I. CAPITOL OBSERVATIONS

Things have been pretty hectic in our firm over the past several months. Our lawyers and support staff personnel have been hard at work on a number of very important projects. A large number of significant projects have been concluded recently, with lots more still in progress. We were able to bring the State of Alabama’s BP litigation to a close with a tremendous settlement. Now we are working hard to wind up the individual claims by private persons and businesses that were filed under the class action settlement. We are making very good progress on those claims.

Our Product Liability Section has been heavily involved in the GM ignition switch litigation, as well as the Takata air bag litigation. In addition, our lawyers are working on a number of other important projects. We have had some excellent results in the GM litigation, working with Lance Cooper’s firm on those cases. The Takata cases are all in the early stages, but all look very promising for our clients at this juncture.

The firm’s Mass Torts Section and Consumer Fraud and Commercial Litigation Section have also been extremely busy. I will write about several of the ongoing projects in all of the Sections in this issue. Our managing lawyer Tom Methvin does an excellent job making sure that the Sections have the resources needed to do their job.

II. MORE AUTOMOBILE NEWS OF NOTE

GM IGNITION SWITCH FUND REJECTED 91 PERCENT OF CLAIMS

The General Motors ignition switch compensation fund has rejected 91 percent of claims filed with the fund, according to revised statistics released by the fund late last month. It appears that only 399 of the total claims filed were accepted. Of the 4,434 claims submitted, the fund approved 124 claims in death cases, 17 in category one injury cases, which include quadriplegia, paraplegia, amputation and permanent brain damage, and 258 in category two injury cases that required hospitalization within 48 hours of the accident.

The fund found a total of 3,944 claims ineligible for compensation, according to the revised statistics. According to a representative for the fund, 63 claims are still outstanding. As we have reported, claimants accepting a settlement waive their right to sue GM. However, those who reject a settlement offer can pursue their case in court. Our firm and Lance Cooper’s firm have been well satisfied with the results we have had with the fund. We still have claims pending, however, that weren’t submitted to the fund and we will pursue those in court in several states.

Source: Law360.com

FORD LEAVES IMPORTANT STRUCTURAL SUPPORT OUT OF ITS NEW F-150 EXTENDED CAB

Ford’s best-selling pickup is the F-150, but according to recent crash tests on its extended-cab version, Ford could be in big trouble for its decision to put profits over safety. The 2015 F-150 SuperCrew and 2015 F-150 SuperCab pickups are the first mass-market vehicle with an all-aluminum body. Ford put an extra steel safety structure in the F-150 SuperCrew but not in the F-150 SuperCab. The Insurance Institute for Highway Safety (IIHS) subjected both the crew cab and the extended cab to its new small overlap front crash test. This test runs one-quarter of the pickup’s front bumper into a barrier at 40 miles per hour. The impact occurs just in front of the driver’s seat. In other words, the test is meant to replicate a partial head-on collision, which occurs when the truck hits a telephone pole or crosses the center line into oncoming traffic.

The F-150 SuperCrew with the extra steel safety structure performed well with a low risk of injury to the occupants, receiving the IIHS’s top rating of “Good.” The F-150 SuperCab passenger compartment, with only an aluminum body and no extra steel safety structure, was crushed during the crash test. IIHS determined that the impact “seriously compromised the driver’s survival space” since the steering wheel was pushed back almost 8 inches (20 centimeters), coming “dangerously close” to the crash dummy’s chest. IIHS gave the smaller SuperCab a “Marginal” rating, which is the IIHS’s second-worst rating.

One would think that if a pickup performs this poorly in a crash test that the manufacturer would not put that pickup on the market. Unfortunately, Ford has decided to put the F-150 SuperCab on the market without incorporating the steel safety structure that it knows would protect occupants in partial head-on collisions. Instead, Ford will wait until its 2016 F-150 model to incorporate the protective structure into all of its F-150 pickups.

Ford added structural elements to the crew cab’s front frame to earn a good small overlap rating and a Top Safety Pick award, but didn’t do the same for the extended cab,” David Zuby, IIHS’s chief researcher, said in a statement July 30. “That short-changes buyers who might pick the extended cab thinking it offers the same protection in this type of crash as the crew cab.”
A pickup that crushes into an occupant's survival space is not crashworthy. Lawyers in our firm have handled many crashworthiness cases involving defective vehicles. A crashworthiness case occurs when something else causes the driver to wreck the vehicle, but the vehicle causes the driver's injuries because it does not hold up in a foreseeable crash. In General Motors v. Edwards, 482 So. 2d 1176, 1181 (Ala. 1985), the Alabama Supreme Court held that “while a manufacturer is under no duty to design an accident-proof vehicle, the manufacturer of a vehicle does have a duty to design its product so as to avoid subjecting its user to an unreasonable risk of injury in the event of a collision.” The Court reasoned that:

[C]ollisions are a statistically foreseeable and inevitable risk within the intended use of an automobile, which is to travel on streets, highways, and other thoroughfares, and that, while the user must accept the normal risk of driving, be should not be subjected to an unreasonable risk of injury due to a defective design. Id. at 1181.

By placing a pickup on the market that will not protect occupants in a partial head-on collision (i.e. with a telephone poll or crossing center line into an oncoming vehicle), Ford is subjecting occupants of the 2015 F-150 extended cab to an unreasonable risk of injury. We can only hope that Ford will change its mind and recall these pickups to make them safe for consumers who have no idea that their vehicle, but the vehicle causes the driver's injuries because it does not hold up in a foreseeable crash. In General Motors v. Edwards, 482 So. 2d 1176, 1181 (Ala. 1985), the Alabama Supreme Court held that “while a manufacturer is under no duty to design an accident-proof vehicle, the manufacturer of a vehicle does have a duty to design its product so as to avoid subjecting its user to an unreasonable risk of injury in the event of a collision.” The Court reasoned that:

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By placing a pickup on the market that will not protect occupants in a partial head-on collision (i.e. with a telephone poll or crossing center line into an oncoming vehicle), Ford is subjecting occupants of the 2015 F-150 extended cab to an unreasonable risk of injury. We can only hope that Ford will change its mind and recall these pickups to make them safe for consumers who have no idea that their extended cab does not contain all the protection of the bigger F-150. If you would like more information on crashworthiness cases, contact our Product Liability Section Head, Cole Portis, at 800-898-2054 or by email at Cole.Portis@beasleyallen.com.

Sources: Bloomberg BNA; CNN Money

Luxury Car Hacking Risk Is Widespread

As I mentioned above, electronic car-hacking has been in the news quite a bit lately. A recent report is most troubling. It appears that thousands of cars from a host of manufacturers have spent years at risk of electronic car-hacking. Expert research revealed that Volkswagen spent two years in the courts trying to suppress the problem. “Keyless” car theft, which sees hackers target vulnerabilities in electronic locks and immobilizers, now accounts for 42 percent of stolen vehicles in London. BMWs and Range Rovers are particularly at-risk. Police say a technically minded criminal can have a car unlocked and stolen within 60 seconds.

Security researchers have now discovered a similar vulnerability in keyless vehicles made by several carmakers. The weakness, which affects the Radio-Frequency Identification (RFID) transponder chip used in immobilizers, was discovered in 2012, but carmakers sued the researchers to prevent them from publishing their findings. The paper by Roel Verdult and Baris Ege from Radboud University in the Netherlands and Flavio Garcia from the University of Birmingham, U.K. was presented at the USENIX security conference in Washington, D.C. The authors detailed how the cryptography and authentication protocol used in the Megamos Crypto transponder can be targeted by malicious hackers looking to steal luxury vehicles.

The Megamos, one of the most common immobilizer transponders, is used in Volkswagen-owned luxury brands including Audi, Porsche, Bentley and Lamborghini, as well as Fiats, Hondas, Volvos and some Maserati models. Tim Watson, Director of Cyber Security at the University of Warwick, stated:

This is a serious flaw and it’s not very easy to quickly correct. It isn’t a theoretical weakness, it’s an actual one and it doesn’t cost theoretical dollars to fix, it costs actual dollars.

Immobilizers are electronic security devices that stop a car’s engine from running unless the correct key fob (containing the RFID chip) is in close proximity to the car. They are supposed to prevent traditional theft techniques like hot-wiring, but can be bypassed. For example, this can be done by amplifying the signal. In this case, however, researchers broke the transponder’s 96-bit cryptographic system by listening to the radio communication between the key and the transponder. This reduced the pool of potential secret key matches, and opened up the “brute force” option: running through 196,607 options of secret keys until they found the one that could start the car. It took less than half an hour. Security researcher Andrew Tierney observed:

The attack is quite advanced, but VW produces a lot of very high-end vehicles that get stolen to order. The criminals involved are more sophisticated than the sorts who just steal your keys and drive off with your car.

There appears to be no quick fix for the problem. As I understand it, the RFID chips in the keys and transponders inside the cars must be replaced, resulting in significant labor costs. The research team first took its findings to the manufacturer of the affected chip in February 2012 and then to Volkswagen in May 2013. Volkswagen filed a lawsuit to block the publication of the paper, claiming that it would put the security of winning an injunction in the U.K.’s High Court.

Finally, after some rather lengthy negotiations, the paper is finally in the public domain with just one sentence redacted. That single sentence, however, contains an explicit description of a component of...
the calculations on the chip. Verdult says that by removing the sentence it was much more difficult to recreate the attack.

Volkswagen says that anti-theft protection is generally still ensured even for older models. That’s because criminals need access to the key signal to hack the immobilizer, according to the automaker. Volkswagen says current models, including the current Passat and Golf, don’t allow this type of attack at all. The Megamos Crypto is not the only immobilizer to have been targeted in this way—other popular products including the DST transponder and KeeLoq have both been reverse-engineered and attacked by security researchers.

Source: Insurance Journal

**NHTSA Won’t Investigate Chrysler Power Module Defect Claims**

The National Highway Traffic Safety Administration has also refused to launch an investigation into claims that 4.7 million of Fiat Chrysler Automobiles US LLC’s (FCA US) vehicles carry defects that could cause unintended acceleration, air bag failure or engine stalls. The agency said an analysis of data and evidence didn’t support the allegations. The claims, included in an August 2014 letter to NHTSA from the Center for Auto Safety, focused on the automaker’s “totally integrated power module,” a computer that controls a range of systems installed in trucks, SUVs and vans beginning with the 2007 model year. NHTSA, in announcing its conclusion relating to the totally integrated power module (TIPM) problem, said in the report:

“No valid evidence was presented in support of claims related to airbag non-deployment, unintended acceleration or fire resulting from TIPM faults and these claims were found to be wholly without merit based on review of the field data and design of the relevant systems and components.”

NHTSA closed the probe just days before it announced a record $105 million enforcement action against Fiat Chrysler for failing to complete 23 recalls covering more than 11 million vehicles. The Center for Auto Safety in an Aug. 21, 2014 letter told NHTSA it has received 70 complaints related to the Chrysler TIPM and that NHTSA has received “hundreds if not thousands” of complaints detailing vehicle stalls, air bag nondeployment and instrument panel failures related to problems with the modules. Chrysler owners are paying for their own TIPM replacements and waiting for weeks or months for the parts while remaining “at the mercy of a defect which many have likened to the vehicle being possessed and uncontrollable,” the CAS petition said.

In coming to its conclusion about the alleged TIPM defects, NHTSA’s Office of Defect Investigation said it analyzed 296 complaints submitted by the group and consumers. However, the agency said Fiat Chrysler submitted a defect information report identifying a defect within some TIPMs that could cause a no-start or stall, potentially affecting more than 500,000 Jeep Grand Cherokees and Dodge Durangos manufactured from 2010 to 2013. The automaker issued a recall in February for nearly 500,000 vehicles with a TIPM issue that affected fuel-pump function. NHTSA concluded:

*Except insofar as the petitioner’s contentions relate to the defect condition addressed by the Chrysler recalls, the factual bases of the petitioner’s contentions that any further investigation is necessary are unsupported.*

I really hope that NHTSA has made a good decision in this matter. But our experience in the Toyota sudden acceleration litigation does give me some concern about decisions by NHTSA to not fully pursue defect claims in some cases. This decision involving the TIPM issue appeared to have enough information from valid sources for NHTSA to go forward. I would remind our readers that it took a jury trial to expose Toyota and for our lawyers to learn first hand of NHTSA’s short comings. NHTSA had failed its responsibilities during a very long period of cover-up by Toyota. Hopefully, NHTSA got it right this time, but we will eventually find out if they did.

Source: Law360.com

**NHTSA Won’t Investigate Alleged Toyota Acceleration Defect**

The National Highway Traffic Safety Administration has denied a petition to investigate an alleged defect related to sudden unintended acceleration at low speeds in Toyota Motor Corp. vehicles. The agency instead found that the crash evidence and pre-crash event recorder data submitted by the petitioner pointed to driver error. It seems like we have heard that before in previous Toyota litigation. NHTSA’s Office of Defects Investigation spent just over a month looking into the request submitted by Dr. Gopal Raghavan, a California resident. He told the office in mid-July his 2009 Lexus ES350 accelerated suddenly and crashed while his wife was trying to park the car in February 2015.

In the event NHTSA had found evidence of a defect, up to 42,833 ES350s from Toyota-owned Lexus could have been affected. Dr. Raghavan submitted as evidence the EDR data from the vehicle just before the crash showing the engine had “revved even though the pedal had not been pressed.” He also pointed to two other complaints involving a 2009 Camry and 2010 Corolla as showing a “troubling similarity” to his alleged acceleration issue.

NHTSA said on August 21, however, that the data immediately before impact showed the brake pedal was not applied and the accelerator pedal was depressed to approximately 71 percent of full apply. The agency said even though the driver alleges that the brakes were not effective during the incident, the brakes had no history of malfunction, and post-accident inspection revealed no issues. The agency said in its denial: “Based on the available information, this incident is consistent with pedal misapplication by the driver and provides no evidence of a vehicle defect.”

NHTSA also said that both of the complaints referenced by Dr. Raghavan did not provide evidence of a vehicle defect, but instead were consistent with pedal misapplication by the driver. NHTSA said the EDR data for both crashes had shown the brake had not been applied and the accelerator pedal had been pressed just before each accident. The petition was not the first to call for an investigation of unintentional acceleration at low speeds in Toyota vehicles, and neither was it the first to be denied. There were other petitions filed with similar claims involving almost identical facts.

As I stated above in the discussion relating to the Chrysler sudden acceleration petition rejection, our experience with NHTSA during our handling of cases against Toyota, makes me wonder if the agency has again dropped the ball. Our lawyers learned how easily it was to hide a known computer defect from NHTSA in our Bookout case in Oklahoma. I really hope NHTSA hasn’t been “fooled” again.

**Chrysler Facing Class Action Over Jeep Transmission Defects**

A class action lawsuit involving the Jeep Cherokee has been filed against the Chrysler Group LLC. The company is accused of hiding widespread transmission problems with the 2014 model year Jeep Cherokee. Stacy Oquendo, a Jeep Cherokee customer, first filed suit in New Jersey Superior Court
on May 15, but Chrysler removed the case to federal court in early July because of cross-state jurisdiction and the size of the potential lawsuit in excess of $5 million.

It was alleged that problems with the Cherokee’s transmission are widespread and depreciated the cars’ value and safety. The complaint stated:

Plaintiff experienced repeated problems with her Jeep Cherokee. The repair history reflects complaints of the transmission not shifting properly, and other transmission problems. She has lost the use of her vehicle for repair, the value of the vehicle is diminished because of its frequent and persistent problems, and the vehicle poses safety concerns to the driver and occupant.

Ms. Oquendo cites a media report to justify her claim that transmission problems occur with unusual frequency in 2014 Cherokees. She also claimed that Chrysler has been unable, or unwilling, to make adequate repairs. The complaint states:

Rather than acknowledge the problem Chrysler has proceeded to deny and/or conceal the problem and directed its dealers to provide deceptive, false, or misleading explanations for the failure to provide warranty coverage and reimbursement. It has breached its standard express warranty and extended warranties.

The proposed class would cover anyone who experienced transmission problems after purchasing a new 2014 Cherokee in New Jersey, New York, Delaware or Connecticut, New York, New Jersey and Delaware because those states have similar laws. Ms. Oquendo says she has repeatedly taken her car to the dealer, which has done two complete transmission replacements. The dealer was said to have been cooperative with pursuing repairs, but that he “just hasn’t been successful.” Howard A. Gutman, a lawyer from Flanders, N.J., represents the lead Plaintiff in this case.

Source: Law360.com

TAKATA TO STOP USING VOLATILE CHEMICAL IN AIRBAGS

Takata Corp., whose exploding airbag modules have caused the largest-ever U.S. automotive recall, has told the National Highway Traffic Safety Administration it will no longer use ammonium nitrate, a volatile chemical, in its airbag inflators. As has been widely reported, the Japanese supplier is at the center of a global recall of tens of millions of cars for potentially deadly airbag inflators that could deploy with too much force and spray metal fragments inside vehicles. Use of ammonium nitrate as a propellant in Takata airbags has been linked to dozens of ruptured inflators since 2003. The defective inflators have been linked to eight reported deaths and hundreds of injuries.

The agreement to stop using ammonium nitrate was detailed by Takata executive Kevin Kennedy in written testimony prepared prior to a hearing before a U.S. House panel last month. Discovery of a root cause of Takata’s airbag problems “is not imminent,” according to David Kelly, head of an automakers’ coalition investigating Takata airbag inflator ruptures. Hopefully, both NHTSA and Takata will be able to resolve all of the safety issues that have caused so many deaths and injuries.

Toyota Motor Corp. said late last month it is looking into using air bag inflators made by suppliers besides Takata to keep up with the pace of recalls. The automaker indicated that it is looking to a number of auto parts makers and other suppliers including Japanese chemical company Daicel Corp., Swedish-American automotive safety tech company Autoliv and Japanese chemical manufacturer Nippon Kayaku Co. Ltd.

Source: Claims Journal

TAKATA PLANS AD CAMPAIGN TO ALERT DRIVERS OF RECALLED AIR BAG RISK

Takata Corp. is planning an extensive advertising campaign to urge consumers to get its air bag defect fixed. The outreach efforts for a series of massive recalls affecting 11 automakers and an estimated 32 million vehicles include targeting high-humidity states like Texas and Florida first. According to Takata, the company decided on a regional approach to ensure the availability of replacement kits.

Takata’s proposal includes “a robust digital advertising campaign” and is designed to support the automakers’ efforts to increase recall completion rates, according to Jared Levy, a U.S. spokesman for the company. Takata told NHTSA last month that it’s working to maximize the number of vehicles that get repaired and assisting in the auto companies’ outreach efforts.

The report to NHTSA was required under the May agreement that we have mentioned. Takata admitted to a safety defect and expanded some air bag recalls. Takata told NHTSA that it’s planning to begin advertising in seven U.S. southern states: Alabama, Georgia, Florida, Louisiana, Mississippi, South Carolina and Texas. The initial wave of ads will include Hawaii, Puerto Rico and the U.S. Virgin Islands. The air bag supplier is planning to emphasize digital advertising through websites like CNN and Yahoo!, as well as social media like Facebook and Twitter.

The banner ads used will be in red with the phrase “Urgent Airbag Recall Notice” in bold letters. The company also will work with the Insurance Institute for Highway Safety on a direct mailing to reach about 85 percent of the U.S. market. Takata also filed a plan on how it will conduct the testing that is designed to find the root cause for the air bag failures. The testing plan contains proprietary information, including technical changes to inflators that hasn’t been released outside the company, Takata said in the filing with NHTSA. The agency granted the confidentiality request after reviewing the documents. NHTSA is reviewing both of the reports.

The agency and Takata have agreed to cooperate on testing of air bag modules as both investigate possible causes for the explosions. NHTSA is urging consumers to comply with the recalls. Apparently that’s because the agency believes the newer air bag units are safer than the defective versions. But, as you may recall, neither the company nor NHTSA can assure vehicle owners that the fixes will permanently reduce the risk of an exploding air bag. NHTSA’s administrator, Mark Rosekind,
said at a June 2 congressional hearing there may be more than one root cause for the Takata explosions. He stated that investigators may never know for sure what the real issue is. It surely does seem that all of the actual causes should have been known by now and the specific culprit identified.

Source: Claims Journal

**SENATORS WANT FULL TAKATA RECALL**

Two U.S. Senators want Takata Corp. to recall all vehicles that contain its defective air bags. The two Senate Democrats made the request in an August 20 letter, pointing to NHTSA’s recent inquiry into a ruptured air bag inflator in the 2015 Volkswagen Tiguan. Sens. Richard Blumenthal, D-Conn., and Edward J. Markey, D-Mass., also asked the Japanese auto parts maker for continuous updates on all the information it gathers from its air bag tests so it can be assessed by outside experts.

At a Senate hearing, the senators had raised concerns over the company’s continuing use of ammonium nitrate as a propellant. The lawmakers said in their letter:

*It is well known that ammonium nitrate mixtures may become unstable when the substance becomes moist or accumulates moisture. Further, as Takata admitted in its written response, based on current testing results for a root cause, “all Takata [base-stabilized ammonium nitrate]-based inflators, whether new or old, contain moisture.” Given this ubiquitous risk, it is deeply disturbing that Takata has now admitted that it is “unable to quantify as a single number the level of moisture in its inflators” that is sufficient to cause safety concerns. This willful lack of transparency unnecessarily risks the lives of many American motorists.*

Hopefully, other members of Congress will follow up and put pressure on Takata to do everything possible to bring this most unfortunate and tragic saga to a conclusion.

Source: Law360.com

**NHTSA QUESTIONS TAKATA AND VOLKSWAGEN OVER AIR BAG INCIDENT IN NEW SUV**

The National Highway Traffic Safety Administration has asked Takata Corp. and Volkswagen AG units to provide the agency with information on an air bag inflator that ruptured in a new Volkswagen Tiguan. Takata was told to list all air bags using ammonium nitrate. NHTSA sent the special orders to TK Holdings Inc. and Volkswagen Group of America Inc. about a month after the automaker told it about the June incident where a driver’s side air bag ruptured in a 2015 Tiguan.

The inflator rupture was said to have occurred on June 7 after the air bag equipped with an SSI-20 type inflator deployed when the vehicle struck a deer. NHTSA asked the manufacturers to provide all information they had on the incident. VW was directed to disclose “a list of all vehicles ever produced” that used stabilized ammonium nitrate as an air bag propellant. Takata is to tell NHTSA about all types of air bags it has manufactured and sold using the propellant.

As a result of the airbags issue there has been a global recall of 34 million vehicles and reports of eight deaths. In July, NHTSA began looking into air bags manufactured by ARC Automotive Inc. based on reports that the company’s inflators using ammonium nitrate propellant had ruptured in incidents involving Kia and Chrysler vehicles. It’s time for the airbag issues to be resolved and from all accounts there are still far too many unanswered questions.

Source: Law360.com

**HYUNDAI CAN’T ESCAPE SUIT OVER SANTA FE STALLING DEFECT**

A California federal judge last month denied a bid by Hyundai Motor Co. to dismiss a putative class action over a stall defect in Santa Fe vehicles. U.S. District Judge Samuel Conti said the Plaintiffs proved they had standing and properly alleged the bulk of the claims against the South Korean automaker. Hyundai’s argument that four of the five named Plaintiffs lacked standing was rejected, the judge saying that at this stage of the case, the Plaintiffs need only prove that at least one named Plaintiff satisfies the standing requirements. The judge wrote in a 37-page ruling:

*Here, there can be no serious doubt that (at least) Jaffe has standing—indeed, defendants did not even challenge Jaffe’s Article III standing in their original [motion to dismiss].*

Judge Conti also denied Hyundai’s attempts to have co-Defendant Hyundai Motor America’s parent company dismissed from the case for lack of a transaction, holding that Hyundai Motor Co. had a duty to disclose the alleged defect. The order said:

*Plaintiffs sufficiently allege materiality. Plaintiffs state that they would have behaved differently had they been aware of the alleged stalling defect. Again, this is highly reasonable, as very few ‘reasonable consumer[s]’ would buy a car (at full price) that they knew will unpredictably stall resulting in an inability to steer or brake.*

Judge Conti also allowed fraud claims and claims brought under California’s Unfair Competition Law and Consumer Legal Remedies Act to proceed, saying the Plaintiffs adequately alleged that Hyundai’s knew of the stalling defect. But a claim brought under the state’s False Advertising Law was dismissed by the judge. He did give the Plaintiffs an opportunity to amend their complaint and try again. The ruling is the latest in a case first brought by named Plaintiff Julia Reniger and others in August 2014, claiming that Hyundai and its American subsidiary knew the 2010-2012 Santa Fe SUVs were prone to unexpected stalling, but did nothing about it.

The Plaintiffs alleged that Hyundai knew before 2010 about the stalling defect and had shown enough evidence, including early consumer complaints, as well as testing data and information the automaker allegedly received from its dealers, to warrant the case moving forward. The case is in the U.S. District Court for the Northern District of California.

Source: law360.com

**HONDA REPORTEDLY FACING PROBE OVER AIR BAG FAILURE CLAIMS**

The National Highway Traffic Safety Administration has launched a probe into allegations that air bags may fail to inflate in up to 384,000 Honda Accord vehicles. The agency has received multiple complaints that an internal computer glitch has caused injury and additional cost to car owners. The Associated Press, in a report last month, cited documents in which the agency said it has received 19 complaints from owners of 2008 Honda Accord vehicles, claiming the computer controlling the car’s air bag release failed and that the illumination of the air bag warning light can disable the release function of the air bags.

NHTSA says it intends to investigate the occurrence rate of the new air bag malfunction to decide whether another recall is warranted. Last year, the agency fined Honda $70 million comprising two $35 million civil penalties, for failing to report nearly 2,000 death, injury and certain warranty claims to the federal government.
between 2003 and 2014, violating the Transportation Recall Enhancement, Accountability and Documentation Act. As part of the penalties, Honda also agreed to “increased NHTSA oversight and third-party audits to ensure that all required reporting is completed now and into the future.”

Source: Law360.com

**JEEP GRAND CHEROKEES UNDER NHTSA PROBE AFTER ROLLWAY REPORTS**

The National Highway Transportation Safety Administration has begun investigating nearly half a million Jeep Grand Cherokees after receiving 14 reports from consumers that their parked Jeeps rolled away, with the engine running and with it off. NHTSA has opened a preliminary evaluation into 408,000 model year 2014 and 2015 Jeep Grand Cherokees after the agency was contacted more than a dozen times by drivers complaining that their vehicles rolled away after the gears were shifted into the “park” position. The Jeeps are equipped with a gear selector that, rather than working the way traditional gear selectors do, allows a selection to be made by pressing the shifter paddle forward and backward, NHTSA said. The preliminary evaluation will assess the scope, frequency and safety-related consequences of the purported defect.

Source: Law360.com

**III. A REPORT ON THE GULF COAST DISASTER**

**ALABAMA’S BP AGREEMENT IN PRINCIPLE MOVES FORWARD**

The State of Alabama’s landmark Agreement in Principle with BP was a bombshell announcement last month. But as we reported, certain contingencies had to be satisfied in order for the agreement to become a final settlement. One of the most important contingencies that had to be met was that enough local governments had to accept their settlement offers. While BP never revealed exactly how many of those local governments had to participate, it did note that enough had to agree to resolve their cases to the oil giant’s satisfaction.

Having reviewed the number of local governments that agreed to settle their claims based on offers made by the third party neutrals appointed by the court, we can now report that BP has agreed that enough local governments participated for the settlement to move forward. All of our local governmental clients were in that number. This is a critically important step in the process. Considering the complex political challenges that exist when working with any governmental entity to negotiate a settlement—much less hundreds of governmental entities—clearing this contingency was a major step toward the Agreement becoming a final resolution of all governmental claims. In fact, it was an absolute necessity.

With the local government claims now resolved, unless something unforeseen develops, the next step will be the consent decree, which must be entered and approved by the Court in order for the $18.7 billion settlement (including Alabama) to move forward. Consent decrees in any complex pollution or environmental case are usually extremely complicated documents. We realize this consent decree will no doubt fall into that category. The environmental restoration plan, which will be part of the consent decree, will go up for public comment in the coming months, and will be taken under consideration by the parties as part of the approval process.

The good news is that this landmark settlement is now much closer to finality. While a very few persons, who have been pretty vocal, have critiqued the settlement, they don’t appear to have all of the needed facts. Considering our direct involvement in this litigation and the settlement negotiations, starting when the spill occurred, I am convinced that this was a great settlement for all concerned and will become final. If you have any questions about the State of Alabama’s oil spill settlement, or any other questions, contact either Rhon Jones or Parker Miller at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com and Parker.Miller@beasleyallen.com.

Source: Public Statistics for the Deepwater Horizon Economic and Property Damages Settlement.

**MEXICAN STATES PETITION US SUPREME COURT TO ALLOW BP OIL SPILL LAWSUIT**

Three Mexican states have asked the US Supreme Court to overturn a Fifth Circuit ruling that found the Mexican states lacked standing to sue BP PLC for coastline damage as a result of the Deepwater Horizon oil spill. You may recall that we previously reported Judge Barbier found only Mexican federal officials have standing to assert claims against BP and other named defendants, and this Fifth Circuit decision uphold that finding.

One of the initial primary arguments concerned which actually owned certain islands that were allegedly contaminated with oil because ownership could have arguably conferred standing to sue. The states of Quintana Roo, Tamaulipas and Veracruz argued that based on their consti-
tutions, there was at least a disputed issue of fact as to who owned the islands. The states are also seeking review of the Fifth Circuits’ conclusion on whether federal ownership over the lands means only the Mexican federal government can sue for damages to the affected lands. The Fifth Circuit found that only the Mexican federal government could pursue damages, but the states have argued that an interest protected by law is all that is required to have standing to file suit. Their stated interest is purportedly established by Mexican environmental law which grants the states the power to act “in matters of ecological balance preservation and restoration and environmental protection.”

In making this argument, the states are essentially challenging long-standing maritime precedent established by the Supreme Court in Robins Dry Dock & Repair Co. v. Flint. In that case, the High Court held that a charterer of a ship damaged by a dry dock could not sue the dry dock operator because it did not have a “proprietary interest” in the ship. Robins Dry Dock effectively limits standing to plaintiffs who suffer physical damage to some property in which the plaintiff has a “proprietary interest.” The states also highlighted a conflict with a Ninth Circuit opinion, finding the city of Sausalito’s proprietary interests were not confined to protection of real property.

Source: Law360.com

IV. DRUG MANUFACTURERS FRAUD LITIGATION

Amgen Pays $71 Million In Multistate Drug-Marketing Settlement

Amgen Inc. has agreed to a $71 million settlement with 48 state attorneys general who accused the drugmaker of marketing its anemia drug Aranesp and plaque psoriasis drug Enbrel, both biologic medications, for uses beyond the scope of U.S. Food and Drug Administration (FDA) approval. The drugmaker, based in California, agreed to a consent judgment last month with New York Attorney General Eric Schneiderman and other Attorneys General after they claimed it marketed Aranesp for cancer-related anemia without FDA approval and promoted Enbrel to treat mild plaque psoriasis—an auto-immune problem that causes the flaking and scaling of skin cells—even though the drug is only approved for more serious forms of the condition.

Aranesp is only approved for treating certain types of anemia, while Enbrel treats a number of conditions including some forms of plaque psoriasis. Attorney General Schneiderman had this to say in a statement:

Pharmaceutical companies are prohibited from making unapproved and unsubstantiated claims about prescription drugs. Consumers need to have confidence in the accuracy of claims made by pharmaceutical companies.

The attorneys general also accused Amgen of promoting Aranesp for different dosage periods than what its FDA-approved label indicates, and for claiming Enbrel’s effects are more long-lasting than they actually are. The settlement prohibits Amgen from using outlets including drug compendium listings to promote Aranesp and other similar blood stimulant medications, and Enbrel. Amgen is also forbidden from using outside lobbyists to facilitate the inclusion of such claims in compendiums without clarifying that they are representing Amgen’s interests. Of the 50 states, only Mississippi and South Carolina did not participate in the settlement.

Amgen said in its own statement that the settlement with the states addresses some of the very same issues that it had settled with the federal government in December 2012. In the statement, Amgen said:

Separate state and federal resolutions of the same underlying issues is the normal practice in such legal matters. Amgen is pleased to have this matter resolved, and remains committed to fulfilling its mission to serve patients. Amgen has a strong compliance program, and our management is dedicated to fostering a culture of doing the right thing at Amgen in full compliance with the law.

In December 2012, Amgen pled guilty in New York federal court to misbranding Aranesp, and agreed to a combined $762 million civil and criminal payout to resolve long-running allegations about its sales and marketing practices. Federal prosecutors said at the time that Amgen would pay $150 million in criminal forfeitures and penalties for marketing the drug to health care providers for unapproved uses. Meanwhile, lawyers involved in several related civil whistleblower lawsuits said the company had agreed to an additional $612 million in civil settlement payments.

Source: Law360.com

V. PURELY POLITICAL NEWS & VIEWS

The Unexpected Rise Of The Donald

I am going to wait until next month to write on the presidential election for a number of reasons. One is due to the sudden rise of Donald Trump as a most serious contender for the GOP nominee. He is no longer a sideshow attraction. Another reason is the fact that most of the other GOP candidates seem to be either in shock, or in a state of confusion, over Trump’s early successes. The candidate I thought was almost a lock for the nominations, Jeb Bush, seems to be in a daze.

So I thought it best to wait and see how things play out over the next few weeks. I will say that Trump reminds me a great deal of a certain Alabama governor who had both the Republicans and Democrats in a “fizzy” back during the late 1960s and on into the 1970s. The message of Gov. George C. Wallace almost 50 years ago and the current message from The Donald are quite similar. Their campaigns were aimed at discontent amongst folks all over the country. I learned a long time ago that a large percentage of Americans vote against something, which can be a person—rather than voting for a candidate. That’s why negative campaigning still works and that’s most unfortunate.

VI. LEGISLATIVE HAPPENINGS

A Failed Session Of The Alabama Legislature

After failing to resolve the more than $200 million deficit in the state’s General Fund budget during the regular session, Alabama legislators were called back into a special session by Gov. Robert Bentley in July. The special session was an unequivocal failure, ending on August 11 with no general fund budget in place. This is absolutely indefensible and should be unacceptable to all involved.
The House defeated a proposal to slash the General Fund budget as a way to “solve” the budget deficit, a plan that would have cut essential funding from programs including Medicaid, Mental Health, Public Health, the Court system, and Public Safety. The proposal was defeated by a vote of 92-2, although it’s likely that even had it passed it wouldn’t have gone much further, as Gov. Bentley had vowed to veto it. The governor vetoed the first budget the legislature passed in June, which was much the same.

Instead of trying to make more cuts, which is essentially like trying to get blood from a stone at this point, Gov. Bentley proposed just over $300 million in tax increases, including a cigarette tax and a business privilege tax. The governor also opposes efforts to resurrect the idea of a lottery or casino-type gambling as a fix for the state’s financial woes. Governor Bentley said he sees new taxes as the long-term solution for the General Fund, as a source of revenue, and I totally agree with him.

If legislators attempt to address the budget shortfall only with more cuts, the adverse effects on the lives of Alabamians will be drastic. Cuts to Medicaid will affect not only individuals but hospitals that depend on that revenue to operate. On average, Gov. Bentley says that 16 percent of the money for hospital operation comes from Medicaid. At Children’s of Alabama, the percentage of patients who receive Medicaid funding is even higher, at just about 50 percent. Without available funds, hospitals will be unable to employ physicians or even stay open in some cases, cutting essential services. Speaking at a civic club in Birmingham after the failed session, Gov. Bentley noted:

This is about the lives of people. It’s not about organizations or agencies. It’s about the people served by those agencies. It’s about whether there are enough troopers on the roads to help you if you have an accident. It’s about whether our children get immunizations or not. It’s about people, folks.

Gov. Bentley is preparing to call another second session, although no date has been set as of press time for this publication. It’s expected to be after Labor Day. The General Fund pays for almost all state services not related to public schools and colleges. A budget must be approved in time to meet the beginning of the fiscal year October 1. It’s time for the legislators to face reality and address the budget problems that have been building up for years to this climax. They need to adequately fund the state government operations and do so during the upcoming special session. I don’t believe another failure will not be tolerated very well by the people of Alabama.

A three-judge federal court heard arguments on August 25 on whether Alabama’s legislative district lines violate the constitutional rights of black voters by packing them into minority districts. The same three-judge court about 3 years ago rejected claims of racial gerrymandering made in lawsuits by the Legislative Black Caucus, the Alabama Democratic Conference and others. That was a 2-1 decision. The districts were used in the 2014 election. The district map did not reduce the number of majority black districts. But the plaintiffs claimed it reduced the number of black voters in other districts, weakening their ability to influence outcomes in those districts.

In March, the U.S. Supreme Court, in a 5-4 decision, sent the case back to the three-judge court for reconsideration, saying the panel erred on several points in its ruling. In the majority opinion written by Justice Stephen Breyer, the Supreme Court said the lower court used the wrong reasoning in concluding that race was not a predominant factor in drawing district lines. It also said the lower court wrongly considered the plaintiffs’ claims as a challenge against the overall district plan, rather than to individual districts. Justice Breyer wrote there was strong evidence that race was the predominant factor used in drawing Senate District 26 in Montgomery. That’s one of four Senate districts specifically challenged by the ADC. The others are District 7 in Huntsville, District 11 in St. Clair, Talladega and Shelby counties and District 22 in Mobile and other counties in southwest Alabama.

Justice Breyer was joined by Justices Ruth Bader Ginsburg, Elena Kagan, Anthony Kennedy and Sonia Sotomayor. Chief Justice John Roberts, along with Justices Samuel Alito, Antonin Scalia and Clarence Thomas dissented. The three-judge court consists of Presiding Judge Bill Pryor and Judges Myron Thompson and Keith Watkins. Judge Thompson dissented in the 2012 decision. During the recent hearing the plaintiffs were ordered by the panel to draw a good plan and to report back to the court.

Source: AL.com

VII.

COURT WATCH

GRAY BORDEN APPOINTED US MAGISTRATE JUDGE FOR ALABAMA’S MIDDLE DISTRICT

Gray M. Borden has been selected to fill the United States Magistrate Judge vacancy created in the Middle District of Alabama after the retirement of the Honorable Charles S. Coody. A merit selection panel of lawyers and other community leaders reviewed all applicants for the position and recommended to the District Court that Borden be chosen for the position. After a full-field background report by the Federal Bureau of Investigation (FBI) and the Internal Revenue Service (IRS), he will be appointed by the court to fill the vacancy.

Currently, Gray Borden is an Assistant United States Attorney with the Middle District of Alabama. A native of Montgomery, he graduated with a B.S. degree from Washington and Lee University and received his law degree magna cum laude in 2005 from the University of Alabama School of Law. While there, he was Editor in Chief of the Alabama Law Review. After law school, Borden clerked for U.S. District Judge William M. Acker, Jr., and was associated for several years with a very good Birmingham civil litigation firm, Lightfoot, Franklin and White, before joining the U.S. Attorney’s office in Montgomery. W. Keith Watkins, Chief U.S. District Judge for the Middle District of Alabama, stated:

The court received a number of outstanding applicants for the position. Gray Borden is exceptionally well qualified to serve as Magistrate Judge. He has a wide range of legal experience, an excellent temperament, and a tremendous work ethic.

The role of a Magistrate Judge is very important. These judges preside over pretrial criminal proceedings in federal court, including preliminary hearings, bond hearings, and arraignments. They handle all non-dispositive matters in civil and criminal cases. Magistrate Judges issue recommendations in prisoner petitions and Social Security cases. When there is consent of the parties, Magistrate Judges also handle civil cases. Borden will serve an eight-year term, but can be reappointed. I believe that he will be an outstanding judge.
The New Jersey Appellate Division on August 11 overturned a $25 million jury verdict for Plaintiff Andrew McCarrell in his Accutane product liability suit against Hoffmann-LaRoche Inc. The court found that Alabama law and a two-year statute of limitations should apply rather than New Jersey law. In its ruling, the three-judge appeals panel applied the precedent of the New Jersey Supreme Court in a similar product liability case, Cornett v. Johnson & Johnson, where the home state dictated the applicable limitations period.

Because McCarrell, an Alabama resident, did not file his complaint in the New Jersey law division until after the two-year Alabama limitations period expired, the panel reversed the 2010 jury award of $25.2 million. The Plaintiff claimed the acne drug Accutane was responsible for the inflammatory bowel disease (IBD) that led to the loss of his colon.

Though McCarrell was diagnosed with inflammatory bowel disease in 1996, allegedly stemming from his 10-month use of Accutane, he did not file suit in the New Jersey law division until 2003. In 2007, a New Jersey jury awarded McCarrell $2.6 million, but Roche successfully challenged that verdict, getting the New Jersey Appellate Court to vacate the judgment in March 2009 on the grounds that certain Accutane usage data was unfairly withheld from the trial.

The case was retried in 2010, and the jury found that Roche failed to provide an adequate warning to McCarrell's prescribing physician about the risks of inflammatory bowel disease from Accutane and that the failure to warn was a proximate cause of McCarrell's IBD. The Defense lawyers argued the Alabama's two-year statute of limitations should apply, but the jury awarded McCarrell $25 million in compensatory damages. The trial judge denied a subsequent motion by Roche to dismiss the case on the grounds that Alabama's two-year statute of limitations had kicked in when he McCarrell was diagnosed in 1996, finding that the prior New Jersey appeal decision was the "law of the case."

In discussing its reversal, the appellate panel pointed to two significant New Jersey Supreme Court precedent decisions that took place in the period between the first and second McCarren v. Roche verdicts:

- The first, laid out in P.V. v. Camp Jaysee in 2008, altered the "choice of law" analysis test for determining which state's laws would apply in cases between litigants from two different states tried in New Jersey, finding that the law of the state where the injury occurred would apply, unless another state has a more significant relationship to the issue.
- In 2010, the New Jersey appellate court applied the principle of P.V. to the case of Cornett v. Johnson & Johnson, ultimately dismissing a Kentucky Plaintiff's product liability action on the grounds that Kentucky's one-year statute of limitations applied, a decision upheld by the New Jersey high court in 2012.

Given these two precedent decisions, the appellate panel said its original 2009 decision was not a binding one, and therefore did not keep the court from reexamining the issue "in the interest of fairness and justice." The opinion read in that regard:

"It would be fundamentally unfair to defendants to treat our unpublished 2009 opinion as a rigid barrier to the application of the Supreme Court's clarified teachings in P.V. or the subsequent precedent issued in Cornett."

In applying the "choice of law" analysis, the appellate court said it was persuaded that Alabama had a more significant relationship to this lawsuit because McCarrell was a longtime resident of the state, was prescribed and ingested Accutane there, and suffered all of his injuries in Alabama. Thus, the state's two-year statute of limitation applies. In concluding that McCarren's complaint was time-barred under Alabama law, the appellate court reversed the trial court's previous decision not to dismiss the complaint.

The Plaintiff has been engaged in ongoing litigation against Roche for 12 years concerning the permanent and devastating injuries he developed from his use of Accutane. He had proved Roche's responsibility for those injuries in two separate trials. His lawyers will ask the New Jersey Supreme Court "to further review the decision." McCarrell is represented by David R. Buchanan of Seeger Weiss LLP, Michael D. Hook of Hook & Bolton PA, and Mary Jane Bass of Beggs & Lane. Hopefully, they will find a way to bring this lawsuit back to life.

Source: Law360.com

### VIII. THE NATIONAL SCENE

#### Asbestos In Schools Poses A Mesothelioma Risk

According to the Environmental Protection Agency (EPA), approximately 15 million students and 1.4 million teachers in this country were at risk of asbestos exposure in 1984. A prime example of the problem involves the Ocean View school district in California. Construction workers last year discovered asbestos in 11 of the district's school buildings. That was most disturbing from a safety and health perspective. As has been widely reported, during the period from 1940 and through the late 1970s, asbestos was commonly found in building materials like floor tiles, shingles and ceiling plaster for fire protection and insulation.

Stable, unbroken asbestos does not necessarily pose a significant health risks according to most experts. But if the material is weakened or damaged, such as in a renovation or demolition project, asbestos may become airborne and can be inhaled or ingested. When this type of exposure occurs, it can lead to the development of mesothelioma, a deadly cancer that affects the lining of the lungs, abdomen or, in rare cases, the heart. Unfortunately, there is no known cure for mesothelioma.

As a result of the asbestos discovery in the California school district in 2014, about 1,700 children were moved from their schools and three elementary schools were closed for the remainder of the school year. Although one of the schools plans to reopen by September 1, the other two are closed indefinitely and won't be opened until the carcinogen is securely and entirely removed. The costs of the extensive asbestos removal reached $15 million, forcing the school district to take out a loan to help cover the exorbitant expenses. “Everyone has asbestos, but they don’t want to deal with it,” said Gina Clayton-Tarvin, the Ocean View school board president. “To abate it is absolutely astronomically expensive.”

According to the Environmental Protection Agency, the creation of the 1986 Asbestos Hazard Emergency Response Act requires both public and private schools to habitually inspect buildings for asbestos and clean any asbestos-related threats in accordance to the EPA and Occupational Health and Safety Administration (OSHA) regulations. Asbestos must be removed by
a licensed asbestos abatement professional, and precautions must be taken to protect workers and the public from exposure. The asbestos-containing materials also must be safely disposed of in an area designated to handle hazardous waste.

Despite strides taken to help protect Americans from deadly asbestos, no one knows exactly how many schools currently contain asbestos today. Sen. Edward M. Markey (D-Mass.), the ranking Democrat on the Senate subcommittee currently overseeing chemical policy, believes that officials are unable to accurately determine whether schools are complying with the asbestos law, or even if a government agency is still enforcing it. “If there are gaps in enforcement, legislative or other reforms may be needed to ensure schools are free from this toxic hazard,” Sen. Markey said.

In order to increase asbestos abatement in schools, Sen. Markey believes the government should help cover the costs. The government’s involvement in asbestos abatement has been called into question by a number of experts hoping to protect U.S. citizens from the harmful effects of the carcinogen. “We don’t have any indication that the government is doing its job to make sure measures are in place,” said senior analyst Sonya Lunder with the Environmental Working Group (EWG).

The EWG Action Fund recently began a public awareness campaign to remind Americans of the dangers of asbestos exposure and the need for government involvement. Asbestos Nation, the EWG’s new national public education campaign, hopes to bring more attention to the 1986 Asbestos Hazard Emergency Response Act and why it was created. Each year, up to 15,000 Americans die from asbestos-related illnesses, but EWG believes that more can be done. Heather White, Executive Director of EWG and EWG Action Fund, had this to say:

The campaign will strive to not only to raise awareness among the public of the risks of asbestos, but also to push for policies to protect future generations from exposure once and for all.

The question of who all are responsible to help deal with the problem is a difficult one. Ms. Clayton-Tarvin had this to say regarding the U.S.’s past usage of asbestos:

We spray this stuff on because it’s safe. Then they find out it’s not safe. Really, whose responsibility is it? I don’t think it’s the school district. We’re trying to educate kids today.

We shouldn’t be responsible for paying for past sins.

Regardless of who is responsible to remedy the situation in our schools it’s very clear that a monumental problem exists all over the country. The federal government must take the lead and also make sure the costs are covered.

Sources: The Washington Post and Environmental Working Group

**College Fraternities Should Ban All Hazardous Hazing Activities**

Tucker Hipps, a fraternity pledge, was killed when he fell from a bridge last year. It’s alleged in a lawsuit that the student was forced to walk a narrow railing along the bridge from which he fell to his death last September. This tragic incident happened at a location near Clemson University. The student’s family filed a lawsuit over the incident. It’s alleged in the lawsuit against Clemson University, the Sigma Phi Epsilon National Fraternity and three of the fraternity’s brothers that the testimony of a new witness will expose wrongdoing that led to the student’s death. The unnamed witness’ allegedly will say Hipps was forced to walk the narrow railing of the bridge spanning Lake Hartwell near Clemson’s campus, then fell and couldn’t hold onto the bridge’s side. This information, if true, will give some insight into how the pledge class president for the Sigma Phi Epsilon fraternity died while on a fraternity-sponsored early morning run. Jimmy Watt, an Oconee County Sheriff’s Office spokesman, said officials who have been investigating the case already have spoken with the witness, but he would not say who it is or elaborate on what the witness said. The sheriff’s office and the South Carolina Law Enforcement Division “have spoken to this individual on more than one occasion,” according to Watt. He says it’s “still an active and ongoing investigation.” Cindy Tucker Hipps, Tucker Hipps’ mother, said the person who came forward is brave for doing so.

It’s alleged in the lawsuit that three of the fraternity’s brothers, identified as Defendants Thomas King, Samuel Carney and Campbell Starr, “forced Tucker to get onto the narrow railing along the bridge and walk some distance of the bridge on top of the railing.” It’s alleged that one of the three fraternity brothers became angry at Hipps for not providing a McDonald’s breakfast for 27 pledges during an early morning pledge run on Sept. 22, 2014. It’s alleged further that Defendant Thomas King was involved in a “confrontation” with Hipps on the bridge.

An autopsy kept secret by officials until details were released in the lawsuits concluded the student had died of “blunt force trauma” consistent with a “downward headfirst falling injury.” A toxicology report is said to have found Hipps had not been drinking or ingesting drugs. According to the lawsuit, Sigma Phi Epsilon brothers attempted to cover up their role in Hipps’ death by deleting text messages, cellphone calls and, in one instance, changing phone numbers. Clemson suspended the Sigma Phi Epsilon fraternity for five years, but has made little additional information available about exactly how Hipps died. It has said the run was not sanctioned by the university.

I agree with the family’s statement that the culture of hazing and inappropriate conduct by social fraternities must be stopped. Universities and fraternities must make the changes that will be required to stop hazing that is dangerous, putting students at risk of serious injury or death.

Source: Anderson Independent Mail

**UAW Blasts General Motors Plan To Sell Chinese-Made Cars In The U.S.**

The United Auto Workers (UAW) union has blasted General Motors (GM) for considering selling Chinese-built Buick Envisions in the United States. The Union vowed to try to kill the plan during ongoing contract negotiations. Cindy Estrada, the UAW vice president responsible for the union’s relations with GM, said in a statement:

After the sacrifices made by US taxpayers and the US workforce to make General Motors the profitable quality company it is today, UAW members are disappointed with the tone-deaf speculation that the Envision would be imported from China. GM should stand by its declaration that it will build where it sells. The Envision should be made in the US by the workforce that saved GM in its darkest time, and UAW members intend to address this issue in contract talks.

GM claims reports about importing the Envision, a compact sport utility vehicle GM put on sale in China in 2014, are “speculative.” The automaker said it hasn’t announced the Buick Envision for any markets other than the China market. Reports have indicated that in 2016 GM would shift production of the Buick Verano...
sedan from Michigan to China; production of the Buick Regal from Canada to either China or Europe; and also start importing the Buick Cascade convertible from Europe.

The GM speculation comes as Republican presidential frontrunner Donald Trump has seized on trade with China as a campaign issue. He has called for putting a 25 percent tariff on Chinese imports. Buick is one of GM’s most popular brands in China and the automaker sells four Buicks in China for every Buick it sells in North America. But car sales are slowing in China, where the Detroit-based carmaker has installed a huge production base over the past decade. The UAW is currently in the midst of negotiating new labor pacts with GM, Ford and Fiat Chrysler America (FCA), which owns the Chrysler brands.

Union president Dennis Williams has said a pay raise will be the union’s top priority in the upcoming negotiations. However, the potential for lost jobs and production will certainly complicate the talks. That’s especially true considering that both GM and Ford have announced major investments in Mexico. A substantial portion of all the vehicles built in Mexico are exported to the United States. I agree with the union that American jobs must be protected.

Source: econoictimes.com

IX.
THE CORPORATE WORLD

Public Citizen Fighting Attack After Exposing Energy Industry Misconduct

Public Citizen, the consumer advocacy group, needs help. This group, totally dedicated to defending democracy from corporate greed, has now come under fierce attack by Murray Energy, the largest private coal company in the country. In 2014, Public Citizen aired radio ads highlighting Murray Energy’s opposition to improved worker safety and clean air regulations. However, due to the U.S. Supreme Court’s ruling in Citizens United, which granted corporations like Murray Energy the same First Amendment rights as living, breathing human beings, the company is now claiming in a lawsuit that Public Citizen’s ads violated its privacy rights. In the suit Murray Energy claims it has suffered “mental anguish and emotional distress.” If it sounds “weird” for a corporation to claim this type “distress,” it’s because it definitely is very weird! I’m surprised the corporation didn’t claim that it suffered “physical pain and suffering,” since it considers itself to be a “person.”

Attempts by Public Citizen to have this ridiculous claim dismissed, or at least moved out of the same city where Murray Energy is located, were denied by the judge overseeing the case. Murray Energy has even gone so far as asking Public Citizen to cover the corporate giant’s legal expenses that it incurred keeping the case in its own backyard, demanding that the costs be taxed by the court against Public Citizen instead.

Despite the privacy rights claim being ultimately dismissed by the court, the corporation is now appealing on the grounds that, “Murray Energy should have the opportunity to assert that [Public Citizen] invaded its privacy ….” The full appellate brief was due in late August, but never doubt that Murray Energy will pull every trick in the book to bolster its attack on Public Citizen. Murray Energy’s sole objective is to keep Public Citizen and other consumer advocates from telling the truth about the corporation’s activities.

Unfortunately, Public Citizen has been consumed with defending itself from the outrageous claim made by Murray Energy. The lawsuit distracts the organization’s resources from its real work—and that’s to assure that our nation puts its hard-working people ahead of corporate greed and profits.

It is my sincerest hope that each of our readers will help Public Citizen continue its fight for real people in this country by making a generous contribution to the organization. You can get more information on the work of Public Citizen and its newsletter by going to www.Citizen.org. To make a donation to Public Citizen, either write a check to Public Citizen at 1600 20th Street NW, Washington, D.C. 20009, or visit its website and click the “Donate Now” button in the top right-hand corner of the home page. You will never regret helping Public Citizen, a group that accepts no corporate money, protect the rights of “real people.”

Source: Public Citizen

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X.
WHISTLEBLOWER LITIGATION

NuVasive Will Pay $14 Million to Settle Kickbacks and Off-Label Uses Lawsuit

Medical device maker NuVasive Inc. will pay $13.5 million to settle a lawsuit alleging violations of the False Claims Act (FCA). The company was accused of promoting off-label uses of spinal fusion products for Medicare patients and dispensing kickbacks through a supposedly independent medical society. The settlement between the U.S. Department of Justice and California-based NuVasive, which also was accused of defrauding Medicaid and Tricare, includes a $2.2 million award to a whistleblower. A onetime sales representative Kevin J. Ryan filed the FCA suit in 2012 in Maryland federal court. The whistleblower will receive another $250,000 for attorneys’ fees, expenses and costs.

NuVasive marketed from 2008 through 2013 its CoRoent devices for uses not approved by the U.S. Food and Drug Administration (FDA). Those uses included spinal fusion surgeries involving more than two contiguous levels of the spine, procedures targeting the thoracic region of the spine and treatments for severe scoliosis and spondylolisthesis. During the same time period, NuVasive allegedly disguised kickbacks to doctors as speaker fees and expenses related to events sponsored by the Society for Lateral Access Surgery (SOLAS). The group was misleadingly portrayed as independent. “Despite its outward appearance of independence, SOLAS was created, operated and funded solely by NuVasive,” the settlement agreement said. Nick DiGiulio of the Office of Inspector General at the U.S. Department of Health and Human Services, stated:

Settlements such as the one entered into today by NuVasive send a message to the medical device industry that such practices will be closely monitored.

I am convinced that if the drug manufacturers had to fear strong regulation by the government, there would be very few FCA lawsuits. However, the drug industry knows that the FDA is underfunded and understaffed and as a result incapable of doing its regulatory function adequately. Therefore, the FCA will continue to be in full use and that’s a good thing. Hopefully, Congress will eventually realize that it
makes “good sense” to give the FDA the help it so badly needs.
Source: Law360.com

XI. CONGRESSIONAL UPDATE

Senate Passes Bill Tripling Potential Automaker Fines To $105 Million

The U.S. Senate passed a bill that will triple the maximum fines automakers pay for violations of motor-vehicle safety laws. The new $105 million cap was part of a six-year surface transportation policy bill. The measure also prohibits the rental of cars with un repaired safety defects and proposes that dealers run a recall check when customers come in for routine service. The higher limit on fines for auto companies fell short of what safety groups and the Obama administration had sought.

The Transportation Department had suggested maximum $300 million fines as a greater deterrent. Senator Bill Nelson, a Florida Democrat, had proposed lifting the cap on fines altogether. The Senate approved the measure without considering amendments that had been expected to improve auto safety. Democrats were critical of the bill, saying the measure missed an opportunity for reforms needed in response to record-breaking numbers of recalls.

The Senate had previously rejected attempts to add criminal penalties for auto executives who knowingly hid information about safety defects. Joan Claybrook, a longtime Washington consumer advocate who headed the National Highway Traffic Safety Administration (NHTSA) in the 1970s, had this to say:

Today the Senate turned its back on the public and ran into the arms of special interests. There should be no victory laps or self-congratulations for passing such a horrific bill.

The final vote on the surface transportation bill was 65-34. The measure still must be approved by the House of Representatives and signed by the president before it would become law. Hopefully, that will happen, but don’t hold your breath.
Source: Claims Journal

XII. PRODUCT LIABILITY UPDATE

Our Firm Has Recently Filed Another Osprey Lawsuit

Several years ago, lawyers in our firm successfully handled a tragic case involving the crash of an MV-22 Osprey which resulted in the deaths of an entire crew of highly trained Marines. For those who don’t know, the Osprey is an aircraft with a long controversial history. Originally intended to replace heavy-lift and troop transport helicopters, the Osprey is a dual rotor aircraft that takes off and lands like a helicopter, but can fly like an airplane. Unlike the British Harrier, which uses ducted thrust from a jet engine, the Osprey propeller engines tilt to transition from helicopter to airplane mode. At least one expert has been quoted as saying that because this aircraft is trying to be both an airplane and a helicopter, it will never be great at being either one. Multiple crashes and deaths caused several groundings of the first fleet of aircraft, but political pressure saved the program from cancellation.

The military has touted the effectiveness of the Osprey, widely used in the war in Afghanistan. Unfortunately, Osprey crashes have continued. Our firm currently represents the family of another Marine killed in a “hard landing” during training in Hawaii. Rather than actually being a hard landing, amateur video shows the Osprey drop suddenly and crash. The aircraft broke up, caught fire and very little was left when the fire was eventually extinguished. Several serious injuries and two deaths resulted. Our lawyers are in the early stages of investigating this tragic case, but they already know that there is a history of problems with the air particle separator intended to filter out airborne dust and dirt from being ingested in the engines. In this case, the Osprey was one of a line of aircraft attempting a beach landing in a very heavy dust storm kicked up by the aircraft rotor downwash. It’s suspected that the filter failed to operate properly and ingested dirt, which caused an engine failure. We look forward to working through this complex case and will update you as information becomes available. If you need more information on the problems with the Osprey, contact either Cole Portis or Mike Andrews, lawyers who handle Osprey litigation for our firm, at 800-898-2064 or by email at Cole.Portis@beasleyallen.com or Mike.Andrews@beasleyallen.com.

Trial Judge Denies Trinity’s Request For A New Trial

A Texas federal judge last month denied a request for a new trial made by Trinity Industries Inc. following the $665 million False Claims Act (FCA) verdict that we wrote about recently. The jury found that Trinity had defrauded the federal government by selling defective guardrails. The trial judge said the company could present new evidence in an appeal. Trinity had argued that the damages award was excessive and that a new trial was warranted given newly discovered evidence that shows the company’s ET Plus guardrail system passed government crash tests. U.S. District Judge Rodney Gilstrap disagreed, saying there was no need for a new trial and that Trinity could pursue an appeal to present the new evidence. The judge wrote in his order:

As to the issues which are not newly raised in this motion, the court has already dealt with these issues in the court’s opinion concerning Trinity’s judgment as a matter of law filed under Rule 50(b). The court declines to address/readress these issues and instead finds that Trinity’s motion should be and is hereby denied so that this case may proceed to a proper appeal.

The false claims suit was based on claims that went undisputed during the 2014 jury trial, including an allegation that Trinity changed the dimensions of its guardrail system without telling the Federal Highway Administration.

In October, a federal jury returned a $175 million verdict finding Trinity liable for changing the design of the guardrails without getting approval, then misrepresenting them as the earlier, approved version even though they were more dangerous. Judge Gilstrap in June had entered final judgment of $663.4 million against Trinity, including a $199 million commission for whistleblower Joshua Harman. Since the U.S. did not participate in the trial and left the litigation solely to Harman, he was awarded the 30 percent commission and more than $16 million in attorneys’ fees, $2.3 million in expenses and $177,830 in taxable costs, for a total award of more than $217 million. The government was awarded $464.4 million.

According to Trinity’s motion for a new trial, a report examined 1,000 ET-Plus

JereBeasleyReport.com
devices installed on roads across the country and found “no evidence” of anything other than federally compliant results. Trinity argues that regardless of FCA allegations, the government received the “benefit of its bargain.” Trinity also argued that Judge Gilstrap’s final judgment—which it called “one of the largest FCA verdicts in history”—is grossly excessive in violation of the Eighth Amendment’s Excessive Fines Clause. Trinity said in its July motion that the company failed to identify the precise number of allegedly defective guardrails the government purchased and instead implemented a misguided formula to come with a figure amounting to “guesswork” and “speculation.”

Source: Law360.com

**Mazda Seat Belt Defect Lawsuit Will Go Forward**

A Montana federal judge has denied Mazda Motor Corp.’s attempt to get a dismissal of a woman’s lawsuit. It’s claimed by the Plaintiff that the company’s automatic seat belt design caused her to suffer organ damage in a crash. Incarcinacion L. Speaks had filed suit against Mazda, and the automaker took the position that her claims are preempted by a U.S. Supreme Court decision. The summary judgement motion was rejected by U.S. District Judge Dana L. Christensen, who said the Plaintiff’s claims are “more nuanced” than Mazda attempted to portray them in its motion. The judge said, unlike the Plaintiff in Geier v. American Honda Motor Co., Ms. Speaks never claimed that her car should have had an airbag or that all automatic seat belts are defective. The judge stated further:

*The success of Speaks’ suit does not depend on the jury finding that every passive belting system is inherently defective; it depends only on the jury finding that Mazda’s particular design of the passive belting system was defective.*

In *Geier*, the Supreme Court held that the Federal Motor Vehicle Safety Standard preempted claims that Honda had a duty to put airbags in its vehicles. Mazda said further that Speaks had presented the court with the same kind of conflict. Mazda said the Plaintiff made a meaningless distinction between her case and Geier when she stated that she wasn’t criticizing Mazda’s decision to use a passive restraint system but how it had implemented its design. However, Judge Christensen disagreed.

Judge Christensen said that Ms. Speaks has alleged that at just 4’9” tall, she was too small to be adequately restrained by the seat belt in her 1994 Mazda Protege, and has presented evidence that safer alternatives to Mazda’s seat belt design were available at the time. The judge also granted in part Ms. Speaks’ motion for partial summary judgment on Mazda’s affirmative defenses, but declined to bar the company from raising its preemption defense based on *Geier*.

While the issue wasn’t suitable for summary judgment, Ms. Speaks touched on a preempted zone by claiming that Mazda’s design—a two-point automatic shoulder belt with manual lap belt—was inherently defective. Judge Christensen said, Mazda had also disputed testimony from two of the Plaintiff’s experts, claiming that one relied on irrelevant studies while the other relied too heavily on the Plaintiff’s own testimony.

The company said the studies one expert cited didn’t involve the exact circumstances that the Plaintiff has alleged, namely that she was wearing both a shoulder and lap belt during the 2011 accident in which her pancreas and duodenum were lacerated. Mazda said the other expert couldn’t rely on the Plaintiff’s version of events because her injuries don’t line up with the position of the seat belt as she described it, and the expert’s opinions are therefore unreliable.

The judge rejected those criticisms, stating that Mazda couldn’t criticize studies involving occupants wearing only shoulder belts and not lap belts when its own experts had said that body movement is similar in either scenario. Judge Christensen said it’s fine for an expert to use a Plaintiff’s testimony as the basis for an opinion. He added:

*In fact, the only person who knows with certainty whether the shoulder belt was properly placed is Speaks. The physical evidence may call into question her veracity on this subject, but that does not preclude [an expert] from relying on Speaks’ sworn testimony in forming her opinions.*

It will be most interesting to see how this case develops as it goes forward. I believe the case has merit and should be successful. We will watch it closely.

Source: Law360.com

**Chrysler Appeals In The Georgia Jeep Fire Death Case**

Fiat Chrysler America (FCA US LLC) has appealed a $40 million verdict for the parents of a boy who burned to death in a Jeep Grand Cherokee. That comes despite having won a reduction of a jury’s original $150 million award for the family. A Georgia state judge reduced the amount of the verdict in late July when the parents indicated they would accept a “reasonable” reduction. The company filed its notice of appeal on August 10.

The company was clearly at fault by positioning the 1999 Jeep’s gas tank near its rear axle. The jury’s verdict included the family’s request for $120 million for the full value of 4-year-old Remington Walden’s life and further found that FCA 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. The jurors also awarded the family an additional $30 million for the boy’s pain and suffering.

Experts had testified he lived for up to a full minute after the flames reached him. The jurors found that Fiat Chrysler bears 99 percent of the responsibility for the death with the remaining percent falling upon the driver of the car that rear-ended the Jeep.

Fiat Chrysler, as part of the record-setting $105 million settlement, will offer $100 gift cards to owners of unrepaired recalled Jeeps. It will offer them $1,000 incentives to trade them in. The National Highway Traffic Safety Administration (NHTSA) has repeatedly criticized Fiat Chrysler for not doing more to get recalled Jeeps repaired faster.

Source: Law360.com

**Taurus Settles Lawsuit**

Firearms manufacturer Taurus has settled a lawsuit that alleges nine handgun models had defects, including one that caused some to inadvertently fire when dropped. This defective product lawsuit was filed in a Florida 2013 in federal court. The settlement affects customers who bought the following models sold between 1997 and 2013 in the U.S., Puerto Rico, U.S. Virgin Islands and Guam: PT-111 Millennium; PT-132 Millennium; PT-138 Millennium; PT-140 Millennium; PT-145 Millennium; PT-745 Millennium; PT-609; PT-640; and PT-24/7. Claims will be handled by a Third Party Claims Administrator (TPA). Once the Claims Period opens, the Taurus Companies will provide

Source: Law360.com

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notice through digital and print outlets. All claims should be made through the TPA.

As of early 2013 the nine models were no longer manufactured and distributed in the United States. The company is headquartered in Brazil, but it has operations in Miami. A federal judge in Miami preliminarily approved the settlement that calls basically for Taurus to do three things for customers:

- Provide an enhanced warranty to allow any owner—even if it isn’t the original owner and for the life of the pistol—to submit the handgun for inspection and repair, if possible. If the defects can’t be repaired Taurus will offer to replace the pistol with a similar new one. Normal inspection and shipping fees and labor costs will be waived.
- Produce on-line safety training videos for those customers who bought the pistols to show them how to handle and carry the pistols to avoid dropping them and how to ship them for warranty repairs.
- Allow customers who bought the pistols to send their pistols back for cash payments. The payments will vary up to $200, depending on how many pistols are returned.

The lawsuit alleges that there were safety defects in the nine models that caused them to fire when the trigger is pulled even though the safety in the “on” or “safe” position and others when dropped or bumped, a notice that will be published and sent to customers’ states. It was alleged that defects are attributable to the lack of a “trigger safety blade” within the semi-automatic pistols. Under the settlement, total cash payments are capped at $30 million.

The federal judge will hold a hearing in January to determine whether to give final approval to the settlement. In the meantime the judge has set out deadlines for the company to publish notices and the safety videos. It’s estimated that with the cash payment cap, repair and replacement of guns, and attorneys’ fees, the cost to Taurus will eventually total more than $50 million. The company has denied there were any defects in those handgun models.

The lead Plaintiff in the class-action lawsuit is Chris Carter, a sheriff’s deputy in Scott County Iowa who had a PT140 Millennium PRO pistol. He alleged that on July 29, 2013, while serving on a narcotics detail he pursued a fleeing suspect. As he ran, his pistol fell from his holster, hitting the ground and discharging a bullet that struck a nearby unoccupied vehicle. Todd Wheeles with the Birmingham law firm Morris, Haynes, Hornsby & Wheeles and David Selby, who is with Bailey & Glasser, are co-lead counsel in the class-action lawsuit. The firms worked on this case with the law firm Leesfield & Partners, P.A., and Angelo Marino, Jr, both located in Miami where the lawsuit was filed.

Sources: WSFA News and The Birmingham News

XIII. MASS TORTS UPDATE

**FIRST STATE COURT TALCUM POWDER TRIAL PLAINTIFF SELECTED**

The first State Court talcum powder/ovarian cancer trial is scheduled to start on Feb. 1, 2016, in the Circuit Court of the City of St. Louis, Mo. It will involve claims brought by Jacqueline Fox, a 61-year-old woman who was diagnosed with ovarian cancer two years ago. Ms. Fox has undergone multiple surgeries and chemotherapy regimens. She used Johnson’s Baby Powder, manufactured by Johnson & Johnson (J&J) and Shower to Shower for female hygiene in excess of 35 years and says that the company’s failure to warn caused her ovarian cancer.

Indeed, even today, when you look at bottles of Johnson’s Baby Powder and Shower to Shower, you will find that there is no mention of the risk of cancer. This is shocking considering a co-Defendant mining company, Imerys, has been warning J&J of the risks since 2006. Two of the experts in Ms. Fox’s case are Harvard doctors, one of whom is an epidemiologist who was the first to publish regarding the risk of ovarian cancer from genital talc use in 1982. The other doctor is a pathologist who used a microscope to look at the cancerous ovarian tissue removed from Ms. Fox and found the presence of talc particles.

In other talc litigation news, recently Judge Brian Holeman of the Superior Court of the District of Columbia Civil Division denied Defendants’ Motions to Dismiss claims similar to those of Ms. Fox, brought on behalf of Lori Oules. Interestingly, a motion was filed by Defendant Personal Care Products Council, a D.C. lobbying group for the talc industry. This ruling will pave the way the way for discovery regarding whether and how the talc industry used this lobbying group to influence public perception of the risks of talc.

**BAYER AGREES TO SETTLE YAZ/YASMIN ARTERIAL THROMBOTIC EVENT INJURY CASES**

Lawyers in our firm’s Mass Torts Section are pleased to report that after years of litigation involving Bayer’s drospirenone-containing oral contraceptives, including Yaz, Yasmin, Ocella, Gianvi, Beyaz, and Safyrl (Yaz), Bayer has finally agreed to settle the claims of approximately 1,300 individuals who suffered Arterial Thrombotic Event (ATE) injuries while using Yaz, including ischemic stroke and heart attack. The ATE injury claims represent the bulk of the remaining cases pending against Bayer over the once-blockbuster DRSP line of oral contraceptives.

Bayer previously settled thousands of Venous Thrombotic Event (VTE) injuries, including pulmonary embolism and deep vein thrombosis, after numerous medical studies found that the risk of VTE injuries was significantly greater with Yaz compared to other oral contraceptives, and after the FDA required Bayer to update its Yaz warning label to warn doctors and patients of the increased risk. Throughout the litigation, however, Bayer has remained resolute that Yaz does not increase the risk of ATE injuries above the risk seen with other oral contraceptives. The settlement was reached only after the courts forced the parties into negotiations.

Yasmin, which was first introduced in the United States in 2001, was marketed by Bayer as having fewer side effects, mainly less weight gain, than older oral contraceptives. The settlement was reached only after the courts forced the parties into negotiations.

Lawyers in our firm are working on the Fox case with the law firms of Onder, Shelton, O’Leary, and Peterson, LLC, Allen Smith, and Porter Malouf. We are also working on the Oules case with the law firms of Ashcraft Gerel, Allen Smith, and Porter Malouf. As I have indicated previously, our firm is heavily involved in litigating cases on behalf of women who were diagnosed with ovarian cancer following the use of talcum powder in the genital area. If you have any questions regarding these cases, please feel free to contact Ted Meadows, a lawyer in our firm’s Mass Torts Section, at Ted.Meadows@beasleyallen.com or 800-898-2034. Ted is our lead lawyer in this litigation.
improper marketing techniques and off-label marketing messages.

Unlike the VTE injury settlements, which have been handled by Bayer on a case-by-case basis, the ATE settlement is a global settlement program through which any claimant alleging an ATE injury can participate. The deadline for enrolling in the ATE Settlement Program is Sept. 12, 2015. Bayer reserved the right to cancel the Settlement Program if at least 97 percent of the ATE injury cases do not enroll. If you need more information on this litigation, contact Roger Smith, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

JURY RETURNS A $9.2 MILLION VERDICT AGAINST ZIMMER IN HIP IMPLANT DEFECT SUIT

A California jury awarded $9.2 million last month to a man who was forced to undergo two hip-replacement surgeries in 15 months after receiving a Zimmer Inc. implant. The jury found for the first time that the company was negligent in designing its metal-on-metal Durom Cup. On July 24, following a three-week trial, the jury in California superior court unanimously found in favor of Gary Kline, who had his first hip surgery in 2007 when he was 51 years old and now suffers from chronic pain as a result of Zimmer’s defective implant.

The jury ordered Zimmer to pay Kline more than $150,000 to cover past medical bills, $2.4 million for past noneconomic damages, including physical pain and mental suffering, and $6.6 million in future noneconomic damages. Kline’s orthopedic surgeon told him that his hip would be 98 percent functional with a Durom Cup because the implant was durable and its large head allows for a greater range of motion than alternative implants.

Kline was left with immobilizing pain from the first operation, and scar tissue and muscle damage from his second surgery have permanently limited his mobility. Kline alleged that Zimmer altered the product’s plasma coating without properly testing it, choosing instead to rush the implant to market. The Durom Cup is designed to allow patients’ bodies to grow into the implant, but the altered coating allegedly resists bone growth. The bulk of Durom Cup claims against Zimmer have been consolidated in multidistrict litigation (MDL) in New Jersey federal court, where related cases and potential tag-alongs continue to stream in and where Waters Kraus serves as liaison counsel. For more information contact Navan Ward or Melissa Prickett, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Navan.Ward@beasleyallen.com or Melissa.Prickett@beasleyallen.com. Source: Law360.com

The Department of Justice has prosecuted companies like Pfizer, Astra-Zeneca, Eli Lily, and Johnson & Johnson, and has levied billions of dollars in fines as a result of off-label promotion. Many of the pharmaceutical and medical device cases lawyers at Beasley Allen have handled over the years involved off-label promotion that led to serious injury and death. When a pharmaceutical company promotes a product for an “off-label” use, it means that the company has not demonstrated to the U.S. Food and Drug Administration (FDA) that the product is both safe and effective for that use.

In early August, however, Federal Judge Paul Engelmayer of the Southern District of New York ruled that under the First Amendment, pharmaceutical manufacturer Amarin could promote its drug Vascepa for use that has not yet been approved by the FDA. Amarin sued the FDA and the Department of Health and Human Services seeking a preliminary injunction that would prevent the company from being prosecuted for making certain truthful statements about the drug. Specifically, Amarin wanted to be able to tell prescribers, among other things, that “supportive but not conclusive research suggests that omega-3 fatty acids help prevent coronary artery disease.”

Although the ruling was narrow and based on specific facts, we believe that it could lead to dangerous and unintended consequences for consumers since this multi-billion dollar industry is highly competitive and driven by the slightest edge a company can gain over its competition in the numbers of prescriptions written by physicians. Additionally, it is now possible that if the government were to prosecute a pharmaceutical company for off-label promotion, the government would have to prove beyond a reasonable doubt that the statements made by the company were false, whereas in the past, the burden was on the pharmaceutical company to demonstrate to the FDA that the product was safe and effective for its intended use. It is our hope that the FDA will appeal the ruling so that corporate greed doesn’t take precedence over patient safety.

PHARMACEUTICAL COMPANY WINS BID TO PROMOTE ITS DRUG FOR AN OFF-LABEL USE

In earlier editions of the Jere Beasley Report, we discussed the much touted securities case, Halliburton Co. v. Erica P. John Fund Inc. The case questioned whether a plaintiff could rely on the fraud-on-the-market presumption at class certification or whether defendant could present evidence that there was no price impact stemming from the defendants actions at the class certification stage. Ultimately, the Supreme Court determined that the presumption remains, but that a defendant can present evidence to rebut that presumption at class certification. Halliburton was remanded where class certification was reassessed and the defendants allowed to rebut market impact.

United States District Judge Barbara Lynn granted class certification, but only with respect to the company’s alleged corrective disclosure of December 7, 2001. As to the other five alleged corrective disclosures, certification was denied. As the new rule played out, the plaintiff was still entitled to the presumption of fraud-on-the-market, meaning Halliburton had the burden to prove that the announcements did not affect the company’s stock price. Judge Lynn found that Halliburton had not satisfied that burden for the December 7 disclosure. That ruling came about the same time that a Baltimore jury found that a Halliburton subsidiary, Dresser, would have to pay $30 million following a trial in an asbestos lawsuit. The company’s shares plunged about 40 percent soon after. Judge Lynn wrote in her order:

Although the court finds that at least some of Halliburton’s stock price decline on that date is likely attributable to uncertainty in the asbestos environment that also impacted other companies with asbestos exposure, Halliburton has not determined that uncertainty caused the entirety of Halliburton’s substantial price decline.

Instead, the court found that the December 7 disclosure “likely reflected the market’s view of Halliburton’s prior representations regarding its asbestos lia-

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bility and increased uncertainty in the asbestos environment.” Despite determining that Halliburton met its burden regarding the five other disclosures, the court also ruled against the company’s attempts to place the burdens of showing actual impact on plaintiffs if the defendant shows evidence to rebut the fraud-on-the-market presumptions.

In other words, the Supreme Court’s decision in Halliburton was strictly interpreted and adhered to by Judge Lynn. The plaintiff still retains the benefit of a price impact presumption and the defendants, though allowed to present evidence of no impact this early, bear the heavy burden of overcoming that presumption; presentation of evidence, by itself, is not enough to shift the burden of proof to the plaintiff.

Judge Lynn also found that certain considerations, such as whether an alleged misrepresentation was in fact a misrepresentation, were not ripe at the class certification stage saying:

“To hold otherwise would require the court to pass judgment on the merits of the allegations after the dismissal stage and before summary judgment—in effect, giving a third bite at the apple to Halliburton.

I suspect that the issues discussed above will continue to be debated in the courts. I don’t believe that corporate defendants and their lawyers will give up very easily.

22 Banks Accused Of U.S. Treasury Auction Manipulation

On July 23, 2015, a Boston retirement fund sued 22 financial companies that have served as primary dealers of U.S. Treasury securities in federal court, in the first nationwide class action alleging a conspiracy to manipulate Treasury auctions that harmed both investors and borrowers. The State-Boston Retirement System, the pension fund for Boston public employees, accused Bank of America Corp’s Merrill Lynch unit, Citigroup Inc, Credit Suisse Group AG, Deutsche Bank, Goldman Sachs Group Inc, HSBC Holdings Plc, JPMorgan Chase & Co, UBS Group AG and 14 other defendants of illegally trying to profit on the sale of Treasury bills, notes and bonds at investors’ expense.

According to the pension fund’s complaint, filed in U.S. District Court in New York, the banks used chat rooms, instant messages and other means to swap confidential customer information and coordinate trading strategies in the roughly $12.5 trillion Treasury market. This enabled the banks to inflate prices on Treasuries they sold to investors in the pre-auction “when issued” market, and deflate prices when they bought Treasuries to cover their pre-auction sales, violating antitrust laws, according to the complaint. Primary dealers are the banks authorized to transact directly with the Federal Reserve. They are big players in Treasury bond auctions and act as market makers in the secondary market.

The pension fund said its “expert economists” observed wide gaps between when-issued and auction prices around December 2012, but that these gaps narrowed significantly as the U.S. Department of Justice (DOJ) and other regulators began probing alleged manipulation of the London interbank offered rate (Libor), a benchmark used to set interest rates for trillions of dollars in loans around the world. The Justice Department is reportedly investigating possible collusion in Treasury auctions. The Fund stated:

The only plausible explanation for the sharp break is that defendants felt the heat of the DOJ’s ongoing investigation into Libor, and ceased their efforts to manipulate the Treasury securities market because Defendants’ Treasury traders feared that they too would be prosecuted.

The scheme was said to have harmed private investors who paid too much for Treasuries. It harmed municipalities and corporations because the rates they paid on their own debt were also inflated by the manipulation. Even a small manipulation in Treasury rates can result in enormous consequences. The case filed by State-Boston Retirement System is in the U.S. District Court, Southern District of New York. The suit was filed on behalf of investors in Treasury securities, including futures and options, from 2007 to 2012.

Source: Reuters

AIG’s Contradictions Help Victaulic Co. Win $55 Million Jury Verdict

The corporate entity Victaulic Co. has won a $55 million verdict in its lawsuit against American International Group Inc. (AIG) subsidiaries. It was proved that the Defendants improperly refused to provide coverage under its policies for the pipe-fitting company Victaulic Co. in a number of product defect suits. The policyholder had sued for breach of contract and bad faith conduct on the part of the insurer. Victaulic’s coverage suit against the AIG insurers was heard before a California state jury. Ultimately, it was proved that the AIG units breached the insurance contracts in bad faith and with malicious intent.

The jury awarded Victaulic $9.3 million for the insurers’ breach of contract and $46 million in punitive damages. Witness testimony and obtained materials during potential discovery revealed that AIG had, at certain times, reached conclusions on coverage internally, only to turn around and tell Victaulic something totally different.

In one instance, an AIG claims handler found that a claim against Victaulic constituted a covered occurrence. But when AIG wrote to the company 15 days later, it indicated that the insurer didn’t have enough information to determine whether an occurrence had happened.

The verdict was the culmination of a long-running legal battle concerning general liability policies that the AIG units issued to Victaulic between 2001 and 2012. The parties disagreed about the coverage provided under the policies with respect to nine underlying product defect actions filed against Victaulic in California, Colorado, Oregon, Massachusetts, Washington and West Virginia. The insurers, The Insurance Co. of the State of Pennsylvania, National Union Fire Insurance Co. of Pittsburgh, Pa., and American Home Assurance Co. Inc., denied coverage of those claims.

AIG filed suit in Pennsylvania state court in 2012 seeking a declaration that it had no duty to defend or indemnify Victaulic. But that suit was dismissed, and Victaulic filed the instant suit in California. AIG brought a second Pennsylvania suit and an arbitration demand in New York, but later dropped both.

In January, Alameda County Superior Court Judge Frank Roesch, ruling on Victaulic’s motion for summary judgement, held that the AIG units had a duty to defend Victaulic in three of the underlying actions, agreeing with the pipe fittings manufacturer that the term “occurrence” as it appears in the policies includes faulty workmanship or defective products resulting in third-party property damage. The parties agreed to bifurcate the ensuing trial, with the first phase being held before Judge Roesch in a bench trial with the second phase being before a jury.

After the close of the bench trial, the judge issued an order finding that AIG owed Victaulic a duty to defend and indemnify in each of the nine underlying suits. In addition, Judge Roesch also held that the insurers had no right to reimbursement for the sums it paid to settle two of the matters, known as the MWRA and United Hospital actions.
Throughout the discovery process, during which AIG was sanctioned three times, the Plaintiff’s legal team identified discrepancies between positions expressed in internal AIG claim notes and claims adjusters’ emails and those AIG set forth in letters to Victaulic and in court filings. Earlier this year, following the recommendation of a special master, the judge ruled that AIG had no basis to withhold many of the documents it had claimed were privileged or irrelevant.

AIG’s final production of documents contained materials that helped to prove Victaulic’s allegations of bad faith and malicious claims handling. During the jury trial phase, Victaulic’s main focus was on AIG’s overall approach to claims handling through litigation and the concerted efforts of the AIG executives and claims handlers to renege on the insurer’s promise to protect Victaulic. It was proved that AIG took steps designed to make getting coverage difficult for Victaulic. Much of the evidence that was damaging to AIG came from its own employees and its own internal documents.

There were 15 witnesses and hundreds of exhibits that supported a cohesive story of the AIG claims handlers’ complete failure to act consistent with standards and customs. The story of a powerful bad faith claim was presented to the judge and to the jury. The punitive damages awarded certainly appear to have been justified.

Joseph D. Jean, Colin Kemp and Jeffrey Kiburtz of Pillsbury Winthrop Shaw Pittman and Craig Diamond of Diamond Baker Mitchell represented Victaulic. They did a very good job for their client in this litigation.

Source: Law360.com

AIG REACHES SETTLEMENT IN $60 MILLION FRAUD SUIT

American International Group Inc. has settled a $60 million fraud suit brought by a group of investment funds that objected to a $725 million class action settlement over an alleged market division scheme. U.S. District Judge Deborah Batts was told that both parties had reached a settlement in principle. The plaintiffs—investment funds whose investors include state, municipal and corporate pension and retirement funds; educational, research and charitable endowments; and other institutional and individual investors—sued AIG in October 2013, accusing the insurance giant of disseminated false and misleading statements concerning its financial results and operations and manipulated the stock market during the period in which they purchased AIG stock.

AIG’s $725 million settlement was finalized in 2012 which, along with $97.5 million paid by PricewaterhouseCoopers LLP, AIG’s audit firm, and $115 million paid by former AIG chief Maurice “Hank” Greenberg and other former executives, was one of the largest settlements in U.S. history. The complaint objecting to the settlement alleged that in October 2004, then-New York Attorney General Eliot Spitzer implicated AIG in a scheme to pay insurance brokers improper “contingent commissions” that resulted in unsuspecting clients being steered by the brokers to purchase AIG insurance policies at inflated prices.

In addition, the complaint alleged a second scheme involving insurance accounting frauds that were fully revealed on May 31, 2005, when AIG filed its 2004 Form 10-K, restating years of earnings and resulting in the company slashing its net income from 2000 through 2004 by $3.9 billion, or 10 percent, and reducing the value of its shareholders’ equity by $2.26 billion. The plaintiffs are represented by Richard A. Bodnar, Thomas E. Redburn, Lawrence M. Rolnick, and Sheila A. Sadighi of Lowenstein Sandler LLP. It appears they have done a good job in this matter.

Source: Law360.com

XV. EMPLOYMENT AND FLSA LITIGATION

FRINGE COMPANY REACHES SETTLEMENT IN OVERTIME LAWSUIT

A federal judge has given preliminary approval to a $6 million dollar settlement in a class-action lawsuit against a Canadian company involved in hydraulic fracturing (fracking) in the United States. The settlement will cover an estimated 1,039 people who worked for Calfrac Well Services Corp. in Pennsylvania, Arkansas, Colorado and North Dakota. The lawsuit alleged that Calfrac underpaid its employees for overtime hours under the Fair Labor Standards Act (FLSA) and respective state wage laws.

The employees were paid a salary and bonuses. When they worked overtime, the company calculated their “hourly” rate by dividing their salary and bonuses by the total hours worked and paying them time-and-a-half on that rate. The Plaintiffs contended that Calfrac should have divided their salary and bonuses by 40 hours per week to obtain the base rate for the overtime calculation. Calfrac’s method of calculating the employees’ hourly rate significantly reduced the amount of overtime compensation Calfrac paid its employees.

Source: Law360

BNY MELLON TO PAY $14.8 MILLION IN SETTLEMENT

Bank of New York Mellon Corp. (BNY Mellon) will pay $14.8 million to settle Foreign Corrupt Practices Act (FCPA) charges that allege the bank gave internships to family members of influential foreign government officials. The U.S. Securities and Exchange Commission alleged that BNY Mellon violated the FCPA in 2010 and 2011 when BNY Mellon employees “sought to corruptly influence foreign officials in order to retain and win business managing and servicing the assets of a Middle Eastern sovereign wealth fund.”

The SEC’s investigation discovered that fund officials requested BNY Mellon provide their family members with highly competitive internships. BNY Mellon provided internships to at least three family members, despite those candidates not meeting the typically rigorous hiring standards for the positions. BNY Mellon employees hired the interns without evaluating them through existing programs and procedures in an effort to maintain the fund’s business. Andrew J. Ceresney, director of the SEC’s Enforcement Division, said in a statement:

The FCPA prohibits companies from improperly influencing foreign officials with ‘anything of value,’ and therefore cash payments, gifts, internships or anything else used in corrupt attempts to win business can expose companies to an SEC enforcement action. BNY Mellon deserved significant sanction for providing valuable student internships to family members of foreign officials to influence their actions.

I have to wonder how much of this sort of thing goes on in the corporate world on a regular and recurring basis. Based on reports, it appears that it’s widespread. We know from our litigation experiences that some of the corporate bosses need a refresher course in business ethics. In fact, it appears some never even took the first course on that subject.

Source: Law 360
XVI.
PREMISES LIABILITY UPDATE

TIANJIN EXPLOSION AMONG DEADLIEST INDUSTRIAL ACCIDENTS IN CHINA IN RECENT YEARS

The death toll continues to rise as workers and residents struggle to clear rubble from the site of an explosion that occurred on August 12 in one of China’s largest port cities, Tianjin. A series of massive explosions originating from a chemical warehouse rocked the city, located about 75 miles east of Beijing. The blast injured more than 700 people, and as of Aug. 18, the death toll had climbed to 114. Its likely more bodies will have been found by the time this issue of the Report is sent to the printer.

Many of the dead were firefighters and other first responders who reported to the scene. Reports confirm 50 firefighters were killed, and 52 others are among the 57 people still missing. This is the deadliest disaster ever for Chinese first-responders were killed, and 52 others are among the 57 people still missing. This is the deadliest disaster ever for Chinese first-responders.

The warehouse stored sodium cyanide, a toxic chemical that can ignite when it comes into contact with water. It is suspected that firefighters were not warned about the presence of this toxic chemical when they responded to the fires following the explosion, potentially increasing their risk as they tried to battle the blaze. The explosion raises several serious questions. Government regulations require that hazardous materials be stored at least 1,000 meters from homes and public structures. The warehouse was in clear violation of this regulation, and many nearby residents were injured when the explosion caused their homes to shake and windows to shatter. Additionally, the warehouse should have been limited to storing no more than 10 tons of toxic chemicals at a time. Reports indicate the warehouse held several hundred tons of sodium cyanide.

There are continued fears of contamination from materials either leaking from the facility or toxic waste in the blast debris. Just after the blast, authorities found highly toxic hydrogen cyanide in the air at levels up to 28 times higher than considered safe at eight of 29 testing sites in the blast zone. Residents and officials fear rain and thunderstorms could spread some of the hazardous chemicals from the blast site and possibly set off fires, chemical reactions and other explosions.

In addition to the cost of human life and health, the Tianjin explosions are estimated to tally up total insurance losses of $1 billion to $1.5 billion. Tianjin was the world’s third-largest port in terms of total cargo volume. The port is China’s largest entry point for imported cars, handling about 40 percent of cars imported into the country in 2014. Additionally, transport insurers are taking a hit for damage to containers, warehouses, and the port’s infrastructure, including trains, railroad tracks and cranes.

It has been determined that a number of toxic substances are present at the site of the explosion, including huge amounts of cyanide. In fact, cyanide levels more than 350 times standard limits have been detected in water close to the site. The chemical was detected at 25 water monitoring sites. The highest level found was 350 times the permitted level.

As a result of the incident, Yang Dongliang, head of the State Administration of Work Safety, the national organization responsible for industrial safety efforts, has been placed under investigation on suspicion of “severe violation of discipline and law.” Additional media reports say 10 other people have been taken into custody, including officials from the management company that handled the warehouse. China’s Executive Vice Minister of Public Security Yang Huanning is overseeing the investigation, along with China’s Cabinet and State Council.

Sources: Associated Press, Claims Journal

It’s likely more bodies will have been found by the time this issue of the Report is sent to the printer.

JereBeasleyReport.com
was. Lomma used the company for another weld that was found to be faulty around a month before the accident, but he failed to act to ensure the safety of the first weld afterward.

The suit was the first over the collapse to go to trial. However, there are several more personal injury suits still pending. The companies previously settled, paying about $3 million in property damage claims. The crane fell on a luxury apartment building across the street. The families of the deceased workers initially sued other companies involved, including crane operator Sorbara Construction Corp., welding company Brady Marine Repair Co. Inc. and weld testing firm Branch Radiographic Laboratories. Claims against all but Sobora and Lomma and his companies were settled before or during trial. The jury found only Lomma and the businesses associated with him liable at trial. The crane operator was found not guilty by the jury.

Source: Law360.com

**Bumble Bee Foods To Pay $6 Million Over Worker Killed In An Oven**

Bumble Bee Foods will pay a record $6 million to settle criminal charges filed after a worker burned to death nearly three years ago inside an industrial oven packed with canned tuna. The settlement represents the largest payout in the criminal prosecution of a workplace safety case involving a single victim in California, according to the Los Angeles County District Attorney’s Office. Under the settlement agreements, Bumble Bee will spend $3 million to buy new ovens at its plant in the Los Angeles suburb of Santa Fe Springs that employees will not be required to enter, and implement other safety measures. The company will also pay $1.5 million in restitution to the family of victim Jose Melena, $750,000 to the district attorney’s environmental enforcement fund and another $750,000 in additional fines, penalties and court costs.

Once it complies with those conditions, Bumble Bee, which is owned by private equity firm Lion Capital LLP, will be allowed to plead guilty to a misdemeanor charge, according to the district attorney’s office. Prosecutors say Angel Rodriguez, the plant’s director of operations, has agreed to perform 320 hours of community service, pay $11,400 in fines and other penalties and take workplace safety classes. If he completes those conditions, he will be allowed to plead guilty to a misdemeanor. Under a separate agreement, Saul Florez, the plant’s former safety manager, pleaded guilty to criminal safety violations and was sentenced to three years probation. Florez was also ordered to complete 30 days of community labor, attend safety classes and pay $19,000 in fines. Upon completion of those conditions he will be eligible to have his felony conviction reduced to a misdemeanor, according to the prosecutors.

Melena, who had worked for Bumble Bee for about six years, crawled into the 35-foot-long (11-meter) cylindrical pressure cooker on Oct. 11, 2012, as part of his duties. Co-workers who were unaware that Melena, 62, was still inside the apparatus then packed 12,000 pounds (5,443 kg) of canned tuna inside, closed the door, and turned it on. His badly burned remains were later discovered by another employee.

Source: Reuters

**HUMAN TRAFFICKING OF FOREIGN EMPLOYEES IS SHAMEFUL**

Corporations and individuals who exploit foreign workers and take unfair advantage of them are shameful and can’t be tolerated. Some recent cases are prime example. E.J. Amusements, a New Hampshire-based carnival company, recently settled a class action suit filed by workers for underpaying wages and forcing employees pay H-2B visa costs that were to be paid by the employer. The suit, which settled for $900,000, involved approximately 200 employees. The suit claimed that the Amusement Company paid employees a flat rate, based on a 40-hour work week. However, the employees were working seven days a week for up to 14 hours per day assembling, dismantling, and operating amusement park rides, as well as carnivals and fairs in New England.

Many of the Plaintiffs in this case, including named Plaintiff Jorge Pilar Garcia, worked under an H-2B visa, and were required to pay for these visas, as well as travel expenses. According to the amended complaint, these costs should have been covered by their employer. The settlement class in this case included all minimum wage and overtime-eligible employees. Because of the magnitude of the problem in the U.S. I will go into more detail on working evidence and worker treatment. The following are some specific examples of how bad things can be for the employees.

In a criminal case involving a New York fair, 19 men worked 16 to 18 hours per day for 11 days in 2010. Even on Labor Day, the men worked 24 hours and were given only one 15-minute break and one meal. The men were threatened by their employer, Peter Karageorgis, that if the men quit, they would violate their visas and be deported. That happening would keep the men from ever being able to legally enter the country. All of them were recruited with a temporary H-2B visa.

One of the workers, Samuel Rosales Rios, was promised $10.71 an hour. Instead, he was paid $1 per hour. Rosales Rios lived in the lodging provided by Karageorgis. A single trailer was provided by Karageorgis where he expected nine to 10 men to sleep, some even sharing beds. Because of the substandard conditions, Rosales Rios became dehydrated and developed infections from bed-bugs and fleas.

The bed bug and flea bites caused Rosales Rios to develop sores. Rosales Rios spent several days and nights of working in the food stand and in 90-degree temperatures. Because Karageorgis was afraid that customers would see Rosales Rios scratching his sores, he sent him back to the trailer to keep him out of the customers' sight.

Rosales Rios was treated by the fair infirmary for dehydration. The medical staff was so concerned about Rosales Rios' infected bites and sores that they transported him by ambulance to the hospital from the fair grounds. This led to a complaint being filed with the U.S. Department of Labor. Rosales Rios received a $5,000 settlement from a criminal action against Karageorgis. Peter Karagoergis was fined $50,500 and was ordered to pay 13 workers back pay totaling $115,900 by the U.S. Department of Labor. Karageorgis also paid $85,000 to 10 workers after prosecutors dropped his criminal case.

Mistreatment of migrant workers doesn’t happen only at fairs and carnivals. Signal International, headquartered in Mobile, recruited nearly 500 Indian men to do marine fabrication work in Orange, Texas, such as welding and pipefitting after the devastation left by Hurricane Katrina. These Indian workers had to pay nearly $20,000 in fees in order to work for Signal in the United States. These Indian employees moved to the United States under the false pretense that Signal was working on obtaining them green cards and permanent residency. Many of these men went
OSHA CITeS DoTHAn’S TWITCHELL PRodUCTS FOr A SECond TiME

The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) on August 5 issued citations to Twitchell Products LLC in Dothan a second time for exposing employees to various hazards at a processing plant in Winesburg owned by North Carolina-based Case Farms Processing Inc.

The Occupational Safety and Health Administration (OSHA) has fined the owners of a northeast Ohio chicken processing plant $861,000 for what the agency says are safety violations that expose workers to the risk of amputation, electrocution and falls. OSHA says in a statement that an investigation found numerous hazards at a processing plant in Winesburg owned by North Carolina-based Case Farms Processing Inc. 

The statement says the plant is an “outra- geously dangerous place to work” and that a company plant in nearby Canton also is being investigated. OSHA says Case was aware of dangers in Winesburg but continued to expose workers to harm. Case, whose headquarters are in Troutman, N.C., says it’s reviewing the allegations and will work with OSHA. A spokeswoman for Case says the plant has surpassed 900,000 employee hours without a lost-time injury.

Lawsuits Settled In Crash That Killed Missouri Teenager

Three lawsuits that arose from the crash of a box truck that killed a Missouri teenager have been settled. Bobby Joe Abernathy, 36, pleaded guilty last year to vehicular involuntary manslaughter while intoxicated and second-degree vehicular assault in connection with the April 5, 2013, crash that killed 17-year-old Amelia Fisher. Abernathy was driving a Slumberland Furniture truck when the truck crossed the centerline of the highway and collided with a sport-utility vehicle driven by 18-year-old Erin Cordell. Ms. Fisher, who was a passenger in the SUV, was killed and the driver, Cordell, was injured. 

Amelia’s father, Christian Fisher, filed a wrongful-death lawsuit against Abernathy, Slumberland Furniture and Slumberland’s parent company, Sleepy Hollow Furniture. Smith and Cordell later filed personal-injury lawsuits against Abernathy and his employers. 

In his guilty plea last year, Abernathy admitted he was under the influence of methamphetamine and marijuana and swerved in and out of his lane at the time of the crash. He was sentenced to 10 years in prison. Online court records show Abernathy has a history of traffic violations, including a 2001 DWI and driving while suspended in 2003. The details of the settlements are confidential.

Source: SEMO News Service
**AIR TRAFFIC CONTROLLERS REPORT CHRONIC FATIGUE DUE TO SCHEDULING**

U.S. air-traffic controllers report high levels of chronic fatigue from schedules that require they work through the night. Aviation regulators should take steps to limit the potential safety hazard, a federal study concluded. Of controllers who made safety errors on duty, 56 percent reported that fatigue contributed to their mistakes, according to the study released by the Federal Aviation Administration (FAA). The 2012 study found controllers averaged only 3.25 hours of sleep on days they worked overnight. There appear to have been some significant changes that incorporate many of the report's recommendations.

The FAA said before the study was completed in December 2012—and following highly publicized incidents of controllers falling asleep on the job in 2011—many of the report's recommendations have been adopted.

Researchers in the study used wrist sensors to monitor sleep on 211 controllers for 14 days and found they averaged 5.8 hours of sleep per night while working. That fell to 3.25 hours for those working shifts that began at midnight. In a survey of almost 3,300 controllers out of about 15,000, 61 percent reported they had caught themselves “about to doze off.” The study, done by NASA researchers under contract to the FAA, was first reported by the Associated Press.

Source: Claims Journal

**NTSB CITES TRUCK DRIVER FATIGUE AS CAUSE OF TRACY MORGAN CRASH**

The National Transportation Safety Board (NTSB) has blamed a fatigued Wal-Mart truck driver for the highway crash last year that severely injured comedian Tracy Morgan and killed one of his friends. The board did say, however, that the failure of Morgan and other passengers riding in a limousine-van to wear seatbelts and adjusted headrests contributed to the severity of injuries when the limo was struck from the rear by the truck. Investigators said that the truck driver, Kevin Roper, could have prevented the June 7, 2014, crash if he had slowed to 45 mph, the posted speed limit for the construction work zone on the New Jersey Turnpike where the crash occurred.

The investigators reported that the Wal-Mart truck was traveling at 65 mph and was slow to react to a sign lowering the speed limit to 45 mph in a construction zone. The truck was said to have been traveling at a rate of speed of 47 to 53 mph when it hit the limousine. Federal accident investigators had said during the hearing that the turnpike crash raised significant safety issues involving driver fatigue and truck safety. The truck driver had been awake for the previous 28 hours, board investigators said at the meeting held to determine the cause of the crash and to make safety recommendations.

Investigators said that when the truck struck the rear of the limo, it caused a chain reaction crash that affected 21 people in six vehicles. One tragic aspect of roadway deaths is that so often they could have been prevented,” said NTSB Chairman Chris Hart. Roper had driven more than 800 miles from Georgia to a Wal-Mart distribution center in Delaware to pick up a load before starting the trip. He had worked for Wal-Mart for 15 weeks and had had nine “critical event reports,” causing him to lose his safety bonus, according to investigators. Critical event reports, which are generated by a truck’s computers and downloaded by Wal-Mart, record things like hard-braking, activation of the vehicle’s stability control system, or other events that might indicate unsafe driving.

Investigators also said the limousine-van wound up on its side after the crash with its rear doors jammed shut. A sheet of plywood that had been added to the limo to separate the cab from passengers blocked occupants from escaping the vehicle through the front doors after the crash. It took emergency responders working with the assistance of other motorists 37 minutes to remove the first of the crash victims from the rear of the limo. Neither the passengers in the back of the 10-seat limo nor the driver were wearing seatbelts.

Morgan suffered head trauma, a broken leg and broken ribs, and was in a coma for two weeks. Three other passengers in the limo suffered serious injuries. Morgan, a former “Saturday Night Live” and “30 Rock” star, and the others were returning from a show in Dover, Del. Roper was charged with death by auto and four counts of assault by auto in state court in New Jersey. The criminal complaint alleged Roper operated the truck “without having slept for a period in excess of 24 hours resulting in a motor vehicle accident.” A person can be charged with assault by auto if he or she causes injury after knowingly operating a vehicle after being awake for more than 24 hours under New Jersey law.

The safety board has long raised concerns about operator fatigue leading to accidents across all modes of transportation, from airline pilots to train engineers. In May, Morgan and two friends injured in the crash settled a lawsuit against Wal-Mart for an undisclosed amount. While there are a huge number of highway collisions each year where driver fatigue played a major role in causing the crashes, this incident received a great deal of media attention because Morgan was a victim. That put the driver fatigue problem in the limelight and has helped make the public much more aware of the magnitude of the problem.

Source: Claims Journal

**$7 MILLION VERDICT UPHOLD IN NEW YORK ROAD WORK INJURY LAWSUIT**

A state appeals court in New York last month upheld a $7.1 million verdict over an accident caused by negligent road work signage in New York City. The court said that liability should be reapportioned between the city and contractor. The city and Burtis Construction Co. Inc. appealed the 2013 jury verdict that had been returned in favor of James Gregware, who was injured in a five-car pileup. The jury found the incident was caused by Burtis' inadequate signage warning drivers of two closed lanes. The appeals court said the evidence did not support the jury's finding of 65 percent liability for the city and 35 percent for Burtis.

The appeals court also found that the city did not deserve a new trial even though the Plaintiff’s lawyer had called a city witness a liar during the trial. The city hired Burtis to repair a seam in the municipally owned highway in Manhattan in 2006. In the middle of the night on May 20 of that year, Mr. Gregware was driving on the highway and struck one of three cars that hit one another after the first driver tried to merge toward the highway’s one open lane. Gregware, then 41 years old, had exited his vehicle to speak with the other drivers and was seriously injured when a fifth car crashed into the vehicles.

Gregware spent three weeks in the hospital and more than a month in a nursing home, and underwent five surgeries on his knee and is expected to need four more during his lifetime, according to the appeals court's summary of the case.

In the October 2013 trial, a jury found the city 65 percent liable for the accident and Burtis 35 percent responsible. It awarded the Plaintiff $6 million for past and future pain and suffering, and $1,125,000 to his wife for past and future loss of consortium. The appeals court found the amount of the award reasonable, but said that evidence of the contractor’s role in setting up the inadequate lane closures could not support a finding of 35
percent liability, as the city had at most only failed to verify the safety of the site.

The appeals court also overturned the lower court’s denial of a post-trial motion for summary judgment in which the city said Burtis had indemnified it in the road work contract. It was unclear whether or not that portion of the ruling would require Burtis to pay the entirety of the judgment regardless of the ultimate apportionment of liability.

Source: Law360.com

MOST RAILROADS WON’T MEET THE SAFETY TECHNOLOGY DEADLINE SET BY CONGRESS

It was reported last month that only a small number of U.S. railroads will meet the Dec. 31 deadline for implementing new train safety technology that experts say would have prevented the deadly May 12 Amtrak derailment in Philadelphia. A report to Congress by the Federal Railroad Administration (FRA) showed that just three out of 38 inter-city passenger, commuter and freight railroads have submitted the plans necessary for regulators to certify advanced technology systems known as positive train control, or PTC. Barely four months before the congressionally mandated deadline, only 11 railroads have told regulators that they expect to begin demonstrating PTC systems in 2015. Others have said PTC demonstrations could start as late as 2020.

Meeting the deadline to install PTC, a complex system of sensors and automated controls that can slow or stop a train, poses a major challenge because of technological difficulties and its high costs, which run into the billions of dollars. Regulators have long said that most railroads will not hit the year-end deadline that Congress imposed in 2008. Railroads face the possibility of fines or service suspension if lawmakers fail to extend the deadline this fall.

A six-year transportation bill that recently passed the Senate would allow the Obama administration to grant an extension of up to three years. But the measure is not expected to be taken up by the House of Representatives when lawmakers return from their summer break this month. The FRA report said:

It is difficult to reliably estimate a firm, network-wide PTC implementation date due to the varying degree of progress and incomplete data provided by the railroads.

The FRA did not say specifically which railroads can meet the December deadline. But it identified BNSF Railway Co., Southern California’s Metrolink service and Philadelphia’s Southeastern Pennsylvania Transportation Authority as the three rail services that have submitted PTC plans. None have been certified. The 11 railroad companies that expect to demonstrate PTC technology this year include major freight handlers Canadian Pacific Railway Co., CSX Corp, Norfolk Southern Corp. and Union Pacific Corp., according to the report.

After the Philadelphia derailment that killed eight people and injured more than 200 others, Amtrak said it expects to have PTC technology operating along segments of the busy Northeast Corridor that it owns or controls. The National Transportation Safety Board, which has been calling for PTC since the 1960s, says the technology would have prevented 300 deaths and more than 6,700 injuries over nearly five decades. I believe it’s very important that Congress not yield to pressure from lobbyists and for the current deadline to be kept in place.

Source: Claims Journal

FAA SAYS DRONE-PLANE SAFETY INCIDENTS LIKELY TO QUADRUPLE THIS YEAR

Pilot encounters with drones are on pace to at least quadruple to more than 1,000 this year. Obviously, unmanned aircraft is a growing threat to U.S. aviation. There were 650 cases reported to the Federal Aviation Administration (FAA) through Aug. 9, compared with 238 in 2014, the agency reported last month. Assuming the reports continue at the current rate, there would be more than four times the safety incidents by the end of this year. The reports of drones spotted near traditional aircraft come from pilots on private planes and helicopters, as well as crews aboard airliners, according to a release from the FAA. It should be noted that FAA rules currently prohibit drones from flying near airports or at altitudes where piloted aircraft operate. Regulators are concerned that a collision between a drone and a plane, which could easily occur at a speed of 200 miles (320 kilometers) an hour or more, may damage an aircraft or its engines. Encounters with drones can also cause pilots to be distracted from other critical tasks. Industry groups estimate that as many as 500,000 drones have been sold in the U.S., many of which are capable of flying thousands of feet above the ground. Some of those are likely to be in the hands of some folks who shouldn’t have them.

Drones have been spotted recently by airline pilots near airports in Newark, N.J.; New York, and Minneapolis, according to the FAA. There were reports of about a dozen cases of drones flying near aircraft attempting to fight wildfires in California, forcing groundings and delays in battling the blazes. Lynnette Round, a spokeswoman for the California Department of Forestry and Fire Protection, made this report known. In July, pilots reported 137 incidents compared with 36 for the same month in 2014. There were 138 such cases in June.

FAA enforcement cases against drone operators haven’t risen along with the incident totals. The agency has settled five civil cases involving unmanned flights that violated regulations, according to FAA data. One involved a Swiss citizen who flew over the University of Virginia campus filming a promotional video. The increase in incidents comes even though the FAA and the drone industry has tried to educate users about safety. The group, called Know Before You Fly, has a website with guidance on how to operate drones. I believe it will take much more than a website to head off a most serious safety hazard created by drones.

Source: Claims Journal

FAA PLANS TO FINE SOUTHWEST $325,000 OVER AGING BOEING 737

The Federal Aviation Administration (FAA) has proposed a $325,000 civil penalty against Southwest Airlines Inc. for allegedly operating a Boeing 737 aircraft that had been improperly repaired. According to the FAA, one of its inspectors in July 2014 discovered that Southwest had improperly listed a temporary repair to a Boeing 737 as a permanent repair and had operated the plane on 24,831 flights without performing the periodic inspections required for that temporary repair. According to the FAA, during an “aging aircraft inspection” on the plane, while it was at an El Salvador maintenance facility, the agency’s inspector discovered a nine-inch crease in the aluminum skin of the jetliner’s rear cargo door had been listed as a permanent repair when the fuselage fix was instead only temporary.

The FAA alleges that Southwest failed to perform required inspections of the temporary repair and flew the plane 4,831 times past the threshold by which it was required to have performed the permanent repair. The FAA said:

The inspector discovered that this fuselage damage bad first been reported in Southwest Airlines’ maintenance records on May 2, 2002,
which is when the airline made the temporary repair. The airline was required to inspect the temporary repair every 4,000 flights and complete a permanent repair within 24,000 flights.

Southwest has requested a meeting with the FAA to discuss the sanction. The airline claims it discovered the potential repair deficiency during a maintenance inspection and promptly addressed all issues to the satisfaction of the FAA before the aircraft was returned to revenue service. It appears the penalty will involve only one Southwest plane. The company said that “safety is the top priority at Southwest,” and that it always strive for “full compliance with established and approved maintenance processes and procedures.”

According to the agency, a final repair to the plane was made July 24, 2014. In March, the FAA proposed two civil penalties against Southwest totaling $328,550 for allegedly failing to properly inspect aircraft and for failing to properly record a repair. In the first incident, Southwest mechanics allegedly failed to complete a mandatory inspection after a 2013 flight lost cabin pressure and oxygen masks were deployed, and operated the plane on 123 flights before completing the inspection. The airline was accused of operating the plane on more than 120 flights with non-compliant oxygen equipment.

In the second incident, the FAA alleged that Southwest didn’t accurately record an air conditioning system repair to a Boeing 717 in the plane’s logbook and that its mechanics improperly deferred making the repairs and allowed the plane to be used on several passenger-carrying flights before resolving the issue.

In January, the U.S. Department of Transportation fined Southwest $1.6 million for violating a tarmac delay rule and failing to offer passengers on 16 delayed flights the opportunity to deplane within three hours of arrival and didn’t have enough staff to implement the airline’s tarmac delay contingency plan.

Source: Law360.com

**XIX. HEALTHCARE ISSUES**

**GLAXO.SMITH KLINE SHUTS DOWN NORTH CAROLINA FACTORY**

Drugmaker GlaxoSmithKline closed its North Carolina factory on August 11 after testing at a cooling tower found bacteria that causes deadly Legionnaire’s disease, a company spokeswoman said. The Legionella bacteria was discovered during routine inspections at the site in Zebulon, N.C. For the uninformed, GSK is a health care company that researches and develops pharmaceuticals, vaccines and consumer health care products. The company’s Zebulon site employs more than 4,400 manufacturing, research and development, and sales and marketing staff. The site reopened one week later, when Glaxo said the situation had been remedied.

The tower is a stand-alone structure that does not come in contact with any products, according to a company spokesperson. Six hundred workers were sent home or told not to come in while the towers were being cleaned and retested. City and state officials said the discovery did not warrant a public health alert and that no threat was posed to city drinking water. Reportedly, it was being tested as a precaution.

The bacteria is found naturally in warm water and thrives in environments such as hot tubs, cooling towers, water tanks, large plumbing systems and fountains, according to the U.S. Centers for Disease Control and Prevention (CDC). Legionnaire’s disease, a severe kind of pneumonia, is contracted by breathing in mist containing the bacteria. The CDC says it’s not contagious. New York City’s Department of Health had previously ordered the inspection and cleaning of all cooling towers in the city in response to an outbreak of Legionnaires’ disease that has claimed 12 lives.

Sources: Insurance Journal and Charlotte News and Observer

**XX. ENVIRONMENTAL CONCERNS**

**GULF COAST ASPHALT TO PAY $1.367 MILLION FINE RELATING TO OIL SPILL**

Gulf Coast Asphalt Company (GCAC) has reached a plea agreement related to violations of the Oil Pollution Act (OPA) and Migratory Bird Treaty Act (MBTA) arising from the 2011 fuel-oil spill into the Mobile River. Criminal penalties and the restitution the company agreed to pay will total $1.367 million. The incident that occurred on Sept. 1, 2011, was caused when GCAC employees miscalculated available space and overfilled a receiving tank during a pressurized tank-to-tank transfer. The receiving tank ruptured and an estimated 143 barrels or 6,006 gallons of fuel oil was released into a secondary containment area around the tank and ultimately into the Mobile River through a series of drainage canals.

Nearly five miles of the lower Mobile River were closed to ship and vessel traffic for 18 hours by the United States Coast Guard. Two laughing gulls, one black-crown night heron and at least one Alabama redbelly turtle died as a result of being oiled. As part of the plea agreement reached in U.S. District Court, Gulf Coast Asphalt Company agreed to pay $1 million in criminal penalties, including $667,000 in a criminal fee and $333,000 in the form of an organizational community service payment to the National Fish and Wildlife Foundation. The community service payment is earmarked to fund projects for the preservation and restoration of waterways and marine wildlife in and around the Southern District of Alabama.

The company, which no longer operates in Mobile and is now based solely in Houston, also agreed to pay $292,000 in restitution to the United States Coast Guard and $75,000 to the Alabama Department of Conservation and Natural Resources, Wildlife and Freshwater Fisheries Division. The case was investigated by the U.S. Environmental Protection Agency (EPA), Criminal Investigation Division and U.S. Fish and Wildlife Service (USFWS) and prosecuted by the United States Attorney’s Office for the Southern District of Alabama. Andy Castro, acting special agent in charge of EPA’s criminal enforcement program in Alabama, stated:

When operators fail to pay attention to required safety procedures and equipment, they not only harm...
natural resources and communities, they break the law. Given the nature of the violations, it is appropriate that the defendant will pay one-third of a million dollars in community service payment to the National Fish and Wildlife Foundation. Companies that damage the environment either through negligence or to save money can expect to face prosecution by EPA and its partner agencies.

Luis Santiago, Special Agent in Charge in the USFWS’s Southeast Region, added these comments:

This spill is yet another example of how human error has adversely affected migratory bird populations. South Alabama has one of the most diverse ecological systems in the Southeast, and migratory birds are a key part of this ecosystem. In recent years, migratory bird populations in coastal Alabama have been severely affected by oil spills. The service will continue to be vigilant in the prosecution of corporations and individuals responsible for harming migratory birds.

In an earlier agreement with the Alabama Department of Environmental Management, GCAC agreed to fund several local restoration projects administered by the Mobile Bay National Estuary program in lieu of facing state fines.

Source: AL.com

XXI.
UPDATE ON NURSING HOME LITIGATION

Arbitration Clauses For Nursing Home Admissions Should Not Be Allowed

One of the most difficult times for any family (and for that matter any person) is when a loved one has to be admitted into a nursing home, either for a short-term, rehabilitative stay or for long-term placement. Americans are living longer, and more and more people have to go into long-term care facilities.

Our firm meets with countless families who claim their loved ones received subpar nursing or medical care in a nursing home or rehabilitation facility. In almost every instance, when we ask the person if they or their loved one signed a binding arbitration agreement, we are told something like, “I do not remember signing anything like that.” In fact, most people tell us they remember no mention of arbitration during the admission process to the nursing home. However, without fail, the nursing home produces an arbitration agreement that has been signed either by the resident or by a family member. People are frequently surprised to find that such a form was signed.

In every nursing home case we file, we are finding that we must fight the arbitration battle first. Nursing homes file motions to dismiss our clients’ cases, arguing that the resident or their family members waived their Constitutional right to a trial by a jury and arguing that those persons must submit any claim they may have to an arbitration body. While our firm has had some success defeating these measures, most people are denied their right to have a jury of their peers decide if the medical negligence is compensable. Win or lose, many of our clients become frustrated because resolving this issue takes several months, delaying their rights to obtain justice for their loved one or their families.

Aware of this prevailing problem of hiding the arbitration agreement in the stack of documents people are asked to sign at such a vulnerable time, the Centers for Medicare and Medicaid Services (CMS) has proposed a rule that would help avoid some of these issues. CMS is proposing that, for a facility to receive Medicare or Medicaid benefits, an appropriate person with the nursing home must fully explain the consequences of an arbitration agreement to the resident or to the appropriate family member.

CMS is also recommending that such arbitration agreements must be entered into voluntarily and must provide convenient forums and a process for a true neutral arbitrator. CMS is also recommending that signing the arbitration agreement may not be a condition to the admission of the person to the nursing home. In other words, the resident or his or her family member must be told, “We are not requiring you to sign this agreement as a condition to you (or your mother) being admitted to this facility to receive care.”

CMS’ proposed rule would also limit who can sign on behalf of the resident, focusing more on the requirements of state law.

While it would be our preference that arbitration agreements be banned for all nursing home admissions, especially for those facilities that receive taxpayer dollars to provide care for the elderly and infirm, CMS at least is showing some common sense in approaching this serious issue and ensuring that individuals understand their options with respect to entering into binding arbitration agreements. CMS is accepting comments on this and other proposed rules until Sept. 14, 2015. We are hopeful that this rule will go into effect and will stymie the oppressive effects of arbitration agreements in nursing home settings. Ben Locklar, a lawyer in our firm, handles nursing home litigation and is knowledgeable in this area. If you need any information on this subject, contact Ben at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

TARGET DATA BREACH DETAILS REVEALED

Target hires ill-equipped employees to oversee its data security systems, maintained woefully deficient security programs, repeatedly ignored pre-breach warnings about malware intrusions and took steps to limit employees’ ability to secure data in busy periods to avoid disrupting profits.

Among other significant failures, Target disabled and removed key security features of Symantec, its anti-virus provider, and kept them disabled until after Black Friday. Target installed FireEye, a cybersecurity
application, but failed to implement its malware prevention features and failed to integrate FireEye into its alert generating system. Further, the banks say that Target implemented a “system freeze” from October 2013 to January 2014 making it more difficult to make any changes to Target’s computer systems “during seasons where Target generated the most revenue.”

The banks explained that once the breach began, Target ignored warnings about the intrusion as early as Nov. 25, 2013, when Target received an alert for unauthorized activity on its point-of-sale (POS) terminals. The alert led a Target Security Operations Center employee to note in an email, “Funny thing was that this one looked kinda suspicious to me. Looks like someone’s using a service account to access all the registers in one store.” Target received alerts the next day, November 26, and several days afterward; however, it failed to act until it was contacted by the U.S. Secret Service on December 12, 2013.

Even prior to the breach, the banks say Target failed to secure its customers’ financial information. A former Target group manager “testified that in April of 2012, Target discovered unencrypted payment card information dating back ‘at least six or seven years’ on servers” in nearly 300 Target stores. It was stated that, “Despite finding this unencrypted data, Target failed to take any action...for nearly six months until the end of September 2012.” Even worse, Target continued to retain unencrypted payment card data on its system. Specifically, unencrypted card data dating back almost 10 years was found in plain text on Target’s servers during the investigation of the breach.

Dee Miles, from our firm, who was appointed by Judge Paul Magnuson to the Plaintiffs’ Leadership Committee representing the banks, say that “within days of the Court publishing the true facts of the case against Target revealing what appears to be ‘gross negligence’ on the part of Target, the company announced publicly that it has been privately negotiating with a third party, VISA, to use something called the ‘GCAR’ Resolution Program to settle losses the banks may have incurred. However, Target’s offer is literally pennies on the dollar and is grossly inadequate to compensate banks for their actual losses, especially under the facts that have now been revealed. Dee and the Plaintiffs’ Leadership Committee have notified the banks of these issues and are urging the banks to not sign any documents whatsoever in relation to any funds VISA sends to them in relation to the Target breach.

Dee believes that Target’s secret negotiations with VISA are a real attempt to undermine the class action and the Court system. He is hopeful that the banks will see Target’s attempt for what it actually is and that’s an effort to cheat them out of their true losses. Target announced that its deadline for banks to participate in their GCAR Program is September 4. The hearing on the class certification will take place in the federal district court in Minnesota on September 13, before Judge Paul Magnuson. If you need more information about this litigation, contact Dee Miles at 800-898-2034 or by email at Dee.Miles@beasleyallen.com.

**FOREX SETTLEMENTS HAVE REACHED $2 BILLION**

Barclays PLC, Goldman Sachs Group Inc., BNP Paribas SA, HSBC Holdings PLC and the Royal Bank of Scotland PLC have agreed to settle class action litigation alleging the companies manipulated the $6 trillion foreign exchange market. This brings the total settlements to more than $2 billion. The settlement with the five banks comes on top of previously announced settlements that have seen Bank of America Corp., JPMorgan Chase & Co., UBS AG and Citigroup Inc. pay a combined $808.5 million in recent months.

Details of the individual settlements, including the dollar amounts, will be made public when the settlement documents are filed. It should be noted that every regulatory agency that has looked at this case around the world has found bad conduct. There have been a total of nine settlements involving banks that were involved.

Specifically, the Plaintiffs allege that from as early as 2003 and through 2013, the banks used multiple online chat rooms—with names like “The Cartel,” “The Bandits’ Club” and “The Mafia”—to communicate in code to avoid detection. “Being a member of certain chatrooms was by invitation only, indicating the secret nature of this conduct,” the complaint says, adding that the chat rooms “replaced the classic smoke-filled backrooms of the past.” The banks are accused of fixing prices by agreeing to widen the difference between the prices at which they buy and sell currency, manipulating benchmark rates, and exchanging confidential customer information in an effort to trigger client stop-loss and limit orders. If this sounds complicated and complex, it’s because it is.

To recap the settlements, over the past year, JPMorgan Chase & Co. and JPMorgan Chase Bank NA agreed to pay $99.5 million in January; UBS AG, UBS Group AG and UBS Securities LLC settled for $135 million in March; Bank of America Corp. and Bank of America NA agreed to pay $180 million in April; and Citigroup Inc. and Citibank NA were required to pay $394 million in May. All except Bank of America were part of a broader $5.6 billion settlement with U.S. and U.K. authorities in May. Each of those settlements have included cooperation agreements.

Only Morgan Stanley, Credit Suisse AG and Deutsche Bank AG have not settled from the original group of banks that were named as Defendants in the litigation. However, the Plaintiffs in late July named Japan’s Bank of Tokyo-Mitsubishi, Canada’s RBC Capital Markets LLC, France’s Societe Generale SA and Britain’s Standard Chartered PLC as Defendants. That brings the total number of Defendant banks in the litigation to 16.

The Plaintiffs are represented by David R. Scott, Christopher M. Burke, Kristen M. Anderson, Sylvia M. Sokol, Walter W. Noss and William C. Fredericks of Scott & Scott LLP, and Michael D. Hausfeld, William P. Butcherfield, Reena A. Gambhir, Timothy S. Kearns and Nathaniel C. Giddings of Hausfeld LLP. As a matter of interest, Scott & Scott opened a London office to pursue claims there. These lawyers did excellent work in this extremely complicated litigation.

Source: Law360.com

**$400 MILLION PFIZER CLASS ACTION SETTLEMENT GETS COURT APPROVAL**

A New York federal judge has granted final approval of a $400 million settlement that ends a class action accusing Pfizer Inc. of misleading investors about illegal off-label drug marketing. However, some investors may not get very much, with a recovery rate of 15 cents per share. U.S. District Judge Alvin K. Hellerstein had granted early approval of the settlement in mid-March after lawyers revised notices to class members clarifying details about the litigation.

The case, because of the settlement, has now been dismissed with prejudice. The recovery rate of 15 cents per share is far less than the $1.26 per share a damages expert for the Plaintiffs had estimated. Judge Hellerstein had said in late February that this discrepancy was disappointing.

Small investors would be especially unlikely to collect their money because their share of the settlement “isn’t worth doing anything” for, the judge said.

Pfizer put the damage per share at nothing because, among other reasons, the
company disclosed a dividend cut to fund its purchase of Wyeth on the day of the January 2009 stock drop that was central to the lawsuit. Historically, dividend cuts tend to trigger intense sell-offs. Both sides noted in February that if fewer people claim, the recovery for claimants will grow, and institutional investors will be active, claiming most of the potential recovery.

The Plaintiffs filed their claims in 2010 after Pfizer pled guilty to illegally marketing the anti-inflammatory drug Bextra and reaching a $2.3 billion settlement with the federal government in 2009. Investors alleged that the company misled them about marketing that drug, as well as Godon, Lyrica and Zyvox, and that Pfizer concealed a kickback scheme involving payments to doctors in exchange for promotion of those drugs.

Source: Law360.com

**Goldman To Pay $270 Million To Settle RMBS Suit**

Goldman Sachs Group & Co. has tentatively agreed to pay $270 million to settle a putative class action brought by a union pension fund. The investment banking giant was accused of selling $6 billion in shoddy residential mortgage-backed securities (RMBS). Goldman agreed to the settlement that will resolve claims brought by NECA-IBEW Health & Welfare Fund that Goldman defrauded more than 400 investors by giving nearly identical misstatements about the loans underlying each offering.

In March, the pension fund had urged U.S. District Judge Miriam Goldman Cedarbaum to grant class certification, saying the investors bought the securities issued by GS Mortgage Securities Corp. through seven offerings after being misled about the quality of the loans backing the securities. The fund said:

*Plaintiff and all other class members assert identical legal theories arising from the same course of conduct by defendants: namely, defendants’ systematic acquisition and securitization of shoddy loans and the offering documenting misstatements about the loans underlying the certificates.*

NECA filed the fourth iteration of its long-running RMBS suit in November 2012. The union pension fund alleged that Goldman, GS Mortgage and three executives gave out registration statements and prospectuses that contained identical misrepresentations about the quality of the loans and the underwriting of those loans’ for several offerings.

NECA sought class certification for both institutional and individual investors who invested in one of seven GSAA Home Equity Trust 2007 offerings. Goldman sold $6 billion worth of certificates in these offerings. The union also asked the judge to appoint it lead Plaintiff and name Robbins Geller Rudman & Dowd LLP as lead counsel in the case. Previous versions of the complaint had been dismissed, but the Second Circuit in September 2012 partially reinstated the proposed class action, finding that NECA alleged a cognizable injury and appropriately represented all potential Plaintiffs who purchased certificates from seven of 17 separate offerings.

Judge Cedarbaum dismissed seven offerings from the suit in July 2014 and struck down NECA’s challenge to the decision in January. Goldman announced in a February regulatory filing that it learned late last year of its involvement in a federal probe into residential mortgage-backed securities and may soon face civil charges as a result. Goldman was among three banks that received final court approval of a $235 million settlement related to mortgage-backed securities reached in February.

Source: Law360.com

**Citco To Pay $125 Million In Settlement Of Madoff Feeder Suit**

Hedge fund manager and administrator Citco Group Ltd. has agreed to pay $125 million to end class action claims that it helped funnel investors’ money into Bernie Madoff’s Ponzi scheme. U.S. District Judge Victor Marrero had been told by Citco that it had reached a settlement in the case in July. Citco filed a stipulation of settlement on August 12 with the Plaintiffs’ lawyer that revealed the fund manager will pay $125 million to owners of shares or limited partnership interests in Madoff feeder funds to end the litigation as to Citco.

The Plaintiffs will proceed with the cases against the remaining defendants, PwC Canada and PwC Netherlands, which are two PricewaterhouseCoopers LLP units. The case is expected to get to trial in January. Named Plaintiffs Pasha and Julia Anwar first filed suit in New York state court in December 2008, and more than four and a half years later, Judge Marrero granted the Plaintiffs’ bid for class certification for a second time.

The certification of a class was granted in March. There was evidence presented that investors relied on PwC’s and Citco’s erroneous valuations and audit reports in choosing to invest in Fairfield Greenwich Ltd.-managed funds, including the Madoff scheme’s single-largest feeder fund. Judge Marrero certified the class after the Second Circuit vacated his certification last year. The class of about 1,000 individuals and businesses lost at least $7.5 billion to the Ponzi scheme as a result of their investments with Fairfield Greenwich.

The investors’ argument—that their relationship with PwC and Citco was close enough to establish a “duty of care” under New York law—was accepted by Judge Marrero. Fairfield Greenwich’s emails to PwC stating that “investors have been requesting the audits for the past couple months,” according to Judge Marrero, showed that PwC knew the Plaintiffs were relying on its reports. The judge pointed out that Citco’s internal-procedures manual explicitly stated that shareholders and partners will make investment decisions based on its net asset value reports.

Citco ended involvement in the case when it reached the settlement last month and if its settlement gets approval by the court, the PwC units will be the sole remaining defendants in the case. The parties involved believe it will get approval because removing Citco will simplify the remaining litigation.

Source: Law360.com

**Zynga Agrees To A $23 Million Investor Settlement Over Pre-IPO Claims**

Zynga Inc. has reached a $23 million settlement ending class action litigation with investors who accused the social media gamemaker of misleading shareholders about its prospects leading up to a 2011 initial public offering (IPO), according to a regulatory filing last month. The FarmVille creator said the preliminary agreement, reached after a mediation session overseen by retired federal judge Edward Infante, will require final approval in a California federal court. The company said the settlement will be funded by insurance and will have no impact on its financial statements if finalized in its current form. Zynga did not elaborate on terms of the settlement, which it disclosed in its quarterly Securities and Exchange Commission filing.

The class action, first filed in 2012 by shareholder David Fee, claimed that Zynga misled investors about financial projections around time of its 2011 IPO, as well as its secondary offering in 2012. Investors alleged Zynga leaders concealed the fact that the company’s launch of its new Web games was delayed and misrepresented its booking numbers, which investors did not realize were fully dependent on Facebook’s
online gaming platform. Investors also claimed the company promised they would see long-term growth in 2012 thanks to investments in international market development, mobile games and technology infrastructure.

That growth failed to happen, and investors say they lost money when Zynga’s stock took a dive in 2012, falling more than 37 percent in one day, down from a close of $5.08 per share on July 25 to $3.18 on July 26. The investors said this was the result of an artificially inflated stock price. When Zynga went public in December 2011, it offered its stocks at $11 a share, with a market valuation of $10 billion. Shareholders of Zynga, which develops online social games including FarmVille, Mafia Wars and Words with Friends, said that before that stock dive, the company unloaded more than half a billion dollars of personally held stock in a second offering in April.

Judge White first rejected a motion to dismiss by Zynga in March, stating that shareholder claims regarding the falsity and materiality of the company’s statements could be supported. He also dismissed an earlier version of the consolidated class action in February 2014, allowing the Plaintiffs to amend their suit. The scope of their suit was then significantly reduced by dropping certain Defendants, shortening the class period, abandoning all claims they had raised under the Securities Act of 1933 and no longer referring to certain confidential witnesses.

Source: Law360.com

OSG INVESTORS ASK COURT TO APPROVE $16 MILLION SETTLEMENT IN SECURITIES ACTION

Investors in Stichting Pensioenfonds DSM Nederland and Overseas Shipholding Group Inc. (OSG) have asked U.S. District Judge Shira A. Scheindlin to approve a partial class action settlement. The investors accused a number of accounting, financial industry and executive-suite Defendants of failing to disclose tax liabilities tied to the formerly bankrupt tanker company. The total value of the settlement is $16.25 million. Individual Defendants will pay $10.5 million, while underwriter Defendants will pay $4 million and PriceWaterHouseCoopers LLP will pay $1.75 million.

The underwriter Defendants are Citigroup Global Markets Inc., Deutsche Bank Securities Inc., DNB Markets Inc., Goldman Sachs & Co., HSBC Securities (USA) Inc., ING Financial Markets LLC and Morgan Stanley & Co. LLC. The individual Defendants were the company’s former CEO and CFO along with a number of board members.

This securities litigation arose out of allegations that false and misleading statements were made in the registration statement that OSG filed in connection with its sale of $300 million of debt in March 2010. The misrepresentations include the company’s false statements related to income taxes, accounting policies and internal controls, according to the complaint.

The motion filed notes that OSG, not a party to the private litigation, will also fund the class to the tune of a minimum of $15 million as a result of bankruptcy proceedings. The class also stands to gain 15 percent of any recovery from Proskauer by OSG, the filing says. On July 1 the Plaintiffs appealed Judge Scheindlin’s May order, granting a summary judgment in favor of defendant Ernst & Young.

Source: Law360.com

KINDER MORGAN PAYS $27.5 MILLION TO SETTLE PAYOUT MANIPULATION LITIGATION

Kinder Morgan Inc. (KMI) has agreed to pay $27.5 million to settle two consolidated suits in Delaware state court accusing it of intentionally misclassifying expenses to artificially inflate payouts, of which it allegedly got 50 percent. The suits claimed KMI and the partnership’s general partner, subsidiary Kinder Morgan GP Inc., manipulated the formula used to determine the quarterly distributions issued by Kinder Morgan Energy Partners LP, now a wholly owned indirect subsidiary of KMI. The suits were brought on behalf of former KMP investors. The Defendants argued in June of last year that the plaintiffs hadn’t suffered any injury and that their claims were barred by the doctrines of laches, estoppel and acquiescence.

If the court approves the settlement, the final judgment will also include a release of all claims asserted in the Delaware consolidated lawsuit as well as claims in a similar action filed in Texas. Plaintiffs claimed that KMG misallocated certain unspecified capital expenditures as expansion capital expenditures instead of as maintenance capital expenditures, with the intention of inflating KMP’s distributions to its investors, including KMG.

The litigation initially claimed that hundreds of millions of dollars were improperly distributed from Feb. 5, 2011, through the closing of the merger. The suits sought disgorgement of any distributions to KMG beyond amounts that would have been distributed in step with a supposedly correct allocation. KMG claims it acted appropriately, that KMP’s unitholders were in no way harmed, and that all allocations were made in good faith. KMP unitholders were paid over a 22 percent premium for their units in connection with the merger, and KMP unitholders earned a total compound annual return of 16.4 percent during the purported class period from 2011 through the closing of the merger, according to KMP.

An agreement-in-principle to settle the action was reached in mid-June, at that time the case was taken off the calendar. Lead Plaintiff and the class are represented by Mark Lebovitch, David Wales and Katherine M. Sinderson of Bernstein Litowitz Berger & Grossmann LLP and Stuart M. Grant and Geoffrey Jarvis of Grant & Eisenhofer PA.

Source: Law360.com
Shareholders in a class action accusing Regions Financial Corp. of misrepresenting the company’s financial status following its 2006 buyout of AmSouth Bancorp are asking for approval of the $90 million settlement that had been previously announced in May. In a notice to the court, lawyers for the shareholders said they will ask for the settlement to be approved during a Sept. 9 hearing. Additionally, the shareholders will ask for the court to approve the plans to distribute the settlement, award attorneys’ fees and approve awards to the lead Plaintiffs. As part of the settlement, Regions denied claims that it misrepresented millions of dollars’ worth of loans to keep the value of goodwill reflected in quarterly reports artificially high. Regions represented that its goodwill had been repeatedly tested during 2007 and 2008 and was properly calculated, even though the value of its real estate investments was steadily dropping, the shareholders claim.

On Jan. 20, 2009, the company made a substantial corrective disclosure, reporting $5.6 billion in losses. On that day, Regio’s stock tumbled to $4.60 per share, down from $23.33 per share the previous February. In June 2012, U.S. District Judge Inge Prytz Johnson certified the class for the period from Feb. 27, 2008, to Jan. 20, 2009. Then in November, Judge Johnson granted a second motion for class certification after reviewing the evidence Regions had previously placed before the court in light of the Supreme Court’s June Haliburton II decision, in which it ruled that securities defendants may rebut the fraud-on-the-market presumption of reliance before the class certification stage by showing a lack of price impact.

In its highly anticipated Haliburton II decision, the U.S. Supreme Court in June declined to overturn its landmark Basic v. Levinson, which in 1988 established the fraud-on-the-market presumption of reliance that rests on the principle that public, material information about a publicly traded company affects the price of the company’s stock and that investors thereby rely on that information when they purchase securities. But the justices found that Defendants should be allowed to rebut that presumption of reliance before class certification by showing evidence that an alleged misrepresentation did not affect the stock’s price.

The Eleventh Circuit Court of Appeals in August asked Judge Johnson to review the Regions class certification in light of the Supreme Court’s ruling, giving Regions a chance to prove that alleged misrepresentations related to the acquisition did not actually affect the price of its stock.

The Plaintiffs are represented by Andrew J. Brown and Matthew I. Alpert of Robbins Geller Rudman & Dowd LLP; Patrick C. Cooper of Ward & Wilson LLC; Roger H. Bedford Jr. of Roger Bedford & Associates PC; and Larry B. Moore of Moore Berry & Linville PC. The case is in the U.S. District Court for the Northern District of Alabama. These lawyers did very good work in this case.

Source: Law360.com

THE ELEVENTH CIRCUIT RULED THAT FRCP RULE 23 TRUMPS THE ALABAMA DECEPTIVE TRADE PRACTICES ACT

In July of this year, the Eleventh Circuit Court of Appeals in Lisk v. Lumber One Wood Preserving, LLC reinstated class action litigation under the Alabama Deceptive Trade Practice Act (ADTPA), despite the statute’s express prohibition against class actions. This ruling now allows Plaintiffs to pursue ADTPA class actions in federal court, even though they are barred from doing so in Alabama state court.

The ADTPA creates a private right of action for consumers; however, it expressly prohibits Plaintiffs from bringing their claims on behalf of a class. In Lisk, the Eleventh Circuit held that Federal Rule of Civil Procedure Rule 23, which provides for class actions in federal court, trumps the ADTPA and allows Plaintiffs to file a class action in federal court despite the fact that it would be barred in Alabama state court.

The Eleventh Circuit concluded that the case was effectively identical to the U.S. Supreme Court’s 4-1-4 decision in Shady Grove Orthopedic Associates v. Allstate Ins. Co. In Shady Grove, the Supreme Court held that Rule 23 trumped a New York ban on class actions in cases involving statutory penalties. While all five justices in Shady Grove agreed that Rule 23 allows for class actions in federal court when certain criteria is satisfied, the majority differed in their reasoning.

Shady Grove turned on whether the application of Rule 23 violated the Rules Enabling Act (REA) mandate by altering a substantive right under New York law. According to the plurality authored by Justice Antonin Scalia, because Rule 23 does not “change Plaintiffs’ separate entitlements to relief,” but “merely enables a federal court to adjudicate claims of multiple parties at once,” it is procedural in nature and Rule 23 can displace state law without violating the REA.

Concurring in the result, Justice John Paul Stevens disagreed with Justice Scalia’s reasoning, concluding that some state procedural rules should apply in federal court because they function as a part of the state’s definition of substantive rights and remedies. Justice Stevens wrote that the law may be “undeniably ‘procedural’ in the ordinary sense of the term,” but it “may exist to influence substantive outcomes.”

However, noting that the New York law was a separate procedural statute applicable to claims under federal law, as well as laws of other states, Justice Stevens found it difficult to characterize the statute as a substantive New York law, thus ultimately concluding that it was procedural and Rule 23 could displace it.

In comparison to the New York statute in Shady Grove, the express prohibition against class actions in the ADTPA is located within the language of the statute itself. The Eleventh Circuit in Lisk, however, took an expansive interpretation of the Supreme Court’s plurality decision in Shady Grove, disregarding any distinction as to how the state chose to organize the language of its statute. In its opinion, the Eleventh Circuit made a distinction between the purely substantive and procedural questions.

The court concluded that Rule 23 does not alter the substantive rights and obligations under the ADTPA. The disputed issue is not whether the class is entitled to redress for any misrepresentation, but whether they may seek redress in one action or separate actions. Thus, the court concluded Rule 23 providing for class actions in federal court controls.

The Eleventh Circuit’s reinstatement of a nationwide class action under the ADTPA is likely to have significant effects around the country for cases involving similar state statutes. Lawyers at Beasley Allen continue to handle cases across the country involving unfair and deceptive trade practices. If you have any questions regarding these cases, or any other case involving fraudulent, unfair, or deceptive practices, contact Ali Hawthorne, a lawyer in our firm’s Consumer Fraud Section, at 800-989-2034 or by email at Alison.Hawthorne@beasleyallen.com.

Source: Law360
**XXIII. THE CONSUMER CORNER**

**MORE THAN 600,000 TAXPAYERS AT RISK BECAUSE OF BREACH OF TAXPAYER DATA**

An attack by hackers who stole sensitive personal information from thousands of taxpayers was far more widespread than the Internal Revenue Service (IRS) first disclosed, officials have revealed as they released new estimates that 610,000 Americans were affected by the breach. The revelation more than doubles the estimated number of victims of the breach. The hackers were able to clear security screens requiring the person’s Social Security Number, date of birth, tax filing status and street address.

The IRS reported in May that the cybercriminals had used stolen Social Security numbers and information they got elsewhere to try to gain access to old tax return information for about 225,000 households. Reportedly, that included about 114,000 successful attempts and 111,000 unsuccessful ones. An “extensive review” of the 2015 filing season uncovered a far wider breach—an additional 390,000 affected taxpayers, including about 220,000 additional households “where there were instances of possible or potential access” to prior-year return data, the IRS said in a statement.

The new numbers also include about 170,000 additional “suspected attempts that failed to clear the authentication processes,” meaning the hackers failed to clear a security screen that required them to know more information about the taxpayer. The IRS said in a statement:

*The IRS is moving immediately to notify and help protect these taxpayers. The IRS takes the security of taxpayer data extremely seriously, and we are working to continue to strengthen security for 'Get Transcript,' including by enhancing taxpayer-identity authentication protocols.”*

“Get Transcript” is the online service the IRS uses to give Americans access to their past tax returns. The hackers used the service as their entry point, using question-able e-mail domains. IRS officials said the cybertheft was part of a sophisticated scheme to get as much information as possible about the taxpayers, then use stolen identities to claim fraudulent tax refunds. In all, the thieves used personal information from about 610,000 taxpayers in an effort to gain access to old tax returns.

Officials said they are notifying all potential victims and offering them free credit-monitoring services. The agency is offering to enroll potential victims in a program that assigns them a special ID number that they must use to file their tax returns. The IRS believes the thieves started targeting the website in February. The IRS hasn’t identified a potential source of the crime. But in May, it said it believes the identity thieves are part of a sophisticated criminal operation based in Russia. The “Get Transcript” website was shut down in May and is still not back up. About 23 million transcripts of past tax returns are legitimately downloaded each filing season, officials said.

The IRS has since added safeguards to prevent similar schemes, but Commissioner John Koskinen has said repeatedly that it is hard for the agency to stay ahead of the criminals. The IRS estimates it paid out $5.8 billion in fraudulent refunds to identity thieves in 2013. That’s a shocking number and it is very clear that the government has lots of catching up to do in its efforts to safeguard public information.

Source: Washington Post

**SPLC SAYS 54 ALABAMA MUNICIPALITIES ENDING PRIVATE PROBATION DEALS**

The Southern Poverty Law Center (SPLC) said last month that more than 50 Alabama cities and towns have canceled contracts with Judicial Correction Services (JCS), a private probation company. JCS was being used by the municipalities to collect fines owed in their municipal courts. The SPLC sent letters in June to almost 100 municipalities urging them to end their contracts with JCS. Under those contracts, municipal courts send people who owe fines, fees or other court costs to JCS to be put on probation. Then JCS collects monthly payments on the fines, along with a monthly fee that goes to the company.

According to the SPLC, cities that have cancelled contracts with JCS, or are in the process of canceling, include: Montgomery, Clanton, Hoover, Mountain Brook, Vestavia Hills, Leeds, Fairhope, Calera, Pleasant Grove and Orange Beach. Others include Glencoe, Hueytown, Lincoln, Scottsboro, Enterprise, Fort Payne, Summerville, Vance, Owens Cross Roads, Somerville, Talladega, Lake View, Level Plains, Millbrook, Skyline, Moulton, Enterprise, Mount Vernon, Sylvania and Maplesville. I suspect that we will be hearing more from the SPLC on this matter. Based on reports, JCS won’t give up without a fight. I understand the company is doing very well financially under these contracts.

Source: AL.com

**ELLiptical Maker To Pay Civil Fine For Machines That Catch Fire**

Johnson Health Tech Co. Ltd. has agreed to pay a $5 million civil penalty to settle allegations by the U.S. Consumer Product Safety Commission (CPSC) that the company failed to report that two of its elliptical exercise machines could short out and catch fire due to new standards. The CPSC approved the settlement in 3-2 vote. The fitness trainers’ defect involved a build-up of moisture in the power sockets of the units from perspiration or cleaning liquids, which caused the machines to short circuit.

Aside from the fine, Johnson Health agreed to maintain a compliance program to keep it in line with the CPSC’s regulations, according to the settlement agreement, which stated that the company did not admit any wrongdoing. Between March 2012 and October 2013, Johnson Health received numerous reports of problems with the machines and instituted two design changes to solve the issue. The machines were eventually recalled in January 2014, but the company failed to report the alleged defect, which created an unreasonable risk of serious injury or death under the Consumer Product Safety Act, according to the CPSC. No injuries were reported as a result of any of the 44 known incidents, most of which involved charring and melting on the machines’ power cord sockets, according to the agency.

Johnson Health has somewhat of a lengthy history with the CPSC, paying a $500,000 penalty in 2004 for defective “runaway” treadmills that could suddenly accelerate to nearly 17 mph and recalling thousands of its exercise bikes called Krankcycles in 2013 for seats that could detach and topple riders. The company also recalled about 1,100 strength training towers in 2014 because of faulty plastic connectors that could become loose or break, causing at least one user to suffer a cut over the eye.

Source: Law360.com
The Seventh Circuit Court of Appeals has revived a putative class action accusing United Student Aid Funds Inc. of saddling borrowers with collection charges even when they were following payment plans to the letter. The court, in a split decision, found that the plaintiff had adequately supported her racketeering and contract claims. The decision generated a written order from each of the three judges on the panel. The court reversed U.S. District Judge Tanya Walton Pratt’s March 2014 ruling that had dismissed the case. The appeals court ruling revived lead Plaintiff Bryana Bible’s claims that the student loan administrator unfairly tacked on collection costs to her debt while she was still making payments on it.

The majority held that Ms. Bible’s claims weren’t preempted by the Higher Education Act (HEA), and that there was no conflict between that law and the Racketeer Influenced and Corrupt Organizations (RICO) Act. The majority found that the HEA offers protections for student borrowers to shield them from some of the harsher consequences of failing to repay debt. The ruling also limits the collection costs that could be assessed. The majority wrote in its ruling:

What would be the point of warning the borrower that declining to make repayment arrangements would trigger costly debt collection activities if the guaranty agency could initiate these procedures and assess those costs regardless of whether she agrees to repay? That the regulations create this sort of safe harbor is not surprising.

The Plaintiff’s lawyers filed a motion for class certification shortly after the appellate ruling came down. Ms. Bible defaulted on her student loan in 2012, but promptly set up what’s known as a rehabilitation program, in which she made lower monthly payments in exchange for keeping the loan current. It was alleged that she had a balance of around $18,000 on her debt when the administrator took it on. Still, the company hit her with $4,500 in collection costs, even though she kept up her end of the agreement, according to allegations in her suit. And USA Funds applied her $50 monthly payments to the collection costs, rather than the loan principal.

Ms. Bible filed suit 2013 seeking to represent a class of borrowers who had been charged for collection costs after agreeing to a deal. Judge Pratt held that Ms. Bible’s contract and RICO claims were preempted by the HEA, and that the law doesn’t provide a private right of action so her claims depending on violations of that act couldn’t be permitted.

The majority found that neither claim was preempted. However, the judges warned that “it remains to be seen whether she can support that [RICO] claim with evidence of fraudulent intent.” U.S. Circuit Judge David Frank Hamilton wrote the majority opinion, while Judge Joel Martin Flaum wrote an opinion concurring in part and concurring in the judgment, and Judge Daniel Anthony Manion concurred in part but dissented with the court’s ruling in the RICO claim.

Interestingly, the majority deferred to the Secretary of Education’s amicus brief, which the court had invited and permitted the parties to respond to after oral argument in the case. The secretary found that the Higher Education Act limits the way collection costs may be assessed to student loan debt, including when the borrower is still making payments in accordance with an agreement, according to the filings. Judge Hamilton wrote for the majority:

Even if this were not the best interpretation of the statutes and accompanying regulations, it is at least a reasonable one, and we defer to that interpretation because it reflects the reasoned position of the Secretary of Education, who is tasked with administering the program.

Judge Flaum also joined in Judge Hamilton’s deference to the secretary, but said that “an unambiguous regulatory scheme is preferable to soliciting the agency’s interpretive guidance.” Judge Manion, in his dissent, wrote that the majority had wrongly blurred the lines between a rehabilitation agreement and a repayment agreement, each of which he says are covered by different sections of the statute.

It’s very important for students to be protected from unfair collection practices and the costs that go along with them. The student loan industry must be reined in by Congress and by the governmental regulators. Too many companies in that industry are no more than predatory lenders and must be strongly regulated.

Source: Law360.com

We are again reporting a large number of safety-related recalls. We have included some of the more significant recalls that were issued in August. 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.

**Mazda Recalls 193,000 SUVs For CorrodingSuspensions**

The U.S. arm of Japanese automaker Mazda Motor Corp. has recalled nearly 200,000 crossover sport utility vehicles due to faulty suspension parts that corrode from exposure to winter road salt. The voluntary recall covers 193,000 Mazda CX-9 vehicles of the model years 2007 to 2014. According to a statement from Irvine, California-based Mazda North America Operations, vehicles manufactured during that time contain suspension ball joint fittings that are prone to deteriorating which can allow water to enter, causing looseness and even separation from the lower control arm. NHTSA launched a probe of the CX-9 on June 9 following six consumer complaints detailing ball joint-control arm separations—one of which took place at 40 miles an hour. NHTSA’s Office of Defects Investigation started the probe when the complaints began increasing in frequency in the first half of 2015.

Mazda says it has prioritized its recall in states that use roadway salt to combat snowy and icy driving conditions. The company said that, after it notifies the owners of subject vehicles via mail mail in September, it will replace the lower control arms and spacers of the cars. Mazda noted in its statement that there have been no reports of accidents or injuries stemming from the defect. The priority states include Ohio, Pennsylvania, Rhode Island, Virginia, Vermont, Washington, Wisconsin, West Virginia, Minnesota, Missouri, Connecticut, Delaware, Iowa, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Maine, Michigan, New Hampshire, New Jersey and New York.
GM Recalls 73,000 2010 Cobalt Cars For Wiring Defects

General Motors Co. (GM) has recalled 73,000 2010 Chevrolet Cobalt sedans because some may have been built with improperly routed side impact wiring that could prevent an air bag from deploying in a crash. GM said it has a report of one injury and crash related to the issue. According to GM, the new call back is not related to the 2014 recall of 2.6 million vehicles—including the 2005-2010 Cobalt—for ignition switch defects that are linked to hundreds of deaths and injuries. The recall includes about 60,000 Cobalt cars in the United States, and 13,000 in Canada. In that recall, the faulty ignition switches in the off or accessory mode could result in the air bags failing to deploy in a frontal crash.

GM said the new recall issue is related to the sensor wire harness routing in the left front door. When improperly routed, the window regulator could contact the harness when the window is fully lowered and over time chafe the harness insulation. That could result in a short circuit preventing the driver side roof rail air bag from deploying during a crash. Dealers will inspect all suspect vehicles and any found with the condition will be repaired. GM said the warning light would display that the air bag was malfunctioning before a crash. The number of vehicles GM has recalled in 2015 has fallen sharply. To date, GM has recalled 2.2 million vehicles in 26 campaigns. By contrast, GM recalled 27 million vehicles in the United States in 2014 in a record setting 84 recall campaigns. By this point last year, GM had already issued 66 campaigns covering more than 25 million vehicles.

GM Is Expanding the Headlight Recall for Buick and Pontiac Sedans

General Motors Co. has expanded its recall to include more than 180,000 Buick and Pontiac vehicles in North America because of a problem with the cars’ low beam headlights, which could result in temporary or permanent headlight failure. The recall covers 2005 Buick Lacrosse models and 2007 Pontiac Grand Prix models. Approximately 160,000 of the affected vehicles are in the U.S. while about 21,000 are in Canada, where the Lacrosse is marketed as the Allure. GM, which noted that it wasn’t aware of any accidents or injuries related to the defect, said dealers will replace the headlights until a permanent solution can be found. This announcement adds on to a similar recall issued by GM last November affecting 316,000 cars: 2006-2009 Buick LaCrosse, 2006-2007 Buick Rainier, 2006 Chevrolet Trailblazer EXT and GMC Envoy XL, and 2006-2008 Isuzu Ascender and Saab 9-7X vehicles.

In July, GM said it is recalling nearly 780,000 midsize SUVs worldwide because of a problem with the vehicles' power liftgates, which can suddenly fall and strike people. That recall covers 2007-2010 Saturn Outlook, 2007-2012 GMC Acadia, 2009-2012 Chevrolet Traverse and 2008-2012 Buick Enclave models that are equipped with the power liftgate option. Approximately 690,000 of the affected vehicles are in the U.S., according to GM. The power liftgate, which is the upward-swinging rear door, has gas struts that hold it up when opened, but the struts can prematurely wear out and cause the open liftgate to unexpectedly fall, according to the automaker, which noted that there have been 56 reported injuries but no crashes or fatalities.

Fiat Chrysler Recalls Sedans Over Engine Stalling

Fiat Chrysler Automobiles (FCA) US LLC is recalling nearly 78,000 Chrysler 200 vehicles after the automaker discovered that damaged electrical connectors in the sedans may cause the engine to stall or to unexpectedly shift to neutral. This is the latest in a number of recent Chrysler recalls.

FCA US said it is voluntarily recalling the vehicles which were primarily sold in the U.S. market after an investigation revealed that a supplier's post-production validation tests may have damaged electrical connectors that led to the problem, which may be accompanied by a dashboard warning light. Airbag function is not affected, said Chrysler, which noted it was unaware of any related injuries or accidents.

Volvo Recalls up to 10,000 XC90 Crossovers Globally

Volvo Car Group is recalling up to 10,000 of its luxury 2016 XC90 crossovers worldwide due to a potential problem with the vehicles' trim panel that could prevent the air bags from deploying properly. All seven-seat model year 2016 XC90 cars worldwide will be included in the recall, which was prompted after the company discovered that the side air bag curtain in the crossovers’ third seat row may not function as intended. The Swedish carmaker blocks delivery of the crossovers for “a few days” until the problems have been corrected. The automaker said that it will modify the design of the panel surrounding the vehicles’ air bag curtains to ensure that the air bags inflate as intended. Elfstrom noted that the faulty part is the panel surrounding the air bag curtain, not the air bag itself. The recall will include approximately 2,000 cars in the U.S., 900 in Sweden and approximately 7,000 in Europe, Volvo said.

John Deere Recalls Lawn Tractors Due to Crash Hazard

John Deere has recalled several models of riding lawn tractors because of a problem with the brake system. The company said the brake arm on the tractors can fail and cause a crash. The John Deere models being recalled are D110, D125, D130, D140, D155, D160 and D170 lawn tractors with serial numbers beginning with 1GXD.

The John Deere models being recalled are D110, D125, D130, D140, D155, D160 and D170 lawn tractors with serial numbers beginning with 1GXD. The model number is printed on the bottom left and right of the hood in yellow. The serial number is located on the on the left side of tractor, under the fender, above the left rear tire. Customers should not use their tractors until they are properly repaired by a John Deere retailer. John Deere can be contacted at 800-537-8233 from 8 a.m. to 6 p.m. ET Monday through Friday and Saturday from 9 a.m. to 5 p.m. ET or online at www.deere.com.

American SportWorks Recalls Four-Wheel Off-Road Utility Vehicles

About 3,500 Off Road Utility Vehicles were recalled by American SportWorks. The throttle can fail to return to idle causing the rider to lose control, posing a risk of injury. This recall includes six models of American SportWorks Four Wheel Off-Road Utility Vehicles. The name of each model is located above each front fender and along the sides of the dump bed. Affected vehicles include:
BullDog 300, ChuckWagon 300 and LandMaster 300 all powered by Kohler 27cc engines with the last six characters of the product identification number between A11746 and A13294, and LandMaster 400, TrailWagon 400 and ChuckWagon 400 all powered by Honda 390cc engines with the last six characters of the product identification number between A24835 and A26806. The product identification numbers can be found on a sticker on the firewall above the accelerator and brake pedal.

**Model**  | **Color**
---|---
LandMaster 300 | Red, Green, Black, White, Camo
LandMaster 400 | Red, Green, Black, White, Camo
BullDog300 | Red
Trail Wagon 400 | Red, Camo
Chuck Wagon 300 | Red, Green, Camo
Chuck Wagon 400 | Red, Green, Camo

The vehicles were sold at Atwood Distributing, Rural King, The Home Depot, Tractor Supply Company and other dealers from September 2014 through June 2015 for between $4,300 and $5,300. Consumers should immediately stop using the recalled product and contact the company for a free repair. Contact ASW toll free at 800-293-0795 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.amsportworks.com at the top of the page under the SAFETY tab under Recalls click on “TSB167 & TSB168” for more information. Photos available at [http://www.cpsc.gov/en/Recalls/2015/American-SportWorks-Recalls-Four-Wheel-Off-Road-Utility-Vehicles/](http://www.cpsc.gov/en/Recalls/2015/American-SportWorks-Recalls-Four-Wheel-Off-Road-Utility-Vehicles/).

**Two Tire Companies Recall Tires Because Of Tread And Bead Issues**

Discount Tire Company, one of the nation’s largest tire retailers, is recalling nearly 80,000 Pathfinder replacement truck tires because the tire’s inner liner gauges were not made to specification and could fail and cause a crash. The recalled tires include: Pathfinder SAT LT245/75R17E 121R W tires manufactured between Sept. 16, 2013 and May 19, 2015; Pathfinder SAT LT265/75R16E1 123Q W tires manufactured between Aug. 5, 2013 and May 19, 2015; Pathfinder SAT LT265/70R17E 121S B tires manufactured between Sept. 2, 2013 and May 19, 2015; and Pathfinder SAT LT275/65R18E1 125S B tires manufactured between Oct. 7, 2013 and May 19, 2015.

The recalled tires were made by Kumho Tire Company at its plants in South Korea and Vietnam. Discount Tire informed NHTSA it will notify owners and dealers of the defective tires and replace them free of charge. Tire owners also may contact Discount Tire customer service at 888-519-6914.

Michelin is also recalling approximately 129,000 BFGoodrich commercial light truck tires sold in the U.S. and Canada. The Michelin tires were made at its plant in Tuscaloosa, Alabama. According to Michelin, the affected tires can experience a rapid loss of air pressure during use and rupture in the sidewall of the tire which can result in a crash. So far, no fatalities have been reported. The Michelin tires are mainly for use on commercial light trucks, full-sized heavy-duty vans, small recreational vehicles and some 3/4- and 1-ton pickup trucks. The Michelin tires being recalled are the:

**Commercial T/A All-Season**—size: LT 275/70R18 125/122Q; load range: LRE; made during May of 2014: 1814 to 1914

**Commercial T/A All-Season**—size: LT 275/70R18 125/122R; load range: LRE; made during May of 2014: 0814 to 2115

**Rugged Terrain T/A**—size: LT 275/70R18 125/122R; load range: LRE; made from May 2014—December 2014: 1414 to 4914

Any person having one of these tires on their vehicle should get it replaced immediately.

**Breezer Recalls Downtown Bicycles Due To Crash Hazard**

Advanced Sports International has recalled about 1,700 Breezer Downtown Bicycles. The bicycle pedal can separate from the spindle (axle) during use and cause the rider to lose control, posing a crash hazard. This recall involves Breezer Bicycles models Downtown 3, Downtown 3-ST, Downtown 8, Downtown 8-ST, Downtown EX and Downtown EX-ST. The main frame is made of steel and has either a single or dual water bottle mount, and the wheel sets are aluminum. The bicycles come in eight different sizes and a variety of gloss colors, including candy apple, chartreuse, chocolate, dark blue, dark green, shale and slate. The model is printed on the top tube of the bicycle. The company has received 12 reports of pedals separating from the spindle. No injuries have been reported.

The bicycles were sold at authorized Breezer Bicycles dealers nationwide from July 2014 through May 2015 for about $450 to $650. For a free pedal replacement, contact Advanced Sports International toll-free at 888-286-6263 between 8 a.m. and 5:30 p.m. ET Monday through Friday or visit www.breezerbikes.com, click on “Recall Notices” in the bottom left corner of the homepage and choose “Downtown Pedal Recall” for more information.

**Taurus Recalls Nearly 1 Million Pistols**

Firearms manufacturer Taurus has recalled nearly one million pistols as part of the settlement of a lawsuit that alleges nine handgun models had defects, including one that caused some to inadvertently fire when dropped. The settlement affects customers who bought the following models sold between 1997 and 2013 in the U.S., Puerto Rico, U.S. Virgin Islands and Guam: PT-111 Millennium; PT-132 Millennium; PT-138-Millennium; PT-140 Millennium; PT-145 Millennium; PT-745 Millennium; PT-609; PT-640; and PT-24/7. More details on the recall are given in the Product Liability Section.

**Whirlpool Recalls 40,000 Jenn-Air Ovens Due To Burn Risk**

Whirlpool has recalled more than 40,000 of its Jenn-Air brand ovens after customers reported burns due to faulty oven racks. The US Consumer Product Safety Commission says the extendable rack inside the oven can fall out. Whirlpool received eight incident reports from customers, including one who reported second degree burns to the back and arm. The recall is for Jenn-Air’s single and double wall ovens. They were sold at Sears, Pacific Sales and other stores for between $2,500 and $5,000. About 35,000 were purchased in the U.S. and 8,000 in Canada. Whirlpool Corp., based in Benton Harbor, Mich., says customers should stop using the extendable rack and contact the company for a free inspection and repair.
AMBIDENT WEATHER RECALLS WEATHER RADIOS DUE TO FIRE HAZARD

About 12,500 Ambient Weather radios have been recalled by Ambient Weather, of Chandler, Ariz. The weather radio’s AC power adapter can overheat, posing a fire hazard. This recall involves Ambient Weather radios. The weather radios are red and black and measure about 8 inches wide by 4 inches tall by 2 inches deep. “Ambient Weather,” “AM/FM/Weather Band Radio” and “NOAA Weather Radio” are printed in white lettering on the front of the radio. The radios have a black crank handle on the back, an antenna on the top, a single LED flashlight on the left side, a clip on the right side and a cable to charge a smart phone. Model number WR-334-U or WR-334A-U is printed in white on the owner’s manual. The AC power adapter is black and has a rounded back. Model number YHD0500500U is printed on a white sticker on the adapter. The company has received three reports of fire and smoke in the back battery area of the weather radios. No injuries have been reported.

The radios were sold at online at AmbientWeather.com and Amazon.com from November 2012 through December 2013 for about $60. Consumers should immediately stop using the recalled weather radios and contact Ambient Weather for a free replacement AC power adapter. Contact Ambient Weather toll-free at 877-413-8800 Monday through Friday between 8 a.m. and 3 p.m. MT, online at www.ambientweather.com and click on Customer Service, then Recall Information for more information, or at www.ambientweather.com/recall.html. Photos available at http://www.cpsc.gov/en/Recalls/2015/Ambient-Weather-Recalls-WeatherRadios/

IKEA RECALLS CHILDREN’S NIGHTLIGHT DUE TO ELECTRICAL SHOCK HAZARD

IKEA North America Services LLC, of Conshohocken, Penn., has recalled about 359,000 PATRULL Nightlights. The nightlight’s plastic covering can detach and expose electrical components, posing an electrical shock hazard. This recall affects all PATRULL Nightlights. Nightlights come in white, orange and pink. The nightlights automatically turn on in the dark and off in the light. Each PATRULL Nightlight has an IKEA logo on the back top near the sensor. The light has a dome-shaped plastic cover that gives the light its color and is attached to a white rectangular plastic base. The nightlight is 2 ¾ inches round and 3 ½ inches deep. IKEA has received one report from Austria where a young child tried to remove the light from the electrical outlet when the colored plastic cover detached. The child received an electric shock and minor wounds on the hand. No incidents have been reported within the US.

The nightlights were sold at IKEA stores nationwide and online at www.ikea-usa.com from August 2013 to July 2015 for about $4. Consumers should immediately stop using and unplug the recalled product and contact IKEA for a full refund. Contact: IKEA toll-free at 888-966-4532 anytime or online at www.ikea-usa.com and click on Press Room at the bottom of the page then Product Recalls at the top of the page for more information. Photos available at http://www.cpsc.gov/en/Recalls/2015/IKEA-Recalls-Childrens-Nightlight/

ACCO BRANDS RECALLS QUARTET MAGNETIC AND DRY ERASE BOARDS

ACCO Brands Corp., of Lake Zurich, Ill., has recalled about 3.3 million Quartet Magnetic and Dry Erase Boards. Sharp metal edges on the back of the boards can become exposed while removing mounted boards, posing a laceration hazard. This recall involves eight styles of Quartet magnetic and dry erase boards, including calendar styles and combination boards with push pins. The boards were sold between January 2005 and December 2013, in eight sizes: 5 ½ x 14, 8 x 11, 11 ½ x 11 ½, 11 x 17, 12 x 12, 14 x 14, 17 x 17 and 17 x 23, and in various colors including white, silver, black, blue, green, pink, purple, grey and multicolor. The Quartet logo is printed on the bottom of the boards. The company has received seven reports of hand, finger and foot laceration injuries, including four that required stitches.

The dry erase board were sold at Ace Hardware, Fred Meyer, Menards, Office Depot and other stores nationwide and online from January 2005 through December 2015 for between $5 and $10. Consumers should immediately contact ACCO for a caution label that instructs consumers to wear heavy gloves when removing the boards. This recall does not require that consumers remove the mounted boards. Consumers should affix the caution label with safe removal instructions for when needed. Contact: ACCO Brands at 800-611-6654 from 8 a.m. to 5 p.m. CT Monday through Friday, or online at www.Quartet.com and click the link “Important Safety Information—Wall Mounted Dry Erase Boards” for more information. Photos available at http://www.cpsc.gov/en/Recalls/2015/ACCO-Brands-Recalls-Quartet-Magnetic-and-Dry-Erase-Boards/

RITE AID RECALLS OUTDOOR DINING SETS DUE TO FALL HAZARD

About 13,000 Outdoor Dining Sets have been recalled by Rite Aid, of Camp Hill, Pa. The chair arms and legs can bend and cause the user to fall, posing a risk of injury. This recall involves a six-piece outdoor patio set containing four folding chairs, a table and an umbrella. The brown metal-frame chairs have a red canvas seat and back, and measure 21 ¼ inches tall by 25 ¼ inches wide. The umbrellas are 80 inches tall have a coordinated red with stripes canvas top. The square table also has a metal frame and a hard-plastic clear top. UPC number 011822350303 and item number 9034923 are printed on the packaging of the patio set. The company has received four reports of chairs bending unexpectedly, including four reports of injuries to the lower back and hip.

The sets were sold exclusively at Rite Aid stores nationwide and online at RiteAid.com from January 2015 to July 2015 for between $100 and $150. Consumers should immediately stop using the recalled chairs and return them to the any Rite Aid store for a full refund. Consumers are not required to return the table and umbrella. Contact Rite Aid at 800-748-3243 from 8 a.m. to 8 p.m. ET Monday through Friday, 9:30 a.m. to 6 p.m. Saturday, or online at www.riteaid.com and click on “Product Recalls” at the bottom of the page under Customer Care for more information.

NIPPONFLEX RECALLS MATTRESSES DUE TO VIOLATION OF FEDERAL MATTRESS FLAMMABILITY STANDARD

Nipponflex of Pompano Beach, Fla., has recalled about 400 Nipponflex
Smart Flex and Smart Care mattresses. The mattresses fail to meet the mandatory federal flammability standard for mattresses, posing a fire hazard. This recall involves all models and sizes of Nipponflex Smart Care, Smart Care split, Smart Flex and Smart Flex split mattresses. The mattresses are white in color and have an electric massage function controlled by a remote. The split mattresses consist of two single mattresses side by side to form a queen or king size mattress. “Nipponflex” and “SMART FLEX” or “SMART CARE” are printed on the label on a side of the mattress.

The mattresses were sold at independent distributors via in-home sales in Florida, Georgia, Massachusetts, New Hampshire, New York, Utah and Virginia from April 2014 through February 2015 for between $2,000 and $7,000. Consumers should contact Nipponflex for free mattress covers to bring the mattress into compliance with the federal standard and protect consumers from a fire. Assistance with installation is available upon request. Contact Nipponflex toll free at 844-226-0366 any time, by email at mattressrecall@nipponflexusa.com or online at www.nipponflexusa.com and click on “Recall Information” for more information. Photos available at http://www cpsc.gov/en/Recalls/2015/Nipponflex-Recalls-Mattresses/

**Stork Craft Recalls Crib Mattresses**

Stork Craft Manufacturing USA Inc., of Las Vegas, Nev., has recalled about 18,500 foam crib mattresses. These crib mattresses fail to meet the mandatory federal mattress flammability standard for open flames, posing a fire hazard. This recall involves Stork Craft foam crib and crib/toddler mattresses with model numbers 06710-100 and 06710-200 and a date of manufacture between August 2014 and January 2015. The mattresses have a zippered white fabric cover and measure about 28 inches wide, 52 inches long and have a 5-inch thick foam core. The model number, date of manufacture and “Stork Craft Manufacturing (USA) Inc.” are printed on white federal label attached to the white mattress cover. The mattresses’ box has a Graco logo.

The mattresses were sold at Walmart stores nationwide and online at Amazon.com, EChannel.com, ToysRUs.com, Walmart.com and Wayfair.com from August 2014 through April 2015 for between $38 and $50. Consumers should immediately stop using the recalled crib mattresses and contact Stork Craft for a free, zippered mattress barrier cover to be placed over the mattress foam core and under the white mattress cover provided with the mattress. Contact Stork Craft at 800-274-0277 Monday through Friday between 7 a.m. and 3 p.m. PT, by email at parts@storkcraft.com, or online at http://storkcraftdirect.com and click on Product Recall near the bottom of the page for more information. Photos available at http://www cpsc.gov/en/Recalls/2015/Stork-Craft-Recalls-Crib-Mattresses/

**J.M. Mattress Recalls Renovated Mattresses**

About 240 mattresses have been recalled by J.M. Mattress, of Chicago, Ill. The mattresses fail to meet the mandatory federal open flame standard for mattresses, posing a fire hazard. This recall involves renovated (rebuild) Tight Top RB Sweet Dream mattresses sold in twin, full, queen and king sizes. Recalled mattresses are ivory colored, have a white federal tag with “Manufactured By: J.M. Mattress, 4536 W. Gladys Ave. Chicago IL 60624, Model: Tight Top RB Sweet Dreams, Prototype ID: TTQRBBD Sweet Dreams.” The federal tag is located on the top side near the foot of the mattress.

The mattresses sold at Independent mattress stores in Illinois, Indiana and Wisconsin from September 2014 through December 2014 for between $50 and $500. Consumers should immediately contact J.M. Mattress to arrange to have the recalled mattresses picked up, recovered and returned free of charge. Contact J.M. Mattress collect at 708-456-4600 from 8 a.m. to 5 p.m. ET Monday through Friday or by email at JM_furniture@yahoo.com. Photos available at http://www cpsc.gov/en/Recalls/2015/JM-Mattress-Recalls-Renovated-Mattresses/.

**Manhattan Group Recalls Children’s Elephant Activity Toys Due To Choking Hazard**

Manhattan Group LLC, of Minneapolis, Minn., has recalled its My Snuggly Ellie Activity Toys. The wooden ring can break into small pieces, posing a choking hazard to young children.

The toy is a plush brown elephant with white crinkle ears. There is a green hanging loop on top of its head allowing it to be a stroller or crib attachment. On the stomach there is a mini mirror while a teether and wooden ring hang below its body. The item number is 212520 and can be found on the small white tag sewn into the bottom of the toy. Manhattan Group has received one report of the wooden ring breaking. No injuries have been reported.

The toys were sold at specialty toy and baby stores nationwide, and online at www.manhattantoy.com from February 2014 through May 2015 for about $10. Consumers should immediately take the toy away from young children and return the toy to where it was purchased for a full refund. Contact Manhattan Group toll-free at 800-541-1345 between 8 a.m. and 5 p.m. CT Monday through Friday, or visit the firm’s web site at www.manhattantoy.com and click on “RECALLS” for additional information. Photos available at http://www cpsc.gov/en/Recalls/2015/Manhattan-Group-Recalls-Childrens-Elephant-Activity-Toys/

**Flowers By Zoe Recalls Girls Striped Hoodie and Neon Tie Dye Jacket Due To Strangulation Hazard**

Flowers By Zoe, Melville, N.Y., has recalled about 122 of its girls hoodies and jackets. The hoodies and jackets have drawstrings around the neck area that pose a strangulation hazard to children. Drawstrings can become entangled or caught on playground slides, hand rails, school bus doors or other moving objects, posing a significant strangulation and/or entanglement hazard to children. In February 1996, the Consumer Product Safety Commission (CPSC) issued guidelines about drawstrings in children’s upper outerwear. In 1997, those guidelines were incorporated into a voluntary standard. Then, in July 2011, based on the guidelines and voluntary standard, CPSC issued a federal regulation. CPSC’s actions demonstrate a commitment to help prevent children from strangling or getting entangled on neck and waist drawstrings in upper outerwear, such as jackets and sweatshirts. This recall involves girls zippered striped hoodies and tie dye jackets.

The lightweight hoodie has multi-colored stripes (yellow, white, orange...
ReSiStant cloSuRe ReQuIReMent
temozoloMIde bottleS wIth cRacked
caps due to FaIluRe to Meet chIld-
proofingInjustice.com. We would also like to
serve as a state attorney general. Bill
Baxley also served as the 24th Lt. Governor
of Alabama, from 1983-1987. I really feel
of Alabama, from 1983-1987. I really feel

and pink). It has a drawstring hood, zip-up front and pockets on both sides. It is made from 100 percent Rayon and was sold in sizes S (7, 8), M (10) and L (12). A label sewn into the garment’s neck seam reads “Flowers By Zoe” and a second label in the side seam reads style #SRH125MS. The tie-dye jacket has tie-dye-effect dark blue, teal, orange, pink and lime green horizontal stripes. It has a drawstring hood, zip up front and pockets on both sides. It is made from 100 percent Rayon and was sold in sizes S (7, 8), M (10) and L (12). A label sewn into the garment’s neck seam reads “Flowers By Zoe” and another label in the side seam reads style #NRH125TA.

The jackets were sold at several children’s boutique specialty retailers; such as LaBella Flora in Auburn IN; Kids Only in Los Angeles, Calif.; Kids Biz, Dallas, Texas; and Polkadot Pony in Jackson, Miss., and other online children’s stores; such as Everything But the Princess, from February 2015 through May 2015 for about $45. Consumers should immediately take the hoodies and jackets away from children and remove the drawstring to eliminate the hazard. Consumers can return the hoodies to the place of purchase for a full refund. Contact Flowers By Zoe toll-free at 844-236-7350 from 9 a.m. to 5 p.m. ET Monday through Friday. Photos available at h t t p : / / w w w . c p s c . g o v / e n / Recalls/2015/Flowers-By-Zoe-Recalls-Girls-Striped-Hoodie-and-Neon-Tie-Dye-Jacket/

**MERCK RECALLS TEMODAR AND TEMOZOLOMIDE BOTTLES WITH CRACKED CAPS DUE TO FAILURE TO MEET CHILD-RESISTANT CLOSURE REQUIREMENT**

About 276,000 bottles with cracked caps containing Temodar® (Temozolomide) and Temozolomide (generic) capsules have been recalled by Merck Sharp & Dohme Corp., of Whitehouse Station, N.J. The bottle cap can be cracked, which can cause the child-resistant closure to become ineffective to young children who can gain unintended access to the capsules, posing a risk of poisoning. This recall to replace involves bottle caps for Temodar and Temozolomide (generic) capsules, an oral chemotherapy drug. The capsules were distributed in 5- and 14-count brown glass bottles that have white plastic child-resistant caps. A white label affixed to the bottle has the word “Temozolomide” printed in black lettering.

They were sold at clinics and pharmacies nationwide as a prescribed medicine from July 2013 to August 2015. The container was included in the cost of the medication which is based on quantities prescribed, health insurance terms and other factors. Consumers should immediately inspect their bottle caps for cracks. If a crack is found, consumers should contact Merck for a replacement cap. As with all drug products, the bottles should be stored up high, out of sight and reach of young children. Consumers may continue to use the drug as directed. Contact Merck Information Center at 800-943-8069 from 8 a.m. to 8 p.m. ET Monday through Friday, or visit www.merck.com and click on “Important Temodar Information” for more information. Photos available at h t t p : / / w w w . c p s c . g o v / e n / Recalls/2015/Merck-Recalls-Temodar-and-Temozolomide-Bottles-with-Cracked-Caps/

**36,000 CASES OF KRAFT SINGLES RECALLED DUE TO CHOKING HAZARD**

Kraft has recalled 36,000 cases of Kraft Singles distributed at stores nationwide due to a choking hazard. In a statement about the recall, the company said it’s possible a piece of thin plastic wrapper may stick to the cheese and create the choking hazard for consumers. So far, 10 customers have reported a problem with the wrapper. The 377,000 packages involved in the recall are 3-lb. and 4-lb. sizes of Kraft Singles American and White American cheese slices with a “best when used by” date of Dec. 29, 2015, through Jan. 4, 2016. The manufacturing code is S54 or S55. Consumers who bought recalled items should return them to the store where purchased for an exchange or full refund. For more information or a full UPC number listing of recalled products, you can go to the Kraft website.

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 or www.RightingInjustice.com. 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.

**XXV. FIRM ACTIVITIES**

“TALES FROM GOAT HILL” SAID TO HAVE BEEN A SUCCESS

Bill Baxley and I appeared at The Capital City Club in downtown Montgomery last month, as advertised, and to our surprise there was a capacity crowd. The topic assigned to us, “Tales from Goat Hill,” was quite appropriate. The label Goat Hill was given years ago to the physical site of state government in Alabama. Now everything around the capitol is referred to as Goat Hill. Since Bill had served as Attorney General and also as Lt. Governor, he is quite knowledgeable about state government. During the event, Bill also told some most interesting stories about his campaigns. I only wish I had heard those stories back when the two of us were political rivals.

Guests at the event enjoyed a two-course lunch while moderator Alva Lambert guided a most lively discussion. Alva, who is known as a master political impersonator, does Governor George Wallace and Senator Howell Heflin to perfection. The crowd roared as he brought characters from the Alabama political scene throughout the years to life. Everybody really enjoyed Alva’s being a part of the program.

I had the honor of serving as the 22nd Lt. Governor of Alabama. My time in office was from 1971 to 1979. During my first term, I also served as Acting Governor from June 5 to July 7, 1972, when Gov. Wallace was shot in an attempted assassination attempt during his run for President of the United States. After an unsuccessful race for the governor’s office in 1978, I hung out my shingle as a lawyer, founding what today has grown into a fairly large civil litigation firm, Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.

Bill Baxley was a tremendously talented politician and he was an effective public servant. He was an outstanding Attorney General, serving two terms from 1971 to 1979. At the age of 28, he was at that time the youngest person in U.S. history to serve as a state attorney general. Bill Baxley also served as the 24th Lt. Governor of Alabama, from 1983-1987. I really feel
Bill was much more suited to be on the floor of the Senate engaged in the battle, rather than having to sit above the fray and be restricted to the role of a presiding officer.

Bill was able to attract good young people to come to work in the Attorney General’s office. I was not at all surprised when many of them went on to be good citizens who were highly successful in their respective careers. Alabamians will recognize names like Judge Myron Thompson, Judge Charles Price, Judge Sally Greenhaw and U.S. Attorney George Beck, each of whom went to work for Baxley in the 1970s. Bill not only attracted quality folks to his office, he also had a special gift of being able to communicate with the masses. The Dothan native would also tell it straight and there was never any doubt as to where Bill stood on an issue. He would have been a great governor in my opinion.

At the luncheon, Bill and I spoke on a wide variety of topics, ranging from recounting how each of them got into politics and memories from early days of campaigning; to the constant confusion caused by the similarity of our names. We shared our thoughts on past governors, and talked about the challenges facing Alabama today. We even gave our current leaders in the legislature and in the Governor’s mansion some unsolicited advice on how to work through Alabama’s current problems and how to find solutions for them.

Bill and I have been asked to take our show on the road, but I’m not too sure about doing that. One time may have been enough for me since I don’t ever plan on being a political candidate again. But now I’m not so sure about Bill. The response he got at the event may have rekindled his interest in serving as Governor of Alabama. I do believe Bill Baxley, who is my friend, would still be outstanding in that role.

**National Night Out Held In Prattville**

We were proud to take part in the National Night Out event held in Prattville, Ala. on August 4. It was a very hot evening but our crew helped the Prattville Police Department, including Officer Brian Gentry and the Prattville Police Explorers, explain the DOT (Department of Transportation) numbers found on tires. This number is important because it tells you when your tire was manufactured so that you can track when it should be taken off the road.

Several law enforcement agencies from around the River Region were present, along with Crime Stoppers and other area businesses. More than 2,000 people attended this year’s event. There were activities for the children and food for the whole family. A very special thank you to Chief Mark Thompson and Tammy Wingard of the Prattville Police Department. They do a fine job coordinating this important event.

**XXVI. SPECIAL RECOGNITIONS**

**THE FELLOWSHIP OF CHRISTIAN ATHLETES DO GREAT WORK**

John Gibbons and Erick Armster, who are with the Fellowship of Christian Athletes in Alabama (FCA), sent us a very good report on the FCA’s summer camp programs. Camps sponsored by the FCA were attended this summer by more than 8000 athletes and coaches statewide. In addition, more than 600 coaches attended the annual FCA coaches’ luncheon, which was held in conjunction with the Alabama High School Athletic Association All-Star Week. I am told that Tommy Bowden, the former head coach at Clemson, presented a very powerful and encouraging message at this special event.

FCA has celebrated the many victories experienced and the ways God has moved in the lives of a tremendous number of coaches and athletes. All of this will create a positive ripple effect as the FCA enters into the new school year. I am convinced the FCA does great work with the result being young men and women having a life-changing experience.

John Gibbons, who is State Director in Alabama, said, ‘As we make plans for the coming months, we are truly looking forward to all God has in store. We seek His guidance each day.” I encourage folks to support the work on the FCA in their state. They do a tremendous job and will be a real blessing to thousands of youngsters this school year.

**BEASLEY ALLEN SPONSORS SEAT CHECK SATURDAY**

We will once again host a FREE child safety seat check for parents and child caregivers in Montgomery on Saturday, Sept. 19, giving them an opportunity to ensure their child safety seats are properly installed in their vehicles. The event, Seat Check Saturday, is part of National Child Passenger Safety Week, an annual event presented by the National Highway Traffic Safety Administration (NHTSA). Seat Check Saturday will once again be held at The Shoppes at EastChase.

Every year, thousands of children are tragically injured or killed in automobile crashes. For children ages 3-6 and 8-14, it is the leading cause of death. It is impossible to overstate the toll this takes on families. All 50 states and the District of Columbia and our territories have laws requiring the use of safety seats, booster seats and seat belts for children traveling in motor vehicles. But these restraints cannot work if they are not installed properly. Sadly, three out of every four child restraints are not properly used.

The sixth annual Seat Check Saturday check point will be located in the Dillard’s parking lot at the Shoppes at Eastchase. Safe Kids USA will provide certified technicians to install, inspect and instruct caregivers. For information about a seat check event or training near you visit safekids.org. Contact Helen Taylor by email, helen.taylor@beasleyallen.com to schedule your appointment between 9:00 a.m. and 12:00 p.m.


The week of July 27 was down and dirty. Our law firm once again sponsored the Fresh Air Family “Gross Out Day Camp” at the Alabama Wildlife Federation Lanark Nature Center in Millbrook, Ala. I had intended to write about the camp last month, but failed to do so. Hopefully, I am not too late in telling about it. The award-winning camp is a part of many outdoor activities organized by the Birmingham organization, Fresh Air Family. Youngsters love the “gross” activities that allow them to get dirty, but this is actually science camp geared towards kids 6-9 years old. Campers searched for macroinvertebrates, bugs, stinky plants and more. They also participate in hikes, creek stomping, crafts, journaling and scientific observation in this hands-on biology camp. It’s both a fun time and a learning experience for the children.

**TOM METHVIN APPOINTED AS UNIVERSITY OF ALABAMA CULVERHOUSE COMMERCE EXECUTIVES SOCIETY PRESIDENT**

Recently Tom Methvin, who is our Managing Principal in the firm, was appointed as the Commerce Executives Society President for the Montgomery chapter of the
University of Alabama Culverhouse College of Commerce. The Commerce Executives Society (CES), the Annual Fund for the College, plays an important role in the continuation of the highly regarded school.

The Culverhouse College of Commerce is the oldest business school in Alabama. Its mission is to provide students with an education they can use in the business environment of tomorrow. It has been ranked by U.S. News & World Report among the top three to four percent of public business programs nationally, and Forbes has ranked the college’s Manderson Graduate School of Business at No. 31 among the top public MBA programs. The Culverhouse program combines a traditional classroom experience with hands-on opportunities for education and professional development by teaming with local and national companies.

CES provides additional dollars to ensure every Culverhouse student receives a superior education by providing the resources and experiences that separate its students from the competition. As of 2014, there were 190 Culverhouse scholarship funds used to award 658 Culverhouse student scholarships totaling $1,657,490. Some 154 of those scholarships went to graduate students. Gifts to CES can be used immediately to help bridge the gap and move integral programs forward.

There will be a CES event in October, so if you are already on the mailing list for the organization, watch for your invitation. If you are a Culverhouse alumnus in the Montgomery area and would like to become more involved with alumni programs including the Commerce Executives Society, contact Courtney Page at cpage@culverhouse.ua.edu.

XXVII.
FAVORITE BIBLE VERSES

Tre Bamberg, a staff assistant in our firm’s Mass Torts Section, sent in a verse this month. Tre’s husband Danny was diagnosed with a brain tumor in 2013. Within a week he had surgery to remove the tumor. Tre says while Danny never lost faith and was strong, she was weak and scared. She says momentarily she forgot that the hand of God was on Danny. Tre says “Danny is now as good as new” and next April they will celebrate 10 years of marriage. Tre says some verses in 2 Corinthians reminded her that although there are things we can see right in front of us, we must never lose faith that the unseen is ever present.

Therefore we do not lose heart. Though outwardly we are wasting away, yet inwardly we are being renewed day by day. For our light and momentary troubles are achieving for us an eternal glory that far outweighs them all. So we fix our eyes not on what is seen, but on what is unseen. For what is seen is temporary, but what is unseen is eternal. 2 Corinthians 4:16-18

A good friend of mine, Erick Armster, sent in a verse this month. Erick works with the Fellowship of Christian Athletes (FCA) in Alabama and operates out of Montgomery.

We give thanks to God always for you all, making mention of you in our prayers, 1Thes. 1:2

Stephanie Houston, who works in our Mass Torts Section as a staff assistant, says that two scriptures have helped her when her needs were not being met in the way she thought they should have been met. While she was feeling all alone and discouraged, these verses helped her. Stephanie says she knew that her help comes from the Lord and she was right because everything worked out for her.

Don’t be afraid, for I am with you. Don’t be discouraged, for I am your God. I will strengthen you and help you. I will hold you up and my victorious right hand! Isaiah 41:10

Be strong and courageous. Do not be afraid or terrified because of them, for the Lord God goes with you: he will make your way perfect. Joshua 1:9

Larry Golston, a lawyer in our firm, says he has lots of favorite scriptures, but Larry says his real favorite is Psalm 23. But Larry wanted to include two other scriptures, which he says are also two of his favorites, for this issue. Larry handles employment-related causes for the firm and enjoys helping folks who have problems and need his help.

For whom he did foreknow he also foreordained, and whom he also called, them he also justified; and whom he also predestinated to be conformed to the image of his Son, that be might be the firstborn of many brethren. Moreover whom he did foreordain, them be also called: and whom be called, them be also justified; and whom be justified, them be also glorified. What shall we then say to these things? If God be for us, who can be against us? Romans 8:28-31 (KJV)

And if it seem evil unto you to serve the Lord, choose ye this day whom ye will serve; whether the gods which your fathers served that were on the other side of the flood, or the gods of the Amorites, in whose land ye dwell: but as for me and my house we will serve the Lord. Joshua 24:15

Chad Cook, a lawyer in our firm’s Mass Torts Section, says that Proverbs 3:5-6 are very special to him. He says these verses were the first scripture that his son, Parker, memorized and says the scripture also serves as one of his life verses.

Trust in the LORD with all your heart and lean not on your own understanding; in all your ways acknowledge him, and he will make your path straight. Proverbs 3:5-6

Chad also wanted us to include the scripture set out below.

Rejoice in the Lord always. I will say it again: Rejoice! Let your gentleness be evident to all. The Lord is near. Do not be anxious about anything, but in every situation, by prayer and petition, with thanksgiving, present your requests to God. And the peace of God, which transcends all understanding, will guard your hearts and your minds in Christ Jesus. Philippians 4

Ted Meadows, another Beasley Allen lawyer, sent in a verse for this issue. He said right now, Isaiah 43:19 is a reassuring reminder that He is constantly renewing everything and everyone, even when circumstances make it difficult for us to realize as much.

Behold, I will do a new thing, Now it shall spring forth: Shall you not know it? I will even make a road in the wilderness , And rivers in the desert. Isaiah 43:19

XXVIII.
OUR MONTHLY REMINDERS

I learned long ago that I needed to be reminded from time-to-time about important matters. For that reason, I decided to always include some timely reminders in the report each month.
XXIX.

PARTING WORDS

CHETTE WILLIAMS DOES GOOD WORK AS AUBURN UNIVERSITY FOOTBALL TEAM CHAPLAIN

I was really surprised to learn that the Madison, Wis., based Freedom From Religion Foundation (FFRF) has threatened a lawsuit against Auburn University involving my very good friend Chette Williams. As some of you may know, Chette is the Chaplain for the football team and he does an outstanding job in that capacity. The group complaining says “unconstitutional Christian chaplaincies embedded in public university football programs,” are not a good thing. FFRF, which has previously sued or threatened suit against school systems and other public institutions around the country, including several in Alabama, reportedly wrote to Auburn University President Jay Gogue requesting that he abolish the chaplain’s position with the Tigers football program.

I understand this organization sent letters to numerous institutions, including the University of Alabama, which it says failed to respond to a request relating to the team chaplain at the schools. FFRF claims Chette has an office in Jordan-Hare Stadium and that’s totally false. I have visited Chette in his office on a number of occasions and know exactly where he is located. The organization takes issue with Chette leading football players in prayer and baptizing some of the players. I wonder how many of the parents of those players are complaining about Chette’s activities at Auburn University.

Cassie Arner with Auburn University’s Athletics Department issued a statement recently saying, “Chaplains are common in many public institutions, including the U.S. Congress. The football team chaplain isn’t an Auburn employee, and participation in activities he leads are voluntary.” I know that to be a truthful statement. No player is required to participate in any activity involving Chette. Everything is strictly on a voluntary basis.

Chette started as team Chaplin in the Fall of 1999 when Tommy Tuberville was the head coach. He serves as the Auburn campus director for the Fellowship of Christian Athletes. Chette’s time with the team dates to the 1980s when he played on the team coached by Pat Dye. Chette helped his teammates win the Sugar Bowl during his playing days. Chette has told me that Pat Dye was like a father to him and that the coach totally turned his life around. Another friend of mine, Kyle Collins, a running back on the team at the time, was responsible for Chette accepting Jesus as his Lord and Savior. Chette says that was the most important decision that he has ever made.

Chette Williams is a good man, a totally dedicated Christian and I consider him to be a very good friend. I know that Chette’s salary is paid by the FCA and I know that he has turned around the lives of lots of young men and women at Auburn. Personally, I believe that to be a good thing. We really need more individuals like Chette involved with student athletes at every level in our public and private schools, starting in the lower grades and going all the way through the college level. In fact, I believe most professional teams currently have chaplains. Those that don’t should consider having one. Based on some of the conduct by a few professional athletes, they need some help.

My prayer today is for more men and women like Chette Williams who are willing to dedicate their lives to working with young people. Teaching youngsters how to cope with all of the problems they face today is very important. God has blessed Chette Williams, giving him the talent and desire needed to work with young athletes. In my opinion, Chette is doing an outstanding job. I support what Chette is doing 100 percent and pray for him constantly.

At a time when young people need positive influences in their lives, having a chaplain involved with a football team makes good sense for a number of reasons. I don’t believe Auburn will make any changes that affect Chette Williams’ role as Chaplain. I am convinced that Chette will remain as Chaplain of the Auburn football team and will continue to do a most important work in the lives of young men and women at Auburn. May God continue to bless and use him.

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

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