



THE  
**JERE BEASLEY REPORT**

MAY 2017

# Beasley Allen

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

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# I. CAPITOL OBSERVATIONS

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## THE ATLANTA OFFICE

We opened our Atlanta office in January of this year and things have gone very well. We should have made this move years ago. Nevertheless, we are glad to be there now and to be a part of the Georgia legal community. Chris Glover will head up the office and Navan Ward will also be there on a permanent basis. Gibson Vance, Parker Miller and LaBarron Boone have also spent a great deal of time in the Atlanta area. Our plan is to expand the office as things progress.

Since moving to Atlanta, Chris Glover has been actively exploring the area, making new connections and building relationships in the legal community. Recently, Chris was asked to serve on the Georgia Trial Lawyers Association (GTLA) Executive Committee. The GTLA is the only association in Georgia committed exclusively to serving the needs of plaintiffs' lawyers.

The executive committee is the governing body of the GTLA, which meets monthly. Chris will have a vote in issues affecting the GTLA membership and also has been asked to oversee the GTLA Public Relations/Communications Committee.

We really look forward to working with lawyers in Georgia on matters of mutual interests. Having Lance Cooper with us in Georgia is very important. We have been working with Lance on product liability cases for years.

# II. MORE AUTOMOBILE NEWS OF NOTE

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## GM's Bid To Block Ignition-Switch Suits Rejected By U.S. Supreme Court

GM has lost its bid to bar hundreds of ignition-switch lawsuits when the U.S. Supreme Court refused to hear the automaker's appeal claiming it isn't liable for pre-bankruptcy filings. The Supreme Court left intact last year's ruling by the

2<sup>nd</sup> U.S. Circuit Court of Appeals that General Motors remains responsible for injury, death, and diminished-value claims that occurred before its 2009 bankruptcy. The lower court found that GM was still responsible for the older claims because it knew about the ignition switch defect for more than a decade but concealed it from the bankruptcy court and its customers.

GM appealed the 2<sup>nd</sup> Circuit Court's ruling and contended that "well-established bankruptcy law allowed the newly reorganized GM to obtain the old company's assets 'free and clear' of liabilities." GM began recalling about 2.6 million vehicles in 2014 over the deadly defect, which allowed the ignition to be jostled into the off or accessory position with the vehicle in motion, causing it to lose power steering, speed, anti-lock brakes, and airbag protection. These faulty ignition switches caused hundreds of GM cars to crash. The GM ignition switch defect has been linked to 124 deaths and 275 injuries. The automaker has already paid about \$2 billion to settle civil complaints and criminal charges in connection to the ignition switch debacle.

The 2<sup>nd</sup> Circuit's ruling reversed a ruling by a U.S. bankruptcy judge in 2015, who drew a line between the liabilities of the pre-bankruptcy "Old GM" and the post-bankruptcy "New GM." This effectively shielded the "New GM" from any claims involving vehicles and accidents before its June 2009 bankruptcy. The Supreme Court's refusal to hear GM's appeal is most significant. GM will face at least 1,000 additional lawsuits.

Beasley Allen and The Cooper Firm represented individuals and families throughout the country who were harmed by the ignition switch defects in GM vehicles. We, working with Lance Cooper, settled a large number of cases with GM last year. Our lawyers welcome the opportunity to work with lawyers on any GM ignition switch cases. For more information about how this recent ruling may affect claims, contact Beasley Allen lawyer Dana Taunton at 800-898-2034 or by email at Dana.Taunton@beasleyallen.com.

Sources: *Bloomberg*, Associated Press and Law360.com

## AUTOMAKERS INSTALLED DEFECTIVE TAKATA AIRBAGS WITH KNOWLEDGE OF DEFECTS

Last year automakers recalled 53.2 million vehicles in the United States. It is a record that has been broken annually since 2014, though it's not exactly one we

should hope to break. Each recall notice means hundreds, thousand or millions of people have been put at risk of serious injury or death. No example better highlights the potential risk than the Takata airbag recall, which has identified 46 million airbag inflators for repair and affected approximately 29 million vehicles.

The National Highway Traffic Safety Administration (NHTSA) estimates only about 13.6 million of the 46 million defective airbags have been repaired, leaving millions driving cars with a defective airbag—a product meant to protect drivers' lives—that could literally explode in their faces during an accident if it is exposed to high temperatures or humidity. The recall

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has been a messy one: Not enough replacement parts exist to fix all the previously affected cars. But what about new cars? You would think a recall on Takata airbags would mean they were no longer installed in vehicles coming off the assembly line—but you would be wrong.

Defective airbags linked to the largest consumer recall in history were still being placed in new cars long after their dangers became apparent. That was because some had yet to be recalled and so they could still technically be installed. A June 2016 NBC News piece reported automakers Fiat Chrysler, Mitsubishi, Toyota, Daimler Vans, Ferrari, Mercedes-Benz and Volkswagen were at some point knowingly using defective Takata airbags that had not been equipped with desiccant, a chemical designed to reduce moisture, in new cars. People bought cars not realizing they would soon be recalled—and the manufacturers knew the parts they were installing had been linked to people's deaths. It seems like a far cry from trying to protect consumers.

To make matters worse, a shortage of replacement parts not only means Americans continue to travel with defective airbags, but last year federal regulators approved installing defective Takata inflators as replacements for older airbags in about 2.1 million recalled vehicles. "Federal regulators have approved (the) move as a temporary measure due to a shortage of replacement parts using newer, safer designs," NBC News explained in its 2016 article.

A better way has to be found. America should be striving to create safer vehicles that require fewer recalls—not switching out one potential disaster for another or continuing to allow manufacturers to install products they know are defective. Some records should never be broken.

If you need more information on the Takata airbag litigation contact Chris Glover, a lawyer in our Atlanta office, at 404-751-1162 or by email at Chris.Glover@beasleyallen.com.

Sources: NBC News and NHTSA

#### **FORMER FBI DIRECTOR SELECTED TO HANDLE \$1 BILLION TAKATA FUND**

Former FBI director Robert Mueller has been selected U.S. District Judge George C. Steeh by a Michigan federal judge to administer the nearly \$1 billion Takata Corp. has agreed to pay automakers and consumers who purchased its defective air bag inflators. Steeh is overseeing the

criminal case against Takata. The automaker agreed earlier this year to refund \$975 million and pay a \$25 million criminal penalty as part of a settlement with the U.S. Department of Justice (DOJ).

Judge Steeh wrote in his order that after conducting "exhaustive research" and "meeting with three potential candidates," he selected Mueller—a former FBI director and former U.S. attorney—to serve as special master for the restitution fund. Judge Steeh said that Mueller's background suggests he is "uniquely qualified" to oversee the settlement fund. The court's order states:

*The court determines that Mr. Mueller is the best candidate for the position, based in part on the parties' support of his appointment, as well as the court's comfort and trust in his impeccable credentials, his relevant experience in settlement negotiations, his familiarity with the automotive industry in general, and based upon his well-known reputation for integrity.*

Mueller and his team will be in charge of determining what entities and individuals should be paid out, and in what amounts, from two separate funds — \$850 million for automakers, and \$125 million for individual consumers. Judge Steeh wrote that Takata must pay the \$850 million within five days of its sale or merger, which must occur by February 2018.

Takata's air bag inflators have been linked to at least 11 deaths in the U.S. and caused the largest auto recall in the nation's history. Takata has faced massive global recalls of its air bag inflators, which have a tendency to explode. In February the company pled guilty to one count of wire fraud in the Michigan federal court as part of its plea deal with prosecutors over the company's falsifying of testing data and reports about its inflators. The settlement resolved the DOJ investigation into the company and its affiliates.

That same day, the DOJ made a superseding filing that charged Takata with the one wire fraud count it to which it agreed to plead guilty. The scheme started sometime around 2000 and ran for at least 15 years. Takata fraudulently persuaded customers to buy air bag systems by giving them false information, hiding the accurate test results for the air bag inflators. To further that plan, Takata made an interstate wire transfer of about \$43,000 from Pennsylvania to Detroit, according to the DOJ.

The settlement called for the creation of the restitution funds, and also required Takata to improve its compliance program and to appoint an independent monitor who will report to the DOJ for three years about Takata's compliance with legal and ethical obligations. A little more than a year ago, NHTSA levied a \$200 million fine on Takata—its largest ever—in a deal in which the company admitted that it failed to tell the agency about the defect even though it knew about it and held important information.

NHTSA estimated at the time that the exploding inflators had caused about 98 injuries. A sprawling multidistrict litigation involving injured victims and people whose car values have decreased is pending in a Florida federal court. Takata is one of the defendants. The case is *U.S. v. Takata Corp.* (case number 2:16-cr-20810) in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

#### **VOLKSWAGEN AGREES TO \$157 MILLION SETTLEMENT OVER STATES' EMISSIONS CLAIMS**

Volkswagen AG, Audi AG and Porsche AG have agreed to pay a total of about \$157.45 million in penalties to 10 states to resolve environmental claims stemming from the companies' emissions cheating scandal, as well as some consumer claims that weren't covered in a prior settlement. The companies and their American subsidiaries reached a settlement to end environmental claims brought by Connecticut, Delaware, Maine, Massachusetts, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington over their use of the defeat devices to hide the true levels of nitrogen oxides being emitted by purportedly "clean" diesel vehicles. The settlement also ends consumer protection claims by the states for injunctive relief or restitution concerning the companies' affected cars that feature 3.0-liter diesel engines, claims that were not included in the \$603 million settlement agreed to last year with 44 states, Washington, D.C., and Puerto Rico.

The settlement also requires Volkswagen to offer at least three new electric car models across its brands, including two electric SUVs, by 2020—something it had previously committed to doing in California. The states included in the latest settlement have adopted California's strict vehicle emissions standards pursuant to section 177 of the Clean Air Act. California has the unique authority to set its own

emission standards, so long as they meet or exceed federal standards. Other states that cannot develop their own standards can adopt those laid out by California.

New York Attorney General Eric T. Schneiderman's office, in a news release, said that this marks the first time that the states have won environmental penalties from an automaker under their state vehicle emission laws. The release said:

*Historically, enforcing vehicle emission standards has been done primarily by the federal government. Setting this precedent is particularly vital now, when President Trump has vowed to defund federal environmental enforcement and undo federal environmental protections, which would leave states like New York and California as the first line of defense for the environment.*

Volkswagen characterized the settlement in a news release as avoiding "further prolonged and costly litigation as Volkswagen continues to work to earn back the trust of its customers, regulators and the public." Under the settlement, the money will be allocated as follows:

- Connecticut receives about \$14.85 million,
- Delaware about \$1.45 million,
- Massachusetts about \$20 million,
- Maine about \$5.16 million,
- New York about \$32.53 million,
- Oregon about \$16.22 million,
- Pennsylvania about \$30.43 million,
- Rhode Island about \$4.1 million,
- Vermont about \$4.24 million and
- Washington about \$28.42 million.

The 10 states' claims against Volkswagen have been wrapped up in multidistrict litigation (MDL) over the emissions scandal and, under the settlement, many of their cases will be remanded back to state court for settlement purposes. The settlement is subject to court approval.

Volkswagen pled guilty in March in a Michigan federal court to conspiracy to defraud the U.S., wire fraud and Clean Air Act violations as part of a deal with the U.S. Department of Justice (DOJ). The settlement with the DOJ and U.S. Customs and Border Protection, initially reached in January, also contains measures to fortify the company's compliance systems. The

U.S. Environmental Protection Agency (EPA) and the California Air Resources Board (CARB) in September 2015 had accused Volkswagen of using the defeat devices to evade federal emissions tests for diesel vehicles.

As we have previously stated, Volkswagen has admitted fault and said that the software came preloaded in millions of its diesel vehicles around the world—nearly 600,000 of which were sold in the U.S.—allowing the vehicles to emit more toxins into the air after they left testing labs and were out on the roads. A number of Volkswagen executives have also become caught up in the debacle.

The MDL is *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, (case number 3:15-md-02672) in the U.S. District Court for the Northern District of California.

Source: Law360.com

#### **VOLKSWAGEN ORDERED TO PAY \$2.8 BILLION IN CRIMINAL FINES**

In a related matter, last month a Michigan federal judge ordered Volkswagen AG to pay a \$2.8 billion criminal fine for cheating emissions standards. This came six weeks after the German automaker formally pled guilty to the three criminal charges connected to the scandal. U.S. District Judge Sean Cox sentenced the automaker to pay the fines pursuant to a settlement agreement with the U.S. Department of Justice and U.S. Customs and Border Protection.

#### **FORD TO SPEND \$295 MILLION ON FIRE RISK AND DOOR LATCH RECALLS**

Ford Motor Co. has announced two recalls—one for a fire risk, and another for a door latch problem—covering about 440,000 cars in North America. In a securities filing, Ford says it expects to spend around \$295 million to fix the issues. The following is a brief statement relating to the recalls:

- The first recall includes 211,000 2014 model year Ford Fiesta, 2013-14 Ford Fusion and 2013-14 Lincoln MKZ cars that may have faulty latches, resulting in a door that can't close, according to the automaker. This expands a previous recall of 2.3 million vehicles over this issue, according to Ford. The automaker said it is not aware of any accidents or injuries related to the cars in the

expanded recall, but it said that a door opening while driving increases the risk of injury.

- Ford said it had received 29 reports of fires in the U.S. and Canada, though no injuries. The company said that it will mail customers instructions from the owner's manual on how to check and refill coolant. "Customers can continue to drive their vehicles, but should see their dealer if their vehicle exhibits a coolant leak, overheating or frequently needs coolant added," Ford said. "When service kits are available, dealers will install a coolant level sensor with supporting hardware and software at no charge to the customer."
- In September, Ford doubled the size of the door latch recall at the time when it added about 1.5 million cars, bringing the total to more than 2.3 million. The original recall, launched in August, only affected owners in 16 states that generally have higher ambient temperatures and solar loading, including Arizona, California, Florida and Texas. Dealers will replace all four side door latches with a more robust service door latch for free, according to Ford. The expanded recall continues the automaker's door latch woes, having recalled nearly 3.3 million vehicles over issues with faulty pawl spring tabs since 2015.
- In the other recall, about 230,000 cars are at risk for under-hood fires, according to Ford. In those cars—Ford Escape, Ford Fiesta ST, Ford Fusion and Ford Transit Connects from model years 2013 to 2015 with 1.6-liter GTDI engines — a lack of coolant circulation could cause an engine to overheat and crack the cylinder head. "A cracked cylinder head can result in a pressurized oil leak," Ford said in a statement. "Oil that comes into contact with a hot engine surface increases the risk of a fire in the engine compartment."

The first recalls came in January 2015 with 205,000 Ford Taurus sedans. Ford announced a second, separate recall of 213,000 Ford Explorer and Police Interceptor SUVs in March 2015. The automaker launched another recall in April 2015, covering 390,000 model year 2011 to 2014 Ford Fiestas and 2013 to 2014 Ford Fusion and Lincoln MKZ vehicles. Ford added 156,000 of the same vehicles to the recall a week later. The automaker disclosed the estimated cost of the recalls in a filing with the U.S. Securities and Exchange Commission.

In January 2016, the National Highway Traffic Safety Administration (NHTSA) launched an investigation after the agency received nearly 75 complaints over faulty door latches on model year 2012 and 2013 Ford Fiestas. The agency closed the investigation in October, saying that the recall addressed the safety risks posed by the door latches.

#### **FORD TO SETTLE FIESTA AND FOCUS CLASS ACTION WITH CASH AND CREDITS**

Ford Motor Co. has agreed to provide “substantial cash payments” and “other benefits” to the owners of about 1.5 million of its Fiesta and Focus models that had to be repaired due to malfunctioning transmissions. The settlement covers owners and lessees of 2011 to 2016 Ford Fiestas and 2012 to 2016 Ford Focuses. Ford did not oppose the Plaintiff’s motion for preliminary approval of the settlement. The alleged malfunctions included vehicles that slipped, bucked, kicked or jerked while the driver attempted to accelerate.

Ford will provide a private arbitration program through which consumers will be able to get the automaker to repurchase or replace defective vehicles. It’s estimated that resolution of claims will take one to two months, but the program’s rules also authorize repurchase or replacement of any vehicle that has endured four attempts to fix its transmission hardware within five years or 60,000 miles and that still doesn’t work.

The program also extends the statute of limitations for claims to six years after the issue arose or six months after the effective date of the settlement, whichever is later. Consumers who prevail in arbitration will be awarded \$6,000 in attorneys’ fees, while those who lose will be able to appeal the finding to a second panel. Ford will receive no fees or appeals rights under the agreement. Class members who believe they have either been improperly charged for repairs or denied repairs that should have been covered under Ford’s new vehicle limited warranty can also pursue these claims through a more limited arbitration process.

Ford will cover the cost and if the consumer is successful, they will receive free repairs or warranty extensions and be reimbursed for out-of-pocket costs. The Plaintiffs are also seeking to appoint 18 class representatives who will each receive between \$1,000 and \$10,000, separate and apart from any benefits they get as part of the settlement class. Capstone Law APC wants to be named lead class

counsel, with Berger & Montague PC and Zimmerman Law Offices PC as class counsel. Ford has agreed to pay up to \$8.9 million in attorneys’ fees and costs.

The proposed class is represented by Jordan L. Lurie, Tarek H. Zohdy, Cody R. Padgett and Karen L. Wallace of Capstone Law, Russell D. Paul of Berger & Montague and Thomas A. Zimmerman Jr. of Zimmerman Law. The case is *Omar Vargas, et al., v. Ford Motor Co.* (case number 2:12-cv-08388) in the U.S. District Court for the Central District of California.

Source: Law360.com

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

#### **THE SENATE RACE IN ALABAMA**

It appears that there will be a hotly contested race for the U.S. Senate seat in Alabama left vacant when Jeff Sessions because U.S. Attorney General. Former Attorney General Luther Strange was appointed by Gov. Robert Bentley before his resignation to fill the vacancy. A special election to fill the rest of the term will be held on Aug 15. A good number of serious candidates will oppose Luther in his bid to keep the seat.

I don’t believe a stand-alone primary helps Luther and it may actually hurt him. It will be interesting to see who all runs. At press time for this issue in addition to Luther, Judge Roy Moore, Rep. Ed Henry and Dr. Randy Brinson were the only other announced candidates. Others waiting in the wings include Sen. Del Marsh and former lawmaker Perry Hooper. Interestingly, Henry and Hooper were the Trump Campaign Managers for Alabama.

Most political observers say the turn out in August will be very low. I predict it will be a record low. I don’t believe any of the candidates will get enough votes to avoid a run-off. This race will be most interesting!

## **IV. COURT WATCH**

#### **NEIL GORSUCH JOINS U.S. SUPREME COURT**

Tenth Circuit Judge Neil Gorsuch has become a member of the U.S. Supreme Court. The new justice was confirmed by the Senate by a 54-45 vote, with only three Democrats voting in favor of President Donald Trump’s nominee. The new justice fills the seat vacated in February 2016 by the death of Justice Antonin Scalia. Justice Gorsuch will create a 5-4 majority on the court for Republican appointees and will definitely put an end to the 4-4 deadlocks that have occurred since Justice Scalia’s death.

Gorsuch, age 49, is the youngest sitting Supreme Court justice since Clarence Thomas. When nominated, Gorsuch was serving as a very active judge on the United States Court of Appeals for the Tenth Circuit. He had been appointed by President George W. Bush and confirmed without opposition in the Senate. Hopefully, Justice Gorsuch will be fair and follow the law, and especially the Constitution, during his time on the high court.

#### **THE PRESIDENT CUTS THE ABA OUT OF FEDERAL JUDGE VETTING PROCESS**

The American Bar Association (ABA) has been told by the Trump administration that the White House will be breaking from a long-standing practice of having the group evaluate district and circuit judge candidates. ABA president Linda A. Klein released a statement saying that the group has been told by the White House that the current administration will not be inviting the ABA’s independent Standing Committee on the Federal Judiciary to review the professional qualifications of potential nominees for the lower federal courts before they are nominated.

I believe the ABA evaluations are important and should be given a place in the nominations and confirmation of federal judges.

Source: Law360.com

#### **SUPREME COURT REJECTS \$2.7 MILLION GOODYEAR DISCOVERY SANCTION**

The U.S. Supreme Court has thrown out a \$2.7 million fine levied against Goodyear Tire & Rubber Co. for what a federal judge

had called “deliberate misconduct” in failing to produce a key test in a motor vehicle crash lawsuit. This was a case focused on the authority of judges to set fines over litigation misconduct. Goodyear successfully challenged an Arizona district court decision that the company and two of its lawyers should pay the sanction to a family that sued the company, but settled on the eve of trial without ever seeing a very important test. The Supreme Court declined to set a new award and left it to the lower court to reconsider the possibility that Goodyear has waived its ability to challenge \$2 million of the sanctions fine.

In her opinion, Justice Elena Kagan, writing for the high court, said that such orders should be restricted to “the fees the innocent party incurred solely because of the misconduct. The opinion said:

*A district court has broad discretion to calculate fee awards under that standard. “But because the court here granted legal fees beyond those resulting from the litigation misconduct, its award cannot stand.”*

Three Defendants—Goodyear, onetime Goodyear local counsel Fennemore Craig PC lawyer Graeme Hancock and coordinating counsel Basil J. Musnuff—challenged the lower court’s decision. The Haeger family were seriously injured when a tire on their motor home blew, causing their vehicle to crash. The family sued the tire maker and settled the case.

During the next year, the Haegers’ lawyer read an article mentioning a relevant Goodyear tire test that had not been produced in their case. A motion for sanctions was filed on behalf of the Haegers. The trial court judge concluded the test should have been produced in response to the Haegers’ first document request, and found Goodyear, Hancock and Musnuff had engaged in “blatant discovery fraud.”

The trial court judge ultimately imposed sanctions on Hancock for \$550,000 and jointly against Musnuff and Goodyear for \$2.2 million. The judge also imposed a “contingent award” of \$2 million, in case the \$2.7 million award was rejected by the Ninth Circuit. Fees incurred by the Haegers relating to demonstrating medical damages and against other defendants were subtracted from the total. The Ninth Circuit affirmed the district court’s penalties in 2015 in full.

The Supreme Court said the standard governing civil procedure sanctions was limited to compensating the party disadvantaged for the conduct, rather than pun-

ishing the party that committed the misconduct. The court said:

*To level that kind of separate penalty, a court would need to provide procedural guarantees applicable in criminal cases, such as a “beyond a reasonable doubt” standard of proof. When (as in this case) those criminal-type protections are missing, a court’s shifting of fees is limited to reimbursing the victim.*

The limits of compensating only costs related to the wrongdoing were governed by a “but for” test, or whether the misconduct led to legal work that would not have to have been done anyway. The results of the tire test definitely should have been provided to the Haegers. Would that have caused Goodyear to settle the case much earlier? In any event, the Haegers contended that the fees against the company should be justified “for any moment past when the test should have been disclosed.”

The high court disagreed with the Haegers, however, noting the existence of defenses that Goodyear would still have been able to use, including claims about the age of the tires on the Haegers’ vehicle. The court explained its decision as follows:

*Further, the Haegers cannot demonstrate that Goodyear’s nondisclosure so permeated the suit as to make that misconduct a but-for cause of every subsequent legal expense, totaling the full \$2.7 million. If nothing else, the district court’s back-up fee award belies that theory.*

While the lower \$2 million award from the district court was said to have more carefully considered which expenses were caused by Goodyear’s misconduct, the Supreme Court said it was unclear whether the court took into account “the right standard” in calculating that award.

In its May petition to the Supreme Court, Goodyear argued that its due process rights were violated when the trial court judge levied what the company said amounted to “a criminal sanction untethered from the discovery problems.” It should be noted that Musnuff and Hancock settled with the Haegers in October and were not parties in the case at the time of Supreme Court oral arguments. The case is *The Goodyear Tire & Rubber Co. v. Haeger et al.* (case number 15-1406) in the Supreme Court of the United States.

Source: Law360.com

## V. THE CORPORATE WORLD

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### THE PRESIDENT KILLS GOVERNMENT CONTRACTOR “BLACKLISTING” RULE

President Donald Trump has signed a Congressional Review Act resolution rolling back the Fair Pay and Safe Workplaces rule. This was the rule that requires bidders for federal contracts to disclose their labor law violations. The signing of the bill makes permanent a preliminary injunction blocking the government from enforcing the rule’s new reporting requirements on federal contractors and subcontractors, which had been set to take effect in October.

The contractor rule, called the “blacklisting rule” by opponents who say it unfairly smears companies alleged to have violated labor laws, requires potential federal contractors and subcontractors bidding on any federal deal worth more than \$500,000—with the exception of contracts for commercial off-the-shelf items—to disclose violations of labor laws going back three years. The rule was enacted in August by the Federal Acquisition Regulatory Council with accompanying U.S. Department of Labor guidance and an underlying 2014 executive order. The executive order stated at the time:

*Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the federal government.*

Under the rule, those disclosures of violations and whether they purportedly show “serious, repeated, willful or pervasive” labor law violations would be taken into account by contracting officers when determining whether to award or extend contracts. Construction and security industry groups sued to block the rule a few weeks before it was set to take effect in October. A Texas federal court was told that the Obama administration exceeded its authority in issuing the rule. The opponents said the rule imposes “new regulatory burdens on government contractors that exceed and contradict Congress’ carefully balanced labor and employment law statutory scheme.”

U.S. District Judge Marcia Crone blocked the rule’s reporting provision and

another portion that prohibits pre-dispute arbitration agreements between contractors and workers covering Title VII allegations and sexual assault or harassment torts. The CRA resolution rolls back the rule's final provision requiring contractors to give workers detailed paycheck information including the number of hours they worked, their rates of pay and their gross pay. The House of Representatives passed the rollback bill by a nearly 50-vote margin in early February, and the measure narrowly passed the Senate.

It's very difficult to understand why corporations seeking federal contracts shouldn't have to disclose information that relates to their past performance involving safety issues. What am I missing? It would appear that workplace safety would be paramount and important to both the Trump White House and Congress.

Source: Law360.com

#### **\$26 MILLION SETTLEMENT ENDS VIVENDI'S 15-YEAR-OLD INVESTOR SUIT**

Vivendi SA has agreed to pay \$26.4 million to settle all remaining disputes in an almost 15-year-old case alleging that it falsely reported "better than expected" financial results after making a series of acquisitions that led it to the brink of bankruptcy. The settlement, which is subject to court approval, was filed in New York federal court on April 6. This closes the book on a Second Circuit appeal and a possible petition for the U.S. Supreme Court to hear the case.

The money will go to 96 investors who appealed to the Second Circuit two New York federal court rulings that granted summary judgment for Vivendi. As a result, those shareholders, clients of investment managers Capital Guardian Trust Co. and Southeastern Asset Management, couldn't collect damages because the trial court said the companies hadn't actually relied on the alleged misstatements when trading Vivendi's stock. If those 96 clients had prevailed in the Second Circuit, they could have been entitled to \$79 million, about three times more than the amount offered in the settlement. The appeal was withdrawn after the settlement, which, if approved, will completely end all claims in the long-running litigation.

Investors sued the French media conglomerate in 2002, alleging that it misled investors about its finances after making a series of acquisitions, including a \$30 billion buyout of Canada's The Seagram

Co. Ltd. and a \$10.3 billion purchase of USA Networks Inc., that put the company \$18 billion in debt and led it to the brink of bankruptcy. Before going to trial in 2009, the court certified a class of investors from the United States, France, England and the Netherlands who purchased Vivendi common stock or American depositary shares between 2000 and 2002.

In January 2010, a New York jury found Vivendi liable for the alleged misstatements and, in December 2014, U.S. District Judge Shira Scheindlin entered partial judgment on the bulk of the class claims, awarding \$49.7 million in damages and interest. Vivendi took that ruling to the Second Circuit, arguing that the investors presented no actionable claim of securities fraud and that the company's statements were nonactionable opinion, "puffery" or forward-looking statements. But in September, the Second Circuit rejected Vivendi's arguments, saying that shareholders had presented enough evidence to the jury to prove Vivendi was liable for the \$49.7 million in damages.

The appellate court stood by that ruling in November when it declined to rehear the case. Vivendi was primed to petition the Supreme Court to review the Second Circuit decision, even getting Justice Ruth Bader Ginsburg to grant an extension of time to file a petition for a writ of certiorari until April 10.

The shareholders are represented by Arthur N. Abbey and Stephen T. Rodd of Abbey Spanier LLP. The case is *In re Vivendi Universal, S.A. Securities Litigation* (case number 1:02-cv-05571) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

#### **INVESTORS REACH \$20 MILLION SETTLEMENT OVER HOLDING BANK'S FAILURE**

A group of hedge funds have reached a \$20 million settlement in Delaware Chancery Court with the former executives and board members of defunct CertusBank. It was claimed that the bank's leadership spent tens of millions of dollars on frivolous expenses, ran the bank into the ground and then destroyed documents in an effort to cover up their wrongdoing. The settlement was reached after months of intense discovery efforts by the hedge funds' lawyers. It should be noted that the bank's only recoverable asset was a \$50 million insurance policy and it was being rapidly depleted by litigation.

Certus was founded in 2011 by former Bank of America and Wachovia executives, who sold a group of hedge funds on the idea of starting a holding company to buy up failing Southeastern community banks in the wake of the financial crisis and turn them around. The federal government was providing charters at the time that qualified holders for lucrative federal support like the ability to bid on failed banks at Federal Deposit Insurance Corp. auctions.

It was contended by the shareholders that Certus was one of only five banks to receive the so-called shelf charters, making it a "government-backed business venture that should have been an easy winner." However, under the terms of the charter investors were required "to accept the unfettered control of the Certus board and management" and were prevented from initiating proxy fights. Certus bought two failed Georgia banks in 2011, but quickly began running up an enormous corporate tab "for [executives'] own personal enjoyment, while projecting an image of glamour and opulence," the original complaint said.

By April 2014, the bank had lost nearly \$170 million and was under investigation by the South Carolina Attorney General's office. In June 2015, the bank sold off nearly all of its remaining assets and in November 2015 some of Certus' hedge fund investors filed suit, alleging breach of fiduciary duty, waste and other claims. Certus entered into a \$110 million lease for 160,000 square feet of office space in Greenville, South Carolina, in 2011, although the board had only authorized them to lease 20,000 square feet total, the complaint says.

The hedge funds are represented by Joel Friedlander, Christopher Foulds and Christopher P. Quinn of Friedlander & Gorris PA and Mark Lebovitch, Christopher J. Orrico and John Vielandi of Bernstein Litowitz Berger & Grossman LLP. The case is *3-Sigma Value Financial Opportunities LP, et al. v. Milton Jones, et. al.*, in the Court of Chancery for the State of Delaware.

Source: Law360.com

#### **RAYMOND JAMES TO PAY INVESTORS \$150 MILLION OVER JAY PEAK FRAUD**

Raymond James & Associates Inc. will pay \$150 million in settlement of a suit accusing two Vermont ski resorts of misappropriating the bulk of \$350 million obtained through the EB-5 immigrant

investor program. The parties said this settlement would facilitate project completion or the return of funds. The suit, pending in the Southern District of Florida, alleged Raymond James and former branch manager Joel Burstein conspired with Ariel Quiros, owner of the Jay Peak and Q Burke ski resorts in northern Vermont; Jay Peak CEO William Stenger; and People's United Bank in a Ponzi scheme to cheat 836 foreign investors out of at least \$200 million of the funds raised for improvement projects.

That money was invested through the EB-5 program, which provides green cards to foreign nationals who invest at least \$500,000 in an American project that creates at least 10 U.S. jobs. Tucker Ronzetti, of Kozyak Tropin & Throckmorton LLP lead interim class counsel, stated:

*We are pleased that our lawsuit and the work of the receiver resulted in an excellent outcome for the investor class. It will help ensure investors can keep their green cards in projects where that is possible, or receive a rapid return of funds where that is not possible, so they may quickly invest in other viable EB-5 projects.*

The lawyers pointed to several benefits in the proposed settlement, which was reached in conjunction with Michael I. Goldberg, the court-appointed receiver for Jay Peak and its related entities. In exchange for resolving Raymond James & Associates' portion of the litigation, the financial company, which is a subsidiary of Raymond James Financial Inc., will provide a \$150 million fund that the receiver will use under a proposed plan to complete certain construction projects or to provide full principal refunds to investors no longer eligible to receive green cards through these projects or where the projects are no longer feasible.

Goldberg, the receiver, said in a statement, that includes \$67 million that will be used to return the \$500,000 principal investment each investor made in the Jay Peak Biomedical Research Park LP. The receiver, according to the statement, will also be able to satisfy the claims of trade vendors and contractors.

According to filings the company made with the U.S. Securities and Exchange Commission (SEC), the \$150 million includes \$4.5 million that Raymond James has already paid in a settlement with the state of Vermont, and the balance will be paid in two installments of \$90.7 million and \$54.8 million. The company said it had accrued \$50 million as of Dec. 31 and

that the settlement allows it to share in the proceeds of certain third-party recoveries the receiver may obtain. The investors will continue with the case against Quiros and People's Bank. The SEC has also brought a separate action against Quiros and Stenger.

The investors are represented by Thomas A. Tucker Ronzetti, Harley S. Tropin, Dyanne E. Feinberg, Rachel Sullivan, Maia Aron and Tal J. Lifshitz of Kozyak Tropin & Throckmorton LLP; Paul Aiello, Michael P. Bennett and Jeremy R. Kreines of Bennett Aiello; Daniel C. Girard and Adam E. Polk of Girard Gibbs LLP; and Kathleen M. Donovan-Maher, Steven Buttafoli, Mark A. Delaney and Nathaniel L. Orenstein of Berman DeValerio. The case is *Daccache et al. v. Raymond James & Associates Inc. et al.* (case number 1:16-cv-21575) in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

#### **RAYONIER WILL PAY \$73 MILLION TO SETTLE STOCK-DROP SUIT**

Forestry company Rayonier Inc. will pay \$73 million to settle claims that it misled investors about its timber inventory and inflated its stock price until the truth came out in late 2014. The suit was filed after Rayonier restated its earnings and disclosed that it had been overstating the amount of timber it could harvest and would be scaling back its logging in the Pacific Northwest to a more sustainable pace. The case was pending before U.S. District Judge Timothy J. Corrigan when it settled.

The investors said the settlement would help shareholders who bought the stock at inflated prices over a period of nearly four years. The settlement was said to be the second largest securities deal ever reached in the Middle District of Florida. WellCare Health Plans Inc.'s \$200 million settlement, announced in 2010, was the largest. Rayonier said in a statement in this case that the settlement would be covered by its insurers.

The Plaintiffs are represented by Maya Saxena, Joseph E. White III, Lester R. Hooker and Brandon T. Grzandziel of Saxena White PA, David R. Stickney, Jonathan D. Uslaner, Niki L. Mendoza, Brandon Marsh and Jenny Barbosa of Bernstein Litowitz Berger & Grossmann LLP, and Robert D. Klausner of Klausner Kaufman Jensen & Levinson. The case is *In re: Rayonier Inc. Securities Litigation* (case

number 3:14-cv-01395) in the U.S. District Court for the Middle District of Florida.

Source: Law360.com

#### **BLACKBERRY AWARDED \$815 MILLION IN ARBITRATION**

An arbitration panel has ordered Qualcomm Inc. to pay \$815 million plus attorneys' fees and interest to resolve a dispute with BlackBerry over a patent license agreement. Details of the arbitration are being kept private because of government, class action and licensee lawsuits involving Qualcomm licensing practices that are still pending. According to a statement issued by Qualcomm, the arbitration decided only the narrow issue of whether BlackBerry was entitled to refunds of royalties on phone and chip modem sales that exceeded per-unit caps. The refunds covered sales from 2010 through 2015.

It was reported that conditional rebates are one of the "licensing strategies" that has been getting Qualcomm in trouble with overseas antitrust regulators. A class action complaint had been filed in January in the Northern District of California.

This case is an example of the proper place for arbitration involving opposite parties with virtually equal power and strength. That's never the situation when arbitration is forced on a consumer who has a dispute with a large corporation.

Source: Scott Graham, *The Recorder*

## **VI. WHISTLEBLOWER LITIGATION**

#### **BILL AIMS TO IMPROVE INCENTIVES AND PROTECTIONS FOR IRS WHISTLEBLOWERS**

A bi-partisan bill introduced in the U.S. Senate proposes two key measures to improve the IRS whistleblower program. Senators Chuck Grassley (R-Iowa) and Bill Wyden (D-Ore.), founding members of the Senate Whistleblower Protection Caucus, produced the IRS Whistleblower Improvements Act of 2017 to enhance communication between the IRS and whistleblowers and strengthen legal protections for whistleblowers facing retaliation from employers for disclosing tax fraud.

Whistleblowers who have called out tax abuses to the IRS have expressed frustration and anxiety over the agency's handling of their tips, and especially when it

comes to updates about the status of their case. Because anxiety over blowing the whistle can be exacerbated by silence, the bill would allow the IRS to exchange information with whistleblowers to aid an investigation. It would also require the IRS to provide whistleblowers with status updates involving each significant development in the review process.

The proposed bill seeks to protect whistleblowers from backlash for standing up to fraud and abuse. That is a giant obstacle whistleblowers face. The bill aims to extend the anti-retaliation provisions afforded to whistleblowers by other laws, such as the False Claims Act and the Sarbanes-Oxley Act, to IRS whistleblowers. Tax whistleblowers can be easily identified within their companies because they have specific knowledge of tax fraud.

Senators Grassley and Wyden said extending protections that exist in other laws and statutes to tax whistleblowers is not just a matter of fairness to all U.S. taxpayers who pay taxes honestly, it's also in the nation's best interest to protect these valuable whistleblowers. Robert Patten, President and CEO of Taxpayers Against Fraud, stated:

*These amendments will significantly strengthen the fraud-fighting potential of the IRS Whistleblower statute and promote the public-private partnerships that the law was originally enacted to foster. In particular, the anti-retaliation provisions will encourage more citizens to come forward and will result in the recovery of significant funds that would otherwise be lost to tax fraud.*

Andrew Brashier, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, handles cases involving whistleblower claims. You can contact him at 800-898-2034 or by email at Andrew.Brashier@beasleyallen.com.

#### **H-1B VISA FRAUD RIPE FOR WHISTLEBLOWER LITIGATION**

The U.S. Citizenship and Immigration Services (USCIS) issued a memorandum on March 31 rescinding the Dec. 22, 2000, "Guidance memo on H1B computer related positions." The government implemented the H-1B visa program to help U.S. companies recruit foreign nationals skilled in specialized areas, specifically for times when there is a shortage of highly skilled workers in the U.S. The majority of H-1B recipients are computer software develop-

ers and computer system analysts. The third highest recipient group of H-1B visas are computer programmers, and that group was the topic of the March 31, 2017, memorandum.

The March memorandum is USCIS response to the H-1B visa fraud which has been taking place across the country. The most common fraud scheme involves misclassification. This is where an employer classifies the employee as a lower level graphic programmer, yet the programmer is performing the duties of a senior engineer. Lower level programmers earn the entry-level salary. When that lower level programmer is a foreign national, the entry salary is around 40 percent below the average industry salary for American workers. This type fraud not only goes against the purpose of the H-1B visa, but it also lowers the average wage in the industry for senior-level jobs. That's because foreign nationals are performing the same senior-level jobs, but at entry-level pay.

USCIS responded by clarifying that an entry-level computer programmer position would no longer generally qualify as a specialty occupation position, which is required for the H-1B visa. This requires employers to provide other evidence to establish that the particular position is a specialty occupation. Whistleblowers have played, and will continue to play, a large role in uncovering H-1B fraud as companies continue to recruit foreign nationals in an attempt to pay entry-level salary for senior-level duties.

USCIS has provided five indicators that could point to possible H-1B fraud. These indicators are:

- A wage disparity between the H-1B worker and the other workers performing the same duties. Especially when the company is paying the H-1B worker a much smaller salary.
- The H-1B worker is not performing the duties assigned in the H-1B petition. Especially when the duties performed are a higher level than the description of the position.
- The H-1B worker has less experience than the U.S. workers in the same position.
- The H-1B worker is not working in the locations certified on the Labor Condition Application.

- The company is not paying the H-1B worker the wage certified on the Labor Condition Application.

Sources: www.uscis.gov and Gould, C. Lance. *Whistleblowers: A Brief History and a Guide to Getting Started.*

#### **OKLAHOMA HOSPITAL PAYS \$1.6 MILLION TO SETTLE FALSE CLAIMS ACT LAWSUIT**

The Norman Regional Hospital Authority in Norman, Oklahoma, a former hospital administrator, and six radiologists have agreed to pay the U.S. government more than \$1.6 million to settle a whistleblower's False Claims Act lawsuit. It was alleged that the Defendants improperly billed Medicare for radiological services that did not qualify for reimbursement. The \$1,618,750 settlement resolves the suit filed in federal court in Oklahoma City by Dr. Lance Garber, a radiologist formerly employed by Norman Regional. Dr. Garber filed the lawsuit under the whistleblower provisions of the False Claims Act, which authorizes private individuals to sue on behalf of the federal government. The U.S. Department of Justice (DOJ) investigated Dr. Garber's claims and elected to back the lawsuit.

Dr. Garber and the U.S. alleged that Norman Regional and the other Defendants were billing Medicare for diagnostic services performed by radiological practitioner assistants (RPAs) without the required supervision of physicians. The U.S. Attorney for the Western District of Oklahoma said in a statement:

*There are certain radiological diagnostic services that require 'personal' supervision. This means that a physician must be in the room supervising the RPA when the RPA performs the service. If a physician is not in the room, the service cannot be billed to Medicare.*

Dr. Garber will receive \$291,375, about 18 percent of the settlement, as a whistleblower award for helping the U.S. recover the Medicare funds. The Defendants also agreed to pay more than \$31,000 for Dr. Garber's legal expenses.

Source: U.S. Attorney's Office for the Western District of Oklahoma

#### **OXYGEN EQUIPMENT PROVIDER TO PAY \$11.4 MILLION TO END FCA SUIT**

A California company that provides oxygen tanks to people with breathing

problems has agreed to pay \$11.4 million to resolve a whistleblower claim that it and its general partner violated the False Claims Act by submitting improper claims to federal health care programs. Braden Partners LP, which does business as Pacific Pulmonary Services, allegedly sought reimbursement from Medicare, Tricare and federal employee health benefits programs for home oxygen and oxygen equipment that was supplied in violation of those programs' rules.

The settlement resolves those claims against PPS and its general partner, Teijin Pharma USA LLC. Other claims involving sleep therapy equipment supplied as part of a kickback scheme with sleep clinics were also settled. "Home oxygen equipment and related supplies are some of the most fraudulently billed items of durable medical equipment," Steven J. Ryan, the special agent in charge from the U.S. Department of Health and Human Services' Office of Inspector General, said in a statement. "Medicare suppliers more concerned with profits than compliance will be met with investigation and enforcement."

The government says the improper conduct began in 2004 when PPS started submitting claims to federal health care programs for home oxygen and oxygen equipment without getting a doctor's authorization, which the programs require. Two years later, some of the company's employees then began to refer patients to sleep testing clinics in exchange for those clinics' promise to refer their patients to PPS for sleep therapy equipment. Brian J. Stretch, U.S. attorney for the Northern District of California, said in a statement:

*Patients in federal health care programs expect and deserve medical care that is free from any undue influence and complies with the program safeguards that are in place to protect patients.*

The suit was initially filed in 2010 by a former PPS sales representative, Manuel Alcaine, who will receive \$1.824 million of the recovered money. The case is Alcaine v. Braden Partners LP, et al. (case number 4:10-cv-04597) in the U.S. District Court for the Northern District of California.

Source: Law360.com

## **BEASLEY ALLEN WHISTLEBLOWER LITIGATION TEAM**

Because of the increased activity in False Claims Act (FCA) litigation, our firm formed a Whistleblower Litigation team last year. This has allowed our firm to handle this type litigation better and I believe our clients have and will continue to benefit by this move.

Are you aware of fraud being committed against the federal government, or a state government? If so, the FCA can protect and reward you for doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim. There is a contact form on the firm's website.

You can contact one of the lawyers on our Whistleblower Litigation Team: Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier. You can call them at 800-898-2034 or reach them by email at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com. You can also contact Beasley Allen for a free copy of Lance Gould's book, "Whistleblowers: A Brief History and a Guide to Getting Started."

## **VII. PRODUCT LIABILITY UPDATE**

### **\$55 MILLION SEAT BELT DEFECT VERDICT UPHELD**

The Pennsylvania Superior Court last month upheld a \$55 million jury verdict against Honda Motor Co. It was alleged that Honda ignored a seat belt defect that a driver claimed led to his becoming paralyzed in a rollover. The Supreme Court found that a trial court judge did not err in her jury instructions. The appeals court rejected Honda's arguments that a key Pennsylvania Supreme Court decision updating the state's tort law issued after the verdict but before post-trial motions should have compelled the judge to order a new trial. Plaintiff Carlos Martinez sued the automaker in 2011, alleging he became a quadriplegic after his 1999 Acura Integra rolled over.

In June 2014, a Philadelphia jury issued the \$55 million verdict against Honda, which Martinez's lawyers called the

highest auto defect verdict ever issued in the state. In its appeal, Honda claimed a Pennsylvania Supreme Court case, *Tincher v. Omegaflex*, required the trial Judge Shelley Robins-New to have granted a new trial. But Judge Alice Beck Dubow said in the Supreme Court's opinion, "We find that the trial court, even in light of *Tincher*, properly instructed the jury and precluded certain evidence."

On Appeal Honda depended on what it claimed were faulty jury instructions. The company pointed to the finding in the *Tincher* case that in design defect cases, juries—rather than judges—must determine whether a product is unreasonably dangerous. Honda argued that by engaging in a risk-utility calculus, Judge Robins-New was the one who made this determination, and that as a result of this, the company deserved a new trial. The Superior Court, however, looked at the jury instructions in the trial and concluded that they demanded the jury engage in its own risk-utility calculus. Judge Dubow said:

*Although the language in this charge—that there was an 'alternative, safer, practicable design' for the seat belt restraint system—is not precisely the language required for the risk utility analysis, we conclude that the charge is not fundamentally flawed. The portion of the charge to determine the 'practicability of an alternate design' inherently requires the jury to balance factors such as the cost of implementing the design against the relative safety of the alternate design.*

Honda argued that Judge Robins-New did not properly instruct the jurors on the question of crashworthiness. The company said the judge failed to charge the jury on Martinez's responsibility to show what injuries, if any, would have come from an alternative, safer design for a seatbelt, and that she also failed to charge them on whether Martinez proved certain injuries were attributable to the flawed design. But the appeals court concluded that the jury instructions did not require the level of specificity demanded by Honda.

The 2014 verdict in favor of Martinez included \$25 million for noneconomic damages such as pain and suffering, \$14.6 million for future medical expenses, \$15 million for his wife's loss of consortium and \$720,000 for lost future earnings.

Martinez is represented by Stewart J. Eisenberg and Daniel J. Sherry Jr. of Eisen-

berg Rothweiler Winkler Eisenberg & Jeck PC and Howard Bashman. The case is *American Honda Motor Co. Inc. v. Martinez et al.* (case number 445 EDA 2015) in the Superior Court of Pennsylvania.

Source: Law360.com

### **COMMERCIAL TRUCK TIRES MUST BE UP TO PAR TO PROTECT PUBLIC SAFETY ON THE ROADS**

Commercial truck tires must be safe and dependable and that's because these tires have a lot riding on them; people's livelihoods and even lives depend on their proper functioning. As The Los Angeles Times reported, the commercial trucks driving down the interstate could even be carrying nuclear bombs. But nuclear bombs or not, making sure that commercial tires are up to their tasks is a must for the safety of truck drivers and the public. Tire problems cause about 8,000 accidents per year for commercial trucks alone, Righting Injustice previously reported. These accidents account for about 6 percent of all commercial truck accidents.

The National Highway Traffic Safety Administration's (NHTSA) Office of Defects Investigations recognizes a number of factors that can compromise tire safety and increase the risk of a deadly accident. As a result, the Federal Motor Carrier Safety Administration (FMCSA) has issued a list of recommendations for commercial truck drivers to help promote tire safety. According to the FMCSA, commercial tires should be examined every day for irregular treadwear, cracking, bulges, inadequate tread depth, cuts and other damage. Tire rims should only be those of an approved width and diameter, as mismatched tire and rim components may explode.

Overloading or underinflating tires causes excessive heat build-up and internal structure damage, and exceeding tires' speed ratings can also cause damage and lead to tire failure. Hundreds of deaths and thousands of injuries from tire failure should motivate preventative action but, sadly, manufacturers and employers often refuse to take the necessary tire safety precautions until their carelessness is revealed in a courtroom.

Ben Baker, a lawyer in our Personal Injury & Products Liability Section, has had a great deal of experience in handling claims involving tire failure. For more information, contact him at 800-898-2034 or by email at Ben.Baker@beasleyallen.com. Ben recently wrote a book, "Tire Litigation: A Primer," which is available free

to lawyers. To order your copy or download a digital copy, visit [benbaker-law.com/book](http://benbaker-law.com/book).

Source: *Los Angeles Times*

### **STRYKER HIP IMPLANT LAWSUITS HEAD TO BOSTON MULTIDISTRICT LITIGATION**

Dozens of Stryker hip implant lawsuits have been consolidated in a Massachusetts federal court so that the cases can be handled by one judge. The U.S. Judicial Panel on Multi-District Litigation (JPML) agreed on April 5, 2017, to transfer nearly three dozen pending cases related to alleged defects in Stryker-branded LFIT Anatomic CoCR V40 femoral heads, a prosthetic hip replacement device, to U.S. District Judge Indira Talwani in the District of Massachusetts. As we have previously stated, the federal court system uses multi-district litigation (MDL) as a tool to consolidate multiple similar cases focused on a particular argument to one judge for pre-trial discovery.

Most of the pending Stryker implant lawsuits focus on corrosion of the LFIT V40, which can lead to serious health consequences and necessitate surgery to remove and replace the hip implant, according to the transfer order. The Defendant in the cases opposed consolidation on the grounds that there are "only a few actions" regarding the device. However, the JPML disagreed, noting that around 33 Stryker hip replacement cases in 17 different districts are pending.

In August 2016, Stryker issued a voluntary recall on some hip implant devices after Stryker received "higher than expected complaints of taper lock failure" for specific lots of certain sizes of LFIT Anatomic CoCr V40TM Femoral Heads manufactured before 2011.

In the current MDL, Stryker had requested that the Boston MDL be renamed from "In re: *Stryker Orthopaedics LFIT V40 Femoral Head Products Liability Litigation*" to "In re: *HOC LFIT V40 Taper Lock Litigation*" and also wanted to restrict the MDL lawsuits to recalled hip implant devices with taper lock failure. However, the JPML disagreed. The transfer order stated:

*We decline to change "Stryker" to "HOC" because defendant marketed the device to physicians under the Stryker brand name. We also decline to change the title to add "taper lock" to the litigation caption or to limit the scope of the MDL only to recalled devices.*

Few Plaintiffs in the pending lawsuits specifically cited "taper lock" as an issue, the panel wrote in its order. Instead, they allegedly experienced problems with corrosion and metal debris, according to the JPML, which will allow non-recalled hip implant devices to be included in the MDL.

Source: [Lawyersandsettlements.com](http://Lawyersandsettlements.com)

### **MACHINE GUARDING & INDUSTRIAL SAFETY**

Some of the most common and often times severe on the job injuries occur when machine operators are injured by industrial equipment. As most know, those injured on the job are often entitled to workers' compensation benefits. However, the inquiry as to what remedies are available to an injured employee should not stop there. All too often, other viable claims related to the design and manufacture of the machine in question are over looked.

As long as heavy machines have been in existence, injuries stemming from the use of those machines have also been around. Over the years machines have become safer. Greater safety awareness, better engineering, and other technological advances have certainly helped reduce the likelihood of injury. Guarding against hazards is just one of many ways to eliminate on the job injuries, and is an ever-evolving practice.

When a hazard within a machine is identified, there are typically three options available to mitigate that hazard. The safety engineering hierarchy gives machines designers a series of steps to take evaluate to mitigate a given hazard. The design engineers can:

- redesign the machine to completely eliminate the hazard,
- guard against the hazard, or
- warn the user of the hazard.

The preferred method for dealing with a hazard is to, when possible, redesign the machine so as to totally eliminate the hazard.

When a machine poses a hazard that cannot be completely eliminated, the appropriate course of action is to guard against the hazard. If a hazard cannot be eliminated or guarded against, the final course of action is to develop adequate warnings alerting the user of the hazard.

This process of identifying a hazard and choosing the best method for eliminating that hazard is known as a safety hierarchy.

It is well known within the engineering field that designing a machine to eliminate a hazard and then guarding against the hazard are far superior methods for safeguarding operators than warning them. However, all too often, we see design engineers skip immediately to the third rung of the hierarchy and merely warn of hazards.

Industrial machines, often due to the very nature of the machines, create hazards that cannot be completely eliminated. Machines that cut aluminum bend steel, or bind materials can often times also cut, bend, or bind the user. To completely do away with these functions would eliminate the hazard, but also the utility of the machine. In such cases, guards are often the best means to retain both the function of the machine and protect against the hazard.

The OSHA Act of 1970 requires that every employer provide a workplace "free from recognized hazards," and requires the guarding of any machine part, function, or process that may cause injury to operators or others. Hazards generally occur in three locations: the point of operation, or the location where the machine cuts, bends, or presses a material, a power take off or power transmission device, and any other moving parts.

There are many different types of guards that are commonly used to protect the user from the hazards associated with these locations. Fixed barrier guards, interlocking devices, light curtains, and sensors are all common methods to protect the user from hazards. An appropriate guarding method largely depends on the type of hazard. The most effective guards are those that do not hinder the function or utility of the machine while safely eliminating the hazard posed to the user.

Even if the manufacturer takes appropriate steps to design and implement guards on machinery, the guards must remain in place and in good working order to be effective. In Alabama, if an employer removes a safety device incorporated by the designers of the machine, the injured may sue their employer outside of workers' compensation. Under Ala. Code § 25-5-11(c)(2), an injured employee may bring an action in tort if a safety device is intentionally removed from a machine. These cases are very common and are easily overlooked unless a detailed investigation is conducted.

All too often machines are unguarded, inadequately guarded, or the wrong type of guard is used. In many instances productivity and ease of use is given more

weight in machine design than user safety. Failure to adequately guard against hazards can cause any number of injuries including amputations, lacerations, and even death. Every on the job injury involving a machine must be examined on a case by case basis. Just because guards are incorporated into a particular machine does not necessarily mean that the user or operator was adequately protected.

If you need more information on this subject, contact Evan Allen, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at [Evan.Allen@beasleyallen.com](mailto:Evan.Allen@beasleyallen.com).

### ***\$3 MILLION VERDICT AGAINST GSK IN SUICIDE CASE***

An Illinois federal jury has found Glaxo-SmithKline liable for the death of Stewart Dolin, a lawyer with Reed Smith LLP. The pharmaceutical giant was ordered to pay \$3 million to the lawyer's widow. The jury reached the conclusion that a generic version of GSK's Paxil caused Dolin to take his own life. The jury agreed with Wendy Dolin that her husband had committed suicide in 2010 under the influence of generic paroxetine, an antidepressant sold as brand-named Paxil. The jury awarded Wendy Dolin \$3 million, \$2 million for the wrongful death of Stewart Dolin and \$1 million for the pain he suffered in the days leading up to his death because of a dangerous side effect that his wife said caused him to take his own life.

The verdict was said to be a vindication of Dolin's belief, expressed in her 2012 lawsuit, that her husband would still be alive if it weren't for the paroxetine prescription he began taking days before he took his life by jumping in front of an L train in downtown Chicago. Mrs. Dolin said her husband was restless and agitated in the days leading up to his suicide, symptoms of a listed Paxil side effect known as akathisia. The side effect of the drug sometimes causes people to act out violently and impulsively.

The lawsuit claimed that GSK knew about the increased risk of suicide for adults taking paroxetine, particularly in the early days of treatment. Dolin said that the company had hidden data proving the link from the U.S. Food and Drug Administration for decades. Mylan NV was the manufacturer of the generic, but was dismissed from the case in 2014 after U.S. District Judge James Zagel ruled that GSK, as the maker of the brand-name drug Paxil, was responsible for ensuring the label was accurate.

Wendy Dolin is represented by R. Brent Wisner, Michael L. Baum, Bijan Esfandiari and Frances M. Phares of Baum Hedlund Aristei & Goldman PC and David Rapoport and Matthew Sims of Rapoport Law Offices PC. The case is *Dolin v. Smith-Kline Beecham Corp. et al.* (case number 1:12-cv-06403) in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

## **VIII. MASS TORTS UPDATE**

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### ***TALCUM POWDER LITIGATION UPDATE***

Beasley Allen lawyers returned to St. Louis in early April to start our fifth talcum powder trial. Our Plaintiff in this case is Lois Slempp, a 62-year old Wise, Virginia, resident who was diagnosed with ovarian cancer in August 2012. She had used Johnson & Johnson talcum powder products for more than 40 years.

The court empaneled 12 jurors on April 10, with six additional jurors selected to serve as alternates. Ms. Slempp's attorneys spent thirteen days presenting evidence to the jury. After opening statements by all three parties, the Plaintiff called her first witness, a cosmetic regulations expert, who testified regarding his review of internal corporate documents and regulatory requirements. Other Plaintiff's experts who testified included a pathologist and two epidemiologists, all of whom addressed causation issues. Defense attorney's began presenting their evidence on May 1<sup>st</sup>. This trial, like the last trial, is also a "defense pick," and the trial is expected to last a total of four to five weeks.

Our firm has another talc trial in St. Louis scheduled for June. Additional talc trials are currently set to take place in St. Louis this fall, as well as additional trials scheduled in Washington, D.C., and California this summer. The lawyers from our firm who are involved in these cases include Ted Meadows, Danielle Mason, David Dearing, Roger Smith, Brittany Scott, Lauren Razick, and Ryan Beattie.

### ***JANSSEN AND BAYER LOSE PREEMPTION BIDS AS XARELTO TRIAL STARTS***

Trial is now underway in a New Orleans Federal Court in the first Xarelto bellwether trial. Days before trial was to begin

in the multidistrict litigation (MDL) over the dangers of the blood thinner, a Louisiana federal judge refused to drop some claims against Bayer AG and Janssen Pharmaceuticals Inc., saying they can't necessarily blame U.S. Food and Drug Administration (FDA) red tape for their lack of label updates or for any noncompliance with Louisiana law. U.S. District Judge Eldon Fallon denied two motions for partial summary judgment that cited federal preemption as a defense to claims over alleged Xarelto misdosing and a label with inadequate warnings.

Judge Fallon ruled that the companies had failed to make a convincing showing that FDA regulations prevented them from updating labels or creating more tailored dose-analysis guidelines. He said, quoting a 2016 ruling in the same district in *Guidry v. Janssen Pharmaceuticals*, that state law requires drugmakers to consider alternative designs and reasonably weigh their products' risks and utility before they are released, and that federal law complements rather than contradicts the state requirements. Judge Fallon wrote in his order:

*This is exactly the Plaintiffs' contention in the instant case. Accordingly, Guidry is directly on point and the court finds Plaintiffs' pre-market design defect claims under the LPLA are not preempted.*

Judge Fallon's conclusions were similar for the other partial summary judgment motion: drug companies have room to comply with laws and to take action in the context of the FDA approval process or after. His order said:

*Manufacturers remain the master of their labels even after FDA approval, and there are clear pathways through which a brand-name drug manufacturer can make changes to their label without FDA approval.*

Even when the FDA rejects certain data, companies shouldn't take it as proof that the agency would reject a label change, Judge Fallon said. He added: "Clear evidence' that the FDA would not approve the change ... requires more than a prior refusal to add similar language."

In this first bellwether trial, Plaintiff Joseph Boudreaux says that he started taking Xarelto to control his atrial fibrillation in January 2014 and less than a month later was hospitalized for dangerous gastrointestinal bleeding requiring blood transfusions. He says Janssen and Bayer misrepresented the safety of the drug to

both the public and the FDA and that there are issues surrounding certain clinical trial results. Janssen and Bayer claim that it believes Xarelto is safe.

The Plaintiffs' Steering Committee is represented by Leonard Davis of Herman Herman & Katz LLC, Gerald Meunier of Gainsburgh Benjamin David Meunier & Warshauer LLC and Andy Birchfield from Beasley Allen. The case is in the U.S. District Court for the Eastern District of Louisiana.

Source: Law360.com

### **MDL FORMED OVER BRISTOL-MYERS SQUIBB'S BLOCKBUSTER DRUG ABILIFY**

The Judicial Panel on Multidistrict Litigation (JPML) recently issued a Transfer Order centralizing all Abilify lawsuits filed in the federal courts across the country in a multidistrict litigation (MDL) in the Northern District of Florida for the purposes of coordinated discovery and other pretrial proceedings. United States District Court Judge Casey Rodgers, who has served as Chief Judge for Florida's Northern District since 2011, and was also the first female Article III Judge in history for that District, is presiding over the MDL.

These cases allege that Abilify causes patients to engage in compulsive behaviors such as gambling, sexual activity, shopping and binge eating. In May 2016, the U.S. Food and Drug Administration (FDA) issued a Drug Safety Announcement regarding the uncontrollable behaviors, but it is alleged that the manufacturers knew about it for many years, yet failed to warn users of these side effects because of the impact it would have on sales.

MDLs benefit all parties involved by eliminating duplicative and costly discovery. Judges presiding over MDLs often set bellwether trials (or test cases) once discovery is completed in an effort to encourage settlement negotiations by setting high and low values, depending on how the juries find in those cases. This is accomplished by having both sides—the Plaintiff's Steering Committee, and the counsel for the Defendant—select their choices for what they believe to be a representative "pool" of cases after each filed case is carefully reviewed.

Abilify belongs to the atypical antipsychotic class of prescription drugs, and was first developed in Japan by Otsuka Pharmaceutical Company. Bristol-Myers Squibb and Otsuka co-market Abilify in the United States, and while sales have been on the decline in recent years, data indi-

cates that more than \$6 billion (USD) in sales have been generated since 2011.

If you need more information on the Abilify litigation, contact Melissa Prickett or Matt Munson, both lawyers in our firm's Mass Torts Section, at 800-898-2034 or by email at [Melissa.Prickett@beasleyallen.com](mailto:Melissa.Prickett@beasleyallen.com) or [Matt.Munson@beasleyallen.com](mailto:Matt.Munson@beasleyallen.com).

### **3M BAIR HUGGER FORCED AIR WARMING BLANKET LITIGATION UPDATE**

Last month, we wrote about the Bair Hugger warming blanket litigation and deep joint infections that resulted when the devices were used postoperatively following total joint arthroplasties. Since that time, the multidistrict litigation (MDL) Plaintiffs' Steering Committee and the Defendants have each selected 16 cases out of a pool of 150 cases that were chosen randomly by Judge Joan N. Erickson for purposes of bellwether trial selection.

Limited discovery will now begin on these 32 cases, which will include the parties obtaining medical records for the patients, as well as records from third parties such as the surgery centers where the procedures were performed. Once that process concludes, the parties will further narrow down the pool to a total of eight cases to be set for full discovery and those cases will eventually proceed to trial. The goal of this process is to select cases that are representative of all the filed cases, which will help encourage settlement negotiations by establishing high and low values. The first bellwether trial is currently scheduled to begin on Feb. 5, 2018.

Beasley Allen lawyers Matt Munson and Megan Robinson continue to investigate and file lawsuits related to 3M's Bair Hugger warming device. To discuss a potential Bair Hugger claim, contact Matt or Megan at 800-898-2034 or by email at [Matt.Munson@beasleyallen.com](mailto:Matt.Munson@beasleyallen.com) or [Megan.Robinson@beasleyallen.com](mailto:Megan.Robinson@beasleyallen.com).

### **"LOW-T" BELLWETHER TRIALS SET TO BEGIN THIS SUMMER**

A group of bellwether cases selected from the nearly six thousand cases pending in *In re Testosterone Replacement Therapy Products Liability Litigation* have completed discovery and are preparing for trial. The testosterone lawsuits were consolidated for the purpose of general pretrial discovery.

In early 2015, the U.S. Food and Drug Administration (FDA) cautioned consumers that prescription testosterone products are only approved for men who have low testosterone levels due to certain medical conditions. The FDA made clear that the benefit and safety of these drugs, including Androgel, Testim, Axiron, Fortesta, and Androderm, have not been established for the treatment of low testosterone levels due to aging, or “Low T.”

The FDA required all testosterone replacement manufacturers to change their labeling to clarify the approved uses of these medications. The FDA also required new warnings about a possible increased risk of heart attacks and strokes in patients taking testosterone. Finally, the FDA mandated manufacturers of approved testosterone products to conduct a well-designed clinical trial to more clearly address the question of whether an increased risk of heart attack or stroke exists among users of these drugs.

Additionally, a recent study rebutted health benefit claims for off-label testosterone use. The study systematically reviewed 156 randomized, relevant controlled trials published from January 1950 to April 2016 comparing testosterone therapy benefits to a placebo in men with low testosterone. The study found that testosterone therapy “did not show consistent benefit for cardiovascular risk, sexual function, mood and behavior, or cognition.” Ultimately, the study showed that testosterone supplementation provided no consistent clinical benefits and that a placebo was equally as effective.

The first “Low-T” bellwether trial against AbbVie, Inc., manufacturer of the testosterone replacement product Androgel, is set for jury selection on June 5, 2017, in Chicago in the United States District Court for the Northern District of Illinois. Plaintiffs contended that the Defendants failed to adequately warn consumers about the risks of stroke, deep vein thrombosis, pulmonary embolism and cardiovascular injury associated with testosterone therapy, while improperly marketing their drugs as a remedy for age-related conditions rebranded as “Low T.”

In April 2017, the court received a final round of briefs addressing several key issues in the bellwether cases, including motions for summary judgment, Daubert challenges against Plaintiff and Defense experts as well as certain medical and causation issues. At press time, the Court had not ruled on these issues, but is expected to do so very soon.

However, in an April 11, 2017 order, the Court denied AbbVie’s request for either a Lone Pine order or a modification of the initial discovery process. A Lone Pine order requires a Plaintiff to preemptively serve a certification from a treating physician or medical expert attesting to and supporting an opinion that the Plaintiff has suffered an injury caused by the Defendant’s product and to do so before the case-specific discovery process is completed.

In denying AbbVie’s motion without prejudice, the Court held that “imposing an expert-certification requirement on the MDL as a whole is premature at this point.” The Court did determine that it may revisit this issue after ruling on “the pending summary judgment motions (or, perhaps, after one or two bellwether trials, which are set for June and July 2017).”

If you need more information on this litigation, contact Jenna Fulk, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at Jenna.Fulk@beasley-allen.com.

Source: Law 360; Treatment of Men for “Low Testosterone”: A Systematic Review, Samantha Huo, PLOS One, 9/21/16

#### **ZIMMER BIOMET SHOULDER REPLACEMENT SYSTEM RECALLED DUE TO EXCESSIVE FRACTURING**

The U.S. Food and Drug Administration (FDA) in 2008 approved Zimmer Biomet’s Comprehensive Reverse Shoulder implant. However, after only eight years on the market, the manufacturer recalled its implantable joint systems last December. The company issued the Class 1 Recall only after thousands of patients suffered from fractures in the humeral tray component. A Class 1 recall is the most serious type of recall, used for defective devices that can cause serious injury or death.

While the recall is limited, approximately 3,662 unsuspecting patients could be affected. Zimmer Biomet warns that patients with a fractured humeral tray may require a revision surgery—a surgery US Recall News described as dangerous. Patients could also experience permanent loss of shoulder function, infection and even death. According to Righting Injustice, the shoulder system is used in patients with extreme shoulder injuries, including rotator cuff tears and for patients who have a severe type of shoulder arthritis known as arthropathy and who have previously undergone failed shoulder joint replacement. Its unique

design swaps the humeral head (ball) and glenoid (cup) to the opposite sides of the glenohumeral joint. The unique design was intended to achieve greater range of motion in patients receiving total shoulder replacement surgeries.

The Biomet Comprehensive Shoulder System is the most recent example of ill-fated products haphazardly entering the market. The joint system was quickly cleared through the controversial 510(k) process. Therefore, the system was never safety-tested in humans. This alternative approval process is allowed for devices that are similar to others that are already approved. Righting Injustice has denounced the process, explaining that it bypasses clinical testing and more rigorous FDA medical review.

If you or somebody you know had a Biomet Comprehensive Shoulder System used in a total shoulder arthroplasty and complications were experienced, you can contact Matt Munson, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Matt.Munson@beasleyallen.com. Matt will answer any questions you might have.

Source: Righting Injustice

#### **THIRD CIRCUIT REVIVES FOSAMAX FRACTURE CASES**

On March 22, 2017, the Third Circuit Court of Appeals breathed new life into the Fosamax Multidistrict Litigation (MDL). Hundreds of MDL Plaintiffs allege that they suffered serious femur fractures while taking Fosamax, and that Merck failed to warn patients about that risk.

The Fosamax cases were initially consolidated into an MDL in the District of New Jersey. In 2014, after discovery and a bellwether trial, U.S. District Judge Joel A. Pisano granted Merck’s motion for summary judgment and dismissed all of the MDL Plaintiffs’ claims, finding they were preempted by federal law. Under the Supreme Court’s decision in *Wyeth v. Levine*, drug companies can’t be sued for failure to warn where there is “clear evidence” that the FDA considered a proposed warning but rejected it for inadequate data.

The Third Circuit reversed Judge Pisano’s ruling because there was a valid argument that Merck could have gotten approval for a fracture warning if it had described the fractures differently. The FDA’s communication to Merck showed that the agency specifically objected to Merck’s use of the term “stress fracture,”

since not all fractures related to Fosamax fit that description. Accordingly, the panel found that a reasonable juror could conclude that, had Merck submitted a revised warning, it could have been approved.

This is a very good result on the pre-emption issue. Lawyers in our firm have handled a good number of Fosamax cases.

Sources: Law360.com and <http://ca3blog.com/uncategorized/third-circuit-en-banc-procedure-the-basics-and-beyond/>

### **FDA DELAYS FINAL RULE ON OFF-LABEL PROMOTION**

The Food and Drug Administration (FDA) has delayed a rule that would regulate off-label drug and device promotion. The rule was scheduled to take effect March 21, 2017, but has been delayed until March 19, 2018, so the FDA could consider public comments. The rule is viewed as giving the FDA broad authority to police off-label promotion, and the delay comes in response to a petition to stay and for reconsideration filed by Pharmaceutical Research and Manufacturers of America, the Biotechnology Innovation Organization and a drugmaker coalition called the Medical Information Working Group.

The FDA contends that misleading information could do more harm than good, and that looser restrictions would make manufacturers less inclined to do perform due diligence by conducting scientifically sound clinical studies. Industry argues that the rule will impede dissemination of information, thus violating their First Amendment rights, and will “chill innovation.” They also contend that the FDA violated the Administrative Procedure Act (APA) by not providing adequate notice and an opportunity to comment on the revised “intended use” definition as published.

Doctors can prescribe drugs off-label, or for uses outside those indicated on their label as approved by the FDA. However, under the False Claims Act and the FDA, drug manufacturers cannot advertise or promote their products off-label. Opponents of off-label promotion argue that the off-label use has not passed scrutiny by the FDA, the chief regulatory body charged with ensuring the safety and efficacy of a drug for specific indications, and exposes patients to inappropriate risk. In recent years, however, there has been a trend toward heightened protection of commercial speech in the health care arena, and opportunities have opened up for off-label promotion.

In the 2002 Supreme Court case *Thompson v. Western States Medical Center*, the Court extended First Amendment commercial-speech protection to compounding pharmacies for the first time, allowing them to promote their compounded drug products. In 2012, the Second Circuit Court of Appeals further expanded First Amendment commercial speech protection in pharmaceutical marketing in *United States v. Caronia*. The Court found that the First Amendment protected the right of a pharmaceutical sales representative to promote off-label use to doctors in a way that was not untruthful or misleading.

Currently, the “intended use” definition states that if a manufacturer has mere knowledge that a drug or device is used for off-label conditions, purposes or uses, the manufacturer is required to provide adequate labeling for that use. (See 21 CFR §201.128 and 21 CFR §801.4). The proposed rule issued on Sept. 25, 2015, would have deleted this standard. However, the final rule, as published in January, retained and amended the current language to include a “totality of the evidence” standard that was not in the proposed rule.

The new standard would allow the FDA to consider all evidence, including internal deliberations, clinical practice guidelines and non-promotional scientific exchange as evidence of intended use to determine whether a company engaged in off-label promotional activity. The FDA would continue to determine the product’s intended use by its labeling, promotional claims, advertising, oral or written statements by a manufacturer or its representatives, circumstances surrounding the distribution or sale of a product, and other relevant evidence.

In its notice to delay, the FDA stated that “good cause” existed for the delay because it would allow the public to comment on the language that was introduced in the final rule that did not first appear in a proposed rule, thereby skirting the Administrative Procedure Act. Public comments on the rule must be submitted to the FDA prior to May 19, 2017.

### **JUDGE KEEPS FRAUD CLAIMS AGAINST GSK ALIVE IN ZOFRAN MDL**

A Massachusetts federal judge has refused to dismiss fraud-based claims from multidistrict litigation complaints alleging that GlaxoSmithKline PLC’s anti-nausea drug Zofran is linked to birth defects. U.S. District Judge F. Dennis Saylor IV said that

claims about the drug’s labeling are sufficiently specific to pass muster. However, he found the suit’s marketing-campaign allegations too broad. Consumers say GSK knowingly misrepresented the safety of taking Zofran during pregnancy in its advertising and marketing campaigns. However, the plaintiffs haven’t provided a specific allegation — either in the master complaints or the individual ones — about any advertisements, brochures, presentations or the like. Judge Saylor said allegations that individual GSK sales representatives misrepresented the safety of taking Zofran during pregnancy to doctors were also expressed in very broad terms.

Judge Saylor found allegations that Zofran’s labeling misrepresented its safety during pregnancy to be sufficiently specific, pointing to a statement about teratogenic effects, which the suit alleges is misleading, that has been included in the drug’s prescribing information since 1993. The judge said:

*Accordingly, because plaintiffs adequately pleaded the content, time, and place of the allegedly false representations made in Zofran’s product labeling, the fraud-based claims premised on that misrepresentation satisfy the requirements of Rule 9(b). Whether those representations were actually false is, of course, a question for another day.*

The MDL plaintiffs accuses GSK of marketing and promoting Zofran to treat pregnancy-related nausea and vomiting, when the U.S. Food and Drug Administration cleared it only for nausea and vomiting related to chemotherapy, radiation therapy or operations. The plaintiffs say that the labels for Zofran and its generic equivalent, ondansetron, don’t specify that the drug has been linked to cardiovascular and cleft palate birth defects.

The plaintiffs are represented by Tobias L. Millrood of Pogust Braslow & Millrood LLC, Kimberly D. Barone Baden of Motley Rice LLC, M. Elizabeth Graham of Grant & Eisenhofer PA, and Robert K. Jenner of Janet Jenner & Suggs LLC and and Kimberly Dougherty of Andrus Wagstaff. The case is In Re: Zofran (Ondansetron) Products Liability Litigation (case number 1:15-md-02657) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

## IX. BUSINESS LITIGATION

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### **JURY AWARDS \$12.2 MILLION TO SURGERY TUBE CO. IN FALSE AD LAWSUIT**

A Delaware federal jury has awarded \$12.2 million to surgery-device maker Lexion Medical LLC, including \$10 million in punitive damages, agreeing with Lexion that rival SurgiQuest Inc. committed false advertising in its fight over tubes used in laparoscopic procedures. SurgiQuest had sued Lexion in Delaware federal court in March 2014 in connection with a SurgiQuest laparoscopy system called AirSeal. Lexion's rival devices are called Insuflow and Synergy. All three devices facilitate the injection of gas into a patient's body between the abdominal wall and the organs that are being worked on, which gives the surgeon more maneuvering room.

According to SurgiQuest, Insuflow and Synergy use a traditional design with one-way valves that can leak, trap instruments, and cause camera blurriness, where AirSeal "establishes a horizontal air barrier" that serves the same function but doesn't give rise to the same problems. In the claims and counterclaims the two companies filed over the years, each accused the other of misleading clients and prospects with regard to the other's product. But the jury found for Lexion, awarding \$2.2 million in damages for lost profits and \$10 million in punitives. The jury failed to award anything to Lexion for "corrective advertising damages." U.S. District Judge Gregory Sleet presided over the trial.

The jury found that SurgiQuest's statements were false regarding "heat and humidification," regarding "air," and regarding "smoke." The latter comes into play during certain laparoscopies that utilize burning and thus create smoke that may need to be cleared out of the abdomen. The one area in which the jury disagreed with Lexion was on its claim that SurgiQuest had committed a deceptive trade practice.

On all of SurgiQuest's claims against Lexion—false advertising, deceptive trade practices, and unfair competition—the jury found for Lexion. Initially, the core of SurgiQuest's claims was on Lexion's stance over the need to warm and humidify gas that goes into the abdomen. Lexion had told customers its "devices are the

only products on the market that effectively reduce side effects allegedly because they are the only products that actively heat and humidify insufflation gas."

Lexion filed counterclaims, saying SurgiQuest bent the truth when it called its tubes "airtight," named them "AirSeal," saying their safety level had never been achieved before. It was stated further that SurgiQuest told customers the tubes obviated the need to heat and humidify gas before injection into abdomens. Lexion contended that SurgiQuest had violated the Lanham Act, Delaware trade-practices law, and, by way of misleading statements, unfair-competition law. Lexion said:

*These statements actually deceived or have the tendency to deceive a substantial segment of purchasers or prospective purchasers of medical devices.*

SurgiQuest's suit was initially a response to a Minnesota federal court suit by Lexion that was dismissed for jurisdiction reasons. SurgiQuest believed that Lexion would try to refile the suit elsewhere and filed its own lawsuit.

Lexion is represented by David Moore and Richard Horwitz of Potter Anderson & Corroon LLP and David Wille of Baker Botts LLP. SurgiQuest is represented by Denise Kraft of DLA Piper. The case is *SurgiQuest v. Lexion* (case number 1:14-cv-00382) in the U.S. District Court for the District of Delaware.

Source: Law360.com

## X. INSURANCE AND FINANCE UPDATE

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### **PENN MUTUAL SETTLES INSURANCE SURPLUS FUND SUIT FOR \$110 MILLION**

Pennsylvania Mutual Life Insurance Co. has agreed to pay \$110 million in settlement with a class of policyholders who alleged the company breached its obligations by improperly withholding surplus funds rather than distributing them as dividends. The settlement involves about 293,000 whole life insurance policies issued by Penn Mutual that were in force between Jan. 1, 2006, and Dec. 31, 2015. It provides for an automatic payout of dividends to the settlement class, according to a motion for preliminary approval of the settlement. The motion says:

*The injunctive relief afforded by the settlement provides terminal dividends having a face amount of \$110 million, a truly exceptional result. There is no subjective or disproportionate treatment of the settlement class members, because all of them will receive settlement class benefits calibrated to the objectively determined cash surrender values of their respective settlement policies.*

The settlement has received contingency approval by the Pennsylvania Insurance Commissioner, following proceedings before the Pennsylvania Department of Insurance involving the regulatory issues at the center of the case. A federal judge stayed litigation in April 2014 pending those administrative proceedings.

The lawsuit was filed in November 2012. Plaintiffs Daniel and Edith Harshbarger argued that while Penn Mutual was obligated under state law to return all profits over a "safety fund" limit, capped at 10 percent of its reserves, to participating policyholders, it repeatedly failed to do so.

The policyholders claimed Penn Mutual's breach of its obligations cheated policyholders out of more than \$5 million over at least 18 years. The complaint said that Pennsylvania state law requires the state's life insurance companies to return all surpluses that accumulate past a maximum annual "safety fund" limit to policyholders.

Unless the state Insurance Commissioner grants an exemption, that limit is capped at 10 percent of its financial reserves, the complaint stated, adding that Penn Mutual had never sought nor received such an exemption. During the administrative proceedings, Penn Mutual argued that the plaintiffs' relied-upon provision has been implicitly repealed through legislation and non-enforcement by the Department of Insurance and that the company's retained surplus, nonetheless, complied with state law.

The plaintiffs are represented by Joseph N. Kravec Jr. of Feinstein Doyle Payne & Kravec LLC, Jason B. Adkins and John Zavez of Adkins Kelston & Zavez PC, Andrew Friedman of Bonnett Fairbourn Freidman & Balint PC, and Mark A. Chavez of Chavez & Gertler LLP. The case is *Harshbarger et al. v. Pennsylvania Mutual Life Insurance Co.* (case number 2:12-cv-06172) in the U.S. District Court for the Eastern District of Pennsylvania.

## **BAD FAITH SUIT WILL GO FORWARD IN MASSACHUSETTS COURT**

A Massachusetts federal judge has ruled that an “unfair insurance practices suit” will go forward. It was alleged that Sedgwick Claims Management Systems Inc. failed to make a reasonable settlement offer before or after an underlying \$16 million verdict was returned in a nursing home death case. U.S. District Judge Patti B. Saris denied a summary judgment motion in a suit brought by the family of Genevieve Calandro, who died in 2008 at a nursing home.

In the underlying suit, the Calandro family said the nursing home was negligent and caused the resident’s death. Sedgwick, the claims adjuster and administrator for a Hartford Insurance Group subsidiary that insured the nursing home company, failed to make a prompt, fair and equitable settlement offer under Massachusetts’ consumer-focused insurance laws.

The Calandros are represented by David J. Hoey, Krzysztof G. Sobczak and Allan Galbraith. The case is Garrick Calandro as administrator of the estate of Genevieve Calandro v. Sedgwick Claims Management Services (case number 1:15-cv-10533-PBS) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

## **XI. EMPLOYMENT AND FLSA LITIGATION**

### **SECURITY GUARDS’ \$110 MILLION “ON-CALL” BREAK SETTLEMENT GETS APPROVAL**

A California judge has granted preliminary approval to ABM Security Services’ \$110 million settlement to resolve long-pending claims that 15,000 guards were unlawfully required to carry radios and stay “on call” during rest breaks. Los Angeles Superior Court Judge John Shepard Wiley expressed reservations about the amount of attorneys fees requested by class counsel, but preliminarily approved ABM’s agreement to pay \$110 million to end the 12-year-long suit alleging its policy requiring the guards to carry radios during breaks violated the state’s Labor Code. The amount of settlement represents the roughly \$90 million judgment the class won in 2012, plus interest. Under the settlement, class

members will receive an average of \$4,700 each.

The single certified class in the matter is defined as all persons employed by ABM in any security guard position from July 12, 2001, to July 1, 2011, who worked a shift exceeding four hours without being allowed to take an uninterrupted rest period. The class of current and former security guards won the nearly \$90 million award on summary judgment in July 2012.

ABM appealed, arguing in its brief that the lower court judge’s “unprecedented” ruling “defies law and reason” and would cripple California companies without providing any real benefit to employees. If upheld, ABM argued, the ruling would require companies to force employees to take their rest breaks off their work sites, without their personal cellphones. The appeals court in December 2014 vacated the award, saying that being on call does not constitute performing work in violation of the rest break law. But a majority of the California Supreme Court disagreed, saying in its December decision that the state’s labor code and Wage Order 4 require “employers relinquish any control over how employees spend their break time, and relieve their employees of all duties—including the obligation that an employee remain on call.”

Even though state law and regulations don’t mention on-call time, “one cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods,” the majority of the court said. After remand, the parties reached the settlement. Judge Wiley in February told them they were “close” to getting it approved, pending several small concerns regarding the proposed class notice and simplifying objection procedures.

The Plaintiffs are represented by Michael Breen Adreani, Drew E. Pomerance and Marina N. Vitek of Roxborough Pomerance Nye & Adreani LLP; Jeffrey Isaac Ehrlich of The Ehrlich Law Firm; Monica Balderrama and G. Arthur Meneses of the Initiative Legal Group LLP; Scott Edward Cole and Matthew R. Bainer of Cole & Associates; and Alvin L. Pittman.

The case is *Jennifer Augustus v. American Commercial Security Services et al.* (case number BC336416) in the Superior Court of the State of California, County of Los Angeles.

Source: Law360.com

## **XII. PREMISES LIABILITY UPDATE**

### **PG&E TO PAY \$86.5 MILLION IN SETTLEMENT OVER SAN BRUNO EXPLOSION-LINKED TALKS**

Pacific Gas and Electric (PG&E) Co. has agreed to pay \$86.5 million to settle claims over its closed-door communications with state regulators following the 2010 San Bruno gas line explosion. The penalty resolves an investigation brought by the California Public Utilities Commission (CPUC) that the San Francisco-based utility engaged in “improper communications” and “back-channel deals” with state regulators in connection with its role in the deadly 2010 explosion. Eight people were killed and 58 were injured in the explosion. Thirty-eight homes were also burned to the ground.

A major share of the settlement relates to the foregoing of revenue collection for years 2018 and 2019, which translates to an approximate 22-cent reduction in residential customers’ monthly bills. This amount totals \$63.5 million of the settlement. PG&E will also pay \$6 million each to the cities of San Bruno and San Carlos, pay \$1 million to the California General Fund, and make a request for a one-time \$10 million adjustment in revenue requirements for 2020 through 2022.

The proposed settlement comes less than a year after a California federal jury convicted the utility of five criminal counts for violating pipeline safety standards and obstructing a subsequent federal investigation into the September 2010 gas line explosion in San Bruno, a suburb of San Francisco. The federal government had charged PG&E with violating minimum federal safety standards outlined in the Natural Gas Pipeline Act and obstructing agency proceedings after it failed to provide all of its records to the National Transportation Safety Board during its investigation.

In January, a California federal judge ordered PG&E to pay the maximum \$3 million statutory fine and complete 10,000 hours of community service, with 2,000 of those hours to be carried out by high-level personnel. Under the \$86.5 million settlement, which must be approved by California’s five-member Public Utilities Commission, PG&E admitted to committing “multiple violations” of the commission’s ex parte rules. The agreement said:

*PG&E's employees and agents engaged in communications with decision makers at the commission, as well as related conduct that was harmful to the regulatory process.*

The proposed settlement involves the cities of San Bruno and San Carlos, the CPUC Office of Ratepayer Advocates, the CPUC Safety and Enforcement Division and The Utility Reform Network.

Source: Law360.com

#### **A LAWSUIT FILED BY THE PARENT OF A STUDENT DRAGGED TO DEATH BY BUS**

A lawsuit has been filed arising out of an incident where a Texas State student was dragged to death by a bus after a fraternity party in Martindale, Texas. The lawsuit was filed against the bus company, multiple fraternities, and a number of others. The lawsuit filed by Freddie Joey Taylor Jr., the father of Jordin Taylor, seeks \$10 million in damages. It's alleged that Skyline Party Bus Company; its management officer Brandon Burleson; B&B Shuttles; Gabriela Wilson, the driver of the bus on the night of the incident; SMTX Properties; VCD San Marcos River; and four national fraternities at Texas State University all played roles in the death of the student.

On Oct. 28, 2016, the student was found wedged between the ground and the axle of a party bus at Cool River Ranch, where fraternities Delta Tau Delta Zeta Delta, Kappa Alpha Order Epsilon Iota, Alpha Tau Omega and Pi Kappa Alpha hosted events. The lawsuit claims Miss Taylor was struck by a party bus before her body became trapped underneath. She was found dead the following day by a mechanic.

The lawsuit claims all of the defendants created a dangerous environment by not having enough security for an event catering to more than 2,000 people; by having poor lighting; by allowing underage drinking; and by allowing reckless driving and negligence by the bus drivers, who were entering and exiting the property.

Source: KVUE.com

## **XIII. WORKPLACE HAZARDS**

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#### **ALABAMA'S WORKPLACES COULD BECOME MORE DANGEROUS AFTER OSHA REPEAL**

President Donald Trump has repealed an Obama-era health and safety regulation that will leave Alabama workers more at risk from health and safety violations. The little known Occupational Health and Safety Administration (OSHA) regulation, known as the "volks" rule, previously allowed OSHA to pursue companies for safety breaches for up to five years after an incident occurred.

The repeal means that OSHA is limited to a statute of limitation of six months. According to experts in OSHA regulation, the rollback of the rule could see employers hide injury data and recurring hazards from regulators. This would make it harder to identify problems at specific business and across wider industries.

This is particularly troubling at shipyards where the injury-accident rate is around 80 percent that of construction and general industry, according to recent Labour statistic records. Between 2005 and 2015, for example, there were 76 deaths at private shipyards around the country. Peg Seminario, Safety and Health director at AFL-CIO, said:

*This means that in the worst cases OSHA won't be able to take enforcement action, and the employers are going to be able to keep doing what they are doing because there are no consequences. It essentially takes away OSHA's ability to enforce patterns of record keeping violations, and what that means is that worse employers that have a pattern of hiding injuries or falsifying records will escape punishment.*

While the repeal means OSHA is unable to legally pursue accidents and incidents that occur at a company more than six months later, the agency is still able to view all data going back five years. That regulation has not changed. This means that OSHA can still identify industry-wide hazardous trends and make suggestions to individual companies on how to fix them. However, the agency can't act against companies that have flouted rules more than six months ago. OSHA inspectors would need to identify an issue at a company within the six-month timeframe

to be able to act on it. According to data collected by AFL-CIO, it would take Alabama's 24 OSHA inspectors roughly 114 years to visit every business in the state. Ms. Seminario added:

*That makes it difficult to catch issues within the six month time frame and enforcement nearly impossible.*

Since coming into power, President Trump and Republicans have reversed more than 30 regulations using what's known as the Congressional Review Act, a powerful legislative tool that enables Congress to quickly overrule newly established federal rules. The act also prevents the reissuing of regulations, meaning OSHA may never be able to reinstate the five-year statute of limitations in the future.

The repeal is clearly a loss for workers. In recent months, the dangers of shipyards have been on full display in Mobile. A detailed investigation into work practices at Austal uncovered dozens of injuries being sustained by employees using a cutting tool known as the "widowmaker." Workers that have been injured by the tool are currently involved in a court case against Austal in which they claim the U.S. Navy contractor forced them to swap out the original blade in the tool for another blade with larger cutting teeth in order to hasten the manufacturing process. The blade swap went against the manufacturer's instructions, which explicitly warned against changing of the blade. Some workers lost fingers while others suffered severe lacerations to their face, neck and upper body.

Many of the injuries go back years, meaning that under the now-current rules OSHA would not be able to act against Austal, although it could make suggestions on better practices. For years there has been confusion over the statute of limitations around OSHA's enforcement of safety breaches. During the last days of the Obama administration, the regulation was clarified to mean that the agency could take action up to five years after a breach of health and safety occurred.

That rewriting of the regulation by the Trump Administration has upset a number of lawmakers who say that it's the job of the legislative branch to write laws. Rep. Bradley Byrne, who represents Mobile County in Congress, said after the repeal that "the role of the executive branch is to enforce the laws—not rewrite them" and that "this OSHA power grab was completely unlawful." "It would have done

nothing to improve workplace safety while creating significant regulatory confusion for small businesses,” added Byrne. “Our efforts are to uphold the rule of law and advance responsible, proactive policies that keep America’s workers safe.”

Source: Christopher Harress of AL.com

### **THIRD-PARTY LIABILITY IN WORKPLACE INJURIES**

Kendall Dunson, a lawyer in our firm’s Personal Injury & Products Liability Section, wrote an article for Law360 last month on workplace injuries. Kendall handles this type litigation for our firm. I am setting out his article below.

The headlines about on-the-job injuries usually focus on employers’ failings, and rightfully so. A quick internet news search shows employers coming under fire for a trench collapse that killed two people last year and for a boiler explosion that killed three workers at a box factory earlier this month. Employer failings are undoubtedly a factor when employees lose a finger, a limb or their lives. However, it is important to note how product liability impacts workers’ compensation cases and on-the-job safety.

Unfortunately, the examples of workers being injured on the job are numerous; again, all it takes is a simple news search. In the past few months, auto parts manufacturers in Alabama have come under fire for unsafe working conditions after a Bloomberg Businessweek article highlighted serious injury rates among the industry’s workers. The article features employees at auto parts manufacturers around the state who have had fingers and arms crushed in machines, have suffered third-degree burns after being engulfed in flames, or have suffered chemical burns after falling into a vat of acid. All this comes as Alabama tests its “New Detroit” nickname. According to the Alabama Department of Commerce, more than 160 automotive parts suppliers operate in Alabama, employing 25,000 Alabamians. The auto-manufacturing sector as a whole employs more than 50,000 people. Alabama Commerce Secretary Greg Canfield told the Birmingham Business Journal in 2015, “Alabama’s auto manufacturing sector is well-positioned for growth over the

next decade[.]” That growth is unlikely to slow, but comes at a high price for employees. In 2010, workers in Alabama auto parts plants had “a 50 percent higher rate of illness and injury than the U.S. auto parts industry as a whole,” the Bloomberg piece notes. The industry’s growth and high injury rate emphasize the importance of understanding the complexities of on-the-job injury cases and the compensation clients can receive.

One of the workers highlighted in the Bloomberg piece, Regina Allen Elsea, 20, of Five Points, Alabama, entered a robotic machine in June 2016 at auto parts manufacturer Ajin USA’s plant, where she was a temporary employee, to try to fix a malfunction. Several other employees had tried and—fortunately for them—failed to fix the machine after a maintenance crew never showed up to make repairs and production came to a standstill. To her ultimate detriment, Elsea apparently knew what she was doing because the machine began functioning while she was still inside, crushing her. She died days later from her injuries. The Occupational Safety and Health Administration (OSHA) fined Ajin USA \$2.5 million for serious and willful safety violations, meaning OSHA felt the employer knowingly failed to comply or acted with plain indifference to employee safety. The company is contesting OSHA’s findings.

In the above case, we expect to include the machine’s manufacturer as a Defendant along with Joon LLC, d/b/a Ajin USA, the custodian of the equipment. Ajin USA’s failure to provide a safe working environment in accordance with OSHA regulations and the machine manufacturer’s failure to provide adequate guarding and safety mechanisms led to the unnecessary death of Regina Elsea. This is often the case. On-the-job injury cases are inextricably intertwined with product liability. Investigating any machine or product involved in an on-the-job injury is in the best interest of a client. What may initially appear to be a workers’ compensation claim may actually turn out to be a case involving a dangerous product or piece of equipment. This is especially useful because workers’ compensation benefits are usually capped, limiting the amount of com-

ensation a client can receive without a third-party claim. The additional claim could be a product liability suit against a machine’s manufacturers, distributors, suppliers, retailers or any others who made the product available to the public.

Designers and manufacturers have a responsibility to use accepted industry practices to make their products safe. For example, microwaves are designed with doors because the designer and manufacturer knew they must find a way to protect consumers from the radiation released by the appliance. Microwaves do not start if the door is open for that reason. Just as microwaves were designed and manufactured to reduce health risks, the same should be true of machines used in the manufacturing process. What safety mechanisms could have saved Regina Elsea? She would still be alive if the machine did not originally malfunction or if it included a mechanism to prevent it from operating when a person is near. An expert witness, such as an engineer who has designed a similar machine or designed safety mechanisms for a similar machine, would be able to explain what safety precautions should have been included to properly protect workers from harm.

In my experience with on-the-job injuries, safety devices often are seen as a slowdown in the manufacturing process, and for the auto parts manufacturers, time is money. Under their delivery system, a parts manufacturer can be fined thousands of dollars each minute the order is late to an automaker’s production plant. The stress on the production timeline means safety devices are often bypassed or removed, if they were ever even in place. Due to the rush, employees are often needlessly exposed to serious hazards that could easily be prevented by simply changing the design of a robot. A year before Regina Elsea’s death, an OSHA representative visited executives at Hyundai Motor Co. and Kia Motor Co. to stress the importance of workplace safety in their automotive plants and in their auto parts suppliers’ plants because otherwise lives would be lost. Clearly, that is absolutely the case.

However, for defective machines that contribute to on-the job injuries, the

warnings are rarely given before someone gets hurt. Therefore, filing a third-party claim not only helps your client, but could save other workers' lives—or at least give them an opportunity to be safe while doing their jobs.

If you need more information on any aspect of workplace litigation, contact Kendall Dunson at 800-898-2034 or by email at [Kendall.Dunson@beasleyallen.com](mailto:Kendall.Dunson@beasleyallen.com). He will be glad to talk with you.

Source: Kendall Dunson wrote the above article for Law360 and it appeared on April 21, 2017.

## XIV. TRANSPORTATION

### *DRINKING AND DRIVING DO NOT MIX*

Alcohol-related deaths on our nation's highways continue to be a huge problem. In 2015, 10,265 people died in drunk driving crashes—one every 51 minutes—and 290,000 were injured in drunk driving crashes. It's obvious drunk driving is still a major problem in this country. It appears the numbers of DUI-related deaths were even greater last year. At press time we weren't able to get the final numbers from a reliable source.

Alcohol impaired driving can be a major safety hazard even though the driver involved may not be "legally intoxicated." In all states it's a crime to drive with a blood alcohol concentration (BAC) of .08 percent or above. However, the laws and penalties for DUI vary greatly from state to state.

It might be good to take a look at what it takes for a driver to reach the level of .08 percent. These are the factors: how fast a person drinks, their weight, their gender and how much food they have in their stomach. For an average male it takes three drinks, and for an average female, only two drinks will usually be enough.

It should be noted, however, that even before reaching .08 percent, a person's driving ability can be impacted. The following will give an indication of how alcohol at numerous levels will impair a person's driving:

- .02—There will be a decline in visual functions and the ability to perform two tasks at the same time.
- .05—There will be reduced coordination, reduced ability to track moving

objects, difficulty steering, and reduced responses to emergency driving situations.

- .08—There will be decreased concentration, short-term memory loss, difficulty controlling speed, reduced information processing (traffic signals and other visuals), and impaired perception.
- .10—There will be a reduced ability to maintain lane position and to brake appropriately.
- .15—The driver will have significant difficulty controlling vehicle, paying attention to driving, and processing the things he or she sees and hears.

Alcohol is not the only drug that causes impaired driving. It has been reported that drugs other than alcohol are involved in about 18 percent of motor vehicle driver deaths. Because of the significant and badly needed attention paid to alcohol-related deaths, the problems caused by the other drugs do not always get the attention they receive.

All states should take a proactive stand against drinking and driving. There are many things that can be done to help curb the carnage that is occurring on our nation's highways. But regardless of laws on the books, it is both dumb and dangerous to drive a vehicle after drinking alcoholic beverages.

Source: Department of Transportation and ALEA

### *CAN AIRBUS' HELIONIX DIGITAL AVIONICS IMPROVE SAFETY IN THE HELICOPTER EMERGENCY MEDICAL SERVICES INDUSTRY?*

During the annual industry-sponsored Heli-Expo held recently in Dallas, Airbus Helicopters (Airbus) and STAT MedEvac announced that the Pennsylvania-based medical transport service will be the first in North America to operate the Helionix digital avionics suite. This was reported by Vertical Magazine. Airbus Helicopters claims that the new suite along with a newly designed helicopter cockpit aboard the H135 will help improve the pilot's situational analysis and reduce pilot workload. The goal for the new technology and physical changes is to maximize safety and reduce the risk of crashing.

In a previous issue of the Report, we described the particularly dangerous nature of the helicopter emergency medical services (HEMS) industry. It was noted that the U.S. Federal Aviation Administration (FAA) incorporated the

National Transportation and Safety Board's (NTSB) recommendations in its new, stricter flight regulations and procedures in 2014, coming after a deadly decade. It was reported that from 2006 to 2015 a crash occurred in the U.S. every 40 days. The NTSB's recommendations were based, in part, on information analyzed by the Air Medical Physician Association. The group examined 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. Robert Sumwalt, an NTSB Board Member, believes the regulations implemented in 2014 were a good first step. However, he has urged the industry and regulators to incorporate additional measures designed to confront the leading causes of HEMS crashes. Some of the additional measures Sumwalt advocated for include better technology and more training for pilots operating and relying on the improved technology.

Helionix offers two computers that include up to four electronic displays designed to improve pilots' situational awareness. It also provides a four-axis autopilot and a Traffic Advisory System to assist pilots in detecting and avoiding other aircraft. Neither Airbus nor STAT MedEvac have discussed pilot training for the new technology and cockpit. However, Vertical Magazine notes that Airbus has a state-of-the-art simulator that is customizable to provide realistic scenarios for all helicopter missions. The company believes that its latest products will significantly enhance helicopter safety and is putting them to the test in a segment of the industry fraught with unique safety challenges such as time constraints and intense pressure to fly in less than favorable environmental conditions.

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

Sources: Vertical Magazine, Airbus Helicopters Inc., *Jere Beasley Report* (December 2016), CNN

### *DEFECTS IN GUARDRAILS ARE A MAJOR THREAT TO MOTORISTS*

Lawyers in our firm are continuing to receive cases where motorists left the road and suffered catastrophic, and often-

times fatal, injuries when the vehicle they were driving struck a defective guardrail system. Guardrail systems are supposed to redirect a car away from a dangerous area on the highway (often an embankment or a creek, for instance) and absorb the energy of the car striking it. In this way, guardrails are supposed to lessen the severity of an accident, if not mitigate it entirely. Guardrail systems should never increase the severity of an accident, but these defective guardrails are doing just that.

Based on investigations by our lawyers where occupants were killed or were seriously injured from guardrail systems, we have observed two major characteristics. The first common characteristic involves a poorly designed guardrail end terminal. End terminals are specially designed end sections of a guardrail system—usually existing on the approach end of the guardrail, and they are designed to absorb the energy of a car that strikes the approach end. In this way, the terminal end is supposed to slow the vehicle down and lessen the severity of an accident. However, a number of roads contain terminal end sections that are defective, one being the breakaway cable terminal. Breakaway cable terminals, which use a cable and a breakaway system to absorb car energy, often fail because the terminal design is too stiff.

Instead of absorbing the energy of a vehicle as the terminal end section should, Federal Government studies proved that the breakaway cable terminal actually penetrates into the passenger compartment, resulting in horrific injuries caused by the guardrail impaling the vehicle (and the occupants inside). Lawyers in our firm are currently litigating these cases. We currently represent one client who lost a leg when a breakaway cable terminal impaled her car like a shish kabob stick.

The second concern we have found involves poorly installed guardrail systems. Poor installation can take a number of forms. For instance, poor installation at splice points (the points where pieces of guardrail sections come together) can cause the guardrail system to break apart when it should hold and redirect the vehicle. If the installer fails to install a guardrail system using the proper height, the guardrail system could actually cause a vehicle to become airborne.

We have also observed situations where the support posts were improperly driven into asphalt. Guardrail posts along the guardrail system are supposed to have some flexibility and bend so they can absorb energy and redirect the vehicle

away from a hazard. By driving the support posts into asphalt (oftentimes deeper than 1 ½ inches), the posts are not allowed to twist in the ground (which absorbs energy). Instead, the support posts can break off and cause splices in the guardrail system to fail. Where splices fail in this manner, we have observed situations where sections of the guardrail system impale the vehicle and kill occupants inside.

Our lawyers are investigating cases where vehicle occupants were severely injured or killed after striking a guardrail system. If you have any questions about these cases, contact Parker Miller, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at [Parker.Miller@beasleyallen.com](mailto:Parker.Miller@beasleyallen.com).

Source: *Knoxville News Sentinel*

## XV. ENVIRONMENTAL CONCERNS

### **MICHIGAN REACHES \$87 MILLION SETTLEMENT TO REPLACE FLINT WATER LINES**

The State of Michigan has agreed to pay \$87 million to enable the City of Flint to replace water lines over the next three years for up to 18,000 households dealing with the city's lead contamination crisis, according to a proposed settlement agreement filed in Michigan federal court. The proposed settlement resolves a lawsuit brought last January by the Natural Resources Defense Council, American Civil Liberties Union and Concerned Pastors for Social Action against state and local officials over the town's lead-tainted water and violations of the federal Safe Drinking Water Act.

A hearing to approve the settlement is scheduled before U.S. District Judge David Lawson. In a lengthy stipulation, the parties agreed they "consider this agreement to be a fair reasonable, and equitable resolution of all claims in this case." The settlement requires the state to replace lead and galvanized steel water service lines in the City of Flint with copper water service lines. The settlement covers the cost of conducting excavations to identify the material of the water line at a minimum of 18,000 households served by the Flint Water System. If all or part of the service line from main line to household meter is determined to be lead or galvanized steel, officials must replace that

portion of the service line with a copper service line at no cost to the resident or property owner. The replacements are set to take place over the next three years, so that by Jan. 1, 2010, replacement lines will be completed for a minimum of 18,000 total households.

Residents in those households where a service line has been replaced will be advised to use filtered water for at least six months following a service line replacement. Under the proposed deal, officials are required to monitor the tap water distributed through the Flint water system for lead during consecutive six-month periods. Flint came under national scrutiny for how local and state leaders responded to the fact that residents' tap water was polluted with lead and other contaminants. The January 2016 lawsuit alleged that officials failed to test drinking water for harmful contaminants and treat the water to control for those contaminants.

It was alleged in the complaint that a Michigan state-appointed emergency manager decided to switch Flint's drinking water source from Lake Huron to the Flint River, regarded as a "dumping ground" for nearby industries, as a cost-cutting measure, according to the suit. When run through the city's aging metallic pipes, this "corrosive" water ate away at the pipes, causing lead to leach into the residents' drinking water, according to the complaint.

The settlement comes about two months after Michigan state officials asked the Sixth Circuit to overturn Judge Lawson's order for Flint and state officials to deliver bottled water to residents whose tap water is undrinkable. Officials said the judge abused his discretion by ordering the weekly delivery of bottled water to every Flint resident. They argued that under the injunction, they would need to deliver approximately 395,000 cases of water per week to meet the court's requirement, five times more than were being delivered before the order.

Under the proposed settlement, the state must continue to operate at least nine sites of distribution for bottled water but can discontinue those services by May 1, 2017, if certain conditions are met. Residents can request delivery of bottled water with a 24-hour turnaround through a Michigan state helpline. Under the proposal, the Plaintiffs will receive \$895,000 in fees and costs.

The state officials are represented by Michigan Solicitor General Aaron Lindstrom, and Assistant Attorneys General Richard S. Kuhl, Nathan A. Gambill,

Michael F. Murphy and Joshua O. Booth. The Plaintiffs are represented by Dimple Chaudhary, Jared E. Knicley, Sarah C. Tallman and Michael E. Wall of the Natural Resources Defense Council; Michael J. Steinberg of the American Civil Liberties Union Fund of Michigan; and Glenn M. Simmington of the Law Office of Glenn M. Simmington.

The case is *Concerned Pastors for Social Action et al. v. Nick A. Kbouri et al.* (case number 2:16-cv-10277) in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

#### **RESEARCHERS DISCOVER EXTENT OF CANCER-CAUSING CHEMICALS' BIOACCUMULATION**

Medical researchers at the UAB School of Medicine in Birmingham, Alabama, have discovered that perfluoroalkyl substances (PFAS) build up in the brains, hearts, livers, bones and skin of mice. While researchers were previously aware of the fact that PFAS accumulates in the tissues of living organisms, the full extent of this accumulation was not understood. Researchers developed the new way of tracing the chemicals by replacing a single fluorine atom in the compounds with fluorine-18, a radioactive isotope that can be traced through the body using medical imaging techniques.

These results are startling, because two "long-chain" versions of the chemicals, PFOA and PFOS, have been used for years to manufacture products like non-stick cookware, water-resistant clothing, fire fighting foams, and stain-resistant coatings for fabrics. In short, these chemicals are everywhere, and most people have significant exposure to the chemicals (it is believed that PFAS can be found in the bloodstream of nearly every person on Earth thanks to heavy use in manufacturing).

Last year, the U.S. Environmental Protection Agency (EPA) released a new announcement warning that PFOS and PFOA had been linked to adverse health effects at lower concentrations than previously thought harmful. PFOA and PFOS have been linked to higher risk of testicular cancer, kidney cancer, developmental effects to the fetus during pregnancy, liver damage, thyroid effects, and cholesterol changes. While PFOA and PFOS are being phased out of use in favor of short-chain alternative chemicals, most recent studies have called this practice into question since it appears that the short-chain chem-

icals can be absorbed into bodily organs just as easily.

If you would like more information about these cases, you can contact Grant Cofer, a lawyer in our firm's Toxic Torts Section. He can be reached at 800-898-2034 or by email at Grant.Cofer@beasleyallen.com.

Source: AL.com

#### **OSHA DELAYS RULE LIMITING SILICA EXPOSURE**

The U.S. Department of Labor (DOL) is delaying a new rule reducing the maximum permissible exposure level to silica dust in certain industries. The 90-day delay will allow the DOL to contact those who could be impacted by the rule and to provide educational materials and guidance to employers.

The rule would reduce the current exposure limit of 100 micrograms per cubic meter to 50. It also requires employer-covered medical examinations. The rule could have a profound impact on the 2.2 million American workers the Occupational Safety and Health Administration (OSHA) estimates are exposed to silica in various industries. Workers are exposed when they cut, grind, crush, or drill silica-containing materials such as concrete masonry, tile, and rock and inhale the resulting crystalline silica dust.

Silica is a known carcinogen that can cause both lung cancer and silicosis. Silicosis is a progressive, debilitating, and incurable disease that is marked by inflammation and scarring in the form of nodular lesions in the upper lobes of the lungs. Silica dust particles can create small cuts in the lung that can scar the lung tissue when inhaled over a prolonged period of time.

Industry groups argued that OSHA failed to show significant health risks justifying a lower threshold without any evidence that the current level caused harm to workers. Labor groups lauded the new rule, but also wanted additional regulations requiring employers to remove workers from dangerous exposure situations with pay if ordered by a doctor. The new rule is set to take effect on Sept. 23, 2017.

Lawyers in our Toxic Torts Section are investigating cases where individuals are diagnosed with silicosis. If you have any questions about this or other severe lung diseases, contact Chris Boutwell or Ryan Kral, lawyers in our Toxic Torts Section, at 800.898.2034 or by email at Chris.Bout-

well@beasleyallen.com or Ryan.Kral@beasleyallen.com.

Source: Law360.com

#### **THERE IS CONCERN OVER ROUNDUP WEED KILLER**

A judge in California recently ruled that the state can require Monsanto to label its popular weed-killer Roundup as a possible carcinogen, even though Monsanto contends that the key ingredient, glyphosate, has a long history of safe use. The action by the State of California comes at a time when the giant seed and pesticide conglomerate faces dozens of lawsuits from Plaintiffs who allege the company misled the public about the risks of Roundup and thus compromised the health of workers.

The Plaintiffs claim that exposure to Roundup caused them to develop non-Hodgkin's lymphoma (NHL). As we reported last month, unsealed court documents were just released suggesting studies attributed to academics were actually ghostwritten by Monsanto employees, and that U.S. regulators based their determination that glyphosate is not a cause of cancer on those studies.

Recently, Robert F. Kennedy Jr., an environmental lawyer and activist, discussed these and other issues regarding Roundup with radio host Steve Curwood on *Living on Earth*. Kennedy offered his opinion on the inconsistent conclusions of the U.S. Environmental Protection Agency (EPA) and Monsanto versus those of the International Association for Cancer Research (IARC) regarding the safety of glyphosate and Roundup.

*There are two issues. One is that glyphosate alone is less toxic, we know, and glyphosate in the formulation of Roundup. There are surfactants and adjuvants in Roundup and particularly a class of surfactants known as tallowamines. That makes glyphosate far more toxic than it is alone, in fact, there's implications that it might be 10,000 times as toxic when combined with the tallowamines. The reason that the tallowamines make it more toxic is that they allow the glyphosate to penetrate human skin on contact in very, very high concentrations.*

*We also have studies by the premier, gold standard cancer research organization on Earth, which is the International Association for*

*Cancer Research or IARC, which is an organization that is funded by 16 industrialized countries, and most nations, most European countries recognize, and countries all over the world, that nobody really had the resources to measure all of these chemicals that we're now swimming around in for carcinogenicity, and we needed to have one centrally funded and adequately, abundantly funded organization and use the highest scientific standards and employ the best scientists on Earth, and that organization has determined that glyphosate is a probable carcinogen.*

Kennedy also voiced concern over the accuracy of a recent determination by the EPA that there is little risk for most Americans in the quantities they say they are usually exposed to. He had this to say:

*It's not accurate, and unfortunately what the documents that have been recently released by Judge Cbbabria show is that there was a history of collusion between the EPA pesticide division which was helping Monsanto cover up the dangers of glyphosate and Roundup® as well. The head of the pesticide branch was a guy named Jess Rowland, who had this very disturbing relationship with Monsanto in which there are emails that show him going to bat for Monsanto. At one point, he tells...A conversation is described in the email in which Jess Rowland pledges to derail an investigation of glyphosate and Roundup by the HHS. We have permission to depose Jess Rowland. We've also deposed David Hayden, who is the Monsanto executive who was coordinating the cover up with the EPA. In answer to your question about whether EPA science is trustworthy, it's not. And in fact, EPA had a long history of ... That particular division is kind of a poster child for what we call "agency capture phenomenon," where the regulatory agency becomes captured by the industry that it's supposed to regulate.*

John Tomlinson, a lawyer in our Toxic Torts Section, has filed cases involving Roundup exposure in both state and federal courts and he is currently investigating other potential cases. If you need more information on this subject contact

John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Source: *Living on Earth* –Public Radio International, April, 2017

#### **AUTO MECHANIC FILES BENZENE LAWSUIT IN ILLINOIS**

A lawsuit alleging damages due to Benzene exposure was recently filed in Cook County Circuit Court Illinois by Steven J. Williams, an auto mechanic who has worked in repair shops since 1982. This man was frequently exposed at his work to products containing benzene or chlorinated hydrocarbons. He was diagnosed with multiple myeloma, a blood cancer that starts in bone marrow. Williams claims his cancer was caused by exposure to carcinogens in diesel fuel, parts washer solvent, paint, belt dressings, and more.

Benzene is a sweet-smelling, flammable chemical that evaporates quickly. Auto mechanics are mainly exposed by breathing it in the air or absorbing it through their skin. Benzene accumulates in the bone marrow and causes the bones to produce cancerous white blood cells. Benzene is found in many products that auto mechanics use regularly, such as solvents (degreasers, cleaning agents, etc.) and car paint. Benzene is also found in gasoline, car exhaust, and cigarette smoke. In recent years, several benzene exposure lawsuits have resulted in multi-million dollar jury awards. For example, a railroad worker with leukemia was awarded \$7.5 million in November 2016. The worker was exposed to benzene, creosote and solvents on the job.

Lawyers for the plaintiff accuse more than a dozen Defendants of failing to provide adequate warnings about the risk of cancer from benzene and exposure to diesel fuel, despite evidence dating back to the 1950s. The lawsuit was filed against Ashland Inc., BP Products North America Inc., Hess Corp., Safety-Kleen Systems Inc., The Sherwin-Williams Co., E.I. DuPont de Nemours & Co., Axalta Coating Systems LLC, CRC Industries Inc., Rust-Oleum Corp., Radiator Specialty Co., Heritage Crystal Clean LLC, Shell Oil Co., ExxonMobil Corp. and Marathon Petroleum Corp.

John Tomlinson, a lawyer in our Toxic Torts Section, has filed and is investigating benzene exposure cases. If you need more information on this litigation, contact John

at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Sources: *Daily Hornet*; and *Cook County Record*

#### **OSHA DELAYS RULE LIMITING SILICA EXPOSURE**

The U.S. Department of Labor announced it would delay a new rule reducing the maximum permissible exposure level to silica dust in certain industries. The 90-day delay was deemed necessary for the Department to contact those who could be impacted and to provide educational materials and guidance to employers.

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Lawyers in our Toxic Torts Section are investigating cases where individuals are diagnosed with silicosis. If you have any questions about this or other severe lung diseases, please contact Chris Boutwell (Chris.Boutwell@BeasleyAllen.com) or Ryan Kral (Ryan.Kral@BeasleyAllen.com) at 800.898.2034.

Source: Law360

### **3M SEEKS DISMISSAL OF WATER CONTAMINATION SUIT**

With the current water crisis in Flint, Michigan making national headlines, the public has never been more concerned over the safety of its drinking water. Many people, however, are unaware that other chemicals, in addition to lead, can be just as harmful and could present a more widespread problem.

Perfluorinated compounds (PFCs) are a group of man-made chemicals most commonly used to make stain-resistant carpet, clothing, and other fabrics as well as in firefighting foams used at airfields and in a number of industrial processes. PFC's are slow to degrade in the environment and, as a result, can persist and accumulate over a period of time, eventually migrating to various sources of drinking water.

Residents in one Philadelphia community sued 3M, the manufacturer of these chemicals, alleging that they migrated from two former naval airbases into their drinking water. 3M is facing a trio of consolidated class actions alongside other defendants, such as Tyco International, for manufacturing a firefighting foam that contains the cancer-causing chemicals perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). The firefighting foam was used in training activities at the two former naval facilities and has been used at airfields and other military basis nationwide.

3M said that the plaintiffs could not support a negligence claim because it had no way of knowing that the foam would eventually make its way into the residents' water supplies, accumulate for decades and ultimately pose any health risks. In its motion to dismiss, Tyco International argued that the Navy's work with governmental authorities to remedy the contamination precluded any involvement by private parties under a provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Because the carbon-flourine bonds in PFOA and PFOS are stable, they do not breakdown over time and can readily be absorbed and accumulate in humans after repeated exposure. The C8 Health Project, an independent science panel, determined that kidney and testicular cancers have a "probable link" to PFOA exposure while other epidemiological studies also link ulcerative colitis, thyroid disease, high cholesterol, and pregnancy-induced hypertension to these chemicals.

In 2009, the Environmental Protection Agency added PFOS and PFOA to a contaminant candidate list and established a

provisional health advisory for those compounds. Then, in 2012, the EPA included those compounds in its Third Unregulated Contaminant Rule, requiring certain water providers across the country to test for their presence. On May 19, 2016, the EPA issued a new drinking water health advisory for PFOS and PFOA at 70 parts per trillion over one's lifetime.

The issuance of these new guidelines left many water systems nationwide over the lifetime limit and scrambling to address the problem. Lawsuits have been filed across the country to ensure that clean and uncontaminated water is delivered to the public. Our firm is representing Gadsden's Water Works and Sewer Board and is seeking remediation costs and injunctive relief.

If you have any questions about PFOA or PFOS contamination, contact Rhon Jones, Rick Stratton, Grant Cofer, or Ryan Kral, lawyers in our firm's Toxic Torts section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, Grant.Cofer@beasleyallen.com or Ryan.Kral@beasleyallen.com.

Source: Law360.com

### **NAVY BANS E-CIGARETTES**

The U.S. Navy will be instituting a ban on electronic cigarettes onto its ships, submarines, aircraft, boats, craft and heavy equipment because of the devices' high risk of explosion due to their lithium-ion batteries. The Navy made this known in a statement issued in mid-April. The ban will go into force on May 14 and is only temporary in nature while Navy officials review the safety concerns of the electronic cigarettes and the lithium-ion batteries used to power them.

Individuals who are stationed on land will still be allowed to use the devices, but just in designated areas. Those who want to take their electronic cigarettes onboard a ship will be able to do so, but will have to remove the lithium-ion batteries and keep them stored in a plastic container, according to Navy officials.

Last year, *Navy Times* reported that the Naval Safety Center called for a full ban of the devices on Navy property, citing their "significant and unacceptable risk." The Navy reported that 15 separate "mishaps" occurred between October 2015 and June 15, 2016, which resulted in either injury to Navy personnel or "fire/materiel damage." The navy reported that eight of these incidents occurred onboard vessels or aircraft. Nine incidents were reported as

being explosive and two explosions resulted in second-degree burns and facial disfigurement to service members.

Given the relatively new nature of e-cigarettes, many rules and regulations around the devices have only recently been finalized. For example, the U.S. Food and Drug Administration only made official its first regulations for e-cigarettes in 2016. Also recent was the U.S. Department of Transportation's decision to formally ban e-cigarette use on commercial flights.

Sources: NPR and The U.S. Navy

## **XVI. AN UPDATE ON CLASS ACTION LITIGATION**

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There has been a great deal of activity in class action litigation recently. We will include a few of those cases below.

### **SALIX TO PAY \$210 MILLION TO SETTLE STOCK INFLATION CLASS ACTION**

Shareholders in a proposed class action have asked a New York Federal Court for preliminary approval of a \$210 million settlement to end a lawsuit accusing Salix Pharmaceuticals Ltd. of inflating stock prices by knowingly misrepresenting the company's wholesale inventory levels. The motion asks U.S. District Judge Kimba M. Wood to certify the class of people and entities that held Salix stock between November 2013 and November 2014, and to approve as class representatives PWCM Master Fund Ltd., Pentwater Equity Opportunities Master Fund Ltd., Oceana Master Fund Ltd., Pentwater Merger Arbitrage Master Fund Ltd., LMA SPC on behalf of the MAP98 Segregated Portfolio, and the City of Fort Lauderdale General Employees' Retirement System.

The exact size of the class is unknown, but it's estimated to comprise thousands of members. Salix had 62 million shares of common stock, with average daily trading volume in the millions of shares per week during the class period.

The class representatives and their lawyers say the proposal "represents an excellent result and is in the best interests of the settlement class,"

which they allege was hurt by the gastrointestinal drug company's misrepresentations. The motion said:

*The proposed \$210 million settlement represents a substantial percentage of the maximum damages that lead plaintiff reasonably believed could be established at trial. This significant benefit to the settlement class must be considered in the context of the serious risks that further protracted litigation might lead to no recovery, or to a smaller recovery, from defendants in this action.*

The suit arises from two putative securities class actions filed in New York federal court immediately after Salix's stock declined in November 2014. The suits were consolidated in March 2015. It was alleged that Salix violated the Securities and Exchange Act when it made false statements about its inventory to inflate its common stock during the class period. When Salix reported on Nov. 6, 2014, that it had as much as nine months' worth of inventory on its top four products, that the complaint alleged the revelation of the "glut" caused the stock price to fall dramatically.

The motion said the proposed settlement was the result of extensive litigation, including 2.7 million pages of documents proffered by Salix and 13 depositions. The filing also argued that a trial would have been risky. It was difficult to prove the misleading statements amounted to an intentional plot to defraud investors, the motion said, since the errors were due to best estimates of inventory. The motion also argued that calculating damages would prove difficult, because it would require breaking down how much of the stock price drop was due to the alleged fraud and how much was a result of other factors, like the company's pending acquirement by Valeant Pharmaceuticals International Inc.

The class is represented by Salvatore J. Graziano, John Rizio-Hamilton and Katherine M. Sinderson of Bernstein Litowitz Berger & Grossmann LLP and Samuel H. Rudman, David Rosenfeld and Mark S. Reich of Robbins Geller Rudman & Dowd LLP. The case is *In*

*Re Salix Pharmaceuticals Ltd.* (case number 1:14-cv-08925) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

#### **WELLS FARGO TO PAY \$142 MILLION TO SETTLE BOGUS ACCOUNTS SUITS**

Wells Fargo & Co. will pay \$142 million in a class action settlement over fraudulent account generation. The San Francisco-based bank has been involved since September in a scandal over the generation of more than 2 million deposit and credit card accounts that were created without customer knowledge. Originally, a \$110 million class action settlement was agreed to in March, but Wells Fargo has extended the class period for the settlement to May 2002. This adds another \$32 million to the settlement.

The settlement is just the latest payout that Wells Fargo has had to make since its account generation scandal became public in September of last year. Wells agreed to pay \$185 million in a settlement with the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency and the Los Angeles City Attorney's Office over claims that the bank's aggressive sales targets and compensation plans drove employees to create more than 2 million deposit and credit card accounts that may not have been authorized by existing customers.

The March settlement in class action litigation over the Wells Fargo sales practices scandal brought to a close 12 separate lawsuits filed against the bank. The original proposed settlement class included anyone who claimed Wells Fargo opened an account in their name without consent, enrolled them in a product or service, or submitted an application for a product or service in their name without consent between Jan. 1, 2009, and the execution of the settlement.

However, since the settlement was reached, an internal report from Wells Fargo found that the bank had known about problematic sales practices in its retail banking unit since at least 2002.

This conduct by a bank is shocking and it can't be tolerated. The plaintiffs are represented by Derek W. Loeser, Gretchen Freeman Cappio, Daniel P. Mensher and Matthew J. Preusch of Keller Rohrback LLP. Wells Fargo is represented by David H. Fry and Erin J. Cox of Munger Tolles & Olson LLP. The case in which the settlement was reached is *Jabbari et. al. v. Wells Fargo & Co. et al.* (case number 3:15-cv-02159) in the U.S. District Court for the Northern District of California.

Source: Law360.com

#### **JUDGE GIVES PRELIMINARY APPROVAL TO \$100 MILLION HALLIBURTON SETTLEMENT**

Chief U.S. District Judge Barbara M.G. Lynn, a Texas federal judge, has granted preliminary approval of a \$100 million securities class action settlement against Halliburton Co. over its asbestos liability disclosures. The judge scheduled a settlement fairness hearing to take place in her courtroom on July 31. It will be determined whether the terms and conditions are "fair, reasonable, and adequate to the class," and whether they should be approved by the court. Judge Lynn also set a deadline of Aug. 12 for any class members wishing to participate in the settlement to submit a claim form. Her order stated:

*At or after the settlement fairness hearing, the court will determine whether the plan of allocation proposed by class counsel, any application for attorneys' fees or reimbursement of expenses, and any lead plaintiff incentive award shall be approved.*

The settlement, which energy giant Halliburton revealed late last year, puts an end to one of the oldest securities fraud class actions still hanging around in U.S. courts. The Erica P. John Fund, a Milwaukee charitable organization that held Halliburton stock, and others had first sued in 2002 after Halliburton's disclosure of a \$30 million verdict stemming from asbestos liabilities sent the company's stock price tumbling.

Years of infighting among investors and class counsel followed, and Boies Schiller took over in 2007. The long-running class action alleged Hallibur-

ton had artificially inflated its stock price by issuing misstatements about its financial liability for asbestos claims. Halliburton said there was no evidence the statements at issue had an actual impact on its stock price.

Judge Lynn, in July 2015, granted in part the investors' motion for class certification, finding that Halliburton did not meet its burden of showing that a Dec. 7, 2011, announcement from the company did not affect its stock price. It was disclosed that a Baltimore jury found that a Halliburton subsidiary, Dresser Industries, was liable for \$30 million following a trial in an asbestos lawsuit. Thereafter Halliburton's shares fell about 40 percent. In the case's first time at the high court, the justices overturned a Fifth Circuit ruling that the class action could not be certified because the investors did not affirmatively prove their losses were caused by Halliburton's alleged misrepresentations.

The U.S. Supreme Court ruled there was no such requirement. The Texas district court then certified the class, rejecting Halliburton's effort to use price impact evidence to negate the investors' presumed reliance on the statements. The Fifth Circuit affirmed that decision, leading to another high court battle, which ended with the Supreme Court declining to overturn its landmark *Basic v. Levinson* decision but finding that securities defendants may rebut the fraud-on-the-market presumption of reliance before the class certification stage by showing a lack of price impact.

The justices found that Halliburton did not show a "special justification" to overturn *Basic*, which in 1988 established the fraud-on-the-market presumption of reliance. That presumption rests on the principle that public, material information about a publicly traded company affects the price of the company's stock and that investors thereby rely on that information when they purchase securities.

The justices found, however, that the energy company should be allowed to rebut that presumption of reliance before class certification by showing evidence that an alleged misrepresentation did not affect the stock's price.

Erica P. John Fund is represented by David Boies and Carl E. Goldfarb of Boies Schiller Flexner LLP and Kim E. Miller, Lewis S. Kahn, Michael Swick and Neil Rothstein of Kahn Swick & Foti LLC. The case is *Erica P. John Fund Inc. v. Halliburton Co.* (case number 3:02-cv-01152) in the U.S. District Court for the Northern District of Texas.

Source: Law360.com

#### **\$25 MILLION TCPA SETTLEMENT OVER HEALTH SERVICE FAXES IS APPROVED**

A California federal judge has granted preliminary approval to a \$25 million settlement between a health care consulting group and a health care provider in a proposed class action lawsuit. It was contended that the consulting group sent unsolicited junk faxes promoting various health services, in violation of the Telephone Consumer Protection Act. California nursing facility Dakota Medical Inc. filed a proposed TCPA class action in 2014 against Cannon & Associates LLC and its former parent company, RehabCare Group Inc., after receiving a number of junk faxes promoting various seminars manuals, DVDs and programs on Medicare and Medicaid billing. Dakota likewise alleged that the two defendants sent a total of 2.4 million junk faxes nationwide between 2010 and 2014. The two sides reached the \$25 million agreement late last year.

In giving preliminary appeal, the judge agreed to preliminarily certify a class that includes anyone who received a successful transmission of one or more faxes sent by either Cannon or RehabCare between July 17, 2010, and Feb. 4, 2014. Dakota Medical is represented by Donald R. Fischbach and Mark D. Kruthers of Dowling Aaron Inc., C. Darryl Cordero, Scott O. Luskin, Matthew K. Brown and Leilani E. Livingston of Payne & Fears LLP, and Joel S. Magolnick of Marko & Magolnick PA. The case is *Dakota Medical Inc. v. RehabCare Group Inc. et al.* (case number 1:14-CV-02081) in the U.S. District Court for the Eastern District of California.

Source: Law360.com

#### **USAA SETTLES SALES TAX COMPENSATION CLASS ACTION FOR \$39 MILLION**

The United Services Automobile Association has agreed to pay \$39 million to settle a class suit in Florida challenging its practice of compensating policyholders with totaled cars for the sales tax incurred in purchasing a replacement, rather than determining tax based on the covered vehicle's value. The parties asked the court to approve the settlement, which provides members with 100 percent of the value of their claims plus 8 percent for claims of prejudgment interest. The claims are estimated to be about \$34 million. The settlement also sets aside about \$46,000 in incentive payments for the five lead plaintiffs.

Garrison Property and Casualty Insurance Co. policyholder Chantal Bastian filed a proposed class action against Garrison and three other USAA-affiliated auto insurance companies in 2013 over their sales-tax compensation for totaled vehicles, later agreeing to add four named plaintiffs who were insured by the other companies.

The plaintiffs are represented by Christopher B. Hall of Hall & Lampros LLP and Tracy L. Markham of Avolio & Hanlon PC. The case is *Bastian et al. v. United Services Automobile Association et al.* (case number 3:13-cv-1454) in the U.S. District Court for the Middle District of Florida, Jacksonville Division.

Source: Law360.com

Class action litigation in our firm is handled by lawyers in our Consumer Fraud & Commercial Litigation Section. Dee Miles heads up the Section and Michelle Fulmer is the Section Administrator. If you need any information on any aspect of class action litigation, contact Michelle at 800-898-2034 or by email at [Michelle.Fulmer@beasleyallen.com](mailto:Michelle.Fulmer@beasleyallen.com) and she will have a lawyer respond to you.

## XVII. THE CONSUMER CORNER

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### **THE INFORMATION OF 100,000 U.S. TAXPAYERS' MAY HAVE BEEN STOLEN**

Internal Revenue Service (IRS) Commissioner John Koskinen says the information of up to 100,000 taxpayers may have been stolen in a security breach of an online tool used to apply for federal student aid. Testifying before the Senate Finance Committee, the Commissioner said the IRS identified suspicious activity in the files of people who were using a “data retrieval tool” as they filled out the Free Application for Federal Student Aid (FAFSA). FAFSA is the form the government and colleges use to determine financial aid for millions of students.

The web-based IRS data tool lets people upload tax-return information, but the IRS and Education Department disabled it in March after identity thieves tried to use personal information from it to file fraudulent tax returns. Koskinen told lawmakers that about 8,000 fraudulent refunds were issued, totaling \$30 million. The IRS prevented another 14,000 illegal refunds from going out the door and halted action on 52,000 other returns. The agency is notifying about 100,000 taxpayers of the possible breach, although some of the FAFSA applications that were flagged for suspicious activity are legitimate, Koskinen said.

Security concerns about the data retrieval tool first emerged in September at the IRS, according to the agency head. Officials learned that with relatively little stolen information, identity thieves could pretend to be students, start the financial aid application, and give permission for the IRS to populate the form with tax data that could then be used for fraudulent returns. The IRS alerted the Education Department in October, the same month that the FAFSA application went live. The agencies monitored the situation, but were reluctant to disable a tool that helps families avoid tedious paperwork. Commissioner Koskinen said:

*We agreed with [Education officials] since we did not have, at that time, any volume of criminal activity that rather than shutting it down and add to the burden of people applying for financial aid, we, with them, would monitor that system. But I told them that as soon as there was*

*any indication of criminal activity, we would have to take that application down.*

By mid-February, the commissioner said it became clear that “there was a pattern of activity...that was clearly not consistent with people going on to actually apply for student loans.” He said that upon further review some of that activity was just students who started but failed to complete the application, while some of it was indeed criminal. Within weeks of taking the tool offline, the IRS and Education Department decided to disable it until October to put stronger protections in place.

Applicants can fill out the paper FAFSA form or use the online version and manually enter tax data. But student advocates are concerned that both of those options will lead to errors. That could lead to students being asked to verify information with additional documents, a time-consuming process that could take them out of the running for aid awarded on a first-come, first-served basis. Lawmakers have asked states to push back their financial aid deadlines in light of the shutdown, since most jurisdictions rely on the FAFSA to dispense grants. Colleges and universities typically want the FAFSA data by March to help them determine use of their own aid dollars.

Hundreds of thousands of students got an early jump on turning in the FAFSA this season because the window for submitting the form opened in October, two months earlier than usual. That gave higher education experts hope that disabling the data tool will have limited impact on students. However, many fear that low-income students, without proper guidance from parents or counselors, are still working through the application, and the outage could discourage completion.

There is an ongoing criminal investigation into the breach. The IRS briefed the Senate committee on the state of that investigation and the actions the agency has taken in response to the hack. Commissioner Koskinen said the IRS is going through documents and continuing to analyze the scope of the breach. Nevertheless, this is a most serious matter. Hopefully, the damages from this breach will be minimized to the extent possible.

Source: AL.com

### **CALIFORNIA SUPREME COURT LIMITS ARBITRATION WAIVER POST-CONCEPCION**

The California Supreme Court has ruled that an arbitration agreement that waives the right to public injunctive relief is contrary to California public policy and is therefore unenforceable under California law. The court reversed an appellate court’s finding that the U.S. Supreme Court’s *Concepcion* decision overshadowed state rules barring some mandatory arbitration. In a unanimous decision, the California justices rejected Citibank’s contention that, under precedent set forth by the nation’s highest court in *AT&T Mobility LLC v. Concepcion*—which established that the Federal Arbitration Act (FAA) preempts all state-law rules that amount to an outright ban of arbitration—an arbitration agreement contained in a “credit protection plan” the bank sold to Sharon McGill and other consumers was enforceable.

Instead, the California justices sided with McGill, who had argued that the arbitration agreement was unenforceable because it sought to prohibit her from pursuing claims for public injunctive relief in any forum under California’s Unfair Competition law (UCL) and False Advertising law, and the Consumer Legal Remedies Act (CLRA). The California high court pointed out:

*While Concepcion holds that the FAA requires courts to place arbitration agreements on equal footing with other contracts and to enforce them according to their terms, the U.S. Supreme Court qualified that statement with a “savings clause,” which permits arbitration agreements to be declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract.*

Under the savings clause, then, arbitration agreements may be invalidated by certain contract defenses, such as fraud or unconscionability, but can also be invalidated by the contract defense at issue here: that a law established for a public reason cannot be contravened by a private agreement, the California justices concluded. The court wrote:

*A provision in any contract ... that purports to waive ... the statutory right to seek public injunctive relief under the UCL, the CLRA, or the False Advertising Law is invalid and unenforceable under California law. The FAA does not require enforcement of such a provision, in*

*derogation of this generally applicable contract defense, merely because the provision has been inserted into an arbitration agreement. To conclude otherwise would [be] contrary to Congress's intent.*

The California Supreme Court said that applying this defense to invalidate the waiver does not modify the FAA, as Citibank argued, but instead implements the FAA as written. The court pointed out that the language in Concepcion supports its analysis. In concluding that the arbitration provision was unenforceable insofar as it purports to waive McGill's statutory right to seek public injunctive relief in any forum, California's high court overruled a lower appellate panel, which had found Concepcion established that the FAA preempts all state-law rules that amount to an outright ban of arbitration.

McGill had filed the putative class action in 2011, claiming Citibank's marketing and administration of its "credit protector" insurance plan violated California's consumer protection laws. She sought monetary and punitive damages, as well as injunctive relief.

Citibank attempted to force the case into arbitration based on its contract language, but met only partial success as the trial court ordered the arbitration of only a portion of the claims, while suspending it for others based on a rule that agreements to arbitrate claims for public injunctive relief under the CLRA, UCL or False Advertising Law are not enforceable in California. However, the appellate court overturned that order, on the grounds that the federal arbitration rules overshadowed state arbitration rules.

In reversing, the California Supreme Court sent back to the appeals court the question of whether the remainder of Citibank's arbitration provision was enforceable. Glenn Danas of Capstone Law APC, a lawyer McGill, told Law360:

*This unanimous decision invalidating forced waivers of consumers' right to seek broad injunctive relief under the California consumer protection statutes gets the issue right, and preserves a vital tool in leveling the playing field between consumers and corporations, holding the latter accountable. This is a robust, pro-consumer ruling, and we're proud to have played a part in obtaining it.*

McGill is represented by Glenn A. Danas and Liana Carol Carter of Capstone Law APC. The case is McGill v. Citibank NA,

(case number S224086) in the Supreme Court of the State of California.

Source: Law360.com

#### **JURY AWARDS \$454 MILLION AGAINST KIMBERLY-CLARK AND HALYARD IN FRAUD SUIT**

A California federal jury found last month that Kimberly-Clark Corp. and its spinoff Halyard Health Inc. misled buyers about the impermeability of the companies' MicroCool surgical gowns. A class of buyers was awarded \$454 million in compensatory and punitive damages.

The jury ordered Kimberly-Clark to pay \$3,889,327 in compensatory damages and \$350 million in punitive damages. In addition, jurors ordered Halyard Health to pay \$261,445 in compensatory damages and \$100 million in punitive damages.

Bahamas Surgery Center's class action, filed in October 2014, claims Kimberly-Clark and Halyard Health falsely represented that their MicroCool surgical gowns provided the highest level of liquid barrier protection. It was alleged that while the gowns are marketed as "impermeable" and effective against pathogens like Ebola, they put health care workers at substantial risk. The class action was brought on behalf of persons and entities in California who purchased the gowns between February 2012 and January 2015.

This appears to have been a classic case of a corporation putting "money and profits" over safety and customer interest. The class presented to the court and jury an assortment of internal company documents stating concerns about the quality of the gowns' seams and testing failures, including emails and chat messages. A May 2013 presentation given to Kimberly-Clark chairman and CEO Tom Falk, saying "the company had 80 compliance challenges on gowns that were delaying progress on cost savings," was also presented and was very damaging.

Additionally, jurors learned of an electronic instant message chat in March 2012 in which a Kimberly-Clark senior research scientist asked a manager at the company's manufacturing plant in Honduras to create a "pretext for rerunning tests," telling him "something, anything" would do. The biggest concern for the company, according to the evidence presented at trial, were problems with the gowns' sleeve seams actually coming apart.

AAMI Level 4 protection is the top rank for protective apparel, appropriate for situations where there's a high-risk of infection. The standard is set by the Association

for the Advancement of Medical Instrumentation. It was proved at trial that it was widely known inside the companies that their surgical gowns were not compliant with the safety standard. That posed a safety risk to users.

The class was represented by Michael Avenatti of Eagan Avenatti. The case is *Bahamas Surgery Center LLC v. Kimberly-Clark Corporation et al.* (case number 2:14-cv-08390) in the U.S. District Court for the Central District of California.

Source: Law360.com

#### **UNITED AIRLINES MUST LEARN FROM SOME VERY BAD CONDUCT**

By now, most folks have probably heard about the incredible situation that occurred on April 9 in which a United Airlines passenger on a flight out of Chicago was forcibly removed from his seat and physically dragged off the airplane. The passenger wasn't causing trouble; neither was he a threat to air safety. He simply refused to be "bumped" from the flight—to give up his seat, which he bought and paid for—in order to make room for four United employees whose travel the airline insisted was more important. Yes, in their opinion, more important than its customers.

The entire incident was caught on camera, filmed by other passengers using their cellphones. A lawyer for the passenger who was removed—a doctor from Kentucky named David Dao—said the man was physically injured in the altercation, suffering a broken nose and two broken teeth, as well as being publicly humiliated.

United initially claimed the flight was overbooked. Gate crew asked passengers prior to boarding to voluntarily give up their seats in exchange for vouchers and other incentives. However, once the passengers were on the plane, the flight crew announced four people still needed to volunteer to give up their seats. Eventually the airline resorted to a random lottery, selecting passengers that would be required to deplane. When Dr. Dao refused to leave the plane, saying he had to work the next day, Chicago aviation police officers forcibly removed him as he screamed, eventually dragging his body down the aisle and off the plane in front of other horrified passengers.

Making matters worse, it later came to light that United was requiring passengers—its paying customers—to give up their seats to off-duty United flight crew,

whose schedules were apparently more important to the airline.

Video of the incident quickly went viral online, sparking international outrage. United CEO Oscar Munoz offered a ludicrous and insulting initial “apology,” in which he said the airline was sorry for “having to *re-accommodate* these customers,” fanning the flames of indignation and causing United stock to plunge. On April 11, Munoz finally issued a statement calling the event “truly horrific,” pledging to take full responsibility and make things right with its customers, as well as announcing an internal investigation into the incident.

Sens. John Thune (R-S.D.) and Bill Nelson (D-Fla.), who are ranking members of the Committee on Commerce, Science and Transportation, called for United and the Chicago Department of Aviation to provide an explanation for the events leading to the forcible removal of the passenger to their committee by April 20. Rather than meeting that deadline, Munoz sent a letter to the senators saying its internal investigation is still underway, and promised answers by April 27. Ginger Evans, Commissioner of the Chicago Aviation Department, says her department will have its own report ready April 26. The senators answered by saying the delay is “unacceptable.”

It is hard to believe either the airline or the aviation department will come up with an acceptable explanation for these recent events, no matter how much time they are given to do so. United did settle with Dr. Dao last week by paying a confidential amount in settlement of all claims.

Sources: *The Huffington Post*, *The New York Times*, *Washington Post*, *BoardingArea.com*

#### **INFORMATION FROM RECENT FDA WARNING LETTERS**

Cybersecurity and battery problems with heart devices continue to trouble Abbott’s St. Jude Medical Inc., whose devices were still being implanted in patients despite a recall over faulty batteries last fall. This is according to a recent warning letter from the U.S. Food and Drug Administration (FDA). Also, cybersecurity issues with smart heart devices still haven’t been handled to agency’s satisfaction, which warned about the problem early in the year. The FDA also scolded a medical food company for not getting the necessary clearance to study a new product, and found a stomach-churning array of pest problems at a Los Angeles bakery. The following is a roundup of the

agency’s enforcement actions last month from Law360.

#### **RECALLED ST. JUDE DEFIBRILLATORS IMPLANTED IN PATIENTS**

St. Jude Medical—which was acquired by Abbott Laboratories on Jan. 4—continued to ship out heart defibrillators with batteries prone to failing early, despite a recall in October, and seven cardiac defibrillators were implanted in patients soon after the recall, according to a warning letter sent April 12. The company also didn’t tell its own management and medical advisory review boards about the full scope of the battery issue, including the death of a patient whose defibrillator battery failed prematurely several years ago, the FDA said. St. Jude in the October recall had warned that batteries in some of its implantable heart devices can short-circuit and run out of juice earlier than anticipated, which it said at the time had been linked to two deaths, one in the U.S. The problem stems from lithium deposits that can form within the devices’ batteries, potentially causing short-circuits that can lead to battery failure with little notice, in some cases within 24 hours of the patient receiving the telltale vibratory alert, according to the FDA. Normally, the devices give three months’ warning, the agency said at the time.

In its warning letter, the FDA said that it had reviewed a number of the company’s product analysis reports between 2011 and 2014, which showed that the battery supplier Greatbatch—now Integer Holdings Corp.—had shown evidence that lithium clusters caused the battery to drain too fast. But despite that evidence, St. Jude repeatedly concluded that the cause of the batteries’ failure couldn’t be determined and classed those failures as “unconfirmed,” the FDA said.

The company didn’t include these unconfirmed cases in its risk evaluation and didn’t consider that those cases could have been shorts, leading it to drastically underestimate the hazard, the FDA said. St. Jude’s management and medical advisory board had been presented with information about the premature battery failure in 2014, but the presentations likewise didn’t include the unconfirmed cases,

the FDA said. “Additionally, both presentations stated there were no serious injuries or deaths directly related to lithium cluster formations,” the FDA said, noting there had been at least one death by that time.

In addition to the battery problems, the FDA again took the medical-device maker to task for cybersecurity issues with its implantable heart devices. This is the second time in 2017 that the agency has faulted St. Jude for cybersecurity problems with the devices; in January, the FDA warned that its smart pacemakers and defibrillators may be vulnerable to hacking, after St. Jude had forcefully denied such reports late last summer. Implantable cardiac devices that use St. Jude’s Merlin@home transceiver to communicate radio frequency signals that export device data “can be vulnerable to cybersecurity intrusions and exploits,” the FDA said in a Jan. 10 safety alert. That could enable a hacker to access the device by changing the programming demands, which could cause the battery to drain rapidly, change pace, or give out shocks, the FDA said, noting that there hadn’t been reports of such tampering so far. In the warning letter, the FDA chided St. Jude for how it handled its corrective and preventive action procedures for the cybersecurity issue. The agency said:

*Your firm conducted a risk assessment and a corrective action outside of your CAPA system. Your firm did not confirm all required corrective and preventive actions were completed, including a full root cause investigation and the identification of actions to correct and prevent recurrence of potential cybersecurity vulnerabilities, as required by your CAPA procedures.*

#### **MEDICAL FOOD COMPANY DIDN’T CLEAR STUDY**

The FDA aimed another warning letter at Targeted Medical Pharma Inc., a maker of amino acid-based medical foods. A medical food is defined as food eaten under a doctor’s supervision that is meant to manage the nutritional aspects of a disease or condition. The company had sponsored clinical investigations

of a redacted drug, but without submitting a required investigational new drug, or IND, application to the agency, the FDA wrote. Targeted Medical had responded to the FDA after it visited in June and July by saying that the medical food is used to treat nutritional deficiencies from pain and inflammation and that it had never been the company's intention to apply for a new drug application or market the food as a drug, according to the letter. However, there are no distinctive nutritional requirements for people with the unnamed condition in question, the FDA said, making this product not a medical food.

Instead, the product meets the definition of a drug under the Food, Drug and Cosmetics Act, the FDA said, and thus requires an IND before a clinical investigation can begin. The agency also noted that the studies were meant to compare the product to a nonsteroidal anti-inflammatory drug. The FDA's letter mentioned that a Targeted Medical employee had contacted the agency before the studies and was advised to apply for an IND. The agency said:

*There are no FDA records to indicate that Targeted Medical Pharma Inc. submitted an IND application before conducting the investigations.*

Just under 300 patients were enrolled in the studies and were given the drug product twice a day for 28 days, the FDA said.

#### **RAT FECES, COCKROACHES AND FLYING BIRDS FOUND AT CROISSANT MAKER**

FDA inspectors found rat feces and live cockroaches during a November inspection of a wholesale bakery in Los Angeles, according to another FDA warning letter. Three birds also flew through the warehouse of C & B Croissants Corp., which had happened before during another visit in 2010, the FDA said. Perhaps relatedly, the inspectors spotted what seemed to be bird droppings on boxes of margarine stored in a walk-in cooler. In the warning letter, the agency recited a litany of other food hygiene and cleaning issues, such as the company's practice of storing uncovered dough and margarine. A dark residue

on an aluminum tray also seemed to rub off on the croissant dough.

Source: Law360.com

#### **VIKING PAYS \$4.65 MILLION CIVIL PENALTY FOR DEFECTIVE GAS RANGES**

Viking Range LLC and its parent company, The Middleby Corp., have agreed to pay a \$4.65 million civil penalty for failure to report defective gas ranges. The civil penalty settles claims that Greenwood, Mississippi-based Viking and Elgin, Illinois-based Middleby failed to immediately report to the U.S. Consumer Product Safety Commission (CPSC) that the gas ranges contained a defect that could create a substantial product hazard and an unreasonable risk of serious injury, according to the agency. The CPSC said:

*Several consumers called 911 for assistance when they discovered that the ranges had turned on spontaneously and could not be turned off or disconnected. Viking knew of this information, but failed to notify CPSC immediately of the defect or risk posed by the ranges, as required by federal law.*

The CPSC said that between 2008 and 2014, Viking received 170 incident reports of ranges that had turned on spontaneously and could not be turned off using their control knobs, resulting in extreme surface temperatures posing a burn hazard to consumers. The incidents include reports by two consumers who said they were unable to turn off the Viking range using the controls and were burned while attempting to disconnect the power source, according to the agency. Viking eventually told the commission that it had received five reports of ranges that had turned on spontaneously and caused damage to property in the areas surrounding the ranges.

Viking recalled a total of 52,000 ranges in May 2015, according to the CPSC. They were sold for between \$4,000 and \$13,000 at retail appliance stores nationwide—including Abt, Ferguson, Morrison's, Pacific Sales and P.C. Richard & Son—from July 2007 through June 2014.

In addition to paying the \$4.65 million civil penalty, Viking and Mid-

dleby have agreed to maintain an enhanced compliance program to ensure compliance with the U.S. Consumer Product Safety Act. Viking will also maintain a related system of internal controls and procedures, the CPSC said. The food equipment manufacturing giant on Feb. 28 reported net profits for fiscal 2016 of \$284 million, compared with \$192 million in fiscal 2015. Middleby's international brands, in addition to Viking, include Aga Ranges in Great Britain, Beech Ovens in Australia and La Cornue cookers in France.

Source: Law360.com

## **XVIII. RECALLS UPDATE**

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

#### **FORD RECALLS F-250 TRUCKS OVER ROLLAWAY DANGERS**

Ford is recalling about 52,600 of its 2017 Ford F-250 gasoline-powered 6.2-liter trucks to fix problems that can cause the trucks to roll away and hit anything the trucks want to hit. Ford didn't release much information but did say the F-250 trucks run on gasoline (not diesel) and can roll away even when the trucks are in PARK. The automaker blames the rollaway risk on a damaged park rod actuating plate that may not move the automatic transmission into PARK. Although the trucks can move with the gear shifter indicating PARK, Ford says no accidents or injuries have been reported related to the F-250 trucks. However, the parking brake should always be applied after shifting the truck into PARK.

All the recalled 2017 F-250 trucks were built in Kentucky between October 9, 2015, and March 30, 2017. Ford says about 48,421 of the trucks are in the U.S. and another 4,143 are in Canada. The automaker didn't mention when the 2017 F-250 recall will begin. Ford dealers will inspect and replace the park rod actuating plates,

if needed. CarComplaints.com will update its site when additional recall details are released, but F-250 owners with questions should call Ford at 866-436-7332 and ask about recall number 17C06.

#### **TOYOTA RECALLS 2.9 MILLION CARS WORLDWIDE WITH TAKATA AIR BAGS**

Toyota Motor Corp. is recalling another 2.9 million cars around the world—though not in North America—that are equipped with the now-infamous and potentially deadly Takata air bag inflators, which have been linked to at least 11 deaths in the U.S. The recall affects 1.16 million vehicles sold in regions including Oceania and the Middle East, and about 750,000 vehicles in Japan, 650,000 in China and an additional 350,000 in Europe and covers the Auris, RAV4, Corolla Axio and other models, according to media reports. Takata air bags prompted the largest auto recall in U.S. history and the company has faced massive global recalls of its air bag inflators, which allegedly had a tendency to explode. The cheap but volatile ammonium nitrate that inflates the bags can misfire, especially in humid conditions, blasting chemicals and shrapnel at passengers and drivers.

The Japanese auto parts manufacturer in February pled guilty to one count of wire fraud in Michigan federal court as part of its plea deal with prosecutors over the company's potentially deadly air bag inflators. Takata's plea stems from the settlement reached with the U.S. Department of Justice (DOJ) in January that also requires the company to pay nearly \$1 billion for falsifying testing data and reports about its inflators and to repay anyone injured by them. The settlement, which Takata announced Jan. 13, resolved the DOJ investigation into the company and its affiliates. That same day, the DOJ made a superseding filing that charged Takata with the one wire fraud count it agreed to plead guilty to. The scheme started sometime around 2000 and ran for at least 15 years, with Takata fraudulently persuading customers to buy air bag systems by giving them information that hid the accurate test results for the air bag inflators, prosecutors said. To further that plan, Takata made an interstate wire transfer of about \$43,000 from Pennsylvania to Detroit, the DOJ said.

Under the terms of the proposed deal, Takata also agreed to pay a \$25 million criminal fine and to establish a \$125 million restitution fund for people who were injured or will be injured by a mal-

functioning Takata air bag inflator. The company also agreed to create an \$850 million fund to benefit automakers that received the falsified data and reports or that purchased the potentially dangerous inflators. Takata further agreed to improve its compliance program and to appoint an independent monitor who will report to the DOJ for three years about Takata's compliance with legal and ethical obligations. A little more than a year ago, the National Highway Traffic Safety Administration (NHTSA) levied a \$200 million fine on Takata—its largest ever—in a deal that saw the company admit that it failed to tell the agency about the defect despite knowing about it and withholding important information. At the time, NHTSA estimated that the exploding inflators had caused about 98 injuries. A sprawling multidistrict litigation involving injured victims and people whose car values have decreased is ongoing in Florida federal court. Takata is one of the Defendants.

#### **HYUNDAI AND KIA RECALL 1.4 MILLION VEHICLES FOR STALLING ENGINE RISK**

Kia Motor Corp. and its parent company Hyundai Motor Co. are recalling 1.4 million vehicles in the U.S., Canada and South Korea due to a risk that the engines can fail and stall, potentially causing a crash, according to documents posted by the National Highway Traffic Safety Administration (NHTSA). According to the automakers, metal debris left over from engine manufacturing can clog oil to bearings, which causes temperatures to rise in the engines and the bearings to fail, which could make the car stall while running. A worn connecting rod bearing will also make a knocking noise from the engine, causing warning lights in the dashboard, according to the documents. "If the warnings are ignored and the vehicle is continued to be driven, the bearing may fail and the vehicle could stall while in motion," Kia said in one document. The recall includes 2013 and 2014 Hyundai Santa Fe Sports and Sonatas, as well as 2011 through 2014 Kia Optimas, Kia Sportages from 2011 to 2013 and Kia Sorentos from 2012 through 2014.

The recalled cars all have either 2-Liter or 2.4-Liter engines, and the vehicles in the U.S. were all made at a Hyundai plant in Montgomery, Alabama. The companies will be mailing car owners starting May 19 and telling them to bring their cars to a dealer, which will inspect and replace the engine assembly, if necessary. The repairs will be free of charge. Owners also will be

reimbursed for previous repair expenses. No accidents or injuries have been reported so far, according to the companies. Kia extended warranties on the engines in May, but decided to voluntarily recall the cars because of anticipated risk concerns.

This is Hyundai's second recall in two years for the same issue. In September 2015, the company recalled nearly half a million Sonatas because metallic debris may have been left in the vehicles' engines at the same Alabama factory. The automaker said at the time that its model year 2011 and 2012 Sonatas were the first of its vehicles to be fitted with engines made at the plant. Hyundai changed its process for removing debris from the crankshaft in April 2012.

NHTSA first raised the Sonata issue with Hyundai in June 2015, but the automaker refrained from taking action on a recall because, it said, the vast majority of warranty claims it received showed that customers were responding to the noise coming from their engines, or the vehicle's check engine light, and bringing their vehicles to service as a result of those warnings. But after NHTSA's Office of Defects Investigation expressed concern that the cars could stall at higher speeds, Hyundai decided to conduct the recall, according to the report.

#### **TESLA ISSUES PARKING BRAKE RECALL**

Tesla is recalling 53,000 vehicles after discovering a potential issue with the electric parking brake on certain Model S and Model X vehicles that might cause the brake to stick. Tesla says the electronic parking brakes on Model S and Model X vehicles built between February and October 2016 may contain a small gear that could have been manufactured improperly by a third-party supplier, according to the statement. The company said while they haven't seen any injuries or accidents related to the issue, they will replace the parts on all potentially affected vehicles. The statement on the company's website said:

*If this gear were to break, the parking brake would continue to keep the car from moving, but the parking brake would then be stuck in place. There have been no reports of the parking brake system failing to hold a parked vehicle or failing to stop a vehicle in an emergency as a result of this condition, and this*

*part has no impact on the car's regular braking systems.*

Tesla is sending emails to affected customers to give them instructions on how to get the electric parking brake replaced. It also says owners of the affected recalls will receive an official recall notice by mail. The company says it can begin replacing parts immediately and is working with its supplier to ensure it has enough parts to address all affected vehicles by October. "In the meantime, it is safe to continue regular use of your vehicle," the statement said. Less than 5 percent of the 53,000 vehicles being recalled may be affected by the issue, but the recall extends to all out of an abundance of caution, Tesla said. "Because of the design of the gear, it is difficult to tell exactly which vehicles are affected," the statement said.

Servicing and repair of the brakes will take less than 45 minutes, the statement said. The recall announcement came one day after Tesla was hit with a punitive class action in California federal court alleging its 2016-2017 models weren't updated with standard safety features and premium enhanced Autopilot software as promised in a December 2016 software update. Tesla also announced a settlement had been reached with Sterling Anderson, a former director of their Autopilot program, and his new company Aurora Innovations, ending a trade secrets suit filed in January.

#### **HORIZON HOBBY RECALLS REMOTE-CONTROLLED MODEL VEHICLES DUE TO FIRE HAZARD**

Horizon Hobby LLC, of Champaign, Ill., has recalled about 18,600 ECX Circuit, Ruckus, and Torment remote-controlled model vehicles. The vehicle's electronic speed control (ESC) can fail and short circuit, posing a fire hazard. The recall involves the Dynamite 40-Amp FWD REV Brushed ESC—DYNS2201. It is the Electronic Speed Control (ESC) that comes in the remote controlled hobby model vehicles ECX 1/10 LiPo Circuit, Ruckus and Torment models with the following models numbers: ECX03130T1, ECX03130T2, ECX03131T1, ECX03131T2, ECX03133T1, ECX03133T2, ECX03154. The model numbers can be found on the product box or in the owner's manual for each vehicle. The model vehicles measure about 18 inches in length and 12 inches in width and are hobby grade remote control models for ages 14 and up. Horizon Hobby

has received 19 reports of the ESC in the model truck and cars catching fire. No injuries or property damage has been reported.

The vehicles were sold at Horizon Hobby stores nationwide and online at [www.horizonhobby.com](http://www.horizonhobby.com) from October 2016 through December 2016 for about \$180. Consumers should immediately stop using the recalled product and contact Horizon Hobby for instructions on receiving a free replacement ESC. Consumer Contact: Horizon Hobby at 800-338-4639 from 8 a.m. to 7 p.m. CT Monday through Friday, 8 a.m. to 5 P.M. CT on Saturday, and 12 p.m. to 5 p.m. CT on Sunday or online at [www.horizonhobby.com](http://www.horizonhobby.com) and click on Product Recalls at the bottom of the page for more information. Photos available here <https://www.cpsc.gov/Recalls/2017/horizon-hobby-recalls-remote-controlled-model-vehicles>

#### **POLARIS ISSUES MORE VEHICLE RECALLS FOR CRASH, FIRE AND BURN HAZARDS**

Polaris Industries, a Minnesota powersports leader has announced two more recalls due to fire, burn and crash hazards.

The first recall involves all 2015 Polaris Ranger XP 900, XP 900 EPS, and CREW 900 recreational off-highway vehicles (ROVs). The Consumer Product Safety Commission (CPSC) said a heat shield can fall off the vehicle, posing fire and burn hazards to riders. Polaris has received 13 incident reports involving the ROVs, including five reports of fires. No injuries have been reported.

The other recall includes 2017 Polaris Sportsman 450, 570, 850, 1000 and Scrambler 1000 model ATVs. Polaris is aware of 15 reports of the electronic power steering unit malfunctioning. No injuries have been reported.

The company is contacting all known purchasers about the recalls and allowing customers to schedule a free repair to correct the problems. The vehicles were made in both the U.S. and Mexico. Polaris has issued more than a dozen recalls since 2015, will release its first quarter 2017.

#### **CHROMAG BICYCLE STEMS RECALLED BY RISER HOLDINGS DUE TO FALL AND INJURY HAZARDS**

About 100 Chromag bicycle stems have been recalled by Riser Holdings Ltd., of Canada, dba Chromag Bikes. The clamping bolts that secure the stem to the fork steerer and/or the handlebars can break,

posing fall and injury hazards to riders. This recall involves Chromag bicycle stems used to clamp the fork steerer and/or handlebars. The recalled stems include models BZA, Director, HiFi and Ranger. Only stems with a "Z" marked inside the bolt head are included in this recall. "Chromag" and the model name are printed on the stems. The stems were sold separately from bicycles. Bolts used in the stems are 6 mm in diameter and 20 mm in length. The stems were sold in various colors including black, red, blue, gold, purple and silver. The firm has received three reports of the clamping bolts breaking. No injuries have been reported.

The bikes were sold at Arts Cyclery, Beachwood Cycles, Beat Cycles, Breadwinner Cycles, Blazin Saddles, Harpers, Quality Bicycle Products, The Bike Hub and Squatch Cycles nationwide or online at [www.chromagbikes.com](http://www.chromagbikes.com) from November 2016 through March 2017 for about \$120 for the stem. Consumers should immediately stop using bicycles with the recalled stems and contact Chromag for free replacement bolts for the stem. Consumer Contact: Chromag Bikes at 800-380-4102 from 9 a.m. to 5 p.m. PT Monday through Thursday, email [info@chromagbikes.com](mailto:info@chromagbikes.com) or online at [www.chromagbikes.com](http://www.chromagbikes.com) and click on Stem Bolt Recall at the top of the page for more information. Photos available at <https://www.cpsc.gov/Recalls/2017/Chromag-Bicycle-Stems-Recalled-by-Riser-Holdings/>

#### **Look Cycle Recalls Aerostems And Road Bikes Due To Fall And Crash Hazards**

Hawley LLC, of Lexington, South Carolina, has recalled about 800 Look Cycle road bikes and Aerostems. The stainless steel clamp that secures the stem to the handlebars can corrode and break, posing a fall and crash hazard. This recall involves Look Cycle Aerostems sold either as an after-market component or installed as original equipment on Look Cycle model 695 and 795 road bikes for model years 2014 through 2017. The Look Aerostems are made of black carbon fiber material with a black steel clamp around the handlebars. Recalled models have either no number or the number 380706 printed in white on the bottom of the clamp. A complete list of photos of the recalled stems and bike models can be found on the company's website at <http://www.lookcycle.com/en/safety-notice>. The company has received one report of the stainless steel

clamp on an Aerostem breaking. No injuries have been reported.

The bikes were sold at independent bike stores nationwide from July 2013 through December 2016 for about \$500 for the stems sold individually and for between \$5,500 and \$16,000 installed as original equipment on Look Cycle road 695 and 795 road racing bicycles. Consumers should immediately stop using bicycles with the recalled Aerostems and return them to the place of purchase for a free repair. Consumers unable to return their bicycles should contact Look Cycle for instructions on receiving a free repair. Contact Look Cycle at 800-822-1980 from 8 a.m. to 5 p.m. ET Monday through Friday, email at [aerostemrecall@hawleylambert.com](mailto:aerostemrecall@hawleylambert.com) or online at <http://www.look-cycle.com/> click on the Safety Notice tab for more information. Photos available at: <https://cpsc.gov/Recalls/2017/Look-Cycle-Recalls-Aerostems--and-Road-Bikes>

#### **MARIN MOUNTAIN BIKES RECALLS BICYCLES DUE TO FALL AND CRASH HAZARDS**

Marin Mountain Bikes Inc., of Novato, California, has recalled about 370 Pine Mountain bicycles. An additional 100 are recalled that were sold in Canada. The rigid front forks on these recalled bikes can bend or break during use or while jumping, causing the rider to lose control, posing fall and crash hazards to the user. This recall involves two Marin Mountain bicycle model years and model names: 2016 Pine Mountain 1 and 2017 Pine Mountain bicycles. The bicycles were sold in five frame sizes and in one basic color scheme (silver painted frame with orange painted fork.) The model name "Pine Mountain 1" (2016) or "Pine Mountain" (2017) is printed on the top tube of the frame and the downtube of the frame has a "MARIN" decal. The company has received four reports of bent bicycle forks including one report in the United States and three in other countries. No injuries have been reported.

The bikes were sold at independent bicycle stores nationwide from December 2015 through February 2017 for about \$1,000. Consumers should immediately stop using the recalled mountain bikes and contact the company for instructions on receiving a replacement bicycle fork and scheduling a free repair. Contact Marin Bikes at 800-222-7557 from 8 a.m. to 5 p.m. PT Monday through Friday or online at [www.marinbikes.com](http://www.marinbikes.com) and click on the "recalls/safety" link at the bottom of the page for more information. Photos

available at <https://www.cpsc.gov/Recalls/2017/Marin-Mountain-Bikes-Recalls-Bicycles>

#### **RAZOR RECALLS RIPSTIK MOTORIZED CASTER BOARDS DUE TO FALL HAZARD**

Razor USA LLC, of Cerritos, California, has recalled about 158,000 RipStik electric motorized caster boards. The rear wheel can stop rotating and lock up while in use, posing a fall hazard. This recall involves Razor RipStik electric motorized caster boards. The boards have two wheels, a hub motor and a lithium ion battery. They have a wireless digital hand remote that controls the speed up to 10 mph. The manufacturing date is on the bar code label located on the bottom of the product and Razor USA LLC is embossed on the bottom. "RipStik" is printed on the top of the board. They are blue and black in color. Razor has received more than 700 reports of the rear wheel locking up, resulting in four injuries, including one loose tooth and three scrapes and bruises.

The ripstiks were sold at Target, Toys R Us, Walmart, and other stores nationwide and online at Amazon.com, Razor.com, Target.com, toysrus.com and Walmart.com and other websites from February 2016 through April 2017 for about \$180. Consumers should immediately stop using the recalled caster boards and contact Razor to receive a free repair kit. Contact Razor toll-free at 866-467-2967 from 8 a.m. to 5 p.m. PT Monday through Friday or online at [www.Razor.com](http://www.Razor.com) and click on "Recall Information" for more information. Photos available here <https://cpsc.gov/Recalls/2017/Razor-Recalls-RipStik-Motorized-Caster-Boards>

#### **XOOTR RECALLS ADULT KICK SCOOTERS DUE TO FALL HAZARD**

About 3,000 Xootr adult kick scooters have been recalled by Xootr of Old Forge, Pennsylvania. The steer support can break during normal use, posing a fall hazard to the user. This recall involves all Xootr adult kick scooters with the QuickClick push-button latching mechanism. The silver scooters are 30 inches long by 10 inches wide, and have a handlebar height of 36 inches. The Xootr logo is on the deck and lower section of the handlebar. The scooters have a plastic, wood or metal deck, and can be identified by a black push button located on the steer support. The company has received six reports of

breaks in steer supports, resulting in one report of scrapes and bruises from a fall.

The scooters were sold at Lajolla Swim and Sport, Nyce Wheels, San Francyclo and other sporting goods stores nationwide and online at Amazon.com and Xootr.com from November 2016 through January 2017 for about \$270. Consumers should immediately stop using the recalled scooters and contact the firm to receive the free repair. Contact Xootr at 800-816-2724 from 9 a.m. to 5 p.m. ET Monday through Friday, by email at [support@xootr.com](mailto:support@xootr.com) or online at [www.xootr.com](http://www.xootr.com) and click on "Recall Information" for more information. Photos available at <https://www.cpsc.gov/Recalls/2017/Xootr-Recalls-Adult-Kick-Scooters>

#### **COST PLUS WORLD MARKET RECALLS WINDSOR-STYLE DINING CHAIRS DUE TO FALL HAZARD**

Cost Plus Management Services Inc., of Alameda, California, has recalled about 4,700. Stafford Windsor-style dining chairs. The legs on the chairs can break, posing a fall hazard to consumers. This recall involves wooden Stafford Windsor-style dining chairs with four legs. The chairs have a walnut finish and are intended for indoor use. Purchase order number 200519526, 400519526, 200519525, 400519525, 200524057, 200536057, 200536058 or 400524058 is printed on the UPC label attached to the underside of the chair seat. The company has received three reports of in-store display chair legs breaking and one report of the chair leg bowing out. No injuries have been reported.

The chairs were sold exclusively at Cost Plus World Market and World Market stores nationwide and online at [www.worldmarket.com](http://www.worldmarket.com) from June 2016 through December 2016 for about \$100. Consumers should immediately stop using the recalled chairs and return them to any Cost Plus World Market or World Market store for a free replacement chair. Contact Cost Plus toll-free at 877-967-5362 from 7 a.m. to midnight ET daily, or online at [www.worldmarket.com](http://www.worldmarket.com) and click on "Product Recalls" for more information. Photos available here: <https://cpsc.gov/Recalls/2017/Cost-Plus-World-Market-Recalls-Windsor-Style-Dining-Chairs>

### **BOSCH SOLAR SERVICES RECALLS SOLAR PANELS DUE TO FIRE HAZARD**

Bosch Solar Energy Corporation, San Mateo, California, has recalled about 51,000 Roof-mounted Bosch solar panels. The solar panels can overheat, posing a risk of fire. This recall involves Roof-Mounted Bosch Photovoltaic Solar Modules with model number c-Si M 60 NA30119. Bosch solar modules are photovoltaic solar panels used to generate electricity. Each module measures approximately 65 inches by 39 inches by 1.65 inches, and weighs just less than 42 pounds. The solar cells are housed in a glass-foil laminate framed by an anodized aluminum profile. The output power of the panel is 245 watt peak.

The panels were sold at commercial installers nationwide from October 2011 through May 2013 for about \$300 per panel. Consumers should contact their installer to determine if their solar panels are the model being recalled. If it is, customers should contact Bosch to arrange for free replacement. Contact Bosch toll-free at 855-866-8470 from 7 a.m. to 7 p.m. CT Monday through Friday, or email [boschsolar@us.bosch](mailto:boschsolar@us.bosch) or online at [www.bosch-solarenergy.com](http://www.bosch-solarenergy.com) and click on "Recall Notice" at the bottom of the page for more information and to register for free replacement. Photos available at <https://cpsc.gov/Recalls/2017/Bosch-Solar-Services-Recalls-Solar-Panels>

### **FOOD DEHYDRATORS RECALLED BY GREENFIELD WORLD TRADE DUE TO FIRE AND BURN HAZARDS**

About 14,000 EZDRY Food Dehydrators have been recalled by Greenfield World Trade Inc., of Fort Lauderdale, Florida. The food dehydrator can overheat, posing fire and burn hazards. This recall involves white, EZDRY, six-tray food dehydrators. The dehydrator weighs about 4 pounds and measures 12 inches tall by about 8 inches deep by 10 inches wide. EZDRY is printed on the front of the dehydrators. EZDRY and the model number EPD60W are printed on a white label on the bottom of the unit. They were sold in a white box labeled "EZDRY by Excalibur" Home Dehydrator with a picture of the product. These products are marked "Date Code: 2116, 2416, or 3316" engraved at the bottom of the label located on the bottom of the unit. The company has received 13 reports of the dehydrator overheating and the plastic unit melting, including six reports of fire and one report resulting in

property damage to the counter top. No injuries have been reported.

The food dehydrators were sold at Kohl's stores nationwide and online at Amazon.com from June 2016 through February 2017 for between \$40 and \$50. Consumers should immediately stop using the recalled food dehydrators and contact Greenfield for instructions on returning the recalled food dehydrators with a prepaid shipping label for a free replacement or full refund. Contact Greenfield toll-free at 877-881-0065 from 12 p.m. to 7 p.m. ET Monday through Friday, email at [productrecall@thelegacycompanies.com](mailto:productrecall@thelegacycompanies.com) or online at [www.greenfieldworld.com](http://www.greenfieldworld.com) and click on the "Product Recall" link at the bottom of the page for more information. Photos available here <https://cpsc.gov/Recalls/2017/Food-Dehydrators-Recalled-by-Greenfield-World-Trade>

### **WOMEN'S SWEATERS RECALLED BY FATFACE DUE TO VIOLATION OF FEDERAL FLAMMABILITY STANDARD**

About 400 Women's overhead and zip-up sweaters have been recalled by FatFace Corp., of Wilmington, Del. The recalled women's sweaters fail to meet federal flammability standards for clothing textiles, posing a risk of burn injuries. This recall involves two styles of FatFace women's sweaters: overhead Cowes (style number 918043) and zip-up (style number 918041). The style numbers are printed on a care label on the inside seam of the sweaters. The Overhead Cowes sweater is 97 percent cotton and 3 percent polyester sold in ivory. This sweater has a 3.5 inch cowl or funnel neckline that can be tightened or loosened by the drawstring located at the center front of the neckline. These sweaters also have a kangaroo-style pocket located at the bottom front of the sweater. The zip-up sweater is 97 percent cotton and 3 percent polyester with a Yarmouth textured zip-up sweater. It sold in ivory, ocean surf (green) and lilac ice (lavender) colors. The sweater has a hood that can be tightened and loosened with a drawstring. The sweater has a silver metal zipper extending from the neckline to the bottom of the sweaters with two pockets on each side of the zipper. The firm has received one report of a burn injury.

The sweaters were sold exclusively at FatFace stores in Maine, Massachusetts and Rhode Island and online at [www.fatface.com](http://www.fatface.com) from September 2016 through January 2017 for about \$60. Consumers should immediately stop using the recalled sweaters and contact the firm for

instructions on returning the sweaters for a \$75 refund. Consumer Contact: FatFace at 800-585-0178 from 4 a.m. to 12:30 p.m. ET Monday through Friday, 5 a.m. to 1 p.m. ET Saturday and 6 a.m. to 12 p.m. ET on Sunday, email at [usproductqueries@fatface.com](mailto:usproductqueries@fatface.com) with "Product Recall" as the email subject or online at <http://us.fatface.com> and click on the "Important Notice" tab for more information. Photos available here <https://cpsc.gov/Recalls/2017/Womens-Sweaters-Recalled-by-FatFace>

### **CUSTOMATIC BEDS RECALLS ADJUSTABLE BEDS DUE TO ELECTRIC SHOCK HAZARD**

PPJ, LLC; d.b.a Customatic Beds of Natick, Massachusetts, has recalled about 50,000 adjustable beds. The bed's side-mounted AC outlets can be incorrectly wired, posing an electric shock hazard to consumers. This recall involves the bases of Customatic adjustable beds. These power foundations were offered in all bed sizes and were sold with handheld remote controls, allowing the head and/or the foot of the bed mattress to be moved up and down. These bases also have a side mounted AC outlet. The model numbers can be found on the metal frame near the foot of the bed and are listed below.

The beds were sold at Sleepy's and other mattress stores nationwide from June 2012 through January 2017 for about \$1,500. Consumers should immediately stop using the AC plug on the side of the bed and contact Customatic Beds to arrange for a free inspection and repair. Contact Customatic Beds toll-free at 844-815-9023 from 9 a.m. through 9 p.m. ET Monday through Saturday or online at [www.customaticbeds.com](http://www.customaticbeds.com) and click on Recall Notice for more information. Photos available at <https://www.cpsc.gov/Recalls/2017/Customatic-Beds-Recalls-Adjustable-Beds>

### **ANAHEIM AND MOEN ISSUE GARBAGE DISPOSAL RECALL**

Anaheim and Moen have issued a recall on their garbage disposals due to an impact hazard. "A metal component inside the disposal can break off and come out of the disposal during use, posing an impact hazard," states the recall. This recall involves 3/4 and 1 horsepower disposals. Recalled brands, model numbers and serial numbers are listed below. The disposal housings were sold in silver, gray, black and blue and have the brand name printed on them. The brand name, model

number and serial number are printed on a label on the bottom or side of the disposals. About 146,000 (in addition to 2,700 in Canada) were sold at Best Buy, HD Supply, Menards, and plumbing supply stores nationwide and online at Amazon.com, Costco.com, HomeDepot.com, Walmart.com and other websites from December 2015 through March 2017. There have been 22 reports of a metal component coming out of a disposal, including three reports of a broken component hitting consumers. There have not been any injuries reported. For more information contact Anaheim Manufacturing at 800-628-0797 from 8 a.m. to 5 p.m. ET Monday through Friday or online at [www.anaheimmfg.com](http://www.anaheimmfg.com) and click on "Product Recalls" for more information.

#### **JURATOYS RECALLS TOY TROLLEYS DUE TO IMPACT INJURY HAZARD**

Juratoys U.S. of Fairfield, New Jersey, has recalled about 9,900 Bricolo by Janod® Push toy trolleys. The toy trolleys can tip backwards, posing an impact injury hazard to children. This recall involves four Bricolo by Janod® -push toy trolleys. The French Cocotte Cooker trolley is red with orange wheels and includes a cooktop with fried egg shapes, an oven and eight accessories, including pots and pans "Janod" printed on the side and front of the trolley and J06544 printed on the base of the toy. The DIY-Magnetic trolley is gray and black with red wheels with work station and tools. "Bricolo" is printed on the front of the DIY-Magnetic trolley and J06505 is printed on the base of the toy. The Redmaster-Magnetic DIY trolley is black and gray with red wheels and 21 accessories, including three magnetic tools and a set of gears. J06493 is printed on the base of the toy. The Barbecue trolley is brightly colored and comes with a magnetic spatula, magnetic barbecue fork, one piece of pork, two sausages, one fish, one piece of beef, and three tomatoes. J06523 is printed on the base of the toy. The trolleys measure approximately 17 inches tall and have a 1 foot by 1 foot base. Item numbers can be found here: <https://www.cpsc.gov/Recalls/2017/Juratoys-Recalls-Toy-Trolleys>. Juratoys has received two reports of trolleys falling backwards, both resulting in ER visits. One involved a tooth extraction the other a laceration to the child's nose.

The toys were sold at various toy stores nationwide including Giggle and Saks Fifth Avenue, and online at Zulily.com from September 2012 to March 2017 for

about \$100. The Janod Barbecue trolley sold for about \$70. Consumers should immediately stop using the recalled trolleys and keep them out of the reach of young children until they have installed a repair kit. Contact Juratoys for a free repair kit that includes instructions, tools, and footers to prevent the toy from tipping backwards. Contact: Juratoys toll free at 877-277-1663 from 8:30 a.m. to 5 p.m. ET Monday through Friday, or online at [www.janod.com](http://www.janod.com) and click on "Product Recall" under the "Janod Express" tab at the top of the page for more information. Photos available at: <https://www.cpsc.gov/Recalls/2017/Juratoys-Recalls-Toy-Trolleys>

#### **TARGET RECALLS MAGNETIC TIC TAC TOE GAMES DUE TO CHOKING AND MAGNET INGESTION HAZARDS**

Target Corp., of Minneapolis, Minnesota, has recalled about 19,000 Magnetic tic tac toe games. The magnets can come off the tic tac toe game pieces, posing a choking hazard. In addition, when two or more magnets are swallowed, they can link together inside the intestines and clamp onto body tissues, causing intestinal obstructions, perforations, sepsis and death. Internal injury from magnets can pose serious lifelong health effects. This recall involves a magnetic tic tac toe 10 x 10 inch plywood board with nine "X" and "Heart" game pieces. The game pieces have a magnet on the back. Model number "234-25-1089" is printed on the bottom right corner of the product. Target has received one report of the magnets falling off the game piece. No injuries have been reported.

The game was sold exclusively at Target stores nationwide from December 2016 through February 2017 for about \$5. Consumers should immediately stop using the recalled tic tac toe game and return it to any Target store for a full refund. Contact Target at 800-440-0680 between 7 a.m. to 8 p.m. CT any day or online at [www.target.com](http://www.target.com) and click on "Recalls" at the bottom of the page, then on "School/Stationery/Seasonal" or the "Product Recalls" tab on Target's Facebook page for more information. Photos available at: <https://www.cpsc.gov/Recalls/2017/Target-Recalls-Magnetic-Tic-Tac-Toe-Games>

#### **FRED MEYER RECALLS CHILDREN'S HOODED SWEATSHIRTS AND GIRLS BOMBER JACKETS**

Fred Meyer, Inc., of Portland, Oregon, has recalled about 48,000 children's zipper hooded sweatshirts and girls bomber jackets. The zipper pull can detach from the sweatshirt, posing choking and laceration hazards to children. This recall involves Kids Korner brand fleece hooded sweatshirts and girls bomber jackets with a front zipper, two front pockets, and knit ribbing around the wrists and waist. The sweatshirts were sold in 18 different prints and solid colors in infant, toddler, and children's sizes 9 months to youth size 7. Kids Korner is printed on the label at the back of the neck. A white label sewn into the lower left inside seam has the manufacture date of "11/16" and style numbers ending in 8701P, 8701YD, 8671P, 9019, or 9022P. These jackets were sold at Fred Meyer, Kroger, Smith's and Fry's Marketplace from February 2017 through March 2017 for between \$7 and \$10. Consumers should immediately stop using the sweatshirt or jacket, and return it to the place of purchase for a full refund. Contact Fred Meyer at 800-576-4377 from 8 a.m. to 9 p.m. ET Monday through Friday or online at <https://www.fredmeyer.com> and click on "Recall Alert" located at the bottom of the page for more information. Photos available at <https://cpsc.gov/Recalls/2017/Fred-Meyer-Recalls-Childrens-Hooded-Sweatshirts-and-Girls-Bomber-Jackets>

#### **FROZEN HASH BROWN RECALL DUE TO POSSIBLE 'EXTRANEIOUS GOLF BALL MATERIALS'**

Frozen hash browns sold in nine states under the Harris Teeter and Roundy's brands have been recalled. The potatoes may contain pieces of golf balls, according to the hash brown maker. McCain Foods USA's recall notice on the US Food & Drug Administration site says the hash browns could be "contaminated with extraneous golf ball materials" that "may have been inadvertently harvested with potatoes used to make this product." "Consumption of these products may pose a choking hazard or other physical injury to the mouth," says the notice of the voluntary recall. There have been no reported injuries, according to the company.

McCain Foods is recalling 2-pound bags of Roundy's Brand Frozen Southern Style Hash Browns from Marianos, Metro Market, and Pick 'n Save supermarkets in Illinois and Wisconsin. It is also recalling 2-pound bags of Harris Teeter Brand

Frozen Southern Style Hash Browns sold in North Carolina, South Carolina, Virginia, the District of Columbia, Delaware, Florida, Georgia and Maryland. The production code on the back of the packaging is B170119, the company says. The contaminated products should be thrown away or returned to the place of purchase.

#### **FDA ISSUES RECALL OF HYLAND'S TEETHING TABLETS OVER 'SERIOUS HEALTH' CONCERNS**

The maker of Hyland's Baby Teething Tablets and Hyland's Baby Nighttime Teething Tablets is recalling the products at the consumer level. A recall on the U.S. Food and Drug Administration's (FDA) website said the tablets "have been found to contain inconsistent amounts of belladonna alkaloids that may differ from the calculated amount on the products' labels." Belladonna, a perennial herbaceous plant, is a "toxic substance," according to the FDA.

"FDA believes that belladonna represents a serious health hazard to children and that the effects of belladonna are unpredictable," a statement reads. "The agency has stated to the company, 'There is no known safe dose or toxic dose of belladonna in children because of the many factors that affect it.'" The recall comes just six months after the FDA issued a warning urging consumers to stop using homeopathic teething tablets and gels, as they may pose a risk to infants and children.

Hyland's stopped making the medicines in October 2016. The latest recall covers all Hyland's products that may have still been on store shelves. The tablets were used to provide temporary relief of teething symptoms. Children who experience seizures, difficulty breathing, lethargy, excessive sleepiness, muscle weakness, skin flushing, constipation, difficulty urinating, or agitation after using homeopathic teething tablets or gels should seek medical care immediately. For more information, contact the Standard Homeopathic Company by calling 800-991-3376 Monday through Friday. Consumers should contact their health care provider if they believe they have experienced any problems that may be related to taking or using this drug product.

#### **TARGET RECALLS 560,000 EASTER EGG TOYS DUE TO INGESTION HAZARD**

Target has recalled approximately 560,000 water-absorbing toys shaped like

Easter eggs, bunnies, chicks and dinosaurs over concerns that, if ingested, the toys can expand inside a child's body and cause intestinal obstructions. The U.S. Consumer Product Safety Commission (CPSC) announced the recall, which involves three toys: Hatch & Grow Easter Eggs, Easter Grow Toys, and Hatch Your Own Dino.

Swallowing the colorful toys could result in "severe discomfort, vomiting, dehydration and could be life threatening," according to the recall notice. "Surgery is required to remove the toy from the body, if ingested." Further complicating matters, the toys "might now show up on an X-ray," the recall notice warns. The toys should immediately be taken away from children and can be returned to any Target store for a full refund, according to the recall notice.

Pictures of the hazardous toys on the Target Corp. website include the packaging, which states on the front: "WARNING: CHOKING HAZARD—Small parts. Not for children under 3 yrs." The cautionary advice is adjacent to instructions to place the toy in water and "[w]atch it grow up to 600 percent its original size!" No injuries or incidents have been reported, but the ingestion hazard is "serious," the recall notice states. The product is manufactured in China, according to the Consumer Product Safety Commission (CPSC).

The Hatch & Grow Easter Eggs have model number 234-25-1200 on the back of the product packaging and contain a bunny or butterfly inside a toy egg. The Easter Grow Toys share the same model number and include a chick or bunny. The Hatch Your Own Dino Eggs have model number 234-09-0016 on the label inserted in the packaging and contain toy dinosaurs. The small toys were sold at Target stores nationwide from February 2017 through March for about \$1. The recall comes just days before Easter Sunday. The recall was conducted voluntarily by the company, under the Consumer Product Safety Commission's "Fast Track" recall process. "Fast Track recalls are initiated by firms, who commit to work with CPSC to quickly announce the recall and remedy to protect consumers," the government agency states.

A spokesperson for Target said the guests can return the item for a full refund without a receipt or proof of purchase. In August, the Consumer Product Safety Commission worked with McDonald's Corp. as it recalled 29 million fitness trackers that were given away in children's meals nationwide after receiving more

than 70 reports of skin irritations and burns.

#### **UNCLE JOHN'S PRIDE SAUSAGE PRODUCTS RECALL**

Uncle John's Pride, LLC., based in Tampa, Florida, has issued a recall for many of its ready-to-eat smoked meat and poultry items. These products may be contaminated with extraneous metal materials. Approximately 139,909 pounds of the smoked meat and poultry sausage products were recalled after a metal magnet was discovered in a beef trim product used during production. This recall has been classified as a Class I / "High" Health Risk recall, signifying that people may become dangerously ill or die if they consume these products. The ready-to-eat smoked meat and poultry sausage products, produced between March 8, 2017 and April 8, 2017, were distributed to retail stores and foodservices in Alabama, Florida, and Georgia. They can be identified by the establishment number "EST. 9179 or P-9179" included inside the USDA mark of inspection.

Consumers in possession of the recalled products should not eat them. Rather, they are advised to dispose of them or return them to their place of purchase for a refund.

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 [BeasleyAllen.com](http://BeasleyAllen.com) or [RightingInjustice.com](mailto: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 of this section, you can contact Shanna Malone at [Shanna.Malone@beasleyallen.com](mailto:Shanna.Malone@beasleyallen.com) for more recall information or to supply us with information on recalls.

## **XIX. FIRM ACTIVITIES**

#### **FIRM GROWTH PROVIDES UNEXPECTED WORK-LIFE BALANCE OPPORTUNITY FOR BEASLEY ALLEN'S DANA TAUNTON**

With a newborn and a 3-year-old, Beasley Allen lawyer Dana Taunton knew

her days of work-related travel needed a switch-up. It just so happened that as Dana's family was growing, Beasley Allen was as well, providing her the perfect opportunity to carve a niche for herself at the firm and spend more time with her children. Dana said:

*Through the grace of God, the timing ended up being perfect. It was becoming more and more difficult for the attorneys to piece together a well-crafted, succinct brief while they were on the road, so this role was developed to meet the firm's needs and my needs.*

Dana now leads the team that handles brief writing for Beasley Allen's Personal Injury and Product Liability Section and is the section's lead appellant attorney. "Any complex briefing that needs to be done, we do it—from oppositions to summary judgments, defending our experts to complex discovery issues. We run the whole gamut of brief writing," she says.

It was unexpected, but turned out to be the perfect fit, which seems to be a theme in Dana's career. She originally intended to become a federal agent after attending law school, but found a better fit in practicing law.

Prior to joining Beasley Allen, Dana worked for a prominent defense firm and had a brief stint with the State of Alabama Attorney General's Office. She joined the firm in 1998 and has handled complex business and commercial litigation and products liability and personal injury litigation for the firm.

A past president of the Alabama State Bar Women's Section, Dana has been actively involved with the organization for years. "It is an important section as, I believe, women still face unique challenges," Dana explained. "The section promotes programs designed to help women through these challenges—from balancing family and work to providing mentors for young female attorneys just starting practice. It also highlights women who have been trailblazers for other women in the legal profession."

In addition, Dana is a member of the Alabama Association for Justice (ALAJ), where she serves on the AMICUS Committee and on the editorial board for ALAJ Magazine; American Association for Justice; Montgomery County Bar Association; Montgomery County Association for Justice; Alabama State Bar; and Trial Lawyers for Public Justice.

Dana, who loves "any and all sports," recently began adventure racing, which

combines trail running, trail biking, kayaking, etc. through unmarked wilderness. She is married to Derrick Taunton, and they have two daughters, Betsie and Abigail. To contact Dana, email Dana.Taunton@beasleyallen.com or call 800-898-2034.

## XX. SPECIAL RECOGNITIONS

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### ALABAMA ARISE WORKS FOR ALABAMIANS

Arise Citizens' Policy Project (ACPP) is a statewide coalition of 150 congregations and community groups, as well as individuals, who share the vision of an Alabama where all residents have enough food, education, health care, and economic opportunity to live happy productive lives. Through ACPP and its sister organization, Alabama Arise, members join together to promote state policies that improve the lives of low-income Alabamians.

More Alabamians need to know about and support this non-profit organization. For nearly 30 years, Alabama Arise has promoted citizen advocacy on public policies affecting low-income Alabamians. Established in 1988 by 32 religious and community organizations which were concerned about high utility rates, Alabama Arise now boasts a membership of more than 150 such groups as well as hundreds of individual supporters.

Arise organizers travel all over the state, holding listening sessions to learn about circumstances that hold low-income people back and to explore how policy change can address these barriers to a better life. Members develop issue proposals over the summer, then meet in Montgomery each September for a full day of spirited discussion before voting to choose their legislative agenda for the coming year. Arise's policy team gets busy developing educational materials to help lawmakers as well as the general public understand the issues and develop long-term solutions. Alabama Arise has a vision to make Alabama a place:

- where all people have resources and opportunities to reach their potential to live happy, productive lives, and each successive generation is ensured a secure and healthy future;

- where all government leaders are responsive, inclusive and justice-serving, and the people are engaged in the policy-making process;
- where all people live with concern for the common good and respect for the humanity of every person.

Throughout the legislative session, members receive email alerts and follow up with phone calls and emails to help move legislation along. This past February more than 160 advocates poured into the State House on Arise's annual Legislative Day to propel interest in the judicial override bill, which eventually passed both houses and became the first bill signed into law by Gov. Kay Ivey.

Over the years, Arise has had success in other areas such as welfare reform, public education, landlord/tenant rights, health care and tax reform. In 2015 it published the second edition of The Alabama Tax and Budget Handbook, a comprehensive but very readable explanation of Alabama's state tax structure and budgeting process that is still available from the Arise office.

My good friend Kimble Forrister heads up Alabama Arise. He and his excellent staff do very good work. To learn more about Arise and how you can support their work through a tax-deductible donation, visit [www.arisecitizens.org](http://www.arisecitizens.org). You can learn more online at [www.arisecitizens.org](http://www.arisecitizens.org), on Facebook at [www.facebook.com/alabama.arise](http://www.facebook.com/alabama.arise) or by phone 800-832-9060.

## XXI. FAVORITE BIBLE VERSES

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Billy Irvin, Director of Ministry Relations, Faith Radio 89.1FM, sent in his favorite verse for this issue. He says Isaiah 53:5 is a verse that means so very much to him and his entire group. Billy says that is because Faith Radio is focused on the cross and how our savior died for us. Jesus died for us, not because of anything we have done, but because He loves us so much.

*But he was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was on him, and by his wounds we are healed.*  
Isaiah 53:5

Stephanie Monplaisir, a lawyer in our firm's Personal Injury & Products Liability

Section, furnished two timely verses for this issue. Stephanie says she grew up hearing the Easter story, but this year, she says she finally “got” what it really means for believers. Before Jesus’s resurrection, believers lacked two things: direct access to God and hope in Life after Death. Stephanie pointed out that as soon as Jesus took his last breath, the veil was torn that divided people from God. When Jesus came back on the third day, that was proof that this life is not the end for believers.

*And when Jesus had cried out again in a loud voice, he gave up his spirit. At that moment the curtain of the temple was torn in two from top to bottom. The earth shook, the rocks split and the tombs broke open. The bodies of many holy people who had died were raised to life. They came out of the tombs after Jesus’ resurrection and went into the holy city and appeared to many people. Matthew 27: 50-53*

*Therefore, if anyone is in Christ, the new creation has come: The old has gone, the new is here! All this is from God, who reconciled us to himself through Christ and gave us the ministry of reconciliation: that God was reconciling the world to himself in Christ, not counting people’s sins against them. And he has committed to us the message of reconciliation. We are therefore Christ’s ambassadors, as though God were making his appeal through us. We implore you on Christ’s behalf: Be reconciled to God. God made him who had no sin to be sin for us, so that in him we might become the righteousness of God. 2 Corinthians 5:17-21*

Janet Glaze, an accounting clerk in our Toxic Torts Section, says selecting favorite verses has always been a hard thing for her to do. She says that’s because as she grows in her faith, she finds new ways to apply even the smallest of words that are in the Bible in her life. Janet’s favorite Bible verse since her childhood have been Hebrews 13:8.

*Jesus Christ is the same yesterday, today and forever. Hebrews 13:8*

Kim Owen, a Legal Assistant in our Mass Torts Section, also furnished a verse for this month, which told the Parable of the Lost Sheep.

*Now the tax collectors and sinners were all gathering around to hear Jesus. But the Pharisees and the teachers of the law muttered, “This man welcomes sinners and eats with them.” Then Jesus told them this parable: “Suppose one of you has a hundred sheep and loses one of them. Doesn’t he leave the ninety-nine in the open country and go after the lost sheep until he finds it? And when he finds it, he joyfully puts it on his shoulders and goes home. Then he calls his friends and neighbors together and says, ‘Rejoice with me; I have found my lost sheep.’ I tell you that in the same way there will be more rejoicing in heaven over one sinner who repents than over ninety-nine righteous persons who do not need to repent. Luke 15:1-7*

## XXII. CLOSING OBSERVATIONS

### LEIGH O’DELL “STANDS IN THE GAP” FOR CLIENTS AGAINST CORPORATE GIANTS

Our firm’s Leading Ladies Series continues with yet another female Beasley Allen lawyer who fights daily for the rights of her clients and that is Leigh O’Dell. A native of Prattville, Alabama, Leigh and her siblings grew up working in her father’s small business, handling tasks from loading pallets to bookkeeping. This experience helped fuel Leigh’s appreciation for small businesses, corporate structures and tax planning. As a result, Leigh graduated from Auburn University with a degree in Accounting. She then continued onto law school at the University of Alabama with a focus on tax and corporate law—all with the goal of assisting her father with the family business.

However, Leigh says the Lord had different plans for her. Her father, Billy O’Dell, passed away unexpectedly during Leigh’s third year of law school. That led to Leigh’s first exposure to the courtroom following her clerkship under Judge Ira DeMent. Through this experience, Leigh came to understand the importance of helping people in need, and though she will always miss her father, she remains forever grateful to the Lord for redirecting

her path to the work being done at Beasley Allen. Leigh says:

*I am thankful that though we have grown over the years and practice around the country, the atmosphere within our firm is still very much like a small Alabama firm. The opportunity to help people at a point of real need, to stand in the gap for them, and to fight on their behalf against true corporate Goliaths is a privilege.*

Much of Leigh’s recent work has involved issues surrounding women’s health. Leigh was recently selected to serve as co-lead counsel for consolidated multidistrict litigation (MDL) in New Jersey federal court concerning talcum powder’s link to ovarian cancer in women. Talc, a mineral made up of various elements, is ground down to make talcum powder—a cosmetic used to absorb moisture and is widely available in various products including baby powder. Tragically, multiple statistics show that nearly 14,000 women die from talc-related ovarian cancer annually. These lawsuits allege Defendant Johnson & Johnson is liable for personal injuries or wrongful deaths that resulted from ovarian or uterine cancer in women who used the company’s talc products for feminine hygiene.

Leigh also handles other female-specific cases involving transvaginal mesh. Transvaginal mesh is used to repair conditions such as pelvic organ prolapse (POP) and stress urinary incontinence (SUI). The mesh is implanted through the vagina and is used to shore up pelvic organs that have become displaced due to age, childbirth, hysterectomy or obesity. Leigh is currently investigating cases linked to mesh manufactured by American Medical Systems, Bard, Boston Scientific, Caldera and Johnson & Johnson.

The U.S. Judicial Panel on Multidistrict litigation (JPML) granted motions to create consolidated multidistrict litigations (MDLs) against seven mesh manufacturers under Chief Judge Joseph R. Goodwin in the U.S. District Court for the Southern District of West Virginia. Judge Goodwin appointed Leigh as a member of the Plaintiffs Steering Committee for each of these MDLs. Leigh is a member of the Alabama State Bar, where she is a member of the Federal Court Practice Section; Alabama Association for Justice; Alabama Law Foundation; Montgomery County Trial Lawyers Association; American Bar Association; Christian Legal Society and the

Federal Bar Association. Leigh also is a member of the American Association for Justice and serves on the AAJ Transvaginal Mesh Litigation Group. To contact Leigh, email Leigh.Odell@beasleyallen.com or call 800-898-2034.

*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

## 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*

## XXIII. PARTING WORDS

### LAWYERS WORK TO REDUCE HUNGER ACROSS ALABAMA

It's my firm belief that lawyers have a responsibility to be actively involved in community affairs. Service to the community is very important. I will mention a project that is a prime example of such involvement.

Approximately 140,000 pounds of food—the weight of six school buses—was donated to the Alabama Food Bank Association as a result of last year's Alabama Legal Food Frenzy. This year, Beasley Allen and more than 50 other law firms from around Alabama competed against each other to continue providing food for families served by the association's eight regional food banks. "The food and funds raised during this competition provided the equivalent of almost 120,000 meals over the summer months," Laura Lester, executive director of the Alabama Food Bank Association, said. "It was incredibly meaningful to see the impact the legal community had on fighting hunger in Alabama."

This is the second year the Alabama Attorney General's Office, the Alabama State Bar and the Alabama Food Bank Association joined together to help end child hunger through the Alabama Legal Food Frenzy, which runs through May 5. During this time, law firms across Alabama, competing in size-based categories, collected food from employees and their communities to be distributed by their local food banks. Food collected from firms in the River Region will help the Montgomery Area Food Bank, which

supports 35 of Alabama's 67 counties and an estimated 375,000 Alabamians in need.

"Our Heart of Alabama network has an extended reach to more than 800 local community agencies, but we continue to grow because there are still more neighbors we need to be able to help," said Richard A. Deem, chief executive officer of the Montgomery Area Food Bank. Summer is traditionally a slow time for food donations, Deem explained, though the need actually increases when school ends and thousands of children lose access to meals.

Only an estimated 10 percent of children who receive free or reduced-price lunches during the school year have access to summer meal programs. Deem said:

*During these months, we have an interactive map of the locations of this year's Summer Youth Feeding programs on our Web site. We have several outreach programs designed to target families, seniors and, of course, children. In fact, we have a new pilot program called Feeding Our Remarkable Kids (FORK). FORK supports the adoption of a local school by one of our agencies, which in turn provides help to students and families needing a little more than the school's breakfast and lunch program can provide.*

The Legal Food Frenzy provides law firms with not only the opportunity for bragging rights, but more importantly, with the chance to provide meals for children who are in need and struggle for good nutrition. The Legal Food Frenzy was held April 24-May 5. However, folks can still donate food. Our firm will assist you. To donate to Alabama Food Bank Association through Beasley Allen, contact Helen Taylor at 800-898-2024 or Helen.Taylor@beasleyallen.com. For more information on helping end childhood hunger in the River Region, visit montgomeryarea-foodbank.org.

God has blessed our law firm and we consider it our responsibility to bless others. In fact, we at Beasley Allen consider it our obligation to do so.

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

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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.



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

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