



THE  
**JERE BEASLEY REPORT**

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# Beasley Allen

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Attorneys at law



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# I. CAPITOL OBSERVATIONS

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## A WELL-DESERVED HONOR

The Alabama State Bar Women's Section has recognized Judge Sharon Gilbert Yates as this year's recipient of the Maud McLure Kelly Award. Named after the first woman to practice law in Alabama, the award honors one female attorney for her outstanding representation of the legal profession within the state of Alabama. Some of the past recipients of this award include Hon. Janie L. Shores, Marjorie Fine Knowles, Mary Lee Stapp and Ernestine S. Sapp.

The Maud McLure Kelly Award celebrates female lawyers with a dedication to serving the public good through the legal field. Maud Kelly, not unlike Judge Yates, was fascinated by the practice of law from a very young age and managed to break the glass ceiling for women in Alabama by becoming the first woman to be recognized as a lawyer within the state. Despite having to overcome a society that excluded women from many professions, Kelly utilized her own brilliance and legal training to accomplish numerous groundbreaking contributions to the field of law and was among the first woman to argue a case before the United States Supreme Court.

Judge Yates received her J.D. from the University of Alabama School of Law in 1982 while working for the Alabama Supreme Court, starting as a Summer Clerk for Chief Justice C.C. "Bo" Torbert and working her way to a position as Staff Attorney under Associate Justice Sam Beatty. Judge Yates also has the unique recognition of being named the first female elected to serve as a Presiding Judge in the Alabama Court of Civil Appeals. Her extensive knowledge of the law is still evident today in her role as an Associate Professor at the Jones School of Law, where she teaches subjects ranging from Criminal Law and Appellate Advocacy to Evidence and Professional Responsibility.

Along with her professional accolades, Judge Yates is an accomplished public speaker, having given seminars and CLE presentations on several important legal matters over the course of her legal career. She has served on a number of community service boards, such as the Child Protect Board of Directors, National Conference for Women in Poli-

tics, the Children's Justice Task Force and the Christian Women's Leadership Advisory Board at Samford University.

Greg Allen, the Lead Products Liability lawyer at Beasley Allen, believes that Judge Yates earned his nomination for the Maud McLure Kelly Award because of her monumental service to the practice of law in Alabama. Greg had this to say:

*I could think of no one more deserving than Sharon Yates. Sharon was the first female elected to the Court of Civil Appeals and is also the first female Presiding Judge of that court. She has also excelled as an attorney in private practice. She was a district court judge for a period of time and was an excellent judge and she now is a professor at Jones Law School. I have no doubt she will continue to have a positive impact on the practice of law through her outstanding work.*

I share Greg's assessment concerning Sharon Yates. She truly deserves the honor bestowed on her and I am very proud to say that she has been my long-time friend. Sharon was a great judge, a great teacher and is an even better person.

## II. AN UPDATE ON JOHNSON & JOHNSON'S LITIGATION ISSUES

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### JOHNSON & JOHNSON NEEDS TO CHANGE ITS CORPORATE CULTURE

Johnson & Johnson was once a well-respected company in this country and in many circles it still is. But based on our firm's litigation experience with this company, I am convinced that Johnson & Johnson has lost its "moral compass." As a result, profit is the real motivating factor in critical business decisions relating to safety made by Johnson & Johnson executives. Consumers would expect such a company to consistently produce and sell high-quality products and that the company would remove defective and dangerous products from the marketplace. I am confident that the public would also expect a quick and thorough

investigation by Johnson & Johnson when safety and health problems arise. The public would also expect fast and effective corrective action by the company when such a problem is found.

Consumers have the right to expect a company like Johnson & Johnson to make the consumers' health, safety and well-being its first priority. Unfortunately, I don't believe that is the way things work at Johnson & Johnson. I believe it's appropriate to examine what has been going on with this giant pharmaceutical company relating to its "moral compass" and see how the company has dealt with health and safety issues. Let's use the scale of justice to see where Johnson and Johnson lands after

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reviewing some facts learned during litigation involving this company.

### **Tylenol Recall—early 1982**

In the space of a few days starting on Sept. 29, 1982, seven people died in the Chicago area after taking cyanide-laced capsules of Extra-Strength Tylenol, the painkiller that was the drugmaker's best-selling product. A year later, its share of the \$1.2 billion analgesic market, which had plunged to 7 percent from 37 percent following the poisoning, had climbed back to 30 percent. What set apart Johnson & Johnson's handling of that crisis from others? It placed consumers first by recalling 31 million bottles of Tylenol capsules from store shelves and offered replacement products that were safe and free of charge. That was the right change to do in 1982.

### **Johnson & Johnson Baby Powder—1982**

The recall of Tylenol in 1982 was costly. Johnson & Johnson spent more than \$100 million for the 1982 recall and relaunch of Tylenol. That same year, Dr. Daniel Cramer of Harvard explained how the talc in Johnson & Johnson's baby powder was causing a significant risk of ovarian cancer in women. So the same year Johnson & Johnson was applauded for high ethics and for doing the right thing relating to Tylenol, the company turned its back on this early discovery of the risks of talc used by women for genital hygiene. I will say more about the talc litigation and what Johnson & Johnson knew, when they knew it, and how they responded.

As mentioned above, Johnson & Johnson was put on notice in the 1970s that these products could increase the risk of ovarian cancer when used in the genital area. J&J has never warned consumers about this risk and now faces hundreds, and we predict soon to be thousands, of lawsuits over this issue. Our firm led a team in a case in City of St. Louis Circuit Court where a jury found Johnson & Johnson liable for causing ovarian cancer resulting from the use of its talc-containing products such as Johnson's Baby Powder and Shower to Shower for feminine hygiene. The jury awarded

the family of Plaintiff Jacqueline Fox \$72 million after agreeing the products contributed to the development of her ovarian cancer.

The verdict includes \$10 million in actual damages and \$62 million in punitive damages. The jury found Johnson & Johnson liable for negligence, failure to warn and conspiracy. We will try the second talc case against Johnson & Johnson in St. Louis starting on April 11. Our client, Gloria Ristesund, used Johnson & Johnson Baby Powder for years. She was diagnosed with Grade II Endometroid Cancer on Aug. 8, 2011. If you have questions about this litigation contact Ted Meadows, a lawyer in our firm's Mass Torts Section, at Ted.Meadows@beasleyallen.com. Ted heads up our Talc litigation team.

### **Transvaginal Mesh Litigation—2007**

Johnson & Johnson has thousands of lawsuits pending involving its transvaginal mesh (TVM) products. The company is currently facing thousands of lawsuits for improperly designing TVM implants. In 2013, a jury ruled that J&J had to pay a single Plaintiff \$11 million in damages. The device at issue in that case was the Prolift, which was implanted in women to support sagging organs. This type of condition is common in older women whose pelvic muscles and organs all weakened after pregnancy and childbirth. A \$1.2 million verdict was rendered against J&J for its TVT-O implant used to treat stress urinary incontinence and pelvic organ prolapse. These J&J products are defective, but J&J rushed them through the FDA process. There was never any testing of the product before it was put on the market. If you have questions about these cases contact Chad Cook, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Chad.Cook@beasleyallen.com.

### **Risperdal Litigation—2008**

In 2013, Johnson & Johnson agreed to pay more than \$2.2 billion in criminal and civil fines to settle accusations that it improperly promoted the antipsychotic drug Risperdal to older adults, children, and people with developmental disabili-

ties. As part of the settlement, Johnson & Johnson has agreed to plead guilty to a criminal misdemeanor, acknowledging that it improperly marketed Risperdal to older adults for unapproved uses. Many product liability lawsuits have also been filed against J&J's Risperdal for causing abnormal breast growth in male patients, an often painful and irreversible condition known as gynecomastia. Verdicts have been rendered by juries against J&J for Plaintiffs. If you have any questions about these cases, contact James Lampkin, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at James.Lampkin@beasleyallen.com.

### **DePuy Hip Litigation—2010**

Johnson & Johnson—the parent company of DePuy Orthopaedics—recalled the DePuy ASR XL Acetabular System and DePuy ASR Hip Resurfacing System hip implants in August 2010. According to a press release announcing the Johnson & Johnson hip replacement recall, these two hip implants were more than twice as likely to fail within five years as the expected rate for artificial hip replacements. One in eight patients who received one of the recalled DePuy hip replacements required repair surgery within five years of receiving the device. J&J paid more than \$2.5 billion to resolve DePuy ASR lawsuits in 2013. J&J is still litigating Pinnacle cases. I will mention below a most significant jury verdict that was returned on March 17 in a Texas Federal Court. If you have questions about this litigation you can contact Lisa Courson, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Lisa.Courson@beasleyallen.com.

### **Xarelto Litigation—2014**

Thousands of lawsuits are pending against the manufacturer Janssen Pharmaceuticals (a subsidiary of Johnson & Johnson) and the co-marketer of Xarelto, Bayer Healthcare AG, alleging these companies failed to warn patients and physicians of the increased risks of irreversible and fatal internal bleeding when using Xarelto. These cases have been consolidated in New Orleans before United State District Judge Eldon Fallon. I have seen Arnold

Palmer and several sports figures being used by Johnson & Johnson in television ads touting the benefits of Xarelto. I find that to be quite offensive knowing what Johnson knows about this drug. Andy Birchfield, who heads up our firm's Mass Torts Section, was appointed by Judge Fallon to lead the Plaintiffs' Steering Committee (PSC) for the entire litigation. Beasley Allen lawyer David Byrne is also working on these cases and can be reached at 800-898-2034 or by email at David.Byrne@beasley-allen.com.

#### **POWER MORCELLATOR LITIGATION—2014**

The power morcellator is produced by several companies throughout the United States, the largest of which is Johnson & Johnson's subsidiary, Ethicon, Inc. When a woman suffers from painful fibroids on her uterine wall, her doctor may recommend surgical removal. In order to avoid the invasiveness and lengthy recovery time associated with traditional fibroid removal surgery, many doctors have turned to less-invasive techniques involving power morcellators.

Morcellators, which are medical devices, work by dividing tissue into small fragments inside of the body before it is removed. The problem with this method is that if any of the shredded tissue is malignant (cancerous) and is not removed it could migrate to other areas of the body. This could cause cancer to spread, significantly worsening a patient's prognosis. In 2014, the Food and Drug Administration (FDA) released a safety communication concerning power morcellator devices and the many dangers they pose to women. Because there is no reliable way for doctors to predict whether or not a woman has uterine cancer, the FDA discourages use of the device. If you have questions about this contact Melissa Prickett, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

#### **The Hip Prosthetics Litigation**

There is currently a multidistrict litigation (MDL) involving the Pinnacle hip prosthetics litigation. Johnson & Johnson is a Defendant in this litigation. The devices have caused a tremendous number of problems. I will write more

on this litigation below and specifically will discuss a recent verdict.

#### **What Can Be Learned?**

What can we learn from all of this litigation about the corporate culture at Johnson & Johnson. It's been proved that J&J's wrongful actions have resulted in many deaths and injuries to innocent consumers. Many observers hold the Tylenol example as a beacon on how a company should respond to these types of health and safety problems. As we see from the Talcum powder and other cases mentioned above, however, it's very clear that J&J only reacted the way it did with Tylenol because it could not hide the safety problem like it has done with its Baby Powder and Shower to Shower products for decades. The internal documents we obtained during pretrial discovery in the Fox case, which no person outside the company had ever seen, tell the real story about J&J's corporate culture.

What Johnson and Johnson did to cover up what it knew to be the deadly cancer risk of its centerpiece product is simply outrageous. It's hard to imagine how corporate executives could be so callous. But the internal company documents that were brought to light in the Fox trial show clearly that is exactly the case. Profits were put far ahead of the health and safety of Johnson & Johnson's customers and the separation wasn't even close.

When the deadly risk became known within Johnson & Johnson, a choice had to be made. The company could warn customers of the dangers and use a substitute for talc or it could elect to hide the health and safety risk and keep on selling a dangerous product. Johnson and Johnson chose to hide the risk and keep selling. Ms. Fox and many other innocent women have paid, and will continue to pay, with their lives. This company has a net worth of \$90 billion and it has profited greatly while at the same time ignoring good safety practices.

Sources: Beasley Allen; Examiner.com; and Drugwatch.com

#### ***\$498 MILLION VERDICT RETURNED AGAINST JOHNSON & JOHNSON IN 2<sup>ND</sup> PINNACLE BELLWETHER TRIAL***

A jury in a Texas Federal Court returned a \$497.6 million verdict on March 17 against Johnson & Johnson in a case involving the Pinnacle hip replace-

ment. This was the second bellwether trial in the MDL over the defective Pinnacle hip prosthetics manufactured by Johnson & Johnson's DePuy Orthopaedics unit. This was a major win for the Plaintiffs in the MDL. The consolidated claims of five patients alleging problems from the devices were tried together. After a two-month trial and five days of deliberations, the Dallas jury found in favor of all five plaintiffs. The verdict included \$360 million in punitive damages.

The jury found for the Plaintiffs on their failure-to-warn and design defect claims, holding both J&J and DePuy liable. About \$240 million of the punitive damages were assessed directly against J&J with DePuy being liable for the other \$120 million. The \$140 million in compensatory damages will be divided among the Plaintiffs based on the extent of their individual injuries. This jury was very careful and deliberate in the way they went about working through the evidence in this case.

Navan Ward, a lawyer in our firm's Mass Torts Section, served as a member of the Plaintiffs' Steering Committee (PSC). He worked on the team helping to prepare the case for trial. The PSC trial team included Mark Lanier (lead lawyer), Larry Boyd, Justin Presnal, Jayne Conroy and Richard Arsenault. The jurors heard and saw convincing evidence of the disturbing company culture at Johnson & Johnson and its subsidiary DePuy Orthopaedics. Egregious corporate practices led to the production of faulty metal-on-metal hip implants that have caused unnecessary harm to thousands of people. Mark and the members of the litigation team did a tremendous job in this case.

J&J and DePuy Orthopaedics are currently facing more than 8,000 additional cases with Plaintiffs claiming the identical or similar damages by the Pinnacle metal-on-metal hip devices. A large percentage of these claimants have undergone revision surgery as a result of the damage caused. More than 1,300 adverse event complaints have been made to the U.S. Food and Drug Administration (FDA) about the devices—among the roughly 150,000 such devices sold—and J&J knew that patients implanted with those devices wound up with unsafe levels of cobalt and chromium in their bloodstream.

This image of this so-called "family company" was shredded by evidence that J&J is facing significant legal issues as a result of the damages caused by its transvaginal mesh devices manufactured by Ethicon, a J&J subsidiary, also under

Plouhar's oversight. It is unclear at this time how this verdict will affect the Pinnacle cases moving forward. Hopefully, the verdict will cause J&J to be more realistic about the damage their actions and this device has caused, and the company will begin to be more receptive to the potential for a global settlement. However, at this point, Johnson & Johnson is holding firm in their resolve to appeal the Pinnacle verdict.

Navan has worked tirelessly for clients that our firm directly represents, as well as for victims all across the country, in his role on the PSC. Lawyers in Beasley Allen's Mass Torts Section currently represent several hundred clients who have suffered the deleterious effects of the DePuy Pinnacle device. If you need more information about this case, or the litigation generally, contact Navan at 800-898-2034 or by email at Navan.Ward@beasleyallen.com.

Sources: Bloomberg, Reuters, and Law360.com

#### ***DID DRUGMAKERS WITHHOLD XARELTO TEST INFORMATION FROM MEDICAL JOURNAL?***

A footnote discovered by *The New York Times* in a federal legal document suggests Johnson & Johnson subsidiary Janssen Pharmaceuticals and Bayer, manufacturers of the blood thinner Xarelto, may have mislead medical journal editors about the medication in order to protect their profits. The footnote seems to suggest the drugmakers left out critical laboratory data when a peer reviewer at the *New England Journal of Medicine* requested it in order to confirm the accuracy of the data.

Lawyers representing individuals suing over bleeding risks linked to Xarelto, including lawyers from our firm, have raised alarming questions about whether the drug company left out key research information that may have skewed clinical trial results that were later used to approve the drug in the United States and abroad. Frankly, this sort of thing from a drug manufacturer is not really surprising.

Xarelto is the leader in a new class of blood thinners taking aim at the long-used warfarin for the prevention of strokes in atrial fibrillation patients, the prevention and treatment of deep vein thrombosis and pulmonary embolism, and the prevention of blood clots in patients who recently underwent knee or hip replacement surgery. Our firm is heavily involved in the Xarelto multidistrict litigation (MDL) and Andy Birchfield

is co-lead of the Plaintiffs Steering Committee.

Xarelto has been linked to gastrointestinal bleeds, brain bleeds and bleeding deaths, and, unlike warfarin, there is currently no antidote to reverse the blood thinning qualities of Xarelto in the event of a bleeding emergency. Xarelto has generated nearly \$2 billion in revenue since it was approved in 2011.

This is an additional red flag raised about the validity of Xarelto testing information. Johnson & Johnson, Janssen and Bayer hired Duke Clinical Research Institute to run a three-year clinical trial involving more than 14,000 patients. The clinical trial compared the number of strokes and bleeding events in patients taking Xarelto compared to those taking warfarin.

Earlier, it was discovered that a device used to measure the blood's clotting ability during the trial was later found to be defective and ultimately it was recalled. The concern is that the malfunctioning device may have caused doctors to give patients the wrong dose of warfarin, ultimately favoring Xarelto. Duke researchers reviewed the issue and determined that the device issue did not affect the trial's results. But some researchers said that a more accurate way of evaluating the device would be to compare the device's readings with those done at a central laboratory. This was done two times during the trial—at 12 weeks and at 24 weeks—during which blood was drawn from 5,000 patients taking warfarin.

Duke researchers had never mentioned this lab data, and the *Journal* editors said they didn't know about the data until they were contacted by a reporter with *The New York Times*. I hope that is an accurate statement. However, it certainly appears that this information should have been made available to the *Journal*.

Sources: *New York Times* and Business Insider

### **III. MORE AUTOMOBILE NEWS OF NOTE**

#### ***TOYOTA RAMPS UP RECALLS OVER TAKATA AIR BAG PARTS***

Toyota Corp. has recalled another 198,000 cars in the U.S. because they contain the dangerous Takata Corp. air

bag parts. This brought the total number of the automaker's Takata-related recalls as of mid-March in the U.S. to more than 3 million. The recall came a week after the revelation that Takata officials had manipulated test data for its air bag inflators. As we have previously reported at least 10 people have been killed with dozens more injured as a result of this defect.

A number of other automakers expanded their recall efforts in connection with the air bags. The latest Toyota recall involves approximately 198,000 model year 2008 Corolla and Corolla Matrixes and model year 2008-2010 Lexus SC 430s. The automaker said that the recalled cars are equipped with a Takata-produced dual-stage front passenger airbag inflator that could potentially rupture when deployed in a crash.

It appears that Takata employees altered test data for its potentially defective air bags even after recalls began. One air bag production engineer had warned in 2005 that "the integrity of validation reports ... is in serious question." Last November, the National Highway Traffic Safety Administration (NHTSA) levied civil penalties against Toyota totaling \$200 million. That's the largest penalty ever imposed by the agency. Toyota has admitted that it failed to alert NHTSA of the defect despite knowing about it, and said that data submitted to the agency about the defect since at least 2009 was "selective, incomplete or inaccurate."

Source: Law360.com

#### ***CARMAKERS DEFEAT SOME CLAIMS IN TAKATA AIR BAG MDL***

The Florida federal judge overseeing the multidistrict litigation (MDL) over defective Takata air bag inflators linked to 10 deaths rejected proposed class action claims of deceptive business practices by automakers brought on behalf of used auto parts dealers. U.S. District Judge Federico Moreno said the claims failed to specify which vehicles the parts dealers bought. The judge rejected claims brought by the Automotive Recycling Association over alleged purchases of vehicles that were recalled for the air bag defect made by three Florida used auto parts dealers, saying the trade group failed to allege the makes of the cars the dealers bought. Judge Moreno said:

*Therefore, it's impossible to tell from the complaint which of the automakers that used Takata air*

*bags—Honda, BMW, Mazda, Mitsubishi, Nissan, Subaru or Toyota—would be responsible for the alleged violations of 28 states’ deceptive trade practice laws, as well as the Florida Deceptive and Unfair Trade Practices Act.*

Judge Moreno dismissed claims against Fuji Industries LTD, a Subaru manufacturer. He rejected fraudulent misrepresentation and concealment claims as well. Even though the complaint listed all the vehicles recalled for the air bags, the judge said that this didn’t illuminate which ones the dealers had actually purchased. He wrote:

*[C]ontrary to ARA’s assertion, the complaint does not indicate the [parts dealers] purchased a vehicle manufactured by each automotive defendant. It would require a leap in logic to conclude that the purchase of “recalled vehicles” equates to the purchase of vehicles manufactured by each automotive defendant.*

Since its allegations aren’t traceable to the action of any of the automakers, Judge Moreno said that the Automotive Recycling Association lacks standing to bring its claims. The MDL centers on Takata air bags that have been recalled worldwide because of the highly publicized defect that car buyers say makes the inflators prone to explode spewing chemicals or fragments at vehicle occupants.

The car buyers first filed suit in November 2014. Subsequently, a second amended complaint was filed with 106 counts against Takata and Honda. As we have reported, Honda is the automaker with the most Takata air bags. The amendment includes claims of fraud, breach of warranty, unjust enrichment, negligence, Racketeer Influenced and Corrupt Organizations (RICO) Act violations, as well as other consumer protection claims. The amended complaint was filed after the U.S. Judicial Panel on Multidistrict Litigation centralized more than 50 proposed class actions in the Florida federal court.

Judge Moreno ruled on March 2 that Takata can redact only information unrelated to air bags in the documents it produces in discovery. He adopted part of the recommendations of a special master in December, finding that Takata could redact “irrelevant” information within seven categories, including pricing, non-public financial information, design, and products not sold in the U.S., but only if

that information isn’t related to air bags. The case is in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

#### **AUTO SAFETY BOSS’ CAR WAS PART OF TAKATA AIRBAG RECALL**

A car owned by the family of Mark Rosekind, the nation’s top auto safety regulator, has been recalled to fix a faulty Takata airbag. Like millions of others, however, even the top regulator has to wait for parts to come in to make the repair. National Highway Traffic Safety Administration (NHTSA) chief Rosekind revealed last month that a family car normally driven by his wife was recalled to fix the airbag inflator. When Mrs. Rosekind checked the vehicle identification number in a recall database, she found there were no replacement inflators available.

The recall of the Rosekind car has helped the top man at NHTSA know what people are going through trying to get their cars fixed and who face potential danger from the defective inflators. The family has been working with a dealership that they have used for a long time and they are seeking a loaner car. Rosekind had this to say:

*I now have that personal experience to be able to deal with it and see how we can push. It is a source of information that probably typically is not available to an administrator facing something like this.*

It’s good for a person who has an important responsibility when it comes to vehicle safety to see first-hand what ordinary folks have to deal with. Rosekind said he’s not getting special treatment, and that the car is going to be fixed at the “appropriate time.” He will just have to wait in line and, if he fails to get a loaner car, park the car.

Source: *Claims Journal*

#### **NHTSA IS INVESTIGATING FORD TRUCK BRAKE FAILURE**

The National Highway Traffic Safety Administration (NHTSA) opened an investigation last month into about 420,000 Ford pickup trucks. The probe was based on dozens of driver complaints in the past year claiming the vehicles’ brakes failed while driving. Four of the incidents resulted in collisions blamed on the defect. NHTSA said it has

received 35 reports, a majority of which were made during the last seven months, that brake pedals in Ford Motor Co.’s popular full-size 2013 and 2014 F-150 trucks failed. The complaints said the pedals went straight to the floor when pressed, resulting in a “complete loss of brake effectiveness.”

In addition, drivers claimed that brake fluid has been unexpectedly low or even gone to empty with no visible leakage coming from the master cylinder reservoir. NHTSA says that several mechanics have said the problem is due to brake fluid leaking into the brake booster. The agency said: “A preliminary evaluation has been opened to assess the scope, frequency, and safety-related consequences of the alleged defect.”

As part of the investigation, NHTSA has asked Ford to provide a great deal of information by the 20<sup>th</sup> of this month regarding quality control during the trucks’ design and production, including testing data and field reports, along with any consumer complaints and communications from dealers concerning the issue. Reportedly, the four reports of crashes caused by the brake defect did not result in injury. Two of these reports are set out below:

- One complaint in August was from a driver in Hemet, Calif., who said his 2013 truck experienced a total brake failure while backing out of a parking spot. Unable to stop the truck, he crashed into a concrete wall. A service technician subsequently diagnosed the problem as brake fluid leaking into the brake booster, but later informed the driver that although the parts needed to be replaced, at a cost of \$800, there was a nationwide backorder for them and it would be five weeks until the truck could be repaired.
- A second driver complaint from July said the brakes in that driver’s truck would consistently drift to the floor when pressed in traffic, eventually leading to a rear-end collision with another vehicle, despite the driver’s having serviced the truck multiple times.

The new NHTSA investigation comes only a few months after the agency said it was deepening a probe into possibly defective brakes in Ford F-150s from 2011 and 2012. Following a preliminary investigation launched in June, NHTSA said Ford received almost 400 complaints over increased brake pedal effort being required to stop the trucks, leading to extended stopping time. Ford has also

given the agency information regarding seven incidents of crashes or fires, resulting in one injury, and nearly 6,500 warranty claims, all stemming from the brake pedal issue. NHTSA said that brake problem was caused by corrosion to a standard electric vacuum pump booster, which provides power assist for braking and is intended to provide a “consistent brake pedal feel,” damage that can lead to total loss of electric vacuum pump function.

Ford’s F-150 was also the subject of a 2013 NHTSA investigation over complaints that the truck lost power when accelerating at high speeds, a potential danger when a driver attempts to pass other drivers on a highway. In 2014, the agency ultimately decided against a recall of 400,000 trucks potentially affected with the problem, after Ford went ahead and addressed the problem on its own.

Source: Law360.com

#### **BMW FACES CLASS ACTION OVER ALLEGED ENGINE DEFECTS**

A putative class action has been filed against BMW, accusing the automaker of installing software in a number of its vehicle models meant to fix a turbo engine defect that instead is said to have led to dangerous acceleration delays, sudden loss of power and decreased gas mileage. According to the suit originally filed in state court, BMW of North America in 2013 implemented a widespread campaign—without the consent of vehicle owners—to update the engine control unit, or ECU, software in eight models of its vehicles equipped with 3-liter twin turbo engines.

Instead of fixing the problem, it’s alleged that the change led to more engine performance issues. Shawn B. McCullers, an Atlanta resident, claims his 2009 BMW 535i has been in the repair shop 21 times since June 2013 as a result of the alleged problems. His complaint alleges that BMW refused to acknowledge the software update led to engine performance issues and instead misled customers to believe that their reported problems were imagined or non-existent. The complaint states:

*Owners were faced to resolve these problems with numerous unfruitful service visits, extended periods of loss of uses, and by obtaining an aftermarket ECU flash update that effectively cost thousands of dollars*

*in out-of-pocket expenses and voided the BMW warranty.*

McCullers is suing the automaker on behalf of all owners and lessees in the state of Georgia of 2007-2011 BMW 135i, 335i, 335xi, 535i, 535xi, XS, X6 and 24 sDrive 3.5i models with N54 3.0 liter twin turbo inline-6 engines. According to his complaint, the vehicles in question continued to exhibit a noticeable performance reduction despite the ECU software updates, which it says “detuned” the vehicles to mask underlying problems with their turbo system. The complaint said:

*BMW eventually changed problematic hardware and/or introduced new engine control units in its newly manufactured vehicles, but customers of the vehicles in question remain saddled with vehicles that possessed underlying defects, exhibited turbo lag and other potentially dangerous and/or deadly problems, and did not possess the performance characteristics that were advertised, bargained and paid for.*

McCullers is accusing BMW in the complaint of violating the Magnuson-Moss Warranty Act, breach of express and implied warranty, breach of implied covenant of good faith and fair dealing, fraud, fraudulent concealment, negligent misrepresentation, defamation, and slander. The case has been removed to a Georgia Federal court. McCullers is represented by Sean Raymond Campbell of Champion Law Group, a firm located in Atlanta, Ga. The case is in the U.S. District Court for the Northern District of Georgia.

Source: Law360.com

#### **CAN AUTOMATIC BRAKING PREVENT 20 PERCENT OF ALL CRASHES?**

Major automakers announced on March 17 that they have agreed to install automatic emergency braking systems in nearly all U.S. vehicles by September 2022. The U.S. National Highway Traffic Safety Administration (NHTSA) announced in September an agreement in principle with 10 automakers to eventually add the technology to prevent thousands of crashes a year. The final agreement, including additional automakers, was unveiled at a press conference in McLean, Va. The final agreement includes automakers representing more than 99 percent of U.S. light vehicle

sales. Among those joining the deal are Toyota Motor Corp., General Motors Co., Ford Motor Co., Fiat Chrysler Automobiles NV, Honda Motor Co. and Volkswagen AG.

Automatic emergency braking includes systems designed to prevent crashes in which drivers do not apply the brakes or fail to apply enough braking power to avoid a collision. Under the agreement, automakers will get slightly longer to add the technology to some vehicles with technical challenges, including some cars with manual transmissions. NHTSA Administrator Mark Rosekind recently told Reuters in an interview that a voluntary agreement that could get the safety technology in vehicles before a legally binding rule was preferable. He said that NHTSA was “excited about this development.”

The Insurance Institute for Highway Safety (IIHS), a group that helped reach the voluntary agreement with automakers, has said as many as 20 percent of crashes could be prevented by the technology. “Do the math. That’s 5 million crashes every year—20 percent reduction means 1 million less. Those are big numbers,” Rosekind said in September. The National Transportation Safety Board (NTSB) and Consumer Reports have both called for making the technology mandatory in all vehicles.

It should be noted that in 2012, rear-end crashes killed 1,705 Americans and injured 547,000 in the United States. About 87 percent of those deaths and injuries might have been prevented or lessened if vehicles had a collision avoidance system—because they were linked to driver inattention, researchers found.

My friend, Joan Claybrook, who is a former NHTSA Administrator, said NHTSA should issue legally binding rules. Joan said the deal “was developed in secret with no public record of its factual basis, no legal requirement that companies comply and no penalties if a company lies about its compliance.” Rosekind has said it could take at least eight years to get legally binding rules in place. While voluntary agreements sound good—and hopefully in this case will be workable—an actual rule mandating implementation and compliance is certainly better. However, at least progress is being made in this matter.

Source: Insurance Journal

## **THE FBI AND NHTSA WARN ABOUT CAR HACKING**

The FBI and the National Highway Traffic Safety Administration (NHTSA) on March 20 jointly warned that modern cars are vulnerable to hacking. That may come as no surprise to those who have followed news reports about the possibility, but it does show the level of attention coming to the issue from the nation's top federal law-enforcement agency. The FBI's "public service announcement," issued last month, cites recent demonstrations in which researchers showed how they could remotely take over various functions in cars. "The FBI and NHTSA are warning the general public and manufacturers—of vehicles, vehicle components, and aftermarket devices—to maintain awareness of potential issues and cybersecurity threats related to connected vehicle technologies in modern vehicles," the agencies said in the bulletin. The warning reads:

*The analysis demonstrated the researchers could gain significant control over vehicle functions remotely by exploiting wireless communications vulnerabilities. Consumers and manufacturers are aware of the possible threats and how an attacker may seek to remotely exploit vulnerabilities in the future.*

The memo points to the many different computers contained in today's cars that control functions ranging from braking to infotainment. Each has its own set of vulnerabilities, especially when it comes to the possibility that the systems can be manipulated by plugging a laptop or other device into the car's diagnostic port. Over the summer, a team from Wired magazine managed to hack into a Jeep Cherokee SUV and drive it into a ditch. Attacks can also occur via Wi-Fi, usually at no more than 100 feet from the vehicle.

In July 2015, Fiat Chrysler Automobiles NV recalled 1.4 million U.S. vehicles to install software after a magazine report raised concerns about hacking, the first action of its kind for the auto industry. Also last year, General Motors Co issued a security update for a smartphone app that could have allowed a hacker to take control of some functions of a plug-in hybrid electric Chevrolet Volt, like starting the engine and unlocking the doors. In January 2015, BMW AG said it had fixed a security flaw that could have allowed up to 2.2 million vehicles to

have doors remotely opened by hackers. The FBI bulletin said:

*While not all hacking incidents may result in a risk to safety—such as an attacker taking control of a vehicle—it is important that consumers take appropriate steps to minimize risk.*

A car traveling at low speeds can be vulnerable to having its engine shut down, brakes disabled or interference with the steering. For cars traveling at higher speeds, hackers can fool with the door locks, turn signal, tachometer, radio, air conditioning or GPS. The warning cites a July recall of 1.4 million Ram, Jeep, Chrysler and Dodge vehicles that were susceptible to hacking through their infotainment systems, following the demonstration by Wired. Owners were being sent a thumb drive with a software patch to remedy the problem.

NHTSA Administrator Rosekind told reporters in July 2015 that automakers must move fast to address hacking issues. The Fiat Chrysler recall came after the Wired magazine report about hackers remotely taking control of some functions of a 2014 Jeep Cherokee, including steering, transmission and brakes. NHTSA has said there has never been a real-world example of a hacker taking control of a vehicle. Two major U.S. auto trade associations—the Alliance of Automobile Manufacturers and Association of Global Automakers—late last year opened an Information Sharing and Analysis Center.

The groups share cyber-threat information and potential vulnerabilities in vehicles. The FBI bulletin warned that criminals could exploit online vehicle software updates by sending fake "e-mail messages to vehicle owners who are looking to obtain legitimate software updates. Instead, the recipients could be tricked into clicking links to malicious websites or opening attachments containing malicious software."

Sources: USA Today and Claims Journal

## **IV. AN UPDATE ON THE VOLKSWAGEN LITIGATION**

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### **BEASLEY ALLEN HIRED BY HILLSBOROUGH COUNTY, FLORIDA ON VOLKSWAGEN CLAIM**

The Hillsborough County, Florida commissioners have hired our law firm to handle a very important case. The firm was hired unanimously to file a lawsuit against Volkswagen for violating the county's anti-air-pollution laws with its emissions cheat device. More than a thousand VW vehicles are being operated in the Tampa area without emissions controls. The county's lawsuit was filed in the U.S. Middle District Court of Florida in Tampa and will soon become part of the consolidated class action against Volkswagen.

The County's Environmental Protection Commission spearheaded the efforts to hire our firm to represent the county. As we have previously reported, our firm is among the group of law firms chosen to form the plaintiffs' steering committee (PSC) that will litigate VW lawsuits consolidated in federal court in San Francisco. The law firm of Gardner Brewer Martinez-Monfort and Thomas L. Young were also chosen to work with our firm in the case filed in Tampa.

Hillsborough County is the only county in Florida with an environmental law that prohibits tampering with emissions control equipment in automobiles. This unique ordinance provides for penalties against manufacturers, installers or sellers of defeat devices of up to \$5,000 per violation. VW has admitted installing codes in about 11 million of its diesel-powered vehicles that enable them to emit up to 10 to 40 times the legal level of nitrogen oxide and other noxious gases during normal operation, and then turn on emissions controls when the vehicles are undergoing emissions tests.

This emissions cheat device affects more than 600,000 VW vehicles in the U.S., many of which have been on U.S. roads since 2009. There are currently about 1,187 of the vehicles in Hillsborough County, according to the Environmental Protection Commission's calculations. Dee Miles, who heads our firm's Consumer Fraud and Commercial Litigation Section, and who is also serving on the Volkswagen PSC in San Francisco, says this litigation highlights a disturbing trend amongst auto industry



giants where “lying is simply business as usual.”

Our lawyers believe this VW litigation involves one of the worst cases of fraud on the public that they have ever seen in the history of the automobile industry. It’s a privilege to help lead the prosecution of these claims against VW, working along with some of this country’s most talented lawyers. It’s also a real honor for our firm to represent the interest of the citizens of Hillsborough County, Florida. The complaint is filed as The Environmental Protection Commission of Hillsborough County, Florida v. Volkswagen AG. Dee Miles, Archie Grubb and Clay Barnett from our firm are handling this case for our firm.

#### **KENTUCKY SUES VOLKSWAGEN OVER DIESEL EMISSIONS CHEATING**

Kentucky filed suit against Volkswagen AG and its luxury units last month, claiming the German automaker’s diesel emissions cheating scheme violated the state’s Consumer Protection Act. “Volkswagen must be held accountable for its false and misleading promotion and sales of its vehicles in the Commonwealth,” Kentucky Attorney General Andy Beshear said in a statement. The suit, filed in Franklin Circuit Court, also names VW’s Porsche and Audi units and seeks civil penalties for violations of the state’s Consumer Protection Act and an injunction barring similar future practices by the company.

Kentucky is at least the fifth U.S. state to sue VW, along with New Jersey, Texas, New Mexico and West Virginia. We mentioned above in this issue the suit our firm filed for a large Florida county. Harris County, Texas, is also suing Volkswagen. The U.S. Justice Department has also filed its own lawsuit accusing VW of violating clean air laws and is seeking up to \$46 billion.

#### **VW INSTITUTIONAL INVESTORS FILE \$3.61 BILLION SUIT IN GERMANY**

Almost 300 institutional investors in Volkswagen have filed a multi-billion “euro suit” against the carmaker for what they see as breaches of its capital markets duty in the emissions scandal. The lawsuit, seeking damages of 3.256 billion euro (\$3.61 billion), was filed at a regional court in Braunschweig in VW’s home state of Lower Saxony last month. The 278 investors from all over the world are Plaintiffs in the lawsuit. They include

German insurers and U.S. pension fund Calpers. The lawsuit is over whether VW neglected its duty to the capital markets regarding the timeframe between June 2008 and Sept. 18, 2015. Volkswagen had published an account of the events leading to the violation of U.S. emissions law which was publicly announced by the U.S. Environmental Protection Agency (EPA).

The Plaintiffs also filed a motion for a so-called “model claims,” a German legal procedure which—for lack of U.S. style class-action lawsuits—uses court rulings won by individual investors as templates to set damages for others that are equally affected. Andreas Tilp said in a statement:

*Due to the fact that—according to our information and experience—Volkswagen AG persistently denies any settlement negotiations and also refuses to waive the statute of limitation defense until now, it was necessary to file this first multi-billion euro lawsuit.*

It will be interesting to see how this litigation fares in the German court judicial system. The problems facing VW, however, continue to mount.

Source: Bloomberg News

#### **VOLKSWAGEN U.S. UNIT SAID TO HAVE DESTROYED EVIDENCE**

Personnel at Volkswagen’s U.S. unit in Michigan destroyed evidence after the U.S. government announced last year that the company had installed illegal devices on hundreds of thousands of vehicles to cheat emissions tests. At least that’s what a former employee has alleged in a lawsuit. Daniel Donovan, who worked as a technical project manager in Auburn Hills, Mich., claims he was fired in December after telling superiors, including the company’s in-house lawyers, that data was being deleted.

Donovan, who had worked for VW since 2008, filed suit in state court last month, alleging wrongful termination and violation of Michigan’s whistleblower law. The complaint alleges that the deletion of data conflicted with an order Donovan had received to preserve such information after the Sept. 18 announcement by the Environmental Protection Agency (EPA) that VW had violated federal law by rigging vehicles sold in the United States.

As has been widely reported, Volkswagen admitted installing cheating software in 11 million vehicles worldwide, including 482,000 sold in the U.S. Later, the company disclosed it had installed questionable emissions software in about 85,000 VW, Audi and Porsche cars with 3.0-liter diesel engines in the U.S.

Donovan alleges that his immediate supervisor, Robert Arturi, told him on Sept. 18 the company had to “stop deleting data effective immediately pursuant to a Department of Justice hold,” connected to the U.S. investigation. Donovan says that when he relayed that message to the information technology manager, he was brushed off. He says the data deletion continued for three more days, in violation of the order, and additional backup disks were destroyed afterward.

Donovan claimed in the lawsuit that an independent investigation by an accounting firm was thwarted, as evidence wasn’t provided. Michigan law permits legal action if an employee is fired in retaliation for refusing to break the law. The complaint also cites a state law protecting workers reporting or about to report a legal violation.

Source: Bloomberg News

#### **VOLKSWAGEN GETS MORE TIME FOR PLAN TO FIX CLEAN DIESEL CARS**

U.S. District Judge Charles R. Breyer, the California federal judge presiding over the multidistrict litigation accusing Volkswagen of outfitting certain cars with software designed to cheat emissions standards, has given the automaker another month to come up with a plan to fix 600,000 of the clean diesel vehicles. At a status hearing on March 24 in San Francisco, Judge Breyer gave the parties until April 21 to present a “concrete proposal for getting the polluting vehicles off the road.” Judge Breyer said:

*This proposal may include a vehicle buy-back plan or a fix approved by the relevant regulators that allows the cars to remain on the road with certain modifications or both or even other remedies. But whatever the proposal, by April 21<sup>st</sup>, it must be specific and detailed as to proposed timing, what cars are involved in each proposal, payments to consumers and the like.*

Judge Breyer is overseeing the huge MDL in California federal court over the company’s alleged cheating on emissions

standards. The cases include the U.S. Department of Justice's lawsuit against Volkswagen for Clean Air Act violations. Volkswagen has since admitted fault and revealed that the software came pre-loaded in millions of its diesel vehicles around the world, but has blamed a handful of managers for the decision. Two CEOs at Volkswagen have resigned in the wake of the scandal.

About 500 Volkswagen drivers filed the first consolidated complaint in the MDL, contending the fraud is taking a financial, environmental and human toll. The consolidated complaint also names Volkswagen AG subsidiary Porsche AG as a defendant.

Regulators around the world have ordered recalls covering about 8.5 million vehicles in Europe, 482,000 in the U.S. and 324,000 in India. While Volkswagen has developed a fix for European vehicles, the company said it has yet to find a solution that will comply with EPA regulations, Elizabeth J. Cabraser the lead counsel for the plaintiffs, reported that the parties are working hard to come up with a plan.

Source: Law360.com

#### **FTC ACCUSES VW OF LYING IN ADS ABOUT DIESEL EMISSIONS**

The Federal Trade Commission sued Volkswagen in California federal court Tuesday, alleging the automaker's "clean diesel" advertising campaign deceived consumers and coerced them into buying vehicles fitted with devices designed to cheat emissions standards.

The FTC is seeking a court order requiring Volkswagen Group of America Inc. to compensate all U.S. consumers who purchased or leased the automaker's so-called clean diesel cars between late-2008 and 2015 because of alleged false advertising that the vehicles had low emissions, complied with state and federal emissions standards, were environmentally friendly and retained a high resale value.

"For years Volkswagen's ads touted the company's 'Clean Diesel' cars even though it now appears Volkswagen rigged the cars with devices designed to defeat emissions tests," FTC Chairwoman Edith Ramirez said. "Our lawsuit seeks compensation for the consumers who bought affected cars based on Volkswagen's deceptive and unfair practices."

## V. A REPORT ON THE GULF COAST DISASTER

#### **AN UPDATE ON THE OIL SPILL GOVERNMENT SETTLEMENTS**

The landmark government oil spill settlements are progressing as intended toward final resolution. As we have previously reported, in order for the United States and State settlements to be finalized, Judge Carl Barbier of the Eastern District of Louisiana had to first enter an order approving the Federal Government's proposed consent decree.

The process of proposing and then approving a consent decree requires a number of steps, including first submitting the consent decree for public comment. Typically, after public comments are made, the submitting party (or parties) either provides responses to the public comments or makes additional revisions to the consent decree that alleviate public concerns. At that time, the consent decree is formally proposed to a court for approval.

On Oct. 5, 2015, the United States, along with the five settling states and BP, proposed a consent decree for public comment. The consent decree was subject to review and comment by the public for 60 days, and that time period has now ended. According to an order from Judge Barbier on March 2, 2016, the Court was advised by the United States that it anticipated filing a motion for entry of the consent decree on March 31, 2016. In addition, Judge Barbier noted his understanding that the United States would file the comments it had received regarding the consent decree, and, we presume, any responses or revisions to the consent decree at that time.

Based on Judge Barbier's order and assuming there are no unexpected developments, the government settlements appear to be close to finality. This is good news for Alabama, as the first payment to Alabama is due within 90 days of the entry of an order approving the consent decree (also known as the "effective date"). From that point on, Alabama should receive its scheduled compensation every additional year on the anniversary of the effective date.

We are pleased that the consent decree process has progressed expeditiously. Rhon Jones and Parker Miller from our firm were leaders in the State of Ala-

bama's multi-billion dollar litigation and settlement against BP. This settlement will provide significant compensation to Alabama for many years to come. If you have any questions regarding the State of Alabama's case, or any aspect of the BP litigation, contact Parker Miller at 800-898-2034 or Parker.Miller@beasley-allen.com.

#### **BP SAID TO BE NOT LIABLE FOR DRILLING MORATORIUM LOSSES**

Judge Carl Barbier has granted BP's request to dismiss claims brought against the company by Gulf drillers who claimed the oil giant was liable for losses they sustained during a government-mandated moratorium on drilling following the Deepwater Horizon spill. The ruling found that under the Oil Pollution Act (OPA) of 1990, a "responsible party" is not liable for economic loss that results from the government's actions in the aftermath of a spill.

Judge Barbier wrote in his order that there is no doubt the government would not have imposed the six-month moratorium had the blowout and spill not occurred, but in his opinion that isn't enough to prove BP's liability. The judge wrote further:

*In OPA terms, then—and putting aside the question of whether plaintiffs' claims are due to the injury, destruction, or loss of property or natural resources—the OPA test case plaintiffs' losses did not result from the discharge or substantial threat of discharge of oil from the Macondo Well; they resulted from the perceived threat (whether substantial or not) of discharge from other wells. On a similar note, while OPA's legislative history makes clear that Congress intended the act to loosen or remove some of the restrictions on recovery that existed under maritime law, there is nothing to suggest that Congress intended OPA to go so far as to hold a discharger liable for the financial consequences of subsequent government actions aimed at preventing similar tragedies in the future and which broadly affect an entire industry.*

The PSC is expected to appeal this decision.

Source: Law360.com

## VI. PURELY POLITICAL NEWS & VIEWS

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### *A LOOK AT THE CURRENT STATE OF THE RACE FOR PRESIDENT*

It appears that Donald Trump and Hillary Clinton—short of a miracle—will face off in the general election. If so, these two will have survived a wild and highly unpredictable primary season. The best candidate on the Republican side, Ohio Gov. John Kasich, never really had a chance. In my opinion, he would have made an outstanding president, but the voters in the Republican primaries were looking for a totally different sort of candidate. They definitely found one in Donald Trump, who incidentally has been a Democrat for years and has taken positions that will haunt him in the General Election. Trump has taken full advantage of the situation and the efforts to derail him have failed thus far.

Regardless of how one might feel about Trump, we all have to admit that he is a master showman and clearly knows how to market a product. He has been able to identify lots of problems, but he has said very little about how to solve the real issues that face our country. I believe Trump will have to explain how he is going to make America “great again” in the general election. Thus far he has not had to do so. Trump’s rally speeches have further divided our nation and have definitely fueled the flames of hate and racism.

The primary battles on the Democratic side have been pretty much civil and tame in comparison to the Republican battles. The two Democratic candidates have mostly discussed the issues in the debates at their respective rallies and town hall meetings. Sen. Bernie Sanders has put in focus lots of issues that the next president will most definitely face. I believe the contest between the Vermont Senator and Hillary Clinton has been good for the country. At least they are discussing issues and preparing proposals to fix things. Sen. Sanders’ appeal to young people has been most interesting. Hillary will have to work hard to bring them into her camp in the fall.

This issue will go to the printer with several states left to hold primaries. Lots can change in politics in short order—and that is a proven fact. Stay tuned!

## VII. COURT WATCH

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### *OBAMA PICKS JUDGE GARLAND TO FILL HIGH COURT SEAT*

On March 16, President Barack Obama created a fire storm when he nominated D.C. Circuit Chief Judge Merrick B. Garland to fill the U.S. Supreme Court seat left vacant by the unexpected death of Justice Antonin Scalia. Judge Garland now finds himself in the middle of a bitter political battle over the vacancy. Judge Garland, who has served on the circuit court since April 1997 and as chief judge of the court since February 2013, emerged from a pool of several federal judges as the President’s top choice to take Justice Scalia’s seat. Prior to selecting Judge Garland, the President had made several public statements outlining the type of nominee he would put forward to fill the vacancy on the Supreme Court. President Obama had said he would ultimately pick an “eminently qualified” candidate and without a doubt he did so. I don’t believe any reasonable person would say that the nominee is not qualified to serve on the Supreme Court.

A 1977 Harvard Law School graduate, first nominated to the bench by President Bill Clinton, Judge Garland has extensive judicial experience. He is widely viewed as a political and judicial moderate—a factor that likely played to his favor, given the increasingly bitter fight between lawmakers over filling the high court vacancy. The nominee began his career clerking for Judge Henry J. Friendly on the Second Circuit and Justice William J. Brennan on the Supreme Court before joining the U.S. Department of Justice (DOJ).

Judge Garland spent several stints at the DOJ and as an assistant U.S. attorney, culminating in a role as principal associate deputy attorney general, supervising two prominent domestic terrorism cases—the Oklahoma City bombing and Unabomber prosecutions—among other very important work. In between his public service roles, the nominee spent two stints in private practice at Arnold & Porter LLP, and he also taught law at Harvard. It is not the first time the judge’s name has been raised in connection with a Supreme Court vacancy. He was on the short list to fill the vacancy left by the retirement of Justice John Paul Stevens, a slot that ultimately went to Justice Elena Kagan in 2010.

Judge Garland already has experience negotiating a politically fraught nomination process, having first been nominated for the D.C. Circuit in December 1995. His nomination languished for more than a year as lawmakers fought—not over his credentials, but over whether the relevant vacancy necessarily needed filling at all. He was ultimately confirmed in March 1997, after re-nomination, in a 76-23 vote. The battle over his nomination this time around is likely to be much more bitter, with the nominee landing squarely in the middle of a contentious election-year battle.

Senate Majority Leader Mitch McConnell, R-Ky., has vowed to block any nominee from moving forward until the next president is sworn in in 2017, regardless of the person’s qualifications. Sen. McConnell has argued that “the American people” should have a say in who is named to the high court through the presidential election in November. Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, has also pledged, alongside all other Republican members of the committee, to not hold a nomination hearing for any nominee. Of course that’s a necessary step for any federal judicial candidate to be confirmed by the Senate.

Senate Democrats and the two independent senators who caucus with them, however—Sens. Bernie Sanders, I-Vt., and Angus King, I-Maine—have argued that Senate Republicans should “do [their] job” and allow any high court nominee to at least receive a confirmation vote, even if that candidate is ultimately rejected, saying holding up a nominee is a dereliction of their constitutional duty to “advise and consent” on nominees.

Personally, I believe that the Republicans in the Senate should give Judge Garland a hearing and then a vote. Playing political games with nominations to the highest court—while perhaps not new—is very much wrong.

Source: Law360.com

### *ALABAMA’S COURTS ARE GROSSLY UNDERFUNDED AND NEED HELP*

I am not real sure the people of Alabama know it, but our state’s courts are facing a real crisis. This is not the first time that our state’s judicial system has faced a crisis. In 1973, a new article to the state’s constitution was approved that took our court system from one of the worst in the nation to one of the best. Gone were the mismatch of courts

and rules, and in its place was a uniform structure of courts and uniform rules of court. That was a major accomplishment that received national attention. In fact the new system was seen as a model for other states to follow.

The changes the people of Alabama implemented in 1973 to streamline our judiciary have allowed Alabama to make many advancements in its court system. In recent years Alabama has been a leader in the move to electronic filing and the establishment of specialty courts such as drug courts and veterans' courts. Unfortunately, the innovations that Alabama has made are now in grave danger. Unless something is done, by the Alabama Legislature, our citizens will be adversely affected. Sadly, over the past decade, Alabama's courts have been grossly underfunded. This year, the budget for the entire court system currently makes up less than one percent of the entire state budget. That can't be tolerated and wouldn't be if the people of Alabama understood what has happened to our courts.

The total appropriations for the trial and appellate courts have actually gone down for the past eight years. The proposed 2016 is several million dollars less than it was even in 2009. The only way that the judiciary has been able to operate within the funds appropriated for it is by eliminating personnel, increasing efficiencies through technology, and extraordinary efforts by court personnel. Bailiffs are no longer available for many trial judges. This leaves a courtroom with no security, which can't be justified.

The office of circuit clerk is very important in each county. The staffs in the Circuit Clerks' offices are a mere shadow of what they once were. The staffing levels are so low for many circuit clerks that they have been forced to close their office to the public one day a week just to work on clearing the backlog without disruption. This means that citizens won't receive adequate services from these essential offices.

The staffs of the appellate courts have also been drastically cut. For example, the Court of Criminal Appeals, which hears every death penalty case in the State, has been forced to eliminate almost one third of its staff in the past decade. Our courts are now at a point where they have less than even the staff required to maintain essential operations. Eliminating staff and closing clerks' offices does nothing to reduce the workload and demands of the court system.

It's the people of Alabama who are the most harmed when Courts are not adequately funded. Backlogs in criminal dockets mean that those charged with crimes sit in our county jails longer, resulting in the counties having to pay more for their incarceration. Crime victims and their families agonize longer waiting for justice to be served. Small businesses suffer when they are denied access to the courts. Children and their parents suffer when custody issues languish on backlogged dockets. The lives of the victims of domestic violence are at risk when they are turned away at the courthouse because offices are closed when they attempt to obtain a protection from abuse order. Innovations such as drug courts and veterans' courts provide tremendous cost savings to the taxpayers compared to incarceration. These programs are being hurt because of a lack of funds.

Since on average it costs \$44 per day to house an inmate in an Alabama prison, *every person* who graduates from drug court instead of going to prison saves the state more than \$16,000 per year. Moreover, those who complete drug court are much less likely to return to criminal activity than those who are incarcerated. These programs, however, are not free. Inadequate funding for the judiciary will lead to the reduction and possible elimination of such programs.

The irony of all this is that Alabama's courts generate almost the entire amount that the legislature appropriates them with fees, fines, and other court costs. According to a study by the Public Affairs Research Council of Alabama, the State's court system is putting as much money in to the State's general fund as it takes out of it. That means if the court budget is cut any further, Alabama's courts would be putting more money into the State general fund than they take out.

Article VI, Section 149 of Alabama's Constitution mandates that the courts be adequately funded, stating "*Adequate and reasonable appropriations shall be made by the legislature for the entire unified judicial system...*"

If things are going to get better, the citizens of Alabama must step up to the plate and champion the cause to ensure that the courts of our state have the resources they need to provide the justice to which Alabama citizens are entitled. In 1973, the people of Alabama voted to bring a 19<sup>th</sup> century court system into the 20<sup>th</sup> century. Now the system—once a model—is sliding backward and at a fast pace.

The Alabama Legislature must now make sure that the proper investment is made to take our state's 20<sup>th</sup> century court system into the 21<sup>st</sup> century. The voice of the people of Alabama in this endeavor is just as crucial today as it was 45 years ago. The Alabama Legislature must adequately fund the state's court system at every level.

Source: AL.Com

#### **FLORIDA SUPREME COURT APPROVES PUNITIVE DAMAGES IN ENGLE TOBACCO SUITS**

The Florida Supreme Court ruled last month that the widow of a smoker who died of lung cancer can seek punitive damages against R.J. Reynolds Tobacco Co. on strict liability and negligence claims, resolving an appellate split on the issue and marking a big win for *Engle* progeny Plaintiffs. The state's high court overturned a First District Court of Appeal decision denying Plaintiff Lucille Soffer's bid for punitive damages, ruling that the trial court's denial of the motion to amend the class action complaint in the original *Engle v. Liggett Group* case was "not based on the merits of the request but instead rested on the procedural posture at the time."

It should be noted that even though the Florida Supreme Court decertified the original *Engle* class and overturned a \$145 billion verdict, the court allowed up to 700,000 individuals who could have won judgments to rely on the jury's findings in that case to file suits of their own. The court in the current opinion said:

*The procedural posture of the case changed entirely when this court vacated the entire punitive damages award of \$145 billion and the related findings on punitive damages, thus wiping the slate clean as it relates to punitive damages and requiring each individual plaintiff to prove entitlement to punitive damages in his or her individual lawsuit.*

The court also ruled that the demand for punitive damages is dependent on an underlying claim and is not a separate cause of action, so a Plaintiff can ask for punitive damages on any properly pled claim that is not time-barred. Soffer was awarded \$2 million in compensatory damages for the 1992 death of her husband Maurice Soffer from smoking-induced lung cancer.

In the Soffer case, the First District in October 2012 affirmed a ruling deter-

mining that *Engle* progeny Plaintiffs cannot recover punitive damages on the strict liability and negligence claims because the lead Plaintiffs in the *Engle* case had not timely asserted claims for punitive damages under those theories. The First District said that adding those punitive damages claims would unjustifiably broaden the scope and effect of *Engle* and change the nature of the litigation. But one year after the First District's decision, the Second District ruled the opposite way, pointing out that the high court in the *Engle* case made two holdings with regard to punitive damages, neither of which creates a bar to individual Plaintiffs seeking punitive damages for strict liability and negligence claims.

With its ruling, the Second District noted the appeals court split on the issue and certified the question to the Florida Supreme Court. Soffer is represented by John S. Mills of The Mills Firm PA, by Mark A. Avera, Rod Smith and Dawn M. Vallejos-Nichols of Avera & Smith LLP and by James W. Gustafson Jr. of Searcy Denney Scarola Barnhart & Shipley PA. They have done an outstanding job in this litigation.

Source: Law360.com

#### **CONFIDENTIAL SETTLEMENTS IN PRODUCT LIABILITY CASES**

While it's not something I advocate, or even approve, the truth is parties routinely enter into confidential settlements in product liability cases. Typically, these agreements prohibit the disclosure of the settlement amount and evidence revealing the wrongdoing of the manufacturer of the product. In most cases the plaintiffs agree to confidentiality solely because they are in need because of their situation. Manufacturers take advantage of the plight their victims are in and insist on confidentiality. Usually they claim it's to protect trade secrets. But in reality it's to prevent future claims based on the defective product. Unfortunately, a victim's need for immediate compensation quite often has to override that person's goal of protecting other consumers from the same harm.

Even when both parties agree to confidentiality, a number of courts around the country have become less likely to approve of secrecy when the case involves a product that could endanger the public. For example, the U.S. District Court for the Western District of Missouri recently denied a motion for protective order filed by Remington Arms Company, which asked the Court to bar

disclosure of details of its defective trigger. The defect allowed the guns to fire without trigger pressure, according to the Plaintiffs, resulting in a number of fatalities. In denying the motion for protective order, the Court stated:

*Given that this case involves alleged design flaws with the Walker Fire Control assembly, there is a strong public interest in not allowing the Court's orders to be used as a shield that precludes disclosure of this danger. Pollard v. Remington Arms LLC, W.D. Mo., No. 13-cv-00086 (Dec. 3, 2014).*

Remington later agreed not to oppose public access to court documents in personal injury cases brought over the alleged defect. I suspect the reason for the change was that the company's keeping a known safety defect was indefensible. But at least they relented.

Similarly, the New York Supreme Court refused to approve a confidential settlement against Graco Children's Products, Inc. even though the involved parents of a child agreed to confidentiality in the settlement. In that case, a defective stroller led to the strangulation of the parents' child. The Court stated:

*[T]he Court finds that there is a strong public interest in a lawsuit involving the death of a child allegedly caused by a defective baby stroller. The parties' interest in keeping the details of their settlement confidential do not constitute good cause to the extent that it outweighs this public interest. Guardino v. Graco Children's Prods., Inc., 2015 BL 392041, N.Y. Sup. Ct., No. 42325/2010 (Nov. 24, 2015).*

The U.S. Court of Appeals for the Ninth Circuit also recently ruled that FCA US LLC, the successor to Chrysler Group LLC, will have to give "compelling reasons" to seal defect-related documents in a class action over its power modules, in *The Ctr. for Auto Safety v. Chrysler Grp. LLC*, 2016 BL 6286, 9<sup>th</sup> Cir., No. 15-55084 (Jan. 11, 2016).

The recent trend away from confidential settlements will raise public awareness of defective products that cause safety hazards. For the public good, I would like to see confidential settlements banned. The public is entitled to know about defective products that are dangerous and create safety hazards. In many cases where confidentially is required as a part of the settlement that doesn't happen. Since we can't depend

on Congress to do anything in this area of concern, we must depend on the courts to take the steps necessary to protect the public from the dangers associated with defective products.

Source: Bloomberg BNA

## **VIII. THE NATIONAL SCENE**

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### **CONGRESS SHOULD CURTAIL DRUG ADS THAT TARGET CONSUMERS**

I have never believed that drug manufacturers should be allowed to advertise prescription drugs on television or in any other manner. The debate about whether pharmaceutical companies should "promote" their drugs to the general public has been heating up in recent months. A consumer watchdog group argues that direct-to-consumer advertising should be curtailed because it drives up the cost of medications and can mislead the public.

Meanwhile, pharmaceutical companies say that ads targeting the general public give patients information and spur conversations with their health care providers. They claim this can actually lower health care costs because people are driven to seek treatment for their conditions. That really doesn't make sense, but at least it's an argument.

In February, Rep. Rosa DeLauro (D-Conn.) introduced the "Responsibility in Drug Advertising Act." The bill proposes a three-year moratorium on direct-to-consumer advertising of newly approved drugs. Drug companies could receive a waiver if the medication in question is considered a breakthrough treatment with a positive impact to public health.

Also, in March, Sen. Al Franken (D-Minn.) introduced legislation to end the tax break for drug makers who participate in direct-to-consumer advertising, saying this action would encourage drug companies to focus on developing new drugs instead of "marketing schemes" to drive up profits.

Drug companies spent about \$3.6 billion on direct-to-consumer advertising during the first half of 2015—a 12.5 percent increase compared to the same period in 2014. Frankly, I can see no justification for drug companies being allowed to advertise drugs that have to be prescribed by a medical doctor. In my

opinion, Congress or the FDA should ban direct-to-consumer advertising by drug companies. What do you think?

Sources: Bloomberg BNA, RightingInjustice.com

### **GILEAD HALTS 6 ZYDELIG TRIALS AFTER DEATHS**

Gilead Sciences Inc. has halted six clinical trials involving the cancer drug Zydelig. This came about after patient deaths occurred. The U.S. Food and Drug Administration (FDA) issued an alert in a statement on March 14. The FDA's alert followed similar news out of Europe on March 11. European regulators reported an increased rate of deaths attributable to infections in three clinical trials involving Zydelig. All the trials in question have been exploring the use of Zydelig in combination with other cancer drugs to treat distinct types of leukemia and lymphoma. The FDA alert said: "The FDA is reviewing the findings of the clinical trials and will communicate new information as necessary."

Details on the number of deaths were not immediately available. In a statement on March 11, the European Medicines Agency (EMA) said it would review trial data "to assess whether the findings have any consequences for the authorized uses of Zydelig." In the meantime, patients should be "carefully monitored" for signs of infection, the EMA said. It was unclear what other drugs were being used in combination with Zydelig. But European regulators said that at least one of the trials involved "combinations of medicines that are currently not approved."

Zydelig, or idelalisib, was approved in the U.S. in 2014 to treat three types of blood cancers in relapsing patients. The drug carries black box warnings about serious and fatal side effects related to liver damage, diarrhea, intestinal perforation and an inflammatory lung condition called pneumonitis. The product is a first-in-class kinase inhibitor, according to Gilead. In its 2014 annual report, Gilead called Zydelig "a new therapy for patient populations with few other options."

Studies leading up to Zydelig's clearance appeared to show significant benefits, according to the FDA. For example, a trial involving leukemia patients treated with Zydelig and the biologic Rituxan found a potential for almost 11 months of survival without disease progression, compared with 5.5 months for patients treated with a placebo and Rituxan.

Source: Law360.com

### **FLINT WATER CRISIS SHINES SPOTLIGHT ON DRINKING WATER DANGERS NATIONWIDE**

The nation has been shocked in recent months as the man-made water disaster unfolds in Flint, Mich., as tests revealed extremely high levels of lead in Flint's water supply. But a new investigation by the USA TODAY NETWORK has revealed the lead problem is not limited to Flint. In fact, the news agency reports evidence of excessive lead contamination in nearly 2,000 water systems in all 50 states.

Drinking water usually is not contaminated by lead when it leaves the water treatment plant. The problem arises when water is especially corrosive, is not treated with anti-corrosive agents, and travels through lead service lines and lead pipes in individual homes. Most homes built before 1980 contain some lead plumbing, and about 7.3 million homes in the U.S. are connected to lead service lines, which is the pipe that carries the water from the water main into the home. The more corrosive the water, the more lead will be drawn out of pipes and leach into tap water.

Flint's residents were exposed to lead poisoning when the state and city officials started drawing Flint's water from the highly polluted Flint River instead of its traditional source, Lake Huron, as a conservative money-saving measure. Those in charge of the switch neglected to run anti-corrosion chemicals through the water system that would have protected against corrosion and may have prevented some of the problems that occurred.

As the toxic water ran through the Flint water system, it corroded the old pipes forming the city's water infrastructure, allowing lead and other contaminants to leach into the tap water used by city residents. The Environmental Protection Agency (EPA) stressed there is no safe level of lead exposure. EPA guidelines establish that a system has exceeded the lead standard when more than 10 percent of samples show lead levels greater than 15 parts per billion (ppb).

Levels of lead contamination in Flint have been reported at levels as high as 104 to 13,200 parts per billion. The EPA designates levels more than 5,000 ppb as "hazardous waste." Independent researchers have tested more than 15,000 homes in Flint to date, revealing more than 1,000 samples with lead content greater than the 15 ppb EPA limit, and more than 40 homes with levels higher than 40 ppb.

Results from water tests around the country are alarming as well. USA TODAY reports many of the highest reported lead levels were in elementary schools and day cares. The news agency reviewed EPA enforcement data and discovered 600 water systems that had lead levels of more than 40 ppb, more than double the EPA's action level limit.

The infrastructure problem is most concerning. Anti-corrosion chemicals can only reduce the corrosive effects. It does not eliminate the problem of lead leaching into tap water. The more corrosive the water is, the more lead will be drawn out of the pipes, but nothing entirely eliminates the leaching process if the water is at all corrosive.

The EPA's National Drinking Water Advisory Council has called for the nationwide removal of lead service lines. However, because generally the water utility owns part of the line and the rest belongs to the homeowner, the task is daunting. Cost of replacing a service line can range from hundreds to thousands of dollars. There are about 155,000 different water systems serving small towns, big cities, and even individual businesses and buildings. Most of the water systems that failed to meet EPA limits serve a few hundred to several thousand each.

While the EPA is working to strengthen existing regulations for monitoring water quality, even regular testing can only provide an indication of a problem. Samples may be drawn from as few as five or 10 taps a year, if it even occurs annually. Even the largest water systems are only required to test water from 50 to 100 taps per year.

Even if tests reveal lead levels in excess of EPA allowable limits, *USA TODAY* reports many water systems were not warning people as they are required to do. Without an effective system to monitor and enforce compliance with testing and reporting, consumers are left in the dark. Small systems with limited resources flounder in the face of potential problems.

"The Flint, Michigan, situation has really opened our eyes to what's going on," Patty Thompson, engineering manager for the Oklahoma Department of Environmental Quality told *USA Today*. However, as we know all too well, seeing and doing are two different things. It's time for those in government at every level who have the responsibility to deal with the problems facing the people in Flint—and actually the entire nation—to act responsibly and work dili-

gently to solve the most serious problems discussed above once and for all.

Source: WFAA

### **THE PUBLIC IS FED UP WITH THE CONGRESSIONAL ANTICS**

Donald Trump and Bernie Sanders have at least one thing in common. Each has recognized that the American people are sick and tired of elected officials not doing their jobs in a good and satisfactory manner. These two candidates recognized that most of the disgust is aimed directly at Washington. Without any doubt, Congress has to share much of the blame. It's quite evident that members of the House and Senate have refused to work together to at least try and solve the many problems that face America. Unity is non-existent in our nation's capital and that's not good. The division and discord in Congress is seen as typical of the way the federal government operates.

Folks back home expect unity and cooperation and don't like the total discord and division that currently exists in Congress. They are rebelling against what the media describes as "the establishment." The Republican primary battles have further divided the country and that's most unfortunate. It seems that President Obama is being blamed by the Republicans for every single problem that exists. While he has to share some of the blame, the real problem lies with Congress. The lobbyists virtually control what happens on fails to happen in Congress and that must change. Until we have campaign finance reform that works that simply won't happen.

I really don't believe the American people distinguish between Democrats and Republicans when it comes to the performance of the members of Congress. Hopefully, there will be a change in attitude in Washington once the November elections are over. We have international problems that—combined with the numerous domestic problems that exist—demand unity and cooperation by Congress and the White House.

## **IX. WHISTLEBLOWER LITIGATION**

### **MEDICAL DEVICE COMPANY PAYS \$623 MILLION TO RESOLVE ANTI-KICKBACK AND FALSE CLAIMS ACT ALLEGATIONS**

The Department of Justice (DOJ) announced last month that largest distributor of medical equipment in the United States will pay \$623.02 million to settle criminal charges and civil claims relating to kickback schemes. Olympus Corp. of the Americas (OCA) was charged with conspiracy to violate the Anti-Kickback Statute. Because the kickback payments caused false claims to be submitted to federal health care programs—such as Medicare, Medicaid, and TRICARE—OCA also violated the False Claims Act (FCA).

The Anti-Kickback Statute prohibits payments to induce purchases paid for by federal health care programs because these illicit kickback payments typically result in:

- the doctor's judgement being compromised;
- inferior or overpriced equipment being used; and
- the cost of health care rising for all citizens.

Therefore, the government refuses to tolerate these payment arrangements and uses every means possible, including the FCA, to pursue anti-kickback claims. It was alleged, and confirmed by OCA, that the company won new business and rewarded sales by giving doctors and hospitals kickbacks, which included:

- consulting payments;
- foreign travel;
- extravagant meals; and
- millions of dollars in grants and free equipment.

The \$623.02 million settlement marks the largest total amount paid in U.S. history for Anti-Kickback Statute violations involving a medical device company. Of the \$623.02 million, \$312.4 million is a criminal penalty, and \$310.8 million settles the civil suit. The civil suit was filed by OCA's former chief compliance officer, John Slowik, under the *qui tam* provision of the FCA. As we have consistently stated, the FCA allows

private individuals to file lawsuits on behalf of the government when those individuals have knowledge of a person or company defrauding the government.

The FCA provides monetary incentives and protection for these whistleblowers, which include 15 to 30 percent of the damages recovered. Mr. Slowik will receive \$51 million as a reward for his part in the OCA case.

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, please contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim. There is a contact form on our firm's website, or you may call Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier at 800-898-2034. You can also email one of these lawyers, each of whom are on our Whistleblower Litigation Team, at Archie.Grubb@beasleyallen.com; Larry.Golston@beasleyallen.com; Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

## **X. PRODUCT LIABILITY UPDATE**

### **\$125.4 MILLION JURY VERDICT UNDERScores INADEQUATE SEAT-BACK STRENGTH TESTING**

A Texas jury has awarded \$125.4 million in compensatory damages to the family of a boy seriously and permanently injured in a rear-end collision. The boy was riding in the back seat behind his father, Jesse Rivera, Sr., who was driving a 2005 Audi A4 Quattro in 2012 when the impact from the collision caused the driver's seat-back to fail. As a result of the seat-back failure, the father pitched backward, and his head struck his son's head. As a result the boy, Jesse Rivera, Jr., who was 7 at the time, sustained a depressed skull fracture, partial paralysis and blindness. He now requires full-time medical care.

The case highlights the woefully outdated standards for testing vehicle seat-back strength. The current safety standards were established in 1968. Although there was a call for standards to be updated in 2004, the National Highway Traffic Safety Administration (NHTSA) declined to do so, saying there

was not enough data to support an update at that time.

NHTSA reports rear-end collisions account for only about 3 percent of traffic fatalities. From that figure, the number of fatalities that result from a seat-back failure is even smaller, according to the agency. At the time, NHTSA could not demonstrate that the cost of evaluating seat-back strength requirements would provide significant “real-world benefits” to justify the expense, Gordon Trowbridge, a NHTSA spokesman, told the *San Antonio Express-News* in an email.

The jury assigned to Audi AG, the car’s German manufacturer, and Volkswagen Group of America Inc., its U.S. distributor, 55 percent of the responsibility for the child’s injuries. The jurors found the driver of the car that rear-ended the Rivera vehicle, Gloria Cordover, 25 percent responsible for the injuries, and the boy’s father 20 percent responsible. Because Audi and Volkswagen were found more than 50 percent at fault, under Texas law (which is “join and several,”) the companies will be responsible for the entire amount of damages.

Although the jury did not award punitive damages, the lawyers involved in the case representing the Rivera family hope the verdict sends a message to federal regulators that stronger safety measures are needed to ensure seat-backs are strong enough to withstand a collision. Joseph Dunn, one of the San Antonio lawyers who represented the family, told the *San Antonio Express-News*:

*NHSTA (the National Highway Transportation Safety Administration), which is supposed to be monitoring our automotive safety and promulgating standards for auto manufacturers to follow, is asleep at the wheel.*

The case is Texas District Court, Bexar County (San Antonio). The plaintiffs were represented by Jeff Wigington, Joseph Dunn, Fidel Rodriguez and Manual Maltos. These lawyers did a tremendous job in the case.

Sources: *San Antonio Express-News*, Bloomberg

#### **SOME TIPS FOR TIRE SAFETY THAT COULD HELP SAVE YOUR LIFE**

Many safety experts will tell you that the tires on your vehicle are the most important safety component on the vehicle. Tires help drivers maneuver safely and avoid accidents. However, when tires fail, the consequences can be

drastic. Each year there are nearly 11,000 tire-related crashes in the U.S. Thousands of people are seriously injured and several hundred people die each year from those crashes.

According to the National Highway Traffic Safety Administration (NHTSA), the federal agency that oversees vehicle safety which includes tire safety, many of these crashes can be avoided simply by understanding tire maintenance, tire labels, keeping track of the age of your tires, and monitoring recalls. The following are some simple safety tips to help assure your tires are safe.

- **Buy the right tire for your needs.**

To begin, understand that the safest tires might not always be the most fuel-efficient or the longest-lasting—and that specialty tires out of their element can be dangerous. For instance, the soft, summer-performance tires that arrive on some top-performance models are ill-suited for cold, wet roads. Likewise, using special winter tires year round are going to cost you some safety (and a lot of tread wear) if you try to use them in hot weather. Buying your tires from an experienced professional is your best bet. However, learning how tires are rated and labeled can help you in selecting a tire that is appropriate and safe for your vehicle.

- **Register your tires.**

This one’s extremely important, and too often skipped or overlooked. The recall system for tires has garnered a lot of attention and deserved criticism over the past several years. The recall system is extremely ineffective in alerting consumers that their tires are being recalled for safety issues. The NHTSA issues about 20 tire recalls per year, and if you register your tires’ details (to receive e-mail recall notifications), you’re far less likely to miss a crucial safety issue.

- **Tire pressure.**

Check your tire pressure often, at least once a month and before each long trip. The best time to check your tire’s pressure is when the tire is “cold”, at least 3 hours after driving. You can find the proper pressure for your vehicle’s tires in the owner’s manual or on the vehicle’s placard located on the driver’s doorjamb for the car. Do not determine the

proper air pressure for your tire from the sidewall of the tire. And, when in doubt, ask a professional. A recent national survey revealed that 55 percent of consumers did not know the correct tire pressure recommendation or where to find it.

- **Tires don’t just wear; they age.**

I have written about the dangers of aged tires on numerous occasions. Most tires age to a point at which you can have ‘safe’ tread left yet, the tire is no longer safe. A tire might look brand new and might not have ever been used, but research and testing shows that when tires reach six years, those tires can break down from the inside, de-treading upon use and causing fatal accidents. Don’t wait for a blowout or tread separation before you decide to replace the tires on that older vehicle that you only take out once in a while. And yes, spares age, too.

- **Take Care of Your Spare.**

Your vehicle’s spare tire is like insurance. Something you forget about until it is needed. However, you need to check your spare tire to assure that it is properly inflated and ready to go when needed. Perhaps the most important thing to check is your spare tire’s age. It is very common to operate a vehicle which is five or six years old. If the spare is original equipment, then it is expired, dangerous to operate and should be removed from your vehicle.

- **Study your tread.**

While damaged or improperly inflated tires that go too long unchecked can lead to suspension, steering, or driveline issues, the opposite can be the case, too, and serious safety issues with your own vehicle can show their first signs through your tires. Most states require your tire tread depth be at least 2/32. Beyond the standard treadwear checks, like “the penny test,” look for fraying, scalloping, cupping, or any kind of uneven wear and take it as a life-saving warning sign. Signs of tread “issues” can be a good indicator that your tire needs to be replaced.

- **New tires on the rear.**

For whatever reason, sometimes we replace only two tires at a time. It



is important to understand that when you purchase only two tires, they should be placed on the rear-axle for safety reasons. Your tire service center should know to do this, as tire manufacturers' have recommended this practice for over a decade. However, there are several service centers that ignore this basic safety procedure which you need to be familiar with and demand.

By following these few guidelines, you can help to assure that your tires are safe and that your next road-trip will be a safe one. We have seen so many serious vehicle crashes with a defective tire being the culprit, that we know how important following these tips are. Rick Morrison, a lawyer in our firm's Personal Injury/Products Liability Section, handles tire litigation for the firm. If you need more information on the tire litigation, contact Rick at 800-898-2034 or by email at [Rick.Morrison@beasleyallen.com](mailto:Rick.Morrison@beasleyallen.com).

## XI. MASS TORTS UPDATE

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### **FRESENIUS TO PAY \$250 MILLION TO SETTLE GRANUFLO AND NATURALYTE LAWSUITS**

A day after a bellwether trial was to begin, Fresenius Medical Care announced it had reached a \$250 million global settlement with the Plaintiffs in the multidistrict litigation (MDL) lawsuit alleging the company's dialysis products GranuFlo and NaturaLyte caused life-threatening side effects. If approved by the court, this settlement would resolve more than 11,000 lawsuits that are in the MDL. In order for the settlement to be final, however, 97 percent of the Plaintiffs will have to agree to the terms by July 2016. Frank Woodson, a lawyer in our firm's Mass Torts Section, had this to say about the global settlement:

*This is a good resolution for the people who were injured, or who lost someone they cared about as a result of Fresenius' failure to warn physicians and patients about the dangers associated with these products. This company had a responsibility to put the care of its patients as its first priority, and obviously it failed to do that.*

Fresenius' GranuFlo and NaturaLyte are administered to patients undergoing dialysis to help balance electrolytes in the blood. Plaintiffs in the multidistrict litigation claimed that the products could cause a buildup of bicarbonate in the blood, increasing the risk of an electrical imbalance in the body that could lead to sudden cardiac arrest, a fatal condition in which the heart stops beating. The Plaintiffs alleged that Fresenius was aware of the heart risks with its dialysis concentrates, but withheld this information from the public. Fresenius is the world's largest provider of dialysis products and services, and generated about \$16.7 billion in profits for 2015. The company claims that it doubts the science behind the warnings; however, it agreed to settle the MDL litigation. In 2013, the lawsuits were consolidated in Massachusetts by the U.S. Judicial Panel on Multidistrict Litigation. The MDL later absorbed suits filed by patients, relatives and the Attorneys General of Louisiana and Mississippi. Last year the states' cases were remanded to state court by a U.S. district judge. If you need more information on this litigation contact Frank Woodson or Matt Munson, lawyers in our firm's Mass Torts Section. They can be contacted at 800-898-2034 or by email at [Frank.Woodson@beasleyallen.com](mailto:Frank.Woodson@beasleyallen.com) or [Matt.Munson@beasleyallen.com](mailto:Matt.Munson@beasleyallen.com).

Sources: Law360.com

### **AN UPDATE ON THE RISPERDAL LITIGATION**

We mentioned the Risperdal litigation in the Johnson & Johnson section of this issue and I am now going to expand the discussion of the litigation. Beasley Allen lawyers continue to pursue Risperdal claims on behalf of individuals who have been injured as a result of taking Risperdal, a brand name drug manufactured by Janssen Pharmaceuticals, Inc., a division of Johnson & Johnson. Risperdal went on the market in 1993 after receiving approval from the FDA for the treatment of schizophrenia. In 2003, the drug was approved for short-term treatment of acute manic/mixed episodes associated with Bipolar I Disorder in adults.

Until 2006, the drug was not approved for any indication to treat minors. In 1997, the FDA denied a request by Janssen for a pediatric indication for the drug. Despite this denial, Janssen marketed the drug for the treatment of depression, anxiety, Attention Deficit Disorder (ADD), Attention Deficit and Hyperactivity Disorder (ADHD), conduct disorder, sleep disorders, anger manage-

ment and mood enhancement/stabilization.

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

In January 2015, the trial judge in Philadelphia ruled that the statute of limitations under Pennsylvania law began to run as of June 30, 2009, for individuals that used Risperdal before October 2006. The judge entered a case management order that applied the January 2015 ruling to many Risperdal cases pending in Philadelphia. This ruling has been appealed and is now pending before a Pennsylvania appellate court. The January 2015 ruling may not bar claims for injuries that arose after June 30, 2009, provided the lawsuit was filed within two years of the discovery of the injury.

On Dec. 11, 2015, a Philadelphia jury awarded \$500,000 to a Plaintiff who had taken Risperdal as a minor. When the Plaintiff started taking Risperdal, the warning label indicated that gynecomastia was a rare side effect and only occurred in less than one in 1,000 patients. In 2006, the Risperdal label was updated to indicate that there was a 2.3 percent rate of gynecomastia in minors taking Risperdal. The Philadelphia jury rejected Janssen's argument that the Plaintiff's gynecomastia resulted from puberty instead of Risperdal.

To date, there have been four Risperdal trials in Philadelphia. In three of the trials, the juries have awarded damages against Janssen. In the other trial, the jury found that the warnings provided by Janssen were not adequate, but did not find that Risperdal usage caused that Plaintiff's injuries.

On Jan. 11, 2016, the United States Supreme Court refused to review a verdict against Janssen in a case filed by the State of South Carolina. That state's Supreme Court affirmed a substantial verdict against Janssen in favor of the State of South Carolina arising out of deceptive marketing of Risperdal.

If you or a loved one has suffered an injury as a result of taking Risperdal, or you need more information on the

subject, contact James Lampkin, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at James.Lampkin@beasleyallen.com.

#### **AN IMPORTANT JURY VERDICT IN A TRANSVAGINAL MESH CASE**

Earlier this year, a Philadelphia jury unanimously decided in favor of the Plaintiff in the case of *Carlino v. Ethicon*. The jury awarded Sharon Carlino \$3.5 million in compensatory damages and another \$10 million in punitive damages against Johnson & Johnson's subsidiary Ethicon for faulty manufacturing. According to the complaint, Ms. Carlino had Ethicon's transvaginal mesh device, marketed as Gynecare TVT, implanted on Aug. 18, 2005. Since then, medical evidence supports her claim that the device eroded inside of her, causing organ damage and causing her permanent pain. She underwent surgery to remove the mesh twice. She filed suit on June 26, 2013.

But Ms. Carlino is not the only woman to claim that Ethicon's poor design and lack of quality is causing immense pain and injury. To date, more than 74,000 cases are waiting for trials in seven multi-district litigations (MDLs) located in the Southern District of West Virginia. Ms. Carlino's case against Ethicon may influence more than 31,000 other cases filed against Ethicon alone. The other 45,000 cases are divided among other manufacturers: Boston Scientific, Coloplast, C.R. Bard, Cook Medical and Neomedic. *Carlino v. Ethicon* is the latest in a long line of TVM lawsuit verdicts and settlements already reached. It is estimated more than 11,700 cases have been resolved. The verdict in *Carlino v. Ethicon* represents one of the higher transvaginal mesh claims verdicts. Recent decisions have included a \$100 million verdict in Delaware, which included \$75 million in punitive damages; and a \$1.2 million verdict in Texas.

Beasley Allen lawyers Leigh O'Dell and Andy Birchfield will try a transvaginal case beginning on June 6 against Boston Scientific. Leigh serves on several of the plaintiff steering committees in the pending MDLs. If you have questions about this litigation, contact Leigh, Andy or Chad Cook, at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com, Andy.Birchfield@beasleyallen.com, or Chad.Cook@beasleyallen.com.

Source: Drugjustice.com

#### **THE FDA NOW REQUIRES A BLACK BOX WARNING FOR ESSURE**

The FDA announced last month that it will require Bayer to add a Black Box Warning to the Essure product information. Essure is Bayer's permanent birth control implant. A Black Box Warning is the strongest warning the FDA requires and is used to highlight when there is reasonable evidence that a drug or device causes a serious risk of injury. The FDA will also require women to sign a multi-page patient checklist and informed consent form outlining the risks associated with the Essure device prior the Essure implant procedure. Additionally, the FDA has directed Bayer to conduct a post-market surveillance study to evaluate the risks of Essure in a real-world setting. These actions came after FDA received thousands of injury complaints from women using Essure.

Because of the possibility of federal preemption issues, unfortunately many lawyers have been hesitant to file Essure lawsuits. The recent regulatory action, however, will likely result in these being increased interest in the litigation with a renewed focus on ways to defeat preemption. While the United States Supreme Court has been very clear that nothing in the Medical Device Act prevents a state from providing a traditional damages remedy for violations of common-law duties when those duties parallel federal law, the courts have been mixed as to the types of claims that are parallel and survive preemption.

If you need more information on the Essure litigation, contact Frank Woodson, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com.

#### **SUIT FILED AGAINST BAYER OVER ESSURE SAFETY**

More than 30 women contending that Essure, Bayer's sterilization device mentioned above, caused them severe health problems, including abdominal cramping, migraines and abnormal menstrual bleeding, have filed one of the first Essure lawsuits against Bayer Corp. Some three dozen Plaintiffs have accused Bayer Corp. and Essure's original manufacturer Conceptus Inc.—now a Bayer unit called Bayer Essure Inc.—of misleading federal regulators by downplaying patients' reports of injuries allegedly caused by the Essure coils. The suit was filed on March 17 in Missouri state court and came before the FDA took action

relating to the warning issue. The FDA, as I mentioned above in this issue, now requires Bayer to apply a "black box" warning to the devices.

The coil inserts, which comprise segments made of stainless steel and a nickel-titanium alloy, are implanted into both fallopian tubes, where they trigger tissue growth over time to block eggs from traveling to the uterus. The Plaintiffs claimed in their suit that from at least May 2014 to late January of this year, Bayer received more than 460 complaints about the coils breaking. In separate reports by Bayer to the FDA relating to the complaints, each of those events contained the allegedly misleading line that "single cases have been reported of Essure breakage, when in fact there are hundreds." The Plaintiffs stated in their complaint:

*Despite knowing about hundreds of instances of the Essure device breaking, Bayer has repeatedly reported to the FDA that only single cases exist. Therefore, when multiple FDA analysts read separate reports that each state 'single cases have been reported of Essure breakage,' it causes each individual analyst to falsely believe that instances of device breakage are extremely rare.*

Essure, which the FDA approved in 2002, is a so-called class III medical device, which goes through a more rigorous approval process. The agency has said that as part of its requirements for granting pre-marketing approval for the device, it required Conceptus to continue studying it after the approval to determine long-term effects on its clinical trial patients and to assess how well new doctors were able to insert it.

The FDA has said that despite the more than 5,000 complaints on Essure it has received since its approval, it is still a compelling option since it is the only sterilization procedure for patients with wombs that doesn't require any incision. The other sterilization process, known as tubal ligation, is a surgery that involves tying both fallopian tubes to prevent eggs from traveling from ovaries into the uterus.

The Plaintiffs are represented by Eric D. Holland and R. Seth Crompton of Holland Law Firm; Lewis O. Unglesby, Lance C. Unglesby, Jason R. Williams, Logan H. Greenberg, Nicole E. Burdett and Adrian M. Simm Jr. of Unglesby and Williams; Wells T. Watson, Jeffrey T. Gaughan and Zita M. Andrus of Baggett McCall Burgess

Watson & Gaughan; and Richard J. Arsenault of Neblett Beard & Arsenault. The case is in the Circuit Court for the City of St. Louis, Missouri.

Source: Law360.com

## XII. INSURANCE AND FINANCE UPDATE

### **UNUM GROUP TO PAY \$46 MILLION IN LONG-TERM CARE BENEFITS LAWSUIT**

A California federal judge gave preliminary approval last month to the \$46 million settlement reached by the Unum Group with long-term care policyholders. It had been alleged just the policyholders were cheated by the life insurer out of increases to their medical insurance benefits through flawed calculations. U.S. District Judge Dale S. Fischer's ruling brings to a near close a two-and-a-half-year-long class action on behalf of individuals who bought long-term care insurance with Unum, but were denied maximum yield on benefits because of the way the company applied an annual inflation increase and how it "set the clock" on a policy's anniversary date.

A spokesman for Unum, in a statement to Law360, said that the settlement involves the claims of only a certain segment of the Portland, Maine-based life and disability insurance provider's policyholders. The proposed settlement arose out of a May 2013 class action lawsuit brought in California state court by Ruben Don. The suit alleged breach of contract claims and it sought injunctive relief on the basis that the company allegedly shortchanged him of \$174,000 for his lifetime maximum benefit amount.

The case was later removed to California federal court, where Ruben's son, Michael Don, was named executor of his estate and listed as a named Plaintiff in the suit. He was joined by fellow now-class representative Tamara Pelham as special administrator of the estate of Leroy Little, and Carolyn Jan Little as individual.

The Plaintiffs and Unum filed a motion for settlement and a stipulation to vacate the Plaintiffs' motion for class certification in November, and submitted their proposed agreement to the court in February. The total settlement amount was calculated to be worth \$50.6 million, but according to a declaration by the Plain-

tiffs' actuary expert that figure was adjusted for present day value to \$45,988,014.

The amount of the settlement includes \$9.6 million in attorneys' fees to class counsel, payouts to two separate nationwide subclasses and service award payments totaling \$60,000 to class representatives. The payout to the first settlement subclass is an estimated \$18.6 million for approximately 11,867 Unum policyholders who had a long-term care policy with Unum, filed a claim that was covered, then were paid benefits based on the policy's effective date rather than policy date to calculate for any increases.

An additional 1,163 policyholders who were underpaid by Unum will be paid \$1.8 million under the agreement, and another \$1.8 million overpayment to 3,069 Unum policyholders will not be clawed back by the company, according to the terms of the settlement. A second settlement subclass consists of policyholders who have or may in the future reach their lifetime maximum benefit amount and in which Unum had applied or will apply an annual inflation increase to their remaining lifetime maximum benefit amount rather than the full lifetime maximum benefit amount. The settlement calls for this subclass to receive 1.5 months of additional benefits estimated at \$18.6 million, an amount downward adjusted by an expert to reflect present value.

Based on the contentions of a third subclass who alleged that Unum did not provide an exact replica of their original policy statements when they requested them, the company has agreed to provide exact copies of the policies moving forward. The judge set a fairness hearing date on June 27 in Los Angeles federal court. The class Plaintiffs are represented by Allan Shenoi of Shenoi Koes LLP, and Christopher C. Vader. The case is in the U.S. District Court for the Central District of California.

Source: Law360.com

### **AON FOUNDER RYAN CLAIMS IT STARTUP CHEATED HIM OUT OF MILLIONS**

Aon Corp. founder Patrick G. Ryan claims in a lawsuit that he was cheated out of hundreds of millions of dollars when Mu Sigma Inc. downplayed its own growth prospects in a ruse to buy back his investment company's early stake in the fast-growing IT-services firm. Mu Sigma and its founder were accused in the lawsuit of "grossly misleading" Ryan's Walworth Investments LLC six years ago

to redeem 17.5 percent ownership of the data-analytics outsourcing startup. The complaint states that by portraying Mu Sigma with dim prospects at a time when it was actually thriving, founder Dhiraj Rajaram schemed "to buy out a significant shareholder at an artificially low price."

Walworth says it paid \$1.5 million in 2006 when Mu Sigma was new and desperate for capital and that the Ryan family agreed to accept \$9.3 million from the IT firm to buy back the private shares in 2010. The complaint alleges this deal was reached after Rajaram put "deceitful" pressure on Ryan's son, Patrick Ryan Jr., telling him that Mu Sigma had limited growth potential because it was on the verge of losing its biggest clients. Chicago-based Mu Sigma said in a statement that the suit has no merit.

Among the allegations in the complaint is a claim that Rajaram's zeal to become "a billionaire Indian-American entrepreneur" drove him to "hoodwink" one of his earliest backers. Walworth also alleges the motivation sprung partly from his religious beliefs. It's alleged in the complaint:

*This perverse mindset—which turned traditional fiduciary duty principles on their head—had its roots in Rajaram's devotion to the Hindu deity Shiva the Destroyer, whose core philosophy called for destroying or selectively abandoning the past. Only in hindsight did it become clear that Rajaram's true objective was to gain back the ownership that he had been forced to share, and that, far from tapering off, Mu Sigma was growing geometrically.*

Mu Sigma received \$133 million in funding from Sequoia Capital and General Atlantic LLC in 2011. Rajaram told Bloomberg News in April 2015 that annual revenue was at about \$250 million and that he aimed to reach \$1 billion in sales by 2022 while growing a six to seven percent rate every month. Rajaram owned 45 percent of Mu Sigma at that time.

Mu Sigma competes with outsourcing giants Cognizant Technology Solutions Corp., Tata Consultancy Services Ltd. and dozens of startups in helping customers get answers from the increasing quantities of data they collect. TCS, the world's largest IT-services firm, earned about \$15 billion in 2015 revenue, which is about 60 times Mu Sigma's sales for that year. Mu Sigma employs more than 3,500 people globally and the Hurun

Report in Luxembourg estimated in September that Rajaram's wealth was growing at about 600 percent a year. In February, Rajaram was succeeded by his wife as chief executive officer of Mu Sigma. He remains as its chairman.

Walworth alleges in the complaint that with the support a decade ago from Ryan, who is a part-owner of the Chicago Bears professional football team, Mu Sigma was able to line up other backers including Microsoft Corp., Wal-Mart Stores Inc. and Dell Inc. In October 2010, months after telling Ryan's son that Mu Sigma wouldn't be the success he hoped for, a Chicago newspaper reported that Rajaram said he was nearing his goal of building "the world's largest applied-mathematics company." Walworth is asking a judge to order Mu Sigma to return the 7.76 million shares from the 2010 buyback or to pay damages equal to their relative value, including interest. This most interesting case is in the Circuit Court of Cook County, Illinois (Chicago).

Source: Law360.com

## XIII. EMPLOYMENT AND FLSA LITIGATION

### **NORTH CAROLINA THERAPIST AWARDED \$3.6 MILLION IN WRONGFUL TERMINATION CASE**

A North Carolina therapist who said she was fired after reporting patient neglect was awarded \$3.6 million last month by a Superior Court jury in Buncombe County. The Plaintiff, Laura Haas, was fired by mental health care provider CooperRiis in 2009. This award was said to be the largest jury verdict in North Carolina for an individual in a wrongful termination case.

Ms. Haas alleged that CooperRiis fired her after she complained about illegal administration of medication, overdoses because of self-administration of medication and problems with prescription refills. CooperRiis board said in a statement that the company will not appeal the decision. The company, according to the statement, has adopted new employment policies to help avoid similar situations.

Source: Insurance Journal

### **PHARMACEUTICAL COMPANY AGREES TO \$8.2 MILLION EQUAL PAY ACT SETTLEMENT**

Daiichi Sankyo (Sankyo), a Japanese Pharmaceutical company, has agreed to pay \$8.2 million to approximately 1,500 female sales representatives who claimed that they were discriminated against by receiving lower pay than their male counterparts in violation the Equal Pay Act, hereinafter referred to as the "Act."

In 2013, Sara Wellens and five other sales representatives filed suit against Sankyo for violating Title VII, the California Fair Employment and Housing Act and the Act. The lawsuit alleged that Sankyo pays female sales employees less than male employees for doing the same work; promotes or advances female sales employees at a slower rate than male sales employees; treated pregnant employees and working mothers of young children adversely compared to non-pregnant employees, male employees, or non-caregivers; and discriminated against women in the workplace.

The suit was broken into two classes: California employed sales representatives over a four-year period and a similar group of women outside California. Payment under the settlement will be as follows: Sankyo will pay \$3.7 million of the settlement to all of those women in proportion to how much they worked during the four-year period; and \$926,200 to those Plaintiffs with claims for gender, pregnancy and caregiver discrimination. Sankyo also agreed to make changes to its employment policies and must hire an independent HR consultant. Of the settlement, \$3 million will go to attorneys' fees and costs as well as settlement administration and service payments to class representatives.

Larry Golson, a lawyer in our Consumer Fraud and Commercial Litigation Section, handles this type litigation for our firm. If you have been the victim of discriminatory pay practices, or have any questions about the subject, contact Larry at 800-898-2034 or email Larry. Golston@beasleyallen.com.

### **JURY SIDES WITH TACO BELL WORKERS ON SKIPPED-BREAK WAGES**

A California federal jury has found that Taco Bell underpaid its workers when they missed their meal breaks in violation of California law. The class was awarded nearly \$496,000. However, the jury found no issue with the chain's other rest and meal break policies. A class of workers had claimed that from

2003 through late 2007 the fast food restaurant maintained a policy of only paying 30 minutes worth of wages when an employee skipped a meal break, rather than the full hour California law required. After a three-week trial that began in late February, the jury agreed, finding that roughly 134,000 class members were underpaid and awarding the group \$495,913 in unpaid wages.

Source: Law360.com

## XIV. PREMISES LIABILITY UPDATE

### **ERIN ANDREWS AWARDED \$55 MILLION IN SUIT AGAINST HOTEL AND A VIDEO STALKER**

Sportscaster Erin Andrews was awarded \$55 million last month by a jury in her high profile lawsuit. Nude videos of Ms. Andrews had been posted by Michael David Barrett on the Internet in 2008. The suit was filed against West End Hotel Partners and Barrett. West End Hotel Partners owns and operates the Nashville Marriott at Vanderbilt University. Barrett has admitted to using a hacksaw to alter the peephole on Ms. Andrews' hotel room. He then used his cellphone to film her naked.

The jury ruled that Barrett was responsible for 51 percent of the blame in the case. The two hotel companies were ordered to pay the remainder of the damages, amounting to almost \$27 million. Ms. Andrews, who testified that the incident continues to haunt her more than five years later, said in her trial testimony:

*This happens every day of my life. Either I get a tweet or somebody makes a comment in the paper or somebody sends me a still video to my Twitter or someone screams it at me in the stands and I'm right back to this. I feel so embarrassed and I am so ashamed.*

Ms. Andrews was staying at the hotel while covering a college football game for ESPN. It was proved that an employee at the hotel allowed Barrett to be placed in an adjoining room to Ms. Andrews after he asked to do so. Barrett was convicted of stalking Andrews in a criminal case and was sentenced to two and a half years in prison.

Source: Associated Press

## **\$5.2 MILLION AWARDED IN FATAL TENT COLLAPSE IN ST. LOUIS**

A St. Louis jury awarded \$5.2 million last month in a wrongful death and personal injury lawsuit filed over a fatal tent collapse at a sports bar near Busch Stadium. The *St. Louis Post-Dispatch* reported that jurors awarded \$2.4 million to the family of 58-year-old Alfred Goodman of Waterloo, Ill., who was killed when wind gusts of up to 50 mph knocked over a tent beside Kilroy's Sports Bar on April 28, 2012. The jury also awarded \$2.8 million to be divided among seven others injured in the collapse, who joined Goodman's family in the lawsuit. Negligence was alleged on the part of bar owners. The defense asserted that "the storm came on so suddenly there was no time to warn patrons." The jurors apparently felt there were early storm warnings that were ignored and that there had been adequate time for a warning.

Sources: Associated Press and *St. Louis Dispatch*

## **FEDERAL OFFICIALS ANNOUNCE PLAN TO STUDY HEALTH EFFECTS OF CRUMB RUBBER**

In response to increasing pressure from consumer safety advocates and two U.S. Senators, the federal government has announced a plan to release a comprehensive study examining the health effects of exposure to tire crumb rubber, which is used as cushion on artificial athletic fields throughout the United States. The Environmental Protection Agency (EPA), the Centers for Disease Control (CDC), and the U.S. Consumer Product Safety Commission (CPSC) will seek to fill important data and knowledge gaps left in existing studies, characterize constituents of recycled crumb rubber used on fields, and determine the toxicity level it poses to children and athletes.

Current CPSC Chair Elliot Kaye recently stepped back from the agency's previous position that crumb rubber posed no significant health risk. Since his statement, increased scrutiny has been aimed at federal agencies to take a position on the issue because the studies completed to date have been inconclusive. The plan will comprehensively examine the issue and report preliminary findings at the end of 2016. Unlike previous studies that were limited in scope, the Action Plan will do the following:

- Test different types of crumb rubber to obtain an understanding of all

chemicals contained therein and evaluate the health risks associated with exposure to those chemicals.

- Determine the rate of absorption into the body and evaluate the cancer and non-cancer toxicity of key crumb rubber constituents.
- Examine various exposure scenarios (absorption via cut, inhalation, or accidental ingestion) to assess the nature, duration, and frequency of exposure.
- Determine how exposure to different playing fields affects health.

This study, along with one scheduled to be completed in June 2018 by a state agency in California, should be adequate reason for the federal government to take a definitive position on the topic. Commensurate with the rise in the use of crumb rubber playing fields, is an increase in the number of athletes, especially goalkeepers, being diagnosed with different forms of cancer. The federal government owes it to the athletes and to our children who visit playgrounds with these substances to know whether they are safe. Hopefully, this study will motivate both the government and the manufacturers to take the steps necessary to remedy the existing problems.

Sources: EPA and NBC News

## **\$109 MILLION VERDICT RETURNED AGAINST CONAGRA IN SUIT OVER PLANT EXPLOSION**

A Nebraska state jury awarded \$108.9 million to Jacobs Engineering Group Inc., last month, finding ConAgra Foods Inc. negligent and responsible for causing a 2009 North Carolina plant explosion that killed four workers. After a four-week trial and less than four hours of deliberation, the jury found that Omaha, Nebraska-based ConAgra and a company it controlled, Energy Systems Analysts. Inc., negligently caused the natural gas explosion at a Slim Jim factory in North Carolina.

The jury determined that ConAgra was 70 percent responsible for the accident with ESA being responsible for the remainder.

Jacobs, which had a contract with ConAgra to perform services at the plant, filed the breach-of-contract suit seeking indemnification from ConAgra in connection with \$108.9 million Jacobs paid to settle various wrongful death and personal injury suits. A Nebraska state judge had previously determined that the agreement signed by the parties required

ConAgra to compensate Jacobs if ConAgra was found to be negligent.

The accident occurred during the installation of a new gas-fired industrial water heater that was manufactured by ESA, according to federal regulators. The explosion caused four deaths and injured 67 people, including three with life-threatening burns and one that required an amputation. ConAgra had asserted that it wasn't responsible for the explosion and that ESA's removal of a sediment trap from a gas line caused the blast and that it didn't control ESA. ConAgra also claimed that the settlements paid by Jacobs were not for reasonable amounts and were not made in good faith.

The jury cleared Jacobs, determining that it settled the various lawsuits in good faith and that the settlement amounts were objectively reasonable. A ConAgra spokesman said the company plans to appeal. The case is in the Nebraska District Court of Douglas County.

Source: Claims Journal

## **XV. WORKPLACE HAZARDS**

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### **COMPANY IN ALABAMA FACES MORE OSHA VIOLATIONS AFTER 2015 EXPLOSIONS**

The Occupational Safety and Health Administration (OSHA) has issued citations against pyrotechnics and special effects company Ultratec in Owens Cross Roads, Ala. Ultratec, which was cited last year for 13 serious and one other-than-serious safety violations after a February 2015 explosion killed two workers, now faces four repeated, six serious and five other-than-serious violations, which equal \$72,688 in proposed penalties. OSHA, a division of the U.S. Department of Labor, said it began an investigation after it learned of two explosions at the Madison County plant on Oct. 1, 2015. The repeated citations relate to the employer because of its failure to:

- Document that safety equipment complies with generally accepted engineering practices for the manufacture and storage of fireworks.
- Update the process hazard analysis at least every five years.

- Develop and implement written operating procedures for all pyro-technic products; and
- Implement procedures to manage changes to the production process.

The serious citations relate to the employer's failure to:

- Compile process safety information for the building relief system.
- Develop, document and utilize specific procedures to prevent machinery from starting up during maintenance and servicing.
- Update process safety information to address equipment changes.
- Conduct a pre-start safety review after significant modifications were made to production buildings.

Ramona Morris, OSHA's area director in Birmingham, had this to say in a statement:

*Ultratec continues to endanger its employees, as it has not addressed previously identified safety hazards and deficiencies with its process safety management system. Fortunately, no one was injured in these incidents, but management must take immediate action to address safety hazards before an employee is seriously injured or killed.*

OSHA said Ultratec, which has a presence in Germany and Canada, employs more than 40 workers in Alabama. Ultratec has 15 business days to comply, request an OSHA conference or contest the findings before an independent review commission.

Source: AL.com

#### **ALABAMA COMPANY CITED FOR WILLFUL SAFETY VIOLATIONS BY OSHA**

An Alabama-based contracting company faces more than \$60,000 in fines levied last month by the Occupational Safety and Health Administration (OSHA). D&J Enterprises, located in Opelika, was issued one willful and one repeated OSHA safety violation by the U.S. Department of Labor. OSHA said it began an inspection of D&J Enterprises in mid-January as part of its National

Emphasis Program on trenching and excavation.

The willful violation involves D&J Enterprises allowing employees to work in an excavation up to 10 feet deep without cave-in protection. The workers were installing new water and sewer lines. The repeated citation was given for D&J failing to provide information and training to employees to recognize and avoid cave-in hazards. OSHA said it found trenching hazards and failure to provide required hazard training to employees at D&J during an inspection in October 2015. The citation was originally labeled "willful," but was changed to "serious" as part of a settlement with D&J. Joseph Roesler, OSHA's area director in Mobile, in a statement said:

*It concerns us that, after settling an October 2015 inspection that found dangerous trench hazards, D&J Enterprises continues to put workers at risk of serious injury or death. The employer has the responsibility for ensuring a safe and healthful job site.*

At press time, D&J Enterprises had not commented on the recent citations, which came with the proposed fine of \$64,350. The company has 15 business days to comply, request an OSHA conference or contest the findings before an independent review commission.

#### **OSHA CITES BIOFUEL COMPANY OVER HYDROGEN GAS EXPLOSION**

The U.S. Occupational Safety and Health Administration (OSHA) has fined a Geismar biodiesel plant \$70,000 and has cited a biofuels company over a September hydrogen gas explosion. OSHA also cited Renewable Energy Group (REG), an Iowa-based biofuels producer, with three willful safety violations over the company's alleged failure to ensure that a flammable chemical was no longer in a plant pipeline that was under repair. An OSHA field operations manual states that a willful violation means a company demonstrated disregard or indifference to employee safety. A REG spokesman says the company disagrees with OSHA's findings and the classification of the citation. The company will contest the citation. The explosion, which occurred on September 3, injured four workers.

Source: Associated Press

#### **GARLOCK OWNER REACHES \$480 MILLION SETTLEMENT OF ASBESTOS CLAIMS**

The owner of Garlock Sealing Technologies LLC has agreed to pay \$480 million to settle with current and future asbestos claimants. A new bankruptcy plan, if approved, would free the pipeline sealer and its related entities from the claims over its gaskets and other equipment for good. EnPro Industries Inc. reached an agreement with the committees representing current and future asbestos claimants in North Carolina bankruptcy court to create a trust that would eventually have \$480 million in it—\$400 million up front, with another \$80 million added before the first anniversary of the agreement—to resolve the claims by people who say they were harmed by Garlock's products.

The "comprehensive" agreement would permanently resolve current and future claims against Garlock and Coltec Industry Inc., the direct parent of Garlock and direct subsidiary of EnPro, and protect EnPro from facing the claims, according to the company. The settlement must be approved by the claimants, the bankruptcy court and the district court overseeing the case, EnPro said.

Barring any unexpected objections to the plan and assuming at least 75 percent of asbestos claimants will be in favor of it, the company estimates the plan could be approved by summer 2017. "This comprehensive, consensual settlement will bring us full, complete and permanent relief from asbestos litigation and will achieve complete and total peace with the asbestos Plaintiff's bar," EnPro CEO Steve Macadam said in a statement.

According to Macadam, the settlement will also shave off the expenses associated with the asbestos claims resolution process, which cost the company about \$25 million in 2015. EnPro said the present value, after tax, of the contributions to the trust would be \$284 million. The company has also promised up to \$17 million, before tax, to resolve current and future Canadian asbestos claims, but negotiations for that arrangement are still underway, EnPro said.

In January 2015, Garlock had said it agreed to a \$358 million settlement with future asbestos claimants, a group that had broken ranks with the rest of the claimants, court records show. The current claimants said at the time that the offer was "far from sufficient." The personal injury asbestos claimants objected in September to Garlock's request that 13 firms provide information on payments to thousands of non-

mesothelioma claimants, telling a North Carolina bankruptcy court that such discovery would be “overkill.”

The committee is represented by Trevor W. Swett III, James P. Wehner and Elihu Inselbuch of Caplin & Drysdale Chtd. and Travis W. Moon of Moon Wright & Houston PLLC. The case is in the U.S. Bankruptcy Court for the Western District of North Carolina.

Source: Law360.com

#### **JURY AWARDS \$20.6 MILLION TO MISSOURI WOMAN EXPOSED TO CARCINOGEN**

A southwest Missouri woman has been awarded \$20.6 million in damages after federal jurors found that a company exposed her to a toxic chemical that left her with permanent disabilities. The jury hearing Jodelle Kirk’s case returned a verdict consisting of \$7.6 million in actual damages and \$13 million in punitive damages. At issue in the case was the conduct of FAG Bearings, which is a subsidiary of Schaeffler Group North America. Jurors heard testimony that the company dumped trichlorethylene, also known as TCE, on its property and that the known carcinogen seeped into the ground, nearby creeks and private wells. The plaintiff was diagnosed with autoimmune hepatitis in 2002 when she was 14 years old. FAG Bearings had previously blamed two other companies for the contamination.

Source: Insurance Journal

## **XVI. TRANSPORTATION**

#### **RECENT REPORT RECOGNIZES TRUCK DRIVER FATIGUED DRIVING PROBLEM**

Each year there are as many as 800 roadway fatalities caused by overly fatigued truck and bus drivers. Insufficient sleep decreases a commercial motor vehicle (CMV) driver’s level of alertness while driving. This problem is many times caused by the irregular schedules and economic pressures placed on CMV drivers by the trucking company that employs them. Most truck drivers don’t get paid by the hour, but instead they are paid by the mile or load. That creates an economic incentive to either be forced to drive over the hours of service limits or push themselves to do so. Lawyers in our firm recently had a

case where a witness—a former employee of the trucking company—testified that the company forced the drivers to deliver loads that were impossible under the Federal Motor Carrier Safety Administration (FMCSA) hours of service limitations.

A recent report by the National Academies of Sciences, Engineering and Medicine determined that additional research was needed to determine ways to minimize the crash risk associated with fatigued driving. The committee that conducted the study and wrote the report found that substantial data gaps limit understanding of the factors that affect the health and wellness of CMV drivers. The FMCSA has several policies and programs to improve highway safety involving large trucks and buses that are based on the current scientific understanding of operator fatigue, its causes, and its consequences. For example, hours-of-service (HOS) regulations for truck and bus drivers specify the maximum number of hours drivers can work in a day and in a work week, based on the assumption that drivers will have enough time to obtain adequate sleep between shifts, and therefore will be more alert while driving. However, HOS rules can only limit hours spent working; they cannot require drivers to get adequate sleep and rest while off duty.

The FMCSA also requires medical examinations of CMV drivers; however, the committee concluded what our firm has seen in numerous cases. That is these medical exams have very limited effectiveness in determining drivers who are prone to excessive fatigue due to sleep apnea or other medical reasons. The report correctly calls for research on whether carriers are taking advantage of programs that are being offered to detect and treat CMV drivers that deal with sleep related medical conditions like sleep apnea. The study was sponsored by the U.S. Department of Transportation.

All of us at Beasley Allen support efforts to make our roads safer and the problem discussed above can be solved. If you have any further questions about truck accidents or specifically about fatigued driving, contact Chris Glover, a lawyer in our firm’s Personal Injury/Products Liability Section, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com.

#### **REDUCED VISIBILITY A LEADING CAUSE IN MOTOR VEHICLE ACCIDENTS**

It’s well known that adverse weather conditions have an effect on driving by posing serious challenges in visibility, with 16 percent of crash fatalities recorded over a 10-year period having to do with weather conditions at the time. There hasn’t been much research conducted involving the prevalence of weather conditions on accidents in overall national highway safety statistics. The American Automobile Association (AAA) has released a report consisting of 23 years of national data on fatal crashes, and 19 years of police-reported crash data having to do with fog and smoke.

Adverse weather, such as fog, snow, rain, wind and smoke, results in reduced visibility for the driver that ends up impacting the driver’s stopping time in many cases. In many cases, drivers are aware that these weather conditions create hazardous driving situations, yet many fail to recognize that reduced visibility from unfavorable weather plays a significant role. Drivers must be aware of weather related road conditions. To help ensure the safety, the following tips will be helpful when encountering adverse weather conditions: reduce speed; maintain a safe distance from other cars; and don’t text or engage in other distracting behaviors.

When traveling in rain, snow, fog or windy conditions, it is more important than ever for drivers to remain aware of their surroundings and to proceed with caution. Simple precautions can help in the prevention of accidents and possibly saving a life.

Source: Personalinjury.com

#### **AUTOMATED CARS WITHOUT HUMAN CONTROLS ARE ON THE HORIZON**

Existing laws in this country pose few barriers to adoption of autonomous vehicle technology so long as cars and trucks stick with existing designs allowing humans to take control, the agency overseeing traffic safety said last month. It’s only when manufacturers push the envelope by developing vehicles without such things as traditional steering wheels and brake pedals that regulations may block new autonomous technology, according to a report released by the National Highway Traffic Safety Administration (NHTSA).

NHTSA issued the report in a briefing on its efforts to speed the adoption of driverless cars and other technology that

assists human operators. It was produced by the John A. Volpe National Transportation Systems Center, which does research for the Transportation Department. Gordon Trowbridge, a spokesman for NHTSA, said at the briefing:

*There are certain designs for which there are relatively few current regulatory obstacles. That means that we need operational guidance, model state policy, out there to help guide the operation and deployment of vehicles that may be relatively close to the road.*

The Volpe study looked at existing federal motor vehicle safety standards and whether those laws will impede the introduction of self-driving technologies. It didn't examine state laws, which govern driver qualifications, insurance requirements, and other issues. In an update to U.S. efforts to promote autonomous vehicle technology, Trowbridge said NHTSA was planning pilot programs across the country to test vehicles, working with states on developing new model laws, and evaluating federal regulations for what changes may be required. The agency is also hosting two forums to gather public input on the issue. One forum will be in Washington and the other will be in California. Transportation Secretary Anthony Foxx said in a press release:

*We are witnessing a revolution in auto technology that has the potential to save thousands of lives. In order to achieve that potential, we need to establish guidelines for manufacturers that clearly outline how we expect automated vehicles to function—not only safely, but more safely—on our roads.*

President Barack Obama wants to spend \$3.9 billion on autonomous vehicle technology over the next 10 years, according to his administration's proposed 2017 budget. Adding more automated safety features to cars is one strategy to reduce roadway deaths, according to Mark Rosekind, NHTSA's administrator. He said at a safety forum that the technology can help correct for human error, which the agency estimates is a factor in 94 percent of fatal car crashes. Traditional manufacturers and technology upstarts are rushing to develop more autonomous cars. The following are some examples:

- Daimler AG this year unveiled a new flagship Mercedes-Benz E-Class that can steer itself in auto-pilot mode,

brake in emergencies, and evade obstructions.

- Ford Motor Co. has announced plans to test autonomous vehicles for better reaction to snowy conditions, one of the major technical hurdles.
- Tesla Motors Inc.'s chief executive officer, billionaire Elon Musk, says it's technically feasible that its electric cars will be capable of driving autonomously across the U.S. within two to three years.
- Google Inc. operates perhaps the best-known fleet of self-driving cars, and Apple Inc. is presumed to be working on its own models.

In February 2014, NHTSA also promised to move forward with regulations that will require cars to be able to communicate with each other to avoid crashes. The agency believes so-called vehicle-to-vehicle communications may in the future save lives on the scale of earlier safety innovations like seat belts and air bags. That is an ambitious prediction and hopefully it will prove in time to be accurate. I am concerned, however, that the industry and NHTSA may be moving a little too fast in this area.

Source: *Insurance Journal*

#### **\$1.44 MILLION AWARDED TO STATE TROOPER INJURED BY DRUNK DRIVER**

A Pennsylvania jury has awarded a State Police trooper more than \$1.4 million in damages for injuries he suffered when an intoxicated driver crashed into his cruiser. The officer was monitoring a construction zone at the time. The verdict came in a suit filed in 2010 by Sgt. Michael J. Chambers against James Mu Lin, the driver of a 2007 Toyota Camry that struck the vehicle, and Glasgow Inc., the Glenside firm that was involved in the construction project.

The crash occurred around 3:20 a.m. on May 31, 2008, on Route 422. Sgt. Chambers suffered "serious, painful injuries," including herniated discs, a concussion and headaches. He still works for the state police in a supervisory capacity. The jury awarded damages for Sgt. Chambers' past and future medical expenses, lost earnings, pain and suffering and loss of life's pleasures.

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

#### **BUS ROLLOVER LAWSUIT SETTLED FOR \$6 MILLION**

A lawsuit arising out of a serious bus crash in 2013 has been settled for \$6 million by Greyhound Bus Lines. While Greyhound had claimed the driver of the bus lost consciousness from a coughing fit while drinking coffee behind the wheel, plaintiffs in the case maintained the driver suffered from an undiagnosed sleep disorder. The 2013 bus rollover injured at least 35 people. An investigation by the Ohio State Highway Patrol found that the Greyhound bus left the road and entered a cornfield about 25 miles north of Cincinnati while en route from Detroit. The driver had reported he was drinking coffee when he suffered a coughing spasm and passed out at the wheel. The bus rolled several times, injuring many of the passengers.

The plaintiffs had contended that the driver fell asleep due to a sleep condition. Five of the passengers injured in the rollover sued Greyhound, alleging that the bus driver Dwayne Garrett actually suffered from sleep apnea. Greyhound denied the assertion. It was alleged by the plaintiffs that Greyhound could have avoided the bus accident had the defendant responded to a recommendation from a medical examiner with the US Department of Transportation.

The medical examiner suspected Garrett of suffering from sleep apnea and recommended restrictions to his driving certificate for a period of three months. That would allow Garrett the opportunity to participate in an overnight sleep study to gauge his sleeping habits and capabilities. That recommendation was issued a month before the crash in Ohio.

It was alleged that Greyhound failed to heed the recommendation, which if followed, that might have prevented the accident from happening. The plaintiffs' lawyers obtained a court order in April 2015 requiring Garrett to undergo an overnight sleep study. Greyhound appealed the trial court's ruling, continuing to maintain the driver lost consciousness after choking on some coffee. However, an appellate court upheld the trial court's ruling, and the sleep study went ahead.

The study confirmed that the driver did actually suffer from moderate-to-severe sleep apnea, supporting the claims made by the plaintiffs. The bus accident caused injuries to a number of passengers, who ranged from 17 to 64 years of age. The bus rolled several times before coming to rest about 100 feet from the highway. The lawsuit was filed against Motor Coach Industries Interna-



tional Inc., FirstGroup America, and the driver Dwayne Garrett.

Source: *Insurance Journal*

#### **CRASH RISK HIGHER FOR TRUCKERS WHO FAIL TO FOLLOW SLEEP APNEA TREATMENT**

A new study co-authored by Virginia Tech Transportation Institute researchers sheds more light on the subject of truck drivers and sleep apnea. Truck drivers, who have obstructive sleep apnea, and who do not attempt to adhere to a mandated treatment program, have a fivefold increase in the risk of a severe crash, according to the study. The study was featured in the March 21 online edition of the journal "Sleep."

Drivers who did not follow the sleep apnea treatment administered by the study fleet were discharged or quit, having been retained only one-third as long as drivers who did adhere to the treatment program. The study observed that 60 percent of drivers who chose not to accept the mandated sleep apnea treatment quit voluntarily before they were discharged. While the treatment program analyzed in the study saw the removal of drivers who were non-compliant with the program, current federal regulations allow those drivers to keep their diagnosis of sleep apnea private, enabling them to work at another trucking firm.

Researchers at Virginia Tech recently co-authored a study that found drivers who have obstructive sleep apnea and who do not attempt to adhere to a mandated treatment program are five times more likely to be involved in a severe crash. Jeff Hickman, one of the study co-authors and a research scientist with the Center for Truck and Bus Safety at the Virginia Tech Transportation Institute, stated:

*These results are important because, currently, drivers who are diagnosed with obstructive sleep apnea at a specific trucking firm with an internal mandated treatment program, and who choose not to accept treatment, can just quit and hire on with a firm that does not have such a program. Given the amount of job turnover in parts of the trucking industry, we can reasonably assume these drivers are going to drive for another firm. Essentially, as long as specific rigorous screening standards for obstructive sleep apnea are not in place, these drivers, if*

*they remain untreated, are likely to remain a risk on the roadways.*

The researchers note that current federal regulations are the result of a previous lack of data available about the effectiveness of a mandated sleep apnea treatment program. However, the current study represents the first large-scale database available to determine how screening, diagnosing, and monitoring obstructive sleep apnea among truck drivers can affect their crash risk. Erin Mabry, co-author of the research article and a senior research associate with the Virginia Tech Transportation Institute's Center for Truck and Bus Safety, stated:

*Previous research has shown that obstructive sleep apnea is among the most common causes of excessive drowsiness or fatigue in the daytime, so this new analysis really underscores the risk truck drivers diagnosed with obstructive sleep apnea assume if they choose not to adhere to a treatment program.*

More than 1,600 drivers diagnosed with obstructive sleep apnea were compared in the study to an equal number of drivers who were deemed unlikely to have obstructive sleep apnea. Drivers who fell in the former category were provided auto-adjusting positive airway pressure treatment, which was objectively monitored. The treatment program was implemented by Schneider. Preventable, U.S. Department of Transportation-reportable crashes per 100,000 miles were compared across the study groups. Stephen Burks, lead author of the research article and professor of economics and management at the University of Minnesota, Morris, stated:

*What we found is that, if we look at 1,000 truck drivers each working for a year, the drivers with obstructive sleep apnea who refuse treatment would have 70 preventable serious truck crashes, compared to 14 crashes experienced by both a control group and by drivers with sleep apnea who adhered to treatment.*

Data collection and statistical analysis for the article were performed by the Truckers and Turnover Project research team at the University of Minnesota, Morris, which also included biostatistician Jon Anderson and several research students. The project's work was funded by Schneider; the University of Minnesota, Morris; and the Roadway Safety

Institute. Treatment was covered without out-of-pocket costs to drivers under Schneider's employee health insurance. Virginia Tech researchers Hickman and Mabry collaborated on interpreting the results and writing the Sleep article, along with representatives from the Harvard Medical School and Precision Pulmonary Diagnostics.

Source: *Insurance Journal*

## **XVII. HEALTHCARE ISSUES**

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#### **DRUG MAKERS ROUTINELY SUBMIT INCOMPLETE REPORTS OF SIDE EFFECTS TO FDA**

It appears that drug manufacturers may have been submitting incomplete reports of side-effects to the FDA for a very long time. When researchers analyzed the serious adverse event reports made to the U.S. Food and Drug Administration (FDA) in 2014, they found that reports filed by drug makers were incomplete more than half of the time, while more than 86 percent of those filed directly by health professional and consumers were complete. That's a huge difference and is quite alarming.

The FDA's Adverse Event Reporting System (AERS) is a crucial tool in evaluating drug safety in an age where drugs are approved quickly with little clinical testing. Incomplete data compromises the usefulness of the usefulness of this tool in formulating future warnings that could prevent injuries and save lives.

The report, published in the journal *Pharmacoepidemiology and Drug Safety*, evaluated serious adverse event reports for completeness. For the purposes of the study they needed to include all of the following to be considered complete: age, gender, event date, and at least one medical term describing the event.

Of the 528,192 new case reports received by the FDA in 2014, 4.7 percent were received directly from health professionals or consumers. Of those, 86.2 percent were complete. Another 95.3 percent of the reports were from drug manufacturers. Drug makers submit two types of reports. Expedited reports are to be made within 15 days of learning of a serious side effect. Periodic reports are made at a later date. Only 40.4 percent of the expedited and 51.3 percent of the periodic reports were complete.

When you consider this in addition to the recent revelation that Bayer and Johnson & Johnson appear to have misled editors of the *New England Journal of Medicine* relating to Xarelto, it's no wonder so many people distrust the pharmaceutical industry. The more the public learns about the corporate culture of the drug industry, the more the distrust grows. Unfortunately, the public has been largely uninformed about the manner in which the huge drug companies operate. Once they really are informed, the public will be outraged.

Source: Personalinjury.com

## XVIII. ENVIRONMENTAL CONCERNS

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### **CONGRESS SHOULD NOT GIVE VIRTUAL IMMUNITY TO MONSANTO**

The U.S. Congress passed versions of legislation last year designed to replace the 40-year-old Toxic Substances Control Act. That act was initially designed to protect American citizens from various toxic substances. Over the years, the Act has become obsolete and completely unworkable, necessitating a new law that would be in keeping with the times. Currently, as many as 1,000 hazardous substances—which are still on sale today—have not been evaluated to determine whether they should be banned or restricted. There is a need for significant changes in the old law to become current with the time.

In light of these issues, both houses of Congress proposed legislation designed to overhaul the Toxic Substances Control Act. The House of Representatives has produced legislation that attempts to overhaul the Act, but in so doing, it has incorporated what I will refer to as the “Monsanto Clause” at the request of the House Energy and Commerce Committee. This addition to the bill would shield Monsanto from all liability resulting from PCB exposure, which is unthinkable. The provision also will open the door for Monsanto to argue immunity for its clear disregard for human health in other areas of concern. It appears that no other company would receive such special treatment as Monsanto gets in the bill.

These antics on Capitol Hill are a prime example of why American citizens are fed up with the political establish-

ment. Clearly, someone did a big favor for Monsanto. When this immunity provision was put into legislation designed to overhaul an outdated Hazardous Substances Act. Those who proposed the addition to the bill and those who voted for the bill should be ashamed of themselves. We invite our readers to call their members of Congress and demand that the “Monsanto” clause be removed from the new Toxic Substances Act. Members of congress should be concerned with protecting their constituents from corporations like Monsanto—not shielding them from responsibility—and they should show their concern by acting appropriately.

Monsanto has a long history of choosing profits over human health. The PCBs they manufactured for years have been proven to cause cancer. Several years ago, lawyers in our firm joined with Johnnie Cockran and we sued Monsanto in an Alabama Federal Court on behalf of individuals in Calhoun County, Alabama. After a tough battle, we reached a landmark \$700 million settlement with Monsanto in that case. It was discovered that Monsanto created a wasteland in Anniston, by dumping thousands of gallons of the cancer-causing PCB in the area.

Over the past few months, Monsanto has come under fire for a key ingredient in its Roundup herbicide called glyphosate, which has been linked to non-Hodgkin's lymphoma in folks who have used the herbicide for an extended period of time. Lawyers in our firm are currently investigating cases where agriculture workers were exposed to glyphosate and developed non-Hodgkin's lymphoma.

If you have any questions about any of the above, contact Parker Miller, a lawyer in our firm's Toxic Torts Section, at Parker.Miller@beasleyallen.com or 800-898-2034.

Source: *The New York Times*

### **LAWSUIT FILED OVER BENZENE RELATED DEATH**

Our law firm filed a wrongful death lawsuit recently in Colbert County, Ala., on behalf of the wife and the estate of her late husband who died of Acute Myeloid Leukemia (AML), a deadly cancer of the blood forming tissues. The deceased had been an automobile painter and restorer for more than 40 years and was constantly exposed to paint and painting related products containing the chemical benzene.

Benzene is a clear, highly flammable liquid with a sweet, gassy smell. It occurs naturally in petroleum, and it is used as

an organic solvent to make a variety of other chemicals and various plastics. It is also used in the manufacturing of some types of rubbers, lubricants, dyes, detergents, drugs and pesticides. Because benzene comes from petroleum, benzene is often found in oil-based paints, various degreasers, and fuels—including diesel, gasoline and kerosene.

Persons working in close proximity to benzene or benzene-containing products can be put at serious risk because their exposure can occur at much higher levels and for longer periods of time. The medical literature is settled that benzene causes AML. There are a variety of AML diagnoses, but all of them have been shown to result from benzene exposure.

The current lawsuit alleges that the Defendants knew the products the decedent was exposed to contained benzene and have known for years that Benzene poses a health hazard and can kill humans working in close proximity to their products. Nevertheless, the Defendants continued to manufacture and sell these products, while at the same time marketing the products as safe. We are very proud to be able to represent the wife and the estate in their efforts to recover for the wrongful death of the decedent.

John Tomlinson, a lawyer in our Toxic Torts Section, is the lead lawyer handling this case. He is also investigating other 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.

### **MORE PEOPLE THREATENED BY SEA LEVEL RISE THAN PREVIOUSLY THOUGHT**

More people live close to a sea coast than earlier estimated, according to a new study. It was stated that these people are the most vulnerable to the rise of the sea level as well as to the increased number of floods and intensified storms. By using recent increased resolution datasets, Finnish university researchers estimate that 1.9 billion inhabitants, or 28 percent of the world's total population, live closer than 100 km from the coast in areas less than 100 meters above the present sea level. By 2050 the amount of people in that zone is predicted to increase to 2.4 billion, while population living lower than 5 meters will reach 500 million people. Assistant Professor Matti Kummu from Aalto University says that many of these people need to adapt their livelihoods to changing climate.

Rising sea level threatens larger number of people than earlier estimated. Shanghai, with more than 24 million inhabitants, is one of the megacities that will suffer from the projected sea level rise and intensified storms. The study found that while population and wealth concentrate by the sea, food must be grown farther and farther away from where people live. Highlands and mountain areas are increasingly important from a food-production point of view, but also very vulnerable to changes in climate. In the past century there has been a clear tendency that cropland and pasture areas have grown most in areas outside the population hotspots, and decreased in coastal areas. This will most probably only continue in the future, summarizes Professor Olli Varis from Aalto University.

The study reveals that even though people and wealth continue to accumulate in coastal proximity, their growth is even faster in inland and mountainous areas. This contradicts the existing studies. In the future, the world will be less diverse in terms of urbanization and economic output, when assessing it from geospatial point of view. For the analysis, researchers used several global gridded datasets. They first created a geographic zoning in relation to the elevation and proximity to coast. This was then used to study the factors included in the study, which were grouped into five clusters: climate, population, agriculture, economy, and impact on environment. For the factors with temporal extent, the researchers also assessed their development over the time period of 1900-2050.

Source: *Claims Journal*

## XIX. UPDATE ON NURSING HOME LITIGATION

### **THE ROLE OF THE NURSES AIDE IN RESIDENT CARE IN NURSING HOMES**

The care of residents (or patients) in nursing homes is multi-faceted. The nursing care portion is made up of registered nurses (RNs), licensed professional nurses (LPNs), and nurses aides. Many nurses aides are certified, granting them the designation of CNAs.

CNAs, in some respects, are the most important people in the resident care tree, because they are responsible for

nutrition intake, recording and measuring bowel movements and urine output, changing bedsheets, helping patients to the bathroom, changing diapers and clothing, bathing, and the like. According to a recent nursing home symposium, CNAs spend about 1.99 hours per day of patient care, compared with 1.25 hours for RNs and LPNs combined. CNAs provide about 60 percent of total nursing hours to residents. CNAs also represent the highest area of turnover in the nursing home industry, with turnover rates being as high as 93 percent annually in some places.

Because of job dissatisfaction, reports also indicate a shortage in available nurses aides in the marketplace. Nurses aides who have left the field of work report a number of reasons for electing to seek work in other areas, including: "(a) low unemployment and increased opportunities in the service sector, (b) low wages and benefits combined with high job demands and a lack of resources, (c) lack of respect and rewards, and (d) unappealing work environments." Jill Quadagno, PhD and Sidney M. Stahl, PhD, *Challenges in Nursing Home Care: A Research Agenda*, *The Gerontologist: Oxford Journals*, Vol. 43, Issue Suppl 2, pp. 4-6 (Oxford Univ. Press 2016).

While the requirements vary slightly by state, in Alabama a person must have certain minimum requirements in order to qualify as a CNA. Those requirements include a high school diploma or an equivalent GED, completion of a state-approved CNA training program, and then passing of the CNA competency exam. Meeting these requirements entitles the person to have his or her name placed on the Nurse Aide Registry as a CNA.

According to the Certified Nursing Assistant License Organization, becoming a CNA is a highly desirable field. This organization reports that the popularity of this field is fueled because "the CNA certification process is extremely straightforward and simple [and] [u]nlike most other health care careers, [one does] not need a license to work as a CNA in Alabama." All that is required is "an acceptable score" on the competency exam for someone to get his or her name on the state's Nurse Aide Registry.

In order to confirm that a person is on the State Registry, a potential employer only needs a Social Security number. That number can be put into the Registry, which is maintained by the Alabama Department of Public Health, and the certification confirmed. Once a person is on the State Registry, they can maintain

that status by working eight hours at an approved facility every 24 months. In other words, working one shift every two years is enough to continue to refer to oneself as a CNA.

While there are certainly many adequately trained and qualified CNAs, it is not a far stretch to see that many CNAs are likely not adequately qualified for the demands of the job, especially when it comes to caring for the aging population, many of whom are admitted to nursing homes each year. Because of this, it is imperative that nursing homes do a thorough background investigation and independently skill test potential CNA candidates to ensure that they are adequately trained, that they have sufficient support to do their jobs, and that they are not overburdened in patient care assignments. Doing so, in many instances, will greatly reduce and, in some cases, eliminate harm to residents of nursing homes.

If you need more information relating to the above or nursing homes in general, contact Ben Locklar, who handles Nursing Home Litigation for the firm, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Sources: <http://www.cnalicense.org/states/alabama/>; [http://gerontologist.oxfordjournals.org/content/43/suppl\\_2/4.full](http://gerontologist.oxfordjournals.org/content/43/suppl_2/4.full); and <http://www.nursinglicensure.org/cna/alabama-nursing-assistant.html#context/api/listings/prefilter>

### **GEORGIA JUDGE AWARDS \$64 MILLION TO MAN BEATEN IN ASSISTED LIVING HOME**

A judge in Wilkinson County, Ga., has awarded \$64.6 million to a man who claimed he was beaten by several employees in a personal-care home. Media outlets report that in January, Judge William Prior issued the final judgment against the owners of the Total Care Personal Care Home in Gordon and 10 employees. The lawsuit had been filed in November by Betty Gill, the mother of Joseph Cason Jr.

The complaint says Cason, who is mentally disabled, was "repeatedly and sadistically beaten and otherwise abused by employees" in November 2013. A surveillance camera recorded the abuse. It was alleged that Total Care employees took Cason to cast a vote for a person, who was directly connected to Total Care, in the Gordon city election despite his mental incapability to vote.

This sort of activity that occurred in the case should never be tolerated and in this case it wasn't by Judge Prior. However, the persons involved in

beating the man should also be prosecuted in the criminal courts.

Source: *Insurance Journal*

## XX. AN UPDATE ON CLASS ACTION LITIGATION

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### **GENWORTH AGREES TO PAY \$219 MILLION TO END SHAREHOLDER SUIT**

Genworth Financial Inc. has agreed to pay \$219 million to settle a consolidated shareholder class action over claims the insurer made false and misleading statements about the health of its long-term care business that resulted in a major stock drop in late 2014. Complete details of the settlement weren't immediately available, but reportedly this is Fresno County Employees' Retirement Association's largest-ever recovery in a securities class action in Virginia. The settlement, which is subject to court approval, was reached about two months before a trial was to start.

The settlement was reached on behalf of purchasers of Genworth securities between Oct. 30, 2013, and Nov. 5, 2014. The investors had accused Genworth, its CEO Tom McInerney and Chief Financial Officer Marty Klein of falsely saying in a December 2013 investor presentation that the company had completed a "broad and deep" review of its long-term care reserves and found them to be adequate.

The plaintiffs said this picture of health turned out to be incorrect, when it was revealed in July 2014 that the insurer was vastly under-reserved for claims on the long-term care business and that, in November 2014, it had to increase reserves by more than \$530 million.

These separate revelations spurred stock plunges of 14 percent and nearly 40 percent, respectively. The complaint also accused the executives of making misleading financial statements and falsely telling investors they had implemented the internal controls necessary to ensure that the claims were based on a thorough review of current data. The alleged misstatements were made at a time when Genworth was one of the only major providers of long-term care coverage. Many insurers left the business amid a spike of costly claims by baby boomers using their policies.

U.S. District Judge James R. Spencer in November 2014 named Fresno County Employees' Retirement Association and the Alberta Investment Management Corp., as co-lead Plaintiffs, noting that they had sustained the largest losses. In May 2015, Judge Spencer denied a motion saying the investors had adequately pled that the company and its top brass made misleading statements or omissions with respect to the purported "complete and thorough" review of the long-term care reserves, the adequacy of those reserves and the use of current data.

The lead Plaintiffs are represented by Blair A. Nicholas, David R. Stickney, Jonathan D. Uslander, Gerald H. Silk and Avi Josefson of Bernstein Litowitz Berger & Grossmann LLP, Javier Bleichmar and Joseph A. Fonti of Bleichmar Fonti & Auld LLP and Susan R. Podolsky of Law Offices Of Susan R. Podolsky. They did very good work in this case, which is in the U.S. District Court for the Eastern District of Virginia.

Source: Law360.com

### **SUPREME COURT AFFIRMS A \$5.8 MILLION JUDGMENT AGAINST TYSON FOODS**

The U.S. Supreme Court has upheld a \$5.8 million judgment in the case of *Tyson Foods v. Bouaphakeo*, a class action lawsuit brought by hourly workers at a Tyson Foods meat processing plant. The workers claimed they were not adequately paid for the time they spent walking to their work stations and changing into protective gear. The Court, in a 6-2 ruling written by Justice Anthony Kennedy, recognized as a conservative on the Court, upheld a 2014 appeals court decision in favor of the workers. Tyson argued that there were too many differences among the workers to constitute a true class.

It was one of three closely watched class action cases to come before the Court during its current term, with business interests urging the justices to rein in such litigation. Of the three cases, the Court has now ruled in two of them, with businesses losing both times. In January, the Court ruled 6-3 against advertising firm Campbell-Ewald, saying a lawsuit could proceed over claims the company violated a federal consumer law by sending unsolicited text messages on behalf of the U.S. Navy.

The narrow ruling turned in part on a 1946 Supreme Court precedent that said plaintiffs can rely on averages in such situations to determine claims under the

federal Fair Labor Standards Act. Kennedy said while corporate defendants "may urge adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions, this case provides no occasion to do so."

Justice Kennedy said further that the ruling does not undercut the Court's major 2011 ruling in favor of Wal-Mart Stores Inc., which made it harder to bring class action cases. The Court did not address a broader question of whether a class action lawsuit should move forward if the group of plaintiffs includes people who were not injured.

Justices Clarence Thomas and Samuel Alito dissented. Workers at the meat-processing facility, which employs around 1,300 people, sued in 2007, claiming they were entitled to overtime pay and damages because they were not paid for time spent putting on and taking off protective equipment and walking to work stations. The jury found in favor of the plaintiffs following a federal district court trial in Iowa in 2011. The 8<sup>th</sup> U.S. Circuit Court of Appeals upheld the judgment in 2014.

The Court's criticism of "trial by formula" came in 2011 in *Wal-Mart Stores v. Dukes*. In this precedent-setting opinion against Rule 23 class actions, the Court said that such an approach deprives businesses of a chance to defend themselves against a class claim for damages. Its approval of "representative proof" in wage-and-hour cases came in 1946 in *Anderson v. Mount Clemens Potter Co.* After Justice Kagan bluntly asserted that this case was not about Rule 23 at all, the *Wal-Mart* decision did not come up at all in oral argument; *Mount Clemens*, however, got a great deal of attention.

In its opinion, released March 22, 2016, the Supreme Court did hold that averages and other statistical analyses can be used to show similarities between disparate class members. Whether such statistical evidence is permitted depends on the purpose for which the evidence is being introduced and on the elements of the cause of action. But because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class. In this case, the Supreme Court held that statistical evidence was allowed because the workers could show that the sample evidence was a permissible means of establishing hours worked in a class action by showing that each class member could have relied on that sample

to establish liability, had each brought an individual claim.

The Court likened this case to *Mount Clemens*, pointing out that in both cases the respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. However, the Court also concluded that its holding was in accord with the *Wal-Mart* decision, distinguishing that case because the employees in *Wal-Mart* were not similarly situated, so they could not rely on a statistical average. The Court did limit *Wal-Mart*, announcing that "Wal-Mart does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability."

While this is a favorable verdict for class members, the Court did narrow this application, finding that this case did not present an occasion to adopt "broad and categorical rules governing the use of representative and statistical evidence in class actions." Rather, the ability to use a representative sample "to establish class-wide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." If you need more information on this case, contact Lance Gould, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at [Lance.Gould@beasleyallenc.com](mailto:Lance.Gould@beasleyallenc.com). Lance handles F.E.L.A. cases for our firm.

Sources: [scotusblog.com](http://scotusblog.com), CNN Money, and *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, \_\_\_ U.S. \_\_\_ (March 22, 2016).

#### **CLASS MEMBERSHIP TEST EVADES SUPREME COURT REVIEW AGAIN**

The U.S. Supreme Court has again refused to consider the proper test for determining who is a member of a class for certification purposes. *Procter & Gamble* asked the high court to review a decision from the U.S. Court of Appeals for the Sixth Circuit upholding class certification in a consumer lawsuit alleging that the company's Align probiotic supplement didn't work as advertised. On February 29 the court had denied review in a similar dietary supplement case out of the Seventh Circuit. This latest case is *Procter & Gamble Co. v. Rikos*, U.S., No. 15-835. Review by the high court was denied on March 28.

## **XXI. THE CONSUMER CORNER**

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### **TREE STAND ACCIDENTS ARE NUMEROUS**

Every year millions of hunters flock to the woods across this country in pursuit of white tailed deer. Deer are the most popular big game animal in the country to hunt. This is largely due to the fact that deer are densely populated in nearly every state and geographical region of the country. In Alabama, opening day of deer season might as well be a state holiday. The most popular method for hunting deer is to sit in an elevated tree stand and wait for the deer. The average person would likely consider guns and other weapons used to harvest deer as the most dangerous aspect of the hunt.

However, that simply is not the case. More hunters are injured and killed every year as a result of falls from tree stands than as a result of gunshot wounds. In the past decade, more awareness has been established regarding tree stand safety. Unfortunately, according to many sources, tree stand accidents may be on the rise. Additionally, the injuries sustained in these accidents are often times catastrophic.

Falls from tree stands are the most common type of hunting related accidents. One study found that nearly 10 percent of hunters who use tree stands are injured annually. Of those accidents, it was found that more than 75 percent occur while using fixed position or climbing tree stands. As most stands are placed at a height greater than 15 feet, falls from this distance can result in high impact injuries. Falls can result in hunters landing at nearly 30 mph. As one would imagine, falls from that height and reaching that speed can result in severe injuries. One study revealed that 80 percent of tree stand fall victims required operative interventions and nearly 10 percent of falls resulted in permanent neurological deficits or death.

A team of neurosurgeons in Rochester, N.Y. recently studied and published an article titled, "Tree stand falls: A persistent cause of neurological injury in hunting." The doctors noted that they wrote the article after seeing patient after patient injured due to tree stand falls each deer season. The doctors examined every tree-stand related injury that came through their regional trauma center from September 2003 through November 2011.

Although their research was limited to a very finite amount of all tree stand accidents nationwide, their findings are interesting nonetheless. According to the researchers, 54 percent of the tree stand falls resulted in spinal injuries and 22 percent resulted in severe head injuries. Additionally, 24 percent of the falls from tree stands resulted in lower extremity fractures and 19 percent resulted in upper extremity fractures.

Based on the research the Rochester surgeons conducted, a fall from a tree stand is likely to cause permanent injuries to the victims' spine, head, or extremities.

The Rochester research team also tracked the cause of all tree stand accident patients they treated. According to their findings, 23 percent of falls were caused by faulty tree stand construction, 23 percent were caused by loss of balance, another 23 percent were caused by the victim falling asleep, 15 percent were caused by structural failure, and the final 16 percent were attributed to other causes. In the past decade, hunters, tree stand manufacturers and others in the hunting industry have made a strong push to advance tree stand safety.

Unfortunately, according to many studies, tree stand accidents are not decreasing. One of the most widely accepted methods for preventing tree stand injuries and death are the use of safety harnesses. Most every commercially made tree stand comes with a safety harness these days. Unfortunately, these harnesses that come with the tree stands are often cheap, bulky, uncomfortable and, subsequently, rarely used. It seems as though they are merely provided so that after an accident occurs, the manufacturer can pat themselves on the back for providing a safety harness.

Additionally, more and more tree stands suffer from defects, rendering them unsafe. As with so many industries, there seems to be a race to make the lightest, cheapest product in the category. This has resulted in dangerous and inadequate materials and products. Many tree stand accidents are a result of structural failures to the stand, or to the locking mechanism to the tree. Recalls in the industry are almost as commonplace as those in the auto industry.

Despite the push toward tree stand safety and awareness, there does not seem to be a measurable decrease in tree stand accidents. According to the Rochester research team, there is "no progress in preventing these neurological injuries, despite an increase in safety advances" compared to a decade ago.

Safety harnesses are essential to tree stand safety. Like seatbelts in a car, they are only effective if they are used, and used appropriately. It is imperative for anyone that intends to use tree stands to buy an adequate full-body safety harness. The harness should be worn not only when the hunter is in the tree stand hunting, but also when the tree stand is being put up and taken down. All too often tree stand accidents occur while the user is moving or altering the position of the stand and not safely harnessed to the tree.

It is also important to buy quality tree stands. Like most products, however, you get what you pay for. A cheaper tree stand will likely be made of cheaper materials and by companies that cut corners when it comes to safety. Finally, it is important to properly inspect and service tree stands. Too often hunters will put a stand in a tree and hunt from it for years to come without taking it down, inspecting it, and replacing any worn or weathered parts.

Tree stand accidents occur too often and can cause devastating injuries. It is imperative to use a quality full body harness at all times, buy quality tree stands, and continuously inspect and repair worn parts. If you need more information on this subject, contact Evan Allen, a lawyer in our firm's Personal Injury/Products Liability Section, at 800-898-2034 or by email at [Evan.Allen@beasleyallen.com](mailto:Evan.Allen@beasleyallen.com).

#### ***E-CIGARETTES POSE SERIOUS RISK OF INJURY TO CONSUMERS***

Since being introduced to the market in 2007, the popularity of electronic cigarettes (e-cigarettes) has risen dramatically. Today millions of people use e-cigarettes and sales of these devices are estimated to be \$1.5 billion in the United States alone. However, along with the rise in popularity of this unregulated device, there are also increasing concerns over their apparent risk of fire and explosion.

An e-cigarette is an electronic device that is powered by a battery, usually a lithium-ion battery. In a 2015 case study from the *American Journal of Medical Case Reports* the *Journal* reported: "Many e-cigarettes use lithium batteries due to their ability to store large amounts of energy in a compact space. However, the inherent characteristic of lithium batteries can pose a risk of fire and explosion. . . ."

The lithium ion battery has separately been described as the 'mini-bomb in your pocket,' due to its known ability to spontaneously ignite. Poor design, use of low-quality materials, manufacturing flaws and defects, and improper use and handling can all contribute to a condition known as 'thermal runaway,' whereby the internal battery temperature can increase to the point of causing a battery fire or explosion."

While many modern products are powered by lithium-ion batteries, their potential risk may be increased in e-cigarettes due to the presence of a heating element in the device. In a 2014 report, the Federal Emergency Management Agency (FEMA) warned that "the shape and construction of e-cigarettes can make them more likely than other products with lithium-ion batteries to behave like 'flaming rockets' when a battery fails." According to one professor of mechanical engineering at Carnegie Mellon University, the electrolyte (or liquid) inside a lithium-ion battery is basically the equivalent of gasoline. So when these batteries short out, there is a surge of heat that causes this flammable liquid to combust and explode.

These explosions can happen without warning and FEMA reported that many fire or explosion incidents occur when the devices are in use. Known injuries caused by these devices include: deep third-degree burns on the hands, arms, legs, and face; injury to the esophagus and lungs caused by inhalation of flames and scorching hot air; fractured bones; and loss of eyesight.

Lawyers at Beasley Allen are currently investigating potential claims on behalf of individuals who have suffered injuries caused by exploding e-cigarettes. If you would like more information, someone you know has been injured by a fire or explosion of one of these devices, or have questions; you can contact Chris Boutwell, a lawyer in our Toxic Torts Section, at 800-898-2034 or by email at [Chris.Boutwell@beasleyallen.com](mailto:Chris.Boutwell@beasleyallen.com).

#### ***SENTINEL DRUG SAFETY SURVEILLANCE SYSTEM IS READY FOR LAUNCH***

Dr. Janet Woodcock, the head of the Center for Drug Evaluation and Research (CDER) at the U.S. Food & Drug Administration (FDA), says the agency's Sentinel drug safety surveillance system is ready for implementation. Congress passed the FDA Amendments Act in 2007. This act mandated that the FDA establish an active surveillance system to monitor

drugs using electronic data from health care information holders. The FDA proceeded to develop the Sentinel program, which was intended to be a central database to monitor all FDA-regulated products, including drugs and medical devices. Sentinel was launched as a pilot program in 2008.

It appears that as of 2014, Sentinel has moved from a proposed or pilot program and is now an "integral part of routine safety surveillance," according to Dr. Woodcock. The Sentinel program works in cooperation with existing drug and device monitoring programs such as the FDA Adverse Event Reporting System (FAERS), Manufacturer and User Facility Device Experience Database (MAUDE), and Vaccine Adverse Event Reporting System (VAERS). However, these are passive reporting systems, relying on manufacturers, patients, physicians and other health care providers to report problems with drugs and devices.

Sentinel, on the other hand, uses a rapid query system that is able to gather information from automated health care data streams such as electronic health record (EHR) systems from hospitals, insurers and universities; administrative and insurance claim databases, and registries. These sources bring to light up-to-the-minute medical product safety issues.

There are three component parts in the Sentinel program—the Active Post-market Risk Identification and Analysis (ARIA) system, Postmarket Rapid Immunization Safety Monitoring (PRISM) system, and the Blood Surveillance Continuous Active network (BloodSCAN). The Sentinel database includes data for nearly 200 million individuals.

The program recently added two new partners, and is now able to gather data from the Medicare Virtual Research Center, which will provide more information about drug and medical device experiences for people older than 65; and the Hospital Corporation of America, which will greatly expand the amount of information about patients' experiences during hospital stays.

It should be noted that Sentinel is not a centralized database. It is a distributed data network. Various components or organizations that are part of Sentinel retain their own data, which can then be accessed through Sentinel, or "mined," but the data is held and owned by participating organizations.

Although Sentinel allows the FDA to explore a vast amount of information, it is not clear that the program has yet made much difference in improving drug safety. Researchers say that pooling the data about adverse events is a positive

step, but that a meta-analysis of that data doesn't necessarily expose the truth about a drug's risk. However, they say that as the database grows and more information is collected, it could yield better analysis of a drug's risk profile.

If data does indicate a possible risk, another problem is how the FDA should address that risk. Consumers are calling for an "early warning" system that could alert them as well as physicians to potential problems. But this opens the door to creating unnecessary alarm. It's a fine line, and likely to be one of the most important challenges for Sentinel and the FDA moving forward. It will be interesting to see what this new technological frontier brings to the future of drug and device regulation.

Sources: FDA, HealthAffairs.org, and Regulatory Affairs Professionals Society

### **DEFENDANTS ORDERED TO PAY MORE THAN \$70 MILLION FOR PROFITING OFF OF CONSUMERS' PERSONAL FINANCIAL INFORMATION**

The Federal Trade Commission (FTC) filed a lawsuit in 2013 against numerous entities and individuals for collecting sensitive consumer information from payday loan applications and selling that information to "scammers" who made unauthorized withdrawals from the consumers' bank accounts. According to the complaint in FTC's lawsuit, the scheme swindled nearly \$7.1 million from the accounts of more than 500,000 consumers. Entities bought consumer payday loan applications, which included Social Security and bank account numbers, from data brokers and payday loan websites, and then used the information to defraud consumers.

The data brokers who sold the information, such as Sitesearch Corp., (also known as LeapLab) Gen X Marketing Group LLC and Sequoia One LLC, and the scammers who bought the information, such as Financial Solutions and its subsidiaries, were included as Defendants in the lawsuit. The action was filed in the Federal District Court for the District of Nevada.

On Feb. 23, 2016, the District Court entered a final judgment that includes a \$43,083,720 judgment against Ideal Financial Solutions and its subsidiaries, Steven Sunyich, Christopher Sunyich, Michael Sunyich, and Melissa Sunyich Gardner, and a \$36,575,542 judgment against Jared Mosher. The court also banned the individual ringleaders of the scheme from marketing, selling and han-

dling any credit-related products or services.

Previously, the FTC entered into settlements with two operators, Kent Brown and Shawn Sunyich, that banned them from placing unauthorized charges on consumer financial accounts and collecting and disclosing consumer information without consent. The orders also imposed a suspended \$25 million judgment against each individual.

If you need more information on this subject, contact Leslie Pescia, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Leslie.Pescia@beasley-allen.com.

Source: Federal Trade Commission

### **AIR CARGO MDL JUDGE APPROVES \$190 MILLION IN SETTLEMENTS**

U.S. District Judge Brian M. Cogan has given final approval to settlements totaling \$190 million in litigation over customer claims that airlines conspired to raise the price for cargo shipments. As a result, Nippon Cargo Airlines, EVA Airways Corp. and Asiana Airlines Inc. were released from the decade-old litigation. The court's approval leaves pending settlements with Polar Air Cargo LLC and Air China of \$100 million and \$50 million, respectively. Under the settlements Nippon Cargo will pay \$36 million, Eva \$99 million and Asiana Airlines \$55 million.

Two remaining defendants, Air India Ltd. and Air New Zealand Ltd., are still scheduled for a September bench trial. Judge Cogan called the settlements a "no-brainer," but warned the plaintiffs' lawyers not to come back later with a request for massive fees. He said these lawyers were "taking a risk" by not combining a fee percentage into the settlement agreements.

The multidistrict litigation started in 2006, when consumers brought more than 90 lawsuits against more than two dozen airlines after the U.S. Department of Justice and the European Commission began investigating the air freight industry. According to the DOJ, the conspirators used meetings, conversations and other communications to determine the rates the airlines should charge for various routes.

The two holdout defendants are scheduled to go to trial on September 12. Korean Air Lines Co. Ltd.'s \$115 million settlement tops the list as the largest settlement to date. The class is represented by Robert N. Kaplan, Gregory K.

Arenson and Gary L. Specks of Kaplan Fox & Kilshheimer LLP, Hollis L. Salzman and Meegan Hollywood of Robins Kaplan LLP, Howard J. Sedran and Austin B. Cohen of Levin Fishbein Sedran & Berman, and Michael D. Hausfeld, Brent W. Landau, Hilary K. Scherrer and Melinda R. Coolidge of Hausfeld LLP.

Source: Law360.com

### **TWO AUTO LENDERS SETTLE CASE IN MASSACHUSETTS FOR \$7.4 MILLION IN RELIEF**

Two national auto lenders have agreed to provide a total of \$7.4 million in relief to more than 2,000 Massachusetts car buyers over allegations they charged excessive interest rates on their subprime auto loans. Massachusetts Attorney General Maura Healey, whose office has now recovered more than \$12 million for consumers in the last several months in settlements relating to high-interest auto loans, announced the settlement on March 17.

Officials said the Spartanburg, S.C.-based American Credit Acceptance LLC and Westlake Services LLC, based in Los Angeles, have agreed to eliminate interest on certain loans they purchased that allegedly included excessive interest rates because of the inclusion of so-called GAP coverage. The lenders also agreed to forgive outstanding interest on the loans and reimburse consumers for the interest they have already paid on the debts. The attorney general's office has identified \$1.7 million in relief for American Credit Acceptance loans, and \$5.7 million in relief relating to Westlake loans.

Under the settlements, additional audit work will determine if other loans are also subject to refunds. For more than 2,000 Massachusetts consumers who will benefit from the settlement, the average amount each consumer would receive in relief is approximately \$3,000. The lenders will also pay \$225,000 for implementation of the agreements. Officials said consumers in these cases were overcharged because of GAP fees. These fees caused the effective interest rates on the loans to exceed the 21 percent state interest cap.

GAP is a product that is intended to limit the shortfall between the payment on an auto insurance claim and the amount the borrower owes on a car loan in the event the financed car is totaled. GAP is sold by car dealers as an add-on product and is often financed in the auto loan. This case was part of an ongoing subprime loan review initiative by the

attorney general's office. Last November, as part of this initiative, the attorney general announced a \$5.4 million settlement with Santander USA Holdings Inc. also relating to GAP fees and excessive interest.

Source: *Insurance Journal*

### **\$15.45 MILLION FINE LEVIED OVER DEHUMIDIFIERS**

Gree Electrical Appliances, Inc., a Chinese appliance maker, will pay a \$15.45 million civil penalty according to the CPSC. It appears the company failed to report fires caused by its dehumidifiers to the Consumer Product Safety Commission and also lied to CPSC staff during its investigation. The settlement amount represents the highest CPSC civil penalty levied to date. The company, along with two affiliates, made and imported dehumidifiers sold under 13 brand names, including Frigidaire, GE and Kenmore.

Source: CPSC Statement

## **XXII. RECALLS UPDATE**

We are again reporting a large number of safety-related recalls. We have included some of the more significant recalls that were issued in March. 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. There don't appear to have been as many motor vehicle recalls in March. Hopefully, we haven't missed any of this sort. If so, let us know.

### **NISSAN RECALLING 47,000 ELECTRIC LEAFS OVER FREEZING BRAKES**

Nissan North America Inc. has assured the National Highway Traffic Safety Administration (NHTSA) that it would begin a safety recall of about 47,000 of its electric Leaf cars over the possibility that a braking component will freeze in colder climates, increasing the risk of a crash. NHTSA said the problem lies with the electronic brake booster in 46,859 model year 2013 to 2015 Leafs. When one of the cars is parked in "extremely

cold temperature conditions," the relay inside the booster tends to freeze up and the car goes into an assisted mode for braking. "The brake system continues to function in a special 'assist mode,' but may require more pedal effort, which may increase the braking distance and increase the risk of a crash," NHTSA said in a letter last month.

Despite the automaker claiming that a service campaign initiated late last year in the U.S. and Canada led to a number of the affected cars being fixed, NHTSA and Transport Canada said a full safety recall was necessary to reach those drivers whose cars had not yet been repaired. The agency has received about a dozen complaints over the Leaf's brakes, including low pedal pressure and pedals going all the way to the floor, but no injuries have been reported. Some drivers said mechanics blamed the problem on a bad battery, but the problem eventually persisted, according to agency records.

Drivers living in colder climes were also affected by an October recall of about 300,000 Nissan Versas, a compact car with front coil springs prone to corrosion from road salt used in colder months. If the springs corroded and fractured, it could cause the car's front suspension and tires to fail completely. NHTSA launched an investigation into the problem in May after receiving 93 complaints of front coil spring fractures and one complaint of a crash related to the defect. In its preliminary analysis, the agency found that coil spring failures could happen without warning and at any speed. That Versa recall came less than one month after Nissan announced a recall of almost 300,000 other Versa and Versa Note cars over an obstruction near the vehicles' acceleration pedal that could catch a driver's shoe when they went to press the brakes.

### **SUZUKI RECALLS 1.6 MILLION VEHICLES OVER STALLED ENGINES**

Japanese automaker Suzuki Motor Corp. is recalling 1.6 million vehicles for problems with the air conditioning that can cause the engine to stall. The automaker said air conditioner compressors in certain vehicles can overheat and stop because they lack the oil necessary to keep them lubricated. If that happens, the vehicles' engines can fail as they decelerate, according to Chinese news outlet Xinhua. Five models of vehicles produced between January 2008 and May 2015 are affected by the recall, including the Wagon R. Suzuki has

received more than 240 reports since 2011 in which engines stalled because of a lack of lubrication, though no accidents or injuries have occurred as a result, Xinhua said. The report added that the Japanese Ministry of Land, Infrastructure, Transport and Tourism has called this the third-largest recall of its kind.

### **KAWASAKI RECALLS 2016 NINJA ZX-10R AND NINJA ZX-10R ABS MOTORCYCLES**

Kawasaki Motors Corp., USA has recalled certain model year 2016 Ninja ZX-10R and Ninja ZX-10R ABS motorcycles, models ZX1000RGFAL, ZX1000RGFL, ZX1000SGFAL and ZX1000SGFL, manufactured Oct. 28, 2015, to Jan. 18, 2016. In the affected motorcycles, the steering damper bracket mounting bolts may break due to being over tightened. If the steering damper bracket mounting bolts break, the steering damper bracket would detach and could interfere with steering the motorcycle, increasing the risk of a crash. Kawasaki will notify owners, and dealers will replace the steering damper bracket mounting bolts, free of charge. The recall began Feb. 29, 2016. Owners may contact KMC customer service at 866-802-9381. Kawasaki's number for this recall is MC16-03.

### **SRAM RECALLS ZIPP BICYCLE WHEEL HUBS DUE TO CRASH AND INJURY HAZARDS**

SRAM LLC, of Chicago, Ill., has recalled about 6,400 Zipp® bicycle quick releases. The quick releases can fail to engage in the closed position, posing crash and injury hazards to the rider. This recalls involves SRAM's Zipp stainless steel or titanium quick releases. They were sold as aftermarket components or as part of the 202 DB V2, 303 DB V2, 404 Firestrike V2, 202 Firecrest V3, 303 Firecrest V3, 404 Firecrest V3, 808 Firecrest V3 or 808 NSW wheels. The quick release has a curved, black lever. Zipp appears on the lever. Only quick releases without a marking at the center of the underside of the lever, below the Zipp logo are included on this recall. The company has received three incident reports of the quick release failing. No injuries have been reported.

The hub flanges on the front hubs can fail, posing a crash and injury hazard. This includes about 54,000 and an additional 2,900 that were sold in Canada. This recall includes SRAM's Zipp bicycle



wheel hubs. The model names of the affected hubs are ZIPP 88v6, 88v7 and 88v8. The Z logo is printed on the hub. The wheel hubs come in black, silver and falcon grey. The diameter of the clinch nut is approximately 1.46 inches. Some of the hubs were sold as part of wheel sets installed on new bicycles. SRAM will post a list of affected bicycle brands and models on its website at [www.sram.com](http://www.sram.com). SRAM has received one report in the U.S. of hub flange failure that could have led to wheel collapse. No injuries have been reported in the U.S.

The hubs were sold at specialty bicycle stores nationwide from May 2010 through January 2015. The front hubs sold for about \$215. Complete front wheels with the hubs sold for between \$1,035 and \$1,325. The front wheel was also sold as a wheel set with a rear wheel for between \$2,300 and \$2,950. Consumers should immediately stop using bicycles equipped with the recalled front hubs and contact SRAM or local bicycle dealer for a free replacement hub. Contact SRAM at 800-346-2928 between 9 a.m. and 8 p.m. ET Monday through Thursday and 9 a.m. to 6 p.m. ET on Friday, or visit [www.sram.com](http://www.sram.com) or [www.zipp.com](http://www.zipp.com) and click on "Recall Notice" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/SRAM-Recalls-Zipp-Bicycle-Wheel-Hubs/>

#### **FRANKLIN FUELING SYSTEMS RECALLS GAS STATION HOSE/SWIVEL FITTING SETS**

About 9,000 gas station hose/swivel fitting sets have been recalled by Franklin Fueling Systems Inc., of Madison, Wis. The swivel fitting can separate from the hose, causing fuel to leak, posing a fire and explosion hazard. This recall involves gas station hose and swivel fitting sets used with gas station nozzles to dispense or transfer refined fuels such as gasoline, diesel, ethanol blends and biodiesel blends. The sets are made of at least one metal swivel fitting attached to ¾-inch or 1-inch FLEX-ING™ brand FLEX-ON™ Hardwall, Marina and Softwall hoses. The attached hoses were sold in varying lengths. The size in inches and millimeters, and part number 559N or 559NMP are printed on the sidewall of the hoses. Hardwall hoses were sold in the colors black, blue, green, red and yellow, and have "FLEX-ING FLEX-ON HW FR PREMIUM FUEL HOSE BY FRANKLIN FUELING SYSTEMS" printed on the sidewall. Marina hoses were sold in the color green and have "2 BD. STYLE BC MARINA GASOLINE" on the sidewall.

Softwall hoses were sold in the color black and have "FLEX-ING FLEX-ON SILVER SW PREMIUM FUEL HOSE BY FRANKLIN FUELING SYSTEMS" on the sidewall. Franklin Fueling Systems has received reports of three incidents in which a swivel fitting has separated from a hose causing a fuel spill. No injuries have been reported. Sets that have swivel fittings with a date code in the following range are being recalled:

Hose Diameter | Date Code Range (MWWYY format)  
¾-inch | M1615 to M3515  
1-inch | M2215 to M4115

The hoses were sold at distributors, contractors and gasoline stations nationwide from April 2015 through September 2015 for swivel fittings with ¾-inch hoses and May 2015 through October 2015 for swivel fittings with 1-inch hoses. The hose/swivel fitting sets were sold for between \$18 and \$400. Consumers should immediately stop using the recalled hose/swivel fitting sets and contact the firm to receive a full refund or a replacement hose/swivel fitting set. Contact Franklin Fueling Systems at 800-984-6266 from 7 a.m. to 5 p.m. CT Monday through Friday or online at [www.franklinfueling.com](http://www.franklinfueling.com) and click on "Hose/Swivel Recall Update" under Latest News for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Franklin-Fueling-Systems-Recalls-Gas-Station-Hose-Swivel-Fitting-Sets/>

#### **GALLERIE RECALLS WALL CLOCKS DUE TO FIRE HAZARD**

About 450 Golda Wall Clocks have been recalled by Z Gallerie, of Gardenia, Calif. The batteries inside the clock can overheat due to defective battery springs located at the bottom of the battery compartment, posing a fire hazard. This recall includes Golda wall clocks. The clocks are round and measure 32 inches in diameter and four inches in depth. The front of the wall clocks is made of glass and has a white background. "Invented in 1698" is printed on the front of the clocks. The numbers printed on the clock and clock hands are printed in a brown antiqued ink. The battery compartment on the back holds one AA battery and four D batteries. "Made in China" and "Made for Z Gallerie" are printed on a label on the back of the clocks.

The clocks were sold at Z Gallerie stores nationwide and online at [ZGallerie.com](http://ZGallerie.com) between July 2015 and January

2016 for about \$400. Consumers should immediately remove the batteries from the clocks and contact Z Gallerie for a full refund and \$50 Z Gallerie gift card. Contact Z Gallerie at 800-208-2765 anytime or online at [www.zgallerie.com](http://www.zgallerie.com) and click on Safety Recalls at the bottom of the page. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Z-Gallerie-Recalls-Wall-Clocks/>

#### **PANASONIC RECALLS LITHIUM-ION LAPTOP BATTERY PACKS DUE TO FIRE HAZARD**

About 387 Lithium-ion Computer Battery Packs have been recalled by Panasonic Corporation of North America, of Newark, N.J. Conductive foreign material was mixed into the battery cells during manufacturing, posing a risk of fire. This recall involves Panasonic six-cell lithium-ion (Li-ion) battery packs sold in Panasonic CF-S10 Series laptop computers. "Panasonic" and "CF-S10" are on the surface of the laptop on the left side below the keyboard. Battery packs with the following model numbers and production lot numbers are being recalled: CF-VZSU61U, BAW, BBX, BC, C1, C2, and CF-VZSU61R. The model number and lot number are located on the battery pack nameplate.

The batteries were sold at Panasonic dealers from December 2011 through August 2013 for about \$2,000 for the laptop. Consumers should immediately stop using the laptop computer with the recalled battery, power off the device, remove the battery pack and contact Panasonic for a free replacement battery pack. Contact Panasonic toll-free at 855-772-8324 anytime or visit [www.panasonic.com](http://www.panasonic.com) and click on Product Recall for more information. Photos available at [http://www.cpsc.gov/en/Recalls/2016/Panasonic-Recalls-Lithium-ion-Laptop-Battery-Packs.](http://www.cpsc.gov/en/Recalls/2016/Panasonic-Recalls-Lithium-ion-Laptop-Battery-Packs/)

#### **AMBIENT WEATHER EXPANDS RECALL OF RADIOS DUE TO FIRE HAZARD**

About 57,000 Ambient Weather radios have been recalled by Ambient Weather, of Chandler, Ariz. The weather radio can overheat when plugged into an AC power outlet, posing a fire hazard. The recalled Ambient Weather radios are red and black and measure about 8 inches wide by 4 inches tall by 2 inches deep. "Ambient Weather," "AM/FM/Weather Band Radio" and "NOAA Weather Radio" are printed in white lettering on the

front of the radio. The radios have a black crank handle on the back, an antenna on the top, and LED flashlight on the left side, a clip on the right side and a cable to charge a smart phone. Accessories included an AC adapter, DC converter or solar panel charger. Model number WR-333,WR-333A, WR-334-U or WR-334A-U is printed in the owner's manual. The firm has received an additional four reports of smoke in the back battery area. No injuries have been reported.

The radios were sold at Grainger stores nationwide and online at Amazon.com and AmbientWeather.com from October 2012 through June 2014 for between \$30 and \$90. Consumers should immediately stop using the recalled weather radios and contact Ambient Weather for a full refund. Consumers who received replacement AC power adapters in the previous recall are also included in this recall. Contact Ambient Weather toll-free at 877-413-8800 Monday through Friday from 8 a.m. to 3 p.m. MT or online at [www.ambientweather.com](http://www.ambientweather.com) and click on Customer Service, then Recall Information for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Ambient-Weather-Recalls-Radios/>

#### **FEDERAL JUDGE ORDERS ZEN MAGNETS TO DESTROY REMAINING INVENTORY OF BB-SIZE MAGNETIC SPHERES**

A federal judge has ordered Denver-based Zen Magnets to recall its BB-size magnetic spheres and offer refunds to customers. U.S. District Court Judge Christine M. Arguello also ordered the company to destroy any remaining magnetic spheres in its inventory, making permanent a 2015 preliminary injunction on their sale.

Zen Magnets purchased about 917,000 of the small magnetic spheres from a New Jersey company shortly before the manufacturer agreed to recall the magnets. Arguello ruled that Zen Magnets violated the Consumer Product Safety Act when it later resold the magnets.

The U.S. Consumer Product Safety Commission maintains the magnets are dangerous, citing nearly 3,000 incidents of children swallowing the 5-millimeter balls during a five-year period from 2009 through 2013. Some of the accidents required emergency surgery because if two or more balls are swallowed, they can bind intestinal tissue together.

#### **UNITED PET GROUP RECALLS TOP FIN POWER FILTERS FOR AQUARIUMS DUE TO SHOCK HAZARD**

United Pet Group, of Earth City, Mo., has recalled about 155,000 Top Fin™ Power Filters for Aquariums. A conductor on the pump motor can become exposed and electrify the aquarium water, posing a shock hazard to consumers. This recall involves five models of Top Fin Power Filters. The models included in this recall are Top Fin Power Filters 10, 20, 30, 40 and 75. The filters are black with a trapezoid shaped top. The words "TOP FIN" are molded into the top of the filter. The filters were also sold as part of Top Fin 5.5 and 10 gallon LED aquarium kits.

The aquariums were sold exclusively at: PetSmart stores nationwide and online from September 2015 through December 2015 for between \$15 and \$64. Consumers should immediately stop using the recalled filters, unplug them from the power supply, remove from the aquarium, and contact United Pet Group for a free replacement power filter. Contact United Pet Group at 800-338-4896 from 8 a.m. to 5:30 p.m. ET Monday through Friday, or online at [www.unitedpetgroup.com](http://www.unitedpetgroup.com) and click on Product Recalls at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/United-Pet-Group-Recalls-Top-Fin-Power-Filters-for-Aquariums/>

#### **GE LIGHTING RECALLS HIGH-INTENSITY LED REPLACEMENT LAMPS DUE TO IMPACT HAZARD**

GE Lighting of Cleveland, Ohio, has recalled about 35,000 of its High-intensity LED lamps. The lamp can separate from its base and fall onto consumers below, posing an impact hazard. This recall involves GE Lighting high intensity discharge (HID) LED lamps. The lamps are used in lighting fixtures for warehouses, schools and gymnasiums. The lamps are 5 1/2 inches in diameter by 11 1/2 inches long and weigh about 3 pounds. The lamps were sold in a blue and white carton with "ED37/EX39 base" on the front and "PC:21259" on the back above the bar code. Recalled lamps have the GE logo and the following information on the white plastic base of the lamp: LED165/M400/740, 165W, 4000K, 20000 Lumens, China and date code K213 or K245. The firm has received four reports of the lamp separating from the lamp base. No injuries or property damage have been reported.

The lamps were sold at GE Lighting authorized dealers and electrical distributors nationwide, including Crescent Electric Supply Company, Graybar and W.W. Grainger Industrial Supply from September 2015 through December 2015 for between \$250 and \$300. Consumers should immediately contact GE Lighting for a free repair kit and installation guide at 800-338-4999.

#### **IKEA RECALLS FLOOR AND TABLE LAMPS DUE TO SHOCK HAZARD**

IKEA North America Services LLC, of Conshohocken, Penn., has recalled about 30,600 Gothem floor and table lamps. Cables damaged during manufacturing can come in contact with the metal body of the lamp, posing a shock hazard to consumers. The lamps are brush-finished nickel plated and have a dimmer switch. The floor lamp is 49 inches tall, and the table lamps are 14 or 18 inches tall. "Gothem" and the IKEA logo are printed on the label attached to the underside of each lamp base. Three reports of minor shock have been received worldwide.

The lamps were sold exclusively at IKEA stores nationwide and online at [www.ikea-usa.com](http://www.ikea-usa.com) from October 2015 through February 2016 for between \$20 and \$50. Consumers should immediately stop using the recalled floor and table lamps and return them to any IKEA store for a full refund. Contact IKEA toll-free at 888-966-4532 anytime or online at [www.ikea-usa.com](http://www.ikea-usa.com) and click on "Press Room" at the bottom of the page, then "Product Recalls" at the top of the page for more information. Photos Available At <http://www.cpsc.gov/en/Recalls/2016/Ikea-Recalls-Floor-and-Table-Lamps/>

#### **RACERMATE RECALLS COMPUTRAINER BLUE FLYWHEELS DUE TO RISK OF INJURY**

RacerMate Inc., of Seattle, Wash., has recalled about 25,000 CompuTrainer Blue Flywheels. The blue flywheel can shatter while in use and throw metal pieces into the air. This poses a risk of injury from impact to the rider and any bystanders. This recall involves blue CompuTrainer Flywheels manufactured before 2008. The CompuTrainer Flywheels are used to make bicycles stationary for indoor training. The blue flywheel is a die casting made of zinc. It measures 4.75 inches in diameter and weighs 1.1 pounds. Flywheels manufactured after 2008 are silver in color, and are not included in this recall. RacerMate

has received five reports of flywheels that have shattered, including three reports of injuries, including lacerations and leg bruises.

The flywheels were sold at RacerMate and bicycle stores nationwide from November 1997 through November 2008 for about \$1,500. Consumers should immediately stop using and remove the recalled blue flywheels. Consumers can contact RacerMate for instructions on receiving a free, silver replacement fly-wheel. Contact RacerMate at 800-522-3610 between 9 a.m. and 4 p.m. PT Monday through Friday or online at [www.racermateinc.com](http://www.racermateinc.com) and click on Support to access the Blue Flywheel Recall form. Consumers can also email the company at [sales@racermate.inc](mailto:sales@racermate.inc). Photos Available At <http://www.cpsc.gov/en/Recalls/2016/RacerMate-Recalls-CompuTrainer-Blue-Flywheels/>

#### **CHICKEN PRODUCT PROCESSED IN QUEBEC FOCUS OF RECALL**

An estimated 103,752 pounds of chicken nuggets made in Canada that may be contaminated with metal pieces have been recalled. The product recall being conducted by Maxi Canada Inc. of Quebec affects products exported to the United States and shipped nationwide to retail locations in the United States, including Wal-Mart, Safeway and Kroger stores. The chicken nugget products being recalled were produced in July 2015 and were shipped to the U.S. between July 30, 2015, and March 5, 2016. They are the 38-ounce (2.975 pound) boxes of Yummy brand fully cooked Chicken Breast Nuggets, 100 Percent All Natural Nugget-Shaped Chicken Breast Patty Fritters with Rib Meat with a best if used by date of July 17, 2017. The products bear establishment number "Canada Est. 348" and UPC number 064563225782. The problem was discovered when a consumer from the United States lodged a complaint with Maxi Canada after finding a foreign object in the product. Maxi Canada initiated the recall and Canadian food inspectors subsequently notified the USDA.

There have been no confirmed reports of adverse reactions resulting from the consumption of the product being recalled. Anyone concerned about an injury or illness potentially associated with the recalled product should contact a health care provider. Consumers who have purchased these products are urged not to consume them. These products should be thrown away or returned to

the place of purchase. Consumers with food safety questions can "Ask Karen," the Food Safety Inspection Service's virtual representative, available 24 hours per day at [AskKaren.gov](http://AskKaren.gov). The toll-free USDA Meat and Poultry Hotline at 888-674-6854 is available in English and Spanish and can be reached 10 a.m.-4 p.m. Monday through Friday.

#### **PISTACHIOS RECALLED**

Wonderful Pistachios, based in Lost Hills, Calif., has recalled a limited number of flavors and sizes of in-shell and shelled pistachios because of a salmonella risk. The Center for Disease Control and Prevention (CDC) announced the recall after 11 people were reportedly sickened by *Salmonella montevideo*. In a statement, the CDC said the products were distributed through several retailers nationwide and in Canada. Pistachios were sold under the brand names Paramount Farms, Trader Joe's and Wonderful. The recalled products can be identified by a 13-digit lot code number on the lower back or bottom panel of the package. For a list of the lot numbers go to <http://www.fda.gov/Safety/Recalls/ucm489959.htm>.

Those infected with salmonella bacteria often develop a fever, diarrhea, sometimes bloody diarrhea, nausea, vomiting and abdominal cramping within 12 to 72 hours of consumption. In some cases, infection from salmonella can be fatal especially in young children, elderly people and those with weakened immune systems. Consumers who have purchased the products listed in the recall can return them to store where they were purchased for a refund or send back the bottom portion of the package that contains the lot code to: Wonderful Pistachios, 13646 Hwy 33, Lost Hills, CA 93249. It appears that the company has taken steps to make its products safer and is cooperating with the CDC.

#### **NESTLÉ RECALLS DIGIORNO, LEAN CUISINE AND STOUFFER'S PRODUCTS**

Nestlé USA has recalled almost 3 million boxes of its products across the DiGiorno, Lean Cuisine and Stouffer's lines, because they may contain small amounts of glass. The company did not elaborate any further on the nature of what may have caused the problem, but more than 10 products have been affected. Nestlé is asking consumers not to use those products. Here's a list of

the products you may need to get rid of, and how to possibly get a refund for them:

- DiGiorno Thin & Crispy Spinach and Garlic Pizza
- DiGiorno Rising Crust Spinach and Mushroom Pizza
- DiGiorno pizzeria Thin Crust Spinach and Mushroom Pizza
- DiGiorno pizzeria Tuscan-style Chicken Pizza
- Lean Cuisine Spinach and Mushroom Pizza
- Lean Cuisine Spinach Artichoke Ravioli
- Lean Cuisine Ricotta and Spinach Ravioli
- Lean Cuisine Spinach, Artichoke & Chicken Panini
- Lean Cuisine Mushroom Mezzaluna Ravioli
- Stouffer's Vegetable Lasagna, the 10 oz., 37 oz. and 96 oz. sizes
- Stouffer's Spinach Soufflé
- Stouffer's Chicken Lasagna

Consumers can check the production codes on Nestlé's website to check if they match the codes on their boxes. The production codes are located on the side panel of each product. "Although our investigation is ongoing, we believe the source of the glass is spinach that was an ingredient common to the products subject to this recall," Nestlé said in a statement. "Nestlé USA is taking this action out of an abundance of caution after several consumers reported they had found small pieces of glass in some of these products." While Nestlé did not say anything in its statement about refunds, consumers can reportedly return these products to the store. Consumers can also call Nestlé Consumer Services at 800-681-1676 for more information. The recall is relatively limited, and I don't think it will affect the reputation of the brands.

#### **BUMBLE BEE FOODS RECALLS CANNED CHUNK LIGHT TUNA**

Bumble Bee Foods, LLC has recalled 3 specific UPC codes of canned Chunk Light tuna due to process deviations that

occurred in a co-pack facility not owned or operated by Bumble Bee. These deviations were part of the commercial sterilization process and could result in contamination by spoilage organisms or pathogens, which could lead to life-threatening illness if consumed. It is important to note that there have been no reports of illness associated with these products to date. No other production codes or products are affected by this recall.

There are a total of 31,579 cases that are included in the recall which were produced in February 2016 and distributed nationally. The products subject to this recall are marked with a can code that starts with a "T" (example: TOA 2BSCAFB).

The company says recall is being initiated out of an abundance of caution due to the possible under-processing of the affected products discovered by the co-packer during its routine quality audit. Bumble Bee is working closely with the co-packer and the U.S. Food and Drug Administration (FDA) to expedite the removal of products from commerce. Consumers are advised to throw away the recalled product. Consumers looking for more information on reimbursement or who have questions about the recall may contact Bumble Bee at 888-820-1947 between the hours of 9 a.m. and 6 p.m. EST seven days a week or visit [www.bumblebee.com/recall-march-2016](http://www.bumblebee.com/recall-march-2016).

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

## XXIII. FIRM ACTIVITIES

### EMPLOYEE SPOTLIGHTS

#### BRITTANY SCOTT

Brittany Scott joined the firm in October 2014 as a lawyer in our Mass Torts Section. She is currently working on our talcum powder litigation. Brittany worked on the talc case that was tried in St. Louis and she did an excellent job. She will also be involved in the second case to be tried in St. Louis starting on April 11.

Brittany earned her undergraduate degree in December 2010, graduating from Vanderbilt University with a B.A. in Medicine, Health and Society, and a minor in Sociology. She graduated *cum laude* from Cumberland School of Law at Samford University in May 2014, where she was a Dean's Scholarship recipient. Brittany was Copy Editor for the *Cumberland Law Review* and included in two publications.

At Cumberland, Brittany also was Oral Advocate on the National Moot Court Team for two years and competed in the 2013 and 2014 Cristol, Kahn, Paskay Cup Moot Court Competition and the 2013 and 2014 Duberstein Bankruptcy Moot Court Competition. She was a 2012 Parham Williams Trial Competition Quarterfinalist and was a finalist in the 2012 Saad Moot Court Competition. Brittany was also President of the Christian Legal Society. Prior to joining Beasley Allen, Brittany worked as a law clerk at the firm for two summers, and also clerked for the Alabama Disabilities Advocacy Program.

Brittany is married to Mac Scott and they live in Prattville with their two dogs and a cat. In her spare time Brittany enjoys cooking with her husband and playing outside with her dogs. Brittany is also Provisional Member of the Junior League of Montgomery and spends time volunteering with various community organizations through the Junior League. She and her husband attend Church of the Highlands. Brittany is a very hard, dedicated worker and has done very good work during her time with the firm. We are blessed to have Brittany with the firm.

#### MELISSA GREGOIRE

Melissa Gregoire has been with the firm for two years. She is a staff assistant in our Mass Torts Section. Melissa has been working on the talcum powder

cases, serving on the talc team from the very beginning. She is currently helping with trial preparation work and client cases. Melissa worked on the talc case that was tried in St. Louis and did an excellent job, both in getting ready for the trial and during the actual trial itself, which lasted for more than three weeks. All of the staff personnel who worked on that case did a tremendous job.

Melissa attended high school in Cairo, Egypt, and graduated in Athens, Ala. She also attended Auburn University Montgomery (AUM) for three years and recently started taking classes online to finish her degree. Melissa has a 7-year-old son named Richard whom she says she adores. Her parents live in Maryland, and she has a sister who is an artist in California. Melissa says most of her hobbies involve her son so she enjoys watching baseball with him, building Legos, and playing video games. Melissa is a very good, hard-working employee and we are most fortunate to have her with us.

#### JESSI MEEKS

Jessi Meeks, who has been with the firm a little more than a year now, is a law clerk in the Consumer Fraud Section. She works with the attorneys in the Section researching legal issues, writing motions, and working on document review. Jessi is currently in her third year at Thomas Goode Jones School of Law where she serves as a Dean's Fellow for the Admission Department of the law school. As a Dean's Fellow, Jessi works with prospective and admitted students prior to their start of Law School.

This position has allowed her to be a mentor to those considering law school and has been one of the most rewarding experiences she says she has had as a student at Jones School of Law. Jessi also serves as the Student Bar Association Vice President and as the Student Life Committee student representative for the Law School. As the Student Bar Association Vice President, Jessi works with the students and faculty of the law school and helps oversee committee heads with their projects for the year.

This year, Jessi focused on the Don Garner Charity Golf Classic, which benefits the law school student relief fund; the Harvest Festival, benefitting the East Alabama Food Bank and the Jones School of Law Clinics; and the Fall Ball formal event. Jessi was also on the Dean's List in the Fall of 2014 and the Spring of 2015. Jessi says she enjoys exploring new cities, reading books (*To Kill a Mockingbird* by Harper Lee is her all-time favorite), spending time with family and friends, and going to amusement and

water parks. Jessi is a very hard worker and is doing a very good job in her work. We are fortunate to have Jessi with us.

#### JENNIFER TOWNSEND

Jennifer Townsend, who is approaching her one year anniversary with the firm, is a Law Clerk in the Consumer Fraud Section. She assists lawyers in the Fraud Section by contacting clients, investigating and researching potential claims, assisting with legal research, drafting complaints and memos, editing motions and briefs, and generally assisting lawyers in the section in whatever capacity needed.

Jennifer is originally from Canton, Ga., which is a small town north of Atlanta. She graduated from the University of Alabama in May of 2013 and is currently attending Faulkner University's Thomas Goode Jones School of Law in Montgomery. Jennifer will graduate in May of 2016 with a joint J.D. and LL.M. in Advocacy & Dispute Resolution as well as being certified in Alternative Dispute Resolution. She currently serves as a Faulkner Law Student Bar Association Senator-at-Large (Barristers).

Jennifer is a member of Faulkner Law's Board of Advocates; competed in the Michigan State Trial Competition in Detroit, Mich., in the Fall of 2014, serves in the Phi Alpha Delta Law Fraternity, International, Executive Board Member (Clerk) and also serves as Vice Chairman of the Jones Law Republicans, and is an Executive Board Member.

In her spare time, Jennifer enjoys volunteering at her church, First Baptist Canton, with the Feed My Sheep Food Ministry. She also enjoys taking trips with friends, going to Alabama football games and cheering on the Tide. Jennifer also enjoys going to Biscuits games during baseball season. She is a very hard worker and doing a very good job. We are blessed to have Jennifer with the firm.

#### A TIRE SAFETY EVENT IN MILLBROOK, ALABAMA

Our firm is pleased to announce that we will partner with the Millbrook Police Department to sponsor a tire safety event for the second year. The Department will host its annual "Cops & Kids" event on Saturday, May 14, from 9 a.m. to 2 p.m. In addition to educational exhibits, Millbrook police officers and staff will have fun activities available for the entire family. Beasley Allen will set up a booth to educate drivers on the importance of checking tire age, espe-

cially during the hot summer months when many families load up for road trips. We have found in litigation that few people are aware of the "age" problem with what appear to be "new" tires with no or little wear.

With no dependable system in place to ensure tire safety, it falls to the consumer to be vigilant. Tire tread and inflation levels are common factors in tire-related accidents. Many people are not aware that as tires age the rubber can become more brittle and more prone to a blowout, regardless of tread or inflation levels. Tires kept in storage for long periods of time can still age.

## XXIV. FAVORITE BIBLE VERSES

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Jim Thompson, a very good lawyer from Birmingham, with Hare Wynn, sent in his favorite verse for this issue.

*Let all bitterness, wrath, anger, clamor, and evil speaking be put away from you, with all malice. And be kind to one another, tenderhearted, forgiving one another, even as God in Christ forgave you. Ephesians 4:31-32*

My good friend Linda Rush from Montgomery sent in one of her favorite verses for inclusion this month.

*Therefore I exhort first of all that supplications, prayers, intercessions, and giving of thanks be made for all men, for kings and all who are in authority, that we may lead a quiet and peaceable life in all godliness and reverence. For this is good and acceptable in the sight of God our Savior, who desires all men to be saved and to come to the knowledge of the truth. For there is one God and one Mediator between God and men, the Man Christ Jesus, who gave Himself a ransom for all, to be testified in due time. 1 Tim 2:1-6*

Rebecca Gilliland, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, wanted our readers to consider the following. She had this to say:

*I thought I'd write about helping others, since that is what we do best here. One of the Bible's best*

*known stories is the story of Moses. I have read it and seen it reenacted countless times—watching Charlton Heston in the Ten Commandments was one of my favorite New Year's Eve traditions growing up. There are lessons to be learned in the small details of the story other than following God's direction for your life. For example, Exodus 17:12 reads:*

*But Moses' hands grew weary, so they took a stone and put it under him, and he sat on it, while Aaron and Hur held up his hands, one on one side, and the other on the other side. So his hands were steady until the going down of the sun.*

*I think this verse is encouraging for so many reasons, yet it is often overlooked in the context of the greater Exodus story. From this, we learn that the man God chose to lead His people out of Egypt, though following God's direction and plan, still grew weary and needed help. It demonstrates not only that it is OK to accept help—nobody is above weariness—but that we have a responsibility to literally hold up and support those around us, no matter their station in life.*

*If a man living and walking on God's divine path needs support, imagine the help that others around us need. "For there will never cease to be poor in the land." God therefore commands us to "open wide your hand to your brother, to the needy and to the poor, in your land." Deuteronomy 15:11. I try to keep these verses in mind; we are blessed with careers that give us the ability, and indeed the job, to continue "helping those who need it most."*

Ryan Beattie, a lawyer in our firm's Mass Torts Section, furnished two scriptures for this issue. He said the scriptures have consistently been coming to him lately. Ryan says that he and his wife used Corinthians in their wedding and that it always reminds him of the happiest day of his life. Ryan says it also helps him and to reflect on good times even when something unexpected comes up.

*Love suffers long and is kind; love does not envy; love does not parade itself, is not puffed up; does not behave rudely, does not seek its*

*own, is not provoked, thinks no evil. 1 Corinthians 13:4-5*

Ryan says the verse in Proverbs reminds him to carefully think through things before jumping to conclusions and helps him to really see both sides of an argument. This helps in the practice of law and that's because a lawyer must consider all legal precedents on an issue. That's necessary if you want to be effective in handling a case.

*He who is slow to wrath has great understanding, But he who is impulsive exalts folly. Proverbs 14:29*

## XXV. CLOSING OBSERVATIONS

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### THE LEADERSHIP CLASS AT TROY UNIVERSITY

I drove down to Troy University last month where I spoke to Dr. John Kline's Leadership Class. I have been making this trip twice each year now for a good while. When I was first invited by John several years ago, I wasn't real sure what to expect. But I was greatly impressed by the quality of students in that first class. I found that each student was very strong academically and most were attending Troy on an academic scholarship. I also learned that the students were very much up to date on current events, and were quite knowledgeable. They were extremely optimistic about the future of the United States. Each trip since then has been just as impressive. I always leave Troy feeling very good about things generally and especially about our young people.

Leadership is a most valuable commodity and strong leadership is badly needed in all areas of our lives. John Kline's leadership class is open to all Troy University undergraduate students and introduces them to the basics of effective leadership. I am told that most of the students have held leadership positions in high school and want to extend their leadership influence to campus, church, community, and student government activities. The course focuses on the important characteristics of effective leaders, which include dedication, service and ethical conduct. It's also important to learn to communicate effectively. Developing leadership skills—

with a special emphasis on listening—is an important part of the leadership course at Troy University. Unfortunately, listening can sometimes be a low priority for folks seeking to lead others. A good leader will listen to others at appropriate times. An effective leader will also have to be willing to take chances on occasion, but without doing so in a reckless manner.

Dr. Kline does an outstanding job at Troy. He has held senior leadership positions and he regularly teaches leadership, team building and communication skills to military and corporate audiences. John has been effective in the use of an array of teaching methods in his classes at Troy. He brings in experienced leaders as guest instructors in the course. I have been privileged for the past several years to be among that group. Troy University and the students are blessed to have John Kline involved with the University.

The Troy University System is also extremely blessed to have Dr. Jack Hawkins in charge as Chancellor. Jack, an effective leader in every respect, is the perfect role model for others who find themselves in leadership positions. I have said previously that Troy University is a great educational institution. I predict that things will only get better at Troy and that's good for Alabama. I believe that Troy University could well be a model for other institutions of higher learning to emulate when it comes to leadership, fiscal responsibility, and efficiency, as well as educating our young people.

### OUR MONTHLY REMINDERS

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

2 Chron 7:14

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

Edmund Burke

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

*their prey, And that they may rob the fatherless.*

Isaiah 10:1-2

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

Martha Washington (1732—1802)

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

Louis Brandeis, 1937  
U.S. Supreme Court Justice

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

Vincent Lombardi

## XXVI. PARTING WORDS

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I taught the Frazier Sunday School class in my church recently. I was filling in for my friend Ellen Cheek, who is an excellent teacher and a real Biblical scholar. I will readily concede that I don't match up in either area. The lesson was from the 14<sup>th</sup> chapter of Mark and dealt with how the disciples abandoned Jesus when he was arrested and taken to a so-called trial in the house of the Chief Priest. Mark's focus was largely on Peter, who had promised to stand with Jesus regardless of what might happen, even if the others left the Master. However, as we now know, Peter fell far short of his pledge.

Jesus had told the 12 disciples that one of them would betray him, which turned out to be Judas, and that all of the others would falter very soon. Jesus had told the disciples on 3 separate occasions that he would be killed. They could not comprehend such a thing. On the fourth time, Jesus added that he would also see them again after his death in Galilee. The disciples failed to comprehend what Jesus was saying either as to his death or his resurrection. Putting one's self in the

shoes of the disciples, it's very easy to identify with them—except for Judas—and at least be confused over what Jesus was saying.

As I read Mark's account, I thought of an event that happened when I was in the 5<sup>th</sup> grade in school back in Clayton. A new Baptist preacher came to town and he had a son named John Henry. However, John Henry, who was in the 5<sup>th</sup> grade, was about 2 or 3 grades behind schedule in school. John Henry was much larger and lots tougher than my friends and I were at the time. It didn't take us long to find out about how tough this new boy really was. John Henry was taking away our lunch money each day and he enjoyed physically abusing at least one of us at recess on a regular basis.

This sort of thing went on for several weeks and we finally decided that, having had enough of this big bully, we would take care of him once and for all. So our plan was to join together and teach John Henry a good lesson. The twelve of us made a pact that the next day at recess we would give this big bully a good whipping. We agreed to stand together and that I would be our leader and the group's spokesman.

So when we went out for recess the next day the 12 of us were all ready to confront John Henry. I was in front of my 11 friends and I told John Henry that "we are going to give you a good whipping John Henry and put a stop to your bullying us." John Henry just grinned and responded, "What do you mean by we? I don't see anybody behind you Jere." I looked around and he was absolutely right—my friends were all running for cover. I suddenly felt the reality of being all alone and in grave danger. Pretty soon I was getting up from the ground. I had

put up a brief fight—but not nearly enough—and I had gotten a real good whipping from John Henry. It was a good lesson for me—but a painful one. I don't mean to be comparing my situation to that described in Mark, but there actually are some comparisons.

It is difficult to comprehend how Jesus' disciples could have failed to understand his ministry and mission since they had been with him, hearing his teachings and witnessing the miracles he performed. However, when you put everything in context, it is very clear. These devoted followers were expecting the Messiah, but they were looking for more of a military leader who would win battles for them and make them truly free at last. This is not what Jesus was all about. His mission on earth was to be a suffering Messiah, a sacrificial Lamb who would save the disciples and all others from their sins. Jesus promised them eternal life, but His disciples simply couldn't comprehend this mission and their faith as a follower of Jesus was tested. Each of them—and especially Peter—failed the test.

Our faith—regardless of how strong—will also be tested. Our test won't be like that of Peter and the other 10 disciples. However, there will be tests where we will be required to either take a stand for Jesus. The good news from the 14<sup>th</sup> chapter of Mark is that even Peter—who denied Jesus 3 times—could be forgiven by Jesus who never quit loving him. Peter then became the pillar upon which the church was built.

My prayer is for all of us who say we follow Jesus to have the faith necessary to stand up for him on a daily basis. There will be some of you who haven't accepted Jesus as Lord and Savior and I fully realize that. I also pray for you

without being judgmental. Consider these verses and reflect on them.

*Consequently, faith comes from hearing the message, and the message is heard through the word about Christ. Romans 10:1*

*Looking unto Jesus the author and perfecter of our faith; who for the joy that was set before him endured the cross, despising the shame, and is seated at the right hand of the throne of God. Hebrews 12:2*

*Now faith is the assurance of things hoped for, the conviction of things not seen. Hebrews 11:1*

*And without faith it is impossible to please God, because anyone who comes to him must believe that he exists and that he rewards those who earnestly seek him. Hebrews 11:6*

*Truly, truly, I say to you, he who believes in Me, the works that I do, he will do also; and greater works than these he will do; because I go to the Father. Whatever you ask in My name, that will I do, so that the Father may be glorified in the Son. If you ask Me anything in My name, I will do it. John 14:12-14*

*Be on your guard; stand firm in the faith; be courageous; be strong. 1 Corinthians 16:13*

Having just celebrated Easter, I pray that this was the most meaningful one ever for each of you and your families. May God Bless!

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