



THE
JERE BEASLEY REPORT

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Beasley Allen

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
Attorneys at law



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I. CAPITOL OBSERVATIONS

MELTON FAMILY CREATES VEHICLE “WATCH LIST” TO ALERT PUBLIC TO DANGEROUS AUTOS

It’s abundantly clear that over the years the federal government has done a very poor job of regulating the automobile industry. The National Highway Traffic Safety Administration has dropped the ball on too many occasions. Based on our litigation experience, lawyers in our firm know that NHTSA has failed to discover safety issues involving a number of automakers. Two classic examples were when the agency failed to discover decade-long cover-ups of known and most serious safety defects by Toyota and General Motors. Those safety problems killed and injured hundreds of innocent victims.

The automobile industry is fully aware that NHTSA has been underfunded and inadequately staffed for years, and as a result, not able to do its job as regulator very well. The industry had tremendous influence over Congress. That influence has assured that Congress has not done its job when it comes to giving NHTSA the tools it needs to adequately regulate the automakers. That has made regulation sort of like the tail wagging the dog.

Brooke Melton was killed in 2010, when her Chevy Cobalt crashed due to the defective General Motors ignition switch in her vehicle. The defect allowed the key to move from the “run” position to the “off” position, cutting power and disabling the vehicle’s power steering, power brakes and airbags. It’s rather ironic that Brooke’s parents, Ken and Beth Melton were able to do that which NHTSA had failed to do by finding the defect in Brooke’s car. The agency was unaware of this fatal defect until it was brought to light following Brooke Melton’s tragedy, through the efforts of the Meltons. The Meltons worked through their grief to make more progress in vehicle safety than the regulator had over a much longer period of time and are continuing to work to make sure other families do not experience a similar tragedy. In partnership with The Safety Institute (TSI), the Meltons are funding a Vehicle Safety Watch List in their daughter’s memory. Ken Melton had this to say in a TSI news release:

Brooke would still be alive if GM had acknowledged the ignition defect and fixed it. Brooke would be alive if the regulators had followed up on their own investigations which revealed the problem. It’s clear to us that the

accountability systems we have in place don’t work as well as they should. The Watch List provides another tool, another way to look at defect trends. So, we are investing in a process that can help uncover emerging problems before they take more lives and turn into a full-blown crisis and cover-up.

The watch list will definitely help to save lives. Beth Melton added the following comments in an interview with NBC: “What we really hope is for other families to be able to use this information and prevent accidents. We think it can save lives.” The Meltons suffered greatly because of Brooke’s death. But they are determined to help other families avoid what they went through because of GM’s conduct and the automaker’s cover-up of a known about defect for 10 years.

Through the litigation, it became known that GM knew about the ignition switch defect, and withheld that knowledge from the NHTSA and the public for a full decade. In the period of time, hundreds of innocent victims were killed because of GM’s wrongdoing and intentional cover-up. GM has now admitted that this defect killed—by its own count—124 innocent people. The automaker recalled about 3 million cars with exactly the very same defect that the Meltons had discovered and made public.

The Meltons’ lawsuit against GM not only exposed GM’s ignition switch cover-up, but also brought to light the failure of NHTSA to effectively monitor automobile defect complaints, or hold automakers fully accountable for their wrongful acts and omissions. The TSI watch list will address shortcomings in the current regulatory system. TSI works to identify potential motor vehicle safety defects that it believes should be more fully investigated, and gathers information from a variety of sources, including publicly available data from NHTSA complaints, manufacturer reported Early Warning Reports on deaths and injuries, and the Fatality Analysis Reporting System (FARS).

The courage and dedication of Ken and Beth Melton cannot be overemphasized. Determined to find out what really happened to their daughter and what caused her to lose control of her car, they enlisted the help of Lance Cooper, an experienced products liability lawyer from Marietta, Ga. Lance discovered the defective ignition switch and exposed GM’s cover-up. Without the efforts of the Melton’s and Lance Cooper, there would have been no massive recalls, no civil or criminal fines and no multidistrict litigation. Sadly, the fines that GM was assessed—regardless of the amount—will be no real consolation to the hundreds of families who were devastated by GM’s conduct. There is no question some persons from GM should

go to jail. I will have more to say about that in this issue. We were honored to have been asked by Lance Cooper to assist his firm in the Melton litigation.

By supporting the Vehicle Watch List, Ken and Beth Melton will continue to make a difference for families throughout the country. The efforts of the Meltons—without a doubt—will help to save lives. We can only hope that by shining a spotlight on the despicable conduct of the automobile industry, and the woefully inadequate safety monitoring by NHTSA that has been in place, the Meltons will also help to turn the tide of public opinion at the grassroots. The American people—once they are fully informed—will no longer stand for this sort of “business as usual” in the automobile industry and at NHTSA. The public demands to be informed,

IN THIS ISSUE

I.	Capitol Observations	2
II.	More Automobile News Of Note.	3
III.	Purely Political News & Views	6
IV.	Court Watch.	7
V.	The National Scene	7
VI.	The Corporate World.	8
VII.	Whistleblower Litigation	9
VIII.	Product Liability Update	10
IX.	Mass Torts Update.	13
X.	Business Litigation.	16
XI.	An Update On Securities Litigation.	17
XII.	Insurance and Finance Update	18
XIII.	Employment And FLSA Litigation	19
XIV.	Premises Liability Update.	21
XV.	Workplace Hazards	22
XVI.	Environmental Concerns	23
XVII.	Transportation.	24
XVIII.	An Update On Class Action Litigation.	25
XIX.	The Consumer Corner	26
XX.	Recalls Update.	28
XXI.	Firm Activities	36
XXII.	Special Recognitions	37
XXIII.	Favorite Bible Verses	37
XXIV.	Closing Observations	38
XXV.	Parting Words	39

and fortunately, the automotive industry and the NHTSA are finally receiving the message.

Sources: NBC News, The Safety Institute, and The Associated Press

II. MORE AUTOMOBILE NEWS OF NOTE

VOLKSWAGEN ADMITS TO MASSIVE SCHEME DECEIVING THE EPA AND AMERICAN CONSUMERS

Things are happening so quickly—almost daily—relating to the Volkswagen AG’s massive problems. I will only give a summary of the automaker’s problems so far. Volkswagen has admitted to systematically cheating U.S. air pollution tests, leaving the company vulnerable to billions in fines and almost certain criminal prosecution. The automaker sold diesel versions of Volkswagen and Audi cars with software that turns on full pollution controls only when the car is undergoing official emissions testing. During normal driving, the Environmental Protection Agency (EPA), the cars pollute 10 times to 40 times the legal limits. The EPA called the technology a “defeat device.”

Volkswagen’s admission that it cheated to make nearly half a million diesel cars appear cleaner-burning than they are leaves the automaker facing billions in fines, its executives risking criminal charges, and its U.S. expansion plans in peril. While the total potential liability at this junction is unclear, the EPA could fine the company \$37,500 per vehicle, according to Cynthia Giles, the agency’s Assistant Administrator for Enforcement. With 482,000 vehicles involved, the total in EPA fines could be \$18 billion.

In my opinion, based on what we have learned so far, Volkswagen should be prosecuted criminally for what it has done. The Department of Justice is investigating Volkswagen AG over the admissions. The criminal probe will provide an early test of the Justice Department’s newly stated commitment to holding individuals accountable for corporate wrongdoing. The department said last month that companies wanting to get credit for cooperating with investigators must name individuals they allege are responsible for the misconduct.

Government fines are not the only liability that the company is facing. The German automaker has gained a foothold in the world’s second-biggest car market with a strategy built in part on touting the efficiency of fun-to-drive “clean diesel” vehicles now shown to be anything but. Consumers

should be upset, not just because of the emissions aspects and environmental impact of the scheme, but because of how the horsepower and fuel economy of VW vehicles are affected. The value of their cars will take a sharp decline. The vehicles affected include various model years of Volkswagen Jettas, Golfs, Passats and Beetles, as well as the Audi A3, with some affected vehicles ranging from as far back as 2009 to 2015, according to the EPA. Audi, which is mostly owned by Volkswagen, says 2.1 million of its vehicles are involved.

Volkswagen says that 11 million diesel vehicles worldwide are affected, and that it will cost the company \$7.2 billion to remove the devices. On September 22, Volkswagen CEO Martin Winterkorn resigned because of the scandal. He accepted responsibility and said he wants to create a “fresh start” for the company. It’s very likely that several officers at Volkswagen will be indicted. It was announced on Sept. 30 that the automaker was recalling up to 11 million vehicles and would refit them with new and legal software.

On top of the horsepower problem, the affected vehicles have definitely lost considerable value. “It’s a huge black eye for Volkswagen,” said Matt DeLorenzo, managing editor for news at Kelley Blue Book in Irvine, Calif. *Consumer Reports* magazine reacted by suspending its “recommended” rating of two diesel models. Consumers have been lied to for years and sold vehicles they were told had certain characteristics, which they clearly do not. Lawyers at Beasley Allen are working with other law firms around the country and they have filed a nationwide class action to redress these wrongs. I will have a little more to say about that suit below.

Source: Bloomberg

CLASS ACTION LAWSUIT SEEKS JUSTICE FOR VOLKSWAGEN OWNERS DECEIVED BY AUTOMAKER’S CLEAN AIR ACT CHEAT

Lawyers from Beasley Allen have joined with other firms and have filed a nationwide class action lawsuit on behalf of Volkswagen owners who were deceived by the automaker’s deliberate end run around Environmental Protection Agency pollution controls. The EPA has filed notices of violation (NOV) against the automaker, accusing Volkswagen of selling diesel vehicles equipped with software that disguises vehicles’ true nitrogen oxide (NOx) emissions, covering up violations of the Clean Air Act.

The EPA cited Volkswagen and its affiliates Audi AG and Volkswagen Group of America. The NOV alleges VW and Audi diesel cars from model years 2009-2015 include a so-called “defeat device.” The

device allows deliberate deception, turning on pollution controls only during official tests, while actually allowing the vehicles to run “dirty” during normal operation. Tests reveal NOx emissions up to 40 times higher than the federal standard. The suit includes 2009-2015 model years of the involved vehicles.

Volkswagen has now recalled the affected vehicles to fix the cars’ emission systems to meet federal standards. While the violations do not pose a safety hazard, and the cars are legal to drive and resell, the deception will definitely hurt the actual and perceived value of the vehicles, causing financial losses to consumers. The class action lawsuit seeks to address those losses.

Any emissions system involves a trade-off between performance and clean exhaust. All else equal, a cleaner engine produces less power and has worse fuel economy. VW let the diesel engines run a little dirtier to squeeze out more power and better mileage. Reversing the cheat through the recall would take away whatever performance gains the cheat provided. The bottom line is, consumers are not getting what they paid for.

The Clean Air Act requires vehicle manufacturers to certify to EPA that their products will meet applicable federal emission standards to control air pollution. Every vehicle sold in the U.S. must be covered by an EPA-issued certificate of conformity. Motor vehicles equipped with defeat devices, which reduce the effectiveness of the emission control system during normal driving conditions, cannot be certified. By making and selling vehicles with defeat devices that allowed for higher levels of air emissions than were certified to EPA, Volkswagen violated two important provisions of the Clean Air Act.

For more information about this case, or to join the class action lawsuit, contact Dee Miles, Head of our Consumer Fraud and Commercial Litigation Section at 800-898-2034 or by email at Dee.Miles@beasleyallen.com.

GENERAL MOTORS HAS RECEIVED A SLAP ON ITS CORPORATE WRIST

There was a great deal of media attention paid to GM’s fine of \$900 million for hiding the fatal ignition-switch defect that caused at least 124 deaths. It’s now clear that General Motors’ officers and employees will face no criminal charges. Instead, the automaker will pay the \$900 million fine, which is less than a third of its \$2.8 billion in profit last year. The settlement with the Department of Justice (DOJ) apparently signals a close to the criminal investigation into the massive cover-up by GM. I agree with the critics who

say the automaker got off very easy for mishandling one of the worst auto safety crises in history with years of lying to safety regulators. Because of the automakers conduct thousands of people were left at risk of serious injury and even death. Clarence Ditlow, Executive Director of the Center for Auto Safety, had this to say: "I have a saying about GM: There's no problem too big that money can't solve. GM is buying [its] way out of a criminal prosecution." His certainly appears to be an accurate assessment of the situation.

The DOJ agreed to hold off on prosecuting General Motors for charges of wire fraud and scheming to hide the defect from regulators, as well as drop the criminal case in three years, if the Detroit automaker continues to acknowledge responsibility, accept independent monitoring and cooperate with authorities. Critics point out the \$900 million fine is a fraction of the automaker's \$156 billion in revenue last year. Also the public should be reminded of the \$50 billion U.S. taxpayers gave to GM during the bailout. No executives will face jail time, even after the company acknowledged how high-level delays and deception had contributed to hundreds of roadway deaths. GM's penalty is also less than the record-setting \$1.2 billion fine levied on Toyota last year after the Japanese car giant failed to recall cars that could suddenly accelerate without warning.

Safety advocates believe the laws governing vehicle safety leave big holes that prevent automakers' employees or executives from being held accountable for injury or death. To pursue homicide charges, prosecutors would have to prove a company representative knowingly intended to kill someone. Other federal safety laws, including those under the Occupational Safety and Health Administration, allow for criminal prosecution of executives whose "willful violation" led to deaths. In this case, "the facts are good, but the law is weak," Ditlow said. "The law is just inadequate to the crime." It's evident that Congress must get involved and make the needed changes in the laws that cover this sort of thing.

GM also announced that it will pay \$575 million to settle more than 1,300 pending death and injury lawsuits. Those lawsuits, which were in the MDL, include at least 50 deaths not included in the 124 deaths that GM has admitted to and were counted by Kenneth Feinberg in his handling of the GM Compensation Fund. We have said all along that the total death count was in excess of 200 and it appears that our projection was on target.

NHTSA SAYS FIAT CHRYSLER UNDER-REPORTED DEATHS AND INJURIES

Fiat Chrysler Automobiles has now admitted there has been "significant" under-reporting of deaths and injuries linked to its vehicles. This is according to a report from the National Highway Traffic Safety Administration. This development follows a record \$105 million in penalties against the automaker some two months ago for its faulty handling of nearly two dozen recalls. Fiat Chrysler Automobiles US LLC alerted NHTSA in July that the automaker's own investigation of a "discrepancy" in its early warning reports found that it had under-reported information including complaints, injuries and deaths, all of which automobile and vehicle equipment manufacturers are required to submit under the Transportation Recall, Enhancement, Accountability and Documentation Act. NHTSA said that the automaker's lapses indicate a "significant failure" to meet its safety obligations and that the agency "will take appropriate action" after it investigates further. This does not bode well for Fiat Chrysler.

Source: Law360.com

NHTSA SAYS 23 MILLION FAULTY TAKATA AIRBAGS STILL IN U.S. VEHICLES

The National Highway Transportation Safety Administration says that vehicles in the United States still contain some 23.4 million defective Takata Corp. airbag inflators. The agency is considering implementing a coordinated remedy program to replace all defective airbag inflators in the U.S. While NHTSA's latest projection of defective Takata airbag inflators is lower than the 30 million it had previously estimated, this is still a huge problem. The new figure, according to NHTSA, is based on responses from automakers. NHTSA is also considering implementing a coordinated remedy program to ensure that all the defective Takata airbags are replaced.

The faulty airbags have been installed in vehicles manufactured by nearly a dozen different automakers including Toyota Motor Co., American Honda Motor Co. and Nissan Motor Co. NHTSA had this to say:

NHTSA is continuing its investigation into possible violations of the Motor Vehicle Safety Act involving defective Takata inflators. Investigating potential violations of law, and holding manufacturers accountable for such violations, is an essential tool in NHTSA's mission to protect American consumers from defective products. If NHTSA determines there are violations of the Safety Act, the agency will

use its enforcement tools to ensure accountability.

NHTSA said also that its tests of Takata inflators showed results that were "broadly consistent" with Takata's own findings. The agency did not elaborate in detail on what those findings were. It did refer to Takata's data on "risk associated with vehicles from high-humidity geographic areas." The driver-side and the passenger-side air bags in some 4 million U.S. vehicles contain defective inflators, according to NHTSA. Takata formally declared in May that many of its air bags were defective as part of a consent order with the U.S. Department of Transportation. That resulted in an expansion of the recall of the products to 34 million automobiles, making it the largest recall ever of its kind.

At the time, Takata submitted four defect reports that nearly doubled the size of the original recall, to include a total of 11 automakers that used the Japanese company's passenger- and driver-side front air bags. The faulty air bags—which can apparently be damaged by humidity and rupture and shoot metal shards into the passenger cabin—have been linked to at least eight deaths so far. NHTSA had estimated at the time that since 2008, automakers had already recalled 17 million vehicles with the defective Takata air bags through more than 30 recall campaigns. Japanese automakers Toyota and Nissan announced in June that they would recall 3 million more vehicles around the world that contain Takata inflators.

Source: Law360.com

NHTSA TELLS VOLKSWAGEN AND OTHERS THAT IT MAY EXPAND TAKATA RECALL

Just as this issue was being sent to the printer we learned that NHTSA has told Volkswagen America and six other automakers—none a part of the current Takata air bag recall—that the agency may expand the recall as it reviews the root causes behind the deadly rupture of the Japanese parts maker's inflators. NHTSA disclosed the possibility of a broader recall that could involve different types of vehicles and inflators in separate letters to the seven automakers that use Takata Corp. inflators with an ammonium-nitrate propellant. NHTSA sent letters to Volkswagen Group of America Inc., Suzuki Motor of America Inc., Volvo Trucks NA, Spartan Motors Inc., Mercedes-Benz US LLC, Jaguar Land Rover North America LLC and Tesla Motors Inc.

The National Highway Traffic Safety Administration will hold a public hearing this month to address its findings relating to Takata Corp. air bags. This most likely caused NHTSA to let the additional automak-

ers know the recall may be expanded. The agency initiated measures earlier this year to accelerate the recall of millions of vehicles containing the airbags. The agency has plans to hold the hearing on Oct. 22 to address information the agency says it “gathered since launching the coordinated remedy proceeding in May.”

It’s encouraging to see NHTSA being more aggressive and as a result doing a better job of “regulating” the automobile industry. Now if Congress will do its part with better funding and passage of needed legislation, good regulation of the industry will become a reality.

Source: Law360.com

NHTSA PROBES AIR BAG SENSORS IN KIA AND NISSAN VEHICLES

The National Highway Traffic Safety Association has stepped up its investigation into issues with weight sensors that could deactivate passenger-side air bags in nearly a million Nissan and Infiniti vehicles. The agency also opened a probe into similar problems in about 190,000 Kias. The agency’s Office of Defects Investigation launched a probe on Sept. 1 into the issue potentially affecting 186,000 Kia Spectras from 2007 to 2009 and escalated an investigation into the problem in up to 986,826 Nissan and Infiniti vehicles of eight different models from 2013 and 2014.

NHTSA opened a preliminary investigation into the reported problem with the Spectra sensor mats inside the passenger-side seats, which use weight to determine whether or not the front passenger seat is occupied by an adult and turns the air bag on and off accordingly. The agency on the same day said it would probe the effectiveness of Nissan’s fix for vehicles’ “occupant classification system,” which fulfills a similar purpose. The agency upgraded its previous recall query into an engineering analysis to probe the issue after it continued to receive complaints. NHTSA has previously said it received complaints that the recall software update didn’t fix the problem.

There have now been 1,271 complaints by Nissan and Infiniti owners, including two reports of crashes and one report of injury. NHTSA had opened the investigation on March 18 to determine the effectiveness of software updates offered by Nissan to address the issue affecting air bag sensors in certain models of Nissan Altima, Pathfinder, Sentra, NV 200 and LEAF, as well as Infiniti QX60 and Q50. Nissan reported last year that the sensors in some owners’ vehicles mistakenly identify adult passengers as either children or empty seats and deactivate the frontal air bag. Nissan recalled about 990,000 vehicles in the U.S. as part of its

April 2014 recall, but the owners’ complaints said the sensor defect still appeared after the software update.

NHTSA said it has received 43 complaints involving the Kia Spectras, including many in which drivers said the glitch had occurred after the warranty period and required costly fixes that deterred them from getting the repair.

Source: Law360.com

TEN AUTOMAKERS SUED OVER KEYLESS IGNITIONS LINKED TO CARBON MONOXIDE DEATHS

Ten of the world’s biggest automakers has been sued by consumers who claim they concealed the risks of carbon monoxide poisoning in more than 5 million vehicles equipped with keyless ignitions, leading to 13 deaths. According to the lawsuit, filed in Los Angeles federal court, toxic gas is emitted when drivers leave their vehicles running, sometimes in garages attached to homes, when they take their key fobs with them, under the mistaken belief that the engines will shut off. Keyless ignitions let drivers start their vehicles by pushing a button on electronic fobs, rather than inserting traditional keys. The Defendants include BMW, (including Mini); Daimler’s Mercedes Benz; Fiat Chrysler; Ford; General Motors; and Honda, including Acura. Also named as defendants were Hyundai, (including Kia); Nissan, (including Infiniti); Toyota, (including Lexus); and Volkswagen, (including Bentley).

Drivers claim that the Defendants have known for years of the risks of keyless ignitions, which have been available since at least 2003, yet marketed their vehicles as safe. They also accused the automakers of failing to install an inexpensive feature that would automatically turn off unattended engines after a period of time. The Plaintiffs said this could have averted the 13 deaths, and many more injuries. It’s alleged by the Plaintiffs that the automakers’ repeatedly promised that the affected vehicles were safe, but in fact they are not. The lawsuit seeks an injunction to require the automakers to install an automatic shut-off feature. It also seeks compensatory and punitive damages, among other remedies.

The lawsuit is the latest seeking to hold the automotive industry liable for defects that could make driving unsafe, such as Takata airbags, and ignition switches on GM vehicles. Interestingly, it was filed in the same federal court where Toyota defended against lawsuits claiming that some of its vehicles accelerated unintentionally.

Source: Law360.com

FORD SUDDEN-ACCELERATION CLASS ACTIONS JOINED AS ONE

A West Virginia judge has consolidated three class actions into a single case alleging Ford Motor Co. vehicles produced between 2002 and 2010 are prone to sudden unintended acceleration. However, new Plaintiffs were not allowed to enter the suit, saying it would essentially undo much of the hard-fought prior litigation. U.S. District Judge Robert C. Chambers gave the Plaintiffs permission to file a consolidated complaint, in which they could include additional facts, revived claims or new claims relating to the existing Plaintiffs.

But Judge Chambers said in his opinion that their attempt to add 16 new Plaintiffs would require renewed discovery and deposition and would prejudice Ford. The judge wrote in his order:

The court agrees with Ford that the addition of these proposed plaintiffs essentially will hit the reset button to this litigation to a significant extent. Additionally, the court has no doubt that joining these proposed plaintiffs inevitably will delay resolution of this matter.

The suit was filed in March 2013 on behalf of potentially millions of Ford purchasers and lessees, claiming that Ford vehicles manufactured between 2002 and 2010 are equipped with an ETC system vulnerable to sudden unintended acceleration. The parties have been embroiled in a battle over discovery requests from the very beginning.

Source: Law360.com

NHTSA SAYS BMW STALLED OVER MINI COOPER RECALLS

The National Highway Traffic Safety Administration has launched an investigation into BMW’s recall methods. The agency has concerns that the company delayed announcing a recall of more than 30,000 Mini Coopers that failed side-impact performance tests. It appears that BMW of North America LLC’s late-July recall of 30,456 model-year 2014-2015 Mini Cooper vehicles came because of pressure from NHTSA. The agency had conducted Federal Motor Vehicle Safety Standard tests of two Mini Cooper models in mid-2014, finding a “potential problem” for passenger safety. Also, another Mini two-door hardtop model failed a side-impact test in October, according to the agency. NHTSA said in a statement:

NHTSA is concerned that BMW was aware or should have been aware of the noncompliance with [Federal Motor Vehicle Safety Standards] and

should have taken remedial action on the population of Mini Cooper vehicles identified in [the] recall earlier than it did. It appears from a review of NHTSA's databases that BMW may have failed to submit recall communications to NHTSA in a timely manner.

The 2014 tests measured spine acceleration in a side-impact crash. The Mini two-door hardtop failed with respect to a female dummy seated in the back of the car. The Model S also failed a side-impact test in July 2015 for a female dummy in the same position, according to NHTSA. In both instances, NHTSA said it believed BMW “should ... have been concerned with the compliance of the vehicles,” but the carmaker claimed the test results were due to weight classifications.

Moreover, NHTSA said that BMW had verbally committed to implementing a service campaign to add padding to the rear side panels of 2015 Mini two-door hardtop models, but “did not initiate the service campaign and failed to inform NHTSA of its failure to do so.” The defective passenger detection, which could cause air bag deployment to fail, affected 91,800 model-year 2005-2006 Mini Cooper and Cooper S vehicles and 2005-2008 Mini Cooper Convertibles and Cooper S Convertibles.

Source: Law360.com

NHTSA FINES BRITISH MOTORCYCLE MAKER \$3 MILLION

Triumph Motorcycles Ltd., Britain's largest motorcycle maker, has been fined \$2.9 million in penalties for failing to notify the National Highway Traffic Safety Administration on time about a steering defect behind its recall of more than 1,300 motorcycles last September. In a consent agreement outlining the penalties, Triumph admitted that it failed to notify NHTSA within five days of discovering the defect, as required by the National Traffic and Motor Vehicle Safety Act of 1966. Triumph, which informed NHTSA about the problem in September 2014, learned of the problem through one of its divisions more than a year earlier, in June 2013, according to NHTSA, which began in April to investigate whether the recall was timely.

The recall impacted more than 1,360 model year 2012 to 2013 Triumph Street Triple R motorcycles, according to the consent order. The penalties include a \$1.4 million cash payment and an additional \$500,000 in expenses to institute safety improvements, according to a statement by NHTSA. The motorcycle company would also be liable for an additional \$1 million—the deferred portion of its penalties—if it violates the terms of its agreement, or flouts the safety act again.

Triumph also admitted as part of the agreement that it had not properly sent early warning reports, which inform NHTSA about problems arising from vehicles, including accidents, customer complaints and death and injuries. Triumph “acknowledged deficiencies in the manner in which it collected and reported early warning data to NHTSA and several instances where Triumph was late in providing quarterly reports on safety recalls.”

Source: Law360.com

III. PURELY POLITICAL NEWS & VIEWS

THE DONALD SEEMS TO BE HEADING TOWARD THE GOP NOMINATION

If anybody had told me this time last year that Donald Trump had a chance to be president of the United States, I would have said “there is no way that a man who is totally unqualified, who enjoys insulting folks in public and who appears to have a fear of women could ever be serious candidate for the job.” But was I ever wrong—the man is leading the pack on the GOP side and has most all of the other candidates looking weak and defenseless against his onslaughts. All polls show The Donald with a commanding lead, and the worse his conduct and statements get, the better the polling numbers are for him. I have to consider this man as a most serious candidate at this juncture.

The more that The Donald insults folks, including his opponents, and brags about how rich he is, the better he does. He has even bragged about using the bankruptcy laws to avoid paying his creditors and that bring loud applause from the huge crowds he is attracting. It's clear that this man has touched a nerve with the people and that's something that no other GOP candidate has been able to accomplish. I forced myself to watch the entire debate on CNN on September 16. Much of which was more like “Comedy Central” than a real political debate involving candidates for President. I thought Gov. John Kasich, and Jeb Bush, on a few occasions, looked presidential. None of the others, with the exception of Dr. Ben Carson and Carly Fiorina, even came close. One candidate described the others as acting like “junior high school students,” and his was a pretty good analogy.

When you consider that some of the GOP candidates might actually be elected president, it's a real scary thought. Jeb Bush is qualified, but he acts like he really doesn't

want to be involved or is just intimidated by Donald Trump. He looked to be shell-shocked during both of the first two debates. Wisconsin Governor Scott Walker and former Texas Governor Rick Perry have already thrown in the towel. I was not at all surprised at their getting out of the race. I suspect others who are not doing well will follow them and withdraw. The American people are fed up with politics as usual in this country and as a result the campaigns of the more recognized politicians haven't gotten off the ground.

On the Democratic side, Sen. Bernie Sanders is clearly having a great deal of success. Even those who don't like his political beliefs will have to admit that at least the man has a message. Joe Biden is still looking, but some experts believe he may have waited too late. I am not so sure that's true. The Vice President is both likeable and capable, which is a rare trait these days, and he may be “drafted” by the party of the American people. We are just in October and the election is more than 13 months away, so maybe there is time for the Vice President, who appears to be very popular, to jump in the race.

In any event, I still have to believe that Hillary, even though she has slipped badly in the polls, will most likely wind up being the Democratic nominee. It's been sort of interesting to see Bill Clinton being so quiet lately. That is totally out of character for him, but at this stage, most likely is a good campaign strategy. I consider Bill Clinton to be the best candidate who has run for president in recent history. He definitely has “it,” whatever “it” is in politics, and I am convinced that this man could be elected president again if the U.S. Constitution allowed him to run.

In any event, it's as clear as a bell that the American people—with the exception of the “super rich”—don't like any of the “politicians” who are in the presidential race. A sobering thought to consider is that we may have a race in November of next year featuring The Donald and Sen. Sanders. As they say back in my hometown of Clayton, “who would a thunk it?” I will confess that I never thought either of these two men, and especially The Donald, would be taken seriously by the people in this country—but was I ever wrong!

IV. COURT WATCH

BANKS MUST TURN OVER \$315 MILLION IN USS COLE BOMBING

The Second Circuit Court of Appeals ruled last month that several banks must turn over Sudanese assets to satisfy a \$315 million default judgment for victims who sued Sudan over the deadly 2000 bombing of the USS Cole, a U.S. Navy destroyer, finding country was properly served with the lawsuit. The Plaintiffs were not required to send a copy of their suit alleging Sudan supplied materials to al-Qaida, the attack's perpetrator, to the nation's capital of Khartoum to satisfy the Foreign Sovereign Immunities Act's (FSIA) service requirements, U.S. Circuit Judge Denny Chin wrote in the opinion. Mailing the summons, complaint and subsequent documents to the Sudanese embassy in Washington, D.C., was sufficient, Judge Chin explained. The judge wrote in his opinion:

Nothing in [the FSIA] requires that the papers be mailed to a location in the foreign state, and the method chosen by plaintiffs—a mailing addressed to the minister of foreign affairs at the embassy—was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person.

In the 2000 attack, an “explosive-laden skiff” pulled up to where the USS Cole was docked in a Yemen port. Seventeen sailors were killed and 42 injured when the explosives were detonated. Fifteen of the sailors and three of their spouses sued Sudan in a D.C. federal court in 2010 under the FSIA. It was alleged that the country supplied materials to al-Qaida, the terrorist organization thought responsible for the attack.

U.S. District Judge Royce C. Lamberth granted the Plaintiffs a \$315 million default judgment in 2012, after Sudan failed to answer the original complaint or file a responsive pleading despite having been served with the lawsuit through its embassy in D.C. The Plaintiffs then successfully petitioned New York's Southern District for a turnover of the country's assets held by various banks, including Mashreq Bank, BNP Paribas, and Credit Agricole Corporate and Investment Bank. Sudan appealed the court's three turnover orders in January 2014, about a month after the first was entered.

Source: Law360.com

V. THE NATIONAL SCENE

JUST HOW COSTLY AND FAST-GROWING IS CYBER RISK?

Cyber risk is costing the global economy \$445 billion annually, \$108 billion of which comes from the U.S., according to a new report. The report from insurer Allianz Global Corporate & Specialty (AGCS) also predicts cyber insurance premiums will grow globally from \$2 billion per year today to more than \$20 billion in the next decade. Allianz said in the report:

Cyber risk is now a major threat to businesses. Companies increasingly face new exposures, including first- and third-party damage, business interruption and regulatory consequences.

AGCS said the problem has become severe only in the last 15 years, though it has a particularly severe impact on the world's top economies. Out of the \$445 billion annual global cost, \$200 billion-plus of that number comes from the world's largest economies—the U.S., China, Japan and Germany. The top 10 global economies account for more than 50 percent of cyber crime costs, according to the report.

AGCS said that cyber risk remains the most underestimated by businesses. But as companies increase their awareness and the government attempts to respond to the problem, there remains rapid growth potential in the area for property/casualty insurance carriers. But as premiums grow, carriers must adapt to counter the cyber risks as they evolve and change. AGCS said that cyber risks of the future will become more complex than they are now.

Corporate data breaches and privacy concerns drew much of the initial attention, but future cyber issues will stem from intellectual property theft, cyber extortion, and the impact of business interruption after a cyber attack, AGCS noted. “Within the next five to 10 years, [business interruption] will be seen as a key risk and major element of the cyber insurance landscape,” Paul Schiavone, AGCS regional head of financial lines in North America, said in prepared remarks. The following are some recommendations from the report:

- Businesses need to spot key vulnerable assets and also address areas such as employee vulnerabilities or over-reliance on third parties.

- Businesses should create a cyber security culture and tackle cyber risk using a “think tank” approach—knowledge-sharing from different stakeholders.
- Hidden risks can emerge. M&A activity and changes in corporate structures can impact cyber security and the holding of third party data.
- Companies should decide which risks to avoid, accept, control or transfer.
- Cyber coverage must evolve to become both broader and deeper. Such policies should address business interruption and close gaps between traditional coverage and cyber policies.
- Cyber exclusions in property/casualty policies should become more common. But standalone cyber insurance will keep evolving as the main source of comprehensive cover, addressing demand from industries including telecommunications, retail, energy and transport sectors.

Without a doubt there is a great deal of work to be done in this area of concern. These recommendations appear to be sound and if implemented will help businesses to protect their overall operations.

AFFORDABLE CARE ACT MARKETPLACES ENROLL 9.9 MILLION

It was reported last month that about 9.9 million people got health insurance coverage through the marketplaces set up by the Patient Protection and Affordable Care Act as of June 30. This was a decline from earlier in the year even though it is still higher than the Obama administration's target. About 84 percent got government subsidies to buy the coverage, getting an average of \$270 a month, according to data released by the Centers for Medicare & Medicaid Services. Enrollment had been 10.2 million at the end of March.

The administration has set a year-end goal of insuring at least 9.1 million people via policies bought in the insurance marketplaces. Folks fall off the rolls when they stop paying for the insurance. That could mean they are getting coverage elsewhere. Two examples are when they are married or have gotten a job that offers health benefits. Sylvia Burwell, secretary of the Department of Health & Human Services, said in a statement: “Millions of Americans are benefiting from the peace of mind that comes with having quality coverage at a price they can afford.”

If a Republican president had been behind passage of the Affordable Care Act, the measure would likely be deemed a success.

But a Democratic president with the name Obama never had a chance with a huge percentage of the American people. That is a very sad commentary on our times.

Source: *Insurance Journal*

VI. THE CORPORATE WORLD

FORMER PEANUT EXECUTIVE GETS 28 YEARS FOR GEORGIA PLANT SALMONELLA OUTBREAK

A former peanut company executive has been sentenced to 28 years in prison for his role in a deadly salmonella outbreak. This was the toughest punishment ever handed out to a producer in a foodborne illness case. The outbreak in 2008 and 2009 was blamed for nine deaths and sickened hundreds more, and triggered one of the largest food recalls in U.S. history. Before he was sentenced, former Peanut Corporation of America owner Stewart Parnell listened as nine victims testified about the terror and grief caused by tainted peanut butter traced to the company's plant in southwest Georgia.

Experts say the trial of Parnell and two co-Defendants a year ago was the first time that a U.S. food producer stood trial on criminal charges in a food-poisoning case. U.S. Attorney Michael Moore of Georgia's Middle District, whose office prosecuted the case, called it "a landmark with implications that will resonate not just in the food industry but in corporate boardrooms across the country." A federal jury convicted the 61 year old man of knowingly shipping contaminated peanut butter and of faking results of lab tests intended to screen for salmonella.

It should be noted that Stewart Parnell and his co-Defendants were never charged with killing or sickening anybody. Instead, federal prosecutors charged them with defrauding customers who used Peanut Corporation's peanuts and peanut butter in products from snack crackers to pet food. Parnell was convicted of 67 criminal counts including conspiracy, wire fraud and obstruction of justice. I compare what Toyota and GM did, and the fact their officers and employees to the peanut case escaped any jail time. I have to wonder how jail time was avoided for the automakers. While the peanut executive was involved with eight deaths, the two automakers were responsible for hundreds of deaths. One would expect the people of GM who were involved in tis wrongdoing and massive cover-up of a known defect to have been prosecuted criminally. But I guess there is more political influence in the automobile industry than in the peanut business.

I don't mean to belittle at all about what happened in the peanut butter litigation—civil or criminal—it was bad. But I thought it necessary to mention how, officers and employees with two automakers got away with no individuals being charged criminally. That is impossible to justify in my opinion.

Source: *Insurance Journal*

BASF TOOK ON HUGE LIABILITIES FROM ENGLEWOOD CORP.

When BASF SE acquired Engelhard Corp. nine years ago for \$5 billion, it appears that executives unknowingly inherited a ticking legal time bomb. It all began decades ago over the seemingly mundane industrial product talc, used in everything from wall-boards to handling auto tires on the factory line. In 1983, Engelhard quietly settled a lawsuit after its officials testified in depositions that talc produced by a company mine contained cancer-causing asbestos. The evidence in that case was sealed and Engelhard and its law firm repeatedly said in subsequent lawsuits spanning more than two decades that the company's talc was asbestos-free.

It wasn't until 2009, after BASF assumed Engelhard's liabilities, however, that another chapter began to emerge. A former Engelhard scientist, testifying in a lawsuit filed by his own daughter, said he was told that "asbestos in trace amounts was found in talc," and the company's legal department "told us to purge our records" relating to the mine. A co-worker testified about test results in the 1970s showing the presence of asbestos in the talc.

Those revelations have set off a legal battle over what Engelhard knew about its talc, how its lawyers may have acted and whether thousands of people around the U.S. should have the right to reopen old lawsuits or file new lawsuits, this time against BASF, for asbestos illnesses. It also raises fundamental questions about whether justice is possible if companies and lawyers hide evidence in civil litigation.

There have been about 300 lawsuits related to the talc filed against BASF, based in Ludwigshafen, Germany. The company, which is the world's largest chemical maker and had \$74.3 billion in revenue last year, has tried to distance itself from the alleged behavior of Engelhard and its former law firm, Cahill Gordon & Reindel LLP. It has been estimated by Plaintiffs' lawyers that as many as 10,000 potential cases related to Engelhard's talc could be reopened.

One case, which seeks class-action status, claims Engelhard and Cahill engaged in fraud and fraudulent concealment by lying about the talc, while hiding and destroying

evidence. The company and law firm have consistently denied any wrongdoing. Another case, pending in state court in New Jersey, seeks to force BASF to produce dozens of documents about the talc that the company maintains are confidential. The talc was used in wall board, joint compound and auto body filler. Tires workers used it to help grip products. But they will have to prove they inhaled asbestos that came from Engelhard's mine. BASF claims that will be hard to prove.

Former workers blame Engelhard's talc for ailments ranging from mesothelioma, a cancer linked to asbestos, to lung ailments. It's estimated that asbestos settlements may ultimately cost corporations and insurers more than \$265 billion. This is the number according to the Rand Institute. BASF first had to defend the litigation practices of Engelhard and Cahill in 2009, when Donna Paduano sued in state court in New Jersey over her mesothelioma. Ms. Paduano, who never worked at Engelhard, was exposed to asbestos from her father's clothes or visits to his workplace. A deposition by her father, former Engelhard scientist David Swanson, triggered an investigation by lawyers who uncovered test results showing the presence of asbestos in Engelhard talc more than 25 years earlier.

Ms. Paduano has since died, as has her father, who had lung cancer but took no legal action. BASF settled the lawsuit with Ms. Paduano's family before her death and the coverup began after another lawsuit filed in 1979 blamed the mesothelioma death of a tire worker on Engelhard talc. That case was settled by Engelhard in 1983. The evidence, discovered in pre-trial discovery, including testing that showed varying levels of asbestos from a Vermont mine that the company ran since 1967, was sealed. This is something that is all too common in corporate litigation. The company closed the mine in 1983 and subsequently issued a memo entitled, "DOCUMENT RETRIEVAL—DISCONTINUED OPERATIONS." Engelhard staff was told to collect documents for discard relating to several companies, including the talc mine's operator. The memo said the company would retain copies of "documents to be preserved."

A federal lawsuit was filed in New Jersey against BASF on behalf of six Plaintiffs, seeking class-action status. A number of persons had previously sued, but their cases were either dismissed or settled. A federal judge initially dismissed this case on procedural grounds, but in a reversal last year, a three-judge appellate panel in Philadelphia revived the fraud and fraudulent concealment claims.

In reinstating most of the Plaintiffs' claims, the panel didn't rule on the merits of the case, returning it to U.S. district court for

further proceedings. But the panel also spelled out its disdain for the sort of conduct described in the complaint. If indeed “they rigged the game from the beginning,” the judges said, “how then can calculated false and misleading statements serve the truth-seeking function of the litigation? According to the complaint, BASF and Cahill were not mischaracterizing the facts; they were creating them.” This is harsh language and it certainly doesn’t bode well for the Defense side in this litigation.

Source: *Bloomberg News*

VII. WHISTLEBLOWER LITIGATION

INTERNAL REPORTING IS NOW COVERED UNDER THE WHISTLEBLOWER ANTI-RETALIATION PROVISION

A recent interpretation of the Security and Exchange Commission (SEC) Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934 was most significant. This interpretation solidified the intent of the SEC as it applied to protecting individuals from employment retaliation who decided to report internally instead of directly to the SEC. In the past, some companies argued that the anti-retaliation provisions did not apply to whistleblowers who went to their supervisor or CEO instead of going directly to the SEC. This was the interpretation adopted by the Fifth Circuit in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013).

In *Asadi*, the Plaintiff went to his supervisor when he became concerned that G.E. was violating federal law. The Plaintiff, who was fired shortly thereafter, filed a complaint under the Whistleblower Anti-Retaliation Provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act. However, the court held that he failed to state a claim because, under the act, he was not considered a whistleblower.

To date, the Fifth Circuit is the only circuit to address the issue of whether or not the anti-retaliation protections extend to any employee who engages in whistleblowing activities regardless of whether the individual makes a separate report to the SEC. One other case addressing this issue is currently pending in the Second Circuit: *Berman v. Neo@Ogilvy LLC*, 14-4626 (2nd Cir.). In order to assist in the litigation pending in the Second Circuit, the SEC submitted an *amicus curiae* brief in support of the appellant on Feb. 6, 2015. In its brief the SEC

argued for the protection of the employee while explaining its interpretation of the SEC’s Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934. The interpretation, provided by the SEC, was promulgated into the Code of Federal Regulations and went into effect on Aug. 10, 2015. This interpretation clarified the ambiguity the Fifth Circuit addressed in *Asadi*.

The ambiguity was the result of there being two definitions of “whistleblower” under Dodd-Frank. One definition applies when an employee submits a tip directly to the SEC and the other applies when the employee only submits the tip to his or her supervisor. The Fifth Court held that an employee was not a whistleblower under Dodd-Frank unless they went directly to the SEC, thus not recognizing the second definition as defining a valid whistleblower. The reason two different categories of whistleblower were stated was to help an employee understand which incentives they were entitled to receive. Three incentives are provided to encourage employees to report directly to the SEC:

- possible monetary rewards,
- confidentiality, and
- protection against employment retaliation.

As of Aug. 10, 2015, both definitions are now in effect and the Whistleblower Anti-Retaliation Provision covers employees reporting directly to the SEC and employees reporting internally to a supervisor. This interpretation means that an employee can report concerns directly to their supervisor without the fear of employment retaliation. However, if an employee decided to report the tip straight to their supervisor then they were not entitled to monetary rewards or confidentiality.

If you have experienced any type of employment retaliation due to reporting a suspected wrong, or if you have suspicion that your company is violating federal law, you can contact a Beasley Allen lawyer for a free evaluation of your claim. Our lawyers have the ability to report directly to the SEC on your behalf, which provides you with the possibility of monetary rewards and confidentiality. For more information about whistleblower laws, contact Lance Gould or Larry Golston, lawyers in our firm who handle this type litigation, at 800-898-2034 or by email at Lance.Gould@beasleyallen.com or Larry.Golston@beasleyallen.com.

U.S. RECOVERS \$115 MILLION IN WHISTLEBLOWER FRAUD CASES AGAINST ADVENTIST HEALTHCARE

Adventist Healthcare, an Altamonte Springs, Fla.-based hospital network with a long rap sheet and history of fraud settlements, has agreed to pay the federal government \$115 million to settle allegations stemming from yet more whistleblower complaints. The U.S. Justice Department announced that the settlement resolves allegations that Adventist paid physicians illegal incentives for referrals and that it modified certain billing codes to get reimbursements from Medicare and Medicaid that were higher than Adventist was entitled to receive.

Whistleblowers Michael Payne, Melissa Church and Gloria Pryor, who worked at Adventist’s Park Ridge hospital in Hendersonville, N.C., and Sherry Dorsey, who worked at Adventist’s corporate office, filed two separate lawsuits against Adventist under the False Claims Act. The federal government investigated the claims and chose to back the complaint. According to the Justice Department, Adventist submitted false claims to Medicare and Medicaid for services its physicians provided to beneficiaries because those physicians received bonuses calculated based on the value of their referrals to Medicare and Medicaid. Federal law prohibits hospitals from engaging in such financial relationships because they put profits over the medical needs of the patient. The settlement also resolves allegations that Adventist submitted bills to Medicare for treatments that contained improper coding modifiers that boosted the reimbursement rate.

It was pointed out by acting U.S. Attorney Jill Westmoreland Rose of the Western District of North Carolina, who helped prosecute the case, that Adventist’s illegal financial arrangements with physicians was undermining patients’ medical care. “Patients are entitled to be sure that the care they receive is based on their actual medical needs rather than the financial interests of their physician,” added Assistant Attorney General Benjamin Mizer, head of the Justice Department’s Civil Division.

Whistleblowers whose False Claims Acts complaints lead to financial recoveries for federal agencies and programs are paid between 15 and 30 percent of the total recovery as an award for the important anti-fraud role they play. The amount the whistleblowers will receive in this case had not yet been determined, at press time, but under the law they are entitled to share at least \$17.5 million. For more information about whistleblower laws and protections, you can contact a lawyer in the Beasley Allen Consumer Fraud and Commercial Litigation

Section. All inquiries are kept confidential. You can contact Archie Grubb, Andrew Brashier, Larry Golston or Lance Gould at 800-898-2034 or by email at Archie.Grubb@beasleyallen.com, Andrew.Brashier@beasleyallen.com, Larry.Golston@beasleyallen.com or Lance.Gould@beasleyallen.com.

FLORIDA DENTIST ACCUSED OF USING CHILDREN IN MEDICAID FRAUD SCHEME

A dentist in Florida has been accused by the Florida Attorney General's Office and 58 patients of needlessly pulling children's teeth in a scheme to defraud Medicaid. As you may know, Medicaid fraud of this sort is known as "overutilization." The term requires more definition, it's when a doctor performs unnecessary surgeries, tests, or procedures in order to bill more money to Medicaid. The accused dentist in this instance has billed \$4 million in four years to Medicaid by using this procedure.

HOSPICE FACILITY AND ITS MANAGER/MAJORITY OWNER WILL PAY \$5.86 MILLION TO RESOLVE CONTINUOUS HOME CARE HOSPICE FRAUD ALLEGATIONS

St. Joseph Hospice Entities, which consists of 13 hospice facilities in Mississippi, Louisiana, Texas and Alabama, and Patrick T. Mitchell, its majority owner and manager, have agreed to pay the United States \$5,867,518 under the False Claims Act to resolve allegations that they submitted false claims for delivery of continuous home care hospice services to patients who were not entitled to receive continuous care hospice level treatment.

Continuous home care hospice services, sometimes called "crisis care services," are provided to hospice-eligible patients in moments of crisis resulting from acute medical symptoms. This level of care is available to a patient when the patient's acute medical symptoms require immediate and short-term skilled nursing services, allowing the patient to remain in his or her home during a very difficult time. Medicare pays for continuous care hospice services at a rate that is nearly six times that of the daily rate for routine home hospice care. The continuous home care reimbursement rate is the highest daily rate a hospice can bill Medicare. Because continuous home care hospice services are limited to moments of crisis and have stringent criteria, they are rarely used.

During the government's investigation, it was discovered that St. Joseph Hospice was an outlier in its use and billing of continuous care hospice services. The government found that there were a significant number

of patients who received continuous care hospice services when there was no crisis, and thus, they were not eligible for such services. The result of this misuse of the continuous home care hospice benefit was millions of dollars of false claims submitted to and paid by the government.

In addition to saving taxpayer dollars, the United States Attorney believes that such efforts will be important in continuing to stem the tide of rising health care costs. St. Joseph Hospice Entities was said to have maxed out Medicare's hospice benefit to make as much profit as possible. This type of greed in our health care system must be dealt with and eliminated.

The allegations in this case are found in a lawsuit filed by three whistleblowers, who were former employees of the company, under the qui tam provisions of the False Claims Act. The relators in this case will receive a little more than \$1 million from the recovery. The investigation and settlement were the result of a coordinated effort among the Office of the United States Attorney for the Southern District of Mississippi, the Federal Bureau of Investigation and the U.S. Department of Health and Human Services Office of Inspector General. In addition to the payment of the settlement amount, St. Joseph Hospice Entities has agreed to submit to ongoing monitoring by HHS-OIG. The United States was represented by Assistant United States Attorney Angela Givens Williams.

Source: Justice.gov

VIII. PRODUCT LIABILITY UPDATE

VERDICT RETURNED AGAINST VOLKSWAGEN AND HONEYWELL IN GEORGIA COURT

On the eve of the announcement of Volkswagen's intentional consumer deception involving its diesel vehicles, lawyers in our firm tried an important lawsuit against Volkswagen and component part manufacturer Honeywell Technologies. A Federal jury in Columbus, Georgia, returned an \$8 million dollar verdict in the case against Volkswagen of America, Volkswagen AG (Germany) and Honeywell. Our firm was fortunate to represent Kevin and Cheryl Bullock in a lawsuit involving severe and permanent injuries Cheryl sustained in a 2011 crash in her Volkswagen turbo diesel Passat.

On the Labor Day weekend in 2011, Cheryl and her daughter were returning to north Georgia after visiting her parents in Bainbridge. As Cheryl drove along through

rural Georgia, she realized that her car began going faster than she intended. She took her foot off the accelerator and pumped her brakes, but the car continued to accelerate. As she fought to control her Passat, the vehicle accelerated around 2 long curves and reached speeds over 90 miles an hour. Eyewitnesses testified at trial that her vehicle moved from left to right as she tried to slow her accelerating vehicle.

Unfortunately, unable to slow or stop her Passat, Cheryl struck another vehicle and her vehicle rolled over several times before coming to rest upside down. Although she was properly wearing her seatbelt, Cheryl suffered life-threatening injuries. She suffered a closed head brain injury, fractures to her spine and legs, and severe internal injuries and bleeding. Among her extensive orthopedic injuries was a catastrophic break to her right ankle which required multiple surgeries and ultimately a complete fusion. Her orthopedic surgeon referred to it as an "aviators fracture" because it was the same type injuries pilots receive in a crash if their feet are on the control pedals at the time of the crash. In this case, it was proof that Cheryl was pushing her brake pedal when she crashed.

After the crash, our firm was contacted by the Bullocks and we began our investigation. Upon the initial inspection, we discovered that the brakes on the Passat showed signs of overheating discoloration (bluing) and the turbo charger intake hoses were saturated with wet, liquid oil. After our expert, along with representatives from Volkswagen and Honeywell, disassembled the turbocharger on the Bullock Passat, it was apparent that a defectively designed seal leaked oil through the turbocharger into the intake.

If the car had been equipped with a gas burning engine, oil forced into the intake would have fouled the spark plugs and most likely stopped the engine. Because Cheryl's Volkswagen was a diesel, however, the engine was able to burn engine oil as a secondary fuel source. As a result, oil that leaked from the turbo seal accumulated in the intercooler and air hoses and became a secondary uncontrolled source of fuel for the car and as a result the vehicle accelerated out of control.

During pretrial discovery, both Volkswagen and Honeywell argued that no other incidents existed and that we were completely wrong about what caused this crash. In fact, both defendants blatantly blamed Cheryl Bullock for her own injuries and tried several times to have her case dismissed. Honeywell claimed that their seal was not defective and they had no complaints about it. However, Mike Andrews, one of our lawyers, was able to discover that Honeywell was aware of their leaky seal years before the Bullock vehicle was manufactured, yet

failed to correct the design defect. Two engineering reports—authored by Honeywell turbocharger engineers and admitted at trial—detailed how the subject seal design leaked in turbochargers installed on agricultural equipment, heavy trucks, and when tested on Volkswagen engines. The reports went on to document how Honeywell could have corrected the defect through alternative designs that Honeywell tested years before our car was built. But just like the recent Volkswagen coverup of emissions' cheating, the engineering reports were kept secret until they were discovered in this trial.

After 7 days of trial, a jury logically concluded that the turbocharger seal was defective and that the defect caused the crash that permanently disabled Cheryl Bullock. Based on the amount of her medical bills, and testimony from a vocational rehabilitation life care planner and an economist regarding the extent of her disability, the jury returned an award of \$7 million dollars for Cheryl and \$1 million for her husband Kevin for his loss of consortium claim.

Beasley Allen lawyers Kendall Dunson and Mike Andrews represented the Bullock family and were very pleased with the verdict. They did a tremendous job in this case for their clients. This crash shows that—just like the GM Cobalt debacle—that vehicles can pass Federal standards and still be grossly defective. The verdict also shows that jurors who hear the evidence won't tolerate defective vehicles or coverups. Cheryl Bullock and her family will continue to adjust to life with her extensive impairments. We are mighty glad that our firm was given the opportunity to help them.

JURORS FIND IN FAVOR OF A COUPLE IN THEIR LAWSUIT AGAINST BLOOD BANK THAT SUPPLIED HIV-TAINTED BLOOD TO HOSPITAL FOR BLOOD TRANSFUSION

A Montgomery couple had been married for more than 50 years. But never in their marriage have they experienced a tragedy like the one that occurred on Oct. 18, 2010, when the husband went in for heart surgery at Baptist Medical Center in Montgomery and was discharged from the hospital infected with HIV, the human immunodeficiency virus. HIV is the same virus that can lead to acquired immunodeficiency syndrome (AIDS).

The blood came from a donor who had just donated on October 10, 2010. The donor had just been exposed to HIV days before he donated the blood that ultimately went to our client. Unfortunately, even the most sensitive tests cannot detect HIV if the donor was exposed to the virus within 10 days

before the blood donation, making the donor screening process is so important.

Sadly, the blood bank that took this donor's blood did not properly screen this donor. The blood bank approved the use of this donor's blood despite the donor's recently positive result for another potentially serious virus, called cytomegalovirus (CMV), which is spread through direct contact with bodily fluids, similar in method of transmission to that of HIV. Although common, CMV can be dangerous to an individual with a weakened immune system, such as an infant or an organ transplant recipient. In doing this, the blood bank violated its own policy, which states that the blood bank will not provide blood for transfusions that contains an infection.

Also, in taking this donor's blood, the blood bank missed several red flags. A blood bank uses a donor form to screen potential donors. By looking at this donor's form, it is obvious to the blood bank that the donor is an EMT because he is required to list his profession on the donor form. The same form contained a question about whether the donor had come into contact with someone else's blood. When the donor asked the blood bank whether he should say "yes" when asked if he had come into contact with someone else's blood, the blood bank told him to answer "no."

Blood banks should never coach donors on how to answer the donor questionnaire. The evidence at trial showed that the donor had, in fact, been exposed to blood and bodily fluids on a regular basis while working as an EMT, as common sense dictates. The blood bank ignored the donor's occupation and improperly coached him into saying that he had not been in contact with someone else's blood.

In addition, this donor was donating frequently at multiple locations and had self-deferred just months before donating the HIV-contaminated blood in October. A self-deferral is when a potential donor undergoes the process blood donation, but then declines to allow the blood to be used by the blood bank. The evidence at trial showed that a person may self-defer if that individual believes his blood to be unsafe.

Despite all of these red flags and the presence of CMV, a potentially dangerous virus, the blood bank approved this blood for a transfusion and it was given to our client, the husband, during his heart surgery. The blood bank did not notify our client that he had HIV until the next summer when the same original donor attempted to donate blood again and his blood tested positive for HIV. When our client asked the blood bank how this could have happened, the blood bank told him that this infected just "slipped through the cracks." Because of this blood bank's "slip-up," our client contracted HIV.

He sued the blood bank and the blood bank technician for negligence and wantonness in screening the donor.

When our client learned of his diagnosis, he spiraled into a deep depression where he thought about taking his own life. He testified on the stand about the toll the diagnosis has had on him:

After I found out I had HIV, I could not bear to be around many people. It's the worst thing that's ever happened to me in my lifetime. ... There were two or three times that I wanted to end it all. Dr. (Karl) Kirkland has pulled me a long way out of it.

When asked on the stand how he is doing with the HIV diagnosis, our client replied, "I'm existing." Our client's wife also filed a claim against the blood bank and blood technician for loss of consortium. She testified at trial that she lives in fear every day that she will get HIV. Their marriage of more than 50 years will never be the same.

The jury found for our clients against the blood bank and technician. There will be no appeal of the jury verdict in this case. Hopefully, the blood bank will change its screening procedures, or at the very least, follow existing procedures, to prevent this sort of tragedy from happening to someone else. Hopefully, the blood bank's corporate officers will read the message that the jurors left on the verdict form. We agreed not to mention the amount of the verdict or the name of the blood bank in this report, but that information was made public by the local media that covered the trial. Gibson Vance, Cole Portis, LaBarron Boone and Stephanie Monplaisir, all from our firm, handled this case for our clients and they did a good job. Hopefully, the verdict, which by the way, won't be appealed by the blood bank, will cause this organization to do a much better job in the future.

Source: Centers on Disease Control

A SETTLEMENT REACHED WITH GENERAL MOTORS IN DALLAS COUNTY, ALABAMA

Lawyers in our firm recently settled a case with General Motors (GM) that was set for trial in Dallas County, Alabama. The case involved the deaths of a husband and wife from Selma. Thomas and Betty Lovoy were returning from taking their grandson shopping when a bobtail truck went out of control and skidded sideways in front of them. The Lovoy's 2008 Chevrolet Malibu struck the rear tandems of the truck. Mr. Lovoy was driving the vehicle and his wife was sitting directly behind him in the rear seat. She was properly wearing the available seatbelt. However, as a result of the frontal

barrier-type impact, Mrs. Lovoy's body moved forward and submarined under the lap portion of the seatbelt, causing her knees to strike the seat occupied by her husband. As a result of the lack of restraint, Mrs. Lovoy's lower body moved forward and the shoulder harness contacted her neck, causing severe injuries and resulting in her death. When Mrs. Lovoy's knees struck the back of her husband's seat, he was crushed as a result of the overload of his seatback.

For years car manufacturers have known of the hazard of submarining and they are supposed to design their seatbelts and seating system in a manner to prevent submarining. The car involved in this case had no rear seatbelt pretensioners, which were available on comparable model vehicles. Car manufacturers have known for a very long time that an unrestrained or improperly restrained rear occupant can slam into the back of the front seat in a frontal collision. The front seat cannot withstand nearly as much force as the seatbelt, which results in the frontal occupant sometimes being squeezed between the seat back and the seatbelt. Lawyers in our firm have successfully handled a number of these type cases over the years.

Mercedes Benz recognized this potential hazard back in 1989 when it wrote to the National Highway Traffic Safety Administration under the heading, "Important Seat Design." Mercedes told NHTSA that the purpose of the front seat was to "protect the belted front occupant from overloading due to non-belted rear occupants during frontal collisions." People who put unrestrained cargo in the back seat of their vehicle need to be warned and made aware of this hazard. It's also important to have pretensioned seatbelts in the rear seat.

The case, after extensive discovery and extended negotiations, was settled for a confidential amount shortly before the scheduled trial date. Greg Allen and Evan Allen from our law firm, along with Tommy Jones and Rick Williams, who are with the Selma firm of Pitts, Pitts & Williams, handled this case. They did an excellent job and obtained a very good settlement for the surviving family members of the two decedents.

BUYERS MUST BEWARE WHEN BUYING CHINESE TIRES

We are handling an increasing number of tire cases involving the failure of Chinese made tires. American consumers have faced numerous issues with Chinese products including lead-laced toys, tainted toothpaste and pet food recalls. However, the problems with Chinese products is emerging with greater frequency with a vehicles' most

important safety features, and that just appears to be the tires.

Currently, China is importing nearly 65 million tires a year. Recently, many Chinese tire manufacturers have come under attack for making substandard and unsafe tires available for sale in the United States. Furthermore, some Chinese manufacturers have been the subject of "recalls" by many state Attorneys General and the Federal Trade Commission. While there have been numerous Chinese tire brands that have been scrutinized, some of the brand tires which have been recalled for safety defects are Westlake Tires, AKS Tires, Telluride tires and Compass Tires. All were made by the China-based Hangzhou Zhongce Rubber Company and all lacked the most basic of tire safety features such as bead wedges and cap plies which are state of the art in the tire industry today.

In addition to design issues, another basic problem that our lawyers are seeing in cases involving Chinese made tires are quality and control measures. In most of the cases we have handled against Chinese tire makers, we discovered that these manufacturers have almost no measures in place to assure quality control. In some cases there are none. Some employ manufacturing processes which were abandoned by domestic tire makers during the 1980's.

While several of these Chinese tires are less expensive, their reduced price is proving to be at the cost of safety which can result in the loss of lives. Folks might want to think twice before buying a less-expensive Chinese tire. If you need more information on this subject, contact Rick Morrison, a lawyer in our firm who handles tire litigation. He can be reached at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

TRIAL JUDGE UPHOLDS THE \$55 MILLION SEAT BELT DEFECT VERDICT AGAINST HONDA

A Pennsylvania state judge has upheld the \$55 million jury verdict against Honda Motor Co. for ignoring a seat belt defect that a driver claimed paralyzed him. Judge Shelley Robins-New rejected several of the automaker's post-trial motions attempting to upset the verdict. The judge said the evidence supported the jury's verdict in Carlos Martinez's suit alleging he became a quadriplegic after his 1999 Acura Integra rolled over in an accident, adding that the amount shouldn't be reduced. Judge Robins-New said:

The verdict for noneconomic damages and loss of consortium was consistent with the facts and testimony presented in court. We did not believe it appropriate for us to disturb the jury's finding.

Honda challenged the verdict in a number of ways, including questioning the admissibility of certain evidence and testimony and the jury instructions, and alleging that the evidence is insufficient to support the verdict. Honda argued that the court shouldn't have denied its request for remittitur and claimed that a recent Pennsylvania Supreme Court opinion warrants a new trial. However, Judge Robins-New rejected all of the automaker's arguments. She ruled that the evidence was properly introduced and supported the verdict, that there was no error in the jury's instructions, and that remittitur is inappropriate. Judge Robins-New said that "large verdicts are not inherently excessive."

Judge Robins-New also disagreed that the state high court's opinion in *Tincher v. Omega Flex Inc.* compels a new trial, saying that she doesn't believe the opinion mandated changes in the court's rulings in the current suit. Judge Robins-New said:

Moreover, even if Tincher changed the law of the case concerning defective design, it did not concern the failure to warn. As the jury found an independent basis of liability based upon failure to warn, if this court erred, such error would be harmless.

The verdict in favor of the plaintiff, which was returned in June, included \$25 million for noneconomic damages such as pain and suffering, \$14.6 million for future medical expenses, \$15 million for his wife's loss of consortium and \$720,000 for lost future earnings. It was proved to the jury's satisfaction by Martinez's attorneys. Martinez' seat belt didn't keep his head from smacking the top of the car as the car rolled over, causing his paralysis. Honda knew about the defect as early as 1992, but did nothing to fix it and didn't disclose it to drivers.

Carols Martinez is represented by Stewart J. Eisenberg and Daniel J. Sherry Jr. of Eisenberg Rothweiler Winkler Eisenberg & Jeck PC. They have done a very good job in this case.

Source: Law360.com

BENZENE CAUSES ACUTE MYELOID LEUKEMIA

Benzene is a chemical that naturally occurs within petroleum, and for decades, it has been used as a building block for various plastics, resins, fuels, solvents, synthetic fibers, rubbers, lubricants, dyes, detergents, drugs and pesticides. Benzene is a known carcinogen, and it has been linked to various forms of leukemia and cancer, including strong ties to acute myeloid leukemia, a vicious blood cancer that affects approximately 20,000 people per year.

Unlike many chemicals that have been limited in use due to their link to cancer, benzene is one of the most widely used chemicals in the world. Today, the chemical ranks as one of the top 20 in production volume for chemicals produced in the United States. Because of the high volume of use, some 238,000 people may be occupationally exposed to high doses of benzene in the United States, including in the following industries:

- Benzene and various petroleum and chemical production processes (petrochemicals, petroleum refining, and coke and coal chemical manufacturing);
- Plastic manufacturing;
- Rubber tire manufacturing;
- Shipping industry, particularly with regards to oil, fuel and petroleum-based products, solvents and resins;
- Steel industry;
- Automobile / automobile service industry;
- Railroad industry;
- Painters;
- Rubber workers;
- Shoe makers;
- Laboratory technicians; and
- Gas station employees.

Like with many occupational exposure scenarios, the time period between benzene exposure and when cancer manifests can be many years. Many times, workers are exposed to benzene for years without knowing it exists in the products they are working with or without knowing the dangerous side effects that go along with exposure to the chemical. In addition to occupational exposure, cigarette smoke contains benzene, and as a result, smoking can cause similar symptoms to those occupationally exposed to benzene.

These are very difficult cases that require careful evaluation, but our firm is currently investigating cases in several parts of in the country where folks developed acute myeloid leukemia after being exposed to benzene or products containing benzene. If you have any questions about this subject, contact Parker Miller, a lawyer in our Toxic Tort Section, at Parker.Miller@beasleyallen.com or 800.898.2034. Parker and other lawyers in the Section will look at any potential claim anywhere in the country.

ENERGY DRINKS AND POWDERED CAFFEINE CAN BE VERY DANGEROUS

It's recognized that in this country caffeine is a vital part of just about everyone's life on a daily basis. Reportedly, more than 100 million Americans drink coffee each and every day. Most experts consider caffeine to be a "safe" drug, but it's recognized that it can be dangerous and lead to all sorts of side effects if taken in high enough quantities. While minor symptoms of caffeine overdose can include headache, diarrhea, fever and irritability more severe symptoms can include vomiting, chest pains, trouble breathing and convulsions. Obviously the latter group is considered quite serious.

It's quite evident that energy drinks have become quite popular. Those like Red Bull or Monster deliver much higher amounts of caffeine than does coffee. An average energy drink will have up to 242 milligrams of caffeine per serving. Compare that to an 8-ounce cup of coffee, which contains only 100 milligrams. Caffeine powders are another source of concern for fatal overdosing, primarily due to their concentration.

The FDA reports that it is aware of at least two deaths due to powdered caffeine. In 2010, a twenty-three year old man died after ingesting two spoonfuls of caffeine powder, the equivalent of about 50 Red Bull energy drinks. According to the Center for Science in the Public Interest, powdered caffeine is the most dangerous dietary supplement currently on the market.

Although adults can safely consume up to 400 mg of caffeine per day, children should only consume 45-85 milligrams per day depending on their weight. The fact that energy drinks and caffeine powders deliver such a high dose at once are a major concern for parents, advocacy groups and the U.S. Food and Drug Administration (FDA). The FDA states, "Symptoms of caffeine overdoses can include rapid or dangerous erratic heart-beat, seizures and death. Vomiting, diarrhea stupor and disorientation are also symptoms of caffeine toxicity."

Because caffeine powders are classified as a "dietary supplement," regulation is very loose and nonexistent for the most part. Caffeine powders are generally not available in stores, but can be purchased online. According to an article on WebMD Health News, for approximately \$10, an individual can purchase 100,000 milligrams of caffeine powder, an amount equivalent to more than 1,000 Red Bulls. In the FDA's Consumer Advice on Pure Powdered Caffeine, it states that "it is nearly impossible to accurately measure pure powdered caffeine with common kitchen measuring tools and you can easily consume a lethal amount."

While caffeine may seem like a harmless way to get us "going in the morning," it can

be very dangerous and even fatal if taken in high enough doses. That's exactly why all of us should exercise extreme caution when using energy drinks or powdered caffeine. I would recommend avoiding the use of both energy drinks and the powdered caffeine products and stick to coffee for caffeine.

Sources: FDA, Center for Science in the Public Interest, WebMD

IX. MASS TORTS UPDATE

ACTOS SETTLEMENT PROGRAM WELL RECEIVED BY CLAIMANTS

After nearly five months following the announcement of the Actos Resolution Program, it appears that lawyers in our firm have garnered overwhelming support for the Resolution Program from lawyers and claimants alike. Although there is no official tally, as the Actos Claims Administrator continues to review enrollment materials for claims involving deceased Actos users and their representatives, I can confidently say that, according to our lawyers, more than 95 percent of the eligible claimants have enrolled in the Resolution Program. The final number is expected to exceed 97 percent once the Claims Administrator verifies the representative documentation submitted on behalf of numerous estates. If the 97 percent threshold is reached, Takeda is obligated to pay an additional \$30,000,000 into the settlement fund, which is great news for our clients and for clients represented by other law firms.

We anticipate that Takeda will announce very soon that the settlement is effective (i.e., that it waives any right it may have under the settlement agreement to terminate the settlement agreement.) The announcement may well be made by the time we reach the printing press with this issue. Once announced, lawyers for claimants enrolled in the Resolution Program will have 90 days to submit complete claims packages, which include all of the medical records necessary to prove the claim as identified in the Master Settlement Agreement. We expect the Claims Administrator to start reviewing those claims packages immediately.

Lawyers in the Mass Torts Section at Beasley Allen, including Andy Birchfield and Roger Smith, have worked tirelessly to educate lawyers and claimants alike on the terms of the settlement and the enrollment process. The hard work they put into crafting this resolution program for the thousands of individuals that have suffered

needlessly as result of their exposure to Actos has been affirmed by the tremendous positive response we have seen from lawyers and claimants across the country. We couldn't have done it without a committed team effort at Beasley Allen. Any questions about the settlement or upcoming deadlines can be directed to Roger Smith at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

AN UPDATE ON THE TRANSVAGINAL MESH LITIGATION

There are currently approximately 83,000 individual transvaginal mesh (TVM) cases consolidated before Judge Joseph Goodwin in the United States District Court for the Southern District of West Virginia. The cases are part of multidistrict litigation (MDL) as ordered by the Judicial Panel on Multidistrict Litigation. As we have previously stated, multidistrict litigation is a consolidation of civil cases transferred from different jurisdictions around the country to a single United States District Court to achieve certain pre-trial efficiencies. The aim of this consolidation is to preserve judicial resources, eliminate duplicities in the fact-finding process, and prevent inconsistencies in pre-trial rulings.

Judge Goodwin currently presides over seven MDLs against various transvaginal mesh manufacturers. The MDL set up for Johnson & Johnson's Ethicon brand has the largest number of pending claims—approximately 28,000 as of Sept. 8. In addition to the numerous claims before Judge Goodwin in the MDL, Ethicon also faces consolidated claims pending in New Jersey state court as well as claims in various state court venues across the country.

Frustrated with the slow pace of litigation in the Ethicon MDL, Judge Goodwin entered a pretrial order on Aug. 19, 2015, directing Johnson & Johnson to begin case-specific discovery for the oldest 200 cases naming Ethicon and/or Johnson & Johnson as the Defendant. Specifically, the order mandates that individual discovery for each of the 200 cases be completed by Feb. 16, 2016. At the conclusion of pre-trial proceedings, the Court will transfer each case that was directly filed to a federal district court of proper venue. Cases that were transferred to the Southern District of West Virginia by the Judicial Panel on Multidistrict Litigation will be remanded for further proceedings to the federal district court from which each such case was initially transferred.

An increasing number of transvaginal mesh trials are scheduled to begin in the next six months, particularly against Ethicon. A trial involving Ethicon's Prolift product is scheduled to begin on Sept. 28, 2015, in Bergen County, N.J. On Oct. 26,

2015, a trial involving Ethicon's TVT Secur System and Ethicon's Proxima Pelvic Floor Repair System is scheduled to begin in state court in Austin, Texas. On Dec. 7, 2015, a trial is scheduled to begin before Judge Goodwin involving 37 separate Plaintiffs whose claims have been consolidated for trial. The trial will focus exclusively on the issues of negligent design defect and strict liability-design defect. All 26 cases involve Ethicon's TVT product used to treat stress urinary incontinence and all of the surgeries were performed in West Virginia.

Firms across the country, including Beasley Allen, continue to press forward in an effort to resolve transvaginal mesh cases against Ethicon as well as other Defendant-manufacturers. For more information, please contact, Leigh O'Dell, Chad Cook, or Beau Darley, lawyers in our firm's Mass Torts Section at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com, Chad.Cook@beasleyallen.com or Beau.Darley@beasleyallen.com.

Sources: Injury Lawyer News; Pretrial Order #192 (Docket Control Order—Wave 1 Cases), *In re: Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig.*, MDL No. 2327 (S.D.W.Va. August 19, 2015); and Pretrial Order #184 (Order Consolidating Above Cases for Trial on Issue of Design Defect), *In re: Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig.*, MDL No. 2327 (S.D.W.Va. July 1, 2015).

AN UPDATE ON THE IVC FILTERS LITIGATION

Blood clots that develop in the legs, called deep vein thrombosis (DVT), can cause serious complications. Typically, doctors treat DVTs with anticoagulant medications (sometimes called blood thinners). However, some patients continue to experience blood clots while taking blood thinners, and others are not able to tolerate those drugs at all. In those cases, doctors may place a device called an inferior vena cava (IVC) filter. IVC filters are small, metal devices that resemble the top of a bird cage. They are inserted into the inferior vena cava—the main vessel that carries blood from the lower half of the body back to the heart—to trap blood clots that form in the legs and prevent them from traveling to the heart or lungs.

IVC filters have been in use for more than 30 years. The use of these filters has increased dramatically over the years. Currently, an estimated 250,000 IVC filters are implanted each year. In recent years, doctors have begun to question whether IVC filters do more harm than good. The FDA has received hundreds of adverse event reports involving IVC filters. Pieces of the filter can break off and cause damage to the heart, or a large clot can push the entire filter into a person's heart, causing serious injury or death.

More troubling is the fact that at least one of the manufacturers knew about these risks

more than 10 years ago. C.R. Bard commissioned a medical researcher in 2004 to study the risks of its Recovery IVC filter compared to its competitors. That study found that Recovery was associated with a significantly higher risk of death, filter fracture, perforation, and filter embolization than all other IVC filters. Bard continued to market and sell the Recovery devices. In September 2005, Bard made modifications to the Recovery design and released the G2 IVC filter as its replacement. Even though the new design was engineered to reduce device fractures, further studies found that the G2 still has a high risk of fracture.

According to an NBC Nightly News report, Bard may have known about these safety risks even before the Recovery IVC filter was approved. In 2002, the FDA rejected Bard's initial application for approval of its Recovery device. Bard then hired regulatory specialist Kay Fuller to assist with a subsequent application. In NBC's report, Fuller says that she expressed serious concerns about the safety of Recovery. Fuller says that she told her boss that she would not sign the application until her concerns were addressed. Bard later submitted its application to the FDA with what appears to be Fuller's signature. However, Fuller says that the signature on the application isn't hers.

Device manufacturers are now facing lawsuits brought by people who have been injured by IVC filters. More than 100 lawsuits have been filed against Cook Medical, Inc. by people injured by its IVC filters. Those cases have been centralized in a Federal Multidistrict Litigation (MDL) in the U.S. District Court for the Southern District of Indiana. On Aug. 18, 2015, the Judicial Panel on Multidistrict Litigation transferred 22 lawsuits alleging injuries from Bard's IVC filters into an MDL in Arizona. If you would like more information about IVC filters, contact Melissa Prickett, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

Sources: NBC News, MSNBC, William Nicholson, MD, et al, Prevalence of Fracture and Fragment Embolization of Bard Retrieval Vena Cava Filters and Clinical Implications Including Cardiac Perforation and Tamponade, *Arch. Intern Med* Vol. 170, No. 20. Nov. 8, 2010.

FDA Safety Communication: Removing Retrieval Inferior Vena Cava Filters, August 9, 2010 and May 6, 2014

In re: Bard IVC Filters Products Liability Litigation, MDL No. 2641, Transfer Order, Document 63

GENZYME PAYS \$32.5 MILLION CRIMINAL FINE FOR SEPRAFILM MARKETING

Sanofi SA unit Genzyme Corp. agreed last month to a \$32.5 million fine to resolve criminal charges that it encouraged surgeons to use its Septrafilm surgical product

in unapproved ways that contaminated it, and suggested without enough proof that it was safe for certain cancer surgeries. Genzyme's fine and admissions of wrongdoing are part of an at least two-year long deferred prosecution agreement with the U.S. Department of Justice (DOJ) over its charges in Florida federal court about the Massachusetts-based pharmaceutical company's Seprafilm surgical device.

Genzyme's conduct took place before French pharmaceutical giant Sanofi acquired it in 2011, according to the Justice Department. Seprafilm is a device used to minimize the formation of scar tissue after surgery that could cause organs to attach. Genzyme admitted that it urged surgeons to use the device in unapproved ways that led to it becoming contaminated, including converting the film into an injectable slurry, according to the DOJ.

The pharmaceutical company also admitted that it marketed the product to suggest that it was safe to use in gynecologic cancer surgeries, even though, according to the DOJ, that claim was based on a study that involved only 14 patients. The agency said this amounted to misbranding. U.S. Attorney A. Lee Bentley III of the Middle District of Florida said in a statement:

Patients rely heavily on the integrity and efficacy of claims made by manufacturers of medical products. When manufacturers make misleading statements about using their products in ways that have not been approved by the [U.S. Food and Drug Administration], patient care, confidence, and safety are put at risk.

The U.S. Food and Drug Administration (FDA) approved Seprafilm in 1996 for pelvic and abdominal surgeries, namely laparotomies, which are open surgeries that involve making a large incision to allow direct access to internal organs. The DOJ alleged that Genzyme encouraged surgeons to use the product in unapproved ways as laparotomies became increasingly replaced by the comparatively less invasive laparoscopic surgeries, for which Seprafilm was not approved.

Genzyme said in the agreement that even though it forbade off-label marketing, its sales representatives were allowed to talk to surgeons about how Seprafilm could be converted into "slurries" that could be used in laparoscopic surgeries. The sales representatives apparently told the surgeons that such use would be off-label. Laparoscopic surgeries involve small incisions through which surgeons insert tubes and narrow instruments.

Surgeons began to inject Seprafilm slurries through these tubes, according to a statement of facts that accompanies the set-

tlement agreement. The pharmaceutical company even allowed its sales representatives to be present for surgeries that used these Seprafilm slurries. The settlement agreement says in 2007 sales representatives were told only that they "should not comment on the use of the product in this fashion if you observe it."

Genzyme apparently took a stricter approach in 2008, telling its representatives then that they were no longer allowed to discuss the use of slurries, but surgeons nevertheless continued to increasingly use them, according to the statement of facts. It wasn't until February 2009 that Genzyme banned its representatives from attending surgeries that used these slurries, according to the statement of facts. As part of the settlement, the DOJ also required Genzyme to improve its compliance programs, according to the prosecutors' statement.

Source: Law360.com

FDA ISSUES BONE FRACTURE AND DENSITY WARNING FOR TYPE II DIABETES DRUGS

The U.S. Food and Drug Administration (FDA) has strengthened its warning for Invokana (canagliflozin, Invokamet, Johnson & Johnson/Janssen Pharmaceuticals Inc.) related to the increased risk for bone fractures, and added new information about decreased bone mineral density at the hip and lower spine.

In March 2013, the FDA approved Invokana for the treatment of Type 2 diabetes. Part of a drug category called sodium glucose cotransporter 2 or "SGLT2 inhibitors," Invokana works by inhibiting the reabsorption of glucose, causing some of it to be flushed away via the urine. This results in a lower blood glucose level for the individual. Since its approval, however, Invokana has been subject to questions and concerns about its potential side effects.

In May 2015, Invokana and Invokamet were included in a warning about serious blood problems linked to use of six diabetes drugs. In a safety alert, the FDA announced receiving 20 reports from March 2013 to June 2014 of diabetic ketoacidosis—a disorder involving elevated levels of blood acids known as ketones—in patients using the six drugs. Regulators said every patient had to be hospitalized or visit the emergency room, and other patients have continued to be affected by diabetic ketoacidosis.

Risk for bone fractures had previously been mentioned in the adverse reactions section of canagliflozin's label. However, based on new information from several clinical trials, the FDA has added further warning and precaution information. In the clinical trials, as early as 12 weeks after starting the drug, bone fractures occurred in the upper

extremities of several individuals. Fractures typically arose from minor trauma such as merely falling from a standing height.

The FDA said it had required Janssen Pharmaceuticals to conduct a clinical test evaluating changes to bone mineral density over two years in 714 elderly individuals; the test showed that canagliflozin caused greater loss of bone mineral density at the hip and lower spine than a placebo.

The regulator urged health care professionals to weigh factors that contribute to fracture risk before prescribing canagliflozin. Further investigations on the potential side effects will determine whether changes will be made in the prescribing information for the SGLT2 inhibitors drug category.

The FDA is currently evaluating the possible risk for bone fractures for other drugs in the SGLT2 inhibitor class, including dapagliflozin (Farxiga, Xigduo XR, AstraZeneca) and empagliflozin (Jardiance, Glyxambi, Synjardy, Lilly/Boehringer Ingelheim), to determine whether additional label changes or studies are needed. If you need more information on this matter, contact Danielle Mason, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Danielle.Mason@beasleyallen.com.

Source: Law360.com; Medscape.com

A THIRD SUIT FILED AGAINST OLYMPUS CLAIMING DEVICE SPREADS CANCER

An Olympus Corp. subsidiary has been sued again in a Pennsylvania state court. It's alleged that a surgical device it manufactures was responsible for the spread of cancer-causing cells. This is the third such lawsuit to be filed. Marlene and Joel Waltman, who filed suit, became the latest Plaintiffs to claim that the medical device and electronics manufacturer should have been aware of the cancer risks associated with its so-called PKS PlasmaSORD Bipolar Morcellator before it was used in a July 2011 surgical procedure.

The latest suit alleges that use of the device during a gynecological procedure aimed at removing what were thought to be benign tumors from Marlene Waltman actually ended up spreading and seeding cancerous cells throughout her abdomen. The complaint said:

The PKS PlasmaSORD Bipolar Morcellator disseminated and seeded cancer throughout plaintiff's abdominal cavity, thereby causing and accelerating the metastases and spread of her cancer, worsening the long-term prognosis and the natural course of her cancer. The spread of the life-threatening cancer suffered by the plaintiff was a direct result of the use of the

PKS PlasmaSORD Bipolar Morcellator during her 2011 surgical procedure.

The U.S. Food and Drug Administration (FDA) issued a warning in November that laparoscopic power morcellators, gynecological tools used to perform hysterectomy or uterine fibroid removal, should not be used in surgery that involves cancer or fibroids. The agency said that uterine tissue may contain unsuspected cancer and that using the morcellators may spread the cancer and decrease long-term patient survival. The Waltmans said that there were studies in medical journals as early as the 1990s reporting on the risk of spreading undetected cancer through the use of the devices, and that Olympus “knew or should have known that their laparoscopic power morcellators could cause malignant tissue fragments to be disseminated and implanted in the body.”

The Waltmans countered in their complaint that a two-year statute of limitations on their claim should be tolled because they had only recently learned of the connection between her cancer and use of the medical devices. It’s alleged in the complaint:

Despite diligent investigation by plaintiffs into the cause of her injuries, including consultations with plaintiff’s medical providers, the nature of plaintiffs’ injuries and damages, and their relationship to PKS PlasmaSORD Bipolar Morcellator, was not discovered, and through reasonable care and due diligence could not have been discovered, until a date shortly prior to the filing of plaintiffs’ claims.

Claims of negligence, fraud and design-defect are included in the complaint and both compensatory and punitive damages are sought in the case. Two other nearly identical suits were filed against Olympus in Philadelphia County in May on behalf of two other women, Betty Dobson and Anita Whitaker, who say they developed cancer after they were operated on using the device in 2009 and 2010, respectively.

Source: Law360.com

ESSURE VICTIMS DESERVE JUSTICE

Essure is a permanent, non-surgical sterilization procedure that was first marketed by Bayer in the United States in 2002. The Essure device, which has a steel inner coil and an outer alloy coil, contains polyethylene terephthalate fibers that induce inflammation and lead to fibrosis. After implantation into the Fallopian tubes, the resulting fibrosis is intended to prevent egg fertilization.

Since its introduction to the market, thousands of women have made complaints

against Essure and Bayer, the manufacturer. The complaints involve severe pain, excessive bleeding, and headaches as well as more serious complications, including perforation of internal organs, hysterectomy, and still-birth. In response to a citizen’s petition filed with the agency, the FDA is investigating the claims and a panel was to have reviewed the safety of Essure on Sept. 24.

Unfortunately for the women who have suffered significantly due to Essure, there has been no legal recourse available. As a result of the Supreme Court’s federal preemption decision in *Riegel v. Medtronic* (which held that manufacturers of medical devices that received pre-market approval by the FDA cannot be sued for product defects), thousands of women have been denied access to the courts to recover for their serious medical complications caused by Essure. It is a classic example of where justice denied results in no justice at all.

Efforts are underway to avoid the draconian results of *Riegel*. A lawsuit is currently pending challenging the preemption effects of *Riegel* in the context of the FDA’s “conditional” approval of Essure. It’s argued that Bayer violated the terms of the conditional approval. We are monitoring this case and will keep our readers posted on the success of that challenge. Hopefully, it will be successful.

X. BUSINESS LITIGATION

\$415 MILLION GOOGLE AND APPLE ANTI-POACHING SETTLEMENT IS APPROVED

U.S. District Judge Lucy H. Koh has given final approval to a \$415 million class action settlement with Apple Inc., Google Inc. and others, resolving claims they illegally agreed not to poach each other’s engineers. The California federal judge ruled that the settlement, which added an additional \$90 million onto a \$325 million settlement she rejected in August 2014, fairly reflected the strength of the software developers’ claims that Google, Apple, Intel Corp. and Adobe Systems Inc. suppressed wages and violated antitrust laws by agreeing not to hire each other’s engineering talent. The Defendants were accused of conspiracy to hold down salaries.

Judge Koh rejected several objections to the agreement, saying a settlement that awarded the Plaintiffs more than 14 percent of their estimated single damages was reasonable, particularly given that the Defen-

dants disputed the amount. Judge Koh wrote:

In objecting to the size of the settlement, none of these class members adequately take into account the risks and delays involved in proceeding to trial. They ignore that the settlement provides the class with a timely, certain, and meaningful cash recovery, while a trial—and any subsequent appeal—is uncertain, would entail significant additional costs, and in any event would substantially delay any recovery achieved.

The software engineers sued the Silicon Valley companies in May 2011 for damages, claiming that the companies had agreed to provide each other notice whenever one made an offer to another’s employee. The allegations came to light after a U.S. Department of Justice investigation into the hiring practices of several Silicon Valley technology companies. They also agreed to cap pay packages for prospective hires to prevent bidding wars and to abstain from recruiting one another’s personnel, the Plaintiffs contended. The agreements depressed the workers’ pay 10 percent to 15 percent below what it would have been with natural market conditions, the Plaintiffs claimed.

The antitrust class action lawsuit was filed in 2011. It has been closely watched because of the possibility that big damages might be awarded and for the opportunity to peek into the world of some elite U.S. tech firms. The case was based largely on emails in which Apple co-founder Steve Jobs, former Google Chief Executive Officer Eric Schmidt and some of their rivals detailed plans to avoid poaching each other’s prized engineers.

Source: Law360.com

DEPARTMENT OF JUSTICE STARTS INVESTIGATION INVOLVING ANTITRUST CLAIMS AGAINST THE FOUR MAJOR AIRLINES

Senator Richard Blumenthal has asked the Justice Department to probe whether airline carriers were colluding to slow growth. The Senator’s letter urged the department to “investigate this apparent anticompetitive conduct potentially reflecting a misuse of market power, and excessive consolidation in the airline industry.” Following the letter, the Department of Justice (DOJ) launched an antitrust investigation into the four major airlines: Delta Air Lines, Inc., American Airlines Group, Inc., United Continental Holdings, Inc., and Southwest Airlines Co. These four airlines have undergone numerous mergers within past several years and now account

for approximately 80 percent of all domestic air travel.

The airlines received inquiries from DOJ to determine whether they are discussing how to control the supply of seats, a crucial factor in determining fares. American and Southwest also confirmed receiving DOJ requests for details of conversations, meetings and conferences where industry capacity was discussed. Antitrust lawsuits were also filed against all four major airlines alleging collusion among major airlines to limit routes, information, and available seats in order to keep airfares artificially high. As one complaint explains:

Plaintiffs allege that defendants illegally signaled to each other how quickly they would add new flights, routes, and extra seats. To keep prices high on fares, it was undesirable for the defendants to increase capacity.

A motion was filed before the Judicial Panel on Multidistrict Litigation (JPML) to consolidate the cases into a multidistrict litigation (MDL). The JPML will hear argument in October before determining whether to consolidate the actions and if so where the MDL should be. It will be most interesting to see if an MDL is created. We will continue to monitor the situation and will update things as they develop.

Sources: *Wall Street Journal*

TORO AWARDED \$24.3 MILLION IN PATENT DISPUTE WITH BRIGGS & STRATTON

Exmark Manufacturing, a Nebraska-based unit of the Toro Co., has been awarded \$24.3 million in a patent infringement lawsuit against Briggs & Stratton. The jury agreed with the Plaintiffs' contention that Briggs & Stratton violated a patent for a mulching mower deck with multiple blades. The jury also decided redesigned versions of the mower don't infringe on the patent. An Exmark spokesman said the company will continue to defend its innovations. A Briggs & Stratton spokeswoman said her company will seek to overturn the verdict on appeal. Exmark is part of Bloomington, Minn.-based Toro.

Sources: *Insurance Journal* and *The Lincoln Journal Star*

XI. AN UPDATE ON SECURITIES LITIGATION

BANKS REACH MULTI-BILLION DOLLAR SETTLEMENT IN CREDIT DEFAULT SWAP LITIGATION

Twelve major banks have reached a \$1.865 billion settlement to resolve claims brought by a group of investors alleging that banks conspired to fix prices and limit competition in the market for credit default swaps (CDS). A group of investors and hedge funds contended that banks extracted excessive profits by exploiting their dominant position to charge high trading fees. The complaint alleged that the financial institutions traded in a way that "kept the relevant price information in the hands of the dealer Defendants, who ensured they were on one side of, and thus profited from, virtually every CDS transaction." The banks and a trade association—the International Swaps and Derivatives Association (ISDA)—"successfully maintained an inefficient and opaque market structure that yielded for them exorbitant profits at the direct expense of the investors".

The Defendants include: Goldman Sachs Group Inc., JPMorgan Chase & Co., Citigroup Inc., HSBC Holdings Plc, Bank of America Corp., Morgan Stanley, Credit Suisse Group AG, Deutsche Bank AG, Barclays Plc, UBS Group AG, Royal Bank of Scotland Group Plc and BNP Paribas SA. Under the terms of the settlement, the banks will pay different amounts toward the settlement. The size of each bank's contribution will be derived from its share of CDS trading. Although the tentative agreement has been reached, the settlement still needs a judge's approval.

U.S. District Judge Denise Cote set a May 2017 trial date, as well as a fall briefing schedule on class certification, in the event the settlement falls apart. A little more than a year ago Judge Cote largely upheld a variety of claims brought by Plaintiffs including the Los Angeles County Employees Retirement Association and Salix Capital US Inc. at the motion-to-dismiss stage. At that time, Judge Cote dismissed claims relating to Section 2 of the Sherman Antitrust Act, which pertains to monopolies, but said the Plaintiffs had sufficiently pled that representatives from the banks secretly met and agreed to the conspiracy.

In court filings the banks had also rejected the conspiracy claims, saying the Plaintiffs' "blanket allegations" were not legally actionable. Plaintiffs allege the banks conspired to keep new participants from entering the

CDS market, keeping the price for trading in CDS artificially high and costing potential class members tens of billions of dollars. The total annual market for CDS is valued in the tens of trillions of dollars, but fluctuates widely with economic conditions.

In addition to Bank of America, Barclays and Goldman the suit names as Defendants BNP Paribas, Citigroup Inc., Credit Suisse AG, Deutsche Bank AG, HSBC Bank Plc., JPMorgan Chase & Co., Morgan Stanley & Co., UBS AG and Royal Bank of Scotland PLC. There are two other Defendants, industry trade group International Swaps and Derivatives Association and financial data provider Markit Group Ltd. The Plaintiffs are represented by Daniel L. Brockett, Steig D. Olson, Sascha N. Rand and Jonathan Oblak of Quinn Emanuel Urquhart & Sullivan LLP and Bruce L. Simon and Clifford Pearson of Pearson Simon & Warshaw LLP. The case is *In re: Credit Default Swaps Antitrust Litigation* in the U.S. District Court for the Southern District of New York.

Source: Law360.com

FOREX LITIGATION FILED IN CANADA

Banks that have been the focus of class action litigation in the United States alleging manipulation of the foreign exchange markets saw the first suit alleging similar claims filed last month in Canada. The banks are accused of fixing prices in the \$5.3 trillion daily foreign exchange market 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, according to court records.

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. The Defendants include Royal Bank of Canada, Bank of America, The Bank of Tokyo Mitsubishi, Barclays Bank, BNP Paribas Group, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan Chase, Morgan Stanley, Royal Bank of Scotland, Societe Generale, Standard Chartered and UBS. As we have reported, similar allegations were brought in the United States and have resulted in settlements totaling nearly \$2 billion in the past year.

Source: Law360

DOLE CEO AND GENERAL COUNSEL FOUND TO BE GUILTY OF FRAUD

The Delaware Court of Chancery recently handed down a \$148 million judgment against Dole Food's CEO, David Murdock, and the company's former General Counsel, C. Michael Carter, for deliberately driving down the value of the company so Murdock could "take the company private on the cheap." Even though the amount is far less than the shareholders sought, the judgment is one of the largest imposed by the Chancery Court. In his opinion, Vice Chancellor J. Travis Laster wrote that although the Dole board's merger committee made a "Herculean effort" to overcome Murdock and Carter's efforts to keep investors in the dark, it was deprived of information about the company's ability to cut costs and improve income and was unable to negotiate on a fully informed basis to reject the merger offer. Vice Chancellor Laster wrote:

But what the committee could not overcome, what the stockholder vote could not cleanse, and what even an arguably fair price does not immunize, is fraud.

It was pretty clear that the Vice Chancellor had Murdock pretty well figured out. He wrote the following about the 92-year-old who is ranked as the 190th richest American:

By dint of his prodigious wealth and power, he has grown accustomed to deference and fallen into the habit of characterizing events however he wants. Murdock was an old-school, my-way-or-the-highway controller, fixated on his authority and the power and privileges that came with it. Murdock testified that he was "the boss" at Dole, and "the boss does what he wants to do."

While Murdock was the primary beneficiary of the scheme, Vice Chancellor Laster stated that he had help in carrying out his scheme. He concluded in his opinion that Carter helped bring everything to fruition. The Vice Chancellor wrote:

His job was to carry out Murdock's plans, and he did so effectively, even ruthlessly. When Carter set a goal for a division, they fell into line. Carter engaged in fraud through his efforts to help Murdock take Dole private as cheaply as possible.

Vice Chancellor Laster added that the billionaire violated legal duties to shareholders by "orchestrating an unfair, self-interested transaction." Murdock sought in the summer of 2013 to buy the 60 percent of Dole he did not already own for \$12 a share. The compa-

ny's independent directors negotiated the price up to \$13.50, and the deal closed in October of that year. Several lawsuits were filed and eventually consolidated in the Delaware Court of Chancery. This decision holds Murdock and Carter jointly and separately liable for damages of \$148,190,590.18, representing an incremental value of \$2.74 per share.

Sources: *New York Times* and *Forbes*

SEC CHARGES 5 PERSONS FOR INSIDER TRADING ON GILEAD ACQUISITION

The U.S. Securities and Exchange Commission has charged five Florida residents, including two lawyers, in a New Jersey federal court with allegations of insider trading related to Gilead Sciences Inc.'s 2011 acquisition of Pharmasset Inc. The commission said in the complaint that the lawyers, Robert L. Spallina and Donald R. Tescher, as well as accountant Steven G. Rosen and financial adviser Thomas J. Palermo, illegally traded on confidential information in the run-up to the \$11 billion acquisition, in violation of securities laws. The men, including a neighbor, Brian H. Markowitz, allegedly obtained the insider information from a mutual client who served on the board of directors at Princeton, New Jersey-based Pharmasset.

The law firm, Spallina, Tescher, Rosen, Palermo and Markowitz, has agreed to pay approximately \$489,000 to settle the charges. Those settlements are subject to court approval. Joseph G. Sansone, co-chief of the SEC's Market Abuse Unit, said in a statement:

Lawyers and accountants occupy special positions of trust and confidence and are required to protect the information entrusted to them by their clients. It is illegal for them to steal their clients' confidential information to trade securities for their own profit or to tip others.

On Nov. 21, 2011, the companies announced that Gilead was purchasing Pharmasset for \$137 per share in cash. Following the public notification, Pharmasset stock rose by 84 percent, and the five defendants liquidated their holdings to gain \$234,000 of illegal profits, according to the commission. The law firm, Spallina, Tescher and Rosen, met with the Pharmasset board member on Nov. 8, 2011 to discuss year-end personal tax and estate planning, according to the complaint. At that meeting, the men discussed Pharmasset's plans to sell the company at "a significant premium.

The lawyers and accountant were said to have broken their fiduciary duties of trust to

their client by using the information from the meeting to purchase Pharmasset stock. Spallina allegedly then told Palermo and Markowitz about the negotiations, and both purchased securities based on the tip. As part of an agreement, Spallina will return nearly \$40,000 of his gains, plus another \$40,000 in prejudgment interest and a civil penalty. Tescher will return nearly \$10,000, plus another \$10,000 in penalties. Rosen will pay a collective \$55,000, and Markowitz will pay \$66,000. Palermo was hit the hardest, having to pay \$125,000 in disgorgement, \$125,000 in penalty and \$14,000 in prejudgment interest. The five men are not the first to be touched by insider trading charges related to the deal.

In 2013, Kevin Dowd, 38, of Boca Raton, Florida, pled guilty to conspiracy to commit securities fraud in connection to insider information he shared with two co-conspirators. Dowd admitted to providing two people with information regarding Gilead's plans to purchase Pharmasset before the companies went public with the terms of the deal. He faces up to five years in prison and a maximum fine of \$250,000.

Source: Law360.com

XII. INSURANCE AND FINANCE UPDATE

INSURERS MUST COVER \$25 MILLION DAMAGES AGAINST APARTMENT COMPLEX

A federal judge has ruled that Interstate Fire & Casualty Co. and Fireman's Fund Insurance Co. must cover a \$25.5 million punitive damages award against an apartment complex's owner and manager in an underlying carbon monoxide poisoning case. U.S. District Judge Alan B. Johnson granted Apartment Management Consultants LLC (AMC) and Sunridge Partners LLC's motion for summary judgment and denied the insurance companies' opposing motion, holding that the insurers were precluded from relying on a punitive damages exclusion in the relevant policies because of Interstate's failure to timely issue a reservation of rights. The judge wrote:

The court finds that [the insurers] may not assert noncoverage as a defense to the claim and they are precluded from raising the punitive damages exclusion as a means of avoiding or denying indemnity.

Sunridge owns an apartment complex in Casper, Wyo., that AMC manages. A former

tenant, Amber Nicole Lompe, filed suit against Sunridge and AMC in May 2012, claiming she suffered injuries when she was exposed to carbon monoxide in her apartment. A federal jury in December found Sunridge and AMC negligent and awarded Ms. Lompe \$2.7 million in compensatory damages and \$25.5 million in punitive damages.

Sunridge and AMC were covered under a primary and an excess policy issued by Interstate and an excess policy from Fireman's Fund from March 31, 2010, to March 31, 2012. Interstate initially accepted the companies' tender of the defense in the underlying suit and later reserved its rights on the issue of punitive damages in November 2013, several days before trial. Shortly after the jury returned its verdict, Interstate and Fireman's Fund filed the instant suit, seeking a declaration that they don't have to pay any punitive damages in the Lompe lawsuit.

The insureds continued in their summary judgment motion that the insurers were estopped from denying coverage for the punitive damages award because Interstate had not reserved the right to deny coverage. In their motion, the insurance companies sought a declaration that the policies provide no coverage for the award and that they aren't estopped from relying on the punitive damages exclusion. Judge Johnson said in his order that it can't be "meaningfully disputed" that the insurers were on notice that punitive damages would be sought in the underlying action from the time that the complaint was filed in May 2012.

The decision points out that while Wyoming law generally doesn't allow the doctrines of estoppel and waiver to be used to expand a policy's coverage, such rules are frequently subject to exceptions. Judge Johnson said he had "little difficulty" in applying an estoppel exception in the instant case to prevent Interstate and Fireman's Fund from denying coverage. The insurers showed a "complete disregard" of their insureds' exposure to punitive damages, the judge said, noting that they didn't heed Sunridge and AMC's pleas to settle the case within the policy limits.

Allowing the insurers to escape coverage by virtue of the November 2013 reservation of rights letter, after nearly 19 months of "lurking in the bushes" following the filing of the underlying complaint, would be "manifestly unfair and egregious," Judge Johnson said. "Sunridge and AMC were lulled into a false sense of security when Interstate defended without a reservation of rights, although it could have made an explicit reservation of rights and agreed to provide a conditional defense as early as May of 2012," the judge wrote. He added that since the excess policies adopt the terms and conditions of Interstate's primary policy, they

cannot exclude coverage based on the punitive damages exclusion either. I must say that I enjoyed reading the judge's comments because he clearly realized that the insurance companies were dead wrong in trying to avoid their contractual and legal obligations to the insureds.

Source: Law360.com

COURT SAYS LLOYD'S OF LONDON CAN'T AVOID HAVING TO PAY \$132 MILLION IN TRAIN CRASH SETTLEMENT

A California judge has ruled that Lloyd's of London and other insurers can't apply an intentional acts of employees exclusion to recoup \$132.5 million paid toward a train crash settlement. Los Angeles Superior Court Judge Elihu M. Berle said Lloyd's "can't show a reasonable party would have known the accident would have occurred as a result of an intentional act. On Sept. 18, Judge Berle granted summary judgment in favor of Veolia Transportation Inc. subsidiary Connex Railroad LLC, saying that under New York law—which the judge said last October applies to the case per a choice of law provision in Connex's policy—the insurers don't have evidence that a reasonable party would have known that the accident would have happened as a result of a train conductor being distracted by his phone.

Lloyd's and the other insurers collectively paid \$132.5 million out of policies with Connex toward \$200 million that covered claims stemming from the 2008 commuter train crash that left 24 people dead and dozens injured. The judge rejected the insurers' argument that Connex knew its drivers were texting and ignored it, saying that the allegation "assumes a negligence-based standard for invoking the exclusion and fundamentally fails to meet the more stringent New York standard."

Judge Berle also noted that no Connex engineer, including the one involved in the accident, Robert Sanchez, had ever caused an accident because of a cell phone violation before the 2008 crash, and that a witness for Lloyd's had acknowledge there is no way it could have known the accident was going to occur on Sept. 12, 2008, at 4:22 p.m. It was noted by Judge Berle that the railroad didn't see Sanchez's cell phone records until they were subpoenaed by the National Transportation Safety Bureau (NTSB) during its investigation. Judge Berle also granted the insurers' motion for summary judgment on the railroad's cross-claims that they brought the suit in bad faith.

A conference date was set by Judge Berle to discuss if there will be future proceedings or if the court should enter judgment. Indian Harbor Insurance Co., Steadfast Insurance Co., Aspen Insurance UK Ltd. and Lloyd's

filed suit in October 2012, seeking reimbursement of the \$132.5 million they paid out after the crash. They contended that Connex should have expected the incident. The insurers claimed that Connex was aware that employees like Sanchez violated company policy by using cellphones on duty, but failed to report the incidents to Los Angeles public transit operator Metrolink or deal with the dangerous behavior.

Connex's general code of operating rules at the time of the crash stated that engineers are not allowed to use any personal electronic devices, including cellphones, while on duty. Also, the train operator's contract with Metrolink required it to report any allegations of a rules violation regarding the safe movement of trains. The suit alleged that Connex ignored several of these rules and requests. By failing to report the incidents to Metrolink, the suit said Connex avoided penalties of up to \$25,000 per occurrence.

Less than 20 seconds after Sanchez sent a text message on his cellphone, the Metrolink passenger train he was driving passed through a red signal and collided with a Union Pacific freight train near Chatsworth, Calif. This happened in September 2008, causing 24 deaths and more than 100 injuries. Sanchez, who died in the collision, received 57 text messages on his phone while on duty for Connex the day of the crash.

Source: Law360.com

XIII. EMPLOYMENT AND FLSA LITIGATION

TRUCKING COMPANY TO PAY \$3.45 MILLION TO SETTLE MINIMUM WAGE SUIT

An Arkansas federal judge has given preliminary approval to a \$3.45 million settlement by PAM Transport Inc. to settle a class action lawsuit involving truck drivers who alleged they were not paid minimum wages. U.S. District Judge P.K. Holmes III approved the preliminary agreement that certifies the class and settles claims that PAM violated the Fair Labor Standards Act (FLSA) and Arkansas labor laws by failing to pay drivers at least the federal and state minimum wages for the amount of time they spent on the road.

The class action alleges that PAM failed to pay drivers for activities that the Plaintiffs claimed are compensable as a matter of law, including on-duty time spent not driving and time spent in a truck's sleeper beyond eight hours per day. The settlement applies to drivers who worked for the company from

August 2010 to December 2013. The notice that will be sent out to drivers provides:

Even though PAM denies that it has violated any law and has what it believes are meritorious defenses to the claims alleged, it has decided to settle the lawsuit. The settlement enables PAM to avoid the costs and business distraction of protracted litigation and to dedicate its time and resources to ongoing business operations and, as such, benefits both its employees and customers.

The settlement provides that of the \$3.45 million settlement amount, class counsel may seek up to a third, or \$1.15 million, of it in attorneys' fees. Half of the net settlement fund would be allocated to pay class members who are FLSA collective action claimants, while the other half would be set aside to pay those who are Rule 23 class claimants, meaning those who did not file a consent form to join the FLSA collective action by the time the Plaintiffs filed the motion seeking preliminary approval of the settlement.

Source: Law360.com

SCHNEIDER AND TRUCKERS AGREE TO \$28 MILLION SETTLEMENT IN WAGE DISPUTE

Schneider National Carriers Inc. has agreed to pay \$28 million to a certified class of thousands of California truckers who alleged their employer violated state wage-and-hour laws and failed to provide meal and rest breaks. The Plaintiffs, a certified group of more than 6,000 Schneider truck drivers, have asked a California federal court to preliminarily sign off on the settlement. If approved, the consolidated claims of three groups of drivers in the long-running litigation that began in 2008 would come to an end. Of the \$28 million settlement, 73 percent, or about \$20.5 million, will go toward settling the claims of the so-called dedicated and intermodal driver subclasses, while the remaining \$7.56 million will be allocated to the settlement of the claims of the regional driver subclass.

The class is made up of California-based truckers who worked for Schneider as intermodal, dedicated or regional drivers from November 2004 to the present. In September 2012, U.S. District Judge Jeffrey White granted class certification to the truckers for most of their claims, clearing the way for them to pursue as a class allegations that the company failed to pay minimum wages for all hours worked, neglected to provide meal and rest breaks, and fell short of paying for all miles driven and accrued vacation at the required state rate. However, the judge

denied the Plaintiffs from bringing class allegations that the company failed to furnish accurate itemized wage statements, finding that individualized issues predominated and that the Plaintiffs were unable to show that the drivers' itemized wage statements did not accurately report calculations based on carrier guidelines.

The case was stayed in January 2013 pending resolution of two appeals in the Ninth Circuit regarding the issue of whether meal and rest break claims under California law are preempted by the Federal Aviation Administration Authorization Act (FAAAA)—a Defense argument raised by Schneider in the current case. The stay was eventually lifted about 18 months later. That came after the appellate court issued its rulings in *Dilts v. Penske Logistics LLC* and *Campbell et al. v. Vitran Express Inc.*

In *Dilts*, the Ninth Circuit found that the claims of drivers in that case were not preempted by the FAAAA. The appellate court then revived the related case against delivery truck company Vitran Express in light of the court's *Dilts* ruling. The settlement between Schneider and its drivers was reached after several mediation sessions earlier this year. Those sessions occurred while the *Dilts* ruling was being appealed to the U.S. Supreme Court, which ultimately refused to hear the case. A trial in the case had been scheduled to start in April 2016. In a separate motion, the Plaintiffs asked the court set a settlement approval hearing for the 25th of this month.

Source: Law360.com

FREIGHTCAR TO PAY RETIREES \$30 MILLION TO SETTLE PENSION DISPUTE

Retirees who filed a class action lawsuit accusing FreightCar America Inc. of unfairly cutting off their pension health benefits have asked a Pennsylvania federal judge to approve the \$30 million settlement to end their long-running dispute. The retirees, including the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (formerly known as the United Steelworkers of America), and the FreightCar Defendants, filed a joint motion last month asking U.S. District Judge Kim R. Gibson to give preliminary approval to a settlement that would allow some 675 class members to net \$30 million.

Under the settlement, which the parties reached in August just days before the dispute was set to head to trial, FreightCar will make a one-time contribution of \$31.45 million to a voluntary employees' beneficiary association (VEBA) trust fund that would be set up by the union for the purpose of providing class members post-

retirement medical and life insurance benefits. FreightCar also agreed to pay \$1.3 million in attorneys' fees and costs to the class counsel provided that the court approves that amount. But if the court approves an amount less than that for the attorneys' fees, then FreightCar will pay the difference between that award and \$1.3 million as an additional payment to the VEBA, according to the settlement agreement.

If FreightCar fails to make those payments before Feb. 16, 2016, interest on the unpaid amounts will accrue at 5 percent per year, with interest capped at \$250,000. Under the settlement, the Plaintiffs will fully and finally release all claims against FreightCar related to the instant litigation, or the trio of cases known as the Deemer, Britt and Sowers lawsuits that included similar allegations.

A group of retirees sued the rail manufacturer in a Pennsylvania federal court in 2013, alleging that the company breached a collective bargaining agreement by cutting off their pension health benefits. Five named Plaintiffs and the union contended that the company's unilateral decision to end the benefits violated the Labor Management Relations Act and the Employee Retirement Income Security Act.

According to the complaint, the class members—who built railroad cars in Johnstown, Penn.—negotiated the benefits through their union with several predecessors to FreightCar America; which were Bethlehem Steel Corp., (which owned the facility until 1991); and then Johnstown America Industries, (which owned the facility until 1999); followed by Johnstown America Corp., (which became known to the public as FreightCar America in 2004). The facility ceased production in 2008.

In 2002, Johnstown America announced that it intended to unilaterally eliminate the retiree health and life insurance benefits of about 250 retirees and spouses, which caused the litigation to begin. The Plaintiffs are represented by William T. Payne, Pamina Ewing and Joel R. Hurt of Feinstein Doyle Payne & Kravec LLC, and Joseph P. Stuligross, associate general counsel for the United Steelworkers. The case is in the U.S. District Court for the Western District of Pennsylvania.

Source: Law360.com

OREGON JURY AWARDS \$3 MILLION TO NURSE IN WRONGFUL TERMINATION SUIT

A Portland, Ore., jury has awarded more than \$3 million to a nurse, finding that she was wrongfully terminated by Legacy Good Samaritan Medical Center for complaining about cost-cutting measures. Linda Boly, a

registered nurse, told management that rushing through patients was jeopardizing their care. The hospital dictated the amount of time nurses had to complete tasks and Ms. Boly was written up three times for failing to meet productivity quotas. The nurse said she spent more time with a patient than the quota allowed if the patient's needs required it. During the trial in Multnomah County Circuit Court, Legacy argued Boly was fired in June 2013 for poor job performance. The jury obviously disagreed.

Source: *Insurance Journal* and *The Oregonian*

JUDGE REJECTS \$3 MILLION CVS WAGE SETTLEMENT WITH PHARMACISTS

A California federal judge has denied approval of a nearly \$3 million settlement between CVS Pharmacy Inc. and a proposed class of pharmacists claiming they were denied overtime wages, over concerns the settlement amount is too low. Judge George H. King, evaluating the settlement with the higher standard of fairness he said is required without formal class certification, expressed concern over the gap between the pharmacists' initial \$4.26 million claim and the present settlement amount of \$2.94 million with only a "cursory" reasoning based on costs of continued litigation. Judge King said:

These broad concerns are always risks in class action cases. Rather, plaintiff must explain the specific risks of prevailing on each of her claims, an estimate of the likelihood of success of prevailing on each of her claims, and then explain why [\$2.94 million] is an appropriate balance given the potential total recovery and the specific risks of litigation.

Lead Plaintiff Angil Sharobiem said in July that the settlement represents about a \$202 payment for each week that a CVS pharmacist worked more than six days without receiving overtime pay in the company's greater Los Angeles district. Judge King found the settlement lacking information on the methodology used to calculate the settlement amount, even though Plaintiffs' counsel Schonbrun DeSimone Seplow Harris & Hoffman LLP said it performed "substantial work" to reach the settlement amount, including analysis of 8,997 alleged wage violations, and based the total in large part on settlements approved in previous wage class actions against CVS.

Judge King also took issue with a requirement that pharmacists automatically agree to a full release of all state claims arising under the Fair Labor Standards Act (FLSA) if they opt in to the class and receive any payment

from the settlement. Judge King in that regard said:

We have serious reservations about the scope of this release. Here, no separate value is being paid for the release of the FLSA claims. Yet, if a class member chooses not to opt into the FLSA collective action by not filing a claim form, he or she would have released all state law claims for no compensation at all.

Considering the issues he found with the proposed settlement, Judge King found it impossible to decide whether the deal is "within the range of being fair, reasonable and adequate" and ordered the parties to file a new stand-alone motion within 30 days. Judge King denied conditional certification of the class and collective action, finding Sharobiem's failure to provide a declaration that she is free from a conflict of interest as a class representative questionable. Judge King wrote:

We take seriously our duty to protect absent putative class members in evaluating the fairness of a proposed settlement, and we are not a rubber stamp of approval.

A similar \$2.3 million settlement is pending in Northern California, where another group of CVS pharmacists claimed similar violations of overtime and state wage laws. It will be interesting to see what happens ultimately in each of the cases.

Source: Law360.com

XIV. PREMISES LIABILITY UPDATE

BAYER CROPSCIENCE REACHES \$5.6 MILLION SETTLEMENT OVER PLANT EXPLOSION

Bayer CropScience LP has agreed to a \$5.6 million settlement involving the fatal 2008 explosion at its West Virginia pesticide manufacturing facility. The U.S. Environmental Protection Agency (EPA) and U.S. Department of Justice (DOJ) made the announced settlement last month. The EPA and DOJ said in a joint statement that the settlement resolves Bayer's alleged violations of federal chemical accident prevention laws at the facility in Institute, W. Va., the site of the explosion that killed two workers and injured eight others.

Under the settlement, Bayer will pay \$4.23 million to improve emergency preparedness and response efforts at the facility and also

to protect the Kanawha River. Bayer will also pay a \$975,000 penalty and \$452,000 aimed at improving safety at chemical storage facilities nationwide. EPA Assistant Administrator Cynthia Giles had this to say in the statement:

The tragic accident at the Bayer CropScience facility in West Virginia underscores the need for hazardous chemicals to be stored and handled in accordance with the law to protect worker health and the environment. This settlement will establish important safeguards at its facilities across the country and improve emergency response capabilities in the Institute, West Virginia, community.

Two workers were killed in 2008 and several others injured when a runaway chemical reaction inside a residue treater pressure vessel triggered an explosion, sending the vessel into a methomyl pesticide manufacturing unit during a restart at the Institute plant. In its complaint, the DOJ noted Bayer's alleged failure to comply with its risk management plan at the facility and claimed that workers were inadequately trained to operate a digital control system that had been recently installed. Both were said to be factors and played a role in the blast. The EPA and DOJ concluded in the statement:

The result was an uncontrollable buildup in a treatment unit causing a chemical reaction resulting in the explosion, fire and loss of life. During the incident, the company delayed emergency officials trying to access the plant and failed to provide adequate information to 911 operators.

The agencies said that the settlement aims to prevent future chemical releases at Bayer's facilities, including sites in Texas, Missouri and Michigan, by bolstering inspections to find possible safety issues. Bayer is required to hold emergency response exercises with local responders at the West Virginia site. The U.S. is represented by John C. Cruden, Daniel S. Smith and Gary L. Call of the Department of Justice and Dean B. Ziegel of the EPA's Office of Civil Enforcement.

Source: Law360.com

SUBCONTRACTOR IN MINNESOTA VIKINGS STADIUM DEATH HAD 9 SAFETY VIOLATIONS

Berwald Roofing Co., the subcontractor involved in the fatal accident at the Minnesota Vikings stadium construction site, has received nine citations for worksite safety violations in the past five years. An employee of the company was killed on Aug. 26 when

he fell about 50 feet at the U.S. Bank Stadium construction site in Minneapolis. Another worker was injured. Berwald, which has a \$3.4 million contract to work on the stadium, has been cited for a number of issues, including failure to use safety harnesses on elevated worksites, according to Minnesota Occupational Safety and Health Administration (OSHA) records.

Mortenson Construction, the general contractor overseeing the \$1 billion-plus project, says it is working with OSHA to investigate the accident. The company, in a statement, had this to say:

Our priority is to ensure that we know exactly what happened and ensure that it never happens again. A man lost his life on this project today and that simply never should happen.

John Wood, Mortenson's senior vice president, said hitting the project's tight deadline to get the stadium open in time for the Vikings preseason in August 2016 hadn't been his immediate priority.

Source: *Claims Journal*

CALIFORNIA MAN HURT IN TROLLEY STATION FALL SETTLES FOR \$21.5 MILLION

A man who was injured when he tripped and fell on trolley tracks in San Diego has received a \$21.5 million insurance settlement. The *San Diego Union-Tribune* reported that 57-year-old David Long was injured in May 2013 when he stepped off the trolley and tripped over a piece of track where workers had ground down the asphalt. Mr. Long hit his head on the platform and suffered fractures to vertebrae in his neck and injuries to his spinal cord. Mr. Long, who was left quadriplegic, filed a lawsuit against the transit system HMS Construction Inc., Asphalt and Concrete Enterprises, Inc., San Diego Transit Corporation, San Diego Trolley, Inc., and other agencies in January 2014. Surveillance video showed as many as 10 people tripping over the exposed track, but Mr. Long had the most severe injury. The case was settled in late July and has just been made public.

Source: *Insurance Journal*

XV. WORKPLACE HAZARDS

A LOOK AT POTENTIAL CLAIMS RELATING TO ON THE JOB INJURIES

On-the-job accidents are some of the most common causes of injuries that lawyers in our firm see on a regular basis. As most will know, those injured on the job are usually entitled to workers' compensation benefits. However, the inquiry as to what remedies are available to an injured employee should not stop there. All too often, other viable claims that are available are overlooked and not pursued. Workers compensation is not the only avenue by which an injured employee can recover. To ensure a severely injured worker is adequately compensated for his or her injuries, the accident and surrounding circumstances must be thoroughly investigated.

Workers compensation is often referred to as an exclusive remedy, meaning that it is an injured employee's only option for recovering damages as a result of his accident. Although that is the general rule, the term is misleading. As with most rules, there are myriad exceptions to workers compensation being the exclusive remedy for an injured employee. It is important to have a firm grasp on these exceptions to the workers compensation exclusive remedy principle when investigating an on-the-job injury. Whether or not an exception to the rule applies often hinges on the facts and circumstances surrounding the injury. The investigation must be done by lawyers and investigators who are knowledgeable and experienced in the field of on-the-job injuries. When first investigating an on the job injury it is important to learn the following things:

- First, how severe is the injury?
- Second, does the employer have workers' compensation benefits?
- Next, how did the accident and injury occur?
- Finally, were there other parties involved?

Every time our lawyers review an on-the-job injury, they have a series of questions to be answered. It's much like a checklist. If an injury is minor in nature, the inquiry into whether exceptions apply may end there. However, minor injuries are still covered under workers compensation, so it is important to know whether the employer is required to maintain workers' compensation insurance under the given state's laws. If the

answer is yes, the inquiry becomes did they in fact have workers compensation insurance.

Minor injuries are where the exclusive remedy provision of workers' compensation laws often works to the benefit of the injured employee. The injured employee will receive benefits for lost wages, medical care and rehabilitation, even if the worker plays some role in causing the injuries. This is often referred to as the "no fault" principle associated with workers' compensation benefits.

If the on-the-job injury is severe in nature and the employer does not maintain workers' compensation coverage, typically all workers' compensation principles go out the window and the employee can bring an action in tort. However, if the employer does maintain workers' compensation coverage, it is important to determine if any exceptions to the exclusive remedy principle apply. These exceptions vary from state to state, but some of the most common exceptions will be discussed.

After it is determined that an injury is severe, it is important to fully understand how the accident occurred. If the injured party played some role in his injury, workers' compensation benefits may still be the best bet for recovering for those injuries. However, if the accident was the fault of others, one or more of the exceptions to the exclusive remedy principle may apply. One of the most common exclusions is third party liability. If some third party caused or contributed to the injured employee's accident, the employee may have a cause of action in tort against that party.

Third party liability is commonly seen in the form of products liability. When an employee is injured on the job by a defective or unreasonably dangerous product, the employee likely can bring a products liability action. Other common exceptions stem from injuries caused by third parties working on the premises of the employer. Because there is no employment relationship between the injured and the third party, workers' compensation does not apply.

In Alabama, there is another often overlooked exception to the workers' compensation exclusive remedy principle. Under Ala. Code § 25-5-11(b), an employer that would be covered by workers' compensation may be sued in tort if injury is caused by the employer's willful conduct. Although this is an extremely difficult burden to carry, Ala. Code § 25-5-11(c)(2), is more easily proven. Under Ala. Code § 25-5-11(c)(2), an injured employee may bring an action in tort if a safety device is intentionally removed from a machine. These cases are very common and are easily overlooked unless a detailed investigation is conducted.

On-the-job accidents happen every day. Workers compensation can provide adequate remedies to those injured on the job. In minor injury cases or when the employee may have contributed to his accident, it is likely the best remedy and only option. Moreover, it is relatively quick and easy to file a claim and receive benefits. However, there are many shortfalls in the workers' compensation laws and often times seriously injured employees do not receive adequate compensation. It is important to thoroughly investigate each on-the-job injury to ensure no viable claims or remedies are left on the table. If you need more information on on-the-job injuries, contact Kendall Dunson or Evan Allen, lawyers in our firm's Personal Injury/Product liability Section, at 800-898-2034 or by email Kendall.Dunson@beasleyallen.com or Evan.Allen@beasleyallen.com.

RECYCLER SETTLES AFTER JURY AWARDS \$29 MILLION FOR WORKER'S DEATH

A Georgia recycling facility has entered into a settlement with the family of a man who was burned to death on the job. The settlement came after a jury awarded the family \$29.25 million. The two-week trial in the suit by Efrain Hilario and Gabina Martinez, parents of Erik Hilario, ended with the verdict. The case had involved questions of whether Newell Recycling Of Atlanta Inc., the entity that owned the property, or Newell Recycling LLC was the man's employer and whether the suit should have proceeded under Georgia's Workers' Compensation Law. It appears that the Defendants had a very complicated employment structure. This made it difficult for the family's lawyers.

The worker was killed in January 2011 after a fire broke out while he was using a front-end loader to clear debris in an area where gas had previously been spilled from soon-to-be-scraped cars. The decedent's parents and his estate sued the recycling facility in a Fulton County court in July 2012. The Plaintiffs alleged it was the defective design of a spike used to drain fuel from vehicles before crushing them that contributed to the death. It was alleged further that the recycler had also failed to warn of the dangers of the device.

The Defendants argued the product liability claims were inappropriate and sought to blame another worker, who had been using a grappling hook to drain gas tanks instead of the spike. The jury found in favor of the Plaintiffs on the negligent design and failure to warn claims, awarding Hilario's parents \$21 million and his estate \$8.25 million. The settlement is confidential. The Defendants said they would have appealed the application of product liability law in the case, had

not a settlement been reached. Under Georgia law if worker's compensation had applied, the amount of the verdict would have been very much less.

The Plaintiffs were represented by Alan J. Hamilton, Jeff P. Shiver and R. Scott Campbell of Shiver Hamilton LLC, Mark Murray of The Murray Law Firm and Darren Summerville of Summerville Moore PC. The case was in the State Court of Fulton County, Ga. These lawyers did a very good job in this case.

Source: Law360.com

OSHA FINES WISCONSIN SCRAP YARD \$42,000 AFTER THE DEATH OF A WORKER

A federal safety agency is proposing \$42,000 in fines against a Waukesha, Wis., scrap yard where an employee was killed when he was struck by a forklift truck. The Occupational Safety and Health Administration (OSHA) cited Waukesha Iron & Metal Inc. with several violations in the death on March 4 of Kenneth LaChance, a 52-year-old maintenance manager at the scrap yard. OSHA said the man died of head and neck injuries when he was struck by a forklift while hoisting an oxygen cylinder onto the machine. It was reported that LaChance was working without head protection. OSHA says Waukesha Iron failed to ensure that workers were wearing protective helmets and that employees were trained in forklift operations.

Source: *The Journal Sentinel*

PIER 1 IMPORTS FINED \$86,000 FOR SAFETY HAZARDS AT TWO TEXAS SITES

Pier 1 Imports Inc. has been cited by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) for workplace safety hazards at facilities in Fort Worth and Mansfield, Texas. The proposed penalties will total \$86,100. The company was cited for three serious and two repeated violations. Two serious violations were cited at the Fort Worth distribution center involved failing to ensure proper training for forklift operators and proper inspections for forklifts. As we have previously explained, a serious violation at the Mansfield location involved damaged storage racks. The repeated violations at both locations were for failing to provide forklift operator training.

OSHA began the inspection after being notified that an electric pallet jack had struck an employee who was subsequently hospitalized. The report of the hospitalization is part of the new record keeping requirements as of Jan. 1, 2015, that a

company must report the hospitalization of one or more employees, amputation or loss of an eye within 24 hours to OSHA. Jack Rector, OSHA's area director in Fort Worth, Texas, said:

Pier 1 Imports exposed workers to hazardous but preventable conditions and ultimately jeopardized the safety of their workers in doing so. This complaint and report of a hospitalization have identified continual hazards which require immediate corrective action to prevent further injuries.

Pier 1, headquartered in Fort Worth, is a home furnishing retailer with stores and distribution centers throughout the U.S. and employs about 23,000 workers nationwide.

The company had 15 business days from receipt of their citations to comply, request an informal conference with OSHA's area director, or contest the citations and penalties before the independent Occupational Safety and Health Review Commission.

Source: OSHA

XVI. ENVIRONMENTAL CONCERNS

ADEM A BIG LOSER IN ALABAMA

I am going to take a special look at one important state agency and discuss how it fared in the general fund budget passed by the Alabama Legislature. The legislators all but eviscerated the Alabama Department of Environmental Management (ADEM) in the budget. The agency lost a whopping 83 percent of its budget, with funding dropping to a paltry \$280,000. In addition, ADEM will be required to pay \$1.2 million into the General Fund out of fees it collects from scrap tire and solid waste disposal.

The severe budget cut has the potential to affect citizens and businesses in Alabama with a raft of fee increases to pay for services the agency is required to maintain by law. If the Environmental Protection Agency (EPA) decides ADEM is not able to effectively administer the Clean Water Act permitting program in Alabama, the EPA can remove the state's authority and take over the permitting program itself. Every industry, utility or wastewater treatment operation that discharges pollutants in Alabama waters is required to obtain a permit from ADEM. If the EPA takes over this program, these businesses would have to travel to the EPA's regional office in Atlanta to obtain the permits.

ADEM Director Lance LeFleur said losing the Clean Water Act permitting program would be an “absolute disaster” for the state, stifling new business recruitment efforts and tying up permits in federal agendas and red tape. Since 2008, ADEM has been woefully underfunded, falling at about 49th in the nation. In order to recoup the revenue from these latest funding cuts, and to pay back the money into the General Fund as is being required, ADEM will request a 20 percent increase in permit fees across the board. The request will be presented to the Alabama Environmental Management Commission. If the board votes no, an EPA takeover is almost a certainty.

ADEM’s budget woes are not only bad news for the agency, but for environmental groups that have been complaining for years that ADEM is not funded well enough to effectively monitor Alabama’s waterways. Groups like the Alabama Rivers Alliance have been worried since 2010 that ADEM lacked the manpower to enforce environmental laws, allowing violators to slip through the cracks.

This situation is dire in a number of respects. I’m not real sure what the answer is, but it surely does sound like Alabama’s citizens, and those who want to do business here, are going to take the hit directly in the pocketbook once again due to ADEM being literally “gutted” in the budget. I have to wonder what the lawmakers who are in control are thinking.

Sources: Al.com and Yellowhammernews.com

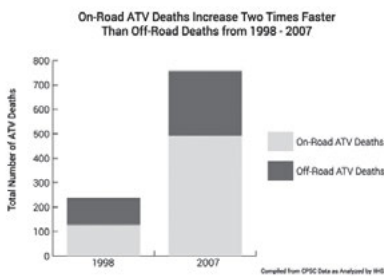
XVII. TRANSPORTATION

357 OFF-ROAD VEHICLE DEATHS DOCUMENTED IN 2015

As we all know, off-highway vehicles are very popular these days. However, these vehicles can be really dangerous. So far this year, the Consumer Federation of America (CFA) and its off-highway vehicle safety coalition have documented 357 off-highway vehicle (OHV) fatalities in 2015. The deaths include deaths that occurred on all-terrain vehicles (ATVs), recreational off-highway vehicles and utility task vehicles.

Of the 357 documented crashes, 335 could be identified as on or off-road incidents. Of those fatalities 193, or 58 percent, took place on roads—a surface that OHVs are not designed for and cannot be safely operated on. Michael Best, senior policy advocate at the Consumer Federation of America, said:

Though there has been a decade long trend toward states, counties and



municipalities opening up roads to OHV use that does not mean it is a safe behavior—which these numbers prove.

It can be dangerous to ride in these vehicles on roads of any type. Dr. Charles Jennissen, co-author of the recent study, *All-Terrain Vehicle Fatalities on Paved Roads, Unpaved Roads, and Off-Road: Evidence for Informed Roadway Safety Warnings and Legislation*, observed:

ATVs are not safe on any public road surface, whether it is paved or gravel. Our research shows that 42 percent of the total 6,625 roadway deaths from 1982 to 2012 occurred on unpaved roads. Unpaved roads are not a safe alternative to driving ATVs on blacktop.

According to the CFA and its off-highway vehicle safety coalition, 79 children younger than 16 have lost their lives to OHV crashes so far this year. Rachel Weintraub, legislative director and general counsel of Consumer Federation of America, added:

There are three additional critical safe riding practices to follow when riding OHVs. Never permit children younger than 16 years old to operate an adult-size OHV or any OHV that is too large and too powerful for them, always wear a helmet and other protective gear when riding an OHV and never allow more people on an OHV than it was designed to carry.

Lawyers in our firm have handled a large number of death and serious injury cases involving off-highway vehicles. There are some of these vehicles that are much more dangerous than others and constitute a hazard for occupants. If you need additional information on the subject, contact Greg Allen, our most experienced product liability lawyer, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com. Greg, who is currently handling several Bad Boy Buggy cases, has successfully handled a number of cases involving off-highway vehicles.

Source: Insurance Journal

CAR SEAT SAFETY SAID TO BE LACKING FOR OLDER CHILDREN

It’s accepted in safety circles that booster seat-aged children are twice as likely to suffer serious injury or death in a car crash than younger children. However, a new study shows these children may be less likely to have car seats inspected for proper use. Less than a quarter of car seat and booster checks analyzed in the new University of Michigan Health System study were conducted in children ages 4 and older at car seat inspection stations in Michigan. Just one in 10 (11 percent) of inspections covered booster seat-age children ages 4-7, while half were for rear-facing car seats.

The findings, which appear in this September’s issue of *The Journal of Trauma*, also show that roughly a third of booster seat-age children who did have seats checked left an inspection in a safer restraint than when they arrived. Senior author Michelle L. Macy, M.D., M.S. of the University of Michigan’s C.S. Mott Children’s Hospital and the Child Health Evaluation and Research Unit (CHEAR):

Booster seats seem less technical and complicated than installing an infant seat, which may lead parents and families to worry less about using them incorrectly. We know that older kids are at particular risk of injury from a car crash. Our study suggests it may be beneficial for certified child passenger safety technicians to focus more on providing education and guidance on prolonged use of booster seats.

Unintentional injury remains the leading cause of death and disability for children older than 1 in the U.S. Children ages 4-12 are more likely to suffer significant abdominal injuries as a result of switching from booster seats to seatbelts too soon. These injuries, known as “seat belt syndrome”, include intra-abdominal, spinal cord, and facial injuries. Booster seats have been shown to reduce the risk of serious injury by 45 percent in children aged 4-8 when compared with seat belt use alone but there are reportedly lower rates of proper restraint use among older kids.

Authors point to such factors as lack of knowledge about the safety benefits of booster seats and risk to child passengers. The authors say that Child passenger safety initiatives also generally focus most on car seat inspections for infants and toddlers. The study analyzed data from 4,531 car seat inspections (1,316 that occurred through Safe Kids Huron Valley and 3,215 through Safe Kids Greater Grand Rapids). Children older than 4 were more likely to have a sibling who underwent a car seat inspection—many may have even been brought

along with no intention from the parent of having the older child's seat evaluated. Lead author Amber Kroeker was with CHEAR at the time of the study. She is now an injury prevention program coordinator at Randall Children's Hospital—Legacy Emanuel in Portland, Ore. Ms. Kroeker had this to say:

Study after study shows that caregivers often need support and direction when choosing and installing child restraints and that they are often using them incorrectly, which puts child passengers at unnecessary risk of harm. This gap can be addressed in car seat inspections, which are free and offered in most communities, but our findings indicate low use of this service by parents of older children.

In a recent survey of 1000 parents by Safe Kids Worldwide, seven out of 10 parents did not know that optimal vehicle belt fit may not be obtained until a child reaches a height of 57 inches, and nine out of 10 parents prematurely transition their child from a booster seat to a vehicle seat belt. Ms. Kroeker had this to say:

Injury risk in motor vehicle accidents has been dramatically reduced for infants and toddlers because of an increased focus on proper restraints. We want to see the same outcomes for older children.

Our firm has been very active in trying to help educate folks, and especially parents of small children, about the proper use of seat belts. If you need more information our firm's activities in this area contact Helen Taylor at 800-898-2034 or by email at Helen.Taylor@beasleyallen.com.

Source: *Claims Journal*

TRUCK DRIVER WORK-RELATED FATALITIES SAID TO BE AT SIX-YEAR HIGH

Fatal work-related injuries to commercial truck drivers last year reached their highest level in six years. This is according to a summary of preliminary results from the Census of Fatal Occupational Injuries for 2014, released recently by the Bureau of Labor Statistics. It was reported by the agency that "transportation and material moving occupations" accounted for the largest share (28 percent) of fatal occupational injuries of any group of workers last year. Fatal work injuries in this group climbed 3 percent to 1,289 incidents in 2014, marking the highest total since 2008. Heavy-truck and tractor-trailer drivers incurred their highest total since 2008—with 725 fatalities recorded in 2014.

Truck drivers and drivers/sales workers accounted for nearly two out of every three fatal injuries in the overall group (835 of the 1,289 fatal injuries in 2014). Fatal injuries to drivers/sales workers jumped 74 percent to 54 in 2014. Breaking down the data by incident type, it was found that in 2014, fatal work injuries related to transportation were up slightly higher, from 1,865 in 2013 to 1,891. Overall, transportation incidents accounted for 40 percent of fatal workplace injuries in 2014. Within the "transportation event," category, roadway incidents made up 57 percent of 2014's fatal work injury total.

The second largest number of transportation fatalities in 2014 involved pedestrian-vehicular incidents, accounting for 17 percent. Fatalities resulting from pedestrian vehicular incidents were up 6 percent. However, the agency noted that the roadway incident counts are expected to rise once updated 2014 data are released in the late spring of 2016. The report also noted that among contracted workers who were employed outside of construction and oil-and-gas extraction occupations, the largest number of fatal occupational injuries (76 workers) was incurred by heavy-truck and tractor-trailer drivers.

As for the overall national numbers, the agency recorded a preliminary total of 4,679 fatal work injuries last year. That equates to an increase of 2 percent over the revised count of 4,585 fatal work injuries the Bureau of Labor Statistics reported for 2013.

Source: Bureau of Labor Statistics

ARE DUCK BOATS TOO DANGEROUS FOR CITY STREETS?

A motor vehicle crash in Seattle last month resulted in the deaths of 4 college students. The National Transportation Safety Board is investigating the deadly crash of a duck boat and a charter bus. This is the first time the agency has looked into a land crash of one of these amphibious vehicles that critics say are too dangerous for city streets. The agency has scrutinized the military-style vehicles several times when they have been in accidents on water. Four international students died in the crash last month when the duck boat veered into the oncoming bus on a Seattle bridge causing the crash.

Federal investigators say the left front axle of the duck boat involved in the accident was sheared off, but they don't know if it was damaged before the collision with the charter bus. The axle has been sent to a federal lab for further examination. Witnesses to the crash said they saw the duck boat's left tire "lock up" as it swerved into the charter bus.

About 45 students and staff from North Seattle College were traveling to the city's

iconic Pike Place Market and Safeco Field for orientation events when according to witnesses the duck boat suddenly swerved into their oncoming charter bus. The driver of the charter bus has said that the duck boat "careened" into them on the bridge. The four North Seattle College students who were killed from Austria, China, Indonesia and Japan.

Even before the crash, there had been calls for greater oversight and even an outright ban on the military-style vehicles that allow tourists to see cities by road and water. Critics say the large amphibious vehicles are built for war, not for ferrying people on narrow city streets. Many believe duck boats are dangerous both on the land and on the water and shouldn't be allowed to be used. It appears the Duck Boat involved in the Seattle crash hadn't received an axle repair that was recommended for the vehicle in 2013. Ride The Ducks International had issued the warning about a potential axle failure and listed a specific needed repair, which was never done for this vehicle.

Reportedly, the company operates 17 amphibious vehicles and employs 35 drivers. The amphibious boats are remnants from when the U.S. Army deployed thousands of amphibious landing craft during World War II. Once the war was over, some were converted to sightseeing vehicles in U.S. cities. The question is: should Duck Boats be allowed to operate on city streets? If I were the decision-maker, the answer would be a resounding no.

Source: *Claims Journal*

XVIII. AN UPDATE ON CLASS ACTION LITIGATION

BP SHAREHOLDER CLASS ACTION SUIT CERTIFICATION UPHeld BY APPEALS COURT

The Fifth Circuit Court of Appeals has upheld the certification of a class action lawsuit filed by a class of BP investors alleging that BP misled them about the rate of oil spewing from the Macondo well as a result of the *Deepwater Horizon* oil rig explosion on April 20, 2010. The lawsuit, filed by pension funds in New York and Ohio, can continue on behalf of purchasers of certain types of BP securities during the 33-day period of April 26, 2010-May 28, 2010.

The lawsuit alleges that BP initially low-balled the oil flow rate which, at the time, falsely inflated securities prices. Plaintiffs claim that share prices began to tumble as

the severity of the spill became known and eventually plunged about 40 percent. The Court determined the issue of whether revelations of the spill's severity were linked to earlier BP misrepresentations was "undeniably common to the class, and is susceptible of a class-wide answer."

The Court simultaneously denied certification for another class of pre-spill investors who bought BP shares up to two and a half years prior to the spill based on the allegation that BP "lulled" them into believing it was equipped to sufficiently manage safety issues, which was not the case in light of the evidence divulged during the three phases of trial in New Orleans. The court reasoned that some conservative investors may have divested from BP if they knew the company's true risk of the disaster while other more aggressive investors may have stayed invested despite the risk. Such a determination ultimately turns on an individualized inquiry rather than an issue common to all class members.

While the pre-spill investors may still proceed with their individual lawsuits against BP, their grievances are certainly understandable in this day and age when some corporations make decisions based on their short-term financial interests and end up harming ordinary people in the process.

Sources: Oil and Gas Investor; gulfive.com

CVS TO PAY \$48 MILLION TO SETTLE INVESTOR SUIT OVER STOCK DROP

CVS Caremark Corp. has agreed to pay \$48 million to settle a securities class action in which government retirement systems accused the company of making misleading statements about a multibillion-dollar loss two years after CVS and Caremark agreed to a merger. The Plaintiffs filed a motion for preliminary approval of the settlement in a Rhode Island federal court. A drop in company's stock value was linked to the misleading statements. The loss came two years after prescription management benefits company Caremark approved a merger with Rhode Island-based CVS in 2007. The proposed class includes investors who bought stock in CVS between Oct. 30, 2008, and Nov. 4, 2009.

Source: Law360.com

SEARS AND WHIRLPOOL SETTLE DISHWASHER LITIGATION WITH REPAIRS AND REBATES

Sears Holdings Corp. and Whirlpool Corp. have agreed to pay for repairs and post public warnings to settle a class action accusing the companies of hiding a defective circuit board that caused name-brand dish-

washers to burst into flames. The full estimated value of the proposed settlement hasn't been made public, but the companies agreed to pay out about \$200 apiece to owners of Kenmore, KitchenAid and Whirlpool home dishwashers to cover repairs or rebates to use toward buying a new dishwasher, according to the joint motion for preliminary approval. The parties have also proposed an arrangement in which the Defendants would also pay for repairs of dishwashers that aren't part of the class but still had fire problems, according to the filing. Some customers can have the full cost of their repairs covered, according to the proposal.

The Plaintiffs filed suit in November 2011 saying that the Defendants knew, or were reckless in not knowing, that certain household dishwashers contained defective electronic control boards that spontaneously overheated, which caused them and other components in the dishwashers to melt, emit smoke and fumes, and combust.

The 10 named Plaintiffs—residents of California, Maryland, Georgia, New Jersey and Massachusetts—all purchased Kenmore, KitchenAid or Whirlpool dishwashers for their homes from 2002 to 2007 that subsequently malfunctioned due to a defective circuit board, the component that performs all the major control functions of the dishwasher and enables the consumer to operate the dishwasher.

In the case of California residents David and Bach-Tuyet Brown, their KitchenAid dishwasher overheated while they were sleeping in April 2010, filling the house with smoke and causing them to spend \$70,000 to replace the entire kitchen and to lose an additional \$3,000 in rental income as a result of having to vacate the property for three weeks, according to their complaint.

The proposed settlement calls for different answers to different Plaintiffs, according to the filing. For example, people who have already had to repair or replace a dishwasher that caught on fire will get \$200 minimum, but if they kept documentation of the costs of repairs they can ask for more, according to the proposed settlement.

The Plaintiffs are represented by Charles F. Fax and Liesel J. Schopler of Rifkin Weiner Livingston Levitan & Silver LLC, Jeffrey M. Cohon and Howard Pollak of Cohon & Pollak LLP, David H. Weinstein and Robert Kitchennoff of Weinstein Kitchennoff & Asher LLC, Steven A. Schwartz and Timothy N. Mathews of Chemicles & Tikellis LLP, and Nicole Sugnet of Lieff Cabraser Heimann & Bernstein LLP.

Source: Law360.com

XIX. THE CONSUMER CORNER

"HOT GAS" SETTLEMENTS FOR EXXON AND CITGO APPROVED

Twenty-eight settlements totaling \$24.5 million that resolve challenges to how motor fuel retailers and refiners including CITGO Petroleum Co. and ExxonMobil Corp. sold fuel have received final approval (*In re Motor Fuel Temperature Sales Practices Litig.* MDL, 2015 BL 270757, D. Kan., No. 07-MD-1840-KHV, 8/21/15). Gas purchasers alleged in putative class actions that the fuel retailers and refiners were liable for selling motor fuel for a specified price per gallon without disclosing or adjusting for temperature expansion, and without disclosing the effect of temperature on fuel in 26 states, the District of Columbia, Puerto Rico and Guam.

Under the settlements, six refiner Defendants—CITGO, ExxonMobil, BP Products North America Inc., Shell Oil Products US, Sinclair Oil Corp. and ConocoPhillips Co.—will put \$21.2 million into a settlement fund and \$500,000 in a class notice fund. Chevron will put \$2 million into a settlement fund and \$125,000 for class notice. E-Z Mart, W.H. Hess and other Defendants will pay \$662,500 toward a settlement fund and \$15,000 toward class notice. Judge Kathryn H. Vratil of the U.S. District Court for the District of Kansas granted final approval to the settlement on Aug. 21.

Settlements with Valero Marketing and Supply Co., Sam's Club and other Defendants call for them to install automatic temperature compensation (ATC) dispensers at retail pumps in certain settlement states. The installations are scheduled to take place during a three-to-five year phase-in period. The court previously granted final approval to a settlement with Costco Wholesale Corp. in April 2012. Costco was the first of the Defendants in the litigation to negotiate a settlement (40 PSLR 539, 5/7/12).

Wawa Inc., 7-Eleven and other former or non-settling Defendants objected to the agreements, alleging that they violated the First Amendment of the U.S. Constitution because they create a "judicially approved subsidy which their political rivals can use to influence government decision making." But the court didn't buy the argument, concluding that the settlements were "voluntary agreements between private parties."

The court also found that the group of objectors that included 7-Eleven didn't have standing to object to the deals based on the First Amendment because they didn't show that they would suffer legal prejudice as a

result of the agreements. A hearing on attorneys' fees and class representative incentive awards is scheduled for Nov. 19, 2015.

LUMBER COMPANY'S ROTTING WOOD REHEARING DENIED

In July, the Eleventh Circuit released an opinion reviving a proposed class action accusing building supplier Lumber One Wood Preserving LLC of providing wood that is susceptible to rotting because it did not undergo the proper treatment process as advertised. Recently, the court denied a motion for en banc rehearing of that decision. The earlier decision of a three-judge panel reversed an Alabama federal court's dismissal of the suit against Lumber One applying the high court's 5-4 decision in *Shady Grove Orthopedic Associates PA v. Allstate Insurance Co.* Justice Antonin Scalia, writing for the majority in *Shady Grove*, found that Rule 23 of the Federal Rules of Civil Procedure allows class actions to proceed in federal court even when state laws restrict them.

In this case, Lisk had alleged violations of the Alabama Deceptive Trade Practices Act (ADTPA), which by its text purports to bar private class actions. In its July order, the circuit panel said that if the case were pending in Alabama state court, then the statute would preclude presentation of the ADTPA claims in a private class action. But because the case is in federal court, the Rule 23 allows class actions and makes no exception for cases of this kind. At the time of its decision, the Eleventh Circuit noted that there was a conflict in the Lumber One case over what the impact of the *Shady Grove* decision would be, because "no single rationale garnered five votes" in that case.

But the panel said that Justice John Paul Stevens, who wrote a concurrence in the *Shady Grove* case, only departed from the four others who ruled with him on the question of "whether a federal rule abridges, enlarges or modifies a substantive right," according to the July opinion. The panel found that what was most critical was that all five justices agreed that applying Rule 23 to allow class actions for a statutory penalty created by New York law did not abridge, enlarge or modify a substantive right, according to the court document.

The application of *Shady Grove* to the ADTPA provides a great benefit to consumers who can now seek class-wide relief against those who commit unfair and deceptive acts in the Eleventh Circuit. If you need more information on anything related to this decision, or the subject matter generally, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud and Commercial Liti-

gation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Source: Law360.com

THE MESSAGE—"OUR WAY OR THE HIGHWAY"—TO AN ARBITRATOR CAN NEVER BE GOOD NEWS FOR CONSUMERS IN ARBITRATION PROCEEDINGS

A run-of-the-mill employment dispute could become a major embarrassment for railroad giant BNSF over an allegation that a senior executive threatened to blackball an arbitrator from the industry if she ruled against the company. In a federal court case that was set to go to trial last month in Tacoma, Wash., a fired railroad employee accuses the company of legal corruption. The suit claims that the railroad executive pressured the arbitrator to reverse a proposed ruling that initially was in the worker's favor.

The central allegation is that two months after a February 2009 phone call with a railroad senior executive, the arbitrator changed her previous decision, which was to reinstate the fired worker. Instead, she decided to dismiss the case. A new arbitrator was brought in and later upheld Kite's firing. This case shines a light on what readers of this report have heard for years concerning the growing use of arbitration in consumer and workplace disputes in recent years. The abuse and pressure brought against arbitrators who rely on corporate business for their livelihoods can be quite prevalent. Unlike judges, arbitrators are private business people who may well be dependent on their next case.

The underlying action involved a conductor who was accused of failing a blood-alcohol test. After all of the evidence, the arbitrator thought the employee should be reinstated to his job. Reportedly, she circulated a draft memo to the parties to this effect. During a February 2009 telephone conference, the railroad executive strongly objected to the employee's proposed reinstatement. According to the executive's written statement filed in court, he said the arbitrator stuck to her guns when criticized and was inclined to finalize her draft. The railroad executive then added:

I then reminded her of what I said at the oral argument: allowing a second-violation employee back to work would create an emotional response from the carrier, and that I didn't know how I could have made that point any clearer unless I'd said, "you won't be able to work in the industry if you make decisions like that."

Growing concern about the fairness of arbitration awards has some courts more

willing to scrutinize them. However, some courts still look at arbitration as an agreement between the parties in which each waived access to the judicial process. Except in very limited circumstances, those courts refuse to look behind "how" an arbitrator actually arrived at her decision. Obviously, there are a lot of good arbitrators out there. But having your constitutional and legal rights adjudicated should not be akin to playing roulette.

American citizens deserve a fair system every time—one that is emblematic of the sacrifices that have been made by all citizens over the course of our nation's history. Fortunately for the employee in this case, he found a court willing to listen to his grievance. In fact, the 9th U.S. Circuit Court of Appeals stated:

[i]f Boldra as a high ranking railway official ... made such a statement and intended it as an economic threat against Zimmerman (the arbitrator) if she did not change the outcome ... then Boldra committed an act of attempted extortion and impaired the integrity of the arbitral process.. (emphasis added).

The case was sent back to the district court to allow the employee the chance to prove corruption. I wish I could tell you that this result is allowed each time a corrupt arbitration proceeding occurs. But that wouldn't be the truth. Hopefully, this case will remind more courts to protect victims from arbitration abuse until such time as some legislative action is taken to get rid of forced arbitration for consumers once and for all.

Source: Fairwarning.org

DISH NETWORK PLACING THE BURDEN OF MANDATORY ARBITRATION ON ITS CUSTOMERS

I wonder how many customers of the satellite TV company DISH Network know what has happened to them recently. Each Dish customer has received a notice from the company informing them their contract would now contain a mandatory arbitration clause. In the event of a dispute with the company, customers will now be forced to negotiate with the company through a representative selected by the company. This gives this large corporation a decided advantage over customers if a dispute arises.

These mandatory arbitration agreements are becoming more common in consumer transactions. When a consumer goes to buy anything from a DVR to a refrigerator, to a car, they are forced to sign a waiver of their constitutional right to a jury trial and be forced to resolve any disputes through

binding arbitration. Usually, the corporation reserves its right to sue in court if the consumer doesn't pay. Arbitration agreements also usually bar class or collective actions, meaning consumers cannot band together to bring a lawsuit.

DISH offered its customers an opportunity to opt-out of binding arbitration, but only if they provided written notice to the company within 30 days of receipt of the notice of arbitration. The letter we saw was dated Aug. 30, so for a lot of folks it may already be too late.

In April, Rep. Hank Johnson (D-Ga.) and Sen. Al Franken (D-Minn.) introduced the Arbitration Fairness Act before Congress. This is an attempt to revive earlier attempts in 2013 to pass legislation that would eliminate mandatory arbitration clauses in employment, consumer, civil rights and antitrust cases. Unfortunately, the bill is on "life-support" in the House Judiciary committee for Regulatory Reform, Commercial and Antitrust Law. Govtrack.us, which tracks the status of pending legislation, gives the bill only a 1 percent chance of getting out of committee and a 0 percent chance of passing.

As the old saying goes, "there is strength in numbers." That's why class actions are so important to consumers. Mandatory arbitration prevents consumers from joining a collective effort to seek justice for wrongdoing. It also hamstring individual consumers in litigation, giving the upper hand to big companies and eliminating the constitutional right to their day in court. For many DISH customers, arbitration has now been forced on them and most of them probably don't even know it.

Source: Govtrack.us News Release

XX. RECALLS UPDATE

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

VOLKSWAGEN RECALLS 11 MILLION VEHICLES

Volkswagen announced on Sept. 30 that it was recalling 11 million vehicles. We just got the notice in time to include the information in the Automotive Section

of this issue. We will have more to say on this subject in the November issue.

FIAT CHRYSLER RECALLS KEEP ON COMING AND AT A FAST PACE

September wasn't a very good month on the recalls front for Fiat Chrysler. There were five major recalls in September. The automaker has recalled more than 1.7 million trucks to fix problems with air bags and welds in the steering system. It also recalled about 8,000 sport utility vehicles for hacking issues. More than 200,000 Jeep Cherokees were recalled for a windshield wiper defect.

The First Recall

The biggest of three recalls covers 1.35 million Ram 1500, 2500 and 3500 pickup trucks and 3500, 4500 and 5500 Chassis Cabs, mainly in North America. All are from the 2012 through 2014 model years. Fiat Chrysler says a company investigation found that some trucks may have steering wheel electrical wires that can wear due to contact with a spring. That can cause a short circuit that could make the driver's side air bags inflate without a crash. The company says it knows of two injuries caused by the problem but no crashes. It says an analysis of warranty data found that less than 1 percent of trucks repaired for the problem had air bags that inflated without a crash.

In some affected trucks, an air bag warning light will come on before there's a problem. Dealers will inspect each vehicle, tie off the wiring harness and install protective caps on the springs. The company is now mailing notices to owners telling them about the recall.

The Second Recall

The second recall covers about 188,000 Ram Quad Cab pickups from the 2014 and 2015 model years. Fiat Chrysler says the side curtain air bags don't comply with federal regulations that protect rear passengers if the trucks roll over. Testing by the National Highway Traffic Safety Administration (NHTSA) found that the air bags don't stop rear passengers from hitting a roof support pillar. The company says it knows of no crashes, injuries or complaints. Fiat Chrysler has not yet developed a

fix for the problem. Owners will be told when they can make an appointment to get repairs done. The company says drivers and passengers should wear seat belts in addition to relying on air bags.

The Third Recall

In a third recall, Fiat Chrysler said it is calling back nearly 194,000 Ram 2500 pickups and 3500 Chassis Cabs to fix a faulty weld in the steering system. The recall covers certain trucks from the 2013 and 2014 model years, mainly in North America. Some 2014 Ram 1500 pickups in Mexico are included in the recall. If the weld fails, steering components can come apart and cause reduced steering capability, the company said in a statement. Fiat Chrysler said it knows of one crash but no injuries from the problem. Customers will be told to take their trucks to dealers for an inspection, and if needed, the steering welds will be repaired. Dealers later will install a reinforcement bracket on trucks that weren't repaired in the first phase, the company said. Ram pickups have been recalled frequently in recent years. The 2014 Ram 1500, Fiat Chrysler's top-selling model that year, has been recalled nine times.

Fourth Recall

Fiat Chrysler Automobiles NV has recalled nearly 8,000 sport utility vehicles (SUVs) in the U.S. so it can update software in their radios amid concerns that hackers could take advantage of a potential security vulnerability. FCA US LLC said the recall covers approximately 7,810 2015 Jeep Renegade SUVs equipped with 6.5-inch touchscreens. It appears that more than half of them are still in the possession of dealers. The company noted that the radios are different than the ones in roughly 1.4 million Dodge, Ram and Jeep vehicles, model years 2013 through 2015, affected by a similar recall in late July. Customers impacted by the new recall will receive a USB device that they can use to upgrade vehicle software, providing additional security features. Customers can also download the software themselves or visit their dealers to have the new software installed.

The automaker says that it doesn't know of any injuries related to software exploitation and isn't aware of any related complaints, warranty claims or accidents beyond those included in an unspecified media report. The company says no defect has been found.

Fifth Recall

Fiat Chrysler Automobiles has recalled more than 200,000 Jeep Cherokees globally to repair the vehicles' control modules that can potentially be damaged by static buildup and disable the cars' windshield wipers, leading to visibility issues. The recall includes 158,671 model year 2014 Jeep Cherokees in the U.S., as well as an estimated 18,366 in Canada, 3,582 in Mexico and 26,049 outside North America. According to the automaker, an internal investigation revealed that static buildup may occur if the vehicles' windshield wipers are activated during dry conditions, and significant static buildup may affect a control module that powers the wipers. The company reported it is unaware of any injuries or accidents related to the recalled Jeeps. Fiat Chrysler said dealers will install a ground strap to the control module in the affected vehicles to eliminate the potential for static buildup.

NISSAN RECALLS VERSAS DUE TO BRAKING ISSUE

Nissan North America Inc. has recalled nearly 300,000 Versa and Versa Note cars because a piece of plastic near the vehicles' acceleration pedal traps some drivers' shoes and prevents them from quickly hitting the brakes. The automaker has recalled 298,747 vehicles among its model year 2012-2015 Nissan Versas and 2014-2015 Nissan Versa Notes in order to fix the vehicles' center console trim panel, which some drivers have reported catches on their shoes and keeps them from being able to effectively brake. In its report to the U.S. National Highway Transportation Safety Administration (NHTSA) on the recall, Nissan said drivers' shoes can impede smooth pedal operation in rare instances and sometimes even catch to the trim, causing a delay in the smooth transition between the accelerator pedal and brake pedal. The automaker said:

If the driver's shoe catches the edge of the center console trim panel, it could cause a slight delay in the smooth transition between the accelerator pedal and the brake pedal, which may increase the braking distance, therefore increasing the risk of a crash.

HYUNDAI SONATAS AND ACCENTS RECALLED DUE TO ENGINE AND BRAKE LIGHT PROBLEMS

Hyundai has recalled nearly a half-million midsize cars in the U.S. to replace key engine parts because a manufacturing problem could cause them to fail. The recall covers 470,000 Sonata sedans from the 2011 and 2012 model years equipped with 2-liter or 2.4-liter gasoline engines. At the time, the Sonata was Hyundai's top-selling vehicle in the U.S. The company also is recalling nearly 100,000 Accent small cars because the brake lights can fail.

In documents on the Sonata recall posted last month by NHTSA, Hyundai says that metal debris may not have been fully removed from the crankshaft area during manufacturing at Hyundai's Alabama engine plant. That can restrict oil flow to the connecting rod bearings, and since they are cooled by oil, they could fail. If that happens, the engines could stall and cause a crash. So far, Hyundai said it has no reports of crashes or injuries from the problem. The company says in documents that a worn connecting rod bearing will make a cyclical knocking noise, and it also could cause the oil pressure warning light to illuminate. Continued driving with the problem can cause the bearing to fail and engine stalling. The company says that the 2011 Sonata was the first Hyundai vehicle to use engines made in Alabama, where the company initially used a mechanical process to remove machining debris from the crankshaft. Reportedly, that process was changed to a high pressure wet blasting system in April of 2012.

Hyundai discovered the problem when owners started reporting engine noise. In June of 2015, NHTSA raised the issue with Hyundai, which said it didn't consider the issue to be a safety problem because owners would get warnings. But NHTSA told the company it was concerned about the possibility of high-speed stalling. Hyundai then decided to recall the cars. Dealers will inspect the cars and replace engine assemblies if

necessary at no cost to owners. The company also will increase the engine warranty for 10 years or 120,000 miles. Owners will be notified on Nov. 2, and they will get a second notice when parts are available.

The Accent recall covers certain 2009 to 2011 models. It's an expansion of a recall issued in 2013. Hyundai says the brake light switch can fail, and the lights won't come on when a driver steps on the brakes. Also, the cruise control may not be deactivated by stepping on the brake, and the gear shifter may get stuck in the "park" position. The company says in documents posted by NHTSA that it has no reports of crashes or injuries. Hyundai will replace the brake switch at no cost to owners starting Nov. 2, the company said.

CHINA RECALLS 280,000 MAZDA 6 CARS FOR DEFECTIVE AIR BAGS

The Chinese government said on Sept. 25th that FAW Car Co Ltd., a partner of Japan's Mazda Motor Corp., is recalling almost 280,000 Mazda 6 cars for safety problems with air bags that expel flying debris on deployment. According to a translated statement on the General Administration of Quality Supervision, Inspection and Quarantine's website, the recall affects Mazda 6 models made between March 29, 2003, and Dec. 29, 2008.

Although the agency didn't name the supplier of the air bags, the defective air bags were made by Takata Corp., according to a Reuters report. In June, Mazda North America Operations added 540,000 cars and trucks in the U.S. and Canada to the millions of vehicles that automakers have recalled for containing possibly defective air bags.

FORD ISSUES 5 RECALLS ON SEPTEMBER 30

Ford Motor Company has issued five safety recalls and one safety compliance recall in North America. There have been a few accidents attributed to these conditions, but no injuries.

Windstar

Ford has issued a safety recall for certain 1998-2003 Ford Windstar vehicles for rear axle inspection. The recall covers 340,000 1998-2003 Ford Windstar vehicles for a potential issue with a previous safety recall repair. There is a risk that the combined effects of corro-

sion and stress can lead to cracks in the axle that—if undetected—can grow and result in a complete fracture. The previous recall repair involved installing a rear axle reinforcement bracket to mitigate the safety risk in the event of an axle fracture. A bracket incorrectly installed could limit the effectiveness of that recall repair. A fractured rear axle could affect vehicle handling, increasing the risk of a crash. Ford is aware of a small number of accidents that might be connected to this issue, but no injuries.

Affected vehicles include certain 1998-2003 Ford Windstar vehicles that received rear axle reinforcement brackets during a previous safety recall repair and were built at Oakville Assembly Plant Sept. 2, 1997 through July 3, 2003. There are a total of approximately 340,000 (actual 342,271) vehicles originally produced that might be affected in North America. Of this total, 283,413 vehicles are located in the United States and federalized territories, and 58,858 are in Canada. Dealers will inspect these vehicles to determine if the brackets were correctly installed. Customers whose vehicles had the bracket installed incorrectly will have their rear axle replaced. If the bracket was correctly installed, customers will receive an incentive to replace their rear axle at a reduced cost. The offer is good for one year with unlimited mileage.

Escape

Ford has issued a safety recall for certain 2001-2008 Ford Escape and Mercury Mariner vehicles with remanufactured transmissions for potential issue. The recall covers approximately 70 2001-2008 Ford Escape and Mercury Mariner vehicles with a remanufactured transmission due to a possible loose shift control lever bolt. In these vehicles, the shift control lever bolt might not have been tightened properly, which could cause the shift lever to disengage from the transmission without warning. This can result in the loss of transmission gear selection and the vehicle could roll away, increasing the risk of an injury or crash. Ford says it's not aware of any accidents or injuries associated with this issue. Affected vehicles include

certain 2001-2008 Ford Escape and Mercury Mariner vehicles with remanufactured transmissions that were built June 11, 2015 through July 5, 2015. There are a total of approximately 70 (actual 69) vehicles that might be affected in North America. There are 57 vehicles in the United States and federalized territories, 11 in Canada and one in Mexico. Dealers will check to ensure the shift control lever bolt is tightened properly at no cost to the customer.

The F-150

Ford has issued a safety recall for certain 2015 Ford F-150 vehicles for potential adaptive cruise control issue. The recall covers approximately 37,000 2015 Ford F-150 vehicles for a potential issue with adaptive cruise control. When passing a large, highly reflective truck, the adaptive cruise control radar in some of these vehicles could incorrectly identify the truck as being in the F-150 lane of travel when it is not. As a result, the vehicle might apply the brakes until the truck is no longer perceived to be in the lane of travel. The collision warning system red warning light might also flash and a tone might be heard at the same time. When this happens, the brake lights will illuminate. The potential duration of this unexpected adaptive cruise control braking could increase the risk of a crash involving a vehicle behind the F-150. Ford received a report of one accident that could be related to this issue; no injuries were reported.

Affected vehicles include certain 2015 Ford F-150 vehicles built at Dearborn Truck Plant, March 18, 2014 through Aug. 5, 2015, and at Kansas City Assembly Plant, Aug. 11, 2014 through Aug. 6, 2015. There are a total of approximately 37,000 (actual 36,857) vehicles that might be affected in North America. There are 33,481 vehicles in the United States and federalized territories, and 3,376 in Canada. Dealers will update the adaptive cruise control module software at no cost to the customer.

Taurus, Lincoln MKS And Explorer

Ford has issued a safety recall for certain 2015 Ford Taurus and Lincoln MKS vehicles, and certain 2016 Ford Explorer vehicles for potential fuel tank attachment bolt issue. The recall covers approximately 250 2015 Ford Taurus and Lincoln MKS vehicles, as well as 2016 Ford Explorer vehicles for a potential issue with the fuel tank attachment bolts that might not have been tightened properly. As a result, the fuel tank straps could fracture after an extended period of time, causing the fuel tank to separate from the vehicle, leading to a fuel leak. A fuel leak in the presence of an ignition source can lead to a fire. Ford is not aware of any accidents, injuries or fires associated with this issue.

Affected vehicles include certain 2015 Ford Taurus and Lincoln MKS vehicles, and certain 2016 Ford Explorer vehicles built at Chicago Assembly Plant on July 24, 2015. There are a total of approximately 250 (actual 251) vehicles that might be affected in North America. There are 203 vehicles in the United States and federalized territories, and 48 in Canada. Dealers will properly tighten the fuel tank attachment bolts at no cost to the customer.

F-53 And F-59

Ford has issued a safety recall for certain 2016 Ford F-53 and F-59 stripped chassis vehicles for potential shift control bracket issue. The recall covers approximately 1,500 2016 Ford F-53 and F-59 stripped chassis vehicles for a potential issue with the shift control bracket. The shift control bracket might not have been manufactured properly, so the vehicle might be able to be shifted into reverse without applying the brakes. This could result in unintended vehicle movement, increasing the risk of accident or injury. Ford is not aware of any accidents or injuries associated with this issue. Affected vehicles include certain 2016 Ford F-53 and F-59 vehicles built at Detroit Chassis Plant, June 1, 2015 through Aug. 11, 2015. There are 1,477 vehicles that might be affected in North America—all located in the United States.

Dealers will replace the transmission shift control bracket and adjust the shift cable at no cost to the customer.

Fusion And Lincoln MKZ

Ford has issued a safety compliance recall for certain 2016 Ford Fusion and Lincoln MKZ vehicles for fuel tank issue. The safety compliance recall affects approximately 700 2016 Ford Fusion and Lincoln MKZ vehicles for a potential compliance issue with the fuel tank. In these vehicles, the fuel tank might not have been manufactured properly and could crack in a crash, which is a compliance issue with FMVSS 301 regarding fuel system integrity. A fuel leak in the presence of an ignition source could lead to a fire. Ford says it's not aware of any accidents, injuries or fires associated with this issue. Affected vehicles include certain 2016 Ford Fusion vehicles built at Hermosillo Assembly Plant, Sept. 3, 2015 through Sept. 13, 2015, and certain 2016 Lincoln MKZ vehicles built at Hermosillo Assembly Plant, Sept. 3, 2015 through Sept. 12, 2015. There are a total of approximately 700 (actual 708) vehicles that might be affected in North America. There are 658 vehicles in the United States and federalized territories, 28 in Canada and 22 in Mexico. Dealers will replace the fuel tank at no cost to the customer.

WISHBONE DESIGN RECALLS RECYCLED EDITION BIKES DUE TO INJURY HAZARD

Wishbone Design Studio Limited of Yardville, N.J., has recalled about 400 Recycled Edition Bikes. The handlebar can pinch fingers placed at the center where the handlebar connects to the bike frame. The Wishbone Recycled (RE) Bikes are made from recycled black plastic materials with 12-inch, air-filled white rubber tires. The adjustable seat height ranges from 9 to 20 inches. The bikes weigh about 10 pounds. The two recalled bikes include one 3-in-1 model, which is adjustable as a 3-wheeler or 2-wheeler with a high seat or low seat; and one 2-wheeler model, which is adjustable with a high or low seat. The date codes for production appear in a round dial on the front frame of the bikes under the seat. Date codes are either December 2013 or May 2014. The year appears in the center of

the dial and the arrow points to the month. There is also a Wishbone logo embossed on each bike fork. The company received reports of four incidents, including two injuries. One required stitches and one required restorative surgery.

The bikes were sold at Independent toy and bike stores nationwide and online at www.amazon.com from July 2014 through June 2015 for about \$200 for the 2-wheeler and \$230 for the 3-in-1. Consumers should immediately stop using the bike, take it away from children and contact Wishbone or the store where the bike was purchased for a free neoprene cover for the handlebar. Contact Wishbone Design Studio toll-free at 888-748-7453 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.wishbonedesign.com and click on Product Care and then Safety & Recalls at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Wishbone-Design-Recalls-Recycled-Edition-Bikes/>.

HUFFY RECALLS BICYCLES WITH FRONT DISC BRAKES

Huffy has recalled about 460 bicycles equipped with front disc brakes. An open quick release lever on the bicycle's front wheel hub can come into contact with the front disc brake assembly, causing the front wheel to come to a sudden stop or separate from the bicycle, posing a risk of injury to the rider. No incidents or injuries have been reported. The recalled products are all model year 2014 Huffy TR 745 and TR-S 740 bicycles with 27.5-inch wheels. "Huffy" is on the downtube of the frame of both bicycles and model name TR 745 or TR-S 740 is on the rear portion of the frame. The TR 745 has a green frame with model number 26504M on the bottom of the frame near the pedals. The TR-S 740 has a white frame and model number 26604M on the bottom of the frame near the pedals.

Bicycles that have a green dot on the inside of the quick release lever are not included in this recall. The bicycles, manufactured in China, were sold at Walmart.com, Sears Puerto Rico and The Northwest Company (Cost U Less) from September 2014 through May 2015, for between \$250 to \$370. Consumers should stop using the bicycles immediately and contact Huffy for a free replacement quick release lever for the front wheel. Consumers may

contact Huffy toll-free at 888-366-3828 from 8 a.m. to 8 p.m. (ET) Monday through Friday, email at Service@Huffy.com or online at www.huffybikes.com and click on "Recalls" at the bottom of any page.

MINI BIKES RECALLED BY BAJA MOTORSPORTS DUE TO FALL AND CRASH HAZARDS

About 4,600 Mini bikes have been recalled by Baja Inc. d/b/a Baja Motorsports, of Anderson, S.C. The front fork can separate from the wheel, posing fall and crash hazards to riders. This recall involves Baja Motorsports gas-powered mini bikes manufactured during November 2014 and December 2014. The recalled mini bikes have a black frame with a black padded seat, a storage tank and fenders that are camouflage, side reflectors, a headlight and a tail light. A decal with model number "Baja Warrior 200" inside a circle with wings attached is on both sides of the storage tank. The date of manufacture is printed on the bottom right of the Vehicle Emissions Control Information label in the MM/YY format. The label is attached to the front side of the engine. The company has received 22 reports of the front forks separating from the wheel, including 11 reports of minor injuries.

The motorsports were sold exclusively at Tractor Supply Company stores from February 2015 through August 2015 for about \$650. Consumers should immediately stop using the recalled mini bikes and contact Baja Motorsports to schedule a free repair. Contact Baja toll-free at 888-863-2252 from 8 a.m. to 5 p.m. ET Monday through Friday, or online at www.bajamotorsports.com and click on Safety Information for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Mini-Bikes-Recalled-by-Baja-Motorsports/>

RECARO RECALLS CHILD CAR SEATS BECAUSE TOP TETHER CAN COME LOOSE

Recaro Child Safety has recalled more than 173,000 car seats in the U.S. because the top tether can detach from the seat in a crash. The recall affects ProRide and Performance Ride seats made before June 9, 2015. Recaro says the seat shells can crack or come loose from the main shell during a crash, increasing the risk of injury. The problem was discovered in testing by the National Highway Traffic Safety Administration (NHTSA). The company says no injuries have been reported.

Recaro will send owners new webbing with instructions on how to secure the seats. The recall was expected to begin this month. Last week the government urged parents to register car seats with the manufacturer so they can get quick notification of recalls.

**CYCLING SPORTS GROUP RECALLS
CANNONDALE MOUNTAIN BICYCLES DUE TO
FALL HAZARD**

Cycling Sports Group Inc., of Wilton, Conn., has recalled about 23,000 Cannondale mountain bicycles with OPI stem/steering tubes. The OPI stem/steering tube assemblies can fail, posing a risk of injury from a fall. Consumers should immediately stop using the recalled bicycle and take it to the nearest authorized Cannondale dealer for a free repair. Cannondale dealers will fit a locking reinforcement wedge assembly inside the OPI stem/steering tube and replace the clamp bolts. This recall involves all model year 2011 through 2015 Flash, FSi, F-4, F-5, F-29, Lexi, RZ, Scalpel and Trigger Cannondale mountain bicycles, with OPI stem/steering tube assemblies "OPI" is printed diagonally across the stem/steering tube in black letters.

The bicycles were sold at authorized Cannondale dealers nationwide from July 2010 to July 2015 for between \$2,000 and \$10,000. Contact Cycling Sports Group at 800-BIKE-USA (800-245-3872) from 9 a.m. to 6 p.m. ET Monday through Friday, by email at custserve@cyclingsportsgroup.com or online at www.cannondale.com and click on "Recalls" under the Recalls & Safety link at the bottom of the page. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Cycling-Sports-Group-Recalls-Cannondale-Mountain-Bicycles/>.

**BED BATH & BEYOND HAMMOCK STANDS
RECALLED BY PRIDE FAMILY BRANDS DUE
TO FALL HAZARD**

About 13,900 Destination Summer Hammock Stands have been recalled by Pride Family Brands, Inc., of Fort Lauderdale, Fla. Z-shaped hooks that attach the hammock to the hammock stand can bend or break, resulting in a consumer falling to the ground. The recalled hammock stand was sold under the Bed Bath & Beyond Destination Summer private label. The bronze-colored heavy gauge steel hammock stand with enamel finish measures 15 feet long by 3.5 feet wide by 4 feet high. The

company has received 13 reports of the z-shaped hooks bending or breaking, resulting in consumers falling to the ground and injuring various body parts.

The stands were sold exclusively at Bed Bath & Beyond stores nationwide and online at www.bedbathandbeyond.com from March 2014 through July 2015 for about \$100. Consumers should immediately stop using the product, dispose of the Z-shaped hooks and contact Pride Family Brands to obtain a free set of heavier-gauged, S-shaped replacement hooks. Contact Pride Family Brands toll-free at 855-612-9800 from 9 a.m. to 4 p.m. ET Monday through Friday or online at www.bedbathandbeyond.com and click on "Safety & Recalls" at the bottom of the page. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Bed-Bath-and-Beyond-Hammock-Stands-Recalled-by-Pride-Family-Brands/>

**PRESTONE PRODUCTS RECALLS WINDSHIELD
DE-ICER AND ICE AND FROST SHIELD DUE
TO FAILURE TO MEET CHILD RESISTANT
CLOSURE REQUIREMENT**

Prestone Products Corporation, of Lake Forest, Ill., has recalled 4.1 million Prestone® Windshield De-Icer and Prestone® Ice & Frost Shields. The trigger spray assembly can be removed from the De-Icer and Frost Shield container. The product contains methanol and ethylene glycol. Children may gain access to the product by removing the trigger assembly, posing a risk of poisoning. Always keep all products that contain hazardous chemicals out of reach and sight of children. Consumers should inspect the bottle to see if the trigger assembly can be removed by twisting the neck shroud counter-clockwise. If the trigger assembly can be removed, consumers should contact Prestone to receive a new replacement trigger assembly that, once engaged, cannot be removed.

This recall involves two products: Prestone Windshield De-Icer and Prestone Ice & Frost Shield. The Windshield De-Icer (SKU AS-246) is used to melt ice on vehicle windshields and windows. The De-Icer was sold in a clear yellow 32-ounce trigger spray plastic bottle with a black tip on the nozzle. The Prestone Ice & Frost Shield (SKU AS-247) is used to reduce morning frost, light ice and snow on vehicle windshields, windows and wiper blades. The Frost Shield was sold in a clear yellow 32-ounce trigger spray plastic bottle with a yellow trigger pull. The SKU

number is printed on the bottom left of the back label.

They were sold at AutoZone, Kroger, Meijer, O'Reilly's, Pep Boys and Walmart, online at www.Amazon.com, and other retailers from September 2011 through August 2015 for between \$3 and \$11. Contact Prestone information center at 800-890-2075 from 8 a.m. to 4:30 p.m. ET Monday through Friday or online at www.prestone.com and click on "De-Icer and Frost Shield Recall" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Prestone-Products-Recalls-Windshield-De-Icer-and-Ice-and-Frost-Shield/>

**TECHNICAL CONSUMER PRODUCTS RECALLS
CONNECTED BRAND DOWNLIGHTS DUE TO
ELECTRICAL SHOCK HAZARD**

About 24,400 LED Downlights for Recessed Cans have been recalled by importer/distributor Technical Consumer Products Inc., of Aurora, Ohio. The internal wiring in the LED downlights can contact the downlight's metal trim, posing a shock hazard to consumers. This recall involves Connected by TCP 5-inch and 6-inch LED Downlight retrofits for recessed cans. These replacement downlights are white and produce a soft white (2700 Kelvin) or bright white (5000 Kelvin) color temperature. Affected units have item number "CD611LC" and the date code printed directly on the black base of the lamp. Consumers will need to shut off power to the lights and disengage the lamp to check the item number and date code. "Connected automated home lighting system" is printed on the product packaging, along with the item number, UPC code and date code.

The cans were sold at The Home Depot stores and electrical distributors nationwide and online at www.Amazon.com from June 2014 through June 2015 for about \$35. Consumers should immediately contact TCP to receive a free replacement lamp with installation instructions. Consumers should not touch the lamp while it is powered. Contact Technical Consumer Products at 800-397-2864 from 8 a.m. to 6 p.m. ET Monday through Friday, by email at connected@tcpi.com, or online at www.tcpi.com and click on "Recall" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Technical-Consumer-Products-Recalls-Connected-Brand-Downlights/>

PHILIPS RECALLS HALOGEN BULBS DUE TO LACERATION AND BURN HAZARDS

About 370,000 Halogen Bulbs have been recalled by Firstech Lighting Corporation, of Shenzhen, China. The lens of the bulb can shatter in the lamp or the lens can fall and shatter, posing a laceration and burn hazard. This recall involves Philips 60W PAR 16 120V halogen bulbs manufactured from November 2013 to March 2015. Date codes that represent the month and year of production are painted on the bulb glass along with "PHILIPS Halogena PAR 16," "China" and "60W/120V." Philips has received 13 reports of the lens of the bulb shattering, including five reports of property damage totaling about \$700 and two laceration injuries.

The bulbs were sold at Home Depot stores and professional distributors nationwide and online at www.amazon.com from November 2013 through March 2015 for about \$10. Philips Lighting North America Corporation, of Somerset, N.J. Consumers should immediately stop using these recalled bulbs, remove them from any fixtures and contact Philips to request packaging materials and instructions for returning the recalled bulbs at no cost. Philips will provide free replacement bulbs. Contact Philips Lighting North America Corporation at 800-239-6587 from 9 a.m. to 5 p.m. ET Monday through Friday, email at halogenlamp@philips.com and online at www.philips.com/recall and select "United States/English" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Philips-Recalls-Halogen-Bulbs/>

TOUCHLESS KITCHEN FAUCETS RECALLED BY LOTA DUE TO FIRE AND BURN HAZARDS

About 4,500 Glacier Bay and Sch n kitchen faucets have been recalled by Lota USA, of Los Angeles, Calif. The battery box used to power the faucet's sensor can short circuit, overheat and/or melt, posing fire and burn hazards to consumers. This recall involves Glacier Bay and Sch n brand touchless kitchen faucets that allow the user to wave a hand in front of a sensor to start and stop the flow of water, a pull-down sprayer head with a white LED light and a single handle to manually turn the water on and off. The touchless feature is powered by four 1.5V batteries installed into a battery box connected to the faucet.

The Glacier Bay faucets include a matching soap dispenser. Glacier Bay is printed on the base of the Glacier Bay faucets. Schön is printed on the base of the Schön faucets. The Glacier Bay faucets were sold in chrome, Mediterranean bronze and stainless steel. The Schön faucets were sold in chrome and stainless steel. The model number and the manufacturing date are printed on the faucet's black piping that connects the faucet to the kitchen's water pipe under the sink. Manufacturing dates are the YY-MM-DD format, e.g. 14-10-29 was manufactured on October 29, 2014. The company has received six reports of the faucet's battery box overheating, melting and/or smoking, including one report of a fire in the box and one report of a burn to a consumer's thumb.

The kitchen faucets were sold exclusively at The Home Depot stores nationwide and online at www.homedepot.com from March 2015 through May 2015 for about \$225. Consumers should immediately unplug and remove batteries from the faucet's battery box and contact Lota USA for a replacement battery box for the faucet. Contact Lota USA/Parts Helper toll-free at 877-580-5682 Monday through Friday between 7 a.m. and 7 p.m. ET, on Saturdays between 7 a.m. and 2 p.m. ET, or online at www.lotausa.com and click on "Recall" or at www.homedepot.com and click on "Product Recalls" at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Touchless-Kitchen-Faucets-Recalled-by-Lota/>

FUJITSU AMERICA RECALLS BATTERY PACKS FOR FUJITSU NOTEBOOK COMPUTERS DUE TO FIRE HAZARD

About 300 Fujitsu notebook computer battery packs have been recalled by Fujitsu America Inc., of Sunnyvale, Calif. The battery packs can overheat, posing a fire hazard. This recall involves Fujitsu lithium ion battery packs sold or provided as replacement battery packs for the following Fujitsu notebook computers: Celsius H720 and LIFEBOOK E752, P701, P702, P770, P771, P772, S752, S762 and T580. The battery packs were also sold separately. The black battery packs measure about 8 inches long, 2 inches wide and about 0.8 inches high. Model number CP556150-1 including all serial numbers, and model number CP556150-2 with serial number range Z120102 through Z120512 are included in this recall. The model and serial numbers are printed on the white battery label. The notebook computer's

model number is printed on a label on the bottom of the notebook. Fujitsu has received three reports of the battery packs catching fire, including two in Japan and one in China and causing fire damage to rugs, bedding, a desk and other furniture. No injuries have been reported.

The battery packs were sold at online at www.shopfujitsu.com and other Web retailers from August 2012 through July 2015 for about \$150. Consumers should immediately turn off their Fujitsu notebook computer, remove the battery pack and contact Fujitsu for a free replacement battery pack. Consumers can continue to use their Fujitsu notebook computer without the battery pack by plugging in the AC adapter and power cord. Contact Fujitsu at 800-838-5487 from 7 a.m. to 7 p.m. CT Monday through Friday or online at www.fujitsu.com/us and click on "Important Announcement: Voluntary Battery Recall and Replacement" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Fujitsu-America-Recalls-Battery-Packs-for-Fujitsu-Notebook-Computers/>

MIWORLD ACCESSORIES RECALLS PLUG-IN WALL CHARGERS FOR IPHONES DUE TO FIRE HAZARD

About 3,200 USB Cord & Wall Chargers for iPhone 5/5S has been recalled by MiWorld Accessories LLC, of New York. The chargers can overheat and catch fire while in use, posing a fire hazard. This recall involves wall chargers with USB cords that are used to charge the iPhone 5 and 5S. The chargers have a geometric print in mint green and peach colors. Style numbers CRGT-003 or CRGT-004 are printed on the UPC sticker on the back side of the package. "Charlotte Russe" and "USB Cord & Wall Charger for iPhone 5/5S" are printed on the packaging. There has been one report of the charger catching on fire. No injuries have been reported.

The chargers were sold exclusively at Charlotte Russe stores nationwide during October 2014 for about \$13. Consumers should immediately stop using recalled chargers and contact MiWorld for a full refund. Contact MiWorld Accessories toll-free at 877-936-6677 between 10 a.m. and 5 p.m. ET Monday through Friday, email support@miworldaccessories.com or online at www.miworldaccessories.com and click on "Product Recall Click Here for More Info" button for more information. Photos Available at <http://www.miworldaccessories.com>

www.cpsc.gov/en/Recalls/2015/MiWorld-Accessories-Recalls-Plug-in-Wall-Chargers-for-iPhones/

KENWOOD RECALLS BLENDERS DUE TO LACERATION HAZARD

De'Longhi America, Inc., of Upper Saddle River, N.J., has recalled about 150 blenders in the U.S. An additional 860 were sold in Canada. The lower blade can break during use, posing a laceration hazard. The recalled blender is the Kenwood Blend-X PRO, BLM800. The glass jar has a glass handle and a black plastic lid and sits on a grey power unit with a motor and user control panel. On the front lower portion of the base is the Kenwood logo on a silver plate. On the bottom of the blender's base, the rating label of recalled units has Type BLM80 and a date code ranging from 14X01 to 15X22 ("X" being any letter) stamped on the label.

The blenders were sold at Bloomingdales, Classic Cook, Frontgate, Good 4u Products, Kitchen Appliances, Kitchen Couture, Kitchen Window, Kitchens With Jazz, Las Cosas Cooking, Le Petite, M & K, Main Street Kitchens, Rolling Pin-Neeve, Ralph's Thyme In The Kitchen, The Cooking Depot, The Cupboard, The Kitchen Clique and online at Bllomingdales.com and frontgate.com from August 2014 through July 2015 for approximately \$400. Consumers should immediately stop using the blender and contact Kenwood to arrange for a free replacement blade assembly kit to be mailed to their homes. Contact Kenwood toll-free at 866-367-4561 anytime or online at www.kenwood-world.com, click on United States and then "Recall Information" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Kenwood-Recalls-Blenders/>

PANASONIC RECALLS METAL CUTTER SAWS DUE TO LACERATION HAZARD

About 165 Metal Cutter Saw Kit and Metal Cutter Combo Kits have been recalled by Panasonic Corporation of North America, of Newark, N.J. The lower blade guard can get stuck in the fully retracted position and not automatically release to cover the blade. The exposed blade poses a laceration hazard and risk of injury. This recall involves the EY3530NQMKW 15.6V Cordless Metal Cutter Kit and the EYC136NQK 15.6V Cordless Metal Cutter Combo Kit. The model EY3530 metal cutter saw is a circular metal cutting saw in black with

yellow accents. "Panasonic" is printed in white letters on the upper wrap around blade guard. "15.6 V" and "Metal Cutter Saw" are printed in black letters with yellow highlights on the blade guard. The recalled metal cutters are about 13 inches long and 6.7 pounds. The model EY136 combo kit includes the EY3530 circular metal cutting saw and also includes a drill and other accessories. The model number and date code are located on the bottom of the lower support, between the battery and the blade. The first number in the date code is the year, the second and the third are the month and the last four digits are the production number.

Date Codes

3120001 through 3120030

4010001 through 4010030

4030001 through 4030030

4080001 through 4080060

5010001 through 5010060

The kits were sold at Industrial distributors nationwide from April 2014 through June 2015 for about \$400 for the saw kit and \$500 for the combo kit. Consumers should immediately stop using the recalled saws and contact Panasonic to receive a return prepaid shipping label. Panasonic will replace the safety guard and return the saws to the consumer. Contact Panasonic Corporation of North America at 800-743-2335 from 9 a.m. to 8 p.m. ET Monday through Friday, 12 p.m. to 5 p.m. ET on Saturday and Sunday or online at www.panasonic.com and click on Product Recall for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Panasonic-Recalls-Metal-Cutter-Saws/>

CABRINHA RECALLS KITEBOARD CONTROL SYSTEMS DUE TO RISK OF INJURY

Cabrinha Kites, a subsidiary of Pryde Group Americas, of Miami, Fla., has recalled about 750 Cabrinha Kiteboard control systems. The point of connection between the kiteboard's trim line and the depower mainline can break and cause a loss of control, posing a risk of injury. This recall involves three TrimLite Cleat™ trim control systems for Cabrinha kiteboards, including the Overdrive 1X with TrimLite, the standard 1X with TrimLite and the Chaos 1X with TrimLite models. A trim line connects the kite to the handle held by the user, allowing the user to control the kite. Only trim lines with white tape below the loop connecting the trim line to the cleat are part of this recall.

The control systems are comprised of a light-weight control bar to control and depower the kite, a set of flying lines and a harness loop/quick release (QR) mechanism. The Overdrive 1X with TrimLite, model number KS6CSODQC, was sold in two sizes 48 cm and 56 cm. The standard 1X with TrimLite control system, model number KS6CSFXQL, was sold in three sizes 42 cm, 52 cm and 60 cm. The Chaos 1X control system, model number KS6CSCSHFX, measures 44 cm. The model numbers are located on a cloth tab attached to the bungee line restrainers at the end of the bars. The firm has received four reports of the kiteboard trim lines breaking. No injuries have been reported.

The kites were sold at watersports stores nationwide from July 2015 through August 2015 for between \$430 and \$530 for the control systems. Consumers should immediately stop using the recalled kiteboard control systems and return them to the place of purchase to have a free replacement part installed. Contact Cabrinha Kites collect at 808-893-0286 from 9 a.m. to 4 p.m. HST Monday through Friday, or online at www.cabrinhakites.com and click on Safety Alert at the top of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Cabrinha-Recalls-Kiteboard-Control-Systems/>

IKEA RECALLS CRIB MATTRESSES DUE TO VIOLATION OF FEDERAL FLAMMABILITY STANDARD

IKEA North America Services LLC, of Conshohocken, Pa., has recalled about 38,400 VYSSA SPELEVINK crib mattresses. VYSSA SPELEVINK crib mattresses were previously recalled in January 2015 and again in May 2015 for entrapment hazards. The crib mattresses fail to meet the federal open flame standard for mattresses, posing a fire hazard. This recall involves IKEA VYSSA SPELEVINK crib mattresses. The recalled mattresses are 52 inches long and 27 1/2 inches wide. The crib mattresses are white with a blue piping around the edge and have an identification label attached to the mattress cover has the date of manufacture in Month-DD-YY format or YY-W format and the VYSSA SPELEVINK model name. Mattresses made after July 2007 also have a federal tag at the foot of the mattress.

The mattresses were sold exclusively at IKEA stores nationwide and online at www.ikea-usa.com from October 2000

through May 2014 for about \$100. Consumers should immediately stop using the recalled crib mattresses and return them to any IKEA store for a full refund. Mattresses that were given in an exchange to consumers for their VYSSA SPELEVINK mattresses in the two previous recalls are included in this recall program. Contact IKEA toll-free at 888-966-4532 anytime or online at www.ikea-usa.com and click on the recall link at the top of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/IKEA-Recalls-Crib-Mattresses-Fire-Hazard/>

THE JAMES TRADING GROUP RECALLS KIDS SPORTS HOODIE DUE TO STRANGULATION HAZARD

The James Trading Group, Orangeburg, N.Y., has recalled about 1,200 Croker Kids Ireland kids hoodies. The sweatshirts have a drawstring around the neck area that poses a strangulation hazard to children. Drawstrings can become entangled or caught on playground slides, hand rails, school bus doors or other moving objects, posing a significant strangulation and/or entanglement hazard to children. In February 1996, the Consumer Products 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 James Trading Group's Croker Kids Ireland Sports Hoodie with model number IR6012 printed on a hang tag attached to the hoodie. The kids hoodie has green fabric on the upper chest and arms with a white diagonal stripe across the torso and a blue panel on the bottom half of the hoodie. "Ireland" is printed in white letters across the chest and there are three Shamrock logos embroidered onto a patch on the bottom left side of the hoodie. The hoodie is 75 percent cotton and 25 percent polyester. The hoodie was sold in kids sizes "2YR" through "12YR" printed on the hang tag and on the tag sewn into the neck of the garment. "Croker" is printed on the inside neck label on the garment.

Irish boutiques and other specialty retail stores nationwide sold the

hoodies as well as online at www.thejtg.com from November 2012 through August 2015 for about \$20. Consumers should immediately take these recalled hoodies away from children. Consumers can remove the drawstring from the hoodie to eliminate the hazard or return it to the place where purchased for a full refund. Contact The James Trading Group at 800-541-5004 from 9 a.m. to 4:30 p.m. ET Monday through Friday or online at www.thejtg.com and click on the Recall tab on the top menu bar for more information. Photos Available at <http://www.cpsc.gov/en/Recalls/2015/The-James-Trading-Group-Recalls-Kids-Sports-Hoodie/>

RAINBOW PLAY SYSTEMS RECALLS PLASTIC YELLOW TRAPEZE RINGS DUE TO FALL HAZARD

Plastic Trapeze rings were recalled by Nylacarb Corporation, of Vero Beach, Fla. The rings can unexpectedly crack or break during use, posing a fall hazard to children. This recall involves only the yellow plastic trapeze rings. They are triangular in shape with rounded sides and have a loop at the top. They measure about 8½ inches high by 6½ inches wide. The yellow rings come as a pair and were connected to a trapeze bar. They were sold either as a separate component or as an attachment on the following Rainbow®-branded residential wooden playsets: All-American, Backyard Circus, Carnival, Fiesta, King Kong, Monster, Sunray, Sunshine and Rainbow. All of these playsets have an aluminum plate located on the front of the wooden swing beam with the following name stamped on it, "Playgrounds America," "Rainbow Play Systems Inc.," or "Sunray Premium Playgrounds." Rainbow has received more than 100 reports of the rings cracking or breaking including 15 with reports of injuries consisting of bumps, bruises, lacerations, concussion and one broken finger.

The rings were sold at Rainbow dealers nationwide from January 2007 through December 2011 and at several mass merchandisers including Sam's Club, Toys R Us and Walmart from January 2009 through December 2009. The playsets retailed for between \$900 and \$10,000. Consumers should immediately stop children from using the recalled rings, contact Rainbow for ring removal instructions, then remove the rings from the playset and receive a \$10 gift card. Contact Rainbow Play Systems toll-free at 888-201-1570 from 8 a.m. to 5

p.m. CT Monday through Friday or online at www.rainbowplay.com and click on the Recall tab located on the top menu bar for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Rainbow-Play-Systems-Recalls-Plastic-Yellow-Trapeze-Rings/>

JURATOYS RECALLS FISHING GAMES DUE TO CHOKING HAZARD

Juratoys U.S. of Fort Lauderdale, Fla., has recalled about 14,000 Sardines Fishing Games and Starfish Fishing Games. In addition, about 200 were sold in Canada. The plastic worm at the end of the fishing pole line can separate, producing small parts that pose a choking hazard to children. Additionally, the small magnet inside the worm can liberate. Swallowing multiple magnets can result in serious internal injury. This recall involves two models of the Juratoys fishing game, Sardines and Starfish. The fishing game user picks up a toy fish using a play fishing rod with a magnetic worm.

The Sardine fishing game has a red and white sardine with a yellow eye painted on a sardine-shaped tin and has product number J08152 printed on the bottom of the container at the tail, and on the back of one of the fish pieces. The Starfish fishing game has an orange starfish painted on a starfish-shaped tin with a product number J08153 printed on the bottom of the container and on the back of one of the fish pieces. Each set comes with two wooden fishing rods and several wooden fish with a magnetic button in the middle. The lid of each tin package contains the word "Janod®."

The company has received about 417 reports of the plastic worm at the end of the fishing pole line separating and releasing small parts, including four reports of children ingesting a small part. No injuries have been reported.

The games were sold online at www.citruslane.com, www.burrogoods.com, www.terratoy.com, www.patinastores.com; numerous retail stores including Patina, Burro, and Terra Toys; and at Juratoys trade shows from April 2015 through August 2015 for approximately \$15 to \$20. Consumers should immediately stop using the recalled games and keep them out of the reach of young children. Consumers should contact Juratoys for a prepaid shipping envelope to return the game. Juratoys will then send a \$15 refund check for the

Sardines game and a \$20 refund check for the Starfish game. Consumers who paid more should include a receipt in the return to receive a full refund. Contact Juratoys U.S. toll-free at 877-271-0440 from 8:30 a.m. to 5 p.m. ET Monday through Friday or online at www.juratoysus.com or www.janod.com and click on the "Product Recall" link at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2015/Juratoys-Recalls-Fishing-Games/>

178,000 CHILDREN'S WATER BOTTLES RECALLED DUE TO CHOKING HAZARD

A children's water bottle sold exclusively at Target is being recalled after reports of potential choking hazards from the lid portion of the product. About 178,000 Zak Designs 26-ounce plastic water bottles were sold nationwide from June 2015 through July 2015. The bottles are 10 inches tall, have a flip-top spout on a twist-off cap with colored inner plastic straws in clear, blue, gray, green, light purple or red. They retailed for about \$10. Affected products are embossed with the mold number 14158 and "Zak Designs" on the bottom of the bottle. Bottles with a black inner straw and a black twist-off cap are not included in the recall.

The Spokane, Wash.-based company received nine reports of the inner plastic straw in the flip-top portion of the cap breaking, including seven reports of plastic fragments spit out by children using the bottle. The company says it hasn't received any reports of injury. The bottles have popular characters on the front, including Captain America, Batman, Minions, My Little Pony, Spiderman, Star Wars aircraft, a Superman logo, Teenage Mutant Ninja Turtles, Thor and Wonder Woman. Consumers are advised to call Zak Designs toll-free at 866-737-1148 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.zak.com.

SALMONELLA-TAINTED CUCUMBERS BLAMED FOR 3 DEATHS

The first case of Salmonella traced to recently sold tainted cucumbers has been reported in Alabama, according to the Centers for Disease Control. Nationally, the outbreak has been blamed for three deaths, 131 hospitalizations and 671 confirmed cases reported in 34 states. The deaths were in Arizona, California and Texas and since last week there have been 113 more reported infections, including one in Alabama.

The tainted cucumbers were imported from Mexico by Andrew & Williamson Fresh Produce Inc. of California. On Sept. 4, Andrew & Williamson, which in 1997 was tied to a hepatitis outbreak linked to frozen strawberries, voluntarily recalled all cucumbers believed to be infected with the particular strain known as Salmonella Poona. A CDC warning said:

Consumers should not eat, restaurants should not serve, and retailers should not sell recalled cucumbers. If you aren't sure if your cucumbers were recalled, ask the place of purchase or your supplier. When in doubt, don't eat, sell, or serve them and throw them out.

The type of cucumbers involved in the recall are called "slicer" or "American" cucumbers. They are dark green and typical length is 7-10 inches. In retail locations, they are usually sold in bulk though some of the infections have been traced back to cucumbers consumed at restaurants. The bacterial infection causes vomiting, diarrhea and abdominal cramping, according to the CDC. It can be particularly dangerous for the very young and old, as well as those with other health conditions.

Once again there have been a large number of recalls since the last issue. There were several recalls issued just as this issue was being sent to the printer. While we weren't able to include all recalls in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, or the ones that came in too late to be included in this issue, visit our firm's web site at www.BeasleyAllen.com or our blog at www.RightingInjustice.com. We would also like to know if we have missed any other significant recall that involve 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.

XXI. FIRM ACTIVITIES

BEASLEY ALLEN LEGAL CONFERENCE SET FOR NOV. 12-13 IN MONTGOMERY

The 2015 Beasley Allen Legal Conference & Expo will take place next month in Mont-

gomery, Ala. We believe this to be the premiere annual event for Alabama lawyers in private practice. More than 1,500 lawyers are expected to attend the two-day conference on Nov. 12-13 at the Renaissance Montgomery Hotel & Spa at the Convention Center. This will be the largest gathering of its kind in the state, and one of the largest legal conferences in the nation.

We have a variety of speakers, including lawyers from Beasley Allen, and a number of special guest speakers who are political and community leaders. Attendees will learn about emerging areas of litigation. They will also find out how to examine potential claims and to evaluate their potential. There will be a great deal of employees placed on that area which we believe will help lawyers and their clients.

Lawyers who attend the conference can earn a full 12 hours of Continuing Legal Education (CLE) credits, certified by the Alabama State Bar. The event also provides a legal services expo where conference attendees can visit with a limited number of the nation's top legal service providers. This is a great place to learn about the leading products and services that will help enhance and support your litigation efforts.

Another valuable benefit of attending the conference is the chance to network with other lawyers from all over the state. If you are a new lawyer or if you have an established practice, are part of a large firm or operate a single-attorney practice, you will learn a lot from talking to your colleagues. This is the time to build relationships that will help you grow your practice.

The best part is that all of this is completely free and open to all Alabama lawyers in private practice. The event includes breakfast, lunch and a dinner reception on Thursday, and a special prayer breakfast on Friday morning, an event that always features an inspirational speaker. We appreciate our sponsors who will help make this conference possible and a success. This year's platinum sponsors are Jackson Thornton Valuation and Litigation Consulting Group from Montgomery, and Freedom Reporting, Inc. from Birmingham.

This is the ninth year our firm has hosted this conference. We are excited about meeting lawyers from around the state and learning about how we can all work together. Lawyers who are on our email list should have already received information about the conference. Registration for the conference will open on Monday, October 12. Visit our conference registration website at expo.beasleyallen.com on that date to reserve your spot. All of us at Beasley Allen look forward to seeing you at the conference.

SEAT CHECK FOLLOW UP REPORT

I mentioned a few months back that our law firm was hosting the sixth annual Seat Check Saturday event in conjunction with National Child Passenger Safety Week. The event gives parents and caregivers an opportunity to ensure their child safety seats are properly installed in their vehicles. Seat Check Saturday was held at The Shoppes at EastChase, whose owners have graciously allowed us to set up there year after year.

The reason we like to bring in certified technicians and host this event is 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. Safety seats, booster seats and seat belts are required in all 50 states and the District of Columbia and our territories 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. My hope is that those parents who have taken the time to visit one of these events learned how to properly fit and install their child's seat so that they are safe.

Mike James, Alabama Statewide Child Passenger Safety Coordinator as well as other certified technicians were on site to instruct parents and caregivers. For information about a seat check event or training near you visit seatcheck.org. you can get more information from Helen Taylor at 800-898-2034 or by email at Helen.Taylor@beasleyallen.com.

XXII. SPECIAL RECOGNITIONS

GRANT ENFINGER HAS HIS 6TH ARCA WIN AT SALEM

We are pleased to report that Grant Enfinger continues his "winning ways." When Grant's car stopped on pit road early in last month's Federated Car Care ARCA Fall Classic at Salem Speedway, it appeared any hopes of him capturing a victory were also stopped. But Grant, with extremely quick-thinking—with a crew member searching under his hood for the problem—checked the kill switch, flipped it on and his car fired. "I guess I hit the kill switch, which is crazy," Enfinger said in victory lane. "We've had a lot of really silly stuff happen this year. I felt like we were going to sit there and go 20 laps down. Finally, I bumped the kill switch again and it fired right up."

Grant's crew pulled everyone off the car and he left pit road just before the pace car

made it around, thus keeping him from going a lap down. He used a late pit stop to take his four fresh tires and sailed to victory lane. Ken Schrader finished second, Sellersburg's Will Kimmel was third and Tyler Dippel from New York was fourth. Chase Briscoe from Mitchell, Ind. was fifth.

Grant's win was his sixth of the 2015 season and he will win the ARCA driver point standings, which is great news. Grant, who has led the series point standings all season, had this to say about his win after Salam Speedway:

It's crazy how it happened. We had a car from about 20 laps in that seemed like it could win the race. It seemed the longer it went on tires the better the car was than everyone else. We took four tires. At that point of the race, for the cars on the lead lap, I think we were the only one on fresh tires. It was a crazy race, but that's nothing different than we always see at Salem. I feel like we had the car to beat on the long runs.

Winning the ARCA driver point standings is huge for Grant. All of us at Beasley Allen are real proud of Grant and his crew. I believe Grant is one of the best drivers currently on the circuit and I predict he will go on to a bigger stage in the near future.

XXIII. FAVORITE BIBLE VERSES

Leigh O'Dell, a lawyer in our firm's Mass Torts Section, furnished a verse for this issue. I agree with Leigh who says this verse is a good way to start each day.

Through the Lord's mercies we are not consumed, Because His compassions fail not. They are new every morning; Great is Your faithfulness.

Lam. 3:22-23

Chris Glover, a lawyer in our firm who handles Product Liability litigation, furnished a verse this month.

While we were staying for many days, a prophet named Agabus came down from Judea. And coming to us, he took Paul's belt and bound his own feet and hands and said, "Thus says the Holy Spirit, 'This is how the Jews at Jerusalem will bind the man who owns this belt and deliver him into the hands of the Gentiles.'" When we heard this, we and the people there

urged him not to go up to Jerusalem. Then Paul answered, "What are you doing, weeping and breaking my heart? For I am ready not only to be imprisoned but even to die in Jerusalem for the name of the Lord Jesus." And since he would not be persuaded, we ceased and said, "Let the will of the Lord be done"

Acts 21:10-14

Chris urges us to pay attention to the last eight words. "Let the will of the Lord be done." Paul was completely and unconditionally surrendered to the will of God even if it meant he would personally suffer. Paul knew the secret of life's fullest sense of joy, contentment, and peace lie in complete submission to the Father's will. For Paul, nothing else would do. We travel down every avenue in life in search of joy, contentment, and peace only to come up empty handed time and time again. Our search for meaning and purpose in life must begin at the feet of Jesus. Pastor John MacArthur wrote: *The question in salvation is not whether Jesus is Lord, but whether we are submissive to His lordship.*

Soo Seok Yang, a lawyer in our firm's Mass Torts Section, furnished two verses for this issue. Soo Seok says he and his wife like these verses because they teach us about the importance of perseverance and total trust in God. They tell them that there is hope even in suffering, which gives us the power to endure hardships and whatever our circumstances are. Recently, Soo Seok had his sixth anniversary with the law firm. His eldest son started school in the first grade. These events gave him an opportunity to reflect on how things have been in the States.

For the past six years Soo Seok says there have been times of uncertainty and difficulty, and sometimes, it was just simply hard to be patient. However, now he says he can say for sure that it's God who makes our paths straight according to His plan and timing, not ours, and His plan is perfect, and not our own. So Soo Seok says, by these verses, he is humbled again and he gives praise to God who is our only Hope.

Not only so, but we also glory in our sufferings, because we know that suffering produces perseverance; perseverance, character; and character, hope. And hope does not put us to shame, because God's love has been poured out into our hearts through the Holy Spirit, who has been given to us.

Romans 5:3-5

*In all your ways acknowledge Him,
And He will make your paths straight.*

Proverbs 3:6

XXIV. CLOSING OBSERVATIONS

GLOBAL WARMING CONTINUES AS CARBON POLLUTION RISES

I am totally amazed that we have politicians in our country who still deny that there is a very serious global warming problem. Many have taken the “ostrich approach” to the problem. Recent reports reveal the amount of heat-trapping pollution the world spewed rose again last year by 3 percent. Many scientists now say it’s quite unlikely that global warming can be limited to a couple of degrees, which is an international goal. Not surprisingly, the overwhelming majority of the increase was from China, the world’s biggest carbon dioxide polluter.

The United States and Germany, of the planet’s top 10 polluters, were the only countries that reduced their carbon dioxide emissions. Last year, all the world’s nations in combination pumped nearly 38.2 billion tons of carbon dioxide into the air from the burning of fossil fuels such as coal and oil, according to new international calculations on global emissions published last month in the journal *Nature Climate Change*.

It should be noted that’s about a billion tons more than the previous year. More than 2.4 million pounds of carbon dioxide are released into the air every second. Emissions of the key greenhouse gas have been rising steadily. The fact that most carbon stays in the air for a century is of great concern. It is not just unlikely but “rather optimistic” to think that the world can limit future temperature increases to 2 degrees Celsius / 3.6 degrees Fahrenheit, according to the study’s lead author, Glen Peters, who is at the Center for International Climate and Environmental Research in Oslo, Norway.

Three years ago, nearly 200 nations set the 2-degree C temperature goal in a nonbinding agreement. Negotiators have been working at a conference in Doha, Qatar, trying to find ways to reach that target. The only way, Peters said, is to start reducing world emissions now and “throw everything we have at the problem.” Andrew Weaver, a climate scientist at the University of Victoria in Canada, who was not part of the study, had this to say: “We are losing control of our ability to get a handle on the global warming problem.”

In 1997, most of the world agreed to an international treaty, known as the Kyoto Protocol, that required developed countries such as the United States to reduce greenhouse gas emissions by about 5 percent when compared with the baseline year of 1990. But countries that are still developing, including China and India, were not limited by how much carbon dioxide they expelled. Interestingly, the United States never ratified the treaty.

The latest pollution numbers, calculated by the Global Carbon Project, a joint venture of the Energy Department and the Norwegian Research Council, show that worldwide carbon dioxide levels are 54 percent higher than the 1990 baseline. The following are the 2011 figures for the biggest polluters:

- China, up 10 percent to 10 billion tons;
- United States, down 2 percent to 5.9 billion tons;
- India, up 7 percent to 2.5 billion tons;
- Russia, up 3 percent to 1.8 billion tons;
- Japan, up 0.4 percent to 1.3 billion tons;
- Germany, down 4 percent to 0.8 billion tons;
- Iran, up 2 percent to 0.7 billion tons;
- South Korea, up 4 percent to 0.6 billion tons;
- Canada, up 2 percent to 0.6 billion tons; and
- South Africa, up 2 percent to 0.6 billion tons.

Currently, air pollution is killing 3.3 million people a year worldwide, according to another new study. Scientists in Germany, Cyprus, Saudi Arabia and Harvard University calculated the most detailed estimates yet of the toll of air pollution, looking at what caused it. The study also projects that if trends don’t change, the yearly death total will double to about 6.6 million a year by 2050. The study, published last month in the journal *Nature*, used health statistics and computer models. About three quarters of the deaths are from strokes and heart attacks, according to lead author Jos Lelieveld, who is at the Max Planck Institute for Chemistry in Germany.

With nearly 1.4 million deaths a year, China has the most air pollution fatalities, followed by India with 645,000 and Pakistan with 110,000. The United States, with 54,905 deaths in 2010 from soot and smog, ranks seventh highest for air pollution deaths. What’s unusual is that the study says that agriculture caused 16,221 of those deaths, second only to 16,929 deaths blamed on power plants. In the U.S. Northeast, all of

Europe, Russia, Japan and South Korea, agriculture is said in the study to be the No. 1 cause of the soot and smog deaths. Worldwide, agriculture is the No. 2 cause with 664,100 deaths, behind the more than 1 million deaths from in-home heating and cooking done with wood and other biofuels in the developing world.

Dr. Lelieveld said the problem with farms is ammonia from fertilizer and animal waste. That ammonia then combines with sulfates from coal-fired power plants and nitrates from car exhaust to form the soot particles that are the big air pollution killers, he said.

Agricultural emissions are becoming increasingly important, but they are not regulated, said Allen Robinson, an engineering professor at Carnegie Mellon University. Professor Robinson wasn’t involved in the study, but had praise for it. Ammonia air pollution from farms can be reduced “at relatively low costs,” he said. In the central United States, the main cause of soot and smog premature deaths is power plants; in much of the West, it’s traffic emissions.

Source: *Claims Journal*

OUR MONTHLY REMINDERS

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

2 Chron. 7:14

But those who wait on the Lord, shall renew their strength; They shall mount up with wings like eagles, They shall run and not be weary, They shall walk and not faint.

Isaiah 40:31

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

Edmund Burke

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

Isaiah 10:1-2

I am still determined to be cheerful and bappy, in whatever situation I may be; for I have also learned from

experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances.

Martha Washington (1732—1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

Vincent Lombardi

XXV. PARTING WORDS

Growing up in the small town of Clayton, Ala., politics in the state's Capital City seemed a long way off to the two Beasley brothers. It's really amazing that both my

brother and I have had the opportunity to serve the people of Alabama on Goat Hill. My brother, William Martin Beasley, who is known as "Billy," currently serves as a Democratic member of the Alabama State Senate, representing the 28th Senatorial District. Prior to being elected to the Senate in 2010, Billy served three terms in the House of Representatives.

After being encouraged to run for Governor, which he strongly considered, Billy decided instead to run for re-election to the Senate. In 2014, he was elected to his second term in the upper chamber. At the beginning of the 2015 legislative session, Billy served on several committees in the Senate: Agriculture, Conservation and Forestry; Finance and Taxation General Fund; Health and Human Services; and the Rules committee. He is one of the few Democrats left in the Senate.

Billy is also very much a part of the Barbour County business community, working in and operating two separate drug stores. He now operates the Clayton Drug Company and the Clio Drug Company. In addition, Billy also serves as the President of Pratts Station, LLC. His community involvement includes service in the Alabama Pharmaceutical Association, Clayton Rotary Club, Auburn Alumni Association, Barbour County Hospital Board, and on the Board of Directors of the Eufaula/Barbour County Chamber of Commerce. Billy and his wife, Rebecca,

are members of the Clayton United Methodist Church.

A graduate of Auburn University, Billy received his Bachelors of Science in Pharmacy in 1962. After graduation, he served as a Captain in the U.S. Army, assigned to the Medical Services Corp. After discharge, Billy pursued his interest in pharmacy and has made it his career.

I am convinced that if he had been given the same opportunities that I had in politics, Billy would have been elected governor without any doubt. While I never was real good as a candidate, Billy is a natural. He enjoys running for office and then after being elected he works extremely hard in office. Billy represents the best interests of the people in his senate district and that's why he has been an outstanding legislator.

I can say without reservation that my brother is a good man who over the years has voted his convictions. He represents the people who have sent him to Montgomery. Billy told me during the recent special session that he was going to do the right thing regardless of how his votes affected him politically. That type political philosophy may be the "rarest of all political birds" in the business of politics these days. I am extremely proud of Billy and very thankful that God has blessed me to have him as my brother.

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218 COMMERCE STREET (36104)
POST OFFICE BOX 4160
MONTGOMERY, ALABAMA 36103-4160
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TOLL FREE
(800) 898-2034
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