I. CPPITOL OBSERVATIONS

BUDGET CUTS WOULD CRIPPLE STATE COURT SYSTEM IN ALABAMA

Normally, I would write about the court system in another section, but this message is too important not to be on page one. If Alabama’s state court system loses 15 percent of its appropriation from the General Fund Budget, a measure that is currently on the table in the Alabama Legislature, it would be unable to carry out its constitutional duties and responsibilities. This is the opinion of Rich Hobson, the Administrative Director of Courts, and I totally agree with him. I have also talked to a number of judges who share Rich’s concern. Additionally, I am told that all of the circuit clerks are greatly concerned over what will happen to their offices.

A budget cut of this severity would badly hurt the state courts, which are already badly underfunded. The system is under-staffed by more than 400 employees. The cuts would mean an additional 530 layoffs, which would have to come from among the Unified Judicial System’s 1,404 regular employees. This would jeopardize its 578 officials.

A 15 percent budget cut comes to $13.9 million. Simply put—the system needs more money. It cannot afford to lose more funding. The courts have $3.6 million in new expenses that have to be paid in order to fund judges’ and employees’ retirement plans and employee health insurance. There also is $6.3 million in expenditures in the current budget that are funded by revenue sources that will not be available next year. Those dollars will have to be made up.

Alabama’s Unified Judicial System is one of the oldest in the nation. It is inconceivable that the system should be allowed to fail. The state and its people will suffer if they lose access to justice. If you believe the court system is important for the people of Alabama, contact your legislators and ask them to support full funding for the courts.

Sources: AL.com, judicial.alabama.gov

LORETTA LYNCH IS NOW THE U.S. ATTORNEY GENERAL

After waiting more than five months for confirmation from the U.S. Senate, Loretta Lynch officially took on the role of U.S. Attorney General on April 23 following a 56-43 vote. She replaces Eric Holder, who resigned from the position in September, and is the first black female to fill the position. Ms. Holder was nominated by President Barack Obama on Nov. 8, 2014. Even though the new Attorney General had a long wait for confirmation, in the end, that wait was well worth it. She was sworn in on April 27 and is now the U.S. Attorney General.

Ms. Lynch was the U.S. Attorney for the Eastern District of New York, which covers Brooklyn, Queens, Staten Island and Long Island. Her office is known for prosecuting people accused of terrorism, including those accused of plotting to set off bombs in the subway. She has also overseen the prosecutions of public officials in corruption cases. Ms. Holder has wide support among law enforcement. She is known among her colleagues at the Justice Department as a quiet hard-worker who, unlike many in positions of influence and visibility, avoids the spotlight and the political game.

During confirmation hearings, Ms. Lynch faced challenges from the Republican side of the aisle primarily due to her stance on immigration. She supported President Obama’s executive actions that limited deportations for people living in the U.S. illegally. Frankly, I believe she was correct in her views concerning the president’s actions.

One of her most outspoken critics on the immigration issue, Sen. Ted Cruz, R-Texas, who has announced his intention to run for the GOP nomination for President, was absent during the vote. The biggest surprise “yes” vote from the 10 Republicans who supported her was from Senate Majority Leader Mitch McConnell, R-Ky. Upon learning of her confirmation, President Obama had this to say:

Loretta has spent her life fighting for the fair and equal justice that is the foundation of our democracy. She will bring to bear her experience as a tough, independent and well-respected prosecutor on key, bipartisan priorities like criminal justice reform.

Ms. Lynch, 55, was born in Greensboro, N.C. Her mother was a librarian and her father a Baptist minister who was also active in the civil rights movement. She received her undergraduate and law degrees from Harvard University. She is married to Stephen Hargrove, with whom she has two stepchildren.

It is unusual for a U.S. Attorney to be moved directly into the position of U.S. Attorney General, although Ms. Lynch served as an advisor to former Attorney General Holder, chairing a committee that advises him on policy. Based on her history and performance, I believe that Ms. Lynch will do an outstanding job in her new role.

I wish her the very best and will be praying for her.

Sources: Associated Press, al.com, New York Times

II. MORE AUTOMOBILE NEWS OF NOTE

MDL JUDGE SELCTS FIRMS TO LEAD TAKATA AIR BAG MDL

U.S. District Judge Federico A. Moreno, the Florida federal judge who is presiding over the multidistrict litigation involving defects in airbags made by Takata, has selected three firms to lead the case.

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BeasleyAllen.com
over the Takata Corp. air bag multidistrict litigation (MDL), has ordered that amended complaints be filed under a two-track structure—personal injury and economic damages—led by lawyers from these firms: Podhurst Orseck, Colson Hicks Eidson; Boies Schiller & Flexner and Power Rogers & Smith. The judge selected these firms from a pool of lawyers from several high-profile firms that had sought a lead counsel position. Peter Prieto of Podhurst Orseck was appointed chair lead counsel. Curtis Miner of Colson Hicks was appointed lead counsel for the personal injury track. Todd A. Smith of Power Rogers and David Boies of Boies Schiller were appointed co-lead counsels for the economic damages track.

The personal injury track will handle all actions brought by individual Plaintiffs claiming injuries as a result of the defective air bags. The economic damages track will include actions where economic damages without personal injuries are claimed. Judge Moreno selected James Ceccci, Elizabeth Cabraser and Roland Tellis for the steering committee. It’s possible that additional lawyers may be appointed to the steering committee if lead counsel determines there is a need. Prieto was allowed to propose up to three additional members for approval from the court.

Lead counsels from both tracks had until April 30 to file amended complaints, each under one case name and number of any of the current pending federal cases against Takata in Florida. Discovery on the underlying product liability cases for both tracks was ordered to be coordinated. But discovery on the personal injury damages that are unrelated to the product liability cases are to proceed with each individual lawyer representing individual Plaintiffs without delay. The judge added that at the end of the discovery process, barring summary judgment, cases for clients who allege personal injury should be severed and proceed to separate trials. The court’s order said:

Upon the filing of the two amended complaints in both tracks, 11 other cases shall be placed in “civil suspense” and provisionally closed, with leave to reopen after all pre-trial proceedings have concluded.

Judge Moreno said he expects the cases in both tracks to be tried in his district in early 2016, barring any appeal on class certification, which is very good and should mean that this litigation is on a fast track. More than 17 million vehicles with Takata air bags have been recalled worldwide because of a defect that causes the bags to explode in humid conditions, with most of those recalls coming just in the past year, according to court papers.

The automakers knew of the defect as early as 2008, but chose not to address it. The defect in the air bags dates back to at least April 2000. Takata definitely became aware of it as early as 2001. However, the defect wasn’t disclosed to NHTSA until 2008. In early February, the U.S. Judicial Panel on Multidistrict Litigation centralized five proposed class actions in Florida federal court and appointed Judge Moreno to oversee the litigation. This story is still unfolding and it’s far from over.

Source: Law360.com

IT APPEARS NHTSA WILL SPEED UP TAKATA AND JEEP RECALLS

The National Highway Traffic Safety Administration says it’s going to take action in the coming weeks on two long-running safety recalls that it views as progressing too slowly. NHTSA Administrator Mark Rosekind said that two working groups at the agency have developed a “range of options” for next steps the agency can take on the recall of 1.56 million older Jeep SUVs for fuel tanks that could rupture in a crash, and the widespread Takata air bag inflator recalls, which have affected some 25 million vehicles worldwide since 2008. He had this to say:

The most important thing was to be able to generate a range of options for us to kind of decide where we want to address these issues in a strategic but timely way. For both [the Takata and Jeep recalls], I think we’re one or two weeks away from actually having some concrete things to start taking action on.

Rosekind hadn’t specified the options on the table, but it’s become quite apparent that NHTSA has been dissatisfied with the overall pace of repairs under the recalls. Bloomberg reported recently that the agency may consider reopening an investigation into the Jeep recalls after reviewing how many of the Jeeps were repaired in the first quarter.

NHTSA has also been considering an order to speed up the pace of repairs under the Takata recalls. The recalls began to grow significantly last summer and accelerated through late last year, when several automakers, under pressure from NHTSA, extended recalls of driver-side air bags that had been limited to high-humidity regions and issued them nationwide.

It’s unclear exactly how many of the vehicles recalled for Takata air bags have been repaired, but anecdotal evidence indicates that the vast majority remain unfixed. For example, American Honda had repaired 815,298 out of roughly 5.39 million vehicles included in its largest Takata-related recall through the first quarter of 2015, according to recall documents posted on NHTSA’s web site. Rosekind summed it up when he said, “Overall we think everything’s been too slow.”

Efforts to speed the Takata and Jeep recalls comes as NHTSA has finally started to push automakers to adopt a more proactive stance on safety issues. Rosekind says he wants automakers to make every effort to repair 100 percent of recalled vehicles. NHTSA held a summit of major automaker CEOs last month in Washington, D.C. to discuss the safety culture at each company. The purpose of this workshop was to devise ways to improve the recall system. The workshop, called “The Retooling Recalls Workshop,” was to be a venue for concrete proposals by the automobile industry to improve the effectiveness of the recall process. Rosekind had this to say prior to the workshop:

Everyone absolutely agrees that there are problems with notifications, parts availability and the timeliness of getting these done. By the end of the day, we want solutions.

I sincerely hope that the leadership at NHTSA will continue to show its renewed interest in doing its job of regulating the automobile industry. It appears at this juncture that the agency is doing a much better job. Congress should also take steps to give NHTSA better staffing and more specific authority so that it can really do its job.

Source: Automotive News

NHTSA ASKED TO INVESTIGATE FORD HEADLIGHTS DEFECT

The National Highway Traffic Safety Administration is looking into a request from a North Carolina consumer protection group to investigate an alleged headlight defect in Ford Motor Co. Crown Victoria and Mercury Grand Marquis cars. NHTSA will evaluate a petition from the North Carolina Consumer Council Inc. (NCCC) to investigate an alleged headlight and exterior lighting defect in about 520,000 Ford Crown Victoria and Mercury Grand Marquis cars, model years 2003 to 2005. The consumer protection group claims that a defect in the lighting control module, which powers headlights, causes the headlights to turn off while driving, pointing to more than 600 consumer complaints filed with NHTSA over the headlights, including seven crashes.

The petition, which was in October of last year, sent cites a consumer complaint received by the NCCC about a 2005 Mercury Grand Marquis that a Ford dealership diagnosed with a failed lighting control module. It was stated that the car couldn’t be fixed at the dealership since there weren’t any available parts. The headlights hadn’t been working for the.
past four months, according to the petition. The NCCC said in the petition that NHTSA’s Office of Defects Investigation had investigated the alleged defect in the car models in November 2008 and closed the investigation four months later, saying that no defect had been identified. That was rather surprising since there were 306 complaints to the agency and 2,000 warranty claims. The petition stated:

*Ford’s own admission is that the lighting control modules contained defective solder joints on the printed circuit board.*

According to the petition, the complaints registered with NHTSA indicate that the headlights’ failure rate increases with the age of the car and that the alleged defect doesn’t seem to apply to model years after 2006. The NCCC said that Ford had extended the warranty for the lighting control module in the Crown Victoria and Grand Marquis models to 15 years or 250,000 miles. However, the NCCC said in the petition that Ford dealerships are reporting that replacement lighting control modules haven’t been available since May. The NCCC said that Ford customer representatives aren’t able to help or say when the replacement parts will be available. Vehicle owners with failed lighting control modules continue to drive their unrepaired vehicles, according to the NCCC.

In its last investigation, NHTSA found that in the 2,000 warranty claims over headlights failure linked to allegedly defective solder joints in the lighting control module, about 12 percent specifically claimed that the headlights failed during driving. The regulatory agency also concluded that a slightly higher warranty rate for Crown Victoria models used by police departments was because the headlights in those cars were left on longer. According to NHTSA the average warranty rate for headlights failure in 2009 was just .05 percent. NHTSA concluded that headlight failure didn’t affect other lighting functions, such as parking lights and emergency flashers.

Source: Law360.com

**FORD FIGHTS SOURCE CODE DISCOVERY IN ACCELERATION ACTIONS**

Ford Motor Co. must provide a portion of proprietary source code to the Plaintiffs in a proposed class action claiming the company’s electronic throttle control system contains a defect that can cause unintended acceleration. U.S. Magistrate Judge Cheryl A. Eifert made a ruling to that effect and Ford Motor Co. is now trying to undo it.

Ford should have a hard job trying to convince Judge Eifert that the relevance of its proprietary source code to discovery in three class actions over unintended acceleration risks in its vehicles does not outweigh the burden that producing the information would pose. The automaker has objected to Judge Eifert’s decision. The ruling in the state court Toyota litigation is a model for the judge to follow in the Ford case in this issue.

In her April 3rd order, Judge Eifert rejected Ford’s argument that the Plaintiffs requested the software as part of a “fishing expedition” and she noted that an investigation of nearly identical claims against Toyota Motor Corp.—that its vehicles’ electronic throttle control system contains a defect that can cause unintended acceleration—proved that the source code is relevant to the Plaintiffs’ claims. Lawyers in our firm tried the Oklahoma case, considered a Bellweather trial, against Toyota and exposed the defect. Ford’s lawyers, in their attempt to change her ruling, told Judge Eifert:

Ford objects to the production of the source code on the grounds that the relevance, if any, of the source code, is minimal, and the significant delay in the proceedings that will result from its production will outweigh any probative value that might be obtained from its production.

Because issues surrounding the source code are highly technical and complicated, both as to relevancy and as to the method of any production of the source code, and because of the potential for significant time to be added to the discovery schedule in the case, Ford requests the Court hold a bearing regarding Ford’s objections.

Ford claimed that because it has already provided engineering documents, the software isn’t relevant to the Plaintiffs’ claims. The company added that the programming and algorithms that make up the “nerve center” in its vehicles can’t be altered, meaning the Plaintiffs could just run tests on its vehicles. But Judge Eifert disagreed that the documents are sufficient, stating that the Plaintiffs shouldn’t be forced to rely on Ford’s determination of what information is relevant to their claims.

But, Judge Eifert did agree that the source code should be afforded some special protection and instructed the parties to meet and establish restrictions and limitations that should be placed on the Plaintiffs’ use and review of the code. Judge Eifert said further that if Ford can segregate the portion of the software that relates only to the ETC system from the source code embedded in the powertrain control module, it will only have to provide that segment of code. The case consists of three class actions against Ford consolidated by U.S. District Judge Robert C. Chambers in January.

The Plaintiffs contend that Ford models produced between 2002 and 2010 are prone to sudden, unintended acceleration, and further that the company failed to provide failsafe systems that would prioritize braking over acceleration. Toyota, which is still involved in the MDL over its unintended acceleration defect, has settled nearly 300 drivers’ claims. Those settlements came after our convincing win against Toyota in the Oklahoma City case.

The Ford cases are all in the U.S. District Court for the Southern District of West Virginia. Lawyers in our firm are currently investigating potential claims involving the unintended acceleration defect in Ford vehicles. If you need more information on this subject, contact Graham Esdale, a lawyer in our Personal Injury/Project Liability Section, at 800-898-2034 or by email at Graham.Esdale@beasleyallen.com. Graham was involved in the Toyota case mentioned above.

Source: Law360.com

**NHTSA OPENS INVESTIGATION INTO HERCULES TIRE RECALL**

The National Highway Traffic Safety Administration has opened an Equipment Query (EQ) investigation into a defective Chinese tire sold in the U.S. under different brand names that was recalled by one importer, but not another—even though they share the same distributor. In March, the agency sent an information request to Hercules Tire and Rubber Company, a subsidiary of American Tire Distributors Inc., to determine if it should have recalled its Hercules Radial A/T in eight different sizes manufactured by the Shandong Yongsheng Rubber Co., Ltd. Tires that were essentially the same, but sold as Capitol Precision Trac II, were recalled by importer ITG Voma in October.

The recall population of 94,890 tires included seven sizes for passenger cars and light trucks. Both tires were manufactured by Shandong Yongsheng and distributed by American Tire Distributors. They shared a common green designation, defined by NHTSA as: “tires that are produced to the same internal specifications but that have, or may have different external characteristics and may be sold under different tire line names.”

The investigation was opened at the request of Michael Cowen, a lawyer with the Cowen Law Group of Brownsville, Texas, who represented Krystal Cantu in a lawsuit. Ms. Cantu’s right arm was crushed when the left-rear tire,
was a safety-related defect in vehicles it manufactured.”

NHTSA also alleged in its Order that Forest River had committed some violations with respect to vehicle identification numbers. The Special Order required Forest River to provide, under oath, certain information requested by NHTSA to confirm violations or ensure compliance. The Order gave Forest River until Nov. 1, 2014, to respond. Even though Forest River did respond, it did so only in part (about one-third of the information requested was provided to NHTSA). Because of the violations, the fines (at $7,000 for days of violation) have amounted to approximately $616,000.

Forest River’s defense is one that lawyers in our firm hear quite often. The company contends that it cannot comply because the software vendor it used failed to install the appropriate software for tracking the information requested by NHTSA. In other words, Forest River is blaming its noncompliance on a third party, an unrelated business. Forest River contends that it realized it had not been submitting the information as required by federal law only after it received the Special Order from NHTSA. Forest River also contended that some of the requested information was privileged and did not have to be reported to the federal agency.

With respect to Forest River’s contentions, Kevin Vincent, Chief Counsel for NHTSA, had this to say in a letter dated Nov. 19, 2014:

“This is unacceptable. We note that previous to issuing the Special Order to Forest River, staff from NHTSA’s Office of Defects Investigation repeatedly informed Forest River that it appeared that Forest River was not meeting its early warning reporting obligations. A purported software malfunction has no bearing on Forest River’s ability to provide the information requested by the Special Order.

At last report, NHTSA has turned this matter over to the US Justice Department to institute civil action against the company in federal court. It is unknown whether the Justice Department will seek action against Forest River for its noncompliance.

Sources: Elkharttruth.com, RV-Pro.com
BP IS TRYING TO KEEP A JURY FROM HEARING ALABAMA’S CASE

BP is now seeking to appeal a recent ruling that declared Alabama is entitled to a jury trial over losses resulting from the 2010 Deepwater Horizon disaster and oil spill. Previously, BP moved to strike Alabama’s right to a trial by jury. But Judge Carl Barbier rejected BP’s argument that the state’s claims should be tried before a judge and not a jury. Judge Barbier held in his ruling that the Seventh Amendment provides for a trial on a states’ claims against BP for removal costs and damages such as lost tax and state department revenues, physical property damage and public service costs. Judge Barbier said in his ruling:

As a general rule, though subject to several exceptions, civil cases before a federal court sitting in admiralty are tried without a jury. BP’s primary argument is tied to this premise. [But] three courts have held that a jury is available for at least some claims or issues under OPA [the Oil Pollution Act]. This court reaches the same conclusion.

We are convinced that Judge Barbier got it right when he determined that Alabama is entitled to a jury trial. BP does not want folks to really know the types of damage the company caused the State to suffer and how truly bad its conduct was. This latest appeal is further proof of that fact. The citizens along the Gulf need to know the truth about what BP did to the Gulf Coast, including the states that call the Gulf home.

Attorney General Luther Strange, along with lawyers Corey Maze and Win Sinclair of the Attorney General’s Office, have done an outstanding job representing the State’s interests. Rhon Jones and Parker Miller, both lawyers in our firm, are heading up Beasley Allen’s involvement in the case on behalf of the State of Alabama. Rhon and Parker, along with Jenna Day and Rick Stratton, who are also lawyers in our firm, have done an excellent job on behalf of the State. The Attorney General has shown tremendous leadership in this battle and should be commended. This case is extremely important to the state and the citizens of Alabama.

JUDGE BARBIER UPHOLDS PROPOSED MATCHING FRAMEWORKS IN POLICY 495

Judge Carl Barbier has affirmed the four matching methodologies for BP claims filed by educational institutions, construction companies, agriculture businesses, and professional service companies such as law firms. The Plaintiffs’ Steering Committee (PSC) sought to overturn these methodologies, which were proposed by Claims Administrator Patrick Juneau in Policy 495. Juneau promulgated Policy 495 in response to the Fifth Circuit Court of Appeals’ Oct. 2, 2013, decision requiring the Claims Administrator to match corresponding variable expenses with revenue when calculating Business Economic Loss (BEL) claims.

The original BEL calculation methodology compared a business’ pre-spill variable profit with its post-spill variable profit in 2010 as itemized on a claimant’s monthly profit and loss statements. This was previously used to calculate BEL claims for all claimants regardless of industry. Policy 495 was then issued to address any purported mismatching of revenue and expenses and concluded that matching would be best accomplished by utilizing different frameworks for business claimants in different industries. While the Annual Variable Margin (AVM) methodology kept revenue as reported on a claimant’s profit and loss statement and reallocated expenses based on that revenue, the methodologies for the construction, educational institution, agriculture and professional services required revenue and expenses to be reallocated accordingly.

The PSC recognized this policy would affect the calculation and compensation of BEL claims as compared to the original Settlement frameworks and, they filed a Motion to Alter or Amend Policy 495, arguing the matching policy altered the causation and calculation frameworks set forth in the Settlement Agreement. The PSC requested that Judge Barbier limit the matching triggers and policy to cash basis claimants, apply the AVM methodology to all insufficiency matched claims, and discard the other matching frameworks. Judge Barbier ultimately decided to uphold Policy 495 as proposed by the Claims Administrator.

As this issue of the Jere Beasley Report went to print, the Claims Administrator has begun to reevaluate claims under all five of the matching frameworks. The processing of all BEL claims has picked up in recent months and will continue as the Claims Administrator must review more than 100,000 BEL claims that have been filed.

BP WANTS SUPREME COURT TO STRIKE CWA LIABILITY FINDING

BP Exploration & Production Inc. (BPXP) has told the U.S. Supreme Court that it is being unjustly held liable for Clean Water Act violations stemming from the Deepwater Horizon disaster. BP claims that the Fifth Circuit inappropriately resolved what it claims is an “ambiguous provision” in favor of the government. In a petition for writ of certiorari, filed last month, BP said the government, a district court, and a Fifth Circuit panel found it liable by invoking “four different, shifting interpretations” of the CWA’s phrase “from which oil or a hazardous substance is discharged.” The Fifth Circuit voted 7-6 to deny an en banc rehearing. Judge Barbier, who made the initial finding, is currently considering how much the company will have to pay for the violations, an amount that could reach $13.7 billion.

Source: Law360.com

FEDERAL GOVERNMENT PROPOSES TOUGHER SAFETY REGULATIONS ON OFF-SHORE DRILLING

On April 13, 2015, the U.S. Department of Interior’s Bureau of Safety and Environmental Enforcement (BSEE) unveiled its proposed regulations designed to increase the safety of blowout preventers—the device that failed to stop the April 2010 Deepwater Horizon Oil Spill. The proposed regulations would incorporate industry standards and require real-time monitoring of drilling data by onshore based facilities.

Post-spill investigations have revealed that the Deepwater Horizon blowout preventer did not block the flow of oil and gas as it should have, nor had it been properly inspected and maintained. The proposed regulations would increase the strength and effectiveness of such devices, in addition to adopting industry standards for their inspection and maintenance.

The proposed regulations would also require that additional measures be taken in order to ensure the safety of offshore drilling, namely the establishment of guidelines for cementing drilling wells and criteria for safe drilling margins. BSEE has received some criticism for what some perceive to be a delay in the adoption of such regulations. It should be noted, however, that many aspects of the proposed regulations incorporate tougher, self-imposed industry standards that have been progressively put into place following the Deepwater Horizon oil spill.

While the proposed regulations have not been finalized, one thing is presently clear—the Deepwater Horizon litigation has made clear to both oil companies and the government that they should take note of the potential hazards associated with off-shore drilling. As the Department of Interior’s Secretary Sally Jewell pointed out in an April 13 statement:

‘Both industry and government have taken important strides to better protect human lives and the environment from oil spills, and these proposed measures are designed to...’
further build on critical lessons learned from the Deepwater Horizon tragedy and to ensure that offshore operations are safe.

I believe that the BSEE’s proposed regulations are certainly another step in the right direction. It appears that the giant oil companies will continue to drill offshore and will attempt to go even deeper into the Gulf of Mexico. They must be responsible and they must also be equally regulated by the U.S. government.

Sources: Law360.com and wwnlv.com

ANADARKO EXCUSED FROM ALABAMA DEEPWATER DAMAGES FIGHT

Anadarko Petroleum Corp. has secured approval of an agreement with the State of Alabama excusing it from the trial proceedings over the 2010 Deepwater Horizon oil spill, in the battle over Alabama’s compensatory damages. In an order signed by Judge Carl Barbier, Anadarko agreed, along with other stipulations, not to contest the amount of compensatory damages awarded under the Oil Pollution Act (OPA). Under the agreement and court order any damages awarded to the state “shall constitute full, complete and total satisfaction of the state[s] ... compensatory damages claims.”

The oil and gas company joins Transocean Ltd., Halliburton Energy Services, Inc. and MOEX Offshore 2007 LLC, who agreed to similar agreements in late 2013 and early 2014 to be excused from pretrial discovery and other pretrial proceedings as well as participating in the trial. The agreements leave BP to face off with Alabama in the upcoming trial. Alabama’s claims in the dispute date back to 2010, when it filed two complaints against BP, Transocean, Anadarko, MOEX, Halliburton and others over alleged losses due to the oil spill.

Source: Law360.com

$150 MILLION IN TRANSOCean EXCESS COVERAGE

Judge Carl Barbier found that certain underwriters at Lloyd’s of London and various insurance companies have satisfied their obligations under excess policies providing $150 million in coverage to Transocean Ltd. Judge Barbier entered a final judgment dismissing a pair of interpleader actions filed by Lloyd’s and the insurers, holding that the three policies—which form the first layer of excess coverage in Transocean’s tower of policies—have been “fully and properly exhausted.”

The so-called “first excess layer insurers” filed two separate actions in June 2011, saying they faced multiple potentially conflicting and competing insurance claims in connection with the disaster and seeking to ensure that payments were made to the proper entities. The parties to the interpleader actions reached an agreement in December 2011 regarding the payment of Transocean employee settlement claims, according to court documents. Under the agreement Transocean and BP PLC asked the court to make determinations regarding coverage for, and the reasonableness of, employee settlements that reimbursement was being sought for under the first excess layer policies.

In November, the court issued a ruling regarding reimbursement of certain settlement claims. When added to the amount of the settlements the court previously found to be reasonable, the total approved settlements exceed the first excess layer policies’ $150 million limit, according to the order. Lloyd’s and the insurers filed a motion in December seeking the entry of a final judgment dismissing the interpleader actions.

Judge Barbier’s order comes two months after the Texas Supreme Court ruled that BP isn’t entitled to claim $750 million under Transocean’s policies for the Deepwater Horizon incident. Ruling on a question certified from the Fifth Circuit, the state high court found 8-1 that the Transocean policies don’t cover BP for damages arising from subsurface pollution. The court considered the drilling contract between the parties to determine BP’s status as an additional insured. The court determined that the only reasonable construction of the drilling contract’s additional-insured provision is that BP’s status as an additional insured is limited to the liabilities Transocean assumed under the contract, thereby precluding BP from claiming coverage for the damages at issue.

Source: Law360.com

IV. PURELY POLITICAL NEWS & VIEWS

HILLARY CLINTON MAKES IT OFFICIAL—SHE’S IN THE RACE FOR THE WHITE HOUSE IN 2016

It’s now official and few political observers are surprised. On Sunday, April 12, Hillary Clinton confirmed that she will make a bid for the office of President of the United States in 2016. The announcement comes after months—maybe even years—of speculation that the former First Lady would make a bid to occupy the White House again, this time as Commander in Chief. The announcement was accompanied by a two-minute video released just after 3 p.m. ET. She is the first Democrat to formally announce her candidacy for 2016.

No stranger to the public eye, she became First Lady of the United States when her husband, Bill Clinton, was elected to his first term as President in 1993, and was elected State Senator to New York in 2000. Speculation about her campaign plans intensified when Mrs. Clinton recently stepped down from her position of Secretary of State in 2013, a role she accepted in 2009 after losing her first bid for the presidency in 2008 to Barack Obama in the primaries.

Another Hillary Clinton campaign is sure to be a lightning rod for debate, as folks tend to love her or hate her, with little middle ground. The election is more than a year away, and already the praise and protestations are starting in equal volume. CBS
News reports early polls show her leading potential primary opponents by as much as 50 points nationwide. Potential Democratic candidates include current Vice President Joe Biden, former Maryland Governor Martin O’Malley, former Virginia Sen. Jim Webb and Vermont Independent Sen. Bernie Sanders. There also is a strong camp calling for Sen. Elizabeth Warren to join the field. I would be surprised if there will be any real serious opposition to the primaries.

Should she win the Democratic nomination, Hillary would be the first woman to capture a major party’s nomination. But it’s a long road to the White House. It will be interesting to see what develops along the way. I plan on supporting Hillary and believe she will be the first female president. I am confident that she will be an outstanding president!

Sources: CBS News, New York Times

HARRY REID STEPPING DOWN FROM UNITED STATES SENATE

On March 27, 2015, U.S. Senate Minority Leader Harry Reid announced that he would not seek a sixth term in the United State Senate. The announcement was somewhat unexpected as Senator Reid is the leader of the Democratic Party in the U.S. Senate and won his last election by a comfortable margin.

Senator Reid suffered a very bad injury on New Year’s Day as a result of an exercise accident. However, he stated that the injury had no effect on his decision not to seek re-election. Senator Reid has been much maligned by conservatives throughout the country but, in my opinion, he did his dead-level best to protect the middle class. As a result of this announcement other democratic senators are jockeying for the top leadership position. At this time it appears that Senator Chuck Schumer of New York will be endorsed by Senator Reid. Senator Dick Durbin of Illinois is currently the number two democrat in the U.S. Senate.

Harry Reid began his career as a trial lawyer representing individuals throughout Nevada against major corporations. Reid first joined the Senate in 1987 after serving two terms as a member of the House of Representatives. He previously spent four years as Nevada’s Lt. Governor.

Politicos can argue for decades about the legacy of Senator Harry Reid. Although I don’t agree with him on all issues, I believe that history will show that he was a very effective leader in the United States Senate, and ushered through reforms that will help everyday citizens. Personally, I consider Harry Reid to be a great American and he will be sorely missed in the U.S. Senate.

V. LEGISLATIVE HAPPENINGS

BUDGET CRISIS IN THE ALABAMA LEGISLATURE

I am not going into any detail, but I must mention that the Alabama Legislature is facing a huge crisis trying to keep a state government that’s literally broke operating. Interestingly, they are trying to do so without finding the additional revenues that are so badly needed to adequately fund the state agencies. Apparently, the Legislative leadership believes they can reduce the size of government and still meet their obligation to see that the state provides essential services to Alabama citizens. They have refused to admit that the state badly needs additional revenues. Being unwilling to face that stark reality is no solution to a most serious problem.

The state’s general fund is hundreds of millions of dollars short and the consequences of not finding the needed revenues will be very bad if massive “cuts” in budgets are the only answer to our state’s financial problems. This group of lawmakers has an opportunity to do the right thing and pass the needed revenue measures. The alternative is for them to follow the lead of previous groups and do nothing. Neither borrowing more money nor asking for more federal funds is the answer. Hopefully, the legislators will do the right thing. Otherwise, the citizens of our state will be hurt badly when good employees are laid off and state services are severely curtailed. It will be most interesting to see what happens during the last half of the regular session.

ALABAMA SUPREME COURT RULES AGAINST PAYDAY LENDERS IN DATABASE CASE

The Alabama Supreme Court, in a most important opinion, has ruled that the state Banking Department can establish a payday loan database to enforce an existing $500 limit on how much people can borrow at one time from the short-term lenders. This decision is a victory for advocates who have sought restrictions on the loans. But it does not go far enough in limiting an industry that preys upon the financially vulnerable. The Court did all it could do because the only thing before the justices in this case was this single issue.

Payday lenders sued Alabama’s Banking Department in 2013 to block creation of the system. Justices upheld Montgomery’s judge’s ruling that the state was within its rights to establish the database. Existing law prohibits folks from taking more than $500 in loans at one time. But that limit is essentially unenforceable without a centralized system to track the loans. The database will give the state the tools it needs to enforce the loan limit.

The Supreme Court has done its work. Now it’s up to the members of the Alabama Legislature to do their job. Hopefully, they will do so in the Regular session which is at the halfway point.

ARBITRATION AWARD REVISED BECAUSE ARBITRATORS FAILED TO DISCLOSE CONFLICTS OF INTEREST

In the ongoing battle to make sure consumers are treated fairly in the arbitration process, lawyers at Beasley Allen recently won an important case in the Alabama Supreme Court. The case, Municipal Workers Compensation Fund, Inc., v. Morgan Keegan & Company, Inc., and Morgan Asset Management, Inc., involved violations of the Financial Industry Regulatory Authority (FINRA) disclosure rules by the arbitrators.

FINRA requires arbitrators to make certain disclosures regarding their private and business relationships with potential participants in arbitration. The arbitrators are under a continuing duty to update those disclosures. In fact, FINRA's Arbitrator Guide advises “If you need to think about whether a disclosure is appropriate, then it is: make the disclosure.” In 2009, and in preparation for the arbitration in this case, FINRA provided the parties with a list of 30 proposed arbitrators and the disclosures of those arbitrators. From that list, the parties narrowed it down and ended with the three-person panel that presided over the proceeding.

After the Defendants prevailed, it was discovered that one of the arbitrators had failed to disclose that he was a Defendant in a separate case that involved “the same or similar subject matters as the arbitration … even if the dispute was not securities related.” Additionally, a second arbitrator had failed to disclose his business relationship with both Morgan Keegan, a Defendant in this case, and with the law firm representing Morgan Keegan, Greenberg Traurig. The fund sought to have the arbitration award vacated.

Although the trial court agreed that the two arbitrators in question had failed to make required disclosures and that those failures violated FINRA rules, the court determined that there was no “evident partiality” on the part of the arbitrators neces-
sary for the award to be vacated. Ultimately, the trial court denied the Motion to Vacate and the fund appealed.

After the Alabama Supreme Court addressed some issues involving admissibility of evidence, it agreed with the trial court’s initial assessment. Specifically, the court agreed that the arbitrators violated FINRA rules. That is where the agreement with the trial court stopped. The court sided with the fund in finding that, based on existing case interpretations of the statutes at issue, a failure to disclose constituted sufficient evidence of partiality to satisfy the “reasonable-impression-of-partiality” test even where the arbitrator does not have actual knowledge of the conflict of interest when the arbitrator, as here, is under a duty to investigate. The result was a reversal of the trial court and the arbitration award being vacated.

While this ruling, obviously, was not won on the merits, the reversal of an arbitration award is rare. This case, considering the failure by two of the three panel members to disclose conflicts of interest, is a big win for the Plaintiffs. It also sets the precedent for the application of a new standard in reviewing whether an arbitrator’s non-disclosure satisfied the “evident partiality” requirement. Thankfully, the Alabama Supreme Court got it right in adopting the “reasonable-impression-of-partiality” test instead of requiring proof of actual partiality. Peter Mougey, a lawyer with Levin Papantonio, a Pensacola, Fla., firm, and this writer argued the case before the Supreme Court. Justice Mike Bolin wrote a very good and very strong opinion.

**NFL Concussion Settlement Gets Final Approval**

A Pennsylvania federal judge has approved an uncapped settlement in the multidistrict litigation (MDL) between the National Football League (NFL) and about 5,000 former players. Those players were seeking damages for concussions and degenerative neurological conditions resulting from their playing days.

Judge Anita B. Brody granted final approval to the settlement, rejecting objections from some players who said the settlement didn’t do enough to address their medical needs. She stated that five months worth of revisions to the agreement had paid off. Judge Brody stated:

**Crucially, this revised deal uncapped the fund to compensate retired players with qualifying diagnoses; the NFL Parties agreed to pay all valid claims over the duration of the settlement regardless of the total cost. In exchange for these concessions, the NFL Parties received heightened anti-fraud provisions to ensure that funds were only disbursed to deserving claimants.**

Christopher Seeger and Sol Weiss, co-lead counsel for the plaintiffs, said the players had won a huge victory by ensuring their future security and care. They said in a statement:

**Today, these courageous men and their families have made history. Despite the difficult health situations retired players face today, and that many more will unfortunately face in the future, they can take comfort that this settlement’s benefits will be available soon, and will last for decades to come.**

The settlement encompasses about 20,000 retired players. The agreement sets aside $75 million for a “baseline assessment program” that provides retired players with free examinations of their neurological functioning and a $10 million education fund intended to promote safety and injury prevention, particularly among children. Class members with neurological diseases will receive damages based on the severity of their conditions.

A former player with Parkinson’s Disease or Alzheimer’s Disease could receive as much as $3.5 million, while players with chronic traumatic encephalopathy (CTE), a degenerative disease associated with head trauma, could receive $4 million. The highest payouts of $5 million are reserved for class members with amyotrophic lateral sclerosis (ALS) better known as “The Lou Gehrig Disease.”

The class approved by the court includes all living players who retired from the NFL prior to July 2014, when the deal was preliminarily approved. The NFL agreed not to contest any award of attorneys’ fees and costs equal to or below $112.5 million, according to the settlement.

What started as a single class action brought by 73 players in 2011 grew to an MDL containing more than 300 complaints claiming that the NFL fostered a gladiator mentality among players, who were encouraged to play through head injuries. After having preliminarily approved a previous version of the settlement, Judge Brody suggested some changes earlier this year. Judge Brody sought assurances from the NFL that all living, retired players who register for the baseline assessment program would receive examinations even if the funding runs out, as well as coverage for NFL Europe and other international players, among other changes.

Judge Brody was impressed by the agreement and noted that only about 1 percent of class members had objected, while another 1 percent had opted out. She explained further:

**For comparison, at least eight times as many class members registered to receive additional information about the settlement as expressed formal dissatisfaction with its terms.**

Kevin Turner, a class representative and former running back for the Philadelphia Eagles and New England Patriots, said he took comfort in the knowledge that the class members will have guaranteed benefits. As many of our readers will know, Kevin is from Prattville, Alabama, and played football at the University of Alabama. Kevin said in a statement:

**Words cannot express the sense of satisfaction and relief I feel now that this settlement has been approved by the court. While nothing can change the reality faced by those who suffer from ALS or other devastating neurocognitive illnesses, this settlement will provide the benefits we need to take care of our families and have the best quality of life we are able to have.**

Kevin Turner is a brave man. While he has ALS, Kevin is a fighter and has not given up. He is an inspiration to all who know him and also to thousands of others who now know about his story. This settlement will help Kevin and many others. While it’s far from perfect, it appears to be a good settlement.

Source: Law360.com

**VII. THE CORPORATE WORLD**

**Pay-For-Delay Cases Moving Forward**

Lawyers at Beasley Allen have been researching a developing area of law for a little more than a year that deals with the intersection of Antitrust law and Patent law. The cases have gained attention in the last two years because of the United States Supreme Court’s decision in *F.T.C. v. Actavis*, 133 S. Ct. 2223 (2013) that reversed an Eleventh Circuit dismissal of antitrust claims against pharmaceutical manufacturers.

The FDA regulates and approves drugs for marketing and sale for human use. When a generic drug manufacturer seeks FDA approval for a new generic version of an already approved brand drug, the generic manufacturer has to certify that
the generic either will not infringe on any patents for the brand, or that those patents are invalid. This portion of the generic application for approval is called a paragraph IV certification. The FDA, however, has no authority or ability to determine if the generic drug manufacturer’s declarations regarding the patent are true or false. It may seem obvious that a brand drug has a valid patent, but that is not always the case. For one thing, it is common practice in the drug manufacturing industry to obtain what are called “method of use” patents. In those instances, shortly before a new drug’s initial patent expires, a brand manufacturer will, for example, “discover” that their drug must be administered with food to achieve maximum effectiveness or will create a new coating for the exterior of the tablet. The brand manufacturer will then obtain a new patent on the very same drug addressing the food or coating. That secondary patent, for food use or the type of coating on the tablet, is usually the basis of a paragraph IV certification.

Inevitably, to protect its patent-based monopoly, the brand manufacturer objects to the paragraph IV certification and sues the generic company for patent infringement. The two manufacturers almost always settle. As part of that settlement, the generic manufacturer agrees not to enter the market for that drug for a certain time period in exchange for foregoing its challenge of the patent. That agreement, as an agreement not to compete and to extend a monopoly to the brand manufacturer, is in violation of federal and state antitrust laws. Without competition, the prices for the brand drug remain high—well above what the market would dictate absent the agreement between the two manufacturers. As a result, citizens, pharmacies, state Medicaid agencies, and insurance companies have all been paying grossly inflated prices for brand pharmaceuticals when they could and would have purchased generic drugs at much lower prices.

Lawyers in our firm’s Consumer Fraud/Commercial Litigation Section have been working with several states to develop a case to recover the damages suffered as a result of those fraudulently and illegally increased pharmaceutical prices. At this time, we have reached an agreement with one state and we are moving forward in other states. We will keep our readers informed as developments occur. In the meantime, if you have any questions, contact Rebecca Gilliland, a lawyer in our Consumer Fraud/Commercial Litigation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

**Teva To Pay $512 Million To End Provigil Pay-For-Delay Dispute**

Teva Pharmaceutical Industries Ltd. and subsidiaries Cephalon Inc. and Barr Pharmaceuticals Inc. have agreed to pay $512 million to settle with the direct purchasers in pay-for-delay litigation over Cephalon’s narcolepsy drug Provigil. The settlement was disclosed on April 17. The direct-purchaser class Plaintiffs, including King Drug Co. of Florence Inc., are asking a Pennsylvania federal judge to give preliminary approval to the settlement. Under the terms, the drug makers will pay $512 million in cash into an escrow fund for the class. The lawsuit would be dismissed with prejudice upon final approval.

Under the agreement, the Defendants would also be permanently released from any claims relating to the alleged delayed entry of generic versions of Provigil and claims of conduct relating to Cephalon’s narcolepsy drug Nuvigil. The direct purchasers noted that the settlement is the largest ever in a pay-for-delay case on behalf of direct purchasers, and that preliminary approval is appropriate. “[Direct-purchaser class] Plaintiffs and the Cephalon Defendants entered into the settlement after fully extensive mediation and negotiations. The proposed class under the settlement includes any person or entity in the U.S. that purchased Provigil from Cephalon between June 24, 2006, and Aug. 31, 2012.

The U.S. Federal Trade Commission (FTC) is set to go to trial in June in a case. It’s alleged that Cephalon made billions of dollars through a series of pay-for-delay deals meant to stave off competition with its blockbuster narcolepsy drug. The case being settled is part of a series of suits brought by direct purchasers, end payors and the FTC challenging a series of patent infringement settlements that Cephalon reached with generics companies in 2005 and 2006 over Provigil. The case is in U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

**Unprecedented Settlement Of Freeport Suit Approved**

A Delaware Chancery judge has given approval to what is being called an “unprecedented” derivative suit settlement. The accord is over Freeport-McMoRan Copper & Gold Inc.’s acquisition of two energy exploration firms. It will pay shareholders much of the agreement’s estimated $150 million value through a special dividend. During a hearing, Vice Chancellor John W. Noble also awarded Plaintiffs’ counsel $32.7 million in attorneys’ fees and expenses from the total amount of the settlement. The settlement also changes to certain Freeport policies that include enhancements to the powers of independent directors and ratification procedures for related-party transactions for at least three years.

It should be noted that the settlement is structured in an unusual way. Freeport shareholders will receive consideration through a special dividend that the board agreed to approve as part of the settlement. The lawsuit was a derivative action. Normally in a derivative action, any damages or benefit would go directly to the company. In this case, that’s not happening.

The settlement resolves what started in December 2012 when a number of lawsuits were filed as a result of Freeport’s announcement the same month of a $6.9 billion cash-and-stock bid for Houston-based Plains Exploration & Production Co., and a $2.1 billion cash deal to acquire New Orleans-based McMoRan Exploration Co., a company it spun off in 1994. Shareholders alleged in these suits that the company’s directors breached their fiduciary duties by handing out “sweetheart” deals that benefited their own interests, and that Freeport’s bosses were so fixated on the acquisitions that it gave little regard to public shareholders and wound up paying a steep premium for McMoRan. Freeport has argued its board complied with Delaware law, creating a special committee of independent directors empowered to negotiate and recommend—or reject—the deals.

There were numerous mediation sessions before the settlement was announced in January. Also part of the settlement is an agreement by Freeport’s financial adviser for the acquisitions, a unit of Credit Suisse Group AG, to pay a total of $16 million, which includes what amounts to $6 million worth of free work, to resolve shareholders’ claims against it.

Source: Law360.com

**Investor Suit Comes After Lumber Liquidators Investigations**

Lumber Liquidators Holdings Inc.’s top executives are facing a shareholder action by Amalgamated Bank in a Virginia federal court. It’s alleged that they exposed the company to damaging investigations by allowing it to sell illegally sourced and toxic hardwood flooring. The company and its entire board of directors were named as Defendants in the derivative complaint filed last month by Amalgamated Bank, the trustee for an index fund that has invested in Lumber Liquidators stock. The suit alleges that the directors

Source: Law360.com
breached their duties to shareholders by failing to prevent possible violations of environmental and consumer protection laws and by failing to disclose the shady practices in public U.S. Securities and Exchange Commission (SEC) filings.

Lumber Liquidators has said it could face criminal charges related to its harvesting of wood from Russia. The company has also been under investigation by the U.S. Consumer Protection Safety Commission (CPSC) and other federal and state regulators following a “60 Minutes” expose regarding unsafe formaldehyde levels in laminated flooring from China. The shareholder complaint states:

Although Lumber Liquidators has been severely injured, defendants have not fared nearly so badly. During the relevant time period, defendants collectively pocketed millions in salaries, fees, stock options, illicit insider trading profits and other payments that were not justified in light of the violations of state and federal law at Lumber Liquidators that occurred on their watch.

It’s alleged in the complaint that Lumber Liquidators’ stock price had been artificially inflated before the illegal practices came to light. Between 2007 and 2011, the company’s profit margins were roughly similar to those of its top competitors, Home Depot Inc. and Lowe’s Companies Inc. However, the suit says Lumber Liquidators’ profit margins increased dramatically after it began purchasing and selling illegally sourced wood from protected Russian forests and toxic wood from Chinese mills.

According to the shareholders, the scandals have exposed Lumber Liquidators to “millions of dollars in potential liability” from investigations and other stockholder suits. It said the allegations had already wiped out more than $1 billion in shareholder equity. The complaint added:

Moreover, these actions have irreparably damaged Lumber Liquidators’ environmentally conscientious corporate image. For at least the foreseeable future, Lumber Liquidators will suffer from what is known as the ‘liar’s discount,’ a term applied to the stocks of companies that have been implicated in improper behavior and have misled the investing public, such that Lumber Liquidators’ ability to raise equity capital or debt on favorable terms in the future is now impaired.

The individual Defendants named in the suit include Lumber Liquidators CEO Robert Lynch, founder Thomas Sullivan, and former CEO Jeffrey Griffiths. There will be much more to this story before this litigation is over—stay tuned!

Source: Law360.com

SHAREHOLDER SUIT FILED AGAINST CHC OVER $310 MILLION IPO

CHC Group Ltd., which runs the world’s largest commercial helicopter operation, has been sued over its $310 million initial public offering (IPO). The class action lawsuit, filed by a shareholder, accuses the company of concealing financial hardships in the runup to its IPO last January. Shareholder Peter McCrory filed the suit last month in New York Supreme Court in Manhattan, claiming CHC failed to tell potential investors that one of its largest customers stopped making payments to the company months before it filed a prospectus for the IPO. It’s alleged that when news about the customer, which accounted for 14 percent of CHC’s business, became public in July, the stock price dropped, causing investors to lose money.

CHC’s failure to disclose a significant loss of income meant the stock’s initial pricing at $10 per share was inflated, McCrory said in his complaint. It was alleged further in the complaint:

The offering materials contained false and/or misleading statements and omissions of material fact and therefore misled investors. Accordingly, the price of the company’s shares was artificially and materially inflated at the time of the offering.

CHC generated $1.8 billion in revenue last year, according to filings with the Securities and Exchange Commission (SEC). A majority of the company’s business is done through providing flights to offshore oil and gas interests with its fleet of 236 helicopters. A crash of one of its aircraft in October 2012 led to a grounding of certain models of medium- and heavy-weight helicopters. One of CHC’s biggest customers, Brazilian energy giant Petrobras Brasiliero SA, or Petrobras, suspended its payments to the company as a result of the grounding, but the company made no mention of this in its prospectus, according to the complaint.

The crash is mentioned in the company’s filing under the “Recent Developments” section, but the filings conclude, “it is too early to determine the extent of the impact of the accident on our results of operations or financial condition based on information currently available.” But McCrory claims in the suit claims that the company knew by the time it was filing for its offering how significant the impact would be. He alleges in his complaint:

It was not ‘too early’ for the company to gauge the impact of the accident, as payments from Petrobras ceased in April 2013, almost seven months before the Registration Statement was filed.

On an earnings call in July, CHC’s chief financial officer, Joan S. Hooper, explained that Petrobras had stopped making payments, and that the company did not believe it would recover any losses related to its contract, according to allegations in the complaint. The price of CHC stock fell from $8.62 before the revelation on July 10 to $7.28 four days after. It should be noted that the company was trading at $1.14 on April 21, 2015. McCrory purchased 1,410 shares of CHC stock, half in September of last year and half last month. The complaints names CHC Group Ltd., a number of the company’s executives and the underwriters of the IPO as defendants. The case was filed in the Supreme Court of the State of New York, County of New York.

Source: Law360.com

U.S. SUES QUICKEN LOANS OVER ALLEGEDLY IMPROPER FHA LOANS

The U.S. Justice Department has sued Quicken Loans, alleging the Detroit mortgage lending giant had improperly originated and underwrote mortgages insured by the Federal Housing Administration (FHA). The complaint, filed in the U.S. District Court in Washington, D.C., alleges that from September 2007 through December 2011, Quicken knowingly submitted, or caused to be submitted, claims for hundreds of improperly underwritten FHA-insured loans.

The government is claiming that Quicken encouraged its employees to disregard FHA rules and falsely certify compliance with underwriting requirements in order to make profits from FHA-insured mortgages. It’s alleged in the government’s complaint that when Quicken received an appraised value for a home that was too low to approve a loan, Quicken would on numerous occasions request a specific new and higher value from the appraiser with no justification for the increase. That practice is prohibited by FHA rules.

The government also said that Quicken granted “management exceptions” whereby managers would allow underwriters to break an FHA rule in order to approve a loan. Interestingly, Quicken beat the government to the punch by suing the government in a declaratory judgement lawsuit. The company is asking for a declaration that its actions were proper and legal. Principal Deputy Assistant Attorney General Benjamin C. Mizer of the Justice


Department’s Civil Division, had this to say:

_Those who do business with the United States must act in good faith, including lenders that participate in the FHA mortgage insurance program. To protect the housing market and the FHA fund, we will continue to hold responsible lenders that knowingly violate the rules._

Quicken is said to be the nation’s largest originator of loans backed by the FHA. In recent fiscal quarters, Quicken has ranked as the nation’s second-largest lender for direct-to-consumer mortgage lending, although its total volume, like that of all major mortgage lenders, has declined since the refinancing boom started to fade in 2013. The government’s complaint alleges that Quicken’s senior management was aware of the problems. There are some very interesting—and very damaging—internal emails that Quicken’s bosses and lawyers will have great difficulty explaining.

The government’s complaint alleges that as a result of Quicken’s knowingly deficient mortgage underwriting practices, The U.S. Department of Housing and Urban Development has already paid millions of dollars of insurance claims on loans improperly underwritten by Quicken. It will be very interesting to see how this matter works out. At this juncture it doesn’t look good for Quicken.

**Source:** The Detroit Free Press

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**VIII. WHISTLEBLOWER LITIGATION**

**Two Companies Settle Whistleblower Lawsuits For Nearly $50 Million**

Health Diagnostics Laboratory, Inc. (HDL) and Singulex, Inc. have agreed to pay almost $50 million after whistleblower lawsuits derailed their practice of soliciting clients from physicians and conducting unnecessary tests. The whistleblowers alleged that HDL and Singulex cheated the Medicare and Medicaid programs by illegally inducing physicians to steer patients to HDL and Singulex for laboratory testing. It was alleged further that the two companies were fraudulently billing the government for laboratory testing services that were tainted by illegal kickbacks.

According to the U.S. Department of Justice, the lawsuits allege that HDL and Singulex induced physicians to refer patients to them for blood testing by paying them processing and handling fees of between $10 and $17 per referral. Additionally, the companies would routinely waive patient co-pays and deductibles as an incentive for referrals. Acting Assistant Attorney General Benjamin C. Mizer, who is in the Justice Department’s Civil Division, had this to say: “Health care providers that attempt to profit by providing illegal inducements will be held accountable.”

The Anti-Kickback Statute prohibits offering, paying, soliciting or receiving remuneration to induce referrals of items or services covered by federally funded programs. The purpose of the statute is to ensure that a physician’s medical judgment is not compromised by improper financial incentives and is instead based on the best interests of the patient. Acting U.S. Attorney Vincent H. Cohen, Jr., of the District of Columbia observed:

_When health care companies pursue profits by paying kickbacks to doctors, they undermine a patient’s ability to trust that medical decisions are being made for scientific reasons, not financial ones._

In addition to undermining doctor’s medical decisions, kickbacks also harm the tax payer because they drive up the cost of federal health care programs with medically unnecessary tests. The False Claims Act is one of the most powerful tools that can be used to combat Medicare and Medicaid financial fraud. Since January 2009, the Justice Department has recovered a total of more than $23.9 billion through False Claim Act cases, with more than $15.2 billion of that recovered in cases involving fraud against federal health care programs. If you need more information on Whistleblower litigation, contact Lance Gould, a lawyer in our firm’s Consumer Fraud/Commercial Litigation Section, at 800-898-2034 or by email at Lance.Gould@beasleyallen.com. Lance handles whistleblower litigation for the firm.

**Source:** Department of Justice—Justice News

**New York State Cracks Down On Tax Evasion With Whistleblower Program**

Under the New York False Claims Act, the state’s attorney general, local governments or private whistleblowers—known as _qui tam_ relators—can file lawsuits against those who defraud the government. The statute has traditionally been used to pursue wrongdoers who have defrauded New York in a number of different ways, from Medicaid fraud to overcharging the state for office supplies and school lunches. New York’s False Claims Act—like false claims acts in many other states—was modeled on the federal False Claims Act. But the federal False Claims Act specifically carves out tax fraud. That makes New York’s Act much better.

New York, because of the law passed in 2010, became the first-in-the-nation state program to allow tax fraud recoveries under a false claims act. The New York law is specifically “aimed at illegal off-shore tax shelters.” An individual with knowledge of offshore tax evasion can assist New York in recovering lost tax revenues by bringing an action as a whistleblower. If such an action is successful, the whistleblower may share in up to 30 percent of the state’s recovery.

The New York Act, in order to avoid a deluge of minor, potentially harassing lawsuits, limits the tax fraud cause of action to defendants with income or revenue exceeding $1 million annually and to allegations pledging damages exceeding $350,000. If liability for any false claim (including tax-related false claims) is established, the state will recover treble damages; penalties of at least $6,000 and up to $12,000 per violation; and fees and expenses (including the fees and expenses incurred by the qui tam relator’s counsel).

If a _qui tam_ relator initiates the lawsuit, the relator files the complaint under seal and serves the attorney general—not the Defendants. This provision allows the government an opportunity to investigate the allegations of the complaint and determine how to proceed before a complaint is openly published. If the state intervenes in the lawsuit, the qui tam relator is generally entitled to 15 to 25 percent of the proceeds recovered from the Defendant. If, however, the state declines to intervene, and the relator successfully litigates the matter independently, the relator is generally entitled to 25 to 30 percent of the proceeds recovered.

The New York False Claims Act can go after both New York residents, as well as nonresident individuals or companies sheltering New York income. In other words, while the suit would seek to hold the New York taxpayer liable, the state could also seek redress from others who acted corruptly or in reckless disregard of tax obligations. Moreover, although such Defendants might expect damages to be measured at three times the amount of back taxes, Law360 points out that “case law and commentators suggest that the appropriate measure of damages may even be higher—three times the back taxes, interest and penalties.”

It’s significant that New York’s False Claims Act has a 10-year statute of limitations, which was explicitly made retroactive. As a result, New York can prosecute instances of tax evasion that predate federal crackdown on offshore accounts. The New York Act appears to be a very good one and it gives that state the oppor-
tunity to achieve in many instances something that other acts including the Federal Act, can’t do.

Source: Law360

IX.
ACTIVITY IN THE PERSONAL INJURY AND PRODUCT LIABILITY SECTION

Lawyers in our firm’s Personal Injury and Product Liability Section are working on a number of interesting projects. Their focus is on accident cases involving automobiles, large trucks, heavy equipment and consumer products. Some of the motor vehicle cases involve single-vehicle crashes, while others involve crashes involving multiple vehicles. The lawyers in the Section are ready to review any case involving catastrophic injury or death. I will give a brief summary of a few of the current projects below.

GM Defective Ignition Switch—As we have previously reported, General Motors has recalled more than 17 million vehicles related to its defective ignition switch problem. This defect can leave a vehicle without power and the driver unable to control the vehicle in sudden and dangerous situations. GM knew about the ignition switch problem as early as 2001. A Victims Compensation Fund was created to address serious injuries and deaths resulting from the ignition switch defect. To date, GM has acknowledged 192 death claims eligible for compensation since the fund began accepting claims on Aug. 1. The deadline to file a claim with the fund was Jan. 31, 2015. We are also still filing claims outside the fund and are handling a number of cases in state courts around the country. Contact Cole Portis, who heads up the Section, at 800-898-2034 or by email at Cole.Portis@beasleyallen.com for more information.

Defective Tires—Tire failure can result in a serious car crash and even a vehicle rollover accident, causing serious injury or death to vehicle occupants. Air, heat and sunlight can cause the rubber in tires to break down. When a tire is defective, potentially serious problems like detsreads and blowouts can occur long before the tire would be expected to wear out. If the tire failure is the result of design or manufacturing defects, and the manufacturer is aware of the problem, they have an obligation to alert consumers to the potential danger. Contact Rick Morrison at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

On-the-job Product Liability—Many times product claims arise from on-the-job injuries involving workers compensation claims. After we investigate the circumstances that caused the injuries, quite often we discover a defective machine of some sort may be the cause of the injuries. Contact Kendall Dunson at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

Our lawyers and staff personnel are working on cases in a number of other areas. If you would like information on potential claims that I didn’t cover above, contact Sloan Downs, Section Administrator, at 800-898-2034 or by email at Sloan.Downs@beasleyallen.com. She will have a lawyer contact you.

$150 MILLION VERDICT RETURNED AGAINST CHRYSLER IN JEEP FIRE

A Georgia jury recently awarded $150 million to the family of a boy who burned to death in a 1999 Jeep Grand Cherokee after a rear-end collision. The jury found that Fiat Chrysler LLC’s defective rear-positioned fuel tank in the Jeep posed a fire risk and killed the child. The verdict granted the family’s request for $120 million for the full value of 4-year-old Remington Walden’s life. Jurors found that Fiat Chrysler showed a “reckless or wanton disregard for human life” in the design or sale of the 1999 Jeep Grand Cherokee and failed to warn consumers about the risk.

Fiat Chrysler internal memos showed that the company knew rear-positioned fuel tanks were dangerous since the 1970s.

The jury also awarded the family an additional $50 million for the boy’s pain and suffering. Experts had testified he lived for up to a full minute after the flames reached him. Fiat Chrysler bears 99 percent of the responsibility for the death, jurors found, with the remaining percent falling upon the driver of the car that rear-ended the Jeep. The trial saw a deposition from Fiat Chrysler CEO Sergio Marchionne, along with testimony from witnesses, experts and doctors concerning the safety of the Jeeps, the physics of the crash, and the pain that the child felt during his last moments of life.

Jurors were left to consider whether a design defect killed Remington, whether Fiat Chrysler showed a reckless or wanton disregard for human life in designing the vehicles and failing to fix them, and whether Bryan Harrell, the driver who struck the Jeep, was negligent and responsible in the boy’s death. The suit was brought by the family of the boy, nicknamed “Remi,” alleging that Chrysler’s negligent fuel tank design in a 1999 Jeep Grand Cherokee caused a fire that killed the boy after a collision that otherwise resulted in minor to moderate injuries.

The little boy was strapped into his booster seat in the backseat of his aunt’s 1999 Jeep Grand Cherokee on his way to tennis lessons on March 6, 2012. His aunt was stopped at a turn signal, waiting to turn left, when she was rear-ended by Bryan Harrell, who was also named in the suit. Since at least the 1960s, Chrysler had actual knowledge that placing a fuel tank
in a vehicle’s crush zone between the rear bumper and axle makes it vulnerable to catching on fire after a rear-end collision. Chrysler failed to warn the public about the known defect. It was technologically feasible, economically practicable and fundamentally safer to redesign the fuel tank placement. But Chrysler chose not to do so.

In June 2013, NHTSA asked Chrysler to recall 2.7 million Jeep Grand Cherokee and Jeep Liberty vehicles. That was because the vehicles’ fuel tanks were more likely than other comparable vehicles to catch fire in a rear-end collision. In a rare rebuke, Chrysler initially refused to conduct any recall. But subsequently the manufacturer said that it would recall a subset of the vehicles to install trailer hitches that would improve their performance in low- to moderate-speed collisions. In January 2014, NHTSA announced that it had accepted Chrysler Group LLC’s recall of 1.56 million Jeep vehicles over concerns that rear-end collisions could cause them to catch fire.

Fiat Chrysler’s CEO, Marchionne, was ordered by the court to give a deposition to be used in the case. The deposition was taken in January and played for jurors in the case. Sergio Marchionne’s 2013 meeting with then-U.S. Secretary of Transportation Ray LaHood and then-National Highway Traffic Safety Administration (NHTSA) chief David Strickland was discussed at trial. The court’s order occurred after NHTSA asked Chrysler to recall the 2.7 million Jeep Grand Cherokee and Jeep Liberty vehicles. It was suggested at trial by the family’s lawyers that the meeting was an attempt to pressure the officials not to find that the Jeeps posed a safety defect. This characterization was rejected by Marchionne, who also said in his deposition that the rear-positioned fuel tanks are safe and not defective.

The Plaintiffs in this case are represented by Jim Butler of Butler Wooten Cheeley & Peak, Jeb Butler of Butler Tohin, and George Floyd of Floyd & Kendrick. They did a tremendous job for their clients. Source: Law360.com

Wrongful Death Case Involving a Defective 1995 Ford Explorer and 16-Year-Old Firestone Tire Settled by Lawyers in Our Firm

LaBarron Boone and Greg Allen, lawyers in our Personal Injury/Product Liability Section, recently settled a case involving two defective products about which we have previously warned. That case arose out of a motor vehicle crash that occurred on July 2, 2011, on I-85, just over the Georgia line. Derrick Sagers and LaTonya Salle were traveling in a 1995 Ford Explorer in the northbound right lane on I-85 when the rear left tire experienced a detread and completely aired out. When the left rear tire began to detread, the Explorer started to “vibrate” and “saw back and forth” in the right hand lane of travel. The detread caused the Explorer to pull to the left. In an effort to correct the leftward pull, the driver steered to the right, then to the left, and then back to the right. A final small corrective steer to the right resulted in a rollover, which caused the crash and the deaths of both occupants.

Just a few days prior to the accident, Mr. Sagers took the Explorer to a repair shop to have the left rear tire changed because it was low on air. The technician who changed the tire replaced the rear left tire with the spare tire from under the Explorer. The spare tire had never touched the ground and looked brand new. But the spare tire was not brand new. Instead, it was the spare that came as original equipment on the 1995 Ford Explorer and was 16 years old at the time the technician put it on the Explorer and at the time of the crash.

Suit was filed against Ford for negligently or wantonly manufacturing a defective vehicle that could not be controlled during a tire detread and failing to warn consumers of the 1995 Explorer’s high propensity to roll over. In addition, our firm also sued Bridgestone for negligently or wantonly failing to warn consumers not to use a tire older than six years.

The 1995 Ford Explorer at issue was manufactured by Ford on June 6, 1995. Mr. Sagers purchased the 1995 Ford Explorer on Feb. 18, 2011, from Mr. John Fitzgerald at Woodward Motors in Montgomery, Ala. The Ford Explorer appeared to be in “good” condition at the time Mr. Sagers purchased it and at the time of the accident.

However, as it turns out, the Ford Explorer was not in good condition at any point in time. In fact, the 1995 Explorer is one of the most notoriously unsafe SUVs in recent history for several reasons that apply in this case.

• First, the 1995 Ford Explorer is unreasonably susceptible to rollovers due to the ratio between the track width and center of gravity height. The Ford Explorer’s rollover propensity has been well-documented through testing over the last 20 years.

• Second, the 1995 Ford Explorer is unreasonably unstable during a foreseeable tire detread.

Paul Semones, our mechanical engineering expert, presented 50 other similar incidents (OSIs) at his deposition that involve a tire detread that resulted in a rollover related to this generation of Ford Explorers. Of these 50 OSIs, 25 were caused by a well-known phenomenon known as “skate,” which occurs during a tire detread when the tires become imbalanced and begin to bounce, causing the back of the Explorer to become uncontrollable. The average driver attempts to control the vehicle, but because the rear tire is detreading, the vehicle actually goes from an understeer vehicle to an oversteer, resulting in a rollover. When a vehicle loses its understeer and becomes oversteer, it becomes uncontrollable in the same way it does when it hits ice.

Bridgestone had known for years that the 1995 Ford Explorer could not withstand a foreseeable tire detread. In 2001, Congress held a hearing to determine whether this same generation of Ford Explorer was rolling over during tire detreads because of the tire or the Ford Explorer. The President and CEO of the tire manufacturer in this case testified before Congress that the Ford Explorer was rolling over during tire detreads because the Ford Explorer was defective.

The CEO testified that the testing conducted by an independent engineer found that 1994-2000 Ford Explorers were rolling over twice as much as all other SUVs involved in single-vehicle, non-tire-related accidents. The CEO acknowledged that a driver should never lose control of a vehicle due to a tire failure, which is a foreseeable event for any car or tire manufacturer. Despite all of this knowledge that the 1995 Ford Explorer could not be controlled by the average driver during a tire detread, Ford chose not to recall or warn consumers of this hazard.

The left rear tire on the 1995 Ford Explorer was a Firestone FR480 P225/70R15 (hereinafter “FR480”) that was designed and manufactured by Bridgestone Americas Tire Operations, LLC. The tire was manufactured in the 21st week of 1995. The tire was an original manufacturer’s equipment (OEM) tire that came equipped on the subject 1995 Explorer as a spare. It had been stored under the vehicle as a spare tire for 16 years before being mounted on the rear driver’s side of the subject Explorer approximately two days before the wreck.

It is well-known throughout the tire and automobile industry that, as tires age, the tire components dry out and can separate, causing the tire to detread. Governmental safety agencies, such as the National Highway Traffic Safety Administration (NHTSA), have recognized for many years before this accident occurred in 2011 that aged tires are dangerous because they result in higher rates of tire blowouts, especially in southern states, like Alabama and Georgia.

What makes tire aging so dangerous is the fact that the average consumer does
not know how to read a tire's Department of Transportation (DOT) code—the only way to tell the true age of the tire. Instead, the average consumer assumes that if the tire looks brand new, then it must be safe. Unfortunately, that is not true, and tire and automotive manufacturers have known this for many years. The evidence in this case showed that some vehicle manufacturers were advising consumers not to use tires older than six years as early as 1990.

Despite knowledge that aged tires are more likely to fail than new tires, that such failure can cause serious injury and death, and that the average consumer is not aware that tires can fail due to age, neither Ford nor Bridgestone Americas Tire Operations (BATO) included any warning in the subject Ford Explorer, the Owner's Manual or on the tire itself regarding the hazards of tire aging. Due to the good work on the part of LaBarron and Greg, Ford and Bridgestone both settled out of court. This settlement will provide closure to two families. If you need more information on these cases, contact LaBarron Boone at 800-898-2034 or by email at LaBarron.Boone@beasleyallen.com.

**Traumatic Brain Injury Cases**

Because so many of our personal injury and product liability cases involve serious injuries, we frequently represent clients who are suffering from injuries that are very easy to see as well as injuries that are more insidious and hidden. For example, broken arms or legs are readily apparent but internal injuries are not. Perhaps the most serious hidden internal injury is a traumatic brain injury, or TBI. Each year in Alabama, more than 10,000 individuals sustain traumatic brain injuries. Thankfully, in about 70-75% of these situations, the physical recovery is substantial enough for the individual to return to their education or career path. For the other 25%, the recovery is tragically incomplete.

A brain injury can be classified as mild if loss of consciousness and/or confusion and disorientation is shorter than 30 minutes. While MRI and CAT scans are often normal, the individual has cognitive problems such as headache, difficulty thinking, memory problems, attention deficits, mood swings and frustration. These injuries are commonly overlooked. Even though this type of TBI is called “mild”, the effect on the family and the injured person can be devastating. Other names for mild TBI may be concussion, minor head trauma, minor TBI, and minor head or brain injury.

**Mild Traumatic Brain Injury is:**

Most prevalent TBI
Often missed at time of initial injury
15% of people with mild TBI have symptoms that last one year or more. Defined as the result of the forceful motion of the head or impact causing a brief change in mental status (confusion, disorientation or loss of memory) or loss of consciousness for less than 30 minutes.

Post injury symptoms are often referred to as post concussive syndrome.

**Common Symptoms of Mild TBI:**

- Fatigue
- Headaches
- Visual disturbances
- Memory loss
- Poor attention/concentration
- Sleep disturbances
- Dizziness/loss of balance
- Irritability-emotional disturbances
- Feelings of depression
- Seizures

**Other Symptoms Associated with Mild TBI:**

- Nausea
- Loss of smell
- Sensitivity to light and sounds
- Mood changes
- Getting lost or confused
- Slowness in thinking

These symptoms may not be present or noticed at the time of injury. They may be delayed days or weeks before they appear. The symptoms are often subtle and are often missed by the injured person, family and doctors. The person looks normal and often moves normal in spite of not feeling or thinking normal. This makes the diagnosis easy to miss. Family and friends often notice changes in behavior before the injured person realizes there is a problem. Frustration at work or when performing household tasks may bring the person to seek medical care.

Severe brain injury is associated with loss of consciousness for more than 30 minutes and memory loss after the injury or penetrating skull injury longer than 24 hours. The deficits range from impairment of higher level cognitive functions to comatose states. Survivors may have limited function of arms or legs, abnormal speech or language, loss of thinking ability or emotional problems. The range of injuries and degree of recovery is very variable and varies on an individual basis.

The number of people with TBI is difficult to assess accurately but is much larger than most people would expect. According to the CDC (United States Centers for Disease Control and Prevention), there are approximately 1.5 million people in the U.S. who suffer from a traumatic brain injury each year. 50,000 people die from TBI each year and 85,000 people suffer long term disabilities. In the U.S., more than 5.3 million people live with disabilities caused by TBI. Patients admitted to a hospital for TBI are included in this count, while those treated in an emergency room or doctor's office are not counted.

The causes of TBI are diverse. The top three causes are: car accident, firearms and falls. Firearm injuries are often fatal: 9 out of 10 people die from their injuries. Young adults and the elderly are the age groups at highest risk for TBI. Along with a traumatic brain injury, persons are also susceptible to spinal cord injuries which is another type of traumatic injury that can result out of vehicle crashes, firearms and falls. Prevention of TBI is the best approach since there is no cure.

**Mechanisms of Injury**

These mechanisms are the highest causes of brain injury: Open head Injury, Closed Head Injury, Deceleration Injuries, Chemical/Toxic, Hypoxia, Tumors, Infections and Stroke.

- **Open Head Injury**
  - Results from bullet wounds, etc.
  - Largely focal damage
  - Penetration of the skull
  - Effects can be just as serious as closed brain injury

- **Closed Head Injury**
  - Resulting from a slip and fall, motor vehicle crashes, etc.
  - Focal damage and diffuse damage to axons
  - Effects tend to be broad (diffuse)
  - No penetration to the skull
• **Deceleration Injuries (Diffuse Axonal Injury)**

The skull is hard and inflexible while the brain is soft with the consistency of gelatin. The brain is encased inside the skull. During the movement of the skull through space (acceleration) and the rapid discontinuation of this action when the skull meets a stationary object (deceleration) causes the brain to move inside the skull. The brain moves at a different rate than the skull because it is soft. Different parts of the brain move at different speeds because of their relative lightness or heaviness. The differential movement of the skull and the brain when the head is struck results in direct brain injury, due to diffuse axonal shearing, contusion and brain swelling.

**Diffuse axonal shearing:** when the brain is slammed back and forth inside the skull it is alternately compressed and stretched because of the gelatinous consistency. The long, fragile axons of the neurons (single nerve cells in the brain and spinal cord) are also compressed and stretched. If the impact is strong enough, axons can be stretched until they are torn. This is called axonal shearing. When this happens, the neuron dies. After a severe brain injury, there is massive axonal shearing and neuron death.

Fortunately, hospitals that specialize in care for brain injuries are trained to recognize the symptoms of TBI and are equipped to care for the spectrum of disabilities that often accompany these injuries. The Shepherds Center in Atlanta is one such facility. Many of our clients have received world-class care from the doctors and staff at Shepherds. Several years ago, I was made aware of Alabama Head Injury Foundation (AHIF), a statewide 501(c)3 nonprofit that specifically works with survivors of traumatic brain injury and their families.

Through local Resource Coordinators across the state, AHIF provides direct support services to more than 1,200 traumatic brain injury survivors each year. These services include home modifications, social/recreational support groups, respite care, a weekend camp, assistance with securing durable medical equipment, assistance with requesting the write-off of medical bills, and assistance with identifying potential funding sources through social service programs. AHIF does a tremendous job.

Several of our lawyers have served with AHIF and Mike Andrews is currently a Board Member and Executive Committee Member of this most worthwhile organization. For many years, AHIF received the majority of its funding through the State of Alabama’s Impaired Driver’s Trust Fund, which receives its revenue through a $100 fine associated with DUI convictions. Over the past five years, however, revenue from the Impaired Driver’s Trust Fund has dropped by 46%. This was due in part due to fewer drunk driving convictions and in part due to the utilization by local municipal courts of the Deferred Prosecution program, which does not generate funds for the IDTF. As a result, AHIF now has to rely more heavily on contributions from the surrounding community. For more information on this organization, how you can help or receive benefits, contact Mike Andrews at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

**NHTSA Opens Investigation Into Hercules Tires**

Lawyers in our firm’s Personal Injury and Product Liability Section have successfully handled cases involving defective tires made by Chinese and other foreign tire manufacturers. They are currently looking at additional potential claims involving these tires. More and more frequently, tires are being made for sale in this country by these manufacturers. Unfortunately, too many of them do not take the appropriate steps through good design and manufacturing practices to assure that their tires are safe. As equally troubling are the companies who import these foreign company’s tires into this country. In too many instances, “importers” are not taking the appropriate steps to assure that Chinese and other foreign tire makers’ tires are safe, despite the National Highway Traffic Safety Administration standards requiring them to do so.

Under Federal law, importers of tires are deemed to be “manufacturers.” As such, Federal Motor Vehicle Safety Standards and Regulations (FMVSS) hold importers to the same responsibilities as domestic manufacturers. “Importers” must take steps to assure that the tires they import are free of defects. Good manufacturing processes require “importers” to conduct on-site inspection(s) of a foreign tire makers’ facilities to assure that adequate testing, manufacturing, quality control and other measures are in place.

Once they import tires into this country, “importers” should perform random sampling, testing and inspection of foreign tires before they distribute and/or sell the tires to consumers in this country. Perhaps one of the most important duties that an “importer” or “distributor” has is to assure that once a foreign tire manufacturer determines a defective tire warrants a recall is to assure the recall is appropriately carried out in this country.

Recently, the National Highway Traffic Safety Administration opened an investigation concerning a defective Chinese tire sold in the U.S. under different brand names that was recalled by one importer, but not another. Last month, NHTSA sent a request for information to Hercules Tire and Rubber Company, a subsidiary of American Tire Distributors Inc., to determine if it should have recalled its Hercules Radial A/T sold in eight different sizes manufactured by the Shandong Yongsheng Rubber Co. Ltd. The investigation was prompted after a different importer, ITG Voma, recalled the Capital Precision Trac II, also manufactured Shandong Yongsheng, which Shandong Yongsheng has admitted is similar in design to the Hercules. ITG recalled 94,890 Capital Precision Trac II, which were sold in seven sizes for passenger cars and light trucks and have been linked to several failures and injuries.

Whether the Hercules tire imported by Hercules Tire and Rubber Company and made by Shandong Yongsheng will be recalled remains to be seen. Based on the admission of the Chinese tire maker, it probably should. The most troubling thing is it appears that once again, an importer of a Chinese tire is not taking the steps it should to assure that it follows guidelines to assure tires are safe.

For more information about the Hercules tire problems and for other tire safety information, contact Rick Morrison, a lawyer in our Personal Injury and Products Liability Section, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com. Rick handles tire-related litigation for our firm and will be glad to talk with you.

**X.**

**AN UPDATE ON THE FIRM’S MASS TORTS SECTION**

Lawyers in our Mass Torts Section have been very busy this year. They are working on litigation involving a wide range of products. A number of projects in the Section are nearing completion, but many more are ongoing. Others are just getting started with investigation and research in the early stage. The Section’s lawyers will continue to get into new areas. I will give a brief overview of some of these projects that are ongoing in the Section. More detail will also be given on some of the products.

**Xarelto—Lawsuits filed against Johnson & Johnson subsidiary Janssen Pharmaceuticals and Bayer Corp. over the blood thinner Xarelto have been consolidated in Louisiana federal court. Xarelto has been linked to serious side effects including internal bleeding, gastrointestinal bleeding,**
Talcum powder and ovarian cancer—As many as 2,200 cases of ovarian cancer diagnosed each year may have been caused by regular use of talcum powder. Talc is a mineral made up of various elements including magnesium, silicon and oxygen. Talcum powder is ground to make talcum powder, which is used to absorb moisture and is widely available in various products including baby powder and adult products including body and facial powder. Talc products used regularly in the genital area increase the risk of ovarian cancer. A jury recently found consumer health care products manufacturer Johnson & Johnson knew of the cancer risks associated with its talc products but failed to warn consumers. I will write separately about the first trial date. Contact Ted Meadows or Melissa Prickett at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Power morcellator—In April, the U.S. Food and Drug Administration (FDA) urged doctors to stop using a medical device called a power morcellator, because studies showed the device may spread cancer. An estimated 1 in 350 women develops uterine sarcoma—a type of uterine cancer—after undergoing a morcellator procedure. Morcellators are typically used to grind away uterine growths such as fibroid tumors, and in hysterectomies. They became popular as a less invasive surgical alternative. The FDA conducted a formal review of the devices in July and announced that its concerns with the morcellator were confirmed. During this time, Johnson & Johnson announced it would stop selling the surgical tools. Contact Melissa Prickett at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

Transvaginal mesh—The FDA has issued an updated safety communication warning doctors and patients that the placement of surgical mesh through the vagina to treat pelvic organ prolapse may present greater risk for the patient than other options. This is also called transvaginal mesh. According to the FDA, reported complications from using the mesh include the mesh becoming exposed or protruding out of the vaginal tissue, pain, infection, organ perforation and urinary problems. Contact Leigh O’Dell, Chad Cook or Melissa Prickett at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com, Chad.Cook@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Lipitor—Lipitor is a statin drug designed to treat high cholesterol. It was approved by the FDA in 1996 and is one of the best-selling prescription medications in the world. Recent studies have found a possible link between Lipitor and the risk of developing Type 2 diabetes. A University of Massachusetts study found a potential link in postmenopausal women, particularly those who had a Body Mass Index (BMI) less than 30. Of the 153,840 women evaluated, more than 10,000 had developed Type 2 diabetes by the end of the study. Contact Frank Woodson or Melissa Prickett at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Testosterone Replacement Therapy (TRT)—These products for men have been linked to an increased risk of death, heart attack and stroke. Researchers found men who used testosterone therapy were 30 percent more likely to have a heart attack, stroke, or die after three years of use. A second study found that men had a significant increase in risk of heart attack and stroke in just the first 90 days of testosterone therapy use. Furthermore, men who started the study with clear, unobstructed coronary arteries were just as likely to have a heart attack, stroke or die as men who entered the study with established coronary artery disease. Testosterone therapy, such as the prescription topical treatments Androgel, Testim and Axiron, are used to help boost testosterone levels in men who have a deficiency of the male hormone. Symptoms of low testosterone include decreased libido and low energy. Contact Matt Teague or Melissa Prickett at 800-898-2034 or by email at Matt.Teague@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Viagra—A preliminary study indicates the erectile dysfunction drug Viagra (sildenafil) may increase the risk of developing melanoma, the deadliest form of skin cancer. The study, published in the JAMA Internal Medicine journal, analyzed data from nearly 26,000 men, 6 percent of whom had taken Viagra. The men who used Viagra at some point in their lives had about double the risk of developing melanoma compared to men who had never taken the drug. Men who were currently taking Viagra were at an 84 percent greater risk of developing melanoma. We are currently looking at cases involving men who are taking or have taken Viagra and were diagnosed with melanoma. Contact Melissa Prickett at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

Risperdal—The atypical antipsychotic drug Risperdal is used to treat schizophrenia and certain problems caused by bipolar disorder. It has been linked to the development of gynecomastia in boys and young men. Gynecomastia is a condition that causes boys to grow breasts. The drug is manufactured by Johnson & Johnson. Contact James Lampkin or Melissa Prickett at 800-898-2034 or by email at James.Lampkin@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Metal-on-Metal Hip Replacement parts—The FDA has ordered a review of all metal-on-metal hip implants due to mounting patient complaints. Problems with the metal-on-metal devices include loosening, fracturing and dislocating of the device caused by inflammation in the joint space. We are investigating all cases involving metal-on-metal hip implants, including the DePuy Orthopaedics ASR XL Acetabular System and the DePuy ASR Hip Resurfacing System, recalled in August 2010; the Smith & Nephew R3 Acetabular System, recalled in June 2012; the Stryker Rejuvenate and ABG II modular-neck stems, recalled in July 2012; the DePuy Pinnacle, the Zimmer Durom Cup, the Wright Conserve, and the Biomet M2A and M2A-Magnum hip replacement systems, which have not been recalled. Reported problems include pain, swelling and problems walking. Contact Navan Ward at 800-898-2034 or by email at Navan.Ward@beasleyallen.com.

GranuFlo—GranuFlo® and NaturLyte® are products used in the dialysis process. On June 27, 2012, the FDA issued a Class 1 recall of GranuFlo®.
and NaturaLyte®. A Class 1 recall is the most serious FDA recall, reserved for situations in which the FDA deems “there is a reasonable probability that the use of or exposure to a violative product will cause serious adverse health consequences or death. Use of these dialysis products has been linked to an increased risk of cardio-pulmonary arrest and sudden cardiac death. The manufacturer, Fresenius Medical Care, was aware of the dangers and injuries associated with these products but failed to warn patients and doctors until 2012. We are currently investigating death claims as well as claims of heart attack, cardiopulmonary arrest or any other serious injury. Contact Frank Woodson at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com.

Mirena—Mirena® is an IUD that was originally approved by the FDA as an intrauterine contraceptive. It was later approved as a treatment for heavy menstrual bleeding. It works by slowly releasing a low dose of levonorgestrel (a synthetic progestin hormone) directly into the uterus. Serious adverse side effects and potentially life-threatening complications have been reported following the implantation of the device. These complications include organ perforation, migration of the IUD to outside the uterus, expulsion of the IUD, and embedment in the uterus, among others. Contact Roger Smith at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

Byetta, Januvia, Janumet and Victoza—These are drugs from a class known as incretin mimetics that are used to treat Type 2 diabetes. The FDA approved Byetta in 2005, Januvia in 2006, Janumet in 2007 and Victoza in 2010. These drugs have been prescribed to millions of people in the United States. Since approving the medications, the FDA has issued several warnings about links between Byetta, Januvia, Janumet and Victoza to complications related to pancreatic diseases. Recent studies have linked these drugs to acute pancreatitis and increased risk of pancreatic cancer. We are currently investigating claims of thyroid cancer and pancreatic cancer. Contact David Byrne at 800-898-2034 or by email at David.Dearing@beasleyallen.com.

If you have any difficulty reaching the lawyers mentioned for any of the projects mentioned above, and your need is urgent, you can contact Melissa Prickett, the Section Administrator, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com. She will have the appropriate lawyer contact you.

**First State Court Talcum Powder Trial Set**

Recently, Judge John Francis Garvey, Jr., of the Circuit Court of the City of St. Louis, Mo., denied motions to dismiss filed by defendants Johnson and Johnson, and Imerys Talc America. The judge also entered a scheduling order setting the Hogans case for trial on Feb. 1, 2016. This lawsuit involves dozens of women who claim that genital use of talcum powder, in the form of Johnson’s Baby Powder or Shower to Shower, caused their ovarian cancer. At this point, it appears this will be the first talcum powder trial since 2013 when a South Dakota Federal Court jury found that Johnson and Johnson failed to warn of the risk of ovarian cancer from genital talc use and thereby caused Ms. Berg’s ovarian cancer.

Judge Garvey is requiring the parties to proceed with discovery in 10 cases, one of which will be the subject of the Feb. 1, 2016, trial. As I last reported, our second talcum powder trial will take place on March 7, 2016, in the Eastern District Of Missouri. It involves the widow of Shawn Blaes, who was diagnosed with ovarian cancer at the age of 47 and died in 2011 at the age of 50.

Our firm is working on the Hogans and Blaes cases with the law firms of Onder, Shelton, O’Leary, and Peterson, LLC, Allen Smith, and Porter & Malouf, P.A. As I have indicated before, our firm is heavily involved in litigating cases on behalf of women who were diagnosed with ovarian cancer following the use of talcum powder in the genital area. If you have any questions regarding these cases, please feel free to contact Ted Meadows at Ted.Meadows@beasleyallen.com or 800-898-2034.

**More Info On The Xarelto Litigation**

I mentioned Xarelto in the section update. Lawyers in our firm are continuing to work on the Multidistrict Litigation (MDL), involving the novel anticoagulant (blood thinning) medication Xarelto. The Xarelto MDL has been established (for all filed federal cases nationwide) in the U.S. District Court for the Eastern District of Louisiana. The litigation is being overseen by U.S. District Judge Eldon E. Fallon, who brings a wealth of MDL-related experience to this case. Judge Fallon presided over the massive MDL litigation against Merck & Co. and its painkiller Vioxx.

A great deal of progress has already been made in the Xarelto MDL proceedings. Organizational discussions of the Plaintiffs Steering Committee (PSC) have led to the formation of various committees and subcommittees for the work to be done on behalf of all Plaintiffs currently in the litigation. I am pleased to report that several members of our firm have been appointed by the Court to serve on the PSC or in key PSC committee roles. Those lawyers include Andy Birchfield (PSC Member and Co-Lead Plaintiffs’ Counsel); Gibson Vance (Co-Chair of the State/Federal Coordination Committee); and David Byrne (Co-Chair of the Sales & Marketing Discovery Subcommittee).

Xarelto is a relatively new anticoagulant developed by Bayer and Johnson & Johnson and marketed by Janssen Pharmaceuticals. Xarelto entered the U.S. market in July 2011, and is currently approved for six indications including reducing the risk of stroke in patients with non-valvular atrial fibrillation; treating deep vein thrombosis and pulmonary embolism, and reducing the recurrence of these conditions; and preventing blood clots in patients following knee or hip replacement surgery.

Unfortunately, Xarelto carries a very significant risk of severe, uncontrolled and sometimes fatal internal bleeding. And unlike Coumadin (Warfarin), a drug that has been the standard in anticoagulation therapy for more than 50 years, Xarelto has no antidote or other way to reverse its anti-coagulation effects—leaving doctors and ER professionals without an effective means to stabilize and treat patients who experience uncontrolled or excessive bleeding while taking Xarelto.

In fact, by the end of 2012, Xarelto ranked 10th among all drugs for the number of direct reports of serious adverse events to FDA—and that was after just one full year on the market. Since then, there have been tens of thousands of reported adverse events. But despite all of this, Xarelto’s sales numbers have continued to grow by leaps and bounds—primarily due to an incredibly aggressive marketing campaign.

This is a problem drug that has hurt a large number of people, including hundreds of our own firm’s clients. We are committed to seeing that these people get the help and compensation that they deserve because of their injuries. If you need more information about the Xarelto litigation, you can contact David Byrne, one of the lawyers in our firm’s Mass Torts Section, and who is mentioned above, at 800-898-2034 or by email at David.Byrne@beasleyallen.com.

**An Update On The Philadelphia Pelvic Mesh Litigation**

Judge Arnold New, who is in the Philadelphia County Court of Common Pleas,
has ruled that the Plaintiffs in the pelvic mesh injury cases had sufficient connections to Philadelphia to properly give the state court jurisdiction. Defendants Johnson & Johnson and Boston Scientific had argued that the Plaintiffs’ claims were not sufficiently related to Pennsylvania. Specifically, Johnson & Johnson sought to have approximately 118 cases filed by non-Pennsylvania Plaintiffs transferred for lack of personal jurisdiction. Plaintiffs argued in response that the fact that Johnson & Johnson and Boston Scientific were registered and conduct substantial business in Pennsylvania was sufficient to allow jurisdiction. Plaintiffs further claimed that the Defendant manufacturers voluntarily conduct regular business in Philadelphia, and thus, were subject to the jurisdiction of the court. The court agreed.

Last February Judge New consolidated all pelvic mesh cases filed in Philadelphia in the “Complex Litigation Center Pelvic Mesh Mass Tort Program,” which includes cases against the largest transvaginal mesh manufacturers in the United States. Additional lawsuits have been consolidated into several multidistrict litigations (MDLs) in the U.S. District Court for the Southern District of West Virginia.

According to media reports, there are approximately 500 pelvic mesh personal injury suits filed in Philadelphia. Pelvic mesh devices may be used to treat stress urinary incontinence (SUI) and pelvic organ prolapse (POP). As we have previously reported, thousands of women have been injured by the devices, resulting in chronic pain, revision surgery, and other injuries.

Source: Law360.com, NewsInferno.com

XI. BUSINESS LITIGATION

**Panasonic To Pay $5.4 Million To Settle Auto Parts Price-Fixing Suit**

Panasonic Corp. will pay $5.4 million to settle auto dealerships’ claims made in three Michigan federal lawsuits that it fixed prices on switches and other parts. This settlement came after the company agreed to a separate $17.1 million settlement in the multidistrict litigation (MDL). The auto dealers said in a motion for preliminary approval that the instant settlement also requires Panasonic to provide attorney profers, witness depositions, and transactional data and other documents that will strengthen their claims against non-settling Defendants over switches, steering angle sensors and high-intensity-discharge lamp ballasts. The Plaintiffs’ motion stated:

*The ability to obtain such information without protracted and expensive discovery is quite valuable to [auto dealers.] Panasonic’s cooperation will greatly enhance plaintiffs’ ability to prosecute their claims against nonsettling defendants.*

The U.S. Department of Justice announced that auto parts supplier Robert Bosch GmbH has agreed to plead guilty and pay a $57.8 million criminal fine for conspiring to fix prices for spark plugs and other auto parts. The instant Panasonic settlement—reached in February—is the first in each of the three cases brought by the auto dealers. It’s different than Panasonic’s $17.1 million settlement that resolves a putative class action brought by car buyers who claimed the company conspired with others to fix prices of auto parts. Panasonic also reached that settlement in February but informed the court about it last month.

The cases are part of a MDL that was established after the Justice Department’s own investigation into the auto parts industry. That probe has already resulted in more than $2 billion in fines. The MDL—known as In Re: Automotive Parts Anti-Trust Litigation—has been divided into separate proceedings for different automotive parts, which also include occupant safety restraints and automotive wire harnesses. In the instant suits, the auto dealers and the classes they seek to represent bought new vehicles containing switches, steering angle sensors and HID ballasts manufactured or sold by a Defendant, or bought auto parts made or sold by a Defendant for their vehicles.

Plaintiffs claim that, as part of the conspiracies, Defendants agreed to allocate the supply of the parts on a model-by-model basis, and then sold the products at noncompetitive prices to automobile manufacturers in the U.S. and elsewhere. The instant suits also name Tokai Rika Co. Ltd., TRAM Inc. d/b/a Tokai Rika U.S.A. Inc., Denso Corp. and others as Defendants. In November the Defendants—in a collective motion—tried to get the suits, along with others, dismissed. They claimed that the auto dealers and end payors lacked constitutional standing because some of the parts at issue aren’t found in all the disputed vehicles.

In 2013, in another related settlement, Panasonic agreed to pay $45.8 million to the Justice Department to settle criminal charges of bid rigging for switches and steering angle sensors sold to Toyota Motor Corp., and HID ballasts sold to Honda Motor Co. Ltd., Mazda Motor Corp. and Nissan Motor Co. Ltd. The auto dealers said that Panasonic’s plea agreement with the government didn’t include an order for restitution because of the potential for recovery through civil causes of action. Also under the terms of the newly announced settlement, Panasonic’s sales will remain in the case for purposes of calculating damages against the non-settling Defendants and will be part of any joint and several liability claims against other current or future Defendants. Source: Law360.com

**Appeals Court Affirms Most Of $76 Million AstraZeneca Prilosec IP Win**

The Federal Circuit has left intact most of a $76 million damages award that Apotex Corp. was ordered to pay AstraZeneca AB for infringing two patents for the indigestion drug Prilosec. But the lower court was instructed to recalculate a portion of the award. The appeals court rejected most of Apotex’s challenges to the damages award, which was based on U.S. Senior Judge Denise Cote’s 2013 decision that AstraZeneca was entitled to 50 percent of Apotex’s profits from sales of the infringing generic product.

While the Federal Circuit said the award did not overcompensate AstraZeneca in most respects, it ruled that the judge’s determination should not have included sales of Apotex’s products for two months during the so-called pediatric exclusivity period, at which point AstraZeneca’s patents had expired. The court said:

*The damages determination should not include Apotex’s sales during the post-expiration period of pediatric exclusivity, because Astra’s rights during that period were not attributable to its patents and were not invaded by Apotex’s infringement.*

The pediatric exclusivity period is a six-month period during which the Food and Drug Administration is barred from approving competing generic drugs if the branded drug owner agrees to conduct pediatric studies. In the instant case, the period began at the point AstraZeneca’s Prilosec patents expired in 2007, and some of Apotex’s sales took place during the period. The Federal Circuit reversed the part of the damages award related to post-expiration sales and remanded so the award could be recalculated.

The court rejected Apotex’s argument that the lower court’s 50 percent royalty rate was inappropriate. For example, Apotex said at the time its generic product entered the market, there were already other generic versions of the drug, so its version caused only “negligible harm” to AstraZeneca. The court said Apotex’s argument ignored many of the detailed factual

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findings that Judge Cote made about the market for the drug when she set the 50 percent royalty rate. The court said:

We therefore reject Apotex’s challenges to the district court’s evidentiary analysis and its conclusion from that analysis that the 50 percent royalty rate constituted fair compensation to Astra under the reasonable royalty theory of damages.

AstraZeneca was entitled to as a result of AstraZeneca's patents. After that ruling was affirmed by the Federal Circuit in 2008, a separate proceeding began to determine the amount of damages AstraZeneca had been entitled to as a result of Apotex’s sales. This resulted in Judge Cote’s 2013 damages decision, following a bench trial.

Source: Law360.com

XII.
AN UPDATE ON SECURITIES LITIGATION

THE SUPREME COURT TACKLES OPINIONS, FACTS, AND OMISSIONS IN § 11 SECURITIES CASES

In one of the least talked about but most watched cases this term, the Supreme Court decided when an opinion can constitute a “material fact” under the Act, and whether the speaker’s belief in the truth or falsity of the opinion mattered, but the Court took the case further than that.

The Court began its opinion in Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, drafted by Justice Elena Kagan, by answering the expected question. An opinion, though not itself a “fact,” can form the basis of a § 11 claim in limited circumstances:

• when the opinion contains untrue factual statements (such as: “I believe we are the best because we have a patent that nobody else has” when the company has no such patent)

• when the speaker does not subjectively believe the opinion expressed (the fact—the speaker’s belief in the opinion—is then the false statement).

Neither of those situations existed in the Omnicare case, however, so the Court chose to address the other possibility for liability under § 11 that was pleaded in the complaint, an “omitted [statement of] a material fact required to be stated therein or necessary to make the statement therein not misleading ...” 15 U.S.C. §77k(a). The Court reasoned that such liability can attach to an opinion because “a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker’s basis for holding that view.”

In sum, liability arises when the speaker knows of underlying facts that refute the stated opinion and does not reveal those facts, or when the speaker makes a statement that a reasonable investor would assume is supported by facts that justify the opinion but the speaker never investigated. To limit the applicability, though, the Court rightly reasoned that a Plaintiff cannot just say the opinion was wrong. Nor can the Plaintiff just complain that the opinion was misleading. Instead, the Plaintiff must point out specific facts that were omitted from Omnicare’s registration statement.

The case is a double-edged sword for investors. It limited liability for opinions in registration statements, but, essentially, opened a new area of liability for omissions. That opening is narrow, and certainly requires a higher pleading standard because of the need to point to specific omitted facts in the initial pleadings (this may be difficult prior to discovery), but it is nonetheless a route to § 11 liability that had not previously been recognized. If you need more information on this subject, contact Rebecca Gilliland, a lawyer in our firm’s Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Sources: Opinion and http://www.scotusblog.com/2015/03/an-opinion-on-opinions/

OLYMPUS TO PAY INVESTORS $92 MILLION IN FRAUD CASE

Electronics maker Olympus Corp. of the Americas has reached an $11 billion yen ($92 million) out-of-court settlement in Japan with institutional investors over allegations of accounting fraud. The settlement was reached on March 27, according to a statement by litigation funder and alternative-dispute-resolution specialist DRRT, which was involved in the case. Olympus has been embroiled in controversy since 2011, when former Olympus CEO Michael Woodford first revealed an accounting fraud by questioning exorbitant advisory fees paid during past mergers. Woodford himself later filed and settled claims that the company had fired him in retaliation for blowing the whistle.

A preliminary settlement was reached in October 2013 but details were not finalized until recently. Olympus was subsequently forced to restate five years of financial earnings in order to remain listed on the Tokyo Stock Exchange. Three former Olympus executives pled guilty to accounting fraud in Japanese court in 2012, after the company admitted to hiding more than $1 billion in losses through a series of sham transactions, including a $687 million payment it made for financial advice on its $2 billion takeover of British device company Gyrus Group PLC in 2008.

In February, Olympus Corp. said the U.S. subsidiary had been facing an investigation for several years by the U.S. Department of Justice for purportedly violating anti-kickback laws and the False Claims Act (FCA), and said the parties had started discussions to settle the probe. Olympus Corp. of the Americas has been under investigation by the DOJ since November 2011 over potential violations by the company’s medical

Sources: Opinion and http://www.scotusblog.com/2015/03/an-opinion-on-opinions/

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business of the Anti-Kickback Statute and the FCA.

Prosecutors in the United Kingdom’s Serious Fraud Office brought criminal charges against Olympus Corp. in September 2013. The executives—the former chairman of Olympus and two others—received suspended prison sentences in Tokyo court in July 2013. In September 2013, Chan Ming Fon, a former banking executive in Singapore, pled guilty to conspiring to help Olympus hide money as part of the accounting fraud.

About four months later, a Pennsylvania federal judge preliminarily approved a $2.6 million settlement to be paid by Olympus to resolve a shareholder class action claiming the company failed to tell investors that it had paid “an unprecedented $687 million” fee—which far exceeded the typical Wall Street advisory fee of 1 to 2 percent—for advice on the Gyrus deal. The judge issued a final judgment ending the case several months later. In April, six Japanese banks sued Olympus demanding nearly 28 billion yen ($233.7 million) for losses related to the accounting scandal.

Source: Law360.com

**QUESTCOR PAYS $38 MILLION TO SETTLE SECURITIES CLASS ACTION**

Questcor Pharmaceuticals Inc. has agreed to pay $38 million to end a consolidated securities class action. It was alleged in the suit that the company lies about the efficacy of its biggest moneymaker, multiple sclerosis drug Acthar. U.S. District Judge Dolly Gee had entered an order granting class certification in November.

The lead plaintiffs, Plumbers and Pipefitters National Pension Fund and West Virginia Investment Management Board, accused Questcor in the suit of lying about the efficacy of Acthar, which accounts for more than 99 percent of its annual revenue, in order to inflate the price of its stock shortly before Aetna Inc. reduced reimbursements for the drug, causing a stock drop.

It’s alleged in the suit that Questcor mischaracterized the nature and results of scientific tests of Acthar to create the impression that the drug was a successful and medically necessary method of treating multiple sclerosis and nephrotic syndrome. The litigation includes six separate class action suits that were consolidated before Judge Gee. While Acthar is prescribed for 19 medical conditions, the suit focuses on Questcor’s marketing of the drug for infantile spasms, multiple sclerosis and nephrotic syndrome.

The class includes all investors who were damaged by buying stock in the company between April 2011 and September 2012. A subclass includes those who were damaged by buying stock at the same time as CEO Don Bailey was selling it. After Aetna issued a bulletin revising its policies concerning coverage for Acthar on Sept. 14, 2012, Questcor’s stock lost almost half its value. Less than two weeks later, the company announced the U.S. government was investigating its sales and marketing tactics. The law firm of Robbins Geller Rudman & Dowd LLP was appointed class counsel for both the class and the subclass.

Source: Law360.com

**XIII. THE CONSUMER FRAUD AND COMMERCIAL LITIGATION SECTION**

Lawyers in our firm’s Consumer Fraud and Commercial Litigation Section are still hard at work on the Medicaid Fraud (AWP) litigation, representing eight states in litigation involving numerous pharmaceutical companies. The Section has also been busy in a number of other projects. I will give a brief summary below of some of the projects that are ongoing.

**False Claims Act / Whistleblower**—Lawyers in the Section are handling and investigating whistleblower claims of government fraud ranging from Medicare/Medicaid to military contracts, and any other type of fraud involving a government contract. Under the False Claims Act (FCA) the whistleblower is entitled to a percentage of the recovery. Studies show that as much as 10 percent of Medicare/Medicaid charges are fraudulent. Common schemes involve double-billing for the same service, inaccurately coding services, and billing for services not performed. Additionally, the Commission on Wartime Contracting has warned that the lack of oversight of government contractors has led to massive fraud and waste. For more information, contact Lance Gould at 800-898-2034 or by email at Lance.Gould@beasleyallen.com.

Lawyers in the Section will be glad to discuss any potential claim—including those discussed above—that involves consumer or business fraud of any sort, employment or work related issues. If you would like to discuss a potential claim or a specific project not mentioned above, contact Michelle Fulmer, Section Administrator, at 800-898-2034 or by email at Michelle.Fulmer@beasleyallen.com. She will have a lawyer contact you.

**XIV. PREDA TORY LENDING**

**Payday Loans Are Defective Products That Injure Our Most Vulnerable Citizens**

In our work on behalf of consumers, lawyers in the firm come across defective
products on a regular basis. In most of these cases, the manufacturers of the products know the dangers, but they place making a profit over the safety of the public. I was struck recently when Stephen Stetson, who works with the Arise Citizens’ Policy Project, characterized payday loans at faulty products. I must say that his was a very accurate comparison. By design, payday loans encourage repeat borrowing, trap borrowers in a cycle of debt with exorbitant interest rates, and damage not only individuals but the communities in which they live.

In Alabama, payday lending companies are allowed to charge interest and fees that amount to an APR as high as 461 percent. If a borrower has any trouble paying back the loan on time, the interest and fees are compounded, creating a cycle of debt that is very difficult to break. The average payday loan is $525. Most borrowers who use these payday lenders become indebted to them for more than five months. A $500 loan can end up costing the borrower more than $1000 in interest and fees. Statistics also show that about 80 percent of payday loans are taken out to pay for another payday loan. And the cycle continues.

Twenty-two states have passed laws regulating the payday lending industry, but Alabama remains a predatory lender’s dream. AL.com reports the only states with more payday lenders per capita than Alabama are Oklahoma, South Carolina, Louisiana and Mississippi. Here, lenders pay state legislators thousands of dollars in campaign funds in exchange for rules that are very pro-industry but destructively anti-consumer. A recent investigation by AL.com revealed every member of the Alabama Senate’s banking committee received campaign contributions from payday lending companies totaling $116,000. Members of the House Financial Services Committee received a combined $97,000 from these businesses.

Some progress has been made. A bill cleared a committee in the Alabama Senate last month that would require payday loan companies to give customers at least six months to pay off a loan, with a maximum APR of 115 percent. Currently, payday lenders can require loans to be paid back in as little as 10 days, and typically between 14 to 30 days, while accruing annual percentage rates of up to 456 percent. Most organizations calling for payday lending reform want to cap interest rates at 36 percent, but so far all those proposals have been defeated by the payday lending industry.

The bill, sponsored by Sen. Arthur Orr (R-Decatur) is said to be a compromise that would allow payday lenders to stay in business while trying to help borrowers actually pay back what they owe. Any lender who can’t make a healthy profit charging 115 percent interest would have to be “dumb as dirt.” Hopefully, this bill will also provide some badly needed protections for folks who borrow from payday lenders. The legislation is said to be modeled after similar legislation that passed in Colorado. Reported, that state subsequently saw a decline in payday loans from $951 million to $54.8 million; defaults on loans dropped by 25 percent; and the number of borrowers fell by 7 percent. I would want to check out the media reports before taking this as 100 percent accurate. About half the payday loan operators in the state closed and that was a good thing.

Ten states currently ban payday loans. More than 20 cities in Alabama have adopted ordinances restricting payday and title loan operations. Hopefully, the Alabama Legislature will pass some really tough laws that will protect the victims of the payday lenders. The cartoon below, which was illustrated by J.D. Crowe, describes without words the plight of folks dealing with the payday lenders extremely well.

Illustration by J.D. Crowe, Alabama Media Group

Our firm’s experience in litigation with the payday lenders has convinced me that the states that ban these loan sharks are doing the right thing. I only wish the Alabama Legislature would either follow that lead or at least pass strong laws to control the out-of-control loan sharks called payday lenders.

Sources: AL.com, Montgomery Advertiser

XV.
INSURANCE AND FINANCE UPDATE

LAWSYERS FOR FINANCIAL INSTITUTIONS HARMED BY TARGET DATA BREACH OPPOSE THE PROPOSED SETTLEMENT WITH MASTERCARD

Lawyers representing financial institutions harmed by the massive 2015 Target data breach are opposing the proposed settlement agreement between the retailer and MasterCard on behalf of its member banks. Lawyers on the Plaintiffs Steering Committee (PSC), who are leading the litigation efforts, believe that the alleged $19-million settlement is vastly insufficient to compensate financial institutions for the losses they incurred as a result of the data breach. They are asking U.S. Judge Paul Magnuson, who is overseeing the consolidated litigation in United States District Court, District of Minnesota, to void the deal.

Lawyers in our firm’s Consumer Fraud and Commercial Litigation Section are representing banks and credit unions in this multidistrict litigation (MDL). Dee Miles, who is head of the Section, is serving on the Financial Institution Cases Steering Committee for the MDL. Dee had this to say:

The banks and credit unions lost hundreds of millions of dollars in the Target data breach, and Target’s attempt to reach a ‘pennies on the dollar’ settlement in a secret negotiation outside of the MDL court’s jurisdiction with an unrelated party (MasterCard) by crafting a release of some of the financial institution’s claims is an outrage.

Dee says that Target has attempted to use a little-known small recovery procedure in the agreements MasterCard has with banks and credit unions to correct transaction errors known as the “Account Data Compromise.” He says this is a means to cheaply wiggle out of its legal responsibility for the financial institutions’ damages. Dee said further:

The MDL court bas control over the claims made against Target, and Target cannot release claims in the MDL with a party that is not in the MDL and then attempt to bind the financial institutions to that release. The PLC has filed the appropriate motions to stop this injustice and we believe Judge Magnuson will rectify the conduct of Target at the hearing scheduled in late April.

The massive Target data breach occurred just as the 2013 holiday shopping season was getting underway, between Nov. 27 and Dec. 15. It is believed to have compromised at least 40 million credit and debit cards and resulted in identity theft affecting as many as 110 million people. Personal information such as email addresses, phone numbers, credit and debit card numbers and PINs were stolen by hackers.

Many financial institutions were left holding the bag when their customers’ accounts were breached, responsible for closing accounts, reissuing credit and debit cards and taking the hit for unauthorized

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charges that were refused by the consumer. This resulted in hundreds of millions of dollars in damages.

The trial court has already denied Target’s attempts to dismiss the MDL lawsuit against it by ruling that the financial institutions’ claims for negligence and statutory violations of the Minnesota Plastic Card Act can proceed. The ruling was reached after finding that evidence of the lack of adequate security—despite knowledge of known data breach risk by Target and other retailers—existed as pled in the lawsuit.

The alleged settlement agreement, announced on March 19th, would reimburse MasterCard Inc. and would then be passed on to the financial institutions for expenses incurred when financial institutions were forced to reissue MasterCard debit and credit cards as a result of the data breach.

The case is In re: Target Corporation Customer Data Security Breach Litigation, U.S. District Court, District of Minnesota. If you need more information on this matter, contact Dee Miles at 800-898-2034 or by email at Dee.Miles@beasleyallen.com.

Sources: Law360.com, and Reuters

U.S. BANK SETTLES SUIT OVER FORCE-PLACED FLOOD INSURANCE

A California federal judge granted preliminary approval last month to a class action settlement between U.S. Bank NA, American Security Insurance Co. and plaintiffs who claim the bank charged homeowners lender-placed flood insurance rates inflated by kickbacks and policy backdating. U.S. Magistrate Judge Laurel Beeler said in her order that the 2,859 class members will be refunded 12.5 percent of the amount they were charged for flood insurance U.S. Bank placed on properties whose policies had lapsed. Given the approximately $4.1 million in unrefunded charges made during the class period, the total refund is about $507,000.

Class members who were charged for coverage backdated 120 days or more will receive between $50 and $100 in additional compensation based on how far back the date was pushed back. The order says that if checks are not cashed within 180 days, the money will go to other class members or to Habitat for Humanity. Judge Beeler says that U.S. Bank and ASIC will pay the class counsel’s attorneys’ fees up to $625,000 and the class representatives will receive an additional payment of $2,500, money that’s not included in the total class refund amount.

According to the settlement, for three years, U.S. Bank, ASIC and their affiliates will not accept payment related to lender-placed flood insurance on property owned by class members, not including payment on damage claims, and ASIC will not give U.S. Bank below-cost or free outsourced services in connection with lender-placed flood insurance on property owned by class members. In return, the class members release U.S. Bank and ASIC from all claims that were or could’ve been asserted in the class action.

The plaintiffs accused U.S. Bank of providing ASIC, a unit of Assurant Inc., with underwriting business in return for kickbacks of part of the premium payments it reaped. These kickbacks were paid to U.S. Bank under the guise of commissions and reimbursements, the complaint said. U.S. Bank allegedly failed to deduct these charges from the premiums it paid to homeowners and also charged for needless retroactive coverage that was backdated to include periods for which the property was already insured. The loans were originally issued by Fannie Mae or Freddie Mac and serviced by U.S. Bank.

Source: Law360.com

XVI. EMPLOYMENT AND FLSA LITIGATION

EX-WAL-MART WORKERS ASK U.S. SUPREME COURT TO LET $188 MILLION WIN STAND

The class action plaintiffs who won a nearly $188 million judgment against Wal-Mart Stores Inc. in Pennsylvania state court for denying breaks to workers have asked the U.S. Supreme Court to reject the retailer’s appeal. Lead plaintiffs Michelle Braun and Dolores Hummel, who claimed Wal-Mart owed them $3 million for 187,000 off-the-clock hours from 1998 onward, said in a filing with the court that Wal-Mart had a full opportunity to present individualized evidence at the 2006 trial. Wal-Mart claimed the employees’ win resulted from a “trial by formula.” The retail giant stated:

The courts below properly allowed the jury to consider Wal-Mart’s uniform business practices and its business records in answering the single, common question of liability, whether Wal-Mart failed to compensate its employees in accordance with its own written policies. This was a trial by corporate record and admission, not a ‘trial by formula.’

In petitions filed by Wal-Mart, it was contended that the plaintiffs used an unfair “trial by formula” that the U.S. Supreme Court expressly barred in its 2011 Dukes v. Wal-Mart decision. While only six plaintiffs testified on behalf of the class, the class’s experts used extrapolated evidence to calculate the total amount of damages suffered. The company added that the judgment violated its due-process rights and pursued multiple appeals before the Pennsylvania Supreme Court ruled to uphold the decision in December.

Braun and Hummel responded that Wal-Mart had a sophisticated computerized record-keeping system that allowed them to track workers’ rest breaks, noting that the company’s move to shut down the system was a “transparent bid” to prevent employees to prove damages from systemic wage and hour violations. As a result, the trial court instructed the jury—without objection from Wal-Mart—that they could make an adverse inference from this absence of records and use expert testimony to reach a verdict.

Wal-Mart was recently backed in its efforts to roll back the verdict by several business groups. The Retail Litigation Center, the U.S. Chamber of Commerce and the Product Liability Advisory Council all filed amicus briefs urging the high court to hear the case. The U.S. Chamber has never backed workers’ rights and is very much anti-consumer. Frankly, for these reasons, I wasn’t surprised that the U.S. Chamber would back Wal-Mart in the case. Hopefully, the plaintiffs will prevail and be able to receive all that is due to them under the law and facts of the case.

Source: Law360.com

XVII. PREMISES LIABILITY UPDATE

JURY RETURNS $11 MILLION VERDICT AGAINST CONCRETE SEALER MAKER

An Illinois state jury has returned a nearly $11 million verdict against a concrete sealer manufacturer. The verdict was in favor of a man who was burned over two-thirds over his body in an explosion when he was sealing his basement floor. The Cook County jury found in favor of Andrzej Plizja, who had claimed that The Euclid Chemical Co. failed to warn him about the dangers of using its concrete sealer inside. It was alleged that the product was too flammable to use indoors. The jury awarded him nearly $9.9 million for medical expenses, pain and suffering and lost wages. His wife, Katarzyna Plizja, was awarded $1 million for lost companionship. Matt Passen, who is with the
XVIII. WORKPLACE HAZARDS

WORKERS BEING FORCED INTO ARBITRATION ALONE

An old cliche says that "there is strength in numbers." This principle holds true in many situations. When one person is hesitant to go at something alone, they often find the courage when someone is standing next to them. Similarly, a person seeking to unfairly impose their will is more cautious when the intended victim has friends. Labor Unions have, for decades, effectively used "collective bargaining" to protect the rights of workers. It is no secret that many companies would rather negotiate with single employees rather than the workforce as a whole. This way they can "divide and conquer" and maximize their influence.

There was a time when workers collective rights were protected by the courts. However, worker's rights have increasingly come under assault. The erosion of worker's rights is reaching a crisis situation. Not only are workers losing rights they once had, they are now losing the right to band together. This trend is just fine with most of Corporate America.

Readers of this Report have heard for years about the abuses of mandatory, binding arbitration in consumer transactions. When a consumer goes to buy anything from a DVR to a refrigerator, to a car, they are forced to sign a waiver of their constitutional right to a jury trial and be forced to resolve any disputes through binding arbitration. Usually, the corporation reserves its right to sue in court if the consumer doesn't pay. These abuses have now thoroughly infiltrated the employment sector in America. It is now common for workers to be forced to waive their right to ever sue their employer in court if they want a job. In similar instances, employees who already have a job are being forced to waive their right to sue their company if they want to keep their job.

Companies argue that mandatory, binding arbitration is quicker and cheaper than litigation. However, there is little evidence to support these claims. There is even less evidence to support the claim that arbitration is fair to the worker. A 2011 Cornell University study found that arbitration favors employers and typically results in lower compensation awards to employees. One reason cases are harder to win in arbitration is because employees often get less discovery and opportunity to fully develop their case.

Awards are often lower because some arbitrators fear that if they give a fair award then they may never get picked to serve as an arbitrator again. The fact cases are harder to win in arbitration and lower payouts are being awarded makes it harder for some employees to find a lawyer to take their case. Rest assured, this is one of the intended outcomes of forcing both consumers and employees into arbitration.

Mandatory, binding arbitration is more oppressive in the workforce when employees are forced to sign "class action waivers" and "anti-joinder" provisions. Although a Plaintiff may have to go to arbitration to resolve their claims, they can technically file on behalf of themselves or join with other workers to bring claims. In these instances, their claims as a group are worth more than just an individual's claim. This fact makes it more likely that they will be able to find a lawyer to accept the case. Additionally, if you can show that other people have suffered the same injuries, it often makes your case stronger.

A class action waiver is an agreement that you will neither file a class action in arbitration nor participate in a class action against the employer. An "anti-joinder" provision is similar in that it says you will not join your lawsuit with another person even if you both suffered the same injuries from the same event. This is another "divide and conquer" tactic that is being used effectively. Currently, more than 43 percent of employers use arbitration clauses that preclude joinder and class actions. That is up from just 16 percent in 2012.

The fact that so many companies are switching to this abusive practice makes it obvious that the oppressive tactic is working. Congress needs to address this problem and start protecting American workers. Companies should not be allowed to force American workers to waive their Constitutional rights just to get a job. That is more power than any one company should be allowed to have. If you need more information on the subject contact Roman Shaul, a lawyer in our firm’s Consumer Fraud /Commercial Litigation Section, at 800-898-2034 or by email at Roman.Shaul@beasleyallen.com.

Source: Wall Street Journal

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XIX. ENVIRONMENTAL CONCERNS

OIL AND GAS DRILLER SETTLES FOR $73 MILLION IN COLORADO POLLUTION CASE

Noble Energy, a major oil and gas driller, has agreed to pay more than $73 million in a settlement with state and federal regulators over Colorado Front Range air-pollution violations. It was reported that the company’s tank batteries were emitting thousands of tons of chemicals a year, contributing to the region’s ozone pollution problem.

The company has agreed to pay about $90 million in improvements. A $4.95 million civil penalty will be split between the federal government and the state. Colorado will receive about $15 million.

Source: The Denver Post

SAVE THE BEES!

Today’s world is a tough place for bees, and it’s getting worse as bee populations plummet as a result of the increasing use of lingering toxic pesticides. Why should you care about bees? Scientists estimate that every third bite of food you eat is the result of pollination by a bee. No bees? No food. That should even get the attention of my “Tea Party” friends.

Now Earthjustice reports the Environmental Protection Agency (EPA) is considering expanding the number of crops that can be treated with a highly toxic pesticide called sulfoxaflor. The expansion would allow the chemical, manufactured by Dow AgroSciences and initially approved in 2014, to be used on food crops including corn, alfalfa, oats and others.

Nearly one third of our crops, including vegetables, nuts, fruits and seeds, depend on bees for pollination. The most commonly used pesticides today are known as neonicotinoids, or neonicos. They replaced organophosphates and carbamates about a decade ago. Although the older pesticides were highly toxic, they dissipated much more quickly than neonicos, narrowing their killing power to more targeted pests. For example, if used on rose bushes to get rid of aphids, they were less likely to stick around long enough to hurt a bee that came along later to pollinate the plant.

The new neonics don’t just sit on the surface of plants. Neonicotinoids penetrate a plant’s leaves and are taken up by the plant internally, making its leaves toxic to insects eating the leaves, and also turn the pollen and nectar deadly. It’s bad news for bees and other pollinating insects.

These new toxic insecticides are damaging both wild and domesticated bees. It’s reported that domesticated bees make up about two thirds of the world’s bee population, playing an important role in agriculture. Around 2006-2007, beekeepers noted an alarming trend, as colony losses—bees that die off in the winter—skyrocketed from about 10 percent to more than 30 percent. Some beekeepers reported a staggering loss of 80 percent of bees. This became known as Colony Collapse Disorder.

In 2014, a Harvard School of Public Health study suggested that even a small amount of neonic pesticide could “significantly harm honeybee colonies and cause mass wintertime die-offs.” The U.S. Department of Agriculture has warned that it is no longer confident in our ability to “meet the pollination demands of U.S. agricultural crops.”

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is supposed to protect people, bees and other wildlife from dangerous chemicals. However, the trend in the U.S. veers toward the “try it first, fix it later” school of thought, rather than the “better safe than sorry” wait-and-see approach adopted by the European Union and other nations. U.S. Pesticides and other chemicals are usually given the benefit of the doubt in the United States as being safe until proven otherwise.

Earthjustice is asking the public to join its petition that demands the EPA deny Dow AgroScience’s application to expand the registration of the bee-killing pesticide sulfoxaflor. Earthjustice has been involved in efforts to protect the public and the environment from dangerous chemicals for 40 years. It’s critically important to act now, and save the bees before it’s too late. For more information, and to sign the petition, visit www.eearthjustice.org and click on the “Take Action” button.

Source: Earthjustice

HIGH-INTENSITY SONAR ENDANGERING WHALE POPULATION

A new plan developed by the Navy puts thousands of whales and other marine life in danger due to new high-intensity sonar set to be used during training exercises. According to the Natural Resources Defense Council (NRDC), the sonar has already been identified as the root cause of death in thousands of whales all around the globe. Even the Navy’s own Environmental Review links the use of the sonar to hundreds of deaths, thousands of lung injuries and millions of cases of temporary hearing loss.

The mid-frequency sonar’s effects include blasting the ocean with noise that is billions of times stronger than natural aquatic sound, often causing whales’ internal organs to hemorrhage. In order to escape the immediate pain, many whales are forced to leave crucial feeding and mating grounds, further endangering the whale’s lifeline on our planet. While blue whales and North Atlantic right whales already suffer from dwindling populations, this sonar could make the difference in their recovery or extinction.

The NRDC has begun filing suit against the Navy to protect the ocean’s marine life from further assault. For more information on how to get involved in the NRDC’s efforts to save the whales, you can make a tax-deductible donation by visiting their campaign website at www.savethewhales.org. You can also contact your members of Congress in Washington to make sure they are aware of this problem.

Source: NRDC

XX. UPDATE ON NURSING HOME LITIGATION

THE EVOLVING USE OF PHYSICAL RESTRAINTS

One of the most difficult things for a person to do is to see their loved one in a medical setting with physical restraints on their wrists, ankles, or across their body. Physical restraints (as opposed to medication restraints) typically come in the form of wrist restraints, leg restraints and vest restraints. Physical restraints are defined as “any device, material or equipment attached to or near a person’s body and which cannot be controlled or easily removed by the person and which deliberately prevents or is deliberately intended to prevent a person’s free body movement to a position of choice and/or a person’s normal access to their body.” (Re-quoted in C. Gastmans & K. Milisen, Use of physical restraint in nursing homes: clinical-ethical considerations, J. Med. Ethics 2006 (Mar. 32(3): 148-152, 2005).

In nursing homes, restraints are used in two primary settings—when a patient is in bed to prevent him or her from falling out of bed, and when a patient is in a wheelchair to prevent the patient from getting out of the chair and falling. While it is less...
common in nursing homes, restraints have also been utilized at times to prevent a patient from removing an IV line, a catheter, or a feeding tube. In the rarest of cases, restraints may also be utilized when a patient is dealing with behavioral issues or psychological issues in order to control that patient until a medication has had time to become effective.

In the past, restraints were over-utilized by many nursing homes and became a method of avoiding having to watch or monitor patients. The belief by some is if the patient was restrained, then fewer staff hours were required to watch a patient to keep him or her from falling or wandering about the facility. The use of restraints also came with its own set of risks, with some patients being injured because of the very thing intended to protect them. This over-utilization and added safety risks, through the years, came under greater scrutiny, and as a result the use of restraints has been greatly minimized as the standards and medical practices with respect to this equipment have evolved.

Federal law (see 42 CFR § 483.13) and most states also address the use of restraints in nursing homes. Generally speaking, the use of restraints in nursing homes is prohibited unless the patient’s medical condition requires the use of restraints. Using restraints for the convenience of the facility or as punishment of the patient is a violation of the law and is never acceptable practice.

Whatever form of restraint a nursing home uses, it is essential that the nursing staff be adequately trained and educated on the application and the risks of these devices. Vest restraints must be properly placed on the patient and the tie-off to the bed or chair must be done appropriately. If not properly placed on the patient, the patient can attempt to slide out of the vest and become entangled. There have been reports of some patients getting their necks caught in the vest.

Wrist restraints should be made of soft, cottony material. The restraints should be applied in such a way to stay on while eliminating the risk of injury the wrists, such as causing breaks, circulatory flow issues, and the like. The same is true for leg restraints, which are most often applied around the ankles. Pedal pulses (at the ankle) are essential to maintain lower-limb blood flow and the return of blood to the heart. If the leg or wrist restraints interfere with the movement of blood through the body, the results can be fatal.

Too, older patients are at a heightened risk of developing skin tears and sores. Sores to the body in elderly patients can be a nightmare to treat and heal, and any open wound greatly increases the risk of bacte-

XXI. AN UPDATE ON CLASS ACTION LITIGATION

Sprint Settles U.S. Class-Action Lawsuit For $131 Million

Sprint Nextel Corp has agreed to a $131 million settlement of a class-action lawsuit accusing the third-largest U.S. wireless carrier of defrauding investors about problems dating back to its $36 billion merger with Nextel Communications Inc in 2005. The all-cash settlement resolves claims that Sprint, former Chief Executive Gary Forsee and other officials fraudulently inflated the company’s stock and bond prices between October 2006 and February 2008.

Investors said the Defendants falsely touted that Sprint was receiving billions of dollars of benefits from the merger and improving its subscriber base by tightening credit standards. Instead, investors said Sprint was struggling to integrate its cellular networks and was losing hundreds of thousands of subscribers, culminating in a $29.7 billion goodwill writedown in February 2008. All of the Defendants denied liability in agreeing to settle the 6-year-old lawsuit, according to settlement papers filed with the federal court in Wichita, Kan.
The preliminary settlement will require final approval by the court. Japan’s SoftBank Corp now owns 80 percent of Sprint. The settlement fund would give shareholders 26 cents per share of common stock before fees and expenses, a little more than 12 percent of the Plaintiffs’ damages estimate, if all class members participate.

PACE Industry Union-Management Pension Fund, Skandia Life Insurance Co. and the West Virginia Investment Management Board, the lead Plaintiffs in the suit, filed suit in 2009, seeking damages for losses on stocks purchased between October 2006 and February 2008.

Source: Law360.com

U.S. BANK SETTLES $200 MILLION PEREGRINE THEFT SUIT

Commodities broker Fintec Group Inc. and U.S. Bank NA have settled a class action lawsuit that claimed the bank helped cover up a former Peregrine Financial Group (PFG) CEO’s misuse of more than $200 million in customer funds. The suit, brought on behalf of companies that had independent introducing broker agreements with the now-bankrupt Peregrine, alleged that due to Peregrine’s illicit actions, the broker companies were denied commodities and futures commissions they were entitled to and lost security deposits entrusted with Peregrine.

Fintec said U.S. Bank was responsible for aiding and abetting fraudulent conduct by Peregrine by allowing it and CEO Russell Wasendorf to make unauthorized withdrawals from customer accounts at U.S. Bank. Fintec alleged that U.S. Bank violated the Commodity Exchange Act, committed fraud, aided and abetted the theft of the funds and was negligent in the handling of those funds. Fintec alleged further that because of Peregrine’s bankruptcy, it lost out on commissions payable for the month of June and for the days of July 2012 before Peregrine’s bankruptcy. It also said it has not had a $50,000 security deposit returned. Based on relevant financial regulations, Fintec said that U.S. Bank had a duty to safeguard customer funds deposited in the bank, and that it knew or should have known that Peregrine was misusing the funds, based on the withdrawals.

The suit came after two other complaints were filed against U.S. Bank over the alleged misuse of PFG customer funds. One was filed by Peregrine customers not including brokers like Fintec. Then another was filed by the U.S. Commodity Futures Trading Commission. Wasendorf admitted to stealing $100 million from Peregrine and was sentenced in January to 50 years in prison.

Source: Law360.com

AIG TO PAY $40 MILLION IN PENSION PLAN CLASS ACTION SETTLEMENT

American International Group Inc. (AIG) will pay $40 million to settle proposed class action litigation alleging that the insurer’s employee pension plans improperly invested in its own poorly performing stock following the 2008 mortgage crisis. The settlement would pay beneficiaries of the plans from August 2007 to May 2009, who according to the motion seeking preliminary approval, are on board with the settlement.

The Plaintiffs had been seeking up to $300 million in damages based on the 2007 to 2009 time period, but a more realistic damages period might have started in February 2008, according to the motion filed with the Court. That would put the plans’ maximum potential losses at about $205 million. The settlement, if approved, would represent only 20 percent of the total possible damages. The Plaintiffs said in the motion:

In plaintiff’s view, this case presents a colossal failure by the plan’s fiduciaries to protect the participants from massive losses that occurred. Nonetheless, plaintiffs recognize that liability is not automatic.

The class action, consolidated in 2009, claimed that the Defendants breached their fiduciary duties by encouraging employees to invest in AIG stock through pension plans, while the company invested heavily in the disastrous subprime mortgage market that led to its near collapse.

The suit alleged that the Defendants breached their duty to manage and administer the plans—and the plans’ investments—in the sole interests of beneficiaries, by continuing to invest in AIG stock as it declined in value. Despite early concerns that the bottom would fall out of the market, the nation’s largest insurer continued to integrate subprime mortgages into its business model during the class period, assuring investors that it would not be adversely affected by its exposure to the looming credit crisis, the Plaintiffs claimed.

Source: Claims Journal

WALGREEN TO PAY $11 MILLION TO SETTLE PRESCRIPTION ROBOCALL SUIT

Walgreen Co. has agreed to pay $11 million to settle a class suit accusing it of violating the Telephone Consumer Protection Act (TCPA) by placing robocalls to customers’ cellphones with prerecorded prescription reminder messages. The settlement stipulates that Walgreens will pay $11 million into a settlement fund, which will be used to pay class members’ claims and will fund notice and settlement administration expenses, along with attorneys’ fees. Putative class members can expect to receive around $20 each for their claims, according to the motion.

All consumers who received a prerecordscription call from Walgreens to their cellphone are included in the proposed nationwide class. This is expected to include more than 9 million individuals. None of the money in the fund will revert back to the retailer, according to the motion. Walgreens has also agreed to improve its procedures for confirming that customers have consented to receive prerecordscription calls to their cellphones, and to more easily allow individuals to opt in or out of the refill reminder program. The Plaintiffs said in the motion:

The settlement—in terms of tangible monetary relief and improved customer telephone contact practices moving forward—is strong, both compared to other similar TCPA actions and when viewed in light of the risks of protracted litigation. As it relates to Walgreens’ defenses and the relationship of the parties, the strength of the settlement becomes even more apparent.

The Plaintiffs acknowledged in the motion that the suit is not a “prototypical” TCPA case in that the calls went to pharmacy patients with a current prescription at Walgreens, which was due for refill. The retailer had also argued that the calls could be viewed as medical alerts, which would be allowed by the statute under its “emergency purpose” exception. If the prescriptions were left unfilled, the consumer could potentially suffer adverse health consequences, the retailer claimed. Settlement class members who submit claims will receive a pro rata share of the settlement after attorneys’ fees, an incentive award, and settlement administration expenses have been paid.

Source: Law360.com

CLASS ACTION LAWSUIT OVER MOLDY CAMRYS FILED AGAINST TOYOTA

A putative class action has been filed against Toyota Motor Sales USA Inc. in a California court. It’s alleged in the suit that Toyota knew of a defect in its Camry models that causes the cars’ air conditioning system to become ineffective, leading to mold buildup and foul odors that can cause health problems in drivers. The lead Plaintiffs claimed in their complaint that the automaker’s 2012 Camry models have a “uniform and widespread defect” in the
heating, ventilating and air conditioning systems that causes emissions of noxious and foul odors from the growth of mold in the system. The automaker knew about the defect prior to the sale of the vehicles, the suit said. The complaint alleged:

**Defendant has actively concealed and failed to disclose this defect to plaintiff and class members at the time of their purchase or lease of the class vehicles and thereafter.**

The HVAC system in the affected Camry models contains one or more design or manufacturing defects that causes the emissions of the bad odors from the mold, according to the suit. Exposure to mold and its related smells is “extremely dangerous” and can lead to sickness, nasal stuffiness, eye irritation, wheezing and other health problems, the suit said. The complaint claimed the mold emanating from the HVAC system in the 2012 Camry vehicles grows on a part known as the evaporator, which is located inside the car dashboard. When cold refrigerant passes into the evaporator, it absorbs heat from the air in the passenger compartment and collects moisture from condensation, which creates a favorable growing condition for mold, the suit alleged.

It’s alleged in the suit that when a consumer complains of the mold build-up in his or her Camry, Toyota “merely replaces” the defective HVAC components with the very same components, and doesn’t repair the defect, in violation of warranty. Toyota knew, or should have known, about the defect as early as 1997, but instead, it’s alleged that the automaker “actively concealed” the defect and didn’t inform consumers. Toyota had “already offered” previous model year Camry vehicles that had similar HVAC systems and acknowledged the defects as early as 1997 and as recently as 2009, according to allegations in suit. The complaint asked the court to certify a class of California purchasers of 2012 Camry vehicles and the suit is in the Superior Court of the State of California for the County of Los Angeles.

Source: Law360.com

**DODGE RAM FALSE SAFETY-STICKER LAWSUIT FILED AGAINST FCA**

A putative class action lawsuit has been filed in a South Carolina federal court against FCA US LLC. The automaker is accused of affixing inaccurate safety stickers on certain Dodge Ram trucks that included false rear axle ratios. Lead Plaintiff Robert K. Besley claims Dodge Ram 1500 vehicles feature “Monroney stickers” that contain false representations, making it appear that the trucks came with original equipment that included larger rear axle ratios than the standard equipment listed on the stickers. The complaint said:

**Plaintiff and the class were damaged because the pickup trucks they purchased did not contain the rear axle ratios that were represented, making the pickup trucks less valuable than the pickup trucks would have been had FCA’s representations been true.**

The 2014 Ram 1500 Big Horn pickup truck was purchased in January 2014 in Aiken, S.C. The truck had a Monroney sticker affixed to it, representing that the truck had original equipment, including a 3.55 rear axle ratio, as opposed to the standard 3.21 rear axle ratio. It appears from the complaint that the FCA informed Besley through a customer service call that the information provided in the sticker was incorrect nine months after his purchase. His Ram model was equipped with a 3.21 rear axle ratio after all. But Besley claims that he purchased the specific Ram model because he wanted the increased towing capacity from the larger rear axle ratio. He says Chrysler offered him $750 in credit, but the cost of increasing the rear axle ratio would cost “substantially more than $750.” It was alleged in the complaint: “At no time during his discussions with Chrysler customer service was plaintiff offered a complimentary replacement of his rear axle.”

Because Chrysler sells more than 350,000, the suit says that class certification is warranted. That’s because the proposed class would consist of “at least thousands of individuals” who purchased Ram pickup trucks with deceptive Monroney stickers. William E. Hopkins, Jr., of Hopkins Law Firm and William G. Besley represent the plaintiff. The suit is in the U.S. District Court for the District of South Carolina.

Source: Law360.com

**CLASS SUIT FILED AGAINST HYUNDAI OVER SONATA ENGINES ALLEGED TO BE DEFECTIVE**

A putative class action was filed last month against Hyundai Motor Co. The automaker was accused of concealing an engine defect in certain Sonata models that could cause “catastrophic engine failure” over time, posing a risk to owners and their passengers. It was alleged in the suit that the automaker has known for years that its 2011-2012 Sonata vehicles with a Theta II engine contain defective connecting rod bearings that shed metal debris, which contaminates the engine oil and spreads to other parts of the engine, ultimately leading to engine failure. The complaint alleges:

**The failure of the connecting rod bearings can cause complete and catastrophic engine failure while the class vehicles are in operation at any time and under any driving conditions or speeds, and the insufficient lubrication channels accelerates the time it takes the class vehicles to experience catastrophic engine failure.**

The putative class claimed Hyundai intentionally concealed information about the defect from consumers and that the company didn’t tell customers the defect would hurt the cars’ resale value. It’s alleged in her complaint:

**Notwithstanding its longstanding knowledge of this design defect, Hyundai has routinely refused to repair the class vehicles without charge when the defect manifests. Indeed, in many cases Hyundai even has refused to disclose the existence of the defect when class vehicles displaying symptoms consistent with the defect are brought in for service, instead choosing to ignore the defect until they have caused significant mechanical problems necessitating costly repairs.**

Lead Plaintiff Elizabeth Mendoza filed the suit on behalf of herself and other purchasers or lessors of 2011-2012 Sonata vehicles. A used 2011 Sonata was purchased according to the complaint. It was alleged that she drove it for about 50,000 miles before blowing a piston in her engine. The dealership demanded $4,500 for repairs, which Mendoza refused to pay, and she later had it fixed by a local mechanic for $3,000. Ms. Mendoza alleged violations of California’s Consumer Legal Remedies Act, Unfair Competition Law, False Advertising Act and breach of express warranty and common law fraud, among other claims. The suit seeks to establish both a nationwide and state class of potentially hundreds of thousands of class members.

Source: Law360.com

**NISSAN FACES CLASS ACTION OVER RUST-PRONE FLOORBOARDS**

A putative class action has been filed against Nissan North America Inc. in an Illinois federal court. It’s alleged that the automaker concealed from consumers that certain Altima vehicles were equipped with defective floorboards that “substantially deteriorate” to the point where the roadway under the vehicle becomes visible. The suit claims model year 2002-2006 Nissan Altima vehicles feature floorboards that cannot withstand normal
exposure to the elements, do not drain properly and rust to the degree where the floorboards deteriorate and holes open up.

The putative class says Nissan refused to disclose the defect to consumers and refuses to cover the cost of repairs. The complaint alleges:

Because the replacement of the floorboard can cost several thousand dollars, and because Nissan refuses to recognize the existence of the defect or to cover the full cost of repairs, many owners of class vehicles are not in a position to replace the defective floorboard when they discover the problem.

Lead Plaintiff Marie DeMaria filed suit on behalf of herself and other consumers who purchased 2002-2006 Altima cars. She says at least one accident with injuries has been reported as a result of the defect, and that “hundreds” of other drivers have complained about the defect to Nissan and the National Highway Traffic Safety Administration (NHTSA), saying they no longer feel safe in their vehicles. It’s alleged that the Altima has “consistently accounted for a significant portion of Nissan’s sales.”

The automaker represents the car as a “top safety pick.” As with other cars, the Altima comes factory-equipped with floorboards at the bottom of the passenger cabin, made of metal and covered by carpet on the interior side, while the exterior side is exposed metal, the complaint says. It’s alleged further that while floorboards are “intended” to last the life of the vehicle, the affected Nissan models are “prone to rusting and corroding in the course of normal operation of the vehicles, which can lead to large holes developing in the floorboards.”

The lead Plaintiff says that Nissan allegedly knows of the defect, yet refuses to cover the cost of repairs. Drivers are forced to pay for their own replacement floorboards, and the automaker provides no guarantees that the replacement parts won’t suffer from the same problem, the suit says. The complaint asks that the judge certify a class of Illinois consumers who purchased the affected vehicles.

Source: Law360.com

**Class Action Suit Filed Over Arsenic Content in Wines**

A class action suit was filed in federal court on April 20. Dozens of California wineries and distributors—including F. Korbel & Bros. Inc., Sutter Home Winery Inc. and Trader Joe’s Co.—produce and sell wine containing dangerous levels of arsenic, without informing consumers, according to a potential class. Zahira Crespo-Bithorn alleged in the suit that the winemakers and distributors have produced or sold wine containing inorganic arsenic and have concealed that fact from consumers, who are at risk for maladies ranging from nausea and bronchitis to cancer, encephalopathy and death. The complaint alleges that just a glass or two of these arsenic-contaminated wines a day over time could result in dangerous arsenic toxicity to the consumer.

Crespo-Bithorn alleges that other “responsible” wineries limit the arsenic in their wines to legal limits with filtering procedures, but that the Defendants’ products contain up to 500 percent of the maximum acceptable safe daily limit. The complaint said further that the Defendants have violated federal laws, as well as statutes from all 50 states, and accused the wineries and distributors of “secretly poisioning wine consumers” by failing to disclose that their products contain any amount of inorganic arsenic. It’s alleged that scientific evidence linking inorganic arsenic to a variety of health problems has been available since at least 1987. The complaint alleges:

Even today, with the sophisticated testing equipment available to wine-makers and distributors, Defendants still conceal and/or refuse to warn the typical wine consumer about the true risks they are taking by ingesting and consuming their product.

The Plaintiff said that government regulators don’t test wine for arsenic or other toxic ingredients, but also cited three annual studies produced by a testing program run by the Alcohol and Tobacco Tax and Trade Bureau that concluded dozens of winemakers’ labels were not compliant.

Crespo-Bithorn accused the defendants of negligence, unjust enrichment and breaching their warranties, and claimed that members of a nationwide class could number “in the millions.” A class comprised solely of Louisiana consumers was proposed. The complaint seeks punitive damages and also asks that the Defendants be ordered to disgorge their ill-gotten gains, stating that each proposed class member’s individual damages would be at least $25.

The Defendants should also be required to produce corrective advertising and notify consumers of their products’ health risks, the complaint said. The case is in the U.S. District Court for the Middle District of Louisiana.

Source: Law360.com

**Hitachi To Pay $47 Million To Settle Some Claims In Antitrust MDL**

Hitachi Automotive Systems Ltd. will pay $46.7 million to settle allegations in nine Michigan federal suits that it fixed prices on alternators, starters and other auto parts. Hitachi is the latest company to settle claims in the multidistrict litigation (MDL). The proposed settlement would resolve end-payor Plaintiffs’ claims against Hitachi Automotive Systems, Hitachi Automotive Systems Americas Inc. and Hitachi Ltd., according to a motion for preliminary approval filed with the court by the Plaintiffs. A lawyer for auto-dealer Plaintiffs told Beasley Allen Lawyer Gibson Vance Named To PSC For Community Health Systems Data Breach Litigation

Gibson Vance, a lawyer in our firm, has been appointed to serve on the Plaintiffs Steering Committee (PSC) for multidistrict litigation (MDL) surrounding a massive data breach affecting customers of Community Health Systems, Inc. The litigation is consolidated under Judge Karen Owen Bowdre, who is in the U.S. District Court, Northern District of Alabama.

In January, Community Health Systems, Inc. (CHS), admitted data from its affiliated physician practices and clinics was breached in what it terms a “foreign-based cyber-attack” on its computer network. The cyberattack occurred in April and June 2014 but was not publicly disclosed until August 2014. Data taken included patients’ names, addresses, birthdates, social security numbers and, in some cases, telephone numbers and the names of employers or guarantors. An estimated 4.5 million individuals who obtained services from CHS-affiliated physicians in the last five years may have been affected. Gibson had this to say:

This is important litigation and I am honored to be a part of the Plaintiffs Steering Committee. I look forward to working with attorneys from around the country on this case.

Community Health Systems is the largest operator of acute-care hospitals in the United States. Its affiliates own, operate or lease 206 hospitals in 29 states, with approximately 31,100 licensed beds.

Source: Beasleyallen.com
The cases are part of an MDL that followed the U.S. Department of Justice (DOJ) ongoing investigation into the auto parts industry that has already yielded more than $2 billion in fines. The MDL—known as In Re: Automotive Parts Antitrust Litigation—has been split into separate proceedings for different automotive parts. The parts at issue in the instant proceedings also include ignition coils, motor generators, inverters, fuel injection systems, valve timing control devices, air flow meters and electronic throttle bodies. The end payors and Hitachi Automotive Systems—which previously agreed to pay a $195 million criminal fine to the DOJ—agreed to the settlement in late March.

The filing came after the auto dealers told the court that Panasonic Corp. would pay $5.4 million to settle allegations against them in three suits in the MDL. The auto dealers had reached a separate $17.1 million settlement to resolve a related putative class action. Meanwhile, the Justice Department said auto parts supplier Robert Bosch GmbH had agreed to plead guilty and pay a $57.8 million criminal fine for conspiring to fix prices for spark plugs and other auto parts.

The MDL arose from alleged conspiracies among the auto industry’s biggest manufacturers, marketers and sellers of auto parts to fix the prices, rig bids and allocate the market and customers in the U.S. for the products. The end-payor Plaintiffs and the classes they seek to represent are consumers and companies who indirectly bought or leased new vehicles containing one or more of the auto parts at issue in the instant suits.

The end payors said that their settlement also covers automotive sensors, transmission control units and engine control units, which are encompassed by Hitachi Automotive Systems’ plea deal with the government. The settlement agreement didn’t include an order for restitution. It was stated on the end payors’ filing that it was because of the potential for recovery through civil causes of action. The end payors said in their motion for preliminary approval that the instant settlement also requires the Hitachi entities to provide attorney proffers, witness depositions, and transactional data and other documents that will strengthen their claims against non-settling Defendants.

Source: Law360.com

**AT&T To Pay $25 Million To Settle FCC Data Breach Claims**

The Federal Communications Commission (FCC) has reached a $25 million settle-

As the nation’s expert agency on communications networks, the Commission cannot—and will not—stand idly by when a carrier’s lax data security practices expose the personal information of hundreds of thousands of the most vulnerable Americans to identity theft and fraud.

As this action demonstrates, the Commission will exercise its full authority against companies that fail to safeguard the personal information of their customers. That is good news. This $25 million settlement is the FCC’s largest privacy and data security enforcement action to date. In the past year, the FCC has taken five major enforcement actions valued at more than $50 million in order to protect consumer privacy and data security. The failure to reasonably secure customers’ personal information violates a carrier’s duty under Section 222 of the Communications Act, and also constitutes an unjust and unreasonable practice in violation of both state and federal laws.

If you need more information on this matter, contact Alison Hawthorne, a lawyer in our Consumer Fraud/Commercial Litigation Section, at 800-898-2034 or by email at Alison.Hawthorne@BeasleyAllen.com.

**Sources:** Law360 and FCC’s April 8, 2015 Press Release

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**XXIII. RECALLS UPDATE**

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

**FIAT CHRYSLER RECALLS 46,000 VEHICLES FOR IGNITION SWITCH AND AIRBAG ISSUES**

Fiat Chrysler has launched two recalls covering more than 46,000 vehicles for ignition switch and airbag issues. The automaker is calling back an estimated 43,874 manual-transmission Jeep Liberty and Wrangler SUVs and Dodge Viper cars from the 2006 model year for possible ignition-switch problems and 2,408 Ram ProMaster City vans from the 2015 model year for airbag deployment issues.

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**Law360**

BeasleyAllen.com
Fiat Chrysler will replace the clutch ignition interlock switches on manual-transmission Libertys, Wranglers and Vipers after engineers found that the vehicles have switches that contain a type of wire that was involved in a 67,000-truck recall in December. The wire may break, preventing the vehicle from starting. If a driver does not follow recommended procedures for starting the vehicle, the vehicle also could move unintentionally when the ignition key is turned.

The automaker is notifying customers of the issue and letting them know of service availability. At present, customers are advised to follow recommended procedures for starting their vehicles, such as activating the parking brake, placing the shift lever in neutral and pressing the clutch pedal before turning the ignition key. The recall affects an additional 2,944 vehicles in Canada, 706 in Mexico and 11,309 outside North America.

Fiat Chrysler is recalling the Ram Pro-Master City cargo and passenger vans to remove a section of tape from the side-curtain airbags. Engineers found that the tape used for airbag installation during vehicle assembly may prevent airbags from fully deploying. About 1,500 vans in Canada have also been recalled. Fiat Chrysler said it knows of no injuries or accidents related to either recall.

**VW Recalls 20,000 Routan Minivans Over Ignition Defect**

Volkswagen Group of America Inc. is recalling 20,676 Routan minivans made by Fiat Chrysler Automobiles NV. The automaker is concerned that their ignition switches might cause air bags not to deploy. This came after Chrysler recalled 700,000-plus vehicles over the same issue.

The recall, which affects 18,521 Volkswagen Routan minivans from the 2009 model year and 2,155 from 2010, will address a defect that can inadvertently allow the ignition key to slip into the “off” or “accessory” position in bumpy road conditions, turning off the engine and disabling air bags and other safety systems, the National Highway Traffic Safety Administration (NHTSA) said in a letter acknowledging the recall. Many of the affected vehicles were previously recalled last year, but the NHTSA said that the fix wasn’t sufficient and that the entire ignition switch has to be replaced.

Volkswagen said in a filing with NHTSA that it will notify owners, and dealers will replace the ignition switch and key fobs free of charge. The recall is expected to start this month for 2009 Routan vehicles and in August for 2010 Routan vehicles. Volkswagen said:

> Until this recall is performed, customers should remove all items from their key rings, leaving only the ignition key. The key fob (if applicable), should also be removed from the key ring.

According to a Volkswagen spokesman there have been no reported accidents or injuries related to the ignition switch issue. The announcement came after Chrysler said in early March that it had recalled 702,578 Dodge Grand Caravans model years 2008 through 2010, Dodge Journeys from 2009 and 2010 and Town & Country from 2008 through 2010 over the same issue. Like Chrysler, Volkswagen has instructed owners awaiting repairs to the affected vehicles to remove additional weight from their key rings to reduce the likelihood that the ignition will slip. Before it was discontinued in 2013, the Routan was built at the same Windsor, Ontario, plant as the Town & Country and Grand Caravan, and the three minivans share the same basic platform and many of the same parts and features.

In March 2011, Chrysler recalled nearly 250,000 of its 2010 model year Town & Country and Dodge Grand Caravan minivans and Dodge Journey SUVs over the ignition defect. That recall was expanded by almost 700,000 vehicles in June, adding additional 2008 to 2010 minivans and 2009 to 2010 Dodge Journeys. The decision to expand the recall came after the NHTSA, prompted by the GM ignition switch scandal, launched two investigations into a total of 1.25 million Chrysler vehicles that had received complaints over ignition problems.

In July 2014, Volkswagen recalled 18,526 Routans from model year 2009 for the same issue, and a detent was fitted to fix it, according to the spokesman. But federal regulators said that the fix wasn’t adequate, prompting Thursday’s recall.

**Nissan and BMW Recall Cars Over Bosch Fuel Pump Defect**

BMW of North America, LLC and Nissan North America, Inc. are recalling more than 94,000 vehicles potentially equipped with defective Robert Bosch GmbH-manufactured fuel pumps that can cause the cars to unexpectedly stall. Nissan is recalling 76,242 model year 2014 Rogue vehicles, while BMW is recalling 18,054 model year 2014 2 and 3 series, as well as model year 2014 and 2015 4 series vehicles. The cars feature fuel pumps made by Bosch that potentially have improper nickel plating, which causes the pumps to fail, the agency said Thursday in letters acknowledging the recalls. Pumps equipped with improper plating can cause the vehicles to stall without warning and increases the risk of traffic accidents, according to NHTSA. BMW said in its filing:

> Contamination due to improper nickel plating of certain sub-components within the fuel pump may cause excessive friction, potentially resulting in an inoperative fuel pump. If the fuel pump becomes inoperative due to this condition, the vehicle operator may experience a no-start condition or in rare cases a stalling condition without the ability to restart the vehicle.

BMW first notified NHTSA of the issue and its voluntary recall on March 26, saying that it noticed an increase in fuel pump warranty claims in July. The automaker began monitoring worldwide warranty data and analyzed returned field parts, according to the documents. Bosch conducted investigations of additional field parts between October and December, the automaker said, and found that a possible nickel plating issue may have led to the elevated warranty rates. Between January and March, Bosch examined its production records and quality control information, identifying the production dates and affected parts. BMW decided to conduct a voluntary recall on March 19, even though it hasn’t received any reports of accidents or injuries stemming from the issue, according to the filings.

Nissan notified NHTSA on March 30, saying in its filing that it first identified an incident involving a no-start condition in one of its Rogue vehicles last March. Nissan’s timeline of discussions with Bosch mirrors BMW’s. The automaker elected to conduct its vol-

**JereBeasleyReport.com**

**Ford Recalling 390,000 Cars Over Door Latch Safety Problems**

Ford Motor Co. has recalled 390,000 cars believed to be affected by faulty door latches that may prevent doors from closing or allow them to unlatch while the car is in motion. This is the third and largest door latch-related recall so far this year. The automaker said 2012-2014 Ford Fiestas and 2013-2014 Ford Fusion and Lincoln MKZ vehicles may be affected by the door latch problem. Ford said the cars may experience a broken pawl spring tab, which may prevent the latch from working or allow the door to unlatch while on the road, increasing the risk of injury.

Two customers have complained of injuries sustained when the door bounced back and hit them after they attempted to close it, Ford said, as well as one incident in which a driver’s door opened during parking and damaged an adjacent vehicle. The recall is the third latch-related recall by the automaker in 2015, following a March recall of 213,000 Ford Explorer and Police Interceptor SUVs and a January recall of 205,000 Ford Taurus sedans. The recall was announced just weeks after NHTSA said it was ratcheting up its investigation of doors popping open or failing to stay latched on certain Ford Fiesta models following hundreds of reports of car doors opening inadvertently, often while the car was in motion.

NHTSA launched its preliminary investigation of door latch problems in 2011 to 2013 Ford Fiesta models in September and upgraded it to an engineering analysis on Feb. 27. The agency’s Office of Defects Investigation has received 207 unique reports of latch problems in the car models, 65 of which claim a door opened while the car was moving. The agency goes through an engineering analysis to determine if it needs to ask an automaker to issue a recall.

The Office of Defects Investigation said the rate of door latch failures in the Ford models is “comparable” to those in other door latch failure investigations. It also questioned the efficacy of warning signals, given the number of claims that a door opened while the car was moving. In response to the agency’s information request, Ford said it had received 451 unique reports about door latches in Ford Fiestas.

**BMW Recalls 2,067 4 Series Convertibles Over Air Bag Issues**

BMW of North America is recalling approximately 2,067 2015 BMW 4 Series Convertibles in order to repair a problem with the driver’s front airbag. The National Highway Traffic Safety Administration (NHTSA) said in a recall summary:

*Due to a programming error, the driver’s front airbag deployment timing may be incorrect. If the driver’s front airbag deployment timing is incorrect, there is an increased risk of personal injury in the event of a vehicle crash.*

The NHTSA report says the recalled vehicles don’t comply with the requirements of Federal Motor Vehicle Safety Standard No. 208. Vehicles affected by the recall include certain model: 2015 428i Convertible, 428i xDrive Convertible, 435i Convertible, and 435i xDrive Convertible vehicles. The recall is expected to start in June, according to the NHTSA. All affected vehicles were built from Oct. 22, 2014 to Feb. 27, 2015.

NHTSA was told by the automaker that it is not aware of any accidents or injuries as a result of the recall. BMW is telling its dealers to reprogram the airbag control module with a corrected version of the software. This means nothing will be taken off a car and it’s said the software update won’t take long. The software update will be completed free of charge to owners. Owners can contact BMW’s customer service line at 800-525-7417 for more information. Owners can also call NHTSA Vehicle Safety Hotline at 888-327-4236, or go to SafeCar.gov.

**Suzuki Recalls 2 Million Cars Over Ignition Switch Defect**

Suzuki Motor Corp. has recalled 1.78 million vehicles in Japan, including Suzuki models and Chevrolet Cruzes it manufacturers in the country, because of a defect in the vehicles’ ignition switches that can lead to smoke fumes and possible grease fires. The recall covers Suzuki Alto, Kei, Wagon R, Twin and Swift models manufactured between 1998 and 2009, in addition to the Cruze models it made for General Motors LLC in Japan between 2001 and 2009. Suzuki had already called for a recall of 125,755 affected vehicles on March 31.

According to a filing with Japan’s transportation ministry, the affected vehicles feature ignition switches that can emit smoke and even potentially start a fire when grease applied to the part comes into contact with the decaying metal of the switch, which can overheat. Suzuki said it will replace the defective parts free of charge as soon as possible.

**Yamaha Recalls Viking VI Sxs Due To Crash Hazard And Driving Ban Instated**

There was some bad news for the owners of the Yamaha Viking VI side-by-side vehicles last month. The Consumer Product Safety Commission (CPSC) and the manufacturer announced the recall campaign number 15-727 and an interdiction to ride the vehicles. The recall and riding ban affects around 3,500 2015 model year YXC700DF (Viking VI), YXC700DHFH (Viking VI Hunter), YXC700PF (Viking VI EPS) and YXC700PHFH (Viking VI EPS Hunter) Sxs vehicles. So far, no injuries or other incidents have been reported.

These side-by-side machines may lose the rear wheels. Yamaha and the CPSC have not provided detailed information on what may cause this very serious problem. The only mention from the CPSC was:

*The rear wheels can loosen and cause the rear end of the vehicle to wobble or the rear wheels to come off and cause the vehicle to crash, resulting in an injury or death hazard.*

The reasons for the problem should be included. Customers can determine the model number of their Viking VI machines by checking the owner’s manual supplied with the vehicle or analyzing the VIN. The letter F in the 10th position of the Vehicle Identification Number (VIN) indicates that the Sxs is a 2015 model. The affected Viking VI six-seaters have been sold in dealerships June 2014 through March 2015, in Realtree camo, hunter green, red and steel blue colors. Yamaha is contacting registered owners directly, and authorized mechanics will repair them for free.
BMW OF NORTH AMERICA ISSUES A RECALL FOR 43,426 MOTORCYCLES

BMW of North America, LLC (BMW) has recalled 43,426 motorcycles. They include model year 2005-2010 R1200GS and R1200RT, 2006-2010 R1200GS Adventure, 2007-2010 R1200R, 2007 R1200S and K1200R Sport, 2005-2007 R1200ST, 2008-2009 HP2 Megamoto, 2006 HP2 Enduro, 2008-2010 HP2 Sport, 2005-2008 K1200S, 2006-2008 K1200R, K1200GT, 2009-2011 K1300S, 2010-2011 K1300R, and 2009-2010 K1300GT motorcycles. In the affected motorcycles, the rear wheel mounting flange may crack if the rear wheel mounting bolts are overtightened. If the rear wheel mounting flange cracks, the mounting bolts may loosen and the rear wheel may not remain secured to the motorcycle, causing a loss of stability and increasing the risk of a crash. BMW will notify owners, and dealers will replace the existing aluminum rear wheel flange with a steel one, free of charge. The recall was expected to begin on April 21, 2015. Owners may contact BMW customer service at 1-800-352-7417.

TREK RECALLS BICYCLES EQUIPPED WITH FRONT DISC BRAKES TO REPLACE QUICK RELEASE LEVER

Trek bicycles equipped with front disc brakes have been recalled by Trek Bicycle Corporation, of Waterloo, Wis. An open quick release lever on the bicycle’s front wheel hub can come into contact with the front disc brake assembly, causing the front wheel to come to a sudden stop or separate from the bicycle, posing a risk of injury to the rider. This recall involves all models of Trek bicycles from model years 2000 through 2015 equipped with front disc brakes and a black or silver quick release lever on the front wheel hub that opens far enough to contact the disc brake. Bicycles with front quick release levers that do not open a full 180 degrees from the closed position are not included in this recall. Trek reports three incidents, all including injuries. One incident resulted in quadriplegia. One incident resulted in facial injuries. One incident resulted in a fractured wrist.

The brakes were sold at bicycle stores nationwide from about September 1999 through April 2015 for between $480 and $1,650. Consumers should stop using the bicycles immediately and contact an authorized Trek retailer for free installation of a new quick release on the front wheel. Trek will provide each owner who participates in the recall with a $20 coupon that is redeemable by December 31, 2015 toward any Bontrager merchandise. (The coupon has no cash value.) Contact Trek at 800-373-4594 from 8 a.m. to 6 p.m. CT Monday through Friday, or online at www.trekbikes.com and click on Safety & Recalls at the bottom of the page for more information.

HUSKY VERTICAL BIKE HOOKS RECALLED BY WATERLOO INDUSTRIES DUE TO RISK OF INJURY

Waterloo Industries Inc., of Waterloo, Iowa, has recalled its Husky® Securelock™ Vertical Bike Hooks. The mounted bike hooks can unexpectedly detach, allowing the bike to fall. This poses a risk of injury to bystanders. This recall involves Husky® Securelock™ vertical bike hooks used with a Husky Trackwall garage storage system. The 3 by 3.5 inch black metal plate is mounted to the grooves in the Trackwall and the bike’s tire is attached to a hook protruding from the plate. There are no markings on the hook. The Trackwall has “Husky” printed on the lower left corner. The hook holds up to a 35 pound bike. The company has received 22 reports of the bike hooks falling from the mounted Trackwall, including 12 reports of property damage to bicycles and/or nearby vehicles. No injuries have been reported.

The bike hooks were sold exclusively at Home Depot stores nationwide from April 2011 to March 2015 for about $9. Consumers should immediately stop using the recalled hooks and return them to the nearest Home Depot store for a full refund. Contact Waterloo Industries at 800-833-8851 from 8 a.m. to 5 p.m. ET Monday through Friday, or online at www.homedepot.com and click on “product recalls” for more information.

GIANT FACTORIES RECALLS WATER HEATERS OVER FIRE RISK

Giant Factories of Canada has recalled 240 water heaters that were sold in 2014 because they could catch fire or explode. The company says that in some cases, the joint between the heater’s combustion chamber and the water tank that holds the water has been damaged. As a result, a safety feature on the heater may not work, and there could be a fire or explosion if flammable liquids or gases are close to the heater. The U.S. Consumer Product Safety Commission is advising consumers to make sure there are no combustible materials near the heater.

Giant Factories is recalling 240 atmospherically vented propane and natural gas water heaters with capacities of 30 to 60 gallons. The heaters were sold at independent distributors in Maryland, New York and Pennsylvania between April and October, and they cost $340 to $830 each. They were made in Canada. The CPSC says no injuries or incidents have been reported.

The CPSC says consumers should contact Giant Factories for a free inspection. If there is a space between the bottom of the water tank and the combustion chamber, the company will replace the heater free of charge.

SAN PEDRO MANUFACTURING RECALLS RENOVATED MATTRESSES AND FOUNDATIONS DUE TO FIRE HAZARD

San Pedro Manufacturing Company, Atlanta, Ga., has recalled about 4,800 Mattresses and Mattresses with Foundations. The mattresses and foundations fail to meet the mandatory federal open flame standard, posing a fire hazard. The rebuilt mattresses and mattresses with foundations come in twin, full, queen and king sizes. They come in a variety of fabrics and colors, and have a white federal tag and yellow state tag with “San Pedro Manufacturing Company, 1041 La Grange Blvd, Atlanta, Georgia 30336” sewn at the foot of the mattress. All mattresses sold separately and all mattresses and foundation sets are being recalled.

The mattresses were sold at A1 Mattress and Furniture, Affordable Furniture, Beds Beds Beds, Bruce Furniture and Thrift, Checkouts, Christian Outreach, Fowlers Furniture, Greenbrier Furniture, Larry Rhodes, Mattress and Furniture Outlet, Mattress and Furniture Warehouse, Mattress Barn, Save Big Mattress and Unclaimed Freight from May 2013 through January 2014 for between $80 and $400. Consumers should immediately contact San Pedro Manufacturing Company and arrange for the mattress to be picked up, rebuilt to compliant federal flammability standards and returned to consumer. Call San Pedro Manufacturing Company toll free at 855-997-0300 from 10 a.m. to 4 p.m. ET Monday through Friday.
**Gorsuch Recalls ERTLRENZ Ski Boot Heat Liners Due To Fire Hazard**

About 300 Ertlrenz Trim Heat and Foam Heat ski boot liners have been recalled from Gorsuch Ltd., of Avon, Colo. Liner can overheat when charging, posing a fire hazard. Gorsuch received three reports of the heat liners smoldering during the charging process. No injuries have been reported.

The ERTLRENZ Trim Heat and Foam Heat are handmade, customized, black inner heat liners for ski boots. Every product is accompanied by a charger and a remote control for the heating system. There also is an accompanying ERTLRENZ instruction manual supplied with the heat liners at the time of purchase.

Gorsuch Ltd. stores in Aspen, Vail and Beaver Creek from November 2011 through March 2015 for about $690. Consumers should immediately stop using the heat liners and return the product with accessories (charger/remote control) to Gorsuch Ltd. or a Gorsuch store for repair or replacement. Call Gorsuch Ltd. toll free at 844-451-8650 between 9 a.m. and 5 p.m. ET Monday through Friday, or visit www.gorsuch.com and click on Recall Heat Liners for more information.

**Lenovo Expands Recall Of Battery Packs For ThinkPad Notebooks Due To Fire Hazard**

ThinkPad notebook computer battery packs have been recalled Lenovo Inc., of Morrisville, N.C. The battery packs can overheat, posing a fire hazard. This recall involves Lenovo battery packs sold with the following ThinkPad notebook computers: the Edge 11, 13, 14, 15, 120, 125, 320, 325, 420, 425, 430, 520, 525 and 530 series; the T410, T420, T510 and T520 series; the L420/421, L512 and L520 series; the 430, 520, 525 and 530 series; the L412, L420/421, L512 and L520 series; the W510 and W520 series; and the X100e, X120e, X121e, X130e, X200, X200s, X220s, X220t series. The date code is printed in the WWYY format. Recalled units have date codes beginning with the number 48 or lower and ending with 14. Vacuum cleaners marked with a dimple or green circle sticker on the outside of the plastic cuff that holds the aluminum wand have been inspected by the company and are not included in this recall. The company has received 62 reports of incidents in which the aluminum wand disconnected from the vacuum cleaner's handle. No injuries have been reported.

The notebooks were sold at computer and electronics stores, and authorized dealers nationwide and online at www.lenovo.com from February 2010 through June 2012 for between $350 and $3,000 when sold as part of ThinkPad notebook computers. The battery packs were also sold separately for between $80 and $150. Consumers should immediately turn off their ThinkPad notebook computer, remove the battery pack and contact Lenovo for a free replacement battery pack. Consumers can continue to use their ThinkPad notebook without the battery pack by plugging in the AC adapter and power cord. Call Lenovo at 800-426-7378 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.lenovo.com and select Support at the top of the page, then click on the link to the recall page in the News and Alerts section at the bottom right of the page for more information.

**Shark Vacuum Cleaners Recalled by Euro-Pro Due To Shock Hazard**

Euro-Pro Operating LLC, of Newton, Mass., has recalled its upright vacuum cleaners. The aluminum wand can disconnect from the vacuum cleaner's handle and remain energized with electricity, posing a risk of electric shock. This recall involves four models of Shark® brand Rotator® Powered Lift-Away® series upright vacuum cleaners. They are either maroon or purple in color and have a clear plastic middle section. Shark and Rotator are printed on the front of the vacuum cleaners. They measure about 45 inches tall by 12 inches wide. Recalled model numbers include NV650W, NV651, NV652 and NV660. The model number is printed on a silver sticker on the upper right-hand corner of the back of the unit. Models NV650W and NV652 are maroon, and models NV651 and NV660 are purple and are sold at retail stores. The date code is printed on the metal prong of the power plug and shows the week and year of manufacture in the WWYY format. Recalled units have date codes beginning with the number 48 or lower and ending with 14. Vacuum cleaners marked with a dimple or green circle sticker on the outside of the plastic cuff that holds the aluminum wand have been inspected by the company and are not included in this recall. The company has received 62 reports of incidents in which the aluminum wand disconnected from the vacuum cleaner's handle. No injuries have been reported.

The vacuums were sold at Bed Bath & Beyond, Best Buy, Kohl’s, Lowes, Target and other stores nationwide, online at www.sharkclean.com and through television infomercials from August 2014 through March 2015 for between $250 and $350. Consumers should immediately stop using the recalled vacuum cleaners and contact Euro-Pro to receive a free replacement wand. Call Euro-Pro toll-free at 877-593-5140 from 7 a.m. to 11 p.m. ET Monday through Saturday and from 9 a.m. to 8 p.m. ET on Sunday, online at www.sharkrecall.com, or click on “Recall” at www.sharkclean.com or www.europro.com for more information.

**Hair Dryers Recalled By AG Hair Due To Electrocution Hazard**

About 3,100 Sweet Heat Hair Dryers have been recalled by AG Professional Hair Care Products Ltd., of Burnaby, British Columbia, Canada. The hair dryers do not have an immersion protection device, which guards against electrocution or shock if the dryer is immersed in water. This recall involves Sweet Heat handheld hair dryers. The hair dryers are white and have the words “Sweet Heat” printed in black near the blower nozzle. “AG Hair” is printed in grey and black on the back of the blower nozzle, above the handle.

The products were sold at ULTA Beauty and other beauty supply stores and hair salons nationwide from May 2013 through March 2015 for about $100. Consumers should immediately unplug and stop using the recalled hair dryers and contact AG Hair to request a pre-paid mailing label and packaging in order to return the hair dryer for a full refund. Call AG Hair toll-free at 866-924-4247 from 11:30 a.m. to 7 p.m. ET, Monday through Friday, by email at recall@aghair.com, or online at www.aghair.com and click on “Recall Notice” for more information.
CHILDREN’S PAJAMAS RECALLED BY
SMOOTH INDUSTRIES DUE TO VIOLATION OF
FEDERAL FLAMMABILITY STANDARD

Smooth Industries, Oceanside, Calif., has recalled about 7,600 children's pajamas. The pajamas fail to meet federal flammability standards for children's sleepwear, posing a risk of burn injuries to children. This recall involves children's one- and two-piece Smooth Industries pajama sets. The pajamas are made of 100 percent polyester and were sold in four styles: Ride Smooth, Honda, MX Superstars and Moto X. The racing-themed pajamas have large motocross-related graphics and were sold in red, white and black; orange, white and black; and red, blue and black. One-piece pajama sets were sold in sizes: 6 to 12 months, 12 to 18 months and 18 to 24 months. Two-piece sets were sold in sizes XS to Youth XL. “Smooth Ind.” and “smooth-industries.com” is printed on the garment's neck label.

The pajamas were sold at authorized Smooth Industries motorcycle and motocross stores nationwide and online at SmoothIndustries.com and other motocross websites from October 2012 through January 2015 for between $30 and $35. Consumers should immediately take the recalled pajamas away from children, stop using them and return them to Smooth Industries for credit towards another Smooth Industries product. Contact Smooth Industries toll-free at 844-216-2076 from 9 a.m. to 5 p.m. PT Tuesday through Friday, or online at www.smoothindustries.com and click on the Product Recall link on the homepage.

ROBERTA ROLLER RABBIT RECALLS
CHILDREN’S PAJAMA SETS

Roberta Roller Rabbit, of New York, N.Y. has recalled about 32,000 of its children's Pajama Sets. The children's pajama sets fail to meet federal flammability standards for children's sleepwear, posing a risk of burn injury to children. This recall involves children's pajamas from Roberta Roller Rabbit by Roberta Freyman. The pajamas are 100 percent cotton, two-piece pajama sets sold in toddler size 1 through youth 12. The sets were sold in two styles; long-sleeve with pants or short-sleeve with shorts. Both styles were sold in eighteen prints in various colors; Babar, Bump, Christopher, Colada, Dino, Elephant, Goby, Hathi, Heart, Heeb, Moby, Monkey, Owl, Rain, Rico, Scotty, Teddy, and Tico- chon. Roberta Roller Rabbit is identifi-}

1.5 MILLION BOTTLES OF MISLABELED MUCINEX RECALLED

Reckitt Benckiser has recalled 1.5 million bottles of four varieties of liquid Mucinex cough medicine after a confirmed report that the drug information may be mislabeled, saying that consumers wouldn’t know about potential side effects. The recalled products are Mucinex Fast-Max Night Time Cold & Flu, Mucinex Fast-Max Cold & Sinus, Mucinex Fast-Max Severe Congestion & Cough and Mucinex Fast-Max Cold, Flu & Sore Throat, according to the company.

BEECH-NUT NUTRITION ISSUES BABY FOOD RECALL NATIONWIDE AFTER GLASS FOUND IN JAR

Beech-Nut Nutrition has recalled 1,900 pounds of baby food after small pieces of glass were found within the product's jars. The company elected to issue a voluntary recall after a consumer reported finding glass shards in a container of Beech-Nut baby food. One injury has been reported, according to Beech-Nut. The USDA considers this to be a class I recall with a high health risk that could result in “serious, adverse health consequences or death.” The recalled products are 4 oz. jars of Classics Stage 2 Sweet Potato and Chicken sold in retailers nation-wide. It will have an expiration date of Dec. 2016 and product numbers “12395750815” through “12395750821.” In addition, the labels will have an establishment number of “P-68A.” Consumers will recalled jars can return them to the place of purchase for a full refund.

BLUE BELL CREAMERIES ISSUES RECALL OF ALL PRODUCTS

Texas-based Blue Bell Creameries has issued a voluntary recall for all of its products on the market after two samples of chocolate chip cookie dough ice cream tested positive for listeriosis. The company “can’t say with certainty” how the bacteria was introduced to the manufacturing line, Blue Bell’s chief executive Paul Kruse said in a statement. He added:

“We’re committed to doing the 100 percent right thing, and the best way to do that is to take all of our products off the market until we can be confident that they are all safe.

The first recall in the family-owned creamery’s 108-year history was issued in March after the U.S. Centers for Disease Control and Prevention (CDC) linked ice cream contaminated with listeriosis to three deaths at a Kansas hospital. Five others in Kansas and Texas were sickened with the disease. The foodborne illness was tracked to a production line in Brenham, Texas, and later to a second line in Broken Arrow, Okla. The recall extends to retail outlets in Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Wyoming and international locations.

Jeni’s Issues Recall After Listeria Found

Jeni’s Splendid Ice Creams of Ohio, the second ice cream company to do so, has recalled all of its products after health officials found listeria in a sample of its frozen treats. Jeni’s said on its website that it recalled its frozen products after the listeria discovery. The action follows a similar recall by Blue Bell Creameries.

These two recalls are uncommon. Listeria isn’t usually found in ice cream, since the bacteria can’t grow at freezing temperatures. A spokesman for the Food and Drug Administration said the agency has no evidence, for now, that the listeria found in Jeni’s ice
Dee entered Cumberland School of Law and in 1988 he was chosen to study “Comparative International Law” at the University Heidelberg in Heidelberg, Germany. Upon graduation from law school from 1989-90, Dee served as a law clerk to Judge John M. Patterson on the Alabama Court of Criminal Appeals. He then served as a Staff Attorney for the Alabama Supreme Court under Justice Henry Steagall from 1990-91. Dee then joined Beasley Allen. Dee says:

As I reflect on how I got where I am today it's clear the Lord led me to Montgomery and to Jere and this firm. A perfect plan, but I can't take credit for it. The thing that most stands out to me in our practice here at the firm is that we are truly helping people who otherwise would not have any recourse when they have experienced harm at the hands of a big corporation. Most of our cases are battles with large corporations that have engaged in some very serious wrongdoing and the average citizen cannot take on a mammoth enterprise with unlimited financial resources that beat down anyone who challenges their conduct. As a firm, we can fight that battle with adequate resources and tenacious and talented lawyers who genuinely care about correcting the wrongs of our clients. It's a very satisfying and spiritual experience to help someone who truly needs a helping band. We are privileged to do that very work and are grateful to be in a position to help those in need.

Dee has settled thousands of cases for clients over the years with settlement value exceeding $4 billion. He has achieved settlements for individual Plaintiffs against this country’s top Fortune 500 companies. Most of those settlements involve confidentiality and cannot be discussed. Without a doubt, Dee’s leadership in the consumer fraud and commercial litigation areas of law is unprecedented.

Dee met his wife, the former Sandra Turnblad, while attending Homewood High School. The two were married after they both graduated from college. Sandra and Dee have four children, two girls and two boys. They are active members of The Holy Spirit Catholic Church in Montgomery. The Roman Catholic Church has honored Dee and Sandra by inducting them into the Equestrian order of the Holy Sepulchre of Jerusalem. The Order is responsible for promoting Christianity within the Middle East and protecting the holy shrines in that region of the world. Dee was recently promoted to Lt. Col. of that charitable organization.

Dee was appointed by Dean John Carroll of the Cumberland School of Law, Samford University, to serve on the Advisory Board of the law school. The goal is to promote and preserve Cumberland's commitment to “seek wisdom to temper justice with compassion.” Dee has served as President of the Advisory Board.

In his free time, Dee enjoys riding dirt bikes and golfing with his children, enjoys all sports with his boys, as well as cooking and traveling with his family. Dee credits his success to his faith: Dee says:

My daily goal is to serve the Lord by giving generous love to my family and hard work to our clients, in that order. Life is a constant balancing act, but if we know the priorities of the Lord first, then our families and our work third, we can achieve anything in life we seek.

We are truly blessed to have Dee in the firm in a leadership role.

**EMPLOYEE SPOTLIGHTS**

**BRENT WAREN**

Brent Waren has served as a Systems Administrator in the Information Technologies Department since August 2001. Before joining the Beasley Allen family, Brent worked five years at Colonial Bank. He currently works alongside his team each day troubleshooting technical issues. In this position, Brent handles Administration and management of the firm’s data back-up system and servers and other related IT support responsibilities. Recently, Brent was involved in the implementation of a backup/disaster recovery plan for the Firm.

Brent graduated from Troy University in 1996, receiving a B.S. degree in Management and Business Administration. He was the recipient of the Wallace Foundation Academic Leadership Scholarship and the Simpson Academic Scholarship. Brent is a Microsoft Certified Systems Engineer.

Brent has been married for 17 years to Michele, who is Director of Operations for the Alabama Dental Association. They have 10-year-old twins, Grady and Madelyn Grace. Brent enjoys hunting, fishing—just about anything that involves being outdoors. He also enjoys spending time with his family. Brent is a very good employee, whose work is very important to the firm, and we are fortunate to have him with us.

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**XXIV. FIRM ACTIVITIES**

**W. DANIEL “DEE” MILES, III**

Dee Miles, who joined the firm in 1991, has been a pioneer of consumer fraud and commercial litigation nationwide. In addition to representing clients in litigation, Dee manages the entire Consumer Fraud and Commercial Litigation Section of the firm. He is involved to some extent in every case being litigated in this section. Most all of the cases in the section are national in scope and there have been numerous record-setting verdicts for clients.

Dee served as lead counsel on behalf of eight separate states and eight separate attorneys general (Alabama, Alaska, Hawaii, Kansas, Louisiana, Mississippi, South Carolina and Utah) in the Average Wholesale Price (AWP) / Medicaid Fraud Litigation. This effort, which is almost complete, resulted in $1.5 billion to the states by way of settlements and judgments. These cases also have made a significant social change in the way our Medicaid program operates nationwide.

Dee and the lawyers in his Section have a proven track record of leadership in significant cases throughout the country. Dee has been selected by Federal Courts as lead and co-lead counsel in four MDL cases to date. He has been selected to 16 different Plaintiff Steering Committees on MDLs. He has also served as lead or co-lead counsel in three national class actions.

Jeni's said the recalled ice cream was distributed in the United States to retail outlets, including food service and grocery stores, as well as online at jenis.com. The recall includes all products bearing the brand name "Jeni's."

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 website 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.

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Brent Waren has served as a Systems Administrator in the Information Technologies Department since August 2001. Before joining the Beasley Allen family, Brent worked five years at Colonial Bank. He currently works alongside his team each day troubleshooting technical issues. In this position, Brent handles Administration and management of the firm’s data back-up system and servers and other related IT support responsibilities. Recently, Brent was involved in the implementation of a backup/disaster recovery plan for the Firm.

Brent graduated from Troy University in 1996, receiving a B.S. degree in Management and Business Administration. He was the recipient of the Wallace Foundation Academic Leadership Scholarship and the Simpson Academic Scholarship. Brent is a Microsoft Certified Systems Engineer.

Brent has been married for 17 years to Michele, who is Director of Operations for the Alabama Dental Association. They have 10-year-old twins, Grady and Madelyn Grace. Brent enjoys hunting, fishing—just about anything that involves being outdoors. He also enjoys spending time with his family. Brent is a very good employee, whose work is very important to the firm, and we are fortunate to have him with us.
XXV. SPECIAL RECOGNITIONS

ALAN WORRELL LEADS BY EXAMPLE

Alan Worrell is the founding Chairman, Chief Executive Officer, and President of Sterling Bank, which opened for business in Montgomery on March 1, 1989. Under his leadership, Sterling Bank, a Division of Synovus Bank, has enjoyed impressive growth and performance serving the River Region with offices in Montgomery and Prattville. During that time, both Sterling and the River Region have weathered a number of challenges, and ultimately witnessed incredible progress. Alan told me recently:

Over our 26 year history, we have certainly seen Montgomery grow and I am pleased to say that we have played a role by banking clients who are investing, building, and expanding in our market. The last several years have been challenging and have kept Montgomery from growing at the level we would all like to see. The national economy and our local economy have impacted Montgomery’s growth; however, we are beginning to see improvements and a pickup in economic activity. Our clients are more optimistic and encouraged, and loan demand has picked up. This means people—and businesses—are spending more and doing more, which is a positive sign.

A key to Sterling’s success is its emphasis on being a good community partner, which Alan defines as a business that leads by example, gives back to the community, and encourages active involvement in civic and community affairs by its management and employees. Sterling does a good job by actively promoting local support of businesses, non-profits, and organizations that are working together for the betterment of the community. In 2014, the Financial Services Roundtable presented Synovus with the Corporate Social Responsibility Leadership Award for enhancing financial education and investing in community development projects.

Synovus has recognized Alan’s professional and personal reputation by awarding him with the William B. Turner Humanitarian Award. In addition, he was inducted into the Synovus All-Star Hall of Fame. Synovus has been recognized by Fortune Magazine as “The Best Company to Work For in America” and was included in the publication’s Hall of Fame. It was also recognized this year by the Small Business Administration as one of the top financial institutions for loans across the country.

In early March, Synovus received 19 Greenwich Customer Excellence Awards for customer service in Middle Market and Small Business Banking. In 2013, Sterling Bank was chosen as “BEST BANK” in Montgomery County by the Montgomery Advertiser Reader’s Choice Awards. Also, Sterling Bank is a former winner of the Frank Plummer Memorial Arts Award presented by the Montgomery Area Business Committee for the Arts.

Alan and Cissy, his wife of 44 years, have two sons and five grandchildren. Currently, Alan is actively involved in our community. He serves on several boards of various organizations. Alan is a Deacon and serves on the Finance Committee of Trinity Presbyterian Church. I am blessed to have Alan as a very good friend, in addition to being my longtime banker! He is a good man!

GRANT ENFINGER SETTING RECORD ON ARCA RACING CIRCUIT

Our favorite ARCA racecar driver, Grant Enfinger, is having a record-breaking year, having won three consecutive ARCA Racing Series events for the second year in a row. He is the first driver in ARCA’s 63-year history to win the first three races of the season in consecutive years. Beasley Allen was Grant’s first sponsor and the firm will once again sponsor him on May 1 at Talladega, with the race to be televised on Fox Sports 1. This issue won’t be received by that time.

Grant entered the record books on Saturday, April 11, at the Troop Aid 200 at Fairgrounds Speedway Nashville. Although he qualified second, a part failure in a subsequent practice forced him to have to tear the car down. He was penalized and had to start last. Despite the setback, he came out on top, winning by 2.5 seconds to make history as the only ARCA driver to win the first three races two years in a row.

The Talladega race, featuring the Beasley Allen-sponsored car, is the International Motor Sports Hall of Fame 200 on May 1 at Talladega Superspeedway. We are pulling for Grant to win at Talladega. We will give you an update in the June issue of the Report. Hopefully, it will be another win!

XXVI. FAVORITE BIBLE VERSES

Stephanie Monplaisir, a lawyer in our firm, supplied two life verses that she says she repeats to herself when she faces obstacles. Stephanie works in the firm’s Personal Injury/Products Liability Section.

Create in me a clean heart, O God, and renew a right spirit within me. Psalm 51:10

And let us not grow weary of doing good, for in due season we will reap, if we do not give up. Galatians 6:9

Sonny Wills, a lawyer in our firm, furnished two verses for this issue. Sonny serves in an Of Counsel role in our Mass Torts Section.

Though the fig tree may not blossom, Nor fruit be on the vines; Though the labor of the olive may fail, And the fields yield no food; Though the flock may be cut off from the fold, And there be no herd in the stalls— Yet I will rejoice in the Lord, I will joy in the God of my salvation. The Lord God is my strength; He will make my feet like deer’s feet, And He will make me walk on my bigh bills. Habakkuk 3:17-19

Ask, and it will be given to you; seek, and you will find; knock, and it will be opened to you. For everyone who asks receives, and he who seeks finds, and to him who knocks it will be opened. Matthew 7:7-8

Laura Jones sent me her favorite verse. Laura is a legal secretary in the firm and works on my floor. She says this psalm teaches us to comfort ourselves in the Lord when difficulties and dangers are greatest. That’s a very true statement.

A song of ascents. I lift up my eyes to the mountains—where does my help come from? My help comes from the Lord, the Maker of heaven and earth. He will not let your foot slip—he who watches over you will not slumber; indeed, be who watches over you will not slumber; nor sleep. The Lord watches over you—the Lord is your shade at your right band; the sun will not harm you by day, nor the moon by night. The Lord will keep you from all harm—be who watches over your coming and going both now and forever more. Psalm 121

JereBeasleyReport.com
Parker Miller, a lawyer in our Toxic Torts Section, has been working on the BP Litigation for five years. He supplied these four verses for this issue.

I can do all things through Christ who strengthens me. Philippians 4:13

May the Lord answer you in the day of trouble; May the name of the God of Jacob defend you; May be send you help from the sanctuary, And strengthen you out of Zion; May He remember all of your offerings, And accept your burnt sacrifice. May be grant you according to your heart’s desire, And fulfill all your purpose. We will rejoice in your salvation, And in the name of our God we will set up our banners! May the Lord fulfill all your petitions. Now I know that the Lord saves his anointed; He will answer him from His holy heaven With the saving strength of His right hand. Some trust in chariots, and some in horses; But we will remember the name of the Lord our God. They have bowed down and fallen; But we have risen and stand upright. Save, Lord! May the King Answer us when we call. Psalm 20

Those who are wise shall shine like the brightness of the firmament, and those who turn away to righteousness like the stars forever and ever. Daniel 12:3

Pride goes before destruction, a haughty spirit before a fall. Proverbs 16:18

The Violence in Baltimore Is Not the Answer

A few weeks ago the national focus was on “Bloody Sunday” and Selma, Alabama. The response around the country was overwhelmingly positive as the events of Bloody Sunday were retold and the tremendous influence that it had on the Civil Rights Movement in this country recognized. A good lesson to learn from those accounts was that when seeking justice violence is never the answer.

Now we see a totally different situation unfolding in Baltimore. The massive acts of violence that have occurred over a period of several days, triggered by the death of Freddie Gray, a 25 year old black male, is now the national story. The question is being asked by the national media: “Would the Reverend Martin Luther King, Jr. condone the violence, burning and looting that is happening in Baltimore?” Personally, I do not believe that Dr. King, whose message was one that advocated non-violent and peaceful protests, would ever condone violence as an answer.

While numbers of persons in Baltimore have peacefully protested for answers—and justice—in the name of Freddie Gray, the nation’s attention has largely been focused on the violent acts, looting and burning by rioters. I have never believed that violence, looting and burning are the answer when folks are seeking real justice and my beliefs have not changed. Dr. King had this to say in a 1966 interview with Mike Wallace:

I will never change in my basic idea that non-violence is the most potent weapon available to the Negro in his struggle for freedom and justice. I think for the Negro to turn to violence would be both impractical and immoral.

Dr. King set the blueprint and laid the foundation fifty years ago and his goal was to assure that African-Americans would achieve real equality in this country. While we have made tremendous progress in the area of civil rights, I know there is much more to do. But I do not believe that violence such as we are witnessing in Baltimore is the answer.

My prayer is that reasonable persons on each side of this volatile issue and especially the leaders, will call for an end to the rioting, burning and violence in Baltimore. Innocent folks will be the real losers and the pursuit of justice in the case of Freddie Gray sidetracked if the situation in Baltimore continues along its present path. Peaceful protests can accomplish that which violence can only slow down and even stop.

XXVII. CLOSING OBSERVATIONS

Monthly Reminders

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

2 Chron. 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732—1802)

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

Louis Brandeis, 1937

U.S. Supreme Court Justice

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

Vincent Lombardi

The Violence in Baltimore Is Not the Answer

Together

An organization functions best when each person correctly accesses his/her gifts, then deploys those gifts as a part of a team effort. Organizations get into problems when some people try to assume responsibilities for which they are not gifted. Another deterrent to productivity is having one person think that his/her gifts are more important than another persons’.

A good model to follow is I Corinthians 12. Paul describes the church as the human body. My body has different parts, such as feet, hands, eyes. My body does not function well if my eyes try to bear or my ears try to listen.
to see. There is also dysfunction when one part of my body starts claiming that it is more important than another part. Each part is extremely important and essential for my body to function as a coordinated unit.

There is a beautiful example of this recently reported in China. A couple of eco-warriors in China are redefining what it means to work together. Jia Hatixia is blind and Jia Wenqi is a double amputee who lost both his arms at age 3. They both found it very difficult to find a job.

In 2001, they decided to engage this basic principle. They began working together planting trees along the riverbank in their hometown of Hebei. Despite the fact that neither one of them could do the work by himself, they discovered that together they could accomplish amazing things. They saw their respective situations not as disabilities but as possibilities if they worked together. The 53-year-olds have now managed to plant 10,000 trees over the last 10 years!

Today they are making a modest living which is helpful to their families, but is also helping to protect their village from dangerous floods.

Hatixia says, “I am his hands. He is my eyes. We are good partners.” It is amazing what can happen when each person contributes his best gift to the work of the entire organization.

There is a story about a Captain of a ship and the Chief Engineer who one day began arguing about which was more important to the ship. To settle the argument, they decided to swap jobs for a few hours. The Chief Engineer went up to the bridge and the Captain went into the engine room.

About an hour later the Captain appeared on the bridge. He was covered with oil and soot and wildly waving a monkey wrench. He said, “I can’t make her go.” The Chief quickly said, “Of course you can’t, we have run aground.”

An important aspect is that we have to be able to both give and receive the help we need. It was recently reported that Apple Chief Executive Tim Cook revealed that he once offered a dying Steve Jobs part of his own liver. Jobs’ response was “I’ll never let you do that.” He refused the help. Cook said that he worked with Jobs for 13 years and was never yelled at but four or five times, but this was one of them. What could have been if Cook and Jobs had been together on the same page about Jobs’ health?

Working together is the “together” that makes for success. Sir Thomas Beecham, the eminent conductor of the London Symphony, on one occasion was the guest conductor in another venue and was frustrated with the seemingly undisciplined group of musicians. During the rehearsal the concert master asked Mr. Beecham bow he wanted a particular section played. After a long pause, and with great emphasis, he replied, “Together!”

We may not have it all together, but together we have it all!

John Ed Mathison
www.johnedmathison.org

John Ed’s message is one we all need to hear and digest. Quite often we see examples of organizations, and on occasion even churches, being split up because some members don’t understand what being a part of a team is really all about. My prayer is that after reading what John Ed had to say each of us will be better teammates!
Jere L. Beasley, Principal & Founder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley’s law firm, established in 1979 with the mission of “helping those who need it most,” now employs over 75 lawyers and more than 175 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 35 years.