



THE
JERE BEASLEY REPORT

MARCH 2016

Beasley Allen

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Attorneys at law



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I. CAPITOL OBSERVATIONS

J&J HIT WITH \$72 MILLION VERDICT LINKING TALC PRODUCTS TO OVARIAN CANCER

A jury in St. Louis, Mo., last month found two Johnson & Johnson companies legally responsible for injuries resulting from the use of their talc-containing products. The products were Baby Powder and Shower to Shower body powder used for feminine hygiene. The jury awarded the family of Plaintiff Jacqueline Fox \$72 million after finding that the products contributed to the development of her ovarian cancer and her death. The verdict includes \$10 million in actual damages and \$62 million in punitive damages. The jury found the two Johnson & Johnson companies guilty of negligence, failure to warn, and conspiracy.

Ms. Fox was diagnosed with ovarian cancer at age 59 in 2013. She had been a lifetime user of Johnson's Baby Powder and Shower to Shower for feminine hygiene. Ms. Fox died on Oct. 6, 2015. Johnson & Johnson has never warned of the cancer risk, a risk known to the Defendants, on these products.

What Johnson and Johnson did to cover up what it knew to be the deadly risk associated with its centerpiece product was without a doubt outrageous. It's absolutely impossible to imagine how corporate executives could be so callous. The internal company documents that were brought to light in this trial showed clearly that the two companies knew of the link between talc use and ovarian cancer as far back as 1979. The companies never thought that anybody—especially a jury—would ever see these documents. The documents were withheld from the FDA and all other organizations that should have had access to them. In fact, the Defendants called six highly paid experts during the trial and not one of them had ever seen the documents.

When the deadly risk became known to the companies, they had a choice to make. They could either warn customers of the dangers of talc or hide the risk and keep on selling the products to women. Johnson and Johnson chose to hide the risk and keep selling. They were willing to run the risk of litigation and Ms. Fox paid with her life. Thousands of other women have also paid that price and until Johnson & Johnson changes others will die in the future.

Jacqueline Fox was an incredible lady whose life was cut far too short by the

callous decisions by the bosses at Johnson and Johnson. These officers have known for decades—literally decades—that the talc contained in its products could cause ovarian cancer. Instead of warning customers, Johnson & Johnson executives made the decision to hide the risk and keep on selling. The internal documents tell a horrifying and infuriating story of corporate greed and a callous indifference to human life. We are honored to represent the family of Ms. Fox and to be able to bring to light the misdeeds of Johnson & Johnson.

An estimated 20,000 women are diagnosed each year with ovarian cancer, and more than 14,000 die. The disease strikes about one in 70 women. An expert at trial testified at least 45,000 women have died as a result of ovarian cancer that could be attributed to talcum powder use by women. An estimated 1,500 women will die this year as a result of talc use. Unless Johnson & Johnson changes its "corporate mind" and starts warning women, women will continue to die.

In 1997, one of Johnson & Johnson's own medical consultants warned against "denying the obvious in the face of all evidence to the contrary." He said there were many studies showing the association of talc with ovarian cancer with "more to come." I have requested that Johnson & Johnson make all of the internal documents the jurors saw about the dangers of talc available to the public on its website. Nobody—other than the jurors—have ever seen the incriminating documents and that includes the U.S. Food and Drug Administration. The public is entitled to have access to these internal documents and then they can decide if the St. Louis jury did the right thing.

When the jury saw the reports on studies—along with internal letters and memos that Johnson & Johnson had in its files about talc dangers—the jurors were shocked. Obviously this company knew its product had a link to ovarian cancer, but chose to do nothing and refused to warn women. As the jury foreperson said after the verdict, "all J&J had to do was put a warning label on the box. But they didn't. They did nothing."

The reason punitive damages are so important is that it sends a message to huge corporations that people are not going to tolerate this kind of lying and deception. An award of punitive damages is the only language the bosses at these companies really understand. It's the only way to get them to act. Obviously, Johnson & Johnson was told by scientists and doctors about the cancer risk for decades, but the bosses wouldn't listen. In fact, even during the trial they still refused to change their ways. But now they have had

to listen to this jury—to 12 men and women in St. Louis—and the message sent was loud and clear. These jurors are a voice for so many women who never knew what caused their ovarian cancer and for those women in the future who deserve to be warned. This verdict is why the civil justice system is so important to the consumers in America.

I was honored to be a part of the trial team in this important case. Others involved from our firm were Ted Meadows, David Dearing and Danielle Mason. Jim Onder, Wylie Blair and Stephanie Rados, all from St. Louis, along with Allen Smith, Jr. from Mississippi, also represented the Plaintiff in the case.

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II. MORE AUTOMOBILE NEWS OF NOTE

NHTSA FAULTED FOR TRAINING AND STAFF OVERSIGHT

The National Highway Traffic Safety Administration (NHTSA), the top U.S. auto safety regulator, has failed to make a number of safety improvements agreed to in 2011 in areas including staff oversight and the training of vehicle defect investigators. A federal audit released on Feb. 29 had that message. The Transportation Department's Office of Inspector General said NHTSA had not done enough to implement the changes aimed at protecting car drivers and passengers that were agreed to after its 2011 audit of the agency. Safety advocates have repeatedly complained about NHTSA's perceived "sluggish response" to major auto safety issues and evidence of potentially deadly defects in vehicles on U.S. roadways including defective airbags, runaway cars and faulty ignition switches. Lawyers in our firm can attest to that ruling.

The 2011 audit was conducted after criticism of NHTSA's handling of consumer complaints about the sudden unintended acceleration of Toyota Motor Corp. vehicles that our firm was involved in. After our "Bookout verdict" in Oklahoma, Toyota ultimately recalled more than 14 million vehicles worldwide due to the issue. The new report found NHTSA failed in a majority of cases to explain why it delayed completing investigations in a timely fashion. The agency also failed to ensure it was retaining safety records and had not implemented a training program, it said. The report said further:

As a result, (NHTSA's defects investigation) staff may not be sufficiently trained to identify and investigate potential vehicle defects, or ensure that vehicle manufacturers take prompt and effective action.

Concern was also voiced about what was described as NHTSA's "lack of mechanisms to ensure that staff consistently apply" changes. Sen. Bill Nelson, D-Fla., said NHTSA needs to do more. He said in a statement:

For the past two years, I have voiced serious concern about NHTSA's ability to detect and deal with new safety hazards. This report confirms those concerns—NHTSA needs to

step it up before we see more mass recalls.

The new audit follows a critical audit by the same office issued in June in the aftermath of General Motors Co.'s recalls of defective ignition switches linked to 124 deaths and 275 injuries. That audit found NHTSA failed to carefully investigate safety issues, hold automakers accountable, collect data or properly train and supervise staff. It also found the agency rejected most requests by staff to open new investigations. A NHTSA spokesman, Gordon Trowbridge, said that the agency agrees with all of the recommendations in both the new audit and last year's audit and "intends to implement the recommendations by June 30."

Source: Autonews.com

NO NEW TRIAL FOR VW AND HONEYWELL IN SUDDEN UNINTENDED ACCELERATION CASE

Federal judge Clay D. Land has denied the request for a new trial sought by Volkswagen Group of America and supplier Honeywell International in the sudden unintended acceleration case our firm tried. The case involved a 2004 VW Passat crash that left a Georgia mother with severe, permanent injuries. Volkswagen and Honeywell designed and manufactured the Garrett turbocharger and seal installed in Cheryl Bullock's Passat GS TDI. A Columbus, Ga., federal jury awarded Ms. Bullock and her husband Kevin \$8 million in damages last September.

On Sept. 2, 2011, Ms. Bullock was traveling with her 5-year-old daughter when her VW Passat suddenly raced out of control, reaching a speed of 90 mph before it sped off the highway and flipped. The impact left Ms. Bullock with severe injuries. Kendall Dunson and Mike Andrews from our firm represented the Bullocks in the case. They successfully demonstrated that defects in the turbocharger could result in unexpected and dangerous acceleration. The award was later reduced to \$4.8 million when the court decided that Volkswagen and Honeywell were only 60 percent to blame for the crash.

Judge Land found the evidence presented at trial was sufficient to uphold the verdict. Judge Land acknowledged the "collective wisdom" of the jury, comprised of eight women and four men, in its verdict, adding that "when the evidence supports the jury verdict, the court can't step in to provide shelter."

Sources: BeasleyAllen.com, Law360, Bloomberg, Ledger-Enquirer

2014 VW INTERNAL WARNING LETTER

I am going to write about Volkswagen's problems in this issue. But things are moving so fast, I will wait until the next issue for a real update. It has been reported that a high-ranking employee warned senior Volkswagen managers in May 2014 that U.S. regulators might examine car engine software as part of an investigation into pollution levels. The warning came in the form of a letter, sent more than a year before the German carmaker's public admission that its cars had been equipped with software to manipulate emission test results. This raises questions about how much senior managers knew about the scandal.

The U.S. Justice Department is looking to establish what role, if any, was played by senior managers, including former Chief Executive Martin Winterkorn. Volkswagen admitted in September 2015 to cheating pollution tests but has maintained that only a small number of employees were to blame and that there was no indication that board members were involved.

The German newspaper *Bild am Sonntag* was first to report the existence of an internal letter warning senior managers about the investigation. Citing documents from VW's own investigation of the scandal, *Bild am Sonntag* reported that an employee known internally as "Winterkorn's fireman" had notified superiors about the investigation. The employee's name is Bernd Gottweis. When Volkswagen felt pressured to take action on the increased NOx emissions, the company sent Mr. Gottweis in to investigate.

Gottweis sent the note to VW headquarters in Wolfsburg. During his years of service, he was in charge of a group called the Committee for Product Security, a team known within Volkswagen as the "Fire Department" that included engineers, lawyers and other specialists who were called into action to put out product fires. During the 1980s, Mr. Gottweis and his team were responsible for containing the damage from Audi AG's sudden unintended acceleration defect, which was believed to be the cause of hundreds of accidents and half a dozen deaths.

Source: Law360.com

ANOTHER STATE SUES VOLKSWAGEN

New Jersey filed suit on Feb. 5, 2016, against Volkswagen AG and its subsidiaries Audi and Porsche for carrying out a "massive fraud" against consumers by using software in millions of diesel vehicles to cheat federal emissions tests and allowing it to increase sales by falsely

touting environmentally friendly cars. New Jersey Attorney General John J. Hoffman vilified the automaker's decade-long emissions scheme, calling Volkswagen's use of so-called "defeat devices"—which only control a vehicle's emission of harmful nitrogen oxides when an emissions test is being run—"one of the largest frauds in the history of the automobile industry." When the defeat devices were not activated during regular driving, the affected vehicles would emit up to 40 times the legal amount of nitrogen oxide.

New Jersey in the complaint is seeking maximum penalties against Volkswagen for violations of New Jersey's Air Pollution Control Act and Consumer Fraud Act. The complaint also asks for direct restitution to consumers who have been "materially harmed" by the company's misconduct. It's currently estimated that about 17,400 Volkswagen vehicles equipped with the defeat devices are registered in New Jersey.

New Jersey's suit came only weeks after New Mexico sued Volkswagen over the same emissions fraud, with that state's Attorney General Hector Balderas noting that the U.S. government's own pending suit over the scandal could result in penalties of up to \$45 billion. Other governments, including Sweden, Germany and Spain, have launched criminal investigations, and South Korea said recently it will file criminal charges against Volkswagen for what it called "insufficient" recall plans by the automaker.

Volkswagen has been in "hot water" since September, when the U.S. Environmental Protection Agency announced it had discovered the automaker had equipped about 11 million 2.0-liter diesel engine cars with software specifically designed to evade federal emissions standards in violation of the Clean Air Act. The company's subsequent admission of using the defeat device has prompted extensive recalls and widespread consumer and dealer litigation.

John Hoffman and assistant Attorney General David Apy are representing New Jersey, while Christopher S. Porrino, Richard F. Ricci, Gavin J. Rooney and Peter Slocum, lawyers with Lowenstein Sandler LLP, are acting as special counsel. The case is in the Superior Court of New Jersey for Hudson County.

Beasley Allen lawyers Dee Miles, Clay Barnett and Archie Grubb are also handling claims against VW on behalf of consumers, dealers and governmental Plaintiffs. You can contact them at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Clay.Barnett@beasleyallen.com or Archie.Grubb@beasleyallen.com.

VW MAY BUY VEHICLES BACK FROM U.S. CONSUMERS AFFECTED BY EMISSION CHEAT

It was reported last month that if Volkswagen cannot devise an effective solution in a timely manner, the automaker may buy back vehicles from U.S. consumers affected by the emissions cheat scandal. As stated above, VW's emissions debacle has been going on since September. It started when when federal regulators revealed that Volkswagen installed a cheat in its diesel-powered vehicles that allowed the vehicles to operate without emissions controls except when they were being tested, at which time the vehicle detects it is being tested and turns the emissions controls on.

The admission opened the floodgates for litigation against VW. Several class action lawsuits were filed claiming fraud and economic losses related to the cheat. Litigation has been consolidated into multidistrict litigation (MDL) under U.S. District Judge Charles Breyer in the U.S. District Court for the Northern District of California. Dee Miles, head of our firm's Consumer Fraud and Commercial Litigation Section, has been selected by Judge Breyer to serve on the Plaintiffs' Steering Committee (PSC) for the MDL.

It appears that the buy-back will only be a last resort if the automaker is unable to bring vehicles up to U.S. emissions standards in a timely manner. However, in a Congressional hearing, a lawyer for Volkswagen admitted that for at least some of the affected vehicles, a fix may be "too far into the future," to avoid a buy-back.

VW has admitted as many as 11 million vehicles worldwide may contain the emissions cheating technology. Specific models affected are 2009-2015 model year Jetta, Beetle, Audi A3, and Golf, and the 2014-2015 model year Passat. Kelly Blue Book values of VW diesel vehicles have dropped by almost 16 percent between September, when the cheat was admitted, and December.

The automaker has vowed to work together with representatives from the U.S. Environmental Protection Agency (EPA) and the California Air Resources Board (CARB), but no agreement has been reached about how to bring the affected vehicles up to meet U.S. Clean Air Act standards. The EPA estimates the affected vehicles may emit close to 40 times more air pollution than legally allowed.

Sources: *New York Times*, RightingInjustice.com, BeasleyAllen.com

LEGISLATORS CALLING FOR TOTAL TAKATA RECALL AS DEATH TOLL CLIMBS

Voices calling for a total recall of Takata airbags are growing louder and more insistent as the death toll surrounding the defective airbags continues to climb. The December death of 53-year-old South Carolina resident Joel Knight was the ninth in the U.S. attributed to the airbags, which explode with excessive force, sending metal fragments out like shrapnel.

Advocates for a total recall say auto owners are confused in part due to the "piecemeal" way the current recall has been handled. Since 2008, 14 automakers have recalled 24 million vehicles to replace the inflators. However, the *Claims Journal* reports there may be as many as 50 million vehicles that have yet to be recalled. It was initially thought the defective airbag inflator, which uses ammonium nitrate to create the small explosion to expand the airbag, was only vulnerable in older-model vehicles and in climates affected by high humidity. Recalls began in those areas, and they were the first to begin receiving replacement inflators. But more recent recalls by manufacturers such as Volkswagen and Mercedes include newer models from 2014, and Honda recently issued a recall for a brand new 2016 year model.

The National Highway Traffic Safety Administration has given Takata until the end of 2018 to either solve the airbag problem or issue a recall for all vehicles containing Takata airbags. But even if Takata issued a blanket recall today, there are not enough replacement parts to repair all the vehicles that currently contain Takata airbags that may have defective inflators. According to figures supplied to the *Claims Journal* by Takata, the auto parts supplier says it and other suppliers can make up to 1.5 million replacement inflators a month, or 18 million per year. Because some of those inflators would have to go to other countries also affected by the Takata airbag recall, it would take four years just to replace the Takata airbags currently under recall in the United States.

Despite this problem, there are many saying a total recall cannot wait. Sen. Bill Nelson (D-Fla.) sent a letter last month asking NHTSA head Mark Rosekind to recall all Takata inflators in U.S. cars, saying:

Recent events and recalls involving relatively new vehicles with these types of inflators raise serious questions as to whether Takata's ammonium nitrate propellant is inherently dangerous. I am concerned that the current approach may be needlessly incremental and

fail to adequately protect public safety.

Senators Richard Blumenthal and Edward Markey also wrote a letter to NHTSA last month asking NHTSA to recall all the inflators and force Takata to publish a comprehensive list of all makes and models for which it has supplied airbags since 2000. It's quite apparent that the Takata airbags debacle is far from over.

Takata has sold about 54 million of its ammonium nitrate inflators in the U.S. A little more than half of those airbag inflators have been recalled, but only 30 percent have been repaired. The other half has not been recalled. This means that nearly 20 million people are driving vehicles equipped with Takata inflator mechanisms that could deploy with excessive force or explode.

Sources: *Claims Journal*, *New York Times*, *The Herald*, Reuters, *New York Times*, and SaferCar.gov

CONTINENTAL LATEST AIRBAG MANUFACTURER TO ANNOUNCE RECALL

Continental Automotive Systems has recalled nearly five million potentially corroded airbags worldwide. The National Highway Traffic Safety Administration (NHTSA) reports that the airbags contain faulty electrical systems that may become ineffective over time, causing the airbag not to deploy in the event of a collision or deploy at an inopportune moment that may cause the driver to crash. The following automakers are impacted by the Continental airbag recall: Fiat Chrysler Automobiles (FCA), Honda, Volkswagen Group, Volvo Trucks (unrelated to the Volvo car company), Mazda, and Mercedes-Benz. Kia was also affected by the Continental airbag recall; however, none of the recalled vehicles are in the U.S.

The defective airbag control units were manufactured between 2006 and 2010. It appears that the defect impacts fewer than 2 million vehicles in the U.S. A majority of the recalled airbags are in other countries. Continental says that each manufacturer will determine "whether a safety-related defect exists in their vehicles."

Sources: Law360.com and Cars.com

NISSAN HOPES THE THIRD TIME'S THE CHARM

Nissan North America has issued a third recall for Altima vehicles. This recall came after two previous recalls failed to resolve a problem with a potentially faulty hood latch. The latest recall involved 850,000 Altimas from year models 2013 to 2015.

Many of the cars were involved in two other recalls issues in late 2015.

Thus far more than one million vehicles may be affected by the defect, which can allow the hood to fly open while the operator is driving. The affected vehicles were manufactured in Smyrna, Tenn., and Canton, Miss. According to the auto manufacturer, a problem with the electrophoretic paint emulsion application during assembly may have been defective. This may have resulted in poor application, allowing the paint to flake off, leaving bare metal exposed to possible corrosion. The defect involves the vehicles' secondary hood latch, which may become stuck open as a result of corrosion, allowing the hood to pop open.

Previous recalls involved adding a lubricant to the hood latches to help prevent corrosion, but it may also have not been applied correctly. Nissan has now agreed to recall the affected vehicles and replace the hood latch entirely. Recall notices were being distributed beginning in mid-February. Nissan will replace the latches free of charge.

Source: Law360.com

NHTSA EXPANDS JEEP INVESTIGATION FOR ROLL-AWAY RISK

According to the National Highway Traffic Safety Administration, more than 100 accidents have been linked to Jeep Grand Cherokees rolling away despite having been parked with non-intuitive electronic gearshifts. This led NHTSA to announce an investigation into Chrysler's other vehicles. NHTSA is adding 2012-14 Dodge Chargers and Chrysler 300s with 3.6L engines to its investigation of the 2014-15 Grand Cherokees. With the latest additions, nearly 856,000 vehicles are now under investigation by NHTSA, compared to the previous 408,000 of just Grand Cherokees.

The issue lies with the vehicles' gearshift assembly, which electronically transmits the gear selected by the driver to the transmission control module. Once the driver selects a gear and lets go of the shifter, the gearshift springs back into a neutral position. However, if the driver's side door is opened while the shift is not in park, a message will be displayed in front of the driver and a chime will sound. The vehicle will also not shut off properly if the vehicle does not sense it is in park. NHTSA described the shifting issue in the following statement:

This logic may provide feedback to drivers who attempt to turn the engine off when the transmission is not in park. However, this function

does not protect drivers who intentionally leave the engine running or drivers who do not recognize that the engine continues to run after an attempted shutoff.

NHTSA has received more than 100 alleged crash reports linked to the non-intuitive gearshift, some of which caused injuries ranging from a fractured pelvis and kneecap to broken ribs, a broken nose and facial lacerations. The agency's failure report summary also identified approximately 121 crashes and 30 injuries resulting from the Jeep's rollaway problem. None of the reported incidents caused any fatalities.

Source: Law360.com

FCA RECALLS DODGE CHARGERS TO PROVIDE OWNERS WITH TIRE CHOCKS

More than 440,000 Dodge Chargers are now under recall by Fiat Chrysler (FCA) in order to distribute tire chocks to drivers. There is nothing inherently wrong with the vehicles, but reports of injury due to the vehicle slipping off the jack have prompted the automaker to provide chocks to enhance safety in the event the vehicle has to be jacked up, for any reason, including the changing of a tire.

The chocks are used to immobilize a vehicle's wheels while they are being changed. If the vehicle is jacked without the chocks, and particularly if it is jacked incorrectly, the recalled Charger may slip off the jack while lifted, putting those nearby at risk of injury. Patrick Rall, a former mechanic writing for TorqueNews.com, explained the problem this way:

The 'problem' is that if you are using a very small jack, like the one included with most new cars, it has a very small surface to contact car undercarriage of the car. If you put this tiny little jack in an unusual place on many cars, there is a chance that the metal or plastic under the car can deform under the weight of the vehicle and as a result, the car can shift on the jack. When working as a mechanic, I saw countless cars that had damage underneath from people jacking them up incorrectly, so that aspect is surprisingly common across all sorts of unibody cars. Unfortunately for Dodge, with a larger car like the Charger, it is easier to jack it up in a way that the weight isn't balanced properly, so the car is more prone to shift if jacked up incorrectly.

The Dodge Charger recall impacts all of the vehicles within the 2011-2016 model years and built from Aug. 23, 2010, to Jan. 7, 2016. FCA and the National Highway Traffic Safety Administration (NHTSA) have learned of three incidents involving owners whose car slipped off the jack. Only minor injuries were reported in the incidents.

The chocks are not available for all FCA dealers yet, so the automaker will be mailing out preliminary recall notices to those impacted by April. An additional follow-up letter will be mailed once the chocks are available. To learn more about the Dodge Charger recall, you can contact FCA customer service at 800-853-1403 and ask about recall #S03. You can also contact Evan Allen, a lawyer in our firm's Personal Injury/Product Liability Section, at 800-898-2034 or by email at Evan.Allen@beasleyallen.com.

Sources: Law360, TorqueNews.com

III.

A REPORT ON THE GULF COAST DISASTER

AN UPDATE ON BP CLAIMS PROCESSING

The progress that has been made to date in the BP MDL is truly remarkable. The entire process—in spite of delaying tactics by BP—has been on a record pace. The *Deepwater Horizon* Economic Claims Center and the Medical Settlement Program (MSP) continue to make significant progress in resolving their respective claims. I will give a brief summary of recent activity relating to the claims.

- **Economic Claims Processing in General.** The Claims Center continues to review the 382,192 claims filed under the historic Settlement Agreement reached with BP. Its monthly progress report shows it has conducted in-depth reviews and issued notices on approximately 80 percent of all claims. Most of the claims that have not been reviewed constitute Business Economic Loss claims (19 percent), Subsistence claims (31 percent), and Wetlands Real Property claims (39 percent). To date, the Claims Center has paid almost \$6.8 billion to eligible claimants including commercial fishermen, subsistence fishermen, property owners and various businesses.
- **Seafood.** The Seafood Compensation Program (SCP) also published its guide-

lines to implement the supplemental rounds of payments to SCP claimants. The guidelines, which were approved by Judge Carl Barbier, bifurcate the remaining distributions into a "Supplemental Distribution Round 2" and a "Residual Distribution." The former includes up to \$29 million to pay claims resolved after the Initial Supplemental Distribution's inception in December 2014 and to claimants requiring a "true-up" on previously awarded amounts. The guidelines for the Residual Distribution are largely unchanged from those used in the First Supplemental Distribution which typically resulted in offers that were 40 percent of the gross award amount (before any deductions of prior payment offsets) to qualifying claimants. These guidelines will expend the \$1.7 billion remaining in the SCP fund.

If you need any information relating to the BP MDL contact Parker Miller, a lawyer in our firm's Toxic Torts Section, at 800-898-2034 or by email at Parker.Miller@beasleyallen.com. Parker has been involved in this litigation from the outset.

Source: <http://www.deepwaterhorizoneconomicsettlement.com/>

BP REMOVES SYSTEMS IMPLEMENTED AS A RESULT OF THE OIL SPILL

It should not surprise anyone that BP, along with many other energy companies, is struggling with the unprecedented drop in oil prices. Oil prices, at this time in 2014, were steady at \$100 per barrel. At press time, the prices are drifting slightly above \$30. BP recently reported in its fourth-quarter earnings report that the firm's earnings had dropped 91 percent, from \$2.2 billion in the same quarter last year to \$196 million this year. CEO Bob Dudley reported that "[i]t's going to be a very turbulent year for our industry."

The energy giant not only has to worry about oil prices, but also its obligations to Gulf Coast residents devastated by the oil spill. The company set aside \$443 million in the quarter to cover obligations associated with the oil spill, with total costs now at \$55.5 billion. Our readers may recall BP's initial claim that costs associated with the event would be \$40 billion.

Of particular interest to Gulf Coast residents is how BP will respond to this turbulent time. If the most recent news is any indication, the response is troubling. Mr. Dudley announced that BP would be taking steps to streamline the firm's redundant systems put into place for legal reasons after the oil spill. Mr. Dudley's excuse was: "We have our confidence back now."

You may recall that this is the same company that consistently promised the government and all those that would listen that it would institute redundant systems and greatly emphasize safety after the Texas City refinery explosion that killed 15 people and injured almost 200 people. We all know the result—just a few years later, that "safety program" yielded the worst environmental disaster in United States history.

If anyone wants to feel sorry for BP considering the current oil price saga, Mr. Dudley has news for all. For example, he said that the markets are not taking into account the firm's robust \$5.8 billion in operating cash flow for the quarter, and the overall loss narrowed to \$3.3 billion as opposed to \$4.4 billion a year earlier. In other words, the oil giant is still circulating billions in cash and will do so for years to come. We should all remain steadfast in holding BP to a standard that does not cause the same situation that caused the worst environmental disaster in United States history.

IV.

DRUG MANUFACTURERS FRAUD LITIGATION

JOHNSON & JOHNSON FIGHTS TO KEEP CHEROKEE NATION'S RISPERDAL MISBRANDING LAWSUIT IN FEDERAL COURT

Jansen Pharmaceuticals is fighting to keep Risperdal litigation in a federal court. The company says a holding company for the Cherokee Nation—and not the tribe itself—is the proper Plaintiff in a lawsuit filed against Johnson & Johnson and Janssen Pharmaceuticals, a subsidiary, over undisclosed side effects with its anti-psychotic drug Risperdal. Thus it's claimed that the case should remain in federal court. That's what the pharmaceutical companies told an Oklahoma federal judge.

Johnson & Johnson is fighting a bid by the Cherokee Nation to move the case to Oklahoma's Sequoyah County Court. The powerful drug giant claims that it never sold Risperdal directly to the tribe, making Cherokee Nation Businesses, the holding company, the proper Plaintiff in the case. The Cherokee Nation argued in response that its government provided health care services to tribe members during the period in question and that should not affect the federal court's jurisdiction over the case.

The Cherokee Nation filed a lawsuit in Sequoyah County Court in April 2015 seeking restitution for Risperdal that the tribe had purchased under the guise that the medication was a safe and effective treatment for elderly patients with dementia. The drug was later found to increase the risk of stroke and diabetes in the elderly.

The Cherokee Nation claims it purchased Risperdal between March 3, 2002, and Dec. 31, 2003, a time in which Janssen has since admitted it promoted the drug as an off-label treatment for elderly patients. The admission was part of a plea deal to resolve a criminal case with the Department of Justice.

In July, Johnson & Johnson removed the case to federal court, and in August the Cherokee Nation filed a motion to remand the case back to Sequoyah County Court. In December, U.S. District Judge James H. Payne put off ruling on whether to keep the lawsuit in federal court, ordering discovery for jurisdictional issues. Johnson & Johnson claims that the Cherokee Nation did not provide complete responses to its discovery questions and that the information that it did receive left them with “more questions than answers.”

Sources: Law360, RightingInjustice.com

DRUG MANUFACTURER ACCUSED OF ENGAGING IN PRODUCT-HOPPING

Reckitt Benckiser, Inc. (Reckitt), a British multinational drug manufacturer, has been sued in a lawsuit involving a prescription drug used for maintenance treatment of opioid dependence. The suit was filed by direct purchasers of the drug and by end payors. The drug, known as Suboxone, is the only pharmaceutical on the market that provides maintenance treatment for patients suffering from opioid addiction that can also be prescribed in an office setting for the patient's home use. One of the primary issues at the center of this multidistrict litigation is whether a pharmaceutical company marketing brand-name prescription drugs can be subject to antitrust liability for engaging in what has been referred to as a “product hopping scheme.”

“Product hopping” is a tactic by which brand name pharmaceutical companies can try to obstruct generic competitors and preserve monopoly profits on a patented drug by making modest reformulations that offer little or no therapeutic advantages. Prior to facing generic competition, a brand drug company can, for example, simply withdraw its original product, forcing consumers to switch to the reformulated brand drug and enabling the branded company to keep its market

exclusivity and preventing consumers from obtaining the benefits of generic competition.

The Plaintiffs alleged in their lawsuit that when the period of exclusivity on brand-name Suboxone expired and generic versions of that drug were to become available, Reckitt effectuated inconsequential changes to the Suboxone dosage form to prevent competition from generic formulations. More specifically, Plaintiffs claim that Reckitt and its affiliates switched from sublingual Suboxone tablets to a sublingual Suboxone film for the purpose of stymying generic competition. This switch was allegedly accompanied by Reckitt falsely disparaging the tablet through fabricated safety concerns and ultimately removing Suboxone tablets from the market just as generic Suboxone tablets were able to begin competing. Reckitt is also alleged to have manipulated FDA regulations to delay the entry of generic Suboxone into the market, thereby unlawfully maintaining a monopoly in violation of § 2 of the Sherman Act and state law. According to the Plaintiffs, Reckitt's conduct negatively affected competition and resulted in ongoing overpayments by consumers.

In late 2014, these product-hopping allegations survived a motion to dismiss in the United States District Court for the Eastern District of Pennsylvania. In denying the motion, U.S. District Judge Mitchell Goldberg concluded that the Plaintiffs had enough to move forward with their claims in part because they alleged that Reckitt paired its introduction of the reformulated product with sufficiently “coercive” measures that limited consumer choice. These allegations have also sparked an investigation by the Federal Trade Commission.

Last month, Indivior, Inc., a specialty pharmaceuticals operation formed by Reckitt in 2014, urged a Pennsylvania federal judge to force drug wholesalers and others who claim the companies used a “product-hopping scheme” to stifle generic competition to Suboxone to turn over information about downstream sales of the opiate addiction treatment. Specifically, Indivior said it needed information about why patients, physicians, insurers and pharmacies made the choices they did with regard to the two versions of the drug to explain why the film version has continued to outsell generic Suboxone tablets.

Antitrust cases based on pharmaceutical product hopping are relatively new and Beasley Allen has been actively following these cases nationwide. If you have any cases involving product hopping, anti-trust, or fraud, please 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.

Sources: Law360.com; Federal Trade Commission; and *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F. Supp. 3d 665 (E.D. Pa. 2014).

V. PURELY POLITICAL NEWS & VIEWS

THE NATIONAL SCENE

It's now pretty well established that the general election will pit Hillary Clinton against Donald Trump for the presidency. The delegate count for each of these candidates is already enough at this stage to virtually assure them of getting the nomination of their respective parties. Senator Bernie Sanders ran a tremendous race and brought a great deal of excitement to the fray. His message was one that needed to be heard and I believe that it was.

The Republican National Party will most likely have a nominee it really doesn't want and one it doesn't know what to do with. The Republican candidate debates were more like a comedy routine than a race for the most powerful office in the world. At times, the debates appeared to be more like a debate at less than the junior high school level. It's rather interesting to see the top Republicans, wringing their hands as they discuss the prospects of Donald Trump leading the ticket in the Fall. Hearing Gov. John Kasich discuss the issues, made me realize that he would be a very good president. But for some reason, the Republican voters weren't listening. They bought into the Trump message which said very little of substance.

There is one thing for certain the United States is more divided today than it has been since the 1970s. In fact, it may be the worst division ever. Racism is still quite evident in our country and that's very sad. The immigration issue—which really is based on racism—has further divided the American people. It's time for a message of unity to be heard!

VI. LEGISLATIVE HAPPENINGS

2016 LEGISLATIVE SESSION

The Alabama Legislature came back to “work” on Feb. 2 and the legislators will have 30 meeting days over the next three months. There are several critically important issues facing the Legislature this term, most of which revolve around the two state budgets.

Legislators find themselves in the same predicament as last year when it comes to the budgets. Prior to the session beginning, key legislators met and held budget hearings where each key agency explained in detail its budgetary needs. It comes as no surprise that more money is needed for the state agencies. To meet their basic responsibilities to our citizens, new funds are badly needed. There simply isn’t any additional money available in the budget. The legislators have refused to raise any new taxes and as a result services have suffered.

As it relates to the budget, this year could be even more interesting than last year. Last year certain revenue increases were suggested and studied but, for the most part, rejected. It appears that there will not be additional money available in the general fund budget and therefore agencies will be, once again, asked to further “tighten their belts.”

Some legislators have discussed the possibility of “un-earmarking” certain revenue items to allow those funds to be used for other spending needs. Additionally, some legislators are calling for the end of having two separate budgets (the general fund budget and the education budget) and placing all the State’s revenue in “one pot” and splitting the revenue 78 percent for education and 22 percent for the general fund.

It would appear that there is a strong consensus that teachers should receive a pay raise during this session. However, it appears that some leaders in the legislature favor tying a teacher pay raise to some changes in the tenure system. Obviously, the education community would be in favor of a teacher raise but would not want to change the current tenure laws.

Once again this year I believe that there will be some call for a state lottery. Lottery fever swept the state a few months ago and has put the topic back in the forefront of the minds of many Alabamians as a solution to raise additional revenue. Senator Jim McClendon, a Republican, was the first to sponsor a lottery plan this session. Most lottery plans will call for a constitu-

tional amendment that would allow the people of Alabama to decide whether or not they want a lottery.

Following what happens in this session should be very interesting. Obviously, once again this year the big elephant in the room is going to be the lack of revenue to fund all the State’s needs. Stay tuned.

VII. COURT WATCH

JUSTICE SCALIA’S DEATH LEAVES FUTURE OF NATION’S HIGHEST COURT IN QUESTION

On Feb. 13, we learned that U.S. Supreme Court Justice Antonin Scalia had passed away. Justice Scalia served as an Associate Justice of the Supreme Court of the United States beginning in 1986 and up until his death. With his passing, particularly in today’s divisive political climate, the future of the nation’s highest court is surrounded in question marks.

Scalia was a staunch conservative, and undoubtedly a friend to business, as evidenced by the murmur about what will happen to class-action lawsuits pending before the Court. Elsewhere in this issue of the Report, we talked about how Dow Chemical agreed to pay \$835 million to settle a case, rather than continue forward with Scalia’s seat vacant.

Although Justice is supposed to be blind, there is not much question she is sometimes led by politics. It is obvious the gridlock on Capitol Hill is worse than it has ever been, and with Justice Scalia’s death the court is currently split 4-4 between so-called conservative and liberal justices.

President Obama says he will send the name of a nominee to fill the vacant seat to the Senate in the next few weeks. Republicans in Congress say the seat should remain open until a new President is elected in November. That leaves an awfully long window for potential deadlock on the bench.

While we disagreed on many issues facing the court, I have a great deal of respect for Justice Scalia’s years of service and dedication to the practice of law. His passing leaves a void on the bench that will be hard to fill for a number of reasons. The thing I really liked about the man was that he really believed in the judicial system and also you never had to wonder where he stood on an issue.

VIII. THE CORPORATE WORLD

OLYMPUS TO PAY \$646 MILLION TO SETTLE KICKBACK PROBES

Japanese camera and medical equipment maker Olympus Corp. will pay \$646 million to settle two different investigations from the federal government over claims it entered into a kickback scheme with physicians and hospitals and violated the U.S. Foreign Corrupt Practices Act.

Olympus will pay a \$312.4 million criminal penalty over the alleged kickback scheme and \$310.8 million to settle False Claims Act violations, which the Justice Department said is the most a medical devices company has ever paid under the act. Additionally, the company’s subsidiary, Olympus Latin America Inc., has agreed to pay \$22.8 million over alleged FCPA violations regarding a kickback scheme targeted at increasing medical equipment sales in Central and South America.

Olympus has been embroiled in controversy since 2011, when former Olympus CEO Michael Woodford first revealed an accounting fraud by questioning exorbitant advisory fees paid during past mergers. Woodford himself later filed and settled claims that the company had fired him in retaliation for blowing the whistle. Olympus was subsequently forced to restate five years of financial earnings to remain listed on the Tokyo Stock Exchange.

Three former Olympus executives pled guilty to accounting fraud in Japanese court in 2012, after the company admitted to hiding more than \$1 billion in losses through a series of sham transactions, including a \$687 million payment it made for financial advice on its \$2 billion takeover of British device company Gyrus Group PLC in 2008.

In September 2013, Chan Ming Fon, a former banking executive in Singapore, pled guilty to conspiring to help Olympus hide money as part of the accounting fraud. About four months later, a Pennsylvania federal judge preliminarily approved a \$2.6 million settlement to be paid by Olympus to resolve a shareholder class action claiming the company failed to tell investors that it had paid “an unprecedented \$687 million” fee—which far exceeded the typical Wall Street advisory fee of 1 to 2 percent—for advice on the Gyrus deal. The judge issued a final judgment ending the case several months later. In April 2014, six Japanese banks sued

Olympus demanding nearly 28 billion yen (\$235 million) for losses related to the accounting scandal.

Source: Law360.com

IX. WHISTLEBLOWER LITIGATION

Pfizer To Pay U.S. \$785 Million To Settle Whistleblower Suits Over Protonix Discounts

Pfizer announced last month that it had reached “an agreement in principle” with the U.S. government and expects to pay \$785 million to resolve a pair of whistleblower complaints that accused the drug giant’s Wyeth unit of cheating Medicaid out of discounts it made available to other customers.

The announcement signaled the end of a decade-long legal battle between the New York-based drug giant and whistleblowers who accused it of withholding discounts from the Medicaid program for Wyeth’s oral and intravenous forms of Protonix, a drug used to treat heartburn by reducing stomach acid.

Medicaid’s “best price” provision requires pharmaceutical companies to offer Medicaid the same discounts and rebates on prescription drugs that they offer hospitals and other health care providers. Failure to provide the best price to Medicaid—and other federal health care programs for that matter—constitutes a submission of false claims when seeking reimbursements for those drugs.

The complaints against Pfizer were filed under the False Claims Act more than 10 years ago by whistleblowers Lauren Kieff, a former hospital-based specialist for AstraZeneca, and Dr. William LaCorte, a hospital physician who frequently prescribed Protonix for his patients. Wyeth’s alleged misconduct occurred from 2001 to 2006. After investigating the claims, the U.S. Justice Department opted to intervene in 2009 and became actively involved in the litigation.

Whistleblowers whose *qui tam* complaints result in a recovery for the U.S. government are awarded between 15 and 30 percent of the total amount recovered, which means that Ms. Kieff and Dr. LaCorte could share an award between \$117.75 million and \$235.5 million if the agreement is approved.

Source: Law360.com

Whistleblower In Accredo Kickback Complaint Awarded \$12.2 Million

A former Novartis sales manager who exposed a kickback scheme involving two pharmacy companies received a whistleblower award of \$12.2 million recently. Accredo Health Group Inc. paid \$60 million to settle its part of the case filed under False Claims Act. Thus far, whistleblower David Kester has received nearly \$15 million from the lawsuit he filed against Novartis, Accredo, and BioScrip Inc. Mr. Kester received more than \$2.3 million when BioScrip agreed to settle the case with the U.S. government for \$11.7 million.

That total doesn’t include his part of the \$390 million settlement Novartis entered into to resolve the kickback allegations, which is still undecided. However, if the court awards Mr. Kester 20 percent of that settlement, as it has in the Accredo and BioScrip settlements, Mr. Kester will receive \$78 million, not including the \$15 million he already received. He could potentially receive more or less, but his share of the Novartis recovery will be no less than \$58 million.

Mr. Kester sued Novartis and the other companies in 2011 in a New York federal court, alleging Novartis gave Accredo and BioScrip discounts and rebates for performance in exchange for pushing Exjade, a drug used to treat patients with too much blood iron, and Myfortic, which is given to patients after an organ transplant.

Federal prosecutors investigated the case, ultimately opting to intervene against Novartis and BioScrip in October 2013 and Novartis in April 2015. The U.S. Justice Department caught Accredo scoring more patient referrals and other kickbacks from Novartis the same week it started investigating allegations against it in Mr. Kester’s complaint. In its settlement of the case, the specialty pharmacy company agreed to pay the U.S. \$45 million and state regulators an additional \$15 million for the costs to Medicare and Medicaid they incurred from the improper reimbursements.

Source: Law360.com

False Claims Act Permits Whistleblowers To Recover For Emotional Distress

As we have stated in past issues, the False Claims Act (FCA) permits private individuals, called whistleblowers, to bring suit on behalf of the federal government when the government is being defrauded. In order to reward and protect the whistleblowers, the FCA provides

monetary incentives as well as protection from retaliation.

The FCA incentivizes whistleblowing by providing 15 to 30 percent of the overall recovery by the government to the whistleblower and protects whistleblowers from retaliation. The whistleblower can seek the following relief under a retaliation claim:

Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and **compensation for any special damages** sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection. 31 U.S.C.A. § 3730 (West) (emphasis added).

The plain language of the statute allows compensation for “special damages,” which raises a question. Can one recover damages for emotional distress under a FCA retaliation claim?

Though the Eleventh Circuit has not ruled on whether a whistleblower could seek compensation for emotional distress as compensatory damages under 31 U.S.C. § 3730(h), five other circuits have either ruled on the issue or, at the very least, discussed the issue *in dicta*. Those five circuits are the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits. Each of these circuits have either ruled, or expressed though dicta, that the “special damages” allowed in the anti-retaliation provision of the FCA includes emotional distress. Out of the seven circuits that have not had their circuit court rule or discuss the issue, three have had the issue discussed or ruled on by a district court. These district courts are located in the Second, Third, and Tenth Circuits and have also held that emotional distress damages are available under the Section 3730(h) FCA retaliation claim.

Whistleblowers have a wide variety of relief available to them—including recovery under an emotional distress claim—when it concerns retaliation against the whistleblower. The Middle District of Pennsylvania stated it this way:

[g]iven the wide variety of retaliation prohibited by § 3730(b) and conduct protected by the statute, a claim thereunder might be analogized to a tort action for wrongful discharge; a whistleblower cause of action; statutory causes of action

prohibiting retaliation against employees for engaging in protected activities; common law torts such as assault, battery, intentional infliction of emotional distress, and defamation; or negligence theories such as negligent hiring, retention, training, supervision, and referencing. Campion v. Ne. Utilities, 598 F. Supp. 2d 638 (M.D. Pa. 2009).

Blowing the whistle can be extremely stressful and many whistleblowers are badly mistreated by their employers for simply standing up for compliance. Fortunately, the anti-retaliation cause of action in Section 3730(h) equips whistleblowers with the ability to seek emotional distress damages, double back-pay with interest, reinstatement with their employer to their prior position and benefits, along with costs and attorney's fees.

Whistleblowers play a vital role in the government's war against fraudsters; therefore, the FCA provides not only an avenue for one to become a whistleblower, it also provides incentives to urge ordinary citizens to become extraordinary by doing the right thing and blowing the whistle on fraud. These incentives include monetary rewards and protection against retaliation. Are you aware of fraud being committed against the federal government, or a state government? If so, the FCA can protect and reward you for reporting the fraud.

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

Sources: 31 U.S.C.A. § 3730(h). *Leggins v. Orlando Hous. Auth.*, 2013 U.S. Dist. LEXIS 33021 (M.D. Fla. Mar. 11, 2013). *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658 (4th Cir. 2015). *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254 (5th Cir. 2014). *Thompson v. Quorum Health Res., LLC*, 485 F. App'x 783 (6th Cir. 2012). *Brandon v. Anesthesia & Pain Mgmt. Associates, Ltd.*, 277 F.3d 936 (7th Cir. 2002). *Neal v. Honeywell, Inc.*, 191 F.3d 827 (7th Cir. 1999). *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886 (8th Cir. 2000). *Townsend v. Bayer Corp.*, 774 F.3d 446 (8th Cir. 2014). *U.S. ex rel. Smith v. Yale Univ.*, 415 F. Supp. 2d 58 (D. Conn. 2006). *McKenna on Behalf of U.S. v. Senior Life Mgmt., Inc.*, 429 F. Supp. 2d 695 (S.D.N.Y. 2006). *Campion v. Ne. Utilities*, 598 F. Supp. 2d 638 (M.D. Pa. 2009). *Lipka v. Advantage Health Grp., Inc.*, No. 13-CV-2223, 2013 WL 5304013, at *1 (D. Kan. Sept. 20, 2013).

X. CONGRESSIONAL UPDATE

DEFECTS AND RECALLS PUSH AUTO REGULATORS TO SEEK BUDGET INCREASE

Faced with record numbers of automotive recalls and harsh criticism for failing to adequately police the auto industry, The National Highway Traffic Safety Administration is asking Congress for the funds to increase its budget and staff. NHTSA seeks a total of \$908 million in fiscal year 2016—an increase of \$58 million over last year's budget.

The increase would allow the agency to hire an additional 59 full-time employees, all of whom would be assigned to its Office of Defect. The new staff would include 22 engineers and additional investigators, statisticians, and other staff to improve the agency's ability to detect and analyze defects affecting auto safety.

Currently there are just 28 full-time workers in the office dealing with a growing number of recalls, including a recent expansion of Takata's airbag inflator recall, which encompasses about 34 million U.S. vehicles. NHTSA head Mark Rosekind has said the agency is under pressure to make the highways safer but that it won't be able to meet everyone's expectations unless Congress gives it the money to handle the increasing workload.

NHTSA's annual budget of \$850 million hasn't increased in nearly a decade. Earlier last year a House subcommittee approved a transportation budget that did not include the extra funds NHTSA needs, but the budget has yet to be finalized. Mr. Rosekind also said that NHTSA's state of affairs was worse than he realized before he took office in December 2014. Inadequate staff, for instance, has meant that just nine NHTSA employees had to review about 80,000 complaints, and a handful of staff were charged with screening, investigating and analyzing defect data spanning 250 million registered vehicles.

The proposed budget increase for NHTSA is part of a plan that would devote nearly \$6 billion to highway safety over the next six years, most of which would be allocated to highway projects administered by the states. The Obama Administration and the Transportation Department are also pushing for \$4 billion to be spent in the next four years on assisting in the development of automated, self-driving cars. Much of that money would be spent on creating the legal and regulatory framework necessary to allow driverless vehicles on the roads in all 50 states.

NHTSA fully supports the development of self-driving cars and every major car company is creating and testing pilot models. So far, the hundreds of self-driving cars Google is testing in California and Texas have been involved in about 16 accidents, but all of those crashes were the fault of other drivers. Transportation Secretary Anthony Foxx said recently to a gathering of auto industry leaders: "Automated vehicles open up possibilities for saving lives, saving time and saving fuel."

Sources: *Automotive News*; *International Business Times*; *The Detroit News*; and *RightingInjustice.com*

FDA'S PROPOSED 2017 BUDGET TAKES AIM AT FOOD SAFETY AND MEDICAL PRODUCTS

The Food and Drug Administration is seeking a \$5.1 billion budget for 2017, which includes \$41.2 million to improve the safety of medical products, and \$211 million to fund what is referred to as "the most sweeping overhaul of the country's food safety system since the first federal food safety law was passed in 1906."

The budget is about 8 percent higher than the agency's 2016 budget—a net increase of about \$283 million. The additional funds would support several key initiatives such as implementing the 2011 Food Safety Modernization Act (FSMA), fighting prescription drug abuse, and supporting Vice President Joe Biden's "National Cancer Moonshot."

About 48 million people acquire foodborne illnesses each year, according to the Centers for Disease Control and Prevention (CDC). The funds requested to move forward with FSMA aim to reduce this number of preventable foodborne illness outbreaks by arming the federal government and states with enforceable safety standards for produce farms, and by enabling the agency to hold food importers accountable for making sure their products meet U.S. safety standards.

Steps have already been made to improve food safety by cementing six key rules in September and November related to overseeing preventative protocols by manufacturers and tightening safety standards for farmed produce and imported food.

Funding would also enable the agency to identify solutions to prevent prescription opioid abuse and accelerate patient access to safe and effective generic drugs. The agency said it would also focus on reducing drug shortages. The FDA also requested \$75 million to pay for a virtual cancer research center for the development new diagnostic tests and treatments. Congress has an obligation to adequately fund the FDA. If you agree, contact your

members of Congress and let them know you are “watching them.”

Source: Law360.com

LAWMAKERS WANT BETTER SURVEILLANCE SYSTEM FOR MEDICAL DEVICES

The Food and Drug Administration’s surveillance system, designed to identify harmful medical devices, relies too heavily on manufacturers to report problems with their own devices, and should be revamped in order to protect public health. That’s the opinion of members of Congress, federal officials and health-policy experts. But how to rework the system leaves a great deal of room for much debate.

One issue at the center of the debate involves duodenoscopes, specialized endoscopes that are fed down patients’ throats to diagnose and treat various bile duct and pancreatic conditions. The scopes have been blamed for spreading antibiotic-resistant infections causing outbreaks in 19 hospitals across the country, sickening nearly 200 patients.

The Senate faulted the FDA for taking 17 months to investigate the issue before alerting the public in February 2015. During that time, outbreaks occurred at seven more hospitals, infecting 68 patients.

One proposal involves creating an entirely new tracking system for medical devices that would work similarly to the monitoring system for prescription drugs, which uses insurance claims data along with manufacturers’ adverse event reports. That proposal supports adding bar codes on medical devices, a system that is being phased into practice over the next several years. However, those unique identifiers won’t be helpful unless Congress requires medical professionals to include those bar codes on insurance claim forms.

The system would flag cases where patients required emergency treatment or developed infections after a procedure, and could help officials identify trends that required investigation. The information would also help identify patients who had implants that were recalled or help hospitals in removing equipment found to be defective.

The new FDA commissioner, Dr. Robert M. Califf, says he supports a new surveillance program for medical devices that relies on data. He told senators last November:

Imagine with these duodenoscopes, if there had been such a system, we would have seen the problem very early. We could see it independently

of industry and act on it much more rapidly.

But it won’t be cheap to revamp the system. Lawmakers say it could cost as much as \$250 million to implement and maintain a new surveillance system over the next five years. However, it’s needed and it’s also the right thing to do.

Source: *Washington Post*

SENATORS CALL FOR LEGISLATION TO END PAY-FOR-DELAY DEALS

A group of U.S. Senators has urged President Barack Obama to call for legislation banning so-called pay-for-delay deals among drugmakers that drive up prescription drug prices and leave patients “with the unimaginable choice of foregoing life-saving care or depleting family savings.”

The group, which includes Sen. Bernie Sanders and at least seven others, urged the president to include in his upcoming 2017 budget measures that would soften this burden on families. The plan includes actions such as banning reverse payment drug patient settlements that allegedly delay generic competition to brand-name drugs, requiring drugmakers to offer rebates to low-income Medicare Part D subsidy enrollees, and allowing the Department of Health and Human Services to negotiate drug prices for biologics and other expensive prescription drugs.

The senators commended President Obama for including many items in his 2016 proposed budget; however, they said the “dramatic rise” in prescription drug spending had necessitated new measures be taken. The lawmakers urged the president to address “changing dynamics” in the pharmaceutical industry that have led to significant increases in generic drug costs. The senators called for policies to increase competition among manufacturers of generic drugs and prevent drug companies from “gouging prices on essential medicines.”

The request comes just months after former Turing Pharmaceuticals CEO Martin Shkreil raised red flags after he gained the rights to the anti-parasite drug Daraprim and raised the price 5,000 percent to \$75,000 per bottle. The senators wrote:

Most Americans agree that current drug costs are unreasonable. We applaud the measures your administration has advanced in the past on prescription drugs and hope that you will expand on them in next year’s budget.

Hopefully Congress will take the needed action to bring about the changes asked for. The powerful drug manufacturers have been taking advantage of their tremendous influence in Congress and also with the FDA for years. The consuming public has been hurt as a result. Hopefully, that will change after the general election.

Source: Law360.com

XI. PRODUCT LIABILITY UPDATE

PRODUCT LIABILITY LITIGATION UPDATE

Lawyers in our firm’s Product Liability Section handle cases involving catastrophic injuries and deaths arising out of any type of accident, including car crashes, 18-wheeler accidents and industrial and workplace accidents. Potential product liability claims are often overlooked by some lawyers when they investigate what many view as routine accidents. In many motor vehicle crashes, some defect—either design or manufacturing—played a major role in causing the accident.

A product liability claim focuses on whether or not the product is defective and unreasonably dangerous. An entire product may be defective or it may be that a component part of the product contains the defect. The product may well contain design, manufacturing, or warning defects. In some cases, it will be a combination of these problems. Below are just a few of the type of cases our firm handles on a regular basis.

Takata Airbags

Within the last months, four automakers have announced more recalls due to the problem with Takata airbags that has caused at least 11 deaths. With the additional recalls, more than 26 million cars from more than a dozen automakers are affected. This new spate of recalls adds over 2.3 million more cars in the U.S. to what is already the largest recall since car recalls have been tracked.

The potential dangers posed by these airbags are that the airbags can unexpectedly explode with excessive force, causing serious injury or death to occupants. The defect is linked to the airbags’ inflator systems, which

can shoot metal fragments from the devices into the car like shrapnel. Airbags on both the driver's and passenger's side can explode, even as a result of a fender bender or other minor collision. Tokyo-based Takata is one of the world's largest automotive suppliers. It manufactures airbags, safety belts, steering wheels and other auto parts for a variety of automakers. Vehicles containing the defective airbags include certain models made by Toyota, Honda, Mazda, BMW, Nissan, Chrysler, Audi, Volkswagen and General Motors.

GM Ignition Switch Litigation

As we all know, General Motors has recalled more than 17 million vehicles related to the defective ignition switch problem, which can leave a vehicle without power and the driver unable to control the vehicle in sudden and dangerous situations. Court documents and other evidence reveal that GM knew about the ignition switch problem as early as 2001.

Our Product Liability Section has handled numerous claims involving the GM ignition switch defect. Some of those claims were settled through the GM Ignition Switch Compensation Fund. Others are still pending in federal and state courts.

Heavy Trucking Accidents

There are significant differences between handling an interstate trucking case and other car wreck cases. It is imperative to have knowledge of the Federal Motor Carrier Safety Regulations, technology, business practices, insurance coverages, and to have the ability to discover written and electronic records. Expert testimony is of utmost importance. Accidents involving semi-trucks and passenger vehicles often result in serious injuries and wrongful death. Trucking companies and their insurance companies almost always quickly send accident investigators to the scene of a truck accident to begin working to limit their liability in these situations.

Chris Glover, a lawyer in the Firm's Product Liability/Personal Injury Section, has represented numerous folks who have been seriously injured or lost a family member as a result of the wrongful conduct of a trucking company. He most recently wrote and had published a book that explains

how to properly litigate a heavy trucking case. The Book, titled "An Introduction to Truck Accident Claims: A Guide to Getting Started," covers topics including the basics of trucking regulations and requirements, how to prepare for your case, potential defendants including the carrier, the broker and the driver; and common issues that arise in commercial vehicle litigation, such as hours of service, fatigue, maintenance and products liability. This book is available free to lawyers in either hard copy or downloadable digital format. For your free hard copy, call us at 800-898-2034. The book also can be downloaded at <http://www.chrisglover-law.com/book>.

Tire Defects

Tire failure can result in a serious car crash causing serious injury or death to the car's occupants. Air, heat and sunlight can cause the rubber in tires to break down. When a tire is defective, potentially serious problems like detreads and blowouts can occur long before the tire would be expected to wear out. If the tire failure is the result of design or manufacturing defects, and the manufacturer is aware of the problem, they have an obligation to alert consumers to the potential danger.

One serious problem with tires is that they wear down on the inside as they age, but they look brand new on the outside. Despite the dangers of tire aging, the National Highway Traffic Safety Administration (NHTSA) has still refused to establish a tire aging standard. A tire aging standard would make it easier for consumers to determine the tire's age. Right now, the only way to determine the age of a tire is to decipher the cryptic code on the tire's sidewall. Also, a tire aging standard would make it mandatory for tire centers to take tires out of service at a specified date, regardless of what the tire looks like on the outside.

We are also seeing a huge influx of defectively designed tires from China. We recently filed a case in North Carolina where a Chinese brand tire failed causing a wreck and a life-long truck driver to suffer serious injuries. As more and more of the products we buy, including tires, are being made in China and other foreign countries, the "importers" role is becoming more critical. In too many instances,

"importers" are not taking the appropriate steps to assure that foreign tire makers' tires are safe, despite NHTSA standards requiring them to do so.

Under Federal law, "importers" must take steps to assure that the tires they import are free of defects. Good manufacturing processes require "importers" to conduct on-site inspection(s) of a foreign tire makers' facilities to assure that adequate testing, manufacturing, quality control and other measures are in place. Further, "importers," once they import tires into this country, should perform random sampling, testing and inspection of foreign tires before they distribute and/or sell the tires to consumers in this country.

In one recent case, we learned that, while a company was importing more than 400,000 tires a month, it was doing nothing to insure that the Chinese tires it imported, sold and profited from were safe. The importer never inspected the manufacturing plant, never observed any tire testing and never checked to see if the Chinese manufacturer employed any quality control measures for its tires and plants. Further, the importer never performed one post-"import" inspection, test and/or took any other step relative to one single tire it sold despite the Federal requirements to do so. This conduct is particularly troubling when you consider how important tires are to our safety. Companies that import tires, or any product for that matter, should be held accountable when they do nothing to insure these products are safe for American consumers. Rick Morrison in our Product Liability Section has pursued numerous claims against both tire manufacturers and importers of the defective Chinese tires.

Bad Boy Buggy Litigation

Lawyers in our firm continue to handle cases involving injuries from the off-road vehicle known as the Bad Boy Buggy. The Buggy was initially designed by a gentleman who owned an auto salvage yard in Natchez, Miss., but the company was sold a couple of times and now is owned by Textron, Inc.

The Bad Boy Buggies are currently marketed for hunting and utility work but they are designed very poorly. They are unstable on uneven terrain. The static stability factor of the Bad

Boy vehicles is very low which is caused by a design that has a narrow track width and a high center of gravity. The vehicles are also very heavy primarily because of the weight of the numerous batteries located internally. When the Bad Boy vehicle turns over, it has the potential to cause significant injuries.

As of today, the Bad Boy Buggies are still not equipped with doors or adequate measures to prevent “leg-out injuries.” Yamaha performed a recall on all of its Rhino vehicles in 2007 because it was seeing numerous leg-out injuries when the vehicles tipped over. The primary problem was that, in a side-by-side vehicle, the driver or passenger will reflexively put their foot out as the vehicle tips. The vehicle typically still has forward momentum as the tip-up occurs, so as the occupant plants his foot on the ground, the foot/leg will be pulled under the backside of the vehicle. Quite often, this causes severe fractures and even amputations.

While Bad Boy has now upgraded its design to add a shoulder net and seat-belt, its foot-out protection is still very bad. Textron added a trip bar in the foot well area, which it claims is a foot-out preventative device. But Textron has performed no testing on the vehicle to see if the trip bar is effective. The vehicles have no protection for occupants who are younger, or of short stature, because their legs may not be long enough to reach the area where the leg-out device is located. These vehicles need doors and netting to prevent leg-out and arm and hand-out injuries.

Hopefully, Textron, Inc. and its subsidiary Textron Specialty Vehicles, Inc. will recognize the design flaw and start equipping their vehicles with doors and other proper safety devices to reduce the danger. In the meanwhile, some very bad and defective vehicles are in use and are an extreme hazard for folks who use them.

If you have any questions about a specific Bad Boy accident or need information on the ongoing litigation, contact Greg Allen, our firm’s Senior Product Liability lawyer, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com. Greg has successfully handled a number of cases involving the Bad Boy Buggy and currently has several in court.

Aviation Accidents

Soaring through the sky at hundreds of miles an hour, thousands of feet above the ground in an airplane or helicopter leaves little room for error. One small mechanical problem, misjudgment or faulty response in the air can spell disaster for air passengers and even unsuspecting people on the ground. This is why it’s crucial for the aviation industry, including manufacturers, pilots, mechanics and air traffic controllers, to adhere to the highest possible standards at all times.

Statistics indicate mechanical failures cause up to 22 percent of aviation crashes. Historically, aircraft manufacturing defects, flawed aircraft design, inadequate warning systems and inadequate instructions for safe use of the aircraft’s equipment or systems have contributed to numerous aviation crashes. In such cases, the pilot may follow every procedure correctly but still be unable to avert disaster. Mike Andrews, a partner in the Section, has handled numerous cases involving defects found in aircrafts.

Currently, Mike is pursuing two defective aviation cases. One case involves a crash of the V22 Osprey in Hawaii resulting in death of a young marine. The Osprey has a long history of defects involving the aircraft’s hydraulics and software. This crash resulted from the engine’s ingesting sand, which was kicked up into the air by the downwash from the Osprey’s rotor-blades as it attempted to land. The aircraft is equipped with a filtration system referred to as an engine air particle separator, which is intended to prevent sand and other particle ingestion. However, the system is faulty. Bell and Boeing have tried various iterations and designs but have not yet implemented a safe and effective filter. Several crashes have resulted in deaths and serious injuries.

The other case involves the crash of a light aircraft off the coast of Georgia. Two inexperienced pilots were attending flight school in North Carolina and were assigned to fly an aircraft to Jacksonville Fla., to the flight school maintenance facility. Unfortunately, the aircraft was dispatched with inoperable equipment. Specifically, the pilots were sent up in an aircraft which had faulty vacuum pumps—one was completely inopera-

ble and the other failed in flight. The vacuum pumps provide the pilots’ horizon and orientation information while in flight. Without such information, pilots lose spatial awareness and become disoriented. Due to the inoperable and faulty equipment, the plane crashed, killing both student pilots.

Non-Auto Product Defects

Lawyers in the Section also handle defective products, including smoke detectors, flammable clothing, industrial equipment, and heaters just to name a few. Most of the time, family members do not suspect that a defective product is the cause of a death or injury, and manufacturers readily blame the victim’s actions. Our firm has discovered that defective products are increasingly a major cause of unexpected deaths and injuries.

Industrial Accidents And Workplace Defects

Each year, thousands of workers are injured or killed at their workplace. Although a state’s workers’ compensation system places limitations on the ability of employees to hold employers accountable for these work-related injuries, many people do not realize that there may be another available source of recovery. Injuries in the workplace are often caused by defective products, such as a machine where a dangerous nip-point is not properly guarded nor is the employee warned of the dangerous nip-point. If a product causes an on-the-job injury, a product liability suit may be brought against the product’s manufacturer. Catastrophic injuries, deaths, and amputations unfortunately too commonly occur from defective products found in the work place.

Our firm handles numerous product cases each year that arise in the context of an accident that occurred on the job or in the workplace. Currently, Kendall Dunson, a partner here at the firm, is handling a tragic case that occurred in Tennessee. While working in the maintenance department for his employer, the employee was setting up a roll stack on an extruder. The roll stack is one machine in an entire line. The roll stack consists of 3 large rollers. The middle roller is the master and the other two are slaves. While working

to get the rollers in sync, he was pulled through the rollers and his head was crushed leading to his death. No one saw the incident but the rollers were found spinning at maximum rate. The rollers have in-running nip points which should have been guarded, but, in this tragic case, the nip-points were not guarded. The manufacturer outfitted the rollers with a stop pull cord along the edges and at the top and bottom of the roll stack. But the roll stack is so large that someone standing in the middle of the roll stack cannot reach the pull cord. The roll stack was defective and unreasonably dangerous for lack of adequate guarding and/or a presence sensing device that would have prevented this needless death.

If you would like to talk with a lawyer on any of the above, contact Sloan Downs, the Section Administrator at 800-898-2034 or by email at Sloan.Downs@beasleyallen.com. Sloan will have a lawyer contact you.

XII. MASS TORTS UPDATE

AN UPDATE ON OUR MASS TORTS SECTION

Activity in our firm's Mass Torts Section is at a record pace. Lawyers in the Section have been very busy on several fronts. They will investigate any potential claim involving a medication or medical device involving catastrophic injury or death. The following are some of the drugs and devices the section is currently working on.

Talcum Powder

I will write in detail on the recent verdict in St. Louis in other parts of this issue. I will say here, however, that Johnson and Johnson has known for decades that its talcum products, such as Shower to Shower and Baby Powder, can cause ovarian cancer. But J & J has failed to warn women of the risk of using these products in the genital area. A Harvard medical doctor says that he has studied the link between talc and cancer for 30 years and believes talc is the likely cause for as many as 2,200 cases of ovarian cancer each year.

Lawyer: Ted Meadows
Primary Staff Contacts: Katie Tucker,
Gwyn Harris or Amy Brown

Transvaginal Mesh

The U.S. Food and Drug Administration (FDA) has issued an updated safety communication warning doctors, health care professionals and patients that the placement of surgical mesh through the vagina to treat pelvic organ prolapse and stress urinary incontinence may present greater risk for the patient than other non-mesh procedures. This is also called transvaginal mesh. According to the FDA, reported complications from the transvaginal placement of the mesh include erosion of the mesh into the vaginal tissue, organ perforation, pain, infection, painful intercourse and urinary and fecal incontinence. Often women require surgery to remove the mesh. In some cases, this can require multiple procedures without successful removing all of the mesh. Currently, we are investigating cases involving mesh manufactured by Bard, Boston Scientific, Caldera, Coloplast and Johnson & Johnson.

Lawyers: Chad Cook and
Leigh O'Dell
Primary Staff Contacts: Tabitha Dean
or Melisa Bruner

Xarelto®

Approved by the FDA in 2011, Xarelto® is one of the newest blood thinners on the market. It is manufactured by Janssen Pharmaceutical (a subsidiary of Johnson & Johnson) and co-marketed by Bayer Healthcare. It is prescribed to prevent blood clots in patients suffering from atrial fibrillation, pulmonary embolism, deep vein thrombosis, stroke and patients who have recently undergone hip or knee replacement surgery. Since its approval, it has been linked to hundreds of injuries and deaths. We are currently investigating claims of GI bleeding, hemorrhagic strokes or any other serious or fatal bleeding involving Xarelto®.

Lawyers: David Byrne and
Melissa Prickett
Primary Staff Contacts: Susan
Harding or Penny Davies

3M™ Bair Hugger

The 3M™ Bair Hugger is a forced hot air warming blanket used primarily to help maintain a patient's body temperature during surgery. The 3M™ Bair Hugger pushes warm air through a flexible hose into a blanket draped over a patient. However, warming blankets can recirculate contaminated air over a patient's body, including over an open surgical site. This may result in infections like MRSA or sepsis. In particular, patients undergoing knee or hip replacement surgery are at risk of infections deep in the joint, which is very difficult to treat. Complications from these infections include hospitalization, implant revision surgery, limited mobility, permanent disability, amputation and death.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Actos®

The FDA has approved updated warning labels for Actos, a prescription medication used to treat Type 2 diabetes. The updated label states that Actos usage for more than one year may cause bladder cancer. Actos, manufactured by Takeda, has been under FDA review since September 2010. In June 2011, the FDA issued a warning for Actos, while at the same time, drug regulators in France and Germany suspended use of the drug.

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

Antidepressants

SSRI-antidepressants such as Celexa, Lexapro, Luvox, Paxil, Prozac and Zoloft are prescribed to treat depression. Studies over the last several years have shown an increased risk of heart birth defects in children born to mothers who took SSRI-antidepressants in the first trimester. Most of the cardiac defects observed in these studies were atrial or ventricular septal defects, conditions in which the wall between the right and left sides of the heart does not completely develop. We are currently investigating claims of birth defects involving children whose mother was taking an SSRI, Wellbutrin or Effexor during pregnancy.

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

Byetta[®], Januvia[®], Janumet[®] and Victoza[®]

These drugs are used to treat Type 2 diabetes. They have been prescribed to millions of people in the United States. Since approving the medications, the FDA has issued several warnings about links between them to complications related to pancreatic diseases. Recent studies have linked these two drugs to acute pancreatitis and pancreatic cancer.

Lawyer: David Dearing
Primary Staff Contact: Kim Owen

Essure[®]

Essure[®] is a permanent birth control device manufactured by Bayer Health care. The device consists of two small nickel alloy coils, which are implanted through the vagina into the fallopian tubes. Scar tissue forms around the coils, preventing sperm from reaching the eggs. Since its approval in 2002, 750,000 Essure[®] devices have been implanted. Adverse events reported with Essure[®] include migration, leading to perforation of the fallopian tube or uterine wall or embedment in other organs, often requiring hysterectomy or surgical removal; allergic reactions; severe pain; and infection.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

GranuFlo[®]

GranuFlo[®] and NaturaLyte[®] are products used in the dialysis process. On June 27, 2012, the FDA issued a Class 1 recall of GranuFlo[®] and NaturaLyte[®]. A Class 1 recall is the most serious FDA recall, reserved for situations in which the FDA deems "there is a reasonable probability that the use of or exposure to a violative product will cause serious adverse health consequences or death." Use of these dialysis products has been linked to an increase in the risk of cardiopulmonary arrest and sudden cardiac death. The manufacturer, Fresenius Medical Care, was aware of the dangers and injuries associated with these products but failed to warn patients and doctors until 2012. We are currently investigating death claims as well as claims of heart

attack, cardiopulmonary arrest or any other serious injury.

Lawyers: Frank Woodson and Matt Munson
Primary Staff Contact: Renee Lindsey

Invokana[®]

Approved in March 2013, Invokana[®] (canagliflozin) is an SGLT2 Inhibitor used to treat adults with Type 2 diabetes, manufactured by Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson. SGLT2 inhibitors work by preventing high blood sugar by helping the patient's kidneys remove excess sugar through their urine. In May 2015, the U.S. Food and Drug Administration (FDA) issued a warning the drug has been linked to cases of ketoacidosis, a serious condition where there is too much acid in the blood. Complications of diabetic ketoacidosis include difficulty breathing, nausea/vomiting, abdominal pain, confusion and unusual fatigue or sleepiness. The condition can lead to diabetic coma and/or death.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

IVC Filter

Retrievable IVC filters are wire devices implanted in the vena cava, the body's largest vein, to stop blood clots from reaching the heart and lungs. These devices are used when blood thinners are not an option. Manufacturers include Bard, Cook, and Johnson & Johnson. While permanent IVC filters have been used since the 1960s with almost no reports of failure, retrievable IVC filters were introduced in 2003, promoted for use in bariatric surgery, trauma surgery and orthopedic surgery. Risks associated with the retrievable IVC filters include migration, fracture and perforation, leading to embolism, organ damage and wrongful death.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Lipitor[®]

Lipitor, a statin drug to treat high cholesterol, was approved by the FDA in 1996 and is one of the best-selling prescription medications in the world. Recent studies have found a possible link between Lipitor and the risk of

developing Type 2 diabetes. A University of Massachusetts study found a potential link in postmenopausal women, particularly those who had a Body Mass Index (BMI) less than 25. Of the 153,840 women evaluated, more than 10,000 had developed Type 2 diabetes by the end of the study.

Criteria: Injured is female who took Lipitor consistently for at least two months and was diagnosed with diabetes while taking Lipitor (or within six months of last dosage of Lipitor).

Lawyers: Frank Woodson and Matt Munson
Primary Staff Contact: Renee Lindsey

Metal-on-Metal Hip Replacements

Metal-on-Metal hip replacement manufacturers have been under heavy scrutiny over the past few years regarding the dangers of their metal on metal hip devices. The main hip devices under scrutiny are:

- Johnson & Johnson/DePuy: ASR Total Hip Replacement and ASR Resurfacing System hip (*Recalled on August 24, 2010*);
- Johnson & Johnson / DePuy: Pinnacle metal-on-metal hip;
- Zimmer: Durom Cup hip;
- Stryker: Rejuvenate and ABG II Stems (*Recalled on July 4, 2012*);
- Biomet: M2a and 38 Diameter hips,
- Wright: (a) Conserve, (b) Dynasty, (c) Lineage and (d) Profemur (femur fracture) hips; and
- Smith and Nephew: R3 Liner hips (*Recalled on June 1, 2012*).

Metal-on-metal hip patients from the above manufacturers have similarly reported problems after their initial implant surgery resulting in revision surgery. All have reported a variety of symptoms, including pain, swelling and problems walking. These symptoms are normal for patients following a hip replacement, but can be a sign that something is wrong if they continue or come back frequently. Additionally, metal debris spreading in the hip area has been reported due to the metal on metal friction involved from the metal components moving together.

We would like to review any cases involving individuals who have had any of the above metal-on-metal hip devices implanted and all individuals unsure of the type of hip device implanted if the person has had revision surgery, or the person is experiencing hip pain, hip swelling or difficulty walking.

Lawyers: Navan Ward and
Melissa Prickett

Primary Staff Contact: Donna Puckett
and Stephanie Dean

Mirena® IUD

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

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

Paxil®

Paxil® (paroxetine) is an anti-depressant manufactured by GlaxoSmith-Kline. Recently Public Health Advisories have been issued for Paxil® regarding an increased risk of heart birth defects, persistent pulmonary hypertension (PPHN), omphalocele (an abnormality in newborns in which the infant's intestine or other abdominal organs protrude from the navel) or craniosynostosis (connections between sutures-skull bones, prematurely close during the first year of life, which causes an abnormally shaped skull) in children born to mothers exposed to Paxil®.

We are investigating claims for children born with birth defects to a mother who has documented use of Paxil® during pregnancy.

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

Power Morcellator

The Power Morcellator is a surgical instrument used to divide and remove masses during hysterectomies, fibroid removal and other laparoscopic surgeries. The device is inserted through small incisions and removes tissue after aggressively cutting and shredding it. The device can put women at increased risk for a number of deadly uterine cancers. According to FDA analysis, 1 in 350 women undergoing surgical treatment for fibroids has an unsuspected uterine sarcoma that cannot be reliably detected before surgery. During power morcellation, there is a chance pieces of tissue may be left behind. If the tissue is malignant, cancer may be spread. The FDA issued a safety alert in April 2014 discouraging the use of these devices in uterine and fibroid removal procedures.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Risperdal®

Risperdal® is an atypical antipsychotic drug used to treat schizophrenia and certain problems caused by bipolar disorder and has been linked to the development of gynecomastia in boys and young men. Gynecomastia is a condition that causes boys to grow breasts.

Lawyer: James Lampkin
Primary Staff Contact: Crystal Jacks

Stevens-Johnson Syndrome

Stevens-Johnson syndrome is an immune complex hypersensitivity reaction that can be caused from an infection or immune response to drugs. It is a severe expression of a simple rash known as erythema multiforme. SJS is also known as erythema multiforme major. It affects all ages and genders including pediatric populations. The most severe form of SJS is toxic epidermal necrolysis (TENS). SJS occurs twice as often in men as in women. Most cases of SJS appear in children and young adults younger than age 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as NSAIDs, non-steroidal anti-inflammatory drugs.

Lawyers: Frank Woodson and
Matt Munson

Primary Staff Contact:
Renee Lindsey

Testosterone Replacement Therapy

Testosterone Replacement Therapy products for men have been linked to an increased risk of death, heart attack and stroke. Researchers found men who used testosterone therapy were 30 percent more likely to have a heart attack, stroke, or die after three years of use. Furthermore, men who started the study with clear, unobstructed coronary arteries were just as likely to have a heart attack, stroke or die as men who entered the study with established coronary artery disease. Testosterone therapy, such as the prescription topical treatments AndroGel, Testim and Axiron, are used to help boost testosterone levels in men who have a deficiency of the male hormone. Symptoms of low testosterone include decreased libido and low energy. We are currently investigating claims of heart attack, stroke, DVT, pulmonary embolism and prostate cancer.

Lawyer: Matt Teague
Primary Staff Contact: Heather Hall

Viagra®

A preliminary study indicates that erectile dysfunction drug Viagra® (sildenafil) may increase the risk of developing melanoma, the deadliest form of skin cancer. The study, published in the *JAMA Internal Medicine Journal*, analyzed data from nearly 26,000 men, 6 percent of whom had taken Viagra. The men who used Viagra at some point in their lives had about double the risk of melanoma compared to men who had never taken the drug. Men who were currently taking Viagra were at an 84 percent greater risk of developing Melanoma. We are currently looking at cases involving men who are taking or have taken Viagra and were diagnosed with melanoma.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Zimmer NexGen Knee Replacement

Since 2003, more than 150,000 Zimmer NexGen Flex-Knee implants have been sold. Several different components used as part of the Zimmer NexGen Flex-Knee replacement system have been associated with

increased risk of complications, including pain, swelling, loosening of component parts, and the need for follow-up/revision surgery. Several prominent surgeons want a Zimmer NexGen knee replacement recall to be issued. At a March 2010 conference of the American Academy of Orthopedic Surgeons, two knee surgeons presented data suggesting that the Zimmer NexGen Flex-Knee failure rate could be as high as 9 percent, and that the actual number of complications that require revision surgery could be even higher. The lead author of the study, Dr. Richard Berger, described the failure rate of the Zimmer NexGen CR-Flex Porous Femoral Component as “unacceptably high.”

We would like to review any cases involving individuals who have had a Zimmer NexGen knee device implanted, or individuals unsure of the type of knee device implanted, if that individual has had revision surgery.

Lawyers: Navan Ward and
Melissa Prickett
Primary Staff Contact: Donna Puckett
and Stephanie Dean

Zofran®

Manufactured by GlaxoSmithKline, Zofran® (ondansetron) was approved to treat nausea during chemotherapy and following surgery. Zofran® works by blocking serotonin in the areas of the brain that trigger nausea and vomiting. Between 2002 and 2004, GSK began promoting Zofran® off-label for the treatment of morning sickness during pregnancy, despite the fact the drug has not been approved for pregnant women and there have been no well controlled studies in pregnant women. The FDA has received nearly 500 reports of birth defects linked to Zofran®. Birth defect risks include cleft palate and septal heart defects.

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

TRANSVAGINAL MESH LITIGATION UPDATE

There are currently approximately 70,000 individual transvaginal mesh cases consolidated before Judge Joseph Goodwin in the United States District Court for the Southern District of West Virginia. The cases are part of Multidistrict litigation (MDL) as ordered by the

Judicial Panel on Multidistrict Litigation. Multidistrict litigation is a consolidation of civil cases transferred from different jurisdictions around the country to a single United States District Court to achieve certain pre-trial efficiencies. The aim of this consolidation is to preserve judicial resources, eliminate duplicities in the fact-finding process, and prevent inconsistencies in pre-trial rulings.

Judge Goodwin currently presides over seven MDLs against various transvaginal mesh manufacturers. The MDL set up for Johnson & Johnson's Ethicon brand has the largest number of pending claims—approximately 22,000 as of Feb. 4. In addition to the numerous claims before Judge Goodwin in the MDL, Ethicon also faces consolidated claims pending in New Jersey state court as well as claims in various state court venues across the country.

Frustrated with the slow pace of litigation in the Ethicon MDL, Judge Goodwin entered a pretrial order on Aug. 19, 2015, directing Johnson & Johnson to begin case-specific discovery for the oldest 200 cases naming Ethicon and/or Johnson & Johnson as the Defendant. Specifically, the order mandates that individual discovery for each of the 200 cases be completed. Since that time, Judge Goodwin has entered pretrial orders directing case-specific discovery to move forward in two additional groups of 200 cases, making a total of 600 cases since August 2015.

At the conclusion of pre-trial proceedings, the Court will transfer each case that was directly filed to a federal district court of proper venue. Cases that were transferred to the Southern District of West Virginia by the Judicial Panel on Multidistrict Litigation will be remanded for further proceedings to the federal district court from which each such case was initially transferred.

In December, a Philadelphia state court jury ordered awarded Plaintiff Patricia Hammons \$12.5 million following a trial against defendant-manufacturer Ethicon. The verdict consisted of \$5.5 million in compensatory damages and \$7 million in punitive damages. Ms. Hammons was implanted with Ethicon's Prolift mesh product in 2009 to treat pelvic organ prolapse. Despite undergoing multiple corrective surgeries due to complications caused by the products, Ms. Hammons, a Walmart stocker from Indiana, continues to suffer problems. During the trial, a product Engineer for Ethicon said the company had never given any thought to how the mesh would be removed if it failed. In earlier testimony, a Plaintiff's expert described such procedures as exceedingly difficult and tantamount to a surgical “train wreck.”

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

Sources: PR Newswire, Pretrial Order #192 (Docket Control Order—Wave 1 Cases), *In re: Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig.*, MDL No. 2327 (S.D.W.Va. August 19, 2015). Pretrial Order #206 (Docket Control Order—Wave 2 Cases), *In re: Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig.*, MDL No. 2327 (S.D.W.Va. November 20, 2015). Pretrial Order #210 (Docket Control Order—Wave 3 Cases), *In re: Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig.*, MDL No. 2327 (S.D.W.Va. December 18, 2015). and philly.com

\$13.5 MILLION VERDICT RETURNED IN CASE AGAINST JOHNSON & JOHNSON'S ETHICON UNIT IN TRANSVAGINAL MESH CASE

A verdict of \$13.5 million was returned against Johnson & Johnson's Ethicon Inc. last month in Philadelphia. The company's transvaginal mesh implant was defective and left a woman in so much pain and discomfort that she can no longer have sexual intercourse. The jury awarded Sharon Carlino \$3.5 million in compensatory damages and \$10 million in punitive damages. Also, \$250,000 was awarded to Carlino's husband for loss of consortium.

Mrs. Carlino was implanted with Ethicon's TVT transvaginal mesh device in 2005 to treat stress urinary incontinence. Two years later, she returned to her doctor complaining of sharp pains in her vagina. It was discovered that the mesh had become exposed and the doctor ordered surgical removal of a portion of the implant. Three years later, another portion of her mesh had to be surgically removed due to continued discomfort. Despite repeated surgeries to remove the device, Mrs. Carlino says the pain and discomfort remain.

It was proved at trial that Ethicon's TVT mesh had key flaws that left Mrs. Carlino in constant pain. First, the pores in the mesh were too small and prevented tissue from properly growing through the mesh. The mesh also created a build-up of scar tissue, which caused the vagina to contract and the mesh also changed shape after implantation and eroded, frayed or curled. Because the mesh is cut by a machine rather than a laser, pieces fall off the edges and become embedded in the vaginal tissue. Finally, over time, the mesh can degrade inside the body. All of these issues prevent doctors from removing all

the mesh, and leads to chronic pain and disability.

This is the second damage award Ethicon has been hit with from a consolidated group of nearly 180 lawsuits in a mass tort program in Philadelphia County Court of Common Pleas. The first trial, which involved the company's Prolift transvaginal mesh, resulted in a \$12.5 million verdict last December. A third trial was scheduled to begin on Feb. 22, but the case was settled.

Source: Law360.com

JURY AWARDS \$4.4 MILLION IN JOHNSON & JOHNSON UNIT TRANSVAGINAL MESH CASE

A jury returned another verdict against a Johnson & Johnson subsidiary, Mentor Worldwide LLC, in a Georgia federal court last month. That case involved a pelvic mesh implant called an ObTape sling. The jury determined the medical device was defectively designed, and said Mentor failed to warn a woman injured by the device, or her doctor, about the possibility of injury. The jury awarded \$4.4 million in damages. The verdict included \$400,000 in compensatory damages and \$4 million in punitive damages.

The U.S. Food and Drug Administration (FDA) says reported complications from transvaginal placement of surgical mesh for treatment of conditions including stress urinary incontinence and pelvic organ prolapse include erosion of the mesh into vaginal tissue, organ perforation, pain, infection, painful intercourse, and urinary and fecal incontinence. Often women require surgery to remove the mesh. In some cases, this can require multiple procedures without successfully removing all the mesh.

Plaintiff Tessa Taylor was implanted with the ObTape, a type of "bladder sling," to treat her incontinence in 2004. She says for the next seven years she experienced bladder pain, back pain and bladder discomfort, and had trouble urinating. In 2011, after a variety of diagnoses that didn't help her, like bladder inflammation and vaginitis, Taylor was diagnosed with stress urinary incontinence, and her doctor recommended they remove the ObTape and replace it with another type of bladder sling.

Ms. Taylor filed suit against Mentor in 2014, joining hundreds of other lawsuits against the company that were consolidated in multidistrict litigation (MDL). Mentor has settled more than 100 of the claims related to its ObTape prior to the consolidation, agreeing to establish a trust fund to compensate victims. The company also has settled two scheduled bellwether cases prior to their going to trial. The case

is in the U.S. District Court for the Middle District of Georgia. The MDL is in the same venue.

Source: Law360.com

LIPITOR LITIGATION UPDATE

As we reported a few months ago, Federal Judge Richard Gergel of Charleston, S.C., held two full days of hearings in Lipitor litigation on the admissibility of the expert testimony offered by the parties in late September with additional hearings on Oct. 22. The trial that was set for January 2016 was canceled, and Judge Gergel excluded most of the Plaintiff experts' opinions and testimony on both liability and causation—two key elements to proving pharmaceutical cases.

We respectfully disagree with Judge Gergel's rulings and believe there is a strong association between Lipitor and Type 2 diabetes in women who were prescribed the drug for the primary prevention of cardiovascular events. We also believe this is supported by evidence that Judge Gergel should have allowed a jury to hear and decide. As a result of his rulings, however, the MDL is now effectively on hold. The Plaintiffs' Steering Committee is weighing its options to appeal to the Fourth Circuit Court of Appeals. This process could take a year or more.

AN UPDATE ON THE ZOFRAN MDL LITIGATION

Zofran was approved by the Food and Drug Administration in 1991 to treat those patients suffering from nausea as a result of chemotherapy or radiation treatment and following surgery. Between 2002 and 2004, GlaxoSmithKline (GSK) promoted Zofran for nausea and vomiting during pregnancy (commonly known as morning sickness), despite the fact that no clinical trials have ever proven Zofran to be safe and effective for that purpose. Relying on GSK's promotions and trusting that Zofran was safe for the treatment of morning sickness in pregnant women, doctors began to prescribe Zofran off-label. GSK made more than \$1 billion in Zofran sales in 2002 alone.

While doctors have discretion to prescribe medications to treat conditions for which they are not approved, FDA regulations forbid pharmaceutical companies from promoting their medications for off-label uses. GSK's promotion practices eventually led to a federal governmental investigation. In July 2012, GSK agreed to plead guilty and pay \$3 billion to resolve criminal and civil liabilities stemming

from its illegal promotion of Zofran and other drugs.

Now available as an inexpensive generic, Zofran continues to be prescribed routinely for pregnant women suffering from morning sickness. Recent epidemiological studies investigating the association between *in utero* exposure to Zofran and the risk of birth defects have raised concerns about this practice. Two studies have shown a doubling of the risk of certain congenital heart defects in babies whose mothers took Zofran early in pregnancy. A third study showed a doubling of the risk of cleft palate for babies whose mothers took Zofran.

To date, more than 200 lawsuits have been filed against GSK, alleging that *in utero* exposure to its anti-nausea drug Zofran caused children to be born with birth defects. In October 2015, the Judicial Panel on Multidistrict Litigation decided to consolidate in one court all of the Zofran cases filed in federal courts across the country and assigned the consolidated litigation to U.S. District Judge F. Dennis Saylor, IV, in the District of Massachusetts.

If you would like more information about this litigation, or if you or someone you know has suffered from a congenital heart defect or cleft palate as a result of prenatal Zofran exposure, contact Liz Eiland or Roger Smith, lawyers in our firm's Mass Torts Section, at 800-898-2034 or by email at Liz.Eiland@beasleyallen.com or Roger.Smith@beasleyallen.com.

Sources: www.qsk.com and www.justice.gov

FRESENIUS AGREES TO \$250 MILLION SETTLEMENT IN THE GRANUFLO AND NATURALYTE LITIGATION

Fresenius Medical Care has agreed to pay \$250 million to settle multidistrict litigation (MDL) alleging its dialysis concentrates GranuFlo and NaturaLyte caused patients' hearts to stop beating. The settlement was reached a day after a bellwether trial was scheduled to begin in Massachusetts federal court. The \$250 million settlement will get approved if at least 97 percent of Plaintiffs agree to the terms by July 2016. Payments would be dispersed the following month. Fresenius, the world's largest provider of dialysis products and services, expects to generate about \$16.7 billion in revenues for 2016.

GranuFlo and NaturaLyte are used during dialysis treatment to help balance chemicals in the blood. The products are used in both Fresenius-owned and non-Fresenius owned dialysis centers across the country. Lawsuits in the multidistrict litigation alleged that the products can cause too much bicarbonate to build up in

the blood, resulting in heart risks including sudden cardiac arrest. Fresenius has been slapped with hundreds of wrongful death and personal injury lawsuits alleging the company concealed these risks from doctors and patients.

Fresenius claims that it issued warnings in 2011 and 2012, but the warnings were not based on studies the company conducted but on information compiled by the Food and Drug Administration (FDA) and outside researchers. As expected, the company says it questions the validity of that research.

Source: Law360.com

XIII. BUSINESS LITIGATION

NEWS CORP. SETTLES ANTITRUST CLAIMS

Dial and Heinz told Manhattan U.S. District Judge William H. Pauley, III last month that consumer product makers had reached a settlement with News Corp. The announcement came just moments before the start of a class action trial over allegations the media giant monopolized the U.S. market for third-party in-store promotions and overcharged them by \$674.6 million. A federal jury had been selected to hear the high-dollar civil case, but Judge Pauley wasn't too happy with the timing of the announcement. He ordered the parties to proceed with opening statements. Judge Pauley told the Plaintiffs' lawyers that "The jury is ready to go."

Judge Pauley refused to halt the openings, saying the parties would have to bring the settlement to his attention later in the day. At press time, details of the settlement were not clear. News Corp. has maintained an illegal monopoly over the market for third-party in-store promotion services since about 2004 by striking long-term, exclusive contracts, Plaintiffs including Heinz and Dial contend. They say it's using its market dominance to charge unfairly high prices. In June, Judge Pauley certified a class of consumer goods companies in the U.S. that directly bought in-store promotions from News Corp. beginning in April 2008. General Mills and a unit of Johnson & Johnson had already settled and were out of the case.

The suit is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

XIV. INSURANCE AND FINANCE UPDATE

JPMORGAN TO PAY \$1.42 BILLION CASH TO SETTLE MOST LEHMAN CLAIMS

JPMorgan Chase & Co (JPM.N) will pay \$1.42 billion in cash to resolve most of a lawsuit accusing it of draining Lehman Brothers Holdings Inc. of critical liquidity in the final days before that investment bank's September 2008 collapse. The settlement was made public last month, and requires approval by U.S. Bankruptcy Judge Shelley Chapman in Manhattan. It resolves the bulk of an \$8.6 billion lawsuit accusing JPMorgan of exploiting its leverage as Lehman's main "clearing" bank to siphon billions of dollars of collateral just before Lehman went bankrupt on Sept. 15, 2008, triggering a global financial crisis. Lehman's creditors charged that JPMorgan did not need the collateral and extracted a windfall at their expense.

The settlement also resolves Lehman's challenges to JPMorgan's decision to close out thousands of derivatives trades following the bankruptcy. The accord would permit a further \$1.496 billion to be distributed to the creditors, including a separate \$76 million deposit. More than \$105 billion has already been paid to Lehman's unsecured creditors, Lehman has said.

Both sides settled nearly four months after U.S. District Judge Richard Sullivan ruled for JPMorgan, saying the largest U.S. bank had no obligation to keep Lehman alive and did not defraud it into providing collateral. Once Wall Street's fourth-largest bank, Lehman reported \$639 billion of assets when it filed for Chapter 11 protection, making its bankruptcy by far the largest in U.S. history. Lehman emerged from bankruptcy in March 2012, and has since been winding down.

Source: Reuters

WELLS FARGO AGREES TO \$1.2 BILLION SETTLEMENT IN MORTGAGE LITIGATION

Wells Fargo, the nation's largest mortgage lender, has agreed to pay \$1.2 billion to put to rest claims that it engaged in reckless lending from 2001 through 2010 under a Federal Housing Administration (FHA) program that left a government insurance fund to clean up the mess.

The bank has been in talks with the government since 2012 over accusations that it knowingly and improperly classified some FHA loans as qualifying for federal insurance when they did not, and failed to

inform housing regulators about the deficiencies before filing insurance claims. Regulators have contended that the bank should not have received the insurance proceeds after some of the loans soured. Wells Fargo said the agreement also includes other potential civil claims relating to FHA lending for other periods. If this sounds familiar, it should. Several other large banks settled similar claims recently, including Citigroup, Bank of America and JPMorgan Chase.

Wells Fargo said in a recent securities filing that it had reached an agreement in principle with the Department of Justice and the United States attorney's offices for the Southern District of New York and the Northern District of California, as well as the Department of Housing and Urban Development.

When he filed the lawsuit in 2012, Preet Bharara, the United States Attorney for the Southern District of New York, said that Wells Fargo had engaged in a "reckless trifecta" of "deficient training, deficient underwriting, and deficient disclosure, all while relying on the convenient backstop of government insurance." It was one of several lawsuits brought after the financial crisis that accused banks of shoddy lending practices. FHA-backed loans are typically made to first-time home buyers and those with lower incomes.

In fact, in 2012, five major banks, including Wells Fargo, agreed to settle with Department of Justice on charges related to misconduct in mortgage lending. The FHA expanded its investigation to include the alleged role of four of the banks in a related housing crisis. This time, Wells Fargo denied the charges and decided to pursue a lawsuit, and settlement talks broke down. In the recent filing, Wells Fargo said that although both sides reached the agreement, "there can be no assurance that the company and the federal government will agree on the final documentation of the settlement."

Sources: *New York Times* and www.foxbusiness.com

MORGAN STANLEY TO PAY \$2.6 BILLION TO SETTLE MORTGAGE CASES

Morgan Stanley has agreed to pay \$2.6 billion to settle U.S. claims arising from the sale of mortgage bonds. This is the largest payout by the Wall Street firm from the financial crisis. The settlement ends a U.S. Justice Department investigation into claims that Morgan Stanley deceived investors by misrepresenting the quality of the home loans the firm packaged into bonds. It follows multibillion-dollar settlements the government reached with other big banks.

The agreement also resolves one of the last, and biggest, “legacy” issues that have weighed on the firm, its chief executive, James Gorman, and shareholders since the 2008 crisis. For Morgan Stanley, the price to move on is steep—wiping out a chunk of earnings—though it will be paid retroactively. In a regulatory filing that disclosed the deal, Morgan Stanley said it increased its legal reserves by about \$2.8 billion, accounting for the costs in its 2014 results. The higher reserves will cut its income from continuing operations by \$2.7 billion, or \$1.35 a share, more than a third of its 2014 net income.

Last month, Morgan Stanley said it earned \$6.2 billion, or \$2.96 a share, from continuing operations in 2014. Large U.S. banks have now paid about \$130 billion in settlements, fines and other costs related to the worst economic downturn in decades. On a January conference call with analysts, Mr. Gorman said his management team had worked hard during the past five years to “put the trouble from the financial crisis clearly in the rearview mirror.” The deal with the Justice Department won’t end once and for all of Morgan Stanley’s legal headaches.

The New York firm would still have to negotiate with the agency about other settlement terms, including what is included in a statement of facts that it must have to sign off on. The accord doesn’t cover other related probes by state litigators, helping to explain why the Wall Street firm had reserved \$200 million above what it agreed to pay federal officials, said a person familiar with the matter. While Morgan Stanley was expected to settle the government probe, the large size of the penalty was still surprising. The company reached its agreement in principle with the Justice Department and U.S. Attorney’s Office for the Northern District of California.

The \$2.6 billion settlement comes in the form of a cash penalty. Unlike some of the other bank settlements, Morgan Stanley’s deal with the government doesn’t include an agreement to provide aid to struggling homeowners.

The Morgan Stanley agreement was a fraction of the amount paid by other banks in mortgage-related settlements with the Justice Department: Bank of America Corp. paid \$16.65 billion, J.P. Morgan Chase & Co. \$13 billion and Citigroup Inc. \$7 billion. The Morgan Stanley number was smaller in part because it wasn’t a major mortgage lender during the housing boom. Morgan Stanley’s archrival, Goldman Sachs Group Inc., is believed to be next in line with the government to potentially hammer out an agreement. Goldman has disclosed in a filing of its own that the U.S. Attorney’s Office for the

Eastern District of California wrote to the company in December that the government had “preliminarily concluded” that it had violated federal law in connection the sale of mortgage bonds. The Morgan Stanley settlement comes as the Justice Department prepares for the departure of Attorney General Eric Holder. He will be replaced by Brooklyn U.S. Attorney Loretta Lynch once the Senate confirms her nomination.

Source: *Wall Street Journal*

UBS AND OTHERS AGREE TO \$100 MILLION SETTLEMENT IN MUNICIPAL DERIVATIVES CASE

In a recent filing in *In re Municipal Derivatives Antitrust Litigation* seeking preliminary approval of a settlement, six investment banks, including UBS AG, Societe Generale SA and Natixis Funding Corp., agreed to pay more than \$100 million to settle private class action claims they fixed prices and rigged bids for municipal derivatives, signaling a potential end to multidistrict litigation in the area. The settlement would end nearly eight years of litigation that have resulted in more than \$226 million in payouts from 11 Defendants, including Morgan Stanley and JPMorgan Chase.

The litigation dates back to March 2008, when municipalities and public entities, including the City of Baltimore and the Central Bucks School District in Pennsylvania, filed suit against 37 financial institutions, alleging that they stifled competition or gave a false appearance of competition within the municipal derivatives market as far back as 1992. Municipal derivatives are used to help public entities invest and manage the proceeds of municipal bond sales, which are earmarked for specific and often multiyear projects, such as building or maintaining roads or mass transportation systems. They are also used to contain the risks of interest rate swings.

Municipalities that sell bonds hire banks and brokers to seek out competitive bids and typically invest proceeds elsewhere that they do not need to spend immediately. Specifically, the Defendants were accused of abusing the process by getting advance peeks at their rivals’ bids, or purposely submitting non-winning bids. As a result of the alleged collusion, municipal issuers paid more than they should have or were deprived of proceeds they would have otherwise gotten from their investments, according to the suits.

The first settlement out of the multidistrict litigation was announced in August 2010, when Morgan Stanley agreed to pay \$6.5 million to escape claims against it. Wells Fargo Bank NA followed suit in October 2011, agreeing to pay \$37 million

on behalf of Wachovia Bank NA, which it acquired during the financial crisis. A third settlement was hatched April 2012, when J.P. Morgan Securities LLC agreed to pay nearly \$44.6 million to settle claims against it.

Further settlements with GE Funding Capital Market Services Inc., for \$18.25 million, and Bank of America NA, for \$20 million, were announced in 2013. Under the current proposed settlement, UBS will pay the largest portion, at \$32 million, followed by Natixis, which has agreed to shell out more than \$28.4 million. Societe Generale will pay \$25.4 million. Other settling firms include Piper Jaffray & Co., National Westminster Bank PLC and George K. Baum & Co., which agreed to pay amounts ranging from \$1.4 million to \$9.75 million.

In addition to the class action settlement, Natixis and Societe Generale have agreed to pay \$1.5 million and more than \$1.3 million, respectively, to settle claims brought by Attorneys General from New York, Connecticut and other states. The larger class action settlements were coordinated with the Attorneys General litigation brought on behalf of the states.

Sources: Law360.com and Reuters

DOW AGREES TO PAY \$835-MILLION TO SETTLE PRICE FIXING LITIGATION

Blaming “uncertainties” on the U.S. Supreme Court, alluding to the death of Justice Antonin Scalia, Dow Chemical has agreed to a class settlement instead of pursuing its appeal. Dow faced a \$1 billion judgment for price-fixing urethanes. The settlement agreement will total \$835 million. Dow Chemical had asked the Tenth Circuit for a full-panel rehearing of the court’s decision to affirm a \$1.06 billion jury verdict in a customer class action that accused the company of fixing prices on its polyurethanes. The appeals court declined that request for rehearing in November 2014, prompting the company to appeal the Supreme Court. In a statement provided to Law360, Dow said:

Growing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits have changed Dow’s risk assessment of the situation. Dow believes this settlement is the right decision for the company and our shareholders.

The litigation, which was consolidated in 2008, accused chemical companies Dow, Bayer AG, BASF SE, Huntsman International LLC and Lyondell Chemical Co. of

orchestrating a scheme to fix prices of polyether polyol products that are used to manufacture urethane foam.

Dow had argued the Plaintiffs didn't pass the test for class certification because they couldn't prove both a conspiracy and injury to the class members through common evidence. Relying on the Supreme Court case *Dukes v. Walmart*, Dow said the realities of the urethane foam components market mean that prices are based on multiple factors, including supply and demand, bargaining power and available substitutes, which vary for each buyer, and thus liability can't be established on a classwide basis.

Source: Law360.com

TOYS R US AND COLONY NATIONAL INSURANCE AGREE TO SETTLE IN CASE INVOLVING WRONGFUL DEATH COMPENSATION

Toys 'R' Us recently agreed to settle its breach-of-contract lawsuit against insurance provider Colony National Insurance after alleging the company failed to provide assistance, both financially and legally, following the retailer's loss of a \$25 million wrongful death suit in 2013. U.S. District Judge Madeline C. Aelee filed a one-page order in New Jersey federal court stating that the two companies have 60 days each to reopen the matter if the settlement is not agreed upon. The settlement itself was not open to the public and both sides have refused to comment.

Toys 'R' Us was found guilty of negligence in a case involving a 28-year-old woman who died after using an allegedly defective Benzai Falls In-Ground Pool Slide sold at one of the retailer's locations. Upon appealing the case in September 2013, the Massachusetts Supreme Judicial Court found the retailer demonstrated a "substantial degree of reprehensibility" when it sold the unsafe pool slides that did not meet federal consumer safety laws.

When Toys 'R' Us turned to Colony to cover them, the provider said the contract had only agreed to cover the slide manufacturer's, Manley Toys Ltd., U.S. subsidiary, but the retailer itself did not qualify as an insured party. The Toys 'R' Us complaint stated:

In breach of its duty to exercise good faith in attempting to settle the [wrongful death suit] on behalf of TRU ... Colony never offered or made available its policy limit.

The complaint does recognize Colony paid out \$800,000 from Manley's \$4 million policy, which allowed them to settle out of the case. Toys 'R' Us, operating under the belief it was a "certificate

holder" to Colony's general liability policy, believed it been under an additional umbrella policy with Colony. The retailer accused Colony of lying when it agreed to indemnify Toys 'R' Us and defend it from all liability, but instead waited three years before claiming the retailer was not covered under an umbrella policy.

Source: Law360.com

XV. EMPLOYMENT AND FLSA LITIGATION

GM ACCUSED OF FLSA COMPENSATION VIOLATIONS

Violating the Fair Labor Standards Act (FLSA) is a serious offense—no matter how large or small the perpetrating company. General Motors (GM) has been in hot water with consumers for some time, but now a group of customer service representatives have come forward in Michigan federal court to accuse the automaker of demanding the employees work up to 30 minutes of compensable time per shift off the clock.

Plaintiffs and customer service representatives Jovena Hudson and Jawanda Hill claim that GM requires the employees to load and log in to several computer programs and applications prior to clocking in for their shifts. The same issue presents itself as the workers clock in and out for their lunch break and to leave for the day. Considering that the process may take five to 15 minutes per day, or longer if a technical error occurs, the unpaid compensation adds up quickly.

The complaint alleges that failure to compensate employees for pre- and post-shift activities, such as starting up computers and programs, is specifically condemned by the U.S. Department of Labor considering how it is often out of the employee's control how long the process can take.

The Plaintiffs claim the following in their complaint against GM:

Defendants knew or could have easily determined how long it took for the [customer service representatives] working at the General Motors Technical Center to complete the pre-shift start-up/log-in process, the post-shift computer log-out process, and the lunch break work duties, and defendants could have properly compensated plaintiffs and the class for the work that they performed, but did not.

In order to resolve the representatives' claim, the suit asks that the court declare the Defendant's actions to be unlawful and enter judgement requiring they pay the Plaintiffs damages and liquidated damages.

Source: Law360.com

LYFT AGREES TO SETTLEMENT IN FLSA DISPUTE WITH CALIFORNIA DRIVERS

Lyft, the popular ride-hailing service and major competitor of Uber, will be giving its drivers extra workplace protections following a class action settlement in California. While the workers will not be classified as employees under the Fair Labor Standards Act (FLSA), they will still be entitled to certain benefits without endangering Lyft's current business model.

According to the terms of the settlement, Lyft agrees to pay class action claimants a total of \$12.25 million and also give its drivers warning before they are deactivated from the company's platform and no longer eligible for benefits. The agreement also adds that the company cannot deactivate drivers for certain reasons, such as low passenger ratings, without the driver having the opportunity to discuss those issues beforehand. Lastly, Lyft has agreed to pay the arbitration expenses for any of their drivers who want to challenge their prior deactivation or wage dispute.

Both Lyft and Uber drivers have been fighting in separate lawsuits to claim they should be treated as full-fledged employees rather than as contractors, and, thus, entitled to benefits such as reimbursement for gas and vehicle expenses. Lyft drivers are still required to handle those expenses themselves.

Despite not getting everything the Plaintiff's side asked for, Shannon Liss-Riordan, one of the lawyers for the Lyft drivers, says she believes the settlement is still significantly positive and may lead to more changes down the line. Liss-Riordan also adds that she has noticed an influx of Uber drivers coming forward about similar issues related to being deactivated from the company's platform as well as wage disputes. She said:

We have not been bearing so many concerns from Lyft drivers, which leads us to believe that Lyft is treating its drivers with more respect than Uber is treating its drivers.

U.S. District Judge Vince Chhabria must approve the settlement before it is final. A hearing on its preliminary approval was

scheduled for mid-February in San Francisco.

Source: *Claims Journal*

PARAMOUNT PICTURES FACES ALLEGATIONS OF FLSA VIOLATIONS FROM EMPLOYEES

Breaking the Fair Labor Standards Act (FLSA)'s minimum wage and overtime provisions is hardly uncommon in the construction and restaurant industries, but would you say the same about a major Hollywood production studio? Paramount Pictures, along with several other production companies, is now facing a FLSA lawsuit filed by four assistants alleging that the companies refused to pay the employees minimum wage or overtime pay despite their working "around the clock."

Filed in U.S. District Court in Manhattan, N.Y., last month, the assistants' lawsuit claims they were regularly denied such basic benefits as mealtime and restroom breaks, leaving some assistants forced to use their own vehicles as bathrooms. The FLSA lawsuit alleges:

Due to limitations on their ability to leave their assigned locations, many of the Plaintiffs are forced to urinate and defecate into bottles and buckets in their vehicles.

The FLSA suit went on to describe how the Plaintiffs were needed to work as parking production assistants, leaving them the responsibility of ensuring filming sites were clear of pedestrians and cars. Parking production assistants are also required to protect production vehicles and equipment on set. Some of the big-budget films listed on the complaint by the assistants, who live in New York, include movies like "The Wolf of Wall Street" and "Noah."

Despite working between 60 and 100 hours a week, the complaint alleges the four assistants were only paid \$140 to \$160 by Paramount and the other Defendants for each 12-hour shift. The payments did not cover any overtime compensation or regard for minimum wage laws, the lawsuit claims. The assistants' suit is seeking unspecified damages, ranging from unpaid wages and penalties to attorneys' fees. Plaintiffs also seek to receive class-action status for the lawsuit.

Source: *LA Times*

XVI. PREMISES LIABILITY UPDATE

MANHATTAN CRANE COLLAPSE KILLS ONE PERSON AND INJURES 3 OTHERS

A huge construction crane being lowered to safety in a snow squall fell into a Lower Manhattan street last month, killing a person in a parked car and leaving three people injured by debris that scattered as the rig's lengthy boom fell. The boom landed across an intersection, smashed several car roofs and stretched much of a block after the accident, which happened around 8:25 a.m. at a historic building about 10 blocks north of the World Trade Center.

The accident happened as workers were trying to secure the mobile crane against winds around 20 mph by lowering the boom, which had been extended to as long as 565 feet the day before. Because the crane was being lowered, workers were directing pedestrians away from it on a street that otherwise would have had lots of people in the danger zone.

Capable of lifting 330 tons, officials said the rig had been working for about a week to replace air conditioning equipment and generators on the roof of a 425-foot-tall skyscraper. The building takes up an entire block. Galasso Trucking Inc. was the crane operator.

All 376 mobile cranes registered with the city, as well as all 43 of the larger tower cranes, were ordered put in secure positions. Crane safety came under scrutiny in the city in 2008, when two tower cranes collapsed in Manhattan within two months of each other, killing a total of nine people. A crane rigger and crane owner were tried and acquitted on manslaughter charges; a mechanic pleaded guilty to criminally negligent homicide. The accidents spurred the resignation of the city buildings commissioner and fueled new safety measures, including hiring more inspectors and expanding training requirements and inspection checklists.

But another crane fell and killed a worker in April 2012 at a subway construction site that was exempt from most city building safety rules. In January 2013, a crane collapsed at a Queens construction site and injured seven workers. In April, a construction worker died when the hydraulics malfunctioned on the boom truck he was inspecting in midtown Manhattan, causing the boom to collapse and fall on him, pinning him against the flatbed.

Last May, a mobile crane with a 168-foot boom dropped a 13-ton air conditioner being placed atop a midtown Manhattan building, injuring 10 people. In other incidents, cranes have dropped loads or come close to falling apart, including a dramatic episode in which a crane's boom nearly snapped off during Superstorm Sandy and dangled precariously over a midtown block near Carnegie Hall.

Source: Associated Press

XVII. WORKPLACE HAZARDS

AUTO PARTS SUPPLIER DAEIL CITED BY OSHA FOR REPEATEDLY VIOLATING WORKER SAFETY RULES

Daeil USA Corp., a parts supplier for automakers like Hyundai Motor and Kia Motor, has been fined more than \$170,000 by the U.S. Occupational Safety and Health Administration (OSHA). An inspection of Daeil's Valley, Alabama, facilities uncovered various safety issues, including 10 serious violations, five repeat offenses exposed in prior investigations, and one other-than-serious safety violation.

According to OSHA's press release on the examination, the plant has repeatedly failed to provide locks to secure robots from accidental activation, create protective guards for workers during welding projects, and ensure that the conveyor line's stop buttons were properly colored red. OSHA believes these fixes were not corrected in the past due to Daeil attempting to save costs.

Some of the most serious violations OSHA cited include exposing employees to both amputation and fall hazard and failure to develop a noise monitoring program or eye-washing facility for those working with dangerous chemicals. Daeil also failed to provide OSHA with proper workplace injury logs within the mandatory time limit.

Joseph Roesler, OSHA's area director in Mobile, Ala., expressed concern in the OSHA press release, stating:

Management at this facility has adopted a productivity-over-safety mentality and repeatedly claims that it is 'too expensive' to address the safety hazards found in this workplace. The safety culture of this company must change immediately; protecting workers must always come before profit margins. OSHA offers free consultative services to

assist companies on how to operate safely.

Daeil had 15 business days to respond to the citations. It can either comply with OSHA's findings, request a conference with Mr. Roesler, or contest the findings altogether before the independent Occupational Safety and Health Review Commission. But it's very clear that some safety changes at the company are badly needed.

Source: OSHA

XVIII. TRANSPORTATION

THE DANGER OF PARKING ON HIGHWAY SHOULDERS FOR TRACTOR TRAILERS

Parking on highway shoulders and similar areas is one of the most dangerous places to be for a tractor trailer truck. It is for this reason that most states and local jurisdictions prohibit parking in these areas in non-emergency situations. Many commercial drivers assume that a highway shoulder is a safe place to park and that it is unlikely they will be struck by another vehicle. Experience proves, however, that parking on highway shoulders and similar areas greatly contribute to accidents resulting in injuries and death, and often those accidents are preventable. According to the National Highway Traffic Safety Administration (NHTSA), studies indicate that commercial vehicles were involved in the majority of crashes involving vehicles parked on shoulders and that they occurred primarily between midnight and 6 a.m.

The Federal Motor Carrier Safety Regulations (FMCSR) prohibit non-emergency stops due to the severe hazard they present to commercial motor vehicle drivers and other motorists. Simply parking on the side of a roadway due to a driver needing rest, or because a driver is lost, is not considered an emergency situation. In these instances, there are alternatives to stopping on the shoulder. It is recognized that sometimes this practice is unavoidable, such as when having a mechanical breakdown. In those unavoidable instances, it is imperative to follow certain safety precautions such as using hazard and warning flashers; and/or the placement of warning devices. There are specific guidelines on the placement of warning devices for commercial motor vehicles, and different guidelines may apply based on the landscape, road or time of day.

Oftentimes, the hazards associated with parking on the roadside, highway or shoulder is addressed in commercial motor vehicle carrier safety manuals. Many companies prohibit their drivers from parking or stopping on the shoulder or emergency lane of any roadway, due to the fact that this creates a deadly hazard to other motorists. Companies realize the serious risk associated with this practice, and it can even lead to driver termination depending on company policy.

There is increasing awareness of the dangers associated with parking on highway shoulders. More information on this issue is available at the National Highway Traffic Safety Administration and in the Federal Motor Carrier Safety Regulations. If you need more information, contact Chris Glover, a lawyer in our firm's Personal Injury/Products Liability Section, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com.

PUBLIC SAFETY INFORMATION GETS "THE AX" BY CONGRESS

In December 2010, the Federal Motor Carrier Safety Administration (FMCSA) launched a new trucking safety program called Compliance, Safety, and Accountability (CSA) Program. At the heart of this program was the Safety Measurement System (SMS) designed to analyze violations from inspections and crash data. The idea was to be able to identify carriers with a pattern of unsafe practices in order to intervene to correct safety violations before they resulted in catastrophic injuries or death.

The SMS assessment included seven safety improvement categories called behavior analysis and safety improvement categories (BASIC) and they cover the following:

- Unsafe driving—dangerous or careless operation of vehicle includes unsafe driving practices like speeding, improper lane changes and/or failure to wear seat belt.
- Crash indicators—history of crash involvement based on state reported crashes (not publicly available).
- Hours of Service compliance—incidents of vehicle operation by drivers who are ill, fatigued, or in non-compliance with hours of service regulations including driver log violations.
- Vehicle maintenance—mechanical defects and failure to make required repairs as well as improper load securing.

- Controlled substance/alcohol—impaired driving through the use of alcohol, illegal drugs and misuse of over the counter and prescriptive drugs.
- Hazardous material compliance—unsafe or incorrect handling of hazardous materials including leaking containers, improper placarding, and missing shipping papers (not publicly available).
- Driver fitness—vehicles operated by drivers who are unfit due to lack of training, experience, or medical conditions.

A key element of the program was that companies exhibiting high risk behavior would be notified and given an opportunity to correct safety violations before they caused tragedies on the road. The FMCSA and state law enforcement were able to utilize a variety of tools including warning letters, roadside inspections, and compliance reviews.

The benefit of public disclosures of the SMS/CSA was raising the awareness of trucking safety, causing motor carriers to devote more attention and resources to safety initiatives due to accountability that comes with having the carrier data publicly displayed.

About 70 million users logged onto the Safersys website each year, creating transparency that encouraged commercial motor vehicle safety, created incentives for motor carriers to improve their safety performance and allowed other companies and members of the public to make informed decisions based on all the available data.

Ever since the FMCSA has instituted this program, the trucking industry has been complaining about the system. More articulate criticisms of the SMS and CSA has raised questions about the accuracy of the data and scoring algorithms in the FMCSA's methodology. The groups that were critical of the system focused on arguments against the CSA methodology. FMCSA compared the crash rates of carriers with sufficient and insufficient data in the system to produce a score. When carriers did not keep the scores above the threshold levels, the FMCSA would intervene in one or more methods. Since introducing the use of the system, the violations rates have dropped by 14 percent.

In August of 2015, 10 trade associations representing companies that owned or operated commercial trucks and busses jointly asked the U.S. Department of Transportation (DOT) to remove the SMS data from public view, citing reports highly critical of the SMS methodology in identifying high-risk carriers. The trucking industry pulled out all the stops in lobby-

ing key members of Congress to insert language in a highway funding bill that was passed in December of 2015.

As of Dec. 4, 2015, the FMCSA removed from public view all carrier percentiles and ranking in the seven SMS BASIC categories. It required the FMCSA and the Government Accountability Office to identify the program's faults and develop a plan to fix them and to implement those fixes before the system can go live again.

Congress has directed FMCSA to study the issues like carrier crash risks and the correlation of the CSA scores, CSA ranking and methodology, and accuracy of the CSA data. The bill requires the report to be produced within 18 months. Until FMCSA can implement a so-called "corrective action plan" the CSA program will not be public. It's incumbent upon the task force studying this issue to get to work soon so that the "corrective action plan" can be issued based upon good and valid data and hopefully the program will be reinstated by 2018.

Sources: FMCSA website; Big Road blog and Ken Shigley blog

DISTRACTED DRIVING AND BIG RIGS ON OUR NATION'S HIGHWAYS

According to government researchers, as many as 660,000 people are driving distracted at any given moment as a result of using their cell phones or other electronic devices. In 2013, figures revealed that 3,154 people were killed as result of distracted driving, and another 424,000 were injured in motor vehicle collisions. Some researchers have suggested that as many as 18 percent of all traffic accidents are the result of distracted driving.

While these factors are disconcerting enough, when one considers the implications of distracted driving caused by electronic devices among operators of tractor-trailers, the concerns become even more alarming. The Federal Motor Carrier Safety Administration (FMCSA), which regulates many aspects of the trucking industry, released a regulation in 2010 to address some of these concerns.

The FMCSA stated in its Summary of its regulation, now included in 49 CFR Parts 383, 384, 390, 391 and 392): "Recent research commission by FMCSA shows that the odds of being involved in a safety-critical event (e.g., crash, near-crash, unintentional lane deviation) is 23.2 times greater for CMV drivers who engage in texting while driving than for those who do not." Per the FMCSA regulation, texting while operating a tractor-trailer can result in significant fines and loss of CMV driving privileges. The company can also be fined under appropriate circumstances.

Unfortunately, this regulation does not go far enough. Nancy Grugle, Ph.D., a forensic human factors expert, describes "distracted driving" thusly: "In general, distracted driving is any activity that diverts attention away from activities critical for safe driving. Driving distractions can be categorized into three main areas: visual manual, and cognitive. Visual distractions are objects that take the driver's visual attention away from the road and driving environment. Manual distractions are objects that take a driver's hands off the wheel. Cognitive distraction involves a driver using their brain to process information not related to the driving task. Many distractions require visual, manual, and cognitive resources all at the same time, which is the riskiest type of distraction." Dr. Grugle notes that "[c]ognitive distraction can last up to 27 seconds after using voice-activated technology."

In other words, while texting seems to be the most hazardous of these activities, voice-activated technology (such as speaking a text message) is also dangerous. Talking on cell phones has also been shown to increase the risks of an accident as well. Many trucking companies have policies precluding the use of cell phones while driving tractor-trailers. Providing detailed regulations about when use of cell phones and other electronic devices may be appropriate and safe would assist in stopping these hazardous practices in big rigs. If you need more information on anything mentioned above, contact Mike Crow, Julie Beasley or Chris Glover, lawyers in our Personal Injury/Product Liability Section, at 800-898-2034 or by email at Mike.Crow@beasleyallen.com, Julie.Beasley@beasleyallen.com or Chris.Glover@beasleyallen.com.

Sources: Nancy Grugle, Ph.D., The Epidemic of Distracted Driving—Expert Presentation, Robson Forensic (Nov. 16, 2015) and Vol. 75 Federal Register, No. 186 at p. 59118 (Sept. 27, 2010).

FEDERAL TRANSIT AUTHORITY PROPOSES RULE REQUIRING COMPREHENSIVE SAFETY PLANS

The Federal Transit Authority (FTA) has proposed a rule that would require all state and local transit agencies in the country that receive federal funding to have a comprehensive safety plan in place. The plan, which the FTA says is authorized under the 2012 Moving Ahead for Progress in the 21st Century Act, would apply to bus and rail transportation agencies and is estimated to cost \$100 million to implement.

The rule would not apply to agencies operating passenger ferries, which are regulated by the U.S. Coast Guard, or to commuter rail agencies, which operate

under the direction of the Federal Railroad Administration. All other agencies would be required to comply within one year of a final rule.

According to an FTA release, the rule would provide a "framework" for FTA to monitor, oversee and enforce safety in the public transit industry. Agencies would be required to prepare and implement a public transportation agency safety plan, which would need to be verified each year. The plan would be required to identify safety risks, provide strategies to minimize public exposure to hazards and unsafe conditions, establish performance goals, provide for annual reviews and designate a safety officer for the agency. Each plan would have to be approved by a board of directors. In a statement, FTA Acting Administrator Therese Mc Millan, said:

With transit ridership at its highest levels in generations, and our nation's transit agencies facing increased pressure to meet the demand for service, we must continue to ensure that safety remains the top priority.

The FTA estimates the plan would cost agencies approximately \$86 million to create and implement, and \$70 million annually to maintain compliance. The FTA is a unit of the U.S. Department of Transportation. "Every day, millions of Americans take public transportation to get to work, school, medical appointments, and other important destinations," said U.S. Transportation Secretary Anthony Foxx. "This new program will help us ensure that transit continues to be a safe way to get around, and a safe place to work."

Sources: Law360.com, U.S. Department of Transportation

PANEL RECOMMENDS BANNING LITHIUM BATTERIES FROM PASSENGER AIRLINES FOLLOWING HOVERBOARD FIRES

The International Civilian Aviation Organization (ICAO), through its air navigation commission, is reviewing a recommendation from a U.N. panel to ban the cargo shipment of rechargeable lithium batteries from passenger airliners. The recommendation comes in the wake of a number of fires and explosions related to a popular recreational item, the hoverboard.

Aviation officials worry the batteries can pose a significant fire risk to airplanes, and even a danger that these fires could be severe enough to cause a crash. The ban would affect cargo shipments of the lithium-ion batteries, which may

include tens of thousands of batteries in a single container.

Although hoverboards have pushed the potential risk of lithium-ion batteries into the international spotlight, they are used to power a number of devices, including cell phones, laptop computers and even electric cars. Federal Aviation Administration (FAA) tests on the batteries have revealed that damaged or defective batteries may overheat and cause a chain reaction of heat throughout an entire shipment. The batteries also have been shown to release explosive gasses. In FAA tests, these explosive batteries have blown the doors off cargo containers and set off massive fires.

The ban could possibly be avoided or lifted if new packaging is developed that could be proven to provide additional safety. About 20 airlines that fly internationally already have begun to voluntarily refuse shipments of lithium-ion batteries. The ICAO air navigation commission, which is made up of 36 members, will vote on whether or not to enact a ban. The commission was scheduled to meet in late February, after press time for this issue of the Report. We will try to provide an update in the next issue and keep you informed about progress on this issue.

Source: ABC News

GREYHOUND PASSENGER AWARDED \$27 MILLION FOR CRASH INJURIES

An Ohio jury awarded a man who was seriously injured in a 2013 Greyhound bus crash in Pennsylvania more than \$27 million in compensatory and punitive damages last month. The jurors found that the bus company and its driver were negligent in the operation of the vehicle. Mark Soberay, 45, had been sleeping in the front passenger seat when the Greyhound bus crashed in the early morning hours of Oct. 9, 2013, on I-80 in White Deer Township, Penn.

The driver, Sabrina Anderson, allegedly fell asleep at the wheel and collided with the back of a tractor trailer that was also traveling in the westbound lane. The impact killed one passenger, a 37-year-old tourist from Vietnam. The front of the bus crumpled in on Mr. Soberay and it took rescuers three hours to free him from the wreckage. Mr. Soberay remained conscious the entire time despite his injuries, which included a severed urethra; a crushed leg that had to be surgically amputated; torn shoulder muscles; crushed arm, foot, and pelvis bones; and a hole in his heart. Mr. Soberay's extensive crash injuries have required him to undergo more than 30 surgeries in the months since the crash.

Greyhound's lawyers argued that Ms. Anderson did not fall asleep, but instead suffered a mini stroke that caused her to lose consciousness. Mr. Soberay's lawyers successfully argued that the driver had likely fallen asleep because she had driven more than 150 miles in the early morning hours without a break. That was contrary to a Greyhound anti-fatigue rule that requires its drivers to stop and rest every 150 miles. The only scheduled stop on the New York City to Cleveland route was more than 200 miles from the bus's departure point.

Mr. Soberay's lawyers also demonstrated to the jury how Greyhound has historically claimed its drivers suffered medical emergencies in crashes even when investigators found they had fallen asleep. The Cuyahoga County jury awarded Mr. Soberay more than \$23 million in compensatory damages. The jurors also awarded him an additional \$4,000,150 in punitive damages. The extra \$150 was intended as a reminder to Greyhound to uphold the 150-mile rule. That was an interesting twist to say the least. It made a point and hopefully, Greyhound got the message.

Sources: Cleveland.com and Law360.com

VICTIM IN DISTRACTED DRIVING ACCIDENT AWARDED \$1.3 MILLION

A jury in Montgomery County, Alabama, returned a \$1.3 million verdict last month in a case involving a school bus crash. The victim, Michael Duey, says that he hopes his ordeal leaves an impact on other drivers as he continues a lengthy recovery from his injuries. He added that his life changed in a split second on Jan. 16, 2013, when he collided with a school bus. The crash was caused by the driver of another vehicle.

Duey sued the "distracted driver" and his employer. On the day of the accident, Duey was driving on Highway 231 in Montgomery County, hauling building materials to Illinois for work. The other driver, Gregory Moore, was driving a rented box truck ahead of him and was making calls for work and failed to stop for a bus that was unloading children with its lights flashing.

Onboard bus video showed the accident sequence. Moore swerved at the last second in an effort to avoid a collision but clipped the rear of the bus. Duey was behind Moore and unaware that there was a school bus stopped up ahead since he couldn't see around the truck. With nowhere to go and no time to react when Moore suddenly swerved, Duey hit the back of the stopped school bus.

Cell phone records show that Moore, who was working for McKelvey Mechanical, an HVAC company in Tuscaloosa, was making calls to subcontractors for a government bid at Fort Rucker. Moore's own expert testified that he had nine seconds and almost 1,000 feet of stopping distance. Moore contended that the calls from his phone were inadvertent "butt dials."

Duey broke both of his knees in the crash, as well as his hip and his left arm in several places. He suffered permanent nerve damage in both legs. He spent 31 days in a coma, 47 in the hospital and is still having troubles. Duey, who is from Eufaula, was represented by Myron Penn and Shane Seaborn of Penn & Seaborn, LLC and Mark Andrews a Dothan lawyer with Morris Cary Andrews Talmadge and Driggers, LLC. These lawyers did an outstanding job for their client.

JURY AWARDS FORMER TRAIN CONDUCTOR \$10.6 MILLION IN ADA VIOLATION LAWSUIT

A federal jury found Norfolk Southern Railway, one of the nation's largest transportation companies, guilty of violating the Americans with Disabilities Act (ADA) and ordered the company to pay a verdict of approximately \$10.6 million to a former conductor. However, the Court vacated the jury's award shortly after due to statutory caps placed on ADA in 1991 that limit damage amounts.

The verdict came in response to a suit filed by the former conductor in 2013 when he was barred from returning to work for nearly three years after sustaining an off-the-job injury. Warren Whitted worked for Norfolk for almost a year when he suffered his significant, yet temporary, injuries that put him out of work for a short period of time. However, when he was medically cleared without restriction by several doctors, Norfolk's Medical Director refused to allow him his job back, stating she believed Whitted suffered from "cognitive impairments that were not readily fixable through training."

During the trial, prosecutors pointed out that the Medical Director had never examined or spoken to Whitted regarding his disqualification, but still sent him an unsigned form letter telling him he could not return to his position following his incident. The letter also did not highlight what Whitted could do to regain access to his position, despite his having wanted to be a conductor his entire life.

The jury determined Norfolk Southern's actions were reckless, willful and violated the ADA. The jury awarded Whitted \$8 million in punitive damages, \$2.5 million

for mental anguish, and \$96,521 in lost wages and benefits.

The ADA law states the amount of compensatory damages and the amount of punitive damages awarded under this section can't be more than \$300,000 for each Plaintiff against a company that has more than 500 employees, so the pain and anguish and punitive awards will likely be reduced to \$300,000. However, the railway company may still be held liable for the full amount of lost wages and benefits, as well as Witted's attorney fees and court costs.

Heather Leonard, one of the lawyers working for Whitted on the case, sent a statement to AL.com regarding the outcome. She had this to say:

We are obviously disappointed by the reduction of the award, although we are bound to abide by it based on the current status of the law. I think the jury's verdict shows, however, that the current caps in place for cases such as this are outdated. The applicable caps were adopted in 1991 and have not been amended or modified since. It is unfortunate that an employer with 30,000 employees who willfully violates federal law can avoid a jury's judgement based on damages caps put in place 25 years ago.

This was a very good result in the case. The lawyers did good work.

Source: AL.com

MADD REPORTS IN-CAR BREATHALYZER LOCK HAS STOPPED NEARLY 2 MILLION DRUNK DRIVERS

Mothers Against Drunk Driving (MADD) reports technology that stops someone who fails a breathalyzer test from driving has prevented nearly 2 million people from driving drunk. The technology requires the driver to blow into a small device wired into the car. If the person's blood alcohol content (BAC) exceeds legal limits, the car will not start.

Since 1999, 25 states have passed laws requiring people with drunk-driving offenses to install the device, known as an ignition interlock system. Currently, the criteria for who is required to have an ignition interlock device, and at what blood alcohol level they will be prohibited from driving, varies from state to state.

The data in the MADD report was supplied by the 11 major manufacturers of ignition interlock systems. When the driver blows into the device, it sends a signal with the BAC information back to the device manufacturer. Data indicates

more than 1.77 million people who had a BAC of 0.08 were stopped from driving by the devices, and more than 12.72 million who had a BAC of at least 0.025 were stopped. The systems automatically stop drivers with a BAC of .025 or higher.

Lobbyists for the alcohol industry argue placing tougher limits on the devices will put an unreasonable burden on state parole and monitoring budgets. They recommend the device only be used for the "most dangerous" drunk drivers. However, the National Highway Traffic Safety Board (NTSB) recommends that states require mandatory ignition interlock devices for first-time offenders, noting that this will allow a person to still drive to get to his or her job or to complete other necessary tasks, while preventing him from committing another drunk-driving offense. This will save time, money and lives down the road.

Source: Associated Press

XIX. ENVIRONMENTAL CONCERNS

REPORT ENVIRONMENTAL LAW VIOLATIONS TO PROTECT OUR ENVIRONMENT

Federal and state environmental laws protect us and our environment from harmful pollution. Many employers intentionally do not comply with these laws but fraudulently represent to federal, state and local governments that they do. Many state and federal environmental laws have provisions that encourage citizens and employees to report environmental law violations by employers and others. All of us, as responsible citizens and employees, should report the improper, unsafe, or potentially illegal practices of employers, contractors or others that harm human health and the environment. These laws also protect employees from employer retaliation when an employee reports employer violations.

Liability can arise when a business: falsely certifies compliance with required environmental laws and regulations related to work activities; deliberately overcharges the government for hazardous waste clean up; gets paid for work that the contractor did not perform; falsifies records of pollutant releases; or provides services that do not meet government specifications. Many other forms of fraudulent or unlawful actions related to environmental compliance requirements may also support liability.

In addition to doing the right thing by reporting environmental law violations, individuals may be eligible to receive a substantial monetary award for coming forward. If you are aware of any business conduct that could be unlawful under environmental laws or if you have, or think you have, witnessed a fraud with regard to a business' compliance with environmental regulations or a government contract, contact a lawyer in our firm's Toxic Torts Section for a free and confidential evaluation of your claim. You can contact one of the lawyers in our environmental law litigation team. Rhon Jones, Parker Miller, or Rick Stratton will be glad to talk with you. Contact them at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Parker.Miller@beasleyallen.com, or Rick.Stratton@beasleyallen.com.

CUSTOMERS MAY SHOULDER UTILITY'S COST TO CLEAN UP AFTER MASSIVE COAL ASH SPILL

Efforts to clean Duke Energy Corp. coal ash pits at the site along the Virginia-North Carolina border where one of the worst spills of the toxic waste occurred two years ago will cost the company as much as \$10 billion. It's a burden the energy company hopes to gain back by increasing customers' power bills in both North and South Carolina. That's certainly not good news.

The utility had set aside about \$3.5 billion for cleanup costs in both states, but the Environmental Protection Agency (EPA) added an additional \$448 million in liabilities. If that \$4 billion is allowed to be shouldered by Duke Energy customers, the average North Carolina household could see an average increase of about \$18 a year for electricity costs over the next 25 years.

The company said the cleanup could cost as much as \$10 billion before it is all said and done. Currently, coal ash and dirt are being dumped into dozens of railroad cars along the Virginia-North Carolina border with plans to ship more than 1.5 million tons of the toxic sludge—a byproduct of coal burned to produce electricity—to a landfill about 130 miles away in central Virginia. Duke Energy built two miles of railroad track to connecting lines to access the excavation site.

Once the coal ash pit is emptied, it will be lined with waterproof material to prevent heavy metals from the coal ash from seeping into underground water supplies. The pit will be refilled with coal ash removed from similar pits closer to the Dan River.

Two years ago, a pipe at one of the coal ash ponds burst, triggering a massive coal

ash spill, contaminating local water supplies. Last year, Duke Energy agreed to pay \$7 million to settle claims of groundwater pollution as a result of the coal ash spill. The utility also agreed to plead guilty to criminal violations of federal water pollution laws and agreed to shell out \$102 million in fines and remediation.

Coal ash ponds have come under stricter guidance after the 2008 spill at a Tennessee Valley Authority (TVA) fossil fuel plant in a small community in east Tennessee destroyed more than 40 homes and contaminated nearby waterways. That clean-up effort cost \$1.1 billion and took six years to complete. Rhon Jones and David Byrne from our firm were involved in that litigation.

Source: *Claims Journal*

KOCH INDUSTRIES AGREES TO SETTLEMENT WITH CHICAGO RESIDENTS OVER DUST CLAIMS

Koch Industries has agreed to a tentative settlement in a class action litigation brought by residents of Chicago's South Side over claims that the industrial company and a fuel company spewed petroleum coke dust into residential homes. The companies are accused of storing the oil refinery byproduct near neighborhoods without proper covering, allowing the dust to blow into homes and coat property.

The Plaintiffs have tentatively agreed to settle with KCBX Terminals Company and Koch Carbon, LLC, and separately with DTE Chicago Fuels Terminal, LLC. The settlement is pending approval in Illinois federal court. The lawsuit, filed by South Side residents in 2013, alleged that the refinery waste called petcoke and its dust covered their homes and property in a fine black film that caused them to incur expenses for cleaning and replacing damaged property.

This is not the first complaint against KCBX for environmental damages. The company already paid a \$35,000 civil penalty as part of a settlement with the State of Illinois in September 2015 after the state alleged petcoke stored on its site was leaking into the river as a result of a poorly maintained barrier. In 2014, the U.S. Environmental Protection Agency (EPA) sent the company a notice of violation after dust samples from nearby homes indicated the levels were in violation of the Clean Air Act.

KCBX said it will no longer store petcoke at the facility in question, but will instead convert it to a transfer facility. The company says plans are underway to remove all petcoke piles from the site by

June. The suit is in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

FBI INVESTIGATING FLINT WATER CRISIS

The FBI has joined the ranks of government agencies investigating the man-made tap water disaster in Flint, Mich. Children and other residents of the city have been affected with lead poisoning. The FBI's involvement signals that there may be a criminal dimension to the catastrophe. There are also a number of civil lawsuits that are pending.

An FBI spokeswoman told the media last month that the FBI had joined a broad, multi-agency investigation comprised of the Environmental Protection Agency's (EPA) criminal division, the EPA's Office of Inspector General (OIG), the U.S. Postal Inspection Service, and the U.S. Justice Department. The announcement confirms earlier reports indicating the FBI had become involved in the investigation.

The U.S. House Oversight Committee has also begun its first hearings on the Flint water crisis, which captured national headlines after it was revealed that several children in the city had extremely high, toxic levels of lead in their system from drinking tap water. Exposure to lead is particularly damaging to young children whose brains and other organs are still developing. Lead toxicity can damage organs, restrict brain development, lead to difficulty learning; promote emotional and behavioral problems, and more.

The problem started when state and city officials started drawing Flint's water from the highly polluted Flint River instead of drawing from Detroit's water system—a misguided money-saving effort. Those in charge of the switch neglected to run chemicals through the water system that would have protected them from the corrosive toxins in Flint River water. Instead, the corrosive water leached lead from the water pipes in Flint's aging infrastructure and delivered it to thousands of Flint homes.

In addition to lead, Flint's water was also contaminated with toxic levels of E. coli bacteria, trihalomethanes (a chemical byproduct of water disinfectants), and Legionella, which can cause a potentially deadly form of pneumonia called Legionnaires' Disease if it is inhaled as a mist or steam.

On the state level, Flint's water crisis is being investigated by the Michigan Attorney General's office, the Michigan Civil Rights Commission, and the office of Gov.

Rick Snyder, who has been under pressure to step down for his part in the disaster.

Sources: *Detroit Free Press*; Associated Press; and RightingInjustice.com

LAWSUIT SEEKS OVERHAUL OF DAMAGED PIPES IN FLINT

The situation in Flint has turned out to be worse than originally thought. The conduct by a number of governmental officials was deplorable. There can be no excuse for the neglect and indifference by these officials who failed to deal with the impending disaster. Flint and state officials have been hit with another lawsuit stemming from the disastrous, cost-cutting measure that switched Flint's water supply from Lake Huron to the highly contaminated Flint River—a move that corroded water pipes and exposed thousands of residents to lead poisoning.

The last lawsuit was filed in a Michigan federal court on behalf of Flint residents by the Natural Resources Defense Council, the American Civil Liberties Union of Michigan, the Concerned Pastors for Social Action, and Flint resident Melissa Mays. The complaint asks the court to order the immediate replacement of all the lead pipes in Flint's water system—a goal that Michigan Governor Rick Snyder has said would be a long-term effort.

The lawsuit accuses state and city officials involved in the Flint water disaster of violating the federal Safe Water Drinking Act when it failed to properly treat the water and supply pipes for corrosion, neglected to test the tap water for lead after it switched sources, avoided notifying residents of results when the problem became apparent, and other reporting errors.

Because of these failures, highly corrosive water from the Flint River flowed through the city's pipes for months, damaging them and allowing dangerous levels of lead to leech into the water supply. It is not yet known how many Flint children will have to live with the permanent and debilitating effects of lead poisoning.

Residents have been complaining of foul-tasting, discolored water for more than a year, but their concerns and those of researchers confirming their concerns were often met with derision and ridicule and then dismissed. Flint has since started drawing water from Detroit's system as a new pipeline from Lake Huron is being installed, but because of the damaged infrastructure, Flint residents still aren't able to drink unfiltered tap water.

Gov. Snyder's administration estimates it will cost about \$55 million to replace about 15,000 damaged lead service lines connecting homes and other buildings to

the water main. The lawsuit asks that the repairs to the infrastructure be made at no cost to customers. Gov. Snyder should accept responsibility for his administration's conduct. In fact, many believe he should resign. His lack of concern when he should have acted is totally unjust.

The lawsuit joins several others filed against state officials since the water crisis became exposed in the fall. Two of the lawsuits seek class-action status and financial compensation for customers harmed by the toxic water. Another lawsuit contends that Flint residents should not have to pay their water bills as long as they are receiving unsafe water.

Sources: *The Globe and Mail*, *CBS News*; and *Roanoke Times*

FREEDOM INDUSTRIES EXECUTIVES SENTENCED FOR ELK RIVER CHEMICAL SPILL

Four of six chemical company officials were sentenced in February for their roles in a chemical spill that contaminated the Elk River in West Virginia in 2014, crippling the water supply of 300,000 residents across a nine-county area. William Tis, a former co-owner and director of Freedom Industries, faced up to one year in prison and fines, but was sentenced Feb. 8 to three years of probation and ordered to pay a \$20,000 fine.

Mr. Tis was the fourth Freedom Industries executive to escape a prison sentence. Robert Reynolds, an environmental consultant with Freedom; Michael Burdette, former plant manager for Freedom Industries' Elk River facility; and Charles Herzig, the company's former owner and vice president, were ordered to pay fines totaling \$52,500 for causing the unlawful discharge of refuse matter, the negligent discharge of a pollutant, and knowingly violating an environmental permit.

The chemical spill was first noticed on the morning of Jan. 9, 2014, when an odor similar to licorice that pervaded the area was traced to Freedom Industries' Elk River plant, where an aging above-ground storage tank was found to be leaking a toxic coal-cleaning chemical 4-methylcyclohexane methanol (MCHM).

The chemical leak also spilled past a secondary containment area that was supposed to prevent such a disaster from occurring and emptied into the Elk River about one mile upstream from West Virginia American Water's intake.

By nightfall, state officials declared a state of emergency, telling residents of Charleston, West Virginia's largest city, and nine counties served by the water company, to stop using the tap water. The advisory lasted 10 days, putting businesses in financial distress while the water sick-

ened many residents. Even after the advisory was lifted, levels of MCHM continued to show up in water samples.

Dennis Farrell, a former Freedom president and owner, pleaded guilty in August to two environmental pollution charges. He was scheduled to be sentenced later in February. Gary Southern, Freedom's president at the time of the spill, pleaded guilty to three environmental pollution charges and faces the harshest penalty of all the convicted men: up to three years in prison and \$300,000 in fines. He was also scheduled to be sentenced in February.

According to the Associated Press, prosecutors have portrayed Mr. Southern as a rich businessman who cared little about the environment or safety. "Southern appeared unsympathetic when he told reporters a day after the spill that he had had a 'long day' and tried to leave a news conference multiple times outside the tank facility," the AP reported, adding that "he also drank a bottle of water in front of TV cameras."

Freedom Industries was sentenced as a corporation Feb. 4 for negligently discharging a pollutant, unlawfully discharging refuse matter, and knowingly violating an environmental permit. Federal Judge Thomas Johnston ordered Freedom to pay penalties of \$900,000, but acknowledged the company would likely never pay because it filed bankruptcy a few days after the spill.

Sources: Associated Press, *The Charleston Gazette-Mail*, WSAZ News Channel 3

PUBLIC NUISANCE CLAIMS CAN BE USED IN ENVIRONMENTAL CASES

California air regulators have filed a public nuisance lawsuit against Southern California Gas (SoCalGas) Co. seeking penalties that could top \$25 million for an out-of-control methane gas leak that has forced evacuations and disrupted lives in much of the San Fernando Valley. The lawsuit, filed by the Southern Coast Air Quality Management District in Los Angeles Superior Court, is one of the latest in a surge of public nuisance complaints filed by Plaintiffs in environmental lawsuits.

Although using the public nuisance tack in environmental suits is nothing new, an increasing number of Plaintiffs have found that it is often the best way to litigate environmental cases, especially when many have successfully argued that federal statutes don't preempt state nuisance laws.

There are currently six environmental cases involving public nuisance claims that lawyers should be aware of. These lawsuits are:

People v. Southern California Gas Co.

This environmental lawsuit was the first public nuisance suit to be filed against SoCalGas Co. concerning the Aliso Canyon methane gas leak near Porter Ranch, Calif. The leak is considered one of the worst environmental disasters to hit the U.S., alongside BP's Deepwater Horizon oil spill in the Gulf. Los Angeles City Attorney Mike Feuer filed the lawsuit in California state court in December on behalf of all the people in the San Fernando Valley sickened, displaced, and otherwise harmed by the methane spill, which has released about 100,000 tons of methane since October, with no end in sight. In January, the Southern Coast Air Quality Management District filed a similar environmental lawsuit in Los Angeles County Superior Court alleging the SoCalGas created a public nuisance with its Aliso Canyon well leak. The complaint also asserts that "as a result of their negligence, people were injured."

Dow v. Cook

Dow Chemical and a unit of Boeing are disputing a Tenth Circuit ruling that a Colorado nuisance claim can support a \$926-million verdict for homeowners who were allegedly injured by the illegal dumping of radioactive waste from a nuclear weapons plant near their Denver community. In June 2015, the Tenth Circuit upheld a federal jury's 2006 verdict finding Colorado's state nuisance claims are not preempted by the federal Price-Anderson Nuclear Industries Indemnity Act. The companies have repeatedly appealed the massive 2006 verdict and have asked the U.S. Supreme Court to reverse it.

Merrick v. Diageo

In December the Sixth Circuit declined to review a panel decision in a proposed class action alleging evaporation from J&B and Johnnie Walker (Diageo Americas Supply Inc.) distilleries caused black fungus to grow on outdoor surfaces in proximate neighborhoods. Allowing the claim to move forward, the court rejected Diageo's argument that state common law nuisance and trespass claims conflict with the federal Clean Air Act's emissions regulations, and that allowing the Plaintiffs' claims to proceed would conflict with the Clean Air Act's objectives.

Monsanto PCB Litigation

San Jose, Berkeley, Oakland and San Diego in California and Spokane and Seattle in Washington State filed a public nuisance complaint against Monsanto for allegedly polluting their waterways with polychlorinated biphenyls (PCBs). The cities have urged the Judicial Panel on Multidistrict Litigation to consolidate the lawsuits against the agricultural giant in U.S. District Court for the Northern District of California.

Freeman v. Grain Processing

In October, an Iowa judge certified a class action accusing Grain Processing Corp. of creating a public nuisance with its releases of smoke from corn milling operations that formed a foul-smelling haze. The judge's decision marked a complete turnaround from a previous ruling that granted Grain Processing Corp's motion for summary judgment on the principle that the Clean Air Act preempted the public nuisance claims covering about 4,000 homeowners. In June 2014, the Iowa Supreme Court ruled that the suit's nuisance claims are not limited to air pollution and allowed the case to move ahead. In December, the U.S. Supreme Court declined to review the case.

Ebert v. General Mills

In disputing a Minnesota federal judge's decision to certify a class of property owners accusing General Mills of releasing carcinogenic vapors into the Minneapolis area, the company pointed to another case involving a pipeline spill, urging the Eighth Circuit Court to decertify the environmental nuisance class action. General Mills argues that another Eighth Circuit panel reversed a federal judge's decision to certify a class action covering property owners who claim that a pipeline owned by Phillips 66 leaked and became a nuisance because it was never properly remediated. General Mills claims the same principles that led the Eighth Circuit to reverse that decision should be used to decertify the nuisance claims filed against it.

Source: Law 360.com

XX. AN UPDATE ON CLASS ACTION LITIGATION

NHL FIGHTS TO DISMISS RETIRED PLAYERS' CONCUSSION LAWSUITS

The National Hockey League (NHL) wants the Minnesota federal court overseeing the multidistrict litigation (MDL) over claims that the league did not protect its players from concussions to step up and make a ruling on its year-old motion to dismiss claims from a group of retired players. The NHL is arguing the retired players' claims should follow in step with a similar case that was recently dismissed.

The NHL argued that the retired players were trying to stall the court's decision, and that the court should reject the players' argument just as an Illinois federal court did in the case of deceased NHL player Derek Boogaard. His family had filed a wrongful death lawsuit against the NHL claiming his 2011 death from a drug overdose was the result of an opioid addiction he developed to quell the pain from injuries he sustained while playing, as well as from a chronic degenerative brain disease, called chronic traumatic encephalopathy (CTE), linked to repeated head blows.

In that case, the NHL successfully argued that the claims were preempted by the federal Labor Management Relations Act, and that in order to determine if the NHL owed anything to Boogaard, the court would have to first interpret a 2005 collective bargaining agreement (CBA) between the NHL and its players.

The Plaintiffs in the multidistrict litigation argued that Boogaard's case was not similar to their claims since Boogaard was bound by the CBA since he had been an active player at the time of his death. Retired players, the Plaintiffs argued, are not governed by that CBA.

Source: Law360.com

XXI. THE CONSUMER CORNER

CPSC DECLARES THERE ARE NO SAFE HOVERBOARDS

The U.S. Consumer Product Safety Commission (CPSC) has declared all hover-

boards currently in the U.S. to be unsafe. That's because none of them meet U.S. safety standards for electrical systems and lithium ion batteries. As a result, the CPSC says the hoverboard pose an unreasonable risk of consumer injury due to fires and burns. Additionally, the CPSC is investigating serious injuries associated with falls from hoverboards to determine if there may be a design defect inherent in the product.

In a letter to the manufacturers dated Feb. 8, CPSC Acting Director Office of Compliance and Field Operations Robert J. Howell said all self-balancing scooters imported, manufactured, distributed or sold in the U.S. must comply with currently applicable voluntary UL and UN/ DOT safety standards. The letter read in part:

Self-balancing scooters that do not meet these voluntary safety standards pose an unreasonable risk of fire to consumers. Consumers risk serious injury or death if their self-balancing scooters ignite and burn. ...We believe that many of the reported incidents, and the related unreasonable risk of injuries and deaths associated with fires in these products, would be prevented if all such products were manufactured in compliance with the referenced voluntary safety standards.

From Dec. 1, 2015, through Feb. 17, 2016, the CPSC received reports from consumers in 24 states of 52 hoverboard fires resulting in more than \$2 million in property damage, including the complete destruction of two homes and one automobile.

All of the hoverboards currently sold in the U.S. are made in China. CPSC Chairman Elliott Kaye said that the CPSC isn't aware of a safe hoverboard brand or model in the U.S. today. He said:

That's why we want everybody to stop sale, test their units, see if they do or not, and if they do continue selling it, if they don't, don't sell them anymore and recall any of them that are on the market.

Noncompliant hoverboards face recall or seizure at ports. Additionally, manufacturers and distributors could be subject to civil and criminal penalties if they fail to notify regulators of product defects. In addition to fires, the CPSC has been tracking numerous reports of emergency room visits to treat serious injuries sustained in a hoverboard fall. These include broken bones and traumatic head injuries.

Chairman Kaye said that while most people chalk up these types of falls to

inexperienced users, the CPSC would like to make sure there are not any defects that may make falls more likely. For example, he said, manufacturers may not have taken into account the different weights and heights of users, making the experience widely different for different people.

Sources: CPSC; Cnet and *Claims Journal*

FEDERAL APPEALS COURT UPHOLDS TARGET DATA BREACH SETTLEMENT AGREEMENT

An appeal of the Target data breach settlement was rejected by the Eighth Circuit Court of Appeals. A three-judge panel has ruled in favor of the \$10 million settlement and dismissed the appeal. The Eighth Circuit cited that the appeal lacked jurisdiction, which was due to the objector's failure to indicate why he was appealing. Florida resident Sam Miorelli filed his appeal on Dec. 18. However, shortly after his filing, the Target class asked the Eighth Circuit to require all objectors to post a bond of about \$50,000 in order to cover the costs of the appeals. The Target class also told the panel Miorelli was unaffected by the settlement and was not a member of the class. The Target class told the Eighth Circuit:

As a non-class member, objector Miorelli cannot satisfy standing requirements, including the injury component, because he has no interest in the settlement and cannot be harmed by its terms. A non-member of a class lacks standing to object to a class action settlement.

Another appeal was taken by California resident John Sciaroni in December. His appeal was rejected for the same reason the Miorelli appeal was dismissed—lack of reasoning. Sciaroni originally appealed back in July, claiming that the \$6.75 million in attorneys' fees were unreasonable and did not benefit the class. However, Judge Paul Magnuson ruled that it did benefit the class considering the additional payment did not come out of the \$10 million settlement fund and only constituted 29 percent of the settlement total.

Out of the 61 million people given notice of the Target class action agreement, the settlement only drew 11 total objections. The agreement allows consumers who can properly document their losses to be eligible for as much as \$10,000 of the settlement amount. Consumers that cannot provide documentation for their losses will be entitled to a split of the settlement fund, following service payments

to the lead Plaintiffs and approved documented claims.

Source: Law360.com

CIRCUIT COURT UPHOLDS \$450 MILLION APPLE E-BOOK SETTLEMENT DEAL

A three-judge Second Circuit Court panel has upheld an agreement by Apple to settle with consumers for \$450 million in a price-fixing lawsuit. It was claimed that Apple conspired with publishers to raise e-book prices. The settlement was upheld on appeal. The panel heard a complaint from consumer John Bradley, who objected to the proposed settlement, saying the U.S. District Judge Denise Cote acted too hastily in approving the settlement plan in 2014.

Bradley says the settlement plan as proposed could leave consumers with no recovery at all if Apple escapes liability in the appeals process. However, the Second Circuit ruled the New York District Court thoroughly reviewed the company's role during the bench trial, and that Judge Cote found reasonable evidence to support the claim that Apple played a central role in the e-book pricing scheme.

The U.S. Department of Justice joined 33 states in alleging that Apple forged deals with five publishers—Simon & Schuster Inc., Penguin Group USA, Macmillan Publishers USA, Hachette Book Group Inc. and HarperCollins Publishers LLC—in 2010 to raise the prices of digital books by as much as \$5 per book. The publishers settled, while Apple proceeded to trial.

If Apple's liability stands, the \$450 million settlement will provide \$400 million to compensate consumers, with \$30 million designated for attorneys' fees and \$20 million for the states that brought the claims against the tech giant. Apple has appealed the liability finding to the U.S. Supreme Court, which could vacate the liability finding, in which case consumers would share a \$50 million settlement and the states and class counsel would receive \$10 million each; or it could reverse the decision and dismiss the case, and Apple would pay nothing. The case on appeal is in the U.S. Court of Appeals for the Second Circuit. The district court case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

FLORIDA MAN SUES AFTER E-CIGARETTE EXPLODES IN HIS MOUTH CAUSING INJURIES

A Florida man suffered severe burns on his face, throat and lungs and was placed

into a medically induced coma after his electronic cigarette exploded in his mouth. Evan Spahlinger has filed suit against the manufacturer of his e-cigarette and the company that sold it to him.

The lawsuit, filed in Miami-Dade, alleges that the devices, which deliver vaporized nicotine through a heated liquid solution, claim to be a safer alternative to traditional tobacco cigarettes. However, the lawsuit claims the product caused Spahlinger permanent injuries and "unimaginable mental anguish."

Spahlinger says he purchased the "Rig Mod V.2" e-cigarette from the Vaping Station in Naples, Fla., in July. The e-cigarette was manufactured by San Diego-based VapeAMP. Three months after purchasing the product, the e-cigarette "exploded into flames in his face, causing him to inhale flames, smoke and scorching hot air," causing his esophagus and lungs to swell from internal burns, his lawsuit claims. Spahlinger was placed in a medically induced coma while he recovered.

Not only has the popularity of e-cigarettes increased in recent years, so have concerns over health and fire risks with the devices. The fire issue has prompted the U.S. Department of Transportation to ban e-cigarettes from checked bags on airplanes. There have been a number of incidents in this country where the e-cigarettes exploded.

Source: *Miami Herald*

EVIDENCE OF DRONE DANGER INCREASES AS UK PILOTS EXPERIENCE FOUR NEAR-MISSES

We have written in past issues of the Report about the growing concern surrounding drones. Drones are unmanned aerial vehicles that can be controlled by someone operating it on the ground, or through a software-controlled flight plan that works in conjunction with GPS. Initially associated with military technology used for surveillance, drones have become more available and affordable for the general public. This poses a number of potential threats, from privacy breaches to more dangerous scenarios involving commercial air space.

The Guardian, the British news agency, reports airline pilots are calling for a clampdown on drones after four pilots reported "category A" incidents involving drones that posed a serious risk of collision. All four of the near-miss incidents occurred in a single month, last September. In two cases, the drone passed within 15 feet of the aircraft or closer.

In December, the UK Airprox Board, responsible for tracking incidents and measuring the threat of mid-air collisions,

identified seven dangerous drone incidents, four of which were classified as serious. Reports of drone incidents increased from just six reported in 2014 to 30 in 2015.

The operators of the drones in the four serious near-misses were not identified. Operators are responsible for obeying rules outlined by the UK Civil Aviation Authority, which includes restrictions on operation in controlled airspace, not flying the devices higher than 400 feet, or in the vicinity of airports without notifying air traffic controllers.

In the United States, the Federal Aviation Administration (FAA) began requiring registration for owners of the small unmanned aircraft effective Dec. 21, 2015. Owners must register their aircraft before they can fly them outdoors. Operators who have already been flying drones before the new regulations took effect were required to register no later than Feb. 19, 2016.

Registration is required for drones weighing between 0.55 lbs. and 55 lbs. Online registration is currently available for operators who intend to use the vehicles strictly for recreational or hobby purposes. The FAA intends to expand online registration to commercial operators by March 21. Online registration is available at www.faa.gov/uas/registration.

The FAA announced that nearly 300,000 drones were registered in the first 30 days after the FAA online registration system went live. Drones must be registered every three years and clearly marked with its registration number. The FAA hopes its system will not only help reduce the risk of collisions with other aircraft, but cut down on the number of other incidents that might threaten public safety or privacy by holding drone operators accountable for their actions. In a news release, US transportation secretary Anthony Foxx said: "The National Airspace System is a great resource and all users of it, including [unmanned aerial system] users, are responsible for keeping it safe."

Sources: *The Guardian* and FAA.gov

CPSC MAY LEAD FEDERAL REVIEW OF CRUMB RUBBER TURF TOXICITY

Under increasing pressure from safety advocates and two U.S. Senators, the U.S. Consumer Products Safety Commission (CPSC) said it may take a more active role in studying the potential health risks posed by "crumb rubber turf," a synthetic turf made from recycled tires and commonly used on athletic fields throughout the U.S.

CPSC regulators have so far turned away from the issue, saying the agency lacks the staff and resources needed to conduct a comprehensive review of the product. The Commission has been following on the sidelines an investigation of crumb rubber products being carried out by California state regulators.

Two U.S. Senators, Richard Blumenthal (D-CT) and Bill Nelson (D-FL), have been pushing the CPSC to investigate the crumb rubber turf, voicing concerns that the material could be laden with benthothiazole, butylated hydroxyanisole, phthalates, and other toxic chemicals.

The two Senators warn that children and athletes may become sick from playing on the artificial rubber turf, which simulates real grass and is installed in playgrounds, schools, and sports venues throughout the country. They recently wrote a letter to President Barack Obama, urging him to draw on the resources of the Centers for Disease Control and Prevention (CDC), the Environmental Protection Agency (EPA), and other federal agencies in addition to the CPSC for a "comprehensive study and assessment of the safety" of crumb rubber turf.

Senators Blumenthal and Nelson explained in the letter that there were 153 reported cancer cases involving athletes who spent significant time playing on crumb rubber fields, and that since "millions of children and young athletes play on crumb rubber synthetic surfaces every day, this correlation with cancer cannot be ignored."

The senators commended statements recently made by CPSC Chair Elliot Kaye in a Florida WFTV 9 television report about the crumb rubber turf. In the interview, Mr. Kaye indicated that the Commission would be spearheading a probe of the potential health risks posed by crumb rubber turf.

Sources: Law360.com and Florida WFTV9

THE CDC SAYS CHIPOTLE E.COLI OUTBREAK IS OVER

The E.coli scare linked to Chipotle Mexican Grill restaurants that sickened customers in several states and caused company stock to plummet has been declared over by the Centers for Disease Control and Prevention (CDC). The investigation has come to a close even though it was never determined what food or ingredient caused the outbreak. The CDC said:

When a restaurant serves food with several ingredients that are mixed or cooked together and then used in multiple menu items, it can be more difficult for epidemiologic studies to

identify the specific ingredient that is contaminated.

Company officials released a statement saying "we are pleased that the CDC has concluded its investigation, and we have offered our full cooperation throughout." The announcement by the CDC finally offers some positive news for the burrito chain after months of reports of food-borne illnesses linked to Chipotle restaurants across the country.

The first blow came last summer when a single Chipotle location in California was blamed for infecting nearly 10 customers with norovirus, the so-called "vomiting bug." Then in September, tomatoes at Chipotle restaurants in Minnesota were linked to dozens of cases of diarrhea-causing salmonella infections. Two months later, the company temporarily closed 43 restaurants in Seattle and Portland after more than 20 people fell ill from bloody diarrhea-causing E.coli over a two-week period after dining at the restaurants. In December, more than 120 Boston College Chipotle eaters fell ill with norovirus. Later that month, five new cases of E.coli emerged in North Dakota, Kansas and Oklahoma.

The company said it has conducted a complete comprehensive reassessment of its food safety programs at all its chains in the U.S., which includes "high resolution testing of ingredients, end of shelf-life testing of ingredients, continuous improvement in the supply system based on testing data, and enhanced food safety training for all of our restaurant teams." The company still faces criminal charges related to a norovirus outbreak last August at a Simi Valley, Calif., Chipotle restaurant. Those charges were brought by the U.S. Attorney's office for the Central District of California. There have been a number of civil lawsuits filed around the county, most of them being class actions, and the cases are still pending.

Sources: RightingInjustice.com and *Los Angeles Times*

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 February. If more information is needed on any of the recalls, readers are encouraged to contact Shanna Malone, the Executive Editor of the Report. We would also like to know if we have missed any safety recalls that should have been included in this issue.

GM ANNOUNCES SAAB AND SATURN RECALL RELATED TO FAULTY TAKATA AIRBAGS

Nearly 200,000 Saab and Saturn vehicles are now under recall by General Motors (GM) upon discovering the cars are fitted with potentially defective Takata airbag inflators. The inflators have been blamed for causing airbags to explode, even in minor collisions, thus causing metal shrapnel to fire into the vehicle's driver and passenger compartments. The defective inflators have been linked to at least 10 deaths thus far, and 139 crash injuries.

According to GM, the latest vehicles to be added to the Takata airbag recall list are the Saab 9-3 vehicles from model years 2003 through 2011, the Saab 9-5 from model years 2010 and 2011, and the Saturn Astra from model years 2008 and 2009. While the Saab model was sold in other markets worldwide as a Saab, the recalled Astra was renamed as Opel in European and other markets around the world.

GM has assured consumers that the automaker has not received any reports of the Saab or Astra vehicles' airbags exploding. However, the vehicles' airbags did explode during testing at GM's testing facilities. GM's position is that "you can continue to drive the cars as normal" until the airbag repairs are made.

GM will notify drivers of the recent recall by mail, but warns that the parts needed to complete the repairs have not arrived yet. The automaker will send a second letter to drivers when the parts have arrived and repairs can be scheduled. Approximately 24.4 million vehicles in the U.S. have been impacted by the Takata airbag recall thus far, but NHTSA expects that number to grow as more vehicles are tested for the defective inflators.

TOYOTA RECALLS 2.9 MILLION SUVs OVER SEAT BELTS

Toyota has recalled nearly 2.9 million sports utility vehicles, including more than 1.1 million in the U.S., because of seat belts that might fail in a crash. The recall covers RAV4 SUVs from the 2005 through 2014 model years, the RAV4 electric vehicle from 2012 through 2014, sold in North America, and the Vanguard sold in Japan from 2005-2016, the Japanese automaker said. Toyota says it's possible the belts in both second-row window seats could come in contact with a metal seat cushion frame in a severe frontal crash. If that happens, the belts could be cut and would not restrain passengers. The company says it will add plastic covers to the metal frame at no cost to customers. The recall also affects 625,000

vehicles in Europe, 434,000 vehicles in China and 177,000 in Japan.

ANOTHER 2.3 MILLION CARS RECALLED FOR TAKATA INFLATOR CHECK

The National Highway Traffic Safety Administration (NHTSA) has confirmed details of the latest 1.7-million vehicle recalls by two major German automakers and said a third also plans to recall multiple vehicles from model years dating back more than a decade. All are fitted with driver side airbags with potentially faulty Takata inflators. According to the latest NHTSA information, BMW will recall 840,000 vehicles, Daimler Vans 136,361 and Mercedes-Benz 711,266 for a total of 1,687,627. NHTSA also lists VW models with no information on the number of affected vehicles but this has been reported separately as an additional 630,000. All the NHTSA notifications say much the same thing:

Upon deployment of the driver's frontal air bag, excessive internal pressure may cause the inflator to rupture. In the event of a crash necessitating deployment of the driver's frontal air bag, the inflator could rupture with metal fragments striking the driver or other occupants resulting in serious injury or death.

BMW's latest recall list of about 840,000 vehicles includes 2006-2011 3 series models, 2007-2013 3-series, 2013-2015 X1, X3 and X5, 2009-2013 X5, 2008-2014 X6, 2010-2011 X6, and 2008-2011 M3. Daimler will recall 136 361 vans sold in the US under Dodge, Freightliner and Mercedes-Benz brands. Affected models are 2007-2014 Freightliner and Mercedes Sprinter 2500 and 3500 models made between 1 July 2006 and 31 July 2014. Meanwhile, Daimler's Mercedes-Benz Cars faces a complex recall of 711,266 units comprising a mix of nameplates and specific model variants. Recalled models include 2009-2010 ML320, GL320 and R320, 2011 E350 and E350 convertible, 2009-2011 ML and C63 AMG, and specific 2011-2012 and 2009-2012 GLs. The list also includes 2007-2008 SLK, 2011-2014 SLS, 2012 SLS and 2013-2014 SLS AMG. C-series cars include 2005 C230 and C320, 2006-2007 C series, 2008-2011 C300 and 2010-2012 GLK.

Mercedes has also announced the recall of 2006-2007 Chrysler Crossfire models built using shared Mercedes platforms and components during the DaimlerChrysler era but the repairs will be handled by Fiat Chrysler dealers. Daimler said earlier it

expected this recall round to cost about EUR340m. The 630,000 additional Volkswagen group cars to be recalled in the US include 2005-2013 Audi A3, 2006-2009 A4 cabriolet, 2009-2012 Q5 and 2010-2011 A5 cabriolet as well as 2010-2014 VW Golf and Jetta, 2007-2010 Passat sedan/wagon, 2012-2014 Passat and Eos and 2009-2014 CC. According to US magazine Motor Trend, since Takata first announced the fault in April 2013, about 34 million vehicles in the United States alone have been potentially affected along with another 7 million recalled worldwide.

MAZDA AND MITSUBISHI ADD 2 MILLION VEHICLES TO AIR BAG RECALL

Japanese carmakers Mazda Motor Corp. and Mitsubishi Motors Corp. have added more than 2 million vehicles to their ongoing worldwide recall linked to malfunctioning Takata air bags. Mazda will recall 1.89 million vehicles globally, including its Atenza or Mazda 6 sedan, which is sold in Europe, China, Australia and other Asian countries, a company spokesman told Bloomberg. The company is recalling 200,000 vehicles in Japan, including models of the Bongo van, Titan commercial truck and the Atenza produced between 2006 and 2014. Mitsubishi will reportedly recall 152,678 vehicles in Japan and is still assessing how many of its vehicles sold in overseas markets have to be called back.

With this recall, Mazda and Mitsubishi Motors have now called back more than 5.5 million vehicles combined worldwide since Takata announced the fault in April 2013. The latest announcements are part of the largest recall in the history of auto industry.

The air bags have been linked to 11 deaths and about 100 injuries, with eight deaths in the United States. In November, Takata agreed to pay a \$70 million fine for safety violations. The company could face deferred penalties of up to \$130 million as part of a settlement with U.S. safety regulators. The embattled air bag maker is currently negotiating a deal with car manufacturers to split the costs of the recall, which may reach up to \$5.2 billion, Bloomberg reported citing Valient Market Research. The company's stock has lost more than 80 percent of its value since the beginning of the scandal.

CONTINENTAL RECALLS 5 MILLION VEHICLES FOR POTENTIALLY DEFECTIVE AIR BAGS

Continental Automotive Systems is recalling 5 million Honda, Fiat Chrysler

and other vehicles to replace air bag control units built over a five year period that may be defective. The unit of Germany-based Continental AG CONG.DE told the U.S. National Highway Traffic Safety Administration (NHTSA) that the electronic systems built from 2006 through 2010 and used in 5 million vehicles may fail and air bags may not deploy in the event of a crash. Honda Motor Co said it is recalling 341,000 2008-2010 Accord cars to replace the control units. Fiat Chrysler said it is recalling 112,000 vehicles for the same issue, including the 2009 Dodge Journey, 2008-2009 Dodge Grand Caravan and Chrysler Town and Country and 2009 Volkswagen Routan that it previously assembled for the German automaker.

**CHARGING STATIONS RECALLED BY
LOCKNCHARGE TECHNOLOGIES DUE TO
ELECTRICAL SHOCK HAZARD**

LocknCharge Technologies LLC, of Madison, Wis., has recalled about 550 charging stations. A defective USB charging hub can cause an electrical shock to the consumer when the charging station is connected to the electrical supply. This recall involves LocknCharge iQ10 charging stations that allow users to charge and store multiple tablet computers. The charging stations are metal cubes about 16 inches tall x about 16 inches wide x about 12 ½ inches long and have two doors on the front. The cube has white sides with black doors and either a black or white top cover. The LocknCharge logo is on the sides of the cube. The charging stations came with a blue basket and a green basket with dividers that hold the devices to be charged. The baskets have a white handle with the LocknCharge logo on each side. The charging stations have two USB charging hubs under the top cover. Recalled charging stations have charging hubs with no batch code or that have batch codes that begin with 14L, 15B or 15C. The batch code is on the bottom of the charging hub under a silver data label. LocknCharge has received one report of a woman in Australia receiving an electrical shock from a charging station.

The charging stations were sold by distributors to schools, government agencies and other users from February 2015 to May 2015 for about \$600. Consumers should immediately stop using the recalled charging stations and contact LocknCharge Technologies for a free replacement charging hub and instructions for replacing the charging hub. Contact LocknCharge Technologies toll-free at 888-943-6803 from 8:30 a.m. to 4:30 p.m. CT Monday through Friday, or online at www.lockncharge.com and click

on Recall Information for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Charging-Stations-Recalled-by-LocknCharge-Technologies/>

**PIER 1 IMPORTS RECALLS SWIVEL DINING CHAIRS
DUE TO FALL HAZARD**

Pier 1 Imports U.S. Inc., of Fort Worth, Texas, has recalled about 800 of its Capella Island Swivel Dining Chairs. The chairs can break at the base, posing fall hazard to the user. This recall involves Pier 1 Imports Capella Island Swivel Dining chairs. The plastic wicker chairs have a natural wood color. The chair measures about 26 inches wide by 26 inches deep and 39 inches high. Pier 1 Imports has received three reports of the chairs breaking, including two reports of customers falling. No injuries have been reported.

The chairs were sold exclusively at Pier 1 Imports stores nationwide and online at Pier1.com from January 2015 through October 2015 for between \$240 and \$500. Consumers should immediately stop using the recalled chairs and return them to any Pier 1 Imports store for a full refund or a merchandise credit. Contact Pier 1 Imports at 800-245-4595 from 8 a.m. to 7 p.m. CT Monday through Friday, Saturday 9 a.m. to 5 p.m. CT or Sunday 10 a.m. to 6 p.m. CT or online at www.Pier1.com and click on the "Product Notes & Recalls" at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Pier-One-Imports-Recalls-Swivel-Dining-Chairs/>

**PNY PORTABLE LITHIUM POLYMER BATTERY
PACKS RECALLED**

PNY Technologies, a New Jersey corporation, has recalled about 56,000 lithium polymer battery packs, model number T10400. These batteries were marketed to USB-enabled smartphones, tablets and other similar devices. The batteries are black or gray in color. Reports have been made that the batteries may burst into flames. These batteries are sold at Best Buy, Office Depot, Office Max, among other retail outlets. Individuals who have and use these batteries should cease doing so and contact the company for a free replacement rechargeable battery.

**GE ZONELINE® AIR CONDITIONERS AND HEATING
UNITS RECALLED**

GE has recalled that about 33,500 air conditioner and hearing units. The recall

is because of a fire hazard. The fire hazard is the result of moisture accumulating near the unit's heater and electrical issues. The units with the serial numbers listed below (GE Zoneline Packaged Terminal Air Conditioners (PTAC) and heating units) are the affected units. The company indicates these units are most commonly used in commercial settings, such as apartment complexes and hotels. If an individual or company has one of these units, they need to contact the company to schedule a free repair of the PTAC. Until repairs are made, they encourage users to close the external vent.

**MICROSOFT RECALLS AC POWER CORDS FOR
SURFACE PRO DEVICES DUE TO FIRE AND SHOCK
HAZARDS**

Microsoft Corp., of Redmond, Wash., has recalled about 2.25 million AC Power cords. The power cords can overheat, posing fire or shock hazards. This recall involves AC power cords sold with Microsoft Surface Pro, Surface Pro 2 and Surface Pro 3 computers before March 15, 2015. Surface Pro and Surface Pro 2 devices have a black case with the product name on the back of the device toward the bottom. Surface Pro 3 computers have a silver case with "Windows 8 Pro" on the back of the device under the kickstand. This recall also involves accessory power supply units that include an AC power cord sold separately before March 15, 2015. The recalled power cords do not have a 1/8-inch sleeve on the cord on the end that connects to the power supply. Microsoft has received 56 reports of AC cords overheating and emitting flames and five reports of electrical shock to consumers.

The cords were sold at Microsoft stores, Best Buy, Costco and other stores nationwide, and online at www.microsoft.com, from February 2013 through March 15, 2015 for between \$800 and \$2,000 for the Surface Pro computer and between \$64 and \$80 for the power supply unit sold separately. Consumers should unplug and stop using the recalled power cords and contact Microsoft for a free replacement AC power cord. Contact Microsoft toll-free at 855-327-7780 from 8 a.m. to 5 p.m. PT Monday through Friday or online at www.microsoft.com and click on Support, then Surface Support, then All Surface Support, then see Power Cords for more information.

ROYAL APPLIANCE RECALLS DIRT DEVIL PET VACUUMS DUE TO ELECTRICAL SHOCK HAZARD

Royal Appliance Mfg. Co., of Glenwillow, Ohio, has recalled about 149,000 Dirt Devil® Total Pet Cyclonic Upright Vacuums in the United States. Also included in the recall is an additional 9,700 in Canada. The vacuum's electric cord plug prong can detach and remain in the electrical outlet when the vacuum is unplugged. The detached prong can pose an electrical shock hazard if it remains connected with the electrical outlet. The recall includes three models of the Dirt Devil Total Pet Cyclonic Upright vacuums, model UD70210, UD70210CA and UD70210RM. The model number and manufacture date code are printed on a silver label on the back side of the vacuum. The vacuums are identical with black, gray and clear housing with red and purple trim. "Total Pet" is printed underneath the Dirt Devil logo in the center of the vacuum. Only vacuums with the first three digits of the four digit manufacture date code that begin with B14 through I15 are included in the recall. All recalled vacuums were manufactured between February 2014 and September 2015. The company has received 14 reports of a detached prong that remained in an electrical outlet. No injuries have been reported.

The vacuums were sold at ABC Warehouse, Boardman Furniture, Fred's, Walmart stores nationwide, Dirt Devil via telephone and online at www.dirtdevil.com, www.ebay.com and www.walmart.com from February 2014 through November 2015 for between \$45 and \$70. Consumers should immediately stop using the recalled vacuums and contact Dirt Devil for instructions on receiving a free replacement vacuum. Contact Dirt Devil at 800-373-6290 from 8 a.m. to 6 p.m. ET, Monday through Friday or online at www.dirtdevil.com and click on the "Support" tab at the top of the page for more information.

SCUBAPRO RECALLS DIVE COMPUTERS DUE TO SERIOUS INJURY HAZARD

About 1,500 Galileo Luna and Sol Dive Computers have been recalled by Johnson Outdoors Diving LLC, of El Cajon, Calif. A short circuit allows the dive computer's screen to freeze or display inaccurate information, posing a risk of serious injury to a diver underwater, including decompression sickness. The recall includes the 2015 models of UWATEC Galileo Luna and Sol dive computers. Only dive computers with the following serial numbers are included in the recall. Galileo LUNA dive computers have serial numbers 150422

0058 001 to 150903 0338 005 and Galileo SOL dive computers have serial numbers 150423 0202 001 to 150921 0001 005. The serial number is stamped on the back of the computer and printed on a label on the product packaging. Scubapro has received three reports of the dive computer screens freezing. No injuries have been reported.

They were sold at authorized Scubapro dealers nationwide from May 2015 through January 2016 for between \$700 and \$1,200. Consumers should immediately stop using the recalled dive computers and contact Scubapro to arrange for a free replacement dive computer. Contact Scubapro at 800-790-3757 from 8 a.m. to 5 p.m. PT Monday through Friday or online at www.scubapro.com and click on "Galileo Recall" for more information.

DOLLAR GENERAL RECALLS CONSTRUCTION TRUCK TOY VEHICLES DUE TO FIRE AND BURN HAZARDS

About 27,000 toy trucks have been recalled by Dollar General Corp., of Goodlettsville, Tenn. The toy truck's remote control can short circuit, causing it to overheat and posing fire and burn hazards. This recall involves a toy excavator and a shovel loader. The remote controlled plastic toys are orange with black and orange wheels. Both have tracking code 90RWE15 marked on the back of the battery compartment. UPC number 00430000549030 can be found on the bottom of the packaging. Power, Shovel Loader and Super Power are printed on stickers located on the side of the excavator. UPC 00400001622537 can be found on the bottom of the packaging. 6000Kg Peakload, FL-330 Deluxe Crane, and Crane Super Truck are printed on stickers located on the side of the shovel loader. Dollar General has received five reports of the toy's remote control overheating. No injuries have been reported.

The trucks were sold exclusively at Dollar General stores nationwide and online at www.dollargeneral.com from July 2015 through December 2015 for about \$10. Consumers should immediately take the recalled toy vehicles away from children and contact Dollar General for a full refund. Contact Dollar General at 800-678-9258 from 8 a.m. to 5 p.m. CT Monday through Friday, email at custsv@dollargeneral.com or online at www.dollargeneral.com and click on Product Recalls at the bottom of the page under the Help section for more information.

CRESCENT POINT ENERGY RECALLS TO INSPECT PROPANE GAS DUE TO FIRE AND BURN

Crescent Point Energy Corp., of Canada has recalled its Propane (LP) Gas. The recalled propane does not have sufficient levels of odorant to help alert consumers of a gas leak. Failure to detect leaking gas can present fire, explosion and thermal burn hazards. This recall involves under-odorized propane gas (LP) delivered to consumers for use in storage tanks or sold at retail locations for use in portable refillable tanks (for use in recreational vehicles, barbecues, stoves and other appliances). LP was also sold to businesses for commercial and industrial use.

The gas was distributed in Arizona, Idaho, Kentucky, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Washington, Wisconsin and Utah, delivered by various companies and sold by retailers between April 2009 and October 2015. Consumers should not attempt to test the propane themselves. Instead, they should immediately contact the retailer, supplier or Crescent Point Energy hotline to arrange for an inspection. If inspection confirms that the propane contains insufficient odorant, Crescent Point Energy will either promptly arrange for appropriate odorization or provide a replacement portable tank. Consumers should have carbon monoxide alarms in homes or other buildings that utilize gas. If consumers do smell even a faint odor of gas or a gas leak, they should immediately leave the building and call 911 or their gas supplier from a neighbor's phone. Do not light a match, turn on a light or switch on anything electrical. Contact Crescent Point Energy toll free at 866-421-4266 from 9 a.m. to 5 p.m. MT, email info@youandpropane.com or online at www.youandpropane.com for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Crescent-Point-Energy-Recalls-To-Inspect-Propane-Gas/>

CE NORTH AMERICA RECALLS FAN HEATERS DUE TO FIRE HAZARD

CE North America LLC, of Miami, Fla., has recalled its KUL Fan Heaters. The fan heaters can overheat, posing a fire hazard. This recall involves KUL small, black portable fan heaters. The KUL logo is printed on the front bottom of the heaters next to the power dial. The fan heater measures about 9 inches long by 5 inches wide by 10.5 inches tall. The fans weigh about two pounds. An adhesive label is on the bottom of the heater with model number "KU39229" and "Date: 0515" in the lower right-hand corner. CE North America has received four reports of the fan heaters

overheating and catching on fire. No injuries have been reported.

The heaters were sold exclusively at: Bed, Bath & Beyond stores nationwide and online at www.bedbathandbeyond.com from August 2015 through October 2015 for about \$20. Consumers should immediately stop using the recalled fan heaters and contact CE North America for instructions on returning the recalled heaters with a prepaid shipping label. The firm will issue a refund check upon receipt of the returned fan heaters. Contact CE North America toll-free at 844-645-3208 from 8:30 a.m. to 5:30 p.m. ET Monday through Friday, email at productrecall@cemglobal.com or online at www.cemglobal.com and click on the "Product Recall" link at the bottom of the page for more information.

GOODMAN COMPANY EXPANDS RECALL OF AIR CONDITIONING AND HEATING UNITS

Goodman Company, L.P. of Houston, Texas, has recalled about 5,300 Packaged Terminal Air Conditioner/Heat Pumps (PTAC) and Room Air Conditioners (RAC). The power cords on the air conditioning and heating units can overheat, posing burn and fire hazards. This recall involves Amana, Century, Comfort-Aire, Goodman and York International-branded Packaged Terminal Air Conditioners and Heat Pumps (PTAC), and Amana-branded Room Air Conditioners (RAC). The units are rated 230/208 volt, 3.5 kW and are most often installed through the walls of hotels, motels, apartment buildings and commercial spaces to provide room climate control. The RAC units are installed through the walls or windows of the same types of properties. The recalled units are beige and have serial numbers ranging from 0701009633 through 0804272329. The brand name is located on the unit's front cover. The serial number is located on the label found by lifting the front cover of PTAC units or the grille of RAC units. Additionally, any PTAC and RAC units that have a beige power cord labeled with a four-digit date code in the MMY format and ending in 06 or 07, or ranging from 0108 through 1808 are included in this recall.

Goodman has received approximately 10 reports of PTACs catching on fire, including four involving property damage.

The units were sold at Goodman and heating and cooling equipment dealers nationwide from January 2007 through June 2008 for between \$700 and \$1,000. Consumers should immediately stop using and unplug the air conditioning and heating units and call the number listed for your brand or go to www.amana-ptac.com

to request a free replacement power cord. Non-commercial owners will receive free installation of the power cord and inspection of the PTAC control board for damages. If the control board has been damaged by the recalled power cord, non-commercial owners will also receive a free installation of a replacement control board. Commercial owners are being contacted directly and will install the power cord and inspect the control board. If the control board has been damaged by the recalled power cord, Goodman will provide a new control board for commercial owners to install. Recalled RAC units do not have a control board. For Amana, Goodman and York International-branded units call 800-366-0339 from 8 a.m. to 5 p.m. CT Monday through Friday. For Comfort-Aire and Century-branded units call toll-free at 877-442-4482 from 8 a.m. to 5 p.m. ET Monday through Friday. For all products, go to www.amana-ptac.com and click on Recall Info at the bottom right corner of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Goodman-Company-Expands-Recall-of-Air-Conditioning-and-Heating-Units/>

HEAD USA RECALLS SKI AND SNOWBOARD HELMETS DUE TO HEAD INJURY HAZARD

About 260 Ski and snowboard helmets have been recalled and another 180 from Canada were also recalled by Head USA, of Boulder, Colo. The helmets do not comply with the impact requirements of safety standards for helmets, posing a risk of head injury. This recall involves six models of HEAD ski and snowboard helmets: Agent, Alia, Andor, Arise, Arosa and Avril. They were sold in sizes M/L and XL/XXL in black, blue, green white and yellow, with straps in a variety of colors. HEAD, the model name, size and "Production Code: Dec. 2014" are printed on stickers that can be found by lifting the lining above the right earpiece.

The helmets were sold at specialty ski and snowboard shops and online from January 2015 through December 2015 for between \$80 and \$120. Replacement—Consumers should immediately stop using the recalled helmets and contact Head USA to receive a free replacement helmet at 800-874-3235 from 9 a.m. to 7 p.m. ET Monday through Friday or online at www.head.com, click on Customer Service and then on 2015 Helmet Recall for more information.

KHS AMERICA RECALLS CHILDREN'S MUSICAL INSTRUMENT DUE TO VIOLATION OF LEAD PAINT STANDARD

KHS America of Mt. Juliet, Tenn., has recalled about 150 Monkey Glockenspiels. The pink metal note bar on the glockenspiel may contain excessive levels of lead in the paint, violating the federal lead paint standard. If the paint is scraped off and ingested lead can cause adverse health effects. The Green Tones 8-note Monkey Glockenspiel is a children's musical instrument with eight metal bars in multiple colors mounted on a wooden base shaped like a monkey. The bars are individually attached to the base with one screw at each end. The second bar from the top is pink, 3.5 inches long and has a "B" stamped on it. This is the bar that needs to be replaced. The Green Tones logo is stamped on the back of the glockenspiel and the tracking number HS0178410914 is printed in black at the bottom.

The instruments were sold at Independent toy and music retailers and online at amazon.com and gogreentones.com from January 2015 through September 2015 for about \$40. Consumers should immediately remove the pink bar from the glockenspiel and contact KHS America for information on getting a free replacement pink bar. Contact KHS America Green Tones at 800-283-4676 from 8:30 a.m. to 4:30 p.m. CT Monday through Friday or online at www.gogreentones.com and click on "Contact Us" for more information.

WEDGWOOD DECORATIVE BABY RATTLES RECALLED BY WWRD DUE TO CHOKING HAZARD

Wedgwood Peter Rabbit decorative baby rattles have been recalled by WWRD U.S. LLC, of Wall, N.J. This includes about 670 in the U.S. An additional 24 were sold in Canada. The ball bearings inside each side of the decorative rattle can be released, posing a choking hazard to young children. This recall involves all Wedgwood Peter Rabbit decorative baby rattles. The silver-plated giftware is shaped like a baby rattle, but is intended to be used as decoration only. It measures about 4 ½ inches long and 2 inches wide. A Peter Rabbit figure and "hop hop hop" underneath are embossed on one end cap and "hop little rabbit" over the Peter Rabbit figure is embossed on the other end cap. The firm has received two reports of ball bearings releasing from the decorative giftware baby rattle. No injuries have been reported.

There rattles were sold at Bloomingdales, Macy's, and WWRD Outlets and other department stores nationwide and online at www.amazon.com and www.wedgwood.com

wood.com from April 2015 through December 2015 for between \$75 and \$95.

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

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

SONNY WILLS

Sonny Wills, who has been with the firm for one year, is a lawyer in the firm's Mass Torts Section. Currently, Sonny is heavily involved in the ongoing Xarelto Multi-District Litigation. Xarelto is a member of a new class drugs known as Novel Oral Anticoagulants and it has been linked to severe and often uncontrollable internal bleeding events. Unlike Warfarin (Coumadin), there is no way to reverse Xarelto's anticoagulant effect. Uncontrollable internal bleeding can quickly lead to catastrophic injuries, including death.

Sonny, the Xarelto bridge lawyer, has duties including answering any of our staff and legal assistants' questions and working with them to keep our clients updated. He also answers our clients' questions and helps to evaluate each client's medical records to determine if they have a valid claim.

Sonny also helps in the drafting of the Xarelto-related Complaints and Motions. He participates in document review and answers any questions our referring lawyers might have. Sonny also provides outside lawyers with information concerning the MDL process and procedures. When necessary, he helps to locate lawyers to open estates for our clients. Sonny works directly with Andy Birchfield and David Byrne to effectuate their plans and is currently very involved in the Xarelto Bellwether discovery process.

Sonny is a 2005 graduate of The University of Alabama Culverhouse College of

Commerce with a Major in Management and a minor in Political Science and History. He graduated from Birmingham School of Law in 2010. In 2014, Sonny was selected as a Rising Star by the Super Lawyers Group.

Sonny and his wife Meredith just celebrated their second wedding anniversary. They have a 14 month-old daughter named Townson. They just recently moved to Montgomery, where they both grew up. They first met in middle school and are both graduates of the University of Alabama. Both of their families still reside in the Montgomery area. The Willis family attends First Baptist Church in Montgomery.

Sonny enjoys the outdoors, especially hunting and fishing. Sonny says he and his father have hunted whitetail deer, quail, and dove together since he was a child. According to Sonny, he is most passionate about bass fishing—his largest catch to date reportedly is an 11.5-pound largemouth bass, which I hear is proudly mounted and on display at the Prattville Bass Pro Shop! Sonny says he lives and breathes Crimson Tide football. Family trips to the zoo and his grandparent's farm in Butler County are also a favorite. We are fortunate to have Sonny with us. Incidentally, his great-grandfather was Mr. Sonny Orr, a legend in Barbour County, but so far I haven't heard our Sonny throw his voice.

CLAIRE BURNS

Claire Burns, who came to work at the firm in September of last year, is a Law Clerk in our Consumer Fraud and Commercial Litigation Section. She is primarily responsible for conducting research for the lawyers in the section. Claire has also drafted complaints, motions, memoranda, lone client investigations, and performed document review for different lawyers in the section.

Claire is originally from Biloxi, Miss. When she began her freshman year at Birmingham-Southern College, her parents moved to Prattville, Ala. She is an only child. Her father is the Senior Manager for Public Relations and Team Relations at Hyundai Motor Manufacturing Alabama and her mother holds a BSBA and MBA in Finance. Both of her parents are University of Southern Mississippi graduates. Claire is in her third year as a law student at Thomas Goode Jones School of Law in Montgomery. She graduated *summa cum laude* from Birmingham-Southern College with a degree in English Literature and a minor in French.

Since her first year at Jones, Claire has earned five best paper awards. As a second-year law student, Claire participated on five moot court and trial advocacy competition teams. In fall 2014, her team

won the Mercer University School of Law Legal Ethics and Professionalism Moot Court Competition. She has also served as a junior editor on the Faulkner Law Review while teaching legal research and writing workshops. This year, Claire is serving as Student Works Editor on the Faulkner Law Review Board and as an Academic Success Dean Fellow. During her free time, Claire enjoys travelling, writing short stories, and playing flute and piccolo. We are fortunate to have Claire with us. She is a very good hard worker and I predict she will soon become a lawyer with tremendous potential.

SPEAKING EVENTS

Beasley Allen lawyers are invited to speak at a variety of events locally, statewide and nationally, about important cases or points of law. Following are some of the speaking engagements our lawyers have participated in recently:

- **W. Daniel "Dee" Miles, III, Principal and Fraud Section Head and H. Clay Barnett, Principal** both spoke at the HarrisMartin's MDL Conference in New Orleans on Volkswagen emissions litigation and the environmental and health implications.
- **Navan Ward, Principal** provided an update on preparing experts and treating physicians for trial at the American Association for Justice Weekend of the Stars Seminar in New York.
- **Archie Grubb, Principal** addressed a group at Cumberland School of Law on qui tam (whistleblower) laws. Archie also gave updates at the HarrisMartin's Volkswagen Diesel Emissions Litigation Conference in Miami and the American Association for Justice Trends in Litigation Seminar in New Orleans.
- **Stephanie Monplaisir and Rebecca Gilliland, Associates** participated in a seminar at the Jones School of Law on Writing Skills and Law Clerk etiquette.

XXIV. SPECIAL RECOGNITIONS

RECENT BEASLEY ALLEN PRO BONO CASES

The Montgomery County Bar Association established the Thomas J. Methvin Volunteer Lawyer of the Year Award in 2009. The Award was named in honor of

Beasley Allen Principal & Managing Attorney Tom Methvin for his dedication to providing pro bono legal services to the less fortunate in our community and for his leadership and advocacy in this area. The firm continues its dedication to providing legal services to those who cannot afford it. Principal James Lampkin and Associate Matt Munson recently concluded cases referred by the Montgomery Volunteer Lawyer Program. The following are a brief summary of those cases:

James Lampkin represented an individual in a dispute over repairs to her vehicle against an automobile repair shop located in Montgomery. His client paid for a transmission rebuild and picked up her car. The car stopped running less than three miles from repair shop. The repair shop owner then recommended several other repairs but those repairs did not return the car to operating condition. James met with the client and repair shop owner to attempt to settle the dispute. When a satisfactory solution could not be agreed on, we filed suit as the repair shop refused to allow client to have car picked up for repairs elsewhere. District Court Judge Jimmy Pool rendered a verdict of \$7,500 in favor of the car owner. The repair shop appealed to circuit court and demanded a jury trial. The parties conducted a court ordered mediation and were able to resolve the case with return of the car, a monetary payment exceeding the amount paid for the attempted repairs and reimbursement of the filing fee advanced by our firm. The client was very happy with the settlement and was thankful for the help from the volunteer lawyer program. She is also cooking James a pot of turnip greens.

Matt Munson successfully defended an elderly woman whose neighbor accused her of causing damage to a convertible BMW. The owner of the BMW complained to our client about cats causing the damage. Our client responded that she did not own the cats. Our client contacted the local Animal Control but was told that they could not pick up stray cats. The owner of the BMW then filed suit claiming damages to pay for new paint job. The owner of the BMW initially refused to allow us to inspect the car, but produced it after the judge ordered her to do so. Upon inspection, it was clear that the only damage to the vehicle was caused by normal wear-and-tear and/or poor upkeep. The case tried to a bench

verdict in favor of our client who was very concerned as she had no money to pay to paint a BMW. A strange set of facts, but one that was a serious matter for our client.

Lawyers at Beasley Allen are encouraged to participate in the Montgomery Volunteer Lawyers program. All lawyers should look at providing pro bono legal services through their State or local programs as a real service. It's an important part of being a lawyer.

XXV. FAVORITE BIBLE VERSES

Kathy Eckermann, my Executive Assistant, sent in her favorite verse.

Your attitude should be the same as that of Christ Jesus: Who, being in very nature God, did not consider equality with God something to be grasped, but made himself nothing, taking the very nature of a servant, being made in human likeness. And being found in appearance as a man, he humbled himself and became obedient to death—even death on a cross! Therefore God exalted him to the highest place and gave him the name that is above every name, that at the name of Jesus every knee should bow, in heaven and on earth and under the earth, and every tongue confess that Jesus Christ is Lord, to the glory of God the Father. Philippians 2: 5-11

Kathy says: "I love that these verses explain exactly who Jesus is and what He did for us in giving his life. He gave us the ultimate example of humility and of putting others above ourselves. My favorite part is the picture of every knee bowing and every tongue confessing that Jesus Christ is Lord."

Ben Locklar, a lawyer in the firm, sent in his favorite verse.

One day Jesus was teaching, and Pharisees and teachers of the law were sitting there. They had come from every village of Galilee and from Judea and Jerusalem. And the power of the Lord was with Jesus to heal the sick. Some men came carrying a paralyzed man on a mat and tried to take him into the house to lay him before Jesus. When they could not find a way to do this because of the crowd, they went up

on the roof and lowered him on his mat through the tiles into the middle of the crowd, right in front of Jesus. Matthew 5: 17-19 (NIV)

Ben says: "I always marvel at this story, not because a man was taken to Jesus to be healed but because his friends refused to be denied access. This paralyzed man's friends were so determined to get their friend to Jesus they literally tore a hole in the roof and lowered the man down in the presence of Jesus. I do not know if I have any friends who love me that much, but it occurred to me that we should all have the hearts of these friends. We should be willing to tear down any barrier necessary to get our loved ones to Jesus to be healed, forgiven, cleansed and saved."

My good friend, Dr. Terry Stallings, sent two verses that he says have great meaning to him.

This day I call heaven and earth as witnesses against you that I have set before you life and death, blessings and curses. Now choose life, so that you and your children may live and that you may love the Lord your God, listen to his voice and hold fast to him. For the Lord is your life, and he will give you many years in the land he swore to give to your fathers, Abraham, Isaac and Jacob. Deuteronomy 30:19-20

Terry had this to say: "In Deuteronomy 30:19-20, Moses challenges us to choose life over death, and by choosing life, we will continue to experience his blessings. God does not force his will upon us, but from the beginning of man, he has given us the opportunity to choose. By choosing to love and obey God, we choose life over death. The other verse he chose is Proverbs 6:16-19, which describes what makes man wicked, and states seven things the Lord hates. Three of the seven are committed with the tongue."

There are six things the Lord hates, seven that are detestable to him: haughty eyes, a lying tongue, hands that shed innocent blood, a heart that devises wicked schemes, feet that are quick to rush into evil, a false witness who pours out lies, and a man who stirs up dissension among brothers. Proverbs 6:16-19

LaSonya Lucas, a Legal Secretary in our Mass Torts Section send in James 1:2-4. She says: "In a world where there is constant turmoil and trouble on every hand it is so encouraging to know that in all that we go through that you can profit from your problems and knowing that going through these things will not only

strengthen us as individuals but they will more importantly draw us closer to our Lord and Savior Jesus Christ.”

Consider it pure joy, my brothers and sisters, whenever you face trials of many kinds, because you know that the testing of your faith produces perseverance. Let perseverance finish its work so that you may be mature and complete, not lacking anything. James 1:2-4 (NIV)

Kim Owen, a Legal Assistant working with David Dearing in our Mass Torts Section, also supplied her favorite verse for the issue. She said one day when she was brushing her hair and saw what was left in the brush, she started thinking about this verse. She couldn't imagine how God could keep up with her hair and everyone else's. Kim says: "Then I thought if God knows every time a sparrow falls then He didn't just count my hair one day and stop. He knows every time a strand of hair grows or falls out. If He counts our hair then know He's aware of all our troubles, sickness, heartaches, and sins. We need to examine our value through God's eyes and live fearless and blessed!"

Are not two sparrows sold for a penny? And not one of them will fall to the ground apart from your Father. But even the hairs of your head are all numbered. Fear not, therefore; you are of more value than many sparrows. Matthew 10: 29—31

XXVI. CLOSING OBSERVATIONS

Since I spent the last part of January and most of February in St. Louis, Mo., in trial, I had to depend on others to help out with this issue. Fortunately, they did an outstanding job. I was honored to have the opportunity to help try a most important lawsuit. We represented Marvin Salter, the son of Jacqueline Fox, a brave woman who died last year from ovarian cancer. Ms. Fox had been a lifetime user of talc products sold by Johnson & Johnson. She never knew J&J Baby Powder and Shower to Shower could cause ovarian cancer and were causing 1,500 women to die each year. During the discovery phase of the litigation, we were able to obtain access to a huge number of internal documents that J&J never thought anybody outside of the companies would ever see. I have written

about the verdict in other parts of this issue. It was a huge victory for women!

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

KEN STABLER DIAGNOSED WITH CONCUSSION-RELATED BRAIN DISEASE

Kenny Stabler is a name that all football fans and especially in Alabama recognize. But today the name of the former National Football League quarterback, who played

at the University of Alabama under Coach Paul Bryant, is in the news for another reason. He had a severe degenerative brain disease linked to repeated concussions. Kenny died from colon cancer in July at age 69. He had volunteered to have his brain donated to researchers at Boston University after his death to find out if his confusion and headaches were caused by chronic traumatic encephalopathy, or CTE. The condition can only be diagnosed posthumously.

Researchers said the former Raiders quarterback had high Stage 3 CTE. The severity of the brain disease is rated on a scale of 1 to 4, with 4 being the most severe. Kenny is one of dozens of former football players who have been diagnosed with CTE. Those afflicted with the condition generally display symptoms of dementia including memory loss and confusion. But they can also show signs of aggression and have in some cases become homicidal and/or suicidal.

In recent years, researchers have begun to connect the dots between repeated head blows and the build-up of abnormal tau proteins in the brain, leading to the degenerative brain disease. In a previous study of 94 former NFL players, CTE was found in 90 of them.

The NFL has been unwilling to take responsibility for not better protecting players from head injuries over the years, but last spring agreed to set aside \$1 billion to settle a class action lawsuit against former players to address concussion-related injuries. Kenny's family, however, will not receive compensation under the terms of the settlement since his CTE was not diagnosed until after the April 2015 cutoff. That is heartbreaking for the family. Kenny's daughter, Alexa Stabler, told the New York Times:

He played 15 seasons in the NFL, gave up his body and, apparently, now his mind. And to see the state that he was in physically and mentally when he died, and to learn that despite all the energy and time and resources he gave to football—and not that he played the game for free, he made money, too—without the knowledge that this is where he would end up, physically and cognitively, and for the settlement to say you get nothing? It's hard not to be angry.

This is a sad story—one of many—that should cause those in charge at the NFL to feel badly and elect to do the right thing. In fact, the NFL has an obligation from a moral perspective—regardless of the settlement—to compensate families like the

Stabler family. Will the NFL do the right thing? Time will tell!

Source: *New York Times*

XXVII. PARTING WORDS

Since I was out of town for about a month I asked for volunteers to write the “today” messages for me. Kathy Eckermann, my Executive Assistant, wrote one that I am passing on this month to our readers. It’s one that all of us need from time to time.

I appreciate each of the volunteers who have written morning messages while Mr. Beasley was in trial. I also appreciate that Mr. Beasley allows us the freedom to share our faith in God. As the other guest writers have written about what is most important in their lives, I would also like to write today about the subjects in my life that are nearest to my heart—my faith, my family and music.

Anyone who knows me, knows that music is a very important part of my life. When my husband and I were dating (over 35 years ago), one of our favorite things to do was to sing and play songs around the piano. Recently I was thinking about what a huge blessing it is to have the good old hymns that my generation grew up singing as well as the newer contemporary music. I hope you will take a fresh look at the songs and hymns you sing at church or along with on the radio. While scripture is the higher priority, I truly believe that God gave us music as a way to worship and express the teachings we learn through his Word, and also as a way to remember the teachings of scripture. Sometimes, a specific song will just pop into your mind and you will start singing it to yourself.

Because songs have melodies and harmonies, they are easily remembered and will stay with you for your whole life. At times you may remember the words of songs just when you need it most—this is because the words are associated with a certain melody.

A few months ago, our family was going through a very difficult time that affected all of us because we love and care about the family member who was involved. To me, it felt like we were in a very dark tunnel and I could not see a light at the end of it. Then a song we had sung at church just started flooding my mind over and over again. The words to the second verse of this song came to me and stayed with me throughout that dark time. The song that kept running through my mind was “Cornerstone” which is really a new version of the old hymn, “The Solid Rock” with a new chorus added. I love both the old and the new versions of this great and wonderful hymn. The words of the song gave me amazing comfort and helped me to remember that no matter how bad things seem to be, God is always there to give us strength through every situation. Here are the words that kept running through my mind along with the beautiful melody:

*When Darkness seems to bide His face,
I rest on His unchanging grace,
In every high and stormy gale,
My anchor holds within the veil.
Christ alone; Cornerstone
Weak made strong; in the Savior’s love
Through the storm, He is Lord,
Lord of all.*

Music is a wonderful gift from God and truly has therapeutic benefits. A great example is in the Old Testament—David played his harp when an evil spirit would come to Saul, and Saul would start to feel

better. I believe that most people enjoy music and have probably experienced its many benefits. Whether you like to sing, play, compose or listen to it, I hope you have a psalm, hymn or spiritual song that is special to you and has brought you comfort when you needed it most. After you vote today, take a break from the political ads and sing a song.

Let the word of Christ dwell in you richly, teaching and admonishing one another in all wisdom, singing psalms and hymns and spiritual songs, with thankfulness in your hearts to God. Colossians 3:16

Speaking to yourselves in psalms and hymns and spiritual songs, singing and making melody in your heart to the Lord. Ephesians 5:19

Give thanks to the Lord with the lyre; make melody to him with the harp of ten strings! Sing to him a new song; play skillfully on the strings, with loud shouts. Psalm 33:2-3

He put a new song in my mouth, a hymn of praise to our God. Many will see and fear the LORD and put their trust in him. Psalm 40:3

Sing to the LORD a new song, for he has done marvelous things; his right hand and his holy arm have worked salvation for him....Shout joyfully to the Lord, all the earth; Break forth and sing for joy and sing praises. Sing praises to the Lord with the lyre, with the lyre and the sound of melody. With trumpets and the sound of the horn, shout joyfully before the King, the Lord. Psalm 98:1, 4-6

Whenever the spirit from God came on Saul, David would take up his lyre and play. Then relief would come to Saul; he would feel better, and the evil spirit would leave him. 1 Samuel 16:23

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