I. CAPITOL OBSERVATIONS

THE PUBLIC MUST BE PROTECTED FROM CORPORATE WRONGDOERS

I have learned in the past 25 years that the federal government does a very poor job of regulating most industries. In fact, I am not aware of a single industry that is being adequately regulated. From experience, I know that the automobile, pharmaceutical, medical device, oil and chemical industries are not being regulated adequately. In many instances, it’s sorta like the “tail wagging the dog.” The public—and unfortunately the media—have 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 something we, as trial lawyers, have to overcome during trials where government regulation is involved.

Many corporate bosses put profits over safety. Lawyers in our firm have seen in case after case where corporations put their profits over safety and the well-being of the public. In those cases, the corporate bean-counters actually do an analysis to see what it will cost the company to keep a product known to be defective on the market. I will have more to say on this as it relates to Toyota and General Motors.

Victims of corporate wrongdoing depend on the courts and trial lawyers to protect them. It is absolutely essential to keep the nation’s courts open, accessible and independent. Without a court system that is independent, open to the public and accessible, victims of corporate wrongdoing and abuse would be left without a remedy when they are damaged. Lawyers who are dedicated to helping victims obtain justice must be available, and those lawyers must be willing to take on powerful interests. To be an effective trial lawyer requires both skill and courage. The arena in which the trial lawyer works is no place for the weak of heart. We must be willing to take risks and have the resources available that are required when taking on corporate giants.

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, we were all “asleep at the switch” and we 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’s 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 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 Amendment 7 to the U.S. Constitution. We could have learned from the NRA.

The jury system must be preserved. 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. 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 U.S. Chamber of Commerce, The American Tort Reform Association and other groups share a common agenda. A major part of that agenda is to protect corporate wrongdoers in America. A prime example of how the groups operate is the recent unjustified attack on the Alabama Supreme Court, an attack that received national attention. Our Court was singled out as being a bad court simply because it ruled in one case contrary to what some in corporate America wanted. Ironically, the ruling was a correct one.

Lawyers have a moral duty to work hard to make sure our courts remain open for people. But this is not just a battle for lawyers. It’s 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 must be willing to engage in the ongoing battle. Ordinary folks depend on trial lawyers to fight the battle for them. It’s a battle none of us can afford to lose.

II. THE ONGOING SAGA OF THE GENERAL MOTORS SAFETY PROBLEMS

GM GETS 108 MORE CLAIMS FOR DEFECTIVE IGNITION SWITCH COMPENSATION

As of Feb. 1, 2015, General Motors had received a total of 4,180 claims for compensation for ignition switch defects in its cars, according to Ken Feinberg, the

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official administering the victims compensation program. GM received 455 claims for death, 278 for catastrophic injuries and 3,447 for less serious injuries requiring hospitalization.

The number of claims found eligible for compensation rose to 128 from 112, according to the most recent report. The company’s compensation program has so far determined that 51 deaths, eight severe injuries and 69 other injuries are eligible to be compensated, for a total of 128 eligible claims. The report noted 482 claims had been deemed ineligible, while 1,103 are still under review. It appears that another 965 claims lacked sufficient paperwork or evidence and that 1,502 were submitted with no documentation at all.

The fund’s protocol set payment for eligible death claims to be at least $1 million. 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 would extend the deadline for applications to its ignition switch compensation fund from Dec. 31, 2014, to Jan. 31, 2015. That has been done and apparently GM will not extend the deadline any further.

Just before the final deadline, two Democratic senators—Richard Blumenthal (D-Conn.) and Edward Markey, (D-Mass.)—called on GM to extend the deadline for application to the ignition switch compensation fund from a second time, but GM declined to do so. GM spokesman James Cain told Law360, “We extended the deadline once, and we decided we have no plans to do it another time.” Sens. Blumenthal and Markey argued the Jan. 31 deadline did not provide enough time for victims who are still waiting on a decision about GM’s bankruptcy and related liability, which is still pending before U.S. Bankruptcy Judge Robert Gerber in New York.

GM set aside an initial $400 million to cover its costs of compensation for claims on behalf of people injured or killed because of the faulty switches. All of this was to be used by the Compensation Fund. We will continue to represent all of our clients to the best of our ability and we believe that justice will be done.

Source: Reuters and Law360.com

GM recalls 83,572 SUVs and trucks last month. The defective ignition can move out of the “start” position causing the vehicle to stall and the airbags not to deploy in the event of a crash. It’s more of the same old story from GM. The models involved this time are 2011-12 Chevrolet Silverado HDs, Silverado LDs, Suburbans, Tahoes, Avalanches; GMC Sierra LDs, Sierra HDs, Yukons, Yukon XLs; and Cadillac Escalades, along with ESV and EXT versions.

There also can be additional vehicles affected and those are 2007-14 vehicles repaired with defective parts. GM claims that fewer than 500 vehicles are expected to have that condition. GM, in a statement made to the National Highway Traffic Safety Administration said:

The ignition lock actuator may bind, making turning the key difficult or causing the ignition to get stuck in the ‘start’ position. If stuck in the ‘start’ position, the ignition may suddenly snap back into the ‘accessory’ position, causing a loss of engine, steering, and braking power, increasing the risk of a vehicle crash. If the vehicle is in a crash, the air bags may not deploy, increasing the risk of occupant injury.

GM is notifying owners. Dealers will inspect and replace the ignition lock housing, as necessary, free of charge. The company claims to know of no crashes, injuries or fatalities associated with this issue. If this sounds familiar, it’s because that’s what we heard when GM’s ignition switch problems first surfaced.

GM is also recalling 152 2015 Chevrolet Silverado 1500s and GMC Sierra 1500 vehicles manufactured during Nov. 24-25, 2014. The automaker said that “due to an improper heat-treatment, the rear axle shaft may crack while the vehicle is being driven.” It says if the rear axle shaft fractures, the rear wheel can separate from the axle shaft. Obviously, that would create the risk of a crash.

GM is also recalling 56 2015 Chevrolet Silverado HD diesel vehicles and GMC Sierra HD diesel vehicles built in a three-week period ending Oct. 21 because the hose clamp that secures the fuel tank vent line may not have been properly tightened during assembly. GM said a loose hose clamp could allow the fuel tank vent line to detach, which may result in a fuel leak, increasing the risk of a fire. I look forward to an issue of the Report with no safety-related recalls from GM. Hopefully, that will come sooner than later.

Source: USA Today

III.
AN UPDATE ON THE TAKATA AIRBAG SAGA

TAKATA AIRBAG LITIGATION IS A TOP AREA OF CONCERN TO WATCH IN 2015

The infamous Takata Corp. recall has been one of the top issues plaguing automakers this year, affecting driver’s side air bags that apparently explode in humid conditions and subsequently pummel passengers with shrapnel. The first consumer class actions over the recalled air bags were filed in California and Florida in late October, with a number of others following suit shortly thereafter.

Consumers suing Takata Corp. and a number of top automakers, including Chrysler Group LLC, Ford Motor Co. and BMW of North America asked the U.S. Judicial Panel on Multidistrict Litigation to consolidate the class actions over the matter in November.

Since this is one of the most notorious recalls in the industry, we are certain that the issues will continue to grow in the coming year. It still remains to be seen whether Takata will expand its recall nationwide as ordered by the National Highway Traffic Safety Administration’s November order. So far, Takata has only recalled vehicles in high humidity areas.

While Takata remains on the fence concerning its responsibility for the defective airbags, car manufacturers are being hit hardest. During the first week of 2015, Honda agreed to pay $70 million in fines due to NHTSA’s allegations that it failed to report more than 1,700 deaths and injuries over a 10-year period. NHTSA discovered this cover-up while investigating the Takata airbag situation. U.S. Transportation Secretary Anthony Foxx, in a statement released last month, said:

Honda and all of the automakers have a safety responsibility they must live up to—no excuses. Last year alone, we issued more fines than in NHTSA’s entire history. These fines reflect the tough stance we will take against those who violate the law and fail to do their...
part in the mission to keep Americans safe on the road.

NHTSA issued more than $126 million in fines in 2014, including a $35 million fine against General Motors Co. over its ignition switch defect. Honda failed to provide early-warning reports to NHTSA to alert it about safety-related issues. The fines address Honda's alleged failure to report some 1,729 death and injury claims to the agency from 2003 to 2014, as well as its alleged failure to report some warranty claims and customer satisfaction-related claims during that time, according to the agency.

The early-warning reporting requirements are part of the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act, which requires car manufacturers to submit reports to the NHTSA every quarter to alert the agency of deaths or injuries arising from possible safety defects.

The TREAD Act was passed in 2000 after the Ford-Firestone tire malfunctions, according to statements by Rep. Fred Upton, R-Mich., who authored the bill. Following a barrage of class actions related to defective Takata Corp. air bags, NHTSA issued a special order Nov. 3 directing Honda to explain its failure to fully report deaths and injuries related to possible auto safety defects, as required under the act.

The 1,729 injuries and deaths that Honda failed to report constituted more than double the number of incidents the carmaker had reported to the agency in the past 11 years, according to the early-warning reports filed with the NHTSA. Honda has attributed its under-reporting of those death and injury notices to “errors related to data entry, computer coding, regulatory interpretation, and other errors in warranty and property damage claims reporting.” NHTSA’s investigation and Honda’s admissions of “systemic failures” may ultimately pose a larger threat to its bottom line, since persons filing suit will likely use the admissions in the ongoing air bag defect litigation against the company.

Honda was among the first to be hit with proposed class actions that accused the company of failing to inform NHTSA that the air bags posed a serious safety risk. It has been reported that more than 14 million vehicles equipped with air bags supplied by Takata have been recalled worldwide because of 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. Honda was aware of an air bag-related accident in 2004 that involved one of its vehicles, but categorized it as an “anomaly” and merely sent a standard incident report to NHTSA.

BMW WILL REPLACE AIRBAGS NATIONWIDE

BMW has agreed to demands from the National Highway Traffic Safety Administration to replace driver’s-side air bags nationwide. NHTSA has been pushing companies to recall older cars with air bag inflators made by Takata Corp. As has been widely reported, the air bags can explode with too much force and spray shrapnel at drivers and passengers. At least five deaths have been blamed on defective Takata inflators.

The decision affects 140,000 BMW 3 Series cars made between January 2004 and August 2006. No problems with BMW vehicles have been reported. In early 2014, BMW recalled 574,000 cars in the U.S. Several automakers have been slow to expand the recall. Ford Motor Co. and Chrysler have joined the list.

BMW is the last automaker to agree to replace air bags in all affected cars nationwide. About 15 million cars have been recalled in the U.S. in total. Initial recalls were limited to states with high levels of humidity. NHTSA has said that the air bag inflator propellant, ammonium nitrate, can burn faster than designed if exposed to prolonged airborne moisture. When that happens, the propellant can blow apart a metal canister meant to contain the explosion.

Takata has refused the NHTSA’s request for a nationwide recall of driver’s side inflators, about 8 million in total, and it says it has tested more than 1,000 air bag inflators from other regions without a single failure. But the company will still make replacement parts for the automakers that are expanding their recalls. It hasn’t been decided whether Takata or the automakers will pay the extra costs involved. In total, 10 automakers have models with Takata driver and passenger air bags. There could be as many as 30 million vehicles with the air bags on our nation’s highways.

FORMER NHTSA EMPLOYEES JOIN TAKATA AIR BAG DEFECT PANEL

Three former National Highway Traffic Safety Administration (NHTSA) leaders and three other experts have joined the independent panel investigating the defective Takata Corp. driver’s side air bags. As we have reported, this resulted in mass recalls by top automakers in the past year. The panel’s head, former U.S. Secretary of Transportation Samuel Skinner, made the announcement on Jan. 20, Skinner, who also previously served as White House Chief of Staff, said in a statement that the now-seven-member team includes “notable members of the transportation safety, manufacturing, quality assurance and engineering communities” and that the panel will soon begin reviewing and assessing Takata’s current policies and procedures to determine what exactly went wrong in the manufacturing of the defective inflator piece that has the potential to explode and pummel passengers with shrapnel—and to stop the error from happening again. He added:

I look forward to leading this important effort to ensure that Takata is responsive whenever questions are raised about the quality or safety of its air bags. Each member of our panel is a highly respected and accomplished professional in areas directly relevant to our review. Together, their collective expertise and perspective will be invaluable.

Takata announced in early December the formation of the independent quality assurance panel to audit the company’s manufacturing process, following an NHTSA order requiring the air bag maker to expand nationwide its recall of the defective inflator parts. In testimony before the House Energy and Commerce Committee on Dec. 3, Takata’s vice president, Hiroshi Shimizu, said the panel will uncover ways that the air bag maker can improve its manufacturing process to ensure the safety of its air bags’ inflators.

Joining Skinner in the panel is Marion C. Blakely, who served as the administrator of the Federal Aviation Administration (FAA) from 2002 to 2007 and chair of the National Transportation Safety Board (NTSB) from 2001 to 2002. Ms. Blakely also previously served as administrator of the NHTSA, and she is currently the president and CEO of the Aerospace Industries Association, an aerospace and defense trade group. Coming over from the health care industry is John C. Landgraf, who brings to the panel years of experience as an executive vice president at Abbott Laboratories. During his tenure at Abbott, he has worked extensively in the pharmaceutical company’s manufacturing and quality assurance departments, according to the statement.
Nelda J. Connors, the previous president of Tyco International Ltd.’s electrical and metal products division, has also been appointed to the panel. She previously served in leadership positions at other private companies within the automotive industry, including Eaton Corp., and is a director for the Federal Reserve Bank of Chicago, the statement said. The Dean of Northwestern University’s engineering and applied sciences school, Dr. Julio M. Ottino, also joins the panel, the statement revealed. He works extensively at the university’s transportation center and is a member of the National Academy of Engineering.

The final two members of the team include Dr. Jeffrey W. Runge, who served as administrator of the NHTSA from 2001 to 2005 and assistant secretary for health affairs and chief medical officer for the U.S. Department of Homeland Security from 2005 to 2008; and John W. Snow, who served as U.S. Secretary of the Treasury under President George W. Bush. Before entering the government sector, Snow worked in the railroad industry as CEO of CSX Corp., the statement said. The make-up of this panel is quite impressive. Hopefully, they will be able to maintain their independence. If so, their work product should result in a report that is based on accurate information and is helpful to working through a most difficult safety problem affecting the public.

Source: Law360.com

IV.
MORE AUTOMOBILE NEWS OF NOTE

NHTSA Needs Adequate Resources To Do Its Job

Mark Rosekind, the new director at the National Highway Traffic Safety Administration has called for the necessary resources the agency needs to do its job. Rosekind says that he knew the agency lacked adequate resources and staff to do its job properly. After a week on the job, Rosekind says he discovered the short-ages are actually much worse than he believed them to be. He said that solutions include “more people and money,” as well as “better processes and innovation.” He is absolutely correct on both counts. NHTSA has been at a decided disadvantage in trying to carry out its responsibilities.

Rosekind, a human fatigue expert and former member of the National Transportation Safety Board (NTSB), spoke with reporters at the Detroit auto show last month. What he told the reporters will shock those who don’t deal with NHTSA on a regular basis. Rosekind says NHTSA got 75,000 safety complaints from the public last year, up from 45,000 in 2013. Yet he pointed out that the agency has just nine people to review the complaints and only 16 people to investigate when a problem is discovered. There were three questions asked of Rosekind to which he gave some candid answers. The Claims Journal edited this exchange for length and clarity. I will set out their edited version below:

Q: NHTSA didn’t act on General Motors’ defective ignition switches or exploding Takata air bags until after people were killed. What will you do to make sure that doesn’t happen again?

A: We’re looking at taking action in three areas: People, technology and our authority to deal with this. We’re already looking at the budget for 2016. We’re trying to make sure the Office of Defects Investigations has other things there. I don’t want to get into it, but our staff has proposed two new divisions and more money for a whole bunch of people, all focused on how to make sure we’re better at doing that job. The agency also supports raising the maximum fine for automakers that hide safety problems from $35 million to $300 million.

Q: Fiat Chrysler CEO Sergio Marchionne says automakers have over-reacted with a record recall of more than 60 million vehicles this year. Do you think the agency has gone too far and forced automakers into unnecessary recalls?

A: We’d rather have people on the proactive end catching stuff really early than waiting too long. I think we should expect to see more recalls coming. I’d rather have quick action than waiting and finding out you made a mistake, because you cannot save those lives after they are gone. We’ll watch to make sure we don’t go too far, and we want to strike a balance.

Q: Is there a fine or court action coming against air bag maker Takata Corp. of Japan for refusing a nationwide recall of driver’s side air bags?

A: Five automakers have agreed to do the nationwide recall. It’s an open investigation. We’re going to use every tool possible for us to go after it. If we find something that deserves an appropriate penalty you can absolutely count on that coming forward. That’s data we just don’t have yet to be able to act on. I’m actually trying to figure out other tools that might be available to us (other than court action). I’m mostly concerned about the safety. The longer it takes to fix the harder it is.

Hopefully, Congress will allocate additional funds to NHTSA so that it can do its job. In addition, laws that are needed to give the regulatory agency more authority and control should be passed. We know from experience that NHTSA, as a result of being underfunded and understaffed, hasn’t been able to properly regulate the politically powerful automobile industry. Hopefully, that will change. But it’s up to Congress.

Source: Claims Journal

IIHS List Of Safest Cars Grows Amid Record Recalls In The U.S.

As we know all too well the reports of massive numbers of recalls by the automakers dominated the news during 2014. That overshadowed some good news in the automobile industry. A report was released by the Insurance Institute for Highway Safety (IIHS) last month that contained some positive news. The insurance industry’s list of cars and trucks that do the best job of keeping owners alive in a crash jumped 82 percent last year. The number of vehicles ranked best for keeping occupants safe in a crash rose to 71 for 2015 models from 39 in 2013. Reportedly, that occurred even though the crash tests used to pick winners got harder. The IIHS report indicated that certain cars are now safer. Interestingly, Toyota Motor Corp. has the most models on the list. Adrian Lund, President of IIHS, had this to say in a recent interview:
The 38 vehicles in the less restrictive “Top Safety Pick” category included 10 models from the Detroit automakers and the rest from foreign brands. GM, with five models, had the most of the U.S. automakers. Honda, in contrast with recalls of older models for Takata airbags, trailed only Toyota with 10 selections among the safest for 2015.

Sources: IIHS and the Claims Journal

SAFETY AGENCY INVESTIGATES STALLING PROBLEM IN FORD TRUCKS

The National Highway Traffic Safety Administration is investigating whether Ford Motor Co. should expand a 2013 safety recall of diesel trucks. The previous recall involved 2,951 F-350, F-450 and F-550 trucks sold with ambulance packages. The trucks were equipped with 6.7-liter diesel engines that could stall because of a malfunctioning sensor. Ford replaced the sensors for free. The NHTSA says it has received complaints from truck owners who didn’t have the ambulance packages as well as owners who got the first repair. The government is now investigating to see whether the first recall repair worked, and whether Ford should expand the recall to cover all of the 200,000 diesel-equipped trucks it sold from the 2011 and 2012 model years. Ford says it’s cooperating with the investigation.

Source: Claims Journal

V. A REPORT ON THE GULF COAST DISASTER

JUDGE BARBIER ISSUES PHASE TWO ORDER

On Jan. 15, Judge Carl Barbier issued his order on the Phase Two “Source Control” trial, which was set to determine the amount of oil spilled in the Gulf of Mexico during the Deepwater Horizon oil spill. Because there was no mechanism in place to physically determine how much oil actually spilled into the Gulf, the Court relied on expert testimony concerning the “flow rate” at the well head. Judge Barbier, in analyzing the testimony, found that no evidence suggested a different conclusion from his previous Phase One order, but he did determine that BP was not grossly negligent in controlling the spill. As to the amount of oil spilled in the Gulf, Judge Barbier found as follows:

The Court finds that 4.0 million barrels of oil released from the reservoir. After deducting the Collected Oil from this amount per the parties’ stipulation, the Court finds for purposes of calculating the maximum possible civil penalty under the CWA that 3.19 million barrels of oil discharged into the Gulf of Mexico.

The determination is less than the previous 4.09 million barrel Federal Government estimate, and slightly more than estimates made by BP. With the total release number determined, the $4,300 per barrel maximum fine means BP could face a total fine price tag of $13.7 billion.

THE PHASE THREE “PENALTY PHASE” TRIAL IS OVER

As this edition of the Report was going to print, the Phase Three “Penalty Phase” of the BP trial has been competed before Judge Barbier in New Orleans, La. The historic trial may well result in the largest pollution fine in United States history. With the amount of oil spilled already determined from the Phase Two trial, the Court will now determine the per-barrel penalty under the Clean Water Act, which can be as much as $4,300 per barrel. To determine the fine, the Court will consider eight critical criteria:

• How serious was the spill?
• Did BP profit from violating the law?
• Who was to blame for the spill?
• Has BP paid any other fines associated with the spill?
• Does BP have a history of prior violations?
• What did BP do to mitigate the oil spill?
• What financial impact would the penalty have on BP?
• Other matters of justice that should be considered?

It is virtually impossible to argue that the spill was not serious—it was the worst environmental disaster in United States history. Accounts certainly support the notion that BP was racing to finish drilling operations so harvesting could get underway. Thus, it seems the
company was breaking the law in the name of profits. As to blame, Judge Barbier has already determined that BP was grossly negligent in causing the oil spill. Moreover, the record indicates that BP has a long history of causing havoc. For instance, at the time of the spill, BP was already on corporate probation from another major explosion that killed workers in Texas and resulted in criminal and civil fines.

BP will certainly be doing everything in its power to reduce the per-barrel fine. In full spin mode, BP stuck to the old lines it has used since the spill was in its infancy: the spill was not near as bad as the media made it out to be; what little oil that was spilled no longer exists because BP or naturally occurring bacteria cleaned it all up; whatever oil that does remain is probably from natural seeps; and whatever economic damage that did occur (because BP will not admit the spill really caused economic damage without some caveat), BP more than compensated those “hypothetical” losses. In the end, each of these conclusions will now face a very stern test from Judge Barbier.

Judge Barbier has done an exceptional job of keeping this case on track. In this day and age, getting a civil case to trial in five years is not uncommon. For this case—a case that has been labeled as one of the largest and most complicated cases in United States history—five years and three massive trials in the books is astounding. An order from Judge Barbier will likely come in a few months.

Source: NOLA.com

VI. DRUG MANUFACTURERS FRAUD LITIGATION

FRESENIUS LAWSUIT FILED BY THE STATE OF LOUISIANA IS REMANDED TO STATE COURT

The lawsuit filed by the State of Louisiana against dialysis giant Fresenius alleging cardiac risks associated with the company’s dialysis solutions has been remanded to state court from federal court. The case is now before Judge Janice Clark of the Nineteenth Judicial District in the Parish of East Baton Rouge, and the State is represented by Beasley Allen lawyers, working with Attorney General James D. “Buddy” Caldwell.

The State of Louisiana, through the attorney general’s office, initiated its case against the Defendants in the Parish of East Baton Rouge on June 26, 2014. Named as Defendants were several Fresenius corporate entities, such as Fresenius Medical Care Holdings, Inc. and Fresenius, USA, Inc., as well as 99 Fresenius clinics operating within the State.

The State’s lawsuit, in addition to the lawsuits filed by thousands of other Plaintiffs in the Fresenius multidistrict litigation (MDL), arises from allegations that the company’s dialysis solutions, GranuFlo and NatraLyte, caused elevated levels of bicarbonate to build up in patients’ blood, leading to serious risks that include sudden cardiopulmonary arrest, while at the same time making misrepresentations regarding these life threatening complications caused by their dialysis solutions.

Louisiana’s lawsuit seeks to recover payments made through the State’s Medicaid program for GranuFlo and Naturalyte. The gravamen of the State’s lawsuit is that the Defendants used false, deceptive, fraudulent, and misleading practices in the promotion, marketing, sale, administering, and reimbursement of their dialyse products and services within the State of Louisiana. The State alleges that despite the Defendants’ knowledge since 2004 that their products were unreasonably dangerous, the Defendants continued to submit or caused to be submitted claims for reimbursement from the State of Louisiana in order to be paid for goods and services that they knew or should have known were of substandard quality.

After Louisiana’s case was filed in state court, it was eventually transferred to the Fresenius MDL in Boston, Mass., where thousands of private claims of personal injury and product liability are currently pending. The State of Louisiana filed its Motion to Remand and successfully argued that because the lawsuit was brought only on behalf of the State, and not private individuals, the Massachusetts court has no jurisdiction over the State’s case. Additionally, the State’s Petition makes no allegations under federal law. On Jan. 20, 2015, the State’s case was remanded back to the Nineteenth Judicial District Court where it was originally filed last June.

This is a great ruling for the State of Louisiana. The lawyers for the State can now move the litigation forward in an effort to recover the loss incurred by the State as a result of the Defendants’ conduct. The attorney general and his staff are working hard to protect the people of Louisiana.

Beasley Allen lawyers representing the State of Louisiana include Dee Miles, who heads our Consumer Fraud Section, along with Lance Gould, Ali Hawthorne, and Roman Shaul. All are lawyers in the section. For more information about this case, contact Ali Hawthorne at 800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.
**Mississippi Wins Remand Of Fresenius Suit In Dialysis Drug MDL**

The state of Mississippi has also won a remand of its lawsuit accusing Fresenius USA Inc. of misleading consumers about the dangers of two dialysis drugs. The Massachusetts federal judge overseeing multidistrict litigation (MDL), as he did in the Louisiana case, found the state’s presence in the suit destroyed diversity jurisdiction. U.S. District Judge Douglas Woodlock remanded the case to state court. The suit, filed on behalf of the state of Mississippi, seeks damages for misleading consumers about the potential of GranuFlo and NatuRate to cause sudden cardiac arrest and other issues.

The AG's suit, which was transferred from Mississippi federal court to be included in the MDL, alleges that the company violated the state’s consumer protection laws by concealing the risks of GranuFlo and NatuRate dialysis products. The state is seeking up to $10,000 in penalties for each time Fresenius violated the Mississippi Consumer Protection Act by providing false or misleading information to a state resident.

The cases encapsulated in the multidistrict litigation allege that the Plaintiffs or their family members suffered injuries or death after using Naturalyte or GranuFlo during dialysis, which are designed, manufactured and distributed by Fresenius. According to the suits, the use of these drugs causes an unexpectedly high level of bicarbonate in the blood that can lead to cardiopulmonary arrest or sudden cardiac arrest. Whether the two drugs were defectively designed or manufactured and whether Fresenius provided adequate warnings are central to the suits.

Source: Law360.com

**VII. LEGISLATIVE HAPPENINGS**

**The Alabama Legislature Comes To Town**

When the Alabama Legislature comes back to Montgomery for the Regular Session next month, they will find a number of problems awaiting them. Perhaps the biggest, which looms over everything else, is the enormous General Fund budget deficit. As of Oct. 1, it’s expected to total around $265 million. Considering the General Fund is expected to fund essential systems including the judiciary, prisons, Medicaid and state troopers, this is indeed a quandary. Maybe it’s time to start establishing both short and long range priorities in state government.

Meanwhile, the state’s debt continues to grow. It is estimated Alabama prisons will need $40 million more. Medicaid is taking a huge bite of the budget, with $100 million required. Another big chunk is tied to paying back other money already borrowed from the state’s Rainy Day Fund in 2010—a whopping $160 million. Borrowing money is not the answer to the state’s problems.

Interestingly, experts say there may be a saving grace on the horizon, in the form of BP Oil Spill money. The oil giant will either settle with state government to compensate for the damages done to the economy and environment as a result of its 2010 oil spill in the Gulf of Mexico, or go to trial and pay later. Either way, it would bring a nice influx of money into the General Fund and give lawmakers room to breathe. That’s why a settlement is the better course of action for the state.

Hopefully, they will use the opportunity to craft a real long-term solution, rather than pushing the state’s fiscal problems further down the line.

There are also a number of issues involving Education facing Alabama legislators in the upcoming session. The Alabama Education Association says raises for educators are a “necessity” for the 2015 legislative session. The organization points out active educators have gotten pay cuts, rather than raises, in recent years, and retired educators have not received cost-of-living or any other increase since 2007.

Legislators also are expected to be faced with a continuing debate about charter schools. Supporters say charter schools or a voucher program will provide vital options for families, whose neighborhood or “zoned” school may not meet their child’s needs. They say charter schools will help foster innovation and new ways of thinking about education, rather than following a cookie-cutter, one-size-fits-all standardized system of education. Opponents of charter schools say the model will pull money out of public schools that most need it, and will corporatize education. They argue charter schools do not have adequate oversight, and leave special needs students and programs behind. I tend to oppose charter schools and hope the legislators will make public education their top priority.

There is no doubt the challenges facing the legislature are many. Will legislators have the answers, or will this session turn out to be another round of “business as usual,” with lots of playing the blame game? Alabama voters need to pay attention and get involved. Things must change or Alabama will continue to fall further and further behind. I predict that Gov. Robert Bentley will rise to the occasion and take some courageous stands on problems that former governors in recent times have not been willing to face. I have tremendous confidence in Gov. Bentley and believe he will do the right thing for Alabama.

Sources: al.com, mlive.com

**VIII. COURT WATCH**

**District Court Sanctions Ghostwriting Of Expert Reports**

A district court in Michigan has strictly enforced the requirement of Rule 26 of the Federal Rules of Civil Procedure that expert witness reports be prepared by the expert witness, and not by lawyers. The case is Numatics, Inc. v. Balluff, Inc., No. 2:13-cv-11049, 2014 WL 7211167, at *7 (E.D. Mich. Dec. 16, 2014). In a ruling excluding Defendants' invalidity expert, the court strongly criticized the practice of lawyers drafting expert reports as “a remarkable breach of ethics and protocol.”

Plaintiff Numatics, Inc. filed a patent infringement suit against Defendants Balluff, Inc. and H.H. Barmun Company alleging infringement of U.S. Patent No. 7,967,646, related to a modular electrical fieldbus system intended to control the opening and closing of hydraulic and pneumatic valves. The Defendants hired a technical expert to provide testimony supporting their invalidity defenses. Their expert submitted a 64-page report on invalidity, asserting that the claims of the ’646 patent were obvious in light of various prior art references.

The Plaintiff moved to exclude portions of the expert report contending that the expert was simply unaware of the elements necessary to establish invalidity and that Defendants’ lawyers drafted the report in its entirety. During the hearing on the motion to exclude, lawyers for Defendants conceded that they had in fact drafted the expert's report.
As a preliminary matter, the court found the expert to be competent in the field of the asserted patent. However, the court decided that the expert “had surrendered his role to Defense counsel,” and stated that is “not how the adversary process works.” The court pointed out that Rule 26 of the Federal Rules of Civil Procedure states that expert testimony “must be accompanied by a written report—prepared and signed by the witness.”

The court acknowledged that expert witnesses are not lawyers, and that an expert may not understand fully the required components of an expert report. This requires a lawyer to explain these requirements and identify the subject matter to be covered. However, the court held that preparing the expert’s opinion from “whole cloth and then asking the expert to sign it if he or she wishes to adopt it is not permissible under Rule 26.”

Calling the Defendants’ expert a “highly qualified puppet,” the court criticized him for spending only eight hours reviewing the report and stated that he had adopted “the attorney’s report—that is the only reasonable way to describe it—in its entirety.” The court further noted that the expert had devoted only two or three hours to reviewing 2,600 pages of deposition transcripts and a total of less than 30 hours developing his opinions about the case, nearly half of which was spent traveling for the case.

The court further noted that the expert report was indistinguishable, down to the punctuation, from Defendants’ invalidity contentions, which were disclosed several months before the expert signed the report. The court concluded that Defendants had violated Rule 26, and Rule 37 vehicle required excluding the expert from the case.

The Nnamatics decision is a reminder to lawyers that we must be mindful of our role in the drafting of expert reports. Lawyers are allowed to assist the expert in the fine tuning of an expert’s report, but should not draft the report or even take the major role in drafting the report. The bottom line is that the expert’s report must represent that person’s own commentary. If the expert doesn’t know all about Rule 26 and other legal principles that apply to the reports by experts, it’s the lawyer’s responsibility to make sure he or she does.

Source: Akingump.com

**SUPREME COURT REJECTS BROADER LIABILITY SHIELD FOR MILITARY CONTRACTORS**

The U.S. Supreme Court, in a very important ruling, rejected three KBR Inc. appeals in cases that would have given military contractors a broader shield from lawsuits over their activities on the battlefield. The court left intact a group of federal appeals court rulings allowing lawsuits against KBR to go forward.

One appeal centered on accusations that KBR and Halliburton Co. harmed thousands of service members and contractor employees in Iraq and Afghanistan by burning hazardous waste, including asbestos and human remains, in open-air pits. The victims contend in 58 consolidated suits that they were exposed to toxic smoke and contaminated water.

In a second case, a KBR unit was defending claims by the family of a soldier who was electrocuted while taking a shower in his barracks in Iraq. The family contended that the company was negligent in servicing the barracks plumbing. The third case involves allegations that KBR was to blame for soldiers’ exposure to a hazardous chemical while repairing a water treatment plant.

Source: Insurance Journal

**MULTI-STATE DOG FIGHTING RING ORDERED TO PAY $2 MILLION RESTITUTION**

U.S. District Judge Keith Watkins, a federal judge in Alabama, has ordered participants in a high-stakes dog fighting operation to pay a record $2 million in restitution. Judge Watkins levied the payments last month on individuals who pleaded guilty in the multi-state case. This is a very good result and Judge Watkins is to be commended for his order. I don’t believe we can be too hard on people who do what these Defendants did.

Officials with the American Society for the Prevention of Cruelty to Animals and the Humane Society of the United States said it was the largest restitution amount ever ordered by a federal judge in a dog-fighting case. The restitution will go to the two animal welfare organizations, which provided care for the 451 dogs seized in the case. But even if all the money is paid, the groups say it won’t come close to covering the $5.5 million they reported spending on the dogs’ care.

I am convinced that if a person will mistreat a dog—and that includes the type treatment described in this case—that person will also likely be prone to violence generally. Hopefully, Judge Watkins’ order will get the attention of all people who are in the dog-fighting business or may be thinking about getting in that sordid enterprise.

Source: AL.com

**IX. THE NATIONAL SCENE**

**STUDY AUTHOR SAYS AUTISM RISK LINKED TO CHEMICALS**

“At today’s rate, by 2025, one in two children will be autistic.” That is the conclusion senior MIT research scientist Stephanie Seneff PhD drew from her extensive body of research examining the impact of environmental toxins on human health. The main culprit? Monsanto’s herbicidal glyphosate and its increasing use on American crops.

Dr. Seneff presented her dire findings at a recent conference, telling a panel discussing genetically modified organisms (GMOS) that autism and glyphosate toxicity not only shared very similar side effects, but there is a remarkably consistent correlation between the use of glyphosate (marketed by Monsanto as Roundup), the Monsanto crop seeds genetically modified to withstand toxic Roundup, and rising rates of autism in American children.

Americans have 10 times the amount of glyphosate accumulation in their bodies as Europeans, whose governments either heavily restrict glyphosate use or have banned it completely. According to the Alliance for Natural Health, studies have found that American mothers have extremely high levels of glyphosphate in their breast milk, where the toxin is present at 760 to 1,600 times the maximum allowable limits in European drinking water.

Autistic children also have biomarkers that indicate excessive glyphosate levels, including zinc and iron deficiencies, low serum sulfate levels, mitochondrial disorder, and seizures.

Perhaps most disturbing is that the trend of using Monsanto’s Roundup and GMO “Roundup Ready” seeds shows no sign of slowing down, let alone stopping. Almost all American corn and soy is produced with Roundup and GMO seeds. These grains form the base of the U.S.
food supply, so glyphosate can be found in everything from cereal and chips to anything sweetened with corn syrup or GMO sugar cane. American livestock are also fed GMO corn and soy, so beef, poultry, dairy products, and eggs also contain glyphosate.

Farmers often spray Roundup on wheat just before harvesting, so glyphosate also works its way into non-organic bread and other foods made with wheat. Even though the U.S. Department of Agriculture (USDA) regulators and other pro-GMO forces say that the amount of glyphosate in these products is trace, they ignore the cumulative effects that glyphosate toxicity is having on human health.

A study conducted by the Department of Public Health Sciences at University of California Davis and published in June found that pregnant women who live near farms where pesticides are applied had a 60 percent higher risk of having children with autism. Present and future generations of children aren’t the only ones being harmed by excessive use of Roundup and GMOs. Studies have shown the same correlations between glyphosate and autism are found in deaths from senility.

Tragically, government regulators who are supposed to shield Americans from such public health disasters seem to be complicit in the widespread use of glyphosate and prevalence of GMO crops. In December, the USDA reported that pesticide residues are found in more than half of the food it tested, but said that 99 percent of these samples contained pesticide levels it considers “safe.”

Additionally, the USDA reported that 40 percent of food tested showed no trace of pesticides at all. The Alliance for Natural Health, however, points out that the agency failed to test these samples for glyphosate, the active ingredient in the most widely used herbicide in the U.S., because of unspecified “cost concerns.” The agency also failed to test for herbicide ingredients considered “inert,” yet scientists have found that those ingredients can radically intensify glyphosate’s toxic effects. “In my view, the situation is almost beyond repair,” Dr. Seneff said after her presentation. “We need to do something drastic.” I agree with that assessment and hope our government officials are listening.

Sources: Alliance for Natural Health, Reuters and Discovery News

X. THE CORPORATE WORLD

JPMORGAN SETTLES CURRENCY MANIPULATION LAWSUIT

In November, we published an article describing an antitrust suit brought against several large banks that mirrored the LIBOR (London interbank offered rate) scandal. Now, the first of those Defendants has settled the claims against them. JPMorgan Chase & Co has become the first bank to settle the lawsuit in which investors accused 12 major banks of rigging prices in the $5 trillion-a-day foreign exchange market. J.P. Morgan, the largest U.S. bank, will pay about $100 million. In a letter filed with the U.S. District Court in Manhattan last month, lawyers for the bank and the investors said a settlement had been reached. Since it involves a class action, the settlement requires court approval.

The 2013 lawsuit is separate from criminal and civil probes worldwide into whether banks rigged currency rates to boost profit at the expense of customers and investors. JPMorgan agreed in November to pay about $1.01 billion to resolve probes by U.S. and European regulators. Five other banks including Bank of America, Citigroup, HSBC, RBS, and UBS also settled with regulators in November for an additional $3.3 billion.

In this class action complaint, investors including the city of Philadelphia, hedge funds and public pension funds accused the 12 banks of having conspired since January 2005 in chat rooms, instant messages and emails to manipulate the WM/Reuters Closing Spot Rates. They said traders would use such names as The Cartel, The Bandits’ Club and The Mafia to swap confidential orders, and set prices through manipulative tactics such as “front running,” “painting the close” and “picking the screening.” Front running is when a broker trades stocks based on internal analyst information prior to giving the clients the information. A broker who purchases stocks in a company that his brokerage firm is about to recommend as a strong buy, is front running.

Banging the close, as we described in an earlier report, refers to a massive push to buy or sell a certain stock right before market close. Painting the screen, sometimes called painting the tape, involves large buying and selling of securities between brokers to create an impression of high market activity, an action specifically declared illegal by the Securities and Exchange Commission.

This is a most unusual and welcomed settlement. I believe that J.P. Morgan Chase did the right thing in addressing its involvement. Hopefully other banks will follow suit. The case is in the U.S. District Court, Southern District of New York.

Source: Reuters

19 STATES SEEK DATA ON DAMAGES FROM JPMORGAN BREACH

JPMorgan Chase & Co (JPMC) was pressed for more evidence by a group of states probing a data breach that jeopardized millions of customer accounts last year, including whether any of the compromised information has been connected with fraud. The group of 19 attorneys general was seeking more information by Jan. 23. They wanted a full timeline of events that led to discovery of the breach. It was stated in a letter from the attorneys general to the bank that “any vulnerability exploited in connection and the company’s efforts to probe and mitigate the damages,” was being sought. The letter dated Jan. 8 was obtained by Bloomberg News and its contents released.

The request came as President Obama was calling for new laws requiring companies to disclose instances when they’ve been hacked and preventing companies from profiting from student data. President Obama’s proposal followed breaches at Sony Corp.’s entertainment unit and Target Corp. The group said in the letter:

This incident raises concerns about the security of our states’ residents’ private information in the hands of JPMC. Further, critical facts about the intrusion remain unclear, including details concerning the cause of the breach and the nature of any procedures adopted or contemplated to prevent further breaches.

JPMorgan, the biggest U.S. bank, said in October that a data breach by hackers affected 76 million households and 7 million small businesses, with customer names, addresses, phone numbers and e-mail details taken. The New York Times reported on the letter earlier. The attorneys general asked for information about JPMorgan’s customers subject to the breach and why the bank said there was...
no evidence that passwords or Social Security numbers were compromised.

The attorneys general also asked for the number of customers in each of the 19 states affected by the breach and whether the company was aware of any fraudulent activity resulting from it. The group also sought information on JPMorgan’s security protocols, including such things as the use of two-factor authentication for access to the servers, which requires two separate ways of identifying a user. JPMorgan shares fell 3.5 percent to $56.81 in New York, the biggest decline in almost three months, after the company reported the lowest fixed-income trading revenue since the financial crisis and legal costs that were about twice as high as some analysts estimated.

Source: Insurance Journal

**CAPITAL ONE TO PAY $32 MILLION IN SETTLEMENT OF OVERDRAFT FEE MDL LITIGATION**

The Plaintiffs in multidistrict litigation (MDL) have agreed to a settlement with Capital One Bank NA. In their complaint, the Plaintiffs alleged that banks acted in bad faith by processing transactions in an order that would net the bank the most in overdraft fees. The Plaintiffs asked a Florida federal court for preliminary approval of the settlement with Capital One, which they say is worth more than $31.7 million. The settlement, which follows settlement agreements with several other banks named in the 2010 suit, was worked out following about two years of settlement discussions and two rounds of mediation. The Plaintiffs’ motion states that the four years of litigation in the case have included about 20 depositions and the production of more than 325,000 pages of documents and electronic files.

The Plaintiffs described the agreement as “an outstanding result for the settlement class,” with the cash payment amounting to about 35 percent of the most likely maximum recovery the settlement class could have recovered through a trial. They requested a final approval hearing for May. The Plaintiffs said in their filing with the court:

> The action involved sharply opposed positions on several fundamental legal questions, including whether Capital One breached its duty of good faith and fair dealing to its customers when it engaged in high-to-low posting, as well as the enforceability to a contractually abbreviated period for bringing claims.

Capital One had tried three times to get the court to dismiss the case. In June, a Florida federal judge rejected the bank's attempt to apply to its case a Ninth Circuit decision holding that similar charges against Wells Fargo & Co. were preempted by the National Bank Act. The suits were filed all around the country in the late 2000s. All took issue with banks' practice of deducting money from accounts not in chronological order, but instead based on the size of transactions, allegedly to maximize the number of overdraft fees. The bulk of the suits were filed in Florida. In most all of the cases a class was certified.

Some of the banks were able to compel arbitration based on provisions in their customer agreements. But those that were not able to do so—including JPMorgan Chase Bank NA, Bank of America NA, and TD Bank NA—have settled. Other recent settlements include M&T Bank’s agreement to pay $4 million and Synovus Financial Corp.’s proposed $3.9 million settlement. Under the most recent settlement, which would release Capital One from all claims in the suit, the bank would pay more than $31.76 million into an escrow account within 14 days of preliminary approval and will also pay all fees and costs for the notice program and administration of the settlement.

It was reported that settlement class members who do not opt out will automatically receive pro-rated shares from the settlement fund. Settlement class counsel and their experts have used Capital One’s data to determine which account holders were harmed by the high-to-low posting practice. If the settlement is approved, class counsel will also seek service awards of $10,000 each for two class representatives in addition to the relief they receive under the settlement program. Capital One has also agreed not to oppose class counsel’s request for attorneys’ fees up to 35 percent of the settlement fund, plus reimbursement of litigation costs and expenses.

**MERCK NOW FACES LITIGATION OVER VIOXX FROM INVESTORS**

As most of those who receive the Report and are familiar with our firm know, our Mass Torts Section was closely involved in the Vioxx litigation against Merck. Led by Andy Birchfield, who now heads up the section, our team worked on behalf of thousands of people injured and killed by the once-blockbuster drug, which was promoted as a pain reliever but eventually proved linked to cardiovascular and thrombotic risks.

Litigation revealed Merck knew about the dangers before it even got approval in 1999 from the U.S. Food and Drug Administration (FDA) but it hid the risks. It was not until 2004 that Merck pulled Vioxx from the market after it was blamed for causing nearly 100,000 heart attacks, strokes or deaths. In 2007, Merck agreed to pay $4.85 billion to settle thousands of personal injury lawsuits, among other settlements related to Vioxx and its injuries.

However, an area of litigation that is still ongoing concerns financial losses to investors who bailed out on the drug’s success. Investor and derivative claims were consolidated into a multidistrict litigation (MDL) in 2005, in New Jersey. That MDL is still ongoing.

On Jan. 23, some additional investors who withdrew from that MDL filed a lawsuit against Merck & Co. Inc. in New Jersey federal court. Plaintiffs are the Kuwait Investment Authority, Aegon Investment Management BV and Transamerica Funds. In their complaint, they allege Merck “engaged in an aggressive campaign to conceal both the medical and commercial risks associated with Vioxx,” not only from the FDA and the public, but from the Securities and Exchange Commission (SEC). As a result, Plaintiffs say Merck stock traded at an artificially inflated price, and investors were not aware that Vioxx had any risk of liability. They expected the drug to remain a blockbuster for years to come.

The lawsuit asks that Merck compensate Plaintiff investors for the more than 1.37 million Merck & Co. shares they purchased. They also call for those who served as officers and senior managers for Merck, who received bonuses and other compensation as a result of aggressively marketing Vioxx while concealing its risks, should be forced to pay back “ill-gotten gains.”

Source: Law360

**IMPORTANT LIBOR RULING BY U.S. SUPREME COURT**

The U.S. Supreme Court ruled on Jan. 21 that investors whose sole antitrust claim was dismissed from ongoing multidistrict litigation (MDL) over alleged manipulation of the London interbank offered rate (LIBOR) was a final and appealable order. This gives the Plaintiffs a right to an immediate appeal. The
ruling reversed the Second Circuit’s refusal to hear the case. The appeal arises from a 2013 district court order dismissing all of the antitrust claims from the MDL. The current suit and others in the MDL followed in the wake of global enforcement actions targeting some of the world’s largest banks for rigging submissions for the key benchmark rate, which is set by the British Bankers Association and used to determine interest rates for a host of financial arrangements.

Petitioners Ellen Gelboim and Linda Zacher filed a class action asserting one claim under Section 1 of the Sherman Antitrust Act against Bank of America and other institutions. The Gelboim-Zacher action was one of more than 60 actions filed in federal district courts in 13 states. The other actions included antitrust claims as well as other state and federal claims. The actions were consolidated for pretrial purposes in the Southern District of New York pursuant to the MDL statute as “involving one or more common questions of fact.” The district court granted the banks’ motion to dismiss all the antitrust claims in all the actions in the MDL, finding that none of the Plaintiffs could assert a cognizable antitrust injury. As the antitrust claim was the only one in the lawsuit filed by Gelboim and Zacher, they argued that they could immediately appeal the decision as of right as a “final decision” under 28 U.S.C. § 1291.

It should be noted that there are other claims in this case still proceeding in the MDL. Justice Ruth Bader Ginsburg wrote in a 13-page, unanimous opinion:

Petitioners’ right to appeal ripened when the district court dismissed their case, not upon eventual completion of multidistrict proceedings in all of the consolidated cases.

The only claim by these Plaintiffs was dismissed. Therefore, their case had a final order regardless of the remaining cases in the MDL. The court said that cases consolidated into MDL for pretrial proceedings generally still remain separate suits. This means that a decision that completely resolves one of the individual cases can be appealed.

As a result, the justices found that the Second Circuit had erred in deciding on its own motion to refuse the appeal from Plaintiffs Ellen Gelboim and Linda Zacher because the district court’s order did not resolve the entirety of the consolidated Libor litigation. Justice Ginsburg wrote:
The district court’s order dismissing the Gelboim-Zacher complaint for lack of antitrust injury, without leave to amend, bad the hallmarks of a final decision. As is ordinarily the case, the [MDL] consolidation offered convenience for the parties and promoted efficient judicial administration, but did not meld the Gelboim-Zacher action and others in the MDL into a single unit.

The court held that the banks’ argument that the Plaintiffs lack the right to appeal until the consolidation is over would leave the Plaintiffs “in a quandary” over when to file their appeal. In fact, Justice Ginsburg could not identify any discrete event or order that would start the jurisdictional 30-day clock for petitioners to file a notice of appeal.

Appeals must be filed in civil suits within 30 days from the judgment being appealed, but often the consolidation in an MDL can wrap up without any judgment being entered and orders returning cases to the courts where they were originally filed are not appealable decisions, according to the opinion. Would-be appellants cannot be made to wait until final disposition of all cases in their original districts, an event that may not occur for several years. Justice Ginsburg wrote:
The sensible solution to the appeal-clock trigger is evident: When the transferee court overseeing pretrial proceedings in multidistrict litigation grants a Defendant’s dispositive motion on all issues in some transferred cases, [those cases] become immediately appealable ... while cases where other issues remain would not be appealable at that time.

This decision is great news for clients and firms that participate in MDL proceedings. MDLs are designed to help with judicial efficiency and economy, but without this ruling, they could also unduly delay cases for years while the dismissed Plaintiffs wait for the entire MDL to resolve.

Sources: law360 and www.scotusblog.com

XI.
WHISTLEBLOWER LITIGATION

DAIICHI SANKYO AGREES TO PAY $39 MILLION TO SETTLE WHISTLEBLOWER CASE

Beasley Allen lawyers continue to handle whistleblower lawsuits under the Federal False Claims Act and related federal and state statutes. Recently, Dee Miles, Archie Grubb and Andrew Brashier, lawyers in our Consumer Fraud Section, represented one of six whistleblowers to come forward alleging that a global pharmaceutical company, Daiichi Sankyo, Inc. (Daiichi) violated federal and state laws, including the Anti-Kickback Statute, by paying kickbacks to induce physicians to prescribe its drugs, including Azor, Benicar, Tribenzor, and Welchol. Daiichi has agreed to pay the United States and state Medicaid pro-
grams $39 million to resolve the allegations. The case was spearheaded by whistleblower Kathy Fragoules, who was expertly represented by attorney Marcella White from the Nolan, Auerbach & White law firm.

The Anti-Kickback Statute was enacted to ensure that physicians’ medical judgment is not compromised by improper payments and gifts by other health care providers. The statute generally prohibits anyone from offering, paying, soliciting, or receiving remuneration to induce referrals of items or services covered by federal health care programs, including Medicare and Medicaid. In this case, the whistleblowers alleged Daiichi used lavish entertainment and padded speaker program payments to induce physicians to prescribe its drugs. In some cases, physicians were alleged to have received payments for speaking to their own office staff.

As part of the settlement, Daiichi has agreed to enter into a corporate integrity agreement with the Department of Health and Human Services—Office of Inspector General (HHS-OIG), which obligates the Defendants to undertake substantial internal compliance reforms for the next five years. The whistleblowers will share approximately $7 million of the settlement proceeds, with the remainder paid to the United States and various state governments.

Since January 2009, the federal government has recovered more than $23.3 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. Beasley Allen lawyers are proud to assist in this effort. For further information on whistleblower cases, call 800-898-2034 and ask for one of these lawyers in our firm: Archie Grubb (Archie.Grubb@beasleyallen.com), Andrew Brasher (Andrew.Brasher@beasleyallen.com), Lance Gould (Lance.Gould@beasleyallen.com), or Larry Golston (Larry.Golston@beasleyallen.com).

Source: Justice.gov

WHISTLEBLOWER WINS SUPREME COURT RULING

The U.S. Supreme Court ruled last month that a former air marshal who was fired after leaking plans to the media about security cutbacks can seek whistleblower protection. By a 7-2 vote, the justices said Robert MacLean did not violate federal law when he revealed that the Transportation Security Administration (TSA) planned to save money by cutting back on overnight trips for undercover air marshals.

MacLean leaked the information in 2003 to an MSNBC reporter after supervisors ignored his safety concerns. His disclosure triggered outrage in Congress, and the Department of Homeland Security quickly reversed the policy, calling it a mistake. But the TSA fired McLean three years later after it discovered he was the leaker. A federal appeals court sided with MacLean, but the Obama administration appealed. The government argued that whistleblower laws contain a major exception—they do not protect employees who reveal information that is “prohibited by law” or by an executive order. Government lawyers pointed to TSA regulations that prohibit employees from disclosing “sensitive security information,” including any information relating to air marshal deployments.

Chief Justice John Roberts said in his opinion for the court that nothing in federal law prohibits MacLean from doing what he did. The government has raised legitimate security concerns, Roberts said, but they must be addressed by the president through an executive order or Congress by changing the law. “Although Congress and the president each has the power to address the government’s concerns, neither has done so. It is not our role to do so for them,” he wrote. Justices Sonia Sotomayor and Anthony Kennedy dissented.

MacLean also had argued that the information about cutting overnight trips wasn’t really sensitive because it had been sent as a text to his cell phone without using more secure methods. The government warned that allowing MacLean to gain whistleblower status would only encourage other federal employees to divulge secret information, posing a future threat to public safety. Chief Justice Roberts repeated what several justices said during arguments in November—that if the safety issue were grave enough, the president could simply sign an executive order prohibiting federal workers from revealing such sensitive data.

Source: Claims Journal

XII. CAMPAIGN FINANCE REFORM

Koch Brothers Set $889 Million Budget For Lead-Up To 2016

Top officials in the Koch brothers’ political organization released a staggering $889 million budget last month to fund the activities of the billionaires’ sprawling social network before the 2016 presidential contest. The budget, which pays for everything from advertising and data-gathering technology to grass-roots activism, was released to donors attending the annual winter meeting of Freedom Partners Chamber of Commerce.

In 2012, Freedom Partners spent nearly $240 million as it funded nearly three dozen organizations, ranging from the U.S. Chamber of Commerce to smaller Tea Party groups. The fundraising target is the latest indication that the industrialists at the center of the network, Charles and David Koch, intend to continue building an operation that rivals—or exceeds—the national political parties in size and scope to help advance their libertarian principles. By comparison, the Republican National Committee (RNC) raised and spent nearly $400 million during the 2012 presidential election cycle.

XIII. CONGRESSIONAL UPDATE

U.S. HOUSE APPROVES BILL SCALING BACK WALL STREET REFORM LAW

I really wasn’t surprised to learn that the U.S. House of Representatives had passed a bill scaling back the 2010 Wall Street financial reforms. If anybody doubts that Wall Street giants have tremendous influence in Congress, this sort of thing is pretty good proof. This was a blow to the public and a victory for Wall Street. House Republicans claim the Dodd-Frank law is unworkable and an unnecessary burden on American businesses. The bill was sent to the U.S. Senate. Hopefully, there will be senators—both Republicans and Democrats—who will defend the law and not yield to
pressure from Wall Street. The vote in the House, 271 to 154, was along party lines.

The bill, if passed, will among other changes give banks extra time to comply with part of the law’s controversial Volcker rule and loosen disclosure requirements for small companies seeking to raise capital. Predictably, House Financial Services Committee Chairman Jeb Hensarling, a Republican, had this to say:

The community banks and the Main Street businesses that are trying to put America back to work are suffering under the sheer weight, load, volume, complexity and cost of the regulatory burden that has been imposed.

Republicans control both the House and Senate after major wins in last November’s elections. They have made it a top priority to reduce what they view as a “burden on business” due to federal regulation. The House approved a bill that creates extra hurdles for agencies writing new rules. Without a doubt, the Dodd-Frank law is a top target. Republicans brought up the financial regulation bill as soon as they returned to Washington last month. They first tried to move it quickly under special rules that required two-thirds of the House’s approval, but Democrats defeated that plan.

Then supporters, including 29 Democrats, approved the bill under normal rules that required fewer votes. Hopefully, this ill-advised bill won’t pass in the Senate. Republicans hold a slimmer majority there than they do in the House. The bill’s most controversial portion relates to the Volcker rule, which bans banks from making risky trades with their own money and restricts certain types of investments. The bill passed by the House gives banks two more years to comply with a section related to collateralized loan obligations, or bundles of business loans. Banks said they would have to dump investments, disrupting the market, if the rules were not changed.

President Barack Obama has threatened to veto the bill if it reaches his desk. Hopefully, enough Senators will remember how Wall Street banks operated prior to enactment of the Dodd-Frank legislation. They came very close to destroying our nation’s economy.

President Obama To Propose New Cyber Security Legislation

President Barack Obama announced plans last month to introduce legislation to strengthen cybersecurity laws. The move came on the heels of several massive data breaches such as Sony Pictures, Home Depot and Target. The President said the recent hacking attacks have emphasized the threat faced not only by financial systems, but also power grids and health care systems that run on networks connected to the Internet. According to the Neilson Report, credit and debit card fraud alone cost consumers more than $11.3 billion in losses in 2013.

Under the proposed legislation, companies will have 30 days to notify consumers if their personal information—such as Social Security number or address—has been exposed by hackers. The proposal also shields private sector companies from liability when they share information on cyber threats with government agencies like the FBI, NSA and Secret Service. Additionally, the White House said the plan “would allow for the prosecution of the sale of botnets, would criminalize the overseas sale of stolen U.S. financial information like credit card and bank account numbers, would expand federal law enforcement authority to deter the sale of spyware used to stalk or commit ID theft, and would give courts the authority to shut down botnets engaged in distributed denial of service attacks and other criminal activity.”

Another piece of the President’s proposed law, the Student Digital Privacy Act, aims to stop the sale of sensitive student data for non-education purposes. With students routinely using laptops, tablets and computer programs at school, lots of that data is being collected—and sometimes this information is sold to advertisers and financial companies. President Obama, after he had spoken to the Republican leaders of the House and Senate, observed:

I think we agreed that this is an area where we can work hard together, get some legislation done and make sure that we are much more effective in protecting the American people from these kinds of cyberattacks.

It’s critically important that Congress enact laws to strengthen our cybersecurity. We can’t sit back and let this area of concern continue to escalate. Steps must be taken to protect the American people and our businesses and institutions.

Source: Reuters

House Republicans Want to Loosen the Reins on the FDA

Fen Phen, Lotronex, Propulsid, Rezulin, Baycol, Vioxx, Bextra, Avandia, and Meridia—what do these pharmaceutical drugs have in common? Each was rushed to the market without adequate safety and efficacy studies, each was over-promoted by pharmaceutical representatives who had large monetary incentives to convince doctors to prescribe the drugs to patients, each ended up severely injuring or killing innocent patients, and all were eventually removed or withdrawn from the market because the risks of injury turned out to be much greater than the benefits the drugs were supposed to provide. Unfortunately, this is just a small sample of the actual number of dangerous pharmaceutical drugs that have been removed or withdrawn from the market since the late 1990s.

Now, Republican leaders of the House of Representatives Energy and Commerce Committee want to overhaul of the Food and Drug Administration by allowing faster clinical trials for new drugs, an accelerated approval process, and, in some cases, waivers on post-market studies. The 393-page bill would also relax regulations on drug promotion and advertising by pharmaceutical companies.

This proposed legislation will enable pharmaceutical companies to rush drugs to market faster than ever before with even less safety and efficacy data, and that will expose patients to unnecessary risks of severe injury or death just as we’ve seen in the past. Most people do not realize that the pharmaceutical companies—not the FDA—conduct the clinical trials for their drugs and the FDA only reviews the data supplied to it by the pharmaceutical company. We have seen numerous instances where the pharmaceutical companies have withheld important data from the FDA, so this is terrible news for consumers.

XIV.
PRODUCT LIABILITY UPDATE

Toyota Ordered To Pay $11 Million in U.S. Trial Over Fatal Crash
Feb 3, 2015—(Reuters)

A jury on Feb. 3rd ordered Toyota Motor Corp to pay nearly $11 million after
finding that an accelerator defect in a 1996 Camry was at fault for a 2006 fatal car crash in Minnesota. Following a three-week trial, jurors in Minnesota federal court found Toyota 60 percent liable for the crash and Koua Fong Lee, the Camry’s driver, was found 40 percent responsible.

The plaintiffs said that the crash was caused by a defect in the Camry’s accelerator that caused it to become stuck, and the brakes failed to work. Toyota denied that the car was at fault, and said the driver was at fault. The car in the crash was not covered by Toyota’s recall of more than 10 million vehicles between 2009 and 2010 over sudden, unexpected acceleration issues.

The Minnesota trial involved a lawsuit filed on behalf of passengers injured or killed in a 2006 crash in St. Paul, Minnesota. The driver, Mr. Lee, who later joined the suit, said he was driving his 1996 Toyota Camry when it inexplicably began to accelerate as he approached other vehicles stopped at an intersection. The Camry slammed into an Oldsmobile Ciera, killing the driver, Javis Trice-Adams Sr., as well as his 9-year-old son. A 6-year-old girl who was also in the car was paralyzed and later died. Two other passengers were seriously injured.

Lee, the driver of the Camry, was charged in connection with the crash and served nearly three years in prison for vehicular homicide. In 2010, when reports of unintended acceleration in other Toyota vehicles surfaced, Lee won a motion to set aside his conviction, and he was released from prison. I didn’t have time to give a full account of this verdict since this issue was sent to the printer on Feb. 4th. Source: Reuters

Aging And Dangerous Tires On Our School Buses

Each day, school buses carry thousands and thousands of our children to and from school. Proper maintenance of school buses to assure our children are safe cannot be stressed enough. Inspection and replacement of school bus tires is critical. Recently, aging school bus tires have garnered well deserved attention. Investigations of school buses in Alabama and other states have uncovered school buses equipped with tires that are 8, 9, 10 and even 13 years old.

Tire aging is perhaps the most dangerous tire defect because it cannot be seen and most people are not aware of the dangers of aged tires. 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. Since 2005, car makers have warned that a tire should be replaced and not used after six years regardless of use or appearance. Tire makers warn that tires should be replaced after 10 years.

Despite the dangers of tire aging, The National Highway Traffic Safety Administration (NHTSA) still refuses to establish a tire-aging standard. Alabama, like almost every other state, has no requirement that the school districts replace tires at a certain age. A tire aging standard would not only make it easier for school districts to determine a tire’s age, but would also be very persuasive, if not mandate that school districts take tires out of service at a specified date, regardless of what the tire looks like on the outside.

Currently, the Alabama Department of Education tire inspection procedures conform to the Federal Motor Vehicle Safety Standards, which provide requirements for tread depth, tire condition, and tire inflation. Our state and local inspectors use these requirements to determine when to replace tires rather than the date a tire was manufactured. While tires should be inspected for these conditions, tire age should not be ignored.

Every effort should be made to provide the safest transportation for our most precious cargo—our students. Old tires on school buses are ticking time bombs that should be removed now. If you need more information, contact Rick Morrison, a lawyer in our firm who has successfully handled tire cases for the firm. Rick can be reached at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

Lawyers In Our Firm Settle Industrial Machine Design Case

Lawyers in our firm settled a case last month involving an on-the-job injury involving a piece of aluminum extrusion equipment manufactured by Granco Clark, Inc. Our firm represented Walter Robinson, a 19-year employee of Thermalex Inc., located in Montgomery, Ala. Mr. Robinson was a machine operator at Thermalex and was injured on the job. At Thermalex, large aluminum logs weighing approximately 1,200 pounds are heated in a furnace and run through a die to make smaller aluminum component parts. Much of the equipment in the Thermalex facility is manufactured by Granco Clark. Located at the beginning of the extrusion line is a Granco Clark log table. The log table is essentially a holding rack for the aluminum logs and it’s tiered for different alloy logs. The table has a series of hydraulic functions that feed logs individually onto a conveyor that pushes the logs through the furnace.

On the day of Mr. Robinson’s accident, a log jammed in the table’s cradle and would not release onto the conveyor. We learned that this particular machine had a history of jamming in this manner. Mr. Robinson worked downstream from the log table at the end of the extrusion line. His co-employee and supervisor requested Mr. Robinson’s help to manually eject the log from the cradle. As Mr. Robinson and his co-employee attempted to manually eject the jammed log, a second log was released from the top tier of the table with the cradle still in the down position. The 1,200-pound log crashed down onto the table, crushing our client’s foot. Walter’s toes could not be saved, and the front portion of his foot had to be amputated.

After the accident, our lawyers investigated the case and inspected the Granco Clark log table. With the help of Dr. Igor Paul, a retired professor of mechanical engineering at MIT, our lawyers discovered several design and guarding flaws. Dr. Paul testified that the machine was unreasonably dangerous and therefore defective due to the lack of hydraulic interlocks preventing the table from releasing logs with the cradle out of position. Dr. Paul further testified that the table lacked adequate perimeter guarding, exposing operators to crush hazards. Following the accident, Thermalex placed fences around the log tables restricting access to the previously exposed crush hazards.

Mr. Robinson’s life was forever changed as a result of the accident, but he has kept his head up and maintained a positive attitude throughout the case. He agreed to a settlement in his case with the amount, at the Defendant’s request, being confidential. This case was handled by Evan Allen and Kendall Dunson, lawyers in our firm. The case was pending before Judge Gene Reese in the Circuit Court of Montgomery County, Ala. Evan and Kendall did a very good job for Mr. Robinson in his case.

FHWA Opens Website For Public Reporting Of Guardrail Flaws

The Federal Highway Administration (FHWA) has opened an Internet portal...
allowing the public to report accidents tied to a Trinity Industries Inc. guardrail system, which has been linked by lawsuits to at least eight deaths. This is the latest sign of intensifying government scrutiny of Trinity and its shock-absorbing guardrail end-terminal, the ET-Plus. It has been reported that the system can seize up on impact, spearing cars instead of giving way as intended.

**Recalls Of Cars Abroad Prompt No Urgency In United States**

Last year, shortly after his teenage grandson experienced repeated power steering failures while driving his red 2006 Chevrolet HHR, Edward Higgins of Melrose, Mass., searched for recalls. He was surprised to find, while searching online, that the vehicle had been recalled for that problem in 2010 in Canada, but not in the United States. Mr. Higgins discussed his frustration in an interview:

*I was beyond mad. I can’t wrap my mind around it. I understand this isn’t a perfect world, but it’s one company. Whether it’s Canada or the U.S., it’s one car. Why would you recall it in one country and not another? It doesn’t make any sense.*

This sort of thing happens all the time. A car manufacturer that distributes the same car all over the world may recall that car in another country, but fail to do so in the United States. For example, Toyota discovered a braking defect, Honda a power steering flaw and Nissan a problem that could lead drivers to lose control of their cars. Additionally, Ford found that wires in some cars could melt, General Motors said that some air bags might fail to deploy, and Chrysler confirmed that some of its Jeeps could burst into flames. These automakers discovered these problems years ago, reported them to regulators and conducted safety recalls—just not in the United States. Do you find that hard to comprehend?

*The New York Times* recently found that automobile companies conducted at least 33 safety actions in foreign countries that never fully led to American recalls. The defects involved such critical parts as air bags, brakes and steering and electrical systems—all defects that could lead to injuries and even death.

In one case, NHTSA opened an investigation into a power steering problem in Toyota models in November 2006, but closed it the following March, despite having found three crashes potentially tied to the problem and more than 100 related warranty claims. Rosemary Shahan, president of Consumers for Auto Reliability and Safety, finds the lack of urgency in the United States absurd. She stated:

*If cars are unsafe in Canada, they’re unsafe here. It’s not believable that suddenly you cross a border into Maine and suddenly your car is safe.*

We have no doubt that the automobile industry’s recall system will cause unnecessary injuries and deaths. Lawyers in our firm have successfully handled cases involving defective vehicles that have not been recalled. If you would like more information on this subject, contact our Product Liability Section Head, Cole Portis, or Stephanie Monplaisir, a lawyer in the Section, at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Stephanie.Monplaisir@beasleyallen.com.

**Jury Returns $2.5 Million Verdict In Wrongful Death Case**

A Virginia federal jury returned a $2.5 million verdict against Ryobi Technologies Inc. last month. The jury made the award to the widow of a man killed when his lawnmower exploded. But the jury found in favor of Home Depot Inc., a Defendant in the case. The jury found that Ryobi, the maker of the lawnmower that exploded in December 2010, fatally burning Frank Wright while he was cleaning up his yard, was guilty of negligence, but not of breaching an implied warranty.

The lawsuit was filed in December 2012 in Virginia state court. The dispute was removed to federal court in 2013. The Plaintiff said Wright was operating his lawnmower under normal conditions when it suddenly exploded, causing a fire that badly burned him. Wright died from his injuries.

It was alleged in the complaint that neither Ryobi nor Home Depot, where Wright bought the lawnmower, warned Wright about the potential risks of explosion. Ryobi didn’t warn customers that the lawnmower could unexpectedly explode under normal operating procedures. The jury considered two claims:

• whether the Defendants were negligent in making and selling a lawnmower that would explode when mowing lawns; and

• whether the Defendants breached an implied warranty.

Home Depot and Ryobi had argued that the Plaintiff didn’t carry his burden to show that the lawn tractor was defectively designed, and that the alleged defect—a separation of the fuel line from the fuel tank—was more likely than not the specific cause of the deadly fire. The Plaintiff was represented by Richard N. Shapiro and Patrick J. Austin of Lewis Appleton & Duffan.

Source: Law360.com

**XV. MASS TORTS UPDATE**

**DePuy ASR—Oklahoma DePuy ASR Trial Verdict**

Feb. 4, 2015—email from Michelle Kranz

We are pleased to announce that a jury in Tulsa County, Oklahoma has returned a $2.5 million compensatory damage verdict in favor of plaintiff Andrea Smith and against defendants DePuy Orthopaedics and DePuy International. Since the verdict was returned on Feb. 3, 1, I can only give a brief summary of this case.

Mrs. Smith was implanted with DePuy ASR XL hips on both sides of her body. The first implant surgery was in October 2006 and the second in February 2007. She underwent revision surgeries to remove and replace the ASR devices in 2011 and 2012. She had significantly elevated metal ions before the revision surgeries. DePuy contended at trial that the devices were not defective and that she needed to have revision surgeries because of a “toe-in” gait on one side and a frayed medical cable (used to repair a fractured femur) on the other.

Tulsa County District Court Judge Linda G. Morrissey presided over the trial. The court permitted DePuy to present limited evidence pertaining to the FDA, and she permitted the plaintiff to present evidence about the recall and about events that occurred after the date of plaintiff’s original implant surgeries.

The jury found in favor of plaintiff in her claim that the ASR was defectively designed, but found for DePuy on the claims for negligence and failure to warn. Jurors didn’t award punitive damages against DePuy.

This is the second verdict in favor of an ASR plaintiff. In each case, the plaintiff...
prevailed on the claim that the device was defective, but lost on the negligence claim. Notably, some jurisdictions do not recognize strict liability for defective medical devices. Neither jury awarded punitive damages. A third ASR case went to trial and resulted in a defense verdict based on a specific causation defense. More will be said on this trial next month.

**AN UPDATE ON THE ZOLOFT LITIGATION**

In June of this year, after conducting a lengthy evidentiary hearing, the Court ruled that Plaintiffs’ expert epidemiologist could not testify that Zoloft causes birth defects in humans exposed to Zoloft during fetal development. After entering the Order excluding Plaintiffs’ expert from testifying, the Court stayed, or suspended, all proceedings in the case, including the bellwether trials originally scheduled for late 2014 and early 2015. On Sept. 11, 2014, the Court permitted Plaintiffs to file a request to allow the identification of a new expert. On Nov. 4, 2014, the Court:

- permitted Plaintiffs to file a request for the Court to reconsider its decision to exclude Plaintiffs’ expert testimony, and
- permitted Pfizer to ask that all cases be dismissed based upon lack of medical evidence that Zoloft causes birth defects in humans.

Pfizer contended that Plaintiffs cannot prove their case without the excluded expert testimony. Pfizer further contended that the Court was correct in excluding Plaintiffs’ expert, and Plaintiffs should not be allowed to identify a new expert following the exclusion of the original expert.

Plaintiffs researched the numerous underlying legal issues and briefed the Court through appropriate court filings. Last week, the Court entered its Order allowing Plaintiffs to designate a new expert to testify that Zoloft causes heart defects in humans exposed to Zoloft in utero. We expect the Court to enter an expedited scheduling order within the coming weeks that will set deadlines for bellwether trials later this year.

The court’s Order is obviously great news for the litigation. If you have a claim you would like for our lawyers to review or if you have any questions regarding the Zoloft litigation, contact Roger Smith at 800-898-2034 or by email at Roger.Smith@beasleyallen.com. Roger is a lawyer in our firm’s Mass Torts Section and is involved in this litigation.

**TRANSVAGINAL MESH UPDATE**

Major activity is underway in the seven transvaginal mesh multidistrict litigations in the Southern District of West Virginia. While American Medical Systems (AMS) continues to settle cases involving its mesh products, C.R. Bard, Boston Scientific, Johnson & Johnson, and Cook Medical are gearing up for more bellwether trials this year. Here are some of the highlights:

**C.R. Bard**

Early last year, Judge Goodwin selected 200 cases (Wave 1 and 2) for case specific discovery to include depositions of the Plaintiffs as well as treating physicians. In an effort to spur continued progression in these cases given the large number of pending claims, the Court later designated approximately 300 more cases (Wave 3) for discovery on cases involving only the Bard Avaulta mesh product used for pelvic organ prolapse repair.

Believing that it would be impossible to actually depose every treating physician responsible for the care and treatment of 300 Plaintiffs, the Court determined that depositions by written question would be the most efficient means of handling the deposition process; however, the process quickly became cumbersome and problematic for all the parties.

To address these concerns, the Court designated a Miniwave process, which reduced the number of Plaintiffs in the wave to 60. Once discovery is completed on these cases, they will be deemed trial ready, and will be either transferred to a federal district court of proper venue, or in the alternative, remanded to the federal district court from which the case was transferred to the MDL, if applicable.

Despite this movement, Bard continues to seek to delay trials and has even argued that trials should be delayed because comments by U.S. District Judge Joseph R. Goodwin served to prejudice Bard’s liability in these cases. Judge Goodwin rejected its argument and ruled that Bard had not demonstrated good cause to further delay trials. The next trial against Bard is scheduled to begin Feb. 18.

**Boston Scientific**

Early 2014 resulted in the selection of approximately 200 cases (Wave 1 and 2) for case specific discovery. This litigation is currently in the Daubert motion phase and these cases will be deemed trial ready early this year. In September 2014, Boston Scientific lost its first trial in Texas state court when a jury awarded a $73.4 million verdict to a Plaintiff implanted with the company’s Obtryx midurethral sling. The jury found that there was a safer alternative design available than the Obtryx device and that it was unreasonably dangerous as marketed. The jury also found that Boston Scientific has acted with gross negligence. Trials against Boston Scientific are currently scheduled for February (Dallas, Texas), May (Delaware), and June 2015 (Texas and Massachusetts).

**Johnson & Johnson**

Cases against Johnson & Johnson and Ethicon have not been designated for case specific discovery through a wave process like in Bard and Boston Scientific. Instead, the Court chose six bellwether cases for trial designation, the last two of which are scheduled to be tried in March 2015 in West Virginia. These cases involve the Ethicon Prolift product for pelvic prolapse repair. The Prolift vaginal mesh system was associated with many negative side effects, prompting the company to voluntarily recall the product from the market.

Last September, a jury in West Virginia federal court awarded a $3.27 billion verdict finding that Ethicon’s transvaginal sling was defectively designed. Prior to that, a jury in Texas state court found for the plaintiff and awarded a $1.2 million verdict. In addition to the federal trial in March, more trials are expected against Johnson & Johnson and Ethicon in state courts this year, with one scheduled for February 2015 in Austin, Texas and another scheduled for April in Dallas, Texas.
Cook Medical

Recently, the MDL court ordered four cases against Cook Medical to be tried as bellwether cases, with the first case to be ready to try on April 20, 2015. If that case is dismissed or otherwise not ready for trial, a back-up case will be tried in its place. The next trial is set for May 18, 2015, and if that case is dismissed or otherwise not ready for trial, another backup case will take its place. The final trial date will be June 8, 2015.

If you need more information on any part of the above contact either Danielle Mason, Leigh O’Dell or Chad Cook, lawyers in our firm’s Mass Torts Section, at 800-898-2034 or email Danielle.Mason@beasleyallen.com, Leigh.Odell@beasleyallen.com or Chad.Cook@beasleyallen.com.

**JURY’S $2 MILLION VERDICT IN BARD MESH BELLWETHER STANDS**

A West Virginia federal judge has left intact a $2 million jury verdict against C.R. Bard Inc. in a bellwether trial over alleged defects in its vaginal mesh implants, saying the company hadn’t proven a miscarriage of justice and denying it a new trial. But U.S. District Judge Joseph R. Goodwin also refused to find unconstitutional a provision in Georgia’s Tort Reform Act of 1987 that requires prevailing product liability Plaintiffs to pay 75 percent of their punitive damages to the state. The lawsuit was originally filed in Georgia before being transferred to the multidistrict litigation (MDL) in March 2011. The ruling dealt a blow to Plaintiffs Donna and Dan Cisson, who had been awarded $1.75 million in punitive damages and $250,000 in compensatory damages by a West Virginia federal jury in August 2013.

The case had been the first federal suit to go to trial within seven multidistrict litigations concerning the use of transvaginal surgical mesh to treat pelvic organ prolapse and stress urinary incontinence. In denying Bard’s motion for a new trial, Judge Goodwin said the court wasn’t wrong to exclude evidence relating to the fact that the device maker had complied with the U.S. Food and Drug Administration (FDA) rule requiring device makers to notify the agency 90 days prior to marketing a medical device.

With an eye toward submitting its case to the Fourth Circuit, Bard had asked the court to rule on its motion for a new trial, according to the opinion. The seven MDLs still contain more than 70,000 cases that are currently pending, of which approximately 10,000 are in the Bard MDL, according to the opinion. The Cissons are represented by Henry G. Garrard III, Gary B. Blasingame, James B. Matthews III, Andrew J. Hill III, and Josh B. Wages all with Blasingame Burch Garrard & Ashley, a firm located in Athens, Ga. The case is Cisson et al v. C.R. Bard, Inc., in the U.S. District Court for the Southern District of West Virginia. Source: Law360.com

**SIGNIFICANT DRUG AND MEDICAL DEVICE DEVELOPMENTS IN 2014**

It was an interesting year for legal issues surrounding pharmaceutical drugs and medical devices in 2014. This litigation covered the waterfront, ranging from “free speech” arguments under the First Amendment, to preemption of claims under state law thought to violate duties under federal law, to changes in expert differential diagnosis requirements. Clearly, the legal framework surrounding these very complex cases continues to evolve and open new opportunities for Plaintiffs that have been previously foreclosed.

Off-label use is the use of pharmaceutical drugs or medical devices for an unapproved reason (indication), age group, dosage, or form of administration. Doctors routinely prescribe medications for conditions other than what the drugs were initially approved to treat, and many times, this practice is attributable to aggressive sales representative promotion of these unapproved indications to the physicians they detail. While it is legal for a physician to prescribe a drug for reasons other than its listed indications, the gray area is whether or not pharmaceutical companies are allowed to promote and market these off-label uses.

In 2011, the U.S. Supreme Court in Sorrell v. IMS Health Inc. held that pharmaceutical marketing is a form of expression protected by the Free Speech Clause of the First Amendment, and the progeny of cases following it determined that the government could not prosecute drug manufacturers or their representatives for promoting off-label use of an otherwise U.S. Food and Drug Administration approved drug. However, a recent whistleblower case in the Eastern District of California has raised the issue of whether truthful speech to doctors is truly protected, or whether off-label promotion is evidence of intent to incite doctors to submit false claims for insurance reimbursement, or if it provides loopholes for companies to circumvent the need to seek FDA approval for additional indications for their drugs.

Why is this important? Off-label uses, in many instances, can treat less serious conditions that do not carry the same risk-benefit analysis as they would for more serious indications. As such, an off-label use for a less serious indication may not be worth the risks inherent in the drug itself. It will be interesting to see how the California case plays out, as a victory for Defendants on this issue could result in more regulated off-label promotion and potentially more harm for consumers.

In 2011, the United States Supreme Court held in Pliva v. Mensing that generic drug manufacturers could not be held liable for failing to strengthen or update their warnings to include information about adverse events because doing so would violate their duties under federal law to be the same, in both medicinal content as well as labeling, as the brand manufacturer’s drug. This court decision preempted claims against most generic manufacturers and resulted in dismissal of many cases when the injured Plaintiff could only prove use of the generic drug.

The theory of Innovator Liability sought to shift the responsibility to the brand manufacturers, who were responsible for both the design and labeling of their drugs, even though the injured Plaintiff never consumed the brand manufacturer’s product. Many jurisdictions failed to embrace this theory of liability, arguing that the lack of product identification fails to show that the brand manufacturer owed Plaintiffs any duty under state law. However, in 2014, the Alabama Supreme Court in Weeks v. Wyeth, Inc, surprisingly joined a minority of jurisdictions who have determined that a brand manufacturer can be held liable for fraud or misrepresentation based on statements it made in connection with the manufacture or distribution of the brand-name drug, even if the Plaintiff only consumed the generic drug.

The Court rejected the notion that their decision created a new “innovator liability” cause of action, and instead stated that under a foreseeability analysis, the brand manufacturer could reasonably foresee that generic manufacturers would copy the brand labeling, therefore the innovator owed a duty of care to the generic drug user. Even though this decision is favorable for Alabama clients (as
well as those in California and Vermont, the only other two states to have recognized this theory of liability) most Plaintiffs who consume generic drugs around the country will not be able to apprise themselves of the benefits of these decisions.

In the context of medical devices, an en banc panel of the Ninth Circuit Court of Appeals held in Stengel v. Medtronic that there is no preemption of a state law claim for violating a state law duty that parallels a federal law duty. In other words, preemption would only apply if there is conflict or impossibility to comply with both state and federal requirements. At issue in the case is whether the device manufacturer could comply with a state law duty to report adverse events to the FDA without violating federal law. The court held that these duties paralleled but did not add to federal requirements for manufacturers. This decision tips favorably toward Plaintiffs and opens the door to claims that argue that a device manufacturer breached its general duty to warn by failing to inform the FDA of newly discovered safety risks.

When it comes to the use of experts to prove causation in an injury case, the standard is that the expert must make a differential diagnosis, or they must distinguish a particular disease or condition from others that present similar symptoms, in order to diagnose that a particular prescription drug or medical device is the cause of the injury. Generally speaking, experts must rule out all possible alternative explanations for their opinions to be sufficiently reliable and admissible.

However, in June 2014, the Eighth Circuit Court of Appeals held to the contrary of most courts, and held in Johnson v. Mead Johnson & Co. LLC, that experts do not necessarily have to rule out all possible alternative explanations for their opinion to be admissible. The court’s rationale was that under Daubert and Federal Rule of Evidence 702, doubts should be resolved in favor of admitting evidence, and that weighing conflicting expert opinions is the role of the jury, not the court.

Therefore, at least in the Eighth Circuit, attempts to exclude expert opinions will be more challenging going forward. If you need more information, contact Danielle Mason, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at Danielle.Mason@beasley-allen.com.

GARLOCK REACHES $358 MILLION SETTLEMENT WITH FUTURE ASPEROS CLAIMANTS

Garlock Sealing Technologies LLC has reached what is being called an “unprecedented” agreement with future asbestos claimants in its bankruptcy case that includes a $358 million settlement of all asbestos injury claims against the company and a revised reorganization plan. The future asbestos claimants and Garlock’s parent company, EnPro Industries Inc., announced the accord, saying the amended plan “provides generous payments to all claimants with a compensable disease and meaningful contact with [Garlock’s] asbestos-containing products during the course of their working careers.”

Source: Law360.com

APPEALS COURT RULES THAT GORE MUST PAY $1 BILLION IN PATENT CASE

The Federal Circuit Court of Appeals last month affirmed a lower court’s ruling that W. L. Gore & Associates Inc. willfully infringed C.R. Bard Inc.’s blood vessel graft patent. That resulted in $205 million being added to the $854 million in damages Gore has already been ordered to pay Bard in the long-running case. The Federal Circuit heard the case once before and used it to set a new standard for proving willfulness. On remand, U.S. District Judge Mary Murguia held that Gore’s infringement was willful under the new standard and the Federal Circuit agreed.

Source: Law360.com

FOUR COMPANIES TO PAY $415 MILLION IN ANTI-POACHING SETTLEMENT

Google Inc., Apple Inc., Intel Corp., and Adobe Systems Inc. have reached a $415 million settlement in the antitrust class action alleging they illegally agreed not to poach each other’s engineers. Interestingly, this is $90.5 million more than a settlement a California federal judge rejected last year. The new settlement comes after U.S. District Judge Lucy H. Koh rejected the defendants’ proposed $324.5 million settlement in August, saying it was at least $55 million too low. The companies had filed a petition with the Ninth Circuit asking it to vacate Judge Koh’s decision. But they have now sent a letter to the appellate court stating that a new settlement has been reached.

This new settlement, if approved by the court, may finally resolve claims that the companies suppressed pay for software engineers after secretly agreeing not to poach each other’s employees. The allegations came to light after a U.S. Department of Justice investigation into the hiring practices of several Silicon Valley technology companies.

Source: Law360.com

XVII.

AN UPDATE ON SECURITIES LITIGATION

CHANGES IN SECURITIES LAW: TWO CASES FROM 2014 AND ONE TO WATCH

Some lesser known securities cases this year have changed things up, while the case everyone watched had little practical effect. You may well remember the hype surrounding at least one securities case this year, Halliburton Co. v. Erica P. John Fund, Inc. (“Halliburton II”), 134 S. Ct. 2398 (2014). The case gave the Supreme Court the opportunity to overrule the fraud-on-the-market presumption of reliance, established in 1988 in Basic v. Levinson. For shareholders and attorneys practicing in the securities litigation field, the potential impact on class action securities cases was striking. As it turns out, the case barely had an impact. Instead of overruling or altering the Basic rule, the Supreme Court simply allowed evidence of the absence of market effect to be admitted at the class certification stage where previously the evidence was not considered until summary judgment.

• One to watch: Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund

A forthcoming Supreme Court decision in a different, less-heralded case—Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund—is the one to watch for this year. Despite the lack of fanfare, Omnicare likely will have the
greatest practical impact of any Supreme Court securities decision since the Court’s 2007 decision in Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007). Although this case only involves Section 11, it poses a fundamental question: What causes an opinion or belief to be a “false statement of material fact?” The Court’s answer will affect the standards of pleading and proof for statements of opinion under other liability provisions of the federal securities laws, including Section 10(b), which likewise prohibit “untrue” or “false” statements of “material fact.” Omnicare concerns what makes a statement of opinion false; whether it is an objective or subjective standard. The Sixth Circuit held that a showing of so-called “objective falsity” alone was sufficient to demonstrate falsity in a claim filed under Section 11 of the Securities Act—in other words, that an opinion could be false even if it was genuinely believed, if it was later concluded that the opinion was somehow “incorrect.” Analysts, those “in the know,” are split on whether the Court is likely to reverse or affirm the Sixth Circuit’s holding, but most seem to expect a middle ground. Bear in mind that the case was only at the Motion to Dismiss stage. So, while the Court will likely provide guidance on what constitutes “reasonable basis,” even if the Court does affirm, the theory will still need to be tested at summary judgment and trial. Potentially, the Court could send the case back and require further pleading on what makes Omnicare’s statements false and without a reasonable basis—this is the most likely result. The Court could also, of course, completely surprise everyone and fully reverse the Sixth Circuit, creating a new standard. Either way, the case is one to watch.

• SEC v. Citigroup

On June 4, 2014, in SEC v. Citigroup, 752 F.3d 285 (2d Cir. 2014), the Second Circuit held that Judge Rakoff abused his discretion in refusing to approve a proposed settlement between the Securities Exchange Commission (SEC) and Citigroup that did not require Citigroup to admit the truth of the SEC’s allegations. Certain events occurred during the pendency of the appeal, however, that overshadowed the case itself. In 2012, the SEC and Citigroup settled the SEC’s investigation of Citigroup’s marketing of collateralized debt obligations. In connection with the settlement, the SEC filed a complaint alleging non-scienter violations of the Securities Act.

The same day, the SEC also filed a proposed consent judgment, enjoining violations of the law, ordering business reforms, and requiring the company to pay $285 million. As part of the consent judgment, Citigroup did not admit or deny the complaint’s allegations. Judge Rakoff held a hearing to determine “whether the proposed judgment is fair, reasonable, adequate, and in the public interest.” In advance, the court posed nine questions, which the parties answered in detail. Judge Rakoff then rejected the consent judgment resting, in part, on the court’s determination that any consent judgment that is not supported by “proven or acknowledged facts” would not serve the public interest because the public would not know the “truth in a matter of obvious public importance,” and private litigants would not be able to use the consent judgment to pursue claims because it would have “no evidentiary value and no collateral estoppel effect”.

The SEC and Citigroup appealed. While the matter was on appeal, the SEC changed its policy to require admissions in settlements—“in certain cases,” and other federal judges followed Judge Rakoff’s lead and required admissions in SEC settlements. Because of the SEC’s change in policy, many people deemed the appeal unimportant. Despite the change in SEC policy, the extent to which the SEC insists on admissions will depend on the amount of deference it receives from reviewing courts—which was the issue before the Second Circuit. The Second Circuit’s holding, that the SEC has the “exclusive right” to decide on the charges, and that the SEC’s decision about whether the settlement is in the public interest “merits significant deference,” reasserted SEC’s authority to make those decisions. The decision grants the Commission a great amount of deference when settling its cases.

• City of Livonia Employees’ Retirement System v. The Boeing Company


This case is important because of the potential to cause scrutiny of the protections of the Private Securities Litigation Reform Act (PSLRA). Some believe the greatest risk to the Reform Act’s protections has always been legislative backlash over a perception that the Reform Act is unfair to investors. The Reform Act’s heavy pleading burdens have caused Plaintiffs’ counsel to seek out former employees and others to provide internal information, i.e. Confidential Witnesses. The investigative process is often difficult and is ethically tricky, and the information it generates can be lousy. Information can be misunderstood, misinterpreted, and/or misconstrued by the time it is conveyed from one person to the next. To further complicate matters, CWs sometimes recant or even deny that they made the statements on which Plaintiffs rely.

Judge Rakoff seemed to call for such reform in his post-dismissal order in the separate, yet similar for its potential to call into doubt the Reform Act, Lockheed matter:

The sole purpose of this memorandum … is to focus attention on the way in which the PSLRA and decisions like Tellabs have led Plaintiffs’ counsel to rely heavily on private inquiries of confidential witnesses, and the problems this approach tends to generate for both Plaintiffs and Defendants. It seems highly unlikely that Con-
In ruling on the contract claims, the court left the issue of whether Darwin acted in bad faith when denying coverage to the jury. Millennium is a national medication monitoring company that provides laboratory analysis to doctors and clinicians, according to the complaint. Rival company Ameritox alleged in its April 2011 suit that Millennium not only distributed misleading advertisements to health care providers in a bid to compete for market share, but also engaged in a host of unfair business practices that included providing illegal inducements to garner business, performing medically unnecessary confirmatory testing, and not collecting legally required copayments and deductibles, according to court documents.

The Calloway suit, filed in Massachusetts Superior Court, also alleged that Millennium disparaged Calloway’s goods, products or services within the policy period. It was also alleged that Darwin was therefore likewise obligated to cover costs associated with those claims. Millennium sought coverage from Darwin for both underlying suits, but the insurer denied any obligation in the actions based on an “improperly narrow” interpretation of the competitors’ claims and its own failure to conduct a good faith investigation of the case.

Source: Law360.com

XIX. EMPLOYMENT AND FLSA LITIGATION

EMPLOYMENT BACKGROUND CHECKS AND CREDIT CARDS UNDER THE FAIR CREDIT REPORTING ACT

Have you applied for a job and been turned down because of a background report? A federal law, the Fair Credit Reporting Act (FCRA) requires employers to get your permission to run a background check before hiring you. Employment background reports may include credit history or public record history, such as criminal convictions, driving records, bankruptcies, and judgments. Employers use this information to determine whether to hire you, promote you, or keep you as an employee.

Did you get the job? If you answered no, then you need to know that the employer must comply with the FCRA before turning you down for the job or promotion. First, the employer must get your permission before running a back-
ground check. The authorization must be separate from the employment application.

Second, if the employer uses the background report to deny you the job or promotion, then the employer must give you a pre-adverse action notice, a copy of the background report, and a summary of your rights under the FCRA before turning you down. The adverse action notice must also include the name, address, and telephone number of the background reporting company, a statement that the background report company did not make the decision, a notice of your right to dispute false information, and the right to obtain a free report from the background report company.

If the employer does not get your permission to get your credit report or background report, fails to provide you with the appropriate summary of your rights or pre-adverse action notice and a copy of the background report, you may be entitled to actual damages and attorney fees. The background reporting company also has to comply with the FCRA. When a background report company sends the employer a report that has negative information, such as tax liens, convictions or judgments, the background reporting company has to notify you that it provided your information to the employer or prospective employer.

Have you received notice that a background reporting company has reported negative public information to your employer or prospective employer? If so you have the right to dispute false information to the background reporting company. If the background reporting company does not delete the false information, then you may be entitled to actual damages, including denial of employment or promotion.

For further information on cases under the FCRA you can call 800-898-2034 and ask for Archie Grubb (Archie.Grubb@beasleyallen.com) or Andrew Brashier (Andrew.Brashier@beasleyallen.com), lawyers in our Consumer Fraud Section.

Sources: Information obtained from RA Micah Adkins and Fair Credit Reporting Act, 7th ed., National Consumer Law Center (2010).

OVERTIME LAWSUIT FILED AGAINST CVS BY PHARMACISTS

A pharmacist working for CVS Caremark Corp. has filed a putative class and collective action against the drugstore chain in the Pennsylvania federal court. It was alleged the company denies overtime to hundreds of subordinate and floater pharmacists working at its stores. The Plaintiff, Junius Baugh, claims in the suit that CVS regularly fails to pay its pharmacists—many of whom “float” from store to store, filling in for absent pharmacists—time-and-a-half for all hours worked over 40, as required by the Fair Labor Standards Act (FLSA) and Pennsylvania wage laws.

It was alleged that while paychecks for the pharmacists demonstrate they regularly work 50 or more hours a week, they are still being paid for these extra hours at straight time rates with no explanation provided by the company. Baugh claims he clocked more than 50 hours a week on at least 10 separate occasions during his time working for CVS, from October 2011 to October 2012. He didn’t receive the statutorily required time-and-a-half rate for any of those overtime hours, he contends. “Plaintiff and the class/collective members are not exempt from the FLSA or Pennsylvania wage and hour laws because they do not meet any of the tests for exemption,” according to the complaint.

The individual Plaintiff is seeking to represent a federal collective of subordinate and floater pharmacists who have worked at one of CVS’ more than 400 Pennsylvania locations. He also hopes to represent a class of hundreds of pharmacists working in the state under Pennsylvania wage and labor laws. Another group of pharmacists recently failed in their attempt to hold CVS responsible as a class, with a California district judge ruling in December that the Plaintiffs used a software program too broadly in an attempt to demonstrate pharmacists were regularly working overtime without appropriate pay.

The putative class had attempted to demonstrate that their log-ins for RX Connect, a CVS computer program used to verify, look up and enter prescriptions, demonstrated that they were often working at the store for longer than 40 hours. But U.S. District Judge S. James Otero in the California case disagreed, saying that employees often used one another’s log-ins and noting that much of the expert’s analysis had to drop the RX Connect data because of false positives. He declined to certify the class in that suit. The Pennsylvania suit is in the U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

AutoZone settles Manager overtime lawsuit on eve of trial

AutoZone Inc. has agreed to a settlement with the named Plaintiffs in a wage-and-hour action that had been set to go to trial in Arizona last month. The case involved claims by a class of 1,500 store managers who were allegedly misclassified as overtime-exempt. The Memphis, Tenn., auto parts retailer settled the case with the four named Plaintiffs on Jan. 19. A stipulation of dismissal was filed with the court. Terms of the settlement were not disclosed.

The settlement comes after Arizona federal judge Frederick J. Martone rejected AutoZone’s motion to decertify the Fair Labor Standards Act (FLSA) collective action, which the Plaintiffs said was made up of 1,475 current and former workers.

The case was filed July 2010 by former AutoZone worker Michael Taylor, who said he worked as a store manager for about 14 months. For more than three years before the suit was lodged, AutoZone improperly classified store managers as FLSA exempt and deprived them of overtime pay, the lawsuit alleged.

The suit was certified as a collective action, covering AutoZone store managers who worked anywhere in the U.S. except California, in May 2011. In California, AutoZone classified store managers as nonexempt and paid them overtime for hours worked beyond the FLSA’s 40-hour weekly threshold, Taylor said.

The Plaintiffs in the Arizona case were scheduled to work 50 hours per week and worked that or much more, they said. AutoZone moved to decertify the action on Jan. 8, warning that the parties had no idea how the case would be managed as a collective and that the Plaintiffs’ trial plan didn’t show any way the company’s due process rights could be guaranteed.

The managers hit back on Jan. 13, arguing that AutoZone was just rehashing arguments that had already been made and shot down. Collective standing was decided in 2011, and later that year the court declined to reconsider its decision granting certification, the Plaintiffs said, adding that the court confirmed the collective action certification two months ago in November.

Judge Martone granted AutoZone summary judgment in 2012, but in May a Ninth Circuit panel breathed new life into the case. The panel found that the summary judgment grant was improper because the case was still plagued by factual disputes over the significance of the Plaintiffs’ management tasks, relative

BeasleyAllen.com
Cosmetology School To Pay $450,000 In Overtime Suit

A Minnesota federal court has approved a $450,000 settlement between Regency Corp. and admissions representatives who say the chain of cosmetology schools subjected them to an unwritten policy requiring off-the-clock work. U.S. District Judge Donovan Frank approved the proposed settlement for class members. Regency will pay $450,000. All claims the school violated the federal Fair Labor Standards Act (FLSA) and Minnesota’s FLSA will be dismissed. According to a joint stipulation filed in early December, five named Plaintiffs and 20 opt-in Plaintiffs will receive payments that range from $199.29 to $28,605.41.

Source: Law360.com

XX.
PREMISES LIABILITY UPDATE

Lawsuit Filed After Dollywood Theme Park Ride Fall

A lawsuit was filed last month against Dollywood arising out of an incident that involved a fall from a ride. The woman suffered a brain injury from a headfirst fall from the ride at Dollywood caused by a mix of sleet and rain that made the ride "dangerously slick" and a lack of adequate safety measures. The lawsuit was filed against the Tennessee theme park's operators.

The Plaintiff, Tedi A. Brown, suffered permanent impairments and disabilities after she plunged from the Waltzing Swinger ride. She had been on vacation with her husband and five of their children in late December 2013. Defendants in the case are Herschend Family Entertainment Corp. and Dolly Parton Productions Inc. Herschend operates and manages the theme park at Pigeon Forge, Tenn.

Mrs. Brown and her husband filed the lawsuit in U.S. District Court in Knoxville, Tenn. The suit alleges that the Brown family had not been on the ride before. Mrs. Brown and her husband asked a Dollywood employee if the Waltzing Swinger was safe to ride in the wintry conditions and the family was told not to worry, the complaint said. The complaint alleges:

- The Waltzing Swinger is a revolving ride with individual seats ascending 25 feet into the air and tilting outward.
- The swinging chairs lacked locking mechanisms to restrain riders, and anyone could lift the lap bar and become unrestrained.
- When the ride is completed, the chairs come to a stop about 10 feet above the ground.
- Once the Brown family's ride had stopped, Tedi Brown thought the ride was over and lifted her lap bar to exit her seat. She quickly realized the seats were too high to exit safely, but lost her grip on the lap bar due to the slick conditions.
- She slid from her seat and fell headfirst onto the pavement.
- She suffered spine and neck injuries, torn ligaments and a broken jaw.
- "Defendants failed to exercise due care and breached the duty owed these Plaintiffs by failing to close the Waltzing Swinger ... when the weather was a wintry mix of rain and sleet, which rendered the seats and lap bars of that ride dangerously slick."
- The park also failed to warn the family not to raise the non-locking safety bar until the ride was safely on the ground.

Source: Claims Journal

Jury Verdict For $1.17 Million Against Atlanta Hotel

A jury has returned a $1.17 million verdict against the owner of the Country Inn & Suites in Atlanta. The Plaintiff, a guest, was shot in the stomach while attempting to check in. The jury in Clayton County, Ga., returned a $3.68 million verdict on claims the hotel provided negligent security. The jury apportioned the responsibility for the damages:

- 58 percent for the shooter, who was not named as a Defendant in the suit;
- 32 percent on the Defendant hotel owner; and
- 10 percent on the Plaintiff.

Source: Insurance Journal

Family Of Georgia Girl Attacked By Dog Awarded $36 Million

The family of an 8-year-old girl who was critically injured in a dog attack has been awarded more than $36 million in a trial in DeKalb County, Ga. The jury awarded the family of Erin Ingram $72 million in a suit against Twyann Vaughn of Lithonia, Ga. The trial judge capped punitive damages at $250,000, reducing the award to roughly $36.6 million. Erin Ingram was attacked by Ms. Vaughn’s dogs and her left arm had to be partially amputated. She also received other injuries. Ms. Vaughn was found guilty in January 2012 of reckless conduct, violation of the county’s vicious dog ordinance, and failure to have the dogs immunized for rabies. She was sentenced to 16 months in jail.

Source: PersonalInjury.com

XXI.
WORKPLACE HAZARDS

Washington Company Fined $199,000 After The Death Of A Worker

The Washington Department of Labor & Industries has fined an Everett, Wash., company $199,000 for 16 safety violations.
related to the death of a worker last July. Nineteen-year-old Bradley Hogue was killed by a rotating auger while working inside the hopper of a bark-blower truck at a Duvall home. Pacific Topsoils was identified as a severe violator and will be subject to follow-up inspections.

The state investigation found that workers were regularly assigned to clear jams in the bark-blower truck hoppers while the machines were operating. Following the July incident, state officials sent out an alert to warn others in the landscaping business of the danger of working in hoppers while the equipment is running.

Source: Insurance Journal and The Houston Chronicle

XXII. TRANSPORTATION

XXII. TRANSPORTATION

Texas Plant with Fatal Gas Leak Had Been Cited For Infractions

A DuPont and Co pesticide plant where four people died in a gas leak in November had been cited for emissions violations by a state agency on several occasions before the accident. The Houston Chronicle cited public records obtained as showing that DuPont reported regular malfunctions with a multimillion-dollar exhaust and ventilation system inside its La Porte, Texas, pesticide plant that exposed workers to potentially dangerous fumes well before the deadly accident. A story appeared in the newspaper that revealed the damaging information.

Despite reports made to the Texas Commission on Environmental Quality in 2009 and 2010 regarding the faulty equipment, there was no investigation by the U.S. Occupational Safety and Health Administration. According to written congressional committee testimony by U.S. Chemical Safety Board Chairman Rafael Moure-Eraso, which was obtained by the paper, maintenance work at the facility was done without the use of respirators.

The four workers who died were “accidently asphyxiated by chemicals,” the local coroner’s office said in November in a finding that suggested the victims were not wearing full safety equipment. It was reported that the workers were overcome by methyl mercaptan, a chemical used to give natural gas its rotten-egg smell and for making insecticides and plastics. Families of the victims have filed lawsuits against DuPont.

It appears that the plant, located in a cluster of refineries and chemical plants 25 miles from downtown Houston, had a history of environmental infractions. But interestingly, it had no record of safety violations, according to information available from OSHA and the Chemical Safety Board. Accidents at four other DuPont facilities have been investigated by the Board. Those include a 2010 phosgene release at a plant in Belle, W. Va., that killed one person and an accident that same year at a facility outside of Buffalo, N.Y., that killed a worker.

Source: Insurance Journal

The NTSB, which investigates transportation and pipeline accidents, has no regulatory authority. It uses its annual Most Wanted list to highlight the areas most in need of improvement. While transportation has become safer in recent decades, the tens of thousands of deaths each year and hundreds of thousands of injuries indicate “we have a long way to go,” Hart said.

The number of people killed in large-truck crashes increased for the fourth straight time, 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 said last month. The number represents a 17 percent increase since 2009, according to the National Highway Traffic Safety Administration (NHTSA). One issue is driver fatigue, according to the NTSB. In the crash that injured Morgan and killed fellow comedian James McNair, the driver of a Wal-Mart Stores Inc. truck hadn’t slept for at least 24 hours, according to a police complaint. The truck struck a van carrying Morgan from behind on the New Jersey Turnpike.

The safety board has recommended that trucking companies implement plans to better manage fatigue on the roads and to require screening for sleep disorders that may lead to drowsiness. Congress last year weakened regulations designed to reduce trucker fatigue. Lawmakers targeted a portion of a rule closing a loophole that kept some drivers from working 82 hours over eight days, according to a Transportation Secretary Anthony Foxx.

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.

The NTSB has also found a pattern in truck crashes of poor safety enforcement, Karol said. The safety board wants regulatory agencies to impose tighter controls on trucking companies. An average of 20 percent of truck inspections find safety violations, he said.

Source: Claims Journal

Study Shows Car Crashes Rise With Daylight Saving Time

An economist has a warning for the more than 1.5 billion people living in countries that observe daylight saving time: Springing forward may be bad for your health. The wisdom of moving clocks an hour forward during summer months has long been a subject of debate. Proponents argue that extending daylight
into the evening saves electricity, encourages people to exercise after work and reduces crime and traffic fatalities. Opponents say the costs of disrupting people's schedules and sleep may outweigh the benefits. The available research offers fodder for both sides. Studies have supported the arguments on crime, exercise and fatalities, but cast doubt on the energy savings and suggested that the disruptions might increase the risk of heart attacks.

Austin Smith, a PhD candidate at the University of Colorado-Boulder, presented a paper at the annual meeting of the American Economic Association. He looked at national data on all fatal car crashes from 2002 to 2011 to see what happens immediately after people reset their clocks in the spring and fall. He does so by comparing the number of crashes that occur just before and after the change times in each year, and also by comparing crashes on dates that—thanks to a 2007 policy change—fell within daylight saving time in some years and not in others.

The result: Fatal crashes increased by about 6 percent over the six days immediately following the spring transition, but didn't change after the fall transition. Because people “lose” an hour only in spring, and because the accidents weren't concentrated at times when changes in daylight might have been a factor, Smith attributes the spike in crashes to inadequate sleep. He estimates that the 6 percent increase amounted to more than 300 added deaths over the 10-year period he studied.

The research doesn't demonstrate that daylight savings time is, on net, a killer. As Smith writes, the “result should be viewed as one piece of the puzzle, to be examined in conjunction with research on other impacts.” That said, it might make sense to take care on the road when the time comes to move clocks forward.

Source: Insurance Journal

AVIATION INDUSTRY APPEARS TO BE STRUGGLING TO RE-TRAIN PILOTS

In the aftermath of the tragic crash of the AirAsia jet in December of last year, the aviation industry appears to be struggling to apply the lessons of accidents in similar weather over the past decade. The crash occurred during an equatorial storm. It is too early to say whether the Airbus A320 crashed into the Java Sea due to pilot error, mechanical problems, freak weather or—as most often happens in aviation disasters—a combination of factors. Recent investigative reports seem to point to pilot error in very violent weather. Regardless of the actual causes, the plane’s apparently uncontrolled plunge, coming after a series of other fatal crashes blamed at least in part on loss of control, has refocused attention on whether pilot training programs need to improve.

Critics say pilots don't get enough training on how to react when an airliner stalls or loses lift, and that changes in guidance about best practices have been slow. David Learmount, one of the aviation industry's leading safety commentators, had this to say: “The lessons have not been learned to this day. Everyone knows what the problem is, but nobody is doing anything about it.”

Though rare, loss of pilot control ranks as the single biggest cause of air travel deaths. Two crashes in particular forced the issue—the 2009 losses of an Air France flight from Rio de Janeiro to Paris, and a Colgan Air turboprop near Buffalo, N.Y. In both crashes, the pilots appeared to be confused and ignored countermanded warnings of an impending stall. As most will know, a stall is a condition where a plane loses lift because the air flow over its wings is too slow. The Air France jet took four minutes to plunge 38,000 feet into the ocean. Despite repeated stall alarms, the control stick was fatally yanked backwards.

Classic stall training calls for pilots to push the control stick forward, nosing the plane down so it will swoop lower and regain speed, which is effective but uncomfortable. But in the last 30 years, most airlines encouraged their pilots to hold the control stick broadly steady and gun the engines to power their way out of a stall, trying to keep the ride as level as possible. In examining stall crashes from that period, however, that procedure may have led to more accidents than it prevented.

In a rare joint move from 2009, Airbus and Boeing called for a return to robust cockpit procedures that prevailed in earlier days. Pilots now receive regular refresher training. The airlines are trying to work through the disputed cockpit procedures of past decades. The new voluntary guidelines by the United Nations International Civil Aviation Organization (ICAO), which coordinates safety, took effect just six weeks before the loss of AirAsia Flight QZ8501, and will take years to be implemented around the globe. New U.S. rules on pilot training do not take effect until 2019. Regulators will require flight simulators to better model stall behavior, changes that will also take years to implement. ICAO also has proposed that pilots refresh their stall training by flying small aerobatic planes.

Changes in training cannot be made overnight because they can create other risks. Even minor adjustments must be thoroughly researched to avoid sowing the seeds of future accidents. It was reported that the industry is wrestling with a steep drop in the time pilots spend manually flying. Pilots now typically steer for only a few minutes at takeoff and landing, and rely on autopilot for the lengthy, boring cruise phase of flight.

When a sudden upset occurs—such as icing or powerful air currents from a storm—even the best pilots can experience a “stallt effect” and may struggle to recall manual flying skills for that rare situation. A study by Australia's Griffith University found a person's ability to process information is significantly impaired for 30 seconds after being startled, so being trained to cope with the unexpected is as important as knowing cockpit theory.

Flight simulators pose another challenge. The machines are crucial because pilots get little or no in-flight training for stalls after basic training. But most simulators still cannot accurately model a plane’s behavior in a full stall. The Federal Aviation Administration pressed to make them better in a rule-making process that closed this week. Simulator makers want better data about stalls to improve their machines. But plane makers say airliner stalls are so unpredictable that the data would be of little value—a dispute that could also have implications for any potential liabilities.

“It's not clear how the simulation data will be collected,” said Pat Anderson, director of flight research at Embry-Riddle Aeronautic University, the largest U.S. flight training school.

Around the world, airlines, flight schools and governments vary widely in how swiftly and fully they adopt the changes. Some airlines train in-house and go beyond what's required. Others just meet minimum standards, according to David Greenberg, a consultant and former head of flight operations at Delta Air Lines. He says, “Training is still a patchwork quilt.” It will be most interesting to see where all of this goes. Most would agree that pilots of commercial airlines must be more than just “adequately” trained. Their training must be well above that designation.

Source: Insurance Journal

JereBeasleyReport.com 25
MORE LAWSUITS FILED AGAINST OREGON COMPANY IN FATAL PERU COPTER CRASH

Two more wrongful-death lawsuits have been filed in connection with a helicopter crash in South America that killed five Americans and two Peruvians two years ago. The Jan. 7, 2013, crash occurred in eastern Peru. The lawsuits filed last month in Portland, Ore., say that the helicopter—under contract for petroleum exploration—broke apart in flight for unknown reasons. The lawsuits list defective components as a possible cause.

The families of six of the seven people who died have now filed suit against Columbia Helicopters, which is based 25 miles south of Portland. The total amount sought is now $110 million. The lawsuits fault the companies that manufactured, owned and maintained the black Boeing-Vertol Model 234 chopper, a civilian version of a military Chinook helicopter with tandem rotors. Listed as Defendants in some or all of the lawsuits are: Columbia Helicopters; Columbia Helicopters Leasing, which owned the aircraft; and the Boeing Co., which manufactured the aircraft. The latest lawsuits were filed on behalf of the two Peruvians—co-pilot Igor Abelardo Castillo Chavez and aircraft mechanic Luis Alfredo Ramos Gonzalez.

The Americans killed in the crash were pilot Dann J. Immel of Gig Harbor, Wash.; maintenance crew chief Edwinordova of Florida; aircraft mechanic Jaime Pickett of Tennessee; Leon Bradford of Utah; and Darrell Birkes, who was born in the Portland area but living in Peru. Birkes worked as a master rigging coordinator, determining the correct loads for helicopters carrying equipment and people to oil and gas production sites. His estate is the only one that has not filed a lawsuit.

Source: Claims Journal

OHIO CONSTRUCTION COMPANY TO PAY $4 MILLION IN LAWSUIT OVER FATAL CRASH

An appeals court has ruled a Cincinnati construction company must pay $4 million to the family of a Tennessee couple who were killed when they crashed into the back of a dump truck entering an interstate in a construction zone. A jury in 2013 found John R. Jorgensen Co. was 25 percent liable for the crash in South America that killed Nicholas Poe and Amanda Poe. A dump truck entered the left lane on Interstate 75 in Warren County, Ohio, and traveled about 25 seconds before the Poes’ vehicle crashed into the back of the truck.

The company appealed and attempted to overturn the jury verdict, arguing that Nicholas Poe was solely responsible for the crash. But the 12th Ohio District Court of Appeals last month upheld the judgment, saying the company could have taken steps to reduce chances of an accident.

Source: Claims Journal

XXIII. ENVIRONMENTAL CONCERNS

$92 MILLION SUPERFUND SETTLEMENT IN NEW JERSEY

Bristol-Myers Squibb Co., Pechiney Plastic Packaging Inc., Citigroup Inc. and others have agreed to a $92 million settlement that will resolve allegations in a lawsuit saying the companies contaminated the groundwater at a New Jersey Superfund site. The U.S. Department of Justice (DOJ) and Environmental Protection Agency (EPA) announced the proposed settlement with several companies to address the Pohatcong Valley Groundwater Contamination Superfund site in Warren County, N.J. The Pohatcong site is contaminated with trichloroethylene (TCE) and perchloroethylene (PCE), which can have serious health effects in humans. The settlement resolves two cases, one against Pechiney and the other against Bristol-Myers Squibb, Citigroup and others.

Under the proposed settlement, Pechiney will have primary responsibility for cleaning up contaminated soil and groundwater at the site, connecting some residents to public water to avoid contaminated groundwater, and operating systems to capture vapors that are getting into a manufacturing facility. The DOJ and EPA said in a joint statement:

As a precaution, the company will continue to monitor for vapor intrusion into homes at the site. In addition, the EPA will receive an estimated $29.5 million for certain past costs and be paid for its future oversight costs at the site. Pechiney will also perform current and future cleanup work estimated to cost $62.5 million, and will pay EPA’s future oversight costs.

The other companies involved are Albea Americas Inc. and Rexam Beverage Can Co. The EPA said it added the Pohatcong site to the Superfund list in 1989 because of elevated levels of volatile organic contaminants including TCE and PCE in the groundwater. The contaminants can have serious health impacts, including liver damage and increased risk of cancer, and were detected in public supply wells, which are now treated to meet drinking water standards before the water is distributed.

According to the EPA, the site includes a contaminated groundwater plume that is approximately 10 miles long and approximately one and a half miles wide, nearly 9,800 acres. As part of the settlement, the EPA will recover civil penalties from Pechiney to resolve allegations that the company violated a previous EPA order by failing to make satisfactory progress on a portion of the cleanup at the site.

Pechiney will also restore and preserve approximately 60 acres of land, valued at $1.1 million, in Warren County through a Supplemental Environmental Project. This land will be converted to native grassland and will become part of the Morris Canal Greenway. John Cruden, assistant attorney general for the Justice Department’s Environment and Natural Resources Division, said in a statement:

This agreement will address a legacy of contaminated groundwater and soil in Warren County that exposed this community to dangerous health risks. The settlement will help ensure residents have access to clean drinking water, require Pechiney to restore and preserve valuable native grasslands, and pay for millions in past cleanup costs.

The cases are in the U.S. District Court for the District of New Jersey.

Source: Law360.com

GROUPS WILL CHALLENGE EPA’S NEW COAL ASH RULE

Environmental groups unhappy with the U.S. Environmental Protection Agency’s first-ever federal regulations on coal ash could challenge the final rule, saying it is much weaker than an earlier proposed version, gives too much leeway to the energy industry and puts an unreasonable enforcement burden on citizens.

The EPA said it would regulate coal ash as solid waste under the Resource Con-
servation and Recovery Act (RCRA), rather than as more strictly controlled hazardous waste, a victory for the power industry that frequently recycles the byproduct for building and agricultural uses. Environmentalists, however, have long contended that coal ash is toxic and that its use and disposal should be highly regulated.

One of the biggest disappointments with the final rule for environmental groups was that it failed to include a provision—present in the earlier version—that wet coal ash ponds, which present a high risk of water pollution, would be phased out within a five- to seven-year period. The EPA does require the capping and closure of some older coal ash sites, like the one that was revealed in February by Duke Energy Corp. to have spilled 82,000 tons of coal ash into North Carolina’s Dan River. Moreover, the new rule does not extend to sites that are no longer active. As a result, there are now a large number of ponds on inactive sites free from any federal oversight.

Others have also noted that in the earlier proposed rule, compliance certifications were to be conducted by an independent professional engineer, but under the new rule, the engineer is not required to be independent—potentially allowing a company’s own staff to certify a site. Furthermore, the new rule places an increased enforcement burden for communities and citizens who must monitor facilities’ websites, keeping their eyes out for violations where the EPA doesn’t have enforcement authority. Environmentalists have pointed out that these are the kinds of things an agency with expert staff is more qualified to do and places the public at a disadvantage.

Another point of issue with environmentalists is the EPA’s decision to allow existing, unlined ash ponds to remain in service so long as they meet location and safety requirements, and there has been no adverse impact to groundwater. Environmental groups had pushed very hard for the closure of all surface impoundments, asking the agency for a move to a dry ash system. At a minimum, environmentalists wanted all coal ponds lined.

While environmental groups seem like the most likely to mount a challenge to the rule, the EPA is also facing scrutiny from U.S. lawmakers. Rep. Fred Upton, R-Mich., the chairman of the U.S. House of Representatives’ Energy and Commerce Committee; Rep. John Shimkus, R-Ill., the chairman of the Energy and Commerce Committee’s Environment and Economy Subcommittee; and Rep. David McKinley, R-W.Va., said in a joint statement that legislation is needed to correct parts of the EPA’s rule. Rep. McKinley said in a statement:

*The EPA falls short of offering a functional regulatory system, fails to address key issues, and still leaves uncertainty for both industry and environmental groups. A legislative answer is still necessary to close many of the open-ended questions and provide greater certainty a future EPA won’t change this decision.*

It will be interesting to see how successful the groups will be. Hopefully, with help from members of Congress, significant and needed changes will come about.

Source: Law360

### Flushable Wipes Causing Septic Problems

A problem has arisen involving “flushable” wipes. Certain moist towelettes are being marketed as flushable and claim to be safe for sewer and septic systems. However, all over the country consumers and sewer authorities are actively voicing their dissatisfaction with the excessive plumbing costs associated with these “flushable” wipes. Reportedly, homeowners are incurring hundreds of dollars in extensive repairs just to unclog plumbing and fix septic tanks. Consumers have reported even seeing wastewater backflow into their home through showers and sinks. Even if consumers correctly follow the disposing directions on the “flushable” wipes packaging and flush one wipe at a time, it’s said that they are still experiencing plumbing issues.

Not only is it causing problems for consumers’ homes but also for utilities. In the past five to six years, New York City’s Department of Environmental Protection has spent more than $18 million in order to manually remove “flushable” wipes from the sewer system, according to Deputy Commissioner Vincent Sapienza. When the department looked at the sales of “flushable” wipes, there was a direct correlation between the increase in “flushable” wipe sales and an increase in clogging issues within its sewage treatment facilities. Although “flushable” wipes are supposed to biodegrade quickly, they are causing millions of dollars of damage to both consumers’ and city plumbing systems. Sapienza reported:

*The word ‘flushable’ means it won’t clog your toilet or your house, but when it gets to a sewage treatment plant, the wipes wrap around the equipment, shuts it down, and then the treatment plant workers go and manually pull these wipes out.*

The agency suggests that consumers refrain from flushing these wipes and instead dispose of them in the garbage.

Lawyers in our firm’s Toxic Torts Section recently filed a class action against Kimberly-Clark Corporation, Walmart Stores, Inc. and Rockline Industries, Inc. on behalf of two consumers harmed by the wipes. If you need additional information on this subject, contact Rhon Jones or Chris Boutwell, lawyers in our firm’s Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or Chris.Boutwell@beasleyallen.com.

Sources: Class Action News and ABC News

### BP Manager Joked About Overbilling California For Natural Gas

I wasn’t too surprised that illegal conduct seems to bring about laughter from BP instead of concern and a willingness to conduct business in a respectable manner. We previously reported about a whistleblower action filed by a former BP employee and later joined by the California Attorney General alleging that BP systematically overbilled state and local government facilities for natural gas. For the past decade, California’s Department of General Services entered into exclusive contracts with BP to provide natural gas for entities in hopes of locking in a reasonable and constant price. Instead, the state alleges, BP routinely sold natural gas to the state at a rate well above the market price. Ultimately, BP reaped a profit margin that was at least three times what was set in the contracts.

These overbillings, which totaled between $150 million and $300 million, allegedly resulted from BP’s management manipulating its profit margins to exceed any reasonable amount of profit and greatly exceeding caps established by contracts with California. According to the complaint, this conduct is even more egregious because BP’s traders sold gas at inflated prices only to state agencies. It allegedly overcharged California agencies by as much as 10 times what it billed other bulk-purchase customers between 2004 and 2012.

The complaint alleges that BP’s management was well aware of these practices and, according to intercompany emails, congratulated traders who unlawful...
fully gouged the state. One manager supposedly bragged about “squeezing gold out of that goose, [so there is] not a lot of love when it happens...LOL.”

Apparently, BP permits any questionable conduct as long as it results in the company reaping a profit. We have seen BP cut corners in its operation of the Deepwater Horizon oil rig, which exploded, killing 11 crewmen and causing extensive environmental and economic damages throughout the Gulf of Mexico. Unfortunately, it should come as no surprise that BP has also been stuffing its coffers from illegally bilking California taxpayers. California Attorney General Kamala Harris is seeking treble damages plus civil penalties under California’s False Claims Act.

Source: Bloomberg News

XXIV. UPDATE ON NURSING HOME LITIGATION

Abuse In Nursing Homes

One of the most unsettling thoughts with respect to placing our loved ones in a nursing home is the concern that someone might purposefully cause them physical harm. Most states have promulgated statutes that are designed to protect the elderly from abuse and neglect. Alabama’s statute, Protecting Alabama’s Elders Act, is found at § 38-9E-1 et seq. of the Alabama Code.

Despite strong laws in this area and aggressive prosecution efforts, the sad reality is that many elderly people continue to be abused. Unfortunately, this situation came to light recently in a Montgomery, Ala., nursing home. Authorities found that a certified nursing assistant (CNA) and former nursing home employee punched a 93-year-old nursing home patient. The report indicated that the elderly patient continued to spit her medicine out when the CNA attempted to administer the medications. The CNA was arrested and charged with abuse or neglect of a protected person.

In 2013, CBS News reported a similar event where two CNAs physically abused patients in Dallas, Texas. The events were caught on camera. In that report, CBS reported that an elder/nursing home advocacy group, Families for Better Care, researched reports from every state and concluded that 11 states received a failing grade for failing to protect elders from abuse and neglect. For the southeastern states, Florida and South Carolina received a score of “B.” All other southeastern states, except Louisiana, received a score of “D.” Louisiana was one of the 11 states that received a failing score of “F.” The states with a “superior” grade of “A” were Alaska, Rhode Island and New Hampshire. According to the group’s findings, one in five nursing homes abused, neglected or mistreated residents in about half of the states. The advocacy group determined that the nursing homes that staffed at higher levels received a higher ranking, while those who had fewer staff or who were understaffed received lower rankings. As late as September 2014, the group updated its findings. The updated report can be found at http://nursinghomereportcards.com.

While abuse events such as those reported in Alabama and Texas are presumably an exception and not the rule in nursing homes, if you suspect your loved one is being abused, the best course of action is to report the abuse to the facility administrator, the facility ombudsman, and the Alabama Department of Public Health (ADPH). For information related to the ADPH, you can go to www.adph.org. The ADPH also maintains a complaint line, and you may call them at 800-356-9596 or 800-873-0366. Of course, you may also need to report the event to the local law enforcement agency as well.

Our firm may also be able to assist with an investigation of reported abuse, and we may be able to offer suggestions on other alternatives in such situations. We understand that mentally and physically incapacitated persons are, like small children, the most helpless among us. Hopefully, nursing homes will do a thorough job of performing background checks and detailed interviews in order to minimize the possibility of hiring a person who would commit such an atrocious act. If you need more information, contact Ben Locklar, a lawyer in our firm who handles Nursing Home litigation, and who can be reached at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Sources: www.wsfa.com, and CBSNews.com

XXV. AN UPDATE ON CLASS ACTION LITIGATION

EBay Pays $6.4 Million To Settle Recurring-Fee Class Action

EBay Inc. agreed to pay $6.4 million to settle a fraud and breach of contract class action in California federal court brought by more than a million sellers alleging the massive auction website charged them hidden, recurring listing fees. The proposed settlement would let eBay out of a lawsuit over more than $50 million in “Good ’Til Canceled” fees, putting the end in sight after more than three years of litigation. The deal would put $4.5 million in the hands of class members and $1.6 million to class counsel, according to the motion. The class includes users behind nearly 1.2 million accounts, though the number of actual users represented by those accounts was unclear as one person could have multiple accounts. The proposed settlement doesn’t provide for a claims process and says most sellers will receive an automatic credit to their accounts.

Richard Noll, the Plaintiff, filed suit in September 2011, alleging that eBay suggested that the Good ‘Til Canceled listings, which automatically renew every 30 days until the seller cancels the listing or the item is sold, came “at no extra cost” when fees were actually charged monthly. About a year later, Rhythm Motor Sports LLC filed a separate suit, and the cases were ultimately consolidated. The lawsuit alleged breach of contract, unfair competition, false advertising, violation of the Consumer Legal Remedies Act, unjust enrichment and fraud. During the course of the litigation, eBay won the dismissal of two of the Plaintiffs’ complaints. But the court granted the Plaintiffs leave to amend except as to claims involving insertion fees during times when eBay’s fee schedules explicitly said those fees would be charged every 30-day period.

During the discovery process, eBay produced more than 90,000 pages of documents and 2 gigabytes of data, according to the motion. The settlement fund would be nonreversionary, with uncashed or returned checks split between the nonprofits National CyberForensics & Training Alliance and the National Consumer Law Center. The case...
is in U.S. District Court for the Northern District of California.
Source: Law360.com

**FedEx and Others Settle With Credit Companies In Swipe Fee MDL**

Nine companies including Federal Express Co., which had opted out of an earlier $7.25 billion settlement with Visa Inc. and Mastercard Inc., have now agreed to a settlement that resolved their claims in multidistrict litigation (MDL) in New York that accused the credit card companies of fixing the price of swipe fees. A diverse array of companies—FedEx, Hawaiian Holdings Inc., JetBlue Airways Co., DSW Inc., Southwest Airlines Co., Alaska Air Group Inc., Progressive Casualty Insurance Co., Carnival Corp. and O’Reilly Automotive Stores Inc.—filed a stipulation and order of dismissal of all claims against Visa and Mastercard in the MDL, in which the card companies are accused of artificially inflating card-sweep fees paid by merchants. The details of the settlement were not disclosed.

This is just the latest turn of events in the MDL, in which Plaintiffs reached a landmark settlement of $7.25 billion over the alleged conspiracy involving interchange fees charged by the credit card giants. Since the court approved the settlement a year ago, the MDL has spawned several litigation branches.

U.S. District Judge John Gleeson signed off on the settlement—believed to be the largest antitrust deal in history—in December 2013 over objections from thousands of retailers and other companies, including 10 of the 19 named Plaintiffs. Among the class members’ concerns was that the deal failed to address the credit card companies’ dominant hold on the industry. K. Craig Wildfang, a lawyer with Robins Kaplan Miller & Ciresi, led the case for the class Plaintiffs as co-lead counsel.

In June, the class members took their concerns about the settlement to the Second Circuit, where their appeal is currently pending. Scores of objectors, including American Express and Blue Cross Blue Shield, as well as hundreds of retailers including Home Depot, Amazon and Whole Foods, claim the deal paled in comparison to the amount the credit card giants would rake in from their allegedly anti-competitive merchant rules and fees.

Following the settlement, several companies struck out on their own in order to achieve their own compacts with Visa and MasterCard. In November, T-Mobile USA Inc., Metro PCS Wireless Inc., VoiceStream Wireless Corp. and Western PCS Corp. all settled for an undisclosed amount. The cellphone companies’ settlements came about two weeks after several companies, including Duke Energy and Orbitz, opted to settle with Visa and MasterCard as well. Other recent settlements in the case include those with companies such as Cox Communications, Live Nation Entertainment Inc., Hewlett Packard Co. and Delta Air Lines Inc.

The MDL kicked off in 2005 with an initial case that accused the credit card giants and the banks that funded them of conspiring to artificially inflate interchange fees. In 2012, by the time the parties reached the landmark settlement, the case’s focus had been narrowed down to the companies’ restrictions on merchants that accept their cards and the practice of setting interchange fees, which merchants pay to be able to accept credit or debit cards.

Source: Law360.com

**1st Circuit Court Of Appeals Approves Class Certification In Nexium Pay-For-Delay Suit**

The First Circuit Court of Appeals has upheld the certification of a class of indirect purchasers of Nexium in pay-for-delay litigation over the heartburn drug. The court ruled that the presence of a few uninjured members in the class didn’t prevent certification. In a split decision, a three-judge panel ruled that the district court hadn’t abused its discretion in certifying a class of consumers, insurers and other entities who ultimately paid for the drug even if the class included a de minimis number of members who wouldn’t have been harmed by the alleged plot between AstraZeneca AB and Ranbaxy Pharmaceuticals Inc. to delay generic versions of the drug through a patent settlement.

The majority reasoned that as long as it is possible to come up with a mechanism that could ultimately sort out the uninjured class members and keep them from recovering damages at some point in the proceedings, a case could be certified. “Defendants also assert that any mechanism of exclusion that requires determination of the individual circumstances of class members is improper,” U.S. Circuit Judge Timothy B. Dyk wrote for the majority. “But the Supreme Court in Amgen and the circuits in other cases have made clear that the need for some individualized determinations at the liability and damages stage does not defeat class certification.”

Even though the Plaintiffs hadn’t proposed a mechanism to do so yet, the majority pointed out that there was no reason to think it would be impossible to come up with one. The court pointed out that, on the one hand, Plaintiffs could argue for a presumption that consumers would choose the generic option if it were available, or alternatively, that consumer testimony could be used to show injury. As long as the class is definite and the court limits the total recovery to the size of the injury and makes sure only that only injured class members recover, the fact that the class definition might encompass some uninjured members shouldn’t block certification at that preliminary stage, according to the opinion. Judge Dyk wrote:

“At worst the inclusion of some uninjured class members is inefficient, but this is counterbalanced by the overall efficiency of the class action mechanism. Moreover, excluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a ‘fail-safe class’—a class defined in terms of the legal injury.”

The majority also dismissed the Defendants’ appeals to the Supreme Court’s recent class action decisions in Dukes v. Wal-Mart and Bebrend v. Comcast, saying that neither case holds that Plaintiffs have to show that every potential class member was injured by the alleged conduct. Judge Dyk wrote: “The Wal-Mart Court nowhere stated that at the class certification stage, every member of the class must establish that he, she or it was in fact injured by the common policy of discrimination.”

The court called the Defendants’ call to Comcast “equally misdirected,” noting that the case only meant that “at class certification, the damages calculation must reflect the liability theory.” U.S. Circuit Judge William J. Kayatta, Jr., dissented from the majority’s decision. While Judge Kayatta agreed that having a mechanism to sort out uninjured class members was key to allowing certification, he said that the court should have vacated and remanded the decision for the district court to take another look at the issue. Judge Kayatta wrote:

The possibility would remain that the Plaintiffs might yet propose and the district court approve some
method of culling uninjured consumers from the class in an administratively feasible manner that protects Defendants' rights. Instead, the majority does the hats of both Plaintiffs' counsel and the district court by first proposing, sua sponte, a culling method that no party has proposed—limiting recovery to consumers who file affidavits—and then announcing itself quite satisfied with that method.

Source: Law360.com

**WAL-MART WILL FACE FALSE AD SUIT OVER HEART SUPPLEMENT**

A California federal judge has kept intact most of a proposed class action lawsuit accusing Wal-Mart Stores Inc. of exaggerating the effectiveness of a heart-health supplement by including misleading statements on the packaging. The court found the fraud allegations sufficiently detailed to pass muster. In largely Tina's claims regarding allegedly exaggerating statements on the packaging. The national class allegations, finding they provide evidence supporting the breach of implied and express warranties those standards could nevertheless prove to be useful further along in the litigation. She referenced in particular Cortina's claims regarding allegedly inconsistently produced batches of Equate, saying USP testing could help provide evidence supporting the breach of implied or explicit warranties.

Judge Bashant refused to strike the national class allegations, finding they weren't "redundant, immaterial, impertinent or scandalous" and that Wal-Mart's motion was premature. She also declined to dismiss claims brought under the Magnuson-Moss Warranty Act relating to statements on the packaging that Equate is "clinical strength." "High absorption" and offers "three times better absorption," saying the allegations were more than legal conclusions in that they set verifiable and reasonable benchmarks. Cortina's claim under the California Legal Remedies Act survived Wal-Mart's motion to dismiss after Judge Bashant determined that she was not seeking damages for those claims and therefore wouldn't have to provide notice at least 30 days in advance.

The suit accuses Wal-Mart Inc. of deceptively advertising Equate CoQ10, specifically targeting statements on the product's packaging. The complaint says the claims are misleading not only because the softgels fail to rupture in a timely enough manner for absorption, but also because Equate and Quinol are formulated differently and employ different technologies for increasing CoQ10 absorption. Cortina is seeking to represent a nationwide class of consumers who purchased Equate, along with a California subclass. Her suit includes claims under California consumer protection and product liability laws.

Source: Law360.com

**REGIONS TO PAY $125 MILLION TO END SUITS OVER FUNDS' COLLAPSE**

Regions Financial Corp. has agreed to pay $125 million to settle both a putative class action and shareholder derivative suit alleging it mishandled three open-end mutual funds that tanked in 2007. The settlement ends two separate suits, part of a multidistrict litigation (MDL) over Regions' allegedly risky holdings in asset-backed securities. Regions, Morgan Keegan and others will pay the class members $110 million, with another $15 million going to settle the derivative suit.

Both sets of Plaintiffs alleged the three funds, managed by Morgan Asset Management Inc., were marketed as safer than other high-yield funds or as good choices for investors trying to preserve capital, but Regions invested more in low-ranking tranches of mortgage-backed securities than peer bond funds, according to the Plaintiffs. Regions' strategy incurred significant undisclosed liquidity, valuation and credit risks, the Plaintiffs said, and failed to properly audit their financial statement. Regions further misled investors by pointing to other funds it said could be used as benchmarks to judge Regions' performance, but the composition of those funds were allegedly materially different.

The class action complaint, filed in 2007, alleged investors were not made aware of the significant risk incurred when investing in the funds. The funds lost much more than other similar funds because of the magnitude of their structured fixed-income securities holdings, according to the complaint. Regions settled another class action from the MDL in 2014, paying $22.5 million to end allegations it kept its stock as an employee retirement plan option even though the company's risky loan practices made it an imprudent investment. When the bubble burst, Regions stock took a nose-dive and lost a whopping 93 percent of its value, those Plaintiffs said, adding that a "prudent fiduciary" would have realized that the company's loan practices were creating excessive risk to the stock value and taken steps to protect plan assets that were in Regions stock. The class action, the derivative action, and the MDL are all in the same court.

Source: Law360.com

**TRACFONE WILL PAY $40 MILLION IN FTC THROTTLING SUIT**

TracFone Wireless Inc. will pay $40 million to consumers for falsely promising them "unlimited" data service but then slashing data transfer speeds after they exceeded certain limits. This is according to a settlement against filed in California last month by the Federal Trade Commission. The FTC's federal complaint accused TracFone of promising consumers access to unlimited data in plans offered for around $45 per month under its various brands, including Straight Talk, Net10, Simple Mobile, and Telcel America, but then drastically reducing or cutting off entirely their mobile data after they had exceeded certain fixed limits during a 30-day period.

The practice, known as "throttling," was never disclosed to consumers until 2013, the FTC said. Even then, the disclosure was hidden amongst fine print or on
the rear of the phone's packaging, where it was unlikely to be seen by consumers. The slowdowns ranged from at least 60 percent of normal service to as high as 90 percent in certain cases, according to the FTC, and has been ongoing since 2009. The FTC alleges that TracFone varied its data limits, but generally slowed data service when a customer used one to three gigabytes, and suspended data service at four to five gigabytes. Only when customers complained about the practice were they warned for the first time about their “excessive data usage” in a prerecorded message, the suit says.

Even then, the company never disclosed its data limits. The agency claims that TracFone internal documents showed that the throttling policies had no technical purpose, such as reducing network congestion, and were instead created to cut the high costs of providing unlimited data. In some cases, the company terminated all of the services including talk, text, and data after consumers had gone beyond the allocated limits. Jessica Rich, director of the FTC’s Bureau of Consumer Protection observed:

“The issue here is simple: when you promise consumers ‘unlimited,’ that means unlimited. This settlement means that Straight Talk, Net10, Simple Mobile and Telcel America customers will be able to get money back from the company for services the company promised but didn’t deliver.

An FTC spokesman said that the amount consumers can expect to receive from the settlement will vary depending on the number of claims filed. TracFone is the country’s largest prepaid mobile phone service provider with approximately 25 million subscribers. A spokesman for the company called the accord “amicable.” The FTC’s complaint against TracFone marks the latest development in the agency’s crackdown against mobile phone companies and tech companies like Google Inc. over alleged consumer protection violations.

The agency last year targeted AT&T Mobility LLC in a lawsuit over alleged throttling, and reached a $90 million settlement with T-Mobile USA in December and a $105 million settlement with AT&T Inc. for placing unauthorized, third-party charges on consumers’ phone bills in a process known as cramming. The agency reached a $19 million settlement with Google Inc. in September to settle charges relating to children’s in-app purchases. All told, the FTC actions have put more than $200 million back into consumers’ hands, according to the agency.

The $40 million settlement was filed in coordination with several private class actions filed against TracFone in California federal court over the same allegations, and will be used to settle claims brought on behalf of the private classes as well.

Source: Law360.com

XXVI.
THE CONSUMER CORNER

SYNGENTA LAWSUITS CONTINUE AFTER GMO APPROVAL IN CHINA

China’s recent approval of Syngenta’s genetically modified trait, known as MIR162, has not stalled litigation against the company. More than 200 cases have been filed, and more continue to be filed, on behalf of farmers across the country based on Syngenta’s premature cultivation of the trait. Release of the trait prior to its approval in China led to the contamination of the United States corn supply, which foreclosed the U.S. corn export market to China. These lawsuits focus on allegations that Syngenta released MIR162 into the marketplace knowing it lacked approval in China, knowing that China has a zero-tolerance policy for unapproved traits, and knowing that commingling of corn is essentially inevitable. Further, Syngenta knew what a devastating impact premature cultivation could have on global trade.

China officially approved MIR162 on Dec. 22, 2014, after nearly 13 months of rejecting corn shipments from the U.S. The approval came after a high-level commercial dialogue between China’s Ministry of Agriculture and U.S. government officials in December. Despite this approval, current lawsuits continue to push forward and others are being filed based on the significant costs incurred by the industry. According to a study published in the spring of 2014 by the National Grain and Feed Association, loss of the Chinese market had already cost the U.S. grain industry damages exceeding $2.9 billion. These cases were consolidated by the Judicial Panel on Multidistrict Litigation in federal court in the District of Kansas.

For more information on this litigation, contact Principal & Consumer Fraud Section Head, Dee Miles, Dee.Miles@beasleyallen.com; or Beasley Allen attorneys Roman Shaul, Roman.Shaul@beasleyallen.com, or Leslie Pescia, Leslie.Pescia@beasleyallen.com.

JUDGE APPROVES REVISED $35 MILLION TOYS R US SETTLEMENT

A Pennsylvania federal judge has approved a revised $35.5 million class action settlement resolving long-running claims accusing Toys R Us of restraining prices on baby products. More than 1.1 million claims will now be paid to consumers as opposed to only tens of thousands. Senior U.S. District Judge Anita B. Brody granted final approval to the settlement, saying the revised deal “maximizes the benefit to an enormous number of class members.” Approval of the deal follows years of contentious litigation and criticism that the settlement provided too much for Plaintiffs lawyer and too little to Toys R Us customers.

The revised settlement was necessary after the Third Circuit failed to approve the settlement in 2013, seven years after the litigation began. Judge Brody gave preliminary approval to the latest agreement in May. The settlement takes into account a ruling from the appeals court to nix the cy pres distributions to charity so that class members get a net settlement of nearly $18 million—as opposed to the $3 million allocated in the initial 2010 agreement. “Unlike the initial settlement, here the total value of claims and the exact amount that will be distributed to the class are known,” Judge Brody said.

Judge Brody did reduce the attorneys fees being sought by Plaintiffs counsel to $11,090,833—more than $742,000 less than they had sought. In a brief, Plaintiffs counsel said they devoted nearly 85,000 hours to the case. The court fully reimbursed Plaintiffs counsel the $2,283,482 million they say they incurred between January 2006 and July 31, 2014. The Plaintiffs brought the suit in 2006 on behalf of consumers who purchased certain baby products from Babies R Us after it allegedly threatened to drop certain popular lines from its stores if their manufacturers didn’t agree to block Internet retailers from offering the same products at lower prices. The class action complaints, brought by 13 consumers, alleged that the anti-markup actions constituted illegal vertical price restraints under the Sherman Act.

Source: Law360.com
CDC SAYS SEVEN DEATHS AMONG LISTERIOSIS VICTIMS LINKED TO CARAMEL APPLES

The U.S. Centers for Disease Control and Prevention (CDC) has reported a seventh death among the 32 illnesses reported in the multi-state Listeria monocytogenes outbreak linked to caramel apples. According to the CDC, Listeriosis contributed to at least three of the deaths reported to date. Since the last case count update, one additional death was reported. It is unclear whether Listeria infection contributed to this death.

On Jan. 6 Bidart Bros. of Bakersfield, Calif., recalled Granny Smith and Gala apples because environmental testing revealed contamination with Listeria monocytogenes at the firm’s apple-packing facility. On Jan. 8, U.S. Food and Drug Administration (FDA) laboratory analyses showed that these Listeria isolates were indistinguishable from outbreak strains by pulsed-field gel electrophoresis (PFGE). Listeria isolates from whole apples produced by Bidart Bros., collected along the distribution chain, were also indistinguishable from outbreak strains by PFGE, according to the Centers for Disease Control and Prevention.

The CDC says consumers should not eat any recalled Granny Smith and Gala apples produced by Bidart Bros., and retailers should not sell or serve them. Consumers who are buying, or have recently bought, Granny Smith or Gala apples can ask their retailers if the apples came from Bidart Bros. If unable to determine whether the apples were supplied by Bidart Bros., consumers should throw the products away. Consumers are also advised not to eat commercially produced, prepackaged caramel apples that were recalled or made with Bidart Bros. apples, and retailers should not sell or serve them.

Happy Apples, California Snack Foods, and Merb’s Candies each announced a recall of commercially produced, prepackaged caramel apples after hearing from Bidart Bros. that there may be a connection between Bidart Bros. apples and this Listeriosis outbreak. As of Jan. 10, 2015, a total of 32 people infected with the outbreak strains of Listeria monocytogenes had been reported from 11 states. Thirty-one individuals have been hospitalized, and seven deaths have been reported.

Ten illnesses were pregnancy-related (occurred in a pregnant woman or her newborn infant), with one illness resulting in a fetal loss. Three invasive illnesses (meningitis) were among otherwise healthy children aged 5-15 years. To date, 25 of the 28 ill people interviewed reported eating commercially produced, prepackaged caramel apples before becoming ill. The Public Health Agency of Canada has also identified two cases of Listeriosis in Canada with the same PFGE patterns as seen in the U.S. outbreak. The agency is working with its provincial and territorial partners to determine the source of these illnesses. This investigation is rapidly evolving, and new information will be provided as it becomes available.

Source: Foodsafetynews.com

SUIT FILED OVER CONTAMINATED APPLES

In a related matter, a products liability suit has been filed by a woman who came down with a listeria infection after purchasing caramel apples. This suit against Wal-Mart Stores Inc., Bidart Bros. Apple Packing Co. and Happy Apple Co. Inc. is the latest suit over the ongoing outbreak that has sickened more than 30 people and killed at least seven. Plaintiffs Darlene Vouri and her husband, Francis Vouri, say that Darlene Vouri became ill with listeriosis, an infectious food poisoning disease caused by the bacterium Listeria monocytogenes, and was later hospitalized. They had purchased Happy Valley caramel apples on Oct. 14, 2014, from a California Wal-Mart location. Bidart Bros. is an apple supplier that supplied apples to Happy Valley.

The suit is at least the second over the Listeria monocytogenes outbreak that in December was connected to the consumption of contaminated caramel apples last month. The complaint in the latest case said that Darlene Vouri was hospitalized after suffering from persistent neck pain and headaches and two serious falls due to loss of muscle control, before doctors discovered a listeria infection on Nov. 14, 2014. After returning home on Dec. 10, Darlene Vouri still required in-home nursing and suffered from neck, head and joint pains. On Jan. 10, 2015, she suffered a third fall and remains “in guarded condition requiring ongoing medical treatment,” according to the complaint.

“The caramel apples were defective because they contained Listeria monocytogenes and defendants failed to give adequate warnings of the product’s dangers that were known or by the application of reasonably developed human skill and foresight should have been known,” the Vouri’s complaint alleged. In addition to a count of negligence alleging the defendants breached their duty of care by doing one or more of: failing to properly test the caramel apples, failing to prevent human and/or animal feces from coming into contact with the apples, failing to apply policies to maintain sanitary conditions, and failing to warn the public of the danger that the caramel apples were contaminated, among other potential breaches.

A wrongful death suit was filed in a California court last month against Safeway Inc., alleging an 87-year-old woman died of a listeria infection after eating a caramel apple purchased at a Safeway grocery store.

Source: Law360.com

FDA SAYS DOZENS GIVEN NONSTERILE SIMULATED SALINE

The U.S. Food and Drug Administration said last month that more than 40 patients had received infusions of intravenous simulated saline from bags made by Wallcur LLC that wasn’t sterile or intended for human use. Some patients were hospitalized. There has been at least one death linked with using the products. Adverse reactions associated with the simulated saline include fever, chills, tremors and headaches, the FDA said in a statement. The agency said it wasn’t clear that the reported death associated with the simulated saline was directly related to its use.

The simulated saline IV bags manufactured by Wallcur, which are only meant to be used in training, simulation and education, aren’t sterile and shouldn’t be used in humans or animals, according to the agency. “Clinicians and office staff are encouraged to take steps to ensure IV solution simulation products are removed from office inventory to eliminate the possible injection of Wallcur simulated products into patients,” the FDA said.

On Dec. 30, the FDA said that it was investigating use of Wallcur’s simulated saline solution bags after reports of adverse events linked with them in Florida, Georgia, Idaho, Louisiana, North Carolina, New York and Colorado. The solution was sent to medical clinics, surgical centers and urgent care facilities in the states, according to the FDA. On Jan. 7, San Diego-based Wallcur recalled all four sizes of its Practi-0.9% sodium chloride IV bags and its Practi-0.9% sodium chloride 100 ml IV solution bag with sterile distilled water, saying in a statement that the bags had been adminis-
The recall is for 66,819 Dodge Dakota, Dodge Ram 1500, 2500, 3500 and Mitsubishi Raider pickups with manual transmissions from model years 2006 and 2007. The Raider, which Chrysler built for Mitsubishi, and Dakota are no longer in production. FCA US LLC, the automaker formerly known as Chrysler Group LLC, said it will start notifying owners Feb. 13 and replace the switches for free. Until then, they recommend drivers start the truck with the parking brake engaged and the gear shifter in neutral.

FCA US, based in Auburn Hills, Mich., is a unit of Fiat Chrysler Automobiles NV. The group, which also recalled more than 900,000 older Dodge Ram pickups, Jeep Commanders and Jeep Grand Cherokees for other defects, declined to elaborate on the fatal accident. Fiat Chrysler fell 1 percent to close at $11.76.

**NISSAN SUVS RECALLED OVER FIRE AND CRASH HAZARDS**

Nissan Motor Co. has recalled nearly 640,000 sport utility vehicles after safety regulators discovered that water seepage in certain Nissan Rogues may cause electrical fires, and faulty latches in some of the automaker’s Infinitis and Pathfinders could make their hoods fly up unexpectedly. The automaker acknowledged two reports filed by the National Highway Transportation Safety Administration that detailed the defects and announced it would remedy the safety hazards by letting owners and dealers know about the problems and paying to fix any identifiable issues. The largest recall involves nearly 470,000 model year 2008 through 2014 Nissan Rogues that the federal regulator found to be plagued by electrical shorts in a seatbelt component due to a mixture of snow or water and salt seeping through the carpet on the driver side floor. The electrical shorts can cause a fire in the SUVs, according to NHTSA.

The recall encompasses approximately 170,000 vehicles, including certain 2013 and 2014 Pathfinders, 2013 Infiniti JX35s and 2014 Infiniti QX60s. The recall includes hybrid varieties of each type of vehicle. According to the NHTSA’s report, the affected autos contain a hood release cable that may not fully engage, which means the latch could remain open even when the hood is closed. The result of the defect is that the hood could fly open while the SUV is in motion, obscuring the driver’s view of the road and potentially causing a crash. As with the Rogue recall, Nissan and Infiniti plan to notify owners and dealers of the problem, inspect the vehicles and fix any defects at no cost to the owner.

Earlier this month, the NHTSA opened an investigation into two “unusual but similar” complaints that air bags in 2013 Nissan Rogues improperly deployed after the vehicles crashed. According to the safety regulator, its investigation will encompass 195,000 Nissan Rogue sport utility vehicles and will explore two consumer complaints that allege the vehicles' front, driver's side air bag deployed many seconds, even up to minute, after impact and didn't fully inflate. The federal investigation was opened Jan. 12 to determine the cause, scope and consequence of the issue, according to the agency. As of Wednesday, no determination had been made on the investigation.

**VALENT PHARMACEUTICALS NORTH AMERICA RECALLS VIRAZOLE®**

Valent Pharmaceuticals North America LLC (VPNA) has recalled one lot of Virazole® (ribavirin powder for solution), 100 mL, 6g Vial, 4-pack to the user level. Inhalation of a non-sterile product with microbial contamination into the airways could increase the risk of respiratory infection. The risk is higher in patients who are immunocompromised (because of underlying disease), and are more susceptible.

Virazole is indicated for the treatment of hospitalized infants and young children with severe lower respiratory tract infections due to respiratory syncytial virus (RSV). Valent has not received reports of adverse events or injuries, related to this recall. Virazole is packaged in 100 mL, 6 g Vial, 4-pack NDC 00187-0007-14 which is to be reconstituted with 300 mL Sterile Water for Injection or Sterile Water for Inhalation (no preservatives added) and administered only by a small particle aerosol generator (SPAG-2). The
affected Virazole lot is Lot No. 340535F with an expiration date of Oct 2018. Virazole was distributed in the U.S. and Australia.

VPNA is notifying its distributors and customers by mail and is arranging for return of all recalled product of this lot. This recall only affects this lot of Virazole; all other lots are not affected and are not involved in this recall. Customers with questions regarding this recall can contact VPNA by phone at 800-321-4576 Monday-Friday, 8 a.m.-5 p.m. ET or by e-mail at pharmcs@valeant.com. Consumers should contact their physician or health care provider for questions regarding this product.

This recall is being conducted in conjunction with the U.S. Food and Drug Administration (FDA). Adverse reactions or quality problems experienced with the use of this product may be reported to VPNA at 877-361-2719 or to the FDA’s MedWatch Adverse Event Reporting program as follows:

Complete and submit the report
Online: www.fda.gov/medwatch/report.htm
Regular Mail or Fax: Download form www.fda.gov/MedWatch/gets.htm or call 1-800-332-1088 to request a reporting form, then complete and return to the address on the pre-addressed form, or submit by fax to 1-800-FDA-0178

IKCA RECALLS Crib Mattresses Due To Risk Of Entrapment

About 169,000 VYSSA crib mattresses have been recalled by IKEA North America Services LLC, of Conshohocken, Penn. The crib mattresses could create a gap between the mattress and crib ends larger than allowed by federal regulations, posing an entrapment hazard to infants.

This recall involves IKEA VYSSA style crib mattresses with the following five model names: VACKERT, VINKA, SPELEVINK, SLOA and SLUMMER. The involved mattresses were manufactured on May 4, 2014 or earlier. An identification label attached to the mattress cover has the date of manufacture in Month-DD-YYYY format and the VYSSA model name. A gap between the mattress and crib ends larger than two finger widths is an indication of the defective mattress. The firm has received two reports of infants becoming entrapped between the mattress and an end of the crib. The children were removed from the gap without injury.

The mattresses were sold exclusively at IKEA stores nationwide and online at www.ikea-usa.com from August 2010 to May 2014 for about $100. Consumers should inspect the recalled mattress by making sure there is no gap larger than the width of two fingers between the ends of the crib and the mattress. If any gap is larger, consumers should immediately stop using the recalled mattresses and return it to any IKEA store for an exchange or a full refund.

Contact IKEA toll-free at 888-966-4532 anytime or online at www.ikea-usa.com and click on the recall link at the top of the page for more information.

PRO PERFORMANCE RECALLS SKLZ RESISTANCE TRAINERS

About 52,000 SKLZ Recoil 360™ All-Position Resistance Trainers have been recalled by Pro Performance Sports LLC, of Carlsbad, Calif. A weld on a ring on the resistance trainer’s belt can break during use and cause the resistance trainer’s flexible cord to quickly and unexpectedly retract and hit an exercise partner who is holding the other end. This recall involves the SKLZ Recoil 360™ All-Position Resistance Trainers, which is a leash-type device that provides resistance during exercise. The resistance trainer consists of a belt, an 8-foot flexible cord attachment leash, a safety handle and a storage bag. “SKLZ” followed by an arrow is printed on the belt. Users wear the belt, which is connected to the flexible cord. The safety handle, connected to the flexible cord, is held by a coach or partner to provide resistance while the user runs, jumps or shuffles. In lieu of a coach or partners, the safety handle can be connected to a sturdy stationary object like a fence or post. Belts with the arrow before the “SKLZ” are not included in this recall. The firm has received three reports of the weld on the resistance trainer breaking and resulting in serious injuries, including blunt trauma to a lower leg, a puncture wound and a laceration.

The trainers were sold at Academy LTD, Dick’s Sporting Goods and other sporting goods and fitness stores; sporting goods and fitness catalogs; and online at SKLZ.com and Amazon.com from January 2013 through December 2014 for about $40. Consumers should immediately stop using the recalled resistance trainers and contact SKLZ to return them for a free replacement resistance trainer, including free shipping. Contact Pro Performance toll-free at 877-225-7275 from 8 a.m. to 5 p.m. PT Monday through Friday or online at www.sklz.com and click on “Product Recall: Recoil 360TM” at the bottom of the page.

CoScentrix Expands Recall of DD Brand Candles

DD brand candles have been recalled by CoScentrix, of Carson, Calif. The candle’s high flame can ignite the surface of the wax, posing a fire hazard. This recall involves four types of DD branded single-wick candles: Mason jars in 5- and 12-ounce sizes, decorative jars in 10- and 20-ounce sizes, 13-ounce coffee tins and 13-ounce jars with a holiday theme. The candles were sold in a variety of fragrances and colors. The 5-ounce Mason jars are 2.25 inches wide by 3.75 inches high. The 12-ounce Mason jars are 3 inches wide by 5 inches high. The jars have gray metal lids. The DD logo and the word Handcrafted are in raised letters on the front of the jars. The candle fragrance and size are printed on a hang tag attached to the mouth of the jars.

The 10-ounce decorative jars are 4 inches wide by 3 inches high. The 20-ounce decorative jars are 5 inches wide by 4 inches high and hold a candle. The jars have gray metal lids with the DD logo in raised letters on the top. The candle fragrance and size are printed on a rectangular label on the front of the jar. The 13-ounce coffee tins are 3.5 inches wide by 4 inches high and have a silver metal lid. The candle size and fragrance are printed on a label that wraps around the outside of the tin. The 13-ounce holiday candle jars are 3.75 inches wide by 4 inches high and have silver metal lids with the DD logo in raised letters on the top.

The DD logo inside a floral wreath, the fragrance and size are printed
The recalled pajamas were sold at children’s boutiques and department stores nationwide from August 2013 through November 2013 for between $10 and $13. Consumers should immediately take the recalled pajamas away from children, stop using them and return them to the place of purchase for a full refund. Contact Star Ride Kids toll-free at 866-349-7094 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.starride.com and click on the Product Recall link on the bottom of the page for more information.

**NPD Furniture Recalls Dining Chairs Due To Fall Hazard**

About 250 Abby Dining Chair has been recalled by New Pacific Direct, Inc., of Newark, Calif. Chair legs can break unexpectedly, posing a fall hazard. The Abby Dining Chair has dark brown wooden legs with seat and back upholstery in either gray or green fabric with black or white edge piping. The chair is approximately 20 inches wide, 24 inches deep and 36 inches tall. The SKU number 428136-CS-C or 428136-GS-C is printed on the product packaging. There are no identifying labels on the product itself. The company has received four reports of a chair leg breaking. No injuries have been reported.

The chairs were sold at various home furnishing retailers nationwide between July 2014 and November 2014 for about $200. Consumers should immediately stop using the product and contact NPD Furniture for a full refund. Contact NPD Furniture at 800-976-8188 from 9 a.m. to 4 p.m. PST Monday through Friday or online at www.newpacificdirect.com and click on “Product Recall” for more information.

**Cleaner And Degreaser Recalled For Chemical Hazard**

CR Brands has recalled their Mean Green Super Strength Cleaner & Degreaser and Mean Green Industrial Strength Cleaner & Degreaser due to a chemical hazard. While the product’s packaging states that it “does not contain ammonia,” the cleaners may contain ammonia. If combined with other cleaning products, such as bleach, the mixture could produce irritating or toxic gases. The recall includes about 83,800 of the cleaning products, which come in white plastic spray bottles and white or green plastic containers. The cleaner was sold at small retailers nationwide from August 2014 to November 2014. Consumers who have a product with the UPC and date code should immediately discontinue use of the product and return it to the retailer for a replacement.

**Johnson Health Tech Recalls Matrix Fitness Strength Training Machines**

About 140 Matrix Fitness Varsity series strength training machines have been recalled by JHTNA Manufacturing LLC, of Milwaukee, Wis. The handle attachment on the strength training machines can detach during use and hit the user with force and/or cause the user to lose balance and fall. This poses a risk of impact injury, laceration and fall hazards. This recall involves five models of the Matrix Fitness series strength training machines with chrome frames, stacked weights, overhead pulleys, and some with black or blue vinyl seats and thigh supports. Models include VY-6021 Lat Pulldown, VY-6042 Bicep/Triceps Press, VY-6046 Lat Pulldown/Low Row, VY-6099 Total Body Trainer, and the J7021 Special Order Lat Pull. “Matrix” and the model number are printed on a white sticker at the base of the machines. They are used in commercial fitness facilities such as health clubs, hotels, apartment complexes and rehabilitation centers, schools and municipal facilities. Johnson Health Tech is aware of two injuries, including a man who was hit and cut on the head when the handle detached and another man who fell when the handle detached on his machine.

The machines were sold at Johnson Health Tech North America and its fitness equipment dealers nationwide from July 2013 through October 2014 for between $3,300 and $4,000. Owners should immediately prevent people from using the strength training machines and contact Johnson Health Tech North America to schedule a free repair.
Contact Johnson Health Tech North America toll-free at 866-218-3674 from 8 a.m. to 5 p.m. CT Monday through Friday, or online at www.matrixfitness.com and click on Safety Notice at the bottom of the page for more information.

HUNTERS TREE STANDS RECALLED BY PRIMAL VANTAGE DUE TO FALL HAZARD

About 1,000 Ameristep Hyde Cliff Hanger and Sky Walker Tree Stands have been recalled by Primal Vantage Co., of Bernardsville, N.J. The cast aluminum platform can break, causing the user to fall to the ground and suffer serious injuries. This recall involves two 2014 models of hang-on tree stands used by hunters. They include the Ameristep Hyde Cliff Hanger with model number 2RX1H008C and date code JH-2014-3-6 and the Ameristep Hyde Sky Walker with model number 2RX1H009C and date code JH-2014-3-6. The date code is stamped on the back of the tree stand’s aluminum seat frame. The model number is printed on the packaging and in the instruction manual. “Hyde” is printed in red on the vertical aluminum bar between the seat and the foot platform. Primal Vantage has received six reports of the tree stand’s aluminum platform breaking. No injuries have been reported.

The tree stands were sold at Bass Pro Shops and other sporting goods stores nationwide from July 2014 through November 2014 for between $220 and $250. Consumers should immediately stop using the recalled product and contact Primal Vantage for a full refund. Contact Primal Vantage toll-free at 866-972-6168 between 9:30 a.m. and 4:30 p.m. CT Monday through Friday, or at www.primavantage.com and click on “For Hyde Recall Click Here” on the homepage or go to the Customer Service tab for more information.

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

XXVIII.
FIRM ACTIVITIES

The firm recently announced a significant move in our Mass Torts Section. We have named four lawyers as new Principals in the firm. These lawyers are David Dearing, James Lampkin, Danielle Ward Mason, and Matt Teague. Each of these works in the firm’s Mass Torts Section.

David Dearing joined Beasley Allen in 2012. He initially worked on our Hormone Replacement Therapy (HRT) litigation team, focusing on drugs such as Premarin, Prempro and Provera, which were shown to cause breast cancer in some women. Mr. Dearing is now primarily working on two other classes of drugs in multidistrict litigation: Fosamax, used to treat osteoporosis but linked to femur fracture; and diabetes drugs Januvia, Byetta, Janumet and Victoza, linked to the development of pancreatic cancer.

James W. Lampkin, II, joined Beasley Allen in 2011 after a career in private practice with a civil defense firm in Mobile. At Beasley Allen, James is handling cases related to the medical device transvaginal mesh (TVM), which is used to repair conditions such as pelvic organ prolapse and stress urinary incontinence. The mesh can erode into the body’s tissue, migrate and perforate organs, causing serious chronic pain. James also is working on cases involving Risperdal, a drug used to treat schizophrenia, bipolar disorder and irritability with autism. The drug has been linked to the development of gynecomastia, a condition in which boys grow breast tissue.

Danielle Ward Mason joined Beasley Allen in 2009. She is currently handling cases involving the drug Reglan, which is used to treat gastric problems but has been linked to the development of uncontrolled muscle movements, a condition known as Tardive Dyskinesia. She also is working on claims related to transvaginal mesh (TVM). Danielle also was part of the trial team that worked on Hormone Replacement Therapy (HRT) litigation and secured a $72.6 million verdict on behalf of three Plaintiffs in Philadelphia who took HRT drugs and later developed breast cancer.

Matthew P. Teague joined Beasley Allen in 2011. He is leading the firm’s Testosterone Replacement Therapy litigation, representing men who suffered significant injuries such as heart attack, stroke, blood clots and related conditions, or who died, after using testosterone replacement drugs. These drugs, heavily marketed to treat a condition dubbed “Low T,” include AndroGel, Testim and Axiron, among others. Matt also is involved in the firm’s transvaginal mesh (TVM) litigation.

Additionally, the firm named seven new Associates. They are Jenna Day (Toxic Torts Section), Stephanie Monplaisir (Personal Injury / Products Liability Section), Leslie Pescia (Fraud Section), Rebecca Gilliland (Fraud Section), Beau Darley (Mass Torts Section), Liz Eiland (Mass Torts Section) and Matt Munson (Mass Torts).

MCBA MEETING HONORS CHAD STEWART

In April of last year a very well respected and extremely smart lawyer in our firm died suddenly. Chad Stewart was a blessing to so many. His work on earth to heal hearts and spread the word of God was amazing for a man his age. Chad loved his wife and children and I know they would agree that they couldn’t have asked for a better man in their lives. The Montgomery County Bar Association honored Chad Stewart along with other lawyers who passed away in 2014. We had a number of our lawyers and staff attend the annual meeting where officers of the Association presented Chad’s wife, Becky, with a commemorative plaque. Although it is hard to move on after losing someone you care about, there is no doubt that Chad’s family remains in many folks’ prayers daily. Chad will be missed, but never forgotten.

BeasleyAllen.com
XXIX.
SPECIAL
RECOGNITIONS

Montgomery Circuit Judge Charles Price Retires

On Jan. 16, Judge Charles Price retired after serving for 31 years as a circuit judge in Montgomery County. During his tenure, Judge Price earned a reputation for being fair, courageous, and a willing mentor. He went above and beyond what is required of a judge. He always made young lawyers feel comfortable in his court. Judge Price understands better than most how to work with folks, cultivating a great deal of respect from the folks he worked with. He had a gift of lifting others up. Judge Price has been described as being a “Legend in his own time,” and that is a title that was well-earned.

Judge Price has served as President of the Montgomery Trial Lawyers Association and President of the Alabama Circuit Judge’s Association 2002-2003. He is a member of the National Bar Association, the Alabama State Bar Association, the Alabama Lawyers Association, the Montgomery County Bar Association, and the Capital City Bar Association. He served as president of the Alabama Circuit Judges Association (2002-2003). On January 6, 1999, he was unanimously elected President of the 15th Judicial Circuit.

Among his many honors, Judge Price received the 1997 John F. Kennedy Profile in Courage Award of the John F. Kennedy Library Foundation and the Alabama Democratic Conference John F. Kennedy Profile in Courage Award. Judge Price also is the only living judge to have a courthouse building named after him. On May 8, 2009, the Montgomery County Courthouse was dedicated as the Phelps-Price Justice Center in memory of Judge Joseph Phelps and in honor of Judge Price.

During the week preceding his retirement, he was honored by the Montgomery County Association for Justice. MCJA President Chad Cook, one of the lawyers at Beasley Allen, presented Judge Price with a plaque commemorating his years of service, and also announced the establishment of the Judge Charles Price Leadership Award, which will be presented annually to people in the area who demonstrate qualities reflecting Judge Price’s dedication and courage in upholding justice. Judge Price is a living legend whose name will go down in history as a man who made a difference.

Mayor Todd Strange has appointed Judge Price to a position in City government. In my opinion, that was an extremely good hire for the mayor. Judge Price will be an asset in his position for the city and all of the people in Montgomery.

Source: Montgomery Advertiser

ASSOCIATED PRESS REPORTER PHIL RAWLS RETIRES

After more than 35 years as a reporter for Associated Press, Phil Rawls has retired. Phil was the longest-serving member of the Alabama Capitol press corps. He is widely recognized as an expert on state politics. AP Deep South Editor Jim Van Anglen called Phil “a legend in Alabama journalism.” In 2013, Phil received the Distinguished Mass Media Achievement Award, presented by Auburn University.

Phil was a journalist for 40 years, with the majority of his career spent with the Associated Press covering Alabama politics and government. He reported on the activities of seven governors throughout the years, from George Wallace to current Governor Robert Bentley. Phil covered 35 regular Legislative sessions. In addition, he also covered general news on the local, state and national level. Van Anglen had this to say:

But it’s not what he has covered that is most important. Rather, it is bow he has done his job—with a sense of dignity, class and grace that has been an inspiration to me and countless other Alabama journalists.

Phil Rawls has been described as a go-to guy with his finger on the pulse of Goat Hill and his ear attuned to the heartbeat of the state of Alabama. His insight, fairness and experience will be sorely missed. I can say without reservation that Phil was one of the best—if not the very best—reporter in my lifetime. I never saw anybody any better.

Sources: Montgomery Advertiser, al.com, Associated Press

PRO BONO WORK IS A PRIORITY FOR THE MONTGOMERY COUNTY VOLUNTEER LAWYERS PROGRAM

Pro bono work is a priority for the Montgomery County Bar Association (MCBA). The MCBA’s Volunteer Lawyer Program (VLP) works to meet the needs of low-income Alabamians with the active participation of its members. Lawyers donate their time to ensure the underserved have equal access to justice.

Access to justice for the poor became the main focus for the Alabama State Bar in 2009, under the leadership of then Bar President and Beasley Allen lawyer Tom Methvin. It is estimated that about 25 percent of Alabama’s population, or about 1 million people, live in poverty.

As lawyers, we have a unique opportunity to provide a critical service to the poor in our community—legal representation. At a time of great crisis in their lives, we can offer people the help they need through pro bono legal services. Pro bono service is a privilege, and it is a critical part of our professional duties.

In 2009 the Montgomery County Bar Association formed a Pro Bono Committee, tasked with increasing participation in the Alabama State Bar Volunteer Lawyer Program (VLP). The MCBA established and operates a monthly Pro Bono Clinic to provide free legal counseling to clients who qualify. This program is still going strong, held on the first Tuesday of each month from 3-5 p.m. at the Head Start Educational Building. Local lawyers provide free legal advice to those who cannot afford legal fees. Legal counseling is provided on civil matters including Divorce/Custody/Visitation; Debts/Bankruptcy/Foreclosure; Landlord/Tenant Issues; and Domestic Violence issues.

In 2012, the Montgomery Volunteer Lawyer Program (MVLP) established the Montgomery County Bar Foundation with a grant from the Alabama Civil Justice Foundation (ACJF). The purpose of the grant is to support the continued growth and expansion of Volunteer Lawyer Programs that are enabling pro bono services by lawyers to effectively function as part of the state’s efforts to ensure civil legal aid for the poor.

This year, Montgomery Bar Foundation President Tim Gallagher helped lead an initiative to establish a new District Court Help Desk that will serve Montgomery County residents in civil matters. The Help Desk launched in December. It is designed to assist self-represented litigants who are appearing in District Court. The Help Desk provides advice and assistance with completing forms,
motions and other legal matters related to these cases. The Help Desk is available the second Monday of each month, set up in Courtroom 2A in the Phelps-Price Justice Center from 8:30-11:30 a.m. Lawyers are asked to volunteer as little as one hour of their time to staff the Help Desk.

The MVLP is steadily growing, increasing the number of individuals served by the program. In 2014 the MVLP opened 332 cases, an incredible 93 percent increase from 2013! If you would like to get involved with the MVLP, contact Mike Martin, Executive Director, at 334-265-0222.

Pro bono work is very important in Alabama, where only 16 percent of people who live in poverty and are in need of civil legal service are able to obtain legal services, and in a state where there are very limited funds for civil legal aid. According to numbers supplied by the ACJF, in 2013 4,100 Alabama lawyers donated more than 12,000 hours in free legal services. Most of the pro bono work done throughout the state is done through the Volunteer Lawyer Programs.

XXXI. CLOSING OBSERVATIONS

CITIZEN UNITED MUST GO

We wrote about the need for doing something about the aftermath of Citizens United. Mega corporations and the super-rich poured more than $500 million into shadowy outside groups in the 2014 elections. This was an all-out attempt to buy our democracy by drowning out the voices of candidates and voters. Many observers believe that’s just the down payment.

In 2016, these shadowy outside groups run by right-wing political operatives like Karl Rove and reactionary industrialists like the Koch brothers, and the U.S. Chamber of Commerce, will blow away the $500 million they spent in 2014. This massive assault on our democracy was unleashed by five Justices on the U.S. Supreme Court.

To put things in perspective, in the 2010 Citizens United v. Federal Election Commission case, the U.S. Supreme Court ruled that corporations like Exxon-Mobil, Bank of America and CIGNA have the same First Amendment rights as living, breathing human beings and can spend unlimited sums of money to support or oppose political candidates. This radical decision overturned more than 100 years of what was believed to be well-settled law.

Then in April, a deeply divided Supreme Court ruled in McCutcheon v. Federal Election Commission that any limit on the total amount an individual can contribute in an election is unconstitutional. This decision gives a handful of billionaires the power to write a single check for $5.9 million to candidates and political committees. These decisions are a disaster for our democracy. They cannot be allowed to stand. That’s why Public Citizen is leading an historic campaign to pass a constitutional amendment to overturn the Supreme Court’s decisions.

There is a lot of work to do. Before the Supreme Court’s 5-4 rulings, Congress at least restricted corporations and billionaires from using their massive financial power to directly influence elections. The reason was obvious: Big business and the super-rich are uniquely capable of gathering enormous sums of money and using it to punish their enemies and reward their friends, effectively undermining our democracy.

That’s just what we experienced in 2014. Powerful corporate interests and billionaires spent nearly twice as much on outside groups as in 2010. It’s not just the total amount these shady, unaccountable groups spend that’s alarming; it’s the increasingly dominant role they play in financing our elections. In 36 races outside groups actually outspent the candidates. That’s up from 11 in 2010.

For these mega donors, these giant contributions are an investment. They expect—and receive—payback many times over in the form of tax breaks, subsidies, regulatory rollbacks and much more. Do you believe that General Electric, Goldman Sachs, BP and a few hundred plutocrats should have the right to spend as much money as they want to corrupt our elections? According to recent polling, more than 80 percent of the public believes the current campaign finance laws are bad for democracy. Nearly 88 percent believe corporations have too much political power already. What do you say? In the four years since the Court’s Citizens United decision, groups like Public Citizen have mobilized this public sentiment and made enormous progress building a national movement to overturn the Court’s unwise decision. Now, they are taking their campaign to the next level to overturn Citizens United.

Tens of thousands of energized citizens are engaged in Public Citizen’s “Democracy Is For People Campaign” to pass a constitutional amendment and restore the First Amendment and fair elections to the people. Enormous progress has been made. Sixteen states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and West Virginia—and more than 550 cities and towns have passed resolutions calling for constitutional amendment to overturn Citizens United.

In Washington, 170 members of Congress and President Obama have endorsed an amendment to overturn Citizens United. More than 3 million people have signed petitions supporting an amendment, and dozens of new organiza-

XXX. FAVORITE BIBLE VERSES

Mark P. Bryant, a very good lawyer from Paducah, Kentucky, sent in two verses for this issue. Each is certainly appropriate and timely for lawyers and judges.

But let justice flow down like water, and righteousness, like a mighty stream. Amos 5:24

And what does the LORD require of you, but to do justly, and to love mercy, and to walk humbly with your God? Micah 6:8

Jamie Collins Doss, a good friend of mine and Sara’s, sent in a verse for this issue. Jamie is a strong prayer partner.

For as the body without the spirit is dead, so faith without works is dead also. James 2:26

Shanna Malone, who is the Executive Editor of this report, says one of her favorite books in the Bible is Proverbs. Although Proverbs has so many great verses, she says this one always stands out to her.

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
tional allies have joined our campaign. In fact, our movement, which was dismissed as quixotic four years ago, reached an important milestone on Sept. 8 when a majority of the U.S. Senate took its first vote ever to overturn Citizens United and the other radical Supreme Court decisions that are handing the keys of our democracy to the highest bidder.

A strong majority of 54 U.S. Senators, representing an even larger percentage of the American public, withstood withering attacks from reactionary billionaires like the Koch brothers and cast their votes with We the People. Public Citizen didn’t get the two-thirds majority necessary to pass a constitutional amendment, but, hopefully, the day is not far off when this will happen. It will take hundreds of thousands of engaged citizens letting Congress know how they feel. If ordinary folks get involved, we can reverse the Court’s decisions and take back our democracy from corporate control.

**SOME MONTHLY REMINDERS**

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

2Chron7:14

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

Edmund Burke

Woe to those who decree unrighteous decrees, Who write misfortune, Which they have prescribed. To rob the needy of justice, And to take what is right from the poor of My people, 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 (1752—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

Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that.

Martin Luther King, Jr.

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**Mr. Cub Was a Good Role Model**

Ernie Banks, an outstanding shortstop for the Chicago Cubs, was an athlete I looked up to both as an athlete and as a man. Even though I grew up a Boston Red Sox fan, I still pulled for Ernie Banks and considered him to be a real role model for young people in that day. He was called, and aptly so, “Mr. Cub,” and he became the face of the Chicago team. To my knowledge, this man did nothing except show real character and class both on the field and off. “Mr. Cub” played from 1953 through the 1971 season. Ernie Banks died on Jan. 23, 2015. Ernie Banks played his entire career for the Cubs and is considered to be one of the greatest players of all times.

Ernie Banks earned another nickname, “Mr. Sunshine” during his playing days, which tells us lots about the man. He was an all-star for 11 seasons and won two Most Valuable Player awards. We need more men and women in sports today who play the game for the right reason and can truly be proper role models for American youth. We see far too many athletes in the sports world today who set the wrong example. We should all put athletics in the proper perspective and not tolerate the conduct we now see from some professional athletes. I put Derek Jeter, who recently returned after a long and highly productive with the New York Yankees, in the same class with Ernie Banks. We simply need more athletes like these two men.

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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 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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