I. CAPITOL OBSERVATIONS

COLE PORTIS INSTALLED AS 141ST PRESIDENT OF ALABAMA BAR ASSOCIATION

Cole Portis has become the 141st President of The Alabama State Bar. The Beasley Allen lawyer heads up the 17,900-member organization. Cole has served on multiple committees and task forces within the Alabama State Bar including the Finance and Audit Committee, Client Security Fund Committee and various others. He has also served on the Alabama State Bar Board of Bar Commissioners for the 15th judicial circuit since 2007. Cole had this to say:

I am blessed to have the opportunity to lead our state bar, which has been entrusted with the obligation to serve our profession, seek improvements in our judicial system and serve the public.

During his term Cole will be committed to a new era of engagement with lawyers to ensure that they have resources available to help them in their practice. He also has pledged the Bar’s commitment to standing alongside our courts to ensure that the rule of law is enforced, and that the Bar is dedicated to serving the public through pro bono work, charitable stewardship and involvement in everyday affairs that impact the communities where we practice law.

Cole plans to accomplish these goals under the theme “Love Your Neighbor,” which goes two ways—loving other lawyers in the legal community and service to the larger community throughout the state. Within the Bar, programs to serve lawyers will address health and wellness—mind, body and spirit; as well as the development of a “Lawyer University” to help lawyers build a successful practice, including tracks to mentor them in technology, business and the law.

Public outreach efforts will include a continued focus on access to justice, particularly providing legal services for the poor and indigent who would not otherwise be able to afford a lawyer through the state and local Volunteer Lawyers Program; a foster care aware-

ness program; and a drive to encourage lawyers to participate in public service in the political realm through running for public office.

Cole received his J.D. from The University of Alabama School of Law in 1990 and joined our firm in 1991. He now serves as head of the firm’s Personal Injury/Products Liability Section. Cole—in his practice—represents people and families who are injured or killed by defective products.

Cole is a board member of the Alabama Law Foundation, where he is also a fellow, and a member of the Atticus Finch Society. He supports the Alabama Civil Justice Foundation through its Pioneers of Justice Society and is a Montgomery County Bar Association volunteer lawyer. He is past president of the Alabama State Bar Young Lawyers’ Section. Cole was recognized as a finalist for Public Justice’s 2014 Trial Lawyer of the Year. He is also an AV-rated lawyer by Martindale-Hubbell.

Above all, Cole is a husband and a father to nine children. He and his wife Joy have four daughters and five sons. Cole and Joy are strong advocates for adoption with six of their nine children having been adopted. They also serve as foster parents and have fostered more than 30 children in the last four years. Cole and Joy are the founders of Love 100 Ministry, which assists Alabama families with adoption costs.

Cole has been an active member of Morningview Baptist Church for more than 40 years and previously served as lay elder and as chair of the deacons. In addition, he teaches a Sunday school class as a way to invest in the lives of young adults. Cole is past president of the Jimmy Hitchcock Memorial Award, a prestigious award honoring Christian student athletes in Montgomery. He serves on the Board of Directors of Trinity Presbyterian School and the Fellowship of Christian Athletes, and is a YMCA basketball coach.

I am confident that Cole will be an outstanding president of the Alabama State Bar. He is a tireless worker with a vision for greatness. May God bless Cole as he undertakes a most important journey.

II. AN UPDATE ON VOLKSWAGEN LITIGATION

JUDGE GRANTS PRELIMINARY APPROVAL TO MONUMENTAL VOLKSWAGEN SETTLEMENT

U.S. District Judge Charles Breyer has granted preliminary approval to the tremendous settlement reached between Volkswagen and owners of about half a million diesel-powered VW vehicles over the German automaker’s emissions cheat. The settlement is expected to...
cost VW about $14.7 billion, including $10.033 billion set aside to cover vehicle buybacks and fixes, $2 billion for “green energy” funds and $2.7 billion to offset diesel emissions. Judge Breyer is overseeing the consolidated litigation. The final approval hearing is set for Oct. 18, 2016.

Beasley Allen is one of the law firms chosen to litigate the Volkswagen case on behalf of Plaintiffs harmed by the automaker’s emissions cheat. Beasley Allen Principal Dee Miles, who heads our firm’s Consumer Fraud and Commercial Litigation Section, was one of the 22 lawyers appointed by Judge Breyer to the Plaintiffs Steering Committee. Dee and the other lawyers on that committee were appointed by Judge Breyer as Class Counsel for this litigation as it proceeds. This is believed to be the largest automobile settlement in history. Dee had this to say:

This historical settlement, which has just been granted preliminarily approved by the court, is now the new benchmark for consumer class actions in terms of meaningful relief for consumers, the government, and, specific to this case, the global environment. While there remains more work to do with regard to the 3.0 liter engines, the fact that the parties and the government were able to achieve this multi-faceted settlement in less than 10 months is quite remarkable.

The settlement will compensate owners of some 482,000 model-year 2009-2015 VW and Audi vehicles with two-liter diesel engines. Under the agreement, vehicle owners would be allowed to choose whether to sell their vehicle back to VW or have it repaired. According to the terms of the settlement agreement, cash compensation offered to each car owner could range between $5,100 and $10,000 and total compensation will depend on the cars’ value before Volkswagen admitted to the emissions cheat.

Volkswagen installed the emissions cheat on 10.5 million diesel-powered vehicles worldwide, including the half-million U.S. vehicles—all while promoting “clean diesel” as an alternative to electric and hybrid vehicles. The defeat device enables the vehicles to detect the special parameters of an emissions drive cycle, which prompts the vehicle’s computer to turn on emissions controls, thereby making the vehicle fully compliant with EPA rules during testing.

This is a remarkable and historical settlement for the VW 2.0-Liter diesel car owners. It provides full relief to the consumers, substantial remedial measures for the environment and adequate punishment to the company for its gross misconduct. None of this would have been possible without the tremendous leadership from Judge Charles M. Breyer, the tenacity of Settlement Master Robert Mueller and the incredible work of the Plaintiffs Steering Committee, which is led by Elizabeth Cabraser.

Volkswagen To Pay $86 Million To California For Emissions Penalties

Volkswagen AG has agreed to pay California $86 million in civil penalties related to the emissions cheat. This is in addition to the $14.7 billion settlement reached with the federal government referred to above. California Attorney General Kamala Harris announced this settlement on July 7 and it appears to be a very good settlement for California.

The settlement, if approved by a California federal judge, would be California’s largest money recovery ever from an automaker. It would resolve claims under the state’s Unfair Competition Law and the Dodd-Frank Act. The misconduct by Volkswagen is giving rise to the state’s penalties the very same that led to the multidistrict litigation (MDL) settlement.

Source: Law360.com

SEVERAL STATES SUE VOLKSWAGEN OVER ENVIRONMENTAL VIOLATIONS

Three states, Maryland, New York and Massachusetts, filed civil lawsuits last month against Volkswagen AG for violations of state environmental laws arising from the automaker’s diesel emissions cheating scandal. The civil litigation by the states is separate from the settlement on behalf of consumers and the federal government over emissions cheating.

The recently filed lawsuits are also different from the settlement the automaker reached with the attorneys general of 44 states, the District of Columbia and Puerto Rico to resolve existing and potential state consumer protection claims for a total settlement of $603 million.

Source: Reuters.com

“Catastrophic” Engine Defect Suits Against VW And Audi

Class action lawsuits continue to be filed against Volkswagen and Audi over an alleged defect that can lead to “catastrophic engine failure.” Another group of consumers filed suit in New Jersey federal court accusing the companies and their American subsidiaries of concealing the defect. The group of 24 consumers became the latest to accuse the auto companies of hiding a problem with the timing chain systems in certain 2008 to 2013 model year VWs and Audis that can cause the engines to give out far before they should and leave car owners stuck paying thousands of dollars for repairs.

On top of causing costly and premature repairs that the companies purportedly refuse to cover outside of the manufacturer warranty period, the consumers allege in the complaint:

The timing chain system defect also presents a significant safety risk for plaintiffs and members of the classes because when the timing chain system suddenly and unexpectedly fails, class vehicles lose engine power, which causes a loss in the ability to accelerate, maintain speed, and/or adequately control the steering wheel or fully engage the brakes. Thus, drivers and occupants of the class vehicles are at risk for rear-end collisions and other accidents as a result of defendants’ failure to disclose the existence of the timing chain system defect and corresponding safety risk.

While the complaint alleges basically the same claims as were included in a suit filed in May, it also adds alleged violations of a number of state laws, including consumer protection statutes in Florida, Texas and New York. The companies had been hit with another New Jersey lawsuit in June, filed by a Connecticut resident after the defect allegedly affected his 2009 VW Tiguan. The claims involve a timing chain system found in some cars equipped with EA888 engines, including certain model...
year VW Jettas, Passats and Beetles and Audi A3s, A4s and TTs.

The consumers seek to represent a nationwide class as well as 17 subclasses of people who purchased or leased affected vehicles in states including New Jersey, Florida, Texas and Pennsylvania. They bring nationwide claims such as fraud, breach of contract, unjust enrichment and breach of warranty, as well as a number of state-law claims under consumer protection statutes like the New Jersey Consumer Fraud Act and California’s Consumer Legal Remedies Act and Unfair Competition Law.

The proposed class is represented by James E. Cecchi and Lindsey H. Taylor of Carella Byrne Cecchi Olstein Brody & Aiglino PC, Gary S. Graifman and Jay I. Brody of Kantrowitz Goldhamer & Graifman PC, Joseph H. Meltzer, Peter A. Muhic, Melissa L. Troutner and Ethan Barlieb of Kessler Topaz Meltzer & Check LLP, and Thomas P. Sobran of Thomas P. Sobran PC. The suit is Dena Stockalper et al. v. Volkswagen Aktiengesellschaft et al. in the U.S. District Court for the District of New Jersey.

Source: Law360.com

III.
MORE AUTOMOBILE NEWS OF NOTE

GM IGNITION SWITCH CLAIMS GET NEW LIFE IN APPELLATE COURT DECISION

It has been widely reported that the Second Circuit Court of Appeals struck down bankruptcy decisions that shielded General Motors from liability related to ignition switch defects. The Second Circuit in its decision said the 2009 sale of the automakers’ assets that was said to provide the company with legal cover violated potential victims’ rights to due process. The court reversed parts of a 2015 ruling by U.S. Bankruptcy Judge Robert Gerber who found that the sale order could be used to enjoin claims related to the ignition switch defect. The appellate decision examines the limits to which the new GM entity that was formed upon the completion of the bankruptcy sale is shielded by “free and clear” provisions in Chapter 11.

GM did not reveal the ignition switch issue during the bankruptcy—even though the company was well aware of it—and the company began recalling cars because of the defect in February 2014. The Second Circuit said the timing of the disclosure by GM effectively denied Plaintiffs the right to weigh in on the sale and therefore, the Plaintiffs cannot be bound by the provisions of the sale order that shield the company from litigation. The court’s opinion reads further:

Opportunities to negotiate are difficult if not impossible to recreate. We do not know what would have happened in 2009 if counsel representing plaintiffs with billions of dollars in claims had sat across the table from Old GM, New GM, and Treasury. Our lack of confidence, however, is not imputed on plaintiffs denied notice but instead bolsters a conclusion that enforcing the Sale Order would violate procedural due process. Indeed, for the following reasons, while we cannot say with any certainty that the outcome would have been different, we can say that the business circumstances at the time were such that plaintiffs could have had some negotiating leverage, and the opportunity to participate in the proceedings would have been meaningful.

The second circuit also ruled that the 2009 sale order does not cover so-called independent claims arising from misrepresentations by the new GM entity (referred to in the litigation as “New GM”) of vehicles made prior to the Chapter 11 sale. Similarly, the Second Circuit said the bankruptcy order does not halt claims based on the lost economic value of GM vehicles due to various defects.

This is a major victory for millions of GM vehicle owners who now have valid claims arising from the defects. As a result of the appellate decision, claims brought by millions of GM owners are not subject to GM’s bankruptcy protection and now can move forward. This decision didn’t come as a big surprise. The three-judge panel who heard the appeal on behalf of the Second Circuit in April expressed reservations about the 2009 bankruptcy sale and how it could be used to shield GM from liability.

Those seeking to hold New GM liable include people injured in accidents and representatives of people killed prior to the bankruptcy sale, as well as those seeking to hold New GM liable for economic losses tied to the defects.

This decision is great news for GM’s victims. Our firm—along with Lance Cooper’s firm—had been monitoring the situation. We were watching for the court to rule. Collectively, our firms represent a large number of persons who are affected by the decision. If you need more information on the effect of this development, contact Cole Portis, who is the lead lawyer on the GM Litigation for our firm, at 800-898-2034 or by email Cole.Portis@beasleyallen.com.

Source: Law360.com

SELF-DRIVING CARS—WILL THEY WORK?

Automakers have been discussing for some time that they are working on self-driving technology that will allow for autonomous driving without input from the driver. In early July, BMW announced that it would have a fully self-driving vehicle on the market by 2021. The vehicle will use technology from Intel and Mobileye. Fiat Chrysler has also announced that it will partner with Google to manufacture self-driving minivans. These partnerships evidence the fact that the technology industry and the auto manufacturing sector need one another in an effort to fully achieve the goal of a self-driving car.

However, the real question is whether the public will accept and trust this technology. Earlier this month, it was also announced in the media that a Tesla automobile crashed and killed its driver while in its “autopilot” function in Florida. Tesla’s system is not a fully autonomous system, but is described as a “traffic-aware cruise control.” The Tesla system requires that a driver maintain hands on the steering wheel at all times and is supposed to slow and/or stop the vehicle if hands are not detected on the steering wheel. Nonetheless, it appears that Tesla’s system allowed the vehicle to run under an 18-wheeler that was turning in front of the vehicle while in the “autopilot” function.

Tesla’s founder, Elon Musk, has described the autopilot feature as “probably better than humans at this point in highway driving.” Nonetheless, in a blog post, Tesla asserts that “Tesla disables autopilot by default and requires explicit
acknowledgement that the system is new technology and still in a public beta phase before it can be enabled.” Does this mean it is an experimental system?

The National Highway Traffic Safety Administration (NHTSA) is investigating a second rollover crash of a Tesla Model X in Pennsylvania. The July 1 crash happened on the Pennsylvania Turnpike. It doesn’t appear that this incident involved serious injury or death, but it’s another incident that causes concern.

NHTSA is seeking details about Tesla Motor Inc.’s autopilot system, particularly how it operates in situations with crossing traffic and its emergency braking mechanism. The agency has asked Tesla to supply information about the fatal May 7 crash of a Tesla Model S in self-driving mode in Florida.

Specifically, the agency wants to know how many times the automatic emergency brake function has been activated in Tesla’s cars and wants the company to hand over consumer complaints, crash reports and any lawsuits or arbitration proceedings that could be related to the alleged potential defect.

NHTSA also requested details about how the autopilot system works in intersections and how it detects crossing traffic, pedestrians, cyclists and other cars.

In addition, NHTSA wants Tesla to provide its own reconstruction of the crash. The accident has drawn heavy scrutiny from regulators, including the U.S. Securities and Exchange Commission (SEC), which is reportedly investigating whether Tesla should have should have disclosed the May 7 accident as a “material” event, or a development that investors needed to know about or would consider important.

The NTSB team investigating the accident will include a recorder specialist, a reconstructionist, a vehicle investigator and an investigator with collision avoidance expertise. The NTSB said the investigation will more comprehensively examine whether the Florida crash reveals systemic issues that might inform the future development of driverless cars and the investigation of crashes involving autonomous vehicles. Another accident involving a different Tesla model likewise equipped with autopilot is also being examined, but it hasn’t yet been determined if the self-driving system was engaged at the time of that crash.

Consumer Reports has urged Tesla Motors Inc. to disable the automatic steering function in its semi-self-driving system until it is reprogrammed with additional safety enhancements to keep drivers in control of the car. The magazine, known for rating cars and other consumer products, recommended that Tesla update the Autopilot system to confirm that the driver’s hands remain on the steering wheel at all times before it can be activated.

Consumer Reports also called on the automaker to change the name of the Autopilot feature, saying that it promotes the potentially dangerous assumption that the Model S vehicle is capable of driving on its own, which can contribute to a false sense of security or laissez-faire attitude by drivers.

Again, the real question is whether the public will accept and trust this new technology. It is clear from recent events, including the Toyota sudden unintended acceleration litigation, that there can be numerous bugs and problems with automobile software that can cause serious and fatal accidents. There is very little room for error with safety system software that will take control of a vehicle away from its human operator. When wrecks occur, it will be interesting to see if the automakers will continue to blame the drivers.

If you need more information on this subject, contact Ben Baker, a lawyer in our firm’s Personal Injury / Products Liability Section, at 800-898-2034 or by email at Ben.Baker@beasleyallen.com. Ben handles product liability litigation for our firm.

Source: theguardian.com and USA Today

Gear Shifters Are Becoming Dangerously Complicated for Consumers.

In the last several months, we have been reporting on Fiat Chrysler’s problems with “rollaway” issues related to its Jeep Grand Cherokee. The National Highway Traffic Safety Administration (NHTSA) opened an investigation into Fiat Chrysler after numerous complaints by drivers that their vehicles rolled away after the gears were shifted into the “park” position. The national media spotlight is now focused on this issue due to the tragic death of a bright young movie star. Twenty-seven-year old Anton Yelchin, who starred in the recent reboot of the Star Trek movie series, as well as several other movies, was crushed to death on June 19 when his 2015 Jeep Grand Cherokee rolled backward on the steep driveway of his Los Angeles home, pinning him against a brick wall and fence.

Just a few months prior to this tragedy, Fiat Chrysler recalled more than 811,000 Grand Cherokees from the 2014-15 model years and 2012-14 Dodge Charger and Chrysler 300 sedans in the United States equipped with monostable shifters.

U.S. safety regulators said there were 68 reported injuries and 266 reported crashes in vehicles, including 2014-2015 Fiat Chrysler Jeep Grand Cherokee models, with a type of gear-shifting control that has confused some consumers and led to rollaway incidents, prompting a recall. The National Highway Traffic Safety Administration indicated that there were no deaths linked to the defect to date. But NHTSA acknowledged that it is aware of the death of Star Trek actor Anton Yelchin. The agency said his death “may have been related to the alleged defect.”

While not acknowledging a design flaw in its transmission gear selectors, Fiat Chrysler has said rollaways have occurred because drivers mistakenly believe they had placed the vehicles in park before getting out. The problem with the design of the gear shifts has brought scrutiny to a once-simple function that has grown more complicated in recent years: shifting a vehicle with an automatic transmission into drive or reverse and back to park or neutral.

Fiat Chrysler Automobiles’ 2014 and 2015 Jeep Grand Cherokees were built with what’s known as a monostable shifter. The shifter typically rests in the middle of three positions. The driver directs the shifter fore and aft to cycle electronically through park, reverse, neutral, drive and low.

Fiat Chrysler has told owners to read their manuals to familiarize themselves more fully with how the shift mechanism is intended to work. Familiarity hasn’t always been a challenge in shifting an automobile into drive or park. But style, electronics and the battle for space on the dash and center console have changed the shifter’s shape and the way it is operated.

One consequence of replacing the old-style mechanical linkage from the shifter to the transmission with smaller, faster and more precise electronic
systems is that drivers no longer shift intuitively. Nor can they seamlessly transition between brands of cars as they once did.

While Federal Motor Vehicle Safety Standard 102 requires the gear sequence—known as PRNDL (PRIN'-duhl)—to be the same in all vehicles, no rules govern how a shifter must look and perform.

These new designs of shifters can be dangerous and confusing for the unsuspecting consumer. Mike Andrews, a lawyer in our firm who handles Product Liability litigation, has successfully investigated and litigated several rollaway cases. If you have any questions or would like to discuss a potential case, Mike can be contacted at Mike.Andrews@BeasleyAllen.com.

Source: This article is a combination of two articles published in the Automotive News on June 27th and 28th by Richard Truett—“Are Shifters Getting Too Complicated?”—and by Bernie Woodall of Reuters—“Fiat Chrysler Rollaway Recall Linked to 68 Injuries, 266 Crashes.”

**Drivers Sue Fiat Chrysler Over Jeep Cherokee Gear Defect**

A class action lawsuit has been filed against Fiat Chrysler, the Jeep Grand Cherokee manufacturer, accusing the company of an “unreasonable delay” in fixing a defect in 2014-15 Jeep Grand Cherokees that was known to create a “rollaway” risk. This is the same defect discussed above. The suit, filed by Plaintiffs Deryl Wall, Justine Andollo, Danielle and Joby Hackett, alleges that the vehicle’s gear shifter is “dangerously defective because there is no tactile or position feedback to the operator as to whether the car has actually been placed into the safe-to-exit ‘park’ gear.”

The complaint alleges that the automobile manufacturer was slow in responding to safety concerns, only issuing a recall of some 811,000 vehicles in the United States in April, despite the fact that reported incidents dated back to early 2015. Maserati owners included in a recent recall have been asked to join this suit. Maserati, which is owned by FCA, is recalling about 13,000 sedans that have the same sort of gear shifter that is allegedly defective.

The suit seeks to recover drivers’ losses for diminished value due to the defect, an injunction against Fiat Chrysler telling drivers of the affected cars not to drive them until they are fixed and giving them replacements until the fix is made, buybacks of the vehicles with requested shifters, and other fees, costs and fines.

Plaintiffs Deryl Wall, Justine Andollo, and Danielle and Joby Hackett are represented by Lee M. Gordon, Steve W. Berman and Thomas E. Loeser of Hagens Berman Sobol Shapiro LLP. The case was filed in the U.S. District Court for the Central District of California.

Sources: Martin Smith and Law360.com

**Honda Audit Finds Takata Engineers Manipulated Air-Bag Test Data**

Honda Motor Co. is claiming that Takata Corp. routinely manipulated results of air-bag inflator tests that were reported to the automaker. This comes from an ongoing audit commissioned by Takata and Honda. Takata engineers removed some test results to artificially reduce variability in air-bag inflator performance, Brian O’Neill, a former Insurance Institute for Highway Safety (IIHS) president, told Bloomberg in an interview. Takata and Honda jointly hired O’Neill to perform the audit in late October, days before Honda first announced findings of data manipulation. O’Neill had this to say:

“We have found examples of what I would call “selective editing,” where they have left out results not because they were bad results, but because the results that remained were better. We found evidence that the report that went to Honda was a shorter version of the original version, and it was a prettier shortened version.”

The results of the audit will factor in Honda’s investigation into whether it should recall some additional Takata inflators, according to Chris Martin, a spokesman for the automaker. As we previously reported, no new Honda or Acura models under development will be equipped with Takata-supplied inflators.

It appears Takata also altered and misrepresented test data in reports to Toyota Motor Corp., Nissan Motor Co. and General Motors Co. Brian Mayville, a Takata engineering manager, said during a deposition taken in November that select reports were not properly represented to Toyota and GM.

It appears that O’Neill and his team have more work to do. The next phase is to review more data pertaining to worldwide Takata inflators for Honda vehicles. O’Neill says that once they receive the data, this phase of the audit may take two to three months. It will be interesting to see how all of this plays out.

Source: Law360.com

**SETTLEMENT REACHED IN AIRBAG DEATH LAWSUIT**

A lawsuit set to go to trial in October blaming a faulty Takata airbag for the ultimate death of a Jacksonville woman was settled out of court on July 8. The settlement came after a brief meeting in the judge’s office. One of the lawyers for the family of Patricia Mincey said the settlement was reached after a day or two of contact between him and legal staff for the Honda Motor Company, Duval Motors of Jacksonville and the Takata Corporation.

The airbag exploded in Ms. Mincey’s 2001 Honda after a 2014 car accident. The meeting with the court was initially requested by Ms. Mincey’s lawyers in an attempt to seek punitive damages and require the head of Takata to testify in the case. If that had happened, it would have been the first time Takata president Shigehisa Takada would have been ordered to give sworn testimony after airbags were recalled worldwide after several deadly explosions. This settlement has delayed Mr. Takada’s having to testify under oath. However, unless there is a global settlement very soon—which is highly unlikely—Mr. Takada’s day to be put under oath will eventually come.

The suit accused Takata and American Honda Motor Co. Inc. of hiding the defect in Takata inflators that prevents air bags from deploying properly in crashes. Ms. Mincey, who was left a quadriplegic following her 2014 car accident, died from the injuries in April. The death total resulting from the defective Takata air bags is now 15.

Ms. Mincey is represented by Theodore J. Leopold and Diana L. Martin of Cohen Milstein Sellers & Toll PLLC. The case is Patricia Mincey v. American Honda Motor Co. Inc. in the Circuit Court of Duval County, Florida.
The National Highway Traffic Safety Administration (NHTSA) has opened an investigation into exhaust odors leaking into passenger compartments of certain Ford Motor Co. Explorer models. There has been at least one crash, according to NHTSA. The investigation, launched on July 1, arises from 154 complaints by owners of model year 2011 to 2015 Ford Explorers who expressed concerns they may be exposed to carbon monoxide due to the leak. The complaints say operating the vehicle at steep grades or speeding up to merge onto highway ramps may contribute to the presence of exhaust gas. NHTSA says the use of recirculation mode in Ford Explorer air conditioning systems also may cause the problem.

One of the complaints said the exhaust odor issue caused a low-speed crash, but resulted in no injuries, NHTSA said. The investigation comes after Ford issued two service bulletins to address some of the issues that may cause the exhaust leak. In December 2012, Ford suggested sealing and undercoating areas of the vehicle's floor and body seams, as well as replacing the left-side air extractor, to fix the issue. The automaker also suggested installing drain valves in the vehicle’s rear lift gate.

In July 2014, a new bulletin added software changes to the recirculation mode of Ford Explorer air conditioning systems. The fix would allegedly help limit the exhaust smell during times of high exertion by the engine, but NHTSA found that the changes resulted in little to no improvement based on responses by vehicle owners. Between 2011 and 2015, Ford sold more than 895,000 Explorer vehicles in the United States. Over that time, the Explorer represented more than 7 percent of Ford's annual vehicle sales.

A California federal judge has given preliminary approval to a settlement that would resolve a putative class action in which Hyundai Sonata owners claimed their engines failed and Hyundai dealers allegedly declined to replace them under warranty. U.S. District Judge Beth Labson Freeman ruled that Hyundai Motor America's proposal to provide extended warranties and prospective repairs if needed was fair. Certification of the settlement class was also approved by Judge Freeman in her order.

The affected vehicles include Sonatas from model years 2011 through 2014. Plaintiffs claimed check-engine light problems, unusual sounds from engine compartments, and sudden engine seizures and stalling. The Plaintiffs claimed that dealers frequently didn’t replace the engine, citing the drivers’ alleged failure to regularly change the oil or failing to keep service records.

Under the proposed settlement, Hyundai will reimburse Sonata owners who paid for engine block replacements or repairs within 10 years and 120,000 miles of the vehicle’s original sale or lease, including rental car and towing expenses incurred as a result of the engine failures. The company will also compensate Sonata owners for loss of resale value if they suffered an engine failure, but sold or traded in their vehicles rather than paying to replace the engine. For those customers who haven't yet experienced engine issues, Hyundai will mail them a pamphlet describing the alleged engine defect.

Eric H. Gibbs and David Stein of Gibbs Law Group LLP, and Joseph G. Sauder and Matthew D. Schelkopf of McCune-Wright LLP, are serving as co-lead interim class counsel. The case is In Re: Hyundai Sonata Engine Litigation in the U.S. District Court for the Northern District of California, San Jose Division.

Source: Law360.com

Automobile parts supplier Denso Corp. will pay about $193.8 million to car buyers and $61.2 million to automobile dealers for Price-fixing

The National Highway Traffic Safety Administration (NHTSA) has launched an investigation that covers about $30,000 Harley-Davidson Inc. motorcycles with anti-lock braking systems after receiving dozens of consumer complaints about the brakes allegedly failing suddenly and without warning, leading to at least two injuries. The investigation, opened on July 6, stems from 43 complaints about model year 2008 to 2011 Harley-Davidson motorcycles with braking systems that allegedly fail without warning, causing riders to apply the front brake hand lever or rear brake foot pedal to no avail, according to the agency.

The issues involve the motorcycles' brake fluid, which Harley-Davidson recommends that owners change every two years. According to NHTSA, consumers either don’t know about or ignore the recommendation. The agency said that the brake fluid absorbs moisture from the air and eventually corrodes valves in the anti-lock braking system, causing those components to stop cycling and the calipers not to activate when a driver applies the brake.

Although the problem may arise from owners’ failure to follow the suggested fluid-replacement schedule, NHTSA said that the sudden and total loss of brakes without warning is still a concern. The investigation comes roughly two years after the company announced a recall of 66,421 of the 2014 anti-lock braking system-equipped Touring and CVO Touring motorcycles that might have been assembled with a brake line defect that can cause the front wheel to lock up. The recall involved models made between July 2013 and May 2014 that potentially had front brake lines positioned such that they could get pinched between the fuel tank and the frame, which can cause front brake fluid pressure to increase, NHTSA said at the time.

Source: Law360.com

Hyundai dealers allegedly declined to provide extended warranties and prospective repairs if needed as that they could get pinched between the fuel tank and the frame, which can cause front brake fluid pressure to increase, NHTSA said at the time. The agency said that the brake fluid absorbs moisture from the air and eventually corrodes valves in the anti-lock braking system, causing those components to stop cycling and the calipers not to activate when a driver applies the brake.

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Source: Law360.com

NHTSA To Probe Ford Explorers Over Exhaust Leak

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In July 2014, a new bulletin added software changes to the recirculation mode of Ford Explorer air conditioning systems. The fix would allegedly help limit the exhaust smell during times of high exertion by the engine, but NHTSA found that the changes resulted in little to no improvement based on responses by vehicle owners. Between 2011 and 2015, Ford sold more than 895,000 Explorer vehicles in the United States. Over that time, the Explorer represented more than 7 percent of Ford’s annual vehicle sales.

Hyundai Reaches Settlement in Sonata Owners' Engine Failure Lawsuit

A California federal judge has given preliminary approval to a settlement
The total amount of the settlements in the litigation is $482 million. Denso pled guilty in March 2012 and paid a $78 million fine as part of the Department of Justice (DOJ) probe for its role in the conspiracy for fixing prices of heater control panels and electric control units from 2000 through February 2010 in violation of the Sherman Act. Numerous company executives have paid fines as well. Japan-based Denso supplies car companies including Toyota Motor Corp., Honda Motor Co., General Motors and Fiat Chrysler.

Source: Law360.com

IV. THE CORPORATE WORLD

CRIMINAL CHARGES IN $1 BILLION HEALTH FRAUD SCHEME

The U.S. Department of Justice (DOJ) is bringing criminal charges in a Florida federal court against three men accused of defrauding Medicare and Medicaid in a $1 billion scheme involving kickbacks and exploitation of drug-addicted patients. The indictments represent the largest criminal health fraud case ever brought against individuals by the federal government. Charges include payment of kickbacks, obstruction of justice, money laundering and wire fraud. It was not immediately clear how much of the $1 billion in allegedly false billing was actually paid out, although an indictment says that Medicare paid out at least $464 million in improper reimbursement.

The indictments targeted Miami-area residents Philip Esformes, Odette Barcha and Arnaldo Carmouze. Esformes, who could face life imprisonment if convicted, was allegedly the ringleader, operating a network of 30 residents Philip Esformes, Odette Barcha and Arnaldo Carmouze. Esformes, who could face life imprisonment if convicted, was allegedly the ringleader, operating a network of 30

Among the thousands of people... drug addicts who were allegedly prescribed opioids

... in order to entice them to stay in facilities where they didn’t belong.

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... in order to entice them to stay in facilities where they didn’t belong.

The DOJ is alleging an array of misconduct. It includes paying kickbacks to attract patient referrals and receiving kickbacks in exchange for steering patients to other health care providers. The kickbacks were sometimes disguised as charitable donations, payments to female escorts and payments to a basketball coach for Esformes’ son, according to an indictment.

Esformes in 2006 was part of a $15 million civil settlement involving allegedly fraudulent conduct that was virtually identical. Prosecutors that he simply retooled the scheme. Specifically, the trio in the recent charges used “sophisticated money laundering techniques” to conceal the scheme and Esformes’ identity. Government agents eventually uncovered the fraud through data analysis that revealed outsize billing and links between providers that were not obviously connected to one another. Barcha was a hospital director and Carmouze was a physician’s assistant. They were charged with the payment of bribes for referrals among other things.

Source: Law360.com

V. WHISTLEBLOWER LITIGATION

HEALTH CARE FRAUD GIVES RISE TO WHISTLEBLOWER CLAIMS

There has been a tremendous amount of activity around the country involving health care fraud with much of the wrongdoing involving claims under the False Claims Act (FCA). I will give a brief summary of whistleblower litigation involving health care and will discuss Medicaid and Medicare fraud in more detail in this Section of the report. Health care fraud involves the filing of dishonest health care claims in order to turn a profit. Some examples of “practitioner schemes” include a health care provider who bills Medicare for services that were not performed or were unnecessary, double-billing, billing for a non-covered service as a covered service, modifying medical records, intentionally reporting incorrect diagnoses in order to maximize payment, and prescribing unnecessary treatment. All of these hurt the government, taxpayers and persons who qualify for Medicare and Medicaid.

The False Claims Act holds responsible those who knowingly submit, or cause another entity or person to submit, false claims for payment of government funds. Those found responsible for fraud are liable for three times the government’s damages, plus civil penalties of $5,500 to $11,000 per false claim. Whistleblower provisions included in the False Claims Act allow citizens with evidence of fraud against government contractors and programs to sue, on behalf of the government, to recover the stolen funds. The whistleblower is then eligible to receive a portion of the recovered funds, usually between 15 and 25 percent.

In addition to the federal False Claims Act, many states also have False Claims Acts that work in a similar fashion. There also is a part of the False Claims Act that is known as the “whistleblower protection” provision. This provision ensures that if you are fired, demoted, suspended, threatened or discriminated against in any other way by an employer as a result of your filing a report of fraud, that you will be reinstated to your former position. This includes receiving any seniority that may have been affected, as well as back pay, interest and other compensation that may be due as a result of damages or losses you suffered as a result of filing a claim.

I have attempted to give a brief explanation of health care fraud that gives rise to whistleblower claims. If you feel you have such a claim, the lawyers on our firm’s Whistleblogger Litigation Team will be glad to talk with you. You may be entitled to compensation. Contact Michelle Fulmer, Section Administrator, at 800-898-2034 or by email at Michelle.Fulmer@beasleyallen.com, and she will put you in touch with a lawyer on the team.

U.S. SUPREME COURT REFINES “IMPLIED CERTIFICATION” THEORY OF FCA LIABILITY

The False Claims Act (FCA) permits lawsuits against government contractors if they “knowingly” present a materially “false or fraudulent” claim for payment. On June 16, the Supreme Court issued an unanimous decision resolving a circuit split around the viability of “implied” fraud claims—claims that are fraudulent
not because of an actual misrepresentation, but because of an implicit representation of contractual and regulatory compliance perceived in the contractor’s request for payment.

In Universal Health Services v. United States ex rel. Escobar, 579 U.S. __ (2016), the contractor, Universal Health Services, provided clinical services covered by Medicaid and Medicare, and submitted claims for those services, which the government reimbursed. However, many of the individuals that provided the services did not have the required qualifications. As a result, the First Circuit treated the contractor’s reimbursement request as an implied certification that the contractor had complied with all applicable regulations, and held that the complaint stated a claim under the FCA. Though the Supreme Court agreed that implied certification is a valid basis for liability, it narrowed the route for recovery under an implied fraud theory.

The Court recognized that “common-law fraud has long encompassed certain misrepresentations by omission,” and thus extended this rule to representations that are implied in a claim for payment. The touchstone, the Court explained, is whether the omission makes the claim “misleading.” Therefore, certain “half-truths—representations that can state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations.”

Rejecting the contractor’s argument that its exposure to misrepresentations should be limited to express conditions of payment, the Court noted that nothing in the statute suggested that an express condition of payment is relevant to determining whether a claim is false or fraudulent. The Court emphasized that a regulatory requirement might well be material even if it is not a condition of payment, and just as well might be immaterial even if it is a condition of payment. However, the Court then used the Act’s materiality and scienter requirements, which the Court characterized as “rigorous” and “demanding,” to limit the broad exposure to which contractors would be subjected under this ruling.

The key concept for the Court was that an item is material only if it is outcome determinative. The Court explained that the materiality requirement “looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” It is not enough to make a falsehood “material” if it would give the government a technical right to withhold payment; the falsehood has to be so serious that the government in fact would withhold payment. The Court thus vacated the First Circuit opinion, and remanded for further proceedings.

Although the Court seemingly expanded a relator’s recovery under the FCA by validating the “implied” fraud theory, the Court ultimately narrowed any recovery under such theory through the materiality requirement of the statute. In this case, the record indicates that Massachusetts conducted a full investigation of the contractor’s misconduct and decided that the appropriate sanction was a nominal fine and improved training procedures; Massachusetts neither cancelled the contract nor sought recovery of benefits previously paid. Read in light of the Court’s newly articulated materiality standard, some believe those facts suggest that the contractor has a strong chance of winning on remand. We will see!


**Government Recovers $900 Million in the Largest Ever Medicare Fraud Recovery**

The Department of Justice (DOJ) says that more than 300 people have been charged with Medicare fraud this year, resulting in more than $900 million being recovered. This is the largest recovery against Defendants attempting to defraud the government through Medicare. This beats the record set last year when 243 Defendants were charged with a loss amount of $712 million.

When a person or business defrauds the government through Medicare, that person or business is stealing money out of the taxpayer’s pockets. Moreover, Medicare fraud results in money intended to be spent on health care being spent on unnecessary procedures, procedures that never took place, or other frivolous expenditures. One driving factor behind the government’s war on fraud is that the trust fund, which supports Medicare, is now projected to be depleted by 2028. U.S. Attorney General Loretta Lynch stated:

As this takedown should make clear, health care fraud is not an abstract violation or benign offense—it is a serious crime. The wrongdoers that we pursue in these operations seek to use public funds for private enrichments. They target real people—many of them in need of significant medical care. They promise effective cures and therapies, but they provide none. Above all, they abuse basic bonds of trust—between doctor and patient; between pharmacist and doctor; between taxpayer and government—and pervert them to their own ends.

According to the DOJ about 50 percent of the cases involved in the takedown dealt with home health fraud, whereas about 25 percent involved pharmacy fraud. Some of these cases involved doctors who billed more than $38 million for home health services that were either not needed or not provided. Other cases involved physical therapists billing for care not needed or not provided.

Overall, arrests took place in 36 federal districts across the country, from southern California to southern Florida and Texas to New York. These arrests were comprised of 29 doctors, eight pharmacists, 11 nurses or physician assistants, nine medical counselors, and others.

The government is waging a war on fraud, and the False Claims Act is its biggest weapon. The FCA includes a whistleblower provision to incentivize taxpayers to report fraud to the government. The incentives allow the whistleblower to recover 15 to 30 percent of the funds recovered. The whistleblower provision has helped the government to detect more fraud, ensure taxpayer money intended for health care is properly spent on health care, and deter others from committing the same fraud.

If you are aware of fraud being committed against the federal government, or a state government, the FCA can protect and reward you for doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim.
You can contact one of the lawyers on our Whistleblower Litigation Team by calling 800-898-2034 or by email at: Archie Grubb, Larry Golston, Lance Brashier at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com. As stated above, you can also contact Michelle Fulmer, Section Administrator, at 800-898-2034 or by email at Michelle.Fulmer@beasleyallen.com, and she will put you in touch with a lawyer on the team.

**PLAVIX FCA SUIT REVIVED AFTER HIGH COURT’S ESCOBAR RULING**

A New Jersey federal judge has reopened a False Claims Act (FCA) suit against Sanofi-Aventis US LLC and Bristol-Myers Squibb Co. This development came after the U.S. Supreme Court ruled in Escobar that liability under the statute can be triggered by failure to comply with regulations that aren’t explicit conditions of payment. U.S. District Judge Freda L. Wolfson, in a text order, resumed the case accusing Sanofi and BMS of deceptively marketing the blood thinner Plavix. The Supreme Court justices had backed what’s known as “the implied-certification theory” on June 16 in *Universal Health Services v. Escobar*, a case that has generated lots of attention. The theory holds that companies implicitly certify compliance with regulations when seeking payment from the government and may commit fraud if they are actually out of compliance.

In the Escobar case, those requirements were about staffing criteria. In the instant case there were state laws regarding cost-effectiveness that the companies were said to have dodged. The Defense bar has argued that fairness requires making clear which conditions are essential, but the government warned that such a rule would allow corporations to flout regulations that aren’t conditions of payment without fear of FCA punishment. The Plavix case was stayed in December at the request of all parties, pending the high court’s ruling in Escobar.

Elisa Dickson, the former Sanofi sales representative, is pursuing the qui tam suit over Plavix. She claims health care programs paid for unnecessary prescriptions because BMS and Sanofi, the co-marketers of the drug, misled physicians on the efficacy of the blood thinner compared with cheaper alternatives.

Judge Wolfson dismissed claims involving 33 states in August, but retained claims for the remaining 17 states, which have those cost-effectiveness requirements on the books. For most states, that condition on reimbursement isn’t accompanied by any specific restrictions that would overcome straightforward language in the federal Medicaid statute that “a drug that has been approved by the FDA, such as Plavix, is considered a ‘covered outpatient drug’ reimbursable under Medicaid when that drug is prescribed for its on-label use,” Judge Wolfson had said. The case brought by Ms. Dickson—who started working at BMS in 1999 and moved to Sanofi in 2003—was among nine Plavix suits that the U.S. Judicial Panel on Multidistrict Litigation consolidated in New Jersey in 2013.

Ms. Dickson is represented by Christopher Cueto of The Law Office of Christopher Cueto Ltd. The case is *U.S. et al., ex rel. Elisa Dickson v. Bristol-Myers Squibb Co. et al.*, in the U.S. District Court for the District of New Jersey.

**CARDIOLOGIST SETTLES FALSE CLAIMS ACT ALLEGATIONS FOR $7.3 MILLION**

Dr. Asad Qamar, a cardiologist in Florida, along with his practice, the Institute of Cardiovascular Excellence, (hereinafter collectively referred to as “ICE”), have agreed to pay $2 million and release $5.3 million in suspended Medicare funds, to settle alleged violations of the False Claims Act (FCA). Additionally, ICE has agreed not to participate in any federal health care program for three years, followed by a three-year Integrity Agreement. It was claimed that ICE performed medically unnecessary procedures on patients and then billed Medicare for those procedures.

ICE also gave kickbacks in the form of waiving the Medicare copay. By waving the copay, ICE was able to persuade patients to undergo procedures that were medically unnecessary, and then billed Medicare for the unnecessary procedures. In response to these allegations, U.S. Attorney A. Lee Bentley III for the Middle District of Florida stated:

**PATIENT SAFETY IS OF PARAMOUNT IMPORTANCE**

When a doctor performs medically unnecessary and invasive procedures on Medicare patients, federal health care programs are defrauded and, more importantly, patients’ lives and well-being are recklessly put at risk. This case shows our office’s steadfast commitment to holding medical providers personally responsible for their actions.

As a result of ICE’s scheme it was reported that Dr. Asad Qamar was the highest paid Medicare cardiologist in the country for 2012 and 2013. The case against ICE was filed by whistleblowers (relators) under the qui tam provision of the FCA, and the federal government intervened on Dec. 22, 2014.

Source: Law360.com

**VERIZON ACCUSED OF KNOWINGLY OVERCHARGING THE FEDERAL GOVERNMENT**

A recently filed lawsuit alleges that Verizon Wireless has been knowingly overcharging the U.S. Department of Defense (DOD) by millions of dollars for wireless communication services in violation of the False Claims Act (FCA). The whistleblower suit was unsealed on July 5 in a D.C. federal court. Relator OnTheGo Wireless LLC, a rate plan analysis firm, accused Verizon of falsely telling the DOD that it would give the government prices that were as good or better than what it offered to its commercial customers. However, starting with a 2006 contract to provide wireless services to different military branches, it’s alleged that Verizon routinely and knowingly charged the DOD more than its favored commercial customers, to the tune of tens of millions of dollars each year.

The United States government in June declined to intervene in the suit, and U.S. District Judge Amy Berman Jackson subsequently called for the complaint to be unsealed. OnTheGo’s suit is not the first time that Verizon has been accused of overcharging the U.S. government. The wireless company is currently urging the DC Circuit to dismiss a False Claims Act suit alleging that it overcharged several federal government agencies, including the U.S. Postal Service, the DOD, the Federal Emergency Management Agency, the U.S.
Department of Justice, the U.S. Department of the Navy, and the Federal Aviation Administration.


New Jersey couple must pay $7.5 million judgment for Medicare fraud

A New Jersey federal judge entered a $7.75 million civil judgment last month against a convicted Garden State couple and their diagnostic imaging companies for knowingly submitting fraudulent claims to Medicare for thousands of falsified reports and tests. Judge Stanley R. Chesler also found Nita K. Patel and Kirtish N. Patel liable for knowingly submitting false claims for neurological tests conducted without physician supervision. The Patels, who owned Morris County-based Biosound Medical Services Inc. and Heart Solution PC from 2006 to 2014, must pay the U.S. $5 million in damages and $2.75 million in civil monetary penalties, plus interest.

The government’s civil complaint alleged that the Patels created fraudulent diagnostic test reports, forged physician signatures on these reports, and then billed Medicare for the fraudulent reports and the underlying tests that were used solely to create these reports. The Patels also billed Medicare for neurological tests that they conducted without the required physician supervision.

The U.S. Attorney’s Health Care and Government Fraud Unit has recovered more than $1.3 billion in health care fraud and government fraud settlements, judgments, fines, restitution and forfeiture under the Federal Food, Drug and Cosmetic Act, the False Claims Act and other laws. The unit was established in 2010 to handle both criminal and civil investigations and prosecutions of health care fraud offenses, according to U.S. attorney for New Jersey Paul J. Fishman.

The whistleblower in this case is a former employee of Biosound and will receive 15 percent to 25 percent of the judgment recovered by the government.

The jury found that the Stratus did not have proper premarket notification to the FDA. The adulteration charges alleged that the device was a more-dangerous class 3 device but had not undergone required safety tests, because Acclarent chose to go the easier 510(K) route and called it a safe class 1 device. Testimony in the trial involving Acclarent’s former CEO William Facteau and former Vice President of Sales Patrick Fabian revealed that sales reps like Melayna Lokosky, who acted as a whistleblower in this case, were trained solely on the off-label use of the device, and that Acclarent executives ignored safety concerns among doctors. According to FDA witnesses, they also failed to tell the FDA about adverse events, like infections, in the few tests they carried out.

The Stratus was pulled from the market in 2013 amid concerns about safety and off-label promotion, which, according to Lokosky, happened “every day” at Acclarent. Facteau and Fabian, who said they will aggressively appeal the misdemeanor convictions, were acquitted of wire fraud and conspiracy charges. Johnson & Johnson bought the company for $785 million in 2010, earning Facteau $32 million and Fabian $4 million. Facteau is now the CEO of EarLens Corp., another medical device company.

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VI. Product Liability Update

Expert Witness Misrepresents Credentials

David Viano is one of the primary occupant kinematics/biomedical experts currently being used by automotive manufacturers all across the country. Dr. Viano’s resume is quite impressive. He received a Bachelor’s of Science in Electrical Engineering from Santa Clara University in 1968; he received his Ph.D. in Applied Mechanics from Cal Tech; and he received a post doctorate degree in Biomedical Science from the University of ETH Zurich. Dr. Viano claims to have a Doctor of Medicine degree from the Karolinska Institute and Medical University in Stockholm, Sweden in 1998.
Dr. Viano has numerous academic appointments. He worked for General Motors for nearly 20 years, retiring as the Principle Scientist, Safety Integration for GM North America. His resume boasts numerous awards, numerous patents, numerous associations with professional societies in the field of biomechanics. He has also authored books, chapters in books and more than 300 professional articles and treaties. He has lectured all over the world. A person with this type training should not have to misrepresent any facts on his resume, and certainly no material facts. Unfortunately, Dr. Viano did that, which cannot be tolerated.

Dr. Viano now works as a consultant primarily for auto manufacturers and routinely charges $500 per hour. Greg Allen, our firm’s most experienced Products Liability lawyer, recently took Dr. Viano’s deposition and discovered for the first time that the “expert” has been misrepresenting his credentials to courts and juries. Dr. Viano has testified under oath numerous times that he was a Doctor of Medicine, but claims that since he was only interested in research, he did not do an internship to practice medicine. As it turns out, Dr. Viano was not even close to being qualified to do an internship and very far from being qualified to practice medicine. To be very clear—Dr. Viano claims to hold a Doctor of Medicine degree from the Karolinska Institute in Sweden. On at least two occasions, when questioned under oath, Dr. Viano has claimed that his degree was more like a medical doctor than a Ph.D degree.

In at least one trial, Dr. Viano responded to a question from the Defense counsel in qualification of whether or not he was an actual medical doctor. He responded to that question with an emphatic “yes.” That’s simply not true. Dr. Viano now says he does not remember giving that testimony. In preparation for Dr. Viano’s deposition, we obtained Dr. Viano’s educational information from the Karolinska Institute and discovered that Dr. Viano was not an M.D. as thought of in the U.S.

Dr. Viano received a degree from Karolinska called a “Medicine Doktorsexamen,” which in Sweden is a P.h.D. not an M.D. Dr. Viano, who wrote a thesis to obtain this Ph.D., never went to a single medical school class during the five and a half years he claims to have attended the university. He took two examination during that period of time. He did not receive the Master of Science in Medicine degree that is required in Sweden to qualify for a medical internship to practice medicine. It will be interesting to see how Dr. Viano handles this problem in depositions and trials going forward.

This is another example proving that good discovery and basic research pays off. Our lawyers have learned over the years that experts can have an extensive resume, however, their primary tool is credibility. If the expert is not a credible witness, no thick resume can make up for that shortcoming. Dr. Viano’s credibility has now been called into question. Greg Allen took the time and effort to look into Dr. Viano’s past history and what he found is proof that this well-paid expert has testified falsely in depositions and actual trials on numerous occasions.

I have a Black Lab named “Buddy” who is a very smart fella. Buddy and Dr. Viano have at least one thing in common—neither is a medical doctor. Fortunately, for Buddy, he has never claimed to be an M.D. Buddy—like Dr. Viano—never attended medical school and definitely is not an M.D. Neither has Buddy ever claimed to be an M.D. while under oath. Sadly, we can’t say the same for Dr. Viano.

**The Number of E-cigarette Lawsuits Is Growing Rapidly**

E-cigarettes were introduced to the U.S. market in 2007 as a safer alternative to cigarettes and as a way to quit smoking. Since then, interest groups have questioned the safety of these devices and there has been a growing number of product liability lawsuits filed by consumers alleging that some e-cigarette devices and their lithium-ion batteries are defective. These lawsuits claim that e-cigarettes and/or their lithium-ion batteries exploded unexpectedly, causing severe burns and injuries.

Most e-cigarette explosion lawsuits are in their infancy and Plaintiffs have generally focused their actions against smaller retailers and online merchants rather than the manufacturers. This is because many of the products that are the subject of these lawsuits were manufactured in China. Plaintiffs are faced with naming everyone in the supply chain as Defendants because Chinese companies make it difficult to get them into U.S. courts.

So far these cases have had some early successes. A California jury recently awarded a woman $1.9 million in damages in a lawsuit filed against a retailer, distributor and wholesaler following an e-cigarette explosion that left the victim with severe burns. In that case, the Plaintiff’s lawyer used experts to show that the e-cigarette devices and their lithium-ion batteries lack appropriate safety controls to prevent combustion. The Defendants argued that the explosion was caused by user error.

Until recently, the e-cigarette industry has had virtually no oversight by government agencies. Previously, the U.S. Food and Drug Administration (FDA) regulated cigarettes, cigarette tobacco, roll-your-own tobacco and smokeless tobacco, but in 2016, the FDA finalized a rule—Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act—which extends the FDA’s authority to include the regulation of e-cigarettes. These regulations largely deal with looking at the ingredients, marketing, and product designs. At this point it is too soon to know whether these regulations will sufficiently address the potential hazards of e-cigarette devices and their lithium-ion batteries. Based on the number of reported e-cigarette explosions to date, we know that the e-cigarette industry has not done enough on its own to address those hazards.

Lawyers in our firm’s Toxic Torts Section are handling civil cases against the e-cigarette industry. If you would like more information about these cases, you can contact Will Sutton, a lawyer in the Section. Will can be reached at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: The Wall Street Journal

**VII. MASS TORTS UPDATE**

**Award in J&J Hip Implant Bellwether Trial Reduced To $150 Million**

The Texas federal judge who has presided over the second bellwether trial reduced the $497.6 million jury verdict to $150 million. The case is in the multi-

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district litigation (MDL) over allegedly defective Pinnacle hip prosthetics manufactured by Johnson & Johnson’s DePuy Orthopaedics Inc. unit. U.S. District Judge Ed Kinkeade reduced the verdict because of the cap on punitive damages under Texas law. As we previously reported, on March 17 a Dallas jury found in favor of all five Plaintiffs in the trial and returned a verdict that had included $360 million in punitive damages. Mark Lanier, the lead attorney for the Plaintiffs, said: “While we believe that the Texas law is unconstitutional, we are not surprised that the judge used it to reduce the judgment.”

The trial had involved the consolidated claims of Margaret Aoki, Jay Christopher, Donald Greer, Richard Klusmann and Robert Peterson, who all underwent hip arthroplasty, where a hip joint is replaced with a prosthetic. In their case, the prosthetics were DePuy Pinnacle metal-on-metal devices, which they alleged cause serious health problems including inflammation of surrounding tissues, bone erosion and metallosis, a toxic condition caused when the device’s components grind against each other and shed metal debris into the bloodstream.

The verdict reduction was on the same day Judge Kinkeade rejected J&J and DePuy’s bid to put all further bellwether trials in the MDL on hold while they appeal. The judge found that not only would the next trial—the third bellwether in the dispute over whether Pinnacle hip prosthetics were defective, set for early September—cover different issues because the Plaintiffs were from California rather than Texas or Montana, as in the first two trials, but that J&J had been repeatedly warned about some of the issues it’s now trying to raise in trial court motions and an appeal to the Fifth Circuit.

J&J and DePuy had agreed on the bellwether process the court is now following and can’t grind the MDL to a halt now just because it lost one of the trials, Judge Kinkeade said. The judge added:

Only after losing the second bellwether trial did defendants object to the process. There are more than 8,000 pending cases in this MDL; the court cannot grant a stay every time plaintiffs win a trial.

Judge Kinkeade noted that the companies had agreed in January 2013 not to raise a venue objection to any of the cases being tried in Texas’ Northern District, one of the issues J&J and DePuy are now raising after losing the second trial. J&J and DePuy had argued in a May 24 motion that they were prejudiced by crucial pieces of evidence introduced at the second bellwether trial.

The jury found in favor of J&J on all counts, rejecting Plaintiff Kathy Herlihy-Paoli’s claims of negligence, defective design, failure to warn and violations of the Montana Consumer Protection Act. The product at issue in the trial was the Ultamet metal-on-metal articulation. The MDL was consolidated in May 2011, when the U.S. Judicial Panel on Multidistrict Litigation centralized three actions and identified 54 potential tagalong actions. There are now more than 8,000 cases in the MDL, all involving Pinnacle devices that contain sockets with metal, ceramic or polyethylene lining, according to court documents.

When Judge Kinkeade entered final judgment, which included the verdict reduction, he said that stalling the claims would be unfair to everyone involved. The judge noted that the average Plaintiff in the case is 68 years old this year.


Source: Law360.com

**Heartburn Drugs Are Linked To Kidney Damages**

Commonly used heartburn medications, otherwise known as proton pump inhibitors (PPIs), are linked to an increased risk for kidney failure and kidney disease. Introduced in the late 1980s for the treatment of acid-related disorders of the upper gastrointestinal tract, such as peptic ulcers (stomach ulcers) and gastroesophageal reflux disease (GERD), PPIs are available by prescription and over-the-counter. Familiar PPIs include Nexium, Prilosec and Prevacid, and there are others. These medications suppress the production of gastric acid by neutralizing enzymes involved, thereby reducing gastric acid and alleviating symptoms of conditions like stomach ulcers, GERD and acid reflux.

According to the National Health and Nutrition Examination Survey, the use of PPIs has increased in the United States from 5.4 percent to 7.0 percent among men and from 4.8 percent to 8.5 percent among women from 1999-2000 to 2011-2013, and in 2012 alone, 14.9 million patients received 157 million prescriptions for PPIs. By 2015, not only were PPIs a preferred treatment for heartburn, but PPIs became among the most widely prescribed medications in the world.

Nonetheless, PPIs affect more than gastric cells. Common adverse effects of PPIs include nausea, headache, dizziness, and abdominal pain. However, associations have also been found between PPI use and more serious adverse events including significant kidney problems such as Acute Interstitial Nephritis (AIN), Acute Kidney Injury (AKI or Acute Renal Failure) and Chronic Kidney Disease (CKD). Acute Interstitial Nephritis (AIN) is a condition where the spaces between the tubules of the kidney cells become inflamed. Acute Kidney Injury (AKI) is a syndrome that results in a sudden decrease in kidney function or kidney damage. Chronic Kidney Disease (CKD) describes the gradual loss of kidney function. As CKD advances, dangerous levels of fluid, electrolytes and wastes can build up in the body.

PPIs have been linked to kidney problems as early as the 1990s, the most notable problem being AIN. PPI use was first linked to AIN in 1992 via case reports. Observational studies in 2014 and 2015 provided further evidence of the link between PPIs and AIN. In fact, a recent study examining the risk of AIN in a population of patients receiving PPIs, found that individuals with PPI treatment had a more than twofold increase in the short-term risk for hospital admission with acute kidney injury relative to patients who were not prescribed PPIs. Individuals age 60 or older using PPIs are considerably more at risk than younger users.

While individuals who suffer from AIN could recover, most will suffer from some level of permanent kidney function loss. In rare cases, individuals suf-

JereBeasleyReport.com
ferring from PPI-induced AIN will require kidney transplant.

Lawyers in our firm are currently investigating cases involving PPI use and Acute Interstitial Nephritis (AIN), Acute Kidney Injury (AKI or Acute Renal Failure) and Chronic Kidney Disease (CKD). If you would like more information, contact Roger Smith or Jenna Fulk, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Jenna.Fulk@beasleyallen.com.


**STUDY LINKS CARDIAC FAILURE TO METAL ON METAL TOTAL HIP ARTHROPLASTY**

Since the inception of the metal-on-metal (MoM) hip implant litigation—starting with the DePuy ASR recall in 2009—the scientific and legal community has struggled to definitively understand the full effects of metallosis. Some corporations even deny the existence of a standard definition of metallosis, while others have paid billions to those adversely affected by these devices and the deleterious effects of metallosis.

The risk of corrosion and metallic debris has been a known potential risk for some time. Because of the immediate effects of tissue damage, pain and elevated chromium and cobalt levels in the blood, there is a need for a revision surgery to remove the MoM and exchange it with ceramic and polyethylene components. Unfortunately, the rate at which certain devices are depositing metallic debris and failing is exponentially higher than doctors thought would happen. Consumers were never warned. The ultimate question now is, what is the ultimate potential effect the exposure of excessive chromium and cobalt levels in the body can have?

In the case report, “Cardiac cobaltism: a rare complication after bilateral metal-on-metal total hip arthroplasty,” published in October 2015 by Dr. J.R. Martin, et al., we see one of the first documented cases of metal-on-metal hip cobalt cardiac toxicity. The subject patient in this study was implanted at the age of 64 in 2008 with a DePuy metal-on-metal hip device in her right hip and another less than a year later in her left hip. At her two-year post-operative appointment, blood testing showed her cobalt levels were markedly elevated at 192 parts per billion, with a normal reading being less than one.

The patient was to undergo a revision surgery to address her complaints of pain and the elevated metal ion levels. She began to develop impaired renal function and shortness of breath. An echocardiogram showed severely abnormal ventricular function. She underwent a cardiac MRI, which showed an “unusual delayed enhancement pattern and hyperenhancement of the atria” as well as a cardiac biopsy to rule out cobalt (Co) cardiotoxicity.

The woman underwent bilateral hip revisions exchanging the metal articulation to ceramic on polyethylene. Extensive evidence of metallosis was found intraoperatively. She was put on anticoagulation therapy to prevent clot formation. Renal function continued to decrease, requiring hemofiltration. The patient then suffered from a “transient episode of acute onset hemiparesis and aphasia” after an intracranial bleed was ruled out she was reintubated seven days post op, day 22 of hospitalization, and she suffered a “hemorrhagic conversion of the previous embolic cerebrovascular event.” She was placed on palliative care and died the next day.

The effects of Co toxicity are “well documented in the literature and can cause cardiomyopathy, hypothyroidism, polyneuropathy, and neuropathy complications.” Though there is no uniform standard of treating Co toxicity, there are theories which ultimately speed the expulsion of the ions from the body. In the instant study, the patient’s pathology showed she had cardiomyopathy secondary to Co toxicity. The cardiac biopsy showed her Co level to be 25 times higher than the normal limit. The pathologists in this case confirmed that cobalt toxicity more than likely contributed to the patient’s death, secondary to cardiac cobaltism.

This case is one of the first to link mortality with cobalt toxicity due to metal on metal total hip devices. Though this case is still considered rare, it outlines a known potential risk and affirms the standard protocol of testing the blood for chromium and cobalt levels with additional work-up as necessary, including biopsy and the replacement of the cobalt chromium femoral head with one made of ceramic. Many orthopaedic surgeons around the country have abandoned using metal-on-metal hip systems in favor of ceramic and polyethylene because of concerns about the as yet not fully understood effects of metallosis.

If you need more information about the study or the hip litigation generally, contact Navan Ward, a lawyer in our firm’s Mass Torts Section. Navan is the lead lawyer handling hip litigation for the firm. He can be reached at 800-898-2034 or by email at Navan.Ward@beasleyallen.com.


**J&J UNIT FAILS TO OVERTURN $8 MILLION HIP IMPLANT VERDICT ON APPEAL**

A California appeals court has upheld a $8.3 million verdict in favor of a retired prison guard who said he was injured by a metal hip implant. The court found that the verdict against Johnson & Johnson was supported by substantial evidence. The appeals court said that Loren Kranisky, the Plaintiff, had presented a mountain of evidence to back his claim that DePuy Orthopaedics Inc.'s ASR XL metal hip had injured him and caused years of pain. The jury had awarded $8 million for noneconomic losses, which was added to $338,000 in medical expenses.

Kransky is represented by Martin N. Buchanan of Law Offices of Martin N. Buchanan, John H. Gomez of Gomez Trial Attorneys, Dean A. Goetz of Law Offices of Dean A. Goetz, Michael A. Kelly, Khaldoun A. Baghdadi of Walkup Melodia Kelly & Schoenberger and Brian J. Panish of Panish Shea & Boyle LLP. The case is Loren Kranisky v. DePuy Orthopaedics Inc. in the Court of Appeal of the State of California, Second Appellate District.

Source: Law360.com

**AN UPDATE ON Risperdal Litigation**

We have written before on the Risperdal litigation. That litigation is still ongoing. Beasley Allen lawyers continue to pursue Risperdal claims on behalf of individuals who have been injured as a result of taking Risperdal. As our readers should already know, Risperdal is the brand name drug manufactured by Janssen Pharmaceuticals, Inc., a division of Johnson & Johnson.
Risperdal went on the market in 1993 after receiving approval from the U.S. Food and Drug Administration (FDA) for the treatment of schizophrenia. The drug was approved in 2003 for short-term treatment of acute manic/mixed episodes associated with Bipolar I Disorder in adults. Until 2006, the drug was not approved for any indication to treat minors.

In 1997, the FDA denied a request by Janssen for a pediatric indication for the drug. Despite this denial, Janssen marketed the drug for the treatment of depression, anxiety, Attention Deficit Disorder (ADD), Attention Deficit and Hyperactivity Disorder (ADHD), conduct disorder, sleep disorders, anger management and mood enhancement/stabilization.

In 2006, Janssen obtained approval to market the drug for autistic irritability for children and adolescents between the ages of 5 to 16 years old. In 2007, Janssen obtained approval to market the drug for treatment of schizophrenia in adolescents between the ages of 13 to 17 years old and short-term treatment of manic or mixed episodes of Bipolar I Disorder in children and adolescents between the ages of 10 to 17 years old. Use of Risperdal can cause gynecomastia (enlarged breasts in males), galactorrhea (milky nipple discharge), weight gain, hyperglycemia, diabetes and inhibited reproductive function.

There have been some recent developments in the Risperdal litigation occurring in Philadelphia and California. A jury returned a verdict in Philadelphia against Janssen and in favor of the Plaintiff and awarded $70 million in compensatory damages. The Plaintiff in that case began taking Risperdal in 2003 and developed enlarged breasts, which were diagnosed in 2005. From 1993 until 2006, the Risperdal label stated that the risk of gynecomastia (enlarged breasts in males) was “rare” and defined “rare” as “less than 1 in 1,000.” In 2006, Janssen modified the gynecomastia warning to state that the risk of gynecomastia in adolescent males was 2.3 percent, which was more than a 2,300 percent increase in risk from the previous warning. There is evidence that Janssen actually knows that the actual risk exceeds the 2.3 percent risk that has been stated in the label since 2006.

To date, there have been five Risperdal trials in Philadelphia. In four of the trials, the juries have awarded damages against Janssen totaling more than $74 million. In the other trial, the jury found that the warnings provided by Janssen were not adequate, but did not find that Risperdal usage caused that Plaintiff’s injuries. There are approximately 1,700 Risperdal cases filed in Philadelphia.

There is a separate group of several thousand Risperdal cases filed in California. Recently, the Judge handling those cases entered an order selecting almost 800 cases for trial work-up over the next year. Discovery in these cases has begun in phases, and trials will proceed in 2016 and 2017. The first case is scheduled to begin trial on July 18, 2016.

If you or a family member has suffered an injury as a result of taking Risperdal, or you need more information generally, contact James Lampkin, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at James.Lampkin@beasleyallen.com.

**FDA Finally Admits The Dangers Of Fluoroquinolone Antibiotics**

Antibiotics are known to be life-savers and, without any doubt, they are heavily used in this country. However, like all drugs, antibiotics have side effects, and some may be dangerous and deadly. This is especially true with a class of drugs called fluoroquinolones that include Levaquin, Cipro, and Avelox. It’s been reportedly that more than 33 million Americans take one or more of these antibiotics each year. In 2010, Levaquin was the bestselling antibiotic in the country.

There is a good chance that you or a family member has taken one of these potentially harmful drugs within the last year. Serious questions have been raised about the safety of these medications—most notably Levaquin—since they came to market in 1996. Until recently, the U.S. Food and Drug Administration (FDA) did little to warn doctors and consumers of the possible deadly side effects of these drugs. By 2010, Levaquin was involved in more than 3,400 lawsuits and as many as 5,000 deaths.

Warnings surrounding the popular antibiotic Levaquin have been dangerously insufficient. The drug, capable of causing debilitating tendinitis, permanent nerve damage, and even psychosis, is meant to be reserved for severe life-threatening infections. Unfortunately, many doctors are prescribing fluoroquinolones like Levaquin for non-life-threatening conditions such as earaches, bronchitis, sinusitis, and other ailments that could be allowed to resolve on their own or are easily treated with lesser drugs or non-drug remedies.

The over-use has led to bacterial resistance and serious, possibly life-threatening side effects in people who should not be taking the drug for less severe conditions. The FDA has finally taken steps to warn the public. While the agency was slow to act, at least it finally did so. For more information contact Melissa Prickett, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

**VIII. AN UPDATE ON SECURITIES LITIGATION**

**Judge Approves $1 Billion Settlement To End Vioxx Marketing Litigation**

A New Jersey federal judge has granted final approval to the $1.06 billion settlement between Merck & Co. Inc. and the drug company’s investors to resolve multidistrict litigation (MDL) over the alleged illegal marketing of the painkiller Vioxx. U.S. District Judge Stanley R. Chesler said the settlement was an “extremely fair and reasonable” conclusion to the long-running case. Judge Chesler signed off on the pharmaceutical giant’s $830 million payment to shareholders and an additional $232 million for legal fees and expenses. It should be noted that there were very few objections to the settlement received and those were rejected by the court.

The agreement represents the largest securities class action settlement ever with a pharmaceutical company, marking an end to a case that was on the eve of trial after 12 years of “hard-fought litigation,” including a unanimous victory for the Plaintiffs at the U.S. Supreme Court.
The settlement class includes those that purchased Merck securities sometime between May 21, 1999, through Oct. 29, 2004, when the drug company recalled Vioxx in the wake of widespread media reports about the drug’s risks.

In 2011, the company agreed to a plea bargain to pay $950 million to 43 states, the District of Columbia and the U.S. Department of Justice (DOJ), which said that the company put profits ahead of patient safety. As in the criminal case, the investors alleged that Merck attempted to conceal Vioxx’s cardiovascular risks and claimed that rheumatoid arthritis patients taking the drug in a clinical study were five times more likely to suffer a heart attack than those who took a drug called Naproxen. The reports of the drug’s risks and the recall sent the company’s stock tumbling, according to the investors.

The investors’ claims against the company were consolidated in a New Jersey federal court in 2005. The investors accused the company of making misrepresentations to inflate the stock’s value and also accused several executives of insider trading, among other violations. The investors stated they faced substantial risks in establishing liability if the case had gone to trial. Among the challenges facing the investors was having to show that Defendants knew or recklessly disregarded certain data regarding drug safety and knowingly made false statements.

Judge Chesler cited the overwhelming favorable response to the settlement from class members and the very small number of objections. Only 14 objections were made and Judge Chesler rejected them as being “insubstantial.”

The lead Plaintiffs are represented by Max W. Berger and Salvatore Graziano of Bernstein Litowitz Berger & Grossmann LLP; David A.P. Brower of Brower Piven, Matthew A. Kupillas of Milberg LLP; Mark Levine of Stull Stull & Brody; and James E. Cecchi and Lindsey H. Taylor of Carella Byrne Cecchi Olstein Brody & Agnello PC. The case is In re: Merck & Co. Inc. Securities, Derivative & ERISA Litigation in the U.S. District Court for the District of New Jersey.

IX. BUSINESS LITIGATION

AN UPDATE ON THE HOME DEPOT LITIGATION

We reported previously that Home Depot was one of many businesses in the U.S. to experience a significant retail data breach in 2014. The breach involved the installation of memory scraping malware on self-checkout terminals, which allowed payment card information to be collected for months at stores in the U.S. and Canada. This malware allowed the attackers to compromise the payment cards of more than 56 million customers.

Currently, Home Depot is involved in a major ongoing lawsuit with financial institutions related to the 2014 data breach. After the Judge refused to throw out the banks’ claims last month, Home Depot asked the District Court to certify several questions of law to the Eleventh Circuit Court of Appeals.

The case is in the Northern District of Georgia and has the potential to influence whether banks can continue to bring claims against major retailers after their customer’s data is hacked.

One of the most important questions put forward by Home Depot is whether the financial institutions have satisfied the requirements of Article III standing related to specific pleading obligations and the degree of harm that must be alleged in order to withstand a motion to dismiss. Given that consumers affected by a data breach have difficulty establishing standing in lawsuits, banks often satisfy the legal hurdle by pointing to the costs associated with the steps they take to protect their cardholders.

In order to satisfy the Article III standing, banks can generally demonstrate financial loss related to a data breach by evidencing costs related to replace customer cards, place a freeze on credit reports, and implement fraud monitoring services.

However, Home Depot is arguing in this case that the banks have failed to adequately specify their damages in the complaint and instead only plead general injuries that relate to the group. The retailer also contends that some of the actions taken by banks as a result of the data breach were merely proactive measures taken in an attempt to prevent future harm and are not enough to confer standing. Due to the fact that the landscape in data breach cases is still developing, courts are still deciding what specific pleading requirements to impose on the banks.

Home Depot has asked the District Court for permission to immediately take its issues to the Eleventh Circuit Court of Appeals, but it isn’t a sure bet as to whether they will succeed in their request. Thus far, the District Court has not issued a final order in the case; therefore, Home Depot has to get approval from both the District Court and Eleventh Circuit Court of Appeals before its issues will be heard. If you need more information on any part of the Home Depot litigation, contact Jake Jeter, a lawyer in our firm’s Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Jake.Jeter@beasleyallen.com.

Source: Law360.com

X. PREMISES LIABILITY

CONSTRUCTION DEFECTS MAY CAUSE SERIOUS RISKS TO HOMEOWNERS’ SAFETY

A construction defect is a defect in the design, construction, or manufacturing of a building or its components that causes the structure to fail to perform its intended purpose or conform to applicable building codes or construction standards. These defects can occur in new construction or remodeling and are caused by a failure to meet workmanship standards, faulty design, violation of building codes, or use of defective materials.

Construction defects can involve various components of a residential building, including windows, stucco, drywall, concrete, balconies or decks, showers, and mechanical systems. These defects can devalue a homeowner’s property, increase maintenance costs, render the home or parts of the home uninhabitable. In the worst case, construction defects can cause health or safety concerns if not timely and properly repaired.

One example of construction defects causing injury to homeowners can be seen in a recently filed class action
XI. WORKPLACE HAZARDS

SUNOCO PIPELINE FACES $1.5 MILLION FINE FOR TEXAS SAFETY VIOLATIONS

Federal safety regulators announced a proposed $1.5 million fine recently against Sunoco Pipeline LP for failing to report a 2013 incident at a pipeline facility that resulted in a worker’s hospitalization. Alleging 15 violations of pipeline safety regulations, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a notice of probable violation and proposed compliance order, with a proposed $1.54 million civil penalty against Sunoco. The PHMSA found after an investigation that the pipeline operator failed to report a 2013 accident at a Wortham, Texas, facility that led to a minor oil spill and a serious worker injury requiring inpatient hospitalization, and had made a series of missteps leading up to the accident.

The notice of probable violation found that Sunoco Logistics Partners LP, which owns the West Texas Gulf Pipeline Co. facility in Wortham, didn’t follow written procedures, or verify employee qualifications. Neither did the company follow up on the accident after it happened. PHMSA said Sunoco failed to review employee activities after the accident to determine whether its procedures were adequate and did not analyze the cause of the accident, with the company providing an incomplete and inconclusive report to the regulator.

PHMSA said Sunoco should have learned from a 2009 accident that happened during similar maintenance work at a different Texas pipeline station, improving its procedures and work plans and using better training and qualification for employees performing the procedures. In the notice, PHMSA said: “Failure to identify the root cause of the 2009 accident allowed the recurrence of the same type of accident in 2013.”

According to the notice, Sunoco failed to verify operator qualifications for its welders, inspector and other contract personnel. One welder had no operator qualifications and another had let his qualifications lapse shortly before the accident. Employees were not evaluated after the accident before they resumed work, completing the welding just a day after the accident even though those same employees’ performance was believed to have contributed to the accident, according to the notice. And the employees and contract workers weren’t tested for drugs or alcohol after the accident.

Among other alleged violations are a failure to use a qualified and trained inspector to oversee maintenance activities at the Wortham station at the time of the accident and a failure to regularly audit its operations and maintenance manuals and ensure the facilities were following proper procedures. PHMSA said Sunoco failed to follow seven of its written procedures for the “hot work” performed at the Wortham station from fall 2012 through post-accident March 2013, “resulting in an unsafe condition and a serious injury to an individual performing hot work.” The company failed to follow nine aspects of its procedures for issuing work permits; a dozen of its provisions for a lockout program and eight written operator qualification program provisions, according to the notice. According to the notice, PHMSA’s investigation of the accident was prompted by a 2015 information request.

Source: Law360.com

CONTRACTOR CITED FOR EXPOSING ALABAMA WORKERS TO FALL RISKS

A Georgia contractor is facing $130,500 in fines after seven different inspections over the course of five years found the company putting workers at risk of potentially fatal falls. The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) cited MMC Construction LLC, located in Dacula, Ga., for failing to protect workers from fall hazards while working from heights as high as 13 feet on a work site in Montgomery.

OSHA says that workers were working on the second level of a scaffold without guard rails. MMC also didn’t require the use of a ladder or other safe means to access the scaffold, according to OSHA. Joseph Roesler, OSHA’s area director in Mobile, said in a statement:

MMC Construction’s continued refusal to comply with OSHA safety standards is putting its employees in serious and poten-
Management at this facility has adopted a productivity-over-safety mentality and repeatedly claims that it is 'too expensive' to address the safety hazards found in this workplace. The safety culture of this company must change immediately; protecting workers must always come before profit margins.

OSHA inspected Daeil as part of its Regional Emphasis Program on Safety in the Auto Industry, a program that aims to reduce risk in the auto industry in Georgia, Alabama and Mississippi. Daeil has 15 business days from when it got the citations to comply, request a conference with OSHA or contest the findings before the Occupational Safety and Health Review Commission.

Source: Kelly Poe at AL.com

XII. ENVIRONMENTAL CONCERNS

3M COMPANY ACCUSED IN LAWSUIT OF CONTAMINATING DRINKING WATER

Another federal lawsuit has been filed against 3M Company for its alleged contamination of the Tennessee River. The Plaintiffs say contamination has threatened the health of those living around the river. The suit, filed by Tennessee Riverkeeper, an environmental nonprofit, says 3M’s Decatur chemical plant is the waste’s main generator. BFI Waste Systems, the City of Decatur and the Municipal Utilities Board of Decatur are also named as Defendants in the suit.

3M has produced perfluorooctane sulfonate (PFOS) since the 1960s and perfluorooctanoic acid (PFOA) since 1999 as byproducts of the non-stick goods it manufactured. The company has stated that it voluntarily decided to stop using PFOA and PFOS in 2001. A press release from the Riverkeeper said: “On-site disposal practices have resulted in ground-water contamination and the contamination of the Wheeler Reservoir of the Tennessee River.”

By contaminating the Wheeler Reservoir and the Tennessee River, Riverkeeper authorities said that 3M and others have tainted the drinking water of local residents. The complaint alleges:

At least 4 other public water supplies using water from the Tennessee River downstream from Defendant 3M’s Decatur facility have detected PFOA contamination in finished water samples, including the Muscle Shoals Water Treatment Plant (WTP), the Florence Municipal Water Supply, and the Sheffield WTP, all of which are approximately 45 miles downstream of 3M’s Decatur facility.

In May, the U.S. Environmental Protection Agency (EPA) issued an advisory that water systems should not contain more that 70 parts per trillion (ppt) of PFOS and PFOA. The Alabama Department of Public Health subsequently released an advisory announcing that eight of Alabama's water systems did not meet the EPA’s new regulation. A December 2015 test showed these chemicals registering at 100 ppt in West Morgan-East Lawrence (WMEL) water system, which is supplied by the Tennessee River.

Following the EPA’s advisory, WMEL general manager Don Sims warned people not to drink or cook with the water until those chemical levels could be reduced. Morgan County Emergency Management began supplying the community with bottled water while WMEL attempted to dilute the chemical levels by mixing in water from Decatur Utilities. Those levels have since been reduced to meet the EPA’s advised standards.

Mark E. Martin, one of the lawyers for the Riverkeeper, noted that while the water has been diluted, people are still exposed to the chemical. He had this to say:

PFOS and PFOA accumulates in sediment and fish, and people are exposed to it by using the river when they swim, fish or ski. There are a lot of people who eat the fish even though (ADPH) advised not to eat more than one fish a month (from the Wheeler Reservoir). There are subsistence fishermen who catch the fish and eat them because they aren’t aware of the advisory, or don’t take it into account.

The Riverkeeper’s complaint states that there is not a known environmental breakdown mechanism for these chemicals. It’s alleged further:

CONCERNS
The human diseases caused by exposure to PFOA, PFOS and related chemicals include cancer, immunotoxicity, thyroid disease, ulcerative colitis and high cholesterol.

In a separate lawsuit filed in October 2015, an Alabama drinking water company and its customers claimed 3M knew its Decatur plant was discharging dangerous chemicals into the Tennessee River, contaminating the company’s drinking water for at least 14 years. The suit also claimed 3M falsely assured the company that “documented levels of pollution posed no threat” to its customers. That suit is ongoing.

In the latest suit filed, the Tennessee Riverkeeper claimed that these toxic releases not only violate the EPA’s recent advisory but also fail to comply with the Resource Conservation and Recovery Act. The complaint said:

The “non-stick” chemicals damage the environment since they do not break down properly. In essence, these ‘non-stick’ chemicals do not stick to anything in the environment either, meaning they do not bind to anything to break down into safer components. There is thus nearly no safe level of these chemicals in the environment.

In the 2015 suit filed against 3M by WMEL a 2010 study, conducted by the federal Agency for Toxic Substances and Disease Registry, was cited. The study analyzed blood samples from 121 people who drank WMEL’s water. An elevated level of PFOA and PFOS was found in their blood. While WMEL’s suit is seeking monetary damages from 3M and others, the Riverkeeper’s suit demands the company remediate the environmental damage it caused. David Whiteside, the Riverkeeper’s founder and director, said their sole purpose “is to force the people who are responsible to clean up (the waste).”

The Tennessee Riverkeeper is represented by William Matsikoudis and Derek Fanciullo of Matsikoudis & Fanciullo LLC and Mark E. Martin. This case is Tennessee Riverkeeper Inc. v. 3M Company et al. in the U.S. District Court for the Northern District of Alabama, Northeastern Division.

Source: Montgomery Advertiser and Law360.com

PFC Bellwether Trials Result In Plaintiff Verdicts

Perfluorinated chemicals (PFCs) are commercially manufactured compounds that are widely used to make everyday products more resistant to stains, grease, and water. For example, PFCs are used to make non-stick cookware, are used in sprays to make fabrics stain-resistant, and are even used in certain food packaging materials. PFCs break down extremely slowly, and as a result there is widespread human exposure to PFCs that have been released into the environment from manufacturing processes.

The most common route of PFC exposure is through consuming PFC-contaminated drinking water. Many types of PFCs are carcinogenic or otherwise toxic if consumed, and can cause a wide range of health problems. Unfortunately, the use and disposal of most PFCs is largely unregulated by the government.

The DuPont company has used a type of PFC called perfluorooctanoic acid (PFOA) in the production of Teflon for non-stick frying pans since the 1950s. At one of DuPont’s chemical sites in Parkersburg, W.Va., the company spent decades dumping PFOA-containing waste into the Ohio River, thereby contaminating local water supplies and farmland. DuPont continued dumping this waste despite having known since at least 1961 that PFOAs were toxic and could cause health problems.

By the 1970s, DuPont discovered that its factory workers had high concentrations of PFOAs, and in 1991 DuPont established an internal safety limit for PFOA concentration in drinking water. Meanwhile, the company hid evidence that the chemical had contaminated the local water supply well beyond what the company’s own scientists considered safe and far beyond what independent scientists considered safe.

Litigation against DuPont over PFOA-contaminated drinking water began in 2001, when a class action was filed in West Virginia state court. In 2004, DuPont settled the case, agreeing to install filtration plants in the six affected water districts and pay a cash award of $70 million. DuPont also agreed to fund a scientific study to determine whether there was a scientific link between PFOA and any diseases. If any such link was found by the study, class members with those diseases could sue for personal injury.

In December 2011, the study found a “probable link” between PFOA and kidney cancer, testicular cancer, ulcerative colitis, thyroid disease, high cholesterol, and pre-eclampsia. Since the study was released, more than 3,500 Plaintiffs have filed personal-injury lawsuits against DuPont, and these cases have been consolidated into a multidistrict litigation (MDL) in Ohio’s Southern District.

There are five bellwether trials planned in the MDL, and the first two trials have recently resulted in verdicts for the Plaintiff.

• In the first trial, Carla Bartlett made Ohio state law claims for negligence and negligent infliction of emotional distress, alleging that she had developed kidney cancer as a result of exposure to PFOA-contaminated drinking water. The jury agreed with Ms. Bartlett, and awarded her $1.6 million. The judge in that case denied DuPont’s request for a new trial, and declined to grant reconsideration of the jury award.

• In the second bellweather trial, the jury awarded testicular cancer survivor David Freeman $5.1 million, and also found that DuPont had acted with “actual malice,” triggering a punitive damages phase in the trial. We wrote in more detail on this case below.

After the remaining bellwether trials conclude, DuPont may choose to settle with the remaining class members, using the outcome of the bellwether cases to determine settlement awards. If you would like more information about any aspect of these cases, you can contact Grant Cofer, a lawyer in our firm’s Toxic Torts Section. Grant can be reached at 800-898-2034 or by email at Grant.Cofer@beasleyallen.com.

Source: Law360.com

Jury Finds Against DuPont In Environmental Pollution Case

An Ohio federal jury ordered chemical manufacturer DuPont and a spinoff company to pay $5.1 million in compensatory damages and half a million in punitive damages to a Plaintiff who alleges the companies’ unlawful dumping of carcinogenic waste into the Ohio River caused his cancer.
The $5.1-million award went to Plaintiff David Freeman, an Ohio College professor who has lived in the vicinity of DuPont’s Washington Works plant in Parkersburg, W. Va., for 23 years. Dr. Freeman claimed DuPont knowingly dumped ammonium perfluorooctanoate, also known as PFOA or C-8, a chemical compound used in the production of Teflon, Stainmaster, and Gore-Tex fabric, into the Ohio River, which forms the border of Ohio and West Virginia.

Ten years ago, the U.S. Environmental Protection Agency (EPA) sued DuPont for contaminating the Ohio River with PFOA. The company agreed to pay $10.25 million to settle the case. Dr. Freeman alleges DuPont’s industrial waste has contaminated the drinking water and environment around its production plant, exposing him and countless others to cancer-causing toxins. A lawyer for Dr. Freeman told Bloomberg: “The jury saw that DuPont acted with pure conscious disregard and now DuPont knows they have to face this.”

The jury in the second phase of the trial awarded $500,000 in punitive damages to the $5.1 million compensatory damages verdict. DuPont dumped the chemical into the Ohio River and the air around its Parkersburg, W. Va., factory for decades, although it’s been almost completely phased out in U.S. manufacturing now.

Source: Bloomberg

U.S. STEEL CORP. SETTLES MINNESOTA BENZENE CASE

U.S. Steel Corp. reached a settlement agreement recently with a former automotive mechanic and hobbyist who said that his work with benzene-containing products, including Liquid Wrench, caused him to develop Myelodysplastic Syndromes (MDS).

Minnesota resident Leonard Samuelson filed his complaint in a Minnesota federal court earlier this year, alleging that his career as an automotive mechanic and auto hobbyist required him to work with a number of products containing toxic benzene, including Liquid Wrench; Berryman B-12 Chemtool Carburetor, Choke, and Throttle Body Cleaner; and Berryman Brake Parts Cleaner. The lawsuit contended that his exposure to dangerous levels of benzene in the automotive products spanned 50 years, and caused him to develop MDS, a group of bone marrow disorders in which the bone marrow fails to produce enough healthy blood cells.

According to Public Employees for Environmental Responsibility (PEER), more than 40,000 deaths happen each year due to chemical exposure at the workplace, making it the eighth leading cause of death in the U.S. Many of these unfortunate deaths are the result of benzene exposure. As we have reported previously, studies have linked benzene exposure to leukemia, as well as other forms of cancer. In fact, the International Agency for Research on Cancer (IARC) states that benzene causes acute myeloid leukemia (AML) and has been linked with acute lymphocytic leukemia (ALL), chronic lymphocytic leukemia (CLL), multiple myeloma, and non-Hodgkin lymphoma.


John Tomlinson, a lawyer in our Toxic Torts Section, is investigating benzene exposure cases. If you need more information on this subject, contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com. Source: HarrisMartin Publishing

ROUNDUP FORMULATION MAY CONTAIN HARMFUL CHEMICALS OTHER THAN GLYPHOSATE

In previous issues of the Report we have mentioned new studies concerning the toxicity of glyphosate, which is the key ingredient in Monsanto’s herbicide Roundup formulation. For decades, Monsanto has attempted to dominate the science concerning the safety of glyphosate and its herbicide Roundup by hiring legions of scientists to generate self-serving studies. Over the past few years, however, independent scientists and researchers have found a strong link between glyphosate exposure and non-Hodgkin’s lymphoma.

While the glyphosate studies are considered new studies, the findings are actually supported by a long line of studies that link glyphosate exposure to non-Hodgkin’s lymphoma. Monsanto has not gone quietly into the night, as the company (and scientists cozy to big Agriculture industry) has quickly mobilized and is now trying to pump out new studies that demonstrate glyphosate is safe. Monsanto has even sued the State of California because the state’s Office of Environmental Health Hazard Assessment stated its intent to classify glyphosate as a carcinogen as the International Agency for Research on Cancer (IARC) has done.

To put things in perspective, IARC happens to be the leading independent cancer research organization in the world, and Monsanto is suing a state for merely trying to inform its citizens about the safety of products.

While much of the attention has focused on glyphosate, new studies are also shedding light on how toxic other Roundup co-formulants are. Roundup products contain both a publicly declared active ingredient (glyphosate) and confidential co-formulants designed to increase the effectiveness of the product. Monsanto claims these co-formulants are inert agreements (i.e., chemically inactive), but the company has refused to publicly identify the ingredients because Monsanto considers them trade secret compounds.

A recent study sought to test the cellular endocrine disrupting effects of co-formulants in glyphosate-based herbicides below what were thought to be toxic levels. Endocrine disruptors are chemicals that may interfere with the body’s endocrine system and produce adverse, developmental, reproductive, neurological, and immune effects in humans.

To determine the identity of the co-formulants, scientists must reverse-engineer the formulation. The study, published in the International Journal of Environmental Research and Public Health, concluded that co-formulants act as endocrine-disrupting chemicals at levels up to several hundred times below the level at which the declared active ingredient glyphosate demonstrates the same activity. This study further demonstrates that endocrine disruption by glyphosate-based herbicides could not only be due to the declared active ingredients, but also co-formulants.

This research adds to the growing literature concerning the toxicity of both glyphosate and Roundup co-formulants. In the face of independent, peer-reviewed research, Monsanto has defiantly refused to warn about the carcinogenic risks of its products.

Source: Bloomberg
Instead, the company’s response has been to sue states that seek to protect their citizens, and try to undercut any suggestion that their products could be unsafe.

Considering the Environmental Protection Agency (EPA) regulates herbicides through a more cooperative regulatory framework, whereby the company has substantial input on what is considered when determining the hazard classification and overall regulation of the product in question, these independent findings are very concerning. If Monsanto has withheld information regarding glyphosate’s toxicity, I cannot imagine what they could be hiding about these unknown co-formulants. It is no surprise the number of Roundup exposure cases filed against Monsanto continues to increase as consumers learn more about these products.

Lawyers in our firm’s Toxic Torts Section are investigating Roundup exposure cases where farmers, nursery workers, landscapers or residents used large amounts of roundup and developed non-Hodgkin’s lymphoma. If you need more information, please contact Parker Miller, who is leading our investigation of these cases, and Ryan Kral, another lawyer working on these cases, at 800-898-2034. You may also contact them by email at Parker.Miller@beasleyallen.com or Ryan.Kral@beasleyallen.com for further information regarding these cases.

TESORO REACHES $425 MILLION SETTLEMENT WITH THE GOVERNMENT OVER EMISSIONS

Tesoro Corp. has agreed to settle Clean Air Act violation claims by the federal government. The settlement is worth as much as $425 million and includes funding emissions improvement projects at operations in California, Alaska, and elsewhere. The company will pay a $10.4 million civil penalty over the alleged Clean Air Act violations at some of its refineries, and put another $1 million toward natural gas-powered school buses in Northern California.

The emissions projects are located in Alaska, Northern California, North Dakota, Utah, Hawaii and Washington. The federal government, Alaska, Hawaii and the Northwest Clean Air Agency had accused Tesoro, two of its units and Par Hawaii Refining LLC of violating the Clean Air Act at six refineries. It was claimed they failed to prevent significant deterioration at the facilities. As part of the settlement, Tesoro agreed to implement certain emissions control projects.

The U.S. Department of Justice (DOJ) said in a statement that the repairs and improvements at the refineries would reduce emissions by about 773 tons of sulfur dioxide, 407 tons of nitrogen oxides and 27 tons of hazardous air pollutants. Overall, the settlement will reduce greenhouse gas emissions from flaring at the six refineries by more than 60 percent, the government said.

Tesoro agreed as part of the settlement to install infrared gas-imaging cameras at four refineries to supplement the company’s leak detection programs to seek out emissions that might not otherwise show up on monitoring systems. Assistant Attorney General John C. Cruden said in a statement:

This settlement, achieved in partnership with states, will benefit the air quality in communities across the Western United States. It uses cutting edge technology to address global environmental issues like climate change by controlling flaring and provides important reductions of harmful air pollutants in communities facing environmental and health challenges.

The government is represented by Elizabeth L. Loeb and Susan Leslie Strawn. The case is United States of America et al. v. Tesoro Refining and Marketing Co. LLC et al., in the U.S. District Court for the Western District of Texas.

Source: Law360.com

ENBRIDGE HIT WITH $177 MILLION PENALTY FOR 2010 OIL SPILLS

Enbridge, a Canadian oil transport giant, has reached a $177 million settlement with the U.S. Justice Department (DOJ) and Environmental Protection Agency (EPA) over oil spills that occurred in 2010 in Marshall, Mich., and Romeoville, Ill. The settlement includes $62 million in civil penalties to Enbridge - $61 million for the Marshall spill, and $1 million for the Romeoville spill. This the largest penalty for a Clean Water Act violation in U.S. history. It’s the second-largest penalty overall, with only those arising out of the Deepwater Horizon oil rig disaster involving the Gulf of Mexico being larger.

Enbridge will also pay an additional $5 million to allow federal agencies to recover their costs associated with responding to the Marshall spill. This is in addition to the $58 million Enbridge has already paid in reimbursement. Infrastructure and inspection improvements across its Lakehead pipeline system were also required. Enbridge estimates that cost at $110 million.

Source: USA Today

A LISTING OF SUBSTANCES AND THE SEVERE LUNG DISEASES THEY CAUSE

We have been asked to mention some of the workplace and consumer products that could potentially cause lung disease. Over the past few months, Lawyers at Beasley Allen have been sounding the alarm about workplace and consumer products that can cause severe lung disease. Our lawyers are now investigating cases involving these products. This month, we will detail a number of the different substances that can cause severe lung disease.

• Aluminum and Aluminum Abrasives: Used often in the manufacturing sector as well as in metal working, aluminum dust exposure can cause fatal severe lung disease, including pulmonary fibrosis, emphysema, and chronic beryllium lung disease (where aluminum is alloyed with beryllium).

• Asbestos: Asbestos was a commonly used, but ultra-hazardous substance, for decades. Exposure to the substance is known to cause asbestosis, COPD, lung cancer, pulmonary fibrosis, and the dreadful cancer mesothelioma. To date, tens of thousands of people have died as a result of asbestos exposure.

• Beryllium: One of the most dangerous substances known to man, beryllium is used in the manufacturing sector, metal alloys (particularly aluminum and copper), in lab technician equipment, in the aerospace industry, ceramics and in various telecommunications equipment. Beryllium is known to cause chronic beryllium lung disease, which is pathologically
identical to sarcoidosis. The disease is oftentimes fatal without a lung transplant.

- **Cadmium:** Cadmium is present in the manufacturing industry as well as chemical emissions, and it is known to cause emphysema.

- **Metal Carbides (tungsten, titanium, etc.):** Often present in the manufacturing and metal working trades, metal carbide exposure can cause fatal pulmonary fibrosis.

- **Chromium:** Like metal carbides, chromium exists in the manufacturing and metal working trades, but it also is present in chemical and fossil fuel emissions. Chromium is known to cause lung cancer and pulmonary fibrosis.

- **Coal Dust:** Coal dust is present in the mining, railroad and steel industries, and it can cause black lung, COPD and emphysema. Black lung is estimated to kill 25,000 people per year.

- **Kaolin:** This substance is commonly used in pottery making, and exposure can cause pulmonary fibrosis.

- **Iron Oxides:** Often present in the manufacturing, metal working and welding industries, iron oxides can cause arc welder's lung and pulmonary fibrosis.

- **Talc:** While many of our readers are aware of the fact that talc causes ovarian cancer, they may not know that exposure to talc (whether in the mining, manufacturing or cosmetics industries) can cause talcosis, a severe lung disease.

- **Tin:** Tin is used in the construction, manufacturing and metal working industries, and it can cause severe lung disease.

- **Cotton and Agriculture Dust:** Dust in various agriculture products can contain mold that can cause hypersensitivity pneumonitis, a severe lung disease.

- **Styrene and Fiberglass:** Exposure to styrene and fiberglass in a manufacturing sector that uses them can cause pulmonary fibrosis as well as bronchiolitis obliterans—a devastating lung condition that occurs when the bronchioles (small airway branches) are compressed by pulmonary fibrosis (irreversible scar tissue). Also known as “popcorn lung,” there is no cure for bronchiolitis obliterans.

- **Coffee Fumes:** Coffee fumes naturally contain diacetyl, which is known to cause bronchiolitis obliterans. As a result, coffee workers should be made aware of this hazard.

- **Food Flavoring Additives:** Diacetyl is used as a food flavoring additive and, as mentioned before, exposure to this substance can cause bronchiolitis obliterans. Anyone working closely with food flavoring additives in the food processing and manufacturing sector could be at risk for exposure.

- **Silica:** Exposure to silica can cause silicosis, a dreadful severe lung disease that kills an estimated 50,000 people per year. Workers in the mining, construction and sandblasting industries are particularly at risk.

- **Manganese:** Present in the manufacturing and metal working industries, manganese can cause fatal pneumonitis.

- **Nickel:** Nickel is a metal commonly used to make coins, magnets, jewelry, stainless steel, electronics and industrial machine components. Despite its handy use, the nickel dust is a significant health hazard in the occupational setting, and it is known to cause lung cancer.

- **Diesel Exhaust:** Diesel exhaust—particularly in the railroad and mining industries, and any confined area where numerous heavy machines are utilized—is known to cause COPD, emphysema and lung cancer.

- **Ammonia:** Ammonia has a host of different uses, including as a fertilizer ingredient, to darken wood, as a fossil fuel scrubber, as a food treatment to kill bacteria, and as a cleaner. A heavy exposure of ammonia can cause severe and instant lung damage, and during industrial accidents, exposure has proven fatal.

- **Chlorine:** Used in the chemical industry, as a pool cleaner, and in the manufacturing industry, misuse of chlorine can result in a chlorine gas exposure, which can cause severe (and sometimes fatal) lung damage.

These are just some of the substances that can cause severe lung disease. If you have developed a severe lung disease that you believe could be related to an occupational or product exposure, you should contact a lawyer immediately. Depending on which state you reside in, the statute of limitations could be a major issue. That’s because your state may not apply the discovery rule (which allows for a period of time for the injured party to connect the exposure with the injury). If you believe you or a family member may have a claim or have any questions, contact Parker Miller, a lawyer in our Toxic Torts Section, at Parker.Miller@beasleyallen.com or at 800.898.2034.

**Bronchiolitis Obliterans Is A Devastating Lung Condition**

Bronchiolitis obliterans is a life-threatening form of obstructive lung disease. This often-fatal and irreversible lung disease obstructs airflow in the lungs by creating scar tissue that compresses the bronchioles (small airway branches) to the point where air cannot pass through them. As the disease progresses, the airways are obliterated.

At first, a patient may show signs of a dry cough, shortness of breath and wheezing. The condition can progress either rapidly or gradually. In a normal FEV1 test (referred to as “forced expiratory volume in 1 second”), which measures the amount of air a person can blow out in one second, the result should be above 80 percent of forced vital lung capacity. In other words, if a person can blow out more than 80 percent of their lung capacity in one second, their result is considered normal. In a case of bronchiolitis obliterans, the test result can drop to between 16-21 percent, meaning that the lungs cannot expel air.

Exposure to a number of chemicals and substances can cause bronchiolitis obliterans. Perhaps the most known exposure occurred when popcorn manufacturing workers at the Gilster-Mary Lee popcorn plant were exposed to diacetyl, a chemical used to produce artificial butter flavoring, and developed the disease. Today, diacetyl is used as a chemical additive in a number of foods where a buttery taste is desired, particularly in candies and desserts. Workers that work in food processing plants, par-
particularly those working in close proximity to foods that are being mixed with flavoring additives, could be at risk.

There are numerous other substances that can cause bronchiolitis obliterans, including sulfur dioxide, nitrogen dioxide, ammonia, chlorine, thionyl chloride, methyl isocyanate, hydrogen fluoride, hydrogen bromide, hydrogen chloride, hydrogen sulfide, phosgene, polyamide-amine dyes, mustard gas and ozone. In addition, nylon flock workers, workers who spray prints onto textiles with polyamide-amine dyes, and battery workers exposed to fumes could develop bronchiolitis obliterans.

Bronchiolitis obliterans is irreversible. Quite often, a lung transplant is required. It should be noted that the disease is commonly misdiagnosed as asthma, chronic bronchitis, emphysema or pneumonia. Numerous tests are often needed to correctly diagnose bronchiolitis obliterans. Those include chest x-rays, diffusing capacity of the lung tests, spirometry, high-resolution CT (HRCT), and lung biopsy. Remember, if you believe your exposure was related to your workplace or a product exposure, and you are scheduled to receive a biopsy, or if you have previously had a biopsy performed—you should request your doctor and the pathology lab to preserve the lung tissue for further testing. If you have any questions, contact Parker Miller, a lawyer in our Toxic Torts Section, at 800-898-2034 or by email at Parker.Miller@beasleyallen.com.

XIII.
UPDATE ON NURSING HOME LITIGATION

NURSING HOME EVICTIONS CAN CREATE SERIOUS PROBLEMS

While there are fewer nursing homes in the United States, there are more elderly people who are in need of the services of a nursing home. That is a growing trend. Each nursing home has a limited number of beds. In order to maximize their profits, nursing homes want to fill those beds with as many low-maintenance patients, who have the ability to pay timely, as they possibly can. For many nursing homes, this profit-driven motivation is creating a disturbing outcome—eviction of its more problematic patients—and eviction of those who lack the ability to pay as well or as timely as others.

The Associated Press has reported that nursing home evictions are up by an alarming 57 percent since 2000. In 2014, “involuntary discharges” was the number one grievance lodged by ombudsmen, individuals who work to resolve issues between residents, their families and nursing homes.

Federal regulations are designed to address these wrongful evictions from nursing homes. The problem is that many facilities ignore these regulations. By and large, that’s because the regulations are weak. The nursing homes don’t face any real punishment for telling a family their elderly loved one must go from the facility.

Nevertheless, the federal regulations apply to those facilities that receive Medicaid or Medicare benefits. In fact, if a facility receives government benefits, the regulations apply not only to the recipients who are in the facility, but also to recipients who are private-pay or insurance-pay patients.

Nursing homes defend the evictions by claiming that more problematic patients are a risk to staff, to other patients and to themselves. However, lawyers who represent families with loved ones who have been evicted report that far too many cases involve slow-pay patients, family members who complain a lot about patient care, or other issues the nursing home simply does not want to deal with. That’s especially the case where another potential resident is on a waiting list who will be much less demanding or is better able to pay.

The federal regulations that pertain to “involuntary discharge” by a nursing home limit removal of a resident/patient from the nursing home, except in the following instances:

• The resident’s needs cannot be adequately met by the facility;
• The resident’s health has improved and the resident is no longer in need of the facility’s services;
• The safety of other individuals in the facility is affected by the resident;
• The health of other individuals in the facility would be endangered if the

resident were allowed to remain in the facility;
• The resident has failed to pay or has failed or refused to apply for Medicare or Medicaid; or
• The facility ceases to operate.

While there may be legitimate occasions when a nursing home must ask to have a patient removed from its facility, the Nursing Home Reform Act prevents improper threatening of a patient (or in some cases a family member) with eviction. Any notice of eviction must be in writing or it lacks any legal effect. The written notice must set forth the resident’s and the family’s rights in the event the nursing home provides the required written notification of “involuntary discharge.”

If a notice of involuntary discharge is received, the law provides a 10-day right of appeal. A compassionate nursing home should work with a family in order to permit the family and the resident to determine what is best for the resident, look for other nursing home placement, and to meet and speak with the patient’s doctor about what might be best for that patient.

If you need more information relating to the above, or relating to nursing home litigation generally, contact Ben Locklar at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com. Ben handles nursing home litigation for the firm and he will be glad to talk with you.

Resources: www.seniortizensguide.com and www.modernhealthcare.com

XIV.
AN UPDATE ON CLASS ACTION LITIGATION

EIGHTH CIRCUIT ADOPTS FAVORABLE CLASS ASCERTAINABILITY THRESHOLD

The Eighth Circuit Court of Appeals’ recent ruling in Sandusky Wellness Center LLC v. Medtox Scientific Inc. adopted a “lower threshold” requirement for class ascertainability. Although the ruling deepened a circuit split on one of the more challenging class certi-
fication issues, this decision reflects a legal trend favoring class actions.

Courts generally agree that a putative class should not be certified unless the members of the class are ascertainable. Rule 23 of the Federal Rules of Civil Procedure contains an implicit threshold requirement that members of a proposed class be readily identifiable. However, courts disagree on what is required to prove ascertainability. Since the Third Circuit’s decisions in Marcus v. BMW, Hayes v. Wal-Mart Stores Inc., and Carrera v. Bayer Corp., circuits have been split on the proper ascertainability standard. The Third Circuit’s “heightened” standard requires that:

• the class is “defined with reference to objective criteria,” and
• there is a “reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.”

On the other hand, a minority of circuits, led by the Seventh Circuit, hold that the “administrative” concerns of ascertainability are properly addressed under a careful application of Rule 23(a) and Rule 23(b)(3), and ascertainability only requires an objectively defined class.

In Sandusky, the Defendant toxicology lab, Medtox Scientific Inc. contacted pediatricians, family practitioners, health departments, and child-focused organizations about its lead testing capabilities. Using a directory from a health insurance company, Medtox transmitted a single-page fax to 3,256 numbers within a nine-day period. One of those numbers belonged to the Plaintiff, Sandusky Wellness Center LLC. Sandusky’s name was not specifically on the contact list, but Dr. Bruce Montgomery—a family practitioner who worked one day a week at the center—was on the contact list.

Sandusky filed suit under the Telephone Consumer Protection Act (TCPA), which prohibits the use of any telephone facsimile machine to send to another facsimile machine an unsolicited advertisement unless certain exceptions apply. Sandusky sought to certify a class of all persons who were sent faxes regarding lead testing services by or on behalf of the Defendant. The district court denied class certification, holding that the class was “not ascertainable, because it does not objectively establish who is included in the class.” The district court concluded that the class was not ascertainable because of the need to conduct individualized inquiries to determine which class members were injured under the TCPA.

On appeal, the Eighth Circuit focused on the language of the TCPA, which prohibits sending an unsolicited fax advertisement to a “recipient.” The Court concluded that a “recipient” is “the person or entity that gets the fax,” and “[t]he best objective indicator of the ‘recipient’ of a fax is the person who subscribes to the fax number.” The Eighth Circuit determined that “fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable.” Most importantly, the opinion defined the ascertainability standard within the Eighth Circuit, requiring only that the class be defined in reference to objective criteria.

The Eighth Circuit joins the Sixth and Seventh Circuits in adopting this standard. The Fifth, Ninth, Tenth, and D.C. Circuits have remained silent on the issue, while the remaining circuits have adopted the higher threshold. Until the United States Supreme Court clarifies the ascertainability standard, the rigorousness of the analysis will depend on the location of the action. Decisions such as Sandusky, though lower the bar for Plaintiffs seeking class certification and provide more ammunition for Plaintiffs’ counsel seeking to bring nationwide class actions. If you need more information 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.

2016 Privacy Cases Benefit Consumers

The October 2015 term for the U.S. Supreme Court included some major events, the largest of which was the death of staunch conservative and well-known textualist, Justice Antonin Scalia. After the passing of Justice Scalia, many feared the Court would be stuck with 4-4 decisions on many of the big cases left pending. Should that happen, those decisions would have no effect on cases with similar issues pending in other courts. While there have been some split decisions, other major opinions came down with enough force to have binding effect going forward. Privacy cases, including a decision on standing within that realm, top the list of cases you should know about.

• Spokeo v. Robins

Faced with a question of whether a statutory violation was sufficient to satisfy Article III’s injury-in-fact standing requirement, the Supreme Court in May handed down its hotly anticipated decision in Spokeo v. Robins. Justice Samuel Alito authored the 6-2 decision in which the justices ruled that consumers can bring claims for statutory damages.

The Court rejected the position argued by corporate advocates—that economic harm is required—but did require Plaintiffs to allege a tangible or intangible concrete injury. “Concrete” injury is not “necessarily synonymous with ‘tangible.’” Instead, as the Court specifically pointed out, “intangible injuries can nevertheless be concrete.”

Those on both sides of the table are left wondering, then, where is the line to determine whether an intangible injury is concrete? Very little guidance was presented on that question, though the Court did opine that, when it comes to the Fair Credit Reporting Act (FCRA) allegations in this particular case, “Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.”

The Court cautioned, though, not all violations of the FCRA will automatically result in the kind of concrete harm that the Constitution requires for standing. For example, it is “difficult to imagine” how getting someone’s zip code wrong, “without more, could work any concrete harm.”

The two dissenting justices, Justice Ginsburg and Justice Sotomayor, actually concurred in much of the reasoning. Their dissent resulted from their disagreement with the majority’s decision that the case should be remanded to determine if the Plaintiff alleged a concrete injury—they believe he met that burden. For all intents and purposes, then, the decision that consumers do have standing to assert statutory violations is essentially unanimous.

• P.F. Chang’s

The Seventh Circuit in April reversed a lower court’s dismissal of a proposed class of P.F. Chang’s China Bistro Inc. customers suing the restaurant chain
over a data breach, declaring that the customers have standing to sue for fraud-prevention expenses. In their briefing to the Court of Appeals, F.P. Chang's had argued that "Plaintiffs have no actual or imminently impending damage. This defeats their cases whether viewed in terms of their lack of standing or their lack of an essential element of their claims."

The Seventh Circuit disagreed, finding that it is plausible to infer a substantial risk of harm from the June 2014 data breach, since a primary motivation for hackers is to make fraudulent charges on payment cards or to assume customers' identities. According to the panel, a Plaintiff in a data breach case, then, need only "cross the line from conceivable to plausible," and the Plaintiffs here had done so.

• **Yerslov, Nickelodeon, and Facebook**
  
The First and Third Circuit have recently attempted to apply the outdated Video Privacy Protection Act, which was enacted in 1988, to modern technologies such as tracking cookies and GPS technology.

  Initially, the First Circuit announced a ruling in April in *Alexander Yerslov v. Gannett Satellite Information Network, Inc.* that revived a putative class action brought by a USA Today smartphone app user alleging that USA Today's parent Gannett illegally collected his browsing data to sell to advertisers. In its decision, the First Circuit held that when Gannett sent to Adobe the title of the video viewed, along with the device's unique device identifier and GPS coordinates, such information amounted to personally identifiable information covered by the statute.

  Then, less than two months later, the Third Circuit handed down an opinion in *In re: Nickelodeon Consumer Privacy Litigation* striking down video privacy claims being asserted against Google and Viacom on the grounds that the "static digital identifiers," such as internet protocol addresses that Viacom shared with Google, could not be considered personally identifiable information under the statute.

  Although these cases appear to be inapposite, the Third Circuit was careful to stress in its opinion that it did not believe its decision created a circuit split with the First Circuit's looser definition of personally identifiable information because the First Circuit had acknowledged that there was a certain point when linking information becomes too uncertain to trigger liability. Thus, a potential opening for Plaintiffs has been created, as well as additional pitfalls that video service providers need to consider.

  The use of another increasingly popular privacy statute, the Illinois Biometric Information Privacy Act (IBIPA), was strengthened in May when the Northern District of California in *In re: Facebook Biometric Information Privacy Litigation* rejected Facebook's argument that the parties' California choice-of-law provision barred the Plaintiffs' claims under Illinois law.

  The IBIPA has been raised in several suits accusing companies of collecting and retaining face scans and similar biometric data without providing consumers with proper notice. In this case, Plaintiffs' claims centered on the legality of the site's facial-recognition and tagging features. The judge here basically stated that Illinois has a fundamental interest in the privacy of its citizens, and to allow Facebook or any other big corporation to use boilerplate choice-of-law provisions would effectively abdicate any state laws that protect consumer privacy. Thus, this ruling a company's ability to use choice-of-law provisions in its terms of service to reduce the risk of being subject to litigation under conflicting state privacy laws.

  All in all, these cases are good news for plaintiffs, though they create some new pleading requirements for privacy cases and standing. Having overcome the standing challenges to statutory claims, in particular, is a huge benefit to consumers. Statutes like those discussed in this article are intended to protect customers by penalizing negligent companies. Taking away a consumer's ability to enforce those statutory damages would have gutted the statutes and, therefore, the incentive for compliance, to the point of uselessness. If you need more information on any part of the above, contact Rebecca Gilliland at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Source: Law360.com

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**XV. SOME RECENT RESULTS IN CLASS ACTION LITIGATION**

There have been a large number of settlements, verdicts and new filings recently in class action litigation around the country. I will mention several of them that we believe to be significant.

**SIRIUS XM AGREES TO PAY $35 MILLION TO END TELEMARKETING LITIGATION**

Sirius XM Radio Inc. has agreed to pay $35 million to settle proposed class actions alleging the company illegally used predictive dialers for telemarketing calls. It was alleged that the New York City-based satellite systems provider violated the Telephone Consumer Protection Act (TCPA) by using an autodialing system to make sales calls to Sirius XM trial users to induce them into subscribing.

Under the proposed settlement, which extends to three related cases around the country, Sirius XM will pay $35 million into a cash common fund from which proposed class members can either draw a payment or opt to receive three months of Sirius XM Select service at no charge. The company also has agreed to enter into agreements with certain telemarketing call center vendors to make modifications to their "system architecture," according to the status report.

The TCPA regulates the use of auto-dialers and prohibits the use of artificial or prerecorded voices to make nonemergency calls to cellphone numbers without the recipient's prior consent.

The entire proposed class consists of all people in the U.S. who were trial recipients of Sirius XM radio service and who did not become paying subscribers, but received one or more calls on their cellphones from vendor TeleServices Direct made by or on behalf of Sirius dating back four years from the 2013 complaint.
A class of investors in auto parts maker Dana Corp. has reached a $64 million settlement that resolves a lawsuit in an Ohio federal suit dating back to 2005. It was claimed that two former company officers violated securities laws by falsifying financial records. The investors have asked the court to give preliminary approval to their settlement with former Dana CEO Michael J. Burns and former chief financial officer Robert C. Richter. It was alleged that Burns and Richter cooked company books in order to get a higher credit rating, hide deferred tax assets and more.

The investor suit, filed in October 2005 against Dana and the two officers, claimed that the company’s public filings with the U.S. Securities and Exchange Commission (SEC) between April 2004 and the suit’s filing were incorrect due to financial record manipulation by Burns and Richter. Dana’s assets were “overstated by as much as $1 billion” during that period, the investors said. The truth about the company’s financial status came to light in September 2005, causing its stock to drop by more than 70 percent. Dana filed for bankruptcy on March 3, 2006, along with a large group of its subsidiaries. It had been dismissed as a Defendant in the suit in October 2011.

**$100 Million In Settlements End Class Action In Munl Bond MDL**

A federal judge has given final approval for settlements totaling $100 million between Plaintiffs alleging price-fixing in the municipal bond industry and six Defendants including Societe Generale, National Westminster Bank, UBS, Natixis Funding Corp., Piper Jaffray & Co. and George K. Baum and Co. Only those Plaintiffs who opted out of the class will continue to litigate in the seven-year-old case. U.S. District Judge Victor Marrero had granted preliminary approval to the settlement in February.

UBS agreed to pay $32 million, Natixis agreed to pay $28.5 million, Societe Generale agreed to pay $25.4 million, Piper agreed to pay $9.8 million, NatWest agreed to pay $3.5 million and GK Baum agreed to pay $1.4 million.

There were no objections to the recent settlements. However, 94 litigants out of a class of potentially 66,000 members have opted out of the settlement. Those Plaintiffs will proceed against the six settling Defendants in the multi-district case. Other opt-outs from previous settlements also remain in the case and will pursue their claims.

**Herbalife Settles With The FTC In Pyramid Scheme**

Herbalife Ltd. has agreed to pay $200 million in a settlement with the Federal Trade Commission (FTC) to resolve claims involving an alleged pyramid scheme. This came after investor class actions and an Illinois Attorney General investigation. The company will have to fully restructure its operations and pay the stated amount to compensate consumers after deceiving them into believing they could make huge sums of money by becoming a distributor.

The company has created an oversight committee of board members and appointed Jonathan Leibowitz, a Davis Polk partner and former FTC chairman, as a senior adviser to the company. It will also pay a $3 million settlement to Illinois to end that investigation. Like Tupperware Brands Corp., Amway Corp. and Mary Kay Inc., Herbalife is what’s known as a multilevel marketer. Instead of selling directly to customers, it relies on a recruited sales force, which buys its products and then tries to resell them for a profit.

The FTC said Herbalife’s compensation structure was unfair because it rewards distributors for recruiting others to join and buy its products to advance the marketing program, rather than in response to actual consumer demand for the products.

In October 2014, Herbalife agreed to pay more than $15 million to members of its sales force who filed a different class action accusing the company of being a pyramid scheme. The company would pay the class $15 million and up to $2.5 million in returned products that its salespeople bought.

**$80 Million Settlement In Auto-Renewal And Faulty Discount Suit**

McAfee will pay potentially $80 million and implement policy changes to settle claims that the security software maker auto-renewed customers’ subscriptions at a higher price than initially indicated and listed discounts with faulty past price references. The plaintiffs in a consolidated proposed class action have asked for preliminary approval of the settlement in which McAfee will pay $11.50 to every member of an “auto-renewal” class and will notify customers at the point of every sale that the service will be auto-renewed at an undiscounted subscription price.

The software maker, as part of the settlement, will also change its policy regarding the past product price it lists as a reference to any discount it’s currently offering. McAfee will now only list a past price it has actually charged customers within the past 45 days, the preliminary approval motion said. The $11.50 amount represents roughly half of what each customer on average was allegedly overcharged for auto-renewal transactions. The overcharges could total more than $80 million, the motion said.

The auto-renewal class would consist of anyone nationwide who paid the automatic renewal of a subscription license from Jan. 10, 2010, to Feb. 10, 2015, whose first auto-renewal change was greater than their initial subscription fee. The reference price class would include anyone nationwide who initially purchased or manually renewed a McAfee subscription from Jan. 10, 2010, to Feb. 10, 2015 at a discounted price.

**Amgen To Pay $95 Million In Class Action Securities Settlement**

Global biotechnology company Amgen Inc. has reached a $95
million settlement with investors over alleged misstatements about two of its anti-anemia drugs. The settlement class includes those who bought Amgen securities from April 22, 2004, through May 10, 2007. The case was filed in 2007 on behalf of Amgen securities purchasers who accused the company and four individuals of making misleading statements about the safety and marketing of anti-anemia drugs Aranesp and Epogen, including statements that were at odds with clinical studies.

The case has a long history, beginning with the initial suit alleging violations of the Securities Exchange Act filed by the Connecticut Retirement Plans and Trust Funds in 2007, which was then consolidated with several other putative class actions. Connecticut Retirement was named the lead Plaintiff.

Amgen appealed a 2009 class certification order that was upheld by the Ninth Circuit in 2011. Amgen then appealed that order to the U.S. Supreme Court, which ruled in Connecticut Retirement’s favor in April 2013. A second amended complaint was filed in 2014, which alleged that the price of Amgen securities was artificially inflated as a result of the misstatements about the drugs.

A settlement hearing before the court is scheduled for Aug. 8 in this case. It’s expected that the settlement will be approved by the court.

**Archer Daniels Faces Class Action Over Deadly Horse Feed**

Two horse owners whose animals got sick or died after consuming Archer Daniels Midland Co. feed have filed a class action lawsuit in an Illinois federal court alleging the products were contaminated with a chemical additive used in cattle feed that is poisonous to horses. The complaint filed by Beth Berarov and Annelisa Bindra alleges that Archer Daniels subsidiary ADM Alliance Nutrition Inc. makes horse feed and supplements at facilities where it produces cattle products in order to lower costs, even though this puts the equine products at high risk of being contaminated by monensin, an additive that increases cattle weight and market value but causes heart failure and other health problems in horses. The complaint says:

*The harm to purchasers caused by this risk of cross-contamination is exacerbated by the inability of modern veterinary medicine to determine whether a living horse has ingested monensin. Monensin poisoning is generally only detectable in a live horse within a few days of consumption; after that, it usually cannot be detected until the horse is dead and a necropsy is performed.*

The chemical’s effects sometime occur gradually, with monensin destroying a horse’s heart fibers and opening the door to sudden heart failure, putting both the animal and rider at risk, the horse owners say. Monensin ingestion can also cause permanent cardiac and skeletal muscle damage, usually meaning the horse cannot be safely ridden or worked again, according to the complaint. In light of these well-known risks, the U.S. Food and Drug Administration (FDA) requires livestock feeds containing monensin to include a warning label indicating that they shouldn’t be consumed by horses or other equines, the owners allege.

Despite this, ADM manufacturers a number of horse products—including GroStrong vitamin-mineral products and Ultra-Fiber and Patriot feeds—in multi-species facilities while touting the products as safe and healthy, the suit says. As a result of these misrepresentations, Berarov—who owns an equestrian center in Michigan—said she purchased ADM feed and supplements for years, using only the company’s products to feed her 13 horses and the six others she cared for during the class period. After all of the horses she stabled fell ill with symptoms like lethargy and severe weight loss, Berarov had the feed products analyzed, discovering that they were contaminated with monensin, according to the complaint. Ultimately, nine of the horses had to be euthanized. Bindra stabled her horse at a South Carolina center that also used ADM feeds, the complaint says. Within days of exhibiting signs of dehydration and digestive problems, her animal and another died.

Source: Law360.com

**$239 Million Settlement Over Faulty Guns Approved**

A Florida federal judge has given final approval to a $239 million settlement in a class action lawsuit alleging safety defects involving several models of a Brazilian gun manufacturer’s pistols. Forjas Taurus SA and related entities will offer expanded warranty services or cash payments to the nearly one million class members located in the United States, Puerto Rico, the U.S. Virgin Islands and Guam to resolve the allegations that the particular firearm models have a “drop-fire defect” and a “false safety defect,” which can allow the guns to fire unintentionally when dropped or when the safety is purportedly set, respectively.

Plaintiff Chris Carter, who sued in December 2013, said that his Taurus pistol went off while he was working as a deputy with the Scott County, Iowa, sheriff’s department as a narcotics agent and that his gun hit the ground during a foot pursuit. The gun’s safety was on, and no one was injured by the shot, which hit a car, Carter said. The company knew about the defects since at least 2007. Taurus has settled cases involving serious injuries from unintended discharges. The Sao Paulo State Military Police in Brazil recalled 98,000 Forjas Taurus pistols in 2013 after realizing they could go off without anyone pulling the trigger.

Carter accused the company of suppression, failure to warn and violating the Magnuson-Moss Warranty Act and state consumer protection statutes. In a preliminary settlement reached in May 2015, Taurus agreed to provide expanded warranties, training and up to $30 million in cash for returned handguns to settle a class action claiming that
Taurus weapons could fire when dropped, even with the safety on. About 1 million of the pistols named in the suit had been sold in the U.S.

The Plaintiffs are represented by David L. Selby II, John W. Barrett, Eric B. Snyder and Patricia M. Kipnis of Bailey & Glasser LLP, Todd Wheelers of Morris Haynes Hornsby & Wheelers, and Angelo Marino Jr. of Angelo Marino Jr. PA. The case is Carter v. Forjas Taurus SA et al. in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

STATE STREET TO PAY $530M IN FOREIGN EXCHANGE FEE DEAL

State Street Corp. will pay $530 million to resolve federal and proposed class claims that it overcharged customers on foreign exchange transactions. This resolves a long-running investigation into those practices. The settlement with the U.S. Department of Justice (DOJ), the U.S. Department of Labor, the U.S. Securities Exchange Commission (SEC) and the Massachusetts attorney general wraps up claims by the regulators that State Street improperly allowed traders to mark up and mark down foreign currency trades in a way that benefited the Boston-based custody bank’s bottom line to the detriment of investors. Andrew J. Ceresney, Director of the SEC’s Division of Enforcement, said in a statement:

State Street misled custody clients about how it priced their trades and tucked its hidden markups into a corner where they were unlikely to notice. Financial institutions cannot mislead their customers about their trading costs.

State Street also faced lawsuits from pension funds alleging that the bank’s practices and lack of oversight violated the Employment Retirement Income Security Act (ERISA), as well as other investor lawsuits. This settlement resolved those claims as well.

Specifically, Global Markets priced the trades based on the worst price of the trading day and kept profits at the plans’ expense. The activities took place from 1998 through 2009. The settlement comes in the wake of Bank of New York Mellon Corp.’s $714 million settlement with New York Attorney General Eric Schneiderman and Manhattan U.S. Attorney Preet Bharara, the SEC and the Labor Department over similar claims.

That settlement also resolved class actions against BNY Mellon, the world’s largest custody bank. Those banks safeguard assets for money managers and other institutional investors. State Street, with $27 trillion in assets under custody and another $2 trillion in assets under management, is the second largest custody bank.

NSK TO PAY $34.5 MILLION TO SETTLE SOME AUTO PARTS MDL CLAIMS

Japanese bearings company NSK Ltd. will pay $34.5 million to settle charges by some automobile dealers and end buyers over auto parts price-fixing, in sprawling multidistrict litigation (MDL) in a Michigan federal court. The purchasers have alleged that NSK and other auto parts makers conspired to restrict competition for bearings and other components in the U.S.

The MDL, in the Eastern District of Michigan, followed the U.S. Department of Justice’s (DOJ) own ongoing investigation into the auto parts industry that has already yielded more than $2 billion in fines. The MDL has been split into separate proceedings for different automotive parts. As a result of the DOJ investigation, nine Japanese auto parts makers, including NSK, agreed to pay $740 million in fines in 2013 and two executives have agreed to plead guilty to their roles in international price-fixing conspiracies that increased the cost of cars sold in the U.S. The alleged price-fixing affected dozens of products that were sold to some of the largest automobile manufacturers in the U.S., including General Motors, Chrysler and Ford. Among the other parts affected by the alleged price-fixing were windshield wipers, air conditioning systems and power steering assemblies.

Other companies implicated in the investigation included Hitachi Automotive Systems Ltd., which agreed to pay a $195 million fine; Mitsubishi Electric Corp., which agreed to pay a $190 million fine; and Mistuba Corp., which paid a $135 million fine. Yazaki Corp. in September 2014 agreed to pay $76 million in the litigation, resolving all claims brought by end payors in three separate cases. The settlement included claims brought against Yazaki in cases involving wire harnesses, instrument panel clusters and fuel senders. That same month, TRW Automotive Holdings Corp. agreed to pay $5.4 million to settle end payors’ claims that it conspired with other auto parts makers to fix the price of occupant safety systems, according to court documents.

The automobile dealer Plaintiff class is represented by Cuneo Gilbert & LaDuca LLP, Larson King LLP, Barrett Law Group PA, and Mantese Honigman Rossman & Williamson PC. The end payor Plaintiffs are represented by Cotchett Pitre & McCarthy LLP, Robins Kaplan LLP,Susman Godfrey LLP, and The Miller Law Firm PC. NSK Ltd. and NSK Americas Inc. are represented by Cleary Gottlieb Steen & Hamilton LLP, and Honigman Miller Schwartz & Cohn LLP. The MDL is In re: Automotive Parts Antitrust Litigation, all in the U.S. District Court for the Eastern District of Michigan.

XVI.
THE CONSUMER CORNER

THE AILES SEXUAL HARASSMENT LAWSUIT EXPOSES DANGER OF FORCED ARBITRATION

As part of the Fox News morning show, Fox & Friends, newscaster Gretchen Carlson became a familiar face to thousands of viewers. Now her name is in the headlines again. This comes after she was fired from the popular

BeasleyAllen.com
program in June. Her employer said the move was the result of low ratings. But Ms. Carlson stunned the public when she filed a lawsuit alleging her firing was in retaliation after she refused repeated inappropriate sexual advances and harassment from Fox News chairman Roger Ailes. In a most significant happening, Ailes resigned from the company and it appears he was forced out.

The lawsuit has opened a window into an unexpected area—forced arbitration—and that has the potential to shield Ailes from liability. As a term of her employment, Ms. Carlson was forced to sign an employment contract with a binding arbitration agreement. This agreement requires an individual to give up their right to sue in the event of a dispute. Instead, the employee must enter into arbitration. The arbitration firm will be chosen by the employer or the company, putting the employee at a distinct disadvantage. Instead of having a remedy through the court system, arbitration leaves the individual powerless, with a limited ability to present evidence or appeal an unjust decision. It's basically a secret affair, one which is totally unfair to individuals who have been wronged.

Each and every day, thousands of consumers sign away their Seventh Amendment right to try to get around the completely enforceable arbitration clause in her contract. You can't separate the CEO from the company be runs.

A hearing in the matter, scheduled for August 1, will likely be over by the time this issue is received. Whatever is decided at the hearing related to the arbitration agreement will be very interesting, and will have a wide-reaching impact. Almost every American citizen is affected by arbitration and not in a good way. While arbitration agreements can be fine in circumstances where the players have equal footing and even bargaining power, this is rarely—if ever—the case with mandatory forced arbitration. In my opinion, arbitration is as “anti-consumer” as anything could be in this country and has no place in a dispute between a person and a huge corporation.

Our access to justice through a jury trial is one of the most important rights we have. The courtroom is the only place an ordinary citizen has a chance to be heard—on an even playing field—when disputes involve Corporate America. Corporate giants hold the power in arbitration. That was the reason for the Seventh Amendment to the U.S. Constitution. It's time to take back our Seventh Amendment rights. That will require putting an end to forced arbitration and we must all join the fight on behalf of the American people.

It will be very interesting to see how this case turns out. It will certainly seem that a broadcasting company would want an employee’s constitutional rights to have real meaning and also would want the public to have complete access to what happens in a civil dispute involving a top official at Fox News, who allegedly is a serial wrong-doer, and who has left the company. Finally, I predict there will be more claims—similar in nature to those of Ms. Carlson—filed against Fox and the departed Mr. Ailes in the next few weeks.


**Lumber Liquidators Class Action Update**

The Consumer Products Safety Commission (CPSC) has completed its evaluation of the safety of laminated flooring imported by Lumber Liquidators from China since 2011. Since the spring of 2015, the federal government has dedicated significant resources to determining if the Chinese-manufactured laminate flooring sold by Lumber Liquidators and installed in homes represents a health risk. The flooring was the focus of a 60 Minutes segment in March 2015 alleging that certain boards did not meet current California Air Resources Board (CARB) standards for formaldehyde emission.

On March 25, 2015, CPSC Chairman Elliot F. Kaye announced that the agency had opened an investigation into the matter. CPSC staff purchased samples of the product and contracted with certified laboratories to test for formaldehyde release from those flooring samples reported by 60 Minutes to have the highest formaldehyde emission. CPSC also requested that the Centers for Disease Control and Prevention’s (CDC) National Center for Environmental Health/Agency for Toxic Substances and Disease Registry (NCEH/ATSDR) evaluate the testing results for possible human health effects from formaldehyde released into indoor air from this China-manufactured laminate flooring. CPSC staff reviewed the ATSDR report and substantially concurred with their findings.

CPSC and ATSDR determined that eye, nose, and throat irritation could occur with the higher formaldehyde-emitting flooring samples in certain home environments. Irritation can happen in anyone, but is more likely among children, older adults, and people with respiratory issues, such as asthma or other breathing problems. Very high levels of formaldehyde in homes may also be associated with a small increase in cancer risk.

Concurrent with the announcement, Lumber Liquidators halted all sales of Chinese-made laminate products and agreed that its future laminate flooring products will be subject to enhanced supplier controls designed to achieve compliance with California formaldehyde requirements and any future federal requirements for laminate flooring.

In May, Clay Barnett, Archie Grubb and Andrew Brashear, lawyers in our firm’s Consumer Fraud and Commercial Litigation Section, joined forces with Anthony Garcia, a Tampa lawyer, to file a class action in Florida against Arm-

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Roger Ailes is the Chairman & CEO of FOX News. Every single allegation in Gretchen’s complaint allegedly took place at FOX News headquarters in New York where he sat in his capacity as CEO. Suing only him is a ludicrous ploy.
strong Flooring, Inc., and retailer Lowe’s for unlawfully selling formaldehyde contaminated laminate flooring to unsuspecting purchasers. Armstrong, like Lumber Liquidators, imported laminate wood from China without ensuring that the products weren’t contaminated with dangerous levels of formaldehyde. Lowe’s retailed the Armstrong products without performing any due diligence of its own prior to selling them. The Woodworth family of Spring Hill, Fla., are the class action’s named Plaintiffs. If you need more information, contact Clay Barnett at 800-898-2034 or by email at Clay.Barnett@beasleyallen.com.

**INDUSTRY PROMISES NEW SAFETY CHANGES TO CORDED WINDOW BLINDS**

Federal safety experts call corded window coverings one of the top five hidden hazards in homes with children. Recently, the Window Covering Manufacturers Association (WCMA) has announced new safety changes. In making the announcement, Executive Director Ralph Vasami stated:

> WCMA is initiating the process to revise the current voluntary window covering safety standard to effectively address the strangulation risk to children from products with accessible cords.

There has been a most serious problem involving these products. The Consumer Product Safety Commission’s (CPSC) emergency department-treated injury data demonstrates that from 1996 through 2012 an estimated 1,590 children were treated for injuries resulting from being caught in window covering cords. Elliot Kaye, Chairman of CPSC, stated:

> It is certainly encouraging that a substantial revision to the standard this year could, at a minimum, mean the vast majority of window covering products sold in the U.S. by WCMA members would be cordless or have inaccessible cords — meaning they would be safe for children — as soon as possible in 2018.

In May, Sen. Amy Klobuchar (D-MN) and Sen. Richard Blumenthal (D-CT) wrote the WCMA asking for changes. Sen Klobuchar had this to say on the subject:

> Consumers deserve to know that the products they use in their homes are safe for every member of their family. After tragic deaths of too many children, including seven in Minnesota, I am hopeful that the window covering industry will take this opportunity to develop standards that fully eliminate the strangulation threat to children.

Linda Kaiser’s daughter Cheyenne died in 2002 in a corded window blind accident. Ms. Kaiser had this to say about the announcement by the WCMA: “I think it’s one step on a long journey. It sounds like this is definitely a step in the right direction.” Ms. Kaiser, who also runs the group Parents for Window Blind Safety, said she will be following the developments carefully and hopes significant changes to eliminate possible dangers will end up happening.

Target and IKEA have made the move to only sell cordless window covering options. Representatives from Home Depot, Lowe’s and Walmart said they plan to switch to only cordless window coverings by 2018. All of this is good news for consumers and especially for the parents of small children.

Source: www.prnewswire.com

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**CVS TO PAY $3.5 MILLION FOR FILLING 500 FORGED PRESCRIPTIONS**

CVS Health will pay $3.5 million to settle claims that its pharmacists in Massachusetts ignored red flags and filled 500 forged prescriptions for drugs including addictive painkillers from 2011 to 2014. The settlement, one of the largest of its kind, comes amid a “devastating” opioid epidemic in the commonwealth of Massachusetts spurred in part by prescription painkillers, U.S. Attorney Carmen Ortiz said. The forged prescriptions, filled at 50 stores, had a street value of $1 million. Ortiz said in a statement:

> Pharmacies have a legal responsibility to ensure that controlled substances are dispensed only pursuant to valid prescriptions. When pharmacies ignore red flags that a prescription is fraudulent, they miss a critical opportunity to prevent prescription drugs from entering the stream of illegal opiates on the black market.

Even though it took a long time, CVS has taken action to help with the problem. A spokesperson for CVS had this to say in a statement:

> Since the covered time period, we have implemented enhanced policies, procedures and tools to help our pharmacists properly exercise their corresponding responsibility to determine whether a controlled substance prescription was issued for a legitimate medical purpose before filling it.

Pharmacies like CVS have to register with the Drug Enforcement Agency (DEA) and are bound by regulations that require they identify red flags that a prescription could be forged or invalid. The settlement resolves allegations that the pharmacy violated the Controlled Substances Act. As described by the U.S. Attorney’s office, some of the forged prescriptions weren’t exactly the result of sophisticated capers, and they were traced to just a few people.

The case was handled by Assistant U.S. Attorneys Giselle J. Joffre and Deana K. El-Mallaway of the office’s Civil Division. Michael J. Fergerson, Special Agent in charge, who is with the Drug Enforcement Agency, was involved in the investigation.

Source: Law360.com

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**ALL AMERICAN CHECK CASHING FORGIVES $800,000 IN LOANS AS IT CLOSES STORES**

All American Check Cashing Inc., a Mississippi-based check cashing company, has closed stores in Alabama and Louisiana. This came about as the company was engaged in legal battle with state and federal regulators. The company says that it will forgive loans to customers affected by the closures. The approximate value of the loans being forgiven is $800,000, according to a statement from a company spokeswoman. The company said it is closing stores as it focuses on what it calls “unfair and unjustified allegations” made by the U.S. Consumer Finance Protection Bureau (CFPB) and the Mississippi State Department of Banking and Consumer Finance.

The federal agency filed suit in May, accusing the company of instructing its employees not to tell customers what fees they were being charged, and of overcharging some customers. In June

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2014, the Mississippi Department of Banking and Consumer Finance ordered All American to stop some transactions such as using the proceeds from one delayed-deposit check to pay the principal or fee owed on any other delayed-deposit check. The department also ordered the company to turn over documents for regulators to investigate. In January, All American filed a federal lawsuit seeking to block the Mississippi department from taking disciplinary action that could shut down the business. The lawsuit is still pending. The closure includes all four Alabama stores and five of six Louisiana stores. All American will still operate 42 Mississippi stores and one in Louisiana.

Source: Associated Press

**ALABAMA SEAFOOD COMPANY ENDS DISTRIBUTION OF SEAFOOD AFTER ALLEGATIONS OF ‘UNSANITY’ CONDITIONS**

An Alabama seafood company has agreed to stop processing fish after complaints were raised by the U.S. Food and Drug Administration (FDA). The permanent injunction is aimed at preventing distribution of the products by BEK Catering LLC, which does business as Floppers Foods LLC of Daphne, Ala., and its co-owners. A federal complaint alleges that BEK Catering, which prepared and distributed seafood soups sold under the names Shrimp Locksley and Mama’s Gumbo, caused food to become “adulterated” and misbranded. The FDA found unsanitary conditions during multiple inspections of the company’s facilities. Those conditions could cause illness for consumers.

Source: Associated Press

**WENDY’S CYBER ATTACK AFFECTS FAST-FOOD RESTAURANTS IN 20 ALABAMA CITIES**

It has been reported that Wendy’s restaurants in 20 Alabama cities were compromised by malicious cyber attacks. The Ohio-based fast-food chain has said that hackers were able to steal customer credit and debit card information, including cardholder name, card number, expiration date, verification value and service code beginning in 2015. Wendy’s, in a statement, said:

*The Company believes this criminal cyberattack resulted from a service provider’s remote access credentials being compromised, allowing access—and the ability to deploy malware—to some franchisees’ POS (point of sale) systems. Soon after detecting the malware, Wendy’s identified a method of disabling it and thereafter has disabled the malware in all franchisee restaurants where it has been discovered.*

Wendy’s says it is working with third-party forensic experts and federal law enforcement officials while an investigation into the hack is ongoing. All customers who paid with a card at one of the affected locations during the cyber attack can take advantage of free fraud consultation and identity restoration services. The company said it “will continue to work diligently” with its investigative team “to apply what they have learned from these incidents and further strengthen its data security measures.”

Source: AL.com

**TOYOTA RECALLS PRIUS AND COROLLA OVER FUEL TANK CONCERNS**

Toyota has recalled about 3.4 million vehicles to repair separate flaws involving leaky fuel tanks and curtain air bags that may crack and injure occupants. The larger fuel tank recall affects 2.87 million vehicles worldwide, including Prius hybrids and Corolla compacts, according to the company. Toyota said fuel emissions control canisters could crack and result in leaks when the vehicles have full tanks of gas.

The other global recall of 1.43 million Prius hybrids and Lexus CT compact cars is to repair Autoliv Inc.-supplied curtain air bags that have cracked and partially inflated in parked vehicles. About 932,000 vehicles are involved in both recalls, according to Toyota.

Toyota said it isn’t aware of crashes, injuries or fatalities related to the curtain air bag or fuel tank flaws. Autoliv says it is aware of a few cases where air bags have partially inflated in parked Prius cars exposed to temperature swings. The vehicles involved in the air-bag recall were produced from October 2008 to April 2012, and the cars with faulty fuel canisters were built between April 2006 and August 2015, Toyota said.

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

**TOYOTA RECALLS 3.37 MILLION VEHICLES FOR AIR BAG AND EMISSIONS DEFECTS**

Toyota Motor Corp. has recalled 3.37 million vehicles globally over possibly faulty air bag inflator components and emissions control units, both of which are prone to cracking, according to statements released by the automaker. Toyota called back 1.43 million Prius and Lexus-model vehicles equipped with air bag inflators composed of two chambers welded together, which could develop a crack in between, the company said—noting too that the component was not made by Takata Corp., which itself has been linked to the largest air bag inflator recall in U.S. history.

The company didn’t offer a breakdown of numbers for the emissions unit callback, but noted that no vehicles in North America would be affected, as they are made with different fuel emissions components. The automaker said it had no reports of any crashes or injuries. In its announcement of the air bag recall on Tuesday, Toyota Motor Sales USA wrote that cracks in the welded inflator chambers has been observed when the vehicle is parked and unoccupied for a period of time. “If an inflator separates, the [curtain shield air bags] could partially inflate, and, in limited circumstances, one or both sections of the inflator could enter the interior of the vehicle. If an occupant is present in the vehicle, there is an increased risk of injury,” the automaker said.

Source: Associated Press
Maserati To Recall 13,000 Vehicles With Dodgy Gearshifts

We wrote on the recall by Maserati of 13,000 cars equipped with the same gearshift that forced parent company Fiat Chrysler to recall more than 1 million Jeep, Chrysler and Dodge vehicles in April. The recall covers every 2014 Maserati Quattraport and Ghibli vehicle the company has sold or leased. All were equipped with the “mono-stable shifter,” which snaps back into a central position after shifting rather than locking into position at the gear indicator, according to the National Highway Traffic Safety Administration (NHTSA) website. The gearshift, which the agency says “is not intuitive,” can leave a car in a drive gear after a motorist thinks it’s been placed in park, according to documents received by the agency June 10 and posted to its website.

Rollaway incidents in other recalled Fiat Chrysler Automobiles vehicles with the gearshift issue have caused 121 crashes, 30 of them reportedly causing injuries, including three people who suffered pelvis fractures, according to the NHTSA website. Maserati owners have not reported any such incidents so far, the agency said. “NHTSA stated that it believes that Maserati should initiate a safety recall for those vehicles posing the same powered rollaway potential as the vehicles recently recalled by FCA,” Maserati said in its defect information report. On June 1, 2016, Maserati concurred with NHTSA’s opinion on this matter.

NHTSA began an investigation into the gearshift in August 2015 after several complaints to the agency about Grand Cherokees, but expanded the probe to include other similarly equipped Fiat Chrysler vehicles. According to Maserati’s defect information report, NHTSA contacted the automaker in February 2016, inquiring whether the gearshift had generated complaints from customers. Maserati replied two days later that there had been none. The carmaker said in its report that it contacted the NHTSA three months later regarding the company’s contemplated action, which was not specified in the report, and was told instead that it should initiate a safety recall. A week later, Maserati concurred, the report says. The company said it was working on a “software re-flash” to inhibit rollaway.

Currently, the cars are equipped with “door ajar” warning chimes and indicate on the dashboard which gear a car is in. The gear status is also illuminated on the shift handle. Maserati expects to have the update ready later in the year, after which it will begin the recall and update the software free of charge.

CPSC Recalls 500,000 Hoverboards For Fire Risk

The Consumer Product Safety Commission (CPSC) has announced a recall of about half a million hoverboards, following just under 100 reports of the battery packs exploding or catching fire that the agency said caused burn injuries and damage to property in some incidents. The lithium ion packs in the two-wheeled hoverboards are susceptible to overheating, which presents a risk of the self-balancing scooters smoking or catching on fire, the agency said. The 501,000 recalled products include hoverboards made or imported by a variety of companies, including Swagway LLC and Razor USA LLC, the agency said. The recalled hoverboards were sold between June 2015 and May 2016 at retail stores and also through Overstock.com, according to the CPSC. Consumers should stop using the recalled hoverboards and get in touch with the companies about refund information or a repair, the agency said.

Some of the injuries reported to the agency included concussions, fractures and injuries to internal organs. There is no safety standard in place for hoverboards. Strong safety standards protect consumers.

Kawasaki USA Recalls Recreational Off-Highway Vehicles Due To Risk Of Injury

About 28,000 Mule Pro side-by-side recreational off-highway vehicles have been recalled by Kawasaki Motors Corp., U.S.A. of Foothill Ranch, Calif. The front floor cover can be punctured by a foreign object, posing an injury hazard to riders. The recall involves 2015, 2016 and 2017 model year side-by-side recreational off-highway vehicles. The recalled models are 4-wheel side-by-side seating for three to six people and automotive style controls. The vehicles come in various colors. The model name is printed on the right and left front fender. Kawasaki has received two reports of debris coming up from the floor cover, including one report of debris striking an operator’s leg.

They were sold at Kawasaki dealers nationwide from July 2014 through June 2016 for between $24,000 and $16,900. Consumers should immediately stop using the recalled vehicles and contact their local authorized Kawasaki dealer to schedule a free repair. Contact Kawasaki toll-free at 866-802-9381 between 8 a.m. and 5 p.m. PT Monday through Friday or online at www.kawasaki.com and click on “Recall” at the bottom of the page for more information. Photos are available at http://www.cpsc.gov/en/Recalls/2016/Kawasaki-USA-Recalls-Recreational-Off-Highway-Vehicles/.

Polaris Recalls More Vehicles For Overheating and Catching Fire

Polaris is recalling another 43,000 off-highway vehicles because they may overheat and catch fire during use. The 2015 and 2016 Polaris Ranger 570 recreational off-highway vehicles (ROVs) are under recall after the Minnesota company received seven reports of the products overheating and catching on fire. There have been no ROV-related injuries. “Consumers should immediately stop using the recalled ROVs and contact Polaris to schedule a free repair,” a statement reads on the Consumer Product Safety Commission (CPSC) website. “Polaris is contacting all known purchasers directly.” The CPSC said they can overheat during “heavy engine loading, slow-speed intermittent use and/or high outdoor temperatures.” The recalled ROVs were made in Mexico and sold for $10,000 to $12,000 from August 2014 to June 2016 at Polaris dealers nationwide.

In April, Polaris recalled 133,000 Model Year 2013-16 RZR 900 and RZR 1000 vehicles after receiving more than 160 reports of fires, resulting in one death and 19 injuries. A 15-year-old passenger died when one of the vehicles rolled over and caught fire. Other injuries included first-, second- and third-degree burns. Polaris is in the process of opening its first Alabama plant on 7049 Greenbrier Parkway N.W., in Huntsville-annexed Limestone County. The facility will produce Polaris Ranger products before expanding to Slingshot on-road.
vehicles that are currently made in Spirit Lake, Iowa.

**URBAN626 Recalls Electric Scooters Due To Fall Hazard**

About 1,200 electric scooters have been recalled by URBAN626, LLC, of Pasadena, Calif. The bolt below the seat can crack, posing a fall hazard. This recall involves all models of the URB-E electric scooter. The foldable electric scooters are aluminum and carbon fiber. They have two wheels and came in black, gray or white. The company has received three reports of incidents, one resulting in a scraped knee.

The scooters were sold at URBAN626 stores in Pasadena, Calif., and online at amazon.com and URB-E.com from August 2015 through June 2016 for between $1,500 and $2,000. Consumers should immediately stop using the recalled units and contact URBAN626 for a free repair kit. URBAN626 will reimburse consumers if they choose to have a bike repair shop replace the bolt. Contact URBAN626 toll-free at 888-270-6988 from 9 a.m. to 6 p.m. PT Monday through Friday, email at recall@urban626.com or online at urb-e.com and click on “Recall” at the bottom of the page for more information. Photos Available At http://www.cpsc.gov/en/Recalls/2016/URBAN626-Recalls-Electric-Scooters/

**Pacifc Cycle Recalls Swivel Wheel Jogging Strollers Due To Crash and Fall Hazards**

About 217,600 Instep and Schwinn swivel wheel jogging strollers have been recalled by Pacific Cycle Inc., of Madison, Wis. The front wheel can become loose and detach, posing crash and fall hazards. This recall involves single and double occupant swivel wheel jogging strollers that have a quick release mechanism for removing and reattaching the front wheel. Instep Safari, Instep Grand Safari, Instep Flight, Schwinn Turismo and Schwinn Discover Single and Double Occupant Swivel jogging strollers are affected. These models come in a variety of colors. The model number is located on the inside of the metal frame above the rear right wheel. The company has received 132 reports of the front wheel becoming loose or unstable, resulting in 215 injuries, including head injuries, sprains, lacerations, bumps, bruises, and abrasions.

The strollers were sold at small retailers nationwide and online at Amazon.com, Target.com, Toys-R-Us.com, Walmart.com and other online retailers from January 2010 through June 2016 for between $130 and $350. Consumers should immediately stop using the recalled jogging strollers and contact Pacific Cycle to obtain a repair kit to secure the front wheel. The repair kit includes a replacement mechanism for securing the front wheel that uses a traditional screw on/off method of attachment instead of the quick release lever method of attachment shipped with the product, as well as new warning labels. Consumers should not return the jogging strollers to retailers where purchased. A repair video is available at www.pacific-cycle.com/safety-notices-recalls/. Contact Pacific Cycle toll-free at 877-564-2261 from 8 a.m. to 5 p.m. CT Monday through Friday, online at www.pacific-cycle.com, www.instep.net or www.schwinnbikes.com and click on “Safety Notices & Recalls” or email customerservice@pacific-cycle.com for more information. Photos Available At http://www.cpsc.gov/en/Recalls/2016/Pacific-Cycle-Recalls-Swivel-Wheel-Jogging-Strollers/

**3M Company Recalls Hard Hats Due To Shock Hazard**

3M Company, of St. Paul, Minn., has recalled about 7,500 vented hard hats. Hard hats sold online were marketed to protect against electric shock, but they do not provide this protection, posing a shock hazard to consumers. This recall involves 3M vented hard hats sold under the 3TM™, 3M™ Tekk Protection™ and AOSafety™ brands. The hard hats are white, have eight, ¾-inch long ventilation slits along each side at the hat’s crown and have a ratchet adjustment for fit. “3M™ or AOSafety™ is molded into the white plastic on the top of the brim. “XLR8 VENTED” is molded onto the bottom of the brim. “ANSI Z89.1” is printed on a sticker inside the hard hats. This recall only involves the 3M hard hats sold online.

The hats were sold online at Alliedelec.com, Amazon.com and HomeDepot.com from January 2008 through April 2016 for about $15. Consumers who purchased the hard hats online for protection against electrical shock should immediately stop using them and contact 3M for a free replacement hard hat. Contact 3M Company at 800-494-3552 from 7 a.m. to 6 p.m. CT Monday through Friday or online at www.3MSafety.com and click on “Safety Recall” for more information, or www.DIY.3M.com and click on “Safety Recall” for more information. Photos Available At http://www.cpsc.gov/en/Recalls/2016/3M-Recalls-Hard-Hats/

**HP Recalls Batteries for HP and Compaq Notebook Computers Due To Fire and Burn Hazards**

About 41,000 HP lithium-ion batteries have been recalled in the U.S. by HP Inc., of Palo Alto, Calif. In addition, about 2,600 sold in Canada and about 4,500 sold in Mexico are also recalled. The battery packs can overheat, posing fire and burn hazards. This recall involves lithium-ion batteries containing Panasonic cells that are used in HP notebook computers. The batteries are compatible with HP, Compaq, HP ProBook, HP ENVY, Compaq Presario, and HP Pavilion notebook computers. The black batteries measure about 8 inches long, 2 inches wide and about 1 inch high. The battery bar code is printed on the back of the battery. “HP Notebook Battery” and the model number are printed on the battery. The batteries included in this recall have the following barcodes: 6BZLU, 6CGFK, 6CGFQ, 6CZMB, 6DEMA, 6DEMH, 6DGAL and 6EBVA. HP has received seven reports of battery packs overheating, melting or charring, including four reports of property damage of about $4,000 total.

The batteries were sold at Best Buy, Wal-Mart, and Costco and authorized dealers nationwide and online at www.hp.com from March 2013 through August 2015. The batteries were sold with notebook computers for between $300 and $1,700. The batteries were also sold separately for between $50 and $90. Consumers should immediately stop using the recalled batteries, remove them from the notebook computers and contact HP for a free replacement battery. Contact HP toll-free at 888-202-4320 from 8 a.m. to 7 p.m. CT Monday through Friday or online at the HP Battery Recall website directly at www.HP.com/go/batteryprogram2016 or...
the user’s peak or holding weight in digital hanging bow scales that measure the user. This recall involves OMP M-100 Inc., of Mount Joy, Penn. The mounting business as October Mountain Products, laceration hazards hanging bow scales due to impact and October Mountain Products recalls

**WINCO FIREWORKS RECALLS BLACK CAT CONE FOUNTAINS DUE TO FIRE HAZARD**

About 14,000 Cone Fountain Fireworks have been recalled by Winco Fireworks International of Lone Jack, Mo. When ignited, the device can burst and spread sparks and pyrotechnic materials outward instead of upward as intended, posing fire and burn hazards to bystanders. This recall involves Black Cat Glitter fountain cones sold in packages of three. The cones have model number BC269 printed on the bottom of the packaging. The cone-shaped fireworks devices are approximately 6 inches tall and have the Black Cat logo on the packaging. The words “Crackling Glitter,” “Colorful Glitter” or “Gold Glitter” is printed in black type on the front of the cone. The company has received three reports of the devices spraying outward. No injuries have been reported.

They were sold at fireworks retailers nationwide from March 2016 through June 2016 for about $9. Consumers should immediately return the recalled fountains to the retailer where purchased for a refund or exchange. Contact Winco Fireworks toll-free 888-697-2217 from 8 a.m. to 6 p.m. CT Monday through Friday or online at www.blackcatfireworks.com and click on “Community” then “Product Recall” for more information. Photos Available At http://www.cpsc.gov/en/Recalls/2016/Winco-Fireworks-Recalls-Black-Cat-Cone-Fountains/

**OCTOBER MOUNTAIN PRODUCTS RECALLS HANGING BOW SCALES DUE TO IMPACT AND LACERATION HAZARDS**

About 640 hanging bow scales have been recalled by Kinsey’s Inc., doing business as October Mountain Products, Inc., of Mount Joy, Penn. The mounting ring on the scales can break during use, posing impact and laceration hazards to the user. This recall involves OMP M-100 digital hanging bow scales that measure the user’s peak or holding weight in archery and bow hunting. The orange plastic pocket-size, portable scales measure about 8 inches long by 4 inches wide by 1.2 inches deep. They have three buttons on the front. On one end of the scale there is a hook and a metal ring on the other. M-100 and the OMP logo are printed in black lettering on the front of the scale. The firm has received four reports of the mounting ring on the scale breaking, including one report of a laceration to the hand that required stitches.

The scales were sold at Academy, Dick’s Sporting Goods, Gander Mountain, Gun World & Archery Shop, Scheel’s and other sporting goods stores nationwide and online at Amazon.com, Eder’s, OctoberMountainProducts.com, Walmart.com and other online retailers from November 2015 through March 2016 for about $30. Consumers should immediately stop using the recalled hanging bow scales and contact October Mountain Products to receive a full refund. Contact October Mountain Products (OMP) at 800-366-4269 from 8 a.m. to 5 p.m. ET Monday through Friday, via email at Info@OctoberMountain.com or online at www.OctoberMountain.com and click on the Support/Recall tab for more information. Photos Available At http://www.cpsc.gov/en/Recalls/2016/October-Mountain-Products-Recalls-Hanging-Bow-Scale/

**BERNHARDT RECALLS DRESSES AND NIGHTSTANDS DUE TO SERIOUS TIP-OVER HAZARD**

About 1,700 Marquesa dressers and nightstands have been recalled by Bernhardt Furniture Company, of Lenoir, N.C. The recalled dressers are unstable if they are not properly anchored to the wall, posing a serious tip-over and entrapment hazard that can result in death or injuries to children. This recall involves Marquesa mirrored glass-front dressers with model number 359-044 and Marquesa mirrored glass front nightstands with model number 359-234. Both models have a gray cashmere finish and mirrored glass drawer fronts with metal overlays. The series and style numbers are printed on a white label on the back of the product. The first three characters of the number will be 359 followed by the style number. Bernhardt says it has received two reports of the furniture tipping over when the drawers were opened, including one injury to an adult involving an arm bruise and neck stiffness.

The dressers were sold at independent furniture stores nationwide from March 2015 through May 2016 for between $2,000 and $4,200. Consumers should immediately stop using any recalled dressers and nightstands that are not properly anchored to the wall and place them into an area that children cannot access. Contact the store where purchased or Bernhardt for a free counterweight repair kit including a wall anchor. Bernhardt is offering a free in-home installation of the counterweight repair kit with a wall anchor. Contact Bernhardt toll-free at 844-288-5295 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.bernhardt.com and click on the Recall alert link at the bottom of the page for more information. Photos Available At http://www.cpsc.gov/en/Recalls/2016/Bernhardt-Recalls-Dressers-and-Nightstands/.

**IKEA RECALLS 80,000 BABY GATES**

IKEA’s PATRULL KLAMMA safety gate + extension has been recalled because it can become unlocked and open unexpectedly. It was first recalled in May after reports of the gate coming unmounted from the wall and not staying in place. There were at least three reports of children falling down stairs as a result. IKEA’s PATRULL FAST safety gate is one of three baby gates included in this recall because it can become unlocked and open unintentionally. Ten injuries have been reported, including two concussions, as well as cuts and bruises, the U.S. Consumer Products Safety Commission (CPSC) said. The recalled gates are the PATRULL safety gate and extension, the PATRULL FAST safety gate, and the PATRULL KLAMMA safety gate and extension. The PATRULL KLAMMA was first recalled by IKEA in May because of reports it was coming unmounted from the wall and not staying in place. At the time, CPSC reported 18 such incidents, including three in which children fell down stairs and were injured.

IKEA’s PATRULL Safety Gate + extension has also been recalled because it can unexpectedly unlock, which can lead to falls. These items were sold online from the store’s website, and in U.S. stores, between August 1995 and
June 2016 for $10 to $60. They were manufactured in Denmark.

IKEA Recalls Dressers and Chests After Numerous Tip-Over Incidents and Deaths

Popular home furnishings retailer IKEA has recalled nearly 36 million chests and dressers sold in the U.S. because they can tip over and injure children. To date, at least 41 incidents have been reported to the Consumer Product Safety Commission (CPSC) that resulted in 17 injuries to children between the ages of 19 months and 10 years. Six of the children were crushed to death after the furniture fell on them.

The recall involves some 8 million MALM chests and dressers, linked to the three child deaths and 21 million additional children’s and adult chests and dressers in the U.S. and an additional 6.6 million sold in Canada.

The three other child deaths - one each in July 1989, March 2002 and October 2007 - were also linked to tip-overs of chests sold at Ikea, the CPSC reported. These were among the 41 incidents reported to IKEA involving chests and dressers other than those in the MALM line. These incidents involving these other chests and dressers also resulted in 19 injuries to children.

The recall mostly involves the MALM dresser, which comes in 3-, 4-, 5- and 6-drawer sizes. Other IKEA dresser and chest brands involved include the GUTE, RAKKE and KURS models.

The recall was initiated, according to the CPSC, because the dressers and chests were found to be unstable if they are not properly anchored to the wall, and can tip over and pose an entrapment hazard that can result in death or serious injury to children.

The company has agreed to stop selling all chests and dressers sold in the U.S. and Canada that do not comply with a U.S. voluntary industry standard (ASTM F2057-14) that aims to prevent tip over incidents of chests and dressers. Consumers are advised to stop using any recalled chest or dresser that is not properly anchored to the wall and place it in an area that children cannot access.

To receive a refund or free wall-anchoring kit for IKEA chests and dressers listed above, visit an IKEA retail store, go to www.IKEA-USA.com/recallchest-sanddressers, or call 866-856-4532 anytime.

Children’s Nightgowns Recalled by Saro Trading Due To Violation Of Federal Flammability Standard

About 7,800 children’s nightgowns have been recalled by Saro Trading Company of Burbank, Calif. The nightgowns fail to meet federal flammability standards for children’s sleepwear, posing a risk of burn injuries to children. This recall involves five styles of children’s nightgowns manufactured by Saro Trading. The 100 percent white cotton nightgowns have “Taleen” printed on the neck label. These nightgowns are embroidered with either eyelet trimming, ribbons on the chest, or buttons on the center front of the garment.

The nightgowns were sold at Francie Hargrove Interior Designs, Georges Girls Luxe Sleep and Nichols stores nationwide, and online at http://www.sarostore.com/ and http://fennco.com/en/ from February 2012 through April 2016 for $25. Consumers should immediately take the recalled nightgowns away from children and contact the firm for instructions on receiving a full refund. Contact Saro Trading Company at 800-662-7276 from 7 a.m. to 3:30 p.m. Monday through Friday PT, email at info@saro.com or online at www.sarostore.com and click on the Product Recall link at the bottom of the page for more information. Photos are available at http://www.cpsc.gov/en/Recalls/2016/Childrens-Nightgowns-Recalled-by-Saro-Trading/.

Purina Animal Nutrition Initiates Recall of Purina® Medicated Sheep Feed Due To Elevated Copper Level

Purina Animal Nutrition LLC is voluntarily recalling one lot of Purina® Lamb Grower® B30 Medicated Sheep Feed packaged in the green and white generic paper LAND O LAKES® Feed bags. The single lot number is:

<table>
<thead>
<tr>
<th>Formula No.</th>
<th>Item No.</th>
<th>Description</th>
<th>Lot No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>L329</td>
<td>1850500-206</td>
<td>Purina® Lamb Grower® B30 Medicated</td>
<td>6MAY06WCH2</td>
</tr>
</tbody>
</table>

The product was distributed in Ohio and Pennsylvania during the dates of May 12, 2016, through June 22, 2016. Elevated copper levels can cause health issues and potential mortality in sheep. There has been one report of mortality associated with this product. Customers should discontinue feeding the product immediately. Symptoms of copper toxicity in sheep include: lethargy and anemia, grinding of teeth, thirst, off feed/poor appetite, pale to yellow mucous membranes, red/dark purple colored urine and recumbency. Death usually occurs one to two days after onset of clinical symptoms.

Customers can find the lot number on the sewing strip of each bag. Retailers have been contacted and told to check their inventories and immediately quarantine any remaining recalled product including notifying customers who purchased the product. Customers who purchased this product should return remaining bags to their retailer.

For more information on the product recall, contact Customer Service at 800-227-8941. The number is staffed 8 a.m. to 4:30 p.m. Central Time Monday through Friday.

P.F. Chang’s Frozen Meal Products Recalled

ConAgra Foods has recalled certain P.F. Chang’s Home Menu Brand products because the sugar in the sauce may contain small metal fragments. At press time there had been no reports of injury. The company issued a recall July 7 after one of its employees found metal fragments while dispensing sugar from one of P.F. Chang’s suppliers. “On July 14, 2016, ConAgra Foods was notified by the supplier of additional production lots of sugar that were impacted, such that the initial recall needed to be expanded to include additional P.F. Chang’s Home Menu Brand meals,” ConAgra said. No P.F. Chang’s restaurants or other ConAgra Foods products are affected by this recall. The recalled product list is as follows:

- P.F. Chang’s Home Menu Brand Signature Spicy Chicken, 22 oz.
- P.F. Chang’s Home Menu Brand Mongolian Style Beef, 22 oz.

P.F. Chang’s Home Menu Brand Beef with Broccoli, 22 oz.

P.F. Chang’s Home Menu Brand Shrimp Lo Mein, 22 oz.

P.F. Chang’s Home Menu Brand Sweet & Sour Chicken, 22 oz.

P.F. Chang’s Home Menu Brand General Chang’s Chicken, 22 oz.

P.F. Chang’s Home Menu Brand Garlic Chicken with Dan Dan noodles, 22 oz.

P.F. Chang’s Home Menu Brand Grilled Chicken Teriyaki with Lo Mein Noodles, 22 oz.

For UPC numbers, best-buy dates and MFG/lot codes, www.conagrafoods.com. To ask questions, call ConAgra’s Consumer Affairs hotline at 800-252-0634, open 9 a.m. to 7 p.m. CDT Monday through Friday.

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.BeaasleyAllen.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.

XVIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

WHITNEY GAGNON
Whitney Gagnon, who has been with the firm for two years, is a Legal Assistant working with Archie Grubb in our Consumer Fraud and Commercial Litigation Section. Currently, Whitney is assisting in numerous MDLs, class actions and whistleblower suits. She works with Archie in all phases of a case, including pretrial activity and the actual trial. Whitney has more than 10 years’ experience in civil litigation. She attended South University, majoring in Criminal Justice with a concentration in Crime Scene Investigations.

Whitney works in the nursery at Lakeview Baptist Church and has volunteered with multiple organizations to aid in child development and family needs. Whitney is a certified scuba diver. She likes reading, camping and hiking with her dog Harper and enjoying live music around the south. Whitney says if Googling can be considered a hobby, then it would be her daily interest. According to Whitney, knowing a little about a lots of things keeps life interesting and keeps her searching for right answers.

Whitney is a very good employee who works hard and is dedicated to helping clients receive justice. We are fortunate to have her with us.

PHYLIS CORTHRON
Phyllis Corthron has been with the firm since January of 2011. She currently serves as a Staff Assistant to Navan Ward. She is working on hip and knee cases. Her responsibilities are numerous all the way from the start to the end of a case.

Phyllis has been married to Fred for 34 years. She says they have two sons who have wonderful spouses. They also have three grandchildren: Caylee, 8; Carter, 10 months old; and Liam, 7 months old. Phyllis enjoys traveling, camping, SEC football especially tailgating, reading and all crafts with children. Phyllis does good work and is another hard-working, dedicated employee. We are fortunate to have her with the firm.

XIX. SPECIAL RECOGNITIONS

ALAJ PROVIDES LEADERSHIP OPPORTUNITIES FOR LAWYERS PRESERVING JUSTICE

The stated mission of the Alabama Association for Justice (ALAJ) is "to make sure any person who is injured by the misconduct and negligence of others can get justice in the courtroom, even when taking on the most powerful interests; to eliminate civil justice restrictions; to ensure our members have the tools needed to provide a level playing field through timely ethical and educational programs; to strengthen the civil justice system so that deserving individuals can get justice and wrongdoers can be held accountable; to strive for equality in the one room where individuals and powerful interests are held accountable—the American Courtroom."

In short, ALAJ strives to educate its members, preserve good laws, foster the development and establishment of new laws to protect consumers and the public good, and to preserve access to justice for every citizen.

Ken Riley, a well-respected lawyer with Farris, Riley & Pitt LLP, based in Birmingham, is serving as ALAJ President for 2016-17. Ken has been a member of ALAJ since starting his law practice in 1999, and he has been involved in a number of various capacities over the years through programs such as Emerging Leaders, and service on ALAJ’s Board of Directors. He has been an officer of the organization for the past five years before becoming President this year.

If preserving the Seventh Amendment rights to access to justice through a jury trial is something important to a lawyer, and to the people they represent, they should be involved with ALAJ, Ken says. Membership in ALAJ provides a place to collaborate with other lawyers of like mind, but also with people with other interests. This is a way for lawyers to expand their network and resources, as well as share their viewpoints and observations in practice.

Particular initiatives for ALAJ in the coming year include encouraging more female and minority membership and participation, and identifying leadership opportunities for members. Ken notes that there are a lots of people out there who have leadership capacity, but haven’t had a forum to access and showcase their abilities. He says ALAJ can provide an opportunity for people to contribute in the way that best matches their talents. “There’s something for everybody, really,” he says. “It’s just a matter of ‘want to.’”

Ken says one of his most valuable lessons through membership in ALAJ has been gaining an understanding of the way the legislative process works, and how complicated it can be. “It’s fascinating to see how laws are made and all that goes into the final passage of a bill into law,” he says. “There’s often a lot of criticism surrounding the legisla-
Alabama passed its landlord-tenant law, occurring in 2006. The first was when

cesses in the past two decades, both
to 15, tripled the number of
members to 15, tripled the number of

Citizens’ Policy Project (ACPP) have
grown monumentally, from two staff

Arise and its sister group Alabama Arise
organization and its mission of

helping Alabama.

In the 25 years Kimble has been with
Arise, the group has seen exponential
growth into the force for good

it is today.

In the 25 years Kimble has been with
Arise, the group has seen exponential
growth, allowing it to develop itself into
a respected voice in politics for low-

income Alabamians. He was able to do
this by spending his time and effort
hosting Sunday School classes, work-
shops, committee meetings—anything
necessary to help spread the word of its
organization and its mission of
helping Alabama.

Under Kimble’s leadership, Alabama
Arise and its sister group Alabama Arise
Citizens’ Policy Project (ACPP) have
grown monumentally, from two staff
members to 15, tripled the number of
member groups, as well as adding nearly
1,000 more members.

Arise has also seen two major suc-
cesses in the past two decades, both
occurring in 2006. The first was when
Alabama passed its landlord-tenant law,
which guarantees renters’ rights. The

second victory involved the state’s deci-
sion to increase its income tax threshold
(determining at what point a household
begins to owe tax) from a meager
$4,600 to $12,600 for a family of four.

It is the organization’s mission to
ensure that legislation is passed that
allows low-income Alabamians to move
up the economic ladder and better
provide for their families. They also
oppose legislation that’s bad for con-
sumers. I encourage any person who
believes that the rights of individuals are
important and should be protected to
support the work of Alabama Arise. To
learn more about Alabama Arise and
how to get involved, visit the organiza-
tion’s website at www.alarise.org. For
more information about ACPP, visit
www.arisecitizens.org.

Kimble Forrister Leads Alabama Arise On A
Path Of Growth And Service

Starting in 1988, the nonprofit
Alabama Arise was formed under the
united belief that low-income Alabami-
ans deserved to be recognized by the
state’s policy decisions. However, the
organization’s success was far from

guaranteed, with only a small coalition
of churches and community groups
willing to speak out against the state’s
injustice. It wouldn’t be until 1991, after
the group elected Kimble Forrister as its
executive director, that the group began
growing into the force for good

it is today.

In the 25 years Kimble has been with
Arise, the group has seen exponential
growth, allowing it to develop itself into
a respected voice in politics for low-

income Alabamians. He was able to do
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oppose legislation that’s bad for con-
sumers. I encourage any person who
believes that the rights of individuals are
important and should be protected to
support the work of Alabama Arise. To
learn more about Alabama Arise and
how to get involved, visit the organiza-
tion’s website at www.alarise.org. For
more information about ACPP, visit
www.arisecitizens.org.

Beasley Allen Lawyers Honored At Annual
AAJ Convention

Three Beasley Allen lawyers were
honored at the annual meeting of the
American Association for Justice (AAJ)
for their “outstanding performance in
the profession of law.”

Gibson Vance was selected as a 2016
recipient of the AAJ Wiedemann &
Wysocki Award. This award is presented
annually to lawyers who demonstrate a
deep commitment to the highest stan-
dards and who are passionately commit-
ted to the principles of the civil justice
system and the mission of AAJ—to
promote a fair and effective justice
system and to support the work of
lawyers in their “efforts to ensure that
any person who is injured by the mis-
conduct or negligence of others can
obtain justice in America’s courtrooms,
even when taking on the most powerful
interests.” Gibson has been very active
on the national level and has done an
outstanding job.

Danielle Mason, who is in our Mass
Torts Section, was selected as a 2016
recipient of the AAJ F. Scott Baldwin
Award. The award was established to
honor and recognize F. Scott Baldwin of
Marshall, Texas, a world-renowned trial
lawyer, whose efforts have produced
outstanding awards for injured victims
and their families. The award is pre-
sent in recognition of the legendary
degree of excellence and compassion
that Scott Baldwin has brought to the
profession and the significant time he
has invested in training, preparing and
encouraging lawyers to the profession
of trial law.

I was honored to receive the 2016 AAJ
Tonahill Award. The award is presented
in recognition of outstanding and dedi-
cated service to and support of consum-
ers and the trial bar. The Tonahill Award
is named in honor of Joe Tonahill, a
respected defender of the civil
justice system.

The awards were presented during
the AAJ Annual Convention in Los
Angeles on July 23. Beasley Allen Manag-
ing Attorney Tom Methvin had this to
say about the awards:

At Beasley Allen we encourage our
attorneys to give back—to their
community and also to the service
of the legal profession and the civil
justice system as a whole. Jere,
Gibson and Danielle are deserving
of these awards. I am proud to
know that my law partners’ dedi-
cation to and love of the judicial
system has been recognized by
such a prestigious organization.

XX.
FAVORITE BIBLE VERSES

A good friend from Tennessee, Harri-
ett Thompson, sent in a most timely
verse for this issue. Harriett says this
verse “covers just about everything and
everyone in life” and that is so very true.
All of us need to read it and then con-
sider how it might apply in our lives.

If anyone thinks they are some-
thing when they are not, they
deceive themselves. Galatians 6:3

Ellen Royal, a Legal Secretary in our
firm, furnished the following scriptures:

A Hymn of Faith

Though the fig tree may not
blossom, Nor fruit be on the vines;
Though the labor of the olive may
fail, And the fields yield no food;
Though the flock may be cut off
from the fold, And there be no
herd in the stalls—Yet I will rejoice
in the Lord, I will joy in the God of
my salvation. The Lord God is my
strength; He will make my feet like
deer’s feet, And He will make me
walk on my big bills. Habakkuk 3:17-19

Dr. Terry Stallings, who is a great doctor and even better man, furnished two verses this month. Terry has a servant’s heart and is an inspiration to all who know him.

For it is impossible for those who were once enlightened, and have tasted the heavenly gift, and have become partakers of the Holy Spirit, and have tasted the good word of God and the powers of the age to come, if they fall away, to renew them again to repentance, since they crucify again for themselves the Son of God, and put Him to an open shame. Hebrews 6:4-8

But also for this very reason, giving all diligence, add to your faith virtue, to virtue knowledge, to knowledge self-control, to self-control perseverance, to perseverance godliness, to godliness brotherly kindness, and to brotherly kindness love. For if these things are yours and abound, you will be neither barren nor unfruitful in the knowledge of our Lord Jesus Christ. 2 Peter 1: 5-8

My friend Larry Minton, another Tennessee resident, sent in a verse that perhaps has a warning message for the United States. What do you think?

O Israel thou hast destroyed thyself; but in me is thine help. Hosea 13:9

The following verses were sent in by Eddy Williams, Director of Bands at Huntingdon College. He also is Interim Minister of Music at Taylor Road Baptist Church.

Yet those who wait on the Lord will gain new strength; they will mount up with wings like eagles, they will run and not get tired, they will walk and not become weary. Isaiah 40:31 NASB

Come to Me, all of you who are weary and burdened, and I will give you rest. Matthew 11:28

Be still and know that I am God. Psalm 46:11

Chris Baldwin, one of our law clerks, supplied two verses for this issue. He says they bring him comfort in knowing that “Jesus chose him.”

“You did not choose Me but I chose you, and appointed you that you would go and bear fruit, and that your fruit would remain, so that whatever you ask of the Father in My name He may give to you.” John 15:16 (NASB).

“I am the vine, you are the branches; be who abides in Me and I in him, be bears much fruit, for apart from Me you can do nothing.” John 15:5 (NASB).

Concerning the vineyard, God says, “I, the LORD, am its keeper; I water it every moment. So that no one will damage it, I guard it night and day.” Isaiah 27:3

XXI. CLOSING OBSERVATIONS

BLACK BOX WARNINGS ON PRESCRIPTION DRUGS

I thought it might be good to let our readers know what a black box warning is and why they are so important. If you are like most consumers, you probably don’t read the package insert for your prescription drugs. I strongly believe the drug manufacturers are well aware of that reality. The insert is that long piece of paper that, among other things, is folded up into a tiny bundle and has very small print. The insert uses scientific words and medical terms that even some medical professionals have difficulty pronouncing. The biological pathways by which a person’s body absorbs and processes the active ingredients is described. The insert also contains a picture of the molecular orbital diagram for the drug. Additionally, the insert will list important information about warnings, side effects, and how the drug may interact with other prescriptions.

Realistically, in today’s world, most of what we know about prescriptions comes from direct-to-consumer television advertisements that are aimed at consumers. These ads—using sports figures and well known entertainers—convince viewers that the featured drug is exactly what they need to cure their ailments and make them well. In fact, if you turn on your television for more than 10 minutes, you will most assuredly see at least one commercial for some new drug to treat some obscure condition.

For example, restless leg syndrome, which allegedly deprives millions of adults of a good night’s sleep (Kramer on Seinfeld called it “the Jimmy Legs”)—could be featured. During the last five seconds of that commercial, a voiceover will list almost every warning and possible side effect imaginable. That done so quickly that it is virtually impossible to mentally process what it is being said. But it doesn’t stop there, because pharmaceutical companies also list warnings and possible side effects during the commercial, usually at the bottom of the screen, in white letters, against a light background, and in such tiny print that even Superman—with his great vision—would have a hard time reading it.

With that having been said, if you are not interested in reading the package insert when you get a new prescription, you should at least glance at it to see if it contains a “black box warning” at the top. For the uniformed, a black box warning is a warning by the Food and Drug Administration (FDA) found at the top of the package insert for prescription drugs. These warnings are the strictest of warnings issued by the FDA when there is reasonable evidence of any serious or life-threatening risk.

The black box warnings are based on clinical data provided to the FDA by the manufacturer through clinical trials and post-marketing surveillance. Medications found to cause serious adverse effects compared with the potential benefit from the drug are required to be reported by the manufacturer to the FDA. Once the FDA confirms a serious risk, a box warning is implemented. These warnings are placed at the top of the prescription label, in bold writing, and are enclosed by a black box, hence the name.

A black box warning is a way in which the FDA warns a person and his health care provider of serious adverse effects or life-threatening risks associated with the drug. Lawyers in our Mass Torts Section have been involved in litigation during the last 15 years that led the FDA to require black box warnings on a number of drugs due to the injuries and deaths our clients and others experienced after taking a prescription drug.
with inadequate warnings. To name a few, the list includes Celebrex®, Bextra®, and Prempro®.

You can easily find the package inserts for any prescription drug with an internet search. If you have any concerns regarding your prescriptions, you should check with your physician. If you need more information relating to black box warnings, contact Matt Munson, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Matt.Munson@beasleyallen.com.

OUR MONTHLY REMINDERS

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

2Chron7:14

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

XXII.
PARTING WORDS

I have been asked on a number of occasions if I have ever regretted not being able to fulfill my original goal, which was to be a successful football coach. I have to admit that I have wondered a few times how that plan would have played out if I had wound up being a coach. However, I must say that I am totally satisfied with what I have done and continue to do as a trial lawyer. While the playing fields for these two callings are quite different, there are some definite similarities. I wound up being a trial lawyer, and can say without reservation, that the work I do can be just as “rough” as football.

I became a trial lawyer by choice and I have been blessed to have had the opportunity to be a person who helps folks who need help. I am also proud to have been an active defender of the courts and specifically the Civil Justice System. The American people deserve a court system that is both open to them and one that is totally independent. The system has been under unjust and unwarranted attacks for decades and those attacks persist today. All any litigant should expect from the courts is accessibility and fairness. There are some in our society, however, who want a different standard.

Trial lawyers have also been under constant attack for decades. All too often Corporate America values money and profits over human lives and safety. It’s essential that corporate wrongdoers be held accountable. The courts are the only place where a corporate wrongdoer can be held accountable and where an ordinary citizen can get true justice. Trial lawyers are involved in the system—on the side of victims of corporate wrongdoing and abuse—and that is exactly why they have been under attack.

It’s critically important to keep the courts in America open and independent. The battle to preserve the court system and keep the courts available and open for victims of corporate wrongdoing and abuse is still ongoing. This is a battle the American people can ill afford to lose. In fact, it’s critically important that this battle is won. Ordinary citizens depend on trial lawyers and for that reason each of us who are trial lawyers has a moral duty to do our very best to protect them. Our law firm has been active on the battlefield referred to above and we have no intention of leaving the field until the battle is won. I believe that the overwhelming majority of people in this country agree with me. They recognize the importance of the 7th Amendment and an independent and fair system of courts.

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No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.
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Jere Locke Beasley, founding shareholder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs over 75 lawyers and more than 175 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 35 years.