THE JERE BEASLEY REPORT

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Beasley Allen

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.

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I. CAPITOL OBSERVATIONS

The Tenth Annual Beasley Allen Legal Conference

We were pleased to host our firm's tenth annual Legal Conference & Expo at the Renaissance Montgomery Hotel & Spa on Nov. 17-18. The event is open to all Alabama lawyers in private practice, and provides them with a full 12 hours of Continuing Legal Education (CLE) credits, for free. The conference has grown steadily each year, from about 400 lawyers in 2007 to 1,453 in attendance this year. It is one of the top five legal conferences in attendance in the United States.

In addition to benefitting lawyers throughout the state, the conference is very good for the Montgomery area's economy. Dawn Hathcock, Vice President of the Montgomery Area Chamber of Commerce Convention and Visitor Bureau, had this to say:

> *The Beasley Allen Law Firm has successfully coordinated a unique conference for the last 10 years, and I applaud their efforts. Lawyers from all over the state have been given the opportunity to see everything Montgomery has to offer as a destination but that is just the beginning. Hosting nearly 1,500 attendees at the state's largest legal conference provides a huge economic impact in the River Region estimated to be roughly a million dollars.*

We are proud to be able to support our River Region in this way each year. Our plan is for the conference to be an annual event for years to come. It's good to know that we are helping lawyers develop their skills and field of knowledge, which in turn helps their clients. It's also good to help our area economy.

The conference gives us an opportunity to connect with our colleagues from firms of all sizes, ranging from those in private practice to lawyers from some of the biggest firms in the state. Practice areas addressed at the conference included Product Liability, Business Litigation, Whistleblower Litigation, Consumer Fraud, and Medical Device and Drug litigation. A separate section on Legal Ethics was on the agenda and as usual Tony McLain, General Counsel, Alabama State Bar, did a tremendous job. Tony has been a great asset to Alabama lawyers and is a very good person in every respect.

A number of guest speakers presented special programs, including a panel discussion with Alabama Supreme Court Justices James Allen Main and Tommy Bryan. Other special guest presentations included remarks from Ken Riley, President of the Alabama Association for Justice; Clay Hornsby, Deputy Director of the Alabama Law Institute; Shane Smith, Chairperson, Family Law Section of the Alabama State Bar; and Bill Blanchand, former President, Alabama Defense Lawyers Association. Our own Cole Portis, who is serving as President of the Alabama State Bar, was our luncheon speaker this year.

While all of the presentations were good, the highlight of the conference was the Friday morning prayer breakfast. This part of the program has always been well attended by lawyers and their families. It was again this year. The prayer breakfast sets the right tone for the conference. This year the presentation was by Rev. John Schmidt, the Senior Pastor at Centerpoint Fellowship Church. John's message was one that any person—especially a lawyer who does trial work—needs to hear.

We also were happy to be able to present our annual Beasley Allen Pro Bono Award to the Montgomery County Bar Foundation Volunteer Lawyers Program. The $15,000 grant will allow the MCBF VLP to continue to provide crucial civil legal services to the poor, who might not otherwise be able to afford a lawyer. Tim Gallagher, President of the MCBF, and Mike Martin, Executive Director, were on hand to accept the award.

A popular attraction each year is the Legal Conference Expo, where vendors provide demonstrations of products and answer questions about how attorneys can best enhance their practice. Event platinum sponsors for 2016 were Jackson Thornton Valuation & Litigation Consulting Group, Freedom Reporting and Virage.

Legal and community groups also participated in the event to provide information about their programs and services. This year we welcomed representatives from the Alabama State Bar Volunteer Lawyer Program, Alabama State Bar Lawyer Referral Program, Alabama Law Foundation, Alabama Civil Justice Foundation, Alabama Association for Justice, and Cumberland School of Law.

The Beasley Allen Legal Conference has been very successful. It is a unique opportunity for lawyers and we are honored to be able to offer this event each year. We look forward to the next one.

II. MORE AUTOMOBILE NEWS OF NOTE

Beasley Allen Joins Other Firms In Filing Class Action Alleging Additional VW Emissions Cheats

Lawyers at Beasley Allen have joined with several law firms to file a new class action lawsuit against Volkswagen. The filing came after it was revealed that Volkswagen used an emissions cheat device in Audi vehicles equipped with 3.0-liter gaso-

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line engines and a specific ZF model 8HP55 transmission. Subject vehicles include the A6, A8, Q5 and Q7. In October, the automaker settled similar claims affecting vehicles with 2.0-liter diesel engines, agreeing to pay out nearly $15 billion to affected vehicle owners. This is believed to be the largest automobile settlement in history. Claims related to the VW's 3.0-liter diesel vehicles remain unresolved.

Audi did not limit its "cheat device" scheme to the diesel engine market, but some Audi gasoline engines contained a similar device. Just as with the devices found in diesel vehicles, it turned off the emission system under certain driving conditions, which in turn produced illegal levels of carbons that were released into the environment unbeknownst to the consumer. This new class action lawsuit recently filed addresses this problem and provides a remedy very much like the diesel engine class we filed previously.

This additional software, like the 2.0 diesel cheat software, monitors steering wheel input and holds the vehicle in "low power" mode until the steering wheel is turned. However, this cheat software is programmed into the vehicle's transmission control module, whose job is to select shift points necessary to maintain vehicle speed over variable driving conditions. Specifically, when a subject vehicle is cranked, its transmission engages a "low CO2" program, shifting gears early to maintain artificially low engine revs and emissions. Once the driver inputs 15 degrees of turn into the steering wheel, the subject vehicle deactivates the program and shifts into its normal, more pollutant fashion that consumes more fuel, delivers more power and produces more CO2. Audi designed this software to fool emissions testing equipment and personnel.

According to the latest investigation into the issue, U.S. Environmental authorities in California reportedly discovered certain Audi gasoline and diesel models with the ZF 8HP55 AL 551 automatic transmission were equipped with a separate cheat software to fool emissions tests. The class action lawsuit was filed in Federal District Court in the State of Minnesota on behalf of Plaintiffs in Minnesota, Missouri, Pennsylvania, Florida, as well as owners nationwide.

Lawyers representing the Plaintiffs in this class include Beasley Allen lawyers Dee Miles, Clay Barnett and Archie Grubb; Adam Levitt with Grant & Eisenhofer; Bryan Bleichner of Chesnut Cambronne; Marc Dicello of Dicello Law; and Tom Young of Tom Young Law Office. For more information about this litigation, contact Dee Miles, who heads up our firm's Consumer Fraud and Commercial Litigation Section, at Dee.Miles@beasleyallen.com, or lawyers in this section, Clay.Barnett@beasleyallen.com or Archie.Grubb@beaselyallen.com, or call us at 800-898-2034.

Source: Bloomberg

Chrysler And Engine Maker Accused Of Emissions Cheating

A class action lawsuit was filed last month in a Michigan federal court against the U.S. unit of Fiat Chrysler Automobiles NV and engine maker Cummins Inc. The proposed racketeering class action alleges that Dodge Ram trucks with diesel engines hid the trucks' emissions of illegally high levels of pollutants. In the complaint, consumers accused Chrysler and engine manufacturer Cummins of conspiring to knowingly deceive consumers and regulators that Dodge Ram 2500 and 3500 trucks equipped with the Cummins 6.7-liter turbo diesel engine were emitting dangerous levels of nitrogen oxides. The complaint states:

> *The defendants never disclosed to consumers that the affected vehicles may be "clean" diesels in very limited circumstances, but are "dirty" diesels under most driving conditions.*

The Dodge Ram trucks outfitted with the Cummins 6.7-liter turbo diesel engine contained a technology to trap and break down pollutants that was meant to limit the amount of NOx escaping in the exhaust of the engines. However, more pollutants were emitted than allowed by California and federal law when the trucks were traveling for long distances or traveling up hills. For example, the legal limit of NOx emissions for stop-and-go driving is 200 milligrams per mile. When tested, the Dodge Ram 2500s emitted 702 milligrams per mile, with a maximum emission of 2,826 milligrams per mile. The California NOx limit for highway conditions is 400 milligrams per mile, but testing for the 2500 Dodge Ram shows an average of 756 and maximum of 2,252 milligrams per mile.

The complaint has claims for fraudulent concealment, false advertising, and violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act and consumer protection laws. The consumers accuse Chrysler, now officially known as FCA US LLC, and Cummins of intentionally misleading the public, concealing emissions levels, illegally selling noncompliant polluting vehicles, knowingly profiting from the dirty diesels and using fraudulently gained emissions credits from the U.S. Environmental Protection Agency (EPA) to use on further production of high-polluting vehicles.

The affected Cummins diesel engines concealed true emissions output, and resulted in wearing out the catalytic converter more quickly, meaning the vehicle burned fuel at a higher rate. This often required truck owners to replace the converter after the warranty had expired at a cost of approximately $3,000 to $5,000. The accusations in this case against Chrysler and Cummins are very much like the claims made against Volkswagen AG in its emissions-cheating scandal.

The truck owners are represented by Steve W. Berman and Jerrod C. Patterson of Hagens Berman Sobol Shapiro LLP, Christopher A. Seeger of Seeger Weiss LLP, James E. Cecchi of Carella Byrne Cecchi Olstein Brody & Agnello PC, Robert C. Hilliard of Hilliard Munoz Gonzales LLP, and E. Powell Miller and Sharon S. Almonrode of The Miller Law Firm PC. The case is James Bledsoe et al. v. FCA USA LLC et al. in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

Tour Bus Crash That Killed 13 Underscores Gaps In Safety Regulations

There is a tremendous need for significant improvements in the regulation of buses that operate on our nation's highways. Currently there is an inadequate patchwork of federal and state protections. Over the past several years we have seen a large increase in low-cost bus services in the U.S. That's primarily because of more casinos opening around the country. Safety experts say that regulations and safety oversight have not kept up with the growth in the industry. Even the most basic improvements have been very slow in coming. A prime example is the need for seat belts in buses.

The rule requiring seat belts on newly manufactured buses that went into effect last month was first proposed by safety experts more than 30 years ago. This came after a horrific 1968 bus crash in California that took 19 lives. Recently, a tour bus crashed into a truck on the way back from a casino, killing 12 passengers and the driver. The bus did not have seat belts. Nor do thousands of other buses that will be on U.S. highway for years to come, and that's because there is no requirement to install them. Jim Hall, former chairman of the National Transportation Safety Board (NTSB), had this to say after the recent California bus crash:

> *We don't invest into doing an adequate job to protect people from inci-*

dents like this. That individuals who ride buses are at lower income levels of our society concerns me. We should ensure that we have the same safety standards for everyone.

There are two standards of safety for transportation in our nation—one for aviation and one for ground transportation. The level of safety for buses is grossly inadequate. The Federal Motor Carrier Safety Administration (FMCSA), the federal agency that regulates buses and trucks, has 1,140 employees to oversee 525,000 companies across the nation. The agency relies largely on state law-enforcement teams to conduct inspections and hand out citations. Interestingly, about half of the agency's $600-million budget is sent to states to help pay for truck and bus inspections.

The U.S. Transportation Department's inspector general launched an audit of truck and bus safety last year, saying that investigations into a series of fatal crashes had disclosed that the motor carrier administration had failed to uncover any problems. Safety reviews had been conducted prior to these accidents, one about five days before the bus was in a crash.

It appears that the number of new casinos in the U.S. has resulted in an increase in the number of "tour buses" needed to haul folks to the casinos. NTSB member Earl Weener recently disclosed that the investigation was ongoing into accidents involving casino buses. However, the agency has yet to publish any data. Representatives of the bus industry claim that the bus-related tragedies are very rare. Peter Pantuso, President of the American Bus Association, contends that the industry is "highly regulated." Based on our experience, that is certainly far from reality.

Motor carrier administration data reveals that in 2014, 44 occupants of buses were killed in crashes. That is similar to other years over the past decade. An additional 233 people in other vehicles or walking were killed in crashes with buses. By contrast, although the two industries carry roughly the same number of passengers annually, no airline passengers were killed in the U.S. that year and few accidents involving major U.S. airlines have occurred in the last decade.

There is definitely a need for stronger regulation of buses of all kinds. However, there is a tremendous need in the "tour bus" industry and for school buses. It will be interesting to see how the Trump Administration reacts in this area of concern. Hopefully, President Trump will see the need and provide strong leadership.

Source: *Los Angeles Times*

Settlement In Takata Air Bag Death Lawsuit

A settlement has been reached between all Defendants and the Texas parents who filed a product liability suit in April alleging their daughter was the 12th person to die as a result of a deployed Takata air bag sending shrapnel into her body. The family of 17-year-old Huma Hanif and defendants TK Holdings Inc. and American Honda Motor Co Inc., agreed to the settlement. The settlement was reported last month by State District Court Judge Dan Hinde. The terms of the settlement are confidential.

The lawsuit was filed about a month after the youngster died on March 31 in Fort Bend County, Texas, as a result of a low-speed collision in her 2002 Honda Civic. The car in front of her, driven by one of the named Defendants, Samantha Iona Martin, came to a sudden stop, causing Hanif to rear-end the vehicle and her Civic's air bags to deploy. Hanif stepped outside her car after the crash, clutched her neck where shrapnel entered her body, then collapsed on the pavement and was pronounced dead at the scene.

The suit alleged negligence, gross negligence, breach of warranty and failure to warn. The family named as Defendants Honda, Takata, Martin, the dealership that sold the used car, Westside Hummer, and Discount Lube and Tune, an auto shop that inspected the car last year.

The family is represented by Muhammad Suleiman Aziz and Scott P. Armstrong of Abraham Watkins Nichols Sorrels Agosto & Friend, by Nomaan Husain and Omar Khawaja of Husain Law & Associates PC and by Mohammed "Ali" Zakaria of M. Ali Zakaria & Associates PC. The case is *Muhammad Hanif et al. v. TK Holdings et al.* in the 269th District Court in Harris County, Texas.

Source: Law360.com

Toyota Recalls Nearly 1.5 Million Cars In Europe Over Takata Airbags

Toyota Motor Corp. recalled about 5.8 million cars recently over the faulty airbag inflators made by Takata Corp. The recall affects about 1.47 million vehicles sold in Europe, about 820,000 cars sold in China and 1.16 million cars in the Japanese market. The action also extends to Central and South America, Africa, the Near and Middle East and Singapore. Affected models include the Corolla compact car, one of the world's best-selling models, the Yaris/Vitz subcompact, the Hilux pickup and the Etios line of sedans and hatchbacks. The recall covers driver-side and passenger-side airbags installed in cars produced between May 2000 and November 2001, and April 2006 and December 2014.

The airbags have now been linked to at least 16 deaths globally, with most of the deaths in the U.S. The inflator recall began around 2008 and continues to expand. The latest recall includes about 20,000 cars that were fitted with replacement Takata inflators following an initial 2010 recall, as the replacement parts are also seen to be at risk of exploding as they do not contain a drying agent.

Transport authorities around the world now consider inflators without a drying agent to be unsafe, and have ordered all of them to be withdrawn. Since global transportation authorities expanded their recall from May, about 100 million Takata airbag inflators have been classified as defective worldwide. Takata is seeking a financial investor to help pay for huge liabilities from the recall, and has been meeting with potential sponsors and automaker clients to discuss its survival options.

Source: Law360.com

Toyota To Pay $3.4 Billion To Settle Rusty Truck Frame Action

Toyota Motor Co. has agreed to pay approximately $3.4 billion to compensate owners of certain truck models with frames that are prone to rust corrosion and perforation. This will settle a proposed class action lawsuit in a California federal court. The owners of certain Tacoma, Tundra and Sequoia trucks asked U.S. District Judge Fernando M. Olguin to give preliminary approval to the settlement, which provides inspections for the approximately 1.5 million vehicles possibly affected by the defect, as well as the replacement of frames for an estimated 225,000 trucks.

If approved, the settlement will end the proposed class action complaint filed in March 2015 by owners from nine states, including New York, California and Florida, alleging that the frames of model year 2005 to 2009 Tacoma vehicles were not properly protected from rust corrosion, and that Toyota knew about the defect but failed to do anything about it.

Tundra and Sequoia owners were added to the case. The settlement covers 2005 to 2010 Tacomas, 2007 to 2008 Tundras, and 2005 to 2008 Sequoias. Toyota says that an inspection for each of the 1.5 million vehicles will cost approximately $60, totaling $90 million, and the replacement frames for the 225,000 vehicles will cost $15,000 each, for a total of $3.375 billion.

Toyota has promised that the inspection and replacement campaign will be at no cost to the vehicle owners. Additionally, the program will last 12 years from the date the vehicle was sold or leased, meaning any future perforations will be covered as well. The replacement and inspection policy remains valid if an owner sells the vehicle to another party. The owners also asked Judge Olguin to certify a class of Tacoma, Tundra and Sequoia owners or lessees from the 50 states, Puerto Rico, Washington D.C. and all U.S. territories.

The owners are represented by Timothy G. Blood and Paula R. Hearst of Blood Hurst & O'Reardon; Ben Barnow and Erich P. Schork of Barnow & Associates; Philip J. Milligan of Milligan Law Offices; Michael L. Roberts of Roberts Law Firm; and Jeffrey S. Hurst of Monteleone & Mccory. The case is *Brian Warner et al v. Toyota Motor Sales USA Inc.* in the U.S. District Court for the Central District of California.

Source: Law360.com

III. PURELY POLITICAL NEWS & VIEWS

President Elect Donald Trump

I am totally convinced that most Americans are very glad the race for President is over. Donald Trump's election came as a surprise to the so-called political experts. However, his message sold to enough voters in the key states to put Trump in the White House. I would give Sen. Jeff Sessions a great deal of credit for the upset victory on Nov. 8.

Not only was Jeff an important "endorser" at a critically important time, but the senator also was a most important "advisor" during the entire campaign. The huge rally in Mobile early in the campaign was a huge shot in the arm for the Trump campaign. Jeff will be named Attorney General and I have to believe that his selection will prove to be one of the new President's best appointments.

Donald Trump is currently forming his government. I sincerely hope that President Trump will put aside all of the negative things he ran on and truly be president of all Americans. Based on his recent comments and actions, it appears that he will work hard to accomplish that goal, which is critically important to our country. However, satisfying his early base may prove to be the most difficult task facing President Trump. Personally, I hope and pray that the new president will be successful.

IV. COURT WATCH

High Court Won't Review Lamictal Pay-For-Delay Ruling In Favor Of Plaintiffs

The United States Supreme Court recently declined to review a Third Circuit ruling in favor of the Plaintiffs, holding that "reverse payment agreements" settling drug patent litigation that lack a cash payment to the generic manufacturer can raise antitrust scrutiny. With the Supreme Court declining to review the ruling, the Court has left in place a ruling that revives the Plaintiff's pay-for-delay dispute against drug makers GlaxoSmithKline and Teva over the anti-convulsant drug, Lamictal.

In these "pay-for-delay" agreements, or "reverse payment agreements", a brand-name drug company and a generic rival locked in patent litigation reach a settlement. Historically, the brand-name drug company may offer cash or something else of value to the generic drug company and, in return, gains more time to sell its brand drug without encountering lower-cost generic competition. The generic drug maker, meanwhile, also comes away with a large payment and an agreement to sell its generic equivalent at a specified future date.

In the case of *In re Lamictal Direct Purchaser Antitrust Litigation*, the Third Circuit looked at one of the biggest questions facing the courts in the wake of the Supreme Court's 2013 landmark U.S. Federal Trade Commission v. Actavis decision: whether actual cash has to change hands for a reverse payment to occur.

Buyers of Lamictal, which is used to treat epilepsy and bipolar disorder, have claimed that GSK paid off Teva to delay its introduction of a generic version of the drug. Instead of exchanging a lump sum of cash, GSK compensated Teva, the generics maker, by agreeing not to launch its own authorized generic during Teva's 180-day exclusivity window. The Plaintiff argued that no-authorized generic settlements like these amount to a "reverse payment" and can be scrutinized under antitrust laws. The reasoning is that such an agreement has considerable value to the first drug-maker to file for approval to make a generic version of a treatment.

This *Lamictal* litigation was originally filed in New Jersey where the New Jersey District Court dismissed the case on Dec. 6, 2012. The Plaintiff appealed and the Third Circuit Court of Appeals remanded the case after the *Actavis* decision, ordering the District Court to reconsider in light of *Actavis*. On remand, the New Jersey court affirmed its original dismissal in January of 2014 based on the Court's conclusion that an antitrust violation can result from a settlement only if the brand manufacturer provides a large, unjustified payment of *money* as opposed to some other form of compensation.

On appeal in June 2015, the Third Circuit found that a cash payment was not necessary and so-called no-authorized generic settlement agreements could be considered a transfer from a brand drug manufacturer to a generic manufacturer and could be scrutinized under antitrust law.

Drug makers GSK and Teva filed a petition for Supreme Court review in February of this year, arguing that the justices should take the opportunity to clear up "disagreement and confusion" about what kinds of settlements can be scrutinized under Actavis. The United States Supreme Court declined to review the Third Circuit ruling.

These "pay-for-delay" agreements have raised antitrust concerns for years now. The Federal Trade Commission has estimated that these deals cost Americans $3.5 billion annually in higher health care costs. Challenging drug makers over these anti-competitive "reverse payment" agreements is just another way Plaintiffs can positively affect the price of prescription drugs in this country.

If you would like to know more about the pay-for-delay litigation, contact Ali Hawthorne, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at Alison.Hawthorne@beasley-allen.com.

Source: Law360.com

$40 Million Damages Award Affirmed In Fatal Jeep Fire Suit

A $40-million jury verdict was affirmed last month by the Court of Appeals of Georgia. The verdict was awarded to the parents of a 4-year-old boy killed in a 2012 Jeep crash fire. The appellate court rejected Fiat Chrysler's arguments that certain evidence was wrongly allowed and the award resulted from prejudice. The Court concluded that a lower judge did not err by allowing the parents of Remington Walden to present during a 2015 trial similar crash instances and other evidence to support their theory that by placing the fuel tank behind the vehicle's rear axle, Fiat Chrysler Automobiles NV acted with a reckless or wanton disregard for human life and breached its duty to warn that a rear-end crash could result in a gas leak and fire.

Four-year-old Remington was riding in the backseat of a 1999 Chrysler Jeep Grand Cherokee in March 2012 when it was struck from behind by a pickup truck driven by Bryan Harrell. The rear-located gas tank was punctured and the Jeep Cherokee caught fire, killing the boy.

In 2015, a Georgia state court jury found for the parents, awarding them $120 million in damage for wrongful death, and $30 million in damages for pain and suffering after finding Harrell to be 1 percent at fault and Fiat Chrysler to be 99 percent at fault. The state court judge then denied the automaker's motion for a new trial, but reduced the wrongful death verdict to $30 million and the pain and suffering damage award to $10 million.

The appellate court ruled the parents had presented sufficient evidence to support their claim that Fiat Chrysler knew that the location of the fuel tank in the 1999 Grand Cherokee was dangerous, yet consciously and deliberately continued to manufacture and sell the vehicle with the gas tank in that location and failed to warn the public of the danger. Among the evidence presented was 17 other instances where a Jeep vehicle with a fuel tank located behind the rear axle was rear-ended, causing gas to leak.

The Waldens are represented by Karsten Bicknese and Robert H. Betts of Seacrest, Karesh, Tate & Bicknese; James Butler Jr. and James E. Butler III of Butler Wooten & Peak; and L. Catharine Cox and George C. Floyd. The case is *Chrysler Group LLC v. Walden et al.* in the Court of Appeals for the State of Georgia.

Source: Law360.com

V. WHISTLEBLOWER LITIGATION

Retooled FCA Celebrates 30 Years Of Fighting Fraud

The False Claims Act has been fighting fraud involving the government for 30 years. We can look back to the 18th Century to put things in perspective. "There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government of its revenues," Benjamin Franklin said in a 1767 letter to the *London Chronicle*, tapping into a problem that would ultimately give rise to the government's best fraud-busting tool: The False Claims Act.

The federal False Claims Act (FCA) was born in 1863 during the Civil War to combat widespread fraud committed by contractors who provided the government with ill horses and mules, spoiled rations, faulty rifles and ammunition, and other deficient goods and services. But "Lincoln's Law," as it was widely known then, didn't have the muscle it needed to effectively prevent fraud or correct it once it happened.

However, it wasn't until Oct. 27, 1986, when President Ronald Reagan signed into law a series of amendments to the original law, that the powerful False Claims Act as we know it today was born.

By its 30th birthday this past October, the retooled False Claims Act had helped the U.S. government recover $50 billion in false claims billed to taxpayer-funded agencies and programs, not counting the criminal penalties collected. Much of the law's success in that time could be attributed to better whistleblower protections and incentives.

However, as the False Claims Act evolved into a better anti-fraud weapon, with even more provisions signed into law by President Barack Obama, it fell under repeated attacks from corporate interests attempting to weaken the badly needed law. According to whistleblower advocates, now is the time to help the Act reach its full potential.

Writing for *The Hill*, Patrick Burns and R. Scott Oswald say the False Claims Act should be further strengthened by closing the information gap between the law and would-be whistleblowers. As part of the Deficit Reduction Act of 2005, President George W. Bush signed into law Section 6032, a measure requiring major recipients of Medicaid funds to educate employees about the False Claims Act and other whistleblower laws.

Since that rule took effect, False Claims Act cases involving Medicaid fraud roughly doubled to about $2 billion annually. Taxpayers Against Fraud (TAF) advocates for applying the same rule to all recipients of government money, not just Medicaid. Burns and Oswald note in their editorial:

> *Indeed, 'How to Blow the Whistle on Fraud' posters should be standard at the workplaces of all government contractors.*

The False Claims Act also needs to be cleaned up as it pertains to the Internal Revenue Service and tax fraud, TAF explains. The group says that the agency has not only been "lackadaisical in pursuing its own whistleblower program," but has been "putting up arbitrary legal hurdles at every turn," according to Senator Chuck Grassley.

The tax code also offers whistleblowers no protection from retaliation, which is a vital part of any whistleblower program. Without sufficient protections, would-be IRS whistleblowers will not speak out for fear of retribution from their employer.

Burns and Oswald propose that the False Claims Act "tax bar" be removed. That would open the Act's anti-retaliation protections to tax whistleblowers and allow qui tam lawsuits to enhance the IRS's ungainly fraud-fighting efforts. Our firm fully supports the FCA and commend those working to make the law even more effective.

Sources: *The Hill*, Taxpayers Against Fraud

The Implied False Certification Theory Is A Basis For FCA Liability

On June 16, the United States Supreme Court unanimously held that an implied false certification theory is a basis for liability under the False Claims Act (FCA). In *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989 (2016) (Escobar), a teenager was prescribed medication for bipolar disorder and suffered an adverse reaction including seizures. After the reaction, the teenager's parents learned few of the employees at the counseling center were actually licensed to provide mental health treatment and the center had minimal supervision of its counseling and mental health services.

The counseling services were also misrepresenting staff qualifications and regulation compliance in order to obtain reimbursement from Medicaid. The parents filed a qui tam suit in 2011 alleging Universal Health Services had violated the FCA under an "implied false certification theory of liability."

The court granted Universal Health Services' motion to dismiss because none of the regulations violated were a condition of payment. However, the First Circuit Court of Appeals reversed on the basis that each time a party submits a claim the party implies it conformed to the relevant program requirements entitling it to payment.

The U.S. Supreme Court affirmed, ruling the theory of implied false certification was valid to hold a provider liable under the FCA in certain circumstances when the misrepresentation of compliance would be material.

Even though the FCA does not itself define false or fraudulent acts, the high court found Congress intended to use a common-law definition of fraud, which includes misrepresentations by omission as well as actively providing false information. Misleading claims or other half-truths are material and actionable under the FCA when they fail to include information related to compliance with regulations and the noncompliance is significant enough the government would likely have acted differently if the information was known.

To prove the misrepresentation was material under the FCA, it must be shown the government would likely have denied payment had they known of the noncompliance. The Escobar decision clarifies that the implied false certification theory is acceptable to create liability under the FCA. The decision definitely opened up the potential for additional claims.

Source: *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989 (2016)

Duke Involved In One Of The Largest FCA Suits To Focus On Academic Research

The majority of False Claims Act (FCA) cases involve health care or military contracts; however, the FCA is both able and beginning to be used by a more diverse range of industries, which now includes academic research. Allegedly, Duke University has submitted fraudulent data in applications for more than 60 grants, worth more than $200 million. The issue began with a researcher working in the lab of a prominent pulmonary scientist at Duke. When the researcher, Erin Potts-Kant, was arrested for embezzlement, Duke took a closer look at the researcher's work. Fifteen of the researcher's papers had to be retracted for unreliable data.

The FCA case against Duke was filed by biologist Joseph Thomas. According to Thomas, Duke was aware of the misconduct before the investigation and failed to disclose the scope of what it knew to federal funding agencies. Additionally, Thomas alleges that Duke received 64 grants either based on or arising from the research of Potts-Kant. These grants totaled more than $200 million. Because public universities are government entities, they may have some protection against FCA lawsuits; however, private universities do not.

Private universities, like Duke, make up the top 25 recipients of federal funding for academic science. The FCA provides treble damages, meaning Duke could be forced to return three times the amount of funding it received from the 64 grants, totaling more than $600 million. Therefore, depending on how this case against Duke resolves, there could be a flux of FCA cases concerning academic research in the near future. The complaint was filed by Joseph Thomas under the *qui tam* provision of the FCA.

Source: Sciencemag.org

CFO Awarded $1.9 Million In Sarbanes-Oxley Anti-Retaliation Case

Greg Becker was awarded $1.9 million last month in his Sarbanes-Oxley (SOX) whistleblower anti-retaliation case. Becker, the chief financial officer (CFO) for Rockwood Clinic, was fired for refusing to file false financial reports. The clinic pressured Becker to project the company's 2012 losses at $4 million instead of $12.8 million, which Becker had estimated. Becker refused to project the losses at $4 million because doing so would violate federal financial reporting laws and mislead investors. Thereafter, he was forced to resign.

Sarbanes-Oxley provides retaliation protection for those blowing the whistle on fraud against shareholders and violations of securities laws. In order to file an anti-retaliation case under Sarbanes-Oxley, the complaint must be filed with the U.S. Department of Labor within 180 days of the adverse action. Under SOX, recovery can include: reinstatement, back pay, special damages, and attorney fees. Front pay has also been accepted as a possible remedy under Sarbanes-Oxley in circumstances where reinstatement would not be appropriate.

Becker was awarded front pay, back pay, special damages, and attorney fees. Specifically, the judge awarded Becker $341,380 in back pay and almost $1.5 million in front pay. Becker was also awarded $15,000 for reputation damage, attorney fees, and cost. The $1.9 million awarded demonstrates the significance of the case.

Many whistleblower provisions include anti-retaliation provisions. Where the provision under SOX requires the complaint to be filed in 180 days, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) permits whistleblowers to file in federal court within two years of the adverse action. Dodd-Frank also permits the recovery of double back pay, special damages, attorney fees, and reinstatement under the same section.

The Beasley Allen Whistleblower Team

Several months ago, because of the increased activity in whistleblower litigation, our board created a whistleblower litigation team with lawyers in our Consumer Fraud & Commercial Litigation Section being on the team. If you have any questions about whether you qualify as a whistleblower, you can contact a lawyer on the team. You can get a free and confidential evaluation of any potential claim. You can find a contact form on the firm's website or you can contact one of the following lawyers on the Whistleblower Litigation Team: Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com, or Andrew.Brashier@beasleyallen.com. You can also call them at 800-898-2034. These lawyers will be glad to talk with you about any aspect of whistleblower litigation.

VI. PRODUCT LIABILITY UPDATE

Do Your Tires Make The Grade?

Did you know that passenger tires are graded on their ability to resist tread wear, generate heat and provide suitable traction for stopping? The federal government requires passenger tire manufacturers to provide tire performance information to consumers to assist them in selecting appropriate tires for their vehicles. Most people are aware that they can find maximum tire pressure information on the tire as well as load ratings that state the maximum load carrying capability of the tire. However, tread wear, traction and temperature information can also be found on the sidewall of a tire. This information can help you determine which tire may be best suited for your purposes.

A tire's traction grade can be found on the sidewall and indicates a tire's stopping capability as measured in straight-ahead braking traction tests. However, these braking tests do not include cornering or turning traction. The grades on a tire will consist of grades of "AA," "A," "B," and "C." A tire rated with an "AA" has the highest traction grade and indicates good ability of the tire to stop on wet pavement. A tire that has a "C" grade will provide the poorest traction, comparatively speaking, under the same or similar test conditions.

Tires also contain information regarding tread wear. The tread wear grade is a ratings system based on the wear rate of the tread under a specified government test procedure. While the actual tread wear can vary depending on the use of the tire including service conditions, the tread wear grade is at least an indicator of the potential tread wear performance of a tire. Under test conditions, a control tire is assigned a grade of 100. Other tires are then compared to the control tire to determine tread wear. For example, a tire grade of 300 should wear three times longer than the control tire.

The National Highway Traffic Safety Administration (NHTSA) reports the following on tread wear grades for current tire designs:

- 15 percent are rated below 200
- 25 percent are rated 201 to 300
- 32 percent are rated 301 to 400
- 20 percent are rated 401 to 500
- 6 percent are rated 501 to 600
- 2 percent are rated above 600

When selecting a tire for your vehicle, a tire with a higher tread wear grade should take longer to wear out than a tire with a lower tread wear grade.

Tires used on vehicles generate heat during use. Heat is an element that can damage tires and increase the likelihood of premature failure and wear. For this reason, the federal government requires tire manufacturers to grade tires ability to resist the generation of heat and the ability of a tire to dissipate heat under controlled test conditions. Temperature grades range from "A" being the highest to "B" and "C."

Tires used in driving long distances, under load, or in hot weather can generate significantly high temperatures on the tire. The heat will deteriorate the components of the tire which can lead to blowouts and tread separations. Tires that can resist heat or dissipate heat with the best grade represent tires that are more likely to perform at safe levels throughout the life of the tire. According to NHTSA, only 27 percent of the current tires available on the market are rated at an "A" grade.

Tire grades regarding traction, tread wear and temperature can be found on the sidewall of the tire. Additionally, this same information can be located in publications available from NHTSA. Information can be found at the government's website, www.safercar.gov. Knowing how your tires graded out can help you understand how the tires may perform throughout their useful life. If you need more information on tires contact Ben Baker, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Ben.Baker@beasleyallen.com.

Lithium-ion Batteries—Once Popular Power Source Goes Up In Smoke

It is difficult to fathom how ordinary devices, such as the Samsung Galaxy Note 7 smartphone or a toy like the hoverboard, can be ticking time bombs in our hands, our houses or even under our child's feet. Yet recent, high-profile incidents of spontaneously combusting devices have made us give these devices more than a passing glance. The culprit that has sparked these devices and the corresponding national conversation is the lithium-ion battery that powers them.

While riding an attraction at the Universal Orlando amusement park, a 14-year-old girl suffered burns to several areas of her body when another passenger's e-cigarette exploded. After a passenger's replacement Samsung Galaxy Note 7 smartphone burst into flames inside the plane's cabin, a Southwest Flight was evacuated while on the runway. When an 8-year-old plugged in her brand-new hoverboard to charge for the first time, it exploded and caught the girl's bedroom on fire.

Hand-held video cameras were among the first devices powered by lithium-ion batteries, which were introduced to the market in the early 1990s. Now, they are used to power just about everything. They are extremely popular because they charge faster, last longer, and have a higher power density for more battery life than traditional battery technology. Moving lithium particles between a negative and positive electrode to charge and discharge, the batteries create energy and a certain amount of heat.

Lithium-ion batteries catch fire or explode due to a faulty manufacturing process. There are at least two common situations that can quickly turn an ordinary electronic device into a dangerous object. First, thermal runaway occurs when a lithium-ion battery is defective and when the heat generated by the charging and discharging ignites the electrolytes—commonly known as overheating. This will cause a fire or explosion.

The other common situation that can cause a lithium-ion battery to catch fire or explode occurs when the battery is susceptible to puncture or tear. The battery is susceptible if its outside shell or the barrier separating the electrodes is defective. Even a slight breach can allow the positive and negative electrodes to touch and create a short circuit. The instant electrical discharge from the short circuit can be explosive.

Although businesses and researchers continue exploring new battery technologies, these lithium-ion batteries remain the standard. If you would like more information about lithium-ion batteries, you can contact Will Sutton, a lawyer in our Toxic Torts Section. He can be reached at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Sources: Righting Injustice; *Orlando Sentinel*; CNN; CBS News; *New York Times*; *The (Lebanon) Daily News*; U.S. Consumer Product Safety Commission; Associated Press; and Samsung

Could The F-35 Fighter Jet Be Déjà Vu For Military Personnel?

Two F-35 fighter jets caught fire during training flights within a month of each other this fall, according to Reuters Business Insider. In September, a U.S. Air Force F-35-A caught fire as soon as the pilot started the engine. The following month, a U.S. Marine Corps F-35B Joint Strike Fighter's internal weapons bay caught fire while in flight. The pilots were unharmed in both mishaps. Even with these recent, back-to-back incidents, both the Air Force and Marine Corps have declared the F-35 fighter jet "combat ready" and have begun integrating it into their squadrons.

This could be a discouragingly familiar refrain. In 1991 the U.S. Department of Defense (DOD) began testing the V-22 Ospry. The hybrid tilt-rotor aircraft was intended to function as both a helicopter and an airplane. The two aircrafts have completely different functions, which is a key reason the Ospry does not perform either function well. It has claimed 37 lives including 30 who died during testing accidents from 1991 to 2000. Despite the "intense Congressional attack" following the deaths of 23 Marines in two crashes of test flights in 2000, the DOD officially deployed the V-22 in 2007.

The most recent V-22 crash happened in May 2015 at Bellows Air Force Station in Hawaii—killing 21-year-old Lance Cpl. Matthew Determan and 24-year-old Cpl. Joshua Barron, both Marines. Earlier this year, Determan's family hired the Beasley Allen Law firm and Honolulu lawyer Melvin Y. Agena to represent them in a wrongful death lawsuit alleging the aircraft is dangerous and defective. Still, the DOD stands by the aircraft.

Similarly, the F-35 has its critics and problems, too. According to Reuters Business Insider, the Pentagon's chief weapons tester noted in a July 2016 memo that the F-35 program was "not on a path toward success but instead on a path toward failing to deliver." The fifth generation fighter presents stealth and advanced electronic attack and communications systems, but has been plagued throughout development with electrical problems, software issues, and glitches with its advanced helmet system.

In June 2014, the first F-35 engine fire occurred while one fighter was preparing to take off from Eglin Air Force Base in Florida. Following the incident, the *New York Times* reported that the fleet was grounded for the second time in a month. A *Popular Mechanics* article explained that the cause of the 2014 incident was fixed and the entire fleet was retrofitted to address the problem.

The cause of the latest F-35 fire, which occurred in October, remains undetermined. However, Popular Mechanics reports that investigators believe the September fire "started after strong tailwinds redirected heat from the fighter's engine during startup procedures." Although both 2016 incidents remain under investigation, there has not been a fleet-wide grounding.

The U.S. Congress has also been critical of the fighter's manufacturer, Lockheed Martin Corporation (Lockheed). In April, the U.S. Senate Armed Services Committee held a hearing on the F-35 program. A CNN report quoted from hearing testimony that it is the "largest and most expensive acquisition program in the history of the Department of Defense." During the hearing, committee chairman Sen. John McCain (R-Ariz.), criticized the numerous delays, design problems and spiraling costs, which has almost doubled the initial estimate, which currently is nearly $400 billion for 2,457 fighters. Expressing frustration, McCain questioned the rationale of investing in a program that is not likely to match the defense capabilities of the nation's potential opponents such as China and Russia.

There is much at stake with the F-35 program. However, as former Secretary of Defense Chuck Hagle said following the first F-35 fire in 2014, "the safety of our military men and women should remain our top priority (as reported by Breaking Defense)." Repeating the mistakes made with other technological advancements in the military, such as the V-22 Ospry, will result in more unnecessary deaths of those serving our country.

If you need more information on this subject contact Mike Andrews, a lawyer in our firm's Personal Injury & Product's Liability Section, at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com. Mike handles aviation litigation for the firm.

Sources: NBC News, Righting Injustice, Reuters *Business Insider*, *New York Times*, *Popular Mechanics*, CNN, Breaking Defense

Missouri Gun Shop Agrees To Pay $2.2 Million To Settle Wrongful Death Lawsuit

A Missouri firearms shop has agreed to settle a wrongful death lawsuit. This outcome may serve as a precedent that will have national repercussions on gun dealer liability. Don't be shocked to learn that is a view not shared by those in the gun making and selling industry. Odessa Gun & Pawn will pay $2.2 million to settle the lawsuit. It was alleged that the gun shop negligently sold a weapon to a mentally ill woman who used the gun to kill her father.

In her lawsuit, Janet Delana said the Odessa, Mo., shop "negligently sold or entrusted a gun" to her mentally ill adult daughter, Colby Sue Weathers, despite prior warnings. Ms. Delana called Odessa Gun & Pawn on June 25, 2012, to urge them not to sell a firearm to her daughter because she posed a potential safety risk to herself and others. But two days after Ms. Delana's call, the daughter bought a handgun from the shop. About an hour later, the 38-year-old woman fatally shot her father, Tex Delana.

In May 2012, Ms. Weathers bought a pistol from the same store. Afterwards, she had suicidal intentions, and the family took the gun for her safety. The complaint alleged the shop knew or should have known during the June sale that Ms. Weathers had a history of mental illness and thus posed a risk to public safety. Ms. Weathers was charged with murder and later found not guilty due to her mental impairment. She was committed to a state mental hospital.

The Defense lawyers tried to have the case thrown based on the Protection of Lawful Commerce in Arms Act (PLCAA). But in April, the state Supreme Court unanimously decided to allow the lawsuit to proceed. The appellate court decided that a gun store could be held responsible for the fatal shooting despite the PLCAA. The 2005 federal shield law grants firearms companies broad immunity from legal actions for weapons used in crimes. The measure has prevented a large number of lawsuits brought by gun violence victims and their families from going to trial. The law bars negligence claims, but among its exceptions is "negligent entrustment," which was cited in the Missouri case.

The Brady Campaign to Prevent Gun Violence has declared the settlement a landmark victory for the gun safety movement. Jonathan Lowy, lead counsel for Delana, who also serves as Director of the Brady Center's Legal Action Project, said in a statement:

> *Today's settlement sends the latest resounding message to gun dealers across the country that if they don't clean up their act, they will be forced to pay the consequences when they choose to irresponsibly arm dangerous people with guns.*

Hopefully, this case will serve that purpose. We can't continue to act irresponsibly in this area of concern. There can be responsible gun control without doing any damage to rights of individuals protected by the U.S. Constitution.

Source: *Newsweek*

VII. MASS TORTS UPDATE

A One Billion Dollar Verdict In The Third J&J Hip Implant Bellwether Trial

A Texas federal Court jury found against Johnson & Johnson's DePuy Orthopaedics Inc. unit and awarded more than $1.04 billion in the six-plaintiff bellwether trial that has been going on for two months. The case involved the metal-shedding artificial hips that are part of the Pinnacle line. Jurors deliberated for less than a day and found J&J and DePuy had negligently designed the hip implant, had failed to warn surgeons about dangerous conditions related to the implant and had concealed the implant's risks.

The verdict includes between $4 million and $6 million per plaintiff in damages for physical injuries and pain and suffering, and $1 million each to four spouses for loss of consortium. More than $504 million was awarded against DePuy and J&J in punitive damages. It's very significant that the jury found the companies had acted with "malice" or "fraud."

DePuy and J&J were each found liable for negligent design defect, negligent failure to warn, strict liability failure to warn, failure to recall, negligent misrepresentation, intentional misrepresentation and fraudulent concealment. J&J was also found liable for aiding and abetting DePuy in each of the seven causes of action. The jury found that J&J did not conspire with DePuy on the design defect claim, but did find J&J liable for conspiracy on the other six claims.

The case involved six Plaintiffs from California, who each had to undergo "revision surgeries" after being fitted with metal-on-metal artificial hip systems made by DePuy, known as the Pinnacle hip system's Ultamet variety. Friction between the device's metal socket and metal ball head rubs away billions of microscopic particles with every step, polluting the bloodstream and surrounding tissue with "wear debris" over time. The Plaintiffs proved that J&J knew the device was riskier than others available, but still marketed it aggressively, even paying "kickbacks" to a number of surgeons.

In closing arguments, Mark Lanier, one of the Plaintiffs' lawyers, asked the jury to impose a stiff enough penalty on Johnson & Johnson that the company would change its behavior with future medical devices. He suggested that a $500 million punitive award would hardly be felt by a company worth $72 billion. The proof at trial revealed some very bad conduct and the jurors recognized how bad it was.

The next bellwether trial is set to begin in September 2017, with the parties preparing for 10 plaintiffs all from New York. J&J has objected to proceeding with any more trials in the multidistrict litigation (MDL) until the appeals from the second bellwether trial have been resolved. The company also contended the Texas federal court lacks jurisdiction over out-of-state residents.

The patients are represented by W. Mark Lanier of The Lanier Law Firm; Richard Arsenault of Neblett Beard & Arsenault, Jayne Conroy of Simmons Hanly Conroy; and Khaldoun Baghdadi of Walkup Melodia Kelly & Schoenberger, among others. The lawyers for the Plaintiffs have done a tremendous job against a company that appears to have lost its moral compass. The MDL is ***In re: DePuy Orthopaedics Inc. Pinnacle Hip Implant Products Liability Litigation*** in the U.S. District Court for the Northern District of Texas.

The Physiomesh Litigation

Physiomesh, intended for hernia repair, is a flexible polypropylene mesh designed to reinforce the abdominal wall, preventing future hernias from occurring. Even though there are several types of hernias, most occur when an organ or tissue protrudes through a weak spot in abdominal muscles. This can cause a bulge in the stomach or groin region that aches or burns, and it can also cause heartburn, vomiting and occasionally swelling of the testicles. The condition often requires surgery where mesh, like Physiomesh, which is intended for laparoscopic use, is used to fill in a hole in the abdominal muscle or laid over or under it to prevent any further protrusions.

On May 25, 2016, Ethicon, a subsidiary of Johnson & Johnson and manufacturer of Physiomesh, issued a voluntary recall of the product due to high rates of reoccurrence. In a safety notice, the company said unpublished data using two large independent hernia registries found the need for additional operations increased when Physiomesh was used in comparison to when other similar meshes were used in abdominal, or ventral, hernias.

The company said it has not been able to pinpoint a cause for the product's failure, but in the health interest of patients, which are at a higher risk of needing additional surgery or experiencing another hernia, Ethicon removed the product from the global market and advised medical professionals who previously treated patients with the product to "follow patients in the usual manner."

A number of other studies have found Physiomesh to lead to additional hernias or to be the cause of additional surgeries, organ perforation, mesh migration, sepsis and even death. A study published in the journal *Surgical Endoscopy* concluded patients treated with Physiomesh suffered "significantly greater hernia recurrences and postoperative pain compared with (Ventralight patients)."

The U.S. Food and Drug Administration (FDA) cleared Physiomesh through a 510k submission, known as a Traditional or Abbreviated Premarket Notification Submission in April 2010. The submission classifies a product as "substantially equivalent" to other products on the market and allows it to forgo providing the extensive safety and efficacy testing required of new products or products determined to have undergone significant changes. Ethicon maintained the mesh was substantially similar to Proceed mesh it already had on the market at the time, though Proceed mesh was recalled in October 2010 due to layers of the mesh separating once implanted.

Many reported complications in hernia surgeries, according to the FDA, are associated with now-recalled surgical mesh, which it credits as the main cause of bowel perforation and obstruction complications. Defects in Physiomesh were found only after it was put on the market.

Lawyers in our firm's Mass Torts Section are currently investigating cases involving serious injury or death as a result of Ethicon's Physiomesh. If you or a loved one has received hernia treatment that included Physiomesh and have experienced complications, reoccurring hernias or the need for additional surgeries, you may have a claim. If you need help or just need more information, contact Matt Munson by calling toll free at 800-898-2034 for a free, no-cost, no-obligation evaluation of your case.

Jury Finds Johnson & Johnson And Imerys Liable For $70 Million In Third Trial

After almost a month of trial, in our third lawsuit against J&J, the jury found for our client, Deborah Giannecchini, and awarded $70.075 million in damages. This is the third jury to find Johnson & Johnson legally responsible for failing to warn of a known risk that talc—containing body powder, Baby Powder, can cause ovarian cancer. For the first time, however, the jury also held Johnson & Johnson talc supplier Imerys Talc America liable as well.

The jury found that Baby Powder contributed to the development of Ms. Giannecchini's ovarian cancer. The verdict includes $575,000 in medical damages, $2 million in compensatory damages, and $65 million in punitive damages against Johnson & Johnson and $2.5 million in punitive damages against Imerys.

Ms. Giannecchini was 59 when she was diagnosed with Stage IV ovarian cancer four years ago. Since then, she has gone through multiple surgeries and chemotherapy regimens. Ms. Giannecchini used Johnson & Johnson's Baby Powder for feminine hygiene for more than 40 years. She clearly met the duration and frequency requirements.

Another jury has now heard the evidence proving a link between Johnson's Baby Powder and ovarian cancer, and has found a clear connection. When is enough going to be enough? Despite repeated verdicts that hold the company accountable, Johnson & Johnson has refused to remove its talcum powder products from shelves, has refused to warn consumers about the risk, and continues to deny its responsibility. It's time for this company to come clean and put consumer health and the well-being of people ahead of profits.

Ms. Giannecchini was represented by Beasley Allen attorneys Ted G. Meadows, David P. Dearing, Danielle Ward Mason, Lauren Razick, and Ryan Beattie, along with Allen Smith of The Smith Law Firm, Tim Porter of Porter Malouf, and Stephanie Rados, Jim Onder, and Wylie Blair of the St. Louis firm of Onder, Shelton, O'Leary & Peterson, LLC.

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

Source: BA staff & website

New Whistleblower Evidence Used In Third Talc Trial

The third trial in St. Louis had a new wrinkle. After seeing media reports about the first two verdicts against Johnson & Johnson, a whistleblower came forward with some shocking information. An employee of a company that had been hired by Johnson & Johnson to review adverse event reports involving the company's Baby Powder realized she had some information that could be devastating to Johnson & Johnson.

This person first approached Johnson & Johnson to reveal that she was being instructed to change the adverse event reports. Instead of doing the right thing, Johnson & Johnson ignored this employee and refused to make any changes in its adverse event reporting system. The employee then decided to contact our law firm. We called the whistleblower to the stand as a rebuttal witness in our case.

Johnson & Johnson tried to prevent the jury from hearing any testimony from the whistleblower witness who said the company instructed her to alter Baby Powder adverse event reports. These reports are sometimes used by the U.S. Food and Drug Administration (FDA) to assess whether a product is associated with a disease such as cancer. Needless to say, this testimony from a whistleblower is strong evidence of Johnson & Johnson's continuing disregard for women's health and safety.

For questions about the Talc litigation contact Ted Meadows at Ted.Meadows@beasleyallen.com. If you have questions about our Whistleblower Litigation Team, contact Andrew Brashier, a lawyer in the firm's Consumer Fraud & Commercial Litigation Section, at Andrew.Brashier@beasleyallen.com or by phone at 800-898-2034.

J&J Settlement Ends Latest Risperdal Case Before Trial

Johnson & Johnson has agreed to a settlement in order to avoid a trial that was slated to begin in Pennsylvania state court on Nov. 1 in the latest case over abnormal breast growth that adolescent boys have suffered after taking the antipsychotic drug Risperdal. The case was filed by the family of a boy (identified only as "N.F.") who allegedly began using Risperdal at age 6 to treat symptoms of Asperger's syndrome. The terms of the settlement are confidential.

The case would have been the sixth case to go to trial over claims that J&J subsidiary Janssen Pharmaceuticals Inc. worked to obscure the risk of abnormal breast growth, a condition known as gynecomastia, faced by young boys taking the powerful antipsychotic medication.

This would have been the first case to go to trial since a jury hit J&J with a $70 million verdict on behalf of a Risperdal plaintiff in July. There are now more than 2,000 Risperdal-related cases pending as part of a mass tort program in Philadelphia. The three other verdicts in Risperdal cases tried in Philadelphia have resulted in $4.75 million in damages for Plaintiffs. In another case, there was a win for J&J. A jury in that case found there was insufficient evidence to show the Plaintiff's injuries had been caused by the medication. The successful cases are all either tied up in post-trial motions or on appeal to the state's Superior Court.

The Plaintiffs are represented by Tom Kline and Christopher Gomez of Kline & Specter PC, and Jason Itkin, Kelly Woods, Cesar Tavares, Cory Itkin and Santana McMurrey of Arnold & Itkin LLP. The cases are *N.F. et al. v. Janssen Pharmaceuticals Inc. et al.* and *C.W. et al. v Janssen Pharmaceuticals et al.* both before the Court of Common Pleas of Philadelphia County, Pennsylvania.

Source: Law360.com

Xarelto Lawsuits On The Rise As The Next MDL Bellwether Trial Date Nears

To date, more than 15,680 lawsuits have been filed across the country against the makers and distributors of Xarelto. Of those cases, more than 14,000 are pending in New Orleans, La., in the multi-district litigation (MDL 2592) overseen by U.S. District Court Judge Eldon Fallon. Beasley Allen lawyer Andy Birchfield serves as Co-Lead Counsel for the Plaintiffs Steering Committee. There are also approximately 1,285 state court cases pending in the Philadelphia Court of Common Pleas, Pennsylvania and additional state court cases pending in Delaware, California and Missouri.

On Sept. 21, 2016, the MDL Court entered Case Management Order No. 2A, amending CMO No. 2 to reset bellwether trial dates and deadlines. The first Xarelto MDL Bellwether trial is scheduled to begin on March 13, 2017. In Pennsylvania state court, Judge Arnold New (presiding over the Philadelphia Court of Common Pleas) consolidated Xarelto litigation, and directed the parties to select 10 Bellwether cases from the pool of more than 1,000 filed cases and get them ready for trial starting in the Summer of 2017. The outcomes of bellwether trials can provide insight into how other juries might rule in similar lawsuits, and potentially help bring an entire litigation to resolution.

Xarelto is a blood thinner manufactured by German drug maker Bayer AG and distributed in the U.S. by Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson. Xarelto entered the U.S. market in July 2011, and is currently approved for six indications, including reducing the risk of stroke in patients with non-valvular atrial fibrillation; treating deep vein thrombosis and pulmonary embolism, and reducing the recurrence of these conditions; and preventing blood clots in patients following knee or hip replacement surgery.

Xarelto carries a significant risk of severe, uncontrolled internal bleeding, with bleeding most often occurring in the gastrointestinal tract or brain. Xarelto has been linked to gastrointestinal bleeds, brain bleeds and bleeding deaths, and, unlike warfarin, there is currently no antidote to reverse the blood thinning qualities of Xarelto in the event of a bleeding emergency. Xarelto carries many black box warnings, the most serious kind issued by the U.S. Food and Drug Administration (FDA).

According to the Institute of Safe Medication Practices, data from the FDA shows that Xarelto accounted for the largest number of reported cases of domestic, serious injury among regularly monitored drugs in 2015. In 2015, there was a total of 10,674 reports involving patients on Xarelto, including 1,121 patient deaths and 4,508 injuries requiring hospitalization. The most frequent reports involved bleeding on the brain and in the intestines.

For more information, you can contact Melissa Prickett, a lawyer in our firm's Mass Torts Section, at 334-269-2343 or 800-898-2034, or email melissa.prickett@beasleyallen.com.

Wright Medical Technology Agrees To $240 Million Hip Implant Settlement

Wright Medical Technology has agreed to a $240 million settlement to end about 1,300 claims in consolidated litigation in Georgia federal court and California state court over its metal-on-metal hip implants. This puts an end to the majority of the suits that were filed over the implants. Under the terms of the settlement, 1,292 patients who had to go through revision surgery within eight years of their original Conserve, Lineage or Dynasty hip implants are eligible for the settlement. Those implanted with the Conserve Cup—the device with the most frequent failures—can receive $170,000, while those who had the metal-liner Dynasty and Lineage devices can recoup $120,000, according to a statement from the Plaintiffs' leadership counsel. Wright Medical CEO Robert Palmisano said in a statement:

> *This settlement addresses approximately 85 percent of the known U.S. revision claims that do not have potential statute of limitations issues and removes a great deal of the uncertainty that has been associated with this litigation.*

As of September, there are about 600 metal-on-metal hip implant revision claims that won't be included in the settlement, as well as 700 metal-on-metal hip implant non-revision claims that are also included in the settlement. The plaintiffs' leadership counsel said in a statement:

> *During the negotiations with Wright Medical, it was made clear that claims for revised Wright metal-on-metal hips that are not included in this settlement will be part of subsequent settlement programs.*

The first bellwether trial in the multidistrict litigation (MDL) in Georgia federal court ended in a $11 million verdict last November for the Plaintiff, Robyn Christiansen. That verdict was later reduced by the court to $2.1 million.

U.S. District Judge William S. Duffey left intact the $1 million in compensatory damages the jury awarded to Christiansen for complications arising from her Wright Conserve Hip Implant System, but reduced the punitive damages award from $10 million down to $1.1 million. The judge concluded that while the company may have mislead doctors and consumers about the safety of the hip system, at least part of its motivation was also to improve the quality of life for active patients by providing an innovative hip system at a time when the market was full of products that failed regularly.

The MDL was established in February 2012. Ms. Christiansen—one of many recipients of the Wright Conserve Hip Implant System, which allegedly causes damage to soft tissue surrounding the device—had her case selected by the court as the first bellwether trial. The Plaintiffs leadership counsel is represented by Michael L. McGlamry of Pope McGlamry; Raymond P. Boucher of Boucher; Helen Zukin of Kiesel Law, Peter Burg of Burg Simpson, Christopher Yuhl of Yuhl Carr; Sean Jez of Fleming Nolen & Jez; and Ellen Relkin of Weitz & Luxenberg.

The cases are *In re: Wright Medical Technology Inc., Conserve Hip Implant Products Liability Litigation*, case number 1:12-md-02329, in the U.S. District Court for the Northern District of Georgia, and *In re: Wright Hip System Cases,* Judicial Council Coordination Proceeding No. 4710, in the Superior Court of the State of California, County of Los Angeles.

Source: Law360.com

Actos Settlement Update

The Claims Administrator has been very busy reviewing the more than 10,000 claims enrolled in the Actos Settlement Program. Interim settlement payments began in late summer and continue as the Claims Administrator works very hard to complete the review process.

The Claims Administrator will begin evaluating Extraordinary Injury Fund (EIF) claims in the coming weeks. The Master Settlement Agreement provided for the EIF to provide additional compensation for those claimants who had minor children when they were diagnosed with bladder cancer, suffered economic damages of more than $200,000, or suffered other extraordinary injuries that were not compensated by the settlement program. EIF claims packages were due to be submitted on July 18, 2016.

We expect to receive EIF payments and final settlement payments for the claims lawyers in our firm's Mass Torts Section submitted on behalf of our clients during the first half of 2017. If you have any questions about the terms of the settlement or the status of a particular claim, contact Liz Eiland or Roger Smith, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Liz.Eiland@beasleyallen.com or Roger.Smith@beasleyallen.com.

The Proton Pump Inhibitors Litigation

So far, 15 lawsuits have been filed in federal courts around the country alleging that a group of commonly-used heartburn medications called proton pump inhibitors (PPIs) caused Plaintiffs to develop kidney disease. Lawyers anticipate that as many as 100 more cases will be filed in the coming weeks, with hundreds more to follow in 2017.

On Oct. 17, 2016, six of the federal-court Plaintiffs filed a Motion for Consolidation and Transfer, requesting that the U.S. Judicial Panel on Multidistrict Litigation (JPML) consolidate the PPI cases in the U.S. District Court for the Middle District of Louisiana. A multidistrict litigation (MDL) transfers all cases pending in federal court to one venue for purposes of pre-trial discovery. Consolidation serves the convenience of the parties, witnesses, counsel, and the judicial system.

An MDL can also promote fairness by avoiding the possibility of inconsistent pretrial rulings with respect to the scope of discovery, causation, and other factual and legal issues. While this allows Plaintiffs to work together on issues of science and discovery, each Plaintiff maintains his or her own action.

PPIs are a group of drugs that block the production of gastric acid. Currently, there are numerous drugs that fall into this category, including Nexium, Prilosec, and Prevacid, with several options now available over-the-counter. PPIs were initially approved for short-term use for the treatment and prevention of gastric acid related conditions, including active duodenal ulcer, Gastroesophageal Reflux Disease (GERD), NSAID-associated gastric ulcers, and pathological hypersecretory conditions. They were later approved to treat frequent heartburn.

Beginning in the 1990s, studies have linked PPIs, including Nexium, Prevacid, and Prilosec, to kidney problems, including Acute Interstitial Nephritis (AIN). AIN is a condition where the spaces between the tubules of the kidney cells become inflamed. Later studies have shown that PPI users also have an increased risk of Chronic Kidney Disease (CKD). In December 2014, the labels of prescription PPIs were updated to include a warning about AIN. However, there is no such warning for the over-the-counter versions of these medications. Neither prescription nor over-the-counter PPI medications warn of the risk of CKD.

Lawyers in our firm's Mass Torts Section 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 Liz Eiland, lawyers in the Section at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Liz.Eiland@beasleyallen.com.

Sources: www.fda.gov and *In re: Proton-Pump Inhibitor Products Liability Litigation*, MDL No. 2757, Memorandum in Support of Plaintiffs' Motion for Transfer of Actions to the United States District Court for the Middle District of Louisiana Pursuant to 28 U.S.C. § 1407 and JPML Rule 7.2 for Coordinated and Consolidated Pretrial Proceedings (Oct. 17, 2016)

Discovery Deadline Is Extended And Bellwether Trial Dates Set For Bard IVC Filter Litigation

In the Bard IVC Filters Products Liability Litigation, multidistrict litigation (MDL) No. 2461, the Court conducted the sixth case management conference with the parties on Oct. 14, 2016, to address matters relating to the production of additional documents and the need to adjust the discovery and trial schedule accordingly. The Court ordered April 21, 2017 as the new deadline for selection of bellwether Plaintiffs. The Court further noted its intention to complete bellwether selection in early May 2017 in time to hold the first bellwether trial in the Fall of 2017. The Court noted that other bellwether trials may also be possible before the end of 2017.

Retrievable IVC filters are wire devices that are placed in the vena cava, the largest vein in the body. They are designed to stop blood clots from reaching the heart and lungs, and are recommended for patients who cannot take blood thinners. The devices are made by 11 manufacturers, including C.R. Bard, Cook Medical, and Johnson & Johnson. Permanent IVC filters have been used successfully in patients since the 1960s. Retrievable IVC filters were introduced in 2003 and promoted for use in patients undergoing bariatric, trauma and orthopedic surgery.

Since the retrievable IVC filters hit the market, hundreds of complications have been reported including migration, fracture, and perforation leading to embolism, organ damage, and death. In some cases, pieces of the device or the entire device have punctured the heart or migrated into the spine. As a result, lawsuits are mounting against manufacturers of these devices.

To date, Cordis IVC Filter Litigation is consolidated in California State Court, Bard IVC Filter Litigation is consolidated in Arizona (MDL 2641), and Cook Medical IVC Filter Litigation is consolidated in Indiana (MDL 2570). For more information, contact Melissa Prickett or Liz Eiland, lawyers in our firm's Mass Torts Section, at 800-898-2034 or email Melissa.Prickett@beasleyallen.com or Liz.Eiland@beasley-allen.com.

FDA Launches New Site

On Oct. 21, the FDA unveiled a new portal on its website for reporting allegations that a medical device manufacturer or marketer is violating the law. The website, called "Reporting Allegations of Regulatory Misconduct," contains a short online form to submit reports of alleged wrongdoing. An example would be marketing a device without FDA approval. The complaints can be submitted by anyone and also can be anonymous. According to the FDA, it will monitor each allegation along with other sources and decide if further investigation is warranted. Further action could involve a warning letter to the company, an inspection of the plant or a request for a recall of the device. You can access the website by going to http://www.fda.gov/MedicalDevices/Safety/ReportingAllegationsofRegulatoryMisconduct/default.htm?source=govdelivery&utm_medium=email&utm_source=govdelivery.

VIII. AN UPDATE ON SECURITIES LITIGATION

Judge Approves The $175 Million BP Settlement In Class Action Lawsuit

A Texas federal judge has preliminarily approved the $175 million settlement between BP PLC and a class of investors alleging the company downplayed the magnitude of the Deepwater Horizon oil spill in the weeks following the blowout. U.S. District Judge Keith P. Ellison rejected a bid by 135 institutional investors to modify the settlement opt-out procedures. BP's settlement resolves a certified class action alleging the company misrepresented the seriousness of the explosion and its aftermath. As all of us now know, 11 workers were killed and an estimated 4.9 million barrels of crude oil were spilled into the Gulf of Mexico, causing tremendous harm and damage.

The class covers anyone who purchased ADSs between April 20, 2010, when the explosion occurred, and May 28, 2010, when it became apparent that the oil flow from the broken well head was much higher than initially disclosed by BP. If that information had been available to the market, the class alleged, the price of BP stock would have been lower when they bought their shares.

The Plaintiffs Steering Committee for the individual action is comprised of Pomerantz; Spector Roseman Kodroff & Willis; Kessler Topaz Meltzer & Check; and Kirby McInerney. The settlement class is represented by lead counsel Cohen Milstein Sellers & Toll and Berman DeValerio. The MDL is *In re: BP PLC Securities Litigation* in the U.S. District Court for the Southern District of Texas.

Source: Law360.com

A Victory For The SEC In Insider Trading Trial Of Former InterMune Director

A California federal jury found last month that a former InterMune director tipped off a friend about the pending European approval of the pharmaceutical maker's lung disease drug. Thus handed the U.S. Securities and Exchange Commission (SEC) a win in its insider trading suit against the two men. Dr. Sasan Sabrdaran, a former director at InterMune, was accused of giving his friend Farhang Afsarpour confidential information about European drug approval for the company's Esbriet medication, against the company's policies and in violation of federal securities laws.

Andrew Ceresney, director of the SEC's Division of Enforcement, said he was pleased with the jury's verdict. The jurors found that Sabrdaran shared confidential information with his friend, who used it to earn $1 million in the stock market, "trading at the expense of ordinary investors who played by the rules. Ceresney said in a statement that "this jury verdict reaffirms our commitment to aggressively root out and prosecute insider trading schemes in order to protect the integrity of our markets."

The SEC's case rested on the timing of Afsarpour's bets, which often coincided with phone calls and text message exchanges with his friend. Afsarpour bet on the Esbriet drug's approval in December 2010, even though all public information and market analysis suggested the decision wouldn't come down until the first quarter of the following year based on the standard 210-day timeline for these applications. Sabrdaran knew the drug's application was progressing so smoothly, though, that InterMune had gotten approval to expedite the process.

It was argued by the lawyers representing the Defendants that those communications between the two friends were based on personal matters. They also said that anyone who looked on the European Union's Committee for Medicinal Products for Human Use website would know that an earlier decision was possible, and argued Afsarpour bet cautiously, using limit orders so his purchases would only go through if the stock dropped to a low price and a stop-loss order that reduced risk by selling if the price dropped below a certain price once he'd bought it. At press time, the judge had yet to rule on remedies.

The case is *U.S. Securities and Exchange Commission v. Sasan Sabrdaran et al.* in the U.S. District Court for the Northern District of California.

Source: Law360.com

IX. BUSINESS LITIGATION

Judge Approves $38 Million Deutsche Bank Silver Price-Fixing Settlement

A New York federal judge has given preliminary approval to the $38 million settlement between Deutsche Bank AG and a class of silver investors. The settlement was in multidistrict litigation accusing the German bank, along with other major banks, of conspiring to fix the price of silver. U.S. District Judge Valerie Caproni approved the settlement. Judge Caproni said that the settlement was a fair, reasonable and adequate end to the investors' claims against the German bank. Judge Caproni said in her order:

The court finds that the settlement agreement was entered into at arm's length by experienced counsel and is sufficiently within the range of reasonableness.

In addition, Judge Caproni certified, for the purposes of the settlement, a class of investors who participated in U.S.-related trades of silver or silver derivatives dating back to January 1999. Lowey Dannenberg Cohen & Hart PC was named class counsel. The suit had alleged Deutsche Bank, HSBC Holdings PLC and Bank of Nova Scotia colluded to fix the price of silver futures to ensure the banks received high returns as part of The London Silver Market Fixing Ltd., which has set the price of physical silver since 1897.

In October 2014, the U.S. Judicial Panel on Multidistrict Litigation centralized the litigation in the Southern District of New York. UBS AG, which was also named in the suit, already secured its exit from the dispute. The bank had argued in its own motion that it should be removed from the case because the plaintiffs admitted UBS had no role in the silver-pricing company at the heart of the alleged scheme. UBS said the allegations against it were inadequate and implausible. Judge Caproni agreed early last month, dismissing the claims against UBS on the grounds that the investors failed to state a claim against the Swiss bank.

The plaintiffs are represented by Barbara J. Hart, Vincent Briganti, Geoffrey M. Horn, Raymond Girnys, Christian P. Levis and Michelle E. Conston of Lowey Dannenberg Cohen & Hart; and James J. Sabella, Robert G. Eisler, Charles G. Caliendo, Peter A. Barile III of Grant & Eisenhofer. The case is In re: London Silver Fixing Ltd. Antitrust Litigation in the U.S. District Court for the Southern District of New York.

Source: Law360.com

Judge Gives Final Approval To $125 Million Settlements In Auto Parts MDL

A Michigan federal judge has granted final approval to a number of settlement agreements that will see car parts manufacturers pay about $125 million in total to settle price-fixing allegations by dealerships. U.S. District Judge Marianne O. Battani, who is overseeing the multidistrict litigation, said in her order that the agreements, reached in litigation covering various individual auto parts, were fair, adequate and reasonable. Judge Battani said:

The settlements reflect both the strengths of the auto dealers' claims and the risk that the settling defendants may prevail on some or all of their defenses.

Among the companies involved in the agreements are Denso Corp., Sumitomo Electric Industries Ltd. and NSK Ltd. The settlements cover litigation over car parts such as air conditioning systems, wire harnesses and heater control panels. The cases are part of an MDL that followed the U.S. Department of Justice's launch of an ongoing investigation into the auto parts industry.

The government alleges that the manufacturers, marketers and sellers of the parts conspired to raise prices they charged automakers. So far, the investigation has led to approximately $2.4 billion in criminal fines paid to the U.S. Department of Justice. The 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, according to the government.

A number of direct purchasers, dealerships and vehicle buyers subsequently brought lawsuits against companies named in the investigation. The lawsuits accuse the companies of forcing the plaintiffs to pay more for the automotive products than they would have paid if the illegal conduct did not occur. This summer, Judge Battani granted final approval to $225 million in settlements between auto parts end payors and companies including Nippon Seiki Co. Ltd., Panasonic Corp., Hitachi Automotive Systems Ltd. and Sumitomo.

In September, the judge gave her initial approval to agreements that will see Aisin Seiki Co., Schaeffler Group USA Inc. and Valeo Inc., among others, pay some $44 million to settle price-fixing allegations by end payors.

Source: Law360.com

X. INSURANCE AND FINANCE UPDATE

Blue Cross Misstated Rates For Years To Alabama Regulators

State law requires insurance companies to file their rates with state regulators at the Department of Insurance. In most instances, though, the filing requirement actually creates a bar to litigation over exorbitant prices called the filed-rate doctrine. Unfortunately for them, Blue Cross Blue Shield of Alabama (BCBS-AL) had a policy for years of charging rates different from those filed with state regulators, a practice that violated state law.

The policy resulted in both overcharges and undercharges for different groups, according to depositions. BCBS-AL's practice of not charging the rates it filed with the Department of Insurance came to light after U.S. District Judge David Proctor unsealed depositions on Oct. 18 in a massive antitrust case against 38 Blue Cross Blue Shield (BCBS) affiliates, including BCBS-AL.

In earlier issues, we have discussed the basics of the BCBS multidistrict litigation (MDL) and Beasley Allen's role in that litigation. The central issue in the case is whether BCBS affiliates in different states conspired to limit competition in order to charge higher rates to subscribers and offer lower payments to medical providers.

The Alabama case is the first of the class actions consolidated in the MDL to move forward. Blue Cross Blue Shield of Alabama dominates the market for health insurance in the state, with more than 93 percent of the market for large group policies, according to the Kaiser Family Foundation. The company has a virtual monopoly in Alabama. Next year, BCBS-AL will be the only company offering individual plans through the marketplace set up under Obamacare.

"We believed and continue to believe Blue Cross is understating the amount of the overcharging," said Barry Ragsdale, a lawyer representing subscribers and providers. Lawyers at Beasley Allen are working closely with several other national firms on the provider side of the case. However, this issue affects subscribers—individuals who purchase BCBS insurance.

In a media response, a BCBS-AL spokeswoman said the policy actually saved $75 million for a vast majority of small group subscribers, which includes businesses with 50 employees or less. The statement read:

Despite the significant overall savings, our research also revealed that a marginal portion of our small business customers may not have received the most favorable rate when renewing their health insurance. This past summer, Blue Cross self-reported this matter to our regulator, the Alabama Department of Insurance, and is fully cooperating with the Department in its review. The Company will refund affected small employer groups upon the conclusion of the Alabama Department of Insurance's review.

Blue Cross has argued that affiliates' rates have been approved as reasonable by state regulators and shouldn't be challenged in court. Department of Insurance actuary Steven Ostlund and Blue Cross Blue Shield Chief Actuary Noel Carden both testified about the charged rates in the unsealed depositions. In his testimony, Ostlund said the department had not yet determined whether the company violated a law or rule by charging different rates. A second deposition unsealed by Judge Proctor, Carden of BCBS-AL, said the policy of holding rates steady from year to year was intended to reduce the shock of big rate increases.

However, it's very significant that the company never told the Department of Insurance about the policy, Ostlund testified to that in his deposition. The company stopped holding rates in 2014, at the beginning of the Affordable Care Act. The discrepancy was discovered by Blue Cross Blue Shield officials earlier this year, according to Ostlund's testimony, a part of which reads as follows:

Q. Right. But as early as March 2012, you had put Mr. Carden on notice that violation of the Trade Practices Act was a violation of state law, correct?

A. Correct.

Q. Okay. Did you ask or were you told the dollar figures of the rates charged by Blue Cross of Alabama that were different from the filed rates?

A. They indicated that—current information indicated that they had undercharged thirty-five million to some carriers—to some employers and overcharged five million to others.

The depositions of Carden and Ostlund focus on how the Alabama Department of Insurance regulates health insurance rates submitted by Blue Cross. To further complicate the matter—and undermine the filed-rate doctrine as a defense for BCBS-AL—Federal officials declared in 2013 that Alabama had an ineffective rate review system, but recently reversed that decision—giving the state power to approve rates for Affordable Care Act plans in 2017. Barry Ragsdale said the department's failure to sanction the company for charging rates that differed from the filed rates shows that the state still does not have an effective system for policing big insurance companies. Barry said:

[BCBS-AL has] attempted to argue that they are immune from antitrust law because they have their rates approved by the Department of Insurance and that is their get-out-of-jail-free card. What this [testimony] does is knocks that leg out of their defense. It illustrates again that the Department of Insurance is underfunded and ill-equipped to regulate a market player with as much power as Blue Cross Blue Shield.

This case implicates concerted actions by all of the BCBS entities, but BCBS-AL is one of the worst players in the field with one of the highest market shares of both providers and subscribers. The big problem for both groups of Plaintiffs is that BCBS absolutely controls what they charge subscribers, and physicians have no say in determining the value of their own services. Hopefully, this litigation will even things out by reducing prices charged to subscribers and increasing provider pay, as well. If you need more information, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Source: Law360.com and *The Birmingham News*

XI. EMPLOYMENT AND FLSA LITIGATION

Providence Health To Pay $352 Million To Settle ERISA Suit

Providence Health & Services has agreed to pay nearly $352 million to settle a proposed class action accusing the nonprofit hospital chain of trying to avoid Employee Retirement Income Security Act (ERISA) requirements by claiming it fits under an exemption for churches. Two longtime nurses, Linda Griffith and Jeanette Wenzl, had sought to represent a class of more than 73,000 employees in their November 2014 complaint. They alleged that the company was violating their rights by failing to protect their retirement plan.

The Washington-based hospital will pay $50 million a year for the employees' benefit plan until it has paid $350 million, according to the terms of the proposed settlement filed by the nurses leading the suit. The remaining $1.9 million will be paid to nonvested former plan participants.

The nurses' claims mirror those of other hospital chain workers who have fought all the way to the Supreme Court to sort out the issue of whether hospitals that claim a religious affiliation can extend that to relief from following ERISA's requirements for retirement plans.

There are several other cases addressing the issue that the high court may take. One of the cases, Dignity Health, sought review from the high court of a similar decision in the Ninth Circuit. In that case, filed by employees, it was contended that skirting the rules has shorted their pension plan by $1.2 billion. Dignity won a stay of the lower court's order while it pursued its Supreme Court appeal. The company claimed it would suffer irreparable harm if it had to convert its plan to fit ERISA rules before the high court has a chance to weigh in. There are two other cases, Advocate Healthcare Network in Illinois and Saint Peter's Healthcare System in New Jersey, where the companies are requesting review of appellate decisions cutting them out of the exemption.

In those suits, the Seventh and Third circuits concluded the hospitals' retirements plans aren't excluded from ERISA as "church plans." But the hospitals argued in filings with the Supreme Court that the appellate court rulings run contrary to "longstanding positions held by the IRS, the U.S. Department of Labor and the Pension Benefit Guaranty Corp." that the organizations do not have to comply with ERISA provisions, including fiduciary obligations and minimum-funding rules.

Source: Law360.com

Wal-Mart Truckers Awarded $54 Million In Wage Class Action Lawsuit

A California federal court jury found that Wal-Mart Stores Inc. intentionally violated state wage laws by failing to pay a certified class of truckers for time spent on work-related on-duty tasks. The jurors awarded class members more than $54 million in damages. The jury found the 839 truckers were entitled to back pay for some of the unpaid tasks named in the lawsuit, awarding damages for pre-trip and post-trip inspections and California-required rest breaks. However, the jury rejected claims for washing trucks, fueling, weighing the trucks' load, waiting at vendor and store locations, performing adjustments, complying with U.S. Department of Transportation inspections, and meeting with driver coordinators.

The jurors also found that drivers were under Wal-Mart's control during federally mandated 10-hour layover breaks, during which the truckers were required to stay with their trucks. The drivers had been paid $42 for the time, not the $67 to $90 they would have earned had they been paid minimum wage during the class period. The jury awarded approximately $44.7 million to make up the difference.

At press time, liquidated damages and penalties had not been determined. In the event the trial judge finds Wal-Mart's defense was not carried out in good faith, the jury's award would be doubled. The jury found Wal-Mart intentionally failed to pay class members for more than 100,000 pay periods. Each unpaid period can carry a $250 fine, which would add approximately $25 million to the total verdict.

The suit was said to hinge on the pay codes drivers input for certain activities, such as arriving on-site and hooking a tractor to a trailer. The truckers had alleged that other required tasks like pre-inspections and post-trip inspections had no associated activity code or compensation. Wal-Mart argued that the duties the manual described were not exhaustive and that the allegedly unpaid tasks were included in other pay codes. Obviously, the jurors didn't agree with that argument.

The class is represented by Daniel M. Kopfman, Lawrence M. Artenian, Russel Myrick and Angela E. Martinez of Wagner Jones Kopfman & Artenian; Jacob M. Weisberg of the Law Offices of Jacob M. Weisberg, and Stanley Saltzman of Marlin & Saltzman. The case is *Ridgeway et al. v. Wal-Mart Stores Inc. et al.* in U.S. District Court for the Northern District of California.

Source: Law360.com

XII. PREMISES LIABILITY UPDATE

Shipper To Pay $20 Million For Oil Spill Cleanup In Mississippi

American Commercial Lines LLC has agreed to pay the federal government $20 million for removal costs and damages from a 2008 oil spill caused by a barge collision on the Mississippi. This resolves claims that were headed toward a November trial. The company and the government came to an agreement that $20 million is a "fair and reasonable" amount to repay funds spent by the federal government under the Oil Pollution Act in the aftermath of the collision. Nearly 300,000 gallons of oil were spilled into the Mississippi River. The suit stems from a July 2008 accident in which a Laurin Maritime Inc. tanker, the Tintomara, had collided with an ACL oil barge being towed by a tugboat, spilling the oil into the lower Mississippi River.

In July 2016, ACL contested some specific sets of claims in the case, including those that were submitted by businesses whose docks and boats were not directly oiled by the spill, but who lost the use of the Mississippi River because the government closed parts of it. The company also contested some reimbursement claims from contractors that the company said were inflated or not properly filed. In September, U.S. District Judge Ivan L.R. Lemelle rejected the company's efforts to challenge those claims.

Judge Lemelle in January 2015 had granted the government's motion for summary judgment on liability, finding that ACL is the "responsible party" under the Oil Pollution Act (OPA). At the time the judge also rejected ACL's defense that a third-party tugboat operator, DRD Towing Co. LLC, was solely at fault for the accident. The company's argument that it was entitled to limit its liability under the OPA was also rejected by Judge Lemelle. According to the joint stipulation filed with the court, the settlement should not be interpreted as a waiver of the company's right to challenge Judge Lemmelle's January 2015 order. The company did agree to "forego any appeal of any other orders of the district court in this case."

According to the settlement, the $20 million did not cover the government's natural resource damage claims from the incident, which were "unaffected" by the settlement and preserved. The case is *U.S. v. American Commercial Lines LLC et al.* in the U.S. District Court for the Eastern District of Louisiana.

Source: Law360.com

XIII. WORKPLACE HAZARDS

Wife Of Electrocuted Worker Files Wrongful Death Lawsuit

A lawsuit has been filed by the wife of a worker who was electrocuted at the Cohen Recycling Center. Heather Garnett, the widow of Geoffrey S. Garnett, filed the wrongful death lawsuit on the two-year anniversary of her husband's death. Garnett died on Oct. 16, 2014. The 33-year-old welder was electrocuted while helping employees replace a metal roof of an electrical transformer substation. The Defendants named in the suit are Metal Shredders Inc., Cohen Brothers Inc., DP&L and Luke Huggins of Metal Shredders.

The Plaintiff's complaint contains five counts for the injuries and damages the worker sustained and pain and suffering he experienced prior to his death. There is also a wrongful death claim for the benefit of the worker's heirs at law and/or next of kin who have or claim to have suffered damages arising out of and as a result of his death.

The Occupational Safety and Health Administration (OSHA) has announced citations for alleged safety violations it says played a part in the worker's death. Of the nine violations listed, eight were categorized as serious and one was originally listed as willful. However, that one was amended to a repeat offense. The initial penalty amount of $115,000 was negotiated to $63,250, according to OSHA online records.

OSHA also cited Cohen Brothers, Metal Shredders' parent company, with three serious safety violations for failing to train employees in electrical safe work practices. The proposed penalties of $21,000 for those violations was negotiated to $17,000.

The complaint filed by the widow alleges that Garnett "contacted or came in proximity to an energized electrical line causing him to sustain an electrical shock, internal and external burns, and multiple other serious injuries that ultimately resulted in his death." The lawsuit also alleges that inferior testing equipment may have played a role in the incident. It was alleged that "(Garnett) was informed or made to believe that this electrical line had been properly tested to confirm it was de-energized when in fact the live line tool voltage tester used was approximately 15 years old and had not been removed from service after two years as required."

Source: *Dayton Daily News*

Troubling Trend Of Temp Agencies In The Industrial Work Setting

On-the-job accidents are a common cause of injuries that lawyers in our firm see on a regular basis. As most know, workers injured on the job as a rule, are entitled to workers' compensation benefits. Workers' compensation is referred to as an exclusive remedy, meaning that it is often an injured employee's only option for recovering damages as a result of their accident. Simply put, an employee cannot sue their employer for negligence if they are subject to worker's compensation, which is a no-fault system. An injured employee will receive benefits for lost wages, medical care and rehabilitation, under workers compensation even if the worker plays some role in causing the injuries.

The no fault system provides a quick and easy remedy for minor on the job injuries. In minor injury cases, or when the employee may have contributed to their accident, it is likely the best remedy and only available option. However, if the on-the-job injury is severe, workers' compensation benefits will not adequately compensate the injured employee. For this reason, it is important to investigate severe on-the-job injuries and determine if there is a potential for any third party liability. Unfortunately, a troubling trend in employment relationships is illuminating a flaw in the system.

Workers compensation is intended to benefit both the injured employee and the employer. In theory, the system works to the benefit of each party. The injured worker is entitled to lost wages and medical care until they are able to return to work. Because the injured worker doesn't have to prove fault, the employee receives the benefits quickly. In exchange, employers are assured the injured employee will not sue them for negligence and the only remedy is statutorily limited and capped.

The employer must have workers' compensation coverage or a self-insurance fund. At the heart of the system is the employee-employer relationship. Workers' compensation should only apply to those two parties who have agreed to this give and take agreement. However, quite often third parties that are not part of the employer-employee relationship are reaping the benefits of the workers' compensation system.

In recent years, a troubling trend has emerged in the industrial work setting in Alabama. All too often, industrial plants and other labor intensive businesses are utilizing temporary work agencies, staffing agencies and labor brokers to supply workers. That is instead of hiring full time employees. In such cases the employer would not need to maintain workers' compensation coverage for the temporary workers. The companies are choosing to hire temporary labor through staffing companies.

Typically, these workers are not given any benefits from the business where they are working. Instead, the temp agency maintains workers' compensation for the employees. The plant or business pays the staffing company and in turn that company pays the worker. The result of this practice is troubling. Quite often these workers are placed in extremely dangerous jobs and not adequately trained or supervised. Inevitably, these practices can lead to catastrophic injuries.

Even though the plant or business where the employee works is not the injured worker's employer and does not maintain workers' compensation on the worker, the employee typically cannot sue for negligence or for fault of any kind. The dual employment doctrine enables the industrial plant to claim the injured worker as their employee after the fact. Despite contracts and documents clearly stating the worker is only the employee of the staffing agency, in the eye of the law the injured worker is an employee of both.

Lawyers in our firm's Personal Injury & Products Liability Section are seeing this scenario time and time again. The injured worker receives workers' compensation from the staffing agency, however the business where the worker was injured gets off the hook. In essence, industrial plants can bring on temporary workers, provide no benefits whatsoever, place the laborers in the most dangerous of jobs, injure or kill the employee, pay no workers compensation benefits and maintain protection from negligence law suits.

The workers' compensation system is intended to be a give-and-take relationship. Unfortunately, as is so often the case, working men and women get the short end of the stick on this bargain. The laborers are getting nothing in return for losing their right to sue for wrongful conduct. Our lawyers continue to fight this trend at every opportunity. Hopefully, we can create needed case law to close this loophole.

If you need more information, contact Evan Allen, a lawyer in our firm's Personal Injury & Product Liability Section, at 800-898-2034 or by email at Evan.Allen@beasleyallen.com.

Department Of Labor's New Fiduciary Rules Facing Challenges

Opponents to the new fiduciary Rule promulgated recently by the Department of Labor (DOL) believe they have a good shot at overturning that rule. At least, if you ask them, they will tell you they have made a strong case. The U.S. Chamber of Commerce and the American Council of Life Insurers (ACLI) were the lead Plaintiffs in a Dallas lawsuit, heard by Judge Barbara M.G. Lynn, that is attempting to invalidate the rule.

Other Plaintiffs in the Northern District lawsuit include the Indexed Annuity Leadership Council, the National Association of Insurance and Financial Advisors, the Financial Services Institute, Financial Services Roundtable, Greater Irving-Las Colinas' Chamber of Commerce, Insured Retirement Institute, Lake Houston Area Chamber of Commerce, Lubbock Chamber of Commerce, Security Industry and Financial Markets Association and the Texas Association of Business. The lawsuit was consolidated from three separate complaints filed in June. There are two main issues in the cases:

- whether the rule implicates First Amendment rights, and
- whether the DOL attempted to create a right of action through rule-making.

Lawyers representing the U.S. Chamber and ACLI, respectively, made clear distinctions between their case and that of the National Association for Fixed Annuities. Though distinguishing the cases, the speakers continually returned to the ruling in the first court case filed opposing the DOL rule. That ruling was issued in November by Judge Randolph D. Moss in District of Columbia District Court. Judge Moss sided with the DOL in rejecting the National Association for Fixed Annuities' request for a preliminary injunction. That decision was not surprising as the judge's tough questioning of the Plaintiff's lawyers was widely reported. Judge Lynn brought up the decision by Judge Moss several times during the hearing and said she has read the 92-page ruling.

A main argument on behalf of the Chamber and ACLI was on the free speech count of the lawsuit. The argument was that the DOL is "impermissibly regulating speech." The DOL argued that it couldn't possibly regulate speech, that it is only regulating the conduct of misleading advice. Judge Lynn didn't agree on that and said that the DOL rule does more than "regulate misleading speech; it punishes it." The DOL claims conflicts of interest are leading advisors to deliver inappropriate advice to clients. The government contended that the fiduciary rule merely requires advisors to act in the "best interest" of clients, disclose fees and accept only "reasonable compensation," which were said to be "fundamental duties."

The question before Judge Lynn is whether the Department of Labor has the right to establish a "private cause of action" with its fiduciary rule. Opponents claim only Congress can establish a private right of action, or the right for people to sue, as individuals or as a class, under an existing law.

In a 2001 Supreme Court decision, *Alexander v. Sandoval*, the high court wrote: "like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." That case is cited in the lawsuits brought against the DOL. However, the DOL denies that the rule "creates" a new private right of action.

The case hinges on how the courts view the rule's Best Interest Contract Exemption, which enables advisors to receive commission-based compensation that the rule otherwise prohibits as long as they adhere to rigorous disclosure standards and sign a contract with clients. Calling it a "complicated case," Judge Lynn conceded that she was "having a hard time" deciphering the issue. It will be most interesting to see how the judge rules in the case.

Sources: insurancenewsnet.com and plansponsor.com

XIV. TRANSPORTATION

Deadly School Bus Crash In Tennessee

The driver of an elementary school bus that crashed in Chattanooga, Tenn., killing 6 children, has been arrested and faces charges including vehicular homicide. The 24-year-old bus driver, Johnthony Walker, was charged with vehicular homicide. Walker was also charged with reckless driving and reckless endangerment. Investigators are looking at speed "very, very strongly" as a factor in the crash. It appears that Walker had a bad driving record and should have never been allowed to drive a school bus.

Six children were killed in the crash and several more are in the hospital, some in critical condition. The National Transportation Safety Board (NTSB) is in Chattanooga investigating the crash. Early indicators are that the driver was speeding at the time and lost control of the bus. For some reason the bus was also on a road that was not a designated bus route.

Durham School Services, a private company, owned the bus involved in the deadly wreck. The company had 142 crashes with injuries and three fatalities in the past 24 months, according to federal records. The records reveal at least 36 crashes with injuries and one wreck with a fatality in Tennessee during that time. There were two crashes with injuries in Hamilton County this year. The Chattanooga Police Department has confirmed the driver of the bus was involved in a school bus accident in September.

Durham School Services, based in Warrenville, Ill., has more than 13,000 vehicles and 13,000 drivers, according to the Federal Motor Carrier Safety Administration (FMCSA). The company has contracts to operate school buses in several counties in Tennessee, including Shelby and Hamilton.

Durham is a large company, and it has an overall satisfactory safety rating from the federal administration, but the records show the company has more problems when it comes to driver fitness than its peers. The administration's records on Durham state "93 percent of motor carriers in the same safety event group have better on-road performance than this motor carrier." A safety event group includes other similar bus and truck companies.

Over the past 24 months, Durham has been involved in 346 crashes, 201 of which were towaway wrecks. That data was last updated in late October. In Tennessee, the company has been involved in crashes in three counties, according to federal statistics. In Shelby County, there were 31 injuries and one fatality as a result of 27 crashes involving the company.

Source: CBS News, Associated Press

FMCSA Must Improve Its Evaluations Of High-Risk Carriers

According to a new study published on Oct. 27, 2016, by the U.S. Government Accountability Office (GAO), the Federal Motor Carrier Safety Administration (FMCSA) must improve its evaluations of high-risk motor carriers. The GAO is an independent, nonpartisan agency that works for Congress to investigate how the federal government spends taxpayer dollars. The GAO analyzed the agency's data-driven Compliance, Safety, Accountability (CSA) program's efforts from 2010 to 2015 to identify and intervene with at-risk motor carriers in an attempt to prevent problems before crashes occur.

From 2011 to 2015, fatalities involving motor carriers have increased and the GAO has recognized that interventions can play a critical role in reversing that trend; interventions that range from warning letters to on-site comprehensive investigations. While the FMCSA has transitioned to a range of more effective and efficient interventions, the GAO says "without improving the quality of information that FMCSA uses to evaluate its performance, the agency will continue to lack the information it needs to determine the extent to which it is achieving these fundamental programmatic improvements." According to GAO, FMCSA did not consistently use a "comparison group design," which considers outcomes among carriers that did and did not receive interventions, for its effectiveness evaluations.

Under the Compliance, Safety, Accountability program, FMCSA can select from a range of eight intervention types, giving the agency flexibility in addressing motor carriers' specific safety problems. These new intervention tools supplement the former compliance reviews and better utilize the agency's limited resources. CSA investigators are equipped to evaluate why safety problems are occurring, recommend remedies, encourage corrective action and invoke strong penalties or even issue out-of-service orders.

The FMCSA used only one investigation intervention type before the CSA program, the on-site compliance review. These compliance reviews required investigators to examine every part of a carrier's operation and were very resource-intensive to conduct, therefore only about 3 percent of active carriers got investigated. The GAO report recommended that FMCSA evaluate the effectiveness of individual intervention types, update cost estimates so that they are current and representative of all states, and establish complete performance measures. The U.S. Department of Transportation concurred with the recommendations and is expected to provide a detailed response very soon.

If you would like more information, contact Chris Glover, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com. Chris handles big truck litigation for the firm.

Amtrak Settles Philadelphia Derailment Claims For $265 Million

A Pennsylvania federal judge has approved a $265 million settlement for all pending claims arising out of the 2015 derailment of Amtrak train number 188 in Philadelphia, which caused eight deaths and more than 200 injuries. U.S. District Judge Legrome Davis signed off on the settlement that was negotiated by the Plaintiffs Management Committee, made up of seven lawyers, and Amtrak, saying it was appropriate because of a $295 million cap on damages under federal law and the prospect of years of protracted litigation.

Lawyers on the management committee said that the $265 million amount was equivalent to the present value of $295 million paid out in two and a half years, the likely minimum amount of time it would take to resolve more than 125 remaining cases via litigation. Lawsuits against Amtrak, also known as National Railroad Passenger Corp., started to be filed shortly after the derailment. The involved train "tumbled" off the tracks as it approached Frankford Junction in Philadelphia on its way to New York in May 2015. All seven passenger cars derailed along with the train's locomotive, injuring nearly all of the train's passengers.

In October of last year, the U.S. Judicial Panel on Multidistrict Litigation ordered Judge Davis in the Eastern District of Pennsylvania to handle the lawsuits brought by victims of the crash. The settlement agreement obligated all Plaintiffs to commit or opt out of the settlement program by Nov. 21. Individuals who have yet to file lawsuits related to the derailment have until Jan. 31, 2017, which is also the last day Amtrak can agree to any settlements with participating or nonparticipating Plaintiffs.

Amtrak must then turn over a lump sum payment to a trust account by Feb. 28, 2017. This is estimated at $265 million, less funds that have already been paid out for medical and rehab expenses and settlements—along with estimates for damages owed to unfiled passengers and those who opt out of the settlement program. Two court-appointed masters will then review the submissions from participating Plaintiffs to determine the value of their damages, and will provide the court a report by May 26, 2017. Victims and families will then receive notice of their final award by June 30, 2017, and could receive payments shortly afterward.

The management committee is composed of Tom Kline of Kline & Specter PC; Judith Livingston, of Kramer Dillof Livingston & Moore; Robert Mongeluzzi of Saltz Mongeluzzi Barrett & Bendesky PC; Frederic Eisenberg of Eisenberg Rothweiler Winkler Eisenberg & Jeck PC; Ben Morelli of the Morelli Law Firm; Denis Mitchell of Stein Mitchell Cipollone Beato & Missner LLP; and Timothy Loranger of Baum, Hedlund, Aristei & Goldman. The case is *In Re: Amtrak Train Derailment* before the U.S. Panel on Multidistrict Litigation.

Source: Law360.com

Wrongful Death Suits Filed After Tour Bus Crash That Killed 13 People

We wrote on the lack of regulation of the bus industry in another section of this issue and mentioned the crash of a tour bus in California. That wreck resulted in 13 deaths and brought a great deal of needed attention to the regulation problem. The families of two of the persons killed in the crash have filed a wrongful death lawsuit against the bus company and its owner-driver who was among the fatalities. The families of 63-year-old Gustavo Garcia and 50-year-old Tony Mia, both of Los Angeles, filed the lawsuit in Los Angeles Superior Court against Alhambra-based USA Holiday and the estate of Teodulo Elias Vides, the driver.

The 1996 MCI bus crashed into the back of a tractor-trailer at 5:17 a.m. on a Sunday along westbound Interstate 10. Traffic ahead of the bus had slowed, and the truck was only moving about 5 mph, according to the California Highway Patrol. Survivors included 31 bus passengers who were hurt. The victims were on their way home to Los Angeles after spending the night at the Red Earth Casino in the Salton Sea-area town of Thermal.

It is alleged in the complaint that Vides and his company were negligent, reckless and legally responsible for the "accident and the carnage." The claims include "failing to travel at a safe rate of speed, failing to reduce speed (near) a construction zone, failing to keep a proper lookout and apply the brakes when coming upon a parked or disabled vehicle, failing to follow proper safety procedures (for maintaining) the tires on the vehicle, operating a bus that is not equipped with seat belts or safety restraint systems for passengers, and all other acts or omissions."

The tread on half of the eight bus tires was too worn to pass a safety inspection, according to federal crash investigators. National Transportation Safety Board (NTSB) member Earl Weener told a news conference that if the bus had undergone a recent inspection with tires in that condition, it could have been taken out of service. The cause of the accident remains under investigation. The possibly causes will include:

- Human factors, including the driver's background, experience and licensing, and whether he was fatigued or had been drinking.
- Highway factors, including the roadway configuration, the traffic flow, lighting and signage.
- Vehicle factors, including the pre-crash condition of the bus and whether it was safe to drive.
- Motor carrier factors, including whether USA Holiday was operating legally, and if the bus had any onboard data-recording device.

The initial investigation revealed that there were no skid marks on the road to indicate a sudden brake application by the bus prior to the collision. USA Holiday is a small tour bus that primarily provided casino trips. This tragic incident points out the need for better regulation.

Source: *San Gabriela Valley Tribune*

Helicopter Emergency Medical Services Increase Both Access And Danger

In March of this year, a pilot, flight nurse and flight medic answered the ultimate call of service as they boarded Haynes Ambulance LifeFlight medical helicopter at Troy Regional Medical Center in Southeast Alabama. The flight staff was on its way to assist an automobile accident victim who had a broken leg and was unconscious. The helicopter went to the crash site, picked up the victim and resumed its flight. They were to transport him to a hospital in Montgomery. At 12:17 a.m., the helicopter was reported missing. The darkness, rain and fog hampered the search for the downed flight, which wasn't discovered for seven hours. Four lives were lost when the helicopter crashed in a heavily wooded area.

Approximately four months following the fatal LifeFlight crash in Alabama, four more lives were claimed when a Cal-Ore Life Flight crashed on a rural northern California mountainside just after midnight. In September, a North Memorial Health Care helicopter crashed near Alexandria, Minn., just after 2 a.m., critically injuring the three flight staff on board who were returning to their base after transporting three patients to a local hospital.

These examples depict the significant risks helicopter emergency medical services (HEMS) personnel face every time they respond to an emergency. The HEMS industry dates back to World War I, and the Journal of Emergency Medical Services (JEMS) reports that the industry has grown rapidly. By 2014, there were more than 1,500 helicopters in the industry, which is nearly double the amount of helicopters in service in 2008. JEMS estimates that HEMS transport more than 400,000 patients each year in the U.S. Although it has increased access to emergency medical services, the industry's growth has also outpaced its ability to provide an infrastructure for acceptable safety regulations.

Analyzing data from HEMS accidents in the United States from 2006 to 2015, Aerossurance estimates that a HEMS crash occurred in the U.S. every 40 days for the last 10 years. A spike in the number of air medical transport crashes in 2008 claimed 29 lives in 12 crashes, including a midair collision. The tragic year prompted a four-day National Transportation and Safety Board (NTSB) hearing in February 2009. Robert Sumwalt, an NTSB Board Member, recalls that the agency issued 21 safety recommendations based on hearing testimony and information from other sources highlighting safety concerns of the HEMS industry.

In February 2014, the U.S. Department of Transportation (DOT) Federal Aviation Administration (FAA) incorporated the NTSB's recommendations in its new, stricter flight regulations and procedures, decades overdue, for the helicopter segment of aviation. Many of the new rules were aimed at addressing the major causes of HEMS accidents. The Air Medical Physician Association analyzed HEMS accidents that occurred over a 20-year period and determined the leading causes for most accidents included the time of day, environmental factors (such as weather conditions, flight altitude and geographic location) and time pressure due to the patient's condition.

The new regulations required improved pilot training, the collection and analysis of flight, weather and safety data, and the use of dual pilots and autopilots. However, as Sumwalt surmises, more steps can and must be taken, including:

- requiring pilots to conduct more scenario-based training in simulators or flight training devices;
- using night vision imaging systems;
- incorporating a safety management system;
- mandating that all helicopters be equipped with autopilots and that all pilots are trained to use the autopilot; and
- developing a low-altitude airspace infrastructure.

Dallas Emergency Medicine resident, Dr. Brandon Morshedi, MD, DPT, NREMT, offers even more practical recommendations from his experience and work with HEMS and first responders. Dr. Morshedi explains that pressure to fly, even when conditions are bad, is due to the nature of the industry (the desire to save the most critically ill or injured patients) coupled with the financial incentives of an unregulated and lucrative business.

Dr. Morshedi urges HEMS flight staff to critically evaluate the time advantage of the air transport versus ground transport. The staff should also objectively evaluate the patient's condition using evidence-based guidelines to determine the likelihood of the services improving the patient's condition. Dr. Morshedi advises that only the pilot should make the decision to launch and, in order to remain objective, the pilot should not have any knowledge of the patient's condition. Additionally, Dr. Morshedi encourages:

- continuous pilot training;
- increased funding for more FAA inspectors;
- implementing "severe and stiff" consequences for companies and operators who violate regulations; and
- regulating a fee structure that rewards quality care and appropriate operation of air ambulance services.

While the cost of implementing more life-saving regulations will likely be substantial, it cannot compare to the crashes that are prevented or the lives saved. Maximizing safety is important to the HEMS flight crews as well as the patients who entrust them with their lives.

If you need more information on this subject contact Mike Andrews at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

Sources: *Dothan Eagle,* CNN, *Twin Cities Pioneer Press*, *Journal of Emergency Medical Service (JEMS)*, Aerossurance, *Propilot Magazine*, and emDocs,

Alarming Rise In U.S. Traffic Deaths

There was an alarming increase in traffic deaths on U.S. highways last year. The number of U.S. traffic accidents soared in 2015. According to the National Highway Traffic Safety Administration (NHTSA), 35,092 people died in traffic crashes on U.S. highways last year—a rise of 7.2 percent from the number of deaths reported in 2014.

The last time there was an increase of this magnitude from one year to another was in 1966. That was two years before safety belts became mandatory standard equipment in new cars. That year, the number of traffic fatalities jumped 8.1. percent over the previous year's toll.

Pedestrian and bicycling fatalities have also increased to a level not seen in 20 years. Motorcyclist deaths increased more than 8 percent. Drunk driving deaths went up 3.2 percent, from 9,943 in 2014 to 10,265 in 2015. Nearly half of vehicle occupants killed in 2015 weren't wearing a seat belt. It's significant that one in 10 traffic deaths involved distracted driving, such as using a smartphone to text while driving.

In the 10 years prior to 2015, U.S. roads and highways were becoming progressively safer, with the number of deaths falling an impressive 25 percent since 2005, when 42,708 people were killed in traffic accidents. NHTSA attributes that significant decline to a series of aggressive safety and awareness campaigns that increased seat belt use and reduced impaired driving. Better safety technology and other vehicle improvements, including air bags and electronic stability control, also contributed to this decline.

So why the sudden surge in fatal traffic accidents? According to NHTSA, job growth and low fuel prices were two factors that led to increased driving, which can translate into higher fatality rates to some degree. U.S. motorists traveled 3.5 percent more miles in 2015 than in 2005—the largest increase in 25 years. But this doesn't explain the full picture. The bottom line is—in short—U.S. safety officials simply don't have an answer.

The sudden increase in traffic deaths prompted the Department of Transportation, NHTSA and the Obama Administration to issue an unprecedented call to action to involve state and local government officials, data scientists, public health experts, students, researchers, and anyone else to look at the data and share any insight they gain.

Sources: National Highway Traffic Safety Administration and Mothers Against Drunk Driving

XV. ENVIRONMENTAL CONCERNS

West Virginia Chemical Lawsuit Is Settled For $151 Million

A West Virginia federal judge has given preliminary approval to the $151 million settlement reached by West Virginia American Water Co. (WVAW) and Eastman Chemical Co. The settlement resolves class claims resulting from a 2014 coal-processing chemical spill that deprived 300,000 people of drinking water for days.

West Virginia American Water Co., a subsidiary of American Water Works, will pay $126 million while Eastman will pay $25 million. West Virginia American Water will waive a $4 million rate recovery from the state's Public Service Commission for costs incurred in responding to the spill. According to the settlement term sheet, $50 million of the $126 million from WVAW has been set aside for claims-based payments.

The trial was scheduled to begin, but was continued to Dec. 1 by U.S. District Judge John Copenhaver pending, finalization of the settlement. The class action was prompted by a January 2014 incident in which a Freedom Industries coal-cleaning mixture containing primarily 4-methylcyclohexane methanol (MCHM) leaked from one of its storage tanks on the banks of the Elk River, just upstream from a municipal drinking water intake. The spill left West Virginia residents and businesses in a nine-county area without a potable water source from which to drink, bathe or wash their dishes for at least five days. We wrote about this incident previously.

Eastman failed to sufficiently warn residents about the danger of the MCHM it produced and sold to Freedom Industries, American Water Works Co. Inc. and subsidiaries West Virginia American Water Co. and American Water Works Service Co. Inc. failed to take necessary precautions to protect a water source in the area.

Freedom Industries had been named as a Defendant, but was dismissed as a party after the company filed for bankruptcy. It should be noted that Freedom Industries executives Dennis Farrell and Gary Southern pled guilty to criminal charges related to the spill and each contributed to the settlement. Southern will pay $350,000 and Farrell $50,000.

In October 2015, Judge Copenhaver certified a class of residents—individuals, businesses and hourly workers—on the issue of liability, but denied their request to collect damages on a classwide basis. The Judge had previously dismissed parent American Water Works Co. Inc. and unit American Water Works Service Co. Inc. from the case and reduced Toxic Substances Control Act claims against Eastman.

The Plaintiffs are represented by Kevin W. Thompson and David R. Barney of Thompson Barney; by Van Bunch of Bonnett Fairbourn Friedman & Balint; and Stuart Calwell, Alex McLaughlin and D. Christopher Hedges of the Calwell Practice. The case is *Good et al. v. American Water Works Co. Inc. et al.* in the U.S. District Court for the Southern District of West Virginia.

Source: Law360.com

Oil Giants Will Now Face Lawsuit Over Coastal Damages

A state court judge in a Louisiana has reversed himself and revived parish's suit against Exxon Mobil Corp., Chevron USA Holdings Inc. and seven other oil and gas companies over the loss of coastal wetlands allegedly from decades of oil and gas exploration activities. Judge Stephen Enright found no good administrative remedy to be available through the Louisiana Department of Natural Resources (DNR).

Judge Enright had dismissed Jefferson Parish's lawsuit in August, saying the action was premature because the Parish first should have voiced its concerns with the Louisiana DNR. The Parish, with support from Louisiana Gov. John Bel Edwards and the DNR, then asked Judge Enright to reconsider his decision. It was contended that there was no feasible way that state regulators could realistically handle all of the allegations made by Jefferson Parish and other parishes bringing similar litigation over wetlands loss. Judge Enright wrote in a Nov. 7 ruling granting the motions for a new trial:

> *Based on the Affidavit of the Secretary of the DNR, the DNR clearly lacks the ability to handle the necessary administrative actions in this case. According to the Affidavit, the LDNR does not have the staff, funding or capability to conduct the thousands of administrative enforcement actions that would be necessary to address the violations alleged in the parish lawsuits.*

Judge Enright said there is no way the Louisiana DNR would be able to deal with those actions while also doing its everyday monitoring and enforcement activities. John Carmouche, a Talbot Carmouche & Marcello lawyer representing the Parish, told Law360:

> *We think the judge made the correct decision and look forward to pursuing the claim and getting a trial date and letting a jury decide if the coast in Jefferson Parish can be restored to its original condition.*

There are four other Louisiana parishes, which are the equivalent of counties in other states, that are suing various oil and gas companies over similar allegations. Judge Enright's ruling is not binding precedent on judges in other parishes. A joint Defense group that includes BP PLC, Chevron and Shell Oil Co. criticized the ruling in a joint statement:

> *The Department of Natural Resources' assertion that it is ill-equipped to review the permits in this case is dubious at best, especially considering it was the agency that issued the permits [allowing the exploration] and that it has a 40-year history of working with industry to resolve its concerns.*

Thus far, Louisiana has intervened in more than 40 lawsuits against various oil and gas companies over the loss of coastline in five parishes, and with 15 parishes comprising Louisiana's coastal zone, more lawsuits are expected in the near feature, according to Donald Price, special counsel for the state's DNR. Price told Law360 that that the state is suffering a "catastrophic land loss" problem, having lost a land area the size of Rhode Island since 1930.

While the loss of land has many factors, Price said the available science suggests oil and gas exploration has contributed to a substantial part of that problem:

- canals used to access oil and gas wells have gone unfilled;
- pollution has killed off vegetation that was holding the soil together; and
- pumping up fossil fuels has led some areas to sink.

Some of those activities were allowed by permits, according to Price, but he said the suits allege that some oil and gas exploration activities either violated their permits or were conducted without obtaining permits.

Gov. Edwards has backed litigation against private companies as a way to help fund the state's master plan for coastal restoration. This plan will be renewed next year with a price tag "widely assumed" to be somewhere between $70 billion and $100 billion. Jefferson Parish is represented by Victor L. Marcello and John H. Carmouche of Talbot Carmouche & Marcello. Louisiana and the LDNR are represented by Megan K. Terrell of the Governor's Office of Coastal Activities. The case is *The Parish of Jefferson v. Atlantic Richfield Co. et al.* in the 24th Judicial District Court for the Parish of Jefferson.

Source: Law360.com

Princess Cruise Lines To Pay $40 Million For Deliberate Oil Pollution

Princess Cruise Lines has agreed to pay a record $40 million settlement to end charges that it illegally dumped oil-contaminated waste from a ship in U.K. and U.S. ports and tried to hide it from authorities.

The the Carnival Corp. subsidiary pled guilty to seven felony charges over the illegal dumping of waste from its Caribbean Princess cruise ship. The settlement is the largest-ever criminal penalty involving deliberate vessel pollution, according to the DOJ. U.S. Attorney Wifredo Ferrer said:

> *The conduct being addressed today is particularly troubling because the Carnival family of companies has a documented history of environmental violations, including in the Southern District of Florida. Our hope is that all companies abide by regulations that are in place to protect our natural resources and prevent environmental harm.*

In addition to the $40 million penalty, the plea agreement calls for a court-supervised environmental compliance program that will oversee cruise ships from eight Carnival companies, including Holland America Line NV, Seabourn Cruise Line Ltd. and AIDA Cruises. The five-year program will include a court-appointed monitor and independent audits, according to the DOJ.

The investigation was prompted by a whistleblowing engineer on the Caribbean Princess who alerted the British Maritime and Coastguard Agency to a "magic pipe" on the ship that was used to illegally discharge more than 4,000 gallons of oily waste 23 miles off the coast of England in August 2013, according to the DOJ. The head engineers on the ship removed the pipe and ordered subordinates to lie.

Acting on the U.K. agency's tip, the U.S. Coast Guard examined the Caribbean Princess when it arrived in New York City in September 2013. Prosecutors say the Caribbean Princess made illegal discharges beginning in 2005, first with a different valve and then with the magic pipe. In addition, U.S. authorities discovered that the Caribbean Princess and four other Princess ships were illegally opening a salt water valve when processing bilge waste to prevent the oil content monitor from stopping the illegal overboard discharge.

The ships also failed to properly process oily bilge water and did not record the practices truthfully, according to the DOJ. Assistant U.S. Attorney General Cruden said:

> *This involved more than just bad actors on one ship and took the company to task on its culture and management. This is a company that knew better and should have done better. Hopefully the outcome of this case has the potential not just to chart a new course for this company, but for other companies as well.*

The illegal practices on other ships were uncovered as a result of this internal probe, according to the company. Princess said that it has already increased training, upgraded equipment and restructured its fleet operation organization with new leadership. The government is represented by John Cruden, Thomas Watts-Fitzgerald, Brendan Sullivan and Richard A. Udell of the U.S. Department of Justice. The case is U.S. v. Princess Cruise Lines in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

XVI. UPDATE ON NURSING HOME LITIGATION

Update On The New Rule Banning Arbitration In Nursing Homes

We reported last month that the Centers for Medicare and Medicaid Services (CMS) issued a new regulation, effective Nov. 28, 2016, relating to nursing-home arbitration agreements. CMS found that arbitration agreements in nursing homes were patently unfair to residents and their family members. It was determined by CMS that any facility that receives Medicare and Medicaid may no longer enter into binding arbitration agreements with residents or their family members after Nov. 28, 2016.

Advocates for patients and their families consider this ruling to be most significant. For all too long, when a family makes a decision to place their loved one in a long-term care facility, they have been compelled by the facility to sign an alternative dispute resolution agreement. Most residents and their family members have no idea that they are potentially signing away their right to a trial by jury. In other words, most families are completely surprised to find out that they cannot file a lawsuit when the nursing home staff injures or kills their loved one.

The pro-nursing home advocacy groups wasted no time in challenging the new CMS ruling. In Mississippi and in other places, nursing home advocacy groups have asked federal judges to stay enforcement of the new rule. The first such order was issued by Judge Michael P. Mills, a United States District Judge from the Northern District of Mississippi. Judge Mills entered a preliminary injunction, determining that the CMS rule could not be enforced until further evidence was taken.

Judge Mills issued a 40-page Order, and in his Order, the judge determined that there are concerns about whether a government agency can ban arbitration agreements where those agreements are otherwise permissible under the Federal Arbitration Act (FAA). Judge Mills determined that the CMS rule banning arbitration may conflict with the FAA, and in doing so, a federal agency may be acting beyond its authority. While lawyers in our firm are extremely disheartened by the ruling, a couple of points can be taken away from this ruling:

- First, it is unclear whether other federal courts will follow suit and apply the ban in other jurisdictions and states.
- Second, the issue will not be fully resolved until the appellate courts, and perhaps even the United States Supreme Court, weighs in on this issue.
- Finally, Judge Mills correctly noted that nursing-home arbitration litigation is not at all time-saving or favorable to injured patients or their families. In fact, Judge Mills expressed some of his personal observation of cases that have come before his court, and noted in one case that the delay from filing the suit until resolution of the arbitration issue was as much as three years.

Judge Mills also noted the concern of patient-advocates that more than half of all nursing home patients have dementia or Alzheimer's. Clearly, the patient and their families are not in equal bargaining positions with the nursing homes. Judge Mills also seemed to express his thoughts that Congress might want to consider banning arbitration in nursing home settings.

Regardless of the outcome, we will continue to fight arbitration. We believe strongly that CMS, which oversees the provision of federal funds to nursing homes, acted within its authority. If a nursing home wishes to receive federal funds, then it should take the high road and avoid having patients or their family members to sign arbitration agreements.

If you need additional information on the arbitration issue or Nursing Home litigation generally, contact Ben Locklar, a lawyer in our firm's Personal Injury and Products liability Section, at 800-898-2034 or by email Ben.Locklar@beasleyallen.com. Ben handles nursing home litigation for our firm.

XVII. An Update On Class Action Litigation

Federal Judge Approves The $530 Million State Street Settlement

A federal judge in Boston has given final approval to a $300 million settlement between State Street Corp. and a class of investors over its foreign exchange practices. This has resulted in other settlements with federal regulators valued at $230 million. The settlement is the largest in the history of Massachusetts' unfair practices law, Chapter 93A. The settlement would also be the third-largest "nonsecurities class settlement" in the First Circuit Court of Appeals.

The State Street case had been filed before a similar one against the Bank of New York Mellon Corp. Meanwhile, State Street's separate settlements with the U.S. Department of Labor (DOL), U.S. Securities and Exchange Commission (SEC) and U.S. Department of Justice (DOJ) are also set to be resolved with the approval by U.S. District Senior Judge Mark L. Wolf. State Street had insisted on interlocking settlements so its agreements with the federal government would go through only if Judge Wolf signed off on the class settlement.

It was alleged in the private suit that State Street, over the course of a decade, swindled millions of dollars a year from its custody clients on their indirect foreign exchange trades. State Street allegedly misled its clients about the exchange rates that were charged on the trades, and applied hidden markups that had no basis in market rates.

None of the class members—after the settlement got initial approval—objected to or opted out of the settlement. The named Plaintiff, the Arkansas Teacher Retirement System, will receive a $25,000 incentive award, and six other plans will get $10,000 each. Three categories of investors will participate in the settlement. The recovery of the class members will depend on the volume of investments. The categories are:

- Employee Retirement Income Security Act (ERISA) plans;
- mutual funds; and
- a third category of miscellaneous investors.

The Plaintiffs are represented by David J. Goldsmith, Lawrence A. Sucharow and Michael H. Rogers of Labaton Sucharow; Garrett J. Bradley, Michael P. Thornton and Michael A. Lesser of Thornton Law Firm; and Daniel P. Chiplock of Lieff Cabraser Heimann & Bernstein. The case is *Arkansas Teacher Retirement System v. State Street Bank & Trust Co.* in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

A Class Is Certified In The NovaStar MBS Buyers Class Action Lawsuit

A New York federal judge has certified a class of investors to pursue fraud claims against Deutsche Bank, RBS and Wells Fargo for underwriting $7.7 billion of NovaStar mortgage-backed securities (MBS). U.S. District Judge Deborah A. Batts ruled the fundamental question of whether the banks lied ties the investors' claims together. In her ruling, Judge Batts granted the motion filed by the New Jersey Carpenters Health Fund, the named Plaintiff, to certify a class of investors. They had invested in now-defunct subprime lender NovaStar Mortgage Inc.'s mortgage-backed securities.

The claims were that Deutsche Bank Securities Inc., RBS Securities Inc. and Wachovia Capital Markets LLC, now Wells Fargo Advisors LLC, lied in the offering documents that accompanied the securities. Judge Batts held that the common question of whether the banks made material false or misleading statements in the offering documents for the securities at issue will predominate over the individual issues in the class.

The dispute stems from 2006, when NovaStar issued six securities tied to residential MBS. The securities, which together held more than $7.7 billion in assets, were underwritten by Deutsche Bank, RBS and Wachovia. By June 2009, more than half the mortgages behind the securities had defaulted amid the housing collapse, causing massive investor losses. The fund filed the suit in June 2008.

The fund, which had invested $100,000 in one of the securities, filed suit against subprime lender NovaStar, the underwriting banks, and ratings agency Defendants such as Moody's and Standard & Poor's. The ratings agencies were dismissed from the suit in April 2011. The class action alleged that offering documents filed when the securities were issued failed to disclose that NovaStar had abandoned its underwriting standards to increase the number of mortgages it could originate.

In March 2012, Judge Batts dismissed the suit, saying that the complaint lacked specific examples of underwriting fraud and that the investors had been adequately warned of risks tied to the mortgage market. However, in March 2013, the Second Circuit Court of Appeals directed the lower court to follow the circuit's 2012 decision in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* Under the precedent of that decision, when a bank issues multiple securities under the same shelf registration statement, an investor that purchased at least some of the securities can serve as the lead Plaintiff, so long as all the claims in the suit raise the same set of concerns.

Judge Batts ruled in February of last year that the Plaintiffs could file a third amended complaint, which is now the operative complaint in the suit. The case is stayed as to NovaStar, as its successor filed for Chapter 11 protection in July, and the underwriter banks and investors have since been in conflict over whether discovery can proceed in the remainder of the suit. The Plaintiffs are represented by Joel P. Laitman, Michael B. Eisenkraft and Christopher Lometti of Cohen Milstein Sellers & Toll PLLC. The case is *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group PLC et al.* in the U.S. District Court for the Southern District of New York.

Source: Law360.com

The $50 Million Settlement In TCPA Suit Against US Coachways Is Approved

An Illinois federal court has approved a $49.9 million class action settlement in a suit claiming US Coachways Inc.'s text messaging blasts to potential customers violated the Telephone Consumer Protection Act (TCPA). Most of the settlement will be pursued by the class against the company's insurer. US Coachways, the national charter bus and bus rental company, was accused of sending a "staggering" amount of text messages beginning in 2011 to customers who had booked past trips as well as people who had requested a quote, but didn't book with the company, in efforts to secure new business. The company is alleged to have sent the estimated 391,459 text messages to about 85,000 individuals' cellphones using a marketing platform called "Gold Mobile." The company agreed to settle the TCPA suit for $49.9 million this year.

Unable to satisfy the judgment, US Coachways turned to its insurer, Illinois Union Insurance Co., to pay for the settlement. The insurer declined coverage. This led to an agreement in which US Coachways will assign its rights against Illinois Union to the Plaintiffs and contribute $50,000 toward the settlement amount. A motion seeking final approval of the settlement stated:

Plaintiff and his counsel will next pursue an action against Illinois Union seeking to collect on that judgment. In the event of recovery, the funds from such an action will be deposited into a settlement fund, with distributions from the settlement fund to be approved by this court.

U.S. District Judge Rebecca R. Pallmeyer entered judgment against the charter bus company for $49.9 million, saying "no just reason exists for delay in entering this final approval order and judgment."

James Bull, the named Plaintiff, filed his suit alleging violation of the TCPA in July 2014. The Ohio resident alleged that over the course of three years, he received more than 20 unsolicited text message ads from US Coachways. The TCPA prohibits computer-generated telemarketing calls to cellphones without that user's express prior consent. US Coachways' violation of the law was not limited to interactions with prior customers, but also to individuals, such as the plaintiff, who had never actually entered into a transaction with US Coachways, but merely obtained a quote.

The Plaintiff is represented by Anthony Paronich and Edward A. Broderick of Broderick Law; Brian Kevin Murphy of Murray Murphy Moul Basil; Matthew McCue and Lauren E. Snyder. US Coachways is represented by Angelo John Kappas; Craig J. Mariam; Eulalio J. Garcia and Paul Gamboa of Gordon & Rees; and Elliot R. Schiff of Schiff Gorman. The case is *James Bull v. US Coachways Inc.* in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

The Wen Hair Products Class-Action Lawsuit Gets Preliminary Settlement Approval

A federal judge in Los Angeles has given preliminary approval to a $26.3 million settlement for a class-action lawsuit against celebrity stylist Chaz Dean and marketer Guthy-Renker over Wen hair care products. That ruling means some six million people may be eligible for an award of up to $20,000. The judge must still give final approval of the settlement. The lawsuit alleged Dean's line of Wen shampoos and conditioners caused hair loss and scalp irritation. Amy Davis, a lawyer for the class Plaintiffs, made this observation:

From what we understand about the product and how it causes hair loss is it contains virtually no cleanser. It's like using lotion to wash your hair. So instead of removing the product when you rinse it off, it just becomes impacted in your hair follicle.

In an attempt to justify their position in view of the settlement, Wen released this statement

Wen by Chaz Dean is safe and we continue to provide our hundreds of thousands of customers with the Wen by Chaz Dean products that they know and love. Since the process of litigation is time consuming and costly, we made a business decision to pursue a settlement and put this behind us so that we can focus on delivering quality products.

However, the problems may not be over for the company. I understand the Food and Drug Administration (FDA) is still investigating. The FDA said it received 127 consumer complaints, which is the largest number of reports ever associated with any cosmetic hair cleansing product. That number is in addition to the 21,000 complaints reported directly to Chaz Dean and the marketing company, according to the FDA.

Source: *CBSLA.com*

XVIII. THE CONSUMER CORNER

Court Appoints Leadership In The Wells Fargo Litigation

We are pleased to announce that Beasley Allen lawyer Dee Miles, along with other lawyers in our firm's Consumer Fraud & Commercial Litigation Section, have been appointed to the Executive Committee by the judge handling the Wells Fargo litigation. This is the litigation brought on behalf of participants in the Wells Fargo employee 401(k) pension plan. The company and its senior executives knowingly and intentionally withheld non-public information from pension plan participants and the public at large about the criminal epidemic at Wells Fargo that has recently come to light.

This epidemic was created by Wells Fargo's senior executives, including its CEO and Chairman, through an incentive structure that encouraged and caused employees to sign up customers, without their approval, for unauthorized and unwanted accounts and other banking products to generate inflated share price growth. At the same time, these senior executives sold millions of their personal Wells Fargo stock at inflated prices, earning hundreds of millions of dollars, while failing to take corrective action to protect Plan Participants.

As a result of this, as well as other conflicts of interest and fraud, these Defendants violated their fiduciary duties to the Plan participants in violation of ERISA, causing no less than hundreds of millions of dollars in damages to the Plan. Lawyers at Beasley Allen will be working with lawyers from five other national firms to resolve these claims on behalf of the Wells Fargo 401(k) plan participants. More will be said about Wells Fargo below. If you need more information concerning this case, contact Dee Miles, the leader of the team of lawyers from Beasley Allen working on this case, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com.

Wells Fargo's Mess Grows And Gets Much Worse

The Consumer Financial Protection Bureau (CFPB) announced in September that Wells Fargo had agreed to pay a $185 million fine for its fraudulent practices that led to the opening of millions of unauthorized accounts. Because of its significance and ramifications, we are going to write in some detail about Well Fargo's messy situation. The announcement of the fine was just the beginning of a mountain of troubles on the horizon for Wells Fargo.

Investigations Increase

The latest of these troubles finds Wells Fargo at the center of a Securities and Exchange Commission (SEC) investigation about its practices. The SEC is investigating whether Wells Fargo violated rules relating to investor disclosures and whistleblower protections, among others. Members of the Senate Banking Committee previously called on the SEC to investigate Wells Fargo's Sarbanes-Oxley reports and to determine whether the bank committed securities fraud by failing to disclose problems of unauthorized accounts while promoting its "cross-selling" strategy to investors.

In addition to the SEC, numerous other entities launched investigations into Wells Fargo, including the Department of Justice (DOJ), the Department of Labor (DOL), several Congressional committees, and state attorneys general and prosecutors' offices. California's Attorney General launched a criminal investigation into Wells Fargo over allegations of false imprisonment and identity theft related to the unauthorized account scheme. "As government authorities examine Wells Fargo, it is likely they will find abuses in other parts of the bank beyond retail customers," said Harvey Pitt, former chairman of the SEC. If Wells Fargo stays on this course, the SEC investigation likely will not be the last.

Cases Cumulate

Investigations are not the only woes Wells Fargo faces in response to the CFPB announcement. Lawsuits are piling up against the bank as well. Even in 2015, before the CFPB announced the $185 million fine, a class action was filed on behalf of consumers against Wells Fargo for opening unauthorized accounts, and the Los Angeles City Attorney filed a complaint as well. After the CFPB announcement, another class action was filed in Utah District Court on behalf of consumers who were victims of the Wells Fargo scheme. The 2015 cases settled, but the consumer case in Utah is still ongoing.

Wells Fargo employees also join in the mix of lawsuits. Lawyers at Beasley Allen are involved in a suit on behalf of Wells Fargo employees claiming that the fake-account scandal is jeopardizing their retirement accounts. Wells Fargo employees have seen the value of their 401(k) retirement plan plunge during this disaster because the plan is heavily invested in the bank.

In fact, Wells Fargo's matching funds are in the form of Wells Fargo stock. The lawsuit alleges Wells Fargo hid the truth from its employees and violated fiduciary duties owed to the plan participants. Another set of cases brought by Wells Fargo employees deal with employees who were fired or demoted over the last 10 years for refusing to open bogus accounts to meet Wells Fargo's aggressive sales goals.

Wells Fargo shareholders have also brought actions since the CFPB announcement. A shareholder suit filed in California alleges Wells Fargo misled investors about its financial performance and the success of its sales strategies causing stock to trade at inflated prices. The suit alleges violations of the 1934 Securities and Exchange Act, including allegations of insider trading. Another shareholder suit filed in California names numerous Wells Fargo directors and officers and claims they should be held responsible for incentivizing the misconduct and failing to monitor sales practices.

Wells Fargo recently found itself out tens of millions of dollars to settle additional, unrelated matters as well. In September, Wells Fargo also agreed to settle a class action accusing the bank of violating the Telephone Consumer Protection Act (TCPA). Wells Fargo agreed to pay $16.3 million to resolve allegations that it violated the TCPA by contacting consumers' cellular phones without their prior express consent. On Oct. 31, Wells Fargo agreed to pay $50 million to hundreds of thousands of members of a class action to settle claims alleging the bank improperly marked up fees for third-party appraisals. The class alleged that Wells Fargo could pass through the costs of getting broker price opinions (BPOs) (a type of informal home appraisal prepared by a real estate broker that a lender will typically demand once a borrower defaults) from third-party real estate brokers, but Wells Fargo secretly charged class members more for the BPOs than it actually paid for them.

Also in October, Wells Fargo agreed to pay $4.1 million to resolve allegations that it improperly repossessed vehicles owned by members of the military. The Servicemembers Civil Relief Act (SCRA) requires Wells Fargo to obtain a court order before repossessing the vehicles, a step which it allegedly failed to follow. In a related action, the Office of the Comptroller of the Currency assessed $20 million in penalties and restitution for alleged violations of the SCRA.

Details Develop

The CFPB announcement outlined the millions of unauthorized accounts and the high-pressure sales tactics underlying the fraud, but since that announcement more devastating details have developed about what those at Wells Fargo knew and when they knew it. Details emerging from former employees and various documents indicate that the fraudulent activity has likely been occurring at Wells Fargo for nearly a decade, maybe longer. As early as 2006, a Wells Fargo branch manager tried to warn leadership about unauthorized accounts by sending a letter to Carrie Tolstedt, who was head of Wells Fargo's regional banking at the time. He warned Tolstedt of "gaming in opening new accounts" and instances where employees applied for loans far greater than what the customer actually requested. His letter further explained that upper management was aware of the misconduct. Not long after the date of this letter, Tolstedt became head of Wells Fargo Community Banking.

Better Business Bureau Backs Out

Adding to the list of troubles, the Better Business Bureau (BBB) pulled Wells Fargo's accreditation in October. The CEO of Better Business Bureau of Southern Piedmont stated, "Nobody can recall a company of this size, this scope, losing their accreditation." The BBB now lists Wells Fargo as "not BBB accredited" with a grade of "C-." The BBB's website lists "Government actions against the business" as the reason for accreditation loss. Wells Fargo can apply for accreditation again in three years, which is how long the actions stay on its BBB files.

States Sever Services

Some states decided it was time to take a break from Wells Fargo after finding out about its rampant misconduct. California, Illinois, and Ohio announced that they will stop doing business with Wells Fargo for the time being. California Treasurer John Chiang announced suspension of state business with Wells Fargo for at least a year, citing the bank's "venal abuse of its customers." Ohio Governor John Kasich said the state will take a one-year break from allowing Wells Fargo to partake in new state debt offerings and financial services contracts initiated by state agencies under his authority. Gov. Kasich is also asking to exclude the bank from participating in debt offerings initiated by the Ohio Public Facilities Commission. Likewise, Illinois Treasurer Michael Frerichs announced his office is suspending its annual $30 billion in investment activity with Wells Fargo for at least one year.

Supervisors Shuffle

In wake of the scandal, Wells Fargo leadership changed. Tolstedt is one of the key players at the heart of the scheme. As head of retail banking operations, she touted the cross-sell strategy and used sales volume as the ultimate measure of performance. Prior to the unauthorized account debacle becoming public, Tolstedt announced that she would retire at the end of 2016. In her July retirement announcement, not one word was mentioned about the unauthorized accounts that would soon top the headlines. Tolstedt ultimately left Wells Fargo in late September.

Following Tolstedt's exit, John Stumpf announced his departure as Wells Fargo's CEO around Oct. 12, 2016. Stumpf had been CEO of Wells Fargo since 2007 and worked for the bank for nearly 34 years. Stumpf's announcement came soon after he was grilled by Congress about the fraudulent account scheme. During Congressional hearings, Stumpf apologized yet failed to take any responsibility for the misconduct. This drew criticism from lawmakers. Stumpf also resigned from his Board of Directors positions at Chevron and Target.

The Wells Fargo Board of Directors named another insider, Timothy Sloan, as the new CEO. Sloan, however, is far from an innocent bystander in the fake-account fiasco. He has spent nearly 29 years with Wells Fargo, and he was present in leadership throughout the past decade when the Wells Fargo culture allowed fraudulent conduct to fester. Sloan has held numerous leadership positions at Wells Fargo, including Senior Executive Vice President, Chief Financial Officer, head of the Wholesale Banking Group, and he was named Chief Operating Officer in November of 2015.

U.S. Senators Elizabeth Warren and Robert Menendez sent a letter to the Wells Fargo Board asking how it decided to choose Sloan; whether he was questioned about his knowledge of the creation of unauthorized customer accounts; and any actions he might have taken in response. They also asked if the Board conducted "an independent investigation of whether Mr. Sloan knew about or took appropriate actions to prevent this scandal" and if so, what that investigation showed. The Senators said in their letter:

> *It is difficult to believe that he had no knowledge of or bears no responsibility for the actions of thousands of Wells Fargo employees creating fake accounts under his and other top executives' watch.*

In fact, the announcement of Sloan as CEO expressly stated that he "knows Wells Fargo's operations deeply." Congresswoman Maxine Waters, ranking member of the House Committee on Financial Services, had this to say:

> *I remain concerned that incoming CEO Tim Sloan is also culpable in the recent scandal, serving in a central role in the chain of command that ought to have stopped this misconduct from happening.*

Arbitration Accentuates Abuses

The Wells Fargo fiasco also shed some light on the unfairness of binding arbitration. Wells Fargo includes a binding arbitration clause in its contracts with consumers that requires any dispute to be handled in arbitration instead of in the courts. Paul Bland, a lawyer at Public Justice, has called Wells Fargo's arbitration clause "one of the most anti-consumer, egregious" clauses in the industry. Adding insult to injury, Wells Fargo has unapologetically used its arbitration clause to throw out consumers' lawsuits about its fake-account scheme. Worse, courts have allowed it. Considering the factual situation, this should shock even our most conservative readers.

Judges have ruled that the arbitration clauses customers signed when opening their legitimate accounts prevent them from suing Wells Fargo over separate, fraudulent accounts that were opened **without** the customer's knowledge. A federal judge recently ruled that a case over unauthorized accounts must go before an arbitrator, noting that Wells Fargo's arbitration clause is broad enough to cover "any unresolved disagreement between or among you and the bank." Does this shock you?

Interestingly, the very question of whether a dispute is subject to arbitration was itself an issue for the arbitrator (who gets paid by the case) to determine. In fact, that's really more than just "interesting." The consumers appealed that case to the Ninth Circuit but settled before any ruling was made. As the *Los Angeles Times* noted, "Theoretically speaking, if Wells [Fargo] tried to take your first-born child in settlement of an overdraft, it would be up to an arbitrator to split the baby."

Arbitration proceedings overwhelmingly favor corporations over consumers. Arbitrators are not required to follow precedent, can make decisions without a hearing, and their income depends on being rehired by the companies. The proceedings are kept secret, which allows a company, like Wells Fargo, to keep a scandal away from the public for years. During the Senate Banking Committee hearing, Senators asked Stumpf whether he planned to cease enforcement of the arbitration clause for unauthorized accounts. Not surprisingly, the then-CEO, stated that he would have to "talk to [his] legal team." "Ending forced arbitration would not only help the victims of this Wells Fargo scandal, it may prevent the next one," wrote Alliance for Justice.

At press time we learned that Wells Fargo is attempting to have a class action lawsuit filed by customers dismissed. The bank says that the customers' claims must go to arbitration. With all of its problems and so many folks hurt, this move is beyond bad. It shows Wells Fargo has no compassion for their victims.

Now, What's Next?

After all is said and done, the fraudulent scheme is expected to cost Wells Fargo $99 billion in lost deposits and $4 billion in lost revenue over the next 18 months. Before the scandal broke, Wells Fargo was worth an estimated $240 billion—a value that will be negatively impacted over the coming months. It remains to be seen how the bank will bounce back from this scandal and how it will rebuild its worth, reputation, and trust with its customers. In my opinion, Wells Fargo has a very steep hill to climb—stay tuned!

Sources: Law360, *Wall Street Journal*, *The Consumerist*, CNBC, *Los Angeles Times*, Alliance for Justice

Deciphering the Economic Loss Doctrine

The lawyers in our Consumer Fraud & Commercial Litigation Section felt that we should write this month on the often misunderstood "Economic Loss Doctrine," herein after referred to as ELD. This is something they have to deal with quite often. For those who are not familiar with the ELD, it is a court-developed doctrine that has been adopted by the majority of the states in the U.S. In general, the doctrine prohibits a plaintiff from recovering economic damages in tort where a product defect or failure causes damage to the product itself, resulting in economic loss, but does not cause personal injury or damage to any other property.

The purpose of the doctrine is to maintain the difference between tort law and contract law. It encourages parties to allocate economic risk through contract, typically by negotiating warranties and other contract remedies.

The public policy behind the doctrine is that the purchaser is in the best position to weigh the risk of economic loss and then act accordingly through warranties and insurance. The fear is that if manufacturers were forced to bear the risk of economic loss themselves they would raise prices accordingly to compensate for the risk. This would place the entire cost of economic losses—for those failing to bargain for contract remedies—upon the consuming public as a whole.

One way to combat the ELD defense is to argue that the loss was not purely economic. Pure economic loss, as it relates to the ELD, is either damage to the product itself or a monetary loss caused by the defective product where no other property was damaged and no person was injured.

For example, if a front-end loader caught fire because of a new heated seat the Plaintiff bought and had installed on the tractor, the Plaintiff could possibly recover the damages in tort from the manufacturer of the heated seat if the seat was found to be defective. This would be possible because the destruction of the front-end loader would be considered "damage to other property" and, thus, not purely economic.

However, if the Plaintiff ordered the front-end loader with a heated seat already installed, the heated seat would then be part of the product and the tort action against the manufacturer would likely be barred by the ELD.

The most important thing to remember is that states differ on how they approach and apply the ELD. For instance, Alabama provides a fraudulent inducement exception to the ELD defense. See e.g., *Ford Motor Co. v. Rice,* 726 So. 2d 626, 631 (Ala. 1998). Other states have promulgated product liability statutes that explain how the ELD shall apply and in what types of circumstances. As more states expand the application of the ELD, however, the law's potential intersection with other statutes increases.

For example, the question about whether and how general construction statutes could co-exist with the ELD came up in a recent summary judgment decision in Wisconsin. In *Housing Authority of the City of Milwaukee et. al. v. Zimmerman Design Group, et al.*, Milwaukee County Case No. 12-CV-11532, the local housing authority asserted claims for, among other things, breach of contract, warranty, and negligence against various parties, including the architect and a supplier of a multi-story, multi-tenant subsidized housing development in Milwaukee, Wis.

Plaintiff's lawyers argued that, under Wisconsin law, the court could not apply the ELD and that parties to construction contracts, like the local housing authority, could pursue tort claims for purely economic losses. It was further argued that it was against Wisconsin public policy to allow a contractor to attempt to limit or eliminate its tort liability.

The lawyers for the Defendant supplier, which filed for summary judgment seeking to dismiss the negligence claim asserted against it, argued that the Wisconsin statute at issue merely provided that parties could not contract away tort liability and that "nothing in the language of the statute added to, subtracted from, or revised the elements of tort liability, including when, where, or how the ELD would be applied." The court ultimately concluded that the Wisconsin statute at issue could run parallel with the ELD.

This is just one example of how one state has had to reconcile the application of the ELD with its other statutes in a particular case. Because each state is different, it would be worthwhile to examine your state's statutes and case law precedent to determine how to best approach an ELD defense in your state.

If you have any questions on the ELD, contact Claire Burns, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Claire.Burns@beasleyallen.com.

Sources: "Unraveling the Applications of the Economic Loss Doctrine, Law360, http://www.law360.com/articles/858374/unraveling-the-applications-of-the-economic-loss-doctrine

Surprise! You Signed An Arbitration Agreement

It has become quite evident that the arbitration system has expanded in scope over the past decade. While many argue this expansion is for good reasons, I strongly disagree. Huge corporations often claim that circumventing the court system reduces litigation costs, allows more limited discovery and yields a swifter result for both parties. I don't believe they can prove those statements to be true. Mandatory, forced arbitration favors large corporations and is very much anti-consumer. The deck is stacked against individuals when they face huge corporations in arbitration and that's exactly why I strongly oppose arbitration unless both sides agree to it.

Consumers will find arbitration agreements in practically every single contract they sign these days. We have come to expect them with the purchase of nearly every consumer product. There are still some surprises, however, when arbitration clauses pop up unexpectedly.

One such instance involved Gretchen Carlson. When she filed a lawsuit in July alleging sexual harassment during her tenure at Fox News, Ms. Carlson became part of a disturbing statistic. At least 25 percent of American women say they have experienced sexual harassment in the workplace, according to a 2016 report from the Equal Employment Opportunity Commission (EEOC). Ms. Carlson also faced a surprising obstacle that blocks an untold lot of them—there was an arbitration clause in her employment contract.

From a consumer advocate standpoint, one major issue is that there is no reliable data on how many Americans have given up a constitutional right to a court hearing through arbitration clauses. With traditional consumer transactions, the assumption today is almost always that an arbitration clause is in play. Employment law, however, is a different beast—arbitration in employment cases is only recently gaining attention.

One academic study estimates, using projections based on narrow data sets, that as many as a quarter of nonunionized American workers may be subject to the restrictions. Arbitration clauses are found not only in multimillion-dollar contracts like that of Ms. Carlson's but also in the most mundane hiring materials—form contracts, even employee handbooks—that have been given to employees at Anheuser-Busch or Applebee's or some editors at *TIME*.

Ms. Carlson cleverly navigated her own clause: she sued Roger Ailes, the co-founder, CEO and chairman of Fox, not the company itself. Her suit alleged that Ailes "unlawfully retaliated" against her and "sabotaged her career because she refused his sexual advances and complained about severe and pervasive sexual harassment." As soon as the case was public, Ailes' lawyers tried to move it into arbitration, arguing that Ms. Carlson had broken the terms of her contract. Her contract, according to Ailes, said that any legal disputes had to be brought in an arbitration proceeding. Ailes denied wrongdoing, and he and Ms. Carlson agreed on a confidential settlement.

This August, in response to Ms. Carlson's case, three U.S. Senators, Richard Blumenthal, Al Franken and Dick Durbin, wrote to four major arbitration businesses, requesting information on employment disputes and cases involving sexual harassment that have been heard in secret by arbitrators. Questions included how many sexual-harassment lawsuits have been referred to binding arbitration through their organizations, and how many cases involved confidentiality clauses similar to Carlson's, regardless of the cause of action.

Three of the four arbitration organizations responded. The American Arbitration Association, one of the largest businesses (and a not-for-profit), noted that its data was not comprehensive and added that only 4 percent of employment-plan cases in 2014 involved sexual-harassment issues. For Sen. Blumenthal, that information was not adequate. He stated:

> *The responses give us no informative or comprehensive view of how prevalent the problem is. It could be very substantial with illegal or dangerous activity going unreported or underreported.*

Last year, Sen. Franken reintroduced the Arbitration Fairness Act, which would invalidate current arbitration clauses in employment, consumer, civil rights and antitrust claims. Under this measure, a claimant alleging sexual harassment who is subject to an arbitration mandate could not be forced to resolve the dispute that way. This year, Sen. Patrick Leahy followed it up with the Restoring Statutory Rights Act, which says no arbitration agreement can make you waive a statutory right. Sen. Blumenthal, who refers to Ms. Carlson's case as a teaching moment for the nation, observed:

> *Clearly these clauses can be misused, and silence can be a means for abusers to conceal misconduct. If Ms. Carlson had adhered strictly to the terms of her employment contract, her case would have remained a secret forever.*

Arbitration Clauses are very easy to miss in a document—you probably have agreed to one at some point, whether at your job or at your bank. They can be just a few short words, but their impact is vast. These clauses push disputes between parties to a system in which an arbitrator (sometimes a retired judge) is hired to adjudicate the matter. Some contracts prohibit claimants from speaking about the claims, which in harassment cases could leave other victims in the dark.

You don't necessarily have to sign on a dotted line to agree to arbitration—Netflix subscribers agree to arbitration in the terms of use before picking a movie; workers at Macy's and Raymour & Flanigan have sued over arbitration clauses that the companies said they agreed to by virtue of accepting employment at the company. Even at-will employees can be compelled into arbitration through clauses in employee materials.

Research by Katherine Stone, a law professor at UCLA, and Cornell law professor Alexander Colvin shows that payouts in arbitration are much smaller than the damages Plaintiffs might receive in court—so small that most lawyers are reluctant to take the cases. Ms. Carlson's reported $20 million settlement is far more than most persons could ever hope to win. Because of the confidentiality in most cases, statistics are hard to come by. But a 2007 Chicago-wide survey put median sexual-harassment settlements at about $30,000. Also, a national study from a researcher at Columbia University in 2006 found employees who take their cases to trial win on average $217,000.

Despite the difference in relief, it may be getting harder for employees to take sexual-harassment complaints to court. "Anecdotally speaking, the use of arbitration agreements from our perspective is increasing," says Peggy Mastroianni, legal counsel at the EEOC. That is not good news for employees.

Arbitration in employment contracts is gaining traction and most people don't think a second thought about signing an agreement—even assuming they notice it is there. Professor Stone stated:

> *When you take a job, you don't think you are going to end up suing your employer. Any employer that is big enough will be advised to put an arbitration clause into their employment materials, and employees will not be able to bring a class-action suit. It'd basically be malpractice not to advise that.*

On the other hand, "[t]he EEOC's stance has always been that mandatory arbitration of employment discrimination is bad: the secrecy, the lack of precedent," says Ms. Mastroianni. She added: "We litigated this issue in a number of cases that we lost."

Despite the increasing uses of arbitration agreements, the trend in forcing cases into confidential arbitration suits is deeply troubling and rightfully so. The Obama Administration has tried to curb the arbitration boom without involving Congress. Recently, a Department of Health and Human Services agency barred nursing homes that receive federal funding from mandating that residents resolve disputes in arbitration. In May, the Consumer Financial Protection Bureau (CFPB) proposed a rule to prevent banks and credit-card companies from using arbitration clauses with consumers. In June, the Department of Education proposed to protect students from arbitration clauses buried in enrollment agreements.

While these rulings are all steps in the right direction, none of them are the cure for arbitration that consumers and employees badly need. On the other hand, slow progress is better than no progress. However, the battle must continue.

Source: *Time Magazine*

Coffee Maker Importer Held Liable For Not Reporting Defect

A Wisconsin federal judge gave the Consumer Product Safety Commission (CPSC) a win, finding importer Spectrum Brands Inc. to be liable for taking years to report a defect in a Black & Decker-branded coffee maker. While declining to issue summary judgment on penalties, U.S. District Judge William Conley did find that Spectrum Brands and Applica Consumer Products Inc.—which it bought in 2010 and merged with in 2014—failed to report dangerous defects in the carafes of the imported coffee makers. The judge also dismissed claims by Spectrum that the reporting standards were too vague and that its due process rights had been violated. Judge Conley said in his opinion:

> *Under the facts alleged, defendant engaged in knowing, arguably outrageous, conduct by failing to notify the CPSC about substantiated complaints that carafes were breaking due to design defects and harming individuals for over two years. Furthermore, even after issuing a recall notice for those defective carafes, Applica sold more of them, necessitating another recall.*

According to the government, from 2008 to 2012, Spectrum and Applica imported and distributed more than 159,000 Black & Decker SpaceMaker Under-the-Cabinet Coffeemaker products. The product had "an obvious and potentially dangerous defect whereby the handles on the coffee makers' glass carafes would suddenly break or detach while the carafe was full of scalding-hot coffee," the government said. In late 2008, the company began receiving what would add up to more than 1,600 consumer complaints, including more than 65 reports of burns, the government said.

In March and April 2009, the company analyzed the defect, prompting the import of a redesigned carafe, but continued distributing its entire inventory of the defective coffee maker. The company did not report the defect to the CPSC until April 2012, after it was served with a class action complaint about the defective carafe handles. Even after issuing a recall on the coffee makers that year, the government contends that Spectrum knowingly and unlawfully sold roughly 640 more of the coffee makers. Judge Conley wrote, referring to Section 15 of the Consumer Product Safety Act:

> *Even at the time Spectrum finally filed its Section 15 report in April of 2012, the CPSC was still not told that Applica had changed the design of the carafes in 2009 in an attempt to remedy the defect, nor that Spectrum had voluntarily recalled the carafes in March of 2012!"*

Judge Conley also said the fact that the CPSC did not have a formal, recorded deliberation of the evidence before referring the case for prosecution was not a due process violation, saying there was no statutory requirement. Judge Conley declined a government motion for summary judgment imposing injunctive relief and financial penalties. Instead, the judge set a scheduling conference for the penalty phase of the case. Scott Wolfson, director of communications for the CPSC, said the agency regarded the ruling as "very positive," particularly in regard to notice and the statute of limitations. He said:

> *This ruling is a very clear message to the regulated community of what the laws are and how this pertains to how the CPSC pursues civil penalties.*

The government is represented by Thomas Ross and Alan Phelps of the U.S. Department of Justice and Harriet Kerwin of the CPSC. The case is *U.S. v. Spectrum Brands Inc.* in the U.S. District Court for the Western District of Wisconsin.

Source: Law360.com

Toys R Us Pulls Battery-Powered Toy Truck After Fire Report

Toys R Us has pulled a Tonka toy truck from the market after reports that one caught fire in Washington state while being taken home from a local store by a pair of grandparents who bought one as a present.

A spokeswoman for Toys R Us said that the ride-on toy has been pulled from stores and its website out of "an abundance of caution." A Tonka 12V Ride-On Dump Truck, made by California-based Dynacraft, caught on fire twice last month while being taken home by a Washington couple. Delmond Harden and his wife stopped to put out the fire, but on the way back to the Toys R Us store to return the toy, the toy burst into flames again, setting their "real truck" on fire. The cause of the fire has not been disclosed.

According to the company's website, the toy was sold exclusively through Toys R Us. Big enough for two children, the Tonka Truck had a working dump truck bed in the back and could get up to four miles per hour. It was powered by a 12-volt rechargeable battery, according to a product description. As widely reported, problems with consumer products spontaneously catching fire have afflicted other manufacturers in recent months. Samsung, with its now-defunct Galaxy Note7 smartphone, has definitely been in the news. Samsung issued a mass recall of 2.5 million Galaxy Note7 phones over reports that a defect in its lithium ion battery had caused at least 35 phones to catch fire.

Source: Law360.com

Study Finds Dramatic Increase In Child Opioid Poisonings

The number of children hospitalized due to accidental opioid poisoning has jumped threefold in recent years. This has caused public health experts to call for initiatives to address the overprescribing of the drugs and to raise awareness of the importance of safe storage of the powerful prescription painkillers.

According to a Yale School of Public Health study published in the journal *JAMA Pediatrics*, the number of opioid poisonings in children aged 1 to 4 increased 205 percent from 1997 to 2012. Poisonings among teenagers 15 to 19 increased 176 percent. Overall, there was a 165 percent increase in opioid poisonings among children and young adults ages 19 and younger.

Most of the poisonings among children younger than 10 years of age were accidental. Lead researcher Julie Gaither said children are "eating them like candy." Most poisonings among teenagers were accidental overdoses, though some were suicide attempts. The most common culprits were painkillers such as OxyContin, Percocet and Vicodin.

For the study, researchers analyzed data from children's hospitals from 1997 to 2012 in three-year intervals. More than 13,000 records of children and teens hospitalized for opioid poisonings were identified, as well as records of heroin poisonings among teens. Just more than 1 percent of children died during hospitalization.

The prescription drug epidemic has become a growing concern in the United States, with opioids being the most misused and abused prescription drug in the country. They are more widely prescribed today than ever before, "so we now have opioids in millions of American homes, and children and teens are exposed to them more frequently," says lead Yale researcher Julie Gaither, a postdoctoral fellow in biostatistics.

Federal agencies are calling on doctors to only prescribe the medicationss if no other therapy options are suitable. This has helped curb access to the painkillers, but it is also driving the cost of opioids up, which has made teens turn to heroin, which is cheaper and more readily available.

Sources: CBS News and RightingInjustice.com

Beware Of Holiday Scams

As the holiday season gets underway, an overall feeling of cheer and kindness seems to take hold of many people, which is a very good thing. This time of year involves gatherings, parties and a time for reflection and accounting of all the past year's blessings. Unfortunately, there are many "scammers" who seek to ruin all the compassion and goodwill by tricking people into false schemes and promotions. Don't let the Grinch steal your joy; be wary of these popular holiday scams:

- Free gift cards and coupons — Many websites will offer these goodies to get you to input your personal information. They can then take this information and raid your online accounts.

- Postal failure delivery — taking advantage of the fact that more people are shipping gifts this time of year, these email notifications generally provide a link for you to click on to correct the alleged delivery problem. The email often looks like an official notification from a popular carrier, i.e., U.S. Postal Service, UPS, FedEx, etc. Once you click on the link, it will then ask you to input personal data that can be used to steal your identity and hack your accounts.

- Ransomware — many people will receive an email asking that a ransom be paid, or the person's computer will be targeted by a hacker. Unfortunately, this has become more prevalent in recent years and has caused millions of dollars in damages to individuals and businesses.

- Local vendor deals — Many people will receive notifications from alleged business that operate in your area and appear to be legitimate. They may advertise free tickets to movies, coupons or even preferred pricing. Again, they usually ask you to enter your personal data to qualify. Just another ploy to get information to hack your accounts.

- Charity tricksters — These solicitations can be sent through email or via regular postal delivery. They almost always play on your emotions and pray for you to help those less fortunate during this holiday season. They may even use the names of legitimate charities but provide a different link or address.

The best way to avoid those "Scrooges" who would prey on your kindness and goodwill toward others is to be critical of those seeking things from you. You don't have to lose your compassion, just double check the people you are dealing with before you click on that link, fill out that form or write that check. We don't want you having to say, "Bah humbug" during this holiday season!

Source: http://www.cutimes.com/2015/11/13/the-12-scams-of-christmas

XIX. RECALLS UPDATE

Once again we are reporting a large number of safety-related recalls. It should be noted, however, that we aren't including all recalls. We have included some of the more significant recalls that were issued in November. 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 Nearly 1.5 Million Cars In Europe Over Takata Airbags

Toyota Motor Corp. has recalled about 5.8 million cars over potentially faulty airbag inflators made by Takata Corp. The recall affects about 1.47 million vehicles sold in Europe, about 820,000 cars sold in China and 1.16 million cars in the Japanese market. The action also extends to Central and South America, Africa, the Near and Middle East and Singapore. Affected models include the Corolla compact car, one of the world's best-selling models, the Yaris/Vitz subcompact, the Hilux pickup and the Etios line of sedans and hatchbacks. The recall covers driver-side and passenger-side airbags installed in cars produced between May 2000 and November 2001, and April 2006 and December 2014.

Toyota Recalling 744,000 Minivans Over Sliding Door Glitch

Toyota Motor North America Inc. is recalling about 744,000 of its popular Sienna minivans over an issue with the vehicles' sliding doors, which can open while driving. The issue lies with the motor circuit in the sliding door for Sienna vans of model year 2011 to 2016, which "under certain limited conditions" can become overloaded and open the motor's fuse, allowing the opportunity for the door to become unlatched and open, even while the car is running and being driven. Toyota is "currently developing the remedy for this condition," and all owners of possibly affected vehicles will be notified of recall procedures by mid-January.

The automaker has had a busy year for recalls, mainly due to its longtime use of airbags manufactured by Takata Corp. Since the defect became known last year, Toyota has recalled millions of vehicles in the U.S. and elsewhere, announcing another round of recalls at the end of October that will affect close to 6 million vehicles worldwide.

Subaru Recalling 100,000 Vehicles Over Air Pump Fire Risk

Subaru of America Inc. is set to recall more than 100,000 of its popular Outback, Legacy, Forester and Impreza models over a potential defect that can cause a part in the air pump to melt and catch fire. In documents posted by the National Highway Traffic Safety Administration (NHTSA), a relay in a secondary air injection pump was pointed to as being prone to continuous running, leading the part to overheat and in some instances melt and cause internal fire. However, the check engine light does go on when the pump fails, and no injuries have been reported due to the defect.

The recall will cover 2007-09 model year Legacys and Outbacks, 2008-14 Imprezas and 2009-13 Foresters totaling 100,127 vehicles, all equipped with turbocharged engines, according to NHTSA records. Subaru will replace the pump and relay without cost to drivers, but a start date for the recall has not been set. Subaru's parent company, Fuji Heavy Industries (FHI), received an initial technical report in April 2011 that noted the check engine light was coming on because the secondary air pump was failing. The company investigated and found the cause was "insufficient contact point pressure of the relay." according to court documents. Fuji told the supplier of the part to make changes to the pressure mechanism and inspect every part, but in 2013 the company learned of a car fire caused by the pump failure. "FHI attempted to investigate; however, this was not possible as the fire department collected the affected parts," NHTSA documents said.

After another pump fire was reported in 2015, another investigation was opened, and ultimately the company decided to recall all of the potentially affected parts in the U.S. The air pump recall comes not long after NHTSA announced that Subaru would be recalling about 593,000 vehicles over faulty windshield wiper motors that can malfunction and, again, in some cases start a fire. That recall also covers certain 2010-14 Outback and Legacy models. In its recall report to the NHTSA, Subaru said the issue comes as a result of poor manufacturing of the bottom cover for the wiper motor installed in front windshields, which could cause interference between two motor components.

BMW Recalls 136,000 Vehicles Over Possible Engine Stalling

BMW of North America LLC is set to recall more than 136,000 vehicles over a possible wiring defect with in-tank fuel pumps that can cause engines to suddenly stall. The recall is expected to begin Dec. 5 and will include a range of BMW X5 models released between 2007 and 2011, several X6 models released between 2006 and 2011 and about 15 other sedan, coupe and convertible models released between 2011 and 2012, all of which are equipped with in-tank fuel pumps that may have "insufficiently crimped wire contacts." "The loose wires may cause the connector to melt, resulting in a fuel leak," the National Highway Traffic Safety Administration (NHTSA) said. "Additionally, the fuel pump may stop working, possibly causing an engine stall and increase the risk of a crash."

With the recall, drivers will have their vehicle's fuel pump replaced free of charge. In an investigation report of the defect, BMW said it had not received any reports and was otherwise unaware of any injuries stemming from the issue.

Fuel Leaks And Wiper Issues Prompt FCA Recall Of 83,000 Vehicles

Fiat Chrysler will recall more than 83,000 vehicles in two campaigns relating to potential fuel leaks in Dodge Durango and Jeep Grand Cherokee vehicles and faulty windshield wiper electronics in certain Dodge Dart sedans. The largest of the two recalls by FCA US LLC covers

53,155 model year 2016 Dart vehicles, which could experience voltage spikes in the circuits of the front windshield wipers caused by a fault in the windshield washer pump. "Pumps with this condition may be subject to short-circuit, which, if one occurs, could disable windshield wiper function," FCA said in a statement. "FCA US is unaware of any related injuries or accidents."

According to the FCA, the company discovered the defect after launching an investigation based on findings from warranty data. FCA and the supplier of the pumps worked together to discover electrical connections that were out of compliance with the automaker's specifications. The company believes that approximately 4 percent of the recalled vehicles are experiencing the voltage spike issue. To fix the problem, the FCA will replace the defective windshield washer pumps at no cost to Dart owners. The FCA said it will begin to notify dealers and owners starting around Dec. 19.

The second recall covers 30,180 SUVs in the U.S., but the FCA says it believes only 30 vehicles are affected by what it called a "manufacturing anomaly" that caused fuel rail tubes in 2016 Dodge Durango and Jeep Grand Cherokee models to become damaged. According to the FCA, the damage was caused by inadvertent contact during assembly between the manifold fastener and the fuel rail. When the rail is exposed to pressure pulsation and thermal cycling, the FCA said it is possible for a fuel leak to develop along the damaged area. This leak in turn results in a higher potential for fires. The vehicles subject to recall all contain engines manufactured over an 11-week period at the Saltillo Engine Plant in the state of Coahuila, Mexico. The recall stems from an FCA investigation launched after an employee at the plant reported a fuel leak in a single vehicle.

The Durango and Grand Cherokee recall also includes 2,534 vehicles in Canada, 489 in Mexico and 1,427 outside the North American Free Trade Agreement (NAFTA) region. The campaign only covers vehicles with 3.6-liter V-6 engines. FCA will inspect all recalled vehicles and will replace the fuel rails and lower intake manifolds if needed, free of charge. As with the Dart recall, the FCA will begin to notify owners and dealers beginning around Dec. 19.

Mazda Recalls Thousands Of Sports Cars Over Gas Leak Risk

Mazda North America is recalling nearly 70,000 of its RX-8 sports cars because they are prone to possible fuel leaks that carry the potential to spark fires, according to the National Highway Traffic Safety Administration (NHTSA). The recalled vehicles, which include RX-8s from the 2004 through 2008 models, have fuel pump rings that might deteriorate from engine and exhaust pipe heat, meaning there is a risk of fuel leakage that in the presence of an ignition source can start a fiery blaze, the recall notice said. Mazda was first made aware of the defect in September 2013 and subsequently started an investigation, the company said in an October recall report to the NHTSA.

At the time, the automaker had concluded bad maintenance was the cause of the fuel pump failure, and closed the investigation. Mazda began a second investigation a year later, after receiving a second field report about cracking pumps. After closely monitoring seal deterioration in the field, Mazda said, it decided to recall the RX-8 vehicles last month. Mazda will apparently notify owners of the problem, and dealers are instructed to replace the sealing ring and add a thermal insulation pad to the fuel tank for no charge. Remedy parts are not yet available, but the automaker will send out a second notice once the parts come in. No timeline has been specified. The vehicles were manufactured in Mazda's Hiroshima plant in Japan.

Mitsubishi Recalls Up To 195,000 Vehicles Over Wiper Problem

Japanese automaker Mitsubishi will recall up to 195,000 vehicles in the U.S. to fix a problem with their windshield wipers. The automaker doesn't believe the problem has caused any injuries, according to regulatory filings posted online. Mitsubishi Motors North America Inc. notified federal officials that it expects to recall up to 100,000 Outlander sport utility vehicles for the model years 2007 through 2013 and more than 94,000 Outlander Sport SUVs for the model years 2011 and 2012. Different parts of the models' windshield wiper assemblies will be replaced free of charge, the company said. The automaker said that it found that a rubber component where the hood meets the windshield of Outlander windshield wipers could degrade over time, eventually creating an opening for water to wear out a metal joint. According to documents filed with the National Highway Traffic Safety Administration (NHTSA), only 11 such incidents have been reported worldwide since 2010.

In the Outlander Sport models, the company said that water could seep into wiper motors and break them. Mitsubishi didn't say how often the problem was reported, but it said it hadn't received any injury claims related to either problem. Both defective parts were made by Denso Corp., the filings said. The company said that it hadn't yet set a date on when it will notify consumers, but it must do so within 60 days of notifying U.S. regulators. The Outlander and Outlander Sport are Mitsubishi's top models in the North American market, making up nearly 60 percent of the company's sales here in all of 2015 and the first half of 2016.

Kia Recalls 72,000 Cars Due To Fire Risk

Kia Motors Corp. is recalling 72,000 Sportages because of concerns relating to electrical fires. The South Korean car maker told highway safety regulators that road salt could corrode wire harness connector pins in the hydraulic electronic control unit assembly, which is part of the brake system. The company said that the issue does not affect brake performance, but could cause short circuits, leading to engine compartment fires in 2008 and 2009 model years. The issue could arise due to improper sealing of the unit, allowing salt water from road salt to get into the system, the company said.

Owners can bring the vehicles to dealers, who will inspect the connector pins for corrosion and replace the connector cover with a new one if none is found. Dealers will replace the whole assembly if corrosion is found. The first report of a fire was in April, in California. Kia learned that a 2008 model year Sportage caught fire in a driveway. Kia was able to identify nine other instances of "thermal events." The Sportage is a small-size SUV. The recall was set to begin on Nov. 28.

BRP Recalls Side-By-Side Off-Road Vehicles

BRP U.S. of Sturtevant, Wis., is recalling about 2,380 side-by-side off-road vehicles. The steering rack and pinion assembly can have an improper amount of grease and result in a loss of steering control, posing a crash hazard. The firm has received 33 incident reports, including reports of intermittent or complete steering lock. No injuries are reported. This recall involves model year 2017 Can-Am Maverick X3 side-by-side vehicles. The vehicles came in various colors. The model name and Vehicle Identification Number (VIN) is printed on a label under the glove box. To determine if your vehicle is included in the recall, have your VIN (Vehicle identification Number) ready and contact your authorized Can-Am side-by-side dealer or BRP. Recalled models include: 2017 Can-Am Maverick X3 STD, 2017 Can-Am

Maverick X3 XDS and 2017 Can-Am Maverick X3 XRS. The vehicles, manufactured in Mexico, were sold at Can-Am dealers nationwide from August 2016, through November 2016, for between $23,000 and $27,000.

Consumers should immediately stop using the recalled vehicles and contact a BRP Can-Am side-by-side dealer to schedule an appointment for a free repair. BRP is notifying registered consumers directly about this recall. Consumers may contact BRP toll-free at 888-272-9222 from 8 a.m. to 8 p.m. (ET) Monday through Sunday or online at www.can-am.brp.com and click on "Owner Center" and then "Recall Information" for more information.

Peg Perego Recalls Children's Ride-On Vehicles Due To Fire And Burn Hazards

Peg Perego has recalled Children's ride-on vehicles. The company has received three reports of the children's ride-on toy vehicles overheating, including one report of a burn. The company says a relay on the circuit board can fail causing the vehicle's motor to overheat and ignite. The toy vehicles have been sold at online retailers including Amazon.com, Cabelas.com, Target.com, ToysRUs.com and Wal-Mart.com from October 2014 through May 2015 for between $500 and $600. The recall involves Peg Perego's 850 Polaris Sportsman ride-on, 24-volt battery operated toy vehicles intended for children ages 5 to 7 years. The ATV-style vehicles for two people are silver, red and black and have four wheels, a flip-up backrest for the back passenger and a front and rear luggage rack. The date code is found underneath the vehicle seat. Sportsman Twin and 850 EFI appear on the side of the ride-on vehicle and Polaris appears on the side of the vehicle's seat.

You can get a list of the recalled vehicles by email at 850recall@pegperego.com or online at http://us.pegperego.com and click on Customer Service and then on Recalls for more information. Consumers should immediately stop children from using the recalled toy vehicles and contact Peg Perego to receive a free replacement circuit board with instructions, including shipping. Consumers can also access the installation instructions on the company's website. Peg Perego is contacting known customers directly.

Trek Recalls Farley Bicycles Due To Fall Hazard

Trek Bicycle Corp., of Waterloo, Wis., has recalled about 2,600 Trek Farley bicycles and framesets. The fork can separate from the steer tube, posing a fall hazard to the rider. This recall involves model year 2014 Trek Farley bicycles and framesets and 2015 Trek Farley 6 bicycles and framesets. The 2014 Trek Farley is black with green decals with an aluminum frame and fork. The 2014 frameset is sky blue with orange decals. The 2015 Trek Farley 6 is black with blue decals with an aluminum frame and fork. Both bicycle models were sold in 14.5 through 21.5 inch sizes. "Trek" is printed across the bicycle frame. The company has received five reports of the bicycle fork separating from the steer tube. No injuries have been reported.

The bikes were sold at bicycle stores nationwide from September 2013 through August 2016 for between $1,700 and $2,600. Consumers should immediately stop using the recalled bicycles and framesets and return the bicycles to a Trek retailer for a free inspection and repair. Contact Trek at 800-373-4594 from 8 a.m. to 6 p.m. CT Monday through Friday or online at www.trekbikes.com and click on Safety & Recalls at the bottom of the page for more information. At press time, photos were available at https://cpsc.gov/Recalls/2017/Trek-Recalls-Farley-Bicycles.

KTM North America Recalls Closed-Course/Competition Off-Road Motorcycles Due To Crash Hazard

About 1,200 Closed-course/competition off-road motorcycles have been recalled by KTM North America, Inc., of Amherst, Ohio. The front brake master cylinder can malfunction, posing a crash hazard. This recall involves model year 2017 KTM brand and Husqvarna motorcycles brand closed-course/competition only motorcycles. Five KTM models are being recalled: 150 XC-W, 250 XC-W, 300 XC-W, 350 SX-F and 450 XC-F. Three Husqvarna models are being recalled: TC 250, TX 300 and FC 350. Recalled KTM motorcycles are orange and black with the KTM logo and engine size on both sides of the shrouds covering the fuel tank. Recalled Husqvarna motorcycles are white with blue and yellow markings and the Husqvarna logo on both sides of the shrouds covering the fuel tank. The engine size is located on both sides of the rear fender below the rear of the seat. Model year 2017 motorcycles have a letter "H" in the 10th position of the vehicle identification number (VIN), located on the right side of the steering head.

The bikes were sold at KTM and Husqvarna Motorcycles authorized dealers nationwide from June 2016 to August 2016 for between $8,000 and $11,000. Consumers should immediately stop using the recalled motorcycles and contact an authorized KTM or Husqvarna Motorcycles dealer to schedule a free repair. Contact KTM North America/Husqvarna Motorcycles North America toll-free at 888-985-6090 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.ktmusa.com or www.husqvarna-motorcycles.com and click on "Service" then "Safety" for more information. Photos available at: https://cpsc.gov/Recalls/2017/KTM-North-America-Recalls-Closed-Course-Competition-Off-Road-Motorcycles

GoPro Recalls About 2,500 Karma Drones

GoPro recalled about 2,500 of its Karma drones just two weeks after they were put on the market. Customers were told to immediately stop using the product. It was discovered that some units lost power while flying. In a notice announcing the recall on its website, GoPro warned customers not to continue operating the drones even if they appear to be working fine, urging consumers to send back the devices for a full refund. The company is not offering replacement units. A very small number of Karma owners have reported incidents of power failure during operation, according to GoPro.

The recall does not apply to GoPro's HERO5 Black and Karma Grip devices, although those who purchased a bundle package containing all three must return all the items to get a full refund, the company said. The U.S. Consumer Products Safety Commission (CPSC) had not issued a recall notice for the product as of Nov. 9.

Fox Factory Recalls Mountain Bike Shock Absorbers Due To Fall And Injury Hazards

Fox Factory, Watsonville, Calif., has recalled about 6,100 Mountain bike rear shock absorbers. The bicycle's rear shock absorber outer sleeve can rupture, allowing the sleeve to come in contact with other bicycle parts or the rider, posing a fall and injury hazard. This recall involves all model year 2016 and some 2017 FLOAT X2 bicycle rear shock absorbers sold both individually and installed on YT, Giant, Pivot, Intense, Ibis, Scott, Trek, GT, Knolly, Norco, Rocky Mountain, Diamondback, Morpheus, Foes Racing, Orbea and Canyon full-suspension mountain bikes and frames.

The solid black or black and gold FLOAT X2 shocks have an air sleeve construction. FLOAT X2 is printed on the external reservoir connected to the blue compression and red rebound adjusters that have X2 and RVS laser etched on them. Recalled shocks do not have a "250 psi max" label directly under the air fill boss on the outer sleeve of the shock. Recalled shocks and bike models can be identified at http://ridefox.com/recall. The company has received seven reports of the shock absorber outer sleeve rupturing. No injuries have been reported.

The shocks were sold at Independent bike stores nationwide, online at Jenson USA, Pro Bike Supply, Universal Cycles, Go-ride.com and other online bike retailers from March 2015 through September 2016. The shocks were installed as original equipment on full-suspension mountain bikes and frames sold for between about $2,700 to $10,000 and sold individually as an aftermarket accessory for about $600. Consumers should immediately stop using bicycles with the recalled rear shock absorbers and return them to the place of purchase for a free repair. Consumers unable to return their bicycles should contact Fox for instructions on receiving a free repair. Contact Fox toll-free at 855-360-3488 from 8 a.m. to 5 p.m. PT Monday through Friday, email at recall@ridefox.com or online at http://ridefox.com/recall and click on the recall link for more information. Pictures available here: https://cpsc.gov/Recalls/2017/Fox-Factory-Recalls-Mountain-Bike-Shock-Absorbers-Due-to-Fall-and-Injury-Hazards

Pier 1 Imports Recalls Glass Knobs Due To Laceration Hazard

About 140,000 Glass knobs have been recalled by Pier 1 Imports, of Fort Worth, Texas. The glass knobs can break while in use, posing a risk of laceration to users from broken glass pieces. This recall involves Pier 1 Imports Basic, Kira and Facets glass knobs commonly used with dressers, cabinets and small drawers. The glass knobs have a metal stem affixed to one side and were sold in seven colors: clear, teal, pink, green, aquamarine, champagne and silver. No other decorative knobs are included in this recall. Pier 1 Imports has received seven reports of injuries as a result of glass knobs breaking during installation or while in use.

The glass knobs were sold exclusively at Pier 1 Imports stores nationwide and online at www.pier1.com from September 2011 through October 2016 for between $6 and $7. Consumers should immediately stop using the recalled glass knobs and return them to any Pier 1 Imports store for a full refund or merchandise credit. Contact Pier 1 Imports toll-free at 855-513-5140 from 8 a.m. to 7 p.m. CT Monday through Friday, 9 a.m. to 5 p.m. CT Saturday or 10 a.m. to 6 p.m. CT Sunday, or online at www.pier1.com and click on "Product Notes & Recalls" at the bottom of the page for more information. Pictures available at: https://cpsc.gov/Recalls/2017/Pier-1-Imports-Recalls-Glass-Knobs

Skidders Footwear Recalls Children's Shoes Due To Laceration Hazard

About 5,500 Children's shoes have been recalled by Skidders Footwear Inc., of New York. The rivets on the shoes have sharp edges, posing a laceration hazard. This recall involves Skidders Footwear children's canvas tennis shoes sold in three sizes: 12M, 18M and 24M. The shoes have white rubber bottoms and come in three different colors: navy blue fabric with orange rivets and laces, gray fabric with green rivets and laces, and denim colored fabric with pink rivets and laces. The company has received three reports of the rivets scratching the feet of the wearer. No injuries have been reported.

The shoes were sold exclusively at Meijer stores located in Michigan, Indiana, Illinois, Ohio, Kentucky, and Wisconsin, from August 2016 through October 2016 for about $10. Consumers should immediately take the recalled shoes away from children and contact Skidders Footwear to receive a full refund. Contact Skidders Footwear toll-free at 866-636-1221 between 9 a.m. and 5 p.m. ET Monday through Friday or online at www.skidders.com and click on "Safety Notice" at the bottom of the page for more information. Photos available at https://www.cpsc.gov/Recalls/2017/Skidders-Footwear-Recalls-Childrens-Shoes

Lithonia Lighting Recalls Commercial Luminaires Due To Risk Of Injury

Lithonia Lighting, a division of Acuity Brands Lighting, Inc., of Conyers, Ga., Acuity Brands Lighting, Inc. of Conyers, Ga., has recalled about 398,000 BLT series commercial luminaires. The plastic lens on the luminaire can detach and fall unexpectedly, posing a risk of injury from impact. This recall involves Lithonia Lighting BLT series luminaires intended for use in indoor, commercial applications, such as office buildings, schools and stores. The low-profile, recessed LED luminaire is a metal light fixture in a white finish with a rounded or square plastic lens. The fixtures measure about 1, 2 or 4 feet long and 1, 1.5 or 2 feet wide. Only non-sensor luminaires with a manufacture date from October 2015 through August 2016 are included in this recall. Lithonia Lighting, the model and date of manufacture can be found on a label attached to the fixture's housing and on the product packaging. The date code on the fixture's housing's label is in a MM/DD/YY format. The date code on the packaging is in a YYYY/MM/DD format. The company has received 107 reports of plastic lenses falling from the luminaire. No injuries have been reported.

The luminaries were sold at lighting and electrical supply distributors nationwide and online at 1000Bulbs.com, Amazon.com, ATGStores.com, Build.com, HD.com, ShineRetrofits.com, and Wayfair.com from October 2015 through August 2016 for between $150 and $250. Consumers should remove the lens and contact Lithonia Lighting to receive a free repair kit to secure the original lens. Consumers should prevent people from going into the immediate area under the fixtures until the lenses are removed or the luminaires are repaired. A video showing proper lens removal and installation of the repair kit is available at the firm's website at www.lithonia.com/bltvideo. Contact Lithonia Lighting toll-free at 844-675-2339 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.lithonia.com and click on BLT Recall on the left side of the page for more information. Photos available here: https://www.cpsc.gov/Recalls/2017/Lithonia-Lighting-Recalls-Commercial-Luminaires.

Dehumidifiers Made By Midea Are Recalled Due To Serious Fire And Burn Hazards

About 3.4 million Dehumidifiers have been recalled by GD Midea Air Conditioning Equipment Ltd., of China. The dehumidifiers can overheat, smoke and catch fire, posing serious fire and burn hazards. This recall involves 25, 30, 40, 50, 60, 65, 70, and 75-pint dehumidifiers with the following brand names: Airworks, Alen, Arcticaire, Arctic King, Beaumark, Coolworks, ComfortAire, Comfort Star, Continental Electic, Crosley, Daewoo, Danby, Danby & Designer, Dayton, Degree, Diplomat, Edgestar, Excell, Fellini, Forest Air, Frigidaire, GE, Grunaire, Hanover, Honeywell, Homestyles, Hyundai, Ideal Air, Kenmore, Keystone, Kul, Midea, Nantucket, Ocean Breeze, Pelonis, Perfect Aire, Perfect Home, Polar Wind, Premiere, Professional Series, Royal Sovereign, Simplicity, Sunbeam, SPT, Sylvania, TGM, Touch Point, Trutemp, Uberhaus, Westpointe, Winix, and Winixl. The brand name, model number, pint capacity and manufacture date are printed on the nameplate sticker on the back of the dehumidifier. To determine if your dehumidifier has been recalled, enter the model number at https://www.recallrtr.com/dehumidifier Midea has received 38 reports of smoke and fire. About $4.8 million property damage has been reported. No injuries have been reported.

The dehumidifiers were sold at Lowes, Menards, PC Richard and other stores nationwide from January 2003 through December 2013 for between $100 and $300.

Consumers should immediately turn off and unplug the dehumidifiers and contact GD Midea for either a replacement unit or a partial refund. Consumers whose dehumidifiers were manufactured before Oct. 1, 2008, will receive a partial refund, not a replacement. The manufacturing dates can be found on back of units. Contact GD Midea at 800-600-3055 from 7 a.m. to 6 p.m. CT Monday through Friday or online at www.midea.com/us/ and click on Product Recall for more information. At press time, photos were available at https://cpsc.gov/Recalls/2017/Dehumidifiers-Made-by-Midea-Recalled.

Kikkerland Design Recalls Teapots With Stands Due To Fire Hazard

About 7,300 Kikkerland and Cost Plus World Market brand teapots with bamboo stands have been recalled by Kikkerland Design Inc., of New York. The bamboo votive stand can catch fire, posing a fire hazard to consumers. This recall involves Kikkerland and Cost Plus World Market brand teapots with bamboo stands. The 30-ounce glass teapots have a removable glass tea infuser sold with a votive-candle holder inside the bamboo stand. The Kikkerland teapots have model number TP02 printed on the packaging next to the UPC code. The Cost Plus World Market teapots have a white sticker with number 25024784 printed on the packaging. No votive candles were included with the teapots. The firm has received six reports of the votive stands burning. No injuries have been reported.

The stands were sold at Amazon retailers, Cost Plus World Market, Uncommon Goods and Urban Outfitters and online at www.Amazon.com from March 2014 through September 2016 for between $40 and $70. Consumers should immediately stop using the recalled teapots and stands and contact the firm for return instructions. Consumers who purchased online will be mailed instructions on how to receive a refund. Consumers who bought the teapots at stores can return the teapots and stands for a full refund. Contact Kikkerland at 800-727-7151 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.kikkerland.com and click on the "Recall" link for more information. Pictures available here: https://cpsc.gov/Recalls/2017/Kikkerland-Design-Recalls-Teapots-with-Stands-Due-to-Fire-Hazard

Samsung Recalls Top-Load Washing Machines Due To Risk Of Impact Injuries

About 2.8 million Samsung top-load washing machines have been recalled by Samsung Electronics America Inc., of Ridgefield Park, N.J. The washing machine top can unexpectedly detach from the washing machine chassis during use, posing a risk of injury from impact. This recall involves 34 models of Samsung top-load washing machines. The washing machines have mid-controls or rear-controls. Model numbers and serial information can be found on two labels affixed to the back of the machine. Consumers should check with Samsung to see if their washer is recalled. Models can be found at www.cpsc.gov/Recalls/2017/Samsung-Recalls-Top-Load-Washing-Machines. Samsung has received 733 reports of washing machines experiencing excessive vibration or the top detaching from the washing machine chassis. There are nine related reports of injuries, including a broken jaw, injured shoulder, and other impact or fall-related injuries.

The machines were sold at Best Buy, The Home Depot, Lowes, Sears and other home appliance stores nationwide from March 2011 to November 2016 for between $450 and $1,500. Consumers should contact Samsung immediately to receive one of the following remedy options. Consumers can choose (1) a free in-home repair that includes reinforcement of the washer's top and a free one-year extension of the manufacturer's warranty; (2) a rebate to be applied towards the purchase of a new Samsung or other brand washing machine, along with free installation of the new unit and removal of old unit; or (3) a full refund for consumers who purchased their washing machine within the past 30 days of the recall announcement.

All known consumers will also receive a Home Label Kit that includes a control panel guide and additional safety instructions in the mail. Until they have received and installed a Home Label Kit, consumers should only use the delicate or waterproof cycles when washing bedding, water-resistant and bulky items. The lower spin speed in the delicate or waterproof cycles lessens the risk of the washing machine top unexpectedly detaching from the washing machine chassis. Contact Samsung toll-free at 866-264-5636 from 8 a.m. to 10 p.m. ET, or online at www.Samsung.com and click on the recall notice at the top of the page for more information.

Kichler Lighting Recalls Chandeliers Due To Injury Hazard

The L.D. Kichler Co., of Cleveland, Ohio, has recalled about 48,900 Aztec Light Chandeliers. The chandelier's fixture loop that connects the hanging chain to the lamp can fail during use causing the chandelier to fall from the ceiling and injure bystanders. This recall involves Aztec nine-light chandeliers sold at Lowe's stores under the PORTFOLIO brand name. The chandeliers are metal with an olde bronze finish and measure about 31-inches wide and 31-inches high. They come with etched amber glass shades and a decorative faux marble ball in the center. The upper arms of the fixture are single long curves and the lower arms of the fixture are "S" shaped. "Aztec" and model number 34330 are printed on a sticker located inside the ceiling canopy at the top of the chandelier. Kichler Lighting has received six reports of the chandeliers falling from the ceiling. No injuries have been reported. Approximately $6,000 in property damage has been reported.

The light fixtures were sold at Lowe's stores nationwide and at www.lowes.com from July 2006 through August 2011 for about $240. Consumers should prevent people from going into the immediate area under the chandeliers and contact Kichler for information on how to obtain a free repair kit or replacement for chandeliers that have fallen. Contact Kichler Lighting's Home Center Division ("Aztec"); at 800-554-6504, from 9 a.m. to 5 p.m. ET Monday through Friday, or online at www.kichler.com and click on "Aztec" and then on "Model No. 34330 Safety Information" for more information.

IKEA Recalls 29 Million MALM And Other Models Of Chests And Dressers Due To Serious Tip-Over Hazard

The U.S. Consumer Product Safety Commission (CPSC), in cooperation with IKEA North America, of Conshohocken, Pa., is recalling all chests and dressers that do not comply with the performance requirements of the U.S. voluntary industry standard (ASTM F2057-14). The recalled children's chests and dressers are taller than 23.5 inches and adult chests and dressers are taller than 29.5 inches. The 29 million units of recalled chests and dressers include: MALM 3-drawer, 4-drawer, 5-drawer and three 6-drawer models and other children's and adult chests and dressers. The recalled chests and 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 serious injuries to children. On July 22, 2015, CPSC and IKEA announced a repair program for the chests and dressers that included a free wall-anchoring repair kit for the MALM chests and dressers and other IKEA chests and dressers. CPSC and IKEA were aware of two tragic fatalities involving MALM chests and dressers that occurred prior to the announcement of the repair program:

- In February 2014, a 2-year-old boy from West Chester, Pa. died after a 6-drawer MALM chest tipped over and fatally pinned him against his bed.
- In June 2014, a 23-month-old boy from Snohomish, Wash., died after he became trapped beneath a 3-drawer MALM chest that tipped over.

Subsequent to the July 2015 announcement, CPSC and IKEA learned of additional tip-over incidents, including a February 2016 incident in which a 22-month-old boy from Apple Valley, Minn., died when a MALM 6-drawer chest fell on top of him. Most recently, CPSC has identified and provided to IKEA a fourth report of a fatality that reportedly occurred in September 2011. A 2-year-old boy from Woodbridge, Va., died after an unanchored MALM 3-drawer chest tipped over, and trapped the child between the dresser drawers.

None of the chests or dressers in the above-listed incidents had been anchored to the wall. In addition to the three deaths, IKEA received reports of 41 tip-over incidents involving the MALM chests and dressers, resulting in 17 injuries to children between the ages of 19 months and 10 years old. The MALM chests and dressers are constructed of particleboard or fiberboard and are white, birch (veneer), medium brown, black-brown, white stained oak (veneer), oak (veneer), pink, turquoise, grey, grey-turquoise, lilac, green, brown stained ash (veneer), and black. A 5-digit supplier number, 4-digit date stamp, IKEA logo, country of origin and "MALM" are printed on the underside of the top panel or inside the side panel. Since 1996, IKEA chests and dressers have been labeled to identify IKEA, the model name and the manufacturing date.

The recalled MALM chests were sold from 2002 through June 2016 for between $70 and $200. VIEW RECALLED MALM CHESTS AND DRESSERS HERE: http://www.cpsc.gov/en/Recalls/2016/IKEA-Recalls-29-Million-MALM-and-Other-Models-of-Chests-and-Dressers/.

- IKEA also received 41 reports of tip-overs involving chests and dressers other than MALMs, resulting in the deaths of three children and 19 injuries to children:
- In July 1989, a 20-month-old girl from Mt. Vernon, Va., died after an unanchored GUTE 4-drawer chest tipped over and pinned her against the footboard of a youth bed.
- In March 2002, a 2½-year-old boy from Cranford, N.J., died after an unanchored RAKKE 5-drawer chest tipped over and fatally pinned him to the floor.
- In October 2007, a 3-year-old girl from Chula Vista, Calif., died after a KURS 3-drawer chest tipped over and fatally pinned her to the floor. It is unknown as to whether the dresser was anchored or not.

Most of the non-MALM chests and dressers included in this recall are listed on the IKEA website at www.IKEA-USA.com/recallchestsanddressers. Since 1996, IKEA chests and dressers have been labeled to identify IKEA, the model name and the manufacturing date. CPSC and IKEA are urging consumers to inspect their recalled IKEA chests and dressers to ensure that they are properly anchored to the wall. Chests and dressers should be properly anchored to the wall whether or not they meet the ASTM standard. Consumers should move any unanchored chests and dressers into storage or other areas where they cannot be accessed by children until the chests and dressers are properly anchored to the wall or removed from the home. 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/recallchestsand-dressers, or call 866-856-4532 anytime. A child dies every two weeks and a child is injured every 24 minutes in the U.S. from furniture or TVs tipping over, according to CPSC data.

Work 'N Leisure Recalls Air Valves Used In CPR Training Due To Choking Hazard

About 10,000 Practi-VALVE training valves have been recalled by Work 'N Leisure Products Inc., of Holliston, Mass. The end-cap of the valves can detach in a person's mouth while being used during CPR training, posing a choking hazard. This recall involves Practi-VALVES that are used to practice mouth-to-mouth resuscitation/CPR. The trainee connects the blue plastic air valve to a plastic mask, places it over the dummy's mouth and blows through the valve to fill the dummy's lungs with air. "WNL Products" is printed in white on the valves. This recall only involves valves in Lot 3197. "Lot 3197" is printed on the packaging. The valves measure 2.75 inches long by 1 inch wide and are disposable. The firm has received three reports of the end-caps of the valves detaching from the Practi-Valve into consumers' mouths or throats during CPR training.

The valves were sold at online at Amazon.com and wnlproducts.com and in the following catalogs: Channing Bete Company, CPR Savers & First Aid Supply, Emergency Medical Products, MCR Medical Supply, NASCO, School Health Company, School Nurse Supply and World Point ECC from July 2016 through September 2016 for about $12 for a 10 pack of valves and about $50 for a 50 pack of valves. The valves were sold separately from the mask. Consumers should immediately stop using the recalled valves and contact Work 'N Leisure to return the valves for free replacements. Consumer Contact: Work 'N Leisure at 800-884-9629 from 9 a.m. to 5 p.m. ET Monday through Friday, email at john@wnlproducts.com or online at www.wnlproducts.com and click on "Practi-VALVE Recall" at the bottom of the page for more information. Photos available here: https://cpsc.gov/Recalls/2017/Work-N-Leisure-Recalls-Air-Valves-Used-in-CPR-Training

Human Touch Recalls Reclining Chairs Due To Fall Hazard

Human Touch LLC, of Calif., has recalled about 1,100 perfect power recliner chairs. The chair's joystick reclining mechanism can malfunction and allow the chair to continue moving, posing a fall hazard to consumers. This recall involves Human Touch's Perfect Chair®, model PC-610 with serial numbers between B613315034 and B614215154. The power reclining chair was sold in a walnut, dark walnut or chestnut wood finish base with a leather pad set that came in 33 different colors. The chair measure about 43 inches long, 31 inches wide and 47 inches high and has a head pillow at the top and a joystick controller on the left armrest. The words "Human Touch" and "Perfect Chair" and the model and serial number can be found on the cross bar connecting the rear legs of the chair. The firm has received one report of the chair's joystick mechanism malfunctioning. No injuries have been reported.

The chairs were sold at furniture and specialty stores nationwide including

Healthy Back, Human Touch, Relax in Comfort, Relax The Back and The Better Back Store and online atebay.com and vitalityweb.com for between $3,000 and $3,500. Consumers should immediately stop using the recalled chairs, and take them to the store where purchased for a full refund or contact Human Touch to receive a free repair kit (including shipping) or to arrange for free repair. Consumer Contact: Human Touch at 800-355-2762 from 6 a.m. to 5 p.m. PT Monday through Friday, via email at csadmin@humantouch.com or online at www.humantouch.com and click on Support and then on Recall for more information. Photos available here: https://cpsc.gov/Recalls/2017/Human-Touch-Recalls-Reclining-Chairs.

Six Brands Of Dry Carpet Cleaning Powder Recalled By Milliken Due To Risk Of Exposure To Bacteria

About 550,000 Dry carpet cleaners have been recalled by Milliken & Company, of Spartanburg, S.C. The dry carpet cleaning powder can contain harmful bacteria. Exposure to bacteria poses a risk of respiratory and other infections in immunocompromised individuals. Consumers with healthy immune systems are generally not affected by the bacteria. This recall involves Arm & Hammer, Capture, Healthy Home, Oreck, Resista and Riccar brands of dry carpet cleaners. The powder can be sprinkled on carpets and rugs to clean and deodorize them. The dry carpet cleaner was sold in various sizes and lot numbers. The lot number is printed on stickers on each container marked with a letter followed by the five-digit lot number. Capture and Resista brand dry carpet cleaners were sold individually and as part of a cleaning kit including a pre-mist spray and a brush. View table here: https://cpsc.gov/Recalls/2017/Six-Brands-of-Dry-Carpet-Cleaning-Powder-Recalled-by-Milliken

The cleaners were sold at Home Depot, Lowes, Menards, Oreck, Walmart and specialty carpet and vacuum stores nationwide from July 2015 through September 2016 for between $5 and $40 for the individual bottles or between $20 and $50 for a kit. Consumers should immediately stop using the recalled dry carpet cleaner and contact Milliken to receive a free replacement. Consumer Contact: Milliken toll-free at 888-770-7142 from 9 a.m. to 5 p.m. CT Monday through Friday or online at www.captureclean.com and click on "Capture Carpet and Rug Dry Cleaner has issued a Recall" at the top of the page or at www.milliken.com and click on "Carpet Cleaner Recall" at the bottom of the page for more information. Photos available here: https://cpsc.gov/Recalls/2017/Six-Brands-of-Dry-Carpet-Cleaning-Powder-Recalled-by-Milliken

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

XX. FIRM ACTIVITIES

RYAN BEATTIE

Ryan Beattie, a lawyer in our firm's Mass Torts Section, is primarily working on the talc litigation at present. Ryan graduated from college and law school at the University of Nebraska before joining Beasley Allen in January of 2016. Ryan says he became fascinated at the prospect of becoming a lawyer at a very young age. The desire to be a lawyer continued right up to his admission to law school. During law school, Ryan was able to clerk for Ralph Chapman and Scot Spragins, two Mississippi lawyers. This gave Ryan an opportunity to witness how the single lawyer, or group of lawyers, can make a real difference in countless lives.

According to Ryan, the best thing about being a trial lawyer is the feeling of truly making a difference in a person's life. He remembers celebrating the talcum powder verdicts with our clients and the experience of helping to win an important case against one of the most powerful companies in the world.

Ryan also says he has found that our firm maintains a sense of moral and ethical goodness that is led from the top down through faith in a higher power. Ryan says the firm practices what it preaches by doing what is right. That's good to hear from one of our young lawyers.

Ryan is a hard worker and is learning the real importance of being a trial lawyer. He is an important member of our Mass Torts Section. We are blessed to have Ryan with the firm.

SUSAN BAKER

Susan Baker, a Legal Assistant in the firm's Mass Torts section, has been working with our firm for more than 20 years. She was fortunate enough to attend Troy University on a full academic scholarship prior to coming to work with the firm. After beginning her career with Beasley Allen in our Fraud section, she was transferred to the Oil & Gas litigation team in our Commercial Litigation division of the section. She then spent 13 years focusing her efforts mainly on defective tire cases in our Products Liability & Personal Injury Section prior to moving to Mass Torts in January 2015. Susan is now working on litigation involving women who have been diagnosed with ovarian cancer after using talcum powder products.

Susan will have been married to her husband Phil for 30 years this upcoming February. She says they have been blessed with three amazing children, as well one "fur baby." Jessica, their oldest child, received her undergraduate degree in Environmental Science from the University of West Alabama, as well as her Masters from Auburn University in Aquaculture and Fisheries. She has spent the past two years working from May until October as a biologist with the Grand Teton National Park Service in Moose, Wyo. Callie received her undergrad degree in Biomedical Science from Troy University and graduated from Auburn University's Harrison School of Pharmacy in May 2016. She and her husband Bryan live in Auburn where she works as a pharmacist. Joshua, the youngest of the three, attends Troy University where he is pursuing a teaching degree. Last but certainly not least, Lacey is the family's spunky 10-year-old "dapple dachshund."

In Susan's spare time, she enjoys reading, traveling and going to antique auctions. Susan is a very good, hard-working employee, who enjoys her work and the clients she helps. We are fortunate to have Susan with us.

TRE BAMBERG

Tre Bamberg, a Staff Assistant in Mass Torts, has been employed by Beasley Allen since April 2014. She serves as part of the talcum powder/ovarian cancer litigation team, specializing in work on filed cases. She recently experienced her first talc trial in October of this year.

As a graduate of Auburn University Montgomery, Tre earned her Bachelor of Science degree in Psychology back in 2005. While she was at AUM, Tre was president of the Psychology Club and a member of the Psi Chi International Honor Society of Psychology.

Tre and her husband Danny, a brain tumor survivor, have been married for 10 years. While the couple are not raising any children, they do own two dogs, two horses and one cat—all of which keep them very busy. Some of Tre's hobbies include horse-riding, trail-riding, hunting, fishing, singing, traveling, reading and simply being outdoors. She also spends time pursuing photography, as she enjoys capturing special moments on film. Tre is another hard-working employee who is dedicated to the welfare of the clients she works with. We are fortunate to have Tre with the firm.

ANN BURKS

After joining Beasley Allen as a temporary worker in January of 2013, Ann Burks stayed on for more than a year and was then hired on a permanent basis in August 2014. She now works as the Legal Secretary to John Tomlinson in the Toxic Torts Section of the firm. Ann holds several certifications for her work experience, including a Strategic Planning certification, a HR Compliance certification, a Talent Sourcing certification and many more.

Ann, a resident of Macon County, lives on approximately 224 acres of land with her husband Robby Burks. She has two sons—Nick, who is 22 years old, and Cody, who is 18 years old. The family has 60 head of cattle and three dogs—Hooch, Loretta and Bo-Diddle. When she is not at work, Ann and Robby can often be found working on their farm.

When Ann has free time, she enjoys taking time to express herself creatively through writing and drawing. From 2008 through 2012, she self-published a series of children's books about "Beetle Pea," a character based on her own childhood. While the series is currently unavailable on Amazon, Ann is in the process of editing and reworking the books for future re-release. I know this may sound like a broken record, but Ann is a very hard worker whose dedication to her work and clients is quite apparent. We are fortunate to have Ann with us.

CHARLES MYRICK

Charles Myrick has worked for the firm as a mail clerk for 15 years. His responsibilities vary from distributing mail, including Fed-Ex and UPS, and posting mail for company-wide pickup. Because of the firm's growing size and the large amount of mail coming in and going out each day, Charles and his co-worker, Fred Gamble, work under challenging conditions each day. Their job is very important.

Charles has been married for 14 years to his wife Sheila, who works as a neo-natal nurse in the intensive care unit at Baptist Hospital South. He has one stepson, Keith, who serves in the National Guard and has been deployed to Afghanistan on three occasions.

Charles suffered severe injuries, including a severe head injury, in a motor vehicle accident in 1990. The accident left him in a coma for more than three weeks. However, Charles now lives as a brain damage survivor and continues to inspire others struggling from similar situations to do the same. In his free time, Charles enjoys watching Alabama football, doing yard work and being involved with activities and support groups at Christ Community Church in Montgomery. Charles is a most valuable employee who works hard and gets the job done each day. I can say without reservation that he is an inspiration to all of us at Beasley Allen. We are blessed to have Charles with us.

XXI. SPECIAL RECOGNITIONS

Grant Enfinger Scores First NASCAR Win At Talladega In Beasley Allen Car

BeasleyAllen.com racecar driver Grant Enfinger claimed his first NASCAR Camping World Truck Series victory on Oct 22 at the Talladega Superspeedway. Grant led the most laps of the Fred's 250, many of which required him to use his mirror to dictate his racing lane at more than 190 mph—a dangerous, but overall successful strategy. He stayed in front of the pack for 120 of the race's 250 miles.

As Grant's first sponsor, Beasley Allen helped him move from late model racing to an ARCA Championship to the NASCAR level. Grant raced at Talladega as part of the GMS Racing team, edging out teammate Spencer Gallagher to take the checkered flag. That gave GMS its first one-two win at Talladega.

In an interview from Victory Lane after the race, Grant noted that he and his father, Floyd Enfinger, along with race enthusiasts Greg Allen and Bobby Mozingo from Beasley Allen, began coming to the track as fans. From there, Grant said he embarked on a racing career spanning two decades. Grant said:

> *Getting this win means the world to me. I have worked so hard to get to where I am today and I wouldn't be here without all of my supporters and the guys that have worked countless hours by my side. Thank you to GMS Racing, Plugfones, Champion Power Equipment, Holmes Excavation II and the Beasley Allen Law Firm for giving me this opportunity. Roll Tide!*

Grant, a native of Fairhope, Ala., was the first-ever ARCA Racing Series national champion from the State of Alabama. He won the title in October 2015 at Kansas Speedway, becoming the 33rd different ARCA national champion in 63 consecutive seasons. Grant led 792 laps over the 2015 season and won the Menards Pole Award presented by Ansell year-end honors. He also won the Hoosier Tire Most Victories award for the 2015 season, in which he won six races including Daytona, Mobile, Nashville, Berlin, Springfield and Salem. Greg Allen, the Lead Products Liability lawyer at Beasley Allen, had this to say:

> *We are incredibly proud of Grant and this monumental achievement in his career. I've seen Grant pursue his dreams first-hand and I know he has what it takes to race. No one has worked harder to achieve his level of success. He is as talented as they come.*

My hope and prayer is that Grant will continue to advance in his chosen line of work. Based on his history, Grant is a good as any driver.

Beasley Allen Lawyers Recognized For Pro Bono Work

Beasley Allen Lawyers James Lampkin, Evan Allen, Liz Eiland, and Aigner Kolom were recognized recently for their work on behalf of low-income residents in need of legal assistance in civil matters. The Beasley Allen Law Firm also was recognized for its outstanding participation in the Montgomery County Bar Foundation Volunteer Lawyers Program.

James Lampkin was honored for his tireless pro bono work by the Alabama Access to Justice Commission. The AAJC was created by the Supreme Court of Alabama in 2007 to serve as a coordinating entity for the legally underserved, legal community, social service providers and the private and public sectors.

The Montgomery County Bar Foundation Volunteer Lawyers Program held its inaugural Pro Bono Recognition Luncheon on Oct. 25 to recognize those law firms and individual lawyers who have provided free legal assistance to low-income Montgomery County residents facing civil legal issues.

Beasley Allen was one of three firms in Montgomery to receive the highest level of recognition, the Gold Medallion award, based on the number of case referrals taken, the number of advice and counsel clinics attended, and the number of hours of free legal assistance rendered. In addition, three Beasley Allen Lawyers were presented with the Medal of the Samaritan in recognition of their outstanding participation and hours of pro bono service—Evan Allen, Liz Eiland, Aigner Kolom. Tom Methvin, who is our Managing Attorney, had this to say:

At Beasley Allen we work day in and day out representing those who need our help the most. It is no surprise that James, Evan, Liz, and Aigner were recognized for their work.

For more information about the Alabama Access to Justice Commission visit www.alabamaatj.org. For information on the Montgomery County Bar Foundation Volunteer Lawyers Program, which is run by Mike Morgan, visit www.montgomeryvlp.org.

XXII. FAVORITE BIBLE VERSES

Willa Carpenter, who is our firm's Human Resources Liaison, supplied two verses this month. She had this to say:

We will soon celebrate Christmas—the birth of Jesus, God with us! After a few months, we will celebrate Easter — the crucifixion and resurrection of our Lord and Savior Jesus Christ. But though He was resurrected and walked among men before and after the resurrection, He left this earth. He ascended to heaven. But we can take great joy in His fulfilled promise that the Holy Spirit will come to abide with us forever. He will not only dwell with us but He will be in us as a guide, teacher, counselor, and one who will reveal the will of the Father to everyone who will believe. This next year can be the very best year of our lives if we would trust and rely upon the Holy Spirit to be our Helper—to be God with us!

Behold a virgin shall be with child, and shall bring forth a son, and they shall call his name Emmanuel, which being interpreted, God with us. Mathew 1:23

And I will pray the Father, and He will give you another Helper, that He may abide with you forever-the Spirit of truth, whom the world cannot receive, because it nether sees Him nor knows Him: but you know Him. For He dwells with you and will be in you. John14:16-17

Coy Morgan, one of the Law Clerks at our firm, furnished one verse for this issue. He says that as a young law student and future lawyer, James 3:13 has called him to live the good life through service, humility, and wisdom.

Who is wise and understanding among you? Let them show it by their good life, by deeds done in the humility that comes from wisdom. — James 3:13

Kimberly Baker, the Director of Development for Valiant Cross Academy, a Montgomery Boys school, and also the wife of Ben Baker, one of our lawyers, sent in a verse this month. Kimberly says she had a hard time narrowing down her favorite, but Phil 2:4 sums up her life perspective. I want you to read what Kimberly had to say:

It is natural in our society for all of us to put our own personal interests and what is best for our lives and the people directly in our lives first. However, what if we were to step back and take a good look at the world away from our natural surroundings. I imagine we would see things quite a bit differently. Such a simple concept, but sometimes extremely difficult to accomplish. We get so caught up in the "me" and the "I" of life, that sometimes we do not even notice the challenges that many people face daily.

I believe it is our responsibility from God to not only notice the challenges many struggle with, but be willing to help and serve those who are struggling. My personal relationship with Christ was strengthened through community service. I began to see and understand people differently. Over time, I have filled my life with serving others. I have worked with families who are hungry, abused, neglected and underserved.

If you have ever held the hand of a mom who could not feed her children, or consoled a child after he was just told by a family member that he was worthless; I guarantee you see things differently. I love serving others and ministering to the needy (in my own way) as I imagine Christ's followers did so many years ago. Next time you are out, take a look at the world around you, and the people around you, and see if you notice anything different.

Do not merely look out for your own personal interests, but look out for the interests of others. Philippians 2:4

Ann Easley, a legal secretary in our firm, sent in two verses this month. Ann says these verses help her to remember the majesty and power of the God who created all of us.

The whole earth is filled with awe at your wonders; where morning dawns, where evening fades, you call forth songs of joy. Psalm 65:8

The Lord is my light and my salvation—whom shall I fear? The Lord is the stronghold of my life—of whom shall I be afraid? Psalm 27:1

XXIII. CLOSING OBSERVATIONS

Cole Portis Is Serving The State As Bar President

Cole Portis is the 141st President of the Alabama State Bar. Cole, the Section Head of the Product Liability & Personal Injury Section for Beasley Allen, is using his 13-month tenure as President of the bar to serve our profession and also the state. He is starting programs that will help lawyers to be more effective in their work and service to the state.

Cole is opening the lines of communication and visiting more than 60 local bar associations so that he and others can listen to what members want and need. He is inviting leaders of those associations to Montgomery for conversations about what's happening within the bar. To supplement those meetings, he helped develop a portal that lawyers can access through alabar.org so that any member can offer suggestions about benefits and address other bar matters.

Cole is familiar with service, being the father of nine children ages 6 to 22. Cole and his wife, Joy, adopted six of their children and are strong advocates for adoption. They founded "Love 100 Ministry," which assists Alabama families with adoption costs, and have fostered many children. Cole believes that children in Alabama who are in the foster care system must be taken care of and that all lawyers have a responsibility to help these children.

Cole's calling to serve resonates throughout his practice. He represents those who have lost someone or have been injured. While he knows that legal professionals are often referred to as lawyers and attorneys, he said he feels like he is a "counselor of law," someone who counsels individuals through their grief. Cole and his staff have successfully handled more than 100 cases that were tried or resolved for more than $1 million. Cole was nominated, along with his colleagues, for the 2014 Public Justice Trial Lawyer of the Year Award for leading the first lawsuit to go to trial against Toyota involving the sudden unintended acceleration issue.

Cole is a highly successful lawyer at trial, but he is also very successful in managing an entire section with more than 14 lawyers and approximately 30 support staff in his section.

Helping others is also the common thread running through Portis's Alabama State Bar agenda. While the Alabama Bar has the Alabama Lawyer Assistance Program, which provides help to lawyers, judges and law students who are addicted and have mental health disorders, Cole is starting a wellness initiative that will help lawyers take care of themselves before concerns become problems.

The initiative will primarily deal with mind, body and spirit, and provide resources for stress, nutrition and faith. Cole is focusing on the practice of law and is designing a program that will help lawyers tap into educational opportunities involved in the practice of law as well as new areas of law.

With technology evolving on a daily basis, Cole wants to show lawyers the technology that is available to help them in their practice and introduce them to emerging technology. He notes that lawyers do not go to school to learn how to run businesses, but law offices are businesses. To help lawyers become more efficient, he wants the Alabama State Bar to provide lawyers with the tools for running effective businesses, including foundational principles and marketing.

Cole asked Monet Gaines, Assistant Attorney General in the Opinions Division, to be his Vice President, and she didn't hesitate to help him accomplish his goals. Monet has agreed to help Cole increase interest in the legal profession and boost minority participation in the bar. The bar has a successful program aimed at attracting high school students, and Cole would like to promote becoming a lawyer to college students, emphasizing there are several roads they can take that end at the same destination. "He really seeks to make a difference in everything that he does, not just this," Monet said. "He really has a heart toward service. Listening to what he's passionate about is just exciting to me."

Under his leadership, the Alabama State Bar also will promote the legal profession by advocating for the public and volunteering to represent those who cannot afford legal representation, increase foster care among lawyers and issue a call to all lawyers to be engaged in public service, including the Alabama Legislature, because lawyers understand how to be analytical and solve problems. Having known Cole since he was in high school, and having worked with him as a lawyer, I believe he will accomplish all of his goals in 13 short months.

We are honored to have Cole serve as Bar President and I am confident he will be outstanding in that role.

Our Monthly Reminders

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732 — 1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

Vincent Lombardi

XXIV. PARTING WORDS

Thanksgiving Day was a great time to look back over the year and to count our many blessings. Each of us has so much to be thankful for. At this time of year it's appropriate to put our focus on Thanksgiving and on how good God really is. We should thank God daily for all we enjoy. I am eternally grateful to be a part of the family of the One true God. Words alone are insufficient to say how thankful and eternally grateful I am for all of my many blessings.

All too often, I have taken God's grace, mercy and love for granted. I find it necessary to slow down occasionally, sit down, and take stock of things in my life. When I do that all things around me fall into focus. God will provide for us and will sustain us in all things and under any circumstances. That's a message I take from Thanksgiving and one that I pass on to you.

We must learn to trust God and realize that He will supply and fulfill our needs. It took me a while to fully understand and comprehend that I can do all things, but only through Jesus Christ, who guides, directs and strengthens me. Once I fully recognized that, my life was changed forever. I thank God for all of my blessings. My prayer today is for God to truly bless America and to heal our land!

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

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