



THE  
**JERE BEASLEY REPORT**

JANUARY 2016

# Beasley Allen

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

*helping those who need it most since 1979*

Distributed to over 40,000 subscribers each month

**BeasleyAllen.com**

# I. CAPITOL OBSERVATIONS

---

## **IMPORTANT WHISTLEBLOWER CASE SETTLED**

Our law firm, with the cooperation of the U.S. Department of Justice (DOJ), has settled an extremely important whistleblower lawsuit against U.S. Investigations Services, Inc. (USIS), a private government contractor. USIS, formerly the federal government's largest provider of security background checks, blatantly violated the False Claims Act. Larry Golston and Dec Miles represented Blake Percival, a former USIS employee, in the case. Mr. Percival filed a whistleblower complaint in 2011 alleging that USIS violated the FCA in performing a contract with the Office of Personnel Management (OPM) to perform background investigations of federal employees and those applying for federal service. Obviously, this dealt with very sensitive matters relating to national security.

The lawsuit filed on behalf of Mr. Percival alleged that USIS knowingly conducted flawed investigations of individuals seeking security clearances. Beginning in at least March 2008 and continuing through at least September 2012, USIS management devised and executed a scheme to deliberately circumvent contractually required quality reviews of completed background investigations in order to increase the company's revenues and profits.

USIS acknowledged that it was hired by the U.S. Government to conduct background checks for Edward Snowden, who leaked NSA surveillance documents to the public. USIS also performed the security background check for Aaron Alexis, a technology contractor who shot 12 people to death at the Washington Navy Yard last year. The Snowden and Alexis cases drew the USIS's work, or lack thereof, into the national spotlight and underscored the most serious allegations made by Mr. Percival.

Specifically, Mr. Percival and the United States alleged in the lawsuit that USIS engaged in a practice referred to internally as "dumping" or "flushing," which involved releasing cases to the Office of Personnel Management as complete when in fact investigations on individuals were either not complete or no substantive investigation had even been performed at all. Approximately 40 percent of all USIS security background checks—at least 665,000 in total—involved dumping/

flushing, which resulted in individuals receiving security clearances for positions for which they were not properly vetted.

The government joined the lawsuit in 2013. However, in the spring of last year, Altrigrity, the parent company of USIS, filed for bankruptcy. That made it much more difficult for the government to recover all that the company owed and for Mr. Percival to receive a whistleblower reward. Under the whistleblower provisions of the False Claims Act, Mr. Percival, as a whistleblower, is entitled to receive up to 30 percent of any money the government recovers. This is both an incentive and a reward for the tremendous sacrifices—both personal and professional—whistleblowers often make by reporting the fraudulent conduct by governmental contractors. Mr. Percival was fired by USIS and had a most difficult time financially for more than four years.

Our lawyers, even with the bankruptcy problem, recognized the importance of this case, and fought hard to continue the litigation. The Justice Department agreed to remain a part of the case. Ultimately, USIS agreed to forego at least \$30 million in payments legitimately owed to the company in order to settle the government's allegations.

Mr. Percival is one of the most important whistleblowers in recent history. USIS was a key part of this nation's security procedures, and they were blatantly lying about having completed critical background checks on people who would receive top secret clearances. Mr. Percival put his future and that of his family, as well as years of hard work, on the line when he reported USIS' fraudulent conduct. As a result of what he did, our nation is now much safer. The importance of this man's actions cannot be understated. He is a true American hero!

Being a whistleblower is not something Mr. Percival set out to do. But because of the enormous safety and national security concerns involved, he felt compelled to act. Blake Percival should be commended for his efforts in bringing this national security issue to light. Hopefully, this case will embolden others who are aware of fraud being perpetrated against the Government to come forward and tell their stories and assist the Government to combat fraud by government contractors.

This is one of the most important whistleblower cases in U.S. history. The fact that it involved national security issues made it so. We were honored to have been a part of this very important case.

# II. AUTOMOBILE NEWS OF NOTE

---

## **GM ISSUES FINAL IGNITION SWITCH COMPENSATION FUND REPORT**

General Motor's Compensation Claims Resolution Fund has made its final report. All but a dozen families whose loved ones perished in accidents linked to General Motors' defective ignition switches have accepted a final payout from the fund set up last year by GM to compensate victims. This brings total payouts to \$595.5 million. According to the report pub-

## IN THIS ISSUE

---

I.	Capitol Observations . . . . .	2
II.	Automobile News Of Note . . . . .	2
III.	A Report On The Gulf Coast Disaster . . . . .	6
IV.	Purely Political News & Views . . . . .	7
V.	Legislative Happenings . . . . .	7
VI.	Court Watch . . . . .	7
VII.	The National Scene . . . . .	9
VIII.	The Corporate World . . . . .	9
IX.	Whistleblower Litigation . . . . .	11
X.	Product Liability Update . . . . .	13
XI.	Mass Torts Update . . . . .	15
XII.	Business Litigation . . . . .	16
XIII.	An Update On Securities Litigation . . . . .	17
XIV.	Insurance and Finance Update . . . . .	17
XV.	Premises Liability Update . . . . .	18
XVI.	Workplace Hazards . . . . .	18
XVII.	Transportation . . . . .	19
XVIII.	Environmental Concerns . . . . .	21
XIX.	Update On Nursing Home Litigation . . . . .	23
XX.	An Update On Class Action Litigation . . . . .	24
XXI.	The Consumer Corner . . . . .	25
XXII.	Recalls Update . . . . .	30
XXIII.	Firm Activities . . . . .	35
XXIV.	Special Recognitions . . . . .	36
XXV.	Favorite Bible Verses . . . . .	38
XXVI.	Closing Observations . . . . .	38
XXVII.	Parting Words . . . . .	39

lished online last month by the fund's administrator, of the 4,343 claims received, the fund approved and settled 399.

This is the fund's final report before winding up operations. The fund run by widely acclaimed compensation fund expert Ken Feinberg said 91 percent of proposed awards were accepted by the victims. That included all 124 death claims, as well as 16 of 18 serious injury claims. At press time only one personal-injury claimant remains undecided about whether to accept GM's compensation offer. That offer will expire on Jan. 6.

GM set up its fund in June of 2014. Victims who settled claims through the compensation fund waived their right to file lawsuits or seek punitive damages from GM. The total payout from the fund fell just below the \$600 million that GM had set aside to resolve the claims. But the automaker's total costs related to its ignition switch defect is said to have exceeded \$2 billion. That number includes the \$900-million settlement reached with the U.S. government for its mishandling of the deadly design defect problem, which GM intentionally concealed from federal regulators for a decade.

The defective ignition switches affected 2.6 million vehicles made in the U.S. from 2003 through 2011. GM continually covered up the problem. The automaker even silenced whistleblowers who voiced concerns about the defect for years. The findings in the Melton case in Georgia exposed GM's massive deceit and that forced GM to finally issue a long-overdue recall on Feb. 13, 2014. As we have written previously, the defect allowed the ignition switch to inadvertently shut the engine off with the vehicle in motion, resulting in a loss of power steering, anti-lock brakes, and airbag protection.

GM's settlements included 128 claims involving incidents that occurred before the company filed bankruptcy in June 2009, later emerging as a so-called "New GM." GM contended it was not legally obligated to settle those claims, but it elected to do so and set up the fund. The carmaker's ethical standards came under close scrutiny and for good reason. Our firm's experience with the Compensation Fund was generally very good. I have tremendous respect for Ken Feinberg, Camille Biros and their staff.

While the payouts bring the fund to a close, GM still faces hundreds of lawsuits filed by victims and families harmed by the defective ignition switches. Those Plaintiffs opted to pursue their claims through litigation and opted out of the compensation fund. Therefore, GM is far from done with litigation over the faulty

ignition switches. Hundreds of personal injury and death lawsuits are pending in U.S. District Court in New York. Our firm has several pending lawsuits that were not submitted to the fund and are in state courts awaiting a trial date.

Sources: General Motors Ignition Compensation Claims Resolution Facility; *The Detroit News* and Reuters

### **SPECIAL MASTERS APPOINTED IN GM IGNITION-SWITCH SETTLEMENT**

U.S. District Judge Jesse M. Furman has appointed two Louisiana-based lawyers as special masters to oversee all aspects of another settlement fund agreed to in September by General Motors and a group of drivers in the ongoing multidistrict litigation (MDL) over injuries related to the automaker's faulty ignition switches. Judge Furman appointed Daniel J. Balhoff and John W. Perry Jr. of Perry Atkinson Balhoff Mengis Burns & Ellis LLC as joint special masters.

These two lawyers are charged with creating a settlement framework, evaluating claims and establishing dollar amounts in the more than 1,380 death and injury lawsuits that GM agreed to resolve with drivers in a "memorandum of understanding" that the company announced in September. We are told that the payoff will be for no more than \$575 million. Judge Furman has approved the establishment of this settlement fund.

The automaker announced on Sept. 17 that it had resolved more than half of all death and personal injury lawsuits in the massive ignition switch MDL, as well as a separate shareholder class action that was filed in a Michigan federal court. GM hasn't disclosed the individual value of each settlement, but only that it would "record a charge of \$575 million in the third quarter." The MDL still includes economic loss suits, as well as 370 injury suits and 84 death suits that are currently pending in New York federal court under Judge Furman.

Source: Law360.com

### **UPDATE ON THE ONGOING VOLKSWAGEN LITIGATION**

Volkswagen announced on Dec. 17, 2015, that it was hiring Ken Feinberg to devise a claims resolution plan for VW diesel owners affected by the cheat device scandal. Feinberg is one of the nation's top compensation experts, having recently handled claims programs stemming from the General Motors ignition switch scandal and the BP PLC Deep-

water Horizon disaster. I am confident that Ken has the ability to craft a fair and efficient compensation payment plan for owners of the affected diesels.

Based on our firm's past history with Ken Feinberg, I believe his selection was a smart move on behalf of the automaker, very likely to be beneficial to both consumers and VW. Lawyers in our firm have worked with Ken on a number of high-profile cases. He recently completed his work as head of the General Motors Ignition Compensation Claims Resolution Facility, where he oversaw the processing of thousands of personal injury and wrongful death claims submitted by victims and families of persons killed because of GM's defective ignition switches. Ken also administered compensation funds for victims of BP's 2010 Deepwater Horizon oil spill, a case in which Beasley Allen lawyers were actively involved. We represented the State of Alabama and thousands of individual and business claimants located throughout the Gulf Coast Region. We also represented a number of local governmental entities that had claims.

Ken Feinberg has extensive experience with this type of complicated litigation, and he has proven himself to be fair and thorough. I'm pleased that Ken will be handling these claims. I am confident that his work will be good for consumers and also good for the company. Ken is assisted by the very able Camille Biros and a talented staff.

Volkswagen has admitted to writing code into the software of nearly half a million diesel vehicles it sold in the U.S. that turned on pollution controls when it detected the vehicle to be in emissions inspection and shut them off in normal daily use. The Environmental Protection Agency (EPA) estimated the vehicles could emit up to 40 times more nitrogen oxide than allowed by federal law. The automaker has not said how it will fix the problem, but the installation of proper emissions controls will almost certainly translate to slower, heavier vehicle performance. Lawyers from Beasley Allen are joining with other firms to file a nationwide class action lawsuit on behalf of Volkswagen owners.

The Judicial Panel on Multidistrict Litigation convened in New Orleans on Dec. 8 to hear lawyers' arguments concerning which federal court was best qualified to preside over the consolidated class action litigation against VW. The Panel released its findings a week later by issuing a transfer order to the Northern District of California. Recognizing that this controversy touches multiple districts across the United States, the Panel stated, "We are persuaded that, in these circumstances,

the Northern District of California is the appropriate transferee district for this litigation.”

Volkswagen claims that it has been working to engineer a fix for the emissions cheating software. Toward the end of November, Volkswagen announced its Euro fix. The fix in Europe consists of a software update and a slight intake modification for some models. The 2.0-liter engines will receive a software update whereas the 1.6-liter engines will receive a software update as well as a “flow transformer” added in front of the air mass sensor. The “flow transformer” is merely a plastic screen that calms the air entering the air mass sensor, promoting more accurate air volume measurement. This may work for the Euro standards but it’s almost certainly inadequate for the U.S. emissions standards. This is because the current U.S. Tier 2 emissions standards are twice as stringent as Europe’s Euro 5 standards.

An American fix has yet to be announced. With 480,000 vehicles affected in the U.S., the Volkswagen litigation is swiftly heading toward trial and our lawyers are working very hard getting ready for this litigation. On Dec. 2, prior to the Judicial Panel hearing, Clay Barnett and Archie Grubb, lawyers in the firm’s Consumer Fraud and Commercial Litigation Section, made presentations at two separate VW class action update conferences in New Orleans, La. If you need additional information on this litigation, you can contact the two lawyers at 800-898-2034 or by email at [Clay.Barnett@beasleyallen.com](mailto:Clay.Barnett@beasleyallen.com) or [Archie.Grubb@beasleyallen.com](mailto:Archie.Grubb@beasleyallen.com).

Sources: [Motorauthority.com](http://Motorauthority.com) and United States Judicial Panel on Multidistrict Litigation: Transfer Order

#### **VOLKSWAGEN OWNERS SUE BANKS OVER EMISSIONS FAILURES**

There is a class-action lawsuit in Montana by Volkswagen owners that has a different twist. The suit is against JPMorgan Chase & Co., Bank of America Corp., and Wells Fargo & Co. They are seeking to hold the financial institutions responsible for financing vehicles containing the emissions test-cheating software. The Plaintiffs seek rescission of the finance agreements and restitution of the amounts already paid under the agreements. The Plaintiffs further seek to have all members of the class allowed to stop making payments on these auto loans. The Plaintiffs are also seeking injunctive relief to prevent the Defendants from making reports to any credit-reporting

agency concerning withholding of payments by class members.

The lawsuit is premised on a rule enacted by the Federal Trade Commission (FTC) known as the Trade Regulation Rule Concerning the Preservation of Consumers’ Claims. 16 C.F.R. §433.2. This rule (also referred to as the “Holder Rule”) allows Plaintiffs and class members to assert the fraud of Volkswagen against the Defendants. As we all know, Volkswagen has recently been the subject of numerous class actions, news stories, and investigations for installing what is known as a “defeat device” on its automobiles to avoid compliance with EPA standards. The software enabled the vehicles to detect emissions testing and pass emissions standards; however, the vehicles actually emitted more than 40 times the amount of nitrogen oxides allowed by the EPA. It will be most interesting to see how this lawsuit turns out. We will watch it closely.

Source: Law360

#### **15 AUTOMAKERS AND THE FEDERAL GOVERNMENT MEET ON NUMEROUS ISSUES OF CONCERN**

Executives from 15 auto companies met with U.S. Transportation Secretary Anthony Foxx last month to discuss specific industrywide actions that hopefully will improve safety on our highways. They also discussed how to prevent cars from being hacked. The meeting was convened after record numbers of cars have been recalled in the last several years. Secretary Foxx requested that the executives “come to Washington to discuss how they and the department can work together.” Participants were asked to come prepared with suggestions to share, and to work toward “concrete commitments to industrywide safety measures.” Secretary Foxx brought the automakers to Washington to discuss the need for accurate reporting of safety defects, following instances where automakers were fined for being late on reporting potential fatal mechanical flaws to regulators. The following are examples of why this meeting was needed:

- Last month, Japanese air-bag supplier Takata Corp. agreed to a record civil penalty of as much as \$200 million after a National Highway Traffic Safety Administration (NHTSA) investigation into explosions linked to the company’s product that have killed eight people worldwide and caused dozens of serious injuries. The agency said the company engaged in a pattern of mis-

leading regulators and providing selective, incomplete or inaccurate information to automakers and consumers.

- In July, Fiat Chrysler agreed to pay a record \$105 million penalty and take steps to change its actions following a government investigation of the company’s handling of 23 recalls involving more than 11 million cars and trucks. The automaker was also fined an additional \$70 million in December. I will write more on that below.

Cyber security was also a topic discussed at the meeting. Secretary Foxx asked at the meeting how the government and industry can work together to improve cybersecurity. Earlier this year, Fiat Chrysler issued two recalls to fix cybersecurity vulnerabilities, after hackers were able to take control of a Jeep Cherokee using a laptop from a remote location.

Companies represented at the meeting were reported to be Volkswagen AG, BMW AG, Fiat Chrysler Automobiles NV, Ford Motor Co., General Motors Co., Honda Motor Co., Hyundai Motor Co., Jaguar Land Rover Automotive Plc, Kia Motors Corp., Mazda Motor Corp., Mitsubishi Corp., Nissan Motor Co., Subaru of America Inc., Tesla Motors Inc., and Toyota Motor Corp. Hopefully, the meeting was a success. At least it means that Secretary Foxx recognized that there are some serious safety-related problems that demand attention and require a fix.

Source: *Insurance Journal*

#### **FIAT CHRYSLER FINED \$70 MILLION FOR FAILING TO REPORT CRASH DEATHS**

Fiat Chrysler Automobiles (FCA) was fined \$70 million last month after earlier this year telling the National Highway Traffic Safety Administration (NHTSA) about its “significant under-reporting” of key warning information to auto regulators, including reports of deaths and injuries related to its vehicles. NHTSA said that the fines addressed FCA’s admission in September that it had found itself to have under-reported so-called early warning report data, which auto manufacturers are required to submit under the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act of 2000. NHTSA said that it needs such data in order to determine whether there are patterns that reveal defects that warrant recalls.

The fine was included as an amendment to the \$105 million consent order that FCA had entered into with NHTSA in

July, bringing the total amount of its penalties to \$175 million. The July consent order was meant to resolve the agency's investigation of the automaker's handling of some 23 recalls covering more than 11 million vehicles. It was not clear whether that investigation was linked to FCA's under-reporting of accident data. NHTSA Administrator Mark Rosekind had this to say in a statement:

*NHTSA's enforcement actions in recent months have been designed not only to penalize previous actions, but to increase safety going forward. FCA has expressed a desire to use this situation as a stepping stone to a stronger, more proactive safety posture, and NHTSA is ready to work with FCA and the industry as a whole to improve safety.*

FCA didn't report the data, according to the consent order, because of "coding problems" in its early warning reporting system. The technical issues prevented it from learning when the system was updated with new information about accident-related issues, the consent order said. It said also that FCA hadn't updated the system to include newly named U.S. brands including its Fiat and Ram models, according to the consent order. FCA's flawed reporting of early warning data goes back to 2003, according to NHTSA. The agency has targeted four other automakers in the past 14 months for similar early warning data reporting problems, most notably American Honda Motor Co. Inc., which in January was also fined \$70 million.

Source: Law360.com

#### **BMW FINED \$40 MILLION FOR MINI COOPER SAFETY LAPSES**

The National Highway Traffic Safety Administration (NHTSA) has hit BMW North America with a \$40 million penalty for violations of safety standards in its 2014 and 2015 Mini Cooper cars. This is the German automaker's second such penalty in three years. BMW agreed to a consent order that includes a \$10 million fine, \$10 million in spending to overhaul safety procedures and \$20 million in deferred fines if the company fails to comply with the order or commits additional safety violations. U.S. Transportation Secretary Anthony Foxx said in a written statement:

*NHTSA has discovered multiple instances in which BMW failed its obligations to its customers, to the public and to safety. The consent*

*order NHTSA has issued not only penalizes this misconduct, it requires BMW to take a series of steps to remedy the practices and procedures that led to these violations.*

BMW violated requirements to issue a timely recall of Mini Coopers that failed to comply with minimum crash protection standards, to notify owners of recalled vehicles quickly enough, and report the recalls to NHTSA. The penalty follows a \$3 million penalty in 2012 for similar violations.

Source: Law360.com

#### **NHTSA STEPS UP PROBE OF AIR BAG PROBLEMS IN 628,167 JEEPS**

The National Highway Traffic Safety Administration (NHTSA) has launched a deeper investigation into a large number of Jeep Wranglers over the possibility that an electrical problem can prevent driver's-side air bags from deploying on impact. NHTSA is opening an engineering analysis into 628,167 of the SUVs between model years 2007 to 2012. A preliminary investigation launched in June found a total of more than 2,000 complaints over an air bag light that possibly indicated a faulty clockspring in the driver's-side air bag. According to NHTSA, an open clockspring circuit would prevent deployment of the driver air bag.

In response to the agency's initial request for information on the issue, FCA US LLC, (the automaker), identified 1,703 consumer complaints related to the possible defect, six of which claimed an airbag did not deploy in a crash "in which either the air bag warning light was allegedly on or came on after the crash," according to the agency. One of the complaints also alleged injuries as a result of the possibly defective air bag, NHTSA said. FCA also provided the agency with nearly 17,000 warranty claims that resulted in the replacement of the faulty clockspring, many of which took place during an extended warranty program Jeep offered from 2007 to 2011 to fix the issue.

The manufacturer told NHTSA that the replacements were not all related to air bag issues, but were due to noise, cruise control and/or radio operation issues. According to the agency, FCA also noted that the Wrangler's removable roof and door configuration may make it more susceptible to outdoor water/moisture and dust ingress. This engineering investigation comes after FCA had recalled a number of Wranglers in the same model years for a similar clock spring issue on the passenger side. According to NHTSA,

that recall led FCA to redesign the clockspring "to improve its durability and environmental protection." The agency said there was also a redesign of the SUV's steering wheel column shroud.

Hopefully, this new investigation will help NHTSA to understand the "scope, frequency, and consequence of the alleged defect." Certain Jeep Liberty and Grand Cherokee models are also the subject to FCA recalls announced in late October that include nearly 900,000 vehicles over the possibility of inadvertent airbag deployments that have already injured at least seven people.

Source: Law360.com

#### **AN UPDATE ON THE TAKATA AIRBAG RECALLS**

Takata has created a mess and there is no other way to say it. Now in the midst of the largest automotive safety recall in U.S. history, Takata has been hit with a record \$70 million dollar fine from the National Highway Traffic Safety Administration (NHTSA) that could increase to \$200 million if Takata does not comply with NHTSA's recall requirements. On top of that economic hit, Takata is now seeing its biggest customers, such as Honda and Toyota, refuse to use its airbags. Takata's airbags are being blamed for at least eight deaths and numerous injuries. Sadly, these deaths and injuries could have been avoided. It turns out that Takata knew that its airbag inflators were exploding since 2004, but instead of issuing a timely recall, Takata misrepresented and manipulated test data; refused to disclose the defect to auto manufacturers who were purchasing the airbags; and then covered up the defect from being discovered by consumers.

Now that a recall has been issued for 19 million vehicles, Takata is facing an even bigger problem—manufacturing the replacement parts quickly enough to comply with the recall. NHTSA estimates that the initial phase of this recall will not be completed until 2019. Why is it taking so long for Takata to replace parts that it knew were defective more than 10 years ago? Sean Kane, president of Safety Research & Strategies Inc., which examines product hazards, explains that this recall is more complex than other recalls because "It involves multiple manufacturers and a variety of both cars and airbags. Plus, manufacturers allowed it to grow exponentially rather than solve it when they first investigated it." Takata's stalling tactics have created such a backlog of vehicles needing to be repaired that the recall is not doing what it is supposed to do—quickly removing the defect. Instead,

consumers are forced to drive around defective vehicles for months—possibly years—before they can be repaired.

With its biggest corporate consumers jumping ship and leaving the economic future of Takata in question, it remains to be seen whether all vehicles covered in the recall will actually be repaired. Further, with NHTSA's funding being cut by \$15 million per year, these recalls will undoubtedly be difficult to enforce, especially if Takata goes under. Takata's manipulative and deceptive corporate atmosphere has left consumers questioning whether this corporate giant's handling of recalls will be any different than the way it handled the defect in the first place. If you need more information on this matter, contact Stephanie Monplaisir, a lawyer in our firm's Personal Injury/Product Liability Section, at 800-898-2034 or by email at [Stephanie.Monplaisir@beasleyallen.com](mailto:Stephanie.Monplaisir@beasleyallen.com).

Sources: *USA Today* and Bloomberg News

### III.

## A REPORT ON THE GULF COAST DISASTER

---

#### YEAR IN REVIEW FOR THE DEEPWATER HORIZON OIL SPILL LITIGATION

This past year was another defining year in the *Deepwater Horizon* oil spill litigation. The year got off to a big start in January with the Phase III Clean Water Act trial between the Federal Government and BP. As we reported previously, the trial sought to determine the per-barrel penalty under the Federal Clean Water Act. The trial came to a close on Feb. 2, 2015, but at the time the parties still did not know how many barrels of oil would be used to determine the penalty. On Feb. 23, Judge Carl Barbier put that question to rest when he ruled that 3.19 billion barrels of oil had spilled into the Gulf of Mexico from the Macondo well. All that remained to determine the multi-billion dollar fine would be an order on the per-barrel penalty from the Phase III trial.

Meanwhile, the State of Alabama, led by Beasley Allen lawyers Rhon Jones and Parker Miller, along with Assistant Deputy Attorney General Corey Maze, were making significant progress in Alabama's bellwether case against those responsible for the oil spill. As we have reported previously, Alabama filed the first state lawsuit and was the first State selected for trial against BP. BP mobilized an army of

resources dedicated to knocking the case off track. However, due in large part to the efforts of lawyers in our firm, Alabama's case stayed on track, State witnesses performed extremely well in their depositions, and BP's corporate witnesses struggled under intense examination.

Feeling pressure from an imminent Phase III ruling and the impending Alabama bellwether trial, on July 2, 2015, BP, along with the Federal Government and the Gulf States, announced a record \$18.7 billion settlement to resolve all governmental claims against the oil giant for the spill. The settlement represented the largest environmental settlement in United States history. Alabama's portion of the settlement would consist of \$1 billion for economic damages and \$1.3 billion for projects under the Natural Resource Damage Assessment. In addition, our local government entities received good compensation under the settlement. Transocean would later agree to pay Alabama \$20 million for its share of responsibility in the oil spill. All told, these settlements were landmark victories for the Gulf Region.

Finally, private litigants also fared well this year. With BP's appeals to the Fifth Circuit and Supreme Court now resolved, Claims Administrator Patrick Juneau has made tremendous progress in paying businesses and individuals in the Economic and Property Damages Settlement. As this issue was going to print, the Claim Center had made a total of \$6,465,828,667 in payments, with business economic loss payments totaling \$3.811 billion and seafood compensation payments totaling \$1.599 billion. To put this progress in perspective, as of Dec. 30, 2014, the Claims Center had paid \$4,292,978,711 with \$2.330 billion going to businesses and \$1.100 billion going to fishermen. In addition to the BP private settlement, Magistrate Judge Joseph Wilkinson was appointed to allocate the Transocean and Halliburton settlements between the old class (which holds a right of assigned claims from BP) and a new, punitive damages class. The settlements totaled \$1,239,750,000, and once allocated, will represent another large investment of compensation to Gulf of Mexico businesses and individuals.

We are proud of the results our firm has obtained on behalf of our oil spill clients this year. We are also grateful for the trust that so many place in the lawyers and staff from our firm who have worked on the BP litigation. If you need further information on this litigation, contact Rhon Jones or Parker Miller at 800-898-2034 or by email at [Rhon.Jones@beasleyallen.com](mailto:Rhon.Jones@beasleyallen.com) or [Parker.Miller@beasleyallen.com](mailto:Parker.Miller@beasleyallen.com).

#### ANADARKO MUST PAY \$159 MILLION FOR 2010 DEEPWATER SPILL

A Louisiana federal judge ordered Anadarko Petroleum Corp. to pay \$159.5 million for Clean Water Act (CWA) violations stemming from the massive 2010 Deepwater Horizon oil spill, saying the penalty was relatively small because the company was a minority owner of the well and didn't cause the spill. U.S. District Judge Carl Barbier said in his order that the award was an attempt to balance Anadarko's lack of culpability with the seriousness of the historic spill in the Gulf of Mexico in which 11 workers were killed and oil leaked for months. The maximum civil penalty would have been about \$3.5 billion. Judge Barbier said in the order:

*Although this amount [\$159.5 million] is high when viewed out of context, it is only 4.5% of the maximum penalty, and therefore on the low end of the spectrum. The court finds that this amount strikes the appropriate balance between Anadarko's lack of culpability and the extreme seriousness of this spill, considering the purposes of the CWA and § 1321(b)(7)'s civil penalty.*

Anadarko owned a 25 percent interest in the Macondo Well, while BP Exploration & Production Inc. owned a 65 percent interest and operated it. Judge Barbier said the relatively low penalty also reflects the fact that Anadarko has paid \$4 billion to settle compensatory claims stemming from the spill. He said the \$159.5 million penalty is roughly in line with fellow non-operating well minority owner MOEX USA Corp.'s agreement to pay \$90 million as part of a June 2012 consent decree. MOEX owned a 10 percent interest in the well. In addition, the judge said, Anadarko should be able to survive the penalty. The order comes after a penalty phase trial in January and February, followed by post-trial briefing. The government had urged the court to award more than \$1 billion in penalties, while Anadarko argued that it should face "no more than a nominal penalty."

Anadarko was found to be liable for civil penalties under the CWA in February 2012 because it was an owner of the well. That finding was upheld on appeal. Judge Barbier said he settled on the penalty after considering the seriousness of the violation, the economic benefit of the violator resulting from the violations, culpability, other penalties from the same incident, prior violations, attempts to minimize the effects of the discharge, the economic impact of the penalty of the

violator, and other matters “as justice may require.” He noted that the spill was the largest in U.S. history and said that “the seriousness of this violation cannot be overstated.” But Anadarko received only a minor economic benefit from the violations, which has been eclipsed by costs it has since incurred. Anadarko was not culpable for the spill, the court found. He said the responsible parties were Anadarko’s co-owner, BXP, and two of BXP’s contractors.

Source: Law360.com

#### **CONGRESS SEEKS TO PREVENT BP OIL SPILL TAX DEDUCTION**

The worst environmental disaster in our nation’s history has rightfully cost BP billions of dollars in cleanup costs and restitution to the countless individuals and business affected by BP’s misconduct. Unsurprisingly, BP is seeking to claim a major portion of its historic \$20 billion Deepwater Horizon disaster settlement with the states and the Department of Justice as a business expense, which means the company could secure a sizable tax windfall.

Under current law, up to 75 percent of BP’s \$20 billion settlement is tax deductible, which could force taxpayers to cover more than \$5 billion of the settlement’s costs according to two Congressmen. In response to this potential windfall, Congressmen Eliot Engel (D-NY) and Peter Welch (D-VT) introduced the Offending Oil Polluters Act, or H.R. 3760, in an effort to reform federal tax law that allows companies to deduct restitution, reimbursement or compensatory payments from their corporate taxes as an ordinary business expense. While this bill sits before the House Ways and Means Committee, House Democrats also urged Attorney General Loretta Lynch to prevent BP from claiming the settlement as a business expense.

Many businesses certainly consider potential litigation and settlement costs as possible business expenses. However, allowing a corporate giant like BP to reap a windfall from its misconduct and burden the taxpayers with a hefty portion of the bill is not right. Ordinary citizens should not have to pay for BP’s gross negligence. Hopefully, Congress will make sure that doesn’t happen.

Source: Law360.com

## **IV. PURELY POLITICAL NEWS & VIEWS**

---

### ***A LOOK AT THE NATIONAL SCENE***

As the year winds down it appears that Donald Trump, Sen. Ted Cruz and Sen. Marco Rubio will go into 2016 as the only legitimate contenders for the GOP nomination. The other candidates have either faded away or were never able to get their campaigns off the ground. On Dec. 15, I watched the last debates for 2015 on CNN and came away shaking my head over some of the things I heard from persons who want to be president. Jeb Bush finally acted like a viable candidate who actually wants the job, but it may be too late to revive a dead campaign.

During the last debate Donald Trump was even more of the pompous man who has been looking down his nose at all the other candidates for weeks. Trump would be Americans’ worst nightmare if he were to be nominated by the GOP and then somehow elected in the fall. No person could have predicted this time last year that Trump would be leading the pack with Jeb Bush totally out of the picture. Frankly, I don’t fully understand how this man is leading the polls at this juncture. However, I do know that the American people are pretty well fed up with politics as usual in our nation’s capital. They have no confidence in Congress and believe the lawmakers controlled by the super rich and special interests. How things have changed since Bill Clinton left office!

One of the most qualified candidates—Sen. Lindsey Graham—dropped out of the race on Dec. 21. Sen. Graham would have made a very good president. His focus was on national security and he laid out some practical solutions to some very big problems.

### ***THE ALABAMA ELECTIONS***

Things are very quiet in Alabama these days. We have had several presidential candidates coming to the state, including Hillary Clinton, Donald Trump, Ted Cruz and Marco Rubio. Things will definitely heat up after the New Year and college football is over. Bama fans—for good reason—have very little interest in politics at this juncture. Of course, this was written before the Tide’s Dec. 31 meeting with the Spartans of Michigan State.

## **V. LEGISLATIVE HAPPENINGS**

---

### ***THE ALABAMA LEGISLATURE***

The Alabama Legislature will return to Montgomery on Feb. 2 for what will be one of the toughest regular sessions in recent history. The state is as broke as a “haint” and is badly in need of additional revenues. I don’t believe the people of Alabama will tolerate more of what we have seen for years when it comes to properly funding state government. The approach to the problem solving, a form of kicking the same old can down the road with no end in sight, must be changed. Gov. Robert Bentley inherited a very big fiscal mess from the Riley Administration and has tried hard to put things right. This governor will have the opportunity to fix a broken system and hopefully he will be able to get the job done. But it will take the cooperation from the Alabama Legislature. Stay tuned!

## **VI. COURT WATCH**

---

### ***U.S. SUPREME COURT FINDS AUSTRIAN RAILWAY IMMUNE FROM U.S. SUITS***

The U.S. Supreme Court ruled unanimously in early December that an American woman injured in an Austrian train accident cannot sue the railroad in U.S. courts merely because she purchased her ticket online in the United States. The decision is the latest in a series of rulings in which the high court has limited the use of U.S. courts as forums for adjudicating wrongs that took place primarily outside the country. The justices determined that the railway has sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), which governs jurisdiction against foreign sovereign nations. Since the railway was an Austrian national railway, it fell within the protections of FSIA.

An exception to the sovereign immunity provided by FSIA is if an American citizen brings a suit against a foreign nation or entity that is based upon commercial activity that the foreign nation directly or indirectly conducts in the U.S. Carol Sachs, the Plaintiff, was a resident of Berkeley, Calif., who suffered catastrophic injuries when attempting to

board a moving train at a station in Innsbruck, Austria, in April 2007. Those injuries ultimately necessitated the amputation of both her legs above the knee. The U.S. Supreme Court held in a 1993 decision that in order to meet the FSIA's commercial exception the domestic activity would have to form the "gravamen of the complaint" and that "those elements of a claim" would, if proven, entitle a plaintiff to relief. The high court held that Ms. Sachs's claim was not based upon her purchase of the ticket, but on her injury; therefore, her claim did not meet the commercial activity exception.

This trend by the Supreme Court is not a good one. This is only the latest of several U.S. Supreme Court cases unnecessarily restricting the jurisdiction of U.S. courts. It makes sense that if foreign companies profit from business they conduct within the U.S., they should be subject to the courts in this country when that company causes injury to a U.S. citizen. Instead, many victims like Ms. Sachs are left with no remedy and foreign entities are granted total immunity for wrongful acts. That's simply wrong and the high court should recognize it.

Sources: Law 360 and *The National Law Journal*

#### **JUDGE UNSURE WHETHER TO REMAND CHEROKEES' RISPERDAL SUIT**

An Oklahoma federal judge has put off ruling on whether to keep in federal court the Cherokee Nation's mislabeling suit over a Johnson & Johnson subsidiary's antipsychotic drug Risperdal. U.S. District Judge James H. Payne ordered discovery for jurisdictional issues. He rejected Johnson & Johnson's contention that the case involves a federal question, but found that the case may belong in federal court on diversity grounds. Apparently, that question will hinge on whether the Cherokee Nation or the tribe's health and business units incorporated in Oklahoma are the real party in interest. Although the tribe argued that it is not a citizen of any state, Johnson & Johnson told the judge that the proper Plaintiffs to the suit are the tribe's health and business units. Judge Payne wrote in his order:

*If a separate corporate entity, rather than the constitutional entity, is indeed the real party-in-interest, then diversity jurisdiction would likely exist.*

The suit was originally filed by the Cherokee Nation in Sequoyah County Court in April, seeking restitution for the misbranded Janssen Pharmaceuticals Inc.'s Risperdal that the tribe allegedly

purchased. The tribe claims in the suit that the companies failed to provide safety information they had about the drug, including that Risperdal increases the risk of stroke and diabetes in the elderly.

The tribe alleged in its suit that it had bought Risperdal between March 3, 2002, and Dec. 31, 2003, a period during which the companies admitted to misbranding the drug as part of a plea deal that ended the Department of Justice (DOJ)'s criminal case. In that settlement, the companies pled guilty to one misdemeanor count of improperly encouraging prescribers to treat dementia with Risperdal, despite its being approved only to address schizophrenia, when the conduct took place in 2002 and 2003.

Johnson & Johnson removed the case to federal court in July, and the Cherokee Nation filed a motion to remand the case in August. Judge Payne said he was not persuaded by Johnson & Johnson's contention that federal law is at issue in the case. He wrote: "Federal law may possibly, but is not necessarily implicated in this case and does not confer jurisdiction on this court."

The Cherokee Nation is represented by Cherokee Nation Attorney General Todd Hembree and Curtis "Muskrat" Bruehl of the Bruehl Law Firm. It will be most interesting to see how Judge Payne rules on the jurisdictional issue. The case is in the U.S. District Court for the Eastern District of Oklahoma.

Source: Law360.com

#### **CONSUMERS LOSE ANOTHER ROUND TO CORPORATE AMERICA**

The U.S. Supreme Court has made it tougher on consumers who have disputes with huge corporations. Some see it as indication of the corporate takeover of our legal system. The high court handed down another pro-corporate decision in which the requirements imposed by a private company trump state law. The Federal Arbitration Act (FAA) is the reason that corporations are able to get away with this sort of thing. This statute, enacted 90 years ago, was never intended to affect consumer disputes. The FAA requires folks who enter an agreement containing an arbitration clause to go to arbitration. As a result they are not allowed to file a lawsuit in civil court and they have no opportunity to have their case heard publicly before a judge and jury. Instead, parties to the contract are required to present the case before a "professional," known as an "arbitrator," in a closed-door meeting. Unlike a judge,

an arbitrator is not required to follow the law or to be unbiased. It's a totally unfair system that gives the corporate world a huge advantage over ordinary folks.

What is particularly egregious about this system is that when it comes to issues between corporations and consumers, it is the corporation that hires the arbitrator. Quite often, the corporation has an ongoing client-contractor relationship with the arbitrator. This system stacks the deck against consumers. The current case involving a customer of DirecTV originated in California in September of 2008. According to the complaint, DirecTV acted improperly in assessing "early termination fees" (in some cases, as much as \$480) for customers who decided they didn't want the company's service any longer. The service contract contains the infamous "arbitration clause," which reads as follows:

*In the unlikely event we cannot resolve any disputes under this Plan that you [the customer] and we [DirecTV] have, you and we agree to resolve those disputes through binding arbitration or small claims court instead of through courts of general jurisdiction.*

The clause goes on to state that customers can only bring action against the company individually—not as a group. However, at the time Amy Imburgia signed her service contract, DirecTV's service contract included the phrase: "unless the law of your state prevents it." In this case, a California statute bars the use of contracts that unfairly allow one party to escape liability—including those that prohibit class action lawsuits over "adhesion" (non-negotiable) contracts, particularly when such cases involve relatively small amounts.

In 2011, the high court made a ruling in another case, *AT&T Mobility v. Concepcion*, that has an effect on subsequent cases. In that case, a couple sued the telecom giant, asserting that AT&T had engaged in false advertising, stating that free cell phones were included in their wireless plan. As was the case with DirecTV, AT&T's contract required unhappy consumers to submit their cases to arbitration, and prevented them from filing class-action lawsuits. This clause was also in violation of California law. However, when the case came before the U.S. Supreme Court, a majority of the court ruled that federal law, the FAA, took precedent over the California statute. It didn't take DirecTV long to use that ruling in an effort to get the class-action lawsuit against the company dismissed. Shortly after the *Concepcion* decision, corporate counsel for DirecTV argued that it had not

moved to compel individual arbitration because they had believed the clause to be unenforceable under California law.

The Supreme Court ruled that federal law overrides state law—and as a result, consumers will have to accept arbitration. This is only the most recent in a series of rulings that stack the deck against consumers in favor of corporations. It has the effect of eroding the Americans people's faith in the judicial system. Plaintiffs' attorney Harvey Rosenfeld of Consumer Watchdog told the *Washington Post*:

*The Supreme Court has taken away Americans' only right to obtain justice: their day in court. The more the U.S. Supreme Court allows big corporations to evade accountability, the less confidence Americans have in the judicial branch and the rule of law.*

*Justice Ruth Bader Ginsburg wrote a study dissent. She stated in her dissent:*

*It has become routine, in a large part due to this court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no class-action arbitration clauses... [this ruling has] again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts.*

Justice Clarence Thomas also dissented on the grounds that the FAA should not apply to proceedings at the state level. For now, corporate greed continues to rule the day. Termination fees of a few hundred dollars are significant to individual consumers—but such amounts don't amount to much to the giants in Corporate America. Those amounts add up, however—and increasingly, consumers are finding it costlier to pursue such claims than to simply accept their loss. That's what Corporate America is counting on and so far they are winning the battle. That's why congressional races are so important. I wonder why some candidates don't see the arbitration issue as a winning issue.

Source: trofire.com

## VII. THE NATIONAL SCENE

---

### **FORMER NEW YORK ASSEMBLY SPEAKER SILVER CONVICTED ON CORRUPTION CHARGES**

Former New York Assembly Speaker Sheldon Silver was convicted on charges of corruption in early December by a New York jury. They found him guilty of honest services fraud, extortion and money laundering. There were two main issues involved in the litigation. The jury found Silver guilty of collecting nearly \$5 million in referral fees from an asbestos disease research physician in exchange for the doctor sending his patients to Silver's associates at a New York law firm for legal counsel. Additionally, the jury found that Silver was guilty of taking a portion of the money from fees paid to a New York real estate tax law firm by developers Glenwood Management and the Witkoff Group.

The jury agreed with the prosecution's allegations that the developers were involved in lobbying efforts and benefited from action taken by Silver on their behalf in exchange for the fees. In testimony, asbestos disease researcher Robert Taub, who practices at a mesothelioma treatment center at Columbia University and New York-Presbyterian Hospital, denied there was any explicit agreement between himself and Silver. However, records indicate he sent dozens of patients to Weitz & Luxenberg over a period of about 10 years. Silver directed state grants totaling nearly \$500,000 to the mesothelioma treatment program.

The trial is part of an anti-corruption effort by Preet Bharara, the U.S. Attorney of the Southern District of New York. In addition to Silver, Bharara has brought a bribery, extortion and fraud case against former New York Senate majority leader Dean Skelos and his son, Adam. Silver is out on bail and is due back in court on the 10<sup>th</sup> of this month.

Source: Law360

### **SANDUSKY SEX ABUSE SETTLEMENTS TOTAL NEARLY \$93 MILLION**

Penn State has settled with six more victims of Jerry Sandusky, the disgraced former coach at the school. This information comes from a new audit that puts the school's total payout in the child sex abuse scandal at nearly \$93 million. The university's audited financial statements

for the year dated Oct. 30, and which were ended June 30, show \$33.2 million in new payments over claims related to the longtime assistant football coach, who now is in prison. Auditors with Deloitte & Touche LLP, located in Philadelphia, wrote:

*Additional claims could be paid in the future but without having knowledge of the number and nature of such claims the university is unable to predict the outcome of these matters.*

Sandusky is pursuing an appeal while he serves 30 to 60 years in prison on a 45-count child sexual abuse conviction. He recently won a court decision restoring his Penn State pension, which the state retirement system had canceled the day he was sentenced. The audit findings say the school has now paid or agreed to pay 32 separate claims.

Penn State announced in October 2013 it had agreed to pay 26 people \$59.7 million related to the Sandusky scandal. In April, the university board voted 18-6 to authorize Penn State officials to settle additional Sandusky-related litigation after dollar limits were discussed in private. Three former top Penn State administrators who were charged with covering up complaints about Sandusky await an appeals ruling in their effort to get charges dropped against them.

Source: *Claims Journal*

## VIII. THE CORPORATE WORLD

---

### **\$2 BILLION FOREX CLASS SETTLEMENT GETS PRELIMINARY APPROVAL**

A New York federal judge has given her preliminary approval to a \$2 billion settlement between nine banks, including JPMorgan Chase & Co. and Citigroup Inc., and investors who say they were victims of manipulation in the foreign exchange market. U.S. District Judge Lorna G. Schofield said that her initial review of the settlement showed that it was up to the standards necessary to move forward. However, the settlement is still the subject of a required fairness hearing.

This approval comes in spite of fund investors who were unhappy with the settlement. They claim that the settlement unfairly cuts them out. Judge Schofield disagreed, finding that the agreements

raise no obvious reasons to doubt their fairness.

The settlements included in the broad agreement Judge Schofield ruled on came from the lawsuit filed by investors. It was alleged that JPMorgan Chase, Citigroup, Barclays PLC, HSBC Holdings PLC, The Royal Bank of Scotland PLC, Goldman Sachs Group Inc., BNP Paribas SA, UBS AG and Bank of America Corp. engaged in a broad scheme to rig the \$6 trillion foreign exchange market.

The first settlement to be announced came in January when JPMorgan agreed to pay \$99.5 million. Since then, UBS AG, UBS Group AG and UBS Securities LLC settled for \$135 million in March; Bank of America Corp. and Bank of America NA agreed to pay \$180 million in April; and Citigroup and Citibank NA were required to pay \$394 million in May. Barclays agreed to pay \$384 million. HSBC Holdings will pay \$285 million and BNP Paribas agreed to a \$115 million contribution to the settlement funds.

RBS will pay \$255 million and Goldman Sachs will pay \$135 million if the settlement gets final approval. In May, Barclays, Citigroup, JPMorgan, RBS and UBS were part of a broader \$5.6 billion settlement with U.S. and U.K. authorities. Of those five banks, only UBS was able to avoid a guilty plea to criminal charges of alleged foreign exchange manipulation. Each of the class action settlements included a cooperation agreement.

It appears that Judge Schofield has given careful scrutiny to the proposed settlements. The judge asked for details regarding damages to determine whether the \$2 billion combined payout was enough to remedy the violations. The settlement has also gotten the attention of some employee retirement funds that say their claims under the Employee Retirement Income Security Act were not properly addressed in the deal. Even if Judge Schofield provides final approval of the settlement, there is still potentially a long way to go.

The Plaintiffs still have claims outstanding against Morgan Stanley, Credit Suisse AG and Deutsche Bank AG, which were in the original group of banks that were sued. Those Defendants continue to fight the class claims. Japan's Bank of Tokyo-Mitsubishi, Canada's RBC Capital Markets LLC, France's Societe Generale SA and Britain's Standard Chartered PLC were added as additional defendants in July. That brought the number of banks that were sued in the litigation to 16.

The Plaintiffs are represented by David R. Scott, Christopher M. Burke, Kristen M. Anderson, Sylvia M. Sokol, Walter W. Noss and William C. Fredericks of Scott & Scott LLP, and Michael D. Hausfeld, William P.

Butterfield, Reena A. Gambhir, Timothy S. Kearns and Nathaniel C. Giddings of Hausfeld LLP. The case is *In re: Foreign Exchange Benchmark Rates Antitrust Litigation*, which is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

### **\$2.3 BILLION IN LOSSES CLAIMED BY CITIGROUP INVESTORS IN NEW RMBS SUIT**

Pacific Investment Management Co. and other investors have filed suit accusing Citibank NA of ignoring widespread problems with toxic residential mortgage-backed securities (RMBS). The Plaintiffs claim \$2.3 billion in losses in the proposed class action filed in a New York state court. It's alleged that Citibank, in an effort to protect its own business interests, turned a blind eye to pervasive problems in how the underlying loans—allegedly worth more than \$13.8 billion—were written or serviced.

Plaintiffs allege that the bank feared jeopardizing its relationship with loan servicers like Washington Mutual, Lehman Brothers Holdings Inc. and Wells Fargo Bank. The putative class action claims the bank breached contracts and its fiduciary duties as trustee for 25 private-label RMBS trusts from 2004 to 2007. Pacific Investments, Prudential Retirement Insurance and Annuity Co. and other investors are class Plaintiffs in the suit.

The Plaintiffs further allege that Citibank has been the target of government investigations and lawsuits over its allegedly deficient servicing operations. The complaint states:

*The abysmal performance of the trust collateral—including spiraling defaults, delinquencies and foreclosures—is outlined on monthly remittance reports that Citibank, as trustee, publishes and publicly files with the government. Citibank did nothing to protect the trusts and certificate holders, choosing instead to deliberately ignore the egregious events of default for its own benefit and to the detriment of the class.*

PIMCO and other Citibank shareholders previously filed a derivative class action in New York federal court accusing the bank of misrepresenting the health of mortgage-backed securities in some \$17.4 billion worth of pools of loans that the bank trustee. That suit is still pending.

Investors and federal regulators, including the Federal Deposit Insurance Corp. (FDIC), have claimed that, in its role as trustee, Citibank should have spotted

heightened default rates, downgrades and other red flags and forced the sponsors of the securities to buy back faulty mortgages, but it failed to do so. In early September, U.S. District Judge Jesse M. Furman dismissed a large portion of the claims from a derivative class action accusing Citibank of mishandling mortgage-backed securities in more than \$17 billion worth of pooled loans. Judge Furman found that the majority of the loans are not covered by federal law. Later that month, Judge Furman denied Citibank's bid to relate the FDIC's suit over the bank's alleged failure as a trustee for mortgage-backed securities to a second suit accusing the bank of mishandling mortgage-based securities in pooled loans.

PIMCO, Prudential and the other investors filed the latest suit on their behalf and for all current certificate holders of the RMBS trusts at issue. Their complaint seeks, among other relief, unspecified damages. The Plaintiffs are represented by Jeroen Van Kwawegen of Bernstein Litowitz Berger & Grossmann LLP, and Blair A. Nicholas, Timothy A. Delange, Benjamin Galdston, Brett M. Middleton, Niki L. Mendoza and Lucas E. Gilmore of Bernstein Litowitz Berger & Grossmann LLP. The case is in the Supreme Court of the State of New York for the County of New York.

Source: Law360.com

### **DOLE CEO AND OTHER EXECUTIVES TO PAY \$114 MILLION IN MERGER FRAUD SETTLEMENT**

David Murdock, the CEO of Dole Food Co. Inc., and several other executives have reached an agreement to pay investors \$114 million over fraudulent conduct aimed at driving down the company's price before a 2013 take-private deal. A Delaware Chancery judge in August had awarded \$148 million in damages in the case. Murdock will issue a payment to shareholders who held stock in the company during an alleged scheme tied to a go-private deal in which the CEO, who already owned 40 percent of Dole, sought to regain exclusive control of the company at a lower price by selling off businesses and land. This is according to a stipulation of settlement filed in Delaware Chancery Court.

In his August finding that Murdock and General Counsel C. Michael Carter were liable for \$148 million to investors, Vice Chancellor J. Travis Laster wrote that, although the Dole board's merger committee made a Herculean effort to overcome the efforts by Murdock and Carter to keep investors in the dark, the commit-

tee was deprived of information about the company's ability to cut costs and improve income. Therefore, the committee was unable to negotiate on a fully informed basis to reject the merger offer.

The settlement will pay investors \$101 million in damages and \$12.5 million in interest, according to the stipulation of settlement. Murdock and Carter will not be able to appeal the August award. The Defendants also agreed not to oppose the Plaintiffs' attorneys' fee application, so long as it's less than 30 percent of the class payment, according to the stipulation filed.

The shareholders are represented by Stuart M. Grant, Geoffrey C. Jarvis and Nathan A. Cook of Grant & Eisenhofer PA, Randall J. Baron, A. Rick Atwood Jr., David T. Wissbroecker, Edward M. Gergosian and Maxwell Huffman of Robbins Geller Rudman & Dowd LLP, and Marc A. Topaz, Lee D. Rudy, Michael C. Wagner, J. Daniel Albert and Justin O. Reliford of Kessler Topaz Meltzer & Check LLP. The case is in the Delaware Chancery Court.

Source: Law360.com

## IX. WHISTLEBLOWER LITIGATION

### **DEPARTMENT OF JUSTICE RECOVERS MORE THAN \$3.5 BILLION IN FCA SETTLEMENTS IN 2015**

The U.S. Department of Justice (DOJ) has announced that it recovered more than \$3.5 billion in fiscal year 2015 as a result of claims filed under the False Claims Act (FCA). This was the fourth year running where the DOJ has recovered more than \$3.5 billion under the FCA. To date the total amount recovered since January 2009 is \$26.4 billion.

As we have previously written, the FCA provides an avenue for the government to bring civil charges against those who attempt to defraud the government. It's a way to return money to taxpayers. Most false claims actions are filed under the Act's whistleblower, or *qui tam*, provisions that allow individuals to file lawsuits alleging false claims on behalf of the government. If the government prevails in the action, the whistleblower, also known as the relator, receives from 15 percent to 30 percent of the recovery.

The main sources of FCA claims in FY2015 were in the areas of Health Care Fraud, Housing and Mortgage Fraud, and Government Contracts. According to the DOJ report:

- Of the \$3.5 billion recovered last year, \$1.9 billion came from companies and individuals in the health care industry for allegedly providing unnecessary or inadequate care, paying kickbacks to health care providers to induce the use of certain goods and services, or overcharging for goods and services paid for by Medicare, Medicaid, and other federal health care programs. The \$1.9 billion reflects federal losses only. In many of these cases, the department was instrumental in recovering additional millions of dollars for consumers and state Medicaid programs.
- Settlements and judgments in cases alleging false claims for payment under government contracts totaled \$1.1 billion in fiscal year 2015, bringing procurement fraud totals to nearly \$4 billion from January 2009 to the end of the fiscal year. The government depends on contractors to feed, clothe, and equip our troops for combat; for the military aircraft, ships, and weapons systems that keep our nation secure; as well as to provide everything that is needed to fund myriad programs at home.
- The DOJ recovered \$5 billion in housing and mortgage fraud from January 2009 to the end of fiscal year 2015, including this past year's recoveries of \$365 million. These recoveries are part of the broader enforcement efforts by President Obama's Financial Fraud Enforcement Task Force. President Obama established the inter-agency task force in 2009, to wage an aggressive, coordinated, and proactive effort to investigate and prosecute financial crimes.

In addition to these categories, the DOJ made additional fraud recoveries in a variety of other federal programs, including the insurance industry, for-profit education companies, and lenders working with small businesses and minority owned businesses through programs like Trouble Asset Relief Program (TARP) and the Small Business Association (SBA). The DOJ also followed through on its promise to hold individuals—not just corporations—accountable for fraud, waste, abuse and other wrongdoing that took place on their watch. It issued a number of indictments as a result of this initiative and is pursuing criminal and civil charges against these corporate leaders.

The FCA was strengthened in 1986 as amendments were added that increased incentives for whistleblowers to file suit. As stated above, these incentives include 15 to 30 percent of the funds recovered. In FY2015, \$597 million was paid to indi-

viduals who brought *qui tam* claims. These incentives—rewards—have helped the government to:

- detect more fraud;
- insure money intended for important purposes, such as health care, is properly spent on furthering those purposes; and
- deter other companies and hospitals from committing the same fraud.

There were 638 whistleblower lawsuits filed under the *qui tam* provisions of the False Claims Act in 2015. As a result of whistleblower lawsuits, between January 2009 to the end of the FY2015 the government recovered \$19.4 billion in settlements and judgments, and paid whistleblower awards totaling \$3 billion. Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department's Civil Division, had this to say:

*The False Claims Act has again proven to be the government's most effective civil tool to ferret out fraud and return billions to taxpayer-funded programs. The recoveries announced today help preserve the integrity of vital government programs that provide health care to the elderly and low income families, ensure our national security and defense, and enable countless Americans to purchase homes. The department's lawyers and staff, together with our law enforcement partners in federal and state governments, work tirelessly and often overcome daunting challenges to achieve these successes on behalf of the taxpayers.*

Source: U.S. Department of Justice

### **OFFICE OF THE WHISTLEBLOWER 2015 ANNUAL REPORT SHOWS PROGRESS IN WHISTLEBLOWER REWARDS AND PROTECTIONS**

The U.S. Securities and Exchange Commission (SEC) Office of the Whistleblower (OWB) has released its 2015 annual report. The following information is listed in this report: payouts for whistleblowers; the whistleblower program's growth; and other highlights for the 2015 fiscal year. Since the new whistleblower rules went into effect in August 2011, the SEC has paid more than \$54 million to 22 whistleblowers. More than \$37 million was paid to reward whistleblowers in the fiscal year of 2015 alone. This \$37 million displays the tremendous growth the whis-

tleblower program is experiencing. The SEC received almost 4,000 tips in fiscal 2015, which is a 30 percent increase from 2012. This growth is a result of:

- the SEC working diligently in educating the public about the whistleblower program and
- acting to protect whistleblowers from retaliation.

One of OWB's primary goals is to increase public awareness of the SEC's whistleblower program. In fiscal 2015, OWB staff promoted and educated the public about the whistleblower program by participating in 20 public engagements. The OWB continues to actively pursue that goal by participating in webinars, media interviews, and presentations, and by distributing press releases. These educational outreaches continue to generate a high percentage of whistleblower tips as the public is made more aware of the whistleblower program. As more folks are being educated about the whistleblower program, the government will be able to detect, deter and prosecute more fraud.

Another reason for the high increase of tips for fiscal 2015 is the measures the SEC has taken to insure whistleblower protection. In 2011, when the SEC issued the whistleblower rules, it attempted to make it clear that the protection from employment retaliation applied to when a whistleblower reported potential fraud internally to a supervisor and not just when the whistleblower reported the potential fraud directly to the SEC. Even with these efforts to clarify the protection, some circuit courts held that whistleblowers received no protection when they did not report directly to the SEC.

On Aug. 4, 2015, the SEC released an interpretive guide clarifying the anti-retaliation provisions. The SEC also submitted *amicus curiae* briefs to urge the court of appeals to defer to the SEC's rule. In doing so, the SEC worked very hard to ensure that employees are protected from employment retaliation whenever they report—internally to a supervisor or directly to the SEC. A spokesperson for the SEC stated: "We want whistleblowers—and their employers—to know that employees are free to come forward without fear of reprisal."

If you are aware of fraud being committed against the federal government, or a state government? You should contact a lawyer who handles whistleblower claims. The False Claims Act can protect and reward you for doing the right thing by reporting the fraud. If you have any questions about whether you may qualify as a whistleblower, or you just need more informa-

tion, you can contact a lawyer at Beasley Allen. You can get a free and confidential evaluation of your potential claim. There is a contact form on our website, [www.beasleyallen.com](http://www.beasleyallen.com), or you may email one of the lawyers on our whistleblower litigation team: [Andrew.Brashier@beasleyallen.com](mailto:Andrew.Brashier@beasleyallen.com), [Archie.Grubb@beasleyallen.com](mailto:Archie.Grubb@beasleyallen.com), [Larry.Golston@beasleyallen.com](mailto:Larry.Golston@beasleyallen.com) or [Lance.Gould@beasleyallen.com](mailto:Lance.Gould@beasleyallen.com). You can also call them at 800-898-2034.

Source: The U.S. Securities and Exchange Commission

### **FCA PENALTIES WILL BE INCREASED**

On Nov. 2, 2015, President Obama signed the Bipartisan Budget Act of 2015 into law. The Act will increase the civil penalties imposed under the False Claims Act (FCA). These penalties presently range from \$5,500 to \$11,500 per violation. However, in an attempt to keep up with inflation, the 2015 Act will allow the government to increase those civil penalties. The Act does not allow civil penalties to be increased to any specified amount. Instead, the cap is set at a 150 percent increase. This cap allows the government to increase the FCA civil penalties in a range from \$13,750 to \$28,750. The expected increases have until Aug. 1, 2016 to be implemented.

The lawyers in our firm who handle FCA litigation believe raising the civil penalties will strengthen the government's negotiating position when it brings an FCA claim against an alleged violator. This strengthened position should help the government obtain additional settlements and greater civil penalties in litigated FCA cases.

If you have any questions about whether you qualify as a whistleblower, contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim by calling 800-898-2034. There is also a contact form on our website, or you may email one of the lawyers on our whistleblower litigation team: [Andrew.Brashier@beasleyallen.com](mailto:Andrew.Brashier@beasleyallen.com), [Archie.Grubb@beasleyallen.com](mailto:Archie.Grubb@beasleyallen.com), [Larry.Golston@beasleyallen.com](mailto:Larry.Golston@beasleyallen.com) or [Lance.Gould@beasleyallen.com](mailto:Lance.Gould@beasleyallen.com).

### **THREE WHISTLEBLOWER CASES SETTLED**

I will mention three whistleblower cases below that were settled last month. These are examples of why whistleblowers are so important to the government's efforts to combat fraud by government contractors. The American taxpayers owe a debt of gratitude to whistleblowers who

have the courage required to report their employer's fraudulent conduct.

### **SHIPYARD SETTLES \$79 MILLION FCA LAWSUIT OVER BAD COAST GUARD HULLS**

Bollinger Shipyards Inc. will pay the federal government \$8.5 million to settle False Claims Act (FCA) allegations it misled the U.S. Coast Guard about vessel modifications that ultimately made them unseaworthy. After first being dismissed by a Louisiana federal judge in 2013, the now-revived suit alleged that at least eight of the Coast Guard's boats were rendered unseaworthy because Bollinger miscalculated the hulls' resistance to bending after adding 13-foot extensions. Bollinger said the 13-foot hull extensions would not compromise the integrity of the vessels. But eight of the boats, known as patrol cutters, were eventually rendered unseaworthy because of the modifications, which took place between 2000 and 2006. Bollinger allegedly ran its strength calculations three times and provided the government with the highest one. The company also did not follow internal controls that would have prevented the miscalculations.

The case came back to the Louisiana court after the Fifth Circuit reinstated the government's case in 2014 after U.S. District Judge Sarah Vance dismissed the suit in 2013 because the government failed to show that the ship repair company's mistake was intentional. But the appellate panel ruled that the U.S. was not required to plea Bollinger's knowledge with such specificity. It was enough to show that Bollinger ran three different calculations with false inputs and submitted the highest one to the Coast Guard to infer it knowingly put false data into its application, according to the Fifth Circuit's 2014 opinion.

### **L-3 WILL PAY \$26 MILLION TO GOVERNMENT IN FALSE CLAIMS ACT SUIT**

L-3 has agreed to pay \$25.6 million to settle the government's False Claims Act suit over EOTech weapons sights sold to the military and law enforcement that the defense contractor allegedly knew were thrown off by extreme temperatures. The U.S. Department of Justice (DOJ) alleged in its federal court lawsuit that L-3 Communications' EOTech Inc. had sold "tens of millions of dollars"

worth of holographic weapon sights to the government despite knowing since 2006 that the sights would drift away from where the firearm was pointed when it got too hot. The government said:

*EOTech represented to DOD that its sights performed in temperatures ranging from -40 degrees to 140 degrees Fahrenheit, and in humid conditions. Those environmental performance representations were important to the United States because U.S. troops used EOTech's combat optical sights in Iraq and Afghanistan, as well as in the jungle, mountains, desert, and other extreme environmental conditions around the world.*

EOTech — part of L-3's Warrior Systems Division — waited years to tell its U.S. Department of Defense (DOD), U.S. Department of Homeland Security (DHS) and FBI clients that the sights, which superimpose a target reticle on an optical window, were prone to "thermal drift." The complaint also named EOTech President Paul Mangano as a Defendant. Some of the sights are reserved specifically for military weapons like grenade launchers and large crew-served guns, the government said, while many of the sights are bound directly for special forces units. EOTech separately discovered that the sights were thrown off by heat, humidity, and temperatures below freezing, but waited years to say anything despite a contractual obligation to do so, all while touting the company's military sales to boost EOTech's commercial market profile, according to the government.

The suit said EOTech, which was acquired by the L-3 Communications Corp. in 2005, did not tell the Pentagon about the heat-specific problem until after the FBI independently discovered the issue in March 2015 and presented its findings to the contractor. The problem with the cold was discovered by early 2007, the government alleged, but EOTech didn't say anything until it had a fix ready, which took more than a year. The government said that EOTech presented its fix to DOD as "an upgrade to a quality product that already conformed to specifications."

A problem with humidity, where moisture managed to get into the sights, was discovered by 2008 but was not disclosed until 2013, according to the suit, which pointed to a large shipment of returned sights from the Pentagon in 2008 where moisture damage was found in virtually every unit. EOTech had pitched its fix "as an upgrade to a quality product that conformed to specifications," the government said. EOTech sold the sights to the military starting in 2004 and to the DHS and the FBI in 2010, according to the government.

#### **LOUISIANA WHISTLEBLOWER TO RECEIVE \$750,000**

A whistleblower who lost his state contract after reporting his concerns that a state-funded dredging project violated environmental laws is set to receive \$750,000 after a Baton Rouge jury ruled in his favor. Dan Collins was under contract to the state Department of Natural Resources (DNR) as a land research consultant when he reported his concerns about the Bayou Postillion dredging project in Iberia Parish.

Collins said the water quality improvement project was actually a million-dollar oil-and-gas access canal project that benefited a family of landowners along the bayou. "It reads like a John Grisham novel," Collins said. "It's so remarkable. ... It was total obstruction once I uncovered it." Collins said the dredging violated state and federal environmental laws. But the Natural Resources Department ignored Collins' report and allowed the canal to be dredged and prevented Collins and his company, CPL & Associates Inc., from doing any more work for the agency.

Collins said he brought the information to then-Gov.-elect Bobby Jindal's transition team in 2007, the state Attorney General's Office and the state Legislative Auditor's Office, but DNR convinced other state officials that the agency's position was correct. In 2008, the Atchafalaya Basin Group and the Louisiana Environmental Action Network filed a federal lawsuit against the state, which was dismissed on the grounds that the environmental groups didn't have proper standing to file. The jury

awarded Collins \$250,000 in his case. Under Louisiana's environmental whistleblower law, Collins is entitled to triple the award, plus attorney's fees and costs. Crystal Bounds represented Collins in this case.

Source: Law360.com and *Insurance Journal*

## **X. PRODUCT LIABILITY UPDATE**

#### **WOMAN AWARDED NEARLY \$80 MILLION IN ETHICON SURGICAL STAPLER LAWSUIT**

A jury in California has awarded nearly \$80 million to a woman whose anal canal was accidentally sealed by a defective Ethicon surgical stapler. The jury awarded \$8.5 million in compensatory damages and \$70 million in punitive damages, which was to punish the Johnson & Johnson subsidiary for gross negligence. The lawsuit was filed by Florence Kuhlmann, who claimed that an Ethicon Proximate stapler misfired and stapled her anal canal shut during surgery in January 2012. As a result, Ms. Kuhlman was hospitalized, suffered an infection and had to undergo a colostomy and full laparotomy. She continues to suffer severe complications from the botched surgery, must use a colostomy bag and has a deformed bowel.

The Alameda County Superior Court jury found that the device was defective and fired with force beyond its specifications. The compensatory damages were awarded to Ms. Kuhlmann for pain and suffering, medical costs, disfigurement and humiliation. The jury also awarded \$1.3 million in her husband's claim for loss of consortium.

At the conclusion of the first phase of the trial, the jury found that the device was defective and fired with force beyond its specifications. In the second phase, the jury awarded the additional \$70 million in punitive damages. This type damages are only awarded in cases where it is established that the Defendant acted with gross negligence or reckless disregard for the safety of others. Punitive damages are designed to act as a punishment for the manufacturer, and are not directly connected to the degree of injury suffered by the Plaintiff.

In August 2013, an Ethicon Proximate stapler recall was announced after complaints from doctors indicated that the surgical staplers were too difficult to fire.

One of the surgical stapler problems filed with the FDA's adverse event reporting system was from a surgeon who said the device misfired during a hemorrhoidectomy, leaving the suture still attached to the stapler. The surgeon cut the suture free, abandoned attempts to use it, and performed the closure manually.

Originally, the Ethicon Endo-Surgery said it checked the device and determined that it appeared to be in proper working order. However, by the time of the recall, the company admitted that the staplers appeared to be difficult to fire "which may result in incomplete firing stroke that may result in an incomplete staple formation."

Ethicon announced a second Proximate stapler recall in October of 2012, affecting even more units. The manufacturer noted that failure to complete the firing stroke of the stapler could result in severe pain, sphincter dysfunction, rectal wall damage, sepsis, bleeding, and occlusion of the rectal canal. Failure to complete the firing stroke could also result in poor staple formation, dehiscence of the rectal wall staple line and bleeding, the company warned.

The jury did the right thing in this case in awarding both compensatory and punitive damages. Nina Shapirshteyn, located in California, represented the Plaintiff in this case and did an outstanding job.

Source: personalinjury.com

#### **FOREIGN MANUFACTURERS SEEK TO AVOID RESPONSIBILITY**

During 2014, 9 million of the 16 million new vehicles sold in this country were made by foreign automobile manufacturers. Following this trend, General Motors (GM) announced last month that its Buick SUV would be manufactured by its Chinese subsidiary. By 2019, both Ford and Fiat Chrysler will make all of their small and mid-sized cars at their Mexican subsidiaries.

While this may be good or bad, lawyers in our firm are seeing a troubling trend with some of our cases and others around the country that involve defective automobiles and products manufactured by these foreign manufacturers. Despite deriving substantial profits from the vehicles they make for the sole purpose of being sold in Alabama and in other states, foreign manufacturers are trying hard to be dismissed from cases in American courts involving their defective products, arguing that our Courts do not have jurisdiction over them.

One example of this alarming issue is one of our cases in which we represent a

young man in the military. Our client was a passenger in a 2003 GM pickup truck that rolled over. During the rollover, the truck's weak roof crushed downward causing our client to be paralyzed from the neck down. The pickup truck was made by General Motors' Canadian subsidiary General Motors of Canada specifically for sale in the United States, including Alabama. After a substantial amount of discovery, General Motors of Canada filed a motion in which it sought to be dismissed, claiming it was not subject to the jurisdiction of Alabama because it did not have any offices or presence in Alabama. General Motors of Canada sought immunity despite making the pickup truck specifically for sale in the United States, including Alabama, and despite making almost 90 percent of its profits from the sale of its vehicles in the United States.

Whether General Motors of Canada will avoid its responsibility is now being decided by our Courts. The impact of our client's case on consumers in Alabama and across this country is enormous. More and more of our products, including automobiles, are made by foreign manufacturers that seek and do derive a substantial benefit from the sale of products in Alabama and other states. However, if our courts will not exercise power over them when they make a defective product that injures or kills, then our right to justice will be greatly affected. In addition, other foreign manufacturers will follow suit in seeking immunity from the power of our Courts and depriving those they injure of their day in Court.

#### **REMINGTON HID DANGERS OF CONTROVERSIAL TRIGGER PROBLEM**

Remington Arms Co. had a most popular rifle—the model 700—but it also had a most serious problem with the rifle. It appears that the rifle would fire without the trigger being pulled. From 1989, when Remington's engineers first realized they had a serious problem, thousands of complaints and about 100 lawsuits were filed before the company could finally put a new fire control for the model 700 on the market. There were serious injuries as well as multiple deaths already. I would recommend that any person interested in learning more about Remington's problems to get a copy of the CNBC.com article that appeared on Dec. 8, 2015. CNBC did a very good investigation of Remington's problems. The class action settlement was reached in which Remington agreed to replace the triggers in as many as 7.5 million rifles. A hearing

to approve the settlement was scheduled but canceled after CNBC's report was first published.

The 2010 documentary "Remington Under Fire: A CNBC Investigation" examined allegations that for decades Remington had covered up a deadly design defect in its signature product. Interestingly, even though the settlement is still pending approval, Remington is claiming that its rifles are still safe. Remington is currently owned by a unit of Cerberus Capital Management, which is not a Defendant in the pending lawsuit.

Source: CNBC

#### **MISSOURI HIGH COURT WEIGHS CASE ON GUN SHOP LIABILITY**

A Missouri mother says a pawn shop should be held accountable for selling her mentally ill daughter the gun she used to kill her own father. She is challenging a defense in her lawsuit. The pawn shop Defendant claims that state and federal law protects a seller from liability. Jonathan Lowy, a lawyer with the Brady Center to Prevent Gun Violence, told state Supreme Court judges last month that Odessa Gun & Pawn was negligent when it sold Colby Sue Weathers the gun in June 2012, only hours before she used it to shoot and kill her father and two days after her mother warned the store that her daughter was mentally ill. The state has since committed Ms. Weathers—the shooter—to a mental institution.

The gun dealer, backed by arguments from the National Shooting Sports Foundation, claims that both Missouri and federal laws block lawsuits. The 2005 Protection of Lawful Commerce in Arms Act bars some state-law actions against gun dealers if buyers use the weapons to harm others. Lowy, the Plaintiff's lawyer, contends that this law doesn't block his client's claim against the pawn shop. However, he does say that if this court interprets it to do so, the law should be ruled unconstitutional because it intrudes on states' rights and takes away legal opportunities for victims of gun violence.

While the pawn shop had the right to refuse to sell a gun to Ms. Weathers, it's contended in the suit that it was store practice to sell guns to anyone who passed a background check. I agree with the statement made by the Plaintiff's lawyer, who told the Associated Press:

*There's a Second Amendment right of law-abiding, responsible citizens to have guns, but with rights come responsibilities. Gun dealers have a responsibility to use reasonable*

*care to prevent dangerous people from getting guns.*

The judges who heard arguments questioned the lawyers about how similar hypothetical cases might play out legally. Judge Laura Denvir Stith asked the Plaintiff's lawyer whether a car dealer would be considered negligent if, after being notified that someone with a history of drunken driving was intoxicated at the time and planned to buy a vehicle, the dealer sold the individual a car anyway. Judge Richard B. Teitelman raised questions about a gun dealer's responsibility if advised against selling a gun to someone whose relatives warn that they might carry out a mass shooting. Judge Teitelman said that's an example of "some of the issues we're dealing with today." The Judges did not indicate when they might rule on the case.

Source: *Claims Journal*

#### **WISCONSIN GUN SHOP TO PAY OFFICERS \$1 MILLION TO SETTLE CLAIMS**

A Wisconsin gun shop will pay \$1 million to settle a lawsuit in which a jury found it negligently sold a gun used to injure two Milwaukee police officers. The settlement came several months after a jury verdict. A jury in October awarded Officer Bryan Norberg and former Officer Graham Kunisch nearly \$6 million against Badger Guns.

The jury found that Badger Guns and its owner negligently sold the gun to a straw buyer—someone buying a gun for someone who cannot legally purchase one. The two officers sued Badger Guns, its predecessor, Badger Outdoors, and the owners five years ago. A separate lawsuit, filed by two different Milwaukee officers who were also wounded with a gun from the shop, is pending and is set for trial in May. Norberg and Kunisch were both shot in the face after they stopped Julius Burton for riding his bike on the sidewalk in 2009. Investigators said Burton got the weapon, a Taurus .40-caliber handgun, a month earlier, after giving \$40 to another man, Jacob Collins, to make the purchase at the store in West Milwaukee.

One bullet shattered eight of Norberg's teeth, blew through his cheek and lodged into his shoulder. He remains on the force, but he said his wounds have made his work difficult. Kunisch was shot several times, resulting in him losing an eye and part of the frontal lobe of his brain. His wounds forced him to retire. Jurors ordered the store to pay Norberg \$1.5 million and Kunisch \$3.6 million. The jury also ruled the store must pay \$730,000 in punitive damages. Burton

pleaded guilty to two counts of first-degree attempted intentional homicide and is serving an 80-year sentence. Collins got a two-year sentence after pleading guilty to making a straw purchase for an underage buyer.

Source: *Insurance Journal*

## **XI. MASS TORTS UPDATE**

---

### **FIRST STATE COURT TALCUM POWDER TRIAL PLAINTIFF DIES OF HER INJURIES**

It is with a heavy heart that I must report on the death of our client, Jacqueline Fox. This brave lady passed away on Oct. 6, 2015, after a two-year battle with ovarian cancer. In August, we reported that Ms. Fox would be our first state court talc trial Plaintiff. Her son Marvin Salter will now be her representative in the trial, which is still scheduled to start on Feb. 1, 2016, in the Circuit Court of The City of St. Louis, Mo.

Ms. Fox was 59 years of age when she was diagnosed with ovarian cancer. Since then, she went through multiple surgeries and chemotherapy regimens. Ms. Fox used Johnson's Baby Powder and Shower to Shower for female hygiene for more than 35 years. Johnson & Johnson failed to warn her about the risk of ovarian cancer. To this day, those products provide no mention of the risk of cancer even though the talc mining company has been providing Johnson & Johnson with a warning of such a risk since 2006. In addition, the medical literature has suggested a risk of ovarian cancer as far back as the 1970s.

Two of the experts in our case in St. Louis are Harvard doctors. One, an epidemiologist, was the first to publish confirmation of the risk of ovarian cancer from genital talc use in 1982. The other, a pathologist, used a scanning electron microscope to look at the cancerous ovarian tissue removed from Ms. Fox, which revealed the presence of talc particles.

In other talc litigation news, the New Jersey State Court system has now consolidated all talc ovarian cancer cases in the Superior Court of New Jersey Law Division, Atlantic County, in front of Judge Nelson Johnson. The first trial in New Jersey is set to start on July 13, 2016.

Our firm is working on the Fox case with the law firms of Onder, Shelton, O'Leary, and Peterson, LLC, Allen Smith,

and Porter Malouf. Ted Meadows, Danielle Mason and David Dearing from our firm, along with this writer, are on the trial team in this very important case in St. Louis.

As I have indicated before, lawyers in our firm's Mass Torts Section are heavily involved in litigating cases on behalf of women who were diagnosed with ovarian cancer following the use of talcum powder in the genital area. If you have any questions regarding these cases, or about the talc litigation generally, contact Ted Meadows, who is in our firm's Mass Torts Section, at Ted.Meadows@beasleyallen.com or 800-898-2034.

### **JOHNSON & JOHNSON FOUND LIABLE IN FIRST PELVIC MESH CASE IN PHILADELPHIA**

A Philadelphia jury returned a \$5.5 million verdict against a Johnson & Johnson unit on Dec. 21 after finding that the negligence of scientists regarding pelvic mesh implant Prolift was the root cause of an Indiana woman's inability to have sex after having the product implanted. The jury found from the evidence that Ethicon Inc. was responsible for Patricia Hammons' contracting the condition known as "dyspareunia." This is the first of 180 cases in the mass tort program to go to trial. The jury also granted Hammons' bid for punitive damages against the company, opening the door for additional arguments and evidence.

Ms. Hammons' May 2013 suit alleged that shards of the Prolift mesh, which was implanted between her bladder and vagina in 2009 in an effort to correct sagging of her internal organs, became implanted in her bladder. She accused Ethicon scientists and officials of overlooking negative side effects associated with Prolift and hiding the risks from her implanting surgeon. Jurors heard Ms. Hammons' lawyers argue that Prolift's design was irredeemably flawed. They said the product incorporated far too much mesh with far too few holes, making it harder for healthy tissue to grow around it when implanted. Instead, the construction of the mesh prompted the growth of scar tissue, which contracts over time, pulling the mesh with it, and ultimately causes the vagina to shrink. On Dec. 22, the jury in the second phase awarded \$7 million in punitive damages.

Ms. Hammons is represented by Shanin Specter, Lee Balesky, Kila Baldwin and Michelle Tiger of Kline & Specter PC and Adam Slater of Mazie Slater Katz & Freeman LLC. These lawyers did an outstanding job for their clients in this very

important case. The case is in the Court of Common Pleas of the State of Pennsylvania, County of Philadelphia.

Source: Law360.com

#### **FIRST BELLWETHER WIN IN WRIGHT HIP IMPLANT LITIGATION BRINGS HOPE FOR GLOBAL RESOLUTION**

On Nov. 24, 2015, an Atlanta Jury returned an \$11 million verdict in favor of Plaintiff Robyn Christiansen in the first federal bellwether trial in the Wright Hip Implant Products Liability litigation currently pending in multidistrict litigation (MDL) in the United States District Court for the Northern District of Georgia.

According to the pleadings, Ms. Christiansen was implanted with the defective device in October 2006. As with most people who have been devastated by the metal-on-metal hip devices, she agreed to the device based on representations that it was longer lasting than devices with polyethylene liners. Also, they were represented to be the best for someone with an active lifestyle. Her device subsequently failed, causing pain and depositing metal debris into her blood and tissue in 2013.

Ms. Christiansen, a ski instructor for almost 50 years is no longer able to enjoy the active lifestyle she had known previously. Despite the Plaintiff losing some ground in some early evidentiary rulings, the court did allow key evidence as to the device design. The jury awarded \$1 million in compensatory and \$10 million in punitive damages. The Plaintiff was represented by Pope McGlamry Kilpatrick Morrison & Norwood, PC along with Boucher, LLP and Kiesel Law, LLP. Wright Medical is represented by Duane Morris, LLP.

Beasley Allen lawyers represent almost 100 Plaintiffs affected by the defective Wright Medical metal on metal hips. In addition to the metal-on-metal corrosion cases, our lawyers are handling cases against Wright Medical involving device fractures. In these cases, the defective design of Wright Medical's Profemur femoral stem causes the device to actually fracture, or break in half, while implanted in the individual's femur. This event causes sudden, excruciating pain.

Wright Medical has expressed its intentions to appeal these verdicts. The Plaintiffs are only encouraged by these verdicts and are committed to continuing to push Wright Medical to accept its responsibility to all affected Plaintiffs and prevent future harm to other patients. If you need more information on this, contact Navan Ward at 800-898-2034 or

by email at [Navan.Ward@beasley-allen.com](mailto:Navan.Ward@beasley-allen.com).

Source: Law360.com

#### **FEDERAL JUDGE EXCLUDES ZOLOFT GENERAL CAUSATION EXPERT**

In the midst of preparing for the upcoming Zoloft bellwether trial slated to begin in March, Judge Cynthia Rufe ruled that the Plaintiff Steering Committee (PSC) causation expert, Dr. Nicholas Jewell, could not testify that Zoloft can cause birth defects. Citing methodological problems, Judge Rufe found Dr. Jewell's testimony to be unreliable and inadmissible. Previously, Judge Rufe excluded the original causation expert, Dr. Anick Berard, ruling that Dr. Berard's opinions were also methodologically flawed, unreliable, and inadmissible.

Immediately following the Court's ruling, Pfizer filed a motion with the Court asking that summary judgment be entered in Pfizer's favor. A "summary judgment" dismissal without trial is appropriate when a party is entitled to a judgment in its favor as a matter of law. Pfizer contends that without Dr. Jewell's expert testimony, Plaintiffs cannot offer sufficient evidence to establish an essential element of their case—that Zoloft causes congenital heart defects—and Plaintiffs' claims fail as a matter of law.

While the future of the multidistrict litigation (MDL) is uncertain, Zoloft birth defect litigation is progressing in state courts across the country. We continue to investigate Zoloft and other SSRI birth defect cases. If you need information on this litigation, contact Roger Smith, a lawyer in our Mass Torts Section, for additional information at 800-898-2034 or by email at [Roger.Smith@beasleyallen.com](mailto:Roger.Smith@beasleyallen.com).

## **XII. BUSINESS LITIGATION**

#### **THE TARGET DATA BREACH HISTORICAL SETTLEMENT**

On Dec. 2, 2015, it was announced that Target Corporation agreed to settle claims with financial institutions over the 2013 data breach that compromised more than 40 million payment cards. This marks the first time that a retailer has agreed to a data breach settlement with financial institutions. The settlement, which has

received preliminary approval from United States District Judge Paul A. Magnuson, totals nearly \$40 million.

The settlement applies to all United States financial institutions that issued payment cards put at risk as a result of the 2013 data breach. A total of \$20,250,000 is to go directly to the class members and to pay for the notice and administration of the settlement, while the remaining \$19,107,939.38 will fund MasterCard's Account Data Compromise program relating to the breach. The financial institutions also already received a settlement from Visa reportedly valued at \$67 million. Beasley Allen is among the firms representing the financial institutions in multidistrict litigation (MDL) against Target, and its lawyers are serving on the settlement committee that helped structure this settlement.

The massive Target data breach occurred just as the 2013 holiday shopping season was getting underway, between Nov. 27 and Dec. 15. It is believed to have compromised at least 40 million credit and debit cards and resulted in identity theft affecting as many as 110 million people. A consolidated class-action complaint was filed in August 2014, and the district court refused to dismiss most of the litigation in December 2014. Then, in September of this year, the financial institutions won their motion to certify a class of all financial institutions that issued cards impacted by the hack.

Class counsel also requested service awards for each of the five settlement class representatives as well as attorneys' fees and costs, which Target has agreed to pay separately from the settlement fund and pledged not to appeal any award of attorneys' fees that is less than \$20 million. The final settlement approval hearing is set for May 10. If you need more information relating to the settlement or anything else about the litigation, contact Dee Miles or Leslie Pescia, lawyers in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at [Dee.Miles@beasleyallen.com](mailto:Dee.Miles@beasleyallen.com) or [Leslie.Pescia@beasleyallen.com](mailto:Leslie.Pescia@beasleyallen.com). Dee is the Section Head and Leslie is a lawyer in the Section.

## XIII. AN UPDATE ON SECURITIES LITIGATION

---

### **FTC FILES AMICUS BRIEF EXPLAINING THAT PHARMACEUTICAL “PRODUCT HOPPING” CAN VIOLATE THE ANTITRUST LAWS**

The Federal Trade Commission (FTC) recently filed an amicus brief before the U.S. Court of Appeals for the Third Circuit in a case involving conduct by pharmaceutical manufacturers known as “product hopping.” Product hopping refers to a tactic by which brand name pharmaceutical companies attempt to obstruct generic competition by making modest reformulations that offer little to no therapeutic advantages to patients. By combining minor product reformulations with efforts to damage or destroy the market for the original formulation, brand-name pharmaceutical companies can avoid generic competition and preserve monopoly profits. Product hopping is in violation of Section 2 of the Sherman Act, which makes it an offense to “monopolize, or attempt to monopolize ... any part of the trade or commerce among the several States.” The conduct can harm consumers and cost the federal government a significant amount of money.

The FTC filed its amicus brief in a case involving a private antitrust action in which Mylan Pharmaceuticals Inc. alleges that Warner Chilcott PLC/Mayne Pharm Group maintained a monopoly in the market for its antibiotic Doryx. The claims involve allegations that the Defendants’ company suppressed generic competition through three successive insignificant reformulations of the drug, combined with various efforts to curtail the availability of the original formulations. The district court granted the Defendants’ motion for summary judgment, and the Plaintiffs appealed to the U.S. Court of Appeals for the Third Circuit.

In its amicus brief, the FTC explains that “If a brand-name manufacturer tweaks its brand-name product shortly before anticipated generic entry and begins eliminating the market for the original formulation, it can impede competition from would-be generic entrants, which have sought FDA approval to sell a generic version only of the original formulation but not the replacement.” The FTC argued that when analyzing whether pharmaceutical product hopping is unlawful, courts should account for the

unique aspects of the pharmaceutical marketplace, including the nature of competition between branded pharmaceutical products and their generic counterparts.

The FTC’s brief explains that the district court’s analysis of the monopoly-power question fails to account for the special characteristics of the pharmaceutical marketplace, including that generics are unique sources of competition for brand-name prescription drugs. The brief argues that the district court’s broad ruling effectively embraces a rule of nearly per se legality for product-hopping conduct. The brief states:

*The district court held that a brand company may with impunity destroy what is often the only means of generic distribution—automatic substitution—so long as generics remain hypothetically free to pursue new and more costly distribution alternatives, such as direct advertising to physicians.*

Antitrust cases based on pharmaceutical product hopping are relatively new and lawyers at Beasley Allen have been actively following these cases nationwide. If you have any cases involving product hopping, antitrust, or fraud, contact Ali Hawthorne, a lawyer in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.

Source: Federal Trade Commission

## XIV. INSURANCE AND FINANCE UPDATE

---

### **PROTECTING THOSE WHO PROTECT US**

“Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and success of liberty.” The words of John Fitzgerald Kennedy ring out that those in service will bear any burden to protect the citizens of the United States, but now is the time to protect our service members. Congress proposed and passed the Military Lending Act (MLA) in 2006 and it offers a plethora of protections to service members and their dependents including capping interest rates, barring mandatory arbitration, and barring prepayment penalties.

A service member, as defined by the statute, is any active duty military person-

nel or any active guard members and reserve duty personnel. In addition, the MLA applies to dependents of those service members who are covered by the MLA, such as a spouse, an unmarried widow or widower, or a child who is either younger than 21 or younger than 23 if they are enrolled in college.

Interest rates under the MLA are capped at an annual percentage rate (APR) of 36 percent. However, there are many industries that charge well over 36 percent. For example: payday lenders, auto title lenders, credit card companies, and tax refund anticipation loans. The MLA only exempts certain residential mortgages and certain purchase-money loans.

Military members and their family are commonly targeted by scrupulous companies and charged well over the 36 percent APR cap, in violation of the MLA. An MLA violation entitles a service member to numerous types of remedies and relief. For a violation of the MLA, a Plaintiff can receive money damages, punitive damages, and even the cost of the action if successful. Furthermore, the loan agreement itself can be voided if it violates the MLA.

Lawyers at Beasley Allen are vigorously investigating violations of the MLA perpetrated against members of our armed forces. Anyone who has a high-interest loan and has a question about whether the loan violates the MLA should speak with a lawyer. Lawyers in our firm’s Consumer Fraud Section are well versed in the statutory violation and the protection offered to consumers when a violation occurs under the MLA. If you would like to learn more about a potential case or need guidance regarding the Military Lending Act contact one on these lawyers: Andrew Brashier at Andrew.Brashier@beasleyallen.com; Archie Grubb at Archie.Grubb@beasleyallen.com; Lance Gould at Lance.Gould@beasleyallen.com; or Larry Golston at Larry.Golston@beasleyallen.com or at 800-898-2034 or 334-269-2443. All consultations are free and confidential.

Sources: U.S.C.A. s987(i)(1), 1072, 987(b), 232.3(f)(2), 987(f)(5), 987(f)(3)

## XV. PREMISES LIABILITY UPDATE

### A REPORT ON THE TAYLOR BRIDGE FIRE SETTLEMENT

The state Department of Transportation (DOT) and two of its contractors have agreed to pay nearly \$60 million to more than 300 people who lost property during the 2012 Taylor Bridge Fire in Kittitas County, Wash. This is said to be the largest wildfire damage settlement in state history. The bulk of the \$59.75 million settlement will come from insurance companies.

Investigators determined that the fire was sparked by construction workers welding on the Taylor Bridge on State Route 10 east of Cle Elum without proper fire-safety precautions. The fire quickly spread across 23,500 acres, destroying 61 homes and more than 100 outbuildings and other structures. In the fire's aftermath, about a dozen lawsuits were filed by landowners and their insurance companies. The cases were consolidated by a King County judge after the Kittitas County Superior Court judges recused themselves, citing too many potential conflicts of interest.

The basic settlement was in place in August, just before the trial was set to start, but it took several more months to work out details and get all documents approved by all parties. The state is paying the majority of the settlement: \$40 million from the Department of Transportation's insurance company and another \$10 million from state funds. Its contractor, Conway Construction Co. of Ridgefield, will pay \$8 million from its insurance. The subcontractor, Rainier Steel Inc. of Auburn, will pay \$1.75 million from its insurance.

The fire investigation report, prepared by the state Department of Natural Resources, identified the two contractors as negligent for welding and cutting steel when fire danger was high with no spotter on the lookout for fire starts below the bridge. But the judge determined that DOT was liable as well. The State of Washington had known about prior fires started at the site and that there wasn't adequate fire protection. There was an outside inspector, but, reportedly, he didn't do anything.

The law firm of Abeyton Nelson represented 124 of the claimants. Greg Lighty and Rod Nelson were the lead lawyers for

the firm in this litigation. They did a very good job.

Source: Yakima Herald

## XVI. WORKPLACE HAZARDS

### TEXAS JURY RETURNS \$2.2 MILLION VERDICT IN TYSON WORKER INJURY LAWSUIT

A Texas federal jury has returned a \$2.2 million verdict against Tyson Foods Inc. The jurors found that the company's negligence caused a worker's injuries on one occasion. But the jury found that the company couldn't be blamed for two other incidents. The jury determined that the food giant's negligence led to Asa Ferrell's lower back injury in August 2013 while separating and sorting boxes weighing 65 to 100 pounds in a "uniquely confined space." However, the jurors weren't convinced that injuries resulting from an overhead door striking Ferrell could be traced to Tyson's negligence.

The workers' complaint sought damages for injuries he blamed on Tyson's dangerous work environment and the negligence of another employee. It was contended that Tyson knew of the dangerous conditions, but failed to make changes or warn workers. The complaint stated:

*Defendant had a duty to its employees to keep the working conditions and environment safe, make the working conditions and environment safe and/or warn others of dangers on said premises. This breach constitutes negligence, and such negligence was a proximate cause of the occurrence in question and the plaintiff's resulting injuries.*

In November 2012, Ferrell, a receiving dock worker, said he was operating an electric floor jack when another employee pulled down a cord to shut an overhead door, striking his neck and shoulder. Ferrell was again hit by an overhead door while operating a jack in May 2013, allegedly knocking him from the machine onto the floor. These incidents caused severe injuries to Ferrell's neck, shoulder and lower back, the complaint said. The most recent incident was the box-lifting injury in August 2013. Though proper lifting procedures prevent lower back injuries, the unsafe workplace prevented appropriate lifting techniques and

Tyson failed to provide necessary equipment or assistance, Ferrell alleged.

As a result of Tyson's negligence and his injuries, Ferrell is permanently impaired, losing earnings and potential earnings as a result. He experienced pain and suffering as a result of the accidents and will continue to incur medical expenses. The complaint contended that Tyson is liable for all of Ferrell's injuries as a nonsubscriber to Texas workers' compensation.

The jury concluded that Ferrell failed to demonstrate that the first two accidents were caused by Tyson's negligence, but awarded the worker damages for various elements related to the box-lifting incident. The damages award included \$7,600 for medical expenses incurred in the past to \$652,192 for pain and suffering in the future. Ferrell is represented by Marquette Wolf and Ted B. Lyon Jr. of Ted B. Lyon & Associates PC. The case was tried in the U.S. District Court for the Eastern District of Texas.

Source: Law360.com

### LOUISIANA FIRM FINED \$105,000 FOLLOWING DEADLY TRENCH COLLAPSE

Federal workplace safety officials have cited a Baton Rouge, La., contractor following a trench collapse in which a 24-year-old worker, Isidro Martinez, was killed. Another worker was pulled to safety by co-workers. The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) cited Baton Rouge-based Ted Hebert LLC in November for one willful and five serious violations. Proposed penalties total \$105,000. OSHA says the willful violation was for exposing workers to trench hazards and for failing to provide an adequate protection system, such as a trench box or similar equipment, to keep the trench from collapsing. The inspection took place on May 21, 2015. The serious violations included the following:

- Failing to train workers to recognize unsafe conditions;
- Neglecting to have a ladder or other means for workers to exit a trench;
- Keeping materials too close to a trench edge;
- Allowing water to accumulate inside a trench, which would make a collapse more likely; and
- Failing to maintain a workplace free from recognized hazards likely to cause death or serious physical harm.

Ted Hebert, which specializes in the installation of sewers, water pipes and grading, employs approximately 32 workers. The employer had 15 business days from receipt of its citations to comply, request an informal conference with OSHA's area director in Baton Rouge, or contest the citations and penalties before the independent Occupational Safety and Health Review Commission.

Source: OSHA

#### **MAN KILLED IN SOUTH CAROLINA WORK RELATED ACCIDENT**

A 51-year-old worker, Billy Robert Alexander, died in an accident involving a pressurized hydraulic hose that exploded while he was at work. The Dec. 11 incident happened at the Colgate-Palmolive plant in Greenwood County, S.C. The worker was testing a hydraulic hose at the plant when it exploded, causing the hose to break loose and strike the worker. He died from the blunt-force trauma to the upper part of his body. OSHA is investigating the incident.

#### **OREGON WIFE FILES WRONGFUL DEATH LAWSUIT AFTER HUSBAND CRUSHED BY DUMP TRUCK**

A Medford, Ore., woman has filed a lawsuit against two construction companies after her husband was crushed to death by a dump truck in a construction area on an Interstate highway near Cottage Grove, Ore. Karee Battenfield filed a \$7.9 million wrongful death lawsuit in Multnomah County Circuit Court. Her husband, Layne Battenfield, was a construction worker and longtime supervisor. He was killed on May 1 when he was struck by an asphalt dump truck that was backing up in the construction area.

The driver of the truck wasn't cited for any criminal offense after an investigation by the Oregon State Police and the Oregon Occupational Safety and Health Administration (OSHA). Neither did a trooper who investigated find any criminal intent or recklessness. An Oregon OSHA inspector found no safety or equipment violations. It appears this was a case of driver error. However, it's possible that further investigation could find more than just driver error.

Source: *Insurance Journal*

## **XVII. TRANSPORTATION**

#### **TRAFFIC DEATHS IN THE UNITED STATES ARE UP BY 8 PERCENT THIS YEAR**

Traffic deaths, after mostly decreasing for the past decade, have increased by 8 percent in the first half of 2015. This increase prompted a call from the nation's highway safety chief to find ways to prevent the "human errors" that he says cause most deadly accidents. The new numbers were released by the National Highway Traffic Safety Administration (NHTSA). A final number of fatal crashes was released for 2014, showing a decline of 0.1 percent. It's reported that lower gas prices and an improving economy are prompting people to travel more this year. Americans drove 1.54 trillion miles in the first half of 2015, up 3.5 percent from the same period in 2014, according to the Federal Highway Administration (FHA).

NHTSA Administrator Mark Rosekind said that not all of the increase could be attributed to people driving more miles. He suspects that texting and other distractions while using smartphones were part of the cause, as well as drunken, drugged and drowsy driving, and increased driving by teenagers. Rosekind said further that NHTSA doesn't have enough clear data so far to pinpoint exact causes. But he did say that the "numbers are a wake-up call." The safety chief urged folks to stop using their phones while driving, not to drink alcohol or use drugs and get behind the wheel, and to wear seat belts and motorcycle helmets.

NHTSA said its research shows that human decisions cause 94 percent of all crashes. I am not sure I can totally agree with that statement. Our lawyers have learned from years of handling product liability litigation that "vehicle design defects" cause a large number of vehicle crashes. NHTSA plans to hold five meetings around the country very early this year to get input on how to cut traffic deaths, followed by a larger meeting in Washington that would have specific recommendations to address the human factor. Hopefully NHTSA won't fail to recognize that design defects play a major role in highway crashes.

Source: Personalinjury.com

#### **SO YOU THINK YOU'RE A GOOD DRIVER? STATISTICS INDICATE YOU MAY BE MISTAKEN**

Depending on where you live, driving from place to place probably consumes lots of your time. Most folks think they are good drivers. But thinking you're a good driver and actually being one are apparently two very different things, according to recent statistics. In a survey conducted by AutoBlog.com, drivers were asked whether or not they believe themselves to be good drivers. Unsurprisingly, a resounding 85 percent of voters claimed to be good drivers. While the drivers were not polled regarding which state they occupied, drivers from Alabama might want to consider the results from a new report released by 24/7 Wall Street.

According to 24/7 Wall Street's study, which ranked states by traffic accidents and fatalities data, Alabama was determined to be the sixth worst state for drivers in the nation. The report stated about Alabama's abysmal driving ranking:

*With 17.6 deaths for every 100,000 residents, fatal accidents on the road are much more common in Alabama than they are across the United States, where the corresponding rate is 10.3 deaths per 100,000 residents.*

Montana came out on top—or maybe the bottom?—as the state with the worst drivers, with 22.6 deaths per 100,000 citizens, while drivers in Massachusetts claimed the title as the nation's safest drivers. Fortunately, not all of the data collected about Alabama drivers was negative. The report also noted that 97 percent of Alabamians buckle up before getting on the road, greatly decreasing their chance of death in the event of a traffic accident. Alabama's seatbelt stat is even 10 percent higher than the national average of seatbelt usage.

No matter which state you live in, the decision to drive safe is always your own. Never let yourself become distracted by texting or other devices while operating a vehicle and remember to always be vigilant of those driving around you. Patience and common sense go a long way when transporting you and your family.

Sources: AL.com, autoblog.com, 24/7 Wall Street

#### **DRIVER SENT NUMEROUS TEXTS BEFORE HITTING TWO OKLAHOMA STATE TROOPERS**

The hazards on our highways caused by drivers who text or use cell phones while driving was brought to the forefront recently in Oklahoma. Two Oklahoma Highway Patrol troopers were hit by a

driver who was texting at the time and one of the officers died. The investigation of the incident revealed that the driver had been texting with a woman he had met online while on his way to see a different woman he met on the internet. Reportedly, he had sent about 70 texts that day. The driver, Steven Wayne Clark, claims that he doesn't remember the crash and for that reason doesn't know exactly what happened. However, he told an investigator he may have been entering the address of the second woman into his phone for directions at the time of the incident.

It's hard to believe, but the driver's daughter was in the back seat at the time of the incident, which is shocking. Details of the incident became public for the first time at a sentencing hearing for the 30-year-old Clark, who pleaded guilty in August to first-degree manslaughter. Clark's car struck two troopers at 10:16 p.m. on Jan. 31 on an Interstate highway in Oklahoma. The tragedy led to passage of the law that specifically bans texting while driving in Oklahoma, which is now in effect.

Source: Personalinjury.com

#### **JURY AWARDS \$32 MILLION AGAINST COMPANY IN CAR CRASH LAWSUIT**

The family of a 6-year-old boy who was killed in a 2012 motor vehicle accident was awarded \$32 million last month by a Pittsburgh jury. The jurors agreed that Golon Masonry Restoration Inc., a commercial contractor based in the city, was independently liable for the actions of a company driver who was convicted of vehicular homicide. The jury found that the company should be held accountable after driver Kirk Fair, who Plaintiffs alleged was under the influence of prescription painkillers, crashed a company-issued pickup truck into the back of a car that had just broken down along a highway outside of Pittsburgh.

Because of mechanical problems, Timothy Straw was forced to bring his vehicle to a stop in a travel lane along the highway. Traveling behind the Straw vehicle was the company-issued pickup truck driven by the company's employee. Fair's truck slammed into the back of Straw's car after the truck driver became distracted picking up several items that had fallen from the seat onto the floor. The crash resulted in serious injuries to Straw, his wife, and one of his two children. Sadly, the couple's other child, 6-year-old Elijah Straw, was killed.

Fair pled guilty last February to vehicular homicide, four counts of reckless

endangerment, and two counts of speeding. The guilty plea resulted in the court automatically finding Fair had been negligent in the Straws' civil case, leaving the jury only to consider whether Golon Masonry could be found vicariously or directly liable for the injuries in the crash. The jury found that Golon Masonry was negligent for having entrusted the pickup to its employee (Fair), whose personnel file included a prior citation for driving under the influence. Any DUIs, under a company policy, would preclude employees from using company vehicles. This was an obvious violation of that policy.

The jury's finding of direct negligence by Golon Masonry made the company entirely responsible for the award of damages. The Straws are represented by Jon Perry of Rosen Louik & Perry PC, who did a very good job for his clients. The case is in the Court of Common Pleas of Allegheny County, Penn.

Source: Law360.com

#### **SOUTHWEST TO PAY UP TO \$8.3 MILLION TO END FAA MAINTENANCE SUIT**

Southwest Airlines Co. will pay up to \$8.3 million to settle claims that it violated certain Federal Aviation Administration (FAA) maintenance and airworthiness requirements. The U.S. Department of Justice (DOJ) announced the settlement, which resolves a suit filed in a Washington federal court in 2014 alleging the airline did not follow required maintenance directives for certain Boeing 737 aircraft between 2006 and 2009, and again in 2012, as well as other pending administrative matters, the DOJ said.

The settlement will involve the airline paying a \$2.8 million civil penalty and making operational changes to enhance its oversight of, and control over, its maintenance contractors. If Southwest does not implement those changes, it will be subject to up to an additional \$5.5 million in deferred penalties, the announcement noted. FAA Administrator Michael Huerta said in a statement:

*Safety depends on compliance with our regulations. This agreement provides strong incentives for Southwest to take specific steps to address the compliance problems that the FAA investigations uncovered.*

In its November 2014 complaint, the FAA had alleged Southwest violated its Continuous Airworthiness Maintenance Program, (CAMP), conditions and related FAA airworthiness directives, (ADs),

which airlines are required to comply with unless they apply for and receive approval for an Alternative Method of Compliance, (AMOC). The agency pointed to three types of alleged maintenance violations, two of which involved maintenance on 44 Boeing 737 aircraft between 2006 and 2009, including fuselage maintenance carried out using improperly installed fasteners and improper support, or shoring, of those aircraft during maintenance. The fuselage of these jets use a patchwork of layered skin panels that must stand up to "extreme forces and massive variations in altitude and temperature" while supporting the weight of both the aircraft and its contents, and there had been a number of related ADs issued between 2002 to 2006, the FAA said.

Source: Law360.com

#### **FEDERAL RULE FINALLY REQUIRES ELECTRONIC LOGGING DEVICES IN COMMERCIAL VEHICLES**

A new federal rule requiring commercial truck and bus drivers to electronically record their driving hours goes into effect on Feb. 16, 2016. Most carriers will have two years to comply. The Federal Motor Carrier Safety Administration (FMCSA) electronic logging device (ELD) rule aims at reducing driver fatigue by making hours-of-service (HOS) recording automatic and difficult to manipulate.

Since 1938, drivers have been required to keep track of their hours of work and rest using paper logs, but the conventional methods make it easy to alter the logs or keep two different sets of books to conceal violations. Installing ELDs in vehicles will automate and streamline the recordkeeping process by continually monitoring and recording engine hours, miles driven, and the vehicle's geographical location and movements. The devices will also be extremely difficult for drivers to tamper with.

In the words of Transportation Secretary Anthony Foxx, the "automated technology not only brings logging records into the modern age, it also allows roadside safety inspectors to unmask violations of federal law that put lives at risk."

Safety regulators estimate that ELDs will compel drivers and carriers to follow HOS rules, saving about 26 lives and prevent approximately 562 injuries every year. The electronic records will also generate a net savings of about \$1 billion through paperwork reductions and associated administrative costs. The ELD rule also provides technical and procedural provisions that will help keep electroni-

cally recorded data from being used to harass, threaten, or coerce drivers.

Once the rule takes effect in February, carriers will have two years to comply. Companies that have already installed automatic onboard recording devices (AOBRDs) will have four years to make sure the devices meet the federal standards for ELDs or replace them with devices that do meet the requirements. Federal authorities expect the rule to affect some 3 million commercially licensed truck and bus drivers.

Exemptions will apply to certain drivers, such as tow truck drivers who record hours with a time card and trucks made before 2000. Commercial carriers operating from Mexico and Canada must also equip their vehicles with ELDs that meet the federal code before they can drive on U.S. highways.

Source: Federal Motor Carrier Safety Administration

## XVIII. ENVIRONMENTAL CONCERNS

### **SOME HIGH PROFILE ENVIRONMENTAL DECISIONS IN 2015**

A report released recently by Law360 addressed environmental litigation in 2015. It was said in the report prepared by Juan Carlos Rodriguez that several decisions in high-profile environmental lawsuits sent “shockwaves” through the legal community last year. These decisions range from a U.S. Supreme Court ruling knocking down mercury emissions regulations to dueling circuit court rulings about the federal government’s jurisdiction under the Clean Water Act. The following cases are the biggest environmental decisions of 2015, according to Law360.

#### **Michigan v. EPA**

The U.S. Supreme Court in June rejected the U.S. Environmental Protection Agency (EPA) landmark rule limiting mercury and other toxic emissions from power plants, saying in a 5-4 decision that it should have considered the rule’s billion-dollar compliance costs first.

Writing for the majority, Justice Antonin Scalia said that even under the standard established in *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, which grants

significant deference to federal agencies in interpreting ambiguous laws, the EPA in this case “strayed far beyond those bounds” when it read Section 112(n)(1) of the Clean Air Act to mean that it could ignore cost when deciding whether to regulate power plants. Nicholas Targ, a partner at Holland & Knight LLP, said:

*In the short run, the court’s decision sends EPA’s rule back for further review, causing delay in implementation. Depending on the outcome of 2016 presidential election, this delay could be critical. As a legacy case, Michigan v. EPA suggests, first, that an agency that does not expressly evaluate the cost of compliance upfront does so at its own peril. Second, the case may represent a further erosion of Chevron deference.*

The case is now back at the D.C. Circuit where a panel must oversee how the EPA complies with the high court’s decision. The agency recently studied the costs and proposed a revision to the rule that includes the analysis, and asserted that even after taking costs into consideration, the rule doesn’t have to be changed. An industry group has called the revision “inconsistent with the Supreme Court’s opinion.”

#### **Corps of Engineers v. Hawkes**

In April, the Eighth Circuit Court of Appeals found that courts can review the U.S. Army Corps of Engineers’ so-called approved jurisdictional determinations about whether a body of water is subject to its authority, overturning a lower court and splitting from the Fifth Circuit on the question. The parties in both cases have petitioned the U.S. Supreme Court to hear their cases.

Hawkes Co. Inc. wants to mine peat from wetland property owned by two affiliated companies in northwestern Minnesota, but the Corps derailed that plan when it issued an approved jurisdictional determination that the property constitutes “waters of the United States” under the Clean Water Act (CWA) and ordered the company to get a permit to discharge dredged or fill materials.

The company challenged the Corps but a district judge agreed with the agency that a jurisdictional determination was not a final agency action and therefore was not subject to judicial review.

While the Eighth Circuit appeal was pending, the Fifth Circuit Court of Appeals held that a jurisdictional determination is not reviewable final agency action under the Administrative Procedures Act and therefore not eligible for judicial review, lining it up with the Ninth Circuit. Neal McAliley, a partner at White & Case LLP, said:

*These cases have the potential to significantly reduce the Corps and EPA’s ability to define what areas are within their regulatory jurisdiction. If the Supreme Court were to rule that a person can challenge a jurisdictional determination, then courts would be given a greater role in determining the scope of waters subject to jurisdiction under the Clean Water Act.*

#### **BP Deepwater Horizon Settlement**

In October, the U.S. Department of Justice (DOJ) unveiled the final terms of BP Exploration & Production Inc.’s agreement to pay more than \$20 billion to settle federal and state claims stemming from the 2010 Deepwater Horizon disaster, and sent the largest pollution judgment in U.S. history to a Louisiana federal judge for approval. Our firm was heavily involved in this litigation

The consent decree filed by the DOJ resolves claims made by the federal government, as well as the states of Alabama, Florida, Louisiana, Mississippi and Texas, and also more than 400 local government entities. The settlement, first announced in July, must still be approved by U.S. District Judge Carl J. Barbier, who is overseeing the sprawling multidistrict litigation over the massive oil spill in the Gulf of Mexico, after a 45-day public comment period.

BXP said in July that it had agreed to a global settlement over its role in the largest oil spill in U.S. history, following its failure to persuade the U.S. Supreme Court to reconsider its Clean Water Act (CWA) liability as determined by Judge Barbier in 2012.

That ruling from Judge Barbier formed the foundation of a three-part proceeding on liability for the spill.

In November 2012, BP pled guilty to 11 felony manslaughter charges, environmental crimes and obstruction of Congress for its role in the disaster, and was sentenced to pay \$4 billion in criminal fines and penalties, restitution and community service.

In December 2012, Judge Barbier approved a \$9.2 billion settlement for a class that alleged economic and property damages. BP has made several unsuccessful attempts to undo the settlement since then, citing unfairness and fraud in the claims process. BP's problem, however, is that it agreed to the settlement and urged Judge Barbier to approve it.

### Shearwater v. Ashe

A California federal judge in August struck down the U.S. Fish and Wildlife Service (FWS) rule lengthening the duration of permits to "take"—kill or harm—bald and golden eagles from five years to 30 years, a measure opposed by environmental groups and Native American tribes. The judge faulted the agency for never conducting an environmental review.

U.S. District Judge Lucy Koh said that instead of completing a National Environmental Policy Act (NEPA)-compliant environmental impact statement or environmental assessment before promulgating the final 30-year rule, the service improperly relied on a two-part "categorical exclusion" taken from U.S. Department of the Interior regulations to bypass the review process.

The American Bird Conservancy and several of its members sued the service in June 2014 over the rule and asserted that it was promulgated specifically to respond to the wind power industry's desire to facilitate the expansion of wind energy projects in areas occupied by eagles.

Cynthia Stroman, a partner at King & Spalding LLP, said the decision spotlights the tension between two environmental objectives—the protection of species and facilitating development of renewable energy. She said:

*The court's decision reverting the permit duration back to*

*five years reinserts the disconnect between the length of a typical wind project and the duration of its permit. Unless and until a [National Environmental Policy Act]-compliant rule is in place, project proponents will have to monetize the risk of additional requirements during the project's lifespan.*

Ms. Stroman said it is important to note that the court did not say that FWS could not issue a 30-year eagle take permit rule, and that if the agency explains its change in position in a manner that passes muster under NEPA, the agency could achieve the result it wants. The FWS has appealed the case to the Ninth Circuit.

Source: Law360.com

### HONEY PRODUCERS SUE BAYER AND SYNGENTA FOR BEE DEATHS AND FINANCIAL LOSS

Two Canadian honey producers have filed a class-action lawsuit against Bayer's agro-chemical unit and Syngenta Canada Inc. seeking to recover \$450 million in damages for a serious decline in the bee population they contend is tied to the manufacture and use of neonicotinoid pesticides. Sun Parlor Honey Ltd. and Munro Honey, both Ontario-based honey producers, filed the lawsuit on behalf of all Canadian beekeepers. It's alleged in the suit that the pesticide manufacturers and their parent companies were negligent in the development, sale, and distribution of neonicotinoids. The Plaintiffs seek \$400 million as compensation for business losses resulting from neonicotinoid-induced environmental damages and an additional \$50 million in punitive damages.

Sun Parlor, which has been producing honey in Canada for nearly a century, states it has lost more than \$2.1 million from 2006 through 2013 because of "colony collapse disorder," which is the name given to the wholesale death of entire bee populations in recent years. Munro Honey says it has lost more than \$3 million during the same period. Other beekeepers and honey producers have reported even sharper losses of up to 50 percent.

The business losses correlate to the decline in bee populations, not just in Canada, but in the rest of North America and other parts of the world. Neonicotinoids, which studies have clearly shown to be up to 10,000 times more toxic to bees than DDT, are banned in Europe.

Neonicotinoids, which make up about 40 percent of the pesticide market, have killed off an estimated 35 percent of honey bees in Canada in the last three years alone, according to research published by the Canadian Honey Council.

It should be noted that beekeepers and honey producers aren't the only ones who suffer from the collapse of bee colonies. The decline of bees will have a devastating impact on agriculture and the North American food supply because bees pollinate crops. The damage caused by the decline in bees will certainly ripple throughout the economy. In a 2013 Health Canada Study, 70 percent of dead bees tested by researchers had neonicotinoid pesticide in them.

In 2012, a study led by Purdue University found high concentrations of the pesticides wherever it found bee deaths throughout Indiana. Numerous other studies have shown that neonicotinoids used to spray fields of soybean and corn have permeated the environment and the bees. Julie White of the Ontario Beekeepers Association had this to say in an interview with *The Star Canada*:

*When things get planted the dust goes into the air, it's systemic as well growing in to the plants and it gets into puddles...the bees either get killed in the field or they carry it back to the hive.*

This is a most serious matter and one that demands attention. We can no longer largely ignore this problem. The damage to our nation's economy resulting from the destruction of the honey bee population will be huge.

Sources: *The Star Canada* and CBC

### EXXON MOBIL AND THE KOCH BROTHERS CREATED A CULTURE OF CLIMATE DOUBT

One of the biggest studies to examine how climate change has been "managed" by big oil and others reveals some most interesting findings. The study looks at the hundreds of individuals and organizations funded by energy heavyweights Exxon Mobil Corp. and the Koch brothers. The study, published in the *Proceedings of the National Academy of Sciences*, reviewed 20 years of data starting in 1993 to show that climate change-denying groups and individuals who received money from Exxon Mobil and the Koch brothers began to unify their messages in 2007, amplifying claimed "uncertainty" surrounding this most important issue. Dr. Justin Farrell, a Yale University sociologist and the lead study author, said:

*They were writing things that were different from the contrarian organizations that did not receive corporate funding. Over time, it brought them into a more cohesive social movement and aligned their messages.*

The study isn't the first to note the influence Big Oil's campaigns have had on the public's perceptions of climate change. But it's the first to look at such a large data set, Dr. Farrell said. Using computer analytics, the study looked at 4,556 individuals—including board members, politicians and researchers—with ties to 164 organizations—including think tanks, foundations and lobbying firms. Researchers examined everything the individuals wrote about climate change from 1993 to 2013—a total of more than 40,700 texts. Those who received industry funding stood out in an alarming way. The study notes:

*Two main findings emerge. First, that organizations with corporate funding were more likely to have written and disseminated texts meant to polarize the climate change issue. Second, and more importantly, that corporate funding influences the actual thematic content of these polarization efforts, and the discursive prevalence of that thematic content over time.*

For example, from 2007 to 2013, those who received funding increased their discussion of the issue of energy production, the positive benefits of CO2 and questions over whether climate change is a long-term cycle. Polarizing issues that way, the study notes, "is an effective strategy for creating controversy and delaying policy progress."

The study comes when Exxon Mobil (and for the entire U.S. oil and coal industry) is being looked at much closer on a number of fronts.

New York state has announced an investigation into whether Exxon Mobil misled investors and the public about the effects and financial implications of climate change. Hopefully, these governmental agencies that have the responsibility of regulating the oil industry will follow up on what they have learned from this important study.

Source: *Huffington Post*

## XIX. UPDATE ON NURSING HOME LITIGATION

### GOVERNMENT-FORCED CLOSURES OF NURSING HOMES

In the past 10 years in Alabama, the Alabama Department of Public Health (ADPH) has taken measures to close only four nursing homes. Earlier this year, after investigating complaints against Golden Living Nursing Home in Trussville, Ala., the ADPH recommended that the Centers for Medicare and Medicaid Services (CMS) cease payment of benefits on behalf of residents who received care at the facility because of the facility's histories of violations. The cessation of Medicare and Medicaid payments has resulted in the owners and operators of this facility having to shut down the facility. It was stated by AL.com:

*Dr. W.T. Geary, medical director of the Bureau of Health Provider Standards at the [ADPH], said the facility had been under the microscope for some time. Golden Living Center in Trussville had been on a federal list of low-performing nursing homes for 45 months, much longer than most other facilities on the same list.*

CMS makes available the results of investigations to the public. The CMS website reveals that this facility had multiple deficiencies, issues and violations in 2013 to the present, which included:

- failing to protect its residents from abuse;
- failing to provide appropriate training and policies on the prevention, identification and reporting of resident abuse;
- walls and sprinkler systems that were substandard;
- failing to minimize medication errors;
- failing to ensure that each resident's drug regimen was free of unnecessary drugs and was properly managed for the highest level of well-being;
- failing to have sufficient controls in place to minimize the risks of infections;
- failing to keep proper clinical records on certain of its residents;

- failing to minimize the use of restraints;
- failing to provide proper care to minimize the formation of bedsores and pressure ulcers;
- failing to provide proper care and treatment to residents with feeding tubes so as to reduce the risks of aspiration, pneumonia, and other health-related concerns;
- failing to encourage and help to restore feeding skills for patients with feeding tubes;
- failing to provide appropriate drug and medication protocols and management for emergency drugs;
- failing to assist those patients who need assistance with activities of daily living (ADLs), such as eating, drinking, grooming and personal and oral hygiene; and
- failing to follow standards with respect to implementing and maintaining catheters in its residents and reducing the risks of urinary tract infections.

The closure of this nursing home facility is a good reminder about the importance on the part of family members and sponsors to closely monitor the care of a resident in a nursing home. It is also a good reminder about the importance of researching a facility to determine the rates of deficiencies and what, if anything, the facility has done to properly and timely remedy those deficiencies.

While ADPH investigators and other state and federal agencies can determine some deficiencies on their own, these agencies rely heavily upon reporting by residents, family members and current and former staff of these facilities. If you are aware of deficiencies in a nursing home, it is imperative that you contact the ADPH. This agency has a website and by following the link the information to file a complaint can be determined. (See ADPH.org.)

While there are private services that keep up with critical information, Medicare.gov has a search engine available that permits potential residents and their families to search for specific nursing homes. This information can be found at [www.medicare.gov/NHCompare](http://www.medicare.gov/NHCompare). Medicare.gov uses a five-star system to rate nursing homes and various aspects of their patient care. This federal agency also provides valuable resources that should assist family members in evaluating different nursing homes.

While closure of a nursing home often causes great hardship on residents and

their family members, on rare occasions this is necessary for the betterment of all residents. If you need more information relating to nursing home litigation, contact Ben Locklar, a lawyer in our firm who handles Nursing Home Litigation, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

## XX. AN UPDATE ON CLASS ACTION LITIGATION

---

### **JPMORGAN WILL PAY \$150 MILLION TO SETTLE “LONDON WHALE” INVESTOR LAWSUIT**

JPMorgan Chase & Co. will pay \$150 million to settle a class action lawsuit accusing the bank of misleading investors about the riskiness of derivatives trading before the \$6 billion “London Whale” trading fiasco. The proposed settlement was in a New York federal court on Dec. 18. The investors, led by a group of retirement funds, reached an agreement for an immediate cash payment from the bank in exchange for ending their litigation just months after winning certification when U.S. District Judge George B. Daniels rejected JPMorgan’s contentions that some of the class members who bought their shares after the bank partially disclosed some losses were differently situated.

The proposed settlement was filed in court the same day the U.S. Securities and Exchange Commission (SEC) said the bank and its investment advisory business will pay \$307 million to settle allegations by the SEC and other regulators that the bank failed to tell clients it was steering them to its own products to obtain higher fees. The suit claims JPMorgan violated the Securities Exchange Act by misleading investors about the riskiness of the bank’s derivatives trading, which led JPMorgan’s stock to drop when the losses were disclosed.

The Plaintiffs sought certification of a class of investors who bought JPMorgan stock from Feb. 13 through May 21, 2012, or in the alternative a shorter class period from April 13 through May 21. JPMorgan argued that neither period clears the necessary hurdles.

The bank, among other things, had argued in its bid to defeat certification that some of the lead Plaintiffs bought shares after May 10, 2012, when JPMorgan disclosed a \$2 billion trading loss in an analyst call, but before May 21, 2012,

when it suspended a planned share buyback program. The bank claims that put them in a different position than investors who had been in the stock long before, meaning the claims don’t pass the “typicality test.” But Judge Daniels found in September that there was no reason to believe some of the Plaintiffs would have to use a unique defense on the May 10 disclosure, because they say the disclosure was only complete on May 21. In that ruling, Judge Daniels approved the shorter period put forth by the class.

The settlement follows a victory for JPMorgan in the Second Circuit earlier this month, when a three-judge panel upheld for the second time Judge Daniels’ finding that shareholder Ernesto Espinoza couldn’t show that JPMorgan’s board had been negligent in rejecting his demand to investigate the wrongdoing connected with the London Whale trading disaster. Referring to guidance from the Delaware Supreme Court, the appellate court said that it was up to the board’s discretion to investigate all of the issues the Plaintiff (Espinoza) raised and that the board didn’t have to respond to all of the demands in the letter it sent refusing his requests.

The Plaintiffs are represented by Jay W. Eisenhofer, Daniel L. Berger and Jeffrey A. Almeida of Grant & Eisenhofer PA, Salvatore J. Graziano, John Rizio-Hamilton and Jonathan D. Uslander of Bernstein Litowitz Berger & Grossmann LLP, and Andrew L. Zivitz, Matthew L. Mustokoff and Johnston de F. Whitman Jr. of Kessler Topaz Meltzer & Check LLP. The Defendants are represented by Richard C. Pepperman II, Daryl A. Libow and Christopher M. Viapiano of Sullivan & Cromwell LLP. The civil case is *In re: JPMorgan Chase & Co. Securities Litigation*, in the U.S. District Court for the Southern District of New York.

Source: Law360.com

### **WELLS FARGO AGREES TO \$25.7 MILLION SETTLEMENT IN RICO SUIT**

A group of homeowners has asked an Iowa federal court to approve a \$25.7 million settlement of a putative Racketeer Influenced and Corrupt Organizations (RICO) class action. Wells Fargo was accused of ordering unnecessary property inspections and charging delinquent borrowers. The homeowners asked the judge to grant final approval of the agreement that comes after seven years of litigation over claims that Wells Fargo violated the RICO Act by ordering repeated property inspections and concealing the nature of charges to delinquent borrowers for the service. The

homeowners, in the motion for final approval, also requested certification of the proposed class in order to carry out the plan of allocation. They stated;

*The settlement benefits the class by conferring a guaranteed, immediate, and substantial benefit of \$25,750,000 and avoids the risks and expenses of continued litigation, including the risk of recovering less than the amount of the settlement fund after substantial delay or of recovering nothing at all.*

The court granted preliminary approval of the settlement in September and the proposed class, which could include more than 2.7 million homeowners, was notified in October after Wells Fargo deposited the sum into an escrow account. According to the motion, a majority of the homeowners view the settlement favorably, with only four potential class members objecting to the agreement and 102 opting out.

The Plaintiffs are represented by Deborah Clark-Weintraub of Scott & Scott LLP, Todd S. Garber of Finkelstein, Blankinship, Frei-Pearson & Garber LLP and Roxanne Barton Conlin of Roxanne Conlin & Associates. Wells Fargo is represented by Elizabeth Holt Andrews of Severson & Werson and Michael A Giudicessi of Faegre Baker Daniels LLP. The case is in the U.S. District court for the Southern District of Iowa.

Source: Law360.com

### **GM ACCUSED OF FALSELY ADVERTISING TRUCKS’ TOWING CAPACITY**

A class action lawsuit was filed against General Motors Co. (GM) in a California federal court last month. The automaker was accused of marketing two types of pickup trucks that don’t live up to their advertised towing capacity. GMC Sierra owner Richard Quintero alleged that GM alerted nationwide owners of 2014 GMC Sierra 1500 Series and Chevrolet Silverado 1500 pickup trucks at the end of 2014 that the company had miscalculated the trucks’ towing capacities and that the actual amount they could tow was about 2,000 pounds less than advertised. It was further alleged:

*Had plaintiff and class members known the 2014 GMC Sierra’s and the 2014 Chevrolet Silverado’s actual towing capability at the time of purchase, and the safety hazard posed by towing loads in excess of a vehicle’s capacity, they would not*

have bought the class vehicles or would have paid much less for them.

The suit includes claims against GM for breach of express warranty, negligent misrepresentation and a violation of California consumer protection laws. The Plaintiff seeks to represent all owners and lessees of the two truck models. Quintero is represented by Raymond P. Boucher and Maria L. Weitz of Boucher LLP, John A. Yanchunis, Marcio W. Valladares and Patrick A. Barthle II of Morgan & Morgan Complex Litigation Group, and Paul R. Kiesel, Jeffrey A. Koncius and Mariana Aroditis of Kiesel Law LLP. The case is in the U.S. District Court for the Central District of California.

Source: Law360.com

## XXI. THE CONSUMER CORNER

### ANGIE'S LIST SUED IN PHILADELPHIA COURT

Our firm and a Pennsylvania firm have filed suit against Angie's List on behalf of Janell Moore, a woman who did business with the company. With the tagline "Reviews you can trust," Angie's List promises to offer "unbiased" customer reviews about service providers. Ms. Moore, a Pennsylvania resident, is the lead Plaintiff in the federal class-action lawsuit filed in Philadelphia against "Angie's List." We allege in the suit that the Indiana-based company breached its contract and committed fraud. Boasting more than three million paid members, Angie's List claims that it provides unbiased customer reviews about all sorts of service providers. Ken Grunfeld, a lawyer with Golomb and Honik, who is working on this case with us, had this to say about how this company operates: "We have learned that a contractor pays Angie's List to be pushed up on Angie's List ratings and to have other negative reviews suppressed."

The complaint alleges that service providers pay Angie's List fees for higher rankings in member searches, to suppress negative reviews, and to ensure that positive reviews are not suppressed. We allege in the suit that Angie's List entices local consumers to pay for unfiltered business reviews. It's alleged further that Angie's List claims to be a "passive conduit" for consumer reviews and that its membership agreement claims rankings are based on actual consumer experi-

ences. In reality, service providers can influence rankings by paying fees. According to Angie's List investor relations department, approximately two-thirds of all revenues come from service providers. Advertising is a significant source of revenue for Angie's List, bringing in much more revenue than subscriptions. In 2014, Angie's List made \$241.9 million from service providers and only \$73.1 million from members. Ms. Moore claims in the suit that she joined Angie's List in 2012 and used the web site to search for a contractor.

Ms. Moore chose a company with no reviews. However, when that "contractor ripped her off" and "she gave a negative review," she later learned that other Angie's List members had posted negative experiences. The court determined these allegations satisfied the fraud pleading requirements. We allege in the complaint that Angie's List not only lied to consumers, it also breached several contract provisions. The court determined the claims were sufficiently pleaded. The court determined that:

*the contract's provisions unambiguously depict the website with which Ms. Moore contracted as a provider rating system based on first-hand consumer reviews, unshaped by input from any other source. [Moore] alleges a breach by averring that (1) an electrician of her acquaintance disclosed that he pays Angie's List to alter his rating, and (2) she could not initially view all negative reviews of the provider she contracted with—both of which counter Angie's List's representation that it is simply a passive conduit for the publication of content about providers.*

By rejecting Angie's List's effort to dismiss Ms. Moore's lawsuit, the fraud and contract breach claims will proceed. Angie's List bases its reputation on providing unbiased, customer-driven reviews. Dee Miles and Rebecca Gilliland from our firm, along with Richard Golomb and Ken Grunfeld from Golomb & Honik, will handle the case.

Cases like this one are critical to insuring that companies actually do what they say. If you need more information on the Moore case contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Sources: Forbes.com, Philadelphia.cbslocal.com and golombhonik.com

### CAUSE OF BRONCHIOLITIS OBLITERANS, OR POPCORN LUNG, FOUND IN E-CIGARETTE FLAVORS

Researchers at Harvard T.H. Chan School of Public Health have concluded that diacetyl, a extremely toxic chemical substance, exists in 75 percent of flavored electronic cigarettes and refill liquids. There are currently more than 7,000 varieties of flavored e-cigarettes and e-juice (nicotine-containing liquid that is used in refillable devices) on the market. Diacetyl is a very dangerous chemical because it is known to cause a deadly and debilitating respiratory disease called bronchiolitis obliterans. The disease gained so much notoriety after killing numerous workers exposed to diacetyl flavorings in the popcorn processing industry that it was termed "popcorn lung."

Despite their exploding popularity, E-cigarettes are not currently regulated by the Federal Government. However, the U.S. Food and Drug Administration (FDA) issued a proposed rule to include e-cigarettes under its authority to regulate as it does tobacco and nicotine-containing products. These E-cigarettes with the flavoring additives containing diacetyl are very popular among users—especially high school students—and everyone should be concerned about the long term health consequences.

Lawyers in our firm are actively investigating cases where a diagnosis of bronchiolitis obliterans, or popcorn lung, occurs. Based on our investigations, we believe these conditions can often be traced to a product containing diacetyl. We are reasonably sure that one of those products will likely be E-cigarettes. If you have any questions about this subject, contact Rhon Jones or Parker Miller, lawyers in our firm's Toxic Torts Section, at Rhon.Jones@beasleyallen.com and Parker.Miller@beasleyallen.com. Alternatively, they can be contacted at 800.898.2034.

### SOME TOYS ARE SAID TO BE TOO DANGEROUS TO OWN

Each year before Christmas an onslaught of new toys hit the market. But not all of these toys bring joy to their new owners on Christmas morning. Whether it's due to hazardous materials, unsafe operations or just poor production, there have been plenty of popular toys that have proved to be dangerous for children. Unfortunately, because of the hoverboards that have a tendency to burst into flame, 2015 was no different. With that in mind, Amber Sutton (asutton@al.com) took a look at 11 famous toys that she

found to be too dangerous to own. Those are set out below with her comments:

### **Hoverboards**

We'll start with this year's riskiest gift of the season. While the popularity of hoverboards took off this summer, it wasn't until recently that the threat of spontaneous combustion became a factor. Since Dec. 1, thousands of the hands-free scooters have been recalled as more and more tales of hoverboards unexpectedly catching fire were reported.

### **Sky Dancers**

Sure, the concept of a fluttery doll spinning into the air before gracefully gliding back down to Earth sounds like a good idea. However, it turns out kids don't always use toys as intended. When you consider that Sky Dancers are basically projectile missiles with colorful wings, you start to see where things could go wrong. The flying fairies were ultimately recalled in 2000 after more than 170 injuries were reported.

### **CSI: Fingerprint Examination**

For a lot of kids, the idea of searching for fingerprints using the CSI: Fingerprint Examination Kit sounded like a pretty fun activity. And it probably would have been if the kit didn't include a powder that contained up to five percent asbestos. In 2007, the toy's maker, CBS Consumer Products, was hit with a civil action suit by the Asbestos Disease Awareness Organization, and the kit was eventually removed from store shelves.

### **Lawn Darts**

Hey, remember when throwing large darts with sharp metal tips near other people sounded like a good idea? Lawn darts, which combined the games of horseshoes and darts, seemed appealing until it resulted in three deaths and was outlawed in the U.S. by the Consumer Products Safety Commission. The ban was reissued in 1997 when the darts were credited with causing a child's brain injury.

### **Magnetix**

Magnetix offered kids a chance to build and create their own designs by using various size plastic pieces that connected using magnets. Unfortunately, the plastic shells were easily broken, allowing young children

access to the magnets inside. When the magnets were swallowed, as small children are prone to do, they caused some serious internal damage. In 2006, the sets were recalled after 34 incidents, including the death of a 20-month-old boy, were reported.

### **Snacktime Cabbage Patch Doll**

There are plenty of dolls on the market, but very few have been known to bite down on a child's finger. Snacktime Cabbage Patch Dolls were a major seller in the fall of 1996, but were recalled a year later after reports of children getting their finger and hair stuck in the dolls' mechanical mouth. While Mattel sold more than 500,000 dolls in only three months, the snacktime line was discontinued in Jan. 1997.

### **Slip n' Slides**

We've all probably found ourselves careening down the wet rubber of a slip n' slide at least once in our lives, right? If so, looks like we were taking our lives into our own hands. The Consumer Production Safety Commission issued a warning in 1993 strongly urging adults and teenagers to stay clear of WHAM-O backyard water slides after several serious spinal injuries, including the paralysis of a 13-year-old, were reported.

### **"Gun Fighter" Toy Cork Gun**

Turns out a Red Ryder BB Gun isn't the only thing kids can shoot their eyes out with. In 1977, the "Gun Fighter" Toy Cork Gun was a hot item, but was quickly proven to be dangerous if kids removed the muzzle and plastic caps covering the gun's barrel. A recall on the guns was issued in 1979 after a young boy suffered an eye injury from being struck by the exposed metal rod.

### **Easy Bake Ovens**

Easy Bake Ovens are probably one of the most famous toys to ever be produced, but they're also one of the most notorious when it comes to injury reports. A new model of the classic toy oven was recalled in 2007 after dozens of children received second and third-degree burns from getting their fingers or hands stuck in the toy. According to the Consumer Production Safety Commission, one child's burn was so severe

that it resulted in a partial finger amputation.

### **Sky Rangers Park Flyer Radio Control Airplanes**

In 2007, Sky Rangers remote control airplanes made the wishlists of children looking for something fun to do outside. However, the planes were known to explode and posed some pretty serious health risks. Overall, 45 reports of the toy, which was launched by hand, exploding were filed. Injuries included ear pain, minor burns, eye injuries and cuts.

### **Yo-Yo Water Balls**

Yo-Yo Water Balls sound simple enough. They consisted of a squishy ball attached to a cord made of a stretch material that allowed children to squeeze and sling the toy. However, the cord soon proved to be a strangulation hazard for young children after 186 reports were filed. While the Consumer Products Safety Commission (CPSC) elected not to issue a recall, several major retailers removed the toys from their shelves out of concern.

Based on the information from Amber Sutton and Law360, I would recommend that parents of young children be extremely careful if any of these toys are in their home. The same recommendations also apply for older children who may have these toys.

Sources: ALc.om and Law360.com

### **SOME TIPS ON HOW TO READ TIRE WEAR**

It's very important for folks to know how to detect and understand tire wear. Abnormal wear patterns are often caused by the need for simple tire maintenance, or by the need for front end alignment. Tires should be inspected at every opportunity; once a week isn't too often. Learning to read the early warning signs of trouble can prevent wear that shortens tire life. Tires should be inspected in three ways. First, visually examine all four tires; second, feel the tread by hand to detect wear such as feathering and finally, check all four tires with a pocket-type pressure gauge.

### **Over Inflation**

Excessive wear at the center of the tread indicates that the air pressure

in the tire is consistently too high. The tire is riding on the center of the tread and wearing it prematurely. Many times, the “eyeball” method of inflation (pumping the tires up until there is no bulge at the bottom) is at fault; tire inflation pressure should always be checked with a reliable tire gauge. Occasionally, this wear pattern can result from outrageously wide tires on narrow rims. The cure for this is to replace either the tires or the wheels.

### **Under Inflation**

This type of wear usually results from consistent under inflation. When a tire is under inflated, there is too much contact with the road by the outer treads, which wear prematurely. Tire pressure should be checked with a reliable pressure gauge. When this type of wear occurs, and the tire pressure is known to be consistently correct, a bent or worn steering component or the need for wheel alignment could be indicated. Bent steering or idler arms cause incorrect toe-in and abnormal handling characteristics on turns.

### **Feathering**

Feathering is a condition when the edge of each tread rib develops a slightly rounded edge on one side and a sharp edge on the other. By running your hand over the tire, you can usually feel the sharper edges before you'll be able to see them. The most common cause of feathering is incorrect toe-in setting, which can be cured by having it set correctly. Occasionally toe-in will be set correctly and this wear pattern still occurs. This is usually due to deteriorated bushings in the front suspension, causing the wheel alignment to shift as the car moves down the road.

### **One Side Wear**

When an inner or outer rib wears faster than the rest of the tire, the need for wheel alignment is indicated. There is excessive camber in the front suspension, causing the wheel to lean too much to the inside or outside and putting too much load on one side of the tire. The car may simply need the wheels aligned, but misalignment could be due to sagging springs, worn ball joints, or worn control arm bushings. Because load has a great affect on alignment, be sure the car is loaded the way it's

normally driven when you have the wheels aligned; this is particularly important with independent rear suspension cars.

### **Cupping**

Cups or scalloped dips appearing around the edge of the tread on one side or the other almost always indicate worn (sometimes bent) suspension parts. Adjustment of wheel alignment alone will seldom cure the problem. Any worn component that connects the wheel to the car (ball joint, wheel bearing, shock absorber, springs, bushings, etc.) can cause this condition. Worn components should be replaced with new ones. The worn tire should be balanced and possibly moved to a different location on the car. Occasionally, wheels that are out of balance will wear like this, but wheel imbalance usually shows up as bald spots between the outside edges and center of the tread.

### **Second-rib Wear**

Second-rib wear is normally found only in radial tires, and appears where the steel belts end in relation to the tread. Normally, it can be kept to a minimum by paying careful attention to tire pressure and frequently rotating the tires. Some car and tire manufacturers consider a slight amount of wear at the second rib of a radial tire normal, but that excessive amounts of wear indicate that the tires are too wide for the wheels. Be careful when having over-size tires installed on narrow wheels.

### **Tire Aging**

We have written on tire aging in prior issues. Tire aging is perhaps the most dangerous tire defect because it cannot be seen and most people are not aware of the dangers of aged tires. A tire might look brand new and might not have ever been used, but research and testing shows that when tires reach six years, those tires can break down from the inside, de-treading upon use and causing fatal accidents. The only way to determine a tire's age is by looking at the Department of Transportation (DOT) number on the sidewall of the tire. The last three or four numbers indicate the week and year that a tire was manufactured. If there are three trailing numbers in a DOT number, then the tire was manufactured Pre-2000. The first two numbers indicate

the week and the last number indicates the year (it is often hard to determine whether that is a 1980 or 1990 generation tire by the DOT and sometimes has to be determined by what years the actual tires were being manufactured). If there are four trailing numbers in a DOT number, then the tire was manufactured after the beginning of 2000. The first two numbers indicate the week and the last two numbers indicate the year.

If you need additional information on tires contact Rick Morrison, a lawyer in our firm who handles tire litigation, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

### ***STUDY REVEALS INCREASED INFANT DEATHS ATTRIBUTED TO CRIB BUMPERS AND A BAN IS RECOMMENDED***

A new study shows that the number of infant deaths and injuries attributed to crib bumpers has increased significantly in recent years, prompting the researchers to call for a nationwide ban on the bedding accessory. The findings stem from an analysis by longtime experts on the topic—a professor emeritus of pediatrics at Washington University School of Medicine in St. Louis and two former researchers with the U.S. Consumer Product Safety Commission (CPSC). The findings indicate that in the majority of incidents studied, crib bumpers were the sole cause of harm, rebutting beliefs that other items also in the cribs—such as blankets, pillows and stuffed animals—caused the deaths and injuries.

Further, the research shows that the 23 crib-bumper deaths reported to the CPSC over a seven-year span—from 2006 through 2012—were three times higher than the average of eight deaths reported in each of the three previous seven-year time spans. Alarmingly, the researchers report, the lack of data gathered on crib-bumper deaths and injuries over the decades suggests that the actual number of related deaths and injuries is likely much larger than what is now known. “Crib bumpers are killing kids,” said senior author Bradley T. Thach, MD, a professor emeritus of pediatrics at the School of Medicine and the author of a landmark study published in 2007 that first documented crib-bumper deaths. Dr. Thach stated that “bumpers are more dangerous than we originally thought. The infant deaths we studied could have been prevented if the cribs were empty.” The findings were reported Nov. 24 in *The Journal of Pediatrics*.

There are no federal regulations regarding crib bumpers. In 2012, a voluntary industry standard was revised to improve crib-bumper safety by limiting the items' thickness. And in 2013, the CPSC directed its staff to explore rule-making options, suggesting change, but it has not resulted in any federal action.

According to the new research, a review of CPSC data showed that 48 infant deaths from 1985-2012 were specifically attributed to crib bumpers. An additional 146 infants were involved in crib-bumper incidents in which the babies nearly suffocated, choked or were strangled. The mean age of death was 4.6 months, with an age range of 1 to 22 months. Documents reviewed included death certificates and autopsy, death scene and other investigative records.

Dr. Thach and his fellow researchers—lead author N.J. Scheers, PhD, former manager of CPSC's Infant Suffocation Project, and Dean W. Woodard, former CPSC corrective actions director—determined that 32 of the 48 deaths they examined could have been prevented if crib bumpers had not been used in the cribs. Most of those infants died due to suffocation because their noses and mouths were covered by a bumper or were between a bumper and a crib mattress. No other objects were between the infants' faces and the bumpers. Dr. Scheers explained:

*When a baby's nose and mouth is covered by a bumper, the infant can suffocate when his or her airway becomes blocked, or from breathing oxygen-depleted air. So if bumpers had not been in the cribs, these babies would not have died.*

Regarding the other 16 infant deaths, the researchers found that the babies were wedged between a bumper and a pillow, a bumper and a recliner used to elevate an infant's head or, in one instance, a bumper and a twin sleeping in the same crib. Had the bumpers not been in the cribs, the researchers maintain, the babies would not have been wedged into such positions and would have survived. However, the researchers linked more deaths to crib bumpers than the 48 indicated in the CPSC data.

A review of data from the National Center for the Review and Prevention of Child Deaths revealed reports of 32 additional bumper-related deaths from 37 states from 2008-2011. That puts the number of fatalities tied to crib bumpers at 77—and suggests the actual number is much higher. Dr. Scheers, who has served as a consultant on sleep safety to the American Academy of Pediatrics, stated:

*This highlights the most important limitation of the study. CPSC relies on death certificates to identify deaths caused by specific products. Bumper involvement is often not specified on death certificates, so it is highly likely many deaths caused by crib bumpers are missed.*

Of the 146 bumper-related incidents, researchers said most were caused by poor bumper design or construction. For example, near-suffocations resulted from a lack of bottom ties or not enough ties, which allowed infants' faces to get trapped in the bumpers. Incidents involving choking and strangulation occurred because of detached bumper ties and decorations, frayed ribbons and loose stuffing. Infant deaths and injuries occurred with thick pillow-like bumpers and thin bumpers, the latter of which some manufacturers have touted as being safer than plush ones. Newer mesh bumpers and vertical bumpers that wrap crib slats were not included in the study because so far there is little information about such items. Dr. Thach said: "They should still be watched. Crib bumpers serve no purpose."

Originally designed to protect infants from slipping through crib slats, entangling their limbs in the gaps or bumping their heads, many parents consider bumpers as necessary safety precautions. However, since 1973, federal regulations have required that crib slats be narrow enough to prevent a baby's head from going through the slats. Dr. Scheers said:

*Ours is the first study to document that slat entrapments and infants hitting their heads also occurred with bumpers in the crib. Sleep sacks prevent a baby's limbs from getting tangled in the slats. It's also unlikely that a baby hitting her head on the crib sides would result in serious injury.*

Despite the data, crib bumpers remain popular among expecting parents who see bumpers in store displays, magazines and catalogues featuring high-end celebrity nurseries. The study recommends the CPSC follow the lead of Maryland and Chicago and ban the sale of crib bumpers. The state of Maryland banned their sale in 2013; following the city of Chicago, which did so in 2011. The American Academy of Pediatrics, Canadian Pediatric Society, the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention have all recommended against the use of crib bumpers.

Ultimately, the CPSC is the only federal agency with the power to institute a U.S. ban. However, the researchers said the

commission is a small, underfunded division with limited resources and a number of looming priorities. Dr. Thach said

*A ban on crib bumpers would reinforce the message that no soft bedding of any kind should be placed inside a baby's crib. There is one sure-fire way to prevent infant deaths from crib bumpers: Don't use them, ever.*

Based on what we have learned, I believe the CPSC should ban the sale of crib bumpers. The risk is too great to allow these products to remain on the market. This study is enough proof to more than justify this action by the CPSC.

#### **WHOLESALE DRUG DISTRIBUTOR CHARGED IN \$100 MILLION FRAUD SCHEME**

The owner of a Utah-based wholesale distribution company has been charged with fraudulently distributing to pharmacies more than \$100 million worth of prescription drugs that he bought from a "nationwide black market," potentially endangering thousands of unsuspecting patients. This was revealed in an indictment unsealed last month in New York. Randy Crowell, a Nevada resident, was charged with one count of conspiracy to commit health care fraud, one count of conspiracy to commit mail or wire fraud, one count of conspiracy to violate the Food, Drug and Cosmetics Act and one count of conspiracy to commit money laundering, the U.S. Department of Justice (DOJ) said. He faces a maximum of 55 years in prison.

The scheme was profitable for Crowell, who earned about \$16 million alone from reselling black market prescription drugs. But what he was doing was dangerous to patients who took the medication not knowing that the medicine had been previously prescribed to others before being resold and trafficked, often in unsafe conditions, according to the DOJ. Manhattan U.S. Attorney Preet Bharara said in a statement:

*Crowell perverted the system designed to ensure patients receive safe and effective medication, making millions in the process. Crowell's alleged crime victimized not only benefit programs like Medicaid, but also countless everyday people suffering from illnesses who had no idea their medicine had been diverted from the legitimate stream of commerce and could be dangerous to consume.*

From early 2010, when Crowell established his business, to at least July 2012, he ran a licensed wholesale distributor based in southwest Utah and bought drugs at a fraction of their original price before selling them as new to pharmacies all over the country, according to the DOJ. To maximize profits, the DOJ said, Crowell and his co-conspirators focused on some of the most expensive medications, including those used to treat HIV and AIDS.

Rather than buying medication from manufacturers or legitimate authorized distributors at full price, participants in the scheme targeted the cheapest possible source of supply—Medicaid patients and other folks who received monthly prescriptions for little or no cost and who were willing to sell them rather than take them. These people sold their medications to so-called “collectors” who worked on street corners and in stores and paid as little as \$40 to \$50 in cash for each bottle, according to the DOJ.

Because the goal was to resell the previously prescribed drugs as new at full price, the conspirators used hazardous chemicals, such as lighter fluid, to remove the labels. This process was dangerous since the chemical could get into the bottles and render the drugs unfit for human consumption.

The collectors then sold the second-hand drugs to people who then sold them to those with direct access to legitimate distribution channels, including corrupt wholesale companies like Crowell’s business, the DOJ said. These wholesalers then sold them as new to pharmacies, which could be the very same locations that initially dispensed them at full price.

Crowell’s company had no legitimate sources of supply, the DOJ said, and, consistent with its illegitimate origins, inbound shipments of drugs often arrived improperly packaged in unsealed, unsecure cardboard boxes. The bottles were sometimes already opened, or contained what appeared to be the wrong medication, the indictment said, noting that employees attempted to remove any bottles that still had patient labels or were otherwise visibly damaged or used.

To maintain a facade of legitimacy, the company lied about the drugs’ origins by creating false documents that purported to show the legitimate movement of the medication, the DOJ said. Crowell himself took numerous steps to conceal his activities, including using the alias “Roger,” frequently changing the phones he used to communicate with co-conspirators and paying them through sham companies, the indictment said. The activities described in the indictment are more than shocking. It’s almost impossible to

conceive such a dastardly plot. Hopefully, there will be a deterrent effect from this prosecution.

Source: Law360.com

#### **HEALTH CONCERNS ASSOCIATED WITH CRUMB RUBBER SYNTHETIC TURF**

In recent months, national media and a growing number of critics have raised concerns that crumb rubber used in synthetic turf contains carcinogens and other harmful substances and is potentially dangerous to children and other users. “Crumb rubber” is the term used to refer to the small bits of rubber that provide infill for certain types of synthetic turf that is made from recycled tires. The use of this material is quite common.

Many local playgrounds and playing fields have this material in place today and a large number of universities and even the NFL and FIFA have installed crumb rubber football, soccer, baseball, field hockey, and other fields. These synthetic turf fields provide significant advantages, such as all-weather use and reduced maintenance.

The tiny bits of rubber are believed to contain a wide variety of chemicals, including heavy metals, polycyclic aromatic hydrocarbons (PAHs) and volatile organic compounds (VOCs), because tires themselves are made from complex petroleum products. Some studies claim that a small number of the chemicals found in crumb rubber pellets are known or probable human carcinogens and others have well-known potentially toxic effects at sufficient doses, e.g., mercury, lead, benzene, PAHs and arsenic.

Current information from a number of crumb rubber studies does not show an elevated health risk from playing on fields with crumb rubber. However, these studies do not comprehensively address new questions and concerns about children’s health risks from exposure to crumb rubber. The Environmental Protection Agency (EPA) and other federal agencies are working with the California Office of Environmental Health Hazard Assessment for a comprehensive evaluation to determine the safety of crumb rubber.

The national media attention has generated additional investigations. Until these questions and concerns are fully addressed, the sports teams and local governments who already have these fields installed will continue to face growing pressure over alleged health effects. If you have any questions or need more information, contact Will Sutton, a lawyer in our firm’s Toxic Torts Section, at 800-

898-2034 or by email at William.Sutton@beasleyallen.com.

Source: Law 360

#### **CPSC TO INVESTIGATE HOVERBOARDS**

Fire-prone “hoverboards” are now the subject of an intensive new investigation by Consumer Product Safety Commission (CPSC) engineers. The CPSC has received numerous reports of the battery-powered, wheeled boards catching fire while charging or while in use. CPSC Chairman Elliot F. Kaye stated in a Dec. 16 release:

*Every consumer who is riding a hoverboard, who purchased one to give as a gift during the holidays, or who is thinking about buying one deserves to know if there is a safety defect.*

Field investigators and laboratory engineers are examining new and damaged boards, focusing on “the configuration of the battery packs and compatibility with the chargers,” Kaye said. It should be noted that no safety standard exists for hoverboards, and that the CPSC has received “dozens” of reports of fall injuries. Hoverboards are also known as “smart boards” or “smart self-balancing boards.” CPSC spokesman Scott Wolfson told Bloomberg BNA:

*We are currently conducting 12 fire investigations in 10 states. We have received at least 40 hospital emergency room reports from hospitals participating in the National Electronic Injury Surveillance System, a sampling system used to estimate injury totals.*

Some of the fall injuries have been serious, according to Kaye. They include “concussions, fractures, contusions/abrasions, and internal organ injuries.” It’s good that the CPSC is investigating what appears to be a most dangerous product.

Source: Bloomberg BNA

#### **BLUE BUFFALO AGREES TO RECORD \$32 MILLION PET FOOD FALSE AD SETTLEMENT**

Blue Buffalo has agreed to pay \$32 million to settle multidistrict litigation (MDL) in Missouri filed by consumers accusing the pet food maker of lying about the ingredients in its kibble. This was said to be the largest settlement ever over pet food. The agreement would pay consumers in the class action proportionate to how much they spent on Blue Buffalo Co.’s products. The company had

claimed its products were free of poultry byproducts, which was challenged in 13 class actions and in a false advertising suit filed by rival Nestle Purina PetCare Co.

Blue Buffalo says the impurities in its pet food were the fault of a supplier. Suits involved the premium pet food brand's True Blue Promise label, which claims the food is healthy and made with the best ingredients, specifically without poultry byproducts and artificial preservatives. The Plaintiffs cited testing done by Purina that allegedly shows the byproducts comprise up to a quarter of Blue Buffalo's kibble.

Purina, meanwhile, filed its own false advertising suit, which is still pending, lodging essentially the same claims against Blue Buffalo, its rival, and contending that independent laboratory studies found often significant amounts of chicken or poultry byproducts in Blue Buffalo products. The highest amounts were in the brand's Life Protection Indoor Health Chicken & Brown Rice product, which contained about 25 percent chicken by-products, the suit claimed. Most other products had less, between about 2 percent and 10 percent in kibble or LifeSource Bits, according to the suit. Purina also alleged that Blue Buffalo's products, though they claim to be grain-free, contain up to 3 percent grain and disputed the company's claim that its food is human food-grade.

Blue Buffalo filed counterclaims against its rival, contending that the pictures of fruits and vegetables on Purina pet food products would mislead consumers into thinking those were ingredients of the food. Purina's suit and the class actions sought damages from the company and injunctions forbidding Blue Buffalo from continuing to make alleged false statements in its marketing materials and labeling. Purina also seeks to force Blue Buffalo to account for all of its gains and profits resulting from the alleged false advertising and to pay restitution to Purina. Purina took note of Blue Buffalo's proposed class settlement, saying in a statement the deal comes seven months after the company admitted it was mislabeling products.

Source: Law360.com

## XXII. RECALLS UPDATE

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

mation 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.

### **FORD RECALLS 450,000 CARS OVER POTENTIAL FIRE HAZARD**

Ford Motor Co. has recalled nearly half a million Ford Fusions and Mercury Milans in North America because the vehicles' fuel tanks are prone to cracking, which can lead to gas leaks and potential fires. Ford reported that the recall encompasses 450,000 model year 2010-2011 Fusions and Milans that have potentially defective canister purge valves that can cause pressure changes inside the vehicles' fuel tanks, which can result in a crack in the top of the tank and a fuel leak. The automaker said that while a fuel leak in the presence of an ignition source can lead to a fire, it is not aware of any accidents, injuries or fires related to the defect.

According to Ford, affected vehicles include certain 2010-2011 Ford Fusion and Mercury Milan vehicles built at the Hermosillo Stamping and Assembly Plant from July 21, 2008 through March 4, 2011. There are a total of approximately 451,865 vehicles that might be affected in North America, including 411,205 vehicles in the United States and federalized territories, 33,605 in Canada and 7,055 in Mexico, it said.

Ford dealers will update the powertrain control module software, inspect the canister purge valve and fuel tank for leaks and replace if necessary, at no cost to vehicle owners. The recall is the latest in a string of Ford recalls implemented this year. In September, the automaker announced six new recalls covering about 380,000 vehicles for 10 models over safety defect concerns, including axle breakage and sudden braking. The largest two recalls in that round concern about 340,000 Ford Windstar vans made between 1998 and 2003 and 37,000 model year 2015 Ford F-150 trucks. The vans contain a potential issue with a safety repair on a fracture-prone rear axle that was performed as part of a previous recall, while the trucks may have a defective adaptive cruise control system that causes unexpected braking. In July, the car manufacturer recalled 433,000 2015 Focus, C-MAX and Escape vehicles over an electronic glitch that could cause an engine to continue running even after the ignition is turned off.

Between March and May, Ford recalled nearly 1.3 million vehicles, including police cars and hearses. About half of those recalls concerned faulty door latches that prevented doors from closing or allowed them to open while driving in newer Ford Fiestas, Fusions and Lincoln MKZ cars, with the first recall of 390,000 cars coming in late April and extended to include another 156,000 cars in early May. The company's largest single recall so far came at the end of April when the company announced a regional recall of more than 518,000 Ford and Lincoln vehicles in cold-weather states over power steering corrosion concerns.

### **MORE FORD RECALLS**

Ford has recalled more than 300,000 North American cars from between 2003 and 2005 for problems with a lighting control module that could cut off power to the headlights, which the company said has been related to 11 accidents and a minor injury. The automaker announced the recall for the Ford Crown Victoria and Mercury Grand Marquis. Ford also recalled more than 1,200 2015 Ford Transit vehicles for a rear axle shaft issue, 177 Ford F-650 and F-750 vehicles for a rear air brake chamber problem and issued a safety compliance recall for just over 3,200 Ford F-150 SuperCrew vehicles for a safety belt concern.

The headlight issue affects 312,814 North American vehicles, including 296,004 in the U.S. and its territories, 14,714 in Canada and 2,096 in Mexico. The cars were built between October 2001 and August 2005 at the St. Thomas assembly plant in Canada. The solder joints on the module could crack and interrupt power to the headlamps—increasing the risk of crash at night, according to Ford. The company will replace the lighting control module for free for customers. The company decided to take action after evaluating data from a 2014 customer satisfaction program, and reviewing the issue with the National Highway Traffic Safety Administration (NHTSA).

Of the remaining recalls, Ford said it is not aware of accidents or injuries linked to the problems. The Ford Transit recall is for rear axle shafts that "could fracture, either causing a loss of motive power without warning while driving or unintended vehicle movement when the vehicle is in park without the parking brake engaged—increasing the risk of injury or crash," the company said.

The recalled dual-rear-wheel vehicles were built at the Kansas City, Mo., assem-

bly plant between May and June and Ford said it will replace both rear axle shafts.

For the F-650 and F-750 recall, Ford said a braking problem could lead to accidents, with vehicles manufactured at the Ohio assembly plant between June and November affected. "The air brake jounce hoses could contact the vehicle's rear axle housing during vehicle operation, which could cause a leak and inadvertent application of the parking brake or diminished braking performance—increasing the risk of a crash," Ford said. On the safety belt issue, Ford F-150 SuperCrew vehicles built between January and March at the Dearborn assembly plant are affected, the company said. Ford will replace the front safety belt retractor and pretensioner assembly. "The safety belt assembly could have improperly secured pretensioner cables, and might not adequately restrain an occupant in a crash," the company said.

#### **TESLA RECALLS ALL MODEL S CARS OVER SEAT BELT ISSUE**

Tesla Motors Inc. is recalling all Model S sedans to check a potential issue with the front seat belts. In an email to customers, the Palo Alto-based company said it recently found a Model S in Europe with a front seat belt that was "improperly attached." The car was not involved in an accident and no injuries were reported, but Tesla said a seat belt in "this condition" would not provide "full protection" in a crash. The recall comes more than a month after *Consumer Reports* withdrew its recommendation for the Model S—a car it previously had raved about. The magazine surveyed 1,400 Model S owners who described an "array of detailed and complicated maladies" with charging equipment, power equipment, the drivetrain and the center console, in addition to sunroof issues. The company said it decided to conduct the seat belt recall as a "proactive and precautionary measure." Tesla said there are no concerns about the seat belts in the back seat.

The company said the European Model S it examined is the only customer vehicle it knows of with this condition, and that it found no issues after inspecting the seat belts in more than 3,000 vehicles spanning the entire range of Model S production. Tesla said it will send Model S owners an official recall notice by mail and that drivers should visit a Tesla service center for a free inspection. Tesla previously recalled the Model S because of a problem with a seat latch in 2013 and to upgrade the software in 2014 to fix a potential charging-system problem.

#### **PETERBILT RECALLS SEMITRUCKS OVER RISK OF TIRE FAILURE**

Peterbilt has issued a recall for more than 1,600 semitrailers that mostly haul automobiles over fears that they have speeds programmed to travel as much as 10 miles per hour over the safe speed rating of their tires. The recall came about a year after an initial inquiry by the National Highway Traffic Safety Administration (NHTSA) into the specifications for auto-hauling semis in late 2014. The company, a part of Washington-based Paccar Inc., pledged in an NHTSA document to reprogram the affected vehicles to limit top speeds to match the tire speed rating. The vehicles are equipped with certain 65 mile-per-hour-rated Michelin tires and the company said some may have vehicle speeds programmed at more than 75 miles per hour. The company said:

*In vehicles described above that are used in the auto hauler application, a premature tire failure may occur on the front or steer axle as a result of certain operating conditions (i.e. higher speeds, loads and road temperature).*

Vehicles could crash as a result of the problem after a premature tire failure, according to the company. The trucks were produced between January 2008 and Oct. 12, according to the documents. Peterbilt provided information on the specifications last year and between February and March began to make changes at the plant to "manually limit maximum road speed" engine parameters. NHTSA confirmed the change in April and verified that Peterbilt trucks with tires that are rated below 75 miles per hour have sun visor decals to notify drivers. "Peterbilt safety committee met and determined that due to the propensity of car haulers to maximize front axle loading, a safety defect exists" for certain vehicles. The trucks recalled include certain years of Peterbilts 335, 337, 340, 348, 365, 386, 388, 389 and 567 vehicles. The trucks have Michelin 295/6 R22.5 XZA-2 Energy and XDA-2+Energy tires. The company estimated that 100 percent of an estimated 1,652 vehicles are affected by the problem.

NHTSA investigated several truck crashes in late 2014 that involved semis with 2014 Michelin 295/60/R22.5 tires after they allegedly failed, though the crashes did not cause injuries or fatalities according to agency documents. The agency closed the investigation in early 2015, finding the failures were most likely caused by increased speed limits in several states. More than a dozen states

allow trucks to travel faster than 75 miles per hour. During the investigation, Volvo recalled auto-hauler trucks that were capable of higher speeds than the 65 miles-per-hour limit rating for their tires, the agency said at the time.

#### **TRANSMISSION TROUBLE TRIGGERS YAMAHA R1 RECALL**

Yamaha is recalling its 2015 YZF-R1 bikes in the U.S. and 2016 models in Canada. The recall is the result of potential transmission failures due to "inadequate component strength and stress concentration at the gear teeth bottom land." A letter dated Dec. 4 being sent by Yamaha to owners of the affected bikes in the U.S. states: "In affected motorcycles, both second gear wheel and pinion gears in the transmission may break as a result of extremely high stress and/or improper shifting. This is due to inadequate component strength and stress concentration at the gear teeth bottom land. In addition, the third and fourth wheel gears may be deformed or break as a result of excessive stress caused by hard usage. This is due to inadequate component strength. If gears fail, the transmission could lock up, causing loss of control that could result in a crash with injury or death."

Yamaha's letter states all costs for parts and labor will be covered under warranty. The work will include replacement by the authorized Yamaha dealer of the transmission assembly with one that includes gears of a different design. Owners are cautioned in the letter that the procedure takes almost 16 hours to complete and that owners should be aware that the dealer may need to keep the motorcycle longer depending on their current service schedule. For more information from Yamaha, call 1-800-962-7926. In the U.S., the recall is identified in the Yamaha customer letter as recall campaign #990100. The National Highway Traffic Safety Administration (NHTSA) has issued a recall campaign number: 15V802. A similar recall has been announced in Canada by Transport Canada, but that announcement refers to 2016 models only and indicates that 240 bikes are affected. The Transport Canada Recall number is 2015559.

#### **FELT BICYCLES RECALLS MOUNTAIN BIKES WITH OEM CARBON FIBER SEATPOSTS**

About 645 Mountain Bicycles have been recalled by Felt Bicycles, of Irvine, Calif. The carbon seat post originally sold with the bicycle can crack and break,

posing injury and fall hazards to the rider. This recall involves all model year 2015 Felt Double Double 30, NINEe 20 and Edict 1 mountain bicycles. The bicycles were sold with carbon fiber seat posts. The model name is printed on the top tube of the bicycles. The Felt logo is on the down tube of the Double Double 30 and the NINEe20, and on the top tube of the Edict 1. The Double Double 30 was sold in the color blue. The NINEe 20 was sold in a gray and orange color scheme. The Edict 1 was sold in a black and blue color scheme. Felt has received 10 reports of the seat post cracking. No injuries have been reported.

The Mountain Bikes were sold at bicycle specialty stores nationwide from August 2014 through September 2015 for between \$2,000 and \$5,500. Consumers should immediately stop using the recalled bicycles and contact their local Felt Bicycles dealer for a free inspection and seat post replacement toll-free at 866-433-5887 from 8 a.m. to 5 p.m. PT Monday through Friday or online at [www.feltracing.com](http://www.feltracing.com) and click on "Notices" for more information.

#### **FOCUS BICYCLES RECALLS IZALCO MAX BICYCLES DUE TO FALL HAZARD**

Focus Bicycles USA, Inc., of Carlsbad, Calif., has recalled about 40 Izalco Max Bicycles. The headset could cause the carbon-fiber fork steer tube to crack, posing a fall hazard. This recall involves the 2014-2015 Focus Izalco Max bicycles with Acros-brand upper headsets. The headsets are black with the word "Acros" printed in white on the upper headset. The company has received 11 reports of incidents outside the United States, including one reported injury in France. No incidents have been reported in the United States.

The bicycles were sold at independent bicycle retailers nationwide, and online at [www.bikebling.com](http://www.bikebling.com) and [www.carbon-connection.com](http://www.carbon-connection.com) from January 2014 through August 2015 for between \$1,800 and \$9,500. Consumers should immediately stop using the recalled bicycles and contact Focus Bicycles to schedule a free repair. Contact Focus Bicycles USA toll-free at 877-753-4480 from 9 a.m. to 5 p.m. PT Monday through Friday or online at [www.focus-bikes.com](http://www.focus-bikes.com) and click on "Izalco Max Recall" for more information.

#### **JOFRAN RECALLS 300 DINING TABLES DUE TO STRESS FRACTURE**

Wood furniture importer Jofran has recalled 300 of its Boulder Ridge dining tables in response to a stress fracture that can form in the table, causing a potential injury hazard. The Consumer Product Safety Commission (CPSC) announced the recall, saying it has received reports of 71 incidents involving stress fractures in the cement top or reports of the tops breaking. No injuries were reported. Made in Vietnam, the 78-inch rectangular dining tables have a cement top and wooden base. The serial numbers of the recalled tables begin with V12760A, V12760B, V12860A and V10134. The CPSC said the tables were sold at Jordan's Furniture, Kittle's Furniture, Nebraska Furniture Mart, Walter E. Smithe Furniture and Design and other retailers nationwide from May 2015 through October 2105 for about \$1,100. It has advised consumers to stop using the tables immediately and contact the Jofran dealer where they purchased the item to schedule a free repair. Consumers can also call Jofran toll-free at 866-563-7261 from 8:30 a.m. to 5 p.m. Monday through Friday or visit the company's website, [www.jofran.com](http://www.jofran.com) and click on the Boulder Ridge Repair link at the top of the page for more information.

#### **SKIP HOP RECALLS CRIB MOBILES DUE TO INJURY HAZARD**

About 3,500 Skip Hop crib mobiles have been recalled by Skip Hop Inc., of New York, N.Y. The strap attaching the product to the crib rail can break, posing an injury hazard if the product falls on the infant in the crib. This recall includes the Skip Hop Moonlight & Melodies projection crib mobiles. The mobile has a white plastic arm that attaches to the side of a crib with four blinking, glowing leaves with stuffed animal attachments. The mobile also has a projector on the top of the mobile that projects stars on the ceiling and plays eight nursery lullabies. The dangling stuffed animals on the mobile include a yellow and gray giraffe, a green turtle with a gray and white polka-dot shell, a brown and tan monkey and a gray and white striped owl. The mobiles measure 17.5 inches long by 14 inches wide by 22 inches tall. SKIP HOP and the model number 185509 are printed on the back of the mobile base. Skip Hop has received eight reports of the strap attaching the mobile to the crib breaking. No injuries have been reported.

The mobiles were sold at Babies R Us, Buy Buy Baby and other independent juvenile specialty stores nationwide and online at [Amazon.com](http://Amazon.com) and [skiphop.com](http://skiphop.com) from July 2015 to November 2015 for about \$65. Consumers should immediately stop using the recalled mobiles and contact the firm for instructions on receiving a \$75 coupon towards the purchase of a new Skip Hop product. Contact Skip Hop toll-free at 877-475-4746 from 9 a.m. to 5 p.m. ET Monday through Friday, by email at [customerservice@skiphop.com](mailto:customerservice@skiphop.com) or online at [www.skiphop.com](http://www.skiphop.com) and click on "Safety Notices" at the bottom of the page under "Customer Care" for more information. Photos are available at <http://www.cpsc.gov/en/Recalls/2016/Skip-Hop-Recalls-Crib-Mobiles/>

#### **ACE BAYOU REANNOUNCES RECALL OF BEAN BAG CHAIRS DUE TO LOW RATE OF CONSUMER RESPONSE**

The U.S. Consumer Product Safety Commission (CPSC) and Ace Bayou Corp., of New Orleans, La., have made a second announcement of the recall of about 2.2 million bean bag chairs sold from 1995 to 2013. Only 790 consumers who purchased the bean bag chairs have responded to the recall. CPSC and Ace Bayou are urging consumers to install the free repair kit to permanently disable the bean bag chairs' zippers so that they cannot be opened.

The CPSC is extremely concerned that these recalled bean bag chairs are continuing to be used by children. The foam beads inside the chairs are serious suffocation and choking hazards for children. Two children died after suffocating on the chair's foam beads. An additional incident has been reported to CPSC involving a 6 year old boy who opened the bean bag and reportedly swallowed some foam beads and had others in his nose and mouth.

The recalled bean bag chairs have two zippers, including an outer zipper that does not have a pull tab and another zipper directly underneath that zipper. Although the outer zipper on the bean bag chair does not have a pull tab, children can open it. Once they have opened the outer zipper, they can open the inner zipper, which contains the foam beads, and crawl inside. Children can suffocate or choke on these foam beads. The voluntary standard requires non-refillable bean bag chairs to have closed and permanently disabled zippers. Ace met the voluntary standard's requirement for a warning label.

The two deaths involved a 13-year-old boy from McKinney, Texas, and a 3-year-old girl from Lexington, Ky., who suffocated from lack of air and inhaling the chair's foam beads. Both children were found inside the chairs. The recalled chairs with zippers that can be opened were sold in a variety of sizes, shapes, colors and fabrics. They include round or L-shaped, vinyl or fabric, and are filled with polystyrene foam beads. They were sold in a variety of colors, including purple, violet, blue, red, pink, yellow, Kelly green, black, port, navy, lime, royal blue, turquoise, tangerine and multi-color. The round bean bag chairs were sold in three sizes, 30, 32 and 40 inches in diameter. The L-shaped bean bag chair measures 18 inches wide by 30 inches deep by 30 inches high. "ACE BAYOU CORP" is printed on a tag sewn into the bean bag chair's cover seam. They were made in China. The recalled bean bag chairs were sold at Bergner's, Big Lots, Bon-Ton, Boston Store, Carson's, Elder-Beerman, Herberger's, Meijer, Pamida, School Specialty, Wayfair, Walmart and Younkers stores and online at Amazon.com, Meijer.com, Walmart.com and other websites from 1995 to 2013 for between \$30 and \$100.

To prevent another death, consumers should check the outside zipper on their bean bag chair to ensure that it has a metal staple to disable the outer zipper. If it does not have a metal staple, take the recalled bean bag chair away from children immediately and contact Ace Bayou for the free repair kit to permanently disable the zipper.

#### ***NORTH CENTRAL INDUSTRIES RECALLS FIREWORKS FOUNTAINS DUE TO BURN AND INJURY HAZARD***

About 2,600 Fireworks Fountains have been recalled by North Central Industries Inc., of Muncie, Ind. The rear plug of the candle can dislodge while lit, posing burn and fire hazards to the user if the user is holding the device. This recall involves all mammoth Great Grizzly brand California Candles. The recalled candles are hand-held fireworks fountains that make crackling noises and display flowering tulips, blue pearls and gold showers. Each candle is approximately 2 inches in diameter and 30 inches long. The candles were sold in packs of three. One candle is labeled with the name "Glow Beam," one has the name "Dazzling Diamonds" and one has the name "Touch of Sparkle." Each candle has the Great Grizzly logo on the label near the beginning of the candle name. North Central Industries has received six

reports of a candle's rear plug dislodging while the firework was lit, resulting in burn injuries to the person holding the device. No reports of property damage have been received.

The firework fountains were sold at Albertson's and Kings Circle Assembly, both of Corvallis, Ore.; six locations of Fundz4Kidz, of Eugene and Springfield, Ore.; Uncle Sam's, of Allenton, Wis.; Boomer's Fireworks, of Muncie, Ind.; Dixie Dragon Fireworks, of Jeffersonville, Ind.; Holiday Packaging, of Marion, Ind.; Krazy Dan's Fireworks, of Gary, Ind.; Parkway Fruit Market, of Louisville, Ky.; Mr. Fireworks of Kokomo, of Kokomo, Ind.; Uncle Sam's Sales, of Hammond, Ind.; and World Cup Inc., of Villa, Ill., from May 2015 through June 2015 for between \$15 and \$25. Consumers should immediately stop using the recalled fireworks and contact North Central Industries for a full refund. Contact North Central Industries Inc. at 800-800-2264 between 8 a.m. and 5 p.m. ET Monday through Friday, email info@greatgrizzly.com, or online at www.greatgrizzly.com and click on Safety for more information.

#### ***THE CRAFTSMAN BRAND RECALLS BLOWER/VACS DUE TO FIRE AND BURN HAZARDS***

About 74,000 Blower/Vacs have been recalled by Ace Hardware Corporation, of Oak Brook, Ill; Orchard Supply Hardware, of San Jose, Calif.; and Sears, Roebuck & Co., of Hoffman Estates, Ill. The blower/vac's motor can catch fire, posing fire and burn hazards. This recall involves two models of Craftsman 12 amp electric blower/vacs. The blower/vacs have a red motor housing and a black blower tube and restrictor nozzle, and measure 12 inches high by 34 inches long. Blower/vacs with model number 138.74898 or 138.74899 are being recalled. Model 138.74898 has a variable speed switch and a serial number between SES0100001 and SES1951280. Model 138.74899 has a two-speed switch and a serial number between SER3561101 and SES2141280. The model number, serial number, "Craftsman" and "AC BLOWER / VAC" are printed on the side of the motor housing. Seven reports of the blower/vacs catching fire have been received. One injury has been reported.

The blower/vacs were sold at ACE Hardware, Orchard Supply Hardware, and Sears stores nationwide and online from January 2013 through October 2015 for between \$50 and \$100. Consumers should immediately stop using the recalled blower/vacs and contact the Craftsman brand hotline for a full refund.

Contact The Craftsman brand hotline toll-free at 888-266-7096 from 9 a.m. to 8 p.m. ET Monday through Friday and from 9 a.m. to 5 p.m. ET Saturday, or online at www.craftsman.com and click on Product Recalls for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/The-Craftsman-Brand-Recalls-Blower-Vacs/>

#### ***LIMOSS RECALLS BATTERY POWER PACKS FOR POWER RECLINERS AND LIFT CHAIRS DUE TO FIRE HAZARD***

About 2,500 Limoss lithium ion battery power packs have been recalled by Limoss US LLC, of Baldwin, Miss. The battery power packs can overheat, posing a fire hazard. This recall involves Limoss AKKU-PACK rechargeable lithium ion battery power packs sold as accessories for Palliser, Flexsteel and Best Home Furnishing power recliners and lift chairs. They are used to power the chair when an electrical outlet is not available. "Limoss Li-ion Battery Pack," model number ZB-B1800, code MC 160 and dates codes of 11-0102011 through 6-14-2012 are printed on a white sticker on the side of the unit. Recalled battery power packs are black and measure 6 inches long by 3 inches wide. Limoss has received two reports of the battery pack overheating, including one incident that resulted in undetermined fire damage. No injuries were reported.

The battery packs were sold at Best Home Furnishing, Flexsteel and Palliser dealers nationwide and online at amazon.com and other websites from November 2011 through August 2012 for about \$100. Consumers should immediately stop using the recalled battery power packs and contact Limoss for a free replacement toll-free at 866-643-0394 from 7 a.m. to 4 p.m. CT Monday through Thursday and 7 a.m. to 11 a.m. CT on Friday or online at [www.limoss-us.com](http://www.limoss-us.com) and click on "Support" and then "Notice and Recalls" for more information.

#### ***TECHNICAL CONSUMER PRODUCTS RECALLS LED LAMPS DUE TO ELECTRICAL SHOCK HAZARD***

Technical Consumer Products Inc., of Aurora, Ohio, has recalled about 25,000 Technical Consumer Products (TCP) and Great Value LED lamps. Water can enter the lamp in wet location applications, posing an electric shock hazard to the user. This recall involves 14 watt LED wet location PAR38 lamps sold under the TCP and Great Value Brand names. These lamps are white and produce a soft white

(3000 Kelvin) or bright white (5000 Kelvin) color temperature. Recalled units have an item number of "L14P38D30KFL", "L14P38D50KFL", "RLP381430WL" or "GVRLP381430WL" and the date code printed directly on the white plastic heat sink of the lamp, just above the screw in base. Consumers will need to shut off power to the lights and disengage the lamp to check the item number and date code.

The lamps were sold at Walmart and electrical distributors nationwide from May 2015 through October 2015 for about \$20. Consumers should immediately shut off power to the lights, remove the lamps to check the item number/date code of the recall, and contact TCP to receive a free replacement lamp with installation instructions. Contact TCP at 800-324-1496 from 8 a.m. to 6 p.m. ET Monday through Friday, by email at [recall@tcpi.com](mailto:recall@tcpi.com) or online at [www.tcpi.com](http://www.tcpi.com) and click on "Recall" for more information.

#### **HARBOR FREIGHT TOOLS RECALLS CORDLESS DRILLS DUE TO FIRE AND BURN HAZARDS**

About 1.7 million Drill Master 18-Volt Cordless Drills have been recalled by Harbor Freight Tools, of Camarillo, Calif. An internal switching mechanism can become stuck in the "on" position and overheat, posing fire and burn hazards. This recall involves Drill Master 18-volt cordless drills with item number 68239 and item number 68287. The drills are black with a red switch and were sold with an 18 volt rechargeable battery pack. Item number 68239 was sold individually and item number 68287 was sold as part of a kit, which included a flashlight. The flashlight is not included in the recall. The item number is located on a black label on the right side of the drill, just beneath the serial number. Drills with item number 69651 and item number 69652 are not included in the recall. Harbor Freight Tools has received 25 reports of the drill switch overheating, including six reports of burns to the hands and fingers, and five reports of minor property damage.

The drills were sold at Harbor Freight Tools stores nationwide, in the Harbor Freight Tools catalog, and online at [www.harborfreight.com](http://www.harborfreight.com) between May 2011 and September 2015 for about \$35 for item number 68239 and \$46 for item number 68287. Consumers should immediately stop using the recalled drills and return the unit to the nearest Harbor Freight Tools store to receive a replacement drill. Contact Harbor Freight Tools at 800-444-3353 from 8 a.m. to 4:30 p.m. PT Monday

through Friday, or online at [www.harborfreight.com](http://www.harborfreight.com). Consumers can also email Harbor Freight Tools at [recalls@harborfreight.com](mailto:recalls@harborfreight.com).

#### **TRADER JOE'S RECALLS TRIPLE GINGER BREW BOTTLES**

Trader Joe's recalled its Triple Ginger Brew because of a spontaneous bursting problem. If you have bought Trader Joe's Triple Ginger Brew, you must be careful disposing of it. The company is recalling the drink after reports of the unopened bottles bursting. Trader Joe's will refund anyone who has purchased the Triple Ginger Brew. If you have any bottles, Trader Joe's says to dispose of the bottles immediately in an outside container. Handle the bottles with extreme care. Triple Ginger Brew has been removed from stores. All Triple Ginger Brew is included in the recall. Monrovia, Calif.-based grocer Trader Joe's opened its first store in Alabama at the Summit in Birmingham in October.

#### **FDA WARNS OF CLASS I RECALL OF CHARIOT GUIDING SHEATH USED IN PERIPHERAL PROCEDURES**

Boston Scientific has issued a worldwide recall of its Chariot Guiding Sheath, used in peripheral vascular interventions. The recall was announced by the FDA's Medwatch program announced today. The recall was issued after the company received 14 complaints of shaft separation, including four involving the distal shaft, a Boston Scientific press release notes. A total of 22 adverse event reports for the Chariot are currently listed in FDA's MAUDE database for 2015.

The FDA designated the recall as a Class I recall, meaning the problem can lead to death or serious injury. Events, according to the company, typically occurred during device preparation for use, but the FDA notes that the possibility of separation and embolism of device fragments during a procedure could lead to obstruction of blood flow and additional interventions.

Physicians who have used the device are being urged to check up on any patients in whom the Chariot was used because "shaft separation and embolized fragments may not have been recognized at the time of the procedure," the recall notice reads. In addition, all health care facilities currently using these devices have been contacted and told to immediately discontinue use of the affected devices and to return any unused devices

to Boston Scientific. Operators who suspect they have used a device that has malfunctioned should report the case to MedWatch.

#### **DOLLAR TREE RECALLS BURN RELIEF GEL DUE TO FAILURE TO MEET CHILD RESISTANT CLOSURE REQUIREMENT**

About 325,000 Assured Burn Relief Gels have been recalled by Greenbrier International, Inc., of Chesapeake, Va. The packaging is not child resistant as required by the Poison Prevention Packaging Act. The burn relief gel contains lidocaine, posing a poisoning risk if swallowed. The recalled burn relief gel is packaged in a blue box with white letters "Burn Relief" and red letters "Burn Relief Gel". The brand name is Assured TM. Inside the box is a blue and white tube labeled "Burn Relief Gel" and measuring approximately 5 inches long by 1 inch wide and weighs about 0.7 ounces (20 grams). The packaging contains the UPC bar code: 6 39277 09311 0.

The gels were sold at Dollar Tree, Dollar Bill\$, Dollar Tree \$1 Stop, Deal\$, Deals and Dollar Tree Deal\$ stores nationwide from March 2015 to October 2015 for \$1. Consumers should immediately stop using the recalled burn relief gel and take the gel to the store where purchased for a full refund. Contact Dollar Tree at 800-876-8697 from 9 a.m. to 5 p.m. ET Monday through Friday, or online at [www.dollartree.com](http://www.dollartree.com), then on the bottom of the page, under "Customer Service," click "Contact Us," then "Company Questions & Answers," and click on "Product Recalls" in the left column. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Dollar-Tree-Recalls-Burn-Relief-Gel/>

#### **FLORIDA PHARMACY RECALLS VITAMINS FOR "SEVERE" VITAMIN D RISKS**

Florida-based pharmacy Glades Drugs Inc. has recalled compounded multivitamin capsules that the U.S. Food and Drug Administration (FDA) says contain excessive vitamin D. The FDA said this could lead to "severe" health problems in the long term, including heart problems and seizures. The agency said that Glades Drugs has conducted a recall of its multivitamin products in Pahokee, Fla., where it has a recall location. The capsules contain too much of the vitamin D3, or cholecalciferol, which can cause toxic effects without treatment and can be complicated by the fact that symptoms of vitamin D toxicity can take a while to

show. The FDA cautioned consumers to stop taking the multivitamins and to consult their doctors. The FDA said in its notice:

*Symptoms of short-term vitamin D toxicity are due to high calcium levels (also known as hypercalcemia) and include confusion, increased urination, increased thirst, loss of appetite, vomiting, and muscle weakness. Acute hypercalcemia may intensify tendencies for heart arrhythmias and seizures and may increase the effects of certain heart drugs. Long-term toxicity may cause kidney failure, increase in calcium deposits in the blood and soft tissue, bone demineralization and pain.*

The FDA's recall notice on the Glades Drugs products comes at a time of increased scrutiny of dietary supplements by federal agencies. Late last year, seven federal agencies including the FDA and the U.S. Department of Justice (DOJ) announced a number of criminal and civil actions brought against those selling and marketing fraudulent dietary supplements. One of the cases they announced was an 11-count DOJ indictment unsealed earlier in November against USPlabs LLC, S.K. Laboratories Inc. and several of their executives. USP, a Dallas, Texas-based firm, formerly manufactured widely popular workout and weight loss supplements, which it sold under names such as Jack3d and OxyElite Pro.

Earlier in 2015, state attorneys general drew attention to the labeling of dietary supplements after a study commissioned by the New York state attorney general found that labels for herbal supplements didn't match their ingredients. The New York and Indiana attorneys general urged the FDA in June to immediately step up its oversight of the dietary supplement industry and strengthen its enforcement, saying that the agency's dietary supplement current good manufacturing practices regulations need to be reformed.

#### **STELLA & CHEWY'S RECALLS PRODUCTS DUE TO POSSIBLE HEALTH RISK**

Stella & Chewy's has recalled four of its products sold in the U.S. and Canada due to concerns of a possible presence of *Listeria monocytogenes*. The recall affects a total of 990 cases (964 cases in the U.S. and 26 cases in Canada). The recall was prompted by a positive test confirming *Listeria monocytogenes* in Stella's Super Beef Dinner Morsels for Dogs 8.5 oz. frozen bags, lot #165-15, "Use by 6-25-

2016", during routine surveillance testing by the Michigan Department of Agriculture and Rural Development.

Listeria is an organism that can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems. Although healthy individuals may suffer only short-term symptoms such as high fever, severe headache, stiffness, nausea, abdominal pain and diarrhea, listeria infection can cause miscarriages and stillbirths among pregnant women. As a precautionary measure, Stella & Chewy's is recalling all products from Lot # 165-15.

Consumers should look at the product descriptions, UPCs, lot numbers, and "Use By" dates on each bag for an exact match to determine if it is subject to the recall. Anyone who has purchased these products are instructed to dispose of the food or return it to the place of purchase for a full refund. Contact customer service at 888.477.8977 or by email at info@stellaandchewys.com.

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

## **XXIII. FIRM ACTIVITIES**

### **THANKSGIVING AND CHRISTMAS CHARITY UPDATE**

The holiday season is a time to celebrate all that we have been given and to help folks who are not as fortunate. There are many in our community who struggle to put food on the table and to meet the basic needs of their family every single day. For many years the employees at Beasley Allen have gone above and beyond the call of duty to make sure that they do their part to help others. This year our firm's staff and lawyers supported six organizations. Each effort was spearheaded by one or more of our

employees. I will describe each project, along with the persons in charge, below.

### **Capitol Hill Nursing Home**

Theresa Perkins organized a wonderful assortment of gifts for 100 residents of Capitol Hill Nursing Home in Montgomery. For many years now the firm has "adopted" residents to provide a gift for those who will not receive a gift and will likely not be visited by anyone. Theresa and her many helpers visit with the residents and pass out gifts including socks, pajamas, hats, and perfumes. The residents of Capitol Hill always enjoy visiting with our staff.

### **Family Sunshine Center**

Angela Talley, Mary Jane Smitherman, and Michelle Bailey started the season by gathering a Thanksgiving meal and food to sustain several families who are currently being served by the Family Sunshine Center. Once Thanksgiving festivities passed they started work gathering toys for the children of those families. These ladies, along with all who supported the cause, were a true blessing to the families who received help this year.

### **Compassion 21 Food Pantry**

Brandi Lucio led the charge for a new campaign this year. Brandi raised money for the Compassion 21 food pantry. Compassion 21 serves poor and homeless in the Montgomery area with counseling and a food pantry. The money raised by the firm will be used by the organization to purchase food from the Montgomery Area Food Bank at a discounted rate. With record numbers of people receiving assistance this year, the monetary donations were very much welcome.

### **Friendship Mission**

Willa Carpenter once again took over the project involving donations for The Friendship Mission. Willa has worked with the Friendship Mission homeless shelter and soup kitchen. Many blankets, socks, coats, and other various necessities were gathered to help ease the burden of those who live on the streets. This is an organization that Willa holds dear to her heart as she volunteers and helps to fill needs throughout the year.

## Family Guidance Center

Helen Taylor worked with lawyers in the firm to provide Christmas for 14 children who are currently enrolled in the Family Guidance Center "Success by Six" program. This program is supported year-round by Judge Jimmy Pool and was designed to help parents of children ages 3-6 learn valuable skills to improve the education success rates of their children. Parents learn parenting skills; ways to help their child succeed in school with positive study habits, as well as training in personal finance to ensure that they take the knowledge with them that they need to improve their family situation.

## School Project

Helen Taylor and Kristin Piatek also coordinated a toy and everyday necessities donation to 12 children from an area elementary school. These children are at risk, several are living in homeless shelters or with non-parental caregivers and would have otherwise not received any gifts this Christmas. Thanks to the overwhelming response from our staff and lawyers not only did the children get several toys to enjoy they also received undergarments, hats, gloves, toiletries, and snacks to help ease their way.

A very special thank-you to all of the folks in our firm who donated their time, money and gifts to these good causes. Many families were able to enjoy the holidays because the lawyers and employees at Beasley Allen cared enough to give so they these families could enjoy Christmas.

## BEASLEY ALLEN ATTORNEYS INVITED TO SPEAK

Each month, Beasley Allen lawyers are invited to speak at a variety of events locally, statewide and nationally, about important cases or points of law. The following are two recent speaking engagements by our lawyers:

- Chris Glover: Litigating Heavy Truck Cases (Alabama Law Weekly webinar); and
- Lance Gould: An update on Expanded Overtime Protections (WILG Winter Conference).

Any group that would be interested in inviting one of our lawyers to address their members or to participate in a conference or seminar can contact Helen

Taylor, our firm's Communication's Director, by email at [Helen.Taylor@beasleyallen.com](mailto:Helen.Taylor@beasleyallen.com) or at 334-495-1169.

## THE TROY COMMENCEMENT SPEECH

I have been a supporter of Troy University over the years. Troy is a great school and it does a tremendous job of preparing its students to live productive lives once they graduate. We currently have several graduates of Troy University working for our firm. I have always respected Chancellor Jack Hawkins and it was quite an honor when Jack invited me to give the commencement address at the Fall ceremony on Dec. 11.

Graduates and their families gathered at the Trojan Arena all ready to celebrate a great achievement. I promised to keep my remarks to 10 minutes and I believe I came very close to doing so. I will admit it was a hard thing for me to do. That's because there is so much to tell young folks who are embarking on a new chapter in their lives. If nothing else I hope they took away the importance of maintaining the proper balance in their lives with God at the forefront.

I just told the graduates exactly what I tell young lawyers in our firm and that is they must set priorities in their lives. Those priorities should always put God first, their family second and their work next in line. When God is always in first place, that makes the other two much easier to handle. My prayer is for each of the graduates enter this new chapter of their lives with great hope and expectations. If they don't recall anything else I told them, I hope they remember to set the proper priorities for their lives.

## HEATHER HALL

Heather Hall, who has been with the firm since April of 2011, is a Legal Assistant working with Matt Teague in our Mass Torts Section. Heather currently works on the Low Testosterone Litigation. She had previously worked on the HRT litigation, attending several out of state trials.

Heather is married to Matt Hall and they have one daughter, 8-year-old Mckenna. They also have three dogs Zoe, a Lab/American Water Spaniel mix; Sadie, a Lab; and Flower, a Chihuahua. Heather says her hobbies revolve heavily around her family and dogs. She and her husband are both involved in Mckenna's softball team, the ABS Ladybugs. Heather serves as team/dugout mom while Matt coaches the team. During the warm months they spend time hosting pool parties and during the fall they host Auburn football parties. Heather's dogs love to swim and

take every chance to join them in the pool. Heather is a very good employee who takes her work seriously. She enjoys working on behalf of her clients in her cases. We are fortunate to have Heather with us.

## LAURA JONES

Laura Jones, who has been with the firm since September of 2012, is a Legal Assistant working with Evan Allen, a lawyer in our Personal Injury/Product Liability Section. In this position, Laura performs both the duties of a legal secretary and a legal assistant. They work on a wide variety of cases, primarily focusing on products liability litigation involving workers injured on the job. Laura previously worked as a Clerical Assistant in the section.

Laura majored in English and received a Bachelor of Arts degree from Troy Montgomery in 2002. Last May, she received a Paralegal Certificate from Auburn Montgomery. Laura has a 10-year-old Shih Tzu named Zoe, who she says is her heart. Laura enjoys reading, working out, traveling, watching football (especially Alabama) and spending time with loved ones. Laura is a very good employee who is dedicated to her work and the clients she works with. She says that she really enjoys her work. We are fortunate to have Laura with us.

## XXIV. SPECIAL RECOGNITIONS

---

### BEASLEY ALLEN LAWYERS OF THE YEAR SELECTED FOR 2015

Beasley Allen is blessed to have more than 70 lawyers who are dedicated to the firm's ideal of "helping those who need it most." In order to recognize some of these outstanding lawyers, we present a number of awards at the end of each year, which are based on their performance over the course of the year.

Beginning in 2014, the firm began presenting one very special lawyer in our firm with "The Chad Stewart Award." This honor was created in memory of Beasley Allen lawyer Chad Stewart, who passed away unexpectedly at the very young age of 41. In addition to being a dedicated lawyer who worked extremely hard for his clients, Chad truly modeled Jesus Christ in his daily walk. The Chad Stewart Award was created to recognize one lawyer each year who best exemplifies Chad's spirit of service to God, his

family and the practice of law in the task of “helping those who need it most.” The Chad Stewart Award for 2015 went to Chad O’Dell, a worthy recipient.

Our Litigator of the Year for 2015 is Kendall Dunson. Kendall has worked tirelessly on a number of different cases in which he sought to obtain justice for his clients. He is dedicated to seeing that corporations develop safer products. In September of this year, Kendall worked with fellow Beasley Allen lawyer Mike Andrews to secure an \$8 million verdict in a Volkswagen sudden unintended acceleration case that left our client severely and permanently injured.

Kendall was also involved in another case involving a negligent vehicle repair causing his client to become paralyzed in a vehicle crash. The jury returned a \$18.79 million verdict for our client in that case. A third case resulted in a \$24 million verdict in a balcony collapse case at an apartment complex in Montgomery. Kendall is an exceptionally talented lawyer who had a tremendous year in 2015. We are blessed to have him with the firm.

The Board and Section Heads at Beasley Allen also selected Lawyers of the Year in each of the firm’s four sections. The lawyers selected were:

**Mike Andrews**, Products Liability Section Lawyer of the Year—Mike has handled cases involving aircraft (both civilian and military), heavy equipment, military arms and weapons systems, agricultural equipment and automobiles and heavy trucks. Specific defects have included GM ignitions, faulty airbags, defective seat belts, fuel systems, seats, roof and door structures. In 2015, Mike was part of trial teams responsible for more than \$30 million in verdicts with the most recent being an \$8 million dollar verdict against Volkswagen and Honeywell in Federal Court in Columbus, Ga. He is currently handling a wrongful death case for the family of a Marine killed in a V-22 Osprey crash in Hawaii, a heavy truck design defect case in Missouri, a civilian aircraft crash off the coast of Georgia, several state court GM ignition cases and is investigating a number of death and serious injury cases around the country.

**Chris Glover**, Personal Injury Section Lawyer of the Year—In conjunction with writing his first book on heavy truck litigation, Chris has dedicated his practice to protecting the rights of survivors of catastrophic

personal injury and victims of wrongful death. He has represented injured individuals and their families in a wide range of serious injury and death claims, including those that were the result of defective products; car, commercial truck and workplace accidents; and aviation accidents. He has litigated numerous cases that have resulted in verdicts or settlements in excess of \$1 million. Chris was lead counsel in a case resulting in \$4.7 million verdict against seat-belt manufacturer Key Safety Systems. The verdict was significant because it is one of the only verdicts of its type against an automobile component manufacturer.

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

**Roger Smith**, Mass Torts Section Lawyer of the Year—Roger was recently selected to serve on the Plaintiffs Steering Committee for multidistrict litigation surrounding the Mirena IUD, manufactured by Bayer. The Mirena IUD is an intra-uterine device used to prevent pregnancy. It is also used to treat heavy menstrual bleeding. It is a small, T-shaped device made of flexible plastic that is inserted into the uterine cavity by a trained health care provider. Since it was approved in 2000, the U.S. Food and Drug Administration has received numerous reports of adverse events associated with the device, including the IUD becoming imbedded, migrating and/or perforating the uterine wall.

**Chris Boutwell**, Toxic Torts Section Lawyer of the Year—Chris has devoted his practice to protecting the rights of those injured by exposure to toxic substances wrongfully placed in the environment by corporate giants and other polluters. Currently, Chris is the lead lawyer in a

class action pending in the United States District Court for the Middle District of Florida involving unfair and deceptive trade practices by the manufacturers and retailers of “flushable wipes.” In this case, the class includes Florida residents who purchased certain moist personal wipes that were falsely marketed to be safe for flushing.

We have so many outstanding lawyers in our firm that it’s always difficult to make the selections for the awards. However, the lawyers selected for 2015 are all worthy recipients. Each of them had a body of work that was special over the past year.

#### **ALI HAWTHORNE IS MADE A PRINCIPAL IN FIRM**

The firm recently announced that Alison Douillard Hawthorne has been named a Principal in the firm. Ali joined Beasley Allen in 2010 as a lawyer in the Consumer Fraud and Commercial Litigation Section. Her practice is now focused primarily on complex litigation on a national level. Ali has been an invaluable member of the team working on the Average Wholesale Price (AWP) and McKesson litigations. Most recently, Ali worked on behalf of multiple states seeking to recover money for the reimbursement of unapproved and/or ineffective drugs. Ali is also involved in class action litigation involving consumer fraud in the health care industry. We are highly pleased to announce that Ali has been made a principal in the firm.

#### **BEASLEY ALLEN LAWYER CHRIS GLOVER “WROTE THE BOOK” ON TRUCKING LITIGATION**

Chris Glover, a lawyer in our firm’s Personal Injury section, has written a primer for attorneys interested in pursuing 18-wheeler and other heavy truck litigation. The book, *Introduction to Truck Accident Claims: A Guide to Getting Started* covers topics including the basics of trucking regulations and requirements; how to prepare a lawsuit for trial; and how to identify potential defendants including the carrier, the broker and the driver. Common issues that arise in commercial vehicle litigation, such as Hours of Service, fatigue, maintenance and products liability, are also covered. Chris says:

*Cases involving commercial trucks are very different than standard cases involving a car crash. There are lots of rules and regulations*

*surrounding commercial vehicles that a lawyer has to be familiar with in order to serve his or her clients fully. This book provides a road map to help lawyers evaluate a potential heavy truck case and learn what it takes to get this often complicated litigation on the path to a successful resolution.*

Chris has dedicated his law practice to protecting the rights and interests of victims and survivors of catastrophic personal injury and wrongful death litigation. An AV Preeminent Lawyer, Chris has represented individuals and families in a wide range of serious injury and death claims. Included have been cases involving defective products, automobiles, helicopters, commercial trucks, and workplace accidents. Chris' experience in litigating cases involving 18-wheelers and other heavy trucks gives him an understanding of the special investment of time and resources needed to take on these types of cases. He also has developed a detailed knowledge of the many rules and regulations that govern the commercial trucking industry. It's absolutely necessary to have a working knowledge of these rules and regulations.

Chris' book is available free to lawyers who are interested in learning more about trucking litigation. For more information or to order a copy, visit [www.chrisglover-law.com/book](http://www.chrisglover-law.com/book). The book is available in hard copy or it can be downloaded in digital format for most e-book readers. I recommend this book without reservation for any lawyer who wants to handle trucking litigation.

## XXV. FAVORITE BIBLE VERSES

---

Bobby Mozingo, one of our investigators in the firm, sent in the following verse for this issue:

*It's better to trust in the Lord than to put confidence in man (KJV)  
Wise words to try to live by but we fail at it every day. If we do this everything else will fall into place.  
Psalms 118: 8*

Michelle Shamblin, another legal assistant who works in the firm's Personal Injury/Products Liability Section, supplied Isaiah 1:17 for this issue. Michelle says she really likes this verse because it reminds us of what we should do every single day.

*Learn to do right! Seek justice, encourage the oppressed. Defend the cause of the fatherless, plead the case of the widow. Isaiah 1:17*

Both Jodi Burkhalter, a legal assistant in the firm's Consumer Fraud and Commercial Litigation Section, and Kimberly Mulder, a staff assistant in our Mass Torts Section, sent in Philippians 4:13 as their favorite verse. Kimberly says the reason this is her favorite Bible verse is that it constantly reminds her that she really can do anything. She says she remembers this verse from her early childhood and that it helped her to remember to always to ask God for his help and guidance when understanding a task of any kind.

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

Chris Baldwin, a law clerk at the firm, supplied Jeremiah 33:3 for this issue. He says it is one of his favorite Bible verses because it not only highlights that God will hear us when we call to Him but that God also will answer us. God longs to show us great and mighty things, which we do not know, if we will only call out to Him.

*Call to Me, and I will answer you, and show you great and mighty things, which you do not know." Jeremiah 33:3 (NKJV)*

Brittney Clemons, an intake specialist with the firm, says Matthew 6:34 is one of her favorite verses because each of us has a different situation that we are going through and no matter what the situation is, we can turn to this verse and know everything will be okay. That's because God is watching over us and He would not bring us to a situation if He was not going to help us get through it.

*Therefore do not worry about tomorrow, for tomorrow will worry about itself. Each day has enough trouble of its own. Matthew 6:34*

Janet Glaze, an Accounting Clerk with the firm, sent in her favorite verse.

*"For I know the plans I have for you," declares the LORD, "plans to prosper you and not to harm you, plans to give you hope and a future." Jeremiah 29:11 New International Version*

## XXVI. CLOSING OBSERVATIONS

---

### **BIG PHARMA CLAIMS CORPORATE HEADQUARTERS ON FOREIGN SOIL TO USE TAX LOOPHOLES**

Big Pharma companies rake in billions of dollars in profits from prescription drugs. But instead of paying their fair share back into the U.S. economy through taxes, many of these companies are squeezing through legal loopholes by setting up shop on foreign soil. Sometimes this is done by merging with a smaller foreign company, and other times the overseas location is little more than a headquarters only on paper.

A prime example of this legal tax evasion is Pfizer, which recently inked a deal to acquire Allergan, which is based in Ireland. Although Allergan is smaller than Pfizer, the larger company will move "operations" for two of its other American drug companies, Actavis PLC and Forest Laboratories, under the Allergan banner, allowing them to escape paying certain U.S. taxes.

This sort of activity is business as usual for Pfizer, which, according to the Institute on Taxation and Economic Policy, has 151 subsidiaries on foreign soil. Its so-called "shell companies" are located in Luxembourg, Holland, the Channel Islands and the Cayman Islands, and now in Ireland. The subsidiaries house Pfizer's patents, then lease the use of the patent back to the parent company. But the profits go on the foreign subsidiary's books, where they are subject to lower taxes, even if the lion's share of the business is actually done on American soil.

One would think the U.S. government would make it a top priority to close these loopholes and make industry leaders like Pfizer play fair. But Congressional leaders have proven to be unwilling to make changes to the corporate tax code that would discourage the game. An ideal solution would be to adjust the tax code to collect a reasonable amount of money from these companies, and simplify the code to eliminate the labyrinth of tax breaks that encourage companies to try to game the system.

Source: USA Today

### **CLIMATE CHANGE LAWSUIT COULD COST EXXON BILLIONS**

Secretary of State John Kerry said Exxon Mobil Corp. could be hit with a

record lawsuit if it's proven that the company misled investors and the public on the science of climate change. Kerry said he personally would be "outraged, furious" if a deliberate deception is revealed. In an interview with *Rolling Stone* magazine that covered topics ranging from foreign policy to climate change, Kerry said Exxon Mobil class-action litigation could total into the billions of dollars. He said the primary importance in an investigation into the oil giant's actions is to uncover the truth.

Kerry's statements follow on the heels of recent reports by InsideClimate News and a team of Columbia University journalists in the Los Angeles Times that accused the oil giant of quietly studying the negative impacts of carbon dioxide on the atmosphere while publicly questioning the science of climate change. We covered those allegations in the November issue of *The Report*.

As one might expect, Exxon has denied the claims and, in a letter sent to Columbia officials earlier this month, accused the journalists of engaging in unethical practices and ignoring evidence from the company. The reports have led environmental groups and the three major Democratic presidential candidates to push the Department of Justice to investigate. New York Attorney General Eric Schneiderman has also launched a probe. There can be no question but that Exxon Mobil and other huge oil companies have done a masterful job of misleading the public and the federal government about the damages of climate change.

Sources: TheHill.com and *Rolling Stone*

## 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

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732 - 1802)

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

Louis Brandeis, 1937  
U.S. Supreme Court Justice

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

Vincent Lombardi

## XXVII. PARTING WORDS

We have just gone through the Advent and Christmas Seasons and hopefully each of us and our families were dramatically changed by the experience. All too often we can get caught up in the commercialization of the weeks leading up to

Christmas and neglect the real reason for the season. Hopefully, each of us have placed our emphasis on the spiritual aspects and spent quality time celebrating the birthday of Jesus Christ, our Lord and Savior.

The Advent and Christmas season makes it very clear how important it is to keep our focus on the true meaning of Christmas. Unfortunately many of us—and I am in that company—may have spent most of our time either at work or engaged in other activities of a secular nature. Advent is a time for preparation for the coming of the Lord Jesus—the Christ—and it's a most special time for us. The birth of Jesus in humble surroundings gave hope and joy in the midst of sorrow, dismay and drudgery, all a part of everyday life in those days. It sounds very much like life in the fast lane of our times.

I recommended to everybody in my law firm that they read the second chapter of the Book of Luke and reflect on what it says and the meaning for us. Luke teaches us to reclaim the joy of the birth of our Lord and Savior. We say today that the birth of Jesus has changed the world but do we really believe that to be true? Sometimes—based on our actions or reactions—it doesn't seem like we really do. There can be little worse than hypocrisy for a Christian. We must do more than just talk about Jesus, we must walk the walk daily. Advent and Christmas are times when we should be concentrating on being more like Jesus and less like the secular world. I recommend that you try it and see what happens as we enter the New Year. The true joy of Christmas should carry over into the New Year and that is the hope that is guaranteed to those who truly believe.

We closed our law firm at noon on Dec. 23 and didn't open back up until Dec. 28. We wanted all of our lawyers and staff to have some well-deserved time off from work and to have more time with their families.

I wish for each of you and your family a happy, prosperous and blessed New Year. Hopefully, we will see some real constructive changes in 2016 that will bring the American people together for the common good. God bless!

***To view this publication on-line, add or change an address, or contact us about this publication, please visit our Website: [BeasleyAllen.com](http://BeasleyAllen.com)***

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

218 COMMERCE STREET (36104)  
POST OFFICE BOX 4160  
MONTGOMERY, ALABAMA 36103-4160  
(334) 269-2343  
TOLL FREE  
(800) 898-2034  
TELECOPIER  
(334) 954-7555  
WEB PAGE  
www.BeasleyAllen.com

PRESORTED  
STANDARD  
U.S. POSTAGE  
**PAID**  
MONTGOMERY, AL  
PERMIT NO. 275

RETURN SERVICE REQUESTED



**Jere L. Beasley**, Principal & Founder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs over 75 lawyers and more than 175 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 35 years.



No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.

# Beasley Allen

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

helping those who need it most since 1979