneca had market power with Nexium and that the drug makers entered into an agreement involving a “large and unjustified” payment worth up to $1 billion. One of the anticompetitive agreements at issue involved a deal made by AstraZeneca not to sell its authorized generic of Nexium, which is a lower-cost version of its own drug. This agreement was of significant value to the generic drug maker, Ranbaxy, because Ranbaxy would have had less competition in the marketplace at the time of its delayed entry. The jury agreed with the Plaintiffs that this agreement was unjustified and the anti-competitive harms of the deal outweighed the benefits.

So how did the Defendants prevail? The jury ultimately decided that because of unique problems with the generic drug maker’s production plant, despite the unjustified agreement to delay generic entry, a generic version of Nexium may not have become available before May of 2014. Therefore, the jury believed there was no evidence of harm caused by the agreement. In other words, the jury didn’t find reason to believe Ranbaxy would have sold a generic pill any sooner.

In this instance, Ranbaxy was unable to sell a generic Nexium sooner than May of 2014 because of manufacturing problems that prompted the FDA to ban products made at certain facilities. One juror, a 54-year-old former federal agent, said he was swayed by the Defense arguments that the deal did not cause anticompetitive harm because no company had the necessary regulatory approval to sell generic Nexium. While many Defense attorneys still believe that these pay-for-delay claims are much easier to allege than prove at trial, the extenuating circumstances in this trial involving Ranbaxy’s manufacturing problems are unlikely to emerge in other cases.

The jury’s determinations, despite the ultimate verdict, provide for a positive outlook for Plaintiffs in future “pay-for-delay” cases. Some of our country’s biggest cases involving pharmaceutical products started out just like this Nexium trial. In fact, the jury in the first Average Wholesale Price (AWP) trial involving fraudulently inflated drug prices returned a Defense verdict, but the states proceeded on after that first lost trial and eventually recovered billions in damages against the drug makers. Lawyers in the Consumer Fraud Section at Beasley Allen have successfully represented eight states and handled hundreds of AWP cases. If you need more information relating to this litigation, contact Alison Hawthorne, a lawyer in our firm’s Consumer Fraud Section, at 800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.

**X. WHISTLEBLOWER LITIGATION**

**RITE AID TO PAY $2.99 MILLION IN WHISTLEBLOWER LAWSUIT**

Rite Aid Corporation has agreed to pay the United States $2.99 million to resolve a whistleblower lawsuit. It was alleged that Rite Aid violated the False Claims Act by inappropriately using gift cards as inducements. It was alleged further that Rite Aid offered illegal inducements to Medicare and Medicaid beneficiaries to transfer their prescriptions to Rite Aid pharmacies. Additionally, the lawsuit alleged that from 2008 to 2010, Rite Aid had knowingly and improperly influenced the

Sources: Reuters and Time.com

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_Rarely taking no for an answer. And sometimes, they win._

_— Beasley Allen_
decisions of Medicare and Medicaid beneficiaries to transfer their prescriptions to Rite Aid pharmacies by offering them gift cards in exchange for their business. Special Agent in Charge Glenn R. Ferry for the U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG), stated:

Pharmacies are not allowed to improperly influence the decision-making of Medicare and Medicaid patients about where to fill prescriptions. Pharmacy chains that manipulate patient choices in this way will be held accountable.

The lawsuit was filed by Jack Chin, a pharmacist, under the qui tam (whistleblower) provisions of the False Claims Act. It’s important to note that the qui tam provisions enable private citizens to bring claims against parties on behalf of the U.S. Government. Since January 2009, the Justice Department has recovered a total of more than $23.2 billion through False Claims Act cases, with more than $14.9 billion of that amount recovered in cases involving fraud against federal health care programs. If you need more information on whistleblower litigation, contact Lance Gould, a lawyer in our firm’s Consumer Fraud Section, at 800-898-2034 or by email at Lance.Gould@beasleycollin.com. Source: Corporate Crime Reporter

XI. CONGRESSIONAL UPDATE

CONGRESS PUTS TRUCKERS AT RISK BY SUSPENDING REST RULES

Congress added a provision to a year-end budget deal that will roll back safety rules aimed at ensuring truck drivers get enough rest. U.S. Transportation Secretary Anthony Foxx and other safety advocates strongly opposed the plan, which surfaced in negotiations on a funding bill to avoid a government shutdown on Dec. 11. The rider, which was attached to the spending bill by Maine Republican Senator Susan Collins, ended up in the $1.1 trillion plan Congress passed and sent to President Barack Obama on Dec. 13.

The bill that passed included the Collins amendment and suspended the rules the Transportation Department implemented last year, which required drivers, after working 70 hours over eight days, to rest for 34 hours before beginning another workweek. The rules had also required that the rest period to include two consecutive nights from 1 a.m. to 5 a.m. The amendment suspends these rules until Oct. 1, 2015, and orders a study on the policy.

The lawyers in our firm who handle cases involving large trucks know that trucker fatigue is a tremendous safety problem all across the U.S. It got lots of attention when the Wal-Mart Store’s tractor-trailer hit a limousine carrying comedian Tracy Morgan. The trucker in that incident, which happened in June, had been awake for at least 24 hours, according to a police report. He was nearing the end of a 14-hour work shift. Secretary Foxx had tried to convince Congress to do the right thing. He sent a letter to senior members of the Senate and House appropriations committees who were considering the year-end spending plan. The letter said:

The evidence clearly shows that truck drivers are better rested and more alert after two nights of sleep than one night, and that unending 80-hour work weeks lead to driver fatigue and compromise highway safety.

Secretary Foxx wasn’t successful in his attempts to get Congress to reject language in the Amendment that suspends regulations that require two overnight rest periods between trucker work weeks. The regulations also curtail practices that allowed up to 82 hours of work a week. Let’s take a look at what we are now facing because of what Sen. Collins’ amendment has done:

Rising Rate

The provision to delay elements of the agency’s rule was in a Senate version of the annual spending bill for transportation programs and was then added to the year-end omnibus bill being worked out by House and Senate appropriators by the Amendment, sponsored by Sen. Collins.

Truck crashes caused 3,912 deaths in 2012, and the fatal-crash rate increased each year from 2009 through 2012, reversing a five-year trend. The hours-of-service regulation was expected to prevent 1,400 truck crashes a year, saving 19 lives and avoiding 560 injuries.

Public Citizen reports that every year, 4,000 people are killed and more than 100,000 are injured in crashes involving trucks. Truck crashes cost the American people and our economy $99 billion annually. Nearly half of all truck drivers admitted to falling asleep behind the wheel at least once in the previous year, according to a 2006 study.

Long Weeks

The trucking rules are needed because the industry has been abusing previous regulations to force truckers to drive as much as 82 hours a week. My long-time friend Joan Claybrook, president emeritus of Public Citizen, the Washington-based watchdog group, had this to say:

No one can drive 82 hours in a seven or eight-day period and not be tired. Truckers don’t get enough rest. These provisions ensure they get a little more.

Sources: Claims Journal, Bloomberg, and Public Citizen

XII. PRODUCT LIABILITY UPDATE

FIRM SETTLES IMPORTANT CASE

Our Firm associated recently with Penn & Seaborn and settled a lawsuit brought against Tigercat Industries, Inc. Our client, Keith Pelham, received a crushing injury to his hips and bowel from a dropping dozer blade on a Tigercat 620-C Skidder. Keith was attempting to disconnect a tow chain when the accident happened. Keith had been a logger for over 10 years.

Keith was helping Brian Green, another experienced logger, pull the skidder out of mud. Brian worked for a different logging company whose job site was near where Keith was working. Brian asked Keith to help him after getting his machine stuck. Keith was under the dozer blade at the front of the Tigercat Skidder, unhooking the chain from the tow lug, when Brian decided to step out of the Tigercat and see if he could assist. When Brian stepped out of the Tigercat cab, his shirt tail got caught on the control handle for the dozer blade, causing the blade to drop. The Tigercat is designed so that when a control handle is activated, it causes the engine to rev and the dozer blade moves under power and quickly. The dozer blade hit a stump as it hit Keith, which prevented Keith from being cut in half.

Through discovery, we learned that Tigercat had originally designed the skidder with buttons at the top of the control handles. With the original design, the operator was required to push the button and move the control
handle to activate the blade. The button on the handle was designed to prevent inadvertent control handle activation. Tigercat had also designed the machine with a button on top of the wench control lever.

Studies go back to the 1950s, where control handles on machines like the skidder are required to have a secondary motion or some other form of interlock to prevent inadvertent actuation. This danger has been well-known throughout the industry for many years.

We learned that after Tigercat designed the switch interlock it received complaints from some operators that the button made it difficult to use the dozer control handle effectively. As a result of the complaints, Tigercat elected to deactivate the switch in the dozer control handle, but it did not. Tigercat did not deactivate the wench handle. We discovered that the switch was still in place on the dozer handle of the machine. The switch was electronically deactivated by Tigercat. But Tigercat took no steps to minimize the danger of control handle inadvertent activation on the dozer blade control. We were able to determine that if the handle switch had been activated, this accident could not have happened.

As a result of this accident, Keith Pelham now has a permanent limp and is in constant pain. He was not able to return to the logging industry and was determined to be 100% vocationally disabled. Part of his bowel had to be surgically removed. The deadline to submit claims to the Feinberg Settlement Facility has been extended to Jan. 31, 2015, and we continue to investigate these cases around the country. Cases that are determined to be viable after the Feinberg cutoff date will be filed and pursued individually in state court.

HEAVY TRUCKING ACCIDENTS

The United States of America and various other countries around the world greatly benefit from the transportation of commercial goods carried by trucks. It is estimated that more than 70 percent of the goods in the United States today are transported by approximately 19 million semi-trucks. The trucking industry produces revenues estimated at $255.5 billion and provides over 8.9 million jobs to people in the United States. The benefits of heavy trucks are unquestionable, but the dangers of trucks can be unparalleled.

The likelihood of a personal injury lawyer representing a person injured in a tractor trailer crash is strong. Within the next decade, it is estimated that if current trends continue 58,000 people will die in tractor trailer related deaths. In 2009, there were approximately 3,380 fatalities and 74,000 injuries as a result of heavy truck related wrecks. That number jumped to an estimated 3,757 fatalities in 2011 representing an 11 percent jump. There were 88,000 injuries in that same year. The ratio of injuries to trucks on the road is extremely high with approximately 90,000 accidents and injuries each year.

One of the most prominent defects with heavy trucks is unreasonable roof crush. To protect occupants in a rollover, maintaining survival space is very important. Survival space is the space around an occupant that remains free of intrusion in an accident. It is the area in which an occupant is able to “survive” the crash. A roof is part of the structural support of a vehicle and is therefore a critical component in keeping the occupant safe. If a roof crushes substantially during an accident, from a failure of the side rails, headers or support pillars, catastrophic injuries can occur. Often, this decreased survival space results in the occupant’s head impacting some portion of the vehicle causing death, paralysis or brain damage. Sometimes, the occupant can even be partially ejected through an opening created during roof crush.

Another defect we see in heavy trucking accidents is seat belt malfunctions. Greg Allen and Mike Andrews are set to try a case down in Mobile involving roof crush and seatbelt defects. In that case, our client had taken his 2004 Freightliner M-2 truck in to be serviced because he felt that the truck was bouncing. The mechanic unnecessarily loosened the control rod, which stabilizes the trailer, and did not tighten it back up. The same day our client picked the truck up from being serviced, the loosened control rod caused the truck to become unstable and our client lost control of the truck. The truck rolled over. His seatbelt became unfastened, and the roof crushed down into his survival space. Our client was thrown out of the back window of the truck and now is permanently paralyzed. We are confident that the jury will diligently consider the evidence at trial and will award our client a just and fair award of damages for his injuries.

Defective cab guards are another primary cause of serious injury or death in heavy trucking accidents. Cab guards are intended to prevent shifting cargo from contacting the cab of heavy trucks that pull trailers. Many cab guards are designed with welded heat treated aluminum, which results in a weakening of the cab guard over time. The weakening of the cab guard due to fatigue stress is relatively unknown to drivers. Many welding requirements established by national organizations are not followed by cab guard manufacturers. The failure to follow such guidelines results in poor welds, poor quality control, and poorly designed cab guards for their intended purpose of protecting truck occupants.

Sometimes, heavy trucking accidents simply involve a driver’s negligent and wanton operation of the truck. Chris Glover, a lawyer in the Section, recently handled a case involving driver negligence. On Dec. 13, 2013, Marilyn Nipper was driving her 2010 Pontiac G6 on AL Hwy. 14 in Elmore County, Ala. Lothario Swiggett was driving a 2006 Mack truck owned by Gale Creek Logging Company, on AL Hwy. 14 in front of the Nipper vehicle. Swiggett’s vehicle was carrying a load of logs at the time of the accident, and the load was in violation of §32-5-211 of The Code of Alabama because the load was not properly marked. His vehicle was stopped at the time of the accident. Ms. Nipper’s vehicle ran into the back of the Swiggett’s vehicle and a log came through her windshield and impaled her, causing injuries which ultimately led to her death.

The plaintiff in this case brought claims against Defendants under Alabama’s Wrongful Death Act. The plaintiff claimed that Defendant’s negligence and wanton-
ness in his operation and use of the tractor trailer resulted in this accident. Plaintiff claimed that Defendant Swiggett was acting within the line and scope of his employment with Gale Creek when he failed to display, notify or warn other motorists of his log load after dark, including but not limited to having any kind of light at the end of his log load. Claims were also brought against Defendant Gale Creek which included negligent hiring, training and supervision of Swiggett, as well as claims based on agency. We recently entered into a confidential settlement with the Defendants on behalf of our clients in this case.

Handling a case involving an 18-wheeler, log truck or other commercial vehicle is significantly different than a standard automobile case. It requires a special investment of time and resources, and a detailed knowledge of the rules and regulations that govern the commercial trucking industry. A lawyer handling these types of cases must be familiar with all these rules in order to recognize a claim and effectively handle the case. Our firm will continue to push for safer roadways by holding trucking companies accountable for violating laws designed to keep roadways safe.

**Heavy Industrial Equipment Accidents**

Our Personal Injury and Product Liability lawyers routinely handle cases involving heavy industrial equipment accidents. Greg Allen, our lead Product Liability lawyer, has handled cases involving a wide range of industrial equipment accidents, including tractors, loaders, and post-hole diggers. His most recent case involved a Tigercat 620C Skidder, which is used for clearing sites for logging. Our client was using the skidder to help a friend pull his tractor out of the mud. The skidder also became stuck in the mud, so our client had to use a bulldozer to pull the skidder out. The only way to tow the skidder out of the mud is to connect a chain to the towing lugs on the front of the skidder behind the dozer blade. The towing instructions for this skidder require that the dozer blade be raised when attaching the chain. Therefore, the only way to connect a chain to the lugs for towing is to go beneath the raised dozer blade.

After our client had pulled the skidder out of the mud, he reached back under the dozer blade to disconnect the chain from the lugs. At this time, his friend was in the skidder cab. When the friend tried to exit the skidder cab, the friend’s shirt became caught on the dozer blade lever, which stuck out into the cab doorway and was not guarded. The dozer blade suddenly fell on our client, crushing him into the ground. He suffered numerous painful and permanent injuries as a result.

The unfortunate thing for our client is that Tigercat knew how to prevent this type of accident caused by inadvertent activation of a lever. In fact, Tigercat designed the dozer blade lever with a button on top of the lever. The lever could not be moved without first pushing the button. Before manufacturing the 620C skidder, Tigercat decided to deactivate the button on top of the dozer blade lever, once again subjecting the lever to inadvertent activation.

Greg Allen, our most experienced lawyer in the Section, worked diligently on behalf of our client throughout the litigation against Tigercat. The defendant decided to settle the case for a confidential amount. Fortunately, Tigercat decided to change the design of the dozer blade lever in subsequent skidders to prevent inadvertent activation. Unfortunately, we probably have not seen the last of these types of cases from other manufacturers.

**Tire Defects**

Tires are among the most important components of vehicle safety as they are the only points of contact between vehicle occupants and the ground. We have previously written on tire defects, but perhaps the most dangerous tire defect is one that cannot be seen—tire aging. A tire might look brand new and might not have ever been used, but research and testing shows that when tires reach a certain age, those tires can break down from the inside, de-treading upon use and causing fatal accidents.

Our lawyers have handled many tire aging cases. Rick Morrison, a lawyer in the Section, settled a crash resulting from the failure of a 10-year-old tire. In that case, our client took her car in to a tire and lube franchise to have one of her tires repaired for being low. When the tire technician informed her that her tire could not be repaired, he recommended that she use her full-size spare. Our client expressed concerns about her spare tire’s age and condition to the technician. She relied on the technician to tell her if the tire was unsafe or if she needed to purchase a new tire. The technician, without verifying the tire’s age, repeatedly assured her that her tire was safe. The tire was actually more than 10 years old. On her way back home, the tire failed on the interstate, causing our client’s vehicle to leave the road and roll over. This crash resulted in severe injuries to our client and her passengers.

LaBarron Boone, another lawyer in the Section, is getting ready to try a case involving the failure of a 16-year-old tire.

The tire was the original spare tire on a 1995 Ford Explorer. The tire looked brand new. However, while driving down I-85, just two days after a mechanic shop put the spare tire on the 1995 Ford Explorer, the tire de-treaded, causing the Explorer to roll over. This resulted in the deaths of our clients’ sister and son. LaBarron has successfully handled cases like this in the past, and will try the case this month.

Despite the dangers of tire aging, The National Highway Traffic Safety Administration (NHTSA) has still refused to establish a tire-aging standard. A tire aging standard would make it easier for consumers to determine the tire’s age. Right now, the only way to determine the age of a tire is to decipher the cryptic code on the tire’s sidewall. Also, a tire aging standard would make it mandatory for tire centers to take tires out of service at a specified date, regardless of what the tire looks like on the outside. Beasley Allen attorneys will continue to heavily pursue actions for tire aging until such standards are in place.

**Smoke Detectors**

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

Lawyers in our firm have handled cases of this sort in the past and will continue to handle them in the future. Smoke detector manufacturers have known for more than 30 years that a standalone ionization smoke detector is not adequate to protect a home involving a slow growth or slow smoldering fire. Testing reveals that ionization smoke detectors do not even detect smoke. They detect submicron particles, which may or may not be in sufficient quantity in certain types of fires. Smoldering fires tend to put off larger and cooler particles that may not set off an ionization detector even if the particles reach the detection chamber.

Ionization detectors are also dangerous because they lull people into a false sense of security. An ionization detector is often the detector that goes off when someone opens an oven door or burns toast. In such cases, there may be no visible smoke whatsoever. The sad truth is that folks who have these types of detectors assume that if their detector sounds in the absence of smoke, that it would certainly
go off in a fire. That is a terrible misconception.

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

There has been an alternative technology that makes the home much safer from smoldering fires. That’s the photo electric design, which does sense the presence of smoke in a smoldering fire. This technology has been around for years and has proven to be effective. On the other hand, on the slow smoldering fire, the ionization detector may delay from 30 minutes to an hour or it may never sound.

LaBarron Boone is currently investigating another death case in Mississippi involving the failure of a Kidde smoke detector. Our firm will continue to update you as we learn more about these dangerous products. If you have any questions regarding smoke detectors, you can contact LaBarron at LaBarron.Boone@beasleyallen.com.

**Auto Defects**

Our Product Liability Section had much success over the last year battling some of the largest auto manufacturers in the world. A trial team consisting of Cole Portis, Graham Esdale, Ben Baker, and this writer secured a game-changing settlement with Toyota regarding an unintended acceleration issue in the case of Bookout v. Toyota. Subsequent to the Bookout case, Toyota began to settle all of its unintended acceleration claims. The Bookout trial team was recognized for its work in changing the course of the unintended acceleration litigation in its selection as a finalist for the 2014 Public Justice Trial Lawyer of the Year award.

Kendall Dunson, another lawyer in the Section, is currently handling a case against General Motors for removing a very important safety feature from its 2008 Chevy Impala—the side curtain airbags. These airbags protect occupants from head and neck injuries. In that case, our client was driving a 2008 Impala when her vehicle was struck from the rear by another vehicle. Because side airbags, which were standard safety equipment on the 2008 Impala had been removed or “deleted” from the subject Impala, our client suffered enhanced injuries in the collision that she would not otherwise have suffered. Our client was paralyzed as a result of the wreck and subsequently died.

Another prominent auto defect involves airbag failure to deploy. Graham Esdale and Cole Portis recently settled a case involving a 2011 Dodge Avenger. Our client was on his way to work, was driving the speed limit, and was properly belted. Another driver coming in the opposite direction crossed the centerline, and despite our client’s efforts to avoid the collision, they hit head-on. Our client’s seatbelt did not restrain him properly and the airbag failed to deploy. The failure of the belt and airbag allowed so much forward excursion that his head was able make contact with the center of the windshield. While striking the windshield did not cause his fatal injuries, the failure of the belt and airbag to slow his forward excursion and provide the needed “ride down” did cause his death. We determined there were some issues with the airbag control module that failed to deploy the driver’s side airbag. In addition, the seatbelt included a feature referred to as a load limiter. These devices allow for additional belt payout during an accident. The real benefit of these devices is that it allows the auto makers to pass Federal Motor Vehicle Safety Standards related to frontal crash protection. In real world crashes, it allows occupants to experience dangerous excessive excursion and increases injury potential instead of reducing it.

In this case, we were able to contrast the performance of the Challenger with a defective system to one that performed as intended in the same crash. The driver of the vehicle that crossed the center line and struck our vehicle head on was alert and walking around the scene after the accident. His airbag deployed and his seatbelt did not allow excessive forward excursion. Airbags failing to properly deploy or failing to deploy altogether are not uncommon. This failure is not limited to the vehicle involved in this crash. In fact, we have seen several GM airbag failures that did not involve the ignition switch turning off.

**Nursing Home Negligence**

Ben Locklar, a lawyer in the Section, is currently handling many cases against nursing homes for negligence and wanton care of residents. Typically, these cases involve nursing home employees allowing residents to develop bedsores, to choke, or to fall because the employees are not providing adequate medical care. The most prominent issue we have faced in nursing cases involves the arbitration agreements that nursing homes require residents to sign before the resident can be admitted for treatment. Often times, the resident is not able to sign the arbitration agreement because of physical or mental incapacities. When a resident is incapacitated, the nursing home lets whoever is with the resident sign the agreement, regardless of whether that person is the resident’s chosen legal personal representative. This practice forces the resident to unknowingly waive the resident’s Seventh Amendment right to trial by jury, which is against legal precedent and public policy. We are currently fighting this issue at the Alabama Supreme Court and will continue to fight this issue until nursing homes change their mandatory arbitration agreement practices.

If you need additional information on any of the above, contact Sloan Downs, the Section Administrator, at 800-898-2034 or by email at Sloan.Downs@beasleyallen.com. She will put you in touch with a lawyer in the section.

**Appeals Court Won’t Hear Trinity Appeal Of $175 Million FCA Verdict**

The Fifth Circuit Court of Appeals has denied a mandamus petition from Trinity Industries Inc. The court was asked to vacate a lower court’s $175 million judgment in a False Claims Act (FCA) suit accusing Trinity of selling dangerous guardrails to the U.S. Federal Highway Administration (FHWA). In the underlying suit, decided in October, a $175 million verdict was returned against Trinity. The jury found the company liable for making alterations to the guardrails after a previous design without the changes was approved by the FHWA, then allegedly misrepresenting those changes as the same approved version despite being more dangerous.

In its petition, Trinity argued in part that Texas’ Eastern District Court abused its discretion in permitting the plaintiff to use the FHWA found that the guardrail still qualified for federal reimbursement. This is the second attempt by Trinity to have the Fifth Circuit overturn the ruling on the grounds that the FCA claims were improper. The appeals court denied the previous petition for review, calling it a “close call” and issued guidance for the lower court, the brief said. Trinity said in its brief: “In light of subsequent events, including the district court’s disregard of this Court’s guidance, the call is no longer close.”

The Fifth Circuit apparently disagreed since the petition was denied without opinion. This means the appeal by Trinity will follow its normal course. Harman filed his original FCA complaint in 2012, alleging that Trinity falsely claimed its modified ET-Plus guardrail was properly crash-tested. The original ET-Plus was designed to absorb and dissipate a collision’s impact by flattening the guardrail and pushing it out into a ribbon that is deflected away from the collision, reducing the impact force felt.
It is shocking that a company would think they could secretly modify a safety device in a way that may actually pose a threat to Virginia motorists. Trinity had an obligation to test and seek approval for its equipment, but instead, they sold the commonwealth thousands of unapproved products that had not been properly tested to ensure they would keep motorists safe.

Virginia’s suit follows a series of accidents across the country involving ET-Plus that resulted in serious injury or death. The complaint alleges:

Many accidents involving the modified ET-Plus units have resulted in serious injuries and fatalities, when the ET-Plus units malfunctioned. This loss of life and limb did not occur before Trinity made the undisclosed modifications.

The complaint alleges further that instead of absorbing the energy from a crash, the guardrail can double over on itself and protrude “like a spear” through the crashed car. Virginia seeks civil penalties of up to $11,000 for each FATA violation since 2005 as well as recovery of costs if tests show the guardrails must be replaced. The FATA bars knowingly making false or fraudulent claims for payment. These lawyers should be commended for having the courage to take on the powerful gun industry. They will face a well-financed opponent and will find out what attacks by the NRA are all about. This case will be watched closely as it goes forward.

The families say that the AR-15 was developed by the U.S. Army to increase soldiers’ firepower in combat, ultimately adopting the rifle as its standard-issue service and renaming it the M16. Like its military counterpart, the AR-15 can empty a 30-round magazine in less than 10 seconds. The high velocity of the bullets makes each hit “catastrophic.” The large-capacity magazines can prolong assaults.

In business, measuring risk prior to producing, marketing and selling a product or service is standard procedure. For far too long, the gun industry has been given legislative safe harbor from this standard business practice. These companies assume no responsibility for marketing and selling a product to the general population who are not trained to use it nor even understand the power of it.

The lawsuit states that, while military personnel and law enforcement undergo training to handle assault rifles and must adhere to safety and storage protocols, there is no institutional structure in place to ensure safe and intelligent use of those weapons by the public.
The suit states further that about half of American gun owners do not store their weapons securely. Most states don’t require a permit or license to buy an AR-15. The assault rifle has been used in highly publicized mass shootings around the country. It’s stated in the complaint:

The most chilling legacy of the entrenchment of the AR-15s to the general population may be that Americans are no longer shocked when combat weapons are used to kill people as they work, shop, commute, attend school and otherwise go about their lives. We may be horrified, saddened, even sickened—but we can no longer be shocked.

The Plaintiffs include the families of Vicki Soto, Rachel D’Avino, Dylan Hockley, Noah Pozner, Lauren Rousseau, Benjamin Wheeler, Jesse Lewis and Daniel Barden, in addition to injured teacher Natalie Hammond. These were real people who were shot down in cold blood. The Plaintiffs are represented by Josh Koskoff and Alinor who are with of Koskoff Koskoff & Bieder, a firm located in Connecticut.

Source: Law360.com

XIII. MASS TORTS UPDATE

It’s widely recognized that lawyers in the Mass Torts Section at Beasley Allen have combined a national reputation as a leader in the area of product liability litigation with our time-tested ability to handle large numbers of victims of consumer fraud to develop one of the largest and most technologically advanced Mass Torts practices in the country. The Mass Torts Section of the firm represents numerous people in claims against companies that manufacture and/or market defective pharmaceuticals, over-the-counter medications and medical devices. The Mass Torts Section will investigate any medication or device claim involving catastrophic injury or death. The following are some of the drugs and devices lawyers and staff in the section are currently working on:

**Actos®**

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

plus Met XR, Duetact and bladder cancer. More will be written on the Actos litigation in this issue.

Contact Lawyer: Roger Smith
Primary Staff Contact: April Worley

**Antidepressants**

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

Contact Lawyer: Roger Smith
Primary Staff Contact: April Worley

**Byetta®, Januvia®, Janumet® and Victoza®**

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

Contact Lawyer: David Dearing
Primary Staff Contact: Nancy LeGear

**Fosamax®**

Fosamax® (alendronate sodium), manufactured by Merck, is in a class of drugs called bisphosphonates. Fosamax® is commonly used in tablet form to prevent and treat osteoporosis in post-menopausal women. Fosamax has been linked to low-energy femur fractures in people taking Fosamax for three or more years. Criteria: Documented use of Fosamax® for three years or longer with diagnosed low energy femur fractures.

Contact Lawyer: David Dearing
Primary Staff Contact: Nancy LeGear

**GranuFlo®**

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

Contact Lawyer: Frank Woodson
Primary Staff Contact: Renee Lindsey

**Lipitor®**

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

Criteria: Injured is female; took Lipitor consistently for at least 2 months; Injured was diagnosed with diabetes while taking Lipitor, or within 6 months of last dosage of Lipitor; Body Mass Index (BMI) of 30 or less at time of diabetes diagnosis; Injured has no or limited family history of diabetes.

Contact Lawyer: Frank Woodson
Primary Staff Contact: Renee Lindsey

**Metal-on-Metal Hip Replacements**

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

- Johnson & Johnson/DePuy: ASR Total Hip Replacement and ASR Resurfacing System hip (Recalled on August 24, 2010);
- Johnson & Johnson / DePuy: Pinnacle metal-on-metal hip;
- Zimmer: Durom Cup hip;
- Stryker: Rejuvenate and ABG II Stems (Recalled on July 4, 2012);
- Biomet: M2a and 38 Diameter hips,
• Wright: (a) Conserve, (b) Dynasty, (c) Lineage and (d) Profemur (femur fracture) hips; and
• Smith and Nephew: R3 Liner hips (Recalled on June 1, 2012).

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

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

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

Mirena® IUD

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

Contact Lawyer: Roger Smith
Primary Staff Contact: April Worley

Paxil®

Paxil® (paroxetine) is an anti-depressant manufactured by GlaxoSmithKline. Recently Public Health Advisories have been issued for Paxil® regarding an increased risk of heart birth defects, persistent pulmonary hypertension (PPHN), omphalocele (an abnormality in newborns in which the infant’s intestine or other abdominal organs protrude from the navel) or craniosynostosis (congenital closure of sutures-skull bones, prematurely close during the first year of life, which causes an abnormally shaped skull) in children born to mothers exposed to Paxil®. Our lawyers are investigating claims for children born with birth defects to a mother who has documented use of Paxil® during pregnancy.

Contact Lawyer: Roger Smith
Primary Staff Contact: April Worley

Power Morcellator

The Power Morcellator is a surgical instrument used to divide and remove masses during hysterectomies, fibroid removal and other laparoscopic surgeries. The device is inserted through small incisions and removes tissue after aggressively cutting and shredding it. The device can put women at increased risk for a number of deadly uterine cancers. According to FDA analysis, 1 in 350 women undergoing surgical treatment for fibroids has an unsuspected uterine sarcoma that cannot be reliably detected before surgery. During power morcellation, there is a chance pieces of tissue may be left behind. If the tissue is malignant, cancer may be spread. The FDA issued a safety alert in April 2014 discouraging the use of these devices in uterine and fibroid removal procedures.

Contact Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Risperdal®

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

Contact Lawyer: James Lampkin
Primary Staff Contact: Crystal Jacks

Stevens-Johnson Syndrome

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

Contact Lawyer: Matt Teague
Primary Staff Contact: Heath Hall

Testosterone Replacement Therapy

Testosterone Replacement Therapy products for men have been linked to an increased risk of death, heart attack and stroke. Researchers found men who used testosterone therapy were 30 percent more likely to have a heart attack, stroke, or die after three years of use. Furthermore, men who started the study with clear, unobstructed coronary arteries were just as likely to have a heart attack, stroke or die as men who entered the study with established coronary artery disease. Testosterone therapy, such as the prescription topical treatments Androgel, Testim and Axiron, are used to help boost testosterone levels in men who have a deficiency of the male hormone. Symptoms of low testosterone include decreased libido and low energy. We are currently investigating claims of heart attack, stroke, DVT, pulmonary embolism and prostate cancer.

Contact Lawyer: Matt Teague
Primary Staff Contact: Heath Hall

Talcum Powder

Johnson and Johnson has known for decades that its talcum products, such as Shower to Shower and Baby Powder, can cause ovarian cancer. But J & J has failed to warn women of the risk of using these products in the genital area. A Harvard medical doctor says that he has studied the link between talc and cancer for 30 years and believes talc is the likely cause for as many as 2,200 cases of ovarian cancer each year. More will be written on these cases below. More will be said on this subject in this issue.

Contact Lawyer: Ted Meadows
Primary Staff Contacts: Katie Tucker or Gwyn Harris

Transvaginal Mesh

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

Contact Lawyer: Chad Cook and Leigh O’Dell
Primary Staff Contacts: Tabitha Dean and Melissa Bruner

VIAGRA

A preliminary study indicates that erectile dysfunction drug Viagra® (sildenafil) may increase the risk of developing melanoma, the deadliest form of skin cancer. The study, published in the JAMA Internal Medicine journal, analyzed data from nearly 26,000 men, 6 percent of whom had taken Viagra. The men who used Viagra at some point in their lives had about double the risk of melanoma compared to men who had never taken the drug. Men who were currently taking Viagra were at an 84 percent greater risk of developing Melanoma. We are currently looking at cases involving men who are taking or have taken Viagra and were diagnosed with melanoma.

Contact Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

XARELTO

Approved by the FDA in 2011, Xarelto® is one of the newest blood thinners on the market. It is manufactured by Janssen Pharmaceutical (a subsidiary of Johnson & Johnson) and co-marketed by Bayer Healthcare. It is prescribed to prevent blood clots in patients suffering from atrial fibrillation, pulmonary embolism, deep vein thrombosis, stroke and patients who have recently undergone hip or knee replacement surgery. Since its approval, it has been linked to hundreds of injuries and deaths. We are currently investigating claims of GI bleeding, hemorrhagic strokes or any other serious or fatal bleeding involving Xarelto®.

Contact Lawyers: Melissa Prickett and David Byrne
Primary Staff Contact: Penny Davies

ZIMMER NEXGEN KNEE REPLACEMENTS

Since 2005, more than 150,000 Zimmer NexGen Flex-Knee implants have been sold. Several different components used as part of the Zimmer NexGen Flex-Knee replacement system have been associated with increased risk of complications, including pain, swelling, loosening of component parts, and the need for follow-up/revision surgery. Several prominent surgeons want a Zimmer NexGen knee replacement recall to be issued. At a March 2010 conference of the American Academy of Orthopedic Surgeons, two knee surgeons presented data suggesting that the Zimmer NexGen Flex-Knee failure rate could be as high as 9 percent, and that the actual number of complications that require revision surgery could be even higher. The lead author of the study, Dr. Richard Berger, described the failure rate of the Zimmer NexGen CR-Flex Porous Femoral Component as “unacceptably high.”

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

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

TALCUM POWDER DEFENDANTS LOSE MOTION TO DISMISS CONSPIRACY CLAIMS

We wrote above about the firm’s handling of talcum powder cases. Recently United States District Judge Ronnie L. White of the Eastern District of Missouri denied a Motion to Dismiss Conspiracy Claims against Defendants Johnson & Johnson and Imerys Talc America, Inc., fka Luzenac America, Inc. This ruling was in a lawsuit filed by Michael Blaes as a result of the death of his wife Shawn Blaes, who died of ovarian cancer allegedly caused by the use of Johnson & Johnson Baby Powder and Shower to Shower (containing talc mined and sold by Imerys) in the genital area. Among other claims, the Plaintiff alleges that the Defendants worked together to perform wrongful acts and conspired amongst themselves to misrepresent and suppress the truth regarding the danger associated with the genital use of talcum powder by doing the following:

• They formed the “Talc Interested Party Task Force” (TIPTF), which worked to pool resources to collectively defend talc use at all costs and to prevent regulation of any type through biased research they funded and promulgated through scientific reports;
• They released false information about the safety of talc to the consuming public; and
• They used political and economic influence on regulatory bodies of talc.

The Plaintiff claims that all of this was part of an effort to illegally prevent consumers from learning about the potential harmful effects of talc use. Lawyers in our firm’s Mass Torts Section are working on the Blaes case with the law firms of Onder, Shelton, O’Leary & Peterson, LLC, Allen Smith, and Porter & Malouf, P.A. This case now moves into the discovery phase in order to have it ready for the court-ordered trial date of March 7, 2016. As we have indicated before, our firm is heavily involved in litigating cases on behalf of women who were diagnosed with ovarian cancer following the use of talcum powder in the genital area. If you have any questions regarding these cases, please feel free to contact Ted Meadows, a lawyer in our firm’s Mass Torts Section at Ted.Meadows@beasleyallen.com or 800-898-2034.

MIRENA LITIGATION UPDATE

We mentioned above that our firm is handling Mirena cases. To date, more than 1,000 cases have been filed in the Mirena Multidistrict Litigation (MDL). The Mirena MDL is pending in the United States District Court for the Southern District of New York before U.S. District Judge Cathy Seibel. In addition to the cases in the Mirena MDL, litigation is also pending in state courts across the country. For example, more than 1,200 cases have been filed in a multi-county litigation before Judge Brian R. Martinotti in New Jersey’s Bergen County Superior Court. Discovery is well underway in the MDL. Lawyers for the PSC have been busy reviewing the more than 11 million pages of documents that Bayer has produced relating to the development, testing, and marketing of Mirena. PSC lawyers are also in the process of completing the depositions of key Bayer employees. The MDL has also begun the process of selecting cases to go to trial. Lawyers on the PSC and defense counsel have narrowed the Initial Disposition Pool to 12 cases. After additional discovery, that list will be further narrowed to four cases. Judge Seibel will then select the first case for trial, which is set to begin in March 2016.

Lawyers in our firm’s Mass Torts Section continue to evaluate and file Mirena claims involving migration with uterine wall perforation. If any of our readers have a claim that they would like for us to review, or if there are any questions relating to the Mirena litigation, contact Roger Smith, a lawyer in the Section, at 800-898-2054 or by email at Roger.Smith@beasleyallen.com.

MORE INFORMATION ON THE ACTOS LITIGATION

As we mentioned above, lawyers in the Mass Torts Section at Beasley Allen continue to evaluate and file claims involving bladder cancer during or following usage of Actos, Actoplanus Met, Actoplus Met XR, and/or Duetact. Manufactured by Takeda Pharmaceuticals, Actos is a class of insulin-sensitizing drugs known as thiazolidinediones and was approved by the U.S. Food & Drug Administration (FDA) to treat Type 2 diabetes in July 1999. In June 2011, the FDA warned that Actos usage for more than one year may be associated with an increased risk of bladder cancer. Takeda made more than $16 billion on Actos, prior to it going generic in late 2012.
To date, more than 8,000 cases are pending in both federal and state courts against Takeda and its co-marketer of Actos, Eli Lilly, alleging that Actos caused bladder cancer injuries. Recently, a West Virginia state court determined that Takeda had intentionally destroyed key documents related to its knowledge that Actos increases the risk of developing bladder cancer and awarded the Plaintiff compensatory damages of $155,000.00. Previously, a Philadelphia state court ordered Takeda Pharmaceuticals to pay more than $2 million for failing to warn doctors that Actos could cause bladder cancer. The Philadelphia jury found that Takeda failed to warn that Actos increases the risk of developing bladder cancer. The Philadelphia jury heard testimony that was presented during the federal trial in Louisiana regarding Takeda’s destruction of key employees’ documents. While we are disappointed that Takeda was not ordered to pay punitive damages for this egregious conduct, we are encouraged by the verdict.

In October, the $9 billion verdict previously entered earlier this year in federal court case in Louisiana was reduced to $37 million. According to the judge, the reduction brings the award “to the maximum amount a jury could have properly awarded” under the law. The federal judge denied Takeda’s request for a new trial.

As you may recall, in 2013 juries in state court cases 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. More trials are scheduled throughout 2015.

If you have any questions regarding the litigation, or if you would like for us to review your potential claim, please contact Andy Birchfield or Roger Smith, lawyers in the Mass Torts Section at 800-898-2034 or by email at Andy.Birchfield@beasleyallen.com or Roger.Torts@beasleyallen.com.

**FEDERAL JUDGE WARNS IMPLANT MAKER BARD IT IS RUNNING A RISK NOT TO SETTLE**

A well-respected and experienced federal judge has urged C.R. Bard Inc. to settle thousands of lawsuits over defective vaginal-mesh implants. The warning came because juries may award billions of dollars in damages after hearing evidence relating to the company’s conduct. U.S. District Judge Joseph Goodwin in Charleston, W.Va., said during a Dec. 9 hearing:

"I can’t imagine a corporation facing potentially billions of dollars in verdicts wouldn’t find it advisable to try to achieve a settlement for a much lesser sum. I base that billions of dollars business on some of the rather large verdicts that we’ve bad."

Judge Goodwin said that the multimillion-dollar verdicts returned against Bard and other makers of the implants, used to treat pelvic organ prolapse and stress incontinence in women, should provide an incentive to settle more than 12,000 cases against the company by next year. Based on what we have learned during the litigation, the judge’s warning to executives at Bard that they are gambling with the future of their company by not settling the litigation should be taken seriously.

As we have previously reported, Judge Goodman is overseeing all federal-court litigation involving the implants. The company agreed in October to settle 500 suits for about $21 million in its first large-scale settlement of vaginal-mesh cases. Bard has acknowledged in filings with the U.S. Securities and Exchange Commission that it faces significant financial exposure over the vaginal-mesh claims.

More than 12,400 suits over the medical devices have been filed in both state and federal courts. Bard acknowledged in a July regulatory filing. Endo International Plc, a Dublin-based maker of vaginal-mesh devices, has agreed to pay more than $1.5 billion to resolve most of the more than 30,000 suits over its implants.

The U.S. Food and Drug Administration ordered Bard, Johnson & Johnson, Boston Scientific Corp and other vaginal-mesh makers to study rates of complications linked to the devices after thousands of women sued over the implants. The agency also has said implants should be subject to stricter safety requirements. We can say without reservation that what Bard and the other companies have done to innocent women is despicable and they must all be held accountable.

Source: Bloomberg

**XARELTO SAFETY SUITS SENT TO LOUISIANA BY MDL PANEL**

The U.S. Judicial Panel on Multidistrict Litigation (JPML) has sent nearly two dozen Xarelto lawsuits against Johnson & Johnson unit Janssen Pharmaceuticals Inc. and Bayer Corp. to a Louisiana federal court. The suits are over Xarelto, which is a blood thinner. The panel found that the cases have enough common factual questions to warrant centralization. The JPML disagreed with the Defendants, who had argued that the cases posed too many unique issues such as medical history and drug dosage, finding that such types of differences apply to nearly all product liability cases and don’t necessarily preclude centralization.

In these cases, according to JPML’s order, the Plaintiffs had posed common factual issues, including whether the drug’s label sufficiently warned about its alleged risk of severe bleeding, as well as issues surrounding certain clinical trial results. The panel said in its order:

While we agree that these actions present a number of individualized factual issues, the existence of such issues do not negate the common ones.

The JPML also rejected the Defendants’ request for an informal coordination of the suits instead of centralizing them, and found that the cases in the litigation were growing too quickly for that to be a feasible option. Based on what they have learned, our lawyers believe the drug is so dangerous that it should not have been sold. They also believe that the drug is inadequate. Bayer and Johnson & Johnson never properly advised customers about the risks of the drug.

Xarelto, an anti-coagulant jointly developed by Janssen and Bayer, was approved in the U.S. for a number of uses, including reducing the risk of blood clots in the legs and lungs of people who have had knee or hip replacement surgery.

Source: Law360.com

**SYNGENTA GMO CORN CLASS ACTIONS SENT TO KANSAS COURT**

The Judicial Panel on Multidistrict Litigation (JPML) has agreed to consolidate in Kansas multiple class actions and lawsuits filed by corn farmers, grain exporters and others who accuse Syngenta Corp. of “tainting” the U.S. corn supply with genetically modified seed before China gave import approval. The JPML centralized approximately 177 suits over Syngenta’s decision to commercialize corn seeds with a genetically modified trait, known as “MIR162,” that gives the plants increased resistance to certain insects. The U.S. Department of Agriculture authorized the introduction of the trait in April 2010, by which time the U.S. Environmental Protection Agency (EPA) and the U.S. Food & Drug Administration (FDA) had already approved the trait, though the Chinese government has not yet approved it.

The panel said it chose the “readily accessible” district of Kansas largely because it could then be assigned to U.S. District Judge John W. Lungstrum, whom it said was “well-versed in the nuances of complex, multidistrict litigation.” The panel said in its order:

As with past litigation involving allegedly improper dissemination of genetically modified crops, centralization will eliminate duplicative discovery; avoid inconsistent pretrial rulings, particularly on class certification; and conserve the resources of the parties, their counsel and the judiciary.

Syngenta commercialized the trait for the 2011 growing season under the brand name “Viptera.” Syngenta misled farmers into believing that approval from China was imminent, but the trait remains unapproved. Syngenta’s premature release of Viptera corn cost the U.S. corn market somewhere between $1 billion and $3 billion due to the rejection and resulting seizures of U.S. containers and cargo ships transporting U.S. corn to China.
Syngenta offered farmers a “side-by-side program,” which encouraged them to plant Vipera corn adjacent to other corn seed. But in so doing, the farmers risked co-mingling the GMO corn with the non-GMO corn, thereby making it likely that Chinese regulatory officials would reject U.S. shipments of corn. The U.S. Department of Agriculture determined that China purchased approximately 5 million tons of U.S. corn in 2012/13, making China the third-largest export market for U.S. corn. Since November 2013, however, Chinese imports for U.S. corn have decreased by an estimated 85 percent.

Source: Law360.com

XIV. PREDATORY LENDING

**Predatory Lenders Are Still At Work**

One would think the 2008 financial crisis and resulting recession would have caused financial institutions and other creditors to rein in risky and illegal lending practices. Indeed, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, which created the Consumer Financial Protection Bureau (CFPB) to ensure such practices were prevented. The CFPB is tasked with overseeing consumer protection in many financial sectors including banks, credit unions, payday lenders, mortgage-servicing operations, foreclosure relief services, debt collectors and, most recently, for-profit colleges. The CFPB’s presence overseeing new consumer protection laws has spawned litigation against various entities engaged in any illegal practices.

Now, state attorneys general are filing lawsuits on behalf of municipalities alleging that financial institutions preyed on minority consumers by offering mortgages or refinancing of mortgages under more costly terms as compared to other consumers. Los Angeles, Miami, and Cook County, Ill. sought damages from banks for lost property-tax revenue and increased municipal services stemming from foreclosures they said resulted from discriminatory lending in violation of the Fair Housing Act. The banks allegedly knew the loans were likely to fail and issued them anyway knowing that the losses could be claimed as write-offs.

Earlier this summer, an Alabama judge dismissed a lawsuit filed by payday lenders who sought to challenge the state’s creation of a central database to track high-interest loans obtained by borrowers. The database was created to ensure that consumers don’t obtain multiple loans exceeding the $500 cap, which often results in total interest payments far exceeding the principal loan amount. This ruling was a step in the right direction against loan scams and preventing exorbitant interest rates from unfairly saddling consumers.

Our firm is actively investigating potential cases involving predatory lending or other actions where abusive financial practices take advantage of consumers. If you would like more information, please contact Rhon Jones or Lance Gould, lawyers in our firm, at 800-898-2054 or by email at Rhon.Jones@beasleyallen.com or Lance.Gould@beasleyallen.com.

Sources: Bloomberg, Chicago Tribune, WSFA 12 News

**Pennsylvania Supreme Court Affirms $187 Million Wal-Mart Wage Verdict**

The Pennsylvania Supreme Court has affirmed the $187 million award in a class action lawsuit against Wal-Mart Stores Inc. The workers had been denied rest breaks. The court said individual examinations of all 187,000 class members weren’t needed to determine whether employees were forced to work through their breaks. Wal-Mart had claimed it was denied its due process rights during the jury trial because the Plaintiffs used an unfair “trial by formula.” But the Pennsylvania high court disagreed, saying evidence in the case supported the inference that managers companywide were pressured to increase profits by understaffing stores. Those across-the-board factors impeded workers’ ability to take scheduled breaks, according to the court’s opinion.

No initial finding of liability for a subset of employees was extrapolated to the entire class, the opinion said. Instead, the extrapolated evidence was used to calculate the total amount of damages. The court wrote in a per curiam opinion:

*Both parties had ample opportunity to present evidence to explain these discrepancies, i.e., to show that the discrepancies were or were not evidence of classwide wage-and-hour violation. Thus, Wal-Mart’s claim that it was denied due process fails.*

Two suits filed by two former Wal-Mart employees, Michelle Braun and Dolores Hummel, claimed the company owed them $3 million for 187,000 off-the-clock hours from 1998 onward. Evidence was presented showing that Wal-Mart made workers skip more than 33 million breaks and 2 million meal periods from 1998 to 2001.

In June 2011, the Pennsylvania Superior Court affirmed the Philadelphia County Court of Common Pleas’ $187 million judgment against Wal-Mart, finding that there was sufficient evidence to conclude that Wal-Mart breached its contract with its workers and violated state wage laws.

The court ruled that Wal-Mart appeared to be claiming the workers’ claims could only be properly proven by individual examination to determine whether they were forced to work through breaks. According to the court’s opinion, the case involved a central, common issue of liability—whether Wal-Mart failed to pay its employees as promised in its written policies—which was proven on a classwide basis at trial. Wal-Mart said it still believed the claims should not have been tried together, and that it is considering a possible appeal to the U.S. Supreme Court.

Source: Law360.com

**U.S. Supreme Court Says No Pay For Workers’ Security Check Time**

The U.S. Supreme Court has ruled unanimously that workers don’t have to be paid for time they spent passing through security screenings. The high court reversed a Ninth Circuit ruling that revived a suit brought by ex-workers at an Amazon.com warehouse against a staffing agency. The court ruled 9-0 that the time former workers Jesse Busk and Laurie Castro spent waiting for and undergoing post-shift anti-theft screenings was non-compensable under the Fair Labor Standards Act (FLSA).

Justice Clarence Thomas delivered the lead opinion, while Justice Sonia Sotomayor—joined by Justice Elena Kagan—filed a concurring opinion. Justice Clarence Thomas wrote:

*We hold that an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. Because the employees’ time spent waiting to undergo and undergoing Integrity Staffing’s security screenings does not meet these criteria, we reverse the judgment of the Court of Appeals.*

The lawsuit, which invoked the FLSA and Nevada labor laws, targeted Integrity Staffing Inc., which provides warehouse workers to Amazon.com throughout the United States. A Nevada district court dismissed the putative class action, ruling that the screening time was not compensable under the FLSA. But the case was partly revived by the Ninth Circuit in April 2013. An appellate panel held that the workers had stated an FLSA wage claim for the security screenings and concluded that they had sufficiently alleged the screenings were “integral and indispensable” to their main duties.

Integrity then appealed the Ninth Circuit’s holding on the security screenings claim. It contended that the court’s decision was in conflict with the plain text of the Portal-to-Portal Act. The workers replied, contending that
taking part in an end-of-shift anti-theft search is integral to employees’ on-shift duty to refrain from taking Amazon products. The Supreme Court agreed to hear the case in March. The Portal-To-Portal Act, which amended the FLSA in 1947, exempts employers from liability for activities that are “preliminary or postliminary” to a worker’s principal tasks.

The high court reversed the Ninth Circuit, finding—as the district court did—that the screenings fell into the category of “noncompensable postliminary activities.” The screenings don’t qualify as principal activities, Justice Thomas wrote, pointing out that Integrity didn’t employ workers to pass through security checks, but rather to retrieve products from shelves and package them for shipment to Amazon customers. The screenings also didn’t qualify as integral and indispensable to the warehouse workers’ duties, the opinion said, adding that the screenings could have been eliminated without compromising the employees’ ability to do their jobs.

Source: Law360.com

XVI.
PREMISES LIABILITY UPDATE

RESIDENTS OF BURNEO-OUT APARTMENT IN PHILADELPHIA SETTLE THEIR CLAIMS

The former residents of a West Philadelphia apartment complex that was destroyed in a 2011 fire have agreed to a $4.75 million settlement. The building owners had been accused of failing to prevent the tragedy. The owners of the Windemere Court Apartments agreed to the settlement after several days of trial in the Philadelphia County Court of Common Pleas before Judge Mary Collins. The case had been filed as a class action. The class members, who numbered more than 100, had alleged that the building owners, David, Sam and Aron Ginsberg, failed to install sufficient fire protection systems and did not protect and salvage their property after the fire.

The four-story, multiple-wing Windemere was ultimately razed after a fire originating in a second-floor apartment spread across the entire complex in January of 2011. Two former tenants filed the class action lawsuit in February 2011, alleging that more than 100 people affected by the fire were not able to return to salvage their property from the site for several weeks. They said by then anything remaining had been exposed to the elements and left vulnerable to looters and vandals. Judge Collins certified the class in February 2013. The case went to trial on Dec. 4th and it was settled during the trial. The settlement is subject to court approval.

A new and separate suit was filed on the eve of the trial by the Ginsbergs against their insurers and former counsel. They said the sole settlement offer made by the insurers—two Zurich NA subsidiaries—was a $325,000 proposal made in March. In that suit—also filed in Philadelphia—the building owners accused the insurers of failing to settle and leaving them exposed to punitive damages. The class action Plaintiffs are represented by Thomas More Marrone and Ron Greenblatt of Greenblatt Pierce Engle Funt & Flores. It appears that they did a very good job for the class.

Source: Law360.com

CONSTRUCTION DEFECTS LEAD TO LOSS OF USE AND ENJOYMENT AND PROPERTY VALUE

When a family buys a newly constructed home, it is usually a time of joy and celebration. The last thing on their mind is that they will have to repair the new building or that there is some type of defect that is causing damage to the value. Unfortunately, many developers, contractors, subcontractors, and suppliers make mistakes while working which can lead to construction defects that affect the use and enjoyment of the home. It can also drastically affect the value of the home.

There are many forms of construction defects and failures: construction deficiencies, design deficiencies, material deficiencies, and subsurface deficiencies. Construction deficiencies are often found when there is a failure to construct a home in a reasonably workmanlike manner, or when the structure doesn’t perform as intended by the buyer.

Typical design deficiencies involve a failure by a design professional to build within a specific code. For example, if an architect or engineer fails to consider the need for particular protections against moisture in designing a roof, water penetration, poor drainage, and water intrusion may result.

Material deficiencies include the use of inferior building materials. This can result in significant problems such as windows that leak or fail to perform and function adequately, deteriorating flashing or building paper, waterproofing membranes that are inappropriate for the project’s location and inferior drywall or any other products that do not work for projects in that area or that work improperly with another element.

Subsurface deficiencies can occur when developers or designers unfamiliar with the soil conditions build in an area construct in out-of-state areas. This can lead to improper compaction or inadequate drainage possibly manifesting in the form of cracked foundations or other damage to buildings.

If a person notices any of these problems, they may have grounds for a lawsuit against a developer, designer, builder, subcontractor, or suppliers. These causes of action may include breach of contract, negligence, breach of warranty, and breach of implied warranty. If you need additional information on this subject, contact Rhon Jones, a lawyer in our firm, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

XVII.
TRANSPORTATION

MONTGOMERY COUNTY JURY AWARDS VERDICT AGAINST STATE FARM IN UIM CASE

Julia Beasley, a lawyer in our firm’s Personal Injury/Products Liability Section, represented Tyrone Powell Johnson and Thomasine Boyd-Johnson in an underinsured motorist (UIM) case that was tried in the Circuit court of Montgomery County, Ala., last month. Mr. Johnson was injured in a two-vehicle accident on Sept. 3, 2013. The driver of the other car was at fault in the crash. The liability insurance carrier for the tort-feasor (the at-fault driver) had paid its limit of $50,000. Our clients proceeded against state Farmer Insurance Company. At the conclusion of the trial, the jury awarded Mr. Johnson $260,000 in compensatory damages and Mrs. Boyd-Johnson, who had a separate claim, $25,000 in compensatory damages.

The Johnsons’ claim against State Farm was based on a policy of insurance that provided for “underinsured” motorist coverage. Mr. Johnson has been a policyholder with State Farm for 25 years and paid premiums for this type coverage. Mr. Johnson suffered a neck injury, which his doctors say will likely require surgery. Mrs. Johnson had a loss of consortium claim.

The jury verdict was important for several reasons—one being the nature of the claim involved. It’s unfortunate that State Farm would not take care of their policyholder and pay a valid claim. Instead, State Farm elected to put the Johnson’s through a trial. The jury’s verdict will do what State Farm should have done.

State Farm had offered $15,000 before jury selection, which was rejected by Mr. & Mrs. Johnson. Fortunately, the Johnsons had adequate underinsured motorist coverage with State Farm. Many people don’t realize how important underinsured motorist coverage is. Many drivers who cause motor vehicle collisions have either no liability insurance or carry the bare minimum limits. That makes uninsured motorist coverage very important. Each person reading this report should check their uninsured motorist coverage.

So many companies offer the minimum amount of uninsured motorist coverage to their policyholders. It’s important for persons to obtain as much uninsured motorist insurance in their policies as possible. We recommend that persons request the maximum amount of uninsured motorist coverage that their liability insurance carrier will write for them. The Johnsons case is a prime example of why this is so important. Julie did a very good job for her clients in this case. The total amount is $334,000 which including’s the tort-
involve Drivesy DriveRs

all kinds of traffic deaths in 2013, the year tied
occuring each month. Besides the decline in
may be improving, and hopefully it is, there
The number of people killed in large-truck
crashes increased for the fourth straight year, bucking a trend of overall improvement in U.S.
highway safety. Fatalities rose to 3,964 people in
2013, which includes truckers, pedestrians and the occupants of vehicles that collided
with the big rigs, the U.S. Transportation
Department stated last month in its annual
traffic-injury report. That’s up 0.5 percent from
2012, even though highway deaths involving
all types of vehicles fell 3.1 percent to 32,719.

Regulators said new federal standards requiring stability-control technology to prevent rollovers, and future rules that may require stronger underride guards on the backs of semi-trailer can help reverse the
trend. David Friedman, the Deputy Administra-
or of the National Highway Traffic Safety
Administration, told the media:

We do know tired truckers are a risk on
our roads. Any effort to reduce the
number of people who are tired or drowsy on the road can have an impact.

Interestingly, the report was issued just a
week after Congress suspended part of a set of
regulations intended to ensure truckers get
adequate rest. Lawmakers targeted a portion of
the rule closing a loophole that kept some
drivers from working 82 hours over eight days.
That provision won’t be enforced for at least a
year as regulators conduct research to see if
it had an unintended effect of forcing more
trucks onto the road during rush hours. Federal regulators will monitor whether the
new policy affects the fatality count. Transpor-
tation Secretary Anthony Foxx stated:

The hours-of-service rule is a critically
important rule. Critical pieces of it have
now been changed.

While the overall state of highway safety
may be improving, and hopefully it is, there
are too many deaths and serious injuries occurring each month. Besides the decline in
all kinds of traffic deaths in 2013, the year tied
an all-time record for the lowest fatality rate—
1.1 people were killed for every 100 million
vehicle-miles traveled.

More Than One In Five Fatal Crashes
Involve Drowsy Drivers

Lawyers in our firm who handle litigation
arising out of motor vehicle crashes know that
driver fatigue is a major problem. This is espe-
cially true with truck drivers. Research from
the AAA Foundation for Traffic Safety (AAA)
reveals that more than one in five (21 percent)
of fatal crashes involve driver fatigue. These
results seem to confirm what safety experts
have long suspected: the prevalence of drowsy
driving is much greater than official statistics
from the National Highway Traffic Safety
Administration (NHTSA) currently indicate.

As daylight saving time ends and evening
commutes darken, AAA has urged drivers to
recognize warning signs of driver fatigue and
take action to avoid tragedy. Peter Kissinger,
President and CEO of the AAA Foundation
for Traffic Safety, gave this timely warning:

This new research further confirms that
drowsy driving is a serious traffic safety
problem. Unfortunately, drivers often underestimate this risk and overesti-
mate their ability to combat drowsiness
behind the wheel.

The report also found that drowsy driving
causes, a mainstay in recent headlines, are not
without consequence. One third of crashes
involving a drowsy driver result in injuries and
more than 6,000 fatigue-related crashes each
year result in at least one fatality.

Previous research from the AAA Foundation
revealed that young adult drivers, ages 19-24,
are the most likely to admit to driving while
drowsy, with 33 percent reporting doing so in
the last month. In contrast, the oldest drivers
(ages 75+) and the youngest (ages 16-18) were
the least likely to report the same offense. Kiss-
ing said further:

Despite the fact that 95 percent of Amer-
icans deem it ‘unacceptable’ to drive
when they are so tired that they have a
hard time keeping their eyes open, more
than 28 percent admit to doing so in the
last month. Like other impairments,
driving while drowsy is not
without risk.

AAA urges drivers to understand the
warning signs of drowsy driving. These
warning signs are:

• The inability to recall the last few
miles traveled;
• Having disconnected or wander-
ing thoughts;
• Having difficulty focusing or keeping your
eyes open;
• Feeling as though your head is very heavy;
• Drifting out of your driving lane, perhaps
driving on the rumble strips;
• Yawning repeatedly;
• Accidentally tailgating other vehicles; and
• Missing traffic signs.

When faced with fatigue, AAA urges drivers
to find a safe place to pull over if experiencing
any of the drowsy driving symptoms. To remain alert and be safer behind the wheel,
AAA suggests:

• Get plenty of sleep (at least seven hours),
especially the night before a long drive;
• Drive at times when you are nor-
mally awake;
• Schedule a break every two hours or every
100 miles;
• Avoid heavy foods;
• Travel with an alert passenger and take
turns driving;
• Avoid medications that cause drowsiness or
other impairment; and
• Consult with a sleep specialist or other
medical professional if you have trouble
getting enough rest or are chroni-
cally fatigued.

The AAA Foundation for Traffic Safety’s
Prevalence of Motor Vehicle Crashes Involv-
ing Drowsy Drivers report is based on the
analysis of a representative sample of 14,268
crashes that occurred in years 2009-2013 in
which at least one vehicle was towed from the
scene. AAA highlighted the risks of drowsy
driving in support of the National Sleep Found-
ation’s Drowsy Driving Prevention Week®,
which was Nov. 2-9. For more information
about drowsy driving, visit the National Sleep
Foundation’s drowsy driving website at www.
DrowsyDriving.org.

Established by AAA in 1947, the AAA Foun-
dation for Traffic Safety is a 501(c) (3) not-for-
profit, publicly-supported charitable
educational and research organization. Dedi-
cated to saving lives and reducing injuries on
our roads, the Foundation’s mission is to
prevent crashes and save lives through research and education about traffic safety.
The Foundation has funded over 200 research
projects designed to discover the causes of
traffic crashes, prevent them, and minimize
injuries when they do occur. Visit www.aaafoun-
dation.org for more information on this
and other research.

As North America’s largest motoring and
leisure travel organization, AAA provides more
than 54 million members with travel, insur-
ance, financial and automotive-related ser-
dices. Since its founding in 1902, the
not-for-profit, fully tax-paying AAA has been a
leader and advocate for the safety and security
of all travelers. AAA clubs can be visited on the
Internet at AAA.com.

Battery Defect Said To Be The Likely Cause
Of Boeing 787 Fire

You will recall that we wrote a few months
back about a serious battery problem that

BeasleyAllen.com
involved Boeing airplanes. Federal investigators have now found that a short circuit likely due to a manufacturing defect in a Boeing 787 airliner battery caused a fire last year that grounded the planes for more than three months. The investigators also faulted the plane’s manufacturers and the Federal Aviation Administration (FAA) for designing and approving a battery design that didn’t protect against such a failure. An inspection of the GS Yuasa manufacturing plant in Japan where the battery was made found that flaws and debris in lithium-ion aircraft batteries were going undetected, according to the National Transportation Safety Board (NTSB) report. Investigators were able to rule out other possible causes of the short circuit such as overcharging, external heat, or improper installation, the report said.

Boeing failed to anticipate, when testing the battery’s design, that a short circuit in one of the its eight cells might lead to uncontrolled overheating known as thermal runaway, which would spread to the other cells and cause them to vent smoke-like vapors and catch fire, the report said. The Federal Aviation Administration was faulted for not catching the design deficiency when it approved the plane for flight. The January 2013 fire in one of two batteries installed aboard a Japan Airlines 787 parked at Boston’s Logan International Airport was followed nine days later by a smoking battery that forced an emergency landing in Japan by an All Nippon Airways 787. The incidents led the FAA and aviation authorities around the globe to ground the entire 787 fleet for more than three months while Boeing redesigned the airliner’s batteries, which run the plane’s auxiliary power systems. The events were a severe blow to Boeing’s prestige. The 787, a long-range, wide-bodied airliner introduced in 2011, was the company’s newest and most technologically advanced plane.

After the incidents, Boeing made extensive changes to the battery and its charger, including more heat insulation, holes to vent any flame or smoke outside of the plane, and lower charging levels. The case that contains the cells was also strengthened. Boeing has said the redesign, approved by the FAA, should prevent any overheating inside the battery and vent any smoke outside the plane. There was a third incident in January of this year when vapors were discovered coming out of a battery in a Japan Airlines 787 parked at Tokyo’s main international airport. Boeing officials said the problem appeared to have been contained by the battery’s redesign.

### THREE DEAD IN FLORIDA AFTER VEHICLE STIKES AND KILLS A BLACK BEAR

There was a tragic ending to a vehicle hitting and killing a black bear on a road in the Florida Everglades. Three people from another vehicle had stopped and were trying to help the woman whose car hit the bear. Those people were killed when they were hit by a third vehicle. Several others were injured in the three-vehicle accident. The woman was driving on a two-lane road just inside Everglades territory when her vehicle hit the bear. The incident occurred after sunset and it was dark at that time. Three people from a second vehicle got out and tried to help and all three were struck and killed by the third vehicle. According to an investigating officer the “events apparently unfolded quickly.”

While there are black bears throughout Florida, those animals aren’t supposed to be in the Everglades. It was believed that there were no black bears in that area, but obviously some are there. Thirteen people in total were riding in the three vehicles and four were injured severely enough that they had to be taken by helicopter to a South Florida hospital. Four others were taken by ambulances. Only two of the 13 weren’t hurt, including the woman in the initial crash with the bear. At least two of the vehicles were going in opposite directions. The incident was still under investigation at press time. The location is on the approximately 50,000-acre Big Cypress Seminole Reservation, one of several tribal reservations scattered about Florida.

Source: Insurance Journal

### DRONE USAGE LIKELY TO INCREASE IN ALABAMA

Unmanned drones may be a common sight in the skies over Alabama within the next few years, doing everything from scouting traffic accidents to delivering packages. Some agencies already use unmanned aircraft here. John McGraw, a former Federal Aviation Administration (FAA) official stated:

> I think in the next five years you’ll see these aircraft fully integrated in the airspace. I think they’ll have the ability to sense and avoid other (air) traffic. I think you’ll see that they’re part of everyday life.

Northport firefighters and Mobile police have put them to use, according to Homeland Security Deputy Director Shirrell Roberts. But he said other Alabama first responders have drones and are afraid to use them until they have clear policies and procedures in place. As we have reported, the FAA is expected to propose new rules very soon. Meanwhile, a task force of state leaders is trying to prepare for that new future by looking at ways to use drones.

Groups representing agriculture, education, law enforcement and more told the task force last month that they see a wealth of opportunities. They said drones could be used to help out on the farm, to monitor power lines, to map land and in many other ways. McGraw said the flying vehicles could examine the underside of bridges or dangerous areas of plants far more quickly and safely than a person could. They could fly package deliver-

**People** need to realize that there are two cameras on every cell phone. There are security cameras inside and outside of almost every building we’re in every day. You’re probably on camera most of the time. They really need to look at the bigger picture and realize that the cameras on an unmanned aircraft don’t change the situation that much, and that there are laws in place already to protect them.

Hopefully, there will be no serious safety problems caused by the use of drones. There must be a coordinated effort to make sure that safety is a top priority. I foresee some very serious problems as the use of drones increases.

### OKLAHOMA SENATOR’S FAMILY SUES PLANE MAKER OVER SON’S DEATH

The family of a U.S. senator whose son was killed in a plane crash is seeking damages in a lawsuit that alleges negligence against the aircraft’s manufacturers. The suit, filed in Tulsa County District Court, claims the 2013 crash that killed 51-year-old Perry Dyson Inhofe II was due to the failure of manufacturers to provide proper maintenance on the plane’s engine and its parts. Inhofe, a licensed pilot, was the son of Sen. Jim Inhofe. The suit names Honeywell International Inc., Standard Aero, Standard Aero (Alliance) Inc. and International Jet Service Corp. as Defendants. A National Transportation Safety Board report on the accident says the pilot didn’t “appropriately manage” the aircraft when one of its engines shut down. It will be interesting to see how this case develops as it proceeds through the system.

Source: The Tulsa World

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JereBeasleyReport.com
The U.S. Environmental Protection Agency will regulate coal ash as solid waste rather than the more strictly controlled hazardous waste. This is a big win for both the coal and the power industries. By choosing to regulate coal combustion residuals under Subtitle D of the Resource Conservation and Recovery Act, the EPA has put it to states to decide if they want to establish permit programs. The Subtitle D listing also means the EPA has no enforcement authority. States will have some enforcement authority and citizen suits can still be filed. The designation also does not establish extensive management requirements for coal ash destined for disposal as there would have been under a stricter hazardous waste listing.

Gina McCarthy, EPA Administrator, said the rule sets structural integrity requirements for both new and existing surface impoundments, and requires the installation of effective groundwater monitoring systems. It also restricts the location of new surface impoundments and landfills so they cannot be built in sensitive areas like wetlands, aquifers or earthquake zones, and new impoundments and landfills must also be designed with liners. The rule also requires the immediate cleanup of current contamination, as well as the closure of unlined surface impoundments that are already identified as polluting groundwater above health-based standards. In addition, facility operators must post detailed information online for public review.

Under the new rule, only impoundments at facilities that are actively producing electricity will be affected. If impoundments on those premises are found to violate standards, Ms. McCarthy said they will be closed down. Impoundments at inactive power generating stations are outside of the EPA's authority, said Mathy Stanislaus, the assistant administrator for the Office of Solid Waste and Emergency Response. The rule had been under construction since 2010. The EPA was under a court-ordered deadline to finish it by Dec. 19th. A federal judge in Washington, D.C., in May had approved an agreement between the EPA and environmentalists. As we have previously written, coal ash is produced when finely ground coal is burned to fuel electrical power plants and can be reused in wallboard, concrete, roofing materials and bricks, or as fill in sand and gravel pits.

The EPA said the product contains contaminants like mercury, cadmium and arsenic associated with cancer and various other serious health effects. And without proper protections, the contaminants can leach into groundwater and often migrate to drinking water sources, posing public significant health concerns. As you will recall, coal ash pollution received widespread attention in 2008 when a massive spill at the Tennessee Valley Authority’s Kingston Fossil Plant in Harriman, Tennessee, dumped more than 5 million cubic yards of toxic coal ash sludge into a nearby river. Former EPA Administrator Lisa P. Jackson called it “one of the largest and most serious environmental releases in our history.” That debacle has cost more than $1 billion to clean up. Our firm was heavily involved in litigation over the spill.

The EPA proposed regulations two years later, but never moved ahead with a final rule after receiving 450,000 public comments. Environmental groups sent the agency notice of intent to sue in January 2012 and mounted litigation three months later in an effort to force the agency’s hand. Currently, state environmental agencies are primarily responsible for regulating the beneficial use of coal ash. Coal ash that is being beneficially used is currently excluded from federal regulations. Under the RCRA, federal action could be taken if there were a finding of imminent or substantial endangerment in a specific circumstance.

Source: Claims Journal

What Lawyers Must Prove in Nursing Home Cases

Lawyers in our firm continue to receive numerous calls about allegations of abuse and neglect of residents in nursing homes. In evaluating the cases, the lawyers have to determine if there is truly abuse or neglect and, if so, whether our firm can prove a case in a court of law. While each state’s law varies slightly, in Alabama claims are required to comply with the Alabama Medical Liability Act (AML). The AML is written most favorably to health care providers. Quite often finding the right expert to testify about the duty and the violation of that duty is a difficult and can be a very costly undertaking.

According to the AML, our lawyers are required to prove “by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.” Code of Alabama § 6-5-548(a) (1975). In other words, it must be established that the nurse, certified nurse assistant, therapist or other health care provider breached a standard of care (or health care rule) that caused the injury or death to the nursing home resident.

In order to comply with this requirement under the AML, expert testimony must be presented through a “similarly situated health care provider,” which generally speaking is a health care person who works or worked in the same field of practice as the person who committed the wrongdoing for the year preceding the event. Locating and selecting experts in medical malpractice cases is a very difficult and costly undertaking. Our firm does not handle cases against directors or nurses, but we do take cases against nursing home owners and operators.

What typically must be shown by the patient or family members is that there was an order, standard, or guideline that was breached. For example, if there was an order written that the patient should only be transported from his or her bed to a wheelchair or to the bathroom with “two-person assist,” and only one person attempts to help the patient who falls, then the rule requiring two-persons to assist was violated. Typically, nursing expert testimony would be needed to confirm that this was the standard of care and that it was violated.

Once this is done, it must then be determined if the failure to provide the required level of care caused or significantly contributed to the injury or death. Stated differently, did the fall at the nursing home and the resulting injuries lead to the death of the patient? Sometimes, causation experts must be hired who can testify on the issue of whether the wrongful event caused the serious injury or death involved in the case.

Our lawyers have evaluated a number of potential claims where there may have been poor medical treatment, but they were unable to take the case because they didn’t believe that the level of care provided fell below the level of care required of other health care providers, or they don’t believe they could satisfy the heavy burden of proof. Bad outcomes do occur in medicine without there being a breach of the standard of medical care that might apply. On the other hand, our lawyers review and accept nursing home cases where they believe the standard of care has been breached and that the burden of proof can be satisfied. Our lawyers then pursue those cases vigorously. If you need more information on Nursing Home Litigation, contact Ben Locklar, a lawyer in our firm who handles these cases, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Nursing Home Liabilities Transfer Can Be Considered Fraudulent

The owners of a multistate chain of nursing homes may have committed fraud by transferring liabilities to a “shell company” that later lost more than $2 billion in jury verdicts to families who claimed relatives died of neglect. This was the stated opinion of a federal judge and an opinion the lawyers at Beasley Allen...
who handle nursing home cases agree with.

U.S. Bankruptcy Judge Michael Williamson in
Tampa, Fla., said last month that the owners of
Fundamental Long Term Care Holdings LLC
engaged in a “carefully orchestrated sham
transaction” by selling a Trans Healthcare Inc.
unit in 2006 to a retired graphic artist who
didn’t even know he bought the company.

Fundamental Long Term Care Inc. (FLTCH)
a Sparks, Md.-based company, kept the unen-
cumbered assets of Trans Healthcare, while
the other unit was saddled with the liabilities,
including judgments in Florida that have never
been paid over the deaths of four residents,
according to a complaint by the residents’ fam-
ilies and the bankruptcy trustee for the
company left holding the debts.

The transfer “bears all the hallmarks of
fraud,” Judge Williamson said. The other unit,
Trans Health Management Inc. (THMI) was
“stripped of all its assets,” he said. Judge Wil-
liamson said in his tentative ruling that FLTCH
and its affiliates have successor liability for
judgments against THMI. Judge Williamson
ordered FLTCH’s owners to mediation with the
Plaintiffs. He said his findings are tentative and
“can’t be used to establish liability.” He said he
wouldn’t issue final findings until after the
mediation. The individual lawsuits remain
stayed until Judge Williamson reaches a final
decision or they are resolved in mediation.

The Plaintiffs claimed that separating liabil-
ities from assets is a common practice in the
U.S. nursing home industry, used to insulate
owners from possible judgments. Also sued
were Trans Healthcare’s lenders, General Elec-
tric Capital Corp. and Ventas Inc., and its
former principal owner, private-equity firm
GTCR Golder Rauner LLC. It was alleged that
these defendants aided an effort to thwart
potential claims.

In the 2006 sale, FLTCH acquired all the
stock of two Trans Healthcare entities, THI of
Baltimore and THI of Nevada, keeping assets
such as real estate and more than 100 nursing
homes nationwide, according to the Plaintiffs.
In a separate, linked transaction, THI sold all
of its stock in THMI to Fundamental Long
Term Care Inc., whose sole owner was retired
graphic artist Barry Saacks, who at the time of
the sale was living in a basement, Judge Wil-
liamson said, quoting from an e-mail intro-
duced in the trial. Saacks said in sworn
testimonial for the lawsuit that he didn’t know
he owned the company and didn’t put up any
money for it. He said he had intended to buy
THI for its computer equipment.

GTCR principal Ned Jannotta conducted the
sale in good faith, trying to save the chain from
bankruptcy, Judge Williamson said. Jannotta
didn’t know of plans to sell part of the
company to Saacks, according to the judge.
GTCR lost more than $60 million on its invest-
ment in Trans Healthcare, he said, adding “It
was a financial disaster” for GTCR.

Source: Law360.com

XX.
An Update On
Class Action
Ligation

**Update On Beasley Allen’s Consumer Class
Action Litigation**

Lawyers in Beasley Allen’s Consumer Fraud
Section are actively engaged in numerous con-
sumer class action lawsuits throughout the
nation. Our firm has made a commitment to
pursue consumer class actions in order to help
those who are injured or wronged through no
fault of their own. Consumers are presently
the subject of national headlines on a regular
basis as certain corporations value profits over
the legal rights of consumers.

**General Motors Litigation**

A classic example of profits being placed
over safety is the present GM Ignition
Switch Defect multidistrict litigation
(MDL). Beasley Allen lawyers, Dee Miles,
Archie Grubb and Andrew Brasher,
lawyers in the Section, actively represent
consumers across the country who have
experienced economic harm due to GM’s
use of a defective ignition switch mecha-
nism in many of its vehicles. The MDL is
presently consolidated before the Souther-
ern District of New York.

Our lawyers are also engaged in the
recent lawsuits against airbag manufac-
turer Takata, Honda, and other auto man-
ufacturers for using Takata’s deadly
airbags in vehicles. These airbags have a
tendency to explode with excessive force
sending metallic shrapnel from the airbag
canister into the driver and passengers.
The Joint Panel on Multidistrict Litigation
will hear arguments regarding MDL con-
solidation in early 2015. Many experts are
expecting the litigation to be consoli-
dated in the Southern District of Florida.

**Blue Cross Litigation**

Dee Miles, Archie Grubb, Andrew Brash-
ier and Rebecca Gilliland, lawyers in the
Section, are litigating on behalf of health
care providers against the Blue Cross Blue
Shield Association and its members’ plans
for violating Federal anti-trust law and
other state law claims. This action is pres-
ently consolidated in an MDL before the
Northern District of Alabama.

**First Alert Smoke Detector Litigation**

Dee Miles, Archie Grubb, Lance Gould,
and Andrew Brasher have also filed a
consumer class action in California on
behalf of consumers who purchased
defective smoke detectors from First
Alert, Inc. and BRK Brands, Inc. This class
action seeks to protect consumers who
have unknowingly and unwittingly pur-
chased smoke detectors that failed to
detect, warn, and alert consumers to
smoldering-type fires.

**Force-Placed Insurance**

Dee Miles, Archie Grubb, and Andrew
Brasher also are litigating consumer class
actions against companies that force-
place insurance on mortgage properties.
Mortgage companies are regularly force-
placing insurance on homeowners’ mort-
gages in excess to the actual debt
remaining on the properties and with
kickbacks going to the force-placed insur-
ance companies. Our lawyers are pres-
ently litigating these cases in the Western
District of Kentucky and Northern Dis-
trict of Alabama.

**Target Data Breach**

The firm has also filed a class action on
behalf of financial institutions impacted
by the Target consumer data breach during
the Holiday 2013 shopping season. This litiga-
tion has been consolidated into an MDL in
the District of Minnesota.

**Home Depot Data Breach**

The firm has also filed a class action on
behalf of financial institutions impacted
by the larger Home Depot data breach
that recently occurred over the summer
and early fall 2014. Multiple class actions
have been filed against Home Depot and
are likely to be consolidated in an MDL.
Although consumers are typically com-
pensated for any fraudulent charges stem-
ming from a data breach and identity
theft, financial institutions do not have
similar protections and therefore have
pursued legal remedies against retailers
who fail to take seriously their duty to
protect consumers’ personally identifi-
able information and financial data.

**Fed-Ex Drivers**

Dee Miles and Larry Golston represent
Fed-Ex Ground drivers who are classified
by Fed-Ex as independent contractors but
treated as regular employees. This allows
Fed-Ex to avoid obligations it owes to
employees by signing them to contracts
that represent them as independent con-
tractors. This action is currently on
appeal to the Seventh Circuit.

**Corn Litigation**

Dee Miles, Roman Shaul, and Leslie Pescia
recently filed a class action against Syn-
genta Corporation’s upheaval of the corn
export market in China. Genetically mod-
ified traits were found in corn sold from
the United States to China, which resulted in Chinese officials rejecting shipments of United States corn. Farmers and grain handlers across the country have suffered significant economic losses as a result. An MDL has yet to be formed as of publication date, but a hearing was held on Dec. 4 in South Carolina by the Judicial Panel on Multidistrict Litigation (JPML).

Talcum Baby Powder

Dee Miles, Larry Gould, and Alison Hawthorne represent California consumers to recover economic damages as a result of Johnson and Johnson's fraudulent, unfair and deceptive marketing, labeling, and sales of its talcum baby powder. Johnson and Johnson intentionally concealed the fact that its baby powder contains talc, which is a carcinogen that can translocate and embed in the tissue of ovaries and cause ovarian cancer.

These class actions and others are currently being litigated by experienced class action lawyers at Beasley Allen. Those lawyers take pride in their work in representing consumers for various economic harms stemming from corporations who disregard the law and pursue making huge profits over their legal duty to protect Americans from harm. If you are aware of instances of American consumers being defrauded, harmed, or injured by way of economic loss that may give rise to a class action, feel free to contact a member of our firm’s Consumer Fraud Section, led by Section Head Dee Miles. Michelle Fulmer, a legal assistant serves as Section Head Administrator. Michelle can be contacted at 800-898-2034 or by email at Michelle.Fulmer@beasleyallen.com.

Retailers Receive a Wake-Up Call in Financial Institution's Class Action Lawsuit

District Judge Paul Magnuson, presiding over the Target data breach MDL, rejected Target’s attempt to have the class action filed by banks and credit unions dismissed earlier this month. A class of financial institutions have sued Target for reimbursement of the money they spent handling fraudulent charges and issuing new cards to their customers as a result of the data breach. These financial institutions are seeking millions of dollars in damages and are alleging negligence and violations of Minnesota’s consumer protection laws.

Judge Magnuson determined that Target had a “key role” in the data breach by its actions in disabling certain security features and its inaction in failing to be mindful of the warning signs available to it at the beginning of the attack. As a result, Judge Magnuson concluded that Target caused foreseeable harm to the Plaintiff financial institutions and that its actions worsened the harm. Judge Magnuson wrote:

Plaintiffs have plausibly alleged that Target’s actions and inactions—disabling certain security features and failing to heed the warning signs as the hackers’ attack began—caused foreseeable harm to plaintiffs. Plaintiffs have also plausibly alleged that Target’s conduct both caused and exacerbated the harm they suffered.

Target has admitted that at least 40 million credit cards were compromised and more than 100 million more people may have had their personal information stolen. This decision has clarified the legal relationship between merchants and financial institutions by Judge Magnuson’s decision that Target owed these institutions a duty to protect consumer information from hackers. This important decision could have positive consequences for other companies facing data breach cases, including Home Depot, Neiman Marcus, K-Mart, Dairy Queen, P.F. Chang’s, and other retailers.

The financial institutions have received a major hit from multiple data breaches since last holiday season, as they have worked to protect their customers and replace their compromised accounts. Judge Magnuson grounded his finding of Target’s duty in furtherance of Minnesota’s policy of protecting consumers’ credit and debit card information. The Plaintiffs include numerous banking institutions that are seeking class-action status on behalf of the banks and credit unions with customers who used their bank cards at Target between Nov. 1 and Dec. 19, 2013. The Plaintiffs include Umpqua Holdings Corp, Umpqua Bank in Roseburg, Oregon; Mutual Bank in Whitman, Massachusetts; Village Bank in St. Francis, Minnesota; CSE Federal Credit Union in Lake Charles, Louisiana; and First Federal Savings of Lorain in Lorain, Ohio. They are seeking class-action status on behalf of banks and credit unions with customers who used credit and debit cards at Target between Nov. 1 and Dec. 19, 2013. Consumers are also pursuing related class-action litigation over the breach, and Target has asked Judge Magnuson to dismiss that case. The case is the U.S. District Court, District of Minnesota. If you need more information on the Target litigation, contacted Dee Miles or Andrew Brasher at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Andrew.Brasher@beasleyallen.com.

Sources: Insurance Journal, Law 360 and Bloomberg

Seventh Circuit Sets New Rules for Reasonableness of Class Action Settlement

The Seventh Circuit Court of Appeals recently invalidated a nationwide settlement agreement covering six consumer fraud class actions (“Settlement Agreement”) brought against NBTY, Inc., Rexall Sundown, Inc., and Target Corporation (“Defendants”). See Pearson v. NBTY, Inc., No. 14-1198 (decided Nov. 19, 2014). Each case involved allegations that the Defendants’ deceptively marketed and sold glucosamine supplements, which are marketed as promoting joint health. The Defendants market, manufacture, and/or sell joint-health dietary supplements, including glucosamine. The Plaintiffs sued after they purchased the dietary supplements but did not experience any of the promised health benefits as represented on the packaging, seeking damages in the amount of the purchase price of the products.

On April 15, 2013, the parties executed the Settlement Agreement, which covered approximately 12 million class members and provided for a total fund of $20.2 million, only $2 million of which was guaranteed to be paid to class members; $4.5 million was guaranteed to class counsel for their fees. Theoretically, each class member could receive $3 for an undocumented purchase and $50 for a documented purchase. As is common in consumer class actions with individual relief of small value, however, the settlement resulted in a very low claim rate. As of the claims deadline, only 0.25 percent of the proposed settlement class returned claims, totaling $865,284.

When Plaintiffs’ moved for Final Approval, certain class members objected, arguing that the settlement agreement was not “fair, adequate and reasonable” within the meaning of Federal Rule of Civil Procedure 23(h) given that class members were receiving less than $1 million dollars, approximately 4 percent of the settlement fund, while class counsel was receiving $4.5 million. On Jan. 3, 2014, the District Court for the Northern District of Illinois approved the final settlement but reduced the attorneys’ fees to $1.9 million. The objectors then appealed to the Seventh Circuit.

During oral argument, the panel made clear that they had grave concerns about the $4.5 million in fees requested by Plaintiffs’ attorneys and whether there was collusion. Judge Posner commented that the settlement claim form and informational website were “extremely confusing” for a $3 refund on a product that averaged around $20 per bottle and suggested that the forms were clearly designed “to discourage people from applying.” Similarly, Judge Rovner questioned the propriety of making class members attest, under penalty of perjury, as to what month they bought a bottle of pills years after their purchase of the product.

As expected, on Nov. 19, 2014, the Seventh Circuit reversed the district court’s confirmation of the settlement, which it described as a “selfish deal between class counsel and the Defendants.” (Slip Op. at 18). Taking a brutal view of class settlement negotiations, the court explained how counsel for both sides often has an incentive to make the claim forms as burdensome as possible to minimize the claims rate. Like all Defendants, Rexall had “no reason to care about the allocation of its cost of settlement between class counsel and class members; all it cares about is a rational maximizer of its net worth is the bottom line—how much the settlement is likely to cost.” (Id. at
The court had previously certified a class of California consumers in the suit in December 2009, and several of its former executives were also charged in the conspiracy.

Thus far, the defendants have agreed to pay out more than $835 million in the MDL, with China Airlines Ltd. Agreeing to a $90 million settlement with the class in May. 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.

Source: Law360.com

JURY AWARDS $55 MILLION IN MORTGAGE LATE FEE SUIT AGAINST WELLS FARGO

A New York federal jury returned a $54.8 million verdict against Wells Fargo & Co. in a class action accusing mortgage companies previously owned by Wells Fargo’s Wachovia Corp. of charging borrowers with unlawful fees. The plaintiffs had sought $629 million in the suit. The jury verdict favored plaintiff Joseph Mazzei’s request for overcharges allegedly assessed by the Money Store or HomEq Servicing Corp. after borrowers’ loans were accelerated and paid off. However, the jury rejected Mr. Mazzei’s claim for amounts paid to non-party Fidelity National Default—which the Money Store and others allegedly employed to help with bankruptcies and foreclosures—from attorneys’ fees charged to borrowers.

In 1994, Mazzei took out a mortgage loan from the Money Store, issued pursuant to Fannie Mae form loan documents, on his home in Sacramento, California. After he fell behind on the loan five years later, he defaulted several times. In roughly March 2000, the Money Store and others accelerated Mazzei’s loan obligations and declared the full amount of the debt immediately due and payable, court filings said. He was then allegedly charged multiple late fees for his failure to make monthly payments. Mazzei later sold his home and made a payment of about $61,000 that allegedly included payment for all attorneys’ fees, late fees and other expenses that the defendants and who from March 1, imposed the agreed-upon rates and participated in subsequent meetings in the U.S. and other countries to enforce the price-fixing plans. Nippon agreed to a $45 million plea bargain to resolve the DOJ’s claims in early 2009, and several of its former executives were also charged in the conspiracy.

The autopilot will pay vehicle owners up to $800 each under a proposed settlement ending legal action involving Nissan North America Inc. The automaker will pay vehicle owners up to $800 each under a proposed settlement ending a class action alleging that the braking system in certain Nissan trucks and SUVs is prone to sudden failure. Under the settlement, current and former owners of approximately 350,000 2004-2008 Nissan Titans, Armadas and Infiniti QX56 vehicles across the country will be able to file claims seeking reimbursement for out-of-pocket expenses they incurred to repair or replace a defective delta brake sensor, which is a component of the faulty braking system.

Nissan will offer redress starting at $20 for owners of vehicles that had more than 120,000 miles at the time of the repair, and up to $800 for vehicles that had less than 48,000 miles at the time of repair. The settlement addresses the safety defect that was alleged in this lawsuit and it provides a method for reimbursement of the cost of repairing or replacing the parts that have failed.

The Plaintiffs asked the court to certify a nationwide proposed class of consumers who owned or formerly owned the affected vehicles and were forced to replace the faulty sensor. Those Plaintiffs with personal injury claims relating to the affected vehicles are excluded from the class.

The court had previously certified a class of California consumers in the suit in December 2013, and the class now proposed is an expansion of that class. The instant suit incorporates a related class action filed by Tom West, now a class representative in this suit, in Miller County, Ark., in 2011. The agreement was the result of three mediation sessions and months of “dedicated” negotiations.

Notice is to be distributed to the class by way of direct mail and to addresses obtained through Nissan or public records utilizing vehicle identification numbers. Class members will be directed to a website and a toll-free number maintained by the settlement administrator that will provide information concerning the settlement, including, if requested, a copy of the long form notice. Originally filed in April 2011, the complaint alleged that the affected vehicles posed a serious safety threat to consumers because the delta brake sensor, an electronic component of the affected vehicles that controls critical safety aspects of braking, was prone to failure.

The defect caused drivers to be suddenly unable to stop their vehicles within a reasonably safe time and distance, or at all, according to the suit. Furthermore, the complaint said, the automaker knew about the defect but hid it from consumers “to [Nissan’s] significant financial gain.” The case is in the U.S. District Court for the Northern District of California.

Source: Law360.com

NIPPON SETTLES CLASS ACTION LAWSUIT OVER FAULTY BRAKES

A settlement has been reached in a class action involving Nissan North America Inc. The automaker will pay vehicle owners up to $800 each under a proposed settlement ending a class action alleging that the braking system in certain Nissan trucks and SUVs is prone to sudden failure. Under the settlement, current and former owners of approximately 350,000 2004-2008 Nissan Titans, Armadas and Infiniti QX56 vehicles across the country will be able to file claims seeking reimbursement for out-of-pocket expenses they incurred to repair or replace a defective delta brake sensor, which is a component of the faulty braking system.

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Source: www.lexology.com

Nissan paid $36.55 million to resolve a long-running putative class action claiming the carrier conspired with other airlines to hike air cargo rates during much of the 2000s. The plaintiffs reported the settlement to a Brooklyn federal court last month. The plaintiffs, entities that bought air cargo services from a host of airlines in the early 2000s, have moved for preliminary approval of the settlement. The settlement includes a $36.35 million settlement fund, plus another $200,000 for notice and administration costs. The settlement terms also require Nippon to cooperate with the plaintiffs by providing witnesses, documents and meetings with lawyers, as the plaintiffs continue to pursue their case against the other airlines.

After years of early negotiations proved fruitless, Nippon and the plaintiffs resumed talks near the end of January. At the time, the plaintiffs sought data to back up Nippon’s claim that it was in “extremely poor” financial condition. The plaintiffs’ own financial consultant eventually agreed that Nippon was “effectively insolvent absent support from a parent company.” Following further negotiations, the two sides reached an initial agreement in September, leading to the current settlement.

The multidistrict litigation dates to 2006, when consumers brought more than 90 lawsuits against more than two dozen airlines under the U.S. Department of Justice 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. The airlines and former executives then imposed the agreed-upon rates and participated in subsequent meetings in the U.S. and other countries to enforce the price-fixing plots. Nippon agreed to a $45 million plea bargain to resolve the DOJ’s claims in early 2009, and several of its former executives were also charged in the conspiracy.

Thus far, the defendants have agreed to pay out more than $835 million in the MDL, with China Airlines Ltd. Agreeing to a $90 million settlement with the class in May. 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.

Source: Law360.com

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In 1994, Mazzei took out a mortgage loan from the Money Store, issued pursuant to Fannie Mae form loan documents, on his home in Sacramento, California. After he fell behind on the loan five years later, he defaulted several times. In roughly March 2000, the Money Store and others accelerated Mazzei’s loan obligations and declared the full amount of the debt immediately due and payable, court filings said. He was then allegedly charged multiple late fees for his failure to make monthly payments. Mazzei later sold his home and made a payment of about $61,000 that allegedly included payment for all attorneys’ fees, late fees and other expenses that the defendants claimed they had incurred as a result of Mazzei’s defaults.

In his complaint, Mazzei alleged breach of contract—and violations of the Truth in Lending Act and California Business & Professional Code—in connection with the defendants’ allegedly improper debt collection practices. A judge had previously dismissed his claims under the Fair Debt Collection Practices Act and the Real Estate Settlement Procedures Act.

U.S. District Judge John G. Koeltl certified the classes in January 2013. They include borrowers who signed on loans owned or serviced by the defendants and who from March 1,
2000, to June 2, 2014, were charged unlawful fees. However, they don’t include borrowers who signed form loan mortgage agreements after Nov. 1, 2006.

Source: Law360.com

$95 Million Settlement In Morgan Stanley MBS Suit Gets Court Approval

A New York federal judge signed off last month on a proposed $95 million agreement to settle and end a putative class action alleging Morgan Stanley & Co. misled institutional investors about shoddy subprime mortgage-backed securities. U.S. District Judge Katherine B. Forrest approved the settlement—tentatively put before the court in September—after noting that none of the 6,700 members of the potential class, led by a group of pension funds, had objected to the proposed allocation plan. She wrote:

The court hereby finds and concludes that the plan of allocation is, in all respects, fair and reasonable to the settlement class. Accordingly, the court hereby approves the plan of allocation proposed by the plaintiffs.

The suit arose from a complaint originally filed by MissPERS in December 2008 and consolidated in July 2009 with a similar suit filed by the West Virginia Investment Management Board, alleging securities fraud over the marketing and sale of various offerings of MBS pass-through certificates issued by Morgan Stanley Dean Witter Capital I Inc. and several Morgan Stanley mortgage loan trusts.

The pension funds accused the Morgan Stanley units of making misleading statements about lax underwriting standards regarding the creditworthiness of the mortgages underpinning the relevant MBS—purportedly poor subprime loans—and failing to warn investors of the potential risk involved in holding those certificates. A range of claims were tossed from the suit in August 2010, and the case was dismissed without prejudice in September 2011.

Then-presiding judge U.S. District Judge Laura Taylor Swain subsequently denied a motion in July 2012 bid by Morgan Stanley to dismiss the plaintiffs’ amended complaint. But in May the judge again trimmed the suit, dismissing several claims as time-barred, in the wake of a relevant Second Circuit ruling in June 2013. The parties then reached an in-principle agreement to settle in July.

The settlement applies to investors who acquired the relevant 2006 MBS certificates at issue before Dec. 2, 2008, or who acquired 2007 MBS certificates before May 7, 2009, and were damaged by those acquisitions.

Source: Law360.com

XXI.
THE CONSUMER CORNER

CONSUMER ADVOCATE ADLER GIVEN ANOTHER TERM AS HEAD OF CPSC COMMISSION

Robert Adler has been confirmed by U.S. Senate for a second term as a commissioner of the U.S. Consumer Product Safety Commission (CPSC). The Senate gave its stamp of approval to the Obama nominee on Dec. 2. Fifty-three senators voted for Adler’s renomination while 44 senators voted against him. Some industry insiders said the former consumer advocate was pushing hard to alter a Consumer Product Safety Act statute that governs the disclosure of product information. The detractors said the change is substantial but Adler and Commissioner Marietta Robinson have fought back against the accusation.

Adler’s nomination was approved by the Senate Committee on Commerce, Science and Transportation this summer along with a couple of other CPSC nominees who were earlier interrogated by the committee on the agency’s priorities. Those nominees, Democrat-backed Elliot Kaye and Republican-backed Joseph Mohorovic, were given the go-ahead by the Senate in July, but not before the Senate committee, led by Sens. Claire McCaskill, D-Mo., Kelly Ayotte, R-N.H., and Amy Klobuchar, D-Minn. called the now-acting chairman and commissioner in for questioning.

Concerns were expressed during that hearing that the agency would fall into partisan squabbling and wasn’t doing enough to prioritize a number of issues ranging from off-highway vehicles (OHVs) to third-party testing standards. The hearing drew out a promise by then-CPSC executive director Kaye to focus on creating new safety standards for OHVs, saying that the agency’s staff was working on it and was hoping to propose a solution by the end of the fiscal year. “Some rules will take longer,” he noted.

President Obama renominated Adler for a second term in June, setting up an unusually long tenure for a commissioner that the industry has increasingly viewed as a foe amid a number of Plaintiff-friendly initiatives he has endorsed. Adler, who began serving as commissioner in August 2009, has been a staunch defender of the agency’s more aggressive policies toward regulating product makers, including a controversial proposal to relax restrictions on its ability to publish product information without first notifying manufacturers. His current term was set to expire in October this year.

Source: Law360.com

ARBITRATION DENIED AGAIN IN CLASS ACTION AGAINST CAR DEALER

A Florida appeals court last month affirmed a lower court’s determination that a putative class action brought against a car dealership is not subject to arbitration. The court said that a sales contract superseded a retail purchasing agreement with an arbitration clause that had been previously signed. The per curiam opinion from the First District denied a motion for rehearing and certification from appellant HHH Motors LLP, which does business as Hyundai of Orange Park.

Customers Jenny Lee Holt and Christopher P. Holt filed the class action alleging violations of Florida’s Deceptive and Unfair Trade Practice Act in regard to electronic titling/registration filing fees charged by HHH Motors. HHH Motors moved to compel arbitration based on a provision in the retail purchase agreement signed in 2010 for the Holts’ purchase of a 2007 Dodge Ram truck. The trial court denied the motion, concluding that a retail installment sales contract containing a merger clause and signed immediately after the purchase agreement constituted the formation of a new contract.

The court ruled that the installment contract to finance the purchase and that lacked an arbitration clause, superseded the purchase agreement. The court’s opinion said “And because the [financing contract] appeared facially complete, no parol evidence could be considered to address alleged ambiguities.”

Public Justice Executive Director Paul Bland, who argued the Plaintiffs’ case, said the ruling correctly held that there must be an agreement between the parties to submit to arbitration and that the court, not an arbitrator, must make that determination. Paul told Law360 in an interview:

The car dealer here wants to skip over these basic protections—they want to jump right into forcing people into arbitration whether there is an agreement or not.”

HHH Motors argued that it met all of the elements needed to compel arbitration, holding that its right to arbitration vested when the purchase agreement was signed and was not affected by any subsequent pacts. As in the trial court’s decision, however, the appeals panel points to language in the financing agreement that said, “[B]y signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract.” The panel agreed with the trial court’s conclusion that the financing agreement and its merger clause was “sufficiently unequivocal” to negate the purchase agreement’s arbitration clause. HHH Motors is being held to the language of its own concurrently signed documents. The First District’s opinion said: “If it intended for credit buyers to be subject to the arbitration clause, then it could have said so in the financing agreement, but did not.”
The appeals panel did not dispute HHH Motors’ argument that two or more documents executed concurrently by the same parties in the same transaction should be read and construed together, but it said there was no dispute that the financing agreement was signed second and found no legal error in the trial court’s conclusions.

The First District also rejected HHH Motors’ argument in its motion for rehearing that its ruling conflicts with the Fourth District’s decision in Morse Operations Inc. v. Sonar Radio Corp., noting that the financing agreement in that case did not feature a merger clause. The appeals panel said:

*The absence of a merger clause justified a different result, there being no support in the record for the trial court’s conclusion that the financing agreement superseded the underlying contract for this transaction.*

Seeing no conflict, the First District declined to certify the matter as a question of great public importance, but said it was providing its opinion to explain its reasoning for potential future use in that area of the law. The Plaintiffs are represented by William C. Bielecky, Deanna L. Blair of Jacksonville Area Legal Aid, Paul Bland of Public Justice and Brian W. Warwick of Varnell & Warwick PA. The case is in the First District Court of Appeal of Florida.

Source: Law360.com

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**NEW STUDY RAISES CONCERNS ABOUT BPA-LINED CONTAINERS**

It might be easy to dismiss the latest study about spiking one’s blood pressure by drinking soy milk from cans lined with bisphenol A (more commonly known as BPA). After all, serious hypertension is more likely to occur from the sodium contained in whatever food or beverage is in the can. But the new Korean soy milk study, involving taking the blood pressure of a relatively small number of women divided into groups—with one drinking soy milk from cans with BPA and the other from glass bottles—has become a “media hit” in the U.S.

The U.S. Food and Drug Administration (FDA) released its 2014 safety assessment for BPA. The FDA continues to approve BPA for use in food packaging. The FDA looked at approximately 300 studies involving BPA that were conducted from November 2009 to May 2013. The agency concluded that BPA is safe at current levels of exposure from food contact uses in cans and plastic bottles. FDA’s Center for Food Safety and Applied Nutrition (CFSAN) conducted the safety assessment.

Two years ago, FDA did ban the use of BPA in baby bottles and sippy cups used by small children. Canada banned the substance from children’s products in 2010 after declaring that it is toxic. The FDA’s action was good news for the North American Metal Packaging Alliance Inc. (NAMPA), which represents the nation’s canning industry. The FDA has cleared the way for continued use of BPA. Dr. John M. Rost, who chairs NAMPA stated:

*The comprehensive review by FDA scientists should dispel any concerns regarding the safe use of BPA epoxy resins in canned food. Agency researchers could not have been more clear or definitive in their conclusion that an adequate margin of safety exists for BPA.*

The Korean study is the first to suggest that BPA can quickly raise one’s blood pressure. Researchers in Seoul tested urine and blood pressure levels shortly after two groups of women drank soy milk, one group from glass bottles and the other from cans with BPA linings. Published in *Hypertension,* a journal of the American Heart Association, the Korean study raises questions about whether folks with high blood pressure should avoid plastic containers and cans altogether because the women who drank soy milk from the cans experienced blood-pressure spikes and BPA was found in their urine. BPA linings in food containers have been used since the 1960s.

Source: Food Safety News

**CHILDREN MAY HAVE DANGEROUS TOYS**

Children who received toys at Christmas could have some that are dangerous and create hazards. Could your child’s favorite toy be hazardous to his health? The U.S. Public Interest Research Group (PIRG) found that despite recent progress in consumer product safety standards, there were hazardous toys on the shelves, which may have found their way under somebody’s Christmas tree. The findings were published in the organization’s 29th annual *Trouble in Toyland* report.

U.S. PIRG looks for potential safety hazards in several areas, such as the presence of toxic chemicals like lead, phthalates and chromium; small toys that pose a choking hazard; toys that are too loud and thereby pose a risk to a child’s hearing; and powerful toy magnets that can be accidentally ingested, causing serious injury or even death. The *Trouble in Toyland* report has led to more than 150 product recalls and other regulatory actions, and has helped educate the public and policymakers about the need for continued action to protect the health and wellbeing of children.

Progress has been made in recent years to protect consumers, particularly children, from hazardous products. The 2008 Consumer Product Safety Improvement Act was created and implemented by the Consumer Product Safety Commission (CPSC), giving the agency new authority to protect children from unsafe products. The Act established mandatory toy standards, lowered acceptable levels of potentially toxic chemicals, implemented independent third-party testing of toys and other children’s products, and increased port inspection to prevent dangerous toys from coming into the U.S. from other countries. Additionally, in September the CPSC banned small, powerful toy magnets that posed a particular hazard if accidentally swallowed.

Rachel Weintraub, legislative director and general counsel for the Consumer Federation of America (CFA), had this to say:

*Parents and all consumer should have more confidence in the products they may own or consider purchasing, but should also continue to carefully research and select the safest and most appropriate products for the children on their gift lists. Manufacturers should ensure they comply with the law and continued CPSC enforcement and adequate funding is necessary to further protect our nation’s children.*

Despite these assurances, each year PIRG discovers there are dangerous toys and children’s products that slip through the regulatory process. U.S. PIRG Public Health Campaign Director Sujatha Jahagirdar told the *Claims Journal* that “Not all toys comply with the law, and holes in the toy safety net remain. He added “We should be able to trust that the toys are safe. However, until that’s the case, parents need to watch out for common hazards when shopping for toys.”

Parents and caregivers can still play an active role in inspecting toys their children may have received as a gift. Key information is available at the CPSC website, www.saferproducts.gov. Parents can find information there about toy recalls or warnings. Additionally, U.S. PIRG and CFA encourage parents and caregivers to report any problems with an unsafe toy or other children’s product to the CPSC as well, which will help identify a potential problem and inform other consumers of a possible risk. In the future, U.S. PIRG recommended before Christmas that consumers should only shop at stores that have a publicly available corporate policy on toxins in their products, and should use caution when purchasing toys online or at big box or discount stores, where regulations may be lax.

A list of unsafe toys identified by the 2014 *Trouble in Toyland* report, along with tips for safer toy shopping, can be found at www.ToySafetyTips.org. I suggest that all parents who have small children check this site to make sure no unsafe toys are in their homes.

Sources: *Claims Journal* and U.S. PIRG

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**XXII. 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 December. If more information is needed on any of the recalls, readers are encouraged to contact Shanna Malone, the Executive Editor
of the Report. We would also like to know if we have missed any safety recalls that should have been included in this issue.

**TOYOTA RECALLING MINIVANS FOR FAULTY OVERHEAD ASSIST GRIPS**

Toyo has recalled about 30,000 Sienna Minivans worldwide, saying the 2015 models’ overhead assist grips can detach when an air bag deploys. The automaker says that the grips, which are mounted to the minivans’ roof rails, could detach from the mounting bracket under some conditions, potentially injuring passengers. Toyota says it’s not aware of any injuries or fatalities caused by the problem. Dealers will modify the headliner under the second row overhead assist grips at no cost to owners. Separately, Toyota says it has also modified some of its Open Country Tuff Duty and Nitto Dura Grappler tires due to potential tread separation. Toyota knows of two crashes involving the malfunction. The free recall involves about 175,310 SUV and van tires.

**GM RECALLS VEHICLES FOR HEADLIGHT PROBLEM**

General Motors (GM) has recalled 316,357 vehicles in North America because their headlights could stop working. The recall affects the Buick LaCrosse sedan and the Chevrolet Trailblazer, GMC Envoy, Buick Rainier, Saab 9-7X and Isuzu Ascender S.U.V. All of the vehicles are from the 2006 through 2009 model years. GM said the low-beam headlights or daytime running lamps could intermittently or permanently stop working. The issue does not affect the high-beam headlights, fog lamps or turn signals. The recall is GM’s 79th in North America this year. The automaker recalled a record 30.4 million cars and trucks.

**HONDA ADDS 2.6 MILLION CARS TO AIRBAG REPAIR LIST**


**AUTOMAKERS RECALL MORE CARS WITH TAKATA AIR BAGS**

BMW of North America LLC and Fiat Chrysler Automobiles last month became the latest automakers to expand their recalls of vehicles equipped with defective Takata Corp. driver’s side air bags. The German automaker is recalling an additional 140,000 model year 2004-2006 3 Series vehicles, while Fiat Chrysler said that it will replace driver’s side air bag inflators in 3.5 million more older-model vehicles worldwide. Ford Motor Co. also added approximately 540,000 vehicles to its recall. Fiat Chrysler had originally only recalled vehicles in Florida, Hawaii, Puerto Rico and the U.S. Virgin Islands because of their high humidity levels, but the expansion includes an additional 2.8 million vehicles in the U.S., nearly 260,000 in Canada, 66,000 in Mexico and almost 100,000 in other regions. The recall includes certain 2004-2007 Dodge Ram pickups and cabs, Dodge Durangos, Chrysler 300s and more.


Mazda Motor Corp. has also expanded its recall in the U.S. to the entire country. This would make the total recalls number 350,000 vehicles.

Nissan Motor Corp. expanded its recall to include some of its Pathfinder and Sentra models. And on Dec. 5, Honda Motor Co. announced it was expanding its recall of the allegedly defective air bag nation-wide, doubling the number of impacted vehicles to more than 6 million.

**FIRE TRUCK MAKER ISSUES RECALL ON AERIAL LADDERS TRUCKS**

Firetruck-maker Sutphen has issued a recall to fix a problem with its aerial ladders. The firetrucks are being recalled because a cable failure could cause the ladder to collapse in use, “increasing the risk of injury to a user,” according to NHTSA. The recall began in November and covers trucks from the 2000 to 2014 model years. Sutphen is notifying the owners and dealers of its trucks, and will inspect and repair or replace the ladders free of charge. NHTSA said in August that two ladders fell after an earlier recall in May of last year.

**TOYO TIRES AND NITTO BRAND LIGHT TRUCK TIRES RECALLED**

Toyo Tire Holdings of Americas Inc. has recalled approximately 175,000 Toyo Tires® and Nitto® brand tires intended for light trucks, SUVs and vans including those used in commercial applications. The recall covers select Toyo® Open Country® H/T with Tuff Duty tires manufactured between November 2008 and June 2013, and select Nitto® Dura Grappler® Highway Terrain tires manufactured between May 2007 and April 2012. It was reported that in a small number of these recalled tires, production variances in the belt package during the relevant production periods may have created conditions that may put undue stress on the belt edge. If undetected, this condition may potentially contribute to a tread/belt separation and/or loss of inflation pressure, which may increase the risk of tire failure and a vehicle crash. The recalled tires were manufactured at the plant in Sendai, Japan (CX) and in Kawanana, Japan (N3) and can be identified by examining the sidewall stamping for the Brand, Model, Size, the “Made in Japan” mark, and the Tire Identification Number (“TIN”), which includes the plant code (i.e., immediately following the “DOT” mark), and the manufacture date (i.e., last 4 digits of the TIN). Owners of affected tires should return to their tire dealer as soon as possible for free replacement tires.

Additional information, including a list of authorized dealers and how to read a tire sidewall, can be found on the respective tire brand websites: toyotires.com/recall-campaign and nittotire.com/dura-grappler-recall/. Assistance is also available by phone: Toyo Tire U.S.A. Corp.: 800-442-8696 (6:30 a.m. to 5 p.m. PST) and Nitto Tire U.S.A. Inc.: 888-529-8200 (8 a.m. to 5 p.m. PST).

**FELT BICYCLES RECALS CYCLOCROSS BICYCLES DUE TO RISK OF INJURY**

About 150 Felt Cyclocross Bicycles have been recalled by the distributor Felt Bicycles, of Irvine, Calif. The frame of the bicycle could break, causing the rider to lose control, fall and suffer injuries. This recall includes Felt Cyclocross bicycles 2015 models F65X and F85X. The 2015 F65X bicycle has a satin black aluminum frame with “Felt” printed in white letters and a diagonal wide white stripe next to a thin white stripe on the frame. The 2015 F85X bicycle has a dark red berry colored aluminum frame with diagonal stripes in black, mint green and yellow on the frame. The Felt logo is printed on the bike frame and the model number is printed on the chainstay of the bicycle frame.
The bicycles were sold by Bicycle specialty stores nationwide from June 2014 through September 2014 for between $1,200 and $1,500. Consumers should immediately stop using the recalled bicycles and contact their local Felt Bicycles dealer for a free inspection and frame replacement. Contact Felt Bicycles toll-free at 866-433-5887 from 8 a.m. to 5 p.m. PT Monday through Friday or online at www.feltcycling.com and click on “News” for more information.

**SALSA CYCLES RECALLS BICYCLE FORKS DUE TO RISK OF FALL HAZARD**

About 2,500 Salsa Bearpaw Bicycle Forks have been recalled by Salsa Cycles, a wholly owned brand of Quality Bicycle Products Inc., of Bloomington, Minn. The bicycle fork can bend or break, posing a fall hazard to the rider. This recall involves all aluminum Salsa Bearpaw forks sold separately and on Mukluk bicycles. The forks have date code 20130710 or 20130826 stamped on the fork steerer, followed by “CW12210BAN2” and a Salsa compass graphic on the bend of the fork blades. Consumers or the dealer will need to disassemble the front of the bicycle to access the steerer tube with the date code and model information. The forks were sold in “tequila lime” with black paint, “metallic gold,” red and black. The bikes were sold in sizes x-small, small, medium, large and x-large.

The bicycles were sold at bicycle stores nationwide and online at various websites from September 2013 through November 2014 for about $250 separately and for between $1,850 and $4,400 for the bicycles. Consumers should immediately stop using bicycles equipped with the recalled Salsa Bearpaw forks and contact a Salsa dealer for a free inspection and replacement fork. Contact Salsa Cycles toll-free at 877-777-6208 from 8 a.m. to 6 p.m. CT Monday through Friday, or online at www.salsacycles.com and click on the “Fork Recall” button for more information.

**BICYCLE HELMETS RECALLED BY UVEX SPORTS DUE TO RISK OF HEAD INJURY**

Uvex Sports GmbH & Co. KG, Germany, has recalled about 46,800 UVEX Bicycle Helmets. The anchor for the helmet’s chinstrap can fail, causing the helmet to slide off the head, posing a head injury hazard. The bicycle helmets also do not comply with the impact requirements of the CPSC safety standards for bicycle helmets. This recall involves seven models of UVEX helmets. The helmets come in a variety of colors with different colored chin straps. The helmets have a model number inside the helmet under the fitting pad on the top right side. The affected helmet model numbers are XB017, XB022, XB025, XB027, XB032, XB036 and XB038.

The helmets were sold at sporting goods and bicycle specialty stores nationwide from September 2009 through June 2014 for about $100 to $260. Consumers should stop using the helmets and contact Uvex for a free compliant helmet or a refund of the purchase price. Contact Uvex Sports Inc. toll-free at 844-767-0656 from 9:30 a.m. to 6:30 p.m. ET Monday through Friday, or online at www.uvex-sports.us and click on “Recall” for more information.

**DAIKIN RECALL AIR PURIFIERS DUE TO FIRE HAZARD**

Daikin Industries Ltd., of Japan, has recalled their Daikin™ Streamer air purifiers. This includes about 625 in the United States and 125 in Canada. The air purifier’s circuit board can overheat and cause the air purifier to catch on fire. This recall involves Daikin™ brand streamer portable air purifiers with model number MC75SKU. The air purifiers are portable and are designed to remove dust, particles and allergens from indoor air in the home or office. They are cream-colored and measure about 25 inches tall by 15 inches wide by 8 inches deep. “Daikin” is printed on the front of the units. The model number is located on a rating plate on the lower right side of the units.

The air purifiers were sold by Goodman Manufacturing and other HVAC contractors to consumers and online at Amazon.com from December 2010 through October 2014 for about $540. Consumers should immediately unplug the recalled air purifiers and contact Daikin™ for a full refund or a free replacement air purifier. Contact: Daikin™ toll-free at 888-624-1908 from 9 a.m. to 5 p.m. ET Monday through Friday, or online at www.daikin.com and click on “Important Safety Recall of Daikin Air Purifiers” for more information.

**LENOVO RECALLS COMPUTER POWER CORDS**

Lenovo Inc., of Morrisville, N.C., has recalled its AC power cords. This includes about 500,000 in the U.S. and 44,000 in Canada. The AC power cord can overheat, posing fire and burn hazards. This recall involves Lenovo’s LS-15 AC power cord manufactured from February 2011 to December 2011. The power cords were distributed with IdeaPad brand B-, G-, S-, U-, V- and Z-series laptop computers and Lenovo brand B-, G- and V-series laptop computers. The recalled power cords are black in color and have the “LS-15” molded mark on the AC adapter end. The manufacture date code in the format REV: 00 YYMM is on a label attached to the cord. None reported in the U.S. or Canada. Lenovo has received reports from outside the U.S. of 15 incidents involving overheating, sparking, melting and burning. No injuries were reported.

The power cords were sold at Laptop computers with the AC power cords were sold at computer and electronics stores, authorized dealers and online at www.lenovo.com from February 2011 through June 2012 for between $350 and $1,500. Consumers should immediately unplug and stop using the recalled power cords and contact Lenovo for a free replacement. Consumers can continue to use the computer on battery power. Contact Lenovo at 800-426-7578 from 9 a.m. to 5 p.m. ET Monday through Friday; or online at www.lenovo.com and click on Support at the top of the page, then select News and Alerts, then click on Recalls for more information.

**HORIZON HOBBY RECALLS HOBBYZONE SUPER CUB S RADIO-CONTROLLED AIRCRAFT**

Horizon Hobby LLC, of Champaign, Ill, has recalled about 6,800 units of HobbyZone Super Cub S Ready-To-Fly and Super Cub S Bind-N-Fly Power Supply and Charger. Power supply units and chargers sold with the model aircraft can overcharge the battery, posing a risk of fire and property damage. This recall involves the power supply and charger included exclusively with the HobbyZone Super Cub S Ready-To-Fly aircraft, model number HBZ8100 and the HobbyZone Super Cub S Bind-N-Fly model number HBZ8180. Aircraft model numbers are located on the packaging. The power supply is 2 ½ inches by 1 ¾ inches by 1 ¼ inches and is black with a blue label that reads “HobbyZone” and model “HBZ1004.” The DC auxiliary charger is 5 inches by 2 ½ inches by 1 ½ inches and is black with a blue label that reads, “HobbyZone” and model “HBZ1003.” The company has received 18 reports incidents involving the power supply units and chargers including reports of small fires, exploding batteries and property damage to the surrounding areas.

The chargers were sold exclusively at Hobby stores nationwide and online at HorizonHobby.com from April 2014 through August 2014 for $170 for the Bind-N-Fly and $200 for the Ready-to-Fly. Consumers should stop using the power supply and chargers immediately and contact Horizon Hobby for a replacement AC charger. Contact Horizon Hobby toll-free at 877-504-0253 from 8 a.m. to 7 p.m. CT Monday through Friday, 8 a.m. to 5 p.m.
About 10,000 Dream On Me Play Yards have been recalled by Dream On Me, of South Plainfield, N.J. The play yard’s rails can collapse, presenting a strangulation hazard to young children. The recall includes Dream On Me Incredible two-level deluxe adjustable height play yards with model number starting with 436A, 436B, 436G, 436O, 436P and 436R. The play yards, made with a steel, powder-coated frame base with rolling, hooded casters, have a fabric and mesh covering that comes in a variety of colors. The play yard includes a changing top, a toy bar for soft toys for entertainment, a side pocket for storage and a carrying case. “Dream On Me” is printed on the bottom left-hand side outside of the product. The model number is printed on a label attached to the play yard’s mattress. The play yard can be folded for storage.

The play yards were sold online at Amazon, Kohls, Toys R Us, Walmart, Wayfair and other online retailers from March 2010 through January 2014 for about $60. Consumers should immediately stop using the recalled play yards and contact Dream On Me to receive a free repair kit. Contact Dream On Me toll-free at 877-201-4317 from 9 a.m. to 5 p.m. ET Monday through Thursday and 8 a.m. to 4 p.m. Friday or online at www.dreamonme.com and click on the Recalls tab for more information.

**WEGMANS FOOD MARKETS RECALLS MOODY FACE STRESS BALLS**

About 7,000 Gift Gallery Moody Face Stress Balls have been recalled by Gift Craft, of Williamsville, N.Y. These rubber stress balls can break into pieces when squeezed, posing a choking hazard to young children. The Gift Gallery Moody Face Stress Balls are solid rubber balls that you can squeeze in your hand. These stress balls were sold in five colors: blue, green, orange, red and yellow and have yellow yarn hair on top. The balls were printed on the front with pink, orange or green, orange, red and yellow and have yellow yarn hair on top. The balls measure about 2.5 inches in diameter. The stress balls were packaged in a clear bag with a white square label that has the “Gift Gallery” logo, model number 205617 and UPC code 0-67103-50053-6.

The balls were sold exclusively at Wegmans in Maryland, Massachusetts, New Jersey, New York, Pennsylvania and Virginia during September 2014 for about $1. Consumers should immediately stop using these stress balls and return them to any Wegmans service desk for a full refund. Contact Wegmans consumer affairs toll-free at 855-934-3663 from 8:30 a.m. to 5 p.m. ET Monday through Friday or online at www.wegmans.com and click on “Product Recalls” for more information.

**SCHNEIDER ELECTRIC RECALLS POWERPACT J-FRAME CIRCUIT BREAKERS**

About 62,500 Circuit breakers have been recalled by Schneider Electric USA Inc., of Columbia, Mo., and Tlaxcala, Mexico. The circuit breaker will not trip during an overload condition, posing a risk of fire, burns and electrical shock. The recall involves PowerPact J-frame molded case circuit breakers with thermal-magnetic trip units. The circuit breakers are made of black plastic and have a three-position breaker handle that indicates whether the breaker is on, off or tripped. The recalled circuit breakers are rated for 150 to 250 amps, have interruption ratings of D, G, J, L and R. They were manufactured in two pole and three pole configurations with either lug-in/lug-out or plug-in (I-Line) style connectors.

Brand name “Schneider Electric” or “Square D” is on a yellow sticker above the breaker handle and on the top of a label on the side of the circuit breaker. A label on the front of the circuit breaker to the left of the breaker handle has the catalog number at the top. The number also appears on a label on the side of the breaker. Schneider Electric catalog numbers begin with “NJ” and Square D catalog numbers begin with “J.”

A label on the front of the circuit breaker to the right of the breaker handle has the date code in the lower right corner. Recalled circuit breakers were manufactured from March 24, 2014, through Sept. 26, 2014, and have date codes 14131 through 14395. The date codes are in the YYWW format (example: 14313 = year 2014, week 13, day of the work week 1/Monday).


The circuit breakers were sold at authorized Schneider Electric distributors, original equipment manufacturers and in factory assembled panel boards from March 2014 through September 2014 for between $2,900 and $11,200. Consumers should immediately stop using the recalled circuit breakers and contact Schneider Electric for either a free replacement circuit breaker and a credit of up to $300 per address to cover labor costs for installation by a certified electrician or a handle update kit and a credit of up to $150 per address to cover labor costs for installation by a certified electrician. Contact Schneider Electric USA at 800-654-8750 any time or online at www.schneider-electric.com and click on Customer Notifications for more information.
Giggles International Ltd., of Hong Kong has recalled about 13,000 animated toys. The battery compartment can reach temperatures up to 230 degrees Fahrenheit, posing a burn hazard. This recall involves Giggles International Animated Sing-Along Monkey toys. The monkey is made of brown and beige plush material and is about 9 inches tall. The toy is designed to hold a song book titled "5 Little Monkeys" and to sing the song when activated. A red music note is on the bottom of the monkey’s right foot and the face of a child with its hands covering its eyes are on the bottom of the monkey’s left foot. Recalled sing-along monkeys were manufactured between 6/7/2014 and 7/5/2014 and have batch code GP1410028. The manufacture date in the M/D/YYYY format and batch code are printed on the bottom of a white fabric label attached near the base of the monkey’s tail. The toy came in a tan colored box with words ‘Animated Sing-Along Monkey,” ‘Sing along with me!’ and ‘I play peek-a-boo with you!’ on the front. The age advisory “For ages 3+” and the warning that batteries are included are also on the front of the box. Giggles International has received two reports of toys overheating and melting their battery compartments.

The toys were sold exclusively at Cracker Barrel Old Country Stores nationwide from September 2014 to October 2014 for about $25. Consumers should immediately take the animated monkey away from children, remove the batteries and return the toy to any Cracker Barrel Old Country Store or contact Giggles International for a full refund. Contact Giggles International at 800-738-6018 from 9 a.m. to 6 p.m. ET Monday through Friday or online at www.LoveMyGiggles.com and click on Recall the tab at the top of the page.

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 we deemed to be 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.

Kiddie Korral Recalls Girls Hoodies with Ponies

Kiddie Korral, Dallas, Texas, has recalled about 2,300 Pink Pony Hoodies. A drawstring through the hood of the hoodies can pose a strangulation hazard to children. Drawstrings can become entangled or caught on playground slides, hand rails, schoolbus doors or other moving objects, posing a significant strangulation and/or entanglement hazard to children. In February 1996, the U.S. 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 Kiddie Korral girl's pink hooded sweatshirts with red ponies and a drawstring through the hood. The zippered front hoodies have two front pockets, are made of 100 percent polyester and were sold in sizes 2 through 12. A label sewn into the garment’s neck seam reads “Kiddie Korral” and a label sewn into the side seam has RN#117026 and style number 327.

The hoodies are sold at Children’s boutiques, gift shops and other specialty retail stores nationwide from December 2012 through November 2014 for about $25. Consumers should immediately take the hoodies from children and remove the drawstring to eliminate the hazard. Consumers can return the hoodies to the place of purchase for a full refund. Contact Kiddie Korral at 800-445-7195 from 9 a.m. to 5 p.m. ET Monday through Friday, or online at www.kiddiekorral.com and click on the Recall tab at the top of the page.

Each year, it is a unique pleasure to recognize lawyers in our firm who have done an exceptional job for their clients and for the firm, not only in the past year but throughout their career. Beasley Allen Litigators of the Year for 2014 are Leigh O'Dell and Ben Baker. The Litigator of the Year award is presented to the attorney or attorneys in the instance who demonstrate exceptional professional skill throughout the course of the year and best represent the firm's ideal of “helping those who need it most.” Leigh and Ben have done especially well during the past year, and we are most appreciative of their dedication and hard work.

Leigh works in the Mass Torts Section. Currently, Leigh is the firm’s lead lawyer on the transvaginal mesh litigation, which involves thousands of victims who have had transvaginal mesh used to repair conditions such as pelvic organ prolapse (POP) and stress urinary incontinence (SUI). Complications include erosion of the mesh into the vaginal wall, chronic pelvic pain, urinary tract infections, bleeding, painful intercourse, urinary and/or fecal incontinence, organ perforation, and leg pain. Numerous surgeries are often required to remove the mesh, which can be risky. For many, symptoms can be debilitating and permanent. The transvaginal mesh is manufactured by various companies, such as American Medical Systems, Bard, Boston Scientific, Caldera and Johnson & Johnson. Leigh was selected to the transvaginal mesh Plaintiff’s Steering Committee for all four Multi-District Litigations (MDL).

Ben works in the firm’s Personal Injury / Products Liability section. Ben has worked on numerous cases aimed at compensating clients for human losses and influencing corporations to manufacture safer products as well as nursing home litigation, aviation crashes and construction site injuries. In the fall of 2014 Ben received a $99 million verdict against Mazda Motor Corporation for a post-collision fuel-fed fire accident caused by poor design of the 2008 Mazda 3. Ben also was part of the trial team that obtained a $3 million verdict against Toyota in Oklahoma City in 2013 as part of the unintended acceleration litigation.

Beasley Allen also selected Lawyers of the Year in each section. Those lawyers selected were:

• Kendall Dunson. Personal Injury Section Lawyer of the Year—Kendall is currently working on cases involving personal injury including workers injured or killed on the job by no fault of their own. Kendall was a member of the trial team that prosecuted a wrongful death case against a corporate defendant resulting in a $2.5 million verdict, the largest jury verdict in Selma, Ala.; and was lead counsel in a maritime lawsuit resulting in a $5.75 million verdict.

• Graham Esdale. Products Liability Section Lawyer of the Year—Graham was the lead attorney in the Toyota Sudden Unintended Acceleration litigation. Graham was one of the first attorneys in the country to file a lawsuit against Toyota alleging that Sudden Unintended Acceleration caused a personal injury and wrongful death. In October 2013 he was a part of the trial team that was awarded a confidential amount for the death and serious injury of his clients. Graham was a finalist for Public Justice’s 2014 Trial Lawyer of the Year, along with the other members of the trial team, for his work in the verdict against Toyota in Oklahoma.

• Alison Hawthorne. Fraud Section Lawyer of the Year—Ali is focused on complex liti-
motion on a national level. Ali began her career working on the Average Wholesale Price and McKesson litigations, which seek to recover millions of dollars lost by state Medicaid agencies as a result of price reporting by the nation’s largest drug manufacturers. She was a part of the trial team working with Louisiana Attorney General Buddy Caldwell that recently reached an $88.4 million settlement with 25 pharmaceutical companies in that state’s ongoing Medicaid Fraud litigation.

- **Navan Ward**, Mass Torts Section Lawyer of the Year—Navan is the firm’s leading attorney on the metal-on-metal hip implant litigation. Navan was selected to Plaintiffs Steering Committee (PSC) for the DePuy “ASR” Hip Implant Recall Multi-District Litigation (MDL), as well as the PSC for the DePuy “Pinnacle” hip replacement MDL and the Biomet M2a Magnum Hip Implant Products Liability Litigation. Most recently, he helped craft a global settlement with Howmedica Osteonics Corporation / Stryker Orthopedics to resolve thousands of claims related to injuries suffered as the result of defective hip implant parts. It is estimated the settlement will cost Stryker more than $1 billion.

- **Parker Miller**, Toxic Torts Section Lawyer of the Year—Parker is currently focused on complex litigation and property owner and business-on-business environmental litigation. He is currently focusing much of his attention on BP Oil Spill litigation. Parker has counseled some of the largest business entities in the Southeast and has served as co-counsel to Alabama Governor Robert Bentley in the valuation of the State of Alabama’s oil spill claims. The U.S. Supreme Court recently upheld the multi-billion dollar BP Settlement agreement, which compensates businesses and individuals harmed by the April 20, 2010, explosion and sinking of the Deepwater Horizon oil rig in the Gulf of Mexico, which killed 11 workers and sparked the worst environmental disaster in U.S. history as oil flowed into the Gulf for months.

In addition to these annual awards, this year it was our particular honor to establish a new award, the **Chad Stewart Award**. This honor was created in memory of Beasley Allen lawyer Chad Stewart, who passed away unexpectedly in April at the very young age of 41. In addition to being a dedicated lawyer who worked hard for his clients, Chad truly modeled Jesus Christ in his daily walk. The Chad Stewart Award was created to recognize a lawyer who best exemplifies Chad’s spirit of service to God, his family and the practice of law in the task of “helping those who need it most.” We were proud to present the 2014 Chad Stewart Award to **Gibson Vance**. Gibson is familiar to lots of the Report readers who also watch The Beasley Allen Report each week on WSFA. He is the longtime host of that popular show.

**IN-HOUSE INVESTIGATORS ARE A HUGE ASSET TO BEASLEY ALLEN CLIENTS**

We wrote in our May 2014 issue on our in-house investigators. We said then that they provide critical pieces of the puzzle in injury and death cases that our firm handles. We learned very early in our firm’s existence that having in-house investigators is a definite advantage for the firm and the clients we represent. This advantage was on display recently during our involvement in the now-infamous and on-going GM defective ignition switch power failure issues.

Each of our investigators is equipped and trained in Crash Data Retrieval. In Jayman’s terms, that means that the investigators can extract the data from the airbag modules, commonly referred to as the vehicle’s “black box.” In these ignition switch defect cases this can be critical evidence. That’s because there is a definite signature from these downloads showing the vehicle power mode at the time of the crash as ‘off’ or ‘inactive’ and then documents the interruption of the data flow from the module, which is normally recording and analyzing the vehicle’s speed, RPMs, braking and the like. Because the vehicle thinks it has been turned off during a power ignition failure, it disables all of the safety devices such as seat belt restraints and air bags, and tremendously impedes the driver’s ability to operate the vehicle and bring it to a stop.

Being able to provide services like this as a part of our initial work-up of a case is just another reason we believe having in-house investigators is so valuable to our clients. Our firm is most fortunate to have a fully staffed investigative unit made up of individuals with extensive law enforcement/investigative training from State, County, and Municipal agencies.

Our Chief Investigator, **Bruce Huggins**, and Investigators **Bobby Mozingo** and **Ricky Moore** have been with the firm for more than 20 years. Investigator **Mike Bush** is a 15-year veteran at Beasley Allen. Investigators **Keith Scott** and **Charles Duffee** each have 12-plus years with the firm. Our most recent addition to the team—Investigator **Marc McHenry**—is in his second year with us.

One of the persons we did not spotlight in our earlier issue and who all of the investigators says is the “glue that holds the entire department together” is **Jill Cawley**. Jill, who is the units Administrative Assistant and Secretary, joined the firm in October of 1995. She initially worked with the Fraud Section and later worked as Secretary to one of the Personal Injury lawyers. Jill also worked with the Accounting Department before coming over to the Investigators in 2000.

Jill is responsible for transcribing the work product generated by all seven of the investigators. Jill grew up in an Air Force family and returned to Alabama in 1972. She is a 1976 graduate of Valley High School and holds an Associate Degree in Business from Southern Union and an Associate Degree in Paralegal Studies from what is now South University. Jill and her husband, Rob, celebrated their 36th anniversary on Dec. 10, 2014.

Our firm is fortunate to be able to offer the skills and services of our experienced in-house investigators, who can “spring into action” once our firm is hired at the very onset of a case. This allows our lawyers and staff to discover, gather, and secure valuable information and evidence early in case preparation. That’s very important and gives our clients a consistent work product and the best representation our firm can provide. We are blessed to have this resource available in-house.

**BEASLEY ALLEN IT SECTION KEEPS FIRM ON FOREFRONT OF TECHNOLOGY**

The Beasley Allen IT Department maintains all of the technological assets within the firm. They work behind the scenes to ensure the firm is able to perform its daily tasks. From mobile phones and desk phones to e-mail and Internet access, the staff in IT protects the core of the firm’s communications.

The IT Department also protects and maintains the firm’s ever-growing data through multiple layers of protection. This protection includes, but is not limited to, firewalls, antivirus anti-malware protection, snapshots, backup and replication, and a co-location for disaster recovery. In addition to communications and data, the IT Department also installs, patches, and troubleshoots the various applications the firm uses. They also help the staff and lawyers to become more proficient and efficient with the software they must utilize in their jobs.

The firm’s server environment is now 94 percent virtualized. Very few physical servers remain, and will soon either be retired or be brought into the virtual environment. The desktop environment is our next virtualization target. Members of the IT team are:
• Scott Barton, Computer Operations Supervisor—Scott has been with the firm for 19 years. He currently oversees the day-to-day operations of the IT department. Other duties include project management, systems engineering and administration, training, and help desk support. Scott is married and has four children ranging from ages 16 to 5.

• Victor Coyle, Network Administrator—Victor joined Beasley Allen in May 1998. He worked briefly as a runner, then moved to the position of mail clerk before joining the IT department. He earned his MBA from Auburn University Montgomery in 2003. As a Network Administrator, Victor makes sure that all of the computers and servers can communicate with each other through all of the switches including network security. He also helps to answer the “411” calls and emails from our staff requesting tech support. “The different challenges we come across each day makes it fun,” he says. “Our group works very well together, which makes it a great workplace.”

• Brent Warren, System Administrator—Brent has served as a Systems Administrator since August 2001. Before joining the Beasley Allen family, Brent worked five years at Colonial Bank. He currently works alongside his team each day troubleshooting technical issues. Recently, Brent was involved in the implementation of a backup/ disaster recovery plan for the Firm. Brent has a Bachelor’s degree in Business Management from Troy State University.

• Steve Youngblood, Network Support Technician—Steve and his wife, Kimberly, both work for Beasley Allen in IT. Steve started with the firm in 2001. He is responsible for taking care of the majority of hardware, network accounts, fire and security systems. Steve has an interesting perspective on the role of IT in business, saying, “In this particular firm you really have to know a little of everything. If it is electronic—and even sometimes not—we take care of it. Think back to how business was done a few decades ago. There was no email, Internet, telecommuting or smartphones. Now communications are instantaneous, huge amounts of information move through email and the Internet, and powerful tools are in the hands of owners and employees. Innovations in technology have improve operations at Beasley Allen tremendously.”

Just in the time Steve has been at the firm, the firm has gone from 500 Gigs (1 million typical pictures) to 130 Terabytes (260 million typical pictures).

• Todd Wall, Database Administrator—Todd has been employed with Beasley Allen since 2003. Some of his duties include maintaining the database servers within the firm, including the server that holds our case management database. In addition, he helps answer calls for tech support, and is responsible for troubleshooting and resolving software issues that may occur with users. Todd says, “Without the infrastructure of what the IT department does, the rest of the firm would not operate as smoothly or efficiently as it does.” Todd is married to Stephanie Wall and they have three children—Christopher, 27; Alex, 22; and Casey, 19.

• Kimberly Youngblood, Systems Software Specialist—Kimberly has been with Beasley Allen since July 2007. In her current position, she troubleshoots issues with any of the software in the firm, researches new software; and rolls out the software updates for the computers in the firm. She also works to design, create, implement and administer Microsoft Access Databases for the firm (i.e., Dollar General Settlement Microsoft Access Database, BA Master Mailing Contacts Microsoft Access Database, and Mass Torts SSRI Microsoft Access Database). She processes and loads documents for cases that are received through document productions into Concordance, Concordance Evolution for several of the departments within the firm (i.e., BP, GM, and AWP) and maintains several systems within the firm (i.e., My BA, Concordance, Concordance Evolution, Hardware\Software Inventory System, and Microsoft Update System). As a member of IT, she also assists in all other capacities needed to ensure the technical aspect of the firm is maintained. Their oldest son, Stephen Jr., is a Police Officer with the City of Millbrook and is married to Rachel Youngblood. They have a grandson named Stephen Kirk (Sky) Youngblood III. Their youngest son, Christopher, is a Firefighter for the City of Montgomery.

• Ashley Pugh, Litigation Technology—Ashley Pugh just celebrated her 15-year anniversary with the firm. While she is currently the Litigation Technologist for the Consumer Fraud Department, Ashley also serves in that same role for all sections of the firm for lawyers needing trial graphics. Ashley assists our lawyers and their legal assistants to prepare exhibits and deposition designations for use at trial, creates power point presentations, creates flow charts for multi district litigation, provides on-site and hands on cutting-edge electronic courtroom technology to courtrooms and war rooms. She also assists with seminar and mediation presentations. Ashley also takes a very active role in assisting the Consumer Fraud department with organization of case discovery and is always willing to lend a helping hand. Ashley is a key part of our firm’s successes in pretrial and trial. Born and raised in Montgomery, she currently lives in Mathews. Ashley is married to Patrick Pugh and they have one child, J.P., who is 10. Ashley and Patrick also have a full-time beef cattle farm and liquid feed business.

• Kelly Allen, Litigation Technology—Kelly joined Beasley Allen in 2004. Litigation technology encompasses many elements of the litigation process. From a trial preparation standpoint, it involves everything from the processing and editing of video evidence and deposition testimony, to the creation of medical images and graphics for use in the courtroom, tables and charts, blow ups, diagrams, timelines and demonstrative aids made with various mediums to digital copies of exhibits. Kelly also travels to provide onsite technology support to attorneys and staff and set up and maintain war rooms and court rooms in various locales; and operates courtroom technology and interactive courtroom presentations for trial. These visual and audio aids are key in helping jurors to understand very complex legal and technical arguments. Before coming to Beasley Allen, Kelly served in the US Air Force both on active duty and as a civilian. She remains active on the Board of Advisors for the Air Force Judge Advocate General Paralegal School. Kelly says, “Litigation technology is a perfect blending of my passions—my work as a paralegal along with technology and graphics design. It also allows me to continue to travel as I work and experience new places.”

We are most fortunate to have this group of talented and hard-working persons in the IT Department. The work they do is critically important to the success of the firm. We believe that having this resource in house and readily available is a tremendous asset.

XXIV. FAVORITE BIBLE VERSES

Mark Williams, a longtime friend, furnished a verse for this issue. It has a timely message for all of us.

"Trust in the Lord with all your heart, And lean not on your own understanding. In all your ways acknowledge Him, And He shall direct your paths." Proverbs 3:5-6

Cecil Spear, another good friend, adds a verse that tell it all for us. John is a professor at Troy University.

"Fear not, for I am with you; Be not dismayed, for I am your God. I will strengthen you, Yes, I will help you, I will uphold you with My righteous right hand." Isaiah 41:10

Dr. John Kline, another good friend, sent in a verse that tell it all for us. John is a professor at Troy University.
And the angel answered and said to her, “The Holy Spirit will come upon you, and the power of the Highest will overshadow you; therefore, also, that Holy One who is to be born will be called the Son of God. Luke 1:35

For some reason we only got these verses sent in this month. So I added one of my own.

For God so loved the world that He gave His only begotten Son, that whoever believes in Him should not perish but have everlasting life. John 3:16

XXV.
CLOSING OBSERVATIONS

ALABAMA TOPS THE LIST OF STATES THAT TAX THE POOR THE MOST

For families living in poverty, every dollar makes a difference. Some politicians don’t get it and others don’t seem to care. These families living in poverty usually receive fairly generous tax breaks at the federal level, with those living at the poverty level often being exempt from federal income tax liability. However, the story changes when it comes to state income tax. Tax rates vary widely among the states. An economic study done by the National Center for Children and Poverty (NCCP) at Columbia University reveals Alabama taxes its poorest citizens the most—in fact, significantly more than other states.

The Columbia study examined the state income tax burden on a family of four, assuming the family has two adults and two children, or a family with a single-parent household with two children, and has earnings equal to the federal poverty level. For the family of four, this would equal an annual income of $23,624, while the single-parent household would earn $18,769 at the poverty level.

In Alabama, the family of four would typically pay $588 per year in state income tax. The family of three would carry an average tax burden of $413 per year. At the low end of the spectrum for states that charge income tax to families at the poverty level is Oregon, at $81 per year for a family of three and Michigan at $20 per year for a family of four.

The study found a total of 16 states imposed tax burdens on families of four living at the poverty level. In six states, including Alabama, those taxes exceeded $200. Fifteen states gave families of four with earnings at the poverty threshold income supplements, usually in the form of state Earned Income Tax Credits. Thirteen of those states provided credits in excess of $200 annually, and six provided credits of more than $1,000 per year.

Fewer states collected income tax from the single-parent households at the poverty level. But nine states—including Alabama, which sadly is again at the top of the list with the highest taxes—imposed taxes on those families exceeding $200 per year. It’s disgraceful for any state to penalize families living in poverty. Hopefully, our leaders in Alabama will recognize the need to make needed changes in our tax structure.

To put it in perspective, the report noted that New York State provides families living at the poverty level almost $2,000 per year in supplementary income, while Alabama charges families living in poverty lose to $400 in income taxes. Curtis Skinner, director of family economic security at NCCP told the Washington Post: “To what some people may seem like a small amount of money the research is showing really makes a big difference to low-income families.” Hopefully, we will see some action in the Alabama Legislature this year that will remedy a very bad situation. There is absolutely no way to justify punishing low income Alabamians by making them pay more than their fair share of taxes.

Sources: Washington Post, NCCP.org

ALABAMA RANKS FIFTH IN NATION FOR FEDERAL SPENDING

I believe it’s somewhat hypocritical for politicians in Alabama to “cuss” the federal government for “political” gain. That’s especially true when you consider how much money our state receives each year from that same federal government. A new national report reveals that federal spending in Alabama equals 29.5 percent of the state’s gross domestic product. That’s the fifth highest rate among the states, according to the Pew report.

In Alabama, the Pew Charitable Trusts began tracking the geographic distribution of federal spending for fiscal 2013 was $56.8 billion. Retirement benefits, including Social Security, and non-retirement benefits, such as Medicare and food assistance, made up nearly two-thirds of the federal spending in Alabama. The Pew Charitable Trusts began tracking the geographic distribution of federal spending after the U.S. Census Bureau quit doing it a few years ago. Mississippi had the highest rate of federal spending relative to its gross domestic product. Virginia was second, New Mexico third, Maine fourth and Alabama ranked fifth.

The Pew Charitable Trusts began tracking the geographic distribution of federal spending after the U.S. Census Bureau quit doing it a few years ago. Mississippi had the highest rate of federal spending relative to its gross domestic product. Virginia was second, New Mexico third, Maine fourth and Alabama ranked fifth. Wyoming finished last among the states. Perhaps, we should question our politician’s motives the next time we hear them tell how much money our state receives each year from that same federal government.

Source: Associated Press

THE NATIONAL DEBT IS OUT OF CONTROL

The national debt has reached $18 trillion and it is high time that members of Congress put politics aside and start finding ways to not only reduce the debt, but bring it under permanent long-term control. Almost $13 trillion of the debt is owed to the public, including bondholders. Republicans and Democrats must work together in Washington and put the national interests above politics. If we don’t address this most obvious and most serious problem, our nation simply cannot remain a world power.

MONTHLY REMINDERS

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732—1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

XXVI.
PARTING WORDS

As we start a new year it is always good to look back and reflect on happenings during the last year. While there were good things,
without a doubt, 2014 was a year filled with problems of all sorts. The United States has become a country that accepts violence and gun-related mass murders as a way of life. That is a most sad commentary on our times. Mass murders no longer shock us and neither do the locations involved. We should be safe in our schools, our workplace, our shopping areas, our churches and certainly in our homes. But are we? I believe all will agree that the answer is a responding no.

Dr. Neal Berte, who served with distinction as President of Birmingham Southern College before he retired, wrote a piece in The Birmingham News recently that I am going to set out below. It is a very good look at where we are in Alabama. Sadly, the rest of the country falls into the same state of affairs. Let’s take a look at Dr. Berte’s assessment.

People Of Faith Must Be More Responsive To The Less Fortunate

For good reason, Alabama prides itself on being one of the most “churched” states in our country, with high attendance and participation in worship, mostly Christian faith communities. That is certainly something to celebrate, but it does call to mind some questions regarding what those of us as people of faith have a responsibility to do on behalf of others. We are reminded by Jesus of the greatest commandment: “to love the Lord your God with all your heart, soul and mind and your neighbor as yourself.”

As we think about Alabama related to the responsibility of people of faith for those less fortunate, particularly in this season of the year, at least three Alabama “realities” come to mind.

First, the latest study by the National Center for Children in Poverty reports that of the nation’s 50 states, Alabama by far has the highest income taxes on the poor. The study goes on to note that Alabama requires citizens to begin paying income tax on earnings of $12,600 a year and this is the lowest threshold of any state in the country. Numerous reports indicate that our poor many times wind up at the end of the month having to choose between whether to buy food, purchase needed medicine, or pay the power bill.

Recently statements by leaders of not-for-profits in our community indicate huge increases in the need for food distributed through food banks and churches, some increases by as much as 50 percent. Alabama is only one of four states with no tax break on groceries, yet proposals to the Alabama Legislature every year seem to fall on deaf ears. Sales taxes, especially on necessities like food, are highly regressive because low-income people must spend most of what they make on taxable goods.

What is missing, Lord?

The second reality that comes to mind relates to predatory lending in our state. According to the Alabama Appleseed Center for Law and Justice, 59 percent of first-time borrowers take out a payday loan for regular, recurring expenses that include rent, mortgage, utilities and food.

The study goes on to say that the average borrower is indebted five months a year. As pointed out by the Alliance for Responsible Lending in Alabama, interest rates of 456 percent and 300 percent for payday and car title loans in Alabama are exorbitant by any standard. We have had a number of legislative proposals to provide a reasonable cap of 36 percent as the maximum annual interest rates on payday and auto loans.

At least 18 cities and towns in Alabama have put some restrictions on payday and title lenders, and there have been numerous proposals calling on the legislature to enact meaningful reform to the payday and car title loan industries but to no avail. The Bible is clear—usury is wrong, and by any standard, lending at triple-digit interest rates is usury.

What is missing, Lord?

Third, Alabama is now ranked 44th among states in child well-being as reported in this year’s national Kids Count report published by the Annie E. Casey Foundation. The report indicates that 290,000 Alabama children, 26 percent, lived in poverty in 2012, up from 21.5 percent in 2000.

The Department of Health and Human Services set the poverty level for a family of four at $23,850 for this year, and while the report commends Alabama for the state-funded First Class Pre-Kindergarten program that has helped more children succeed in school, this program is still accessible to just 12 percent of the state’s 4-year-olds.

What is missing, Lord? Is it You? Or is it us?

Neal R. Berte is President Emeritus of Birmingham-Southern College. His email address is nberte@bsc.edu.

I believe what Dr. Berte says is directly on point. His message should be put on the desk of every member of the Alabama Legislature when they come to Montgomery for their organizational session and the message delivered to Gov. Bentley in the event he failed to read it in the Birmingham News. In fact, it should be required reading for all elected officials in Alabama, including our Congressional Delegation. It might just be a needed wake-up call for all of us.

I sincerely hope that each of our readers and their families had a blessed Christmas. I wish for each a blessed and joyous New Year. Hopefully, it will be the best year ever.
No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

Jere Locke Beasley, founding shareholder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley’s law firm, established in 1979 with the mission of “helping those who need it most,” now employs 44 lawyers and more than 200 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 30 years.

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