



THE
JERE BEASLEY REPORT

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Beasley Allen

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

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I. CAPITOL OBSERVATIONS

BEASLEY ALLEN IN TOP 10 BEST LAW FIRMS FOR BLACK LAWYERS IN THE U.S.

Our law firm was selected by Law360 as one of the 10 Best Law Firms for Black Attorneys in the United States. The firm was recognized as having the highest percentage of African American partners of any of the firms included on the list. That's something all of us at Beasley Allen are extremely proud of.

Tom Methvin, Principal & Managing Attorney for the firm, says being mindful of providing opportunities for African American lawyers is part of our firm's business plan. The firm actively supports programs of the Alabama Lawyers Association, and each year hires two or more law clerks from that network. Creating a workplace where black lawyers can succeed is a win-win for all concerned.

Lawyers are hired by our firm based strictly on merit. However, when you have diversity in a firm, there will be different and needed points of view. We have African-American lawyers in each section of the firm. Lots are expected out of all our lawyers and we have been blessed to attract tremendously talented lawyers. We provide an environment in the firm where each lawyer can be successful. When an individual lawyer has success, the entire firm will benefit and our clients will have been well-served.

Kendall Dunson, a Principal in the firm's Personal Injury/Products Liability Section, was named Beasley Allen's Litigator of the Year for 2015. He has served as President of both the Alabama Lawyers Association and the Capital City Bar Association. Kendall also served as the first African-American President of the Montgomery County Bar Association. Kendall points out that the firm is very proud of our stance on diversity. He is proud of the success of all of our African-American lawyers. Kendall says: "Each of us has distinguished our self as a lawyer, and we are all assets to the legal profession."

To compile its Top 10 list, Law360 surveyed more than 300 U.S. firms with a U.S. component, about their overall and minority headcount numbers as of Dec. 31, 2015. Only U.S.-based lawyers were included in the survey. Firms are ranked based on three factors: the percentage of partners, both equity and non-equity, who self-identify as black; the percentage of non-partners who self-identify as black; and the

number of lawyers at the firm who self-identify as black.

To obtain more information about Beasley Allen's African American lawyers and their successes, visit the attorneys page on the firm's website at www.beasleyallen.com/attorneys. For additional information, you can contact Helen Taylor, Public Relations Coordinator, at Helen.Taylor@beasleyallen.com.

II. MORE AUTOMOBILE NEWS OF NOTE

RECALL OF ADDITIONAL 35-40 MILLION TAKATA AIR BAG INFLATORS

The National Highway Traffic Safety Administration (NHTSA) has expanded and accelerated the recall of Takata air bag inflators. The decision followed what the agency says is confirmation of the root cause behind the inflators' propensity to rupture. As we have written, ruptures of the Takata inflators have been tied to 10 deaths and more than 100 injuries in the United States. There have been at least two more deaths outside the U.S.

Under the Amended Consent Order issued to Takata, the company is required to make a series of safety defect decisions that will support vehicle manufacturer recall campaigns of an additional estimated 35-40 million inflators, adding to the already 28.8 million inflators previously recalled. These expansions are planned to take place in phases between May of this year and December of 2019. The expansions mean that all Takata ammonium nitrate-based propellant driver and passenger frontal air bag inflators without a chemical drying agent, also known as a desiccant, will be recalled.

The five recall phases are based on prioritization of risk, determined by the age of the inflators and exposure to high humidity and fluctuating high temperatures that accelerate the degradation of the chemical propellant.

NHTSA and its independent expert reviewed the findings of three independent investigations into the Takata air bag ruptures and confirmed the findings on the root cause of inflator ruptures. The agency says a combination of time, environmental moisture and fluctuating high temperatures contribute to the degradation of the ammonium nitrate propellant in the inflators. Such degradation can

cause the propellant to burn too quickly, rupturing the inflator module and sending shrapnel through the air bag and into the vehicle occupants.

NHTSA will also consult with affected vehicle manufacturers before revising the Coordinated Remedy Order that governs the accelerated program to obtain and install replacement inflators. The Coordinated Remedy Program will continue to ensure that replacement inflators will be made available to highest-risk vehicles first. The revised Coordinated Remedy Program, to be announced this summer, will detail the updated vehicle prioritization schedule and the schedule by which manufacturers are required to procure a sufficient supply of replacement parts to conduct the required recall repairs. This is

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the largest and most complex safety recall in U.S. history.

All vehicle owners should regularly check SaferCar.gov for information about any open safety recall on their vehicle and what they can do to have it fixed free of charge. The recall expansion does not include inflators that include a chemical desiccant that absorbs moisture. There have been no reported ruptures of the desiccated inflators due to propellant degradation.

Takata is required, under the Amended Consent Order, to redirect its research toward the safety of the desiccated inflators. Absent proof that the desiccated inflators are safe, Takata will be required to recall them under the November 2015 Consent Order. As you will recall, NHTSA imposed the largest civil penalty in its history in 2015 for Takata's violations of the Motor Vehicle Safety Act, and for the first time used its authority to accelerate recall repairs to millions of affected vehicles. NHTSA also appointed an Independent Monitor to assess, track and report the company's compliance with the Consent Order and to oversee the Coordinated Remedy Program.

Source: Custerfreepress.com

HAWAII IS FIRST STATE TO SUE TAKATA OVER DEADLY AIR BAGS

Hawaii has become the first state to file suit against Takata Corp. over its faulty air bags linked to several deaths. The consumer protection lawsuit was filed in state court accusing the Japanese auto parts maker of engaging in a cover-up. Takata was accused in the suit of making and supplying air bags it knew were unsafe, and \$10,000 is sought for each instance of unfair and deceptive conduct in violation of state consumer protection laws. The state also claims that Honda Motor Co., which installed at least 10 million of the defective air bags, failed to do enough to warn consumers of the potential danger.

Hawaii claims in its lawsuit that Takata switched to ammonium nitrate propellant to inflate the bags because it was cheaper, despite being aware of the potential for the bags to unpredictably explode upon inflation. The complaint states:

Takata knew even before it began using ammonium nitrate in its air bags in 1999 that ammonium nitrate was too unstable to be suitable for use in motor vehicle air bags, particularly in areas of the country with high heat and/or high humidity, like Hawaii.

The suit says Takata ran secret tests on its air bags and later concealed the adverse results until Takata whistleblowers made the information public. It's alleged that Takata continued to deny that ammonium nitrate was responsible for the safety issues in its air bags, failed to disclose what it knew about its own testing of the air bags, and continued to attempt to minimize the scope of the problem.

In the claim against Honda, Hawaii alleges the automaker didn't halt sales of cars furnished with Takata air bags despite being aware of the dangers. Hawaii said in the complaint:

[Honda] continued to sell cars equipped with Takata air bags and inadequately pursued recalls—saving money while subjecting consumers to an ongoing risk of serious injury and death.

Stephen Levins, head of Hawaii's Office of Consumer Protection, said companies are obligated to deliver safe products. He added the following in a statement:

Takata and Honda put their own profits and reputations ahead of honesty and their customers' safety. We intend to hold them accountable for their conduct.

Hawaii is represented by Melina D. Sanchez of the Hawaii Office of Consumer Protection, L. Richard Fried Jr. and Patrick F. McTernan of Cronin Fried Sekiya Kekina & Fairbanks, and Linda Singer and Anthony R. Juzaitis of Cohen Milstein Sellers & Toll PLLC. The case is in the First Circuit Court of the State of Hawaii.

Source: Law360.com

WARRANTY CLAIMS SURVIVE IN FORD POWER STEERING SUIT

A federal judge in California has rejected an attempt by Ford Motor Co. to deflect implied warranty claims in a proposed class action alleging power steering in some Focus and Fusion cars is prone to sudden failure. U.S. District Judge Lucy H. Koh found that each of Ford's arguments against the claims "lack merit." Judge Koh said that implied warranty claims under both the Song-Beverly Act and the Magnuson-Moss Warranty Act reasserted in March by lead Plaintiff Jaime Goodman in an amended complaint over the alleged steering defect "rise and fall together." Being so intertwined, Judge Koh said each are properly pled in view of the Ninth Circuit's December ruling in *Daniel v. Ford Motor Co.*, which found Focus warranties were vague enough to cover a latent rear

suspension defect. Judge Koh said in her order:

Indeed, the facts here are almost identical to those in Daniel: Both cases involve the same defendant (Ford), the same sort of defect (a latent defect brought under the Song-Beverly Act after the one-year duration period), and even the same vehicle (the Focus). The Song-Beverly Act claim survived in Daniel. They also survive here.

Despite Ford's claims that the ruling did not actually mean a driver can recover on an implied warranty claim "no matter when" a defect is found and that, essentially, a defect must be discovered within a year of purchase, Judge Koh found that argument did "not comport" with court precedent. In fact, she said the Ninth Circuit in *Daniel* and a state court of appeal in *Mexia v. Rinker Boat Co.*—which concerned a latent engine defect in certain Rinker boats—both held Plaintiffs in those cases could pursue claims of latent defects outside of the one-year period Ford has argued for. Judge Koh said in her order:

Ford has failed to explain why Mexia and, in particular, Daniel—a published Ninth Circuit decision involving the same basic claim against the same defendant and concerning the same vehicle—do not govern the instant case. Accordingly, the court finds that California plaintiffs have sufficiently alleged a Song-Beverly Act claim under Mexia and Daniel.

The suit filed by plaintiffs in June 2014 was initially on behalf of a nationwide class of drivers who had leased or purchased 2010-2014 Fusion and 2012-2014 Focus vehicles. The Plaintiffs alleged that Ford advertised the cars' electric power-assisted steering system as enhancing vehicle safety, but knew the system was defective. The case is in the U.S. District Court for the Northern District of California.

Source: Law360.com

LAWUIT FILED AGAINST BMW OVER ELECTRIC CARS LOSING POWER WHILE DRIVING

A lawsuit filed against BMW involves its newer i3 line of electric cars. It's alleged that these cars can unexpectedly drop to dangerously low speeds due to a design defect in an engine feature meant to extend the cars' mileage. The proposed class of national drivers filed the suit in a

California federal court. Named Plaintiff Edo Tsoar alleges that 2014 to 2016 BMW i3 REx models contain a "range extender" feature that, when a car's battery drops to a certain level of available power, switches over to a two-cylinder, traditional, gasoline combustion engine to extend the available drive time from 81 to 150 miles per charge.

It's claimed that the switch to the fuel extender can happen mid-drive. When that happens, the performance capability is prone to slide off dramatically. The cars are unable to maintain speed for normal operation, a function consumers relied on having when purchasing the vehicle, the suit says. The complaint states:

Indeed, if the vehicle is under any kind of significant load (such as going uphill, or loaded with passengers), the speed of the vehicle will dramatically decrease as the battery charge diminishes. BMW knew about, but did not disclose, this sudden, significant, and dangerous loss of power that was inevitable when the range extender is engaged.

Online consumer reports are cited by Tsoar, along with a number of complaints made with the National Highway Traffic Safety Administration, all concerning the loss of power experienced while driving the i3 due to the fuel extender switching on. One of the NHTSA complaints was made by a driver who claimed the car suddenly dropped from 75 to 35 miles per hour while driving on a freeway in December. Another driver said their i3 dropped from 50 to 25 miles per hour while he was driving along a Northern California highway in 2014, shortly after the model hit the market.

The named Plaintiff is seeking certification of a national class of i3 drivers and a California subclass, reimbursement of car payments and out-of-pocket expenses related to the alleged defect, and unspecified damages for the automaker's "malicious, oppressive and deliberate fraud."

Source: Law360.com

GM DRIVERS ARE OFFERED CASH AND WARRANTIES OVER FALSE FUEL ECONOMY

General Motors (GM) announced last month that it will offer prepaid debit cards or extended warranties to owners of certain SUVs for fuel economy numbers that are overstated by one to two miles per gallon. It's estimated that 135,000 customers will be covered by the reimbursement program. The automaker said it had to conduct new emissions tests on the

2016 Chevrolet Traverse, GMC Acadia and Buick Enclave because of new emissions-related hardware. GM claims that the new numbers weren't reflected in calculations for fuel economy labels, causing the numbers to be overstated.

GM said buyers will get to choose between a prepaid debit card and a four-year, 60,000-mile protection plan, which the automaker said is designed for high-mileage customers or those who plan to keep their vehicle for an extended amount of time. Those who leased their vehicles will be offered the debit card. According to GM, the average value of the debit cards will be \$450 to \$900, though the numbers will vary individually. The maximum payout for certain vehicles will be \$1,500, according to GM.

The automaker said it based its calculations on a fuel price of \$3 per gallon and 15,000 miles of driving per year over a five-year period, which it says is the same assumptions used in the U.S. Environmental Protection Agency's (EPA) formula to calculate future fuel costs on the window label. Dealers were notified of the plan on May 20. Letters will be sent out to customers starting on May 25. GM says about 135,000 customers are expected to be covered by the plan.

The announcement of the reimbursement program came about a week after reports circulated that GM had instructed dealers to stop selling the 2016 Traverse, Acadia and Enclave while it corrected their fuel economy ratings. A class action lawsuit has also been filed, claiming that GM knew or should have known that its automobiles were being advertised and sold with misleading ratings. It was alleged by Sean Tolmasoff in the complaint that the company should have compensated drivers who bought their cars before the miles per gallon ratings were updated. GM claims that its reimbursement program was a GM customer initiative, and that the framework for the program was created and approved before Tolmasoff's suit was even filed. Based on our history with GM, I find that very hard to believe.

Source: Law360.com

CLASS SUIT ACCUSES VOLKSWAGEN AND AUDI OF ANOTHER COVER-UP

Volkswagen and Audi, which already face hundreds of lawsuits over a scheme to falsify diesel emissions, now face a class action filed in the U.S. District Court for the District of New Jersey. The automakers are accused of concealing defective timing belt tensioning systems in their vehicles. The defect can cause vehicles to

lose power at any time, placing occupants at risk. The suit claims that, based on pre-production testing, design failure mode analysis and consumer complaints to dealers, the Defendants knew of the premature failure of the tensioning system in class members' vehicles, but fraudulently concealed them from class members. In addition, it's alleged in the suit that the Defendants knowingly omitted material facts about the defective tensioning system and its corresponding safety risk, and misrepresented to buyers the standard, quality or grade of class vehicles.

It's alleged further in the complaint that owners whose vehicles suffered failure of the timing belt tensioning system have had to pay thousands of dollars to make repairs or to replace the entire engine. The Plaintiffs claim that the Defendants did not reimburse class members for failures that occurred outside the vehicle's warranty periods. There are claims in the suit on behalf of a nationwide class of owners or lessees of 2008 through 2013 Volkswagen and Audi vehicles with 2.0L TSI or 2.0L TFSI engines. Also, there is a subclass of New Jersey residents who owned or leased such vehicles.

On behalf of the nationwide class, there are claims in the suit for breach of contract, fraud, negligent misrepresentation, breach of express and implied warranty, violation of the Moss-Magnuson Warranty Act and unjust enrichment. There is also a claim for violation of the New Jersey Consumer Fraud Act on behalf of the subclass of New Jersey owners.

The engine with the faulty timing chain tensioner was sold in various Volkswagen Beetle, CC, EOS, Golf, GTI, Jetta, Passat, Golf R32, Rabbit, Routan, Tiguan and Toureg and Audi A3, A4, A5, A6, A7, TT, Q3, Q5 and Q7 models. Volkswagen has faced other suits over timing chain tensioners in the past, and it is also named in 763 suits that have been consolidated in the Northern District of California by the Judicial Panel for Multidistrict Litigation over allegedly rigged emissions systems on cars with diesel engines.

Source: Insurance Journal

CATERPILLAR GETS PRELIMINARY APPROVAL FOR \$60 MILLION SETTLEMENT

We previously mentioned the class action lawsuit filed against Caterpillar Inc. involving its bus engines. The company has now won preliminary approval for a \$60 million settlement in the lawsuit. It was alleged that Caterpillar sold bus engines with a defective anti-pollution system. U.S. District Judge Jerome B. Simandle found the settlement amount to

be fair and reasonable. A final approval hearing will be held in September. Judge Simandle said in his order:

The court has conducted a preliminary assessment of the fairness, reasonableness and adequacy of the agreement, and hereby finds that the settlement falls within the range of reasonableness meriting possible final approval.

The settlement calls for a \$60 million common fund. Class members would be eligible for \$500 to a maximum of \$10,000 per engine, or \$15,000 for losses stemming from repairs. Settlement administrator Epiq Systems Class Action & Claims Solutions Inc. will set up a settlement website, giving notice and the necessary forms to potential class members. Plaintiffs in the five consolidated class actions alleged that an exhaust emission control system used in Caterpillar's C13 and C15 heavy-duty on-highway diesel engines is defective.

The cases claim that buses or trucks with the engines suffered repeated failures and fault warnings that resulted in time-consuming and costly repairs. The engines contain technology, known as ACERT, that recycles exhaust back through the engine to reduce emissions, which Caterpillar developed to comply with a series of tougher emissions regulations that went into effect in 2002, according to Salud Services Inc., which does business as Endeavor Bus Lines.

Source: Law360.com

NHTSA ACCUSED OF LETTING CAR AUTOMAKERS OFF EASY ON AUTO BRAKING

Three well-respected consumer and safety advocacy groups have accused the National Highway Traffic Safety Administration of not doing enough to make automatic emergency braking standard in all light vehicles. A recent "backroom deal" between the agency and a number of automakers allows them to skirt safety standards, according to the groups. NHTSA announced in March that 20 automakers representing nearly the entire U.S. auto market, including Ford, GM Subaru and many others, had made an "unprecedented commitment" to making automatic emergency braking a standard feature on all new cars no later than 2022. NHTSA estimated the agreement would get the technology to the public three years faster than would be possible through a "formal" rulemaking process.

Consumer Watchdog, the Center for Auto Safety and Public Citizen said in a

letter, dated May 23, 2016, to NHTSA that the agreement is "unlawful" as it's merely a memorandum of understanding that purportedly allows the automakers to avoid federal safety rules already in place. The letter says further that NHTSA won't have to explain the terms of the agreement. Moreover, the advocacy groups are taking issue with NHTSA's claim that "substantially all" light cars and trucks will have AEB systems standard by 2022, which they say means only 95 percent of vehicles will need to have AEB by the deadline, leaving one out of every 20 vehicles without the technology.

The consumer groups also said the memorandum allows light duty vehicles with a manual transmission two additional years for standardizing AEB and lets those vehicles that are phased out within one year of the 2022 deadline to leave out AEB altogether. The consumer groups said:

Nowhere has NHTSA said how many vehicles these waivers and extensions cover, and perhaps the agency does not even know. If the MOU were a rulemaking, as the law requires, NHTSA would have to provide such information to the public.

As the name implies, AEB systems are intended to prevent crashes or reduce their severity by applying the brakes for the driver. The technology generally works through on-vehicle sensors like radar, cameras or lasers to detect an imminent crash, warn the driver and apply the brakes if the driver does not respond quickly enough, according to NHTSA.

But the consumer groups said the memorandum agreement with the auto companies has "inexplicably" weakened brake tests like NHTSA's standard minimum 25 miles per hour to 10 miles per hour safety test. The manufacturers in the memorandum now only need to show the AEB can slow a car to 2 mph from 12 mph.

The groups pointed out that if the AEB deal was going through a traditional rulemaking process, NHTSA "would have to explain how and why the AEB voluntary measures became so weak in the face of higher ratings everywhere else." Beyond that, the compliant manufacturers also allegedly have "unfettered discretion" to implement an AEB system that can bring a car driving 40 mph to a full stop, something that is a standard measure in NHTSA's current 5-Star Safety Rating Program. The consumer groups said:

It speaks volumes that neither the MOU nor NHTSA requires a window sticker detailing the speed at which

the AEB system will stop the car from before hitting a parked vehicle.

In November NHTSA announced plans to include AEB capabilities in its safety rating system beginning with 2018 vehicle models. A month before that announcement, NHTSA said it would also begin considering new federal standards for crash avoidance technology in heavy trucks, or those over 10,000 pounds, including early crash warnings and auto braking.

Source: Public Citizen

III. A REPORT ON THE GULF COAST DISASTER

BP LAWSUIT FILINGS ON THE RISE

After the BP oil spill in 2010, thousands of lawsuits filed by businesses, individuals, and other entities ranging from Texas to Florida were consolidated before U.S. District Court Judge Carl J. Barbier in the Eastern District of Louisiana. To facilitate the effective administration of the multi-district litigation (MDL), Judge Barbier established eight separate "pleading bundles" for different categories and claims. The "B1" Bundle included claims for Non-Governmental Economic Loss and Property Damages by Private Individuals and Businesses. The Court utilized the B1 Master Complaint as a procedural device for administrative purposes to facilitate the filing of short form joinders by Plaintiffs who sought to file suit against BP.

With the purpose of the B1 Master Complaint fulfilled, the Court dismissed the B1 Master Complaint in Pretrial Order No. 60 (PTO 60), which was issued on March 29, 2016. PTO 60 effectively removed the bundling of lawsuits, and contains certain requirements that must be met or risk having the case dismissed without prejudice.

Understandably, the most catastrophic environmental disaster in the history of the United States has taken some time to resolve issues common to all Plaintiffs. The PSC has done a phenomenal job of handling this massive litigation and brokering the Deepwater Horizon Economic and Property Damages Settlement.

BP DROPS INJUNCTION AGAINST SEAFOOD COMPENSATION PROGRAM FUND

BP has withdrawn its motion seeking an injunction against paying approximately \$1 billion for claims remaining in the \$2.3 billion Seafood Compensation Program (SCP) Fund. In 2013, BP urged U.S. District Court Judge Carl J. Barbier to suspend additional payments required under the Settlement Agreement, claiming that it was tainted by an inflated number of SCP claimants who were projected to submit commercial fishing claims.

BP's motion was filed in the midst of its attempt to stall and eventually overturn the 2012 *Deepwater Horizon* Economic and Property Damages Settlement reached with private individuals and businesses. One year after the Settlement Program became operational, BP realized it underestimated the likely cost of the settlement and sought to renege on both certain provisions and the entire settlement. While the company was successful in altering the way in which Business Economic Loss claims are calculated, BP's attempt to overturn the class settlement as a whole was denied.

Unfortunately, BP's behavior during this process didn't come as a surprise. Some huge corporations facing liability for their actions will do almost anything to limit their exposure, even when doing so directly contradicts what they tell the public. In this instance, BP touted the settlement as a fair and expedient way to resolve tens of thousands of claims asserted by those harmed by its conduct.

But when it came time to pay claims BP had acknowledged were legitimate, instead the company sought to invalidate the settlement it had agreed to. BP questioned those who were playing by the rules that BP had agreed to. The oil giant tried to intimidate other claimants from rightfully asserting their legitimate claims. In so doing, BP had no qualms about halting payments to commercial fishermen, who are among the many victims of this tragedy.

All of this goes to show that a fight against a corporate giant is never-ending, even when one thinks the companies have owned up to their "mistakes." We have learned this reality over the years, so I can't say our lawyers were surprised by BP's actions. The lawyers from our firm working on this project will continue to fight for all of those harmed by the oil spill. So far their efforts have been successful.

Source: Law360.com

IV. DRUG MANUFACTURERS FRAUD LITIGATION

MISSISSIPPI SUPREME COURT UPHOLDS \$30 MILLION JUDGMENT AGAINST SANDOZ

Lawyers at Beasley Allen have been serving as Special Counsel to Mississippi Attorney General Jim Hood for several years on the Average Wholesale Price (AWP) litigation. Thus far we have recovered from 61 companies over \$200 million for the State of Mississippi, including a \$30 million verdict against generic pharmaceutical giant Sandoz, Inc. in 2011. That verdict was appealed by Sandoz and the Mississippi Supreme Court affirmed the verdict in full last October. Sandoz then asked the Supreme Court to rehear the appeal. On May 26th, we were informed that the court had denied Sandoz's rehearing request. This effectively exhausts the drug company's last chance for an appeal. Attorney General Hood applauded the Mississippi Supreme Court's refusal to reconsider its October 2015 decision that affirmed the state's \$30 million verdict. He had this to say:

It is reassuring to know that when a big drug company like Sandoz cheats the taxpayers, justice will prevail. The court made the right decision to turn back a greedy corporation that focused on its own profits at the expense of the people of Mississippi.

This case came to the Mississippi Supreme Court following a 9-day bench trial in Rankin County Chancery Court. Chancellor Tom Zebert concluded that Sandoz defrauded Mississippi, and cost taxpayers \$24 million when it reported Average Wholesale Prices, or AWP's, which grossly exceeded the actual prices Sandoz charged its customers.

Those manipulated prices caused the state to pay more for prescription drugs for Medicaid recipients. As a result of this fraud, the trial court awarded the state compensatory, statutory and punitive damages. The case against Sandoz was among dozens of similar cases brought by the state against other drug companies that also manipulated their reported AWP's so that Mississippi paid too much for prescription drugs for Medicaid recipients.

Our firm represented eight other states in this very same litigation and recovered over \$1.5 billion in settlements and jury

verdicts for those states. The AWP trial team was lead by Dee Miles with Roman Shaul, Clay Barnett, Ali Hawthorne and Chad Stewart (1972-2014) assisting. All of our lawyers and support staff did tremendous work in this litigation.

TWENTY-FIVE YEARS OF PHARMACEUTICAL INDUSTRY CRIMINAL AND CIVIL PENALTIES: 1991 THROUGH 2015

Public Citizen published a report last month that catalogues all major financial settlements and court judgments between pharmaceutical companies and federal and state governments from 1991 through 2015. The report found that drugmakers entered into 373 settlements totaling \$35.7 billion in criminal and civil penalties, but that both the number and size of settlements decreased significantly in 2014 and 2015.

In September 2012, Public Citizen published an updated analysis of all major financial settlements and court judgments between pharmaceutical manufacturers and the federal and state governments from 1991 through July 18, 2012. At the time of the report's publication, more than \$30 billion had been paid by the pharmaceutical industry to settle allegations of numerous violations, including illegal off-label marketing and the deliberate overcharging of taxpayer-funded health programs, such as Medicare and Medicaid. The following study was undertaken to assess the level of settlement activity from the time period studied in the previous report through 2015, an additional three and a half years, thereby providing collective data for the entire 25 years from 1991 through 2015.

Methodology from the 2012 report was replicated, the sole exception being that unlike the previous studies, this study includes federal and state settlements totaling less than \$1 million. Therefore, the study includes all federal and state government settlements reached with pharmaceutical manufacturers from July 19, 2012, through 2015, but only settlements of at least \$1 million for the period prior to July 19, 2012.

In addition, the totals presented in this report for the period prior to July 19, 2012, are different from those listed in the previous report for several reasons, most notably the overturning on appeal of two previous state court judgments against Johnson & Johnson totaling \$1.5 billion in fines.

As in the prior report, single-state settlements were those in which only one state was a party to the final settlement, as gleaned from the information provided in

the press release. All other state settlements were classified as multi-state.

From 1991 through 2015, a total of 373 settlements were reached between the federal and state governments and pharmaceutical manufacturers, for a total of \$35.7 billion. Of these, 140 were federal settlements, for \$31.9 billion, and 233 were state settlements, for \$3.8 billion. Other key findings include the following:

- Financial penalties declined sharply since 2013. Just \$2.4 billion in federal financial penalties were recovered in the most recent two-year period (2014-2015), less than one-third of the \$8.7 billion in federal penalties in 2012-2013 and the lowest two-year total since 2004-2005. In contrast, the number of these federal settlements decreased only slightly, from 22 to 19, from 2012-2013 to 2014-2015. Thus, the average size of federal settlements declined from \$395 million per settlement—in 2012-2013 to \$126 million per settlement—in 2014-2015, less than one-third of the average amount in the earlier interval.
- There were just 20 state settlements in the final two years of the study period (2014-2015), a nearly 80 percent drop from the 95 settlements in 2012-2013 and the lowest two-year total since 2006-2007. State financial penalties totaled just \$424 million during these two most recent years—compared with \$1.2 billion in 2012-2013—a lower total than in any two-year period since 2007-2008.
- From 1991 through 2015, overcharging of government health insurance programs, mainly drug pricing fraud against state Medicaid programs, was the most common violation, while the unlawful promotion of drugs was the single violation that resulted in the largest financial penalties.
- Almost all of the decrease in the total number of settlements in 2014 and 2015 was attributable to the sharp decrease in the number of single-state settlements involving overcharging government health programs, from a combined 73 settlements in 2012 and 2013 to just five in 2014 and 2015, a 93 percent drop.
- The decline in total financial penalties in 2014 and 2015 was primarily due to a decrease in the size of federal settlements involving unlawful promotion, with federal financial penalties that could be attributed to unlawful promotion declining by 90 percent from

nearly \$2.8 billion in 2012-2013 to \$263 million in 2014-2015. The combined total for these latter two years was lower than that for any single year since 2006. As was the case with overall federal financial penalties, this reflects a sharp decrease in the amount of the average penalty paid for unlawful promotion, since the number of federal unlawful promotion violations had declined only slightly, from 11 to eight.

- The most striking decrease in financial penalties involved criminal penalties (all of which, from 1991 through 2015, were federal). For 2012 and 2013 combined, criminal penalties totaled \$2.7 billion, but by 2014-2015, the total had fallen to \$44 million, a decrease of more than 98 percent.
- *Qui tam* (whistleblower) revelations, brought mostly under the False Claims Act, were responsible, at least in part, for 81 of 140 (58 percent) federal settlements, and \$22.8 billion of \$31.9 billion (71 percent) in federal penalties, from 1991 through 2015. By contrast, just 17 of 233 (7 percent) state settlements and \$793 million of \$3.8 billion (21 percent) in state financial penalties originated from *qui tam* actions. Of all state settlements originating from *qui tam* actions from 1991 through 2015, a single state, Texas, accounted for nine of 17 (53 percent) settlements and \$409 million of \$793 million (52 percent) in financial penalties.
- From 1991 through 2015, 29 states and the District of Columbia reached at least one single-state settlement with a pharmaceutical company. Hawaii recovered the most money as a proportion of Medicaid drug expenditures (15 percent), South Carolina recouped the most money per enforcement dollar spent (\$12.25), Louisiana had the most single-state settlements (55), and Texas finalized, by far, the most whistleblower-initiated settlements (nine). Overall, 17 of the 30 states with at least one single-state settlement from 1991 through 2015 attained a return on investment of \$1 or greater for every dollar spent on enforcement of all (both pharmaceutical- and non-pharmaceutical-related) Medicaid fraud.
- From 1991 through 2015, GlaxoSmith-Kline and Pfizer reached the most settlements (31 each) and paid the most in financial penalties—\$7.9 billion and \$3.9 billion, respectively—to the federal and state governments. Johnson & Johnson, Merck, Abbott, Eli Lilly, Teva, Schering-Plough, Novartis, and Astra-

Zeneca also paid more than \$1 billion in financial penalties. Thirty-one companies entered into repeat settlements with the federal government from 1991 through 2015, with Pfizer (11), Merck (nine), GlaxoSmithKline, Novartis, and Bristol-Myers Squibb (eight each) finalizing the most federal settlements.

The number and size of federal and state settlements against the pharmaceutical industry decreased significantly in 2014 and 2015. It remains to be seen whether this decline represents a longer-term trend. Financial penalties continued to pale in comparison to company profits, with the \$35.7 billion in penalties from 1991 through 2015 amounting to only 5 percent of the \$711 billion in net profits made by the 11 largest global drug companies during just 10 of those 25 years (2003-2012).

Public Citizen says to its knowledge a parent company has never been excluded from participation in Medicare and Medicaid for illegal activities, which endanger the public health and deplete taxpayer-funded programs. Nor has almost any senior executive been given a jail sentence for leading companies engaged in these illegal activities.

Much larger penalties and successful prosecutions of company executives that oversee systemic fraud, including jail sentences if appropriate, are necessary to deter future unlawful behavior. Otherwise, these illegal but profitable activities will continue to be part of companies' business model.

Source: Public Citizen News Release

J&J, MERCK AND ENDO INVESTIGATIONS INVOLVE PHARMACY BENEFIT MANAGERS

Federal prosecutors in Manhattan have asked drugmakers including Johnson & Johnson, Merck and Endo for information regarding contracts with pharmacy benefit managers in connection with a False Claims Act (FCA) investigation. In its quarterly report filed with the U.S. Securities and Exchange Commission (SEC), J&J disclosed that its Janssen Pharmaceuticals unit received a civil investigative demand from the U.S. Attorney's office for the Southern District of New York asking for information about Janssen's contractual relationships with pharmacy benefit managers (PBMs) for unspecified products from January 2006 to the present. The demand was issued in connection with an investigation under the False Claims Act.

Merck & Co. Inc. disclosed a similar request by federal prosecutors, who wanted to know more about Merck's PBM

contracts, services and payments in connection with its Maxalt and Levitra drugs. Endo Pharmaceuticals Inc. said last month that prosecutors requested information regarding PBM contracts for its Frova treatment for migraines.

None of the three companies revealed in their respective SEC filings which pharmacy benefit managers they contracted with. Pharmacy benefit managers such as Express Scripts Inc. and CVS Health act as a third-party administrator of prescription drug programs for health plans, processing drug benefits, negotiating prices with drugmakers and operating mail-order pharmacies.

In October, Novartis Pharmaceuticals Corp. agreed to pay \$390 million to resolve the federal government's FCA allegations that it provided improper discounts and rebates to specialty pharmacies. The following month, the company made detailed admissions about its sales strategies with specialty pharmacies and agreed to sweeping federal oversight of its relationships with the controversial dispensers.

Novartis admitted to using various methods to create incentives for specialty pharmacies to increase sales of iron-reducing drug Exjade and immunosuppressant Myfortic. Specifically, Novartis admitted that it threatened to cut ties with at least one pharmacy that wasn't dispensing enough of its medicines. The drugmaker also acknowledged that it steered patients and bonus payments to specialty pharmacies based on their ability to generate refills, many of which were paid for by Medicare and Medicaid.

I have found that few people in the business world really understand how the pharmacy benefit managers operate. There is ample opportunity for the PBMs to use the current system for their financial benefit with little supervision over their activities. Kickbacks from drug companies to PBMs appear to be quite prevalent. If you are not familiar with PBMs, you should check out the legislature history and learn how they have become so powerful.

Source: Law360.com

V. LEGISLATIVE HAPPENINGS

DOES ALABAMA NEED A SPECIAL SESSION?

While there were a number of issues left over when the Alabama Legislature

completed the Regular Session last month, I don't believe Gov. Robert Bentley should call a Special Session unless a definite plan to address two specific issues is agreed upon in advance. First, it's abundantly clear that Medicaid must be properly funded. Too many mistakes have already been made in dealing with the Medicaid program to compound the problems by bringing the Legislators back to Montgomery without an agreed-upon plan to adequately fund the program.

I have mixed emotions about the proposed \$800 million bond issue to build new prisons. We have 16 existing prisons and the state should be able to bring them up to standards without having to build three new prisons at a tremendous cost. In my opinion, the state already has enough debt. I might add that a no-bid \$800 million construction project is sort of scary. Nevertheless, those in state government must deal with the prison problems. However, I am not sure a huge bond issue—without a bidding requirement—is the answer. My preference would be to work toward improving what we already have in place.

VI. COURT WATCH

U.S. SUPREME COURT REFUSES TO HEAR PHILIP MORRIS APPEAL

The U.S. Supreme Court has declined Philip Morris USA Inc.'s request to review an Oregon jury's \$25 million punitive damage award to the family of a woman who died of lung cancer. The tobacco giant had claimed that the verdict conflicted with a first jury's decision that the company was liable. The high court wasn't impressed with Philip Morris' argument that Oregon's partial retrial system had deprived the company of its right to due process after an Oregon appellate court threw out the first jury's \$150 million punitive damage verdict.

The initial verdict was based on two types of fraud. A new trial was ordered after the first verdict solely on the issue of the appropriate amount of punitive damages. The Oregon Supreme Court affirmed that decision, and a second jury then awarded \$25 million in punitive damages for fraud arriving from statements the company made about low-tar cigarettes.

Source: Law360.com

\$70 MILLION FAULTY CARPET RESIN VERDICT UPHELD BY FLORIDA APPEALS PANEL

A Florida appeals court has upheld a \$70.1 million judgment against Arizona Chemical Co. over defective carpet resin. The court found that Mohawk Industries Inc.'s evidence at trial was sufficient to justify the damages awarded. The First District Court of Appeal said Mohawk had provided plenty of evidence to show a spike in warranty claims for Mohawk carpets that used Arizona Chemical's Unibond resin was not just a coincidence. The three-judge panel said:

Mohawk did not argue simply that the coincidence of a claims spike with the use of Arizona's resin established causation. Mohawk argued that other factors, such as the history of Unibond claims and the lack of any significant change to the product other than the manufacturer of the resin during the relevant time period, combined with the claims spike to suggest that the resin was to blame.

Arizona Chemical had begun supplying Mohawk and Aladdin Manufacturing Corp. with pine-based resin in 2005. In subsequent years, Mohawk noticed an increase in warranty claims related to the carpeting. The carpets' backing deteriorated, causing unraveling of edges, backing delamination and offensive odors, according to court documents. Mohawk notified Arizona Chemical of the problem in 2008 and stopped using the company's resin before suing in 2011.

In March 2014, a Jacksonville jury returned a \$70.1 million verdict against Arizona Chemical that comprised \$32.3 million for future lost profits, \$16.9 million for warranty claims and \$20.9 million for past costs incurred by Mohawk for warranty claims and carpet that was sold at a discount or destroyed. This was the largest "commercial" jury award in Florida in 2014.

In a separate appeal, Arizona Chemical had asked the First District to slice nearly \$15 million in prejudgment interest from the verdict—which now totals \$93 million—arguing that the clock on interest should start when Mohawk discovered the problem, not on the date the resin was delivered. Arizona Chemical argued that the damages should be calculated from the date Mohawk had to pay customer warranty claims or discard the carpet, which at that point was several years after Arizona Chemical supplied the resin.

Excess insurer XL Insurance America Inc. sued other insurers in the Middle District of Florida to escape having to cover

the verdict. XL is asking the court to rule that Commerce and Industry Insurance Co. and National Union Fire Insurance Co. of Pittsburgh, Penn., are obligated to cover the judgment against Arizona Chemical under their umbrella policies.

Source: Law360.com

CLAIM ADJUSTER'S DOCUMENTS NOT PRIVILEGED IN BUS CRASH LAWSUIT

The Pennsylvania Superior Court has ruled that records generated by a claims adjuster for Greyhound Lines Inc. were not protected by attorney-client privilege. The ruling was in litigation over a bus crash that injured 42 people. The panel affirmed three trial court orders obligating Greyhound and its adjuster to turn over documents and a fourth order pertaining to a videotaped practice deposition of the bus driver involved in the accident. That decision followed an in camera review of thousands of documents submitted to the court after a March 2015 discovery order.

The consolidated lawsuits are from a 2013 accident in which the Greyhound bus traveling from New York City to Cleveland rear-ended a tractor trailer that lacked operating headlights, taillights, hazard lights and reflectors. The truck's owners and operator are also named as additional defendants. Greyhound and its driver filed an appeal to the orders on the documents as did FirstGroup America, whom the plaintiffs say owns Greyhound. But both raised different issues.

Source: Law360.com

VII. THE NATIONAL SCENE

DEFECTIVE GUNS ARE NOT REGULATED

There is always lots of talk in corporate boardrooms about how the government overregulates and hurts businesses in this country. This is largely a myth created by Corporate America. Considering the source, I fully expect to hear that sort of thing. But I know based on our firm's experience in product liability litigation that the government not only doesn't overregulate, it actually does an inadequate job of regulation. There may well be a number of small businesses that believe that too much regulation hurts them. However, the regulation of such industries as the automobile industry, the chemical industry,

the oil industry and the drug industry is grossly inadequate and the health and safety of the consuming public is put at risk as a result. That makes the role of the judicial system extremely important.

However, there is at least one industry that is not only unregulated, but also enjoys a level of immunity that no other industry has. International Business Times reports, "Unlike virtually any other consumer product sold in the United States—from toasters to medical devices—the federal government has no authority to force the recall of potentially defective and dangerous firearms." There is no agency tasked with ensuring the product functions safely.

While there is a lot of emphasis on the Second Amendment "Right to Bear Arms," the freedoms granted by an unregulated gun industry are a double-edged sword for gun owners. Whether gun manufacturers choose to recall a firearm is entirely at their discretion. If they do, there is no mandatory protocol to follow to alert owners, and no official repository of recall notices. If a gun is defectively designed and unintentionally injures or kills someone, gun owners are left with little recourse to hold companies accountable outside the civil court system.

Experts can't pinpoint the exact number of deaths and injuries from defective firearms, because there is no national data that tracks it. But there were 215,422 non-fatal injuries from unintentional gunshots between 2001 and 2013, according to the Centers for Disease Control and Prevention (CDC). During that same period, 8,383 people died from unintentional shootings.

Just because a gun is inherently lethal doesn't mean it can't be designed in such a way that the odds are less that a person will be injured or killed unintentionally. For example, a gun shouldn't have a design flaw that allows the weapon to fire if dropped.

Technology also exists to create additional safety features, such as an indicator to allow a person to see if the gun is loaded with a round in the chamber; and for a magazine disconnect device that would prevent the gun from firing when the magazine is removed, even if there is a bullet in the chamber. Experts estimate these features would cost as little as \$1 for a manufacturer to add, and greatly enhance the weapons' safety. Yet, gun manufacturers still refuse to add them.

Gun manufacturers are not adding safety features because the public is not demanding them, through lobbying or litigation. Safety features in other industries, such as airbags in automobiles, were also initially balked at by manufacturers who

decried the cost. But with public outcry—and civil litigation—airbags are now standard features on automobiles.

But there is some promise. Under the terms of a pending class action settlement, Taurus International Manufacturing agreed to effectively recall nearly 1 million Taurus pistols. The lawsuit was filed by Iowa Police Officer Chris Carter, a deputy sheriff with the Scott County Sheriff's Office, who alleges his Taurus PT 140 fired when it fell to the ground during a drug sting. No one was injured, but the gun shot out a car window, according to the complaint, which was filed in 2013 in the U.S. District Court for the Southern District of Florida.

The Taurus recall would include the PT 140 involved in Carter's case and others, as well as the PT 111, which is one that the company's former CEO admitted during his testimony at a jury trial six years ago could fire when dropped. Since 2005, at least 13 people have been injured in similar incidents involving various models of Taurus handguns, and an 11-year-old boy was killed.

Taurus' concession in the case is a legal landmark for a gun company operating in the U.S., but the company continues to deny allegations that its guns have defects. In a statement provided to the International Business Times, Tim Brandt, director of marketing for Taurus Holdings Inc., said, "We are unable to comment at this point in the Carter settlement process, which has received preliminary court approval, or on other pending litigation at this time."

The pending Taurus settlement, which is scheduled for a final review in January, is only the second proposed class action settlement with a U.S. gun manufacturer in which the company effectively agreed to a recall. The other agreement is pending with Remington Arms, and would affect more than 7 million guns.

If guns are finally going to be subject to federal safety regulations, the next question is how that will be done, and by whom. Several times in the past, and most recently this year, legislators and advocates have suggested the U.S. Consumer Product Safety Commission (CPSC) would be the logical choice. The CPSC already monitors emergency room data to identify injury patterns, investigates consumer complaints and enforces companies' reporting requirements related to dangerous defects. It can sue businesses that violate safety regulations, and force them to recall defective products. Companies face fines and other penalties for violating safety standards.

However, others, such as the Violence Policy Center, argue adding guns and

ammunition to the CPSC's regulatory duties would overburden the already heavily overworked agency. Representatives from the Center say the duties would be better handled by the U.S. Justice Department.

Source: *International Business Times*

VIII. THE CORPORATE WORLD

CITIBANK TO PAY \$425 MILLION IN SETTLEMENT

Citigroup Inc. has agreed to pay \$425 million to settle civil charges that it tried to manipulate interest rate benchmarks. In announcing the settlement, the Commodities Futures Trading Commission said Citigroup affiliates also made false reports in connection with ISDAFIX benchmark rates and dollar Libor rates during the financial crisis to protect its reputation. The CFTC accused Citigroup of trying to manipulate the benchmarks by certain traders putting in false data to benefit their own trading positions. The various actions occurred between 2007 and 2012.

With the Citigroup settlement, the CFTC said it has imposed more than \$5 billion in penalties in 17 actions against banks and brokers for manipulating benchmarks for interest rates and foreign exchange. The settlement is the latest in a series of ongoing international probes of global banks. Citibank has faced at least one larger regulatory settlement. In 2014, Citi agreed to pay the U.S. Justice Department \$7 billion to resolve claims it misled investors about the quality of mortgage-backed securities. The benchmarks included the U.S. dollar ISDAFIX for fixed interest rate swaps, the Yen Libor and the Euroyen Tibor.

Banks use the London Interbank Offered Rate (Libor) and Tokyo Interbank Offered Rate (Tibor) to set the cost of borrowing from each other. Libor is often used to set rates on such things as credit cards and mortgages.

Source: Reuters

SEVEN BANKS AGREE TO PAY \$324 MILLION IN SETTLEMENT

Bank of America Corp., Citigroup Inc. and JPMorgan Chase & Co. were among seven banks that have agreed to pay a total of \$324 million to settle class action litigation alleging that they rigged a benchmark

interest rate used to set terms for swaps transactions. The banks, which lost a motion to dismiss the complaint in March, also agreed to cooperate with lawyers for the Plaintiffs in further investigation of manipulation of the so-called ISDAfix, a tool that determines valuations for interest rate derivative products. The cooperation feature is potentially significant because 15 Defendants that have been sued over alleged ISDAfix manipulation have pending cases.

According to the Plaintiffs, who filed suit in September 2014, the banks worked closely with interdealer broker ICAP PLC, which until January 2014 was tasked by the International Swaps and Derivatives Association with managing the daily setting of the U.S. dollar-rate version of ISDAfix. The banks were responsible for submitting rate quotes, which ICAP essentially adopted. The suit alleges that the parties worked together to set the rate at the point where it was most profitable for them, including engaging in a process known in the industry as "banging the close" where they bought and sold derivative products just before the fix was closed in order to get the price they wanted.

JPMorgan agreed to pay \$52 million to settle the case while Bank of America, Credit Suisse AG, Deutsche Bank AG and The Royal Bank of Scotland PLC each agreed to pay \$50 million. Citigroup agreed to a \$42 million payout and Barclays PLC will pay \$30 million to resolve the claims, the Plaintiffs said. Barclays had already paid \$115 million last May to settle claims brought by the U.S. Commodity Futures Trading Commission (CFTC) related to alleged ISDAfix rigging.

Class action lawsuits are still pending against BNP Paribas SA, Goldman Sachs Group Inc., HSBC Bank PLC, ICAP Capital Markets LLC, Morgan Stanley, Nomura Securities Inc., UBS AG and Wells Fargo & Co.'s Wells Fargo Bank NA unit. The CFTC and other regulators are reportedly continuing their investigation into allegations of manipulation of the ISDAfix.

The CFTC has reportedly referred the case to the U.S. Department of Justice for an investigation into potential criminal activities. U.S. District Judge Jesse M. Furman noted that many of the claims made by institutional investors related to alleged manipulation of the ISDAfix looked very much like those made against banks in litigation related to the London Interbank Offered Rate (Libor) and other financial benchmarks. Judge Furman rejected the banks' motion to dismiss in March, writing:

It appears that that sort of rate manipulation can be economically

sensible and feasible given that many banks (including some defendants) have admitted that, in approximately the same period of time, they conspired to rig similar benchmark rates—namely, Libor and the leading benchmark interest rate for the foreign exchange market—in order to maximize profits.

The Plaintiffs alleged that the conduct came to a halt once the subpoenas arrived, an assertion that Judge Furman said strengthened their claims. The Plaintiffs are represented by lawyers from Scott & Scott LLP; Quinn Emmanuel Urqhart & Sullivan LLP; Robbins Geller Rudman & Dowd LLP; Grant & Eisenhofer PA; Bernstein Liebhart LLP; Carella Byrne Cecchi Olstein Brody & Agnello PC; Labaton Sucharow LLP; Trief & Olk; Berger & Montague PC, McCulley McCluer PLLC; and Fine Kaplan & Black RPC. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

CITIBANK FIGHTS OBJECTORS TO \$2 BILLION FOREX SETTLEMENT

Citibank NA has urged a New York federal court to reject two settlement class members' bid to modify a \$2 billion settlement over alleged foreign exchange (forex) market manipulation. The bank contends the settlement properly releases claims involving undisclosed transaction charges. In a letter to U.S. District Judge Lorna G. Schofield, Citibank said that an objection filed by traders Eduardo and Gervasio Negrete in April improperly seeks to exclude claims related to undisclosed markups the bank charged for transactions. Not only are the claims appropriately covered by the forex manipulation settlement, but also the objection has come too early, Citibank said.

Citibank is part of a \$2 billion agreement between investors and nine banks that was preliminarily approved in December to settle allegations that they engaged in a broad scheme to rig the \$6 trillion foreign exchange market. JPMorgan Chase & Co., Barclays PLC, HSBC Holdings PLC, The Royal Bank of Scotland PLC, Goldman Sachs Group Inc., BNP Paribas SA, UBS AG and Bank of America Corp. are also parties to the settlement. Citibank agreed to pay about \$400 million in the settlement.

The forex manipulation settlement has also drawn the ire of some employee retirement funds contending their claims under the Employee Retirement Income

Security Act (ERISA) were not properly addressed in the settlement. Plan participants have filed an amended complaint including ERISA claims; however, the banks have said the settlement deals with the same underlying actions as those claims as well. Both the antitrust case and the markup case are in the U.S. District Court for the Southern District of New York.

Source: Law360.com

SIXTEEN BIG BANKS TO FACE REVIVED LIBOR ANTITRUST SUIT

The Second Circuit Court of Appeals has revived an antitrust lawsuit against 16 big banks, including Citigroup, JPMorgan Chase and Bank of America. It's alleged the banks rigged the London Interbank Offered Rate (LIBOR). A three-judge Second Circuit panel ruled that Manhattan U.S. District Judge Naomi Reice Buchwald was wrong when she dismissed the complaints against the banks on the grounds that the Plaintiffs had failed to allege injury under antitrust law. The panel instead found that the proceedings should be reopened because antitrust law does not require that Plaintiffs show injury in order to effectively allege a conspiracy among market participants. The opinion, written by Judge Dennis Jacobs, reads:

Since the district court did not reach the second component of antitrust standing—a finding that appellants are efficient enforcers of the antitrust laws—we remand for further proceedings on the question of antitrust standing.

The Second Circuit panel said that the Plaintiffs had sufficiently alleged both a violation of antitrust law and antitrust injury in a series of complaints alleging that the 16 banks, including Barclays PLC, Credit Suisse AG and UBS AG, engaged in a wide-ranging, horizontal conspiracy to rig the LIBOR, a key benchmark interest rate that is used to set rates for everything from derivatives contracts to mortgage rates and credit card interest rates. Barclays, UBS and the Royal Bank of Scotland PLC all entered into criminal plea agreements with U.S. authorities over LIBOR manipulation claims. RBS is also a party to the litigation before the Second Circuit.

Prior to the alleged rigging of the rate coming to light, LIBOR was set by the British Bankers Association (BBA), which would collect borrowing cost estimates from participating banks and then calculate an average of the costs, eliminating the highest and lowest estimates. It should

be noted that BBA no longer conducts the LIBOR calculations. The Plaintiffs alleged that the banks began in 2007 to lowball their borrowing costs in a bid to shield themselves from worries that they were being charged high rates to borrow money.

The fear was that, in the wake of the financial crisis, a higher borrowing cost reflected worries that a bank would be unable to repay any short-term debt they acquired, which could further destabilize their financial positions. The Second Circuit said that Judge Buchwald incorrectly ruled that the Plaintiffs failed to allege injury in the lower court's March 2013 decision.

Although the market participants retained the power to negotiate financial contracts, the rates from which they negotiated were artificially set due to the banks' actions to falsify their borrowing cost estimates, the opinion said. Because of that, the consumers, investors and municipalities on the other side of contracts with the banks were potentially harmed, the Second Circuit said. The opinion stated:

The Sherman Act safeguards consumers from marketplace abuses; appellants are consumers claiming injury from a horizontal price-fixing conspiracy. They have accordingly plausibly alleged anti-trust injury.

The panel also found that Judge Buchwald did not take stock of the question of whether the Plaintiffs would be an "efficient enforcer" of the antitrust statute, the second component that would need to be decided for the decision to move forward. The judges on the panel instructed Judge Buchwald to explore that question. Despite the clear win for the Plaintiffs in getting the case revived, the Second Circuit panel cautioned that it was not making a dispositive ruling that antitrust injury had occurred. Instead, the panel merely found that the Plaintiffs had met the bar for their claims to be heard in court. The opinion said further:

This decision is of narrow scope. The net impact of a tainted LIBOR in the credit market is an issue of causation reserved for the proof stage; at this stage, it is plausibly alleged on the face of the complaints that a manipulation of LIBOR exerted some influence on price. The extent of that influence and the identity of persons who can sue, among other things, are matters reserved for later.

This case as it goes forward will be watched closely. In any event, at this juncture, it's a big win for the plaintiffs.

Source: Law360.com

\$150 MILLION "LONDON WHALE" SETTLEMENT IS APPROVED

JPMorgan Chase & Co. will pay \$150 million to settle fraud allegations tied to its "London Whale" trading debacle, after U.S. District Judge George B. Daniels gave final approval to the class action settlement last month. Judge Daniels found that the settlement was "fair, reasonable and adequate" for the class of investors, saying the two objections had no merit. The settlement was placed into escrow in January and has been accruing interest since then. It was reported that an expert for the investors had estimated a maximum recovery at trial of about \$2 billion.

Apparently there was a risk that the Plaintiffs could establish that bank CEO Jamie Dimon and former finance chief Douglas Braunstein knew that they were making misleading statements during an April 2012 conference call. Dimon and Braunstein have maintained that they believed their statements to have been true when they were made, but the investors have argued the opposite. None of the institutional investors, which held about 76 percent of the stock during the class period, objected to the settlement. Anyone who bought JPMorgan common shares between April 13 and May 21, 2012, will be part of the settling class.

The suit was filed in 2012, and in 2014, during motions to dismiss, Judge Daniels reduced the scope of the case by dismissing three individual defendants and limiting the investors' claims to statements made by Dimon and Braunstein during the conference call. During that call, Dimon, addressing reports of the losses, called the matter "a complete tempest in a teapot."

Other "London Whale" civil suits—which use the name given to Bruno Iksil, the former JPMorgan trader whose bets caused the losses—have been dismissed, including employee pension and derivative claims against the bank. The bank itself settled with U.S. and United Kingdom regulators in 2013.

Source: Law360.com

B. BRAUN MEDICAL ADMITS TO TAINTED SYRINGE SALES

B. Braun Medical, a drug and device maker, has admitted wrongdoing and will

pay up to \$7.8 million to avoid criminal charges related to the distribution of contaminated saline syringes. The U.S. Department of Justice (DOJ) announced the settlement, which included a non-prosecution agreement last month. The payout includes \$3.8 million in forfeitures, a \$1 million civil penalty and up to \$3 million in restitution for patients who were “directly and proximately harmed” by bacteria-laced saline produced by North Carolina-based AM2PAT Inc. and sold by Germany-based B. Braun.

Although B. Braun did not manufacture the syringe products, it sold them under its name and was responsible for taking certain steps to ensure the products were safe. The company failed to adequately oversee quality control and therefore could have faced criminal liability under the Federal Food, Drug and Cosmetic Act for distributing tainted products, the DOJ said. Benjamin C. Mizer, head of the DOJ’s civil division, said:

Companies must take reasonable steps to ensure that their suppliers are making quality products that help rather than harm patients. Today’s settlement shows that the government will continue to hold companies accountable for failing to fulfill this critically important responsibility.

The improper manufacturing and sales stretch back almost a decade. Two employees of AM2PAT ultimately received 54-month prison sentences for fraud. Reportedly, the company’s former president, Dushyant Patel, a wanted fugitive, is still on the run. He is believed to have fled the United States. B. Braun’s nonprosecution agreement says that AM2PAT used “dirty and filthy equipment” to manufacture sterile syringes that are used to flush out medical devices, such as catheters. On several occasions, the agreement said that AM2PAT falsified data and hid its wrongdoing from B. Braun. The agreement also contains elaborate detail on B. Braun’s admitted conduct.

On repeated occasions, company employees are described as raising concerns about AM2PAT and being alerted to suspicious products but failing to follow through, sometimes amid the backdrop of overdue syringe orders from customers. The agreement revealed the following:

For example, B. Braun in 2006 conducted an on-site audit of AM2PAT to confirm remedial actions in the wake of a warning letter issued by the U.S. Food and Drug Administration (FDA). However, B. Braun’s auditor signed off on the remedies

without even viewing AM2PAT’s manufacturing operations. In 2007, B. Braun began selling syringes without visiting or auditing AM2PAT’s new manufacturing plant. B. Braun ultimately received numerous complaints about saline tainted with orange or black particles and brownish saline that “looked like it contained water from the Hudson River.”

B. Braun is agreeing to an array of compliance actions. The agreement includes the following:

improved vetting and monitoring of suppliers, stronger tracking of customer complaints, enhanced training of auditors and annual certifications of the stepped-up compliance by B. Braun’s CEO. The compliance obligations will last for 30 months, although an extension or early termination are possible depending on B. Braun’s adherence.

In a statement, a B. Braun spokesperson said that the events occurred almost a decade ago and that the company is “fully committed to ensuring patient safety.” The government is represented by Benjamin C. Mizer, John Stuart Bruce, Michael S. Blume, Felice M. Corpening, Allan Gordus, Shannon L. Pedersen and Evan Rikhye of the U.S. Department of Justice.

Source: Law360.com

IX. WHISTLEBLOWER LITIGATION

CFTC WHISTLEBLOWER PROGRAM GAINS MOMENTUM WITH \$10 MILLION WHISTLEBLOWER AWARD

The Director of the Whistleblower Office for the U.S. Commodity Futures Trading Commission (CFTC) wants to strengthen the agency’s whistleblower program. Christopher Ehrman, who left the U.S. Securities and Exchange Commission (SEC) in 2013 to lead the CFTC’s whistleblower program, recently told the *National Law Journal* that he is “committed to doing everything I can to protect whistleblowers.”

Both the SEC and the CFTC have whistleblower programs that allow whistleblowers to receive up to 30 percent of monies recovered by the government based on the whistleblower’s original information. The SEC has awarded 21

whistleblowers to date, while the CFTC has awarded only three. There are signs, however, that the CFTC may be catching up. In April, the CFTC approved a payout of more than \$10 million to a whistleblower who provided key information that led to a successful CFTC enforcement action. The identity of the whistleblower and the name of the company penalized were not disclosed in that case. Ehrman, in a press release, stated:

The Whistleblower Program is working. My hope is that this multi-million dollar award will encourage others to come forward with information that will assist the Commission in protecting our markets.

The CFTC’s Whistleblower Program was created by section 748 of the Dodd-Frank Act. The CFTC pays monetary awards to eligible whistleblowers who voluntarily provide the CFTC with original information about violations of the Commodity Exchange Act (CEA). Under the Dodd-Frank Act, employers may not retaliate against whistleblowers for reporting violations of the CEA to the CFTC. In general, employers may not discharge, demote, suspend, threaten, harass, or discriminate against a whistleblower because of any lawful act done by the whistleblower.

According to Ehrman, the CFTC’s whistleblower program is gaining momentum. He told the *National Law Journal*:

My sense is that you’re going to see a lot more frequent awards than in the past. They used to be every year. I think we’re going to step that up. Certainly we’ll be doing more than one a year.

Lawyers at Beasley Allen handle whistleblower cases involving violations of the federal False Claims Act and related state statutes, as well as cases under the IRS, SEC, and CFTC whistleblower programs. For more information on our firm’s whistleblower practice, contact Archie Grubb (Archie.Grubb@BeasleyAllen.com) at 800-898-2034.

Sources: www.CFTC.gov and www.nationallawjournal.com

THE FALSE CLAIMS ACT WILL HAVE INCREASED PENALTIES

The United States Department of Justice (DOJ) announced that there will be increased penalties under the federal False Claims Act, is a powerful tool in the government’s war against fraud. As we have stated on numerous occasions, the False

Claims Act incentivizes integrity by empowering ordinary citizens to blow the whistle on fraud committed against the United States government.

The text of the False Claims Act provided for penalties not less than \$5,000 and not more than \$10,000. The Department of Justice later increased that range to \$5,500 to \$11,000, and now the range has been adjusted once again. On May 2, the Department of Justice published the new penalty range for False Claims Act violations, which now provides for penalties not less than \$10,781 and not more than \$21,563. This new increase takes effect this year on August 1, and will last until Jan. 1, 2017. After Jan. 1, 2017, the penalties are indexed to increase annually to keep pace with inflation. These new penalties will be published in the Federal Register on an annual basis on or before Jan. 15 of each calendar year.

The False Claims Act is like a watchdog against fraud, and the penalties are the teeth. With these long-overdue penalty increases, the teeth are now twice as sharp as before. The new penalties serve to protect citizens and the government in three ways:

- First, there is a correlation between penalties and the tax pool. When an unscrupulous person or corporation defrauds the government, they steal from our tax pool. They are depleting monies gathered to fund our health care, our defense, and other benefits our tax dollars afford us. Higher penalties for committing fraud help replenish the tax pool.
- Second, these new penalties deter others from committing fraud against the government. Fraudulent acts committed many times over, such as improper billing, coding, or documenting of medical procedures, may result in penalties in the millions of dollars.
- Third, the False Claims Act provides incentives for citizens to step forward and blow the whistle on fraud. These incentives include 15 to 30 percent of the funds recovered by the government. Larger penalties equal larger rewards for whistleblowers. These larger rewards will incentive whistleblowers to remain vigilant, which is a win-win situation for taxpayers and the government. Whistleblowers receive larger rewards while the tax pool is more adequately recompensed.

If you are aware of fraud being committed against the federal government, or a state government, you should report it. The False Claims Act and other laws can

protect and reward individuals for doing the right thing by reporting fraud. If you have any questions about whether you qualify as a whistleblower, or need more information about the FCA, you can contact a lawyer at Beasley Allen for a free and confidential evaluation of your potential claim. There is a contact form on our firm's website, or you can email one of the lawyers on our whistleblower litigation team: Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier at 800-898-2034 or by email at ArchieGrubb@beasley-allen.com, Larry.Golston@beasleyallen.com, LanceGould@beasleyallen.com or AndrewBrashier@beasleyallen.com.

HOLLISTER AND BYRAM TO PAY \$21 MILLION IN FCA KICKBACKS CASE

Medical product maker Hollister Inc. and medical product supplier Byram Healthcare Centers Inc. have agreed to pay a combined \$21 million to settle whistleblower allegations that they violated the False Claims Act (FCA) by carrying out a years-long kickback scheme involving catheters and colostomy bag accessories. According to the U.S. Department of Justice (DOJ), the payouts include almost \$11.5 million from Hollister and almost \$9.5 million from Byram. This settlement resolves an FCA case brought in Massachusetts federal court by three employees of Coloplast Corp., a manufacturer, also named in the suit. That company agreed to pay a \$3 million settlement in December.

The settlement agreements released described allegations of misconduct over a period from 2007 to 2014. It was claimed in the case that Hollister bribed Byram to promote its medical products, in violation of prohibitions on kickbacks in Medicare and Medicaid. Benjamin C. Mizer, head of the DOJ's civil unit, said in a statement:

We will not permit such illegal payments to taint the decision-making of those who serve the beneficiaries of these important programs.

The companies allegedly reached an agreement in 2007 under which Hollister would pay Byram for the costs of cash incentives given to its sales representatives for every new order of Hollister barrier rings and strips. In 2012, the companies allegedly reached another agreement under which Hollister paid cash incentives for the Byram vice president who presided over the largest annual revenue growth for Hollister catheters. And from 2009 to 2014, Hollister paid \$200,000 per year in "catalog funding" to

incentivize Byram's recommendation of its products, according to the settlement agreement. The company entered a five-year corporate integrity agreement as part of the settlement.

The complaint was brought by three whistleblowers: Kimberly Herman, a Minnesota resident and former Coloplast president; Kevin Roseff, a Florida resident and former Coloplast director; and Amy Lestage, a Massachusetts resident and Coloplast manager. Herman and Roseff say that they were fired for objecting to kickbacks, and Lestage says that she was placed on leave for joining the FCA case.

The suit alleges kickback arrangements that spanned much of the industry for continence care and ostomy goods. In addition to Hollister, Byram and Coloplast, a supplier called Liberator Medical Supply Inc. has also agreed to a settlement in the case. Liberator agreed to pay \$500,000 last year. A number of other companies have been parties to the litigation, and certain allegations—including claims of retaliation by Coloplast—are still being litigated.

The federal government is represented by George B. Henderson II, Kriss Basil and Jay Majors of the U.S. Department of Justice, and Robert K. DeConti of the Office of Inspector General at the U.S. Department of Health and Human Services. The relators are represented by Paul W. Shaw and Taylor R. Neff of Verrill & Dana LLP, and Jeffrey E. Marcus of Marcus Neiman & Rashbaum LLP. The case is in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

MERCK AND GENENTECH SAID TO HAVE SOLD UNAPPROVED DRUGS

Merck Serono S.A., Genentech and other drug manufacturers are facing quit tam claims that they illegally received reimbursements from the government for unapproved vaccines and other biologic drugs. The False Claims Act (FCA) suit was unsealed last month in a New York federal court. The complaint alleges that Merck Serono S.A., Genentech Inc., Amgen Inc., Bayer Schering Pharma AG, Bristol-Myers Squibb and a number of other companies put patients at risk by conspiring with pharmacies and drug-packaging companies to repackage drugs with excess product in violation of approved labeling.

John F. Underwood, the relator, a former sales representative for Merck and Genentech, said the manufacturers entered into a scheme to overfill vials and pre-filled syringes with extra liquid solution or powder up to and exceeding the authorized amount. The overfill was alleg-

edly marketed to health care providers as a free dose that can be repackaged and billed to U.S. taxpayers. Underwood claimed the allegedly repackaged drugs weren't eligible for coverage and reimbursement. The complaint says:

Although expansive in scope, the fraudulent scheme is straightforward. With the knowledge and participation of defendant health care providers and manufacturers, defendant repackagers unlawfully manipulated the licensed biologic drugs by repeatedly entering single-use and multi-use vials, extracting and/or pooling the overfill, and repackaging the product into smaller doses that are relabeled and replaced in interstate commerce for delivery to health care providers.

Biological products, or biologics, are a virus, vaccine, blood component or cure of cancer, anemia, multiple sclerosis and other diseases or conditions, according to the FCA suit. The biologics at issue in the suit are liquid and powder formulations that are intravenously infused or administered by injection in patients. Biologics are highly regulated, and their manufacture requires a valid biologics license, the complaint said. The U.S. Food and Drug Administration allegedly only approves a biologics licensing application after a showing that the biologic is safe, pure and potent and that it is made in a safe and effective manner.

Moreover, if a drug manufacturer contracts with another facility to package or repack its products, the manufacturer must ensure that the repackager complies with certain standards, according to the complaint. Underwood claimed he has more than 30 years' experience in marketing biologic and conventional drugs. He allegedly started working for Merck in 1972 and for Genentech in 1986, leaving the latter company in February 2005. The relator filed his sealed complaint in May 2010.

The complaint also names Johnson & Johnson, Genetech, Teva Pharmaceutical and Kaiser Permanente, among other Defendants. Underwood said that, during his time at Genetech, he discovered that the drug companies, pharmacies and pharmaceutical repackagers were conspiring to unpack, divide, repack and relabel unlicensed biological drug, resulting in the adulteration and misbranding of products that were later administered to patients. It was alleged in the suit:

As a result of the acts and practices described herein, defendants sub-

jected patients to increased risks of morbidity and mortality.

Underwood further accused the manufacturers and health care providers of receiving kickbacks as part of the alleged scheme. He said the defendants violated state FCA laws by submitting false claims through various state Medicaid and other health care programs in California, Illinois, New York and other states. The suit sought up to \$11,000 for each alleged violation of federal anti-kickback laws, in addition to other relief.

The relator is represented by Andrew M. Beato, Robert F. Muse, Joshua A. Levy and Kerrie C. Dent of Stein Mitchell & Muse LLP. The case is in the U.S. District Court for the Eastern District of New York.

Source: Law360.com

UPSCALE FURNITURE SELLER AGREES TO PAY \$15 MILLION TO SETTLE REVERSE FCA ALLEGATIONS

The Department of Justice (DOJ) announced last month that Z Gallerie LLC has agreed to pay \$15 million to resolve a lawsuit filed under the False Claims Act (FCA). It was alleged in the lawsuit that Z Gallerie was committing "reverse false claims" by making false statements concerning furniture imported from the People's Republic of China, thereby evading customs duties. The FCA contains a reverse false claims provision that makes it unlawful for one to "knowingly make, use, or cause to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceal or knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G).

Reverse false claims are different from other false claims. That's because, unlike the typical false claim where one falsely claims federal or state funds, the reverse false claim arises when one makes false statements in order to avoid paying monies owed to the government. The complaint alleged in this case that Z Gallerie was classifying wooden bedroom furniture, such as dressers and chests, as non-bedroom furniture, such as a hall chest, in order to avoid the antidumping duties on imported wooden bedroom furniture. Because the obligation to pay duties on imported wooden bedroom furniture from the People's Republic of China existed before and outside of the false statement, the reverse false claims provision of the FCA applied.

The Department of Commerce (DOC) publishes orders detailing the antidumping duties, including the antidumping order concerning wooden bedroom furniture imported from the People's Republic of China. 70 FR 329-01. These antidumping duties protect domestic manufacturers against foreign manufacturers dumping their products into the American market at prices below cost. Companies that import and sell foreign goods are required to obey the orders published by the DOC, especially the orders designed to protect our domestic companies from unfair competition. The allegations against Z Gallerie were brought by Kelly Wells, an e-commerce retailer of furniture, under the whistleblower provision of the FCA.

Sources: U.S. Department of Justice

WHISTLEBLOWERS WIN IN U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

The U.S. Court of Appeals for the Fourth Circuit ruled last month in favor of a corporate whistleblower in a case filed under the Sarbanes-Oxley Act. Mrs. Dinah R. Gunther, a former employee, alleged that the Virginia-based software provider, Deltek, Inc., fired her after she raised accounting concerns to the company's General Counsel, Audit Committee and the U.S. Securities and Exchange Commission (SEC).

The U.S. Department of Labor originally reviewed the claim and ruled in Mrs. Gunther's favor, ordering the company to pay substantial damages, including back pay with benefits and four years of front pay. Subsequently, the company filed various appeals.

In ruling for Mrs. Gunther, the Court determined that she was "entitled to be returned to the identical financial position she would have occupied had she not been terminated unlawfully for protected whistleblowing." The Court also made important findings upholding the Department of Labor's rulings on removal of company documents and surreptitious tape recording in the context of a whistleblower case. The Court noted that "Gunther's effort to protect selected relevant documents from what she reasonably believed was a risk of destruction" was reasonable. Stephen M. Kohn who argued before the Court of Appeals on behalf of Mrs. Gunther stated:

This is a great day for whistleblowers. Employees who risk their jobs to report wrongdoing must be assured that they will not suffer financial retribution. Mrs. Gunther is a hero. With the support of her husband

and her family, she stood up to a corporate giant, and vindicated her right to disclose potential violations of law. She has fought this case since her illegal termination on October 27, 2009. A long and painful journey.

The whistleblower, Dinah Gunther, had this to say:

This has been both the simplest and most difficult journey I've made. Simple because I believe I did the right thing by reporting potential wrongdoing; difficult because Deltek mounted forceful defenses that took a toll on my career and family. I am grateful that the trial judge ultimately found Deltek's defenses lacked merit. I think of King David, who as a shepherd boy faced Goliath, a giant who in every measure—save one—had the advantage over David. What David had over Goliath was unshakable faith. Standing on faith, David stopped Goliath with a simple smooth stone. Throughout this process, my faith never wavered, and today I feel like I am the stone that stopped the giant.

I agree that Mrs. Gunter is a hero. She is an inspiration to all persons who simply want Corporate America to do the right thing and play by the rules. When that doesn't happen, corporate wrongdoers must be held accountable. The False Claims Act is a valuable tool that is available to help make that happen.

Source: *Corporate Whistleblowers News*

X. CONGRESSIONAL UPDATE

WILL THERE BE A POLITICAL MARRIAGE INVOLVING GOP MEMBERS OF CONGRESS?

The biggest news coming out of Congress recently has been the dilemma faced by GOP members of the House and Senate who are facing reelection this year. Having to run on a ticket led by "The Donald" seems to have lots of them very much concerned. While several have endorsed Trump, some have tried their best to dodge him. Frankly, I believe all of them on the GOP ticket are stuck with Trump.

I doubt seriously that more than a handful of the members of Congress approve of Trump's candidacy. When you

get down to it, The Donald's campaign has been largely run based on the not-too-stellar performance of Congress. In effect, Trump is running against Congress, and now he wants the GOP members of the House and Senate to join his campaign.

The old saying that "politics makes strange bedfellows" certainly seems to apply to the Trump bandwagon effect. It will be most interesting to see how these "arranged marriages" work out. Things have a way of changing quickly—sometimes overnight—in politics. I have to wonder when the Trump voters will start to look at their candidate's history. When—or I should say if—they do, The Donald could see a very fast drop in popularity. Stay tuned!

XI. PRODUCT LIABILITY UPDATE

STRONGER UNDERRIDE GUARDS ARE NEEDED TO PREVENT DEADLY TRUCK UNDERRIDE CRASHES

The Insurance Institute for Highway Safety (IIHS) recently held an all-day conference at its Vehicle Research Center in Ruckersville, Va., on the issue of deadly truck underride crashes. The topic of discussion at this conference, attended by trucking industry executives, government officials and safety activists, was that big trucks need improved underride guards.

In an underride crash, a passenger vehicle crashes into a tractor-trailer truck or straight truck from behind or from the side and jams underneath the truck, flattening the passenger compartment and injuring or killing the vehicle's occupants. Underride can also happen when bicyclists, pedestrians and motorcyclists slide under the body of a truck and are in danger of being run over. There are federal regulations in place that require trailers and some straight trucks to be equipped with rear underride guards, which are bars that hang down on the back of the truck and trailer. In fact, regulations requiring modest underride guards have been in place in the U.S. since 1953. However, the National Highway Traffic Safety Administration (NHTSA) is currently considering a new standard for the guards; a stronger underride guard.

As a demonstration, IIHS, an insurance industry trade group, crash-tested a latest-design Stoughton trailer, slamming a 2010 Chevrolet Malibu into the back of the trailer hooked to a semi-tractor and laden with 34,100 lbs. The collision occurred at

35 mph, the speed at which federal regulations require that a vehicle is strong enough so that its occupants survive a crash. The test was successful in that the newly designed rear underride guard did not intrude into the passenger compartment, therefore making the crash survivable.

The main change to the bars would be four supports across the horizontal bar instead of the current two. The new bars are on the outer ends of the bar, and all are fastened to a more robust undercarriage. Currently, Manac, Vanguard, Wabash and Stoughton trailers pass the institute's crash test; however, Great Dane, Hyundai, Strick and Utility do not. One manufacturer says the fix is easy, doesn't add a lot of extra weight and is not expensive—costing only \$20. The National Highway Traffic Safety Administration believes the fix is much costlier than this. However, IIHS disputes that and disagrees with the agency. Regardless, the cost and extra weight should not be an undue burden for independent owners-operators.

There was also discussion at the conference that semi-trailer side skirts, currently used for fuel-saving streamlining, could be made more rugged to also serve as underride prevention devices in side crashes. Many cities are putting side guards on their trucks to protect pedestrians, bicyclists and motorcycle riders. These are further steps taken in the right direction to decrease the number of people who are killed each year in underride accidents.

Our firm has successfully handled a number of underride cases over the years for clients who lost loved ones in a crash. If you would like to have more information relating to the underride issue, contact Chris Glover, a lawyer in our Personal Injury / Products Liability Section, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com.

THE SAILUN S825 MEDIUM TRUCK TIRE HAS ISSUES

Lawyers in our firm are handling an increasing number of tire cases involving the failure of tires made in China. American consumers have faced numerous issues with Chinese products including lead-laced toys, tainted toothpaste and pet food recalls. However, the problems with Chinese products are emerging with greater frequency and a major area of concern involve tires. The tires on a vehicle are part of the vehicles and are amongst the most important. One of the most important safety features on an automobile is its tires.

China is currently sending nearly 65 million tires a year into the U.S. and that number is increasing. Many Chinese tire manufacturers have come under attack recently for making substandard and unsafe tires available for sale in the United States. Furthermore, some Chinese manufacturers have been the subject of recalls by many state attorneys general and the Federal Trade Commission (FTC).

While there have been numerous Chinese tire brands which have been scrutinized, some of the brand tires which have been recalled for safety defects include Westlake Tires, AKS Tires, Telluride tires and Compass Tires. All of these tires are made by the China-based Hangzhou Zhongce Rubber Company and all lack the most basic of tire safety features, such as bead wedges and capplies, which are state-of-the-art in the tire industry today.

Another Chinese tire that our lawyers have found to be failing and causing injury to people is the Sailun S825, a medium truck tire. Our firm has just filed two cases against Sailun and their importers involving failures of the S825. One case in Mississippi involves the death of a retired military man who was working for Oktibeha County. He lost his life when the right front tire on the truck he was driving separated, causing the vehicle to become uncontrollable.

The other case is in North Carolina and it involves a truck driver, who suffered a disabling injury when the S825 failed on the truck he was driving for his employer. In fact, his employer bought 10 of the S285s from Sailun distributors and has had two other tires fail, causing injury to employees. The employer has removed all Sailun tires from service.

There is also another case pending against Sailun in Florida where several people were injured. We are aware of numerous other cases involving this tire. Interestingly, Sailun has recalled similar tires, but has not recalled the S825 involved in our cases.

In addition to the workers who continue to be at risk while operating cement and other trucks on our highways, all of us who share the roadways with these medium trucks equipped with S825 tires are also at risk of injury or death. When a tire fails on the front axle of a medium truck, such as a cement truck, the driver cannot control the truck and a 40,000-pound vehicle becomes a lethal weapon on the highway posing a risk for others.

Based on what we have seen so far, the tragic incidents caused by this defective tire are not over. Until these tires are recalled and gotten off the highways, people will remain at risk.

LUMBER LIQUIDATORS PAYS \$26 MILLION TO SETTLE INVESTORS' IMPORT SUIT

Lumber Liquidators Inc. has agreed to pay \$26 million to settle shareholder and derivative suits alleging the company misled investors regarding its importation of hazardous products that used illegally harvested wood from China. Lumber Liquidators will also pay \$1 million to settle a contract dispute with its ex-CEO.

The flooring manufacturer, which has faced a series of suits and actions over formaldehyde used in the glue to hold the imported composite flooring together, said in a U.S. Securities and Exchange Commission (SEC) filing that it will pay \$26 million and issue stock worth \$16 million under the terms of a settlement ending the proposed consolidated securities lawsuit.

The 8-K filing also said ex-President and CEO Robert M. Lynch had agreed to a general release of claims to cooperate with the company, and to certain restrictive terms regarding confidential information, non-competition and non-solicitation of its employees or customers.

Lumber Liquidators came under scrutiny when independent analysts began investigating the company, followed by federal regulators and journalists with "60 Minutes." The news program, in a March 2015 episode, purchased dozens of boxes of Chinese flooring from Lumber Liquidators stores in four states, and said that independent testing revealed that all but one of the samples surpassed the California limit for unsafe formaldehyde levels, with some going more than 13 times beyond the mark.

Plaintiffs in the securities lawsuit alleged the company was buying engineered and laminate flooring manufactured in China that contained and emitted dangerously high levels of formaldehyde, as well as wood that had been illegally harvested from protected forests in the Russian Far East, home to the critically endangered Siberian tiger and Far East leopard, which are both among the rarest animal species on the planet.

The U.S. Lacey Act bans trading in illegally sourced wood products imported in violation of foreign laws. The company's allegedly false statements led to its stock price soaring from \$19.17 to a high of \$115.44 in less than two years, but these values plummeted resulting in a "massive loss in shareholder value" when the company came under suspicion of violating the law, according to the Plaintiffs.

The securities filing also said Lumber Liquidators reached an agreement in principle last month to settle related derivative litigation. Under the terms of that settle-

ment, the company would adopt new stock holding guidelines and make other corporate governance changes, according to the filing.

Source: Law360.com

A \$11.5 MILLION VERDICT IN A DEATH CASE AGAINST R.J. REYNOLDS

A Florida jury returned a \$6.5 million verdict against R.J. Reynolds Tobacco Co. in punitive damages in a lawsuit brought by relatives of a chain-smoking registered nurse and addiction counselor who died of lung cancer. This is in addition to the \$5 million compensatory verdict awarded to the Plaintiffs a day earlier. The jurors awarded \$1 million to each of Dorothy Jane McCabe's five children, but found she was 70 percent responsible for her own death, while R.J. Reynolds bears 30 percent of the blame. McCabe began smoking as early as 12 years old and was a regular smoker by age 14. The evidence revealed that she smoked two to three packs per day for 53 years, always keeping a pack on her nightstand and often smoking outside instead of spending time with her family.

R.J. Reynolds claimed that McCabe's training as a health professional and addiction counselor made it unlikely she didn't know about the dangers posed by cigarettes. She was a registered nurse who attended nursing school immediately after high school and worked at Charity Hospital in New Orleans, where one of the nation's foremost anti-smoking cancer experts worked. Ms. McCabe also was a serious alcoholic who sought treatment to overcome her alcohol addiction and eventually helped run an addiction treatment program.

Ms. McCabe was diagnosed with lung cancer in 1995 and died the following year. The case is one of the thousands stemming from the landmark Engle class action against tobacco companies. The Florida Supreme Court had decertified the Engle class in 2006 and overturned a \$145 billion verdict, but allowed up to 700,000 people who could have won judgments to rely on the jury's findings to file suits of their own. Those findings include conclusions that smoking causes certain diseases and that tobacco companies hid the dangers of smoking.

Source: Law360.com

TONY GWYNN'S FAMILY SAYS TOBACCO COMPANIES ARE RESPONSIBLE FOR HIS DEATH

Family members of Baseball Hall of Famer Tony Gwynn have filed a wrongful death lawsuit in a California state court, alleging that a tobacco company lured him into an addiction to smokeless tobacco that made him an unwitting promoter of the products and eventually led to the ball-player's death in 2014. The suit, filed in California Superior Court by Gwynn's widow and two children, names the Altria Group—the parent company of Philip Morris USA and U.S. Smokeless Tobacco Co.—for its sale and marketing of smokeless tobacco products under brands including Skoal, Copenhagen and Happy Days. According to the complaint, Gwynn started using smokeless tobacco or “dip” at age 17 while in college after receiving free samples from the company. He used it throughout his 20-year Major League Baseball career.

Gwynn died in 2014 at age 54 from salivary gland cancer. It's alleged in the suit that Gwynn's addiction turned him into an unwitting promotional figure for the deadly products, especially in the eyes of young children, even though the company knew all along about their associated health risks but refused to admit them. The complaint states:

Collectively, the defendants are the companies and individuals that manufactured, adulterated and pushed on the public the tobacco products that led to Gwynn's death, all while falsely denying the products were dangerous or addictive and engaging in a worldwide campaign to continually recruit new underage users. This case seeks to hold them responsible for killing a baseball legend and a wonderful human being.

Gwynn started receiving free samples of smokeless tobacco products as a San Diego State University freshman and eventually became a “self-described ‘tobacco junkie’” who daily consumed as much as two cans of dip, the equivalent of four to five packs of cigarettes. Comparing this marketing tactic to the practices of illicit drug dealers, the family said the scheme was part of larger practice of the company, which they said purposefully targeted young people, athletes and African-Americans in efforts to promote addiction. The complaint says:

The only major difference between the marketing by defendants and other dealers is that defendants orchestrated their schemes from a

boardroom instead of a street corner. The tactic is basically the same.

After his 1982 debut with the San Diego Padres, Gwynn quickly became an extremely popular player because of his outstanding on-field performance and likable personality. He was a natural hitter and had a tremendous career. His constant use of tobacco products made him a marketing tool without his even knowing it. The complaint says:

Throughout his career, he was photographed and broadcast directly into countless homes across America, including in formats like baseball cards directed at children, complete with a distinctive dip visible in his lower right cheek and a distinctive round can of dip visible in his back pocket. Defendants received the benefit of this priceless advertising without Tony's knowledge, permission or compensation.

The company has known since the 1960s that smokeless tobacco could have devastating health effects, but worked to convince the public otherwise. The Gwynn family said the industry has now been forced to place warning labels on its products with the admission that they could cause oral cancer, but no such labels appeared when the all-star outfielder first received samples. And despite the labels, the family said that tobacco companies today continue to dispute the fact that dip is addictive and cancerous.

The complaint has claims for negligence, product liability, negligent misrepresentation and fraudulent concealment. In addition to Altria and its subsidiaries, the suit also names three individuals who marketed the products on the San Diego State campus while Gwynn attended school there and the operators of two ampm convenience stores where he purchased the dip. A lawyer for the Gwynns, David S. Casey, Jr., told Law360.com that the suit is meant to remind people about the dangers of smokeless tobacco. Casey had this to say:

Tony Gwynn was an iconic figure in the history of baseball and a role model for many young people. The family really wants people to know that the dipping and chewing of tobacco is dangerous to their health.

The Gwynns are represented by David Casey Jr., Frederick Schenk, Robert J. Francavilla, Jeremy Robinson, Srinivas Hanumadass and Adam B. Levine of Casey Gerry Schenk Francavilla Blatt & Penfield; and Donald P. Tremblay, Peter Q. Schlued-

erberg and Katherine A. Tremblay of the Law Offices of Donald P. Tremblay. The case is in the Superior Court of the State of California, County of San Diego.

Source: Law360.com

XII. AN UPDATE ON JOHNSON & JOHNSON LITIGATION

ANOTHER VERDICT IN A JOHNSON & JOHNSON BABY POWDER CASE

On May 2 the second jury in three months found Johnson & Johnson liable for ovarian cancer resulting from use of its talc containing products. The St. Louis jury awarded Plaintiff Gloria Ristesund \$55 million dollars after agreeing Johnson's Baby Powder contributed to the development of her ovarian cancer. Mrs. Ristesund was diagnosed with ovarian cancer in 2011 when she was just 57 years old. She had used Johnson's Baby Powder for feminine hygiene for more than 40 years. The verdict includes \$5 million dollars in actual damages and \$50 million in punitive damages.

You will recall that we reported on the first of these two verdicts after a St. Louis jury found in favor of the family of Jacqueline Fox. The jurors found that her ovarian cancer, and subsequent death, were caused by the use of Johnson & Johnson's Baby Powder and Shower to Shower. The Fox verdict came down in February of this year and totaled \$72 million dollars—\$62 million of which was punitive in nature.

Both Mrs. Ristesund and Jacqueline Fox's family were represented by our firm. Each of these women testified that the purpose for bringing their lawsuit was so that other women would be aware of this cancer risk. Since Johnson & Johnson is unwilling to change the labeling on their baby powder product, it will take lawsuits brought by brave women and their families to get the word out to the public regarding this health hazard. Eventually Johnson & Johnson will have to listen.

The juries in these two cases saw internal company documents that proved Johnson & Johnson has known for decades about the ovarian cancer risk and not only didn't do anything to warn consumers, but they purposely refused to warn and covered up the risk. Indeed, Johnson & Johnson's own consultant advised them in a 1997 letter to the CEO of the company

that if they didn't start warning and otherwise acknowledging that the evidence presented by studies showed this increase risk, the public would start perceiving them like the cigarette industry for denying a risk of cancer when all evidence pointed to the contrary. The jury also heard evidence that genital talc use causes thousands of new ovarian cancer cases in this country every year and results in an estimated 2,500 deaths each year.

Mrs. Ristesund was represented in her case by Beasley Allen lawyers Ted G. Meadows, David P. Dearing, Danielle Ward Mason, Brittany Scott, and Ryan Beattie, along with Allen Smith of The Smith Law Firm in Jackson, Mississippi, and Stephanie Rados, Jim Onder, and Wylie Blair of the St. Louis firm of Onder, Shelton, O'Leary & Peterson, LLC. All of these lawyers have worked hard on the Talcum powder cases and they did an excellent job in this second case. Shortly after Labor Day we will have two more cases set for trial, one in St. Louis and a second in New Jersey, with many more to follow.

If you have any questions regarding these cases, or you want to know more about the Talc litigation generally, contact Ted Meadows at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com.

JOHNSON & JOHNSON SHOULD DO THE RIGHT THING

Following the two trials mentioned above, resulting in multi-million dollar verdicts against Johnson & Johnson—including \$112 million in punitive damages—it's time for the giant drug company to put an end to the ongoing talcum powder litigation and also to remove its talcum powder products from store shelves, or at least to warn women about the cancer risks the giant drug company has known about for decades.

Johnson & Johnson should face reality, confess their corporate sins, admit the truth that the company has hidden for decades, and end the litigation by taking care of the thousands of women harmed by its talcum powder products and the families of those who have died. The message that the jurors are sending to Johnson & Johnson is loud and clear. They are demanding that Johnson & Johnson warn women of the dangerous link between talcum powder used for feminine hygiene and its well-documented increased risk of ovarian cancer.

Gloria Ristesund and the family of Jacqueline Fox have made it very clear—they want other women to be warned about this cancer risk. The juries saw documents that proved Johnson & Johnson has

known for decades about these risks, and that they not only didn't do anything to warn consumers, they purposefully refused to warn, and covered up the risks. There are other products on the market that work in a similar way, that use cornstarch instead of talc. Yet Johnson & Johnson still sells talc and insists there is no danger.

It's now time for Johnson & Johnson to bring this massive litigation to an end by doing the right thing. We have called on Johnson & Johnson to establish a compensation fund that will be fully adequate to compensate all of the thousands of victims who have suffered greatly because of Johnson & Johnson's intentional wrongdoing. We have also called on Johnson & Johnson to either pull the talc products from the market or at the very least give an adequate warning to women so they can make an informed choice.

If Johnson & Johnson refuses to do the right thing, our law firm and those other firms working with us, are totally dedicated to continuing our mission, and that is to obtain total and complete justice for all of Johnson & Johnson's victims. The ball is in the giant drug company's court and our hope is Johnson & Johnson will change its corporate culture and do the right thing for a change.

\$2.5 MILLION RISPERDAL VERDICT AGAINST J&J STANDS

A Philadelphia judge has refused to disturb the \$2.5 million jury verdict that was returned against a Johnson & Johnson unit over allegations its antipsychotic drug Risperdal caused an autistic boy to grow breasts. Interestingly, both sides had asked for new trials. Philadelphia County Court of Common Pleas Judge Ramy I. Djerassi denied the new trial bids. In his May 4 order, Judge Djerassi rejected Janssen Pharmaceuticals Inc.'s argument that letting in a new expert during the bellwether trial had prejudiced the drugmaker.

Judge Djerassi also refused the now 20-year-old Austin Pledger and his mother a new trial exclusively on Janssen's punitive liability and damages. Janssen had argued that the substitution of Pledger's causation expert left the drugmaker's lawyers unprepared for the new testimony. The company also claimed that the \$2.5 million figure was excessive because it was solely based on the mother's testimony, including her account of her son's experiences after growing breasts.

Pledger had requested a new trial on punitive damages, saying Judge Arnold L. New, the coordinating judge of Philadel-

phia's Complex Litigation Center, had erroneously dismissed his bid for putative damages during the pretrial proceedings. Judge New said New Jersey law applied to punitive damages and did not permit any recovery in the case. Pledger's family had sued the drugmaker in April 2012, alleging the boy grew large breasts after a nearly five-year course of Risperdal treatment beginning in 2002, when he was 7 years old. In February 2015, a Philadelphia jury returned the \$2.5 million verdict for Pledger. The suit is one of 1,500 Risperdal cases pending in a mass tort program in the court. The Pledger verdict marks the third Risperdal case Janssen has lost at trial so far.

In November, another jury awarded \$1.75 million to a Maryland man who took Risperdal as a 9-year-old in 2003. Janssen lost its bid to throw out that verdict in March, but the verdict was reduced to \$680,000. In December, a jury awarded a Wisconsin man \$500,000 in another Risperdal case. The trial judge in that case denied the Plaintiff's bid for a new damages trial in January. The drugmaker did get a victory in the second Risperdal trial, when in March 2015 a jury found that Janssen was negligent in warning about the drug's risks, but that this failure was not the cause of the patient's abnormal breast growth.

The Plaintiffs in the case are represented by Thomas R. Kline and Charles L. Becker of Kline & Specter PC and Stephen A. Sheller and Christopher A. Gomez of Sheller PC. The case is in the Court of Common Pleas of the State of Pennsylvania, County of Philadelphia.

Source: Law360.com

CALIFORNIA AND WASHINGTON FILE SUITS AGAINST J&J OVER PELVIC MESH

California and Washington state have each filed suit against Johnson & Johnson for false advertising and deceptive marketing of a surgical mesh product for women, saying the company failed to inform both patients and doctors of severe potential complications. Attorneys General Bob Ferguson of Washington and Kamala D. Harris of California contend that Johnson & Johnson knowingly concealed the risks associated with their product, which is designed to treat common conditions in women such as stress urinary incontinence and pelvic organ prolapse, but can lead to serious complications including loss of sexual function, chronic pain and infection, permanent urinary or defecatory dysfunction and a "devastating impact on overall quality of life."

The two states filed separate complaints against J&J and its subsidiary Ethicon Inc. in California and Washington state courts. In California, violations of the state's unfair competition and false advertising laws are alleged. In the Washington case, "tens of thousands of violations" of the state's consumer protection laws are alleged.

Both states are seeking injunctive relief and monetary penalties potentially in the millions of dollars "to ensure that J&J stops its deceptive practices." Attorney General Harris said in a statement:

Johnson & Johnson put millions of women at risk of severe health problems by failing to provide critical information to doctors and patients about its surgical mesh products. Johnson & Johnson's deception denied women the ability to make informed decisions about their health and well-being.

These complications can crop up years after the surgery and are in many cases irreversible, as removal of the mesh is nearly impossible, Attorney General Ferguson said in a statement. She said further:

It's difficult to put into words the horrific injuries and pain many women are still suffering as a result of Johnson & Johnson's deception. They believed they were making informed medical decisions, but that was impossible when Johnson & Johnson was spreading inaccurate information about its products' risks, essentially duping doctors into using their own patients as clinical trials.

A spokeswoman for Johnson and Johnson told Law360 the company plans to "vigorously defend itself against the allegations," which is a typical corporate response, and should not be a surprise to any lawyer who has dealt with the company. In a statement it was said:

The evidence will show that Ethicon acted appropriately and responsibly in the marketing of our pelvic mesh products. The use of implantable mesh is often the preferred option to treat certain female pelvic conditions, including pelvic organ prolapse and stress urinary incontinence, and is backed by years of clinical research.

The states' lawsuits were only the latest in a string of litigation J&J has faced over its pelvic mesh. As we have previously reported, in late March, a New Jersey appeals court upheld a \$11.1 million jury

award to a woman who claimed Ethicon's pelvic mesh caused debilitating nerve pain. The court said ample evidence presented at trial showed that better warnings of the product's risks might have prevented her injuries. A month earlier, a Philadelphia jury returned a \$13.5 million verdict against J&J and Ethicon in a separate case brought by a woman who claimed the company's faulty mesh implant produced near constant pain, discomfort and an inability to have sex.

Both state attorneys general said that besides false advertising and deceptive marketing, J&J also misrepresented the severity and frequency of common complications and failed to disclose that its surgical mesh devices "presented risks not present in alternative treatment options." Attorney General Harris said that J&J had sold more than 42,000 mesh devices in the state between 2008 and 2014, and that the company faces more than 35,000 personal injury lawsuits nationwide.

Attorney General Ferguson said J&J had sold 12,000 mesh products in his state during about that same time and said he would seek to impose the maximum \$2,000 penalty for each violation of the state's consumer protection laws.

California is represented by Kamala D. Harris, Judith A. Fiorentini, Jinsook Ohta, Sanna Singer and Michelle Burkart of the state Attorney General's Office. Washington is represented by Robert W. Ferguson, Elizabeth J. Erwin, Andrea M. Alegrett and Leilani N. Fisher of the state Attorney General's Office.

The cases are *California v. Johnson & Johnson et al.*, in the Superior Court of the State of California, County of San Diego; and *Washington v. Johnson & Johnson et al.*, in the King County Superior Court in the State of Washington.

Source: Law360.com

\$3 MILLION VERDICT IN J&J TOPAMAX CASE UPHOLD ON APPEAL

A Pennsylvania appeals court has upheld the \$3 million verdict against Janssen Pharmaceuticals Inc., a Johnson & Johnson unit. Once again the court rejected arguments that claims over birth defects allegedly caused by the anti-epilepsy drug Topamax were preempted by federal law. A three-judge Superior Court panel said that prior decisions upholding verdicts against Janssen over Topamax-related birth defects had already dispensed with the company's arguments that federal law did not allow the company to make unilateral changes to the medication's warning label in order to avoid

potential liability under state law. The opinion states:

Janssen's argument that impossibility preemption precludes the failure-to-warn claim has already been rejected by this court. We conclude that Janssen's preemption arguments ... do not merit relief.

Kelly Anderson and her family had filed suit in December 2011 alleging her daughter Payton was born with a cleft lip after doctors continued to prescribe Topamax to her mother to treat chronic migraines during the pregnancy. They argued that Janssen should have pushed to have Topamax listed as a so-called Pregnancy Category D drug, which warns consumers there is evidence of fetal risk based on studies in humans.

The family was awarded \$3 million in damages by a Philadelphia County jury in March 2014 after jurors agreed that the company failed to adequately warn the mother's physicians about the risks associated with the drug. On appeal, Janssen said it had no authority to unilaterally change the drug's pregnancy category without the blessing of the U.S. Food and Drug Administration (FDA).

The appellate court panel found that what was actually at issue was the company's efforts across the board to warn doctors about what risks it may have known about. The opinion stated further:

Prior to trial, the court issued an order declaring that Janssen did not have the ability to unilaterally change the pregnancy category from C to D, and the jury was instructed as such multiple times during trial. Thus, the jury's determination that Janssen is liable for its failure to warn was not predicated upon Janssen failing to change Topamax's pregnancy category.

The appeals court rejected arguments by Johnson & Johnson that the failure-to-warn claim was precluded based on testimony from Anderson's prescribing doctor that she could not have totally ruled out the possibility of Topamax causing birth defects at the time she prescribed the drug. The opinion stated:

Janssen's argument fails to differentiate between the nonspecific, potential risk that Topamax's Category C label implied and a known risk in which the drug has been scientifically established to cause particular birth defects. The evidence presented at trial indicated that Janssen knew of a causal relationship between Topamax and specific birth defects,

including cleft palate, but failed to disseminate the information so that [Anderson's] physicians would be adequately warned.

Only one of the two prior Topamax cases to be decided by the Superior Court was presented to the state's Supreme Court for a potential appeal, but court records show that the application was withdrawn before the justices decided whether or not to hear arguments.

The Andersons are represented by the Law Offices of Howard J. Bashman, David deBruin of Bifferato Gentilotti LLC, David Matthews of Matthews & Associates, and Rosemary Pinto of Feldman & Pinto PC. The case is in the Superior Court of the State of Pennsylvania.

Source: Law360.com

XIII. MASS TORTS UPDATE

MIRENA LITIGATION UPDATE

More than 1,200 Mirena cases have been filed in the federal court Multidistrict Litigation (MDL) and are now pending in the United States District Court for the Southern District of New York. Each of these women alleges that, after a successful placement procedure, her Mirena device spontaneously perforated the uterine wall and migrated outside of the uterus, requiring surgical removal. In the last three years, the Plaintiffs' Steering Committee (PSC) has been hard at work, reviewing millions of pages of documents produced by Bayer and taking depositions of current and former Bayer employees, as well as experts designated to testify at trial.

While preparations were underway for the first Mirena bellwether trial slated to begin this spring, U.S. District Judge Cathy Seibel issued an order that the PSC's causation experts cannot testify that Mirena is capable of perforating the uterus after the IUD is correctly placed. Citing methodological problems, Judge Seibel found Plaintiffs' experts' testimony to be unreliable and inadmissible.

Following that ruling, the Court granted Bayer's request to file an omnibus motion for summary judgment. As our lawyer readers well know, a summary judgment without trial is appropriate when one party is entitled to judgment in its favor as a matter of law. Bayer believes that, without expert testimony, Plaintiffs

cannot offer sufficient evidence to establish an essential element of their case—that a Mirena IUD is capable of spontaneous uterine perforation and migration—and Plaintiffs' claims therefore fail as a matter of law. The PSC maintains that the case against Bayer is strong, even without expert testimony, and is working to prepare a response to Bayer's motion. However, if Bayer's motion is granted, the Court will dismiss all of the Mirena lawsuits currently pending in the MDL.

Although the future of the MDL is uncertain at this time, Mirena litigation continues in New Jersey state court, where more than 2,000 cases have been filed. We continue to investigate cases of spontaneous uterine perforation involving Mirena IUDs. If you have any questions about the Mirena litigation, contact Liz Eiland or Roger Smith, lawyers in our Mass Torts Section at 800-898-2034 or by email at Liz.Eiland@beasleyallen.com or Roger.Smith@beasleyallen.com.

LAWSUITS LINK VIAGRA TO MELANOMA

A growing number of product liability lawsuits are being filed around the country by men who have been diagnosed with melanoma skin cancer, allegedly caused by the erectile dysfunction drug Viagra. On April 7, 2016, the United States Judicial Panel on Multidistrict Litigation issued a Transfer Order consolidating the pretrial proceedings against Pfizer before U.S. District Judge Richard Seeborg in the Northern District of California. The cases pending in the U.S. District Courts will be centralized as part of a multidistrict litigation (MDL) (MDL 2691), to avoid duplicative discovery on common issues and avoid conflicting pretrial rulings from different courts. However, unlike a class action, each case in the MDL remains an individual action, and each Plaintiff must individually establish causation and damages. The Transfer Order states that “[t]hese actions share actual questions arising out of the allegation that Viagra (sildenafil citrate) causes or increases the risk of developing melanoma and that Defendant failed to warn consumers and health care providers of the alleged risk.”

Prior to the consolidation, there were 15 claims pending against Pfizer in several different federal jurisdictions, all making similar claims and allegations. Plaintiffs' lawsuits include allegations that Pfizer knew Viagra posed a cancer risk and purposely concealed facts regarding the drug's safety. Plaintiffs allege that Pfizer failed to sufficiently test the link between the drug and risk of melanoma prior to FDA approval. Allegations include the

failure to warn users about the link between Viagra and the increased risk of melanoma even after studies showed the association, and instead continued promotion of the product. The plaintiffs say that if they been properly informed they could have limited their dosage or length of use, more closely monitored for symptoms of melanoma, or simply not used Viagra at all.

Viagra, generically sildenafil, acts by essentially inhibiting the secretion of an enzyme, phosphodiesterase 5 (PDE5). Decreased levels of PDE5 leads to the relaxation of smooth muscle and increased blood flow. *In vitro* studies show that PDE5 inhibition results in increased tumor cell invasiveness, which is supportive of a causal connection between Viagra and invasive melanoma. In 2011, a study linked melanoma invasion with Viagra treatment. A 2012 study found that PDE5 inhibitors can promote melanin synthesis, and thus exacerbate the development of melanoma in that way. A study published in *JAMA Internal Medicine* in June 2014 found that men taking Viagra, generically sildenafil, may be 84 percent more likely to be diagnosed with melanoma skin cancer than men who do not use the drug. Viagra does not appear to cause an increased risk of cutaneous squamous cell carcinomas or basal cell carcinomas.

Four other drugs are currently prescribed for erectile dysfunction that also contain active ingredients that inhibit PDE5: Cialis (tadalafil), Levitra (vardenafil), Staxyn (vardenafil) and Stendra (avanafil). In addition, the PDE5 inhibitors Revatio (sildenafil) and Adcirca (tadalafil) are used in the treatment of pulmonary arterial hypertension (PAH). Data is still emerging on the epidemiology of these drugs and their active ingredients, but because their mechanism of action includes PDE5 inhibition, a link with melanoma may be found for them as well.

Pfizer began marketing Viagra in 1998 for the treatment of erectile dysfunction. During its peak sales year in 2012, it was prescribed about 8 million times, and it brought in more than \$2 billion in sales annually. Pfizer estimates that as many as 35 million men have taken Viagra. The discovery process will get underway throughout 2016, but it is expected to be several years before the first trials reach a jury or settlements are negotiated with Pfizer.

The Viagra MDL is titled *In re: Viagra (Sildenafil Citrate) Products Liability Litigation*, and is pending in the Northern District of California. If you need more information, contact Jennifer Emmel, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Jennifer.Emmel@beasleyallen.com.

XIV. AN UPDATE ON SECURITIES LITIGATION

INVESTORS WIN FINAL APPROVAL FOR \$300 MILLION SETTLEMENT IN GM SECURITIES SUIT

A Michigan federal judge has given final approval to a \$300 million settlement that was agreed to in a shareholder class action alleging that General Motors' concealment of deadly ignition-switch defects damaged its stock prices. U.S. District Judge Linda V. Parker approved the settlement approximately six months after the New York State Teachers' Retirement System asked for approval of the settlement ending claims that General Motors Co.'s stock price was inflated during a period when the company allegedly concealed ignition-switch defects that killed at least 124 people when their cars shut down mid-drive. Judge Parker said:

The court finds the settlement and plan of allocation to be fair, adequate, and reasonable to the settlement class and therefore is granting final approval of the settlement and the plan of allocation.

While a number of individuals objected to the settlement, Judge Parker found the objectors' contentions lacked merit. She ruled that the complexity of the case, the likelihood of success, class counsel's opinions and the public interest all favor approval. Judge Parker said she approved both the Plaintiff's motion for final approval of the settlement and approval of the plan allocation and its motion for an award of attorneys' fees and reimbursement of litigation expenses.

According to the Plaintiffs, GM's stock value steadily and substantially dropped after it became evident that GM held off on fixing an ignition switch problem in several older-model cars, including Chevrolet Cobalts and Saturn Ions. The initial complaint in the case was filed in March 2014, the month after GM began its recalls, and a consolidated class action complaint was filed in January 2015.

The New York teachers' pension fund was selected as lead Plaintiff in October 2014. The suit covers stock bought from Nov. 17, 2010, the day the new GM was born out of the old GM's bankruptcy, to July 2014. The stock price declined from \$37.09 in March 2014 to \$31.93 in April 2014 as information started coming out. That was what the lawsuits called the first

wave. Three months later, there was another during which the price fell from \$37.41 on July 23 to \$35.74 on July 24, according to the complaint.

The investors are represented by Salvatore J. Graziano and James A. Harrod of Bernstein Litowitz Berger & Grossmann LLP and E. Powell Miller, Marc L. Newman and Sharon S. Almonrode of The Miller Law Firm PC. The case is *New York State Teachers' Retirement System v. General Motors Co. et al.*, in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

INTERCEPT TO PAY \$55 MILLION TO END INVESTORS' STOCK-DROP MDL

Intercept Pharmaceuticals Inc. has agreed to pay \$55 million to settle multi-district litigation (MDL) brought by investors accusing the company of securities fraud by concealing a liver drug's side effects. A stipulation of settlement was filed last month by the parties in a New York federal court. The settlement amount reflects a recovery of about 35 percent of the total possible damages, according to the investors, who contend that this is a good result.

For the purposes of the settlement, the parties asked U.S. District Judge Naomi Reice Buchwald to certify the class. The investors said the recovery to individuals from the proposed two-day class period will depend on variables, including the number of Intercept shares purchased, but the estimated average distribution per share of Intercept stock is projected to be about \$48.27.

The investors' two proposed class actions, which were consolidated in May 2014, accused Intercept, along with CEO Mark Pruzanski and Chief Medical Officer David Shapiro, of withholding news that the drug, obeticholic acid, caused "substantial" increases in cholesterol lipids in order to drive up the value of Intercept's stock.

In March 2015, Judge Buchwald denied Intercept's motion to dismiss the multidistrict litigation, finding the investors provided evidence that the company and its executives knowingly concealed the liver drug's side effects. Judge Buchwald noted that Intercept learned from a National Institutes of Health (NIH) doctor running a clinical trial that the drug had proven effective, but also had the side effect of increasing cholesterol.

Judge Buchwald said the company only told investors about the good news, while correspondence between the doctor and Intercept's chief medical officer revealed the company had misgivings about

keeping the information under wraps. The price of the company's stock shot up more than 500 percent after Intercept announced the drug's positive effects in January 2014, but dropped sharply days later when the NIH revealed the patients' increased cholesterol levels, according to Judge Buchwald.

The proposed class includes those who purchased Intercept stock during two days that month. In support for their settlement, the investors said recovery is 13 times greater than the average. Intercept executives had argued to the court that they lacked scienter because their statements were approved by the National Institute of Diabetes and Digestive and Kidney Diseases. The executives claimed they had no motive to mislead the investors.

The Plaintiffs are represented by Tor Gronborg, Kevin A. Lavelle, David Avi Rosenfeld, Samuel Howard Rudman and Trig Randall Smith of Robbins Geller Rudman & Dowd LLP, and Jeremy Alan Lieberman of Pomerantz LLP. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

XV. INSURANCE AND FINANCE UPDATE

\$39 MILLION SETTLEMENT OVER TARGET DATA BREACH APPROVED

U.S. District Judge Paul Magnuson has approved the settlement between Target and a group of financial institutions over the retail giant's massive 2013 data breach. As part of the settlement, Target has agreed to pay \$39.3 million to the financial institutions. The court has also approved attorneys' fees of \$17.8 million.

The settlement resolves a consolidated complaint filed in August 2014 by Umpqua Bank, Mutual Bank, Village Bank, CSE Federal Credit Union and First Federal Savings of Lorain after more than 40 million payment cards used at Target in late 2013 were compromised. Under the settlement, approved by Judge Magnuson, Target must pay up to \$20.25 million directly to class members and an additional \$19.1 million to fund MasterCard's Account Data Compromise program, which relates to the breach.

The settlement applies to all U.S. financial institutions that issued payment cards identified as having been at risk as a result of the breach and that did not previously

release their claims against the retailer by signing on to separate settlements with card brands Visa Inc., and Master Card Inc.

In December, Judge Magnuson had granted preliminary approval of the settlement and the financial institutions pressed the judge in April to issue final approval on the settlement arguing that the deal was positively received by class members and helps avoid further complex and expensive litigation. Of the 2,212 total financial institutions with members whose accounts were potentially compromised, 67 percent filed for compensation from the settlement fund—a high response rate, according to the lawyers involved in the litigation. If you need more information on this matter, contact Section Head Dee Miles or Larry Golston, a lawyer in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Larry.Golston@beasleyallen.com.

XVI. EMPLOYMENT AND FLSA LITIGATION

OBAMA ADMINISTRATION IMPLEMENTS NEW LAW THAT WILL GIVE MORE PEOPLE OVERTIME

As we have written in this publication on numerous occasions, the Obama Administration has been working on new regulations that would result in more workers being eligible for overtime pay. On May 18, President Obama announced the Department of Labor's (DOL) rule updating the overtime regulations under the Fair Labor Standards Act (FLSA). This new rule raises the minimum salary amount required to be exempt from overtime pay from \$23,660 to \$47,476 and it will take effect on Dec. 1, 2016. When the DOL published the proposed rule on July 6, 2015, the Department received 270,000 comments in response. After those comments, the DOL announced this new rule, which, as expected, has instigated a strong split of opinion.

It should be noted that the FLSA has narrow exceptions for corporations who don't want to pay their employees overtime. In order to meet one of those exceptions, certain tests or criteria have to be met. One of these tests is the "salary-level test," and it's this test that has been changed. The basic rule is employers must pay employees a minimum salary in order for an employee to fall within the exception.

The concept behind this rule is this: if the employee holds a high level position, then they have the bargaining power to ensure they do not work excessive hours without being properly compensated for their work. Until Dec. 1, 2016, this minimum salary will remain \$23,660; however, after that date this minimum salary will be raised to \$47,476. This increase, according to the Washington Post, will cause "[a]bout 35 percent of full-time salaried employees [to] be eligible for time-and-a-half when they work extra hours...[which is] up significantly from the 7 percent who qualify under the current threshold."

Some believe, as does Jared Bernstein, a former chief economist for Vice President Biden, that "this is one of the most important measures that the Obama administration has implemented to help middle-wage workers." However, others believe the change will have a large negative impact on small businesses and educational institutions. Linda Harig, Vice President of Human Resources for the University of Tennessee, said, "We agree that there needs to be a change. But we believe due diligence has not been done on the impact for higher education."

The impact of this new rule is yet to be seen; however, it does have the potential to boost worker's wages by \$12 billion over the next 10 years. Additionally, with the new threshold requirement being updated every three years, to compensate for inflation, we could see the minimum salary requirement reach \$51,000 by 2020. If you need additional information on this subject, contact Roman Shaul, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Roman.Shaul@beasleyallen.com.

Source: *Washington Post*

XVII. WORKPLACE HAZARDS

OSHA IS USEFUL FOR LAWYERS REPRESENTING INJURED WORKERS

OSHA can be a valuable resource for lawyers and their clients in workplace injury litigation. That is well known to the lawyers in our firm who are involved in work-place litigation. I asked Kendall Dunson, a lawyer who has handled a number of work-place injury and death litigation for our firm, to help our readers

understand how OSHA can help in litigation.

Kendall was recently referred a workers' compensation client who unfortunately had lost the ability to see in one of his eyes following an on-the-job injury. Kendall asked the worker if he had spoken to OSHA and he replied he had not. Kendall says he initially wondered if the employer had failed to report the injury.

The worker explained to Kendall that he felt OSHA was an advocate for the employer and that he was hesitant to call back. The worker was told to call OSHA immediately because OSHA is not an ally of the employer and that the OSHA report would be a tool Kendall could use in prosecuting the worker's case. This man is not the first client to misconstrue OSHA's role. For that reason, it is important for workers and lawyers representing injured workers to fully understand OSHA and how its role and purpose can serve injured workers.

As most of you will know, OSHA stands for the Occupational Safety and Health Administration. It is an agency of the United States Department of Labor and its goal is to ensure safe and healthy working conditions through inspections, training and enforcement actions. OSHA's website (OSHA.gov) is rich with information and statistics valuable to attorneys practicing in this field. Because some accidents are mandatory reports, OSHA is the best source for statistics on injury trends in the United States.

OSHA requires the employer to report all work-related fatalities within eight hours and all inpatient hospitalizations, amputations and losses of an eye within 24 hours. In addition to employer mandatory reporting requirements, employees may report conditions and request an OSHA inspection if they believe unsafe working conditions exist. Kendall says he has recommended many employees to contact OSHA to report unsafe conditions and each such employee was justly concerned about losing their job.

It should be noted that OSHA regulations specifically prevent employers from retaliating against whistleblower employees. There is also a provision for anonymous reporting. So if a worker approaches a lawyer for advice about reporting what they believe are unsafe working conditions, the worker should be encouraged to call OSHA. That report could prevent injuries or deaths and could serve as valuable evidence of notice of a dangerous condition in a later incident.

Kendall handled a fatality case a few years ago where his client's spouse was killed on the job. He knew OSHA would investigate the accident so Kendall submitted a Freedom of Information request for

OSHA's investigation. He was able to obtain OSHA's citations against the employers who were involved, OSHA's investigation including photographs and statements, and OSHA's imposition of penalties. The OSHA investigation is an asset in that OSHA has access to the scene within hours of the event occurring.

Because a potential client may not get to a lawyer until months or even a year has passed, this makes OSHA's work very important. OSHA's investigation is a great source of information. In addition to the incident report, Kendall obtained prior OSHA investigation reports only to discover that the hazard that killed his client's spouse had also killed another individual nine years earlier.

After reviewing those reports Kendall knew the hazard, what happened, why, and which witnesses he needed to depose. The prior report was the basis for Kendall's punitive damages arguments. In full disclosure, our firm handled the first death case involving that equipment; however, because the fines levied against one of the employers exceeded a certain threshold (\$7,000), Kendall knew this was a repeat violation that would have triggered a second Freedom of Information request for any fatality. OSHA lacks the ability to assess heavy fines (\$7,000 max for serious violations and \$70,000 maximum for repeat or willful violations), and the assessed fines are often reduced. OSHA's real power originates from the ability to conduct inspections following complaints and reportable incidents.

Kendall says all of our lawyer readers who handle workplace litigation, need to heed this warning: do not base your analysis of third party claims solely on the OSHA report. OSHA only focuses on the conduct of the employer. OSHA does not focus on manufacturers of machinery. For example, an unguarded machine that kills or injures an employee will be photographed and discussed in OSHA's report. However, the citation will state the employer failed to guard a known hazard.

Almost 99 percent of the time, employers purchase machinery used in their business from other companies. The designer/manufacturer of that machinery is primarily responsible under the common law for eliminating or guarding recognized hazards. A reading of an OSHA report with an untrained eye would lead one to believe that only the employer is responsible for an incident. Thus, OSHA reports are a useful tool, but they are not the only tool that should be used to analyze an incident for third party liability.

Anytime a death or serious injury occurs on the job, a third party analysis must be conducted. The failure to conduct

a proper third party case analysis could result in a failure to adequately compensate the client or their family and a legal malpractice claim against the offending lawyer. We all know that state workers' compensation laws do not adequately compensate injured workers, but third party claims certainly can. If you want additional information, or have questions, contact Kendall Dunson at 800-898-2034 or by email at Kendall.Dunson@beasley-allen.com.

XVIII. TRANSPORTATION

LAWSUIT AGAINST SANDERSON FARMS SETTLED FOR \$27.5 MILLION

A Waco mother and her two sons, injured almost three years ago when a Sanderson Farms truck crashed into the back of their car, have settled their lawsuit with the chicken processing company for \$27.5 million. Judge Vicki Menard approved the agreement during a hearing that came after the parties in the case had been through two mediation sessions. Jim Dunnam, who represents the family along with Robert E. Ammons, said the proceeds from the settlement involve three insurance companies for Sanderson Farms and will be divided into three trust accounts that the family can draw on for long-term health and educational needs for the two boys. One of the boys was 2 weeks old at the time of the accident and suffered severe brain damage that likely will leave him incapacitated for the rest of his life. The boy, who is almost 3 now, cannot speak, walk or crawl.

The mother, who was waiting to make a turn onto another road, suffered a compound fracture to her left arm and other injuries in the November 2013 collision. Her older son, who was 2 at the time, suffered minor scratches on his neck. The infant, who was in a car seat in the back, suffered a fractured skull, massive brain damage and a collapsed lung. The injuries caused one half of the baby's brain mass in one hemisphere to die and about a third in the other hemisphere to die, according to the lawsuit. The Sanderson Farms truck was traveling 57 mph when it struck the back of the woman's car. After the impact, the woman's car was knocked into oncoming traffic and was hit by a van.

The lawsuit alleges that in the days before the crash, the truck driver worked "long and irregular work hours on a schedule which disrupted his sleep patterns."

On the morning of the accident, the driver said he got up about 5:30 a.m. to drive to work at a chicken farm in Chilton. The driver said he had to be in Chilton between 6:30 and 7 a.m. and that he normally worked 10 to 16 hours a day. In the week before the wreck, records reveal that the driver worked 67.5 hours. Driver fatigue is a very serious problem and lots of folks are put at risk on our highways as a result.

Source: *Waco Tribune-Herald*

FATAL BUS CRASH IN TEXAS IS BEING INVESTIGATED

Federal investigators and local authorities are working to determine what caused a charter bus to crash in far South Texas, killing nine people and injuring 43 others in a one-vehicle rollover. National Transportation Safety Board (NTSB) investigators are working on the incident and their work was ongoing when this issue went to the printer. A spokesman, Keith Holloway, said the agency will look at the operations of the charter bus company as part of its investigation and has requested inspection and maintenance records. The state Department of Public Safety is also conducting its investigation, separate from the NTSB.

Source: Associated Press

XIX. HEALTHCARE ISSUES

FDA SAYS JANSSEN DIABETES DRUGS ARE LINKED TO AMPUTATIONS

Patients in a clinical trial studying Janssen Pharmaceuticals' diabetes drugs Invokana and Invokamet were roughly twice as likely to undergo amputations as patients taking a placebo, the U.S. Food and Drug Administration reported last month. The FDA said in a safety alert that the equivalent of five of every 1,000 patients taking a 300-milligram daily dose of the active ingredient canagliflozin needed amputations. In addition, the equivalent of seven of every 1,000 patients taking a 100-milligram daily dose needed amputations, compared with only three of every 1,000 patients taking a placebo. The amputations affected toes, feet and legs.

FDA officials said they are working to determine whether canagliflozin really does elevate the risk of amputation, and

that patients shouldn't stop taking the drug without first consulting a doctor. The agency said:

Patients taking [canagliflozin] should notify their health care professionals right away if they notice any new pain or tenderness, sores or ulcers, or infections in their legs or feet.

Canagliflozin is the only active ingredient in Invokana and is combined with another active ingredient, metformin, in Invokamet. Invokana and Invokamet were approved in 2013 and 2014, respectively, and are used to control blood sugar levels in patients with Type 2 diabetes. The trial, which is examining how canagliflozin affects cardiovascular health, has followed patients for 4.5 years and is expected to continue. A similar clinical trial that has followed patients for nine months hasn't found the same elevated risks of amputation, the FDA said.

In a statement, Janssen officials said they "remain confident that canagliflozin is an important treatment option for people with Type 2 diabetes." The uptick in amputations has not been observed in a dozen other Phase III and Phase IV trials or in postmarketing safety reports, the company officials added. Admittedly, there is a risk of amputations for diabetics because the disease can cause nerve damage and impair blood circulation. The Mayo Clinic confirms that. However, the FDA report gives cause for concern.

Invokana was the first in a class of drugs known as sodium-glucose cotransporter 2, or SGLT2, inhibitors. It was approved amid concerns about cardiovascular health and bone safety, and the FDA has since updated Invokana's and Invokamet's warning labels to reflect risks of bone fractures. The drugs' labels—as well as the labels of other SGLT2 inhibitors—have also been revised to disclose risks of a blood disorder and urinary tract infections.

Other drugs in the class include AstraZeneca PLC's Farxiga and Xigduo XR, dapagliflozin and a dapagliflozin-metformin combination respectively, and Boehringer Ingelheim GmbH and Eli Lilly and Co.'s Jardiance and Glyxambi, empagliflozin and an empagliflozin-linagliptin combo respectively.

Source: Law360.com

XX. ENVIRONMENTAL CONCERNS

\$46.5 MILLION JURY VERDICT RETURNED IN PCB SUIT AGAINST MONSANTO

A Missouri state court jury has awarded \$46.5 million to three people who claimed Monsanto Co. negligently handled toxic polychlorinated biphenyls that gave them cancer. The three alleged they absorbed PCBs through the course of their daily lives, by eating food, drinking liquids or breathing air that contained traces of the chemical. The St. Louis jury awarded the plaintiffs, one of whom has died, \$17.5 million in damages and \$29 million in punitive damages. Steven J. Kherkher, a lawyer with Williams Kherkher, had this to say:

We argued that Monsanto, since FDR was our president back in 1933, did not conduct itself as an ordinary, prudent chemical company should have done. The jury saw right through Monsanto's misrepresentation. I wish I could tell you it was my great lawyering, but it wasn't. It was just that the facts and the evidence were overwhelming.

Monsanto's predecessor company manufactured and sold PCBs, an industrial chemical, to large companies that then incorporated them as safety fluids and additives in their own products. Monsanto stopped making PCBs in 1977. Aside from the personal injury PCB suits, Monsanto is facing a number of environmental damage lawsuits filed by municipalities around the country. In April, the U.S. Judicial Panel on Multidistrict Litigation refused to consolidate suits in which cities in California and Washington are seeking environmental PCB cleanup costs from Monsanto, saying the suits don't have enough in common.

The JPML said the factual questions in the four actions in California and the two in Washington will differ, since they involve different bodies of water: the San Diego Bay, San Francisco Bay, the Spokane River and the Duwamish River. The plaintiffs are represented by Steven J. Kherkher of Williams Kherkher and John G. Simon of the Simon Law Firm PC.

Source: Law360.com

DOW AND A BOEING UNIT AGREE TO \$375 MILLION POLLUTION SETTLEMENT

The Dow Chemical Co. and a former Rockwell subsidiary, which is now owned by The Boeing Co., have agreed to pay \$375 million to settle a 26-year-old nuclear pollution lawsuit. The lawsuit, filed by a class of Colorado residents, claimed injuries from exposure to waste from a nuclear weapons facility.

The settlement means that the U.S. Supreme Court will not decide whether the federal Price-Anderson Act—a 1957 law covering liability claims for personal injury and property damage caused by commercial nuclear facility operators—preempts state nuisance claims. Dow and Boeing petitioned the high court to review a Tenth Circuit holding that state claims are not preempted.

Dow's portion of the settlement is \$131.25 million, leaving the remaining \$243.75 million to be paid by Boeing-owned Rockwell Automation Inc. The settlement is still subject to approval by the U.S. District Court for the District of Colorado. The U.S. Department of Energy (DOE), although not a party to the litigation, said that the Price-Anderson Act imposes indemnification requirements on the government for certain public liability claims relating to nuclear incidents. Both companies said that they expect to be fully indemnified.

The federal government established the Rocky Flats facility, which is about 16 miles from downtown Denver, in the early 1950s to produce nuclear weapons components, according to the DOE. From 1952 to 1975, Dow operated the plant, and from 1975 to 1989 it was operated by Rockwell. The 6,500-acre plant site was closed in 1992, remediated, and is now a wild-life refuge.

Federal Bureau of Investigation agents raided the plant in 1989 and found evidence of environmental crimes. Plant workers had mishandled radioactive waste for years, with some being poured into the ground and leaching into nearby bodies of water. Some of the waste was released into the air and filtered its way into the soil throughout the area. The residents' lawsuit was first filed in Colorado federal court in 1990, with the Plaintiffs alleging that plutonium releases from Rocky Flats had exposed area residents, increased their cancer risks, contaminated their properties and lowered property values.

The trial started in October of 2005, and in early 2006, the jury found Dow and Rockwell liable under trespass and nuisance theories. The jury awarded the Plaintiff class about \$177 million in compensatory damages from both companies,

and about \$111 million in punitive damages from Dow, and about \$89 million in punitive damages from Rockwell. After awarding prejudgment interest dating back to 1990, the district court entered a final \$926 million judgment in favor of the Plaintiffs.

In 2010, the Tenth Circuit vacated the judgment and sent the case back to district court, where it was completely dismissed by the presiding judge. But the Plaintiffs appealed that decision, and in 2015, the Tenth Circuit issued a second ruling holding that the Plaintiffs could proceed with their lawsuit under state nuisance claims. It was those claims that were pending before the Supreme Court when the settlement was reached.

The class is represented by Merrill G. Davidoff, David F. Sorensen, Jennifer E. MacNaughton and Caitlin G. Coslett of Berger & Montague PC, Gary B. Blum and Steven W. Kelly of Silver & DeBoskey PC, Marcy G. Glenn of Holland & Hart LLP, Jeffrey A. Lamken and Robert K. Kry of MoloLamken LLP, and Paul M. De Marco and Louise M. Roselle of Markovits Stock & DeMarco LLC.

Source: Law360.com

BEASLEY ALLEN LAWYERS ARE INVESTIGATING SEVERE LUNG INJURY CASES

Severe lung injury cases are of growing concern to lawyers in our firm who are committing resources to evaluating the cause of these dreadful illnesses. In many situations, severe lung disease occurs as a direct result of exposure to hazardous substances. The lungs are the only internal organ consistently exposed to the outside world, and, as a result, they are particularly vulnerable in the workplace as well as to certain hazardous consumer goods.

It is important to understand the many different forms severe lung injury can take. Short-term, high concentration exposures (also known as acute exposures) can cause devastating injuries to the lungs and body in only one exposure. Chemicals most commonly related to acute severe lung injury cases are chlorine and chlorine gas, ammonia, acrylonitrile, formaldehyde, vinyl acetate, petroleum hydrocarbons in the oil industry, high concentrate acids and high concentrate ethers.

Long-term “chronic” exposures can also cause severe lung conditions. Commonly, these lung conditions are interstitial lung diseases where the end result is advanced pulmonary fibrosis (permanent lung scarring). There are more than 100 lung diseases that are associated with occupational exposure / hazardous sub-

stance exposure, including the following categories:

- **The Pneumoconiosis Diseases:** diseases caused by exposure to inorganic dusts and substances such as coal, silica, chemicals, metals, and fibers. These diseases include black lung disease, silicosis, bronchiolitis obliterans, hard metal lung disease, and chronic beryllium disease (also known as berylliosis).
- **The Hypersensitivity Pneumonitis Diseases:** diseases caused by exposure to organic dusts and molds which oftentimes lead to permanent lung scarring (dust, mold, wood dust, cheese, bird excrement and wastes, cotton, etc.). These diseases include farmer’s lung, compost lung, coffee worker’s lung, hot tub lung, wood worker’s lung, chemical worker’s lung and byssinosis (brown lung), to name a few.

- **Asthma:** Occupational asthma can either be caused by an acute or chronic exposure to fumes, gases, dusts, isocyanates (chemicals used for spray painting, insulation, plastic manufacturing, rubber, and foam), and high concentrate ethers. Depending on the exposure, if diagnosed and treated early, permanent damage to the lungs may be avoided. Unfortunately, we see instances where permanent damage to the lungs occurs.

The pneumoconiosis diseases are particularly troubling because they often result from man-made products. For instance, chronic beryllium disease is caused by exposures to beryllium that occur in the manufacturing sector. Bronchiolitis obliterans, which has been termed “popcorn lung,” is a devastating and irreversible disease caused by exposure to diacetyl (flavoring additive), acetaldehyde, formaldehyde, fiberglass and styrene (oftentimes in the fiberglass industry). Hard metal lung disease (various steels and metal dusts) and silicosis (quartz and silica dust) are equally devastating and irreversible.

Unfortunately, many of the interstitial lung diseases progress to the point where they are fatal without a lung transplant. These cases are oftentimes the result of poor industrial hygiene, defectively designed products and infrastructure. Parker Miller, a lawyer in our firm’s Toxic Torts Section, leads a team of lawyers who are all reviewing these cases. If you have any questions about severe lung disease, you can contact Parker at 800.898.2034 or Parker.Miller@beasleyallen.com. He will be glad to assist you.

CHRONIC BERYLLIUM DISEASE CAN BE MISDIAGNOSED AS SARCOIDOSIS

Beryllium is the fourth element on the periodic chart and is arguably one of the most toxic substances on earth. For decades, beryllium was used in the aerospace industry, as well as to make airplanes, engine components, telecommunications equipment (including semiconductors and cell phones), x-ray and lab tech equipment, nuclear reactors, and rockets. Because of its unique properties, beryllium is an often-used alloy for various metals, including copper, nickel and aluminum, and this use has further expanded the substance’s presence in consumer goods (such as golf clubs) and to employees throughout the manufacturing sector.

As we have detailed in the Report previously, exposure to beryllium can cause a dreadful lung disease called chronic beryllium disease, or “CPD.” A certain percentage of the population is especially vulnerable to beryllium. Exposure to the substance can induce an allergic reaction that causes the lungs to fail. In cases where chronic beryllium disease has been diagnosed, the condition is often fatal unless a lung transplant is obtained.

CPD is virtually identical to sarcoidosis pathologically. Due to a lack of causal awareness, as well as the fact that CPD is considered a rare disease, studies have shown that CPD is commonly misdiagnosed as sarcoidosis.

Lawyers in our Toxic Torts Section are investigating cases where a person has been diagnosed with sarcoidosis when, in fact, their condition may actually be chronic beryllium disease caused by exposure to beryllium. If you have any questions about beryllium, contact Parker Miller at 800.898.2034 or Parker.Miller@beasleyallen.com.

IOWA JURY AWARDS \$3.52 MILLION IN BENZENE EXPOSURE CASE

An Iowa jury has awarded just over \$3.5 million at the conclusion of a benzene trial brought by the widow of a former truck driver who, she alleged, developed acute myeloid leukemia as a result of exposure to benzene during the course of his employment. The jury in the U.S. District Court for the Southern District of Iowa awarded the Plaintiff \$1.76 million in actual damages and an additional \$1.76 million in punitive damages, against Lyondell Chemical Co., Equistar Chemicals LP, and Equistar GP LLC.

The Plaintiff’s deceased husband Dean Dahlin was employed as a commercial

truck driver for Dahlen Transport Inc. from 1990 to 1992, and for A&R Logistics Inc. from approximately 1992 to 1995. During the course of his employment, Dahlin loaded, transported and unloaded benzene-containing products from a petrochemical facility located in Clinton, Iowa, to a municipal dock storage facility in South Clinton, Iowa. The Plaintiff asserted, that as a direct result of the benzene exposure, Dahlin developed myelodysplastic syndrome, which eventually developed into acute myeloid leukemia.

In less than a day of deliberating, the jury found that the defendants knew, or should have known, "of a condition on the premises, specifically benzene exposure, and that it involved an unreasonable risk of injury to a person in Dean Dahlin's position." Jurors further found that the defendants knew, or should have known, that Dahlin would not discover the condition, realize the condition presented a risk of injury, and would not protect himself from the condition. As referenced above, in addition to general damages, the jury found the defendants' actions constituted a willful and wanton disregard for the rights or safety of others and awarded an additional \$1.76 million in punitive damages.

Prior to the trial, the defendants had asked the court to throw out the punitive damage claim, saying that the plaintiff had failed to present evidence that would support a finding of willful and wanton disregard of the rights or safety of another. The federal court declined to revisit its order denying the motion, however, saying that it had already "considered and rejected the arguments now raised by the defendants." The Plaintiffs were represented at trial by Keith E. Patton and David J. Baluk of Shrader & Associates in Houston; and Robert Gallagher Jr. and Peter Gierut of Gallagher Millage & Gallagher in Bettendorf, Iowa.

John Tomlinson, a lawyer in our Toxic Torts Section, has filed and is investigating Benzene exposure cases. If you need more information on this contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Source: Harris Martin Publishing, April 5, 2016

XXI. AN UPDATE ON CLASS ACTION LITIGATION

CLASS ACTION LAWSUIT FILED AGAINST LOWE'S AND ARMSTRONG OVER TOXIC FLOORING

Lawyers in our firm have filed a lawsuit for a Florida couple against home improvement retailer Lowe's and floor manufacturer Armstrong World Industries. The company is accused of selling laminate flooring that emits toxic levels of formaldehyde, a known carcinogen. The Plaintiffs, William Woodworth and Diane Pilkerton, researched the various laminate flooring product options, ultimately choosing Armstrong's product whose label stated that the flooring satisfied California's standards for formaldehyde content, when it actually did not.

The couple bought about \$2,000 worth of 12mm high-gloss Woodland Walnut laminate flooring made by Armstrong and sold by Lowe's. The purchase was made by the Plaintiffs after they checked the product's label to make sure it complied with formaldehyde regulations set by the California Air Resources Board and adopted by federal regulators.

After learning about formaldehyde contamination problems from other laminate wood products imported from China, the Plaintiffs sent samples of the flooring to a well-respected lab for testing. The results showed it emitted formaldehyde gas well beyond the maximum allowable concentrations. The complaint states:

Rather than seek to effectively remedy the harm and the risks to its customers' health and safety caused by its formaldehyde-laden flooring products, Armstrong has instead sought to cover up the dangers inherent in its products with misinformation and with a disingenuous public relations campaign that is designed to mislead its customers.

Like other Plaintiffs suing Lumber Liquidators over toxic flooring, the Woodworths accuse Armstrong of using untrustworthy Chinese mills that use excessive amounts of formaldehyde in the manufacturing process to save time and money. The lawsuit alleges Armstrong offshored its manufacturing process to Chinese plants operated by individuals with no regard for the safety of American consumers. Lowe's allegedly retailed the contaminated laminate knowing it came

from China. In so doing, it appears both companies put the American consumer at risk.

In addition to increasing the risk of cancer and leukemia, formaldehyde exposure can cause burning eyes, nose and throat irritation, coughing, headaches, dizziness, and nausea. Toxic flooring may be especially dangerous to toddlers and young children who play and crawl on the floor and have underdeveloped immune systems. Armstrong's quality and compliance control are woefully inadequate. The company is trusting these Chinese manufacturers instead of scientifically testing in reasonable intervals the core that is actually in the laminate flooring. This puts people at risk.

For more information about this litigation, contact Beasley Allen Consumer Fraud and Commercial Litigation Section Head Dee Miles, or Clay Barnett, Archie Grubb, or Andrew Brashier, the other lawyers in this section who are handling these claims, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Clay.Barnett@beasleyallen.com, Archie.Grubb@beasleyallen.com, or Andrew.Brashier@beasleyallen.com. Anthony Garcia is also working with our firm in this litigation.

Source: Law360.com

\$55 MILLION SETTLEMENT BY PWC IN MADOFF FEEDER ACTION

U.S. District Judge Victor Marrero has given final approval to a \$55 million settlement between PricewaterhouseCoopers LLP (PwC) and investors in Bernie Madoff's Ponzi scheme. It was alleged that the audit firm had ignored red flags. This settlement winds up the litigation against entities that provided services to Madoff feeder funds. The total recovery is \$235 million. Judge Marrero said the seven-and-a-half-year-old litigation was a "long road," but that the PwC settlement was a good one.

The total recovery comes from settlements with PwC, Fairfield Greenwich Ltd., GlobeOp Financial Services LLC and Citco Group Ltd. An additional \$30 million recovery is possible, pending the outcome of litigation brought by the trustee overseeing the liquidation of Madoff's defunct brokerage. The litigation is in relatively early stages. Named Plaintiffs Pasha and Julia Anwar filed suit against PwC in 2008, claiming that the company was negligent in its auditing of funds invested in Madoff's investment company and failed to recognize red flags that would have revealed the Ponzi scheme.

The class of about 1,000 people and businesses that lost about \$7.5 billion following Madoff's collapse settled with PwC just before the case was slated for trial. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

XXII. THE CONSUMER CORNER

CONSUMERS GET A BIG WIN IN FIGHT AGAINST ARBITRATION

In May, the Consumer Financial Protection Bureau (CFPB) delivered a much-needed win to consumers by leveling the first blow to mandatory arbitration. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 authorizes the CFPB to limit arbitration in contracts for consumer financial products and services. After a multi-year analysis into the effects of arbitration on consumers and businesses, the CFPB proposed a rule prohibiting companies from using pre-dispute arbitration agreements to block consumer class actions and requiring providers to insert language into their arbitration agreements reflecting this limitation. To accomplish this, agreements between consumers and companies must state:

We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it.

While the CFPB's proposed rule does not prohibit companies from forcing individuals to arbitrate their disputes, it does require the companies to provide information about the arbitration, including the initial claim and any counterclaim as well as any award issued. The proposed rule's requirements on individual arbitration information disclosure allow the process to be more transparent for consumers as the CFPB plans to provide this information to the public on its website.

The CFPB published and provided its study to Congress in March 2015, and the results showed that mandatory arbitration provisions seriously undermine consumers' rights and relief. Businesses won bigger judgments against consumers in arbitration than the consumers obtained in relief, according to the analysis. The

CFPB highlighted the 2015 study's finding that class actions bring "hundreds of millions of dollars in relief to millions of consumers each year and cause companies to alter their legally questionable conduct" and noted that mandatory pre-dispute arbitration clauses can block class actions.

This proposed rule finally provides a step in the right direction toward reigning in the abusive arbitration practices that many consumers have faced. Although the precise wording of the final rule is subject to change, the proposed rule demonstrates the CFPB's commitment to protecting the Seventh Amendment rights of consumers. This rule provides a huge win for consumers, and although it only applies to the financial markets, hopefully it will pave the way for other industries as well.

There is a 90-day comment period after the proposed rule is published in the Federal Register. The effective date of the final rule is 30 days after final rule is published in Federal Register. Consistent with the Dodd-Frank Act, the proposed rule will apply only to agreements entered into 180 days after the effective date. The final rule will apply to agreements entered into 211 days after the final rule is published in the Federal Register.

The public is invited to comment on the proposed rule. It is published in the Federal Register and available for viewing at http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf. If you need any more information on the proposed rule, or the subject matter generally, contact Leslie Pescia at 800-898-2034 or by email at Leslie.Pescia@beasleyallen.com.

You can find the May 5, 2016, proposed rule on the CFPB's website at: http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf. If you have any questions, contact Leslie Pescia, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Leslie.Pescia@beasleyallen.com.

GOOGLE SET TO BAN PAYDAY LENDERS FROM ADVERTISING

Tech giant Google announced last month it will begin banning payday lending companies from advertising on its website. This is the first time the company has imposed a global ban on ads for a category of financial products. In the past, Google has imposed bans on ads for illegal activities or products or services it deemed illicit or dangerous, like selling

guns, drugs or explosives; or ads that were sexually explicit or graphic.

The ban, which is set to take effect July 13, comes as a result of pressure from consumer advocates that say payday loans prey on the poor and disadvantaged. Unlike most other forms of credit, to qualify for a payday loan a borrower need only provide proof of income (such as a paystub or verification of government benefits) and a bank account.

In theory, these types of loans are designed to help people meet a small, one-time expense, yet in practice most payday loans are taken out to pay for previous loans. More than three quarters of all payday loans are given to borrowers who are renewing a loan or who have had another payday loan within their previous pay period.

Payday loans trap borrowers in a cycle of debt by charging exorbitantly high interest rates. According to a 2014 study by The Pew Charitable Trusts, annual interest rates on small payday loans can range from 300 percent to more than 700 percent. A borrower finds himself unable to pay off the interest on the loan, and often borrows again, perpetuating a worsening cycle of debt.

The Google ban will apply to companies globally that provide loans that are due within 60 days of issue, and in the United States to loans whose annual interest rate is 36 percent or higher. Payday lending companies may still appear in organic search results, but they may no longer purchase clickable ads (pay-per-click ads) that appear on the top and right-hand side of the Google search results pages.

Facebook already bans ads from payday lenders, a practice it instituted last August. Hopefully others will soon follow the lead of Facebook and Google and institute a ban.

Sources: *Montgomery Advertiser* and *The Washington Post*

THE CONTINUING DANGER OF EXPLODING E-CIGARETTES

Recently, a high school student in Albertville, Alabama, was hospitalized with burns to his face and neck when another student's electronic cigarette exploded inside a classroom. This event is one of many incidents that illustrate the major safety issues with e-cigarettes. The devices—particularly the lithium ion batteries—can explode or catch fire. This injury in Albertville was not life-threatening, but many others have been far worse. In a previous issue, we wrote about a Florida man who was placed into a medi-

cally induced coma after his e-cigarette exploded in his mouth. More recently, a California man lost an eye and was seriously burned as a result of an e-cigarette explosion.

Two more incidents involving teenagers occurred within a week of the Albertville explosion. In Paso Robles, California, a 17-year-old was sitting in his car listening to music and laughing with friends when his e-cigarette exploded. He was airlifted to a burn unit and the debris from the explosion knocked out teeth and burned a hole through his tongue. Another 17-year-old of Ogden, Utah, suffered injuries when he put his e-cigarette into his mouth and pressed the ignition device. The explosion burned a hole into the back of his throat and caused serious cuts and burns.

The examples we see are only those publicized because of the severity of injuries. It is very likely that more devices are malfunctioning. Despite the recent increase in popularity, e-cigarettes are largely unregulated and lack adequate safety standards. Sharp growth in the popularity of e-cigarettes, lack of regulation and the lack of safety standards in the industry are attributes of a product that will likely continue to cause harm to persons who use the products. There will certainly be an increase of litigation involving e-cigarettes.

Lawyers at Beasley Allen are currently investigating potential claims on behalf of individuals who have suffered injuries caused by exploding e-cigarettes. If you would like more information, someone you know has been injured by a fire or explosion of one of these devices, or have specific questions, you can contact William Sutton, a lawyer in our firm's Toxic Torts Section. He can be reached at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: *Personal Injury Law Journal*

CFPB SUES ALL AMERICAN CHECK CASHING OVER "DECEPTIVE" TACTICS

The U.S. Consumer Financial Protection Bureau (CFPB) has filed suit against payday lender All American Check Cashing. The Madison-based company is accused of tricking and trapping check-cashing and loan customers at its 43 stores in Mississippi and a number of other stores in Alabama and Louisiana.

The suit seeks monetary relief against All American and owner Michael Gray, injunctive relief and penalties, the CFPB said in a press release. The Bureau filed the suit in the U.S. District Court Southern District of Mississippi Northern Division.

In a complaint filed in federal court, the CFPB alleged that All American tried to keep consumers from learning how much they would be charged to cash a check and used deceptive tactics to stop consumers from backing out of transactions. The CFPB also alleged that All American made deceptive statements about the benefits of its high-cost payday loans and also failed to provide refunds after consumers made overpayments on their loans. The CFPB's lawsuit seeks to end All American's unlawful practices, obtain redress for consumers, and impose penalties.

The action is separate from enforcement action the Mississippi Department of Banking and Consumer Finance has taken against All American and Gray. The banking department alleges All American violated the state's loan rollover laws as a matter of company policy. With a rollover, the borrower pays fees on the first loan with money from a new loan.

In ordering revocation of the licenses for All American's Mississippi stores and payment of a \$3 million penalty, the Banking Department says it found 1,600 rollover violations involving 6,500 customers. In addition, the investigation turned up 692 violations involving refusals to give customers refunds All American Check Cashing owed them, regulators say. All American, they say, took "overt" actions to keep customers from learning they had refunds coming.

The CFPB complaint alleges that All American:

- Refused to tell consumers how much they will be charged: All American instructs its employees to hide the check-cashing fees by counting out the money over the fee disclosure on the receipt and removing the "receipt and check as quickly as possible." All American's policies explicitly forbid employees from disclosing the check-cashing fee to consumers, even when directly asked. A training presentation for new employees instructs them to "NEVER TELL THE CUSTOMER THE FEE." Employees are directed to say they do not know what the fee will be, and to deflect consumers' questions with small talk and irrelevant information so that "they are overwhelmed with info."
- Trapped consumers who change their minds: When consumers ask to cancel or reverse a check cashing transaction after learning the fee, All American employees sometimes lie and say that the transaction cannot be canceled, even when that is not the case. All American employees also falsely tell consumers that it will take a long time

to reverse a transaction. In some cases All American's procedures actually do make it difficult or impossible for the consumer to cash the check elsewhere. For example, employees sometimes apply a stamp to the back of the check—such as "For Deposit Only: All American Check Cashing Inc."—effectively locking the consumer into the transaction.

Meanwhile, appeals by Grey have helped him so far to both avoid payment of the \$3 million state fine and to keep his stores open. Gray's lawyers say the Madison businessman and his company are victims of "government thuggery" and that the "draconian" penalties proposed by regulators "are the result of a vendetta against All American, orchestrated by one or more" unidentified employees of the [Banking] Department. In all due respect, that's a rather lame excuse for a defense and I don't believe that sort of thing will sell to a judge.

Source: *Mississippi Business Journal*

XXIII. RECALLS UPDATE

It seems that each month we report a large number of safety-related recalls. Again, that is the case this month. We have included some of the more significant recalls that were issued in May. 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.

NISSAN RECALLS 3 MILLION CARS OVER AIR BAG SYSTEM DEFECT

Nissan is recalling about 3.17 million vehicles including a range of models due to a potential air bag system defect that can leave a car to misclassify an adult passenger as a child or even as nonexistent, according to the National Highway Traffic Safety Administration (NHTSA). In a letter, NHTSA said Nissan North America will issue a recall for 13 models that may contain a front-seat passenger "occupant classification system" that can incorrectly peg an adult passenger as a child or even decide a seat is empty, leaving the passenger air bag to be shut down and unable to deploy during a crash.

The affected models include 2013 Infiniti JX35, the 2014 to 2016 Infiniti Q50 and

Infiniti QX60, the 2013 to 2016 Altima and Leaf, the 2016 to 2017 Maxima, the 2015 to 2015 Murano, the 2013 to 2016 NV200 and the 2014 to 2016 NV200 Taxi, the 2013 to 2017 Pathfinder, the 2014 to 2017 Rouge, the 2013 to 2016 Sentra, and even the 2015 to 2016 City Express model Nissan manufactured for Chevrolet. NHTSA said the issue occurs with “a small number of rare passenger ingress scenarios and unusual seating positions immediately upon entering the vehicle” that lead the system to think a seat is occupied by a child or empty, but if the position is maintained when the car begins moving, the classification is locked in for the duration of the drive. “In all instances, the OCS may not perform as designed and the passenger air bag not to deploy as designed in a crash, increasing the risk of injury to the front passenger seat occupant,” NHTSA said.

Nissan said it intends to notify the owners of the potentially affected vehicles within 60 days. Although repairs are expected to vary between vehicle models, the defect will be fixed without cost to drivers. The air bag recall comes little more than a month after Nissan agreed to recall about 47,000 Leafs released between 2013 and 2015 over the possibility that a braking component will freeze in colder climates, increasing the risk of a crash.

At the time NHTSA said the problem lies with the cars’ electronic brake booster. When one of the cars is parked in “extremely cold temperature conditions,” the relay inside the booster tends to freeze up and the car goes into an assisted mode for braking, requiring more effort and likely increasing braking distance. Drivers living in colder climes were also affected by an October recall of about 300,000 Nissan Versas, a compact car with front coil springs prone to corrosion from road salt used in colder months. If the springs corroded and fractured, it could cause the car’s front suspension and tires to fail completely. NHTSA launched an investigation into the problem in May after receiving 93 complaints of front coil spring fractures and one complaint of a crash related to the defect. In its preliminary analysis, the agency found that coil spring failures could happen without warning and at any speed.

NISSAN RECALLS 110,000 ROGUES OVER REAR LIFTGATE DEFECT

Nissan has recalled nearly 110,000 Rogue vehicles over a problem with an anti-corrosion treatment on the rear liftgate support that can cause it to break off and cause injury, the National Highway Traffic Safety Administration (NHTSA)

announced the recall in a letter. If the anti-corrosion coating on the outer tube of the rear liftgate support stay used to power assist the door is insufficient, it could corrode over time and break off, the agency said in a safety recall report filed with its recall notice.

Approximately 108,500 2014-2016 Nissan Rogue vehicles are affected by the recall, and dealers will replace the rear tailgate stays with new ones at no cost to drivers, the NHTSA said. The parts aren’t currently available, but customers will be notified when they are. According to the report, the supplier of the anti-corrosion treatment on the rear liftgate stay’s outer tube altered the treatment from its specification, resulting in a coating that is potentially insufficient. If the coating isn’t adequate, the rear liftgate stay can corrode over time as a result of water and salt penetration. Because the stay operates under high-pressure gas, the corrosion can cause a sudden release of pressure, potentially causing the stay to break off and injure someone.

Nissan North America Inc. was first notified of field incidents in foreign markets involving the rear liftgate stays malfunctioning on older vehicles that aren’t for sale in the U.S. and launched an investigation, according to the safety report. The automaker later determined that the component was also installed on vehicles in the U.S. and reviewed field data to see if there had been any incidents in the country. Nissan said it didn’t identify any incidents. As part of its investigation, Nissan says it also analyzed parts gathered through a parts collection program and didn’t find any evidence of corrosion on Rogue vehicles in the U.S.

FORD RECALLS 271,000 TRUCKS OVER BRAKE FLUID LEAK

Ford Motor Co. has recalled nearly 271,000 F-150 pickup trucks in North America due to malfunctioning brake master cylinders that allegedly led to nine accidents. Ford said in a press release that it will recall 270,873 model year 2013-2014 F-150 trucks because the master cylinders leak brake fluid into the brake booster, increasing the risk of a crash. Dealers will replace the brake master cylinder, and will also replace the brake booster if a leak is found. The issue only affects the vehicles’ front wheels, Ford said. The recall covers F-150s built at two Ford plants in Dearborn, Michigan, and Kansas City, Missouri, in August 2014. Ford sold 225,012 of the affected vehicles in the United States, 43,682 in Canada and 402 in Mexico. The recalled F-150 trucks repre-

sent more than 17 percent of the 1,534,205 Ford F-Series trucks sold in 2014 and 2015. In those same years, the Ford F-Series were named America’s best-selling truck and best-selling vehicle.

FORD RECALLS 202,000 VEHICLES WITH TRANSMISSION ISSUE

Ford Motor Co. has recalled roughly 202,000 trucks, cars and SUVs in North America affected by a transmission problem that can inadvertently shift the vehicles into first gear and increase accident risks. Ford announced the three safety recalls and two safety compliance recalls in a press release. The largest of the recalls pertains to roughly 202,000 2011-2012 Ford F-150 trucks, and 2012 Ford Expedition, Lincoln Navigator and Ford Mustang SUVs and cars for a potential problem with the output speed sensor in the vehicles’ transmission lead frame. The problem could lead to the transmission controls to temporarily shift the vehicle into first gear, resulting in a sudden speed reduction that could increase the risk of an accident, according to Ford. The company is aware of three reported accidents related to the transmission problem, but no injuries, according to the announcement.

Ford said that dealers will inspect the power train control modules, and update the modules’ software to eliminate the downshift problem, plus provide a one-time replacement of the lead frame at no charge for vehicles within 10 years or 150,000 miles from their warranty start. There are 184,000 vehicles in the U.S. and 17,900 in Canada affected. Ford also announced that roughly 81,000 2014-2015 Ford Explorer and Ford Police Interceptor SUVs are being recalled to replace rear suspension toe links. The company said that in some vehicles poor weld quality could cause the suspension links to fracture, making it harder to control the vehicles. Ford said that it is aware of one accident and one injury related to the suspension problem.

MASERATI RECALLS 26,000 VEHICLES OVER REAR SUSPENSION PROBLEM

Maserati has recalled more than 26,000 vehicles over a loose bolt that could cause the rear tires to oversteer under extreme driving conditions and increase the likelihood of a crash. NHTSA said in a recall notice recently posted online that Maserati North America Inc. is recalling certain 2014-2016 Quattroporte and Ghibli vehicles because the attaching bolt on the rear

tie-rod to hub assembly might not have been properly tightened during the assembly process. The bolt could lessen its clamping force over time and result in noise emanating from the rear of the car while it's being driven, according to NHTSA. Eventually, the piece could fail and the tie-rod and hub carrier assembly could separate, resulting in a condition in which the vehicle pulls to one side from the rear that could increase the risk of a crash.

To fix the problem, NHTSA said Maserati will inspect vehicles starting on July 1 to ensure the bolt is properly tightened. In the event that it's loose, the automaker will replace the rear tie-rod to hub carrier assembly at no charge to customers. In documents filed with the recall, Maserati said it wasn't aware of any accidents or injuries that could be related to this issue as of late April. The automaker opened an investigation into the problem in July 2014 after receiving four field claims about excessive noise when certain vehicles were being driven, according to the documents. Maserati pinned the problem on a possible torque process failure and thought it had solved the problem, but an additional eight field claims were reported after it modified its torque procedure, prompting the automaker to reopen its internal investigation early last year.

All affected customers will be notified of the problem by first-class mail and be advised to schedule an appointment to have their vehicles repaired. Maserati expects it could take up to a day to fix the vehicle, but noted that the repair will be free of charge.

GM TO RECALL 2 MILLION CARS IN CHINA OVER VALVE ENGINE DEFECT

General Motors' Chinese affiliate is set to recall more than 2 million cars over possibly faulty crankcase valves, which allow gasses to flow through a typical combustion engine, the country's quality control body said last month. According to a statement on the General Administration of Quality Supervision, Inspection and Quarantine's website, the recall will include about 1 million Chevrolet Cruzes, 830,000 Buick Excelles, 159,000 Chevy Epicas and 18,000 Chevy Aveos, all of which were manufactured by SAIC-GM and have been sold exclusively in China. The potential problem lies with the valves being prone to corrosion, which can lead to oil leaks and other engine malfunctions.

ROCKY MOUNTAIN RECALLS BICYCLES WITH FRONT DISC BRAKES TO REPLACE QUICK RELEASE LEVER DUE TO CRASH HAZARD

Rocky Mountain Bicycles of Canada has recalled about 17,300 Rocky Mountain Bicycles. An open quick release lever on the bicycle's front wheel hub can come into contact with the front disc brake assembly, causing the front wheel to come to a sudden stop or separate from the bicycle, posing a risk of injury to the rider. This recall involves all 2003 through 2016 models of Rocky Mountain bicycles equipped with front disc brakes and a black or silver quick-release (QR) lever on the front wheel hub. Bicycles that do not have disc brakes are not included in this recall. When the front QR is fully opened, if there is less than 6 mm—or the width of a No. 2 pencil—between the QR and disk brake rotor on the wheel, the bicycle is included in this recall.

The bicycles were sold at Rocky Mountain bicycle dealers nationwide and online at www.Bikes.com (Rocky Mountain Bicycles), www.Ems.com (Eastern Mountain Sports), www.JensonUSA.com, www.MikesBikes.com and www.PerformanceBike.com from May 2002 through April 2016 from between \$250 and \$15,000. Consumers should stop using the recalled bicycles immediately and contact an authorized Rocky Mountain retailer for free installation of a new quick release on the front wheel. Contact Rocky Mountain toll-free at 800-663-2512 from 9 a.m. to 5 p.m. ET Monday through Friday, via email at info@bikes.com or online at www.bikes.com and click on Safety/Recall at the bottom of the page. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Rocky-Mountain-Recalls-Bicycles-with-Front-Disc-Brakes-to-Replace-Quick-Release-Lever/>

SCOTT RECALLS BICYCLES DUE TO FALL HAZARD

SCOTT USA Inc., of Salt Lake City, Utah, has recalled about 1,400 SCOTT bicycles with SYNCROS seat posts in the U.S. and an additional 170 in Canada. The seat post can break, posing a fall hazard to the rider. This recall involves model year 2016 SCOTT men's and women's road bicycles with SYNCROS FL 0.1 seat posts. Bicycle models included in the recall are Addict CX 10 disc, Addict SL, Addict Team Issue, Addict 10, Addict 15, Addict 20, Addict Gravel disc, Solace Premium disc, Solace 10 disc, Frame set Addict 10 (HMF), Frame set Addict CX 10 disc (HMX) mech / Di2 and Seatpost Syncros FL1.0 Carbon Offset 27.2mm. "SCOTT" is printed on the

bicycle down tube and "SYNCROS" is printed on the seat post. The bicycles were sold in black, grey and white with yellow, orange, green or blue decals. A complete list of serial numbers included in the recall can be found at <http://www.scott-sports.com/global/en/company/safety-and-recalls>. The serial number is printed on a white sticker and embossed on the underside of the bicycle frame near the pedals. The company has received 11 reports of broken seat posts outside of the U.S. No injuries have been reported.

The bicycles were sold at authorized SCOTT dealers nationwide and online from June 2015 through March 2016 for between \$3,300 and \$9,700. Consumers should immediately stop riding the recalled bicycles and return them to an authorized SCOTT dealer to have a free replacement seat post installed. Contact Scott USA toll-free at 888-607-8365 from 8 a.m. to 6 p.m. CT Monday through Friday, by email at recall@scott-sports.com or online at www.SCOTT-Sports.com and click on "Safety" at the bottom of the page, then "Recalls" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Scott-Recalls-Bicycles/>

RIXSON EXTERIOR GATE CLOSERS RECALLED DUE TO INJURY HAZARD

Rixson, of Monroe, N.C., a brand of Yale Security Inc. (Yale Security is owned by Assa Abloy) has recalled about 130 Exterior Gate Closers. The gate closer mechanism can break and eject metal pieces including the spring or it can spray oil, posing a risk of injury. This recall involves the Exterior Gate Closer Model 1350. The affected gate closer is affixed to external gates and has a body that is approximately 6.5 inches long, with a sliding arm that is about 3 feet in width when extended. The unit is marked on the side of the body with "MAB/ASSA ABLOY." The recall only includes units produced between January 2014 and December 2015. The unit's production date is stamped on the side of the gate closer body in a "week/year" format and can be accessed by removing the body's plastic housing. The firm has received 15 reports worldwide of mechanisms breaking and ejecting metal objects, including three in the U.S. No injuries have been reported.

The gate closers were sold at wholesale and hardware distributors from April 2015 through November 2015 for about \$460. Consumers should immediately stop using the gate and contact Rixson for information on safely removing the arm from the gate closer and returning for a free

replacement gate closer. Rixson is contacting consumers who bought the recalled product directly. Contact Rixson toll-free at 866-474-9766 (Option 2) from 8 a.m. to 4:30 p.m. ET Monday through Friday or contact Assa Abloy Italia online at www.assaabloy.it and click on the "Rixson 1350 Gate Closer Corrective Action" box on the right-hand side of the page for more information.

Photos available at <http://www.cpsc.gov/en/Recalls/2016/Rixson-Exterior-Gate-Closers-Recalled/>

TJX RECALLS FOLDABLE LOUNGE CHAIRS DUE TO RISK OF INJURY

About 5,200 foldable lounge chairs have been recalled by The TJX Companies Inc., of Framingham, Mass. This recall involves T.J. Maxx and Marshalls foldable weather-proof lounge chairs. The chairs are made of an acacia wood frame and striped fabric in two styles: a natural oiled wood frame with red and white stripe fabric or a white gloss frame with blue and white stripe fabric. The chairs measure about 30 inches high by 42 inches long when unfolded. The style number is printed on the hang tag attached to the chair. "MADE IN VIETNAM" is printed on a label on the bottom of the chair frames. TJX has received 15 reports of injuries from collapsing chairs. Injuries included back and tailbone injuries, one report of a fractured finger, three reports of stitches to fingers and reports of cut, bruised or swollen fingers.

The chairs were sold at T.J. Maxx and Marshalls stores nationwide during March 2016 for about \$40. The chairs can collapse unexpectedly, posing a fall and injury hazard. Consumers should immediately stop using the recalled foldable chairs and return them to any T.J. Maxx or Marshalls store for a full refund. Consumer Contact: T.J. Maxx at 800-926-6299 from 9 a.m. to 6 p.m. ET Monday through Friday or online at www.tjmaxx.com then click on Product Recalls at the bottom of the page or Marshalls toll-free at 888-627-7425 or online at www.marshallsonline.com and click on Customer Service at the bottom of the page.

NOBLE HOUSE RECALLS COUNTER STOOLS DUE TO LACERATION HAZARD

Noble House Home Furnishings LLC, of Chatsworth, Calif., has recalled about 2,000 counter stools. The kick plates of the counter stools can have a sharp edge, posing a laceration hazard to consumers. This recall involves Noble House's Louigi

and Tate counter stools with solid wood legs and a metallic kick plate. The Louigi black leather counter stool has a backrest and measures about 18 inches wide by 26 inches deep by 41 inches tall. The backless Tate counter stools were sold in white or brown and measure about 16.5 inches wide by 16.5 inches deep by 27 inches tall. "MADE BY: PERMAISURI CO., LTD: No. 30 YUANCUO ROAD HONGSHANQIAO, FUZHOU, FUJIAN 350002 CHINA" is stamped on a tag on the underside of the stool's seat. The firm has received six reports of the stools injuring consumers, including scratches and cuts.

The stools were sold online at Amazon.com, ATC.com, eBay.com, Greatdealurniture.com, Groupon.com, Houzz.com, Overstock.com and Wayfair.com from October 2013 through March 2015 for about \$120. Consumers should immediately stop using the recalled stools and remove the kick plates from the stools and contact Noble House for free replacement kick plates, including shipping. Consumer Contact: Noble House toll-free at 888-600-6376 from 8:30 a.m. to 5:30 p.m. PT Monday through Friday or online at www.noblehousefurniture.com and click on the Safety Recall link at the bottom of the page.

ROBERT BOSCH TOOL RECALLS GRINDERS DUE TO RISK OF BURNS

Robert Bosch Tool Corp., of Mount Prospect, Ill., has recalled about 91,000 Bosch small angle grinders. The grinder can overheat while in use, causing the brush covers to melt and expose the end of the brush holder, posing a risk of burns to the consumer. This recall involves Bosch 1380 Slim small, 4.5-inch angle grinders with date codes 502 through 511. The model number and date codes are located on the name plate affixed to the underside of the grinder. The grinders are blue and silver with a black label and black and red control buttons. "BOSCH" is printed in red on the side of the product. The company has received four reports of the grinders overheating. No injuries have been reported.

The grinders were sold at Lowe's, Menards, The Home Depot and other home improvement, hardware stores nationwide and online at Amazon.com, HomeDepot.com, Lowes.com and Menards.com from March 2015 through November 2015 for between \$50 and \$200, depending on the model and whether it was sold in a combination package with other tools. Consumers should immediately stop using the recalled grinders and contact the company

to obtain a free repair. Contact Robert Bosch Tool toll-free at 844-552-6724 Monday through Friday between 7 a.m. and 7 p.m. CT, or online at www.BoschTools.com and then click on Important Product Recalls at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Robert-Bosch-Tool-Recalls-Grinders/>

DIGITAL CLAMP METERS RECALLED BY KLEIN TOOLS DUE TO SHOCK AND BURN HAZARDS

About 114,000 Digital clamp meters have been recalled by Klein Tools, of Lincolnshire, Ill. The meters can fail to give an accurate voltage reading, resulting in the operator falsely believing the electrical power is off, posing shock, electrocution and burn hazards. This recall involves Klein Tools digital clamp meters used to detect electrical current in wiring. Model numbers CL110, CL210, CL310 and CL110KIT with date codes 0815U-A1, 1015U-A1, 1115U-A1, 1215U-A1, 0116U-A1, 0216U-A1 and 0316U-A1 are included in this recall. "Klein Tools" and the model number are printed on the front of the clamp meters. The date code is printed on the back. The meters are black with a backlit LCD display and an orange trigger and clamp mechanism. The meters are rated CAT III 600 volts and measure voltage up to 600 volts and alternating current up to 400 amps. Only the meter in the CL110KIT is included in the recall.

The meters were sold at Home Depot and other hardware stores, industrial distributors and electrical wholesalers nationwide from November 2015 through April 2016 for between \$55 and \$75. Consumers should immediately stop using the recalled digital clamp meters and contact Klein Tools to receive postage paid labels to return the clamp meters for free replacement units. Contact Klein Tools at 800-527-3099 from 7 a.m. to 6 p.m. CT Monday through Friday, online at www.kleintools.com and click on "Safety Recall Information" at the bottom of the page for more information, or email ClampMeter-Recall@kleintools.com. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Digital-Clamp-Meters-Recalled-by-Klein-Tools/>

PHILIPS LIGHTING RECALLS METAL HALIDE LAMPS DUE TO BURN AND LACERATION HAZARDS

About 87,000 Halide Lamps have been recalled by Philips Lighting North America Corp., of Somerset, N.J. The outer bulbs can shatter, resulting in hot internal pieces of glass falling from the lamps, posing a

burn and laceration hazard. This recall involves the Philips Energy Advantage Ceramic Metal Halide Lamps model CDM330. They are designed as energy efficient replacements for traditional 400W quartz metal halide lamps installed in magnetic ballasts and intended for use in high-ceiling industrial, retail and commercial applications. The lamps were sold in both clear and coated versions. Each lamp includes an etching, located either at the base of the lamp or on the ovoid of the lamps, that displays the relevant date code, along with Philips' name, wattage (330W) and the model (CDM330). Each lamp includes an etching, located at the base of the lamp or on the ovoid of the lamps, that displays the relevant date code, along with Philips' name, wattage (330W) and the model (CDM330). The firm has received two reports of lamps shattering. No injuries have been reported.

The lamps were sold at electrical supply distributors from May 2011 through June 2012 for about \$40. Consumers should immediately stop using the recalled lamps and contact Philips for a free replacement. Contact Philips Lighting toll-free at 866-253-5503 from 9 a.m. to 5 p.m. ET Monday through Friday, via email at ceramicmh@philips.com or online at www.philips.com and click on "For Professionals" and then "Recalls" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Philips-Lighting-Recalls-Metal-Halide-Lamps>.

WATER HEATING TECHNOLOGIES RECALLS GAS WATER HEATERS DUE TO FIRE HAZARD

About 14,400 Gas water heaters have been recalled by Water Heating Technologies Corp., of Pomona, Calif. The water heaters have a space between the burner flange and the combustion chamber that allows flammable liquids or gases to contact burning flammable vapors inside the combustion chamber, posing a risk of fire or explosion. This recall involves Water Heating Technologies "American Standard" gas water heaters. The model numbers included in the recall begin with GN and GSN. The water heaters are white with an "American Standard" logo printed on the front. The model number is printed on a label on the side of the water heater. The water heaters were sold in 30, 40 and 50 gallon capacities. A complete list of models and serial numbers can be found on the company's website at <http://www.americanstandardwaterheaters.com/recall/>.

The water heaters were sold by plumbing contractors nationwide from May 2015

through February 2016 for between \$400 and \$820. Consumers should immediately stop using the gas water heaters and call Water Heating Technologies to arrange for a service technician to inspect, repair or replace the water heater free of charge. Contact Water Heating Technologies toll-free at 888-883-0788 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.americanstandardwaterheaters.com and click on "Recall Information" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Water-Heating-Technologies-Recalls-Gas-Water-Heaters/>

WALMART RECALLS RIVAL ELECTRIC WATER KETTLES DUE TO BURN AND SHOCK HAZARDS

Wal-Mart Stores Inc., of Bentonville, Ark., has recalled about 1.2 million Rival brand electric water kettles. The heating element can fail and rupture, posing burn and shock hazards to the user. This recall involves Rival brand electric water kettles with model numbers WK8283CU and WK8283CUI. The model numbers are printed on a product label on the underside of the water kettle. The white plastic water kettles were sold with a warming base and a pitcher. A window on the side pitcher has markings that measure the water levels. "Rival" is printed beneath the window. Walmart has received 80 reports of incidents, including seven reports of burns.

The kettles were sold exclusively at Walmart stores nationwide and online at Walmart.com from March 2011 through October 2015 for about \$14. Consumers should immediately stop using the recalled kettle and return it to any Walmart store for a full refund. Contact Walmart at 800-925-6278 between 7 a.m. and 9 p.m. CT Monday through Friday, 9 a.m. and 9 p.m. CT Saturday, or noon and 6 p.m. Sunday; or visit the company's website at www.Walmart.com and click "Product Recalls." Consumers can also visit <http://walmartstores.com/contactus/feedback.aspx>.

BLACK DIAMOND RECALLS CAMMING CLIMBING DEVICES DUE TO FALL HAZARD

Black Diamond Equipment Ltd., of Salt Lake City, Utah, has recalled about 45,500 Black Diamond Camalot climbing devices in the U.S. and an additional 5,700 in Canada. The camming devices can come apart during use and fail, posing a fall hazard to the consumer. This recall involves all sizes of Black Diamond

Camalot and Camalot Ultralight camming devices. The climbing devices are used to secure ropes while rock climbing. The Camalots were sold in sizes 0.3 to 6 and have manufacturing codes from 5133 to 6067. The Camalot Ultralights were sold in sizes 0.4 to 4 and have manufacturing codes from 5309 to 6061. Manufacturing codes are printed on the underside of the cams.

The devices were sold at Eastern Mountain Sports, Gear Express, Mountain Gear, REI and other specialty outdoor recreation stores nationwide and online at BackCountry.com and BlackDiamond.com for between \$65 and \$130. Consumers should immediately stop using the recalled camming devices and contact Black Diamond for inspection and replacement instructions. Instructions for inspection are also available at <https://warranty.bdel.com/CamalotRecall/Landing>. Only those camming devices that have unformed axle ends are included in the recall. Contact Black Diamond at 877-775-5552 from 8 a.m. to 5 p.m. MT Monday through Friday or online at <http://blackdiamondequipment.com> and click on "Safety Notices" for more information. Consumers can also email the company at recall@bdell.com. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Black-Diamond-Recalls-Camming-Climbing-Devices/>

TWIN GO RECALLS BABY CARRIERS DUE TO FALL HAZARD

TwinGo LLC, of Mclean, Va., has recalled about 4,000 baby carriers in the U.S. along with 160 that were sold in Canada. The waist buckle can break, posing a fall hazard to children in the carrier. The Twin Go Original Carrier is an infant carrier designed to carry one or two babies against the caregiver's body at the waist. It is intended for babies that are from 10 to 45 pounds. "Twin Go" is printed on a label located on the front of the carrier and an 11-digit batch number is printed on a label sewn to the waistband. Batch numbers included in this recall: 23014024003, 01515026003, and 21615019001. They were sold in fabric that is black on the outside and blue or orange on the inside. The company has received 13 reports of buckles breaking worldwide, including 10 in the U.S., one in Canada and two in the UK. No injuries have been reported.

The carriers were sold at boutique stores nationwide and online at Amazon.com and TwinGoCarrier.com from December 2014 through May 2016 for about \$215. Consumers should immediately stop using

the infant carrier and contact TwinGo for a free repair kit. A free replacement buckle will be provided with instructions. A repair video is also available at <http://twingocarrier.com/pages/repairkit>. Consumer Contact: TwinGo toll-free at 888-288-9342 from 9 a.m.-5 p.m. EST Monday-Friday, via email at safety@twingocarrier.com or online at www.TwinGo-Carrier.com and click on "Product Recall" at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Twin-Go-Recalls-Baby-Carriers/>

PHIL&TEDS RECALLS DASH STROLLERS DUE TO RISK OF INJURY

About 630 phil&teds dash strollers have been recalled by phil&teds, of Fort Collins, Colo. The hinge used to fold the dash v5 stroller can become damaged while opening and closing the stroller, posing a pinch hazard to the consumer. This recall involves phil&teds dash v5 buggy-style strollers with serial numbers ranging between PTRV 0715/0746 and PTRV 0815/2525. The serial number is printed on the lower left rear cradle, next to the identification label. The company has received one report of the stroller hinge joint separating. No injuries have been reported.

The strollers were sold at Baby Street, Dainty Baby, Mega Babies and other baby product and specialty stores nationwide and online at Amazon.com, diapers.com and philandteds.com from August 2015 through April 2016 for about \$550. Consumers should immediately stop using the dash v5 stroller and contact phil&teds to have the stroller frame replaced free of charge. Contact phil&teds toll-free at 855-652-9019 from 9 a.m. to 5 p.m. MT Monday through Friday or online at www.philandteds.com and click on "Support," then "Upgrades" and "Recalls" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/philandteds-recalls-dash-strollers/>

CASCADE DESIGNS RECALLS AVALANCHE RESCUE PROBES DUE TO RISK OF SUFFOCATION

Cascade Designs Inc., of Seattle, Wash., has recalled about 1,600 Avalanche rescue probes in the U.S. and an additional 230 that were sold in Canada. The lock button on the probe can fail to engage and lock, causing the probe not to function as intended. This can interfere with finding someone buried beneath snow, posing a suffocation hazard. This recall involves Mountain Safety Research Striker™ 320,

Striker™ 240 avalanche rescue probes. The probe is divided into six or eight sections of 18-inch aluminum shafts that lock into place to create a single 94-inch or 126-inch probe, depending on the model. The probe is used by searchers to help identify something or someone buried by snow after an avalanche. "Striker 320" is printed on the red and gray probe and "Striker 240" is printed on the yellow and gray probe. "MSR" is printed on the shaft.

The probes were sold at REI and other outdoor recreation stores nationwide and online at Amazon.com and other websites from September 2014 through January 2016 for between \$60 and \$70. Consumers should immediately stop using the recalled probes and call Cascade Designs for instructions on receiving a refund or free replacement probe. Contact Cascade Designs at 800-531-9531 from 8 a.m. to 5 p.m. PT on Monday through Friday or online at www.msrgear.com and click on "Recall" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Cascade-Designs-Recalls-Avalanche-Rescue-Probes/>

MUNCHKIN RECALLS LATCH LIGHTWEIGHT PACIFIERS & CLIPS DUE TO CHOKING HAZARD

About 180,000 Latch™ lightweight pacifiers and clips have been recalled by Munchkin Inc., of Van Nuys, Calif. The clip cover can detach from the pacifier's clip, posing a choking hazard for young children. This recall involves Munchkin's Latch lightweight pacifiers and clips sold as a set. The pacifiers were sold in five styles: designer, rattle and heartbeat clips with 0m+ natural shape pacifiers, and designer and rattle clips with 6m+ orthodontic pacifiers. The designer pacifiers and clips 0m+ and 6m+ are in three color patterns: blue and white strips, orange and with white polka dots and pink with white polka dots. The rattle pacifiers and clips 0m+ and 6m+ are green with beads in the pacifier cover to make a rattle sound and have a polka dot strap. The heartbeat pacifiers and clips have a red, heart-shaped pacifier cover and red and white polka dots on the strap. The company has received 10 reports (five in the U.S. and five in Canada) of the clip cover detaching from the pacifier clip. No injuries have been reported.

The pacifiers and clips were sold at Babies R Us, Target, Wal-Mart and other mass merchandisers, juvenile product, baby boutique and discount stores nationwide and online at amazon.com, munchkin.com and other website from March 2014 through March 2016 for between \$11 and \$15. Consumers should immediately

take the clip away from young children and contact Munchkin for a free replacement Lightweight Pacifier pack with two pacifiers or a full refund. Contact Munchkin toll-free at 877-242-3134 from 7 a.m. to 5 p.m. PT Monday through Friday or online at www.munchkin.com, click on Help at the bottom of the page and then Recalls for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Munchkin-Recalls-Latch-Lightweight-Pacifiers-and-Clips/>

HOBBY LOBBY RECALLS INFANT RATTLES DUE TO CHOKING HAZARD

Hobby Lobby Stores Inc., of Oklahoma City, Okla., has recalled about 14,400 rattles. The rattle seams can separate, exposing the fiber stuffing and bell rattle, posing a choking hazard. This recall involves Little Wishes Chenille Stuffed Rattles, including the Pink & Green Fish rattles, item number 5141577, and the Blue & Yellow Fish rattles, item number 5127642. The rattles are made of a soft chenille fabric with a fiber stuffing. They are 8.5 inches by 7 inches and have a hole cut out in the middle. The item number is printed on the top left corner of the product hang tag. Rattles have a sewn-in label with "Reg. No. PA-15130(CN)" and "Hobby Lobby 9123069" printed on the front of the label.

The rattles were sold exclusively at Hobby Lobby Stores nationwide from January 2016 through April 2016 for about \$7. Consumers should immediately stop using the recalled rattles and return them to the nearest Hobby Lobby store for a full refund or store credit. Contact Hobby Lobby Stores at 800-326-7931 from 9 a.m. to 6 p.m. ET Monday through Friday, or online at www.hobbylobby.com and click on the "Recall" tab at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Hobby-Lobby-Recalls-Infant-Rattles/>

PUBLIX RECALLS CRANBERRY NUT AND SEED MIX FOR POSSIBLE LISTERIA

Publix is urging consumers to throw away or return its 7.05-ounce containers of cranberry nut and seed mix because the product may have Listeria. The supermarket chain issued a voluntarily recall after the company's walnut supplier, Woodstock Farms, alerted Publix about possible contamination.

The cranberry nut and seed mix was sold in Alabama, Tennessee, Georgia, Florida, North Carolina and South Caro-

lina and has best-by dates of Aug. 6-30, 2016. The UPC is 41415-34986. Listeria can cause symptoms such as high fever, severe headache, stiffness, nausea, abdominal pain and diarrhea. Young children, frail or elderly people, pregnant women and those with weakened immune systems are most at risk of developing a serious or sometimes fatal infection with Listeria exposure. To ask questions, call Publix at 800-242-1227 or the U.S. Food and Drug Administration at 888-SAFEFOOD (888-723-3366).

BLUE BELL RECALLS MORE ICE CREAM

Blue Bell has another recall on its hands. The company, which had a large listeria outbreak in 2015, said select lots of Blue Bell's Rocky Road pints made in Brenham, Texas, may be mispackaged to contain Cookies 'n Cream ice cream, which has undeclared allergens soy and wheat. No illnesses have been reported, but Blue Bell acknowledges the allergens may pose a serious or life-threatening reaction to certain people. "The problem was discovered when a Blue Bell employee restocking a retailer observed the incorrect packaging," the company said in a statement on the FDA website. The recalled product has a Rocky Road pint with a Cookie 'n Cream Lid and the code number 022918576. The ice cream was sent to retail outlets in Texas and Louisiana. Customers who have one of the mislabeled products may return the ice cream for a refund. Call 979-836-7977 from 8 a.m. to 5 p.m. CST Monday through Friday with questions.

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. 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.

XXIV. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

HEIDI BOWERS

Heidi Bowers, a native of Elba, Ala., has been with the firm for 15 years and currently works as a Legal Assistant in our Consumer Fraud and Commercial Litigation Section. Although Heidi has previously worked in the both Mass Torts and Personal Injury Sections, she is now tasked with working on whistleblower claims and employment law claims, which covers a broad range of cases. The whistleblower claims are increasing at a record case. She also works on sexual harassment, discrimination, wage and hour, and retaliation cases.

Heidi graduated Magna Cum Laude from Auburn University of Montgomery in 2001 with a Bachelor of Science in Justice and Public Safety. She has also earned her Legal Assistant Certificate. In her free time, Heidi enjoys being on the water and quilting. She is a very hard working, dedicated employee who puts the clients' interest first. We are fortunate to have Heidi with us.

DAVID BYRNE

David Byrne is a lawyer in our Mass Torts Section. He is currently assisting clients with claims against pharmaceutical and medical device companies. David is primarily working at this juncture on litigation related to Xarelto blood thinner, Transvaginal Mesh injuries, as well as Hormone Replacement Therapy class action litigation in California.

Prior to moving to Mass Torts, David practiced in the firm's Environmental & Toxic Torts section, where he has handled numerous complex environmental cases in state and federal courts throughout the United States. He has also been actively involved in litigation related to the BP Oil Spill disaster. Additionally, David's cases have involved such wide-ranging topics as drinking water contamination, toxic air emissions, contaminated waste water discharges, toxic exposure, improper landfill activities, petroleum spills, medical monitoring claims and soil and groundwater contamination.

During the course of his environmental practice, David has represented individuals, businesses and municipalities, and assisted numerous clients in obtaining multi-million dollar settlements or verdicts. In 2003, David was involved in the landmark \$700 million toxic tort settle-

ment with Solutia, Monsanto and Pharmacia over PCB contamination in Anniston, Alabama.

In connection with the BP Oil Spill litigation, David has assisted the State of Alabama and numerous counties and cities in Alabama and northwest Florida that have been damaged by the disaster. In addition, David recently served as co-lead counsel in the federal trial against the Tennessee Valley Authority over the company's catastrophic release of more than 1 billion gallons of coal ash sludge from an impoundment at its Kingston Fossil Plant. Our lawyers represent hundreds of individual property owners and businesses who were damaged when the Kingston impoundment ruptured on December 22, 2008, and released an enormous wave of toxic coal slurry into local neighborhoods and the Watts Bar Reservoir. The environmental ramifications of the TVA spill have been enormous and cleanup is slated to cost more than \$1 billion and continue for years to come.

David is a 1989 graduate of the Citadel where he served on the Cadet Honor Committee. In 1992, he obtained his law degree from the Cumberland School of Law at Samford University. During his time at Cumberland, David was elected to the positions of Chief Justice of the Student Honor Court and Director of the Student Trial Advocacy Board. David's peers elected him Best Student Advocate in 1991.

Following graduation, David served as a Deputy Alabama Attorney General and as a law clerk to U.S. District Judge Robert Varner and Alabama Court of Criminal Appeals Judge John M. Patterson. Before joining Beasley Allen, David was a partner with the Montgomery, Ala., law firm, Beck & Byrne, P.C. As a matter of interest, his former partner George Beck is now the U.S. Attorney in Montgomery for the Middle District of Alabama.

David currently serves as the Chair of the Alabama State Bar's Federal Court Practice Section. David is a past-president of the Montgomery County Trial Lawyers Association and currently serves on the Board of the Federal Bar Association (Middle District of Alabama Chapter). David is also a member of the Board of Governors for the Alabama Association for Justice and is a Master Bencher with the Justice Hugh Maddox American Inn of Court. In 2009, David was appointed to serve as the Chair of the Alabama Bar's Federal Practice Section Task Force. He was named to the Best Lawyers in America list.

David is a regular speaker at state, regional and national environmental law seminars. Most recently, he served as a

speaker and faculty member for the HB Litigation Coal Ash & Slurry Contamination seminar and the American Association for Justice's Gulf Coast Oil Spill Litigation seminar.

David and his wife Betty Bobbitt have been married for 22 years, and they have two children. The family attends First Baptist Church in Montgomery, Ala. David is a very good lawyer and an extremely hard worker. He cares deeply about the clients he works for. We are blessed to have David with in the firm.

TRACIE HARRISON

Tracie Harrison began working for Beasley Allen in September 1999 in the Toxic Torts section of the firm. For the past three years, Tracie has served as legal assistant to Parker Miller, a lawyer in our firm's Environmental/Toxic Torts Section. Tracie is highly skilled in the management of large document production databases, and her work proved essential in the management of the *State of Alabama vs. BP case*. Before BP, Tracie was a key contributor on the Carbon Black, Aniston Monsanto PCB, 3M Minnesota and TVA Coal Ash Spill litigations. Currently, Tracie assists Parker with the day-to-day management of his BP personal injury, seafood and business economic loss client bases, as well as with clients suffering debilitating severe lung injuries.

After graduating from Southern Academy in Greensboro, Ala., Tracie went on to attend both Shelton State Community College and Wallace Community College to receive a degree in nursing. She is currently a student at Judson College in Marion, Ala., with dreams to attend law school.

Tracie has been married for 21 years to her husband, Nick, and they have one son, Hayden. Tracie is also a 2nd recommended black belt in Taekwondo and trained in both Bo Staff and Escrima/Kali. In her spare time, Tracie enjoys reading and cooking for her family. Tracie is a very good, hard-working and dedicated employee. We are fortunate to have her with the firm.

JAKE JETER

Jake Jeter started working at Beasley Allen as a summer intern in 2009 through 2010 before becoming a Staff Attorney in the Consumer Fraud section. Jake learned after an accident that left him paralyzed at a young age how lawyers are in a unique position to assist others with their legal problems. His decision to stay with Beasley Allen was due to the firm's many experienced attorneys and support staff, allowing him to better help those in need.

Jake attended Auburn University Montgomery (AUM) where he graduated with a

B.S. in Finance in 2008. He then went on to earn his J.D. at Thomas Goode Jones School of Law in May 2011. While attending law school, Jake served on the Honor Court from 2008-2011, and was the Honor Court Chief Justice from 2010-2011. During his time at Jones, Jake and his service dog Phoenix were featured in a national advertising campaign for Milk-Bone, a major sponsor of the Canine Assistants program.

Jake is a member of the Alabama State Bar, American Association for Justice, Montgomery County Association for Justice and the Montgomery County Bar Association. Jake has a light sport pilot's license and really enjoys flying, hunting and fishing. His favorite part of practicing law is being trusted by clients to help solve their legal issues and navigate the tangled web of the law. Jake is a very good lawyer who is dedicated to helping folks who need help. He is a very hard worker. We are blessed to have Jake with us.

BEN LOCKLAR

Ben Locklar has been with Beasley Allen since 2005, but wasn't always an attorney. Upon graduating high school, Ben joined the Montgomery Police Department and later went on to become a sworn police officer. However, after being chosen to play the role of a lawyer during a mock trial in 8th grade, Ben maintained his dream of eventually becoming a lawyer. After graduating from Auburn University Montgomery, Ben left his job as a police officer and moved to Birmingham to attend Cumberland School of Law at Samford University, where he earned his J.D. in 1989.

As a lawyer in our Personal Injury / Products Liability Section, Ben has handled several cases, many of which resulted in six- and seven-figure settlements and verdicts. Ben's favorite part of practicing law is helping people with the complexities of the law. He has found that his relationship with the Lord allows him to help obtain justice on behalf of his clients. Ben says that Beasley Allen is a great environment for him to practice law because of our firm's extended resources, name recognition and positioning in the legal community. This allows Ben the opportunity to work on a variety of cases. He says Beasley Allen is a family that holds true to its motto of "helping those who need it most."

Ben has served in a number of leadership roles on various boards, such as the editorial board for *The Docket*, a publication of the Montgomery County Bar Association, as well as the board of trustees of the Montgomery County Trial Lawyers Association.

Ben is married to Lisa Matthews Locklar and has three daughters—Katie, Sarah Beth and Greyson. Ben and his family are members of Frazer Memorial United Methodist Church. During his free time, he enjoys his horses at his small farm in South Montgomery and riding his Harley Davidson motorcycle. Ben is a very good lawyer who totally is dedicated to his clients. We are blessed to have Ben in the firm.

PAM MURPHY

Pam Murphy has worked at Beasley Allen for 15 years and has been serving as a Medical Records Coordinator for Melissa Prickett since 2005. In her position, Pam is required to order medical records for all of the files within the firm's Mass Torts section.

Pam has one son and a daughter-in-law, Kelly and Shea Murphy, and two grandchildren, Wilson and Ella. She also has two dogs, Jack and Boxer, who are her best friends at home. Pam's sister, Deborah Drinkard, also works in the firm as a Medical Records Coordinator.

Pam is a hard-working employee who is dedicated to her work and the clients she serves. When Pam is not working at the firm, she enjoys working in her yard, taking rides to the country and spending time with her family. She is also a fan of Alabama football and NASCAR racing. We are most fortunate to have Pam with us.

XXV. SPECIAL RECOGNITIONS

FRED GRAY IS A GREAT AMERICAN

Over the years there have been a number of individuals in America whose lives on this earth have made a tremendous difference for good in the lives of others. Tuskegee lawyer Fred Gray is such a person. Without a doubt, this man made a huge difference in how people of color are treated in the United States. Fred Gray fought for the rights of African-Americans in this country at a time when those rights were universally being denied.

While I had read and heard lots about Fred, I didn't actually meet him until I moved back to Clayton in the Fall of 1964. That first meeting came about in Eufaula at a call of the civil case court docket. I later had a civil case in Clayton and Fred was one of the defense lawyers. I got to know him much better during that trial. I was very impressed with Fred on each of those occasions both as a lawyer and as a

man. Perhaps the most impressive thing about Fred was how down-to-earth and unassuming he was, considering that he was already developing a national reputation. Fred had handled a number of notable civil rights cases by that time.

Fred Gray has made a name for himself as a champion for real change in America. The early battles for equality and civil rights were most difficult for those who were on the front lines. Being involved quite often came at a tremendous cost. It took great courage to do that which men and women like Fred Gray did. I am told that Fred made a promise to himself that he would work diligently to end racial segregation in Montgomery upon becoming a lawyer. Not only did Fred keep that promise, he expanded his territory greatly and America is better for it today.

Fred has received an array of accolades over the years. He became president of the National Bar Association in 1985, later becoming the first African-American president of the Alabama Bar Association in 2002. In 1995, Fred published his autobiography, *Bus Ride to Justice: The Life and Works of Fred Gray*. I have a signed copy, which I consider a prized possession, and I recommend it to all persons who believe in liberty and justice for all citizens. I am privileged to say that I have known Fred Gray and that he is a good friend.

We need more men and women today who have the courage needed to help bring about even more change in America and continue the fight for equality, liberty and justice for all. Fred Gray can be a role model for them. I thank God for bringing Fred into the battle early in his career and for sustaining him over the years. Fortunately, Fred is still engaged in this battle and that has to be an inspiration to younger persons who share his zeal and dedication to a worthy cause.

BEASLEY ALLEN PROMOTES TIRE SAFETY AT MILLBROOK POLICE DEPARTMENT "COPS & KIDS" EVENT

Each year, the Millbrook Police Department hosts a fun family event, "Cops & Kids," at the Village Green park. This year the all-day celebration was held on May 14 and Beasley Allen was proud to participate with a tire safety booth. The firm held two tire safety events last year and had such a good response that we have scheduled three in 2016 including the MPD's "Cops & Kids," a booth on June 25 at the Shoppes at EastChase Farmer's Market, and the Prattville Police Department "National Night Out" event in August.

With no dependable system in place to ensure tire safety, it falls to the consumer

to be vigilant. Tire tread and inflation levels are common factors in tire-related accidents. Many people also are not aware that as tires age the rubber can become more brittle and more prone to a blowout, regardless of tread or inflation levels. These community events provide a hands-on opportunity to educate people about tire safety and prevent deadly tire-related accidents.

BEASLEY ALLEN PARTICIPATES IN ALABAMA LEGAL FOOD FRENZY

Recently Beasley Allen joined law firms from across the state in raising money and collecting food items for Alabama Legal Food Frenzy, sponsored by the Alabama State Bar, Alabama Attorney General Luther Strange and the Alabama Food Bank Association. Our firm's donations went directly to the Montgomery Area Food Bank to help end child hunger. The campaign ran from April 25-May 6 and more than 225 pounds of food was donated by Beasley Allen staff and lawyers in addition to \$1,872 donated in cash.

One in four children in Alabama experience food hardships. Alabama's food banks distributed more than 50 million pounds of food last year through their 1,500 partner agencies and pantries. With the demand increasing during the summer months the Alabama State Bar and Attorney General Luther Strange developed the inaugural event in an effort to help end child hunger. To find a food bank near you visit www.alfoodbanks.org.

BARTLETT RANCH NAMED ZOETIS-AQHA BEST REMUDA

The American Quarter Horse Association (AQHA), along with its Corporate Partner Zoetis, announced last month that Bartlett Ranch, an AQHA Ranching Heritage Breeder, is the recipient of the 2016 Zoetis-AQHA Best Remuda Award. The award was established to honor the contributions ranch horses have made to the heritage of the American Quarter Horse. Traditionally, a remuda is a herd of horses from which ranch hands select their mounts. The word remuda derives from a Spanish term meaning "change of horses."

The Bartlett Ranch was established in Pike Road, Ala., in 1954. It is owned by Dr. H.B. "Woody" Bartlett and managed by Stephanie Bryant, Milton Scott, Woody Bartlett Jr. and Warren Bartlett. Currently, the diversified cattle and horse operation is comprised of three properties located in Alabama, Texas and Wyoming, with a

combined land area totaling nearly 90,000 acres.

The Bartlett Ranch pastures and feeds out 4,000 head of steers each year, calves 1,500 commercial cows and owns more than 250 American Quarter Horses. Bartlett Ranch-bred horses are not only used by ranch cowboys as a vital part of the ranching operations, but have also been extremely successful in halter, cutting, barrel racing, roping and other rodeo events.

Dr. Bartlett's passion for breeding American Quarter Horses has been a focus of the ranch since the 1950s. In the ranch's 2016 Best Remuda application, Dr. Bartlett had this to say:

The goal of the Bartlett Ranch remuda program is to produce horses that look good, have a quiet temperament and can be used for any type of work on or off the ranch. Bartlett Ranch remuda horses are structurally sound and correct in conformation, minimizing lameness. The cowboys and horses of Bartlett Ranch are a winning combination, and the traditions of American ranching are alive and well.

All of the 2-year-old remuda horses are started during an annual colt starting clinic each year at the Wyoming ranch. The renowned clinic, held for the past 20 years, is taught by "Cody" Bill Smith, three-time world champion Professional Rodeo Cowboys Association saddle bronc rider. At the ranch, all foals are halter broken at weaning. Care is taken to ensure gentleness is worked for and attained with the foals. The foals are handled on a regular basis for the next year and a half until they come to the clinic.

Bartlett Ranch is an AQHA legacy breeder, and the ranch's top resident stallions over the years include "Handle Bar Doc" (1983 National Cutting Horse Association world champion and NCHA Hall of Fame member); "Preferred Pay" (a son of the famous racehorse "Dash For Cash"); and "Watch Two Eyed Buck" (an AQHA Superior calf roping, Superior heading, Superior heeling and Open Performance Champion). Dr. Bartlett recently added "Very Special Playgun," who is a son of "Playgun" out of the mare "Very Special Peppy," to his stallion roster. As you can see, there have been some great horses on this ranch.

Many of the Bartlett Ranch remuda horses have also found success outside of the ranch. A few of these American Quarter Horses include "Reys Desire," "Whats Your Handle," "Raps Red River," "Hav U Herd My Handle," "Silky Rap" and "Approach With Caution." Each of these

horses achieved accolades in events ranging from rodeo to cutting to halter.

Dr. Bartlett and Bartlett Ranch have received recognition and awards that support the importance of education and community involvement. In addition to the AQHA Legacy Award for breeding American Quarter Horses for 50 consecutive years, they have received awards including the Colorado State University Equine Industry Leader Award, induction into the Alabama Cattleman's Association Hall of Fame, and recognition as a 2005 AQHA Best Remuda Regional Finalist.

The Best Remuda Award began in 1992 and has since recognized outstanding ranches for their efforts in raising American Quarter Horses, an important tool of their trade. Any ranch that has five or more American Quarter Horse mares used to produce horses for ranch work and is an AQHA Ranching Heritage Breeder is eligible for this award. The award will be formally presented to the Bartlett Ranch during the 2016 Working Ranch Cowboy's Association World Championship Ranch Rodeo held Nov. 10-13 in Amarillo. Bartlett Ranch will also be recognized during the 2017 National Cattleman's Beef Association Convention.

Zoetis is the proud sponsor of the Zoetis-AQHA Best Remuda Award. AQHA Corporate Partner Zoetis cares about the well-being of horses and understands the serious consequences of disease. Founded in 1940, the American Quarter Horse Association is the largest equine breed organization in the world. With headquarters in Amarillo, AQHA has a membership of more than 260,000 people in 86 countries and has registered more than 5 million horses in 95 countries. For more news and information, follow @AQHAnews on Twitter and visit www.aqha.com/news. For more information on Bartlett Ranch, you can visit www.bartlettranch.com.

I am a partner with my daughter Julie in Double B Ranch, located in Montgomery, AL and we both have a real love for horses. Julie competes in cutting horse competitions and has done quite well. I help feed the horses and clean stables and do whatever needs to be done when Julie is unavailable.

Julie and Dr. Bartlett are good friends and she insisted that I write about this tremendous award and the many successes Dr. Bartlett and his vast operation have had. My friend Carol Brown also told me that I should include a good "horse story" in this issue. She too is a good friend of Dr. Bartlett's. Hopefully, this change of pace from law will be of interest to our readers.

XXVI. FAVORITE BIBLE VERSES

Pete Raiche, a lawyer with Blustein, Shapiro, Rich & Barone, Health, a law firm located in Goshen, N.Y., sent in his favorite verse this month.

"Make yourself an ark of gopher-wood; make rooms in the ark, and cover it inside and outside with pitch. And behold, I Myself am bringing floodwaters on the earth, to destroy from under heaven all flesh in which is the breath of life; everything that is on the earth shall die."

Genesis 6:14 and 17

Lynn Bloodsworth, who serves as Administrative Assistant for the Alabama Fellowship of Christian Athletes, the verse she furnished is perfect for this issue:

Whatever you do, work at it with all your heart, as working for the Lord, not for human masters, since you know that you will receive an inheritance from the Lord as a reward. It is the Lord Christ you are serving.

Colossians 3:23-24

Francis "Cricket" Katsos, a Paralegal who also serves as Office Manager for O'Leay Associates, located in Lexington, S.C., sent in her favorite verse for this issue.

The LORD is more pleased when we do what is right and just than when we offer him sacrifices.

Proverbs 21:3

My friend Cecil Spear furnished a verse for this issue. As I have mentioned previously, Cecil works for Trinity Industries and has one of the best jobs in the U.S. All Cecil does now is take folks who either work for Trinity or are good customers to play golf at Shoal Creek in Birmingham. That's pretty hard to beat and he actually gets a salary.

Jesus Christ is the same yesterday, today, and forever.

Hebrews 13:8

LaBarron Boone, a lawyer in our firm, was a graduate engineer (Auburn University) before he decided to go to law school. All of us at Beasley Allen are mighty glad he made the decision to be a lawyer.

LaBarron says the following is one of his favorite Bible verses.

If God is for me, then who can stand against me.

Romans 8:31

Pastor Dean Finch, the Pastor for Missions and Senior Adults at Taylor Road Baptist Church in Montgomery, sent in some verses that he says keep him going and highly motivated. Pastor Finch says that he wants to be faithful in waiting on the Lord to lead him and that he wants the strength to follow God's leading.

Have you not known? Have you not heard? The everlasting God, the Lord, The Creator of the ends of the earth, Neither faints nor is weary. His understanding is unsearchable. He gives power to the weak, And to those who have no might He increases strength. Even the youths shall faint and be weary, And the young men shall utterly fall, But those who wait on the Lord Shall renew their strength; They shall mount up with wings like eagles, They shall run and not be weary, They shall walk and not faint. For I, the Lord your God, will hold your right hand, Saying to you, 'Fear not, I will help you.' Isaiah 40:28-31 and 41: 13

And now, behold, the Lord has kept me alive, as He said, these forty-five years, ever since the Lord spoke this word to Moses while Israel wandered in the wilderness; and now, here I am this day, eighty-five years old.

Joshua 14:10-11

XXVII. CLOSING OBSERVATIONS

THE POLITICAL RISE OF THE DONALD

I have watched the political rise of Donald Trump over the past several months and must say that he caught all of the so-called political experts off guard. My wife Sara warns me not to write about politics, but I really can't resist writing about "The Donald." I find Trump's rise to prominence in the political arena to be quite interesting and also quite scary. I sensed months ago that there was a great

deal of unrest in our country and that lots of folks were unhappy with most all politicians and generally dissatisfied with both political parties. I also recognize that “negative stuff” sells well in the political arena and that’s been proven to be true on many occasions. Obviously, Donald Trump also recognized that unhappy folks will respond to negative messages so long as there is a little bit of positive material thrown in.

When the GOP primary campaign began, I really didn’t believe Trump would come on like he has. All of the experts said the leaders were Jeb Bush, Marco Rubio and Ted Cruz, with several more candidates bunched together below the leaders. On the bottom rung of the ladder was Donald Trump. Nobody paid any real attention to Trump’s candidacy when he announced. Most of the experts said he was in the race to get publicity and have fun.

As I watched the first debates, I saw how unprepared the other candidates were to deal with Trump’s brash and self-centered political style. As the weeks passed, The Donald, with surgical precision, systematically eliminated his primary opponents one by one. I wonder how many folks can name all of the 17 candidates who started the race. I suspect very few will be able to do so.

Trump has no real regard for the truth—changes his positions on important issues on a daily basis—has no substantive policy—and during the GOP primaries, nobody challenged and exposed him. It’s been evident that Trump’s personal attacks on his opponents worked extremely well. Those attacks by Trump made the news daily and the real issues facing America were relegated to the background. Thus far, Trump has evaded close scrutiny, but I suspect that is coming and very soon.

It will be most interesting to list Trump’s initial positions on each important issue and then see how his positions have changed almost daily as the weeks passed. The only consistent feature of the Trump Campaign has been the candidate’s constant and relentless attacks on his opponents. As the primary season rolled on, it became very clear that all of the candidates—with the exception of Gov. John Kasich—were pretty much intimidated by Trump. Their campaigns floundered and eventually sank. The Republican establishment sat back, watched what was happening, and eventually realized that a candidate they didn’t like or respect, who started at 1 percent, was going to be their standard bearer. The party leaders appeared to be in shock and their efforts to derail Trump—which were disjointed

and totally ineffective—actually made him even stronger with his base.

Trump’s attacks on his opponents always put a special label on them. Who could forget about “Little Marco” and “Lying Ted?” Trump made it apparent early on that Jeb Bush was dishonorable and too weak to be President. Trump also convinced folks that Lindsay Graham, a good man and a powerful member of the U.S. Senate, was nothing more than a lightweight. You will recall how the other candidates were labeled and how effective Trump’s attacks against them were.

Trump even compared Ben Carson, a well-respected medical doctor who aspired to be president, to a “child molester,” with absolutely no factual basis for the charge. Dr. Carson has now joined the Trump campaign, which I find to be very interesting. Then there is Gov. Christie, who tried hard to attack Trump, but with no success. He now—with a totally blank look—stands behind Trump at his rallies. I have to wonder what it took to get Christie on board. His deer-in-the-headlights stare at the rallies—always to Trump’s right—is sorta weird, but funny.

I have to wonder what Donald Trump’s label would have been if say Jeb Bush, an honorable and capable man, had used that tactic. I thought of a few possibilities for Jeb to use. For starters, how about “Dishonest Donald,” “Devious Donald” or “Dangerous Donald” or maybe even “Disastrous Donald?” Actually, I suspect most of you could do a better job of coming up with an appropriate label for a man with Trump’s most interesting background. Some who support Trump might say “Dandy Donald” or “Darling Donald” would be the proper labels for their candidate. But the real scary thing would be to hear the GOP nominee called “President Trump.” As they used to say in Clayton, “Who woulda thunk it?”

In any event, the fall campaign between Hillary and The Donald will be most interesting. I am convinced that neither candidate can afford to underestimate their opponent. To do so will be a major blunder. I sincerely hope that the general election campaign will be one run on issues rather than on personal attacks. Sadly, our country is as divided today as I can ever recall. There are strong feelings of “hate” and “ill will” around the country that are quite evident and also quite scary. Those feelings should never be the motivating factors in selecting a president. We badly need a leader who will be able to bring all of us together, unify the nation and be a real leader.

I sincerely hope and pray that the person selected in November to lead our nation will see the need to involve God in

their decision-making process. What the next president does and how he or she does things is so critically important to America’s future. We are literally at a crossroads in our nation and we must take the right direction for the good of our nation and for all of the American people. We can’t afford to take the wrong road, and if we do, our nation will pay the consequences for years to come. We need a true leader, who not only knows how to lead, but will really lead our nation.

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 bear from heaven and will forgive their sin and will heal their land.

2 Chron7 :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

We must all hang together, or assuredly we shall hang separately.

Ben Franklin

At the signing of the Declaration of Independence

XXVIII. PARTING WORDS

Each member of the Beasley Allen family was saddened last month when we got the news that a longtime employee and friend Genie Harper Pruett had passed away. She died on Tuesday, May 10, after a courageous battle with pancreatic cancer. Without a doubt, Genie's response to cancer was filled with grace, hope and peace. Genie was a Legal Secretary in the Mass Torts Section for 18 years, working primarily for Andy Birchfield, Mass Torts Section Head. She was a tremendously talented employee and a real asset to our firm.

Benita Bunch, who worked with Genie for many years, recalls how Genie would greet her with a cheery, "Hey gal!" and a ready laugh. (This trademark greeting was mentioned to me by several folks who worked with Genie.) "Genie loved life, and it sounded through in her laughter," Benita says. "My life is better for having her a part of it. She was such a blessing and I count myself privileged to have worked side by side with her for a number of years. She is a part of Beasley Allen that can never be replaced."

Kelli Alfreds began working as a lawyer in the firm's Mass Torts section in 2002. Genie made an immediate and lasting impression on Kelli, and became an important person in her life. "Life-loving. Kindhearted. Trustworthy. Hilarious. Honest and direct. Loyal. REAL. These are the words that come to mind when I think of Genie," Kelli says. "She wasn't nearly

old enough to be my grandmother, but she very much reminded me of my grandmother, who was one of my very favorite people in the world. Over the years Genie became a surrogate for that relationship in my life and I cherished it so very much. I could (and did) tell Genie anything. She was always there to listen and to give sincere and good advice, especially after having my first child. It isn't common to find that person in the workplace, but I was lucky enough to find that in Genie," she said. "Genie loved her children and her grandchildren and it was evident in everything she did. We often bonded over our pet stories and no one grieved with me like Genie did over the loss of my beloved lab a few years ago. Genie loved big and everyone that she loved will feel a huge void in their lives. I know I do. I thank God for bringing Genie into my life and I am so glad to know that I will see her again!"

Frank Woodson, a lawyer in the Mass Torts Section, also mentioned Genie's ready smile and laugh as evidence of her positive outlook on life. Although she was facing a serious cancer battle, Frank says Genie never complained. There was a powerful peace about her attitude, he says. "She carried on with her life, and was a wonderful example for us with her positive attitude throughout her battle with cancer."

The sentiment is echoed by so many folks who worked with Genie at Beasley Allen. "One of the biggest things I remember about Genie is that it didn't matter if you were having a bad day or just in a mood, you always left her office with a smile," recalls Lisa Bruner. "She would quickly have you laughing about some observation she had made, or what she thought about something. She had an infectious laugh. She would laugh and it would make you laugh. You always knew where you stood with Genie. She didn't worry about being politically correct and would tell it like it is. Sometimes you just need someone to be honest and upfront

with you. She was that person," Lisa says. "She enjoyed the simple things in life. Flower gardens, puppy dogs and just being outside in nature. She would always ask how my children were doing and more recently how our service dog was doing. She loved hearing stories about his latest antics or what he did to take care of my daughter. She adored dogs and would do anything that she could to help them. She always said that she would have a hundred of them if she could. Her spunkiness will be deeply missed by all here in Mass Torts."

Genie was born on Aug. 28, 1948, to the late Carey Davis Harper, Jr., and the late Mary Brook Putman Harper. She was raised in Montgomery and attended Lanier High School. She worked as a legal secretary for more than 30 years. Genie was a beloved mother, grandmother and friend to many. She is survived by three children: Patti Prickett Brewer (Shane), Michael Prickett (Melissa), Jennifer Prickett Ayers (Tommy); seven grandchildren: Savannah Richardson Abrams (Jake), Hollie Ingram Moland (Zach), Sarah Harrison Popwell (Dustin), Jessica Ingram, John David Harrison, Jake Prickett, Sam Prickett; and four great-grandchildren.

Genie enjoyed the outdoors, gardening, knitting and had a passion for dogs. In lieu of flowers, the family wanted those wishing to remember Genie to make a donation to the humane shelter of their choice. A memorial service with Senior Pastor Jay Wolf officiating was held at First Baptist Church in Montgomery, on Friday, May 13.

The loss of Genie Pruett is felt by all of us at Beasley Allen. The response to Genie's death made me realize that the folks who work in any capacity at our firm are family. All of us will really miss Genie, but we know that because of her faith, she is now in a much better place and will live eternally with her Lord and Savior Jesus Christ. God blessed us to have Genie with us for 18 years; now she is with Him.

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