



THE
JERE BEASLEY REPORT

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Beasley Allen

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



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I. CAPITOL OBSERVATIONS

BEASLEY ALLEN LAWYERS ARE FINALISTS FOR 2016 PUBLIC JUSTICE TRIAL LAWYER OF THE YEAR AWARD

Beasley, Allen, Crow, Methvin, Portis & Miles has been selected as a finalist for the 2016 Public Justice Trial Lawyer of the Year award for the firm's work on litigation related to Johnson & Johnson talcum powder and its link to an increased risk of ovarian cancer. This is quite an honor and one that is greatly appreciated. Nominees from our firm are Ted G. Meadows, David P. Dearing, Danielle Ward Mason, Brittany Scott and this writer, along with R. Allen Smith, Jr., from Ridgeland, Miss.; and James G. Onder, Stephanie Rados, Michael J. Quillin and W. Wylie Blair of Onder, Shelton, O'Leary & Peterson, LLC, a St. Louis firm; and Russ Abney of Ferrer, Poirot & Wansbrough in Atlanta, Ga. The trial team has led the ongoing litigation against Johnson & Johnson, and Imerys Talc America, Inc.

On May 2, a jury in St. Louis found Johnson & Johnson liable for ovarian cancer linked to genital use of its talcum powder products. The jurors awarded Gloria Ristesund \$55 million, which included \$5 million in actual damages and \$50 million in punitive damages. Earlier, in February, a separate jury awarded \$72 million to the family of Jacqueline Fox, holding Johnson & Johnson liable for her ovarian cancer related death. In that verdict, \$62 million was punitive damages. The purpose of awarding punitive damages is to punish a company for wrongdoing and to compel it to change its actions.

This is the second time lawyers from Beasley Allen have been nominated for this award. The trial team that worked on Toyota litigation related to sudden unintended acceleration of vehicles were nominated for the 2014 Public Justice Trial Lawyer of the Year Award. The trial team in that litigation from our firm included J. Cole Portis, R. Graham Esdale, and Benjamin E. Baker, and this writer; Larry Tawwater of The Tawwater Law Firm in Oklahoma City, Okla.; and Paul Martin of Martin Jean Jackson in Ponca City, Okla. This litigation team led the charge against Toyota on behalf of the Bookout and Schwarz families. Our case in Oklahoma City was the first suit to go to trial against Toyota tying sudden unintended acceleration to electronic throttle control problems. It was the case that caused Toyota to start settling cases in the multidistrict litigation (MDL), and ultimately winding up the litigation.

Public Justice pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and

government abuses. Public Justice presents its Trial Lawyer of the Year Award to the lawyers who made the greatest contribution to the public interest within the past year by trying or settling a precedent-setting, socially significant case. The finalists will be honored and the award presented at the annual Public Justice gala at the Millennium Biltmore in Los Angeles on July 24, 2016. A full list of the nominees and more information can be found at www.publicjustice.net. We are honored and grateful to be among this group of good lawyers.

II. MORE AUTOMOBILE NEWS OF NOTE

VW AND AUDI NAMED IN ANOTHER DEFECTIVE ENGINE SUIT

Another putative class action has been filed against Volkswagen and Audi in a New Jersey federal court. The German carmakers and their American subsidiaries are accused of concealing information from consumers about a defect in certain models that "can result in catastrophic engine failure." The suit claims that the automakers allegedly have known about a defect in the timing chain tensioning system in the engines of several models that can unexpectedly fail during normal use, endanger vehicle passengers and cost car purchasers thousands of dollars' worth of damage.

Plaintiff Karl Molwitz, a Connecticut resident seeking to certify a nationwide and statewide class of car purchasers, claims that since at least 2007, the Defendants had knowledge of the defect but did not inform consumers that they should anticipate having to inspect or repair vehicle timing chains or associated parts on a regular basis.

The Molwitz suit closely resembles a class action filed in the same court in May. The alleged defect is present in numerous Volkswagen and Audi vehicles, including popular models like the Volkswagen Jetta, Tiguan, Passat and Audi A4 and TT. The complaint reads:

The class vehicles present a safety hazard and are unreasonably dangerous to consumers. If the timing chain tensioner fails while the vehicle is in operation, the vehicle could lose all forward propulsion resulting in a dangerous safety issue for occupants of the class vehicles and others on the road, and could even result in personal injury or death.

The named Plaintiff in the suit claims that the manufacturers had to know about the defect by way of:

- pre-manufacturing research and testing;
- complaints made to authorized dealers and directly to the manufacturers;
- complaints made to the National Highway Transportation Safety Administration (NHTSA); and
- testing conducted in response to those complaints.

Even though the vehicle maintenance recommendations do not require inspection or replacement of the timing chain until at least 120,000 miles, it's claimed that the defect can affect vehicles before they reach that mileage. In addition to presenting a safety hazard, the cost to repair the unexpected defect can be "exorbitant" because consumers may be required to prematurely

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repair or replace their engine and related components, according to the suit. The Plaintiff said:

Had plaintiff and the members of the putative class known about the timing chain defect at the time of purchase or lease, neither plaintiff nor members of the putative class would have purchased the class vehicles or would have paid less for them.

There are claims for breach of implied warranty, violations of the Magnuson-Moss Warranty Act, statutory fraud, common law fraud and unjust enrichment in the complaint. It should be noted that VW and Audi are not the only companies that have been accused of faulty tensioning systems. Similar suits have been brought against Nissan North America Inc. and BMW of North America LLC.

The Plaintiff in the instant case is represented by Matthew Mendelsohn of Mazie Slater Katz & Freeman LLC and Payam Shahian of Strategic Legal Practices APC. The case is in the U.S. District Court for the District of New Jersey.

Source: Law360.com

VW TO COME WITH A \$10 BILLION DIESEL-FIX PLAN

By the time this issue is received, Volkswagen AG will have most likely submitted a \$10 billion plan the automaker says will fix a half-million emissions-cheating cars or get them off U.S. roads. This submission was to happen on June 28. Remember that the automaker is still awaiting regulators' approval on how to retrofit the vehicles. Reportedly, under the plan, about \$6.5 billion will go to car owners and \$3.5 billion to the U.S. government and California regulators.

Because the U.S. Environmental Protection Agency (EPA) and the California Air Resources Board (CARB) haven't approved VW's proposed fixes, the plan as of now includes an option for car owners to request their vehicles be repaired. But there is no timetable for doing so or a guarantee there will be an approved fix, according to reports.

Lawyers for car owners were due to submit the proposed plan to Judge Charles Breyer of the U.S. District Court for the Northern District of California, who is overseeing the federal litigation. The plan will include options for car owners to sell their vehicles back to Volkswagen or to terminate their leases early. According to reports, the terms of the agreement may change before it's submitted to the court. Judge Breyer is scheduled to consider the proposal, in the event it's submitted on schedule, along with the carmaker's agreements with regulators, on July 26. The judge will then decide whether to accept it.

Volkswagen is also subject to lawsuits in Germany and still faces a criminal probe there as well as in the U.S. Prosecutors in Germany are looking into allegations against a VW employee who might have encouraged other employees to delete or remove data. Prosecutors also said most of the data has been recovered in the meantime. Admissions of manipulation and allegations of cheating by other carmakers have pressured authorities to increase scrutiny of real-world emissions and fuel economy.

Source: Bloomberg News

NISSAN AND TAKATA FACE CRIMINAL COMPLAINT OVER AIR BAG IN JAPAN

Nissan Motor Co. and Takata Corp. executives responsible for quality and safety face a criminal complaint in Japan over the rupturing of a defective air bag. This is the first such case in Japan, which is the companies' home market. The complaint was made by a female passenger injured by a Takata air bag that ruptured in a Nissan X-Trail sport utility vehicle in October. Both Nissan and Takata said they were cooperating with the investigation and have declined to comment further.

Under Japanese law, after accepting a criminal complaint and conducting an investigation, police decide whether to refer cases to prosecutors to issue an indictment. This is the first instance of legal action related to defective Takata air bags in Japan. Nissan has said the X-Trail SUV had been recalled, but not yet fixed at the time of the rupture incident. The air bag on the passenger side of the vehicle was involved.

Mitsubishi Motors Corp.'s former president Katsuhiko Kawasoe and three other executives were found guilty in 2008 of professional negligence by a court in Japan in connection with a fatal truck accident in October 2002. All four received suspended sentences. It will be interesting to see how the current criminal complaint is handled.

Source: Bloomberg News

III. THE CORPORATE WORLD

MORGAN STANLEY FAILED TO SAFEGUARD CUSTOMER DATA

The Securities and Exchange Commission (SEC) announced last month that Morgan Stanley Smith Barney LLC has agreed to pay a \$1 million penalty to settle charges related to its failures to protect customer information. Some of this information was hacked and offered for sale online. The SEC issued an order finding that Morgan Stanley failed

to adopt written policies and procedures reasonably designed to protect customer data.

As a result of these failures, from 2011 to 2014 a then-employee impermissibly accessed and transferred the data regarding approximately 730,000 accounts to his personal server. These accounts were later hacked by third parties. Andrew Ceresney, Director of the SEC Enforcement Division, stated:

Given the dangers and impact of cyber breaches, data security is a critically important aspect of investor protection. We expect SEC registrants of all sizes to have policies and procedures that are reasonably designed to protect customer information."

According to the SEC's order instituting a settled administrative proceeding, the following observations and findings were noted:

- The federal securities laws require registered broker-dealers and investment advisers to adopt written policies and procedures reasonably designed to protect customer records and information.
- Morgan Stanley's policies and procedures were not reasonable, however, for two internal web applications or "portals" that allowed its employees to access customers' confidential account information.
- For these portals, Morgan Stanley did not have effective authorization modules for more than 10 years to restrict employees' access to customer data based on each employee's legitimate business need.
- Morgan Stanley also did not audit or test the relevant authorization modules, nor did it monitor or analyze employees' access to and use of the portals.
- Consequently, then-employee Galen J. Marsh downloaded and transferred confidential data to his personal server at home between 2011 and 2014.
- A likely third-party hack of Marsh's personal server resulted in portions of the confidential data being posted on the Internet with offers to sell larger quantities.

The SEC found that Morgan Stanley violated Rule 30(a) of Regulation S-P, which is also known as the "Safeguards Rule." Morgan Stanley agreed to settle the charges, and, as usual, wasn't required to admit the findings. In a separate order, Marsh, the employee, agreed to an industry and penny stock bar with the right to apply for reentry after five years. He was criminally convicted for his actions last year and received 36 months of probation and a \$600,000 restitution order.

The SEC's investigation was conducted by William Martin and Simona Suh of the Enforcement Division's Market Abuse Unit.

The probe was supervised by Joseph G. Sansone, Co-Chief of the unit. The SEC says it appreciates the assistance of the New York Field Office of the Federal Bureau of Investigation and the U.S. Attorney's Office for the Southern District of New York. It's good to see agencies working together for the common good.

Source: SEC News Release

MURDER AND RICO CHARGES REMAIN IN MENINGITIS OUTBREAK SUIT

Employees of the New England Compounding Center (NECC), accused of murder and racketeering after a deadly 2012 meningitis outbreak from tainted steroids the company sold, will now have to face those charges. U.S. District Judge Richard G. Stearns, a Massachusetts federal judge, denied the employees' argument that a pattern of fraud and causation of death had not been established. At least eight workers at the pharmaceutical company face charges by the U.S. government of Racketeer Influenced and Corrupt Organizations (RICO) Act violations. Both Barry J. Cadden, the president and shareholder of the company, and Glenn Chin, the company's supervising clean-room pharmacist, will face additional charges of second-degree murder for the 2012 outbreak that led to 64 deaths.

The outbreak was caused by tainted epidural steroid injections of methylprednisolone acetate compounded by NECC. The products went to customers in 23 states. The Centers for Disease Control and Prevention said that 751 people in 20 states were diagnosed with fungal infections after receiving them and, according to prosecutors, 64 of those died.

Cadden and Glenn Chin were arrested in December and charged with second-degree murder. Twelve other people were arrested that day on multiple charges, including racketeering. Prosecutors say Cadden instructed Medical Sales Management Inc., which provided sales and administrative services to NECC, to falsely represent to customers that NECC was complying with the U.S. Pharmacopeia, which sets the standard for the identity, strength, quality and purity of medicines. Glenn Chin allegedly told pharmacy techs to prioritize production over cleanliness and to falsify cleaning records. Prosecutors say certain Defendants neglected to investigate contamination found in "clean rooms" in 37 out of 38 weeks in 2012.

The additional Defendants include director of operations Sharon Carter, clean room pharmacists Gene Svirskiy, Christopher M. Leary and Joseph M. Evanosky, "unlicensed clean room pharmacy technician" Scott Connolly, and checking pharmacist Alla V. Stepanets, among others. The case is in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

OPPENHEIMER PENALIZED NEARLY \$3 MILLION FOR UNSUITABLE SALES

Broker-dealer Oppenheimer & Co. has been fined \$2.25 million for selling non-traditional exchange-traded funds (ETFs) to retail customers without reasonable supervision and for recommending the investments to clients for whom they were unsuitable. The Financial Industry Regulatory Authority (FINRA) announced these developments last month. New York-based Oppenheimer was also ordered to pay \$716,000 in restitution to customers who lost money on the investments.

Since 2009, Oppenheimer had rules that barred its representatives from soliciting retail customers to buy the investments. That prohibition included leveraged, inverse and inverse-leveraged exchange-traded funds. The company rules also barred representatives from executing unsolicited purchases of the funds for retail investors unless the customers had more than \$500,000 in liquid assets. However, FINRA says that Oppenheimer representatives continued to solicit retail customers for the investments and also executed unsolicited transactions for customers who did not meet the asset requirement. Non-traditional exchange-traded funds are designed to return a multiple of an underlying financial index or benchmark, the inverse of that benchmark, or both, over the course of one trading session, usually a single day.

As a result, the longer-term performance of the investments can differ significantly from their underlying index or benchmark. For that reason, the investments may not be suitable for retail customers. FINRA said Oppenheimer representatives executed more than 30,000 non-traditional exchange-traded fund transactions totaling roughly \$1.7 billion for customers from August 2009 through Sept. 20, 2013. According to the regulator, some conservative investment clients lost money. These are examples:

- An 89-year-old customer whose annual income was \$50,000 held 96 of the investments for an average of 32 days, resulting in a \$51,847 net loss.
- A 91-year-old client with an annual income of \$30,000 held 56 of the investments for an average of 48 days, producing a net loss of \$11,161.
- A 67-year-old customer whose annual income was \$40,000 held two of the investments in her account for 729 days, resulting in a \$2,746 net loss.

As is usually the case in matters of this sort, Oppenheimer neither admitted nor denied the charges, but interestingly the company consented to entry of the FINRA findings. Brad Bennett, FINRA's enforcement chief had this to say:

Written procedures are worthless unless accompanied by a program to enforce them. While Oppenheimer's

procedures prohibited solicitation of non-traditional ETFs, the absence of any meaningful compliance effort resulted in its representatives continuing to solicit unsuitable non-traditional ETF purchases, including a number involving elderly investors.

It's good to see FINRA at work, protecting the public against behavior such as we see in this case. We are oftentimes prone to criticize the government, but in this case we should commend those with FINRA who took action.

Source: USA Today

VALEANT SETTLES WITH FEDERAL GOVERNMENT FOR \$54 MILLION

Valeant Pharmaceuticals will pay \$54 million in settlement of an investigation by the U.S. Attorney in New York into marketing practices for several drugs that were sold by Salix Pharmaceuticals, a company that Valeant bought last year for \$11 billion. It was an inherited problem for Valeant. The agreement, reached last month, must still be finalized. The settlement was disclosed by Valeant in a filing with the U.S. Securities and Exchange Commission (SEC).

The drugs that were the focus of the investigation, which began in February 2013, are Xifaxan, Relistor and Apriso, which are used to treat various stomach disorders. It is not clear whether the investigation involved off-label marketing, which is promoting medicines for unapproved uses, or kickbacks that are made to induce doctors to write prescriptions.

The settlement is only one of several government investigations that Valeant must resolve. The U.S. Federal Trade Commission (FTC), the U.S. Department of Justice (DOJ), and several U.S. Attorneys are investigating acquisitions, patient assistance programs, a relationship with a mail-order pharmacy, accounting practices, and payments to physicians. Among them is an SEC investigation into Salix inventory disclosures.

Before Valeant acquired it, Salix imploded when senior management had to walk back statements about inventory levels that were much lower than previously indicated. The disclosure prompted a huge drop in Salix stock and some executives later left the company. The events set the stage for a sale.

It is widely known that Valeant pursued Salix in order to gain the Xifaxan medication. That drug is used to treat traveler's diarrhea and irritable bowel syndrome. Regulators had approved this usage after Valeant bought the company. It was expected to become a lucrative market. However, the drug has failed to live up to its sales potential, according to analysts.

Source: Statnews.com

\$225 MILLION AUTO PARTS PRICE-FIXING SETTLEMENT GETS FINAL APPROVAL

A Michigan federal judge has given final approval to a \$225 million settlement that will resolve claims by purchasers of auto parts in multidistrict litigation (MDL) in which a number of companies were accused of having a role in a conspiracy to rig prices on parts. Nine companies were involved in the approved agreement, which will settle allegations from classes of end payors that purchased a new vehicle in the U.S. over the last decade that included one or more of 19 component parts manufactured or sold by the companies. U.S. District Judge Marianne O. Battani has signed off on the settlement. The settling Defendants include Nippon Seiki Co. Ltd., Lear Corp., Autoliv Inc., Panasonic Corp., TRW Automobile Holdings Corp., Yazaki Corp., Hitachi Automotive Systems Ltd., Fujikura Ltd. and Sumitomo Electric Industries Ltd., according to the order.

The end payors' lawyers represent nearly 60 class representatives pursuing claims under federal law and the laws of 30 states and the District of Columbia. Judge Battani said in her order:

Given the difficulty and protracted nature of antitrust cases, the court finds that any final adjudicated recovery for the [end payors] would almost certainly be many years away.

The cases are part of a large MDL that followed the U.S. Department of Justice's start-up of an investigation into the auto parts industry that has resulted more than \$2 billion in fines. The government alleges that the manufacturers, marketers and sellers of the parts conspired to raise prices they charged automakers for the parts. The MDL had been split into separate proceedings for different parts. The agreement approved last month by Judge Battani covered wire harness systems, instrument panel clusters, alternators, starters and other parts.

In early June, Mitsubishi Electric Corp. received early approval by Judge Battani of a \$64 million settlement to resolve claims with the end payors. That settlement covered cars with certain alternators, starters, ignition coils, fuel injection systems, valve timing control devices, automotive wire harness systems, lights and electronic power steering assemblies made by Mitsubishi or its related units. There have also been other settlements of note.

The end payor Plaintiffs are represented by Steven N. Williams, Adam J. Zapala and Elizabeth Tran of Cotchett Pitre & McCarthy LLP, Hollis Salzman, Bernard Persky and William V. Reiss of Robins Kaplan LLP, and Marc M. Seltzer, Steven G. Sklaver, Terrell W. Oxford and Omar Ochoa of Susman Godfrey LLP. The MDL is in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

IV. AN UPDATE ON ACTIVITY IN BEASLEY ALLEN'S PERSONAL INJURY / PRODUCTS LIABILITY SECTION

Lawyers in our firm's Product Liability and Personal Injury Section handle cases involving catastrophic injuries and deaths arising out of any type of accident, including car crashes, 18-wheeler accidents, industrial accidents and workplace accidents. Cole Portis is the Section Head and Sloan Downs serves as Section Administrator. There are currently 14 lawyers and 31 support staff in the Section. Greg Allen is the most senior products liability lawyer in the Section. He has been a real mentor to all of the other lawyers in the Section who handle products' cases, which has been a tremendous benefit to the firm.

Over the years we have found that potential product liability claims are often overlooked by some lawyers when investigating what they consider as only a routine accident. However, in many motor vehicle crashes, some defect—either design or manufacturing—played a major role in causing the accident. That makes it a product liability claim.

A product liability claim focuses on whether or not the product in question is defective. An entire product may be defective or it may be that a component part of the product contains the defect. The product may well contain design, manufacturing or warning defects. In some cases, it will be a combination of these problems.

Personal Injury Claims handled in the Section include heavy truck litigation, nursing home litigation, slip and falls, and automobile accidents. I will set out below a few of the type of cases our lawyers in this Section are handling and routinely handle on a regular basis.

Takata Airbags

When will the growing list of recalls involving these airbags ever end? In May, the National Highway Traffic Safety Administration (NHTSA) announced that it was expanding the recall to include 35-40 million airbag inflators. NHTSA's announcement doubled the size of the recall. Even more shocking and scary was the announcement that came out on June 14. On that date, Mitsubishi, Toyota and Volkswagen confirmed that they are selling new vehicles with defective airbags. Let that sink in—car manufacturers are selling new cars knowing that they contain defective and dangerous airbags.

The potential dangers posed by these air bags are that the air bags can unexpectedly explode with excessive force, causing serious injury or death to occupants. The defect is linked to the air bags' inflator systems, which can shoot metal fragments from the devices into the car like shrapnel. Airbags on both the driver's and passenger's side can explode, even as a result of a fender-bender or other minor collision.

Tokyo-based Takata is one of the world's largest automotive suppliers. It manufactures airbags, safety belts, steering wheels and other auto parts for a variety of automakers. Vehicles containing the defective airbags include certain models made by Toyota, Honda, Mazda, BMW, Nissan, Chrysler, Audi, Volkswagen and General Motors. Cole Portis and Ben Baker, lawyers in the Section are involved in these cases. They can be contacted at 800-898-2034 or by email at Cole.Portis@beasleyallen.com and Ben.Baker@beasleyallen.com.

GM Ignition Switch Litigation

General Motors (GM) has recalled more than 17 million vehicles related to a defective ignition switch problem, which can leave a vehicle without power and the driver unable to control the vehicle in sudden and dangerous situations. Court documents and other evidence reveal that GM knew about the ignition switch problem as early as 2001.

Our Product Liability lawyers have handled numerous claims involving the GM ignition switch defect. Some of those claims were settled through the GM Ignition Switch Compensation Fund. Others are still pending in federal and state courts. Cole Portis, Graham Esdale, Ben Baker and Mike Andrews, lawyers in the Section, are handling these cases. They can be contacted at 800-898-2034 or by email at Cole.Portis@beasleyallen.com, Graham.Esdale@beasleyallen.com, Ben.Baker@beasleyallen.com and Mike.Andrews@beasleyallen.com.

Heavy Trucking Accidents

There are significant differences between handling an interstate trucking case and other car wreck cases. It is imperative to have knowledge of the Federal Motor Carrier Safety Regulations, technology, business practices, insurance coverages, and to have the ability to discover written and electronic records. Expert testimony is of utmost importance. Accidents involving semi-trucks and passenger vehicles often result in serious injuries and wrongful death. Trucking companies and their insurance companies almost always quickly send accident investigators to the scene of a truck accident to

begin working to limit their liability in these situations.

Chris Glover, a lawyer in the Section, has represented numerous folks who have been seriously injured or lost a family member as a result of the wrongful conduct of a trucking company. He most recently wrote and had published a book that explains how to properly litigate a heavy trucking case. The book is titled "An Introduction to Truck Accident Claims: A Guide to Getting Started." The book covers topics including the basics of trucking regulations and requirements, how to prepare for your case, potential Defendants including the carrier, the broker and the driver; and common issues that arise in commercial vehicle litigation, such as hours of service, fatigue, maintenance and products liability. This book is available free to lawyers in either hard copy or downloadable digital format. For your free hard copy, call us at 800-898-2034. The book also can be downloaded at <http://www.chrisglover-law.com/book>. You can contact Chris at 800-898-2034 or by email at Chris.Glover@beasleyallen.com.

Tire Defects

Tire failure can result in a serious car crash causing serious injury or death to the car's occupants. Air, heat and sunlight can cause the rubber in tires to break down. When a tire is defective, potentially serious problems like detreads and blowouts can occur long before the tire would be expected to wear out. If the tire failure is the result of design or manufacturing defects, and the manufacturer is aware of the problem, they have an obligation to alert consumers to the potential danger.

One serious problem with tires is that they wear down on the inside as they age, but they look brand new on the outside. Despite the dangers of tire aging, NHTSA has still refused to establish a tire aging standard. A tire aging standard would make it easier for consumers to determine the tire's age. Right now, the only way to determine the age of a tire is to decipher the cryptic code on the tire's sidewall. Also, a tire aging standard would make it mandatory for tire centers to take tires out of service at a specified date, regardless of what the tire looks like on the outside.

Our lawyers are also seeing a huge influx of defectively designed tires from China. We recently filed a case in North Carolina where a Chinese brand tire failed causing a wreck and a life-long truck driver to suffer serious injuries. As more and more of the products we buy, including tires, are being made

in China and other foreign countries, the "importers" role is becoming more critical. In too many instances, "importers" are not taking the appropriate steps to assure that foreign tire makers' tires are safe, despite the National Highway Traffic Safety Administration standards requiring them to do so.

Under Federal law, "importers" must take steps to assure that the tires they import are free of defects. Good manufacturing processes require "importers" to conduct on-site inspection(s) of a foreign tire makers' facilities to assure that adequate testing, manufacturing, quality control and other measures are in place. Further, "importers," once they import tires into this country, should perform random sampling, testing and inspection of foreign tires before they distribute and/or sell the tires to consumers in this country.

In one recent case, we learned that, while a company was importing more than 400,000 tires a month, it was doing nothing to insure that the Chinese tires it imported, sold and profited from, were safe. The importer never inspected the manufacturing plant, never observed any tire testing and never checked to see if the Chinese manufacturer employed any quality control measures for its tires and plants. Further, the importer never performed one post "import" inspection, test and/or took any other step relative to one single tire it sold despite the Federal requirements to do so. This conduct is particularly troubling when you consider how important tires are to our safety.

Companies that import tires, or any product for that matter, should be held accountable when they do nothing to insure these products are safe for American consumers. Our Product Liability Section has pursued numerous claims against both tire manufacturers and importers of the defective Chinese tires. If you have questions regarding a potential tire case, contact Cole Portis or Ben Baker, lawyers in the Section, who handle tire litigation. They can be contacted at 800-898-2034 or by email at Cole.Portis@beasleyallen.com and Ben.Baker@beasleyallen.com.

Bad Boy Buggy Litigation

Lawyers in the Section continue to handle cases involving injuries from the off-road vehicle known as the Bad Boy Buggy. The Buggy was initially designed by a gentleman who owned an auto salvage yard in Natchez, Miss., but the company was sold a couple of times and now is owned by Textron, Inc.

The Bad Boy Buggies are currently marketed for hunting and utility work but they are designed very poorly. They are unstable on uneven terrain. The static stability factor of the Bad Boy vehicles is very low which is caused by a design that has a narrow track width and a high center of gravity. The vehicles are also very heavy primarily because of the weight of the numerous batteries located internally. When the Bad Boy vehicle turns over, it has the potential to cause significant injuries.

As of today, the Bad Boy Buggies are still not equipped with doors or adequate measures to prevent "leg-out injuries." Yamaha performed a recall on all of its Rhino vehicles in 2007 because it was seeing numerous leg-out injuries when the vehicles tipped over. The primary problem was that, in a side-by-side vehicle, the driver or passenger will reflexively put their foot out as the vehicle tips. The vehicle typically still has forward momentum as the tip-up occurs, so as the occupant plants his foot on the ground, the foot/leg will be pulled under the backside of the vehicle. Quite often, this causes severe fractures and even amputations.

While Bad Boy has now upgraded its design to add a shoulder net and seat-belt, its foot-out protection is still very bad. Textron added a trip bar in the foot well area, which it claims is a foot-out preventative device. But Textron has performed no testing on the vehicle to see if the trip bar is effective. The vehicles have no protection for occupants who are younger, or of short stature, because their legs may not be long enough to reach the area where the leg-out device is located. These vehicles need doors and netting to prevent leg-out and arm- and hand-out injuries.

Hopefully, Textron, Inc. and its subsidiary Textron Specialty Vehicles, Inc. will recognize the design flaw and start equipping their vehicles with doors and other proper safety devices to reduce the danger. In the meanwhile, some very bad and defective vehicles are in use and are an extreme hazard for folks who use them.

If you have any questions about a specific Bad Boy accident or need information on the ongoing litigation, contact Greg Allen, our firm's Senior Product Liability lawyer, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com. Greg has successfully handled a number of cases involving the Bad Boy Buggy and currently has several in court.

Industrial Accidents And Workplace Defects

Each year, thousands of workers are injured or killed at their workplace. Although a state's workers' compensation system places limitations on the ability of employees to hold employers accountable for these work-related injuries, many people do not realize that there may be another available source of recovery. Injuries in the workplace are often caused by defective products, such as a machine where a dangerous nip-point is not properly guarded nor is the employee warned of the dangerous nip-point. If a product causes an on-the-job injury, a product liability suit may be brought against the product's manufacturer. Catastrophic injuries, deaths, and amputations unfortunately too commonly occur from defective products found in the workplace.

Our firm handles numerous product cases each year that arise in the context of an accident that occurred on the job or in the workplace. Currently, Kendall Dunson, a lawyer in the Section, is handling a tragic case that occurred in Tennessee. While working in the maintenance department for his employer, the employee was setting up a roll stack on an extruder. The roll stack is one machine in an entire line. The roll stack consists of three large rollers. The middle roller is the master and the other two are slaves. While working to get the rollers in sync, he was pulled through the rollers and his head was crushed, leading to his death. No one saw the incident but the rollers were found spinning at maximum rate.

The rollers have in-running nip points that should have been guarded, but, in this tragic case, the nip-points were not guarded. The manufacturer outfitted the rollers with a stop pull cord along the edges and at the top and bottom of the roll stack. But the roll stack is so large that someone standing in the middle of the roll stack cannot reach the pull cord. The roll stack was defective and unreasonably dangerous for lack of adequate guarding and/or a presence sensing device that would have prevented this needless death. If you need more information, contact Kendall Dunson at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

Aviation Accidents

Soaring through the sky at hundreds of miles an hour, thousands of feet above the ground in an airplane or helicopter leaves little room for error. One small mechanical problem, misjudgment or faulty response in the air can spell disaster for air passengers and even unsuspecting people on the ground. This is why it's crucial for the aviation

industry, including manufacturers, pilots, mechanics and air traffic controllers, to adhere to the highest possible standards at all times.

Statistics indicate mechanical failures cause up to 22 percent of aviation crashes. Historically, aircraft manufacturing defects, flawed aircraft design, inadequate warning systems and inadequate instructions for safe use of the aircraft's equipment or systems have contributed to numerous aviation crashes. In such cases, the pilot may follow every procedure correctly but still be unable to avert disaster. Mike Andrews, a lawyer in the Section, has handled numerous cases involving defects found in aircrafts.

Currently, Mike is pursuing two defective aviation cases. One case involves a crash of the V22 Osprey in Hawaii resulting in death of a young Marine. The Osprey has a long history of defects involving the aircraft's hydraulics and software. This crash resulted from the engines ingesting sand, which was kicked up into the air by the downwash from the Osprey's rotor-blades as it attempted to land. The aircraft is equipped with a filtration system referred to as an engine air particle separator, which is intended to prevent sand and other particle ingestion. However, the system is faulty. Bell and Boeing have tried various iterations and designs but have not yet implemented a safe and effective filter. Several crashes have resulted in deaths and serious injuries.

The other case involves the crash of a light aircraft off the coast of Georgia. Two inexperienced pilots were attending flight school in North Carolina and were assigned to fly an aircraft to Jacksonville, Fla., to the flight school maintenance facility. Unfortunately, the aircraft was dispatched with inoperable equipment. Specifically, the pilots were sent up in an aircraft that had faulty vacuum pumps—one was completely inoperable and the other failed in flight. The vacuum pumps provide the pilots' horizon and orientation information while in flight. Without such information, pilots lose spatial awareness and become disoriented. Due to the inoperable and faulty equipment, the plane crashed, killing both student pilots. If you have any questions, contact Mike Andrews at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

Non-Auto Product Defects

Our Product Liability Section also handles defective products, including smoke detectors, flammable clothing, industrial equipment and heaters, just to name a few. Most of the time, family

members do not suspect that a defective product is the cause of a death or injury, and manufacturers readily blame the victim's actions. Our firm has discovered that defective products are increasingly a major cause of unexpected deaths and injuries. LaBarron Boone, a lawyer in the Section, has successfully handled several of these types of cases and has been leading a campaign to make smoke detectors safer and more effective. Contact LaBarron if you need information about a potential case at 800-898-2034 or by email at Labarron.Boone@beasleyallen.com.

Nursing Home Litigation

One of the most vulnerable segments of society is our senior citizens. As our population ages, more and more individuals are admitted to nursing homes and long-term care facilities. Our firm reviews and files cases in state courts, federal courts, and arbitration tribunals against nursing homes as a result of negligent medical and nursing care provided to nursing home residents. Currently, our firm is handling cases involving bed sores, falls, chokes, and medication errors. Ben Locklar, a lawyer in the Section, has handled numerous cases involving patients who have died or been severely injured by the negligent acts of nursing homes. If you have any questions regarding these types of claims, contact Ben at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com. He would be happy to discuss them with you.

Premises Liability Litigation

Premises Liability Cases can involve claims arising out of falls caused by a foreign substance on the premises, falls caused by a part of the premises, as well as injuries caused by falling items. Specifically, in a case involving a foreign substance on a floor, a Plaintiff must establish that the foreign substance caused the fall and that the Defendant premises owner had notice or should have had notice of the substance at the time of the accident. The law is different when injuries are caused by part of the premises that is in a dangerous condition, such as part of a doorway, curb, or stairs, or where the injury is caused by a display created by a store employee.

In situations where the injury is caused by part of the premises or a display that was set up by the store, proof of notice is not a prerequisite but the Plaintiff must still prove the injury was caused by a defective or dangerous condition. Injuries caused by falling objects most often involve items falling from displays that are either part of the premises, or were set up by the store. If the falling object is the result of a display set up by the store or some part of the

premises falling, then the customer does not have to prove notice. Mike Crow and Julie Beasley, lawyers in the Section, have extensive experience in handling premises liability cases. If you need any guidance or have any questions, contact Mike or Julie at 800-898-2034 or by email at Mike.Crow@beasleyallen.com or Julie.Beasley@beasleyallen.com.

V. WHISTLEBLOWER LITIGATION

HSBC Will Pay \$1.6 Billion To Settle Investor Class Lawsuit

HSBC Holdings PLC has reached a \$1.575 billion settlement that will resolve a securities class action involving fraudulent lending practices. This ends 14 years of litigation that included a prior \$2.4 billion judgment that was vacated by the Seventh Circuit Court of Appeals last year. This settlement is believed to be the largest ever in a securities fraud class action case. It is also said to be the largest in the Seventh Circuit. The settlement was agreed to just prior to the start of trial.

The investors had claimed back in 2002 that Household International Inc., which HSBC acquired in 2003, and three of Household's former top executives lied about the company's lending practices, financial accounting and loan quality. The shareholders won a jury verdict in 2009, but the Seventh Circuit reversed the partial final judgment last year and sent the case back for a new trial. The bank said:

The settlement is subject to court approval and is expected to result in a pretax charge to HSBC Finance of approximately \$585 million, including legal fees and expenses, in the second quarter of 2016.

Household focused on credit card, auto finance and mortgage lending, particularly for subprime borrowers. In August 2002, the company, then one of the top consumer finance firms in the country, restated nine years' worth of earnings, disclosing that it had earned \$386 million less than it had reported. HSBC acquired Household in 2003, and the company was later renamed HSBC Finance Corp.

In the suit, Household shareholders accused the financial institution of misrepresenting interest rates, improperly charging prepayment penalties and excessive fees, and perpetrating other fraudulent lending practices. The Plaintiffs also alleged that Household and its executives manipulated the credit quality of the firm's loan portfolio. A jury in 2009 found the company

and three former executives, including former Household CEO William Aldinger, recklessly made misleading public statements that deceived shareholders, according to case filings.

The Plaintiffs are represented by Michael J. Dowd, Spencer A. Burkholz, Daniel S. Drosman, Luke O. Brooks, Jason C. Davis, Maureen E. Mueller and Hillary B. Stakem of Robbins Geller Rudman & Dowd LLP. The case is in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

FEDERAL GOVERNMENT TARGETS MEDICARE AMBULANCE FRAUD WITH NEW BILLING RULES

A recent government push to crack down on fraudulent ambulance services in Pennsylvania has triggered a dramatic decline in Medicare billings, Federal and state health care data shows. In 2014, tougher measures were passed that took aim at illegitimate ambulance services. That means more taxpayer money can be spent on medically necessary services instead of bankrolling sham ambulance companies.

Before that time, ambulance companies that were closed amid allegations of Medicare fraud simply re-appeared under a different name just as the former incarnation was shut down. These companies billed Medicare for millions of dollars in unnecessary, non-emergency transportation as well as ambulance trips that never occurred.

The *Philadelphia Inquirer* noted that most of the Medicare fraud took aim at Medicare beneficiaries who needed kidney dialysis treatments three times a week. The *Inquirer* reported:

When the fraud was rampant, companies bid against each other for patients, with some paying patients as much as \$500 a month for the right to bill Medicare, which pays \$360 to \$380 per round trip, including mileage, for each of those three weekly trips. Some patients were driven in cars. Others drove themselves.

In fact, one dialysis patient was worth about \$67,000 per year to ambulance companies that did nothing but taxi dialysis patients on the taxpayers' dime when the patients could have driven themselves, found a ride, or taken public transportation.

Federal authorities hit on an effective strategy to combat this fraud in 2014 when they barred new ambulance companies in the Philadelphia area from being paid for these services by Medicare. Additionally, all repetitive, non-emergency ambulance trips, such as rides to dialysis, needed prior authorization before they could be billed.

As a result of these new rules, Medicare's annual expenditures for ambulance services dropped from \$55.4 million in 2010 to just \$12.7 million in 2015. The new measures

also led to more than a quarter of the ambulance companies in Southeastern Pennsylvania closing (83 companies total), as well as 30 criminal convictions, \$22 million in restitution, and 82 years in aggregate prison sentences.

The *Inquirer* also noted that New Jersey and South Carolina—two other states where prior authorization has been required since December 2014—have also seen drastic drops in Medicare expenditures on ambulance services to an average of \$5.4 million last year from \$19 million in 2014.

Sources: *The Philadelphia Inquirer* and Righting Injustice

SEC ISSUES \$26 MILLION IN WHISTLEBLOWER AWARDS OVER ONE-MONTH PERIOD

I am pleased to report that the whistleblower program under the Securities and Exchange Commission (SEC) is working very well. In a clear sign of the increased awareness—and effectiveness—of the program, the SEC awarded five whistleblowers a total of more than \$26 million for their assistance in four separate enforcement actions between May 13 and June 9.

- May 13, 2016: the SEC awarded \$3.5 million to a whistleblower who provided useful information in an ongoing investigation. Notably, the information the whistleblower provided did not cause the Commission to open a new line of inquiry; rather, the information "significantly contributed" to the ongoing investigation by focusing the Commission on a particular issue and providing additional settlement leverage during its negotiations with the company.
 - May 17, 2016: the Commission announced an award of \$5-6 million (its third highest in history) to a "former company insider" who provided a detailed tip that, according to the Commission, "led the agency to uncover securities violations that would have been nearly impossible for it to detect but for the whistleblower's information."
 - May 20, 2016: the Commission jointly awarded more than \$450,000 to two individuals for a tip that led to the opening of a corporate accounting investigation and for their assistance as the investigation proceeded.
 - June 9, 2016: the SEC awarded \$17 million—the second largest award in the history of the whistleblower program—to a "former company employee" who provided a tip which, according to the SEC, "substantially advanced the agency's investigation and ultimate enforcement action."
- Andrew Ceresney, Director of Enforcement for the SEC, stated that when employees—who are often well-positioned to

identify wrongdoing—“report specific and credible tips to us, [the SEC] will leverage that inside knowledge to advance [its] enforcement of the securities laws and better protect investors and the marketplace.” These awards reaffirm the SEC’s intent to encourage whistleblowers to come forward and provide useful information—and show that the program is gaining momentum.

The SEC’s whistleblower program, as part of Dodd-Frank, has now awarded more than \$85 million to 32 whistleblowers since the program’s inception in 2011. Whistleblowers may be eligible for such an award when they voluntarily provide the SEC with unique and useful information that leads to a successful enforcement action.

These awards can range from 10 to 30 percent of the money collected when the monetary sanctions exceed \$1 million. Payments are made out of an investor protection fund established by Congress that is financed through monetary sanctions paid to the SEC as a result of securities law violations.

Source: *Bloomberg News*

MOTOR VEHICLE SAFETY WHISTLEBLOWER ACT

Congress recently passed the Fixing America’s Surface Transportation (FAST) Act, which took effect in December 2015. The Act includes an amendment to the National Traffic and Motor Vehicle Safety Act, known as the Motor Vehicle Safety Whistleblower Act. This new statute is located at 49 U.S.C. § 30172 and operates much like the SEC whistleblower program; however, it’s for the Department of Transportation.

As is the case in other False Claim Act litigation, a whistleblower may receive an award, 10 to 30 percent of collected monetary sanctions, if original information is provided to the Secretary of Transportation and that information leads to a successful resolution of a covered action. 49 U.S.C. § 30172(b).

The Act defines the term “whistleblower” as “any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who voluntarily provides to the Secretary original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter, which is likely to cause unreasonable risk of death or serious physical injury.” 49 U.S.C. § 30172(a)(6). Therefore, a whistleblower must be an employee or contractor of a motor vehicle manufacturer, part supplier, or dealership.¹

Original information means the information supplied to the Secretary is the inde-

pendent knowledge of the individual and the information is not already known to the Secretary from any other source. 49 U.S.C. § 30172(a)(3). There is an exception which makes information known to the Secretary of Transportation from another source still fall under original information. Id. The exception is if the whistleblower is the original source of that information. Id. This exception applies across, what seems, all venues—including judicial or administrative actions, governmental reports hearings, audits, investigations, and even news media. Id.

Finally, a covered action means any action brought by the Secretary of Transportation or Attorney General under this chapter that in the aggregate results in monetary sanctions exceeding \$1,000,000. 49 U.S.C. § 30172(a)(1). Therefore, when the Secretary of Transportation or Attorney General brings an action under this chapter² based on the information an employee or contractor whistleblower provides then they will be considered for an award of 10 to 30 percent of the monies recovered. Also noteworthy is the fact that this program provides protection of the whistleblower through confidentiality of their identity. See 49 U.S.C. § 30172(f).

There are factors the Secretary of Transportation shall take into consideration in determining an award, including any “additional factors as the Secretary considers relevant.” U.S.C. § 30172 (c)(1)(B)(iv).³ The Secretary does not have as much discretion when it comes to determining the denial of an award. However, no award shall be provided when one of five scenarios occurs.

- First, there shall not be an award provided if the whistleblower is convicted of a criminal violation related to the covered action. Id.
- No award shall be issued if the whistleblower deliberately causes or substantially contributes to the alleged violation, unless the action was under the direction of the manufacturer, part supplier, or dealership.⁴ Id.
- There shall not be an award if the information provided to the Secretary is based

² [R]elating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter, which is likely to cause unreasonable risk of death or serious physical injury. 49 U.S.C. § 30172(a)(6).

³ The other factors include whether a whistleblower reported or attempted to report the information internally to an applicable motor vehicle manufacturer, part supplier, or dealership; the significance of the original information provided by the whistleblower to the successful resolution of the covered action; the degree of assistance provided by the whistleblower and any legal representative of the whistle in the covered action[.] 49 U.S.C. § 30172 (c)(1)(B).

⁴ This section also allows the whistleblower to receive an award even if they were acting under the direction of an agent. U.S.C. § 30172 (c)(2)(B).

on the facts underlying the covered action of another, previous, whistleblower. Id.

- The whistleblower will not receive an award if they fail to provide original information to the Secretary in such form, which may be required by regulations. Id. However, there have not been any regulations promulgated concerning this whistleblower provision as of yet.
- Finally, the whistleblower shall not receive an award if the manufacturer, part supplier, or dealership had an internal reporting system to protect their employees from retaliation and the whistleblower failed to use that system.⁵ Id.

The Department of Transportation is required by the new law to issue proposed regulations outlining how the program will operate within the next year. However, at this time the statute is in effect and potential whistleblowers should act quickly in order to timely file a tip with the Department of Transportation under the law. To that end, it is highly recommended that any potential whistleblower contact a lawyer who is familiar with whistleblower provisions of other similar statutes, such as the Securities and Exchange Commission (SEC), U.S. Commodity Futures Trading Commission (CFTC), and Internal Revenue Service (IRS) whistleblower programs, and the False Claims Act. Beasley Allen has an entire section of lawyers and support staff dedicated to whistleblower law and are experienced in advising potential whistleblowers of their potential options.

This Department of Transportation whistleblower program operates much like the SEC whistleblower program, a successful program in its own right and one that has recovered hundreds of millions of dollars. Currently, there are an unprecedented number of motor vehicle recalls involving makes and models both new and used alike. The Department of Transportation’s new whistleblower program could not have come at a better time.

NEW YORK BASED BANK WILL PAY \$64 MILLION TO SETTLE INSURED MORTGAGE LENDING LAWSUIT

The Department of Justice (DOJ) announced recently that M&T Bank Corp., a bank headquartered in New York, has

⁵ There are exceptions to the internal reporting system requirement. These exceptions include (1) the whistleblower reasonably believed that such an internal report would result in retaliation; (2) the whistleblower believed the information was already internally reported, was already subject to or part of an internal investigation, or the whistleblower already knew the information was already known to the manufacturer, part supplier, or dealership; (3) the Secretary waives this requirement with good cause. U.S.C. § 30172 (c) (2).

¹ The term part supplier is defined as a manufacturer of motor vehicle equipment. 49 U.S.C. § 30172(a) (4).

agreed to settle a False Claims Act (FCA) lawsuit for \$64 million. Allegations in the suit involve M&T Bank's lending practices and claim the bank was knowingly originating and underwriting loans that did not meet certain requirements to be insured by the Federal Housing Administration (FHA).

Some banks have the option to participate as a direct endorsement lender (DEL), and in the capacity are able to underwrite, originate, and endorse mortgages for FHA insurance. If a person defaults on one of these mortgages, the bank, as holder of the loan, may submit an insurance claim to the Department of Housing and Urban Development (HUD), which is the parent agency for the FHA. However, the problem is these loans are not reviewed by the FHA under this program before they are endorsed for FHA insurance.

Therefore, there are strict requirements the loans must meet before a direct endorsement lender can certify the mortgages for FHA insurance. Moreover, such a lender must maintain a quality control program and report any deficient loans identified by that program. Principle Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department's Civil Division, had this to say, "Mortgage lenders that fail to follow FHA program rules put taxpayer funds at risk and increase the chances of borrowers losing their homes."

In this case, the allegations were M&T Bank failed to comply with the requirements set forth by the FHA. In addition, it was alleged that M&T Bank created a quality control system that detected significantly lower major error rates. Moreover, even though M&T Bank did detect numerous loans with major errors, the bank failed to report these loans to HUD. Therefore, HUD insured hundreds of loans that were not qualified for the FHA insurance. As all of our readers should know, the FCA contains a qui tam provision, which allows private citizens to sue on behalf of the government when they have knowledge of an entity committing fraud against the government.

As we have stated previously, the qui tam provision provides incentives for ordinary citizens to become whistleblowers by reporting the fraud. These incentives include 15 to 30 percent of the monies recovered and protection against retaliation. This case was originally filed under the qui tam provision of the FCA by a former employee of M&T Bank. Though the share to be awarded to the whistleblower has not yet been determined, it's believed the employee will receive anywhere from \$9.5 million to \$19 million as an award for her participation in the case.

Pfizer To Pay \$784.6 Million To Settle Drug Discount Case

Pfizer Inc. has agreed to pay \$784.6 million to resolve a 14-year-old lawsuit claiming its Wyeth unit overcharged the

government by hiding the discounts it was giving hospitals for drugs used to treat acid-related damage to the esophagus. The hidden discounts meant that Medicaid paid "hundred of millions of dollars" more for the drugs than it should have from 2001 to 2006, according to a statement from U.S. Attorney Carmen Ortiz in Boston.

Pfizer, which acquired Wyeth in 2009, announced the broad terms of the agreement in February. The settlement covers bundled discounts given for Protonix Oral and Protonix IV. Benjamin C. Mizer, Deputy Assistant Attorney General at the Department of Justice, said in a statement:

This settlement demonstrates our unwavering commitment to hold pharmaceutical companies responsible for pursuing pricing schemes that attempt to manipulate and overcharge federal health care programs.

Several other drugmakers have resolved cases accusing them of failing to give Medicaid required drug discounts related to the best prices offered to private purchasers. Under the Pfizer settlement, \$413.2 million will go the U.S. and \$371.4 million to state governments.

The settlement resolves two lawsuits filed under the False Claims Act. Two whistleblowers, Lauren Kieff and William St. John LaCorte, will share \$98.1 million, according to the Justice Department. Dr. LaCorte, a physician in New Orleans who filed suit in 2002, will get \$64 million plus interest, according to the settlement agreement. Ms. Kieff, a former hospital sales representative in Massachusetts for AstraZeneca Plc, filed suit sued a year later. Dr. LaCorte claimed that Wyeth sold Protonix Oral tablets to hospitals for as low as 16 cents per tablet while not reporting that price to federal programs.

Ms. Kieff, who was marketing competing drugs for AstraZeneca, believed that Wyeth had an unfair advantage. It appears from reports that "hospitals were buying the drug and getting incredible discounts, and the government was not getting the benefit of those prices." Proving the case was said to be a "very difficult, complicated" process, partly because the regulations for best drug prices were rewritten in 2007. It appears that the Justice Department, which intervened and filed its own complaint in 2009, did good work in this matter. James Markey, who represented the Plaintiffs, had this to say:

The government used brick by brick its analytical skills, its data-mining skills and its ability to elicit testimony and build a case showing there was knowledge of the fraud at Wyeth, or alternatively, willful blindness.

The cases are U.S. ex rel. LaCorte v. Wyeth, U.S. District Court, Eastern District of Louisiana and U.S. ex rel. Kieff v. Wyeth,

U.S. District Court, District of Massachusetts (Boston).

Source: *Bloomberg News*

Genentech and OSI Reach \$67 Million FCA Settlement Over Cancer Drug Claims

Drugmakers Genentech and OSI Pharmaceuticals have agreed to pay \$67 million to settle a whistleblower lawsuit. It was alleged in the suit that the companies violated the False Claims Act (FCA) by making misleading statements about the effectiveness of cancer drug Tarceva. Federal prosecutors said the drug's co-developers, Roche AG unit Genentech Inc. and Astellas Pharma Inc. subsidiary OSI Pharmaceuticals LLC, aggressively marketed their Tarceva drug to doctors and health care providers from January 2006 to December 2011. The drug companies lacked evidence the drug could effectively treat certain patients with non-small cell lung cancer. That was especially true as it related to those who didn't have a mutation in their epidermal growth factor receptor or were smokers.

The settlement, if approved, would resolve claims brought by Brian Shields, a former Genentech employee, who filed the whistleblower suit in California federal court in 2011. He will receive approximately \$10 million for filing the suit. A Genentech spokeswoman told Law360 that the government did not require a corporate integrity agreement from either company. It should be noted that the claims in question occurred before Astellas acquired OSI in 2010.

Genentech, located in South San Francisco, Calif., and OSI Pharmaceuticals, located in Farmingdale, N.Y., co-promote Tarceva, which is approved to treat certain patients with non-small cell lung cancer or pancreatic cancer. OSI Pharmaceuticals LLC is the successor to OSI Pharmaceuticals Inc., which was acquired by Astellas Holding US Inc. in 2010 and converted to a limited liability company in 2011. The Department of Justice has said it will hold those companies accountable that mislead the public about the efficacy of their products. In a statement, Benjamin C. Mizer, the head of the U.S. Department of Justice's Civil Division, had this to say:

Pharmaceutical companies have a responsibility to provide accurate information to patients and health care providers about their prescription drugs.

As a result of the \$67-million settlement, the federal government will receive \$62.6 million and state Medicaid programs will receive \$4.4 million. The Medicaid program is funded jointly by the state and federal governments. Shields will receive approximately \$10 million.

This settlement illustrates the government's emphasis on combating health care

fraud and marks another achievement for the Health Care Fraud Prevention and Enforcement Action Team (HEAT) initiative, which was announced in May 2009 by the Attorney General and the Secretary of Health and Human Services.

The partnership between the two departments has focused efforts to reduce and prevent Medicare and Medicaid financial fraud through enhanced cooperation. One of the most powerful tools in this effort is the False Claims Act. Since January 2009, the Justice Department has recovered a total of more than \$29.8 billion through False Claims Act cases, with more than \$18.2 billion of that amount recovered in cases involving fraud against federal health care programs.

Genentech is facing FCA claims unsealed in May in New York federal court accusing the company and many others of unlawfully receiving government reimbursements for unapproved vaccines and other biologic drugs. The whistleblower suit alleges that Genentech, Amgen Inc., Bristol-Myers Squibb Co. and a host of other companies put patients at risk by conspiring with pharmacies and drug-packaging companies to repackage drugs with excess product in violation of approved labeling. The case is in the U.S. District Court for the Northern District of California.

Source: Law360.com

BEASLEY ALLEN WHISTLEBLOWER LITIGATION TEAM

Due to the increasing activity involving whistleblower cases, our firm has assigned lawyers to a team to handle these cases. As we have reported, these cases can arise under either federal or state law. If you are aware of fraud being committed against the federal government, or a state government, the False Claims Act (FCA) or a state law 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, you can contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim. You can contact one of the lawyers on our Whistleblower Litigation Team at 800-898-2034 or by email at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com, Andrew.Brashier@beasleyallen.com, Clay.Barnett@beasleyallen.com or Rebecca.Gilliland@beasleyallen.com.

VI. MASS TORTS SECTION UPDATE

AN UPDATE ON ACTIVITY IN BEASLEY ALLEN'S MASS TORTS SECTION

As I have mentioned previously, Andy Birchfield heads up our Mass Torts Section. We currently have 25 lawyers and 66 support staff in this Section. The Section also has eight contract lawyers and 16 contract staff workers who are helping the firm with cases in the Section. Melissa Prickett, a lawyer in the Section, serves as Section Administrator and she helps to coordinate all of the activity in the Section. Melissa is assisted by Penny Davies, her Administrative Assistant, who helps with coordination of all Section activities.

Everybody in the Section—lawyers and support staff—has been very busy over the past several weeks. At present, a number of important projects are underway. Lawyers in the Section will investigate any medication or device claim involving catastrophic injury or death. The following are some of the drugs and devices lawyers and support staff in the Section are currently working on:

Talcum Powder

Johnson and Johnson has known for decades that its talcum products, such as Shower to Shower and Baby Powder, can cause ovarian cancer. But J&J has failed to warn women of the risk of using these products in the genital area. A Harvard medical doctor says that he has studied the link between talc and cancer for 30 years and believes talc is the likely cause for as many as 2,200 cases of ovarian cancer each year.

Lawyers: Ted Meadows, Danielle Mason, David Dearing and Brit-tany Scott
Primary Staff Contacts: Katie Tucker, Gwyn Harris and Amy Brown

Transvaginal Mesh

The U.S. Food and Drug Administration (FDA) has issued an updated safety communication warning doctors, health care professionals and patients that the placement of surgical mesh through the vagina to treat pelvic organ prolapse and stress urinary incontinence may present greater risk for the patient than other non-mesh procedures. This is also called transvaginal mesh. According to the FDA, reported complications from the transvaginal placement of the mesh include erosion of the mesh into the vaginal tissue, organ perforation, pain, infec-

tion, painful intercourse and urinary and fecal incontinence. Often women require surgery to remove the mesh. In some cases, this can require multiple procedures without successfully removing all of the mesh. Currently, we are investigating cases involving mesh manufactured by Ethicon/Johnson & Johnson.

Lawyers: Leigh O'Dell and Chad Cook
Primary Staff Contacts: Tabitha Dean and Melisa Bruner

Xarelto®

Approved by the FDA in 2011, Xarelto® is one of the newest blood thinners on the market. It is manufactured by Janssen Pharmaceutical (a subsidiary of Johnson & Johnson) and co-marketed by Bayer Healthcare. It is prescribed to prevent blood clots in patients suffering from atrial fibrillation, pulmonary embolism, deep vein thrombosis, stroke, and in patients who have recently undergone hip or knee replacement surgery. Since its approval, it has been linked to hundreds of injuries and deaths. We are currently investigating claims of GI bleeding, hemorrhagic strokes or any other serious or fatal bleeding involving Xarelto®.

Lawyers: David Byrne and Melissa Prickett
Primary Staff Contacts: Susan Harding and Penny Davies

3M™ Bair Hugger

The 3M™ Bair Hugger is a forced hot air warming blanket, used primarily to help maintain a patient's body temperature during surgery. The 3M™ Bair Hugger pushes warm air through a flexible hose into a blanket draped over a patient. However, warming blankets can recirculate contaminated air over a patient's body, including over an open surgical site. This may result in infections like MRSA or sepsis. In particular, patients undergoing knee or hip replacement surgery are at risk of infection deep in the joint, which is very difficult to treat. Complications from these infections include hospitalization, implant revision surgery, limited mobility, permanent disability, amputation and death.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Essure®

Essure® is a permanent birth control device manufactured by Bayer Healthcare. The device consists of two small nickel alloy coils, which are implanted through the vagina into the fallopian tubes. Scar tissue forms around the

coils, preventing sperm from reaching the eggs. Since its approval in 2002, 750,000 Essure® devices have been implanted. Adverse events reported with Essure® include migration, leading to perforation of the fallopian tube or uterine wall or embedment in other organs, often requiring hysterectomy or surgical removal; allergic reactions; severe pain; and infection.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Invokana®

Approved in March 2013, Invokana® (canagliflozin) is an SGLT2 Inhibitor used to treat adults with Type 2 diabetes, manufactured by Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson. SGLT2 inhibitors work by preventing high blood sugar by helping the patient's kidneys remove excess sugar through their urine. In May 2015, the U.S. Food and Drug Administration (FDA) issued a warning the drug has been linked to cases of ketoacidosis, a serious condition where there is too much acid in the blood. Complications of diabetic ketoacidosis include difficulty breathing, nausea/vomiting, abdominal pain, confusion and unusual fatigue or sleepiness. The condition can lead to diabetic coma and/or death.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

IVC Filter

Retrievable IVC filters are wire devices implanted in the vena cava, the body's largest vein, to stop blood clots from reaching the heart and lungs. These devices are used when blood thinners are not an option. Manufacturers include Bard, Cook and Johnson & Johnson. While permanent IVC filters have been used since the 1960s with almost no reports of failure, retrievable IVC filters were introduced in 2003, promoted for use in bariatric surgery, trauma surgery and orthopedic surgery. Risks associated with the retrievable IVC filters include migration, fracture and perforation, leading to embolism, organ damage and wrongful death.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Lipitor®

Lipitor, a statin drug to treat high cholesterol, was approved by the FDA in 1996 and is one the best-selling prescription medications in the world. Recent studies have found a possible link between Lipitor and the risk of developing Type 2 diabetes. A University of Massachusetts study found a potential link in postmenopausal

women, particularly those who had a Body Mass Index (BMI) less than 25. Of the 153,840 women evaluated, more than 10,000 had developed Type 2 diabetes by the end of the study.

Criteria: Injured is female who took Lipitor consistently for at least two months and was diagnosed with diabetes while taking Lipitor (or within six months of last dosage of Lipitor).

Lawyers: Frank Woodson and Matt Munson
Primary Staff Contact: Renee Lindsey

Metal-on-Metal Hip Replacements

Metal-on-Metal hip replacement manufacturers have been under heavy scrutiny over the past few years regarding the dangers of their metal on metal hip devices. The main hip devices under scrutiny are:

- Johnson & Johnson/DePuy: ASR Total Hip Replacement and ASR Resurfacing System hip (*Recalled on August 24, 2010*);
- Johnson & Johnson / DePuy: Pinnacle metal-on-metal hip;
- Zimmer: Durom Cup hip;
- Stryker: Rejuvenate and ABG II Stems (*Recalled on July 4, 2012*);
- Biomet: M2a and 38 Diameter hips; and
- Wright: (a) Conserve, (b) Dynasty, (c) Lineage and (d) Profemur (femur fracture) hips.

Metal-on-metal hip patients from the above manufacturers have similarly reported problems after their initial implant surgery resulting in revision surgery. All have reported a variety of symptoms, including pain, swelling and problems walking. These symptoms are normal for patients following a hip replacement, but can be a sign that something is wrong if they continue or come back frequently. Additionally, metal debris spreading in the hip area has been reported due to the metal-on-metal friction involved from the metal components moving together.

Lawyers in the Section will review any cases involving individuals who have had any of the above metal-on-metal hip devices implanted and all individuals unsure of the type of hip device implanted if the person has had revision surgery, or the person is experiencing hip pain, hip swelling or difficulty walking.

Lawyer: Navan Ward
Primary Staff Contacts: Donna Puckett and Stephanie Dean

Mirena® IUD

Mirena® is an IUD that was originally approved by the FDA as an intrauterine contraceptive. It was later approved as a treatment for heavy menstrual bleeding. It works by slowly releasing a low dose of levonorgestrel (a synthetic progestin hormone) directly into the uterus. Serious adverse side effects and potentially life-threatening complications have been reported following the implantation of the device. These complications include organ perforation, migration of the IUD to outside the uterus, expulsion of the IUD, and embedment in the uterus, among others.

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

Power Morcellator

The Power Morcellator is a surgical instrument used to divide and remove masses during hysterectomies, fibroid removal and other laparoscopic surgeries. The device is inserted through small incisions and removes tissue after aggressively cutting and shredding it. The device can put women at increased risk for a number of deadly uterine cancers. According to FDA analysis, 1 in 350 women undergoing surgical treatment for fibroids has an unsuspected uterine sarcoma that cannot be reliably detected before surgery. During power morcellation, there is a chance pieces of tissue may be left behind. If the tissue is malignant, cancer may be spread. The FDA issued a safety alert in April 2014 discouraging the use of these devices in uterine and fibroid removal procedures.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Proton Pump Inhibitors

Proton pump inhibitors (PPIs) were introduced in the late 1980s for the treatment of acid-related disorder of the upper gastrointestinal tract, including peptic ulcers and gastrointestinal reflux disorders, and are available both as prescription and over-the-counter drugs. Use of PPIs has increased in the U.S. from 3.4 percent to 7.0 percent among men and from 4.8 percent to 8.5 percent among women from 1999-2000 to 2011-2013, according to the National Health and Nutrition Examination Survey, and 14.9 million patients received 157 million prescriptions for PPIs in 2012. We are currently investigating cases involving PPI use and Acute Interstitial Nephritis (AIN), which is a condition where the spaces between the tubules of the kidney cells become inflamed.

Case reports have linked PPI use to AIN as early as 1992, and observational

studies in 2014 and 2015 provided further evidence of the link between PPIs and AIN. The injury appears to be more profound in individuals older than 60. While individuals who suffer from AIN can recover, most will suffer from some level of permanent kidney function loss. In rare cases individuals suffering from PPI induced AIN will require kidney transplant. Lawyers in the section are currently investigating PPI induced acute interstitial nephritis cases.

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

Risperdal®

Risperdal® is an atypical antipsychotic drug used to treat schizophrenia and certain problems caused by bipolar disorder and has been linked to the development of gynecomastia in boys and young men. Gynecomastia is a condition that causes boys to grow breasts.

Lawyer: James Lampkin
Primary Staff Contact: Crystal Jacks

Stevens-Johnson Syndrome

Stevens-Johnson Syndrome (SJS) is an immune complex hypersensitivity reaction that can be caused from an infection or immune response to drugs. It is a severe expression of a simple rash known as erythema multiforme. SJS is also known as erythema multiforme major. It affects all ages and genders including pediatric populations. The most severe form of SJS is toxic epidermal necrolysis (TENS). SJS occurs twice as often in men as in women. Most cases of SJS appear in children and young adults younger than 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as NSAIDs, non-steroidal anti-inflammatory drugs.

Lawyers: Frank Woodson and Matt Munson
Primary Staff Contact: Renee Lindsey

Testosterone Replacement Therapy

Testosterone Replacement Therapy products for men have been linked to an increased risk of death, heart attack and stroke. Researchers found men who used testosterone therapy were 30 percent more likely to have a heart attack, stroke, or die after three years of use. Furthermore, men who started the study with clear, unobstructed coronary arteries were just as likely to have a heart attack, stroke or die as men who entered the study with established coronary artery disease. Testosterone therapy, such as the prescription topical treatments Androgel, Testim

and Axiron, are used to help boost testosterone levels in men who have a deficiency of the male hormone. Symptoms of low testosterone include decreased libido and low energy. We are currently investigating claims of heart attack, stroke, DVT, pulmonary embolism and prostate cancer.

The Bellwether discovery process is ongoing against the manufacturers of Androgel with trials expected to start in 2017. The Defendants failed to adequately warn about risks of stroke, deep vein thrombosis, pulmonary embolism and cardiovascular injury and improperly marketed their drugs as a remedy for a series of age-related conditions rebranded as "Low T." The testosterone lawsuits were centralized under federal multidistrict litigation (MDL) last year to help streamline pre-trial discovery, and are being overseen by Judge Matthew Kennelly.

Lawyer: Matt Teague
Primary Staff Contact: Heather Hall

Viagra®

A preliminary study indicates that erectile dysfunction drug Viagra® (sildenafil) may increase the risk of developing melanoma, the deadliest form of skin cancer. The study, published in the *JAMA Internal Medicine journal*, analyzed data from nearly 26,000 men, 6 percent of whom had taken Viagra. The men who used Viagra at some point in their lives had about double the risk of melanoma compared to men who had never taken the drug. Men who were currently taking Viagra were at an 84 percent greater risk of developing melanoma. We are currently looking at cases involving men who are taking or have taken Viagra and were diagnosed with melanoma.

Lawyer: Melissa Prickett
Primary Staff Contact: Penny Davies

Zimmer NexGen Knee Replacement

Since 2003, more than 150,000 Zimmer NexGen Flex-Knee implants have been sold. Several different components used as part of the Zimmer NexGen Flex-Knee replacement system have been associated with increased risk of complications, including pain, swelling, loosening of component parts, and the need for follow-up/revision surgery. Several prominent surgeons want a Zimmer NexGen knee replacement recall to be issued. At a March 2010 conference of the American Academy of Orthopedic Surgeons, two knee surgeons presented data suggesting that the Zimmer NexGen Flex-Knee failure rate could be as high as 9 percent, and that the actual number of complications that require revision surgery

could be even higher. The lead author of the study, Dr. Richard Berger, described the failure rate of the Zimmer NexGen CR-Flex Porous Femoral Component as "unacceptably high."

Lawyers in the Section will be glad to review any cases involving individuals who have had a Zimmer NexGen knee device implanted, or individuals unsure of the type of knee device implanted, if that individual has had revision surgery.

Lawyer: Navan Ward
Primary Staff Contacts: Donna Puckett and Stephanie Dean

Zofran®

Manufactured by GlaxoSmithKline, Zofran® (ondansetron) was approved to treat nausea during chemotherapy and following surgery. Zofran® works by blocking serotonin in the areas of the brain that trigger nausea and vomiting. Between 2002 and 2004, GSK began promoting Zofran® off-label for the treatment of morning sickness during pregnancy, despite the fact the drug has not been approved for pregnant women and there have been no well controlled studies in pregnant women. The FDA has received nearly 500 reports of birth defects linked to Zofran®. Birth defect risks include cleft palate and septal heart defects.

Lawyers: Roger Smith and Liz Eiland
Primary Staff Contact: April Worley

If you need more information on any of the projects discussed above, contact the lawyer listed as the contact for the particular project at 800-898-2037. You can also call or email Melissa Prickett, the Section Administrator, at 800-898-2034 or Melissa.Prickett@beasleyallen.com. She will be glad to put you in touch with a lawyer.

VII. MORE ON MASS TORTS LITIGATION

AMS SETTLES MORE THAN 100 SUITS IN PELVIC MESH MDL

American Medical Systems Inc. (AMS), a unit of Endo International plc, has settled more than 100 injury suits in the multidistrict litigation (MDL) in West Virginia. This suit involves health complications caused by a number of vaginal mesh devices. AMS has about 135 suits filed by women who say they were injured and damaged by the vaginal mesh devices.

The devices included the Apogee and Perigee systems, as well as the MiniArc Slings

and the IntePro Y Sling, among other products. All of the suits contend that the vaginal mesh devices at issue are defective and have caused the women chronic pain, incontinence and other injuries. The women are represented by a number of law firms.

Last July, Plaintiffs in another 100 suits agreed to settlements with AMS. In May 2015, U.S. District Judge Joseph R. Goodwin, who is overseeing the MDL, said he had been informed by counsel for AMS that approximately 108 Plaintiffs had reached a settlement with Endo.

In April 2015, Endo told Judge Goodwin it had “compromised and settled all claims” in about 360 cases. Endo said in April 2014 that it had agreed to pay \$830 million to settle a large number of suits over the alleged mesh injuries. That agreement was with several Plaintiffs’ firms—including Motley Rice LLC, Blasingame Burch Garrard & Ashley PC, Levin Simes LLP and Clark Love & Hutson GP—and sought to settle approximately 20,000 claims in the ongoing litigation.

Seven separate MDLs comprising some 70,000 cases are pending in West Virginia involving alleged pelvic mesh implant injuries. Ethicon is facing about 23,000 suits as part of its MDL.

It should be noted that the U.S. Food and Drug Administration (FDA) recently reclassified pelvic mesh devices like those at issue in the suits as high-risk devices that must undergo the agency’s most stringent safety evaluation before hitting the market.

The Plaintiffs in the most recent settlements are represented by the Barton Law Firm and the Nations Law Firm, among others. The multidistrict litigation is *In re: American Medical Systems Inc. Pelvic Repair System Products Liability Litigation*, which is in the U.S. District Court for the Southern District of West Virginia.

Source: Law360.com

TEVA HALTS HEADACHE PATCH SALES AMID PATIENT BURNS

Teva Pharmaceuticals is halting sales of headache patch Zecuity amid reports that patients have been burned by the product. This is a significant step that would certainly appear to validate recent safety concerns relating to the Zecuity patches. The development came less than two weeks after the U.S. Food and Drug Administration (FDA) said that “a large number of patients” have experienced “serious burns and potential permanent scarring” when using Zecuity, which hit the market in September for treatment of migraine headaches.

Teva, in an urgent letter sent to health care providers on June 9, asked doctors to stop prescribing Zecuity. The anti-headache drug sumatriptan is delivered to the bloodstream by way of the patch more quickly than pills. Doctors should tell patients with existing prescriptions to discontinue use of Zecuity, the letter stated. Teva’s letter also

acknowledged that some patients have suffered long-lasting side effects from Zecuity. The battery-powered patch is applied for several hours to the upper arm or thigh. Teva acknowledged that “Although many cases resolved within hours to weeks, there are reports of cases with unresolved skin reactions, typically skin discoloration, after several months.”

The company also disclosed a recall of Zecuity that will extend to the pharmacy level, a moderately extensive type of recall that goes beyond the distributor level but not all the way to consumers. Teva said that it is working with the FDA “to better understand these adverse events.” The product was originally developed by Pennsylvania-based NuPathe Inc., which Teva acquired in 2014.

According to Teva, injuries have been described as “severe redness, cracked skin, blistering or welts, and burns or scars where the patch was worn.” Zecuity’s label lists skin redness as the product’s most common side effect and says that discoloration normally disappears within 24 hours. Information contained in the label indicates “intense redness” or “intense redness with blisters/broken skin” was reported in 6 percent of clinical-trial patients within four hours of using Zecuity, a figure that fell to 2 percent within 24 hours.

Thus far, there are no specific figures on the number of serious skin reactions to Zecuity, outside of clinical trials, that have been made public. It’s not common for drug-makers to suspend sales in the face of new safety concerns.

ABBOTT SETTLES DEPAKOTE SUIT DURING JURY DELIBERATIONS

Abbott Laboratories Inc. has reached a settlement with a Missouri woman alleging that the drugmaker’s seizure and bipolar disorder drug Depakote caused a severe spinal condition in her son. The settlement actually came while the jury in the case was out deliberating.

In 2012, Beth Forbes accused Abbott of failing to warn her and other patients of the risk of bearing a child with spina bifida while taking Depakote during pregnancy. The following was alleged and said to have been proved at trial:

Ms. Forbes began showing signs of mental illness in 1999 and was diagnosed with bipolar disorder in 2002 during a hospitalization. She was prescribed Depakote extended-release tablets as a mood stabilizer, as well as Geodon and Wellbutrin. In early 2005, Forbes became pregnant with her son, stopped taking Depakote when she realized she was expecting and gave birth in September of that year. Her son was diagnosed with spina bifida, as well as several secondary conditions, such as club feet

and hearing loss. While Ms. Forbes was taking Depakote, its label included specific warnings about the risk of spina bifida from exposure in the womb, including a black box warning in capital letters that warned of the risks of neural tube defects such as spina bifida.

Abbott had unsuccessfully tried to get the punitive damages claim in the suit thrown out by the court. U.S. District Judge Charles Shaw rejected Abbot’s request, saying Forbes had shown evidence that Abbott knew since the 1980s that Depakote had strong enough risks for serious birth defects that it should only be used along with birth control. Therefore, the warnings on the label didn’t convey the full extent of the risks.

Ms. Forbes is represented by Daniel Ranieri of Aubuchon Ranieri & Panzeri, John Boundas, John Eddie Williams, Jr., Brian Abramson and Margot Trevino of Williams and Kherkher, and George Erick Rosemond of Rosemond Law PC. The case is in the U.S. District Court for the Eastern District of Missouri.

Source: Law360.com

\$20 MILLION KNEE INJURY VERDICT AGAINST ZIMMER SENT BACK TO TRIAL COURT

A divided Pennsylvania appeals court ruled against a knee-replacement patient last month, finding that a \$20-million verdict against Zimmer Inc. and marketing firm Public Communications Inc. was excessive. The Superior Court ruled 4-to-1 that the verdict was excessive considering the nature of the injuries that a jury agreed Margo Pollet had suffered during a bike ride she took promoting a Zimmer artificial knee product. In an opinion written by Judge Jacqueline Shogan, the court said:

The ... jury award to Mrs. Polett for non-economic losses deviates substantially from the uncertain limits of what is considered fair and reasonable compensation and, therefore, shocks the sense of justice. Accordingly, we vacate the award to Mrs. Polett and remand.

The case was back before the Superior Court following a ruling by the state’s highest court in October. The Pennsylvania Supreme Court said last year that the verdict was wrongly voided and that a jury instruction didn’t improperly suggest that it was up to the Defendants to provide medical evidence that something other than Ms. Pollet’s bike ride had caused her injuries. That had been what the lower court initially found.

On remand, the Superior Court found another and new reason to upset the award. The court considered for the first time whether the Defendants should have been granted remittitur of the verdict. That issue

had not previously been addressed on appeal.

As we previously reported, a Philadelphia County jury awarded Ms. Pollet \$26.6 million in damages in June 2011, but the award was reduced based on a finding of 30 percent comparative negligence on the part of the Plaintiff. Ms. Pollet's husband, meanwhile, was awarded \$1 million for loss of consortium. The jury had found Zimmer was 34 percent negligent, while PCI was found to have been 36 percent negligent. The Superior Court's recent ruling, however, found that the award was excessive given the fact that Ms. Pollet did not seek compensation for any specific medical expenses. Instead, the opinion said she had sought non-economic damages, based on the permanent degradation suffered following a series of additional surgeries she required after the injury.

While acknowledging that Ms. Pollet was "clearly ... entitled to compensatory damages," the court found the damage award to be "excessive, if not punitive." The court remanded the case back to Philadelphia County for remittitur by a trial judge. Judge Kate Ford Elliott issued a one-page statement noting her dissent in the case, and pointed to a prior dissent that addressed the remittitur issue when the case was initially before the Superior Court.

Judge David Wecht, who has since been elected to the Supreme Court, said in a separate dissent that it was not for the court to second guess the damages awarded by a jury. Judge Wecht said in his dissent:

The decision to grant or deny remittitur is within the trial court's sound discretion, and will be overturned only upon a showing of abuse of discretion or error of law. We cannot substitute our judgment for that of the factfinder, and we must view the record with consideration of the evidence accepted by the jury.

I have always believed the law relating to remittitur was more in line with Judge Wecht's dissent. Ms. Pollet is represented by Shanin Specter and Charles Becker of Kline & Specter PC. The case was before the Pennsylvania Superior Court.

Source: Law360.com

VIII. AN UPDATE ON SECURITIES LITIGATION

BP TO PAY \$175 MILLION TO SETTLE CLAIMS IT HID THE SIZE OF THE OIL SPILL

BP Plc has agreed to pay \$175 million to settle claims by U.S. investors that its manag-

ers lied about the size of the 2010 Gulf of Mexico oil spill in order to prop up its stock price. This settlement removes the oil giant's last major overhang from the disaster. The investors, who blamed BP for massive losses when the true scope of the spill was revealed, had sought as much as \$2.5 billion. The settlement avoids a trial that was set for this month in Houston federal court.

The settlement announcement came shortly after a ruling by U.S. District Judge Keith Ellison to narrow the evidence that could have been presented to a jury. The decision, which would have benefited BP at trial, limited the management statements that investors could claim affected the stock price. BP shares fell sharply—by more than 40 percent—in the weeks after the April 2010 disaster. It became very clear the company couldn't immediately contain the spill. More than 4 million barrels of oil escaped into the Gulf of Mexico during the 87 days BP took to control the well.

The investors' lawsuit, led by the public employee pension funds of New York and Ohio, revolved around statements made shortly after the Deepwater Horizon drilling rig blew up in April 2010. Those statements also were central to BP's agreement in 2012 to pay \$525 million to resolve claims by the Securities and Exchange Commission (SEC) that the London-based company underestimated the size of the spill to bolster stock prices. BP also pleaded guilty to a felony count of obstruction of Congress related to spill estimates. Jennifer Freeman, a spokeswoman for the New York Comptroller's Office, observed: "Investors saw their stock prices plummet after the Deepwater Horizon explosion. This settlement helps compensate investors for their losses."

BP has set aside \$56.4 billion so far for the disaster, according to an April regulatory filing. The company's cumulative pre-tax charge to earnings doesn't show a complete picture of the company's financial hit from the spill. As part of funds paid out to stop and clean up the spill and compensate victims, BP has agreed to a series of settlements with different groups damaged by the disaster. The amounts remaining to be paid under all of these agreements is uncertain. The following is a review of those settlements:

In 2012, BP agreed to pay \$4 billion to resolve criminal charges tied to pollution violations, misleading Congress and manslaughter for the deaths of 11 rig workers killed in the initial explosion. In a separate settlement that year, BP agreed to pay private property and economic-loss claims by hundreds of thousands of individuals and businesses in the five Gulf states, although it excluded whole categories of business claims by casinos, real estate developers and financial institutions. As many of these claims remain unevaluated and unpaid, BP said in April its estimate of \$12.9 billion will likely be "significantly

higher" once all private claims are processed and paid.

Last year, BP settled the most expensive part of its spill litigation by agreeing to pay \$20.8 billion over the next 17 years to cover additional pollution violations, financial losses and natural resources damages suffered by state, local and national government entities.

In the recent ruling Judge Ellison said that investors could sue to recover for losses caused by low-ball flow rate estimates BP managers made public during the first two weeks of the spill. Company officials repeatedly estimated that 1,000 to 5,000 barrels of oil were gushing from the well daily, when internal calculations pegged the flow rate at more than 10 times higher. Judge Ellison rejected investors' theory that BP kept propping up the share price with other statements that downplayed the financial impact a longer, wider spill would have on the company, saying that's not the same thing as misrepresenting the flow rate.

Judge Ellison previously allowed investors who bought ADR shares immediately after the disaster to sue as a group or class action, while rejecting claims by investors who bought before the incident. BP says that the \$175 million settlement won't cover other securities-related claims. This case is *In Re BP Plc Securities Litigation*, which is in the U.S. District Court, Southern District of Texas (Houston).

Source: Margaret Cronin Fisk and Laurel Brubaker Calkins with *Bloomberg News*

IX. AN UPDATE ON ACTIVITY IN BEASLEY ALLEN'S CONSUMER FRAUD AND COMMERCIAL LITIGATION SECTION

We are featuring ongoing activity this month in our firm's Consumer Fraud and Commercial Litigation Section, which is managed by Section Head Dee Miles. Michelle Fulmer is the Section Administrator and she helps coordinate the work of the Section. Currently, there are 11 lawyers and 19 support staff in the Section. They have all been very busy during the first half of 2016. The Section is currently investigating and/or litigating the cases in the areas set out below.

Class Actions

Our firm's class action practice is rapidly growing. We have cases filed all over the country ranging from consumer fraud, Antitrust, employment abuses, ERISA (Employee Retirement Income Security Act) to product liability and nuisance cases. This area of the law continues to grow due to the corporate abuses occurring in the business world. Oftentimes the class action is the most efficient legal vehicle to rectify a large scale "wrong" because while corporate abuse may have caused someone or a business harm, the harm is small, yet widespread. Some say a class is appropriate when "nobody gets 'hit' for much, but everybody does get 'hit.'" Well, the "hits" keep coming and the class action cases continue to be filed.

While arbitration clauses have had some limited impact on class action filing, it has not proved to be the effective deterrent corporate America had hoped for. This is mainly due to the courts finally recognizing that arbitration was never intended to be utilized in consumer contracts. It was designed for complex business transactions involving sophisticated parties in specialized areas of business. However, corporations have abused the use of arbitration clauses to frustrate consumer resistance to their fraudulent practices; thus, it has resulted in a profit-making measure for corporate America.

Just because a consumer contract has an arbitration clause, that doesn't mean a class action on the abusive corporate conduct is barred. There may be ways around the arbitration clause and a lawyer familiar with the ever-changing law on this issue can make that determination. Archie Grubb and Andrew Brashier, lawyers in the section, are well versed in the area of the law surrounding both class actions and arbitration clauses. We review many potential class actions daily and welcome the opportunity to review more.

Volkswagen/Audi/Porsche Emissions Defect

Lawyers from Beasley Allen joined with other firms to file a nationwide class action lawsuit on behalf of consumers that own Volkswagen, Audi and Porsche vehicles who were deceived by the automaker's deliberate end run around Environmental Protection Agency (EPA) pollution controls. We were most fortunate to have been selected by Judge Charles R. Breyer, United States District Judge in California, located in San Francisco, Calif., to serve on the Plaintiff's Steering Committee (PSC) of this most important

case. Dee Miles was selected by the court and has been quite busy on this case so far this year. The EPA has filed notices of violation (NOV) against VW, accusing the automaker of selling diesel vehicles equipped with software that disguises vehicles' true nitrogen oxide (NOx) emissions, and covering up violations of the Clean Air Act.

The EPA cited Volkswagen and its affiliates Audi AG and Volkswagen Group of America. The NOV alleges VW and Audi diesel cars from model years 2009-2015 include a so-called "defeat device." The device allows deliberate deception, turning on pollution controls only during official tests, while actually allowing the vehicles to run "dirty" during normal operation. Tests reveal NOx emissions up to 40 times higher than the federal standard.

The emissions cheat affects the following vehicles:

- VW Jetta (2009-2014)
- VW Beetle (2013-2015)
- VW Golf (2010-2015)
- VW Passat (212-2015)
- VW Toureg (2009-2016)
- Audi A3 (2010-2015)
- Audi A6 Quattro (2014-2016)
- Audi A7 Quattro (2014-2016)
- Audi A8/A8L (2014-2016)
- Audi Q5 (2014-2016)
- Audi Q7 (2009-2016)
- Porsche Cayenne (2014-2016)

Our firm is also representing the Environmental Protection Commission of Hillsborough County, Fla., in a case against Volkswagen, Audi, and Porsche to recover statutory penalties for violations of a local clean air ordinance for these allegations. The illegal defeat devices installed in the Defendants' diesels affect more than 1,000 vehicles in the greater Tampa area. If you own one of the affected vehicles, you may have a claim. You can contact one of our class action lawyers for more details.

Lawyers: Dee Miles, Archie Grubb, and Clay Barnett
Primary Staff Contacts: Michelle Fulmer and Whitney Gagnon

Life Insurance

Our firm has recently filed a class action complaint against Banner Life, alleging that the cost of insurance increases Banner has implemented on certain policies are unfounded. Policyholders are seeing increases of more than 500 percent in some cases, and the cash value of their policies are being stripped down to nothing in a matter of months. It appears that these increases have been executed ultimately to benefit shareholders and rid

the company of near-term liabilities it has accrued due to its wrongful use of captive reinsurance companies. Beasley Allen represents the policyholders in an effort to recover the excess insurance costs paid out-of-pocket or stripped from the value of the policy. Additionally, we are looking into many other life insurance companies with similar unfair practices and welcome the opportunity to review additional policies that have seen sudden increases in costs or premiums.

Lawyers: Dee Miles, Andrew Brashier, and Rachel Boyd
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, and Ashley Burgin

Takata Air Bags

Lawyers in the Section have filed a class action lawsuit for economic losses related to the potentially defective air bags manufactured by Takata Corporation. We were fortunate to have been selected by the MDL Leadership to conduct discovery in this case and are working furiously to move this case along to trial and class certifications. While vehicle owners and drivers could not have known about the potential danger posed by the air bags, the Defendants knew about the defect and failed to disclose it to consumers and actively concealed that defect from the public and federal regulators. It was not until December 2011, when the fifth recall related to the same defect was issued, that Honda finally reported the injuries and deaths related to the Takata air bags to federal regulators. To date, more than 14 million vehicles with Takata-manufactured air bags have been recalled due to the defects.

Lawyers: Dee Miles, Archie Grubb, Clay Barnett, and Andrew Brashier
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, and Whitney Gagnon

General Motors

The consumer fraud section is also involved in the class action lawsuits against General Motors for its conduct relating to the faulty ignition switch. Unlike claims for personal injury and death, which the firm is also handling in a different section, the fraud claims are seeking compensation for economic losses incurred by owners of the defective vehicles.

Lawyer: Dee Miles
Primary Staff Contacts: Michelle Fulmer and Ashley Pugh

Talc

The firm is representing a class of California citizens who were deceived into believing that Johnson and Johnson's talc-based products were safe and purchased those products for genital hygiene use. Some recent studies have demonstrated a significantly increased risk of ovarian cancer for women who use talc-containing products on their genitals. Johnson and Johnson has been aware of the risk, or should have been, for years, yet the company continues to market its products as safe for daily use. These citizens would not have purchased the baby powder and other talc products had they known of the increased risk of ovarian cancer, but thanks to Johnson and Johnson's marketing, believed they were purchasing and using a safe product. Beasley Allen represents these citizens in an effort to recover the money they spent on these cancer-causing products that they would not have spent absent Johnson and Johnson's marketing.

Lawyers: Dee Miles, Lance Gould, and Ali Hawthorne
Primary Staff Contacts: Holly Busler and Jessica Stapp

Oil and Gas

The firm also filed a class-action complaint against XTO Energy, Inc. in Arkansas. The case involves royalties owed to landowners for the sale of natural gas. The landowners signed leases with XTO granting it the right to drill and produce natural gas and constituents. In exchange, XTO was to pay the landowners royalties as a share of the production income. Instead of selling the gas in arms-length transactions on the open market, XTO sells to affiliates at grossly inadequate prices. Landowners' royalty payments are calculated off that first sale. The XTO affiliate or related entity that first purchased the gas then sells the products at market price. XTO keeps the difference between what it would have paid in royalties to the landowners had those first sales been made at market price and the fraudulently low royalties it actually did pay the landowners. Beasley Allen is representing the class of landowners and is seeking to recover the money those landowners would have received had XTO properly sold the natural gas on the market.

We are pursuing a similar case in Monroe, La.

Lawyers: Lance Gould, Larry Golston and Leslie Pescia
Primary Staff Contacts: Holly Busler and Whitney Gagnon

Target Data Security Breach

Target Corporation, which is headquartered in Minnesota, suffered a massive data breach that is believed to have taken place primarily between Nov. 27 and Dec. 15, 2013. It was originally believed to have affected about 40 million Target shopper accounts including credit and debit card information. However, after further investigation, Target officials revealed that hackers stole not only information from cards used by shoppers at Point of Sale (POS) machines, but that other information was compromised, including names, phone numbers, email and mailing addresses from more than 100 million other customers. Beasley Allen filed two class action lawsuits in the wake of the Target data breach, one on behalf of consumers whose information was compromised, and another on behalf of Alabama State Credit Union as lead Plaintiff representing credit unions, banks and other financial institutions. Both cases have settled and are in the final stages of approvals and appeals. We were fortunate to have been selected by the court to serve on the Plaintiffs Steering Committee for the financial institutions in this important MDL.

Lawyers: Dee Miles, Larry Golston, Andrew Brashier, and Leslie Pescia
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, and Ashley Burgin

Home Depot Data Breach

Dee Miles was appointed to the Plaintiffs Steering Committee (PSC) representing financial institutions in the Multidistrict litigation (MDL) over a massive Home Depot data breach. The litigation involves consumer and financial institution Plaintiffs who were affected by the incident, which compromised up to 56 million credit and debit card numbers. The cyberattack is believed to have occurred at Home Depot stores between April and September of 2014. The MDL Court recently denied Home Depot's Motion to Dismiss and will allow the claims to move forward and our firm will be leading the charge on the discovery, trial and possible settlement of this important consumer litigation.

Lawyers: Dee Miles, Larry Golston, Andrew Brashier, and Leslie Pescia
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, and Ashley Burgin

Community Health Systems

Community Health Systems, a Tennessee-based hospital system, said it is contacting patients whose personal

information may have been compromised last year in a data breach apparently originating from China. The cyberattack may have exposed as many as 4.5 million patients who were referred to the hospital or received services in CHS-affiliated hospitals over the past five years. The CHS data breach came just weeks after the company agreed to pay the U.S. government more than \$98 million to resolve lawsuits filed by several whistleblowers who alleged the company cheated Medicare, Medicaid, and other taxpayer-funded health care programs through fraudulent billing practices. Lawyers in our Fraud Section are talking to patients whose data has been compromised in the CHS data breach. Once again, we are fortunate to have been selected by United States District Judge, Karen Bowdre, to serve on the Plaintiffs Steering Committee. Gibson Vance is serving on that committee assisted by Andrew Brashier. The case is proceeding swiftly and we look forward to a good result for consumers.

Lawyers: Dee Miles, Archie Grubb, Larry Golston, and Andrew Brashier
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, Heidi Bowers, and Whitney Gagnon

Anthem Health Insurance

Anthem is the second-largest health insurance company in the U.S. Anthem representatives say they believe the cyberattack successfully compromised customer names, birthdays, medical IDs, social security numbers, street addresses, e-mail addresses and employment records. Employee records also were compromised. More than 80 million personal Anthem customer records are now at the mercy of unidentified hackers due to a data breach reported by Anthem Inc. Many Anthem brands were affected by the data breach, including Anthem Blue Cross, Anthem Blue Cross and Blue Shield, Blue Cross and Blue Shield of Georgia, Empire Blue Cross and Blue Shield, Amerigroup, Caremore, Unicare, Healthlink, and DeCare. Lawyers in Beasley Allen's Consumer Fraud section are handling claims for losses on behalf of consumers and financial institutions related to data breaches.

Lawyers: Dee Miles, Larry Golston, and Andrew Brashier
Primary Staff Contacts: Heidi Bowers and Whitney Gagnon

Armstrong Chinese Laminate Flooring

Our firm recently filed a class action against Armstrong Flooring, Inc. and Lowe's for manufacturing and selling

formaldehyde tainted laminate flooring manufactured in China. Like other Plaintiffs suing Lumber Liquidators over imported toxic flooring, our Plaintiffs accuse Armstrong of outsourcing manufacturing to untrustworthy Chinese mills that utilize excessive amounts of formaldehyde to save time and money. Formaldehyde use in product manufacturing is regulated by the EPA and by a powerful California state law. Testing of Defendants' laminate flooring showed formaldehyde levels far exceeding the federal and state limits. Formaldehyde exposure increases the risk of cancer and leukemia and can cause burning eyes, nose and throat irritation, coughing, headaches, dizziness, and nausea. Toxic flooring may be especially dangerous to toddlers and young children who play and crawl on the floor and have underdeveloped immune systems. The Plaintiffs' particular Armstrong laminate floor model is Woodland Walnut, although Armstrong likely imported numerous models featuring similar levels of contamination from 2012 forward.

Lawyers: Dee Miles, Clay Barnett, Archie Grubb, Andrew Brashier, and Rachel Boyd
Primary Staff Contacts: Michelle Fulmer, Brenda Russell, and Whitney Gagnon

Silent Recalls

Lawyers in the Section are investigating numerous safety defects involving multiple auto manufacturers and varying models. Although there are more active recalls now than ever before, every potential defect has not necessarily been placed under a mandatory recall. Auto manufacturers commonly conduct "silent recalls"—where the dealer only repairs a defect once a consumer complains about the specific defect even though the manufacturer is aware of the defect. This practice leaves thousands of American motorists unaware of the defective components in their vehicles. Alternatively, auto manufacturers are able to conduct regional recalls that are only disseminated to a particular region, leaving consumers outside the specified region unaware of the recall. Under this process, the same make and model under recall in one state may not be under recall just over the state line. If you have a vehicle with a safety defect and the manufacturer has refused to repair your vehicle under the warranty, then you may have a case. Contact one of our class action attorneys for more details.

Lawyers: Dee Miles, Archie Grubb, Clay Barnett, and Andrew Brashier

Primary Staff Contacts: Whitney Gagnon and Ashley Burgin

ERISA litigation

The Employee Retirement Income Security Act of 1974 (ERISA) dictates certain minimum standards for voluntarily established health and benefit plans. Employers sometimes violate the requirements of ERISA, to the detriment of their employees. If these violations are plan-wide, or affect a large number of employees, it is possible to form a class to seek recompense and/or to force compliance. Please contact us with information regarding any instances where ERISA's requirements have been violated; we are particularly interested in self-funded employee health benefit plans.

Lawyers: Dee Miles and Rebecca Gilliland
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, and Amanda Richards

Qui Tam Cases

A *qui tam* action involves a private party, called a relator, who asserts claims on behalf of the government. Although the government is considered the real (named) Plaintiff, if the action is successful, the relator receives a share of the award. Most *qui tam* actions are brought under the federal False Claims Act (FCA), 31 U.S.C. § 3729, et seq., although many States have adopted their own false claims acts. The successful results speak for themselves—more than \$34 billion in recoveries since 1986—and that tells us a powerful story. Our firm is currently involved in a number of these *qui tam* cases throughout the country.

Qui tam actions typically begin with an employee witnessing his/her employer defrauding the government. The employee may later consult with an attorney on another matter, but convey their knowledge of false information being given to the government. Attorneys need to be on the lookout for such information and recognize potential claims.

It takes vigilance and courage for these private individuals, commonly referred to as "whistleblowers," to report fraudulent activity; but without them, the vast majority of fraud against our government would go undetected. Recognizing the perils faced by whistleblowers, legislators have passed laws protecting individuals who take a stand against fraud. 31 U.S.C. § 3730 prohibits discrimination and retaliation against whistleblowers and imposes

strict penalties, including double back pay with interest, on violators.

Additionally, if a *qui tam* action is successful, the whistleblower receives between 10- 30 percent of the Government's recovery. Damages under the FCA include penalties and "three times the amount of damages which the Government sustains" due to the fraud. 31 U.S.C. § 3729(a)(1)(G). In short, the law protects and rewards whistleblowers for their instrumental role in exposing and prosecuting fraud. Lawyers in our firm have waged war against corporate fraud for more than 30 years and would welcome the opportunity to assist with any *qui tam* actions that any of our readers may have.

One such case recently settled by our section involved the failure of United States Investigations Services LLC (USIS) to perform quality-control reviews when investigating backgrounds of potential U.S. Office of Personnel Management employees. For examples, USIS vetted former CIA employee and NSA contractor Edward Snowden before he famously leaked documents. It also vetted Aaron Alexis, who shot 12 people to death at the Washington Navy Yard recently. The complaint alleges that the company used an internal program to automatically release background checks prior to their completion to increase profits; USIS was paid monthly for completed background checks, so those incomplete checks were non-billable. Instead of completing the work, the whistleblower alleges, USIS automatically cleared the background checks in order to submit claims for payment. We will include a number of important developments relating to whistleblower claims in another Section of this issue.

Lawyers: Dee Miles, Larry Golston, Archie Grubb, Clay Barnett, Andrew Brashier, and Rebecca Gilliland
Primary Staff Contact: Holly Busler

Antitrust Cases

Lawyers in the Section continue to investigate and litigate antitrust cases. Antitrust law is the law of competition. Society is better off if buyers and sellers act independently, not in concert. Antitrust law focuses on the promotion of competition through restraints on monopoly and cartel behavior. Typical cases involve attempts to monopolize, price fixing, exclusive distributorships, refusals to deal, tying arrangements, and mergers and acquisitions. We believe that antitrust is a growing area, as corporations increasingly tend to "cross the line" as they seek to gain advantage in this tough economy. The

firm is currently involved in antitrust litigation involving several pharmaceutical companies, Blue Cross Blue Shield, and manufacturers of capacitors.

Lawyers: Archie Grubb and Clay Barnett
Primary Staff Contact: Michelle Fulmer

Pay for Delay

Lawyers in the Section have been researching a developing area of law related to pay for delay schemes. As a result of the illegal agreements between brand and generic pharmaceutical manufacturers, citizens, pharmacies, wholesalers, the states, and other insurers all paid grossly inflated prices for brand drugs when they otherwise would have paid reduced prices for generics. The firm has been working with several states to develop a case to recover the damages suffered as a result of those fraudulently and illegally increased pharmaceutical prices.

Lawyers: Dee Miles, Roman Shaul, Ali Hawthorne, Rebecca Gilliland, and Leslie Pesca
Primary Staff Contacts: Jessica Stapp and Brenda Russell

Blue Cross Blue Shield

Beasley Allen is currently involved in an antitrust cases dealing with Blue Cross Blue Shield's illegal actions. The BCBS case involves the Blues' agreements not to compete with each other. BCBS has separate companies that cover different geographical regions of the country. Those individual companies agreed amongst themselves to stay out of other geographic regions. For example, BCBS of Alabama and BCBS of Mississippi agreed to not compete with each other for providers (hospitals and physicians) or subscribers (individual and group policyholders). Normally, competition in a certain area drives costs down with each company trying to be the lowest available. Absent competition, the companies were able to set prices for both reimbursement and premiums at any price they chose.

Fortunately, we are honored to be serving on the leadership of this multi-district litigation (MDL) case and are diligently pursuing discovery in the case as the Alabama portion of this MDL is headed for trial in 2017.

Lawyers: Dee Miles, Archie Grubb, and Rebeca Gilliland
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, Whitney Gagnon, and Amanda Richards

Capacitors

The capacitor litigation involves a price-fixing scheme. Capacitors are, generally, tiny but are in nearly every electronic device on the market. The manufacturers agreed amongst themselves to only sell their products at a certain price, one that is above what normal market conditions would dictate. Their actions caught the attention of several United States and foreign agencies, including the Department of Justice, who are investigating the illegal agreements. Beasley Allen and other national firms we are working with moved quickly to recover damages for those directly injured by the price-fixing scheme.

Lawyers: Roman Shaul, Archie Grubb, Ali Hawthorne, Andrew Brashier, and Rebecca Gilliland
Primary Staff Contacts: Jessica Stapp, Holly Busler, Whitney Gagnon, Brenda Russell, and Amanda Richards

Pharmaceutical Litigation

The firm handles a wide array of cases dealing with the pharmaceutical industry. These cases include AWP, unapproved drugs, Actos, Granuflo and many others.

State Attorney General Representation

AWP

Our firm has represented the States of Alabama, Alaska, Hawaii, Kansas, Louisiana, Mississippi, South Carolina and Utah in a series of cases against pharmaceutical companies, known as the Average Wholesale Price (AWP) litigation. These states allege that pharmaceutical companies' falsified pricing information, causing state Medicaid agencies to grossly overpay for prescription drugs. The manufacturers' false and inflated AWP's (average wholesale prices) caused pharmacies to shop for drugs that offered the highest reimbursement from the State. The inflated AWP's in turn provided higher sales revenue, volume and market share for the drug companies, and created dramatically steeper costs for the states.

Juries have returned more than \$600 million in verdicts for the States of Alabama, Mississippi, Kentucky, Wisconsin, Missouri and Massachusetts. We recently won the appeal of a \$30 million verdict in Mississippi Supreme Court regarding Sandoz, Inc. Meanwhile, our firm has settled with many companies in all eight states for more than \$1 billion and completed the liti-

gation in all states, with the exception of a few trials remaining in Utah.

Lawyers: Dee Miles, Roman Shaul, Clay Barnett, and Ali Hawthorne
Primary Staff Contacts: Jessica Stapp and Brenda Russell

Molina/Unisys

At the conclusion of the AWP cases in Louisiana, the state discovered that its' data-processing firm, Molina, appears to not have been utilizing the correct reimbursement rate in processing payments to pharmacies. Instead of the computer system automatically calculating reimbursements with the state-approved formulary, Molina programmers apparently input the wrong data points, resulting in overpayments. Beasley Allen represents the State in seeking to recoup those overpayments from the party that caused them, which appears to be Molina.

Lawyers: Dee Miles, Roman Shaul, and Ali Hawthorne
Primary Staff Contacts: Jessica Stapp and Brenda Russell

Unapproved Drugs

In order for a state to reimburse pharmacies for dispensing drugs to state Medicaid beneficiaries, those drugs must be FDA approved. By manipulating the system, some pharmaceutical manufacturers have been able to sneak certain drugs that have not been FDA approved onto the state Medicaid reimbursement without alerting anyone. States have reimbursed pharmacies for dispensing these drugs, unaware that they were not FDA approved, and, therefore, ineligible for reimbursement. Beasley Allen represents the State of Louisiana in seeking to recover Medicaid reimbursements for these ineligible drugs and we are consulting with other state attorneys general.

Lawyers: Dee Miles, Lance Gould, and Ali Hawthorne
Primary Staff Contacts: Holly Busler and Jessica Stapp

GranuFlo

GranuFlo is a dialysate product used in the hemodialysis process. Several years ago Fresenius, the manufacturer of GranuFlo, realized that through a natural biological process, its product created a significantly increased risk of cardiac distress and death when not administered in a different dosage than every other dialysate product on the market. It appears that instead of warning clinics, physicians, consumers, and the states, Fresenius remained silent about the risk. Once the risk came to the attention of the FDA, Frese-

nus notified its own clinics to adjust their dosage, but it appears it did not notify those owned and operated by non-Fresenius companies. Eventually, the true risk information became public. There are several cases filed against Fresenius alleging that the Defendants actions caused injuries to individual users. Beasley Allen represents the State of Louisiana in seeking to recover for the reimbursements it made and damages it suffered because of the claims submitted to the state's Medicaid office for this substandard product and Fresenius' failure, through its marketing to physicians, clinics, and citizens, to inform its customers of the proper dosage requirements.

Lawyers: Dee Miles, Lance Gould, Ali Hawthorne, and Rebecca Gilliland
Primary Staff Contacts: Holly Busler and Jessica Stapp

Pay For Delay

As mentioned previously, Beasley Allen has been researching a developing area of law for a little more than a year that deals with the intersection of Antitrust law and Patent law. The cases have gained attention in the last two years because of the United States Supreme Court's reversal last year of an Eleventh Circuit decision. The FDA regulates and approves drugs for marketing and sale for human use. When a generic drug manufacturer seeks FDA approval for a new generic version of an already approved brand drug, the generic manufacturer has to certify that the generic either will not infringe on any patents for the brand, or that those patents are invalid. Inevitably, the brand manufacturer objects to the certification and sues the generic for patent infringement. The two manufacturers almost always settle. As part of that settlement, the generic manufacturer agrees not to enter the market for that drug for a certain time period. That agreement, as an agreement not to compete and to extend a monopoly to the brand manufacturer, is in violation of federal and state antitrust laws. Without competition, the prices for the brand drug remain high—well above what the market would dictate absent the agreement between the two manufacturers. As a result, citizens, pharmacies, state Medicaid agencies, and insurance companies have all been paying grossly inflated prices for brand pharmaceuticals when they could and would have purchased generic drugs at much lower prices. The firm has been working with several states to develop a case to recover the damages suffered as a result of those fraudulently and illegally increased pharmaceutical prices. These cases have experienced challenges in the trial courts and so far have had

limited success. However, as the case law continues to develop, we will pursue appropriate avenues of recovery for our clients.

Lawyers: Dee Miles, Roman Shaul, Ali Hawthorne, Rebecca Gilliland, and Leslie Pescaia
Primary Staff Contacts: Jessica Stapp, Brenda Russell, and Amanda Richards

Actos

Actos is a commonly prescribed drug used in treating Type 2 Diabetes Mellitus. Diabetes affects more than 26 million people nationwide. Approximately 90 to 95 percent of those 26 million Americans with diabetes suffer from Type 2 Diabetes. Actos received FDA approval in 1999, but, prior to that, an unreported clinical study was conducted, whereby the Defendants discovered an association between Actos and an increased risk of bladder cancer. Subsequent studies over the years have demonstrated that there is in fact a statistically significant increase in the risk of bladder cancer for individuals that have been prescribed and consumed Actos. The Defendants, manufacturers of Actos, were aware of the increased risk of bladder cancer, but downplayed and tried to discredit the numerous studies that demonstrated that risk. Beasley Allen represents the State of Louisiana in seeking to recover for the reimbursements it made and damages it suffered because of the claims submitted to the state's Medicaid office for this substandard product and the manufacturers' failure, through their marketing to physicians and citizens, to inform its customers of the proper dosage requirements.

Lawyers: Dee Miles, Lance Gould, and Ali Hawthorne
Primary Staff Contact: Jessica Stapp

Usual and Customary

State Medicaid agencies reimburse pharmacies for the drugs they dispense to Medicaid beneficiaries within their States. The amount that a pharmacy receives is determined by a reimbursement formulary that is set by the State and approved by the Federal government. Most States will reimburse using a "lesser of" or "lower of" formula where four to five factors are considered and the pharmacy is paid whichever amount is the lowest. These factors usually include: Wholesale Acquisition Cost (WAC), Average Wholesale Price (AWP), the Federal Upper Limit (FUL), a State-set Maximum Allowable Cost (SMAC), or the pharmacies' Usual and Customary price (U&C) as reported by the pharmacy seeking reimbursement.

U&C is generally understood to be the price charged to a cash-paying customer. Historically, the AWP, WAC, FUL, or SMAC were lower than a pharmacy's reported U&C, so U&C was very rarely utilized in reimbursement. However, around May of 2006, the historical U&C pricing model underwent a drastic change when Walmart and Kmart introduced their nationwide discount generic drug programs. Walmart's discount program offered hundreds of generic drugs at \$4 for a 30-day supply and \$9 for a 90-day supply.

Similarly, Kmart's discount drug program offered hundreds of generic drugs at \$5 for a 30-day supply and \$10 to \$25 for a 90-day supply. Those low, flat-rate prices became the pharmacy's U&C price and should have been reported to State Medicaid agencies as the U&C.

Lawyers in the Section uncovered evidence that many pharmacies with discount drug programs are not, however, reporting their flat-rate prices as their U&C, causing State Medicaid agencies to overpay large, chain pharmacies by millions of dollars. We are working closely with state attorneys general to hold these pharmacies accountable.

Lawyers: Dee Miles, Roman Shaul, Ali Hawthorne, Rebecca Gilliland, and Clay Barnett
Primary Staff Contacts: Michelle Fulmer, Ashely Pugh, Jessica Stapp, Brenda Russell, and Amanda Richards

FLSA Litigation

We have been handling FLSA (Fair Labor Standards Act) cases for many years. FLSA cases range from mischaracterizing an employee as a "manager" to avoid having to pay overtime wages, to employers having employees "work off the clock" to save on labor cost, but both are violations of the law under the FLSA.

Lawyers: Lance Gould and Roman Shaul
Primary Staff Contact: Holly Busler and Brenda Russell

Equal Pay/Race Discrimination/Age Discrimination

Several Lawyers in the Section also handle other employment cases involving discrimination due to gender, race, age, culture and other factors. We recently settled several cases involving

these issues and hopefully bettered the work environment for many others.

Lawyers: Larry Golston and
Lance Gould
Primary Staff Contact: Holly Busler

Wills and Estates

Creating a will to plan for what happens to your estate after you pass is critical. Without a will, all of a person's possessions pass through their state's intestate succession laws—meaning that heirloom you want your cousin to have probably will not get into your cousin's hands without a will; it will pass to whomever the law dictates receives your estate. For some people, those with a lot of assets, even a trust is necessary to protect the estate assets for years to come. This is particularly important for people who own their own business. A trust can dictate who controls the business, what happens to business assets, and how the company profits are handled. Though the decedent would hope it does not create a dispute, sometimes the heirs of an estate dispute the validity of the will/trust or dispute the meaning of the language in the will/trust. Lawyers in the Section are looking into these disputed wills and trusts involving large estates.

Kessler Litigation

Beasley Allen has teamed up with The CBC Law Group in Nashville to litigate a dispute involving the estate of the late Gerald A. Kessler. Mr. Kessler passed away in March of this year at the age of 80, leaving an estate believed to be valued at more than \$800 million. In dispute is an Amendment created in 2013 to the Gerald A. Kessler Revocable Trust that gives Melanie Kay Williams (an actress also known by the stage name Meadow Williams) control over almost all of his assets as Trustee. It further established her as, essentially, the sole and exclusive beneficiary of the estate. The Petition filed on behalf of the Kessler family alleges Ms. Williams, who is 31 years younger than Mr. Kessler, manipulated and unduly influenced him to execute new estate planning documents through actions including bigamy, undue influence and elder abuse.

Lawyers: Dee Miles, Lance Gould, and
Leslie Pesca
Primary Staff Contact: Holly Busler

CONCLUSION

These are just some of the highlights for the Consumer Fraud/Commercial Litigation

Section's work. Our lawyers continue to dedicate their practice to all issues involving corporate misconduct and do an excellent job in this area of the law.

As you can see from the above, all of the lawyers and support staff in this Section have been very busy. If you are unsure which lawyer to contact on a specific project, Michelle Fulmer, the Section Administrator, will be glad to put you in touch with a lawyer who deals with the subject matter of your inquiry. Michelle can be reached at 800-898-2034.

X. INSURANCE AND FINANCE UPDATE

SEVERAL BLUE CROSS BLUE SHIELD ENTITIES AGAIN SEEK DISMISSAL FROM THE ANTITRUST MDL

Several Blue Cross Blue Shield units, Arizona, Kansas, North Dakota, Wyoming and New York, have asked to be dismissed from four class actions in multidistrict litigation (MDL) accusing the insurer of anti-competitive behavior, saying that they have no significant ties to Alabama, where the litigation is centered. According to Defendants, the "Plaintiffs cannot allege such facts because moving Defendants meet none of the indicia of substantially transacting business in the Northern District of Alabama." This most recent motion stated.

They do not solicit or advertise in the district. They have no employees or representatives who are located in the district. They do not have offices or own real property in the district. They do not exercise control over any subsidiary or affiliate who transacts business there. They do not offer insurance or other products in the district.

Even if all of this is true, the MDL court has already denied a motion to dismiss filed by these very same Defendants. In fact, the Defendants made these very same arguments.

The MDL was created in 2012, when nine antitrust actions in Alabama, North Carolina, and Tennessee were consolidated in the Northern District of Alabama. At the time of the 2012 order creating the MDL, the Blue Cross Blue Shield Association's business model created 38 separate Blue plans operating in local areas nationwide under the company's brand, providing health insurance to approximately 100 million subscribers. The lawsuits generally contend that under normal market conditions the companies would compete against one another, but have instead allocated among themselves regional health insurance

markets in violation of the Sherman Antitrust Act.

This recently filed motion to dismiss is not the first time these same Defendants have sought to be dismissed from the case on personal jurisdiction grounds. In fact, Judge Proctor, who is overseeing the MDL, denied an earlier motion to dismiss on Oct. 30, 2015. The court's earlier ruling commented that Plaintiffs were willing to stipulate that the defense was not waived and could be decided after the cases were remanded to their home courts, but that the Defendants declined to agree, instead choosing to push for dismissal.

In the October 2015 order, Judge Proctor also noted that because of the peculiar nature of the MDL proceeding, even should he determine that personal jurisdiction was lacking in some of the class actions as to the moving Defendants, each moving Defendant had filed an answer (instead of a motion to dismiss) in at least one of the cases. Specifically, Judge Proctor noted:

[e]ach of the Moving Defendants, by filing an Answer (rather than a Motion to Dismiss) in at least one of the cases conditionally transferred to this MDL, has conceded that they are properly participating in the MDL through at least one case.

Therefore, if the court granted the motions to dismiss, the Defendants would remain in the case and before the MDL court. In light of the desire to preserve judicial time and resources, rather than continue to brief and address an issue that would have no effect on the MDL proceeding, Judge Proctor denied the earlier motions to dismiss without prejudice and entered an order stating that the Defendants' personal jurisdiction and venue defenses are "DEEMED PRESERVED to be addressed by [the MDL] court immediately prior to remand, or by the respective transferor courts after remand."

In light of the MDL court's clear ruling in October of last year, we expect the MDL Court to deny the motions to dismiss. If you need more information, contact Rebecca Gilliland at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Source: Law360.com

TEXAS JUDGE APPROVES \$1 BILLION SETTLEMENT IN LIFE PARTNERS INVESTOR LITIGATION

A Texas bankruptcy judge has approved a more than \$1 billion settlement presented by Life Partners Holdings' court-appointed bankruptcy trustee. The settlement will resolve class action litigation alleging that thousands of investors were fraudulently misled into purchasing bad life insurance settlements with promises of big returns. U.S. Bankruptcy Judge Russell F. Nelms approved the settlement that covers legal claims brought on behalf of more than

20,000 investors. His approval allows a major hurdle in Life Partners Holdings Inc.'s attempt to restructure, after filing for bankruptcy early last year, to be overcome.

The settlement, filed in April, came weeks after Chapter 11 trustee H. Thomas Moran II said in a report that Life Partners and its former CEO Brian Pardo engaged in one of the largest frauds in Texas history. The Trustee claims that under Pardo's direction, Life Partners solicited investors to purchase a stake in life insurance policies the company acquired. Life Partners acquired the policies for less than the total value of the policies, which mature when a person dies. It will take decades for all of the policies in Life Partners' portfolio to mature, according to the Trustee.

According to the Trustee, Pardo and Life Partners aggressively marketed these investments utilizing life expectancy figures that were far shorter than they actually were, deceiving investors, many of them elderly, who were led to believe they would receive double-digit returns. The parties' agreement provides for the certification of a settlement class in Life Partners' bankruptcy cases for purposes of voting on a Chapter 11 plan. The class would be broken into various subclasses, the largest of which includes 11,322 investors.

The total value of the settlement for class members is currently estimated at \$1,078,582,000, according to reports. The settlement also caps attorneys' fees for Plaintiffs counsel at \$33 million. The present value of the fees, which would be paid out over time, is \$5,219,043. Judge Nelms appointed Keith L. Langston of The Langston Law Firm as class counsel.

Lawyers for the Trustee and the Plaintiffs have said the settlement serves the interest of both the estate and the investors. The bankruptcy judge agreed that the agreement was fair and reasonable, explaining that the settlement resolves the ownership issue that posed a problem and makes the prospect of a confirmed Chapter 11 plan that maximizes recovery for claimholders more likely. The court's order said:

The complexity, expense, inconvenience, and delay of litigation is overwhelming and, in some respects, would waste the assets of the estates that otherwise would be available for creditors who ultimately hold allowed claims in this case. Any delay caused by litigation or otherwise jeopardizes the ongoing administration of the estates.

Life Partners filed for bankruptcy in 2015 in response to a \$47-million jury verdict obtained by the SEC. At the time of Life Partners' bankruptcy, \$1.4 billion in investor funds were at risk, according to the Trustee.

In September, the Trustee sued Pardo for more than \$40 million in damages over money he transferred to himself and his family. Pardo served as Life Partners' CEO and chairman until early 2015. The Trustee

is represented by David M. Bennett, Richard B. Roper and Katharine Battaia Clark of Thompson & Knight LLP. The Plaintiffs are represented by Bieging Shapiro & Barber LLP, the Langston Law Firm and Sternklar Law, LLC. The case is in the U.S. Bankruptcy Court for the Northern District of Texas.

Source: Law360.com

XI. EMPLOYMENT AND FLSA LITIGATION

FedEx To Pay \$240 Million To End Driver Wage Claims In 20 States

FedEx has agreed to pay approximately \$240 million to settle class actions by delivery drivers in 20 states. These drivers said they were misclassified as independent contractors and cheated on wages. As you may recall, there was a \$226.5 million settlement last year by California drivers. Plaintiffs from states including New York, Pennsylvania and Indiana filed individual memoranda supporting their motions for settlements. Beth Ross, a lawyer for the Plaintiffs, told Law360 that roughly 12,000 class members were involved in the settlements.

Drivers accused FedEx Ground Package System Inc. of violating various state laws by deducting company business expenses from their pay. Plaintiffs further accused FedEx of engaging in unjust enrichment by virtue of classifying the workers as independent contractors and violating consumer fraud laws.

The cases were part of a number of lawsuits filed by FedEx drivers in about 40 states across the U.S. The suits, which were eventually consolidated in multidistrict litigation (MDL) and certified as class actions, alleged FedEx's improper classification of its employees had cost them important benefits. The 20 instant cases were litigated in an Indiana federal court between 2005 and 2010, and the Seventh Circuit between 2011 and the present. In July 2015, the Seventh Circuit ruled in one of the class actions, finding that FedEx drivers were employees under Kansas state law.

After incorporating answers it received from its certified questions to the Kansas Supreme Court, the appellate panel ruled that the Indiana federal court overseeing the MDL was incorrect to grant FedEx summary judgment that the drivers were independent contractors under the Kansas Wage Payment Act. The recent settlements all arose from cases that went to the Seventh Circuit.

The Plaintiffs are represented by Beth Ross at Leonard Carder LLP, Robert Harwood at Harwood Feffer LLP and Susan Ellingstad at Lockridge Grindal Nauen PLLP. The case is *In re: FedEx Ground Package System Inc. Employment Practices Litiga-*

tion in the U.S. District Court for the Northern District of Indiana.

Source: Law360.com

X. WORKPLACE HAZARDS

CONSTRUCTION LITIGATION UPDATE

Lawyers at Beasley Allen have been handling construction litigation, which is a highly specialized field of law, for a very long time. This area of our firm's practice deals with defective conditions in construction. A construction defect is a condition in a building that reduces the value of the structure or causes a dangerous situation. A defect of this sort may be rooted in a faulty design, defective materials, or poor workmanship performed on site.

Many such defects arise from a combination of factors, including improper soil analysis and preparation, site selection and planning, civil and structural engineering, or negligent construction. Due to the hidden nature of many construction defects, problems often aren't discovered until many years after construction is completed. An example is an unsteady foundation that was defective and that slowly unbalances a building.

Construction defects present in a house or condominium are often particularly egregious, given that a home is the most expensive long-term investment most folks will make in their lifetimes. These defects can lower the value of your home, undermining your investment, and may present health hazards for you and your family. Defects can also result in serious injury and even death in certain cases.

Unfortunately, the most common reason problems occur is that some entity involved in the construction process, whether the developer or the contractor, was attempting to save money. That appears to be a common problem in many of the cases handled by our lawyers.

There may be several different parties responsible for a given defect, but most commonly the general contractor, developer, and the builders of residential structures will be legally responsible and have liability. Architects, designers, and subcontractors may also be involved as potential Defendants in the litigation. Usually they come after the original suit is filed because of information learned during discovery.

The damages that can be recovered due to a construction defect will vary depending on the facts and circumstances of the case. However, in general, a home or property owner will be able to recover the cost of repairs and/or the decline in the value of the building due to the defect. Additionally,

the Plaintiff may be able to recover for the loss of use of the property during the repair, the cost of temporary housing if necessary, and in some instances attorney's fees if provided for by contract or your state's law.

Of course there will be cases where deaths and serious injuries are caused by construction defects. Because these cases involve death and injury, they are much more complex. However, the discovery issues relating to liability are the same. Also, the laws relating to proving liability are the same. The most obvious difference involves the damages that can be recovered. Our firm has successfully handled a number of construction defect cases involving serious injury and death.

If you need more information relating to construction defects litigation contact Kendall Dunson, Grant Cofer or Evan Allen, lawyers in our firm, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com, Grant.Cofer@beasleyallen.com or Evan.Allen@beasleyallen.com.

XI. TRANSPORTATION

\$27 MILLION SETTLEMENT IN ROLLOVER CASE

A former Pennsylvania landscaper, rendered a quadriplegic when his company truck rolled over in a 2011 accident, will receive \$26.55 million in a settlement from ServiceMaster Co., TruGreen and other Defendants. Reportedly, this is the largest settlement ever in a personal injury case in Philadelphia County. The settlement has been approved by Philadelphia Court of Common Pleas Judge M. Teresa Sarmina.

David Williams, 32, had accused ServiceMaster, which owned TruGreen Corp. at the time of the accident, along with Dickinson Fleet Services LLC, of failing to change the "bald tires" on his truck, which caused the rollover. Bob Mongeluzzi, a lawyer for Mr. Williams, said in a statement:

The defendants were alleged to have knowingly and recklessly permitted a dangerous and potentially lethal bald tire on Mr. Williams' 2005 Ford-350 TruGreen truck to continue in service after it failed their own inspection. We would have demonstrated at trial how easy it would have been for the defendants ... to just do the right thing: remove the truck from service until the hazardous tires were replaced. Tragically, no amount of damages can restore a semblance of normalcy in the shattered life of David Williams.

Mr. Williams was ejected from his truck as a result of the November 2011 crash after he lost control of the vehicle without warning and it swerved off the road. He suf-

fered a fractured spinal cord, which required several surgeries. His post-accident care included spending several months at a Philadelphia hospital. Experts have estimated his lifetime medical expenses in the millions of dollars. Mr. Williams, who is married with three sons, requires around-the-clock nursing supervision for activities of daily life, and must be awakened and repositioned in bed several times during the night.

Mr. Williams sought punitive damages in the lawsuit against ServiceMaster and TruGreen along with Dickinson Fleet Management. He detailed in the complaint how a field service technician for Dickinson, which contracted to manage TruGreen's vehicles, identified the insufficient tread on the rear right tire on Williams' truck. It was contended that both companies should have made sure that the vehicle was taken out of service.

TruGreen and ServiceMaster—which spun off TruGreen in 2014—will together pay Mr. Williams \$16.75 million. Dickinson is responsible for \$9.5 million, and Brooks Auto Repair, a Centre County business that also serviced the truck, will pay \$300,000. Mr. Williams is represented by Bob Mongeluzzi, David Kwass and Benjamin Baer of Saltz Mongeluzzi Barrett & Bendesky PC. They did a very good job for their client. The case is in the Philadelphia County Court of Common Pleas.

Source: Law360.com

FAMILY OF WORKER KILLED IN AMTRAK CRASH FILES SUIT

A lawsuit involving a fatal Amtrak crash near Philadelphia blames a "colossal miscommunication" for the deaths of two rail workers killed when a train traveling 106 mph struck a backhoe on the same track. The lawsuit was filed on behalf of the family of one victim, 61-year-old Joe Neal Carter Jr., who was working overtime on a Sunday morning. He was operating the backhoe on the track when the Amtrak train struck him. The other person killed was Carter's supervisor, Peter Adamovich. The precise cause of the April 3 crash remains under investigation by the National Transportation Safety Board (NTSB).

The speeding train was approaching a sharp curve shortly after leaving Philadelphia for New York and hit the backhoe. The NTSB concluded last month that the engineer was distracted by word that a nearby commuter train had been hit by a rock. The agency also said a contributing factor was the railroad industry's decades-long failure to fully install positive train control—GPS-based technology—that can automatically slow trains that are going over the speed limit. It's believed that similar safety systems could have averted the April crash just south of Philadelphia that killed the rail workers.

The southbound train was heading from New York to Savannah, Ga., when it struck

the backhoe in Chester in the early morning hours. The impact derailed the lead engine of the train, which was carrying more than 300 passengers and seven crew members. More than 40 people were hospitalized, most with minor injuries. Investigators have said the train engineer had just five seconds to brake after seeing something up ahead on the track. The Federal Railway Administration has suggested the crash followed a breakdown in communications and issued a directive ordering Amtrak to retrain rail workers on basic safety rules. Carter had worked for Amtrak for 40 years at the time of his death. His family is represented in the suit by Bob Mongeluzzi and Tom Kline.

Source: Insurance Journal

XIV. HEALTHCARE ISSUES

CDC ISSUES A WARNING RELATING TO LEGIONNAIRES' DISEASE

Reported instances of Legionnaires' disease, which as you may know is a severe and sometimes fatal pneumonia, are growing in the U.S. This is happening because hotels, long-term care facilities and hospitals haven't taken adequate steps to ensure their water is clean, according to a report issued by the U.S. Centers for Disease Control and Prevention (CDC). Tom Frieden, who is CDC Director, said: "Almost all Legionnaires' disease outbreaks are preventable with improvements in water systems management."

The CDC reviewed 27 building outbreaks of Legionnaires' disease from 2000 to 2014 at hotels and resorts, long-term care facilities, senior living facilities and hospitals. The CDC investigators found that workers had not used enough disinfectant, didn't change filters often enough, or didn't monitor their water pipes and storage areas properly, leading to the outbreaks.

Showering with infected water was a leading source of contamination, as well as air-conditioning and hot tubs. In one case, it was a decorative fountain, according to the report. Dr. Frieden urged building managers across the country to set up plans to figure out where the disease might grow and take steps to reduce it.

XV. ENVIRONMENTAL CONCERNS

MAJOR ENVIRONMENTAL RULINGS TO DATE IN 2016

Lawyers in the Toxic Torts Section at Beasley Allen handle environmental litigation for our firm. The Section is headed by Rhon Jones and Sandra Walters is the Section Administrator. Currently there are nine lawyers and 17 support staff in the Section. It's mid-year and already there have been some major Court rulings affecting environmental litigation. Following is a brief rundown of these decisions:

ARMY CORPS V. HAWKES

Landowners scored a win in this U.S. Supreme Court decision that says federal courts can review Army Corps of Engineers' determinations that a wetland is subject to Clean Water Act regulations. This unanimous decision upholds the Eighth Circuit's ruling that determined approved jurisdictional determinations are final agency actions that can be reviewed by courts under the Administrative Procedure Act. This makes it easier for landowners who disagree with the agency's findings to challenge the decision. It is expected that this ruling will be expanded to apply to other challenges or administrative orders, especially under the Resource Conservation and Recovery Act (RCRA) or the Clean Air Act. The case is *U.S. Army Corps of Engineers v. Hawkes Co. Inc. et al.* in the U.S. Supreme Court.

WEST VIRGINIA V. EPA

A ruling that shocked a lot of folks came down in February, when the U.S. Supreme Court reversed the D.C. Circuit's decision not to stay the implementation of the Environmental Protection Agency (EPA) Clean Power Plan while it is being challenged in court. This was one of Justice Antonin Scalia's last actions. The ruling grants emergency stay actions filed by opponents of the rule, and prevents the EPA from implementing the rule until the litigation is complete. The proposed rule would govern carbon dioxide (CO2) emissions from existing power plants nationwide. As a result of the Supreme Court ruling, the D.C. Circuit canceled oral arguments scheduled for June in front of a three-judge panel and moved them to September, where they will be held in front of the full court. The cases are *West Virginia et al. v. EPA* in the U.S. Supreme Court and *West Virginia et al. v. EPA* in the U.S. Court of Appeals for the District of Columbia Circuit.

HARD ROCK FINANCIAL ASSURANCE REGULATION LITIGATION

In January the D.C. Circuit Court resolved issues of financial assurance or financial responsibility surrounding the release of hazardous substances. The Court approved a deal with the EPA that would set a hard deadline for the agency to decide whether to impose new financial rules for hard rock mining companies involved in Superfund litigation. This was a blow to the industry, which argued that the schedule is arbitrary and unreasonable. The ruling affects entities potentially responsible for the release of hazardous substances to put aside funding for future cleanup or reclamation efforts. The EPA and environmental groups said the rules, to be established under the Comprehensive Environmental Response, Compensation and Liability Act, were 30 years overdue. The case is *In re: Idabo Conservation League et al.* in the U.S. Court of Appeals for the District of Columbia Circuit.

AOGA V. JEWELL

Polar bears in Alaska will receive protection under the law as the result of a February ruling by the Ninth Circuit, which reversed an Alaska district court ruling that vacated parts of the U.S. Fish & Wildlife Service's (FWS) designation of critical habitat for the bears. Energy groups including oil and gas associations, along with several Alaska Native corporations and villages, and the state of Alaska had challenged the designation, which protects 120 million acres of polar bear habitat under the Endangered Species Act (ESA). They argued that the FWS would need to provide verifiable evidence of essential habitat features for the species. By reversing the earlier ruling that faceted parts of the critical habitat designation, the Ninth Circuit makes it possible for the FWS to more easily set aside large portions of land to boost species conservation. The case is *Alaska Oil and Gas Association et al. v. Sally Jewell et al.* in the U.S. Court of Appeals for the Ninth Circuit.

ENVIRONMENT TEXAS CITIZEN LOBBY V. EXXON MOBIL

In May, the Fifth Circuit decided Exxon Mobil Corp. will have to face a lawsuit from environmentalists concerning emissions from its Baytown, Texas, refinery. The ruling was handed down by a three-judge panel and allows the lawsuit filed by the Environment Texas Citizen Lobby Inc. and the Sierra Club to proceed. The suit accuses the oil giant of more than 18,000 actionable violations of environmental laws. The ruling determined that an earlier ruling

in Exxon's favor was "irreconcilably inconsistent." The case is *Environment Texas citizen Lobby Inc. et al. v. Exxon Mobil Corp. et al.* in the U.S. Court of Appeals for the Fifth Circuit.

SAHU V. UNION CARBIDE

The Second Circuit in May upheld U.S. District Judge John F. Keenan's 2014 decision to reject Plaintiffs' bid for a putative class action against a pesticide factory located in Bhopal, India. The lawsuit sought compensation for alleged property damage and soil and drinking water contamination the Plaintiffs said resulted from the Union Carbide Corp. facility in the 1970s and '80s. The Court supported the Judge's earlier ruling that this lawsuit's facts were the same as those in a personal injury lawsuit that was dismissed in 2013. The Plaintiffs had asserted they had new evidence that could link Union Carbide with Union Carbide India Ltd., the subsidiary in charge of the Bhopal facility. However, the Second Circuit ruled the purported new evidence was insufficient. The case is *Jagarnath Sabu et al. v. Union Carbide Corp. et al.* in the U.S. court of Appeals for the Second Circuit.

EBERT V. GENERAL MILLS

A unanimous ruling by the Eighth Circuit in May overturned class claims status for 200 homeowners suing General Mills Inc. for allegedly allowing carcinogenic vapors from a Superfund site to seep into their Minneapolis neighborhood. The Plaintiffs alleged lingering vapors from the substance trichloroethylene, or TCE, had contaminated the soil beneath their homes, decreasing property values. However, the Court ruled questions of liability and damages were too individualized to be grouped. The case is *Karl Ebert et al. v. General Mills Inc.*, in the U.S. court of Appeals for the Eighth Circuit.

Source: Law360

XVI. OTHER MATTERS OF INTEREST TO THE TOXIC TORTS SECTION

SHELL OIL SPILL IN THE GULF OF MEXICO GOES LARGELY UNNOTICED

Just a little more than six years after the BP oil spill occurred, another oil giant is responsible for spilling 88,200 gallons (or

2,100 barrels) in the Gulf of Mexico. On May 12, 2016, Royal Dutch Shell identified an underwater flow line near the company's Brutus tension-leg platform as the source of the leak. Fortunately, Shell was able to isolate and secure the source of the discharge after first spotting an oil sheen 90 miles south of the Louisiana coast.

While investigations to determine the cause of the spill are ongoing, public records show that Shell was approved to use a method of offshore fracking. The Bureau of Safety and Environmental Enforcement approved the use of a "frac pack" which sends chemicals into a well to help stimulate the flow of oil and gas trapped in subsea rock formations. Unlike onshore fracking, offshore frac packs employ a much smaller amount of chemicals and affect a relatively small area of rock and sand.

Although both Shell and the United States Coast Guard completed cleanup operations by May 16, environmental groups are rightly concerned about the recurrence of oil spills and the lasting impact on the environment. Doug Helton, Operations Supervisor for the NOAA Emergency Response Division, estimated the Shell spill was just one of 20 in a 30-day period and believes that most spills releasing fewer than 100,000 gallons go unnoticed by the public. The environmental impact of the oil spill is currently unknown and will be monitored in the coming months.

Sources: Forbes; Nola.com; WWLTV.com

ROUNDUP EXPOSURE PUTS PEOPLE AT RISK OF DEVELOPING NHL

Across the country, a strong case is building against Monsanto that Roundup causes cancer. Studies are linking use of the product to non-Hodgkin's lymphoma or "NHL." The herbicide glyphosate is the key component in the Roundup formulation that has been widely used since it was introduced in 1974. Overall, glyphosate comprises 30 percent of the herbicide market and accounted for approximately \$7.8 billion in sales globally in 2014.

Last year, the International Agency for Research on Cancer (IARC) designated glyphosate as probably carcinogenic to humans with the most likely linked cancer being NHL. It should be noted that NHL is a broad classification of malignancies that include multiple subtypes with varied characteristics and possibly diverse etiologies. As a result, further studies are currently being conducted to identify which specific subtypes of NHL are linked with exposure to glyphosate. Thus far, the strongest association proven has been with B cell lymphomas. We expect additional studies to shed much-needed light on the full range of NHL-related diseases linked to glyphosate.

Roundup remains the primary revenue generator for Monsanto's agricultural productivity division, accounting for 32 percent of its revenue in 2015. Thus, we expect Mon-

santo to vigorously defend the increasing number of lawsuits being filed as more information is revealed about glyphosate's harmful effects. As expected, Monsanto urged U.S. Environmental Protection Agency (EPA) officials to publicly denounce the IARC report. It is also pursuing legal action against the California Office of Environmental Health Hazard Assessment to prevent the agency from adding glyphosate to its list of cancer-causing chemicals. The May issue of the Report detailed additional instances of Monsanto's meddling with studies and false advertising regarding glyphosate's effects.

As Monsanto seeks to discredit reports and stands by its claim that Roundup is harmless, the federal government will offer some much needed clarity when it completes its review of glyphosate. In February, the Food and Drug Administration (FDA) said it would begin testing for glyphosate residue in food. Also, the EPA plans to release a draft of its decision regarding glyphosate's toxicity later this year. These reports will be instrumental in revealing glyphosate's widespread effect on the agricultural industry and on all Americans who consume its bounty.

Our Toxic Torts Section is actively investigating Roundup exposure cases. If you need more information about this subject, contact Parker Miller or Ryan Kral, lawyers in the Section, at 800-898-2034 or by email at Parker.Miller@beasleyallen.com or Ryan.Kral@beasleyallen.com, and they will be glad to speak with you.

Source: *Bloomberg News*; International Agency for Research on Cancer

DIESEL EXHAUST IS A MAJOR CONCERN FOR RAILROAD WORKERS

Our firm is investigating cases where long-time railroad workers developed severe lung disease as a result of exposure to numerous dusts, chemicals and fumes on the job. Railroad workers are constantly being exposed to a variety of hazardous chemicals and substances, including mold, asbestos, diesel exhaust, fumes, and other hazardous chemicals. Each one of the substances can permanently damage the lungs and lead to severe lung disease.

Diesel exhaust is an exposure that is particularly problematic for railroad workers. Workers are often exposed to high concentrations of exhaust while working on trains, in train sheds, or in train depots. The scientific literature shows that diesel exhaust can cause chronic obstructive pulmonary disorder (COPD), lung cancer, and various other lung ailments. COPD is a top five killer in the United States per year, and while the most common cause of COPD and lung cancer is cigarette smoke, any person that worked on the railroad for an extended period of time, was exposed to large concentrations of diesel exhaust, and received a diagnosis of lung cancer or COPD should

investigate whether they have a case. If you need more information on this subject, contact Parker Miller at 800-898-2034 or by email at Parker.Miller@beasleyallen.com.

LUNG TISSUE IS CRITICAL IN A SEVERE LUNG DISEASE CASE

As we have written in previous issues, lawyers in our firm are actively investigating numerous cases of severe lung disease caused by exposure to hazardous dusts, fumes and chemicals. There are many different ways to describe a severe lung disease condition, and understanding a severe lung disease condition can be confusing. Terms to be aware of can include pulmonary fibrosis (or lung scarring), interstitial lung disease, lung cancer, hypersensitivity pneumonitis, pneumoconiosis, restrictive lung disease or obstructive lung disease.

In severe lung cases, a patient's physician may perform a biopsy of the lungs in order to assess the disease. In the case of a lung transplant, the patient's diseased lungs will be discarded unless the patient requests they be preserved. Critically, if the patient believes exposure to a hazardous substance caused their severe lung disease, the patient **must request** the sampled lung tissue (or in the case of a transplant, the entire lungs) be preserved for further testing.

Physicians are often more concerned about diagnosing the disease, as opposed to determining with specificity which substance (or illness) may have caused it. What's more, assessing what caused a patient's lung disease requires specific testing for certain types of hazardous substances. This specific testing for the presence of certain substances is rarely ever performed by the pathology lab.

Our firm has access to experts who can examine lung tissue to determine whether a hazardous substance could have caused the patient's lung disease. Again, if you, a loved-one or one of your clients has, or may have, a severe lung condition and receives a lung transplant, has a lung biopsy performed, or has a tissue sample obtained from the lungs, they need to ask both their physician and their pathology lab to preserve as much of the lung tissue as they can for future testing.

Parker Miller, a lawyer in our firm's Toxic Torts Section, is leading our investigation of severe lung disease cases. If you have any questions about severe lung disease, contact Parker at 800-898-2034 or by email at Parker.Miller@beasleyallen.com.

EVERY CASE OF PULMONARY FIBROSIS OR A LUNG TRANSPLANT SHOULD BE INVESTIGATED

Pulmonary fibrosis is irreversible, permanent scarring of the lungs. Scarring can occur over time due to exposure to environmental hazards. Unfortunately, the fibrosis may not become manifest to the patient

until it is too late. In such a scenario—as with most all severe lung conditions—the only option for the patient is a lung transplant.

Inhalation of various abrasives, metal dusts, asbestos, metal carbides (tungsten, titanium, or tantalum, for instance), coal dust, iron oxides, kaolin, fiberglass, styrene, ozone, phosgene, silica and talc are known to cause pulmonary fibrosis.

If a person has been diagnosed as having pulmonary fibrosis, or if they are having to undergo a lung transplant, they should have a lawyer investigate their case. If you need more information on this subject, contact Parker Miller at 800-898-2034 or by email at Parker.Miller@beasleyallen.com.

SPRAY FOAM INSULATION MAY BE HAZARDOUS TO YOUR HEALTH

Spray polyurethane foam (SPF) insulation is widely used in residential and commercial construction in the United States, Canada and Europe. The product can be easily applied to walls, ceilings and other small spaces in a building's infrastructure, but contains extremely toxic components that have been linked in the scientific literature of pulmonary diseases.

SPF, among other toxic ingredients, contains isocyanates, which are highly reactive and toxic chemicals. Exposure to isocyanates can cause skin, eye, and lung irritation, as well as asthma and immune-sensitization. In 2006, The National Institute of Occupational Safety and Health (NIOSH) published a study examining the risk of asthma and death from SPF exposure. Isocyanates have been reported to be the leading attributable chemical cause of work-related asthma, a potentially life-threatening disease.

The U.S. Environmental Protection Agency (EPA) has described isocyanates as the "leading attributable cause of work-related asthma." In addition to asthma, exposure to the isocyanates in SPF may cause sensitization in some people. Sensitization may result from either a single exposure to a relatively high concentration or repeated lower concentration exposures over time. According to the EPA, there is no safe level of exposure after sensitization. NIOSH found that exposure to isocyanates, even when it does not result in sensitization, can lead to long-term lung and respiratory problems.

Manufacturers of SPF often advertise the product as being "non-toxic," "safe" and "environmentally friendly." The EPA has found these marketing claims to be inaccurate. In addition to serious health effects, reliance on these false marketing claims can also cause homeowners to suffer a catastrophic reduction in the value of their homes or buildings in which SPF was installed.

Lawyers in our firm's Toxic Torts Section are currently investigating potential claims by homeowners and construction workers who suffer adverse health effects from exposure to the toxic chemicals contained in SPF. If you would like more information, or have questions you can contact Chris Boutwell, a lawyer in the Section, at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com.

EIGHT ALABAMA WATER SYSTEMS SHOW CONTAMINATION ABOVE NEW EPA GUIDELINES

The Alabama Department of Environmental Management (ADEM) recently announced that eight Alabama water systems showed levels of perfluorooctanoic acid (PFOA) and perfluorooctyl sulfonate (PFOS) that were above the threshold amounts detailed in the recent drinking water health advisory issued by the Environmental Protection Agency (EPA). PFOA and PFOS are synthetic chemicals often called PFCs, which are extremely resistant to breaking down in the natural environment, making them persistent for many years after production.

These chemicals were typically used to manufacture a variety of consumer products and have been linked to a number of health problems, including low birth weight, accelerated puberty, cancer, liver damage, and immune-system effects. According to ADEM, the sources of PFOA and PFOS in drinking water systems are generally the facilities that manufactured those compounds and industries that used those compounds in their manufacturing processes.

The water systems in Alabama where tests have shown concentrations of PFOS and PFOA to be above the final health advisory level are: West Morgan-East Lawrence Water Authority (which currently has warned customers not to drink or cook with tap water); Gadsden Water Works & Sewer Board; Centre Sewer Board; V.A.W. (Vinemont Anon West Point) Water Systems, Inc.; West Lawrence Water Co-op; Northeast Alabama Water District; Southside Water Works and Sewer Board; and, the Utilities Board of Rainbow City.

While the EPA's health advisory is not an enforceable regulation or action, ADEM and the Alabama Department of Public Health have issued statements that said they will work together with the affected systems to bring them below the new advisory level. The EPA recommends using activated carbon filtering or high pressure membrane systems (e.g., reverse osmosis) to remove the substances from drinking water. Unfortunately, these systems are not standard methods of water treatment in Alabama.

If you would like more information on this subject, you can contact Rhon Jones or William Sutton, lawyers in our firm's Toxic Torts Section. They can be reached at 800-

898-2034 or by email at Rhon.Jones@beasleyallen.com or William.Sutton@beasleyallen.com.

Sources: ADEM and EPA

FRACKING WORKERS AT RISK OF BENZENE EXPOSURE

Government researchers are warning that workers at hydraulic fracturing sites are at risk of being exposed to high levels of benzene, a known carcinogen that can cause leukemia and other forms of cancer. The U.S. Centers for Disease Control and Prevention (CDC) released the findings of a study in 2014 evaluating the risk of chemical exposures that workers are likely to face during hydraulic fracturing, which is a controversial process of extracting natural gas from underground pockets. According to the CDC fracking study, when extracting the liquids used to crack open shale and bedrock to free trapped pockets of gas, hydraulic fracturing also brings up naturally occurring, and sometimes dangerous, substances from underground.

The study was conducted by researchers from the CDC's National Institute for Occupational Safety and Health (NIOSH), which conducted air sampling of personal breathing zones and biological monitoring of workers who dealt with flowback liquids, which are stored in special tanks. "In addition to the mixture originally injected, returning process fluids 'flowback' can contain a number of naturally occurring materials originating from within the earth, including hydrocarbons such as benzene." Out of 17 samples of personal breathing zones and biological monitoring, 15 of those showed levels of benzene exceeding NIOSH standards of 0.1 parts per million (ppm) and averaged at more than double that, 0.25 ppm. The study did not determine what risks there might be for local residents near fracking sites.

Benzene is an industrial chemical that is used as a solvent in the production of drugs, synthetics and dyes. It has also been used as a gasoline additive, although limits have been placed on its use in fuel due to benzene's negative health effects. Exposure to benzene has been associated with the development of several fatal forms of cancer, leukemia and other conditions, such as Acute Myelogenous Leukemia (AML), Chronic Myelogenous Leukemia (CML), Acute Lymphocytic Leukemia (ALL), Chronic Lymphocytic Leukemia (CLL), Hairy Cell Leukemia (HCL), Non-Hodgkin's Lymphoma, Multiple Myeloma, Myelodysplastic Syndrome (MDL), Myelofibrosis and Myeloid Metaplasia, Aplastic Anemia and Thrombocytopenic Purpura.

John Tomlinson, a lawyer in our Toxic Torts Section, is handling Benzene exposure cases for our firm. If you need more information on this contact John at 800-898-2034

or by email at John.Tomlinson@beasley-allen.com.

Source: AboutLawsuits.com

XVII. AN UPDATE ON CLASS ACTION LITIGATION

\$244 MILLION SETTLEMENT IN CASE AGAINST NEWS CORP. HAS BEEN APPROVED

A New York federal judge has now approved a \$244-million settlement in a class action in which consumer product makers such as Dial and Heinz accused News Corp. of monopolizing the market for third-party, retail store promotions. The settlement came one day after the judge demanded that changes be made in the original settlement. Granting preliminary approval of the class action settlement, U.S. District Judge William H. Pauley, III, approved a plan by which News Corp. would pay the settlement funds into the government's Court Registry Investment System no later than July 5.

Judge Pauley had objected to a plan to have the settlement funds held at private banks and instead ordered the money to be held in the government's Court Registry Investment System (CRIS). He had said on that aspect of the settlement:

All of the funds will be deposited into a CRIS account—and the plaintiffs' counsel can learn something new about CRIS accounts.

Therefore, under Judge Pauley's order, the funds will be held in a CRIS account. A hearing on the settlement is slated for Sept. 21. The class action brought by hundreds of product makers proceeded with opening statements at a jury trial in February when an apparently very unhappy Judge Pauley was made aware of the settlement by the parties.

News Corp. maintained an illegal monopoly over the market for such promotions since about 2004 by striking long-term, exclusive contracts, according to the Plaintiffs. They said that News Corp. used its market dominance among retailers to charge product makers unfairly high prices. While the media giant denied the allegations and did not admit liability, it did agree to make changes to the way it contracts with retailers.

Judge Pauley also said that potential objectors would not have to appear in person at the Sept. 21 fairness hearing if they lodge objections in the docket. He said that the sides will have to act fast on his fixes to the settlement in order to preserve the proposed timeframe for closing the case.

News Corp. has agreed not to object to attorneys' fees of up to 30 percent of the settlement amount. The class is represented by James T. Southwick, Ryan v. Caughey and Richard W. Hess of Susman Godfrey LLP and Steven F. Benz of Kellogg Huber Hansen Todd Evans & Figel PLLC. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

NISSAN FAULTY BRAKES SETTLEMENT IS APPROVED

A California federal judge has approved a revised settlement agreement between Nissan and a class of drivers who claimed the braking system in certain vehicles is prone to sudden failure. The parties agreed to increase payments to class members and to reduce attorneys' fees after U.S. District Judge Phyllis J. Hamilton in November rejected the proposed settlement. The judge at that time said the \$3.4 million in attorneys' fees was "grossly disproportionate" to the \$278,056 to be paid to about 1,500 drivers of Nissan North America Inc. trucks and sport utility vehicles.

The parties went back to the negotiating table and presented a revised settlement that provides for larger payouts to class members and reduces attorneys' fees to \$2.8 million. The order signed by Judge Hamilton stated:

The court affirms its preliminary approval of the amended settlement as fair, reasonable and adequate, and amends its preliminary approval order as set forth herein.

The settlement pertains to class members' claims that they were forced to pay out of pocket for the replacement of a so-called delta stroke sensor, an electronic component of the affected vehicles that controls critical safety aspects of braking. Under the settlement, current and former owners of certain 2004-2008 Nissan Titans, Armadas and Infiniti QX56 vehicles across the country can file claims and seek reimbursement for what they paid to repair or replace a defective brake sensor.

The original agreement, proposed in December 2014, had capped those payments at \$20 for owners of vehicles that had more than 120,000 miles at the time of repair and at \$800 for vehicles that had fewer than 48,000 miles at the time of repair. Those payouts increase under the amended settlement. On the lower end, owners of vehicles with more than 100,000 miles at the time of repair are eligible to receive up to \$400, while on the higher end, owners of vehicles with fewer than 60,000 miles at the time of repair are eligible to receive up to \$800.

Judge Hamilton rejected the initial proposal in November for what she described as "lowballing class members." The judge

said in her order that a settlement "where 95 percent of the total payout goes to those directly participating in the litigation (i.e., class counsel, the settlement administrator and the class representatives) creates the impression that the proposed settlement has been negotiated for their benefit, at the expense of unnamed class members."

According to the 2015 order, the total amount of the settlement fund was about \$4.27 million, which included \$278,056 for the claimants, \$20,000 in service payments to the four class representatives, \$3.4 million for class counsel and \$542,508 for the settlement administrator. Reportedly, the parties participated in an additional mediation session in January and a settlement conference in April. The parties presented the revised settlement agreement to the court in late May. In total, the amended agreement increases payments to class members, reduces the attorneys' fees, provides for certain payments to class members who submit claims pursuant to the amendment and clarifies the scope of the settlement class. A final fairness hearing has been scheduled for Sept. 21.

The named Plaintiffs, Brandon and Erin Banks, filed the suit in April 2011. The complaint against Nissan alleged that the affected vehicles posed a serious safety threat to consumers because the delta stroke sensor was prone to failure. It was said in the complaint that the defect caused drivers to be suddenly unable to stop their vehicles within a reasonably safe time and distance, or at all.

The Plaintiffs are represented by Michael F. Ram and Karl Olson of Ram Olson Cereghino & Kopczynski LLP, F. Jerome Tapley and Hirlry R. Lutz III of Cory Watson PC, Kirk J. Wolden and Clifford L. Carter of Carter Wolden Curtis LLP and James C. Wyly and Sean F. Rommel of Wyly-Rommel PLLC. The case is in the U.S. District Court for the Northern District of California.

Source: Law360.com

VALEANT FACES RICO SUIT IN "SECRET" PHARMACY NETWORK LITIGATION

A class action lawsuit was filed recently against Valeant Pharmaceuticals International Inc., accusing the drug company and several executives of violating the Racketeer Influenced and Corrupt Organizations (RICO) Act. A scheme to block the company's drugs from competition through a "secret network of captive pharmacies," was alleged in the complaint.

The suit—filed by AirConditioning and Refrigeration Industry Health and Welfare Trust Fund, along with Fire and Police Health Care Fund, San Antonio—claims that Valeant used the network to stifle competition and fraudulently inflate the prices of the company's products. Citron Research, a stock commentary website, previously accused Valeant of counting inventory shipments to specialty pharmacies as revenue.

Citron made an interesting analogy, saying that Valeant is a “pharmaceutical Enron,” cooking its books through dispensers including Philidor Rx Services LLC, which is also named as a Defendant. The suit alleges that Valeant used fraudulent practices to improperly inflate the reimbursements for drugs paid for by third-party payors, including the Plaintiffs in the instant case. The suit alleges:

Through their fraudulent scheme, defendants obtained hundreds of millions of dollars in ill-gotten profits at the expense of the TPP class, whose members paid inflated prices for Valeant drugs that in many cases should never have been dispensed. Indeed, in 2015 alone, Valeant channeled nearly \$500 million worth of its drugs through Philidor, its central pharmacy hub.

Valeant has been accused of creating phantom sales through a shadowy network of specialty pharmacies. The drugmaker has denied those accusations. Valeant cut ties to Philidor in October amid reports that the specialty pharmacy had altered prescriptions and manipulated prices to boost sales of drugs sold by Valeant, Philidor’s exclusive customer.

An internal review determined that Valeant had inadequate internal controls over financial reporting. The review found that the “tone at the top of the organization and the performance-based environment,” set high targets that served as key performance expectations.

The Citron report sparked a stock plunge, which was exacerbated by the unveiling of a U.S. Securities and Exchange Commission (SEC) investigation into the Philidor affair. Valeant, and another drugmaker, Turing Pharmaceuticals, have come under fire in recent months over dramatic hikes in drug prices.

Valeant has been the focus of investigations by Congress, the U.S. Department of Justice and the U.S. Securities and Exchange Commission. Plaintiffs say Defendants violated the RICO Act by issuing fraudulent statements in thousands of communications to third-party payors. It seeks to represent TPPs who paid claims or incurred costs in connection with Valeant prescriptions from Jan. 2, 2013, through Nov. 9, 2015. The instant case is in the U.S. District Court for the District of New Jersey.

Source: Law360.com

\$64 MILLION AUTO PARTS PRICE-FIXING SETTLEMENT HAS BEEN APPROVED

U.S. District Judge Marianne O. Battani has approved the \$64-million settlement reached by Mitsubishi Electric Corp. that resolves car buyers’ claims in multidistrict litigation (MDL). The company was accused of having a role in a massive conspiracy to

rig prices on auto parts. Preliminary approval was granted to the settlement for car buyers whose vehicles included certain parts with prices that were alleged to have been fixed since July 1998. This settlement resolves their claims that Mitsubishi conspired to allocate the supply of auto parts and sell them at noncompetitive prices in the U.S. and elsewhere. Judge Battani appointed Cotchett Pitre & McCarthy LLP, Robins Kaplan LLP and Susman Godfrey LLP as settlement class counsel. In his order, Judge Battani wrote:

The terms of the settlement agreement are hereby preliminarily approved, including the release contained therein, as being fair, reasonable and adequate to the settlement classes, subject to a fairness hearing.

The MDL against manufacturers, marketers and sellers had been split into separate proceedings for different automotive parts. The instant settlement covers cars with certain alternators, starters, ignition coils, fuel injection systems, valve timing control devices, automotive wire harness systems, lights and electronic powered steering assemblies made by Mitsubishi or its related units.

The cases are part of a large MDL that followed the U.S. Department of Justice’s expensive, ongoing investigation into the auto parts industry that has yielded more than \$2 billion in fines. I will discuss some of the settlements below:

- In April 2015, Hitachi Automotive Systems Ltd. agreed to pay \$46.7 million to settle claims that it fixed prices on auto parts in the MDL.
- In September, when announcing a \$50 million settlement with Japanese manufacturer Sumitomo Electric Industries Ltd., lawyers for the end payors said total settlements for the Plaintiffs group had surpassed \$200 million.
- In March, a Michigan federal judge signed off on a settlement reached between Mitsubishi, Takata Corp. and a number of other auto companies. Three individual consumers were dismissed from the multidistrict litigation without prejudice. The terms of that agreement were not disclosed.
- Later, a Toyota Camry owner objected to multimillion-dollar settlements that auto parts companies reached with end payors in multidistrict litigation of an alleged price-fixing scheme. It was claimed that the deals invite “minitrials” and fraudulent claims.
- And in early May, end payors urged the court to approve a group of settlements worth \$225 million despite objections about whether the definition of the class was sufficiently clear, among other things.

The end-payor Plaintiffs are represented by Steven N. Williams, Adam J. Zapala and Elizabeth Tran of Cotchett Pitre & McCarthy LLP; Hollis Salzman, Bernard Persky and William V. Reiss of Robins Kaplan LLP; and Marc M. Seltzer, Steven G. Sklaver, Terrell W. Oxford and Omar Ochoa of Susman Godfrey LLP. Objectors to the settlement are represented by lawyers Olen York and David Dishman. There are two pro se objectors.

Source: Law360.com

SIXTH CIRCUIT COURT OF APPEALS VACATES \$30 MILLION BLUE CROSS ANTITRUST SETTLEMENT

The Sixth Circuit has vacated a \$30-million settlement resolving class action claims that a Blue Cross Blue Shield subsidiary “flouted antitrust laws by fixing insurance prices,” finding that the district court improperly sealed documents that class members needed to determine if the settlement was fair.

Both the class and BCBS of Michigan gave only “brief, perfunctory and patently inadequate” reasons for sealing nearly 200 pieces of evidence and an expert report that they relied on when negotiating the deal, the three-judge panel said. It was this information that class members needed to help them decide if they wanted to accept 12 percent of the recoverable damages estimated by the expert, and 4 percent of what they could have received if they won at trial, the panel said.

The appeals court said that not only did the lower court improperly seal documents and exhibits, in doing so it conflated the standards for entering a protective order with the “vastly more demanding” standards for sealing judicial records from the public, as it also vacated the orders to seal the information. The court said:

One can only conclude that everyone in the district court was mistaken as to which standard to apply. But one point is unmistakable: on the showings set forth in this record, every document that was sealed in the district court was sealed improperly.

The appeals court said, unlike information exchanged during discovery, the public has a strong interest in seeing what is entered into the court record while the case is being adjudicated. Courts have also long been in favor of openness and the party that seeks to seal documents must prove why they should be sealed, and even if neither party objects, the panel said a court that seals something must say exactly why it did so, the panel said. These standards were unmet in this case.

When the Plaintiffs—individuals and businesses who said BCBS of Michigan’s scheme to raise hospital reimbursement rates hurt them—sought to seal a brief supporting class certification and all 90 attachments, their entire justification was that the brief

includes quotes, information and references to depositions and documents BCBS or third parties had designated as confidential, the Sixth Circuit explained.

Despite these being justifications for a protective order, not an order to seal, the district court in its order allowed the documents to be sealed anyway. The other motions to seal followed the same pattern, the court said. BCBS argued that the Sixth Circuit has repeatedly held that objectors' right to discovery is limited, but the court disagreed. The court explained:

There is an obvious difference—so obvious that one wonders how a party could overlook it—between limiting the right of class members to take new discovery after settlement, and denying them the right to view materials already in the court record.

The insurer also argued that it was concerned about the possible disclosure of sensitive financial and negotiating information, an argument that the court found inadequate for a number of reasons:

- Proponents of sealing information must show that it will hurt them, but BCBS offered “only platitudes,” and information about a practice that was eventually outlawed by Michigan’s legislature isn’t a legitimate trade secret and can’t be protected as such.
- There is concern for the information of third parties over a reasonable argument, but there is no statutory or regulatory privilege protecting that information from disclosure in this case.
- Third parties’ conduct is intricately bound with the subject of the suit.

Beginning no later than 2007, according to a U.S. Department of Justice (DOJ) complaint filed in 2010, BCBS used its “extraordinary” market power to reach agreements with Michigan hospitals under which the insurer agreed to raise its own reimbursement rates for hospital services as long as the providers agreed to charge other insurers rates at least as high as the hospital charged BCBS. Within two weeks of the DOJ’s lawsuit, a number of putative class action lawsuits were filed—adopting many of the government’s allegations—which were eventually consolidated into one case seeking more than \$40 billion in damages, plus fees and expenses.

In March 2013, Michigan banned the use of agreements like those negotiated by BCBS, giving the DOJ the relief it sought, and the government voluntarily dismissed its case. In October of that year, the Plaintiffs’ antitrust expert, Dr. Jeffrey Leitzinger, finished his report, which described the scheme in detail and tentatively concluded that about \$118 million in damages could be calculated on a class-wide basis, but was unclear about whether more could be calculated on an individual basis.

The two sides reached the \$30 million settlement agreement in June 2014. It was reported that the settlement after attorneys’ fees and other expenses are deducted from the settlement fund would work out to \$14.6 million. Since there are 3 million to 7 million potential class members, each of those individuals would receive between \$2 to \$5. That sort of recovery might make the class members wonder if pursuing the case was worth their involvement. Obviously, the panel on the Sixth Circuit had serious questions about the settlement.

Source: Law360.com

CLASS ACTION ALLEGES INTUITIVE’S DEVICE SENT METAL TO PATIENTS’ BRAINS

A class of heart surgery patients have accused Intuitive Surgical Inc., which builds the “da Vinci” surgical robot, of building a defective medical device that caused metallic debris to end up on their brains. In the complaint, filed in a Georgia federal court in mid June, the Plaintiffs claim that Intuitive and its affiliate, Intuitive Surgical Operations Inc., designed, manufactured, marketed and sold defective medical instruments that were used during surgeries at hospitals across the country. It’s alleged that Intuitive knew, or should have known, about the defects in the instrument, including the fact that it can leave metallic debris inside the body, and thus should be held liable for breaching implied and express warranties, negligence and other claims for not warning anyone about possible harm.

Both Plaintiffs claim to have discovered the metallic debris after undergoing a mitral valve repair surgery by a cardiac surgeon at Saint Joseph’s Hospital in Atlanta. The doctor is one of the surgeons listed on Intuitive’s website as being qualified to use the da Vinci device for mitral valve repair.

One Plaintiff underwent heart surgery on June 16, 2015, and had no evidence of metallic debris on his brain before that date, but imaging done after the procedure showed findings that suggested he had metal in his head. The other Plaintiff underwent the same surgery three days later and experienced the same issue, the complaint says.

Both Plaintiffs allege they have suffered, and will continue to suffer, physical and mental effects, including the emotional distress of having metallic fragments in their brains, as well as the cost of medical expenses to address those effects. Both expect to lose future wages.

Plaintiffs seek to represent three subclasses of patients who underwent a surgery within the last two years that used the device and who didn’t previously have any evidence of metallic debris on their brains. Those subclasses are:

- those who still don’t know if they have debris on their brains;

- those who have found that they may have debris on their brains, and
- those who have suffered an injury from having debris on their brains.

In April, Intuitive reached a last-minute settlement in the \$30-million trial over a woman’s serious internal injuries stemming from a da Vinci-assisted hysterectomy. If you need more information on this subject, contact Clay Barnett, a lawyer in our firm’s Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Clay.Barnett@beasleyallen.com.

Source: Law360.com

XVIII. THE CONSUMER CORNER

NEW RULES SHOULD HELP TO END PAYDAY LOAN “DEBT TRAPS”

Claiming American consumers have been “set up to fail” by the short-term lending industry, federal regulators last month issued sweeping new rules that would drastically alter the payday and title lending industries. Under the proposed rule from the Consumer Financial Protection Bureau (CFPB), short-term lenders would have to verify borrowers’ ability to promptly repay loans, and be prevented from repeatedly issuing loans to the same consumers. CFPB Director Richard Cordray said:

The Consumer Bureau is proposing strong protections aimed at ending payday debt traps. Too many borrowers seeking a short-term cash fix are saddled with loans they cannot afford and sink into long-term debt. It’s much like getting into a taxi just to ride across town, and finding yourself stuck in a ruinously expensive cross-country journey. By putting in place mainstream, common-sense lending standards, our proposal would prevent lenders from succeeding by setting up borrowers to fail.

The ability-to-repay provision would require that lenders verify a borrower’s after-tax income, government benefits or other sources of income, and make sure that borrower can make timely loan payments while still being able to afford basics, like food and shelter.

Lenders would also be required to check a consumer’s credit report to verify the amount of other outstanding loans and required payments. The new rules also include provisions designed to prevent consumers from being hit with drastic fees, such as repeated attempts to collect debts

from depleted checking accounts. The CFPB said:

After two straight unsuccessful attempts, the lender would be prohibited from debiting (a borrower's) account again, unless the lender gets a new and specific authorization from the borrower.

The proposal would also cap the number of short-term loans that can be made in quick succession. CFPB research has shown that while payday loans are designed for the short term, many borrowers simply renew their loans when payment is due. One CFPB study found that 80 percent of payday borrowers took another loan out within 30 days. Alert to industry criticism that regulating the payday marketplace would make it impossible for consumers to get any short-term credit, the bureau tried to strike a balance, leaving some lending possibilities open.

Under the proposed rule, consumers will be allowed to borrow a short-term loan of up to \$500 without passing the so-called "full-payment test," as long as they have not used short-term loans for more than 90 days during the previous year and the loan is not secured with a car title. Lower interest short-term loans—with a total borrowing cost of 36 percent interest or less—will also be permitted in certain circumstances. Consumer groups have greeted the CFPB rules with enthusiasm. Tom Feltner, Director of Financial Services at Consumer Federation of America, says:

Since the CFPB was created, the Bureau has worked diligently to understand the payday and car title market, examine the consumer experience and develop focused and data-driven interventions to prevent harmful practices.

Industry groups, however, warned that regulations to short-term loans could force Americans to turn to even less attractive alternatives. The public comment period on the new rules will begin shortly and continue until Sept. 14. The CFPB is expected to issue its final rule afterward.

I have never been a fan of the payday lenders and that's because these lenders prey on working men and women who are having financial problems and simply need "quick money." Very soon most of the borrowers find themselves in the "quicksand" created by the payday lending industry. Over the years, efforts at controlling these loan sharks has been weak at best. It's time to get much tougher and do the job required to protect consumers. While the new rules are a step in the right direction, much more needs to be done, both by Congress and state legislative bodies, to protect working men and women and especially low income citizens from the greedy loan sharks in this industry.

Source: Bloomberg News

ARBITRATION BILL INTRODUCED IN CONGRESS

The introduction of the bipartisan "Justice for Servicemembers Act" would clarify that the Uniformed Services Employment and Reemployment Rights Act (USERRA) guarantees members of the military the right to enforce their USERRA rights in court. That would be true even when their employer has buried a forced arbitration clause in its employment agreement. This bill was introduced in the U.S. Senate by Sen. Richard Blumenthal, and in the U.S. House of Representatives by Rep. David Cicilline. These Senators should be commended for taking on this needed battle. My friend, Larry Tawwater, the current president of the American Association for Justice, had this to say:

The brave men and women of the U.S. Armed Forces selflessly fight to protect our rights. It is despicable that corporations would attempt to deny them their rights through the abusive use of forced arbitration. The 'Justice for Servicemembers Act' will clarify a critical provision in USERRA that will stop this shameful practice and guarantee that members of our military can fully and fairly enforce their rights in court.

Congress overwhelmingly passed USERRA in 1994 to prohibit corporations from discriminating against their employees on the basis of military service, including a celebrated ban on firing reservists who are called to active duty. However, by burying a forced arbitration clause in the fine print of employment agreements, corporations have been able to evade USERRA protections and discriminate against service members. Regardless of the circumstances, the employers aren't being held accountable in court. Instead, service members attempting to assert their USERRA rights are kicked out of court and funneled into a rigged, secretive arbitration proceeding decided by an arbitrator chosen by the employer. That's a certain way to deny justice to a person with a valid legal claim and it's wrong.

The "Justice for Servicemembers Act" would allow service members to pursue any employment discrimination cases that arise under USERRA in federal court instead of employer-forced arbitration, while preserving the option to enter into an arbitration agreement after a dispute arises. That would be where both sides to a dispute agree to arbitration. The American Association for Justice and its Executive Director Linda Lipscon have worked very hard on this project.

Source: AAJ News Release

NEW RULE WILL PROTECT STUDENTS DEFRAUDED BY COLLEGES

The U.S. Department of Education (DOE) has released a proposed rule that has the effect of forgiving student loans if students were defrauded by their college. The rule would also bar colleges from creating mandatory arbitration clauses and class action waivers for students. The Obama administration's rule will protect students from wrongs committed by their colleges and provide ways for those students to escape their debt or fight back against those who wronged them. DOE Secretary John B. King, Jr., said in a statement:

We won't sit idly by while dodgy schools leave students with piles of debt and taxpayers holding the bag. All students who are defrauded deserve an efficient, transparent and fair path to the relief they are owed, and the schools should be held responsible for their actions.

Reportedly, the rule would do the following:

- The regulation would allow groupwide loan discharges for students who have faced misconduct by their colleges. Colleges would also have to pay if they "engage in misconduct or exhibit signs of financial risk," based on specific triggers, the agency said.
- Schools that are financially risky or whose students often have bad outcomes on their loans would have to specifically and clearly share that information with prospective and current students, as well as the public, according to the proposed regulation.
- Schools would be banned from using pre-dispute arbitration clauses to prevent students from bringing the schools to court or filing class actions.

Colleges place those clauses in enrollment agreements and other documents, according to the DOE, and also tend to include gag clauses that stop students from speaking out about wrongs committed. DOE Under Secretary Ted Mitchell said in the statement:

These regulations would prevent institutions from using these clauses as a shield to skirt accountability to their students, to the department and to taxpayers. By allowing students to bring lawsuits against school for alleged wrongdoing, the regulations remove the veil of secrecy, create increased transparency, and give borrowers full access to legal redress.

Public comment will be accepted through Aug. 1, and the final regulation will be published by Nov. 1. This proposed regulation comes just over a year after the White House released a Student Aid Bill of Rights, saying

it was looking into ways to make student debt less permanent, such as by allowing both federal and private loans to be forgiven during bankruptcy and extending protections that other forms of consumer debt enjoy to student debt. President Barack Obama ordered his cabinet and the Consumer Financial Protection Bureau to look into measures “such as notice and grace periods after loans are transferred among lenders and a requirement that lenders confirm balances to allow borrowers to pay off the loan,” according to a March 2015 fact sheet.

Source: Law360.com

STARBUCKS UNIT'S \$3.75 MILLION EXPLODING TUMBLER FINE DIVIDES THE CPSC

Teavana Corp., which is owned by Starbucks, has agreed to a \$3.75 million civil penalty to settle allegations it failed to report complaints of exploding tea tumblers. The company's agreement came after a “contentious settlement” that prompted one commissioner to criticize the agency's “opaque penalty process.” The U.S. Consumer Product Safety Commission (CPSC) had provisionally accepted the settlement agreement with Teavana, in a 3-2 vote. The agreement would put an end to claims the tea retailer violated federal laws by failing to report that its glass tea tumblers contained a defect after receiving complaints about the products exploding in consumers' hands.

Commissioner Joseph P. Mohorovic, opposing the settlement, said he did not think Teavana had made a mistake and that the agency failed to spell out enough facts and evidence to justify fining the company. He said the CPSC does not go far enough to “publicly justify” such penalties and thereby creates “distrust” between the agency and its stakeholders. Commissioner Mohorovic said in a statement accompanying the CPSC's official announcement:

When that distrust becomes deep enough and broad enough, more companies will force us to make our penalty cases in court, a dynamic that benefits only their lawyers' billable hours.

Mohorovic, who has served on the commission since July 2014, has previously criticized the way the CPSC calculates fines and explains decisions, saying the agency could do a better job informing the public and the regulatory industry of its reasoning.

In this case, the CPSC accused Teavana of failing to immediately inform it about the defect or unreasonable risks associated with the tumblers after it received consumer complaints, and said the company knowingly violated the Consumer Product Safety Act. The CPSC alleged:

Teavana had information reasonably supporting the conclusion that the

tumblers are defective or created an unreasonable risk of serious injury or death because they can unexpectedly explode, shatter or break during normal use, posing a laceration and burn hazard.

It appears that Teavana received “numerous reports” of the tumblers exploding, shattering or breaking between 2010 and 2013. There had been six reports of consumers being cut by broken glass or burned by hot liquid while holding a tumbler when it exploded. Teavana issued a recall of 445,000 tumblers in May 2013.

The settlement agreement also says that Teavana's voluntary recall of the tumblers was initiated out of an abundance of caution, and the company never determined or concluded that any models contained a defect, posed a substantial product hazard, or created an unreasonable risk of serious injury or death. The CPSC said that while Teavana does not admit to the charges, the penalty agreement also requires the company to comply and maintain a compliance program in accordance with the Consumer Product Safety Act.

The dissenting commissioner made a good point when he suggested that the CPSC should make clear to the industry about what the agency's expectations are. I agree that the CPSC should make it abundantly clear when a company has a reporting obligation. That may be happening now, but at least one commissioner doesn't believe it is.

Source: Law360.com

MR. COFFEE MAKER AGREES TO A \$4.5 MILLION DEFECT SETTLEMENT WITH THE CPSC

Sunbeam Products Inc. has reached a \$4.5 million settlement with the Consumer Product Safety Commission (CPSC) on a claim that the company hid from the agency a defect in Mr. Coffee appliances that let steam build up and possibly shoot hot water toward users. In a notice published in the Federal Register, the CPSC said it reached a preliminary settlement with Sunbeam, which does business as Jarden Consumer Solution, in which the household products maker agreed to pay the civil penalty for failing to report the defect in its Mr. Coffee Single Cup Brewing System.

The settlement is open to a 15-day comment period, after which it will officially take effect, and Sunbeam will then owe the \$4.5 million. The CPSC said that between 2011 and 2012, Sunbeam sold roughly 520,000 Mr. Coffee appliances. The company was said to have received numerous complaints of the product's opening and expelling hot water and coffee grounds on users, 32 of whom reported being burned. However, despite having information “reasonably supporting” the conclusion that the coffee makers contained a defect that created a substantial risk of harm, the

agency says that Sunbeam did not immediately notify the commission as required, a violation of the Consumer Product Safety Act.

Instead of reporting to the CPSC, Sunbeam conducted its own investigation into the incidents. The company eventually determined the cause to be a buildup of steam inside the Mr. Coffee's hot water tank, which itself was caused by brewing a second cup of coffee with an under-filled water tank immediately after brewing the first cup. After concluding its investigation, the CPSC says Sunbeam then filed a report with the commission. However, the report should have come sooner as the company was “presumed to have knowledge” of the defect much earlier. Aside from the \$4.5 million civil penalty, Sunbeam is also required to maintain a compliance program designed to ensure the company follows the CPSC's defect reporting rules in the future.

The compliance program includes updated written reporting standards at the company, implementing mechanism for confidential reporting by any Sunbeam employee, communicating its compliance policies to employees, and retaining any CPSC compliance-related records for at least five years.

Source: Law360.com

E-CIGARETTES WILL BE SUBJECT TO FDA REGULATION

The Food and Drug Administration (FDA) recently announced that a final rule will extend its authority to all products that meet the statutory definition of “tobacco product,” which includes all forms of electronic cigarettes (e-cigarettes). The new rules require manufacturers to submit ingredient, safety and other product information normally required to initially obtain FDA approval for market sale, to ban the sale of these products to minors, and require new health warnings on product labels and in advertising.

The new FDA rules go into effect Aug. 8, 2016, and will require manufacturers, importers and retailers of e-cigarettes and similar products to undergo a pre-market analysis and regulatory review by the FDA, including registering manufacturers, and listing all ingredients and potentially harmful substances in these products. Manufacturers will have two to three years to file pre-market analysis and safety data on each product, and each product must be found to be in FDA compliance in order to remain on the market. All new e-cigarette and similar products will be subject to FDA review and pre-market approval.

Before this recent FDA ruling, e-cigarettes and similar products were not subject to any federal regulation or industry-wide standardization on their manufacture, sale, marketing, or distribution. Some e-cigarettes, for example, have been touted as a safer alternative to traditional tobacco cigarettes, or as

an effective way to quit smoking, yet there are no studies proving either of these. Bringing these products under the purview of the FDA will prevent manufacturers from making false health claims, and will give the FDA the power to issue warnings about health risks to consumers.

Intending to improve public health overall and prevent future generations from using tobacco products, the new rules also forbid the sale of e-cigarettes and other tobacco products to anyone younger than 18 years old, either in person or online, and require photo identification to purchase these products. A handful of states have laws banning sales to minors so this new FDA rule codifies the ban nationally. The rule will also remove these products from vending machines and disallow giving away of free samples. The rule further requires health warnings on product packaging and changes in safety labeling and in advertisements.

If you would like more information, you can contact William Sutton, a lawyer in our Toxic Torts Section. He can be reached at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: Food and Drug Administration

XIX. 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 June. 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.

AUTOMAKERS RECALL 12 MILLION MORE CARS WITH TAKATA AIR BAG PARTS

Automakers, including Fiat Chrysler Automobiles and Honda, have agreed to recall about 12 million additional vehicles in the U.S. over possibly defective air bags manufactured by Takata. FCA US LLC and American Honda Motor Co. have the bulk of affected vehicles and are recalling 4.3 million and 4.5 million cars, respectively. Behind them is Toyota Motor Corp., which is recalling about 1.7 million cars off the road, and then Nissan, which is recalling about 400,000. Subaru of America Inc. is also recalling about 300,000 cars over the issue.

4.4 MILLION VEHICLES ADDED TO TAKATA AIR BAG RECALL

Seven automakers have added nearly 4.4 million vehicles in the United States to the huge Takata air bag inflator recall. Documents detailing recalls by General Motors, Volkswagen, Ford, Daimler Vans, BMW, Jaguar-Land Rover and Mercedes-Benz were posted by the government. Recalls from eight other companies had been posted earlier. The recalls are part of an expansion announced in May. Seventeen automakers are adding 35 million to 40 million inflators to what was the largest auto recall in U.S. history.

Of the recalls announced, General Motors had the largest total at 1.9 million, covering pickups and large SUVs. The latest round of recalls covers passenger air bags mainly in older models in states with high temperatures or humidity. The move brings the total number of vehicles recalled in this round to 16.4 million. The inflators are responsible for at least 11 deaths and more than 100 injuries worldwide. The recalls are being phased in during the next three years because of a lack of available replacement parts. Models from 2011 or older in high heat and humidity areas will get first priority. Research has shown that it takes at least six years for the ammonium nitrate to deteriorate.

NISSAN ADDS 402,450 VEHICLES TO EXPANDED TAKATA AIR BAG RECALL

Nissan North America is adding 402,450 vehicles to the expanded Takata recall for defective front-passenger air bag inflators, according to the National Highway Traffic Safety Administration (NHTSA). The vehicles include:

- 2005-'08 Infiniti FX35
- 2005-'08 Infiniti FX45
- 2003-'04 Infiniti I30
- 2003-'04 Infiniti I35
- 2006-'10 Infiniti M35
- 2006-'10 Infiniti M45
- 2007-'11 Nissan Versa

These vehicles are equipped with certain air bag inflators assembled as part of the passenger frontal air bag modules and used as original equipment or replacement equipment. These inflators may rupture due to propellant degradation occurring after long-term exposure to absolute humidity and temperature cycling. An inflator rupture may result in metal fragments striking the vehicle occupants, resulting in serious injury or death. All of this came from NHTSA's summary.

Nissan says there are "no known incidents." Nissan dealers and Infiniti dealers will replace the front-passenger airbag inflator. Parts are not currently available. Owners will be sent an interim notification by the end of July. A second notice will be

mailed when parts are available. Owners can contact Nissan customer service at 1-800-647-7261.

300,000 HYUNDAI, KIA VEHICLES RECALLED OVER HOOD LATCHES

Korean automakers Hyundai and Kia have recalled a combined 300,000 vehicles over problems with the hood latches in the Hyundai Tucson and Kia Sedona that can cause the hood to open while driving. Kia Motors America Inc. will recall nearly 220,000 model year 2006 to 2014 Kia Sedona minivans because of the issue with the hood latch, while Hyundai Motor America will recall about 81,000 model year 2016 Tucson SUVs. NHTSA warned in a notice:

If the primary hood latch is inadvertently released and the secondary latch cannot secure the hood, the hood may unexpectedly open while driving, increasing the risk of a crash.

Affected Kia Sedonas were manufactured between June 2005 and April 2014. Affected Hyundai Tuscons were made between May 2015 and March 2016. The automakers plan to contact owners and have dealers replace the secondary hood latch at no charge. Alternatively, Kia might clean and lubricate the latch depending on its condition.

The secondary hood latch problem in the Kia Sedona is due to corrosion of the latch. The new hood latches will have an enhanced corrosion coating. Kia said in a statement that it is voluntarily recalling the vehicles after determining that corrosion could cause the secondary latch to remain open when the hood is closed.

TRAXXAS RECALLS X-MAXX MONSTER TRUCKS AND ELECTRONIC SPEED CONTROLS DUE TO FIRE HAZARD

About 4,900 X-Maxx Monster Trucks and 140 VXL-6s electronic speed controls have been recalled by Traxxas LP, of McKinney, Texas. In addition, 96 trucks were sold in Canada. Vehicle modification or electronic failure can result in a short circuit, posing a fire hazard. The recalled VXL-6s electronic speed control #3365 is sold installed in the Traxxas X-Maxx Monster Truck, model 77076-04, and is also sold separately. The electronic speed control is the electronic control module that manages the throttle control (speed), directional control (forward or reverse) and braking of the drive motor in the truck. The truck is 30 inches long, 22 inches wide and 4 inches above the ground. The truck comes in two colors, red and blue. It weighs approximately 20 pounds. The electronic speed control is located near the center of the truck in a vented blue case approximately 2 inches wide, 2 inches long

and 2 inches tall. Traxxas XMaxx is displayed on the side of the truck. The company has received 40 reports of fire. One injury to a finger has also been reported.

The trucks were sold at HobbyTown and other hobby stores and Traxxas dealers nationwide from November 2015 through January 2016. The X-Maxx truck sold for about \$840. The electronic speed control sold for about \$250. Consumers should immediately stop using the recalled trucks and return their electronic speed control to their dealer for a free firmware upgrade and installation of a new fusible link, or contact Traxxas customer support to return the electronic speed control and have a firmware upgrade and free fusible link installation. Contact: Traxxas toll-free at 888-872-9927 from 8:30 a.m. to 9 p.m. CT Monday through Friday or online at Traxxas.com, then click on "Support" and then "Repair-Exchange" for more information. Photos are available at <http://www.cpsc.gov/en/Recalls/2016/Traxxas-Recalls-X-Maxx-Monster-Trucks-and-Electronic-Speed-Controls/>.

SOUTHWIRE RECALLS VOLTAGE DETECTORS DUE TO SHOCK AND BURN HAZARDS

About 1.2 million non-contact voltage detectors have been recalled by Southwire Company LLC, of Carrollton, Ga. The voltage detectors can give a false "no voltage" reading when being used to test live wires for electric current, posing shock, electrocution and burn hazards to consumers. This recall involves Southwire non-contact voltage detectors with model numbers 40110N and 40120N. Voltage detectors alert users to the presence of electric current running through electrical wires. The recalled voltage detectors are cylindrical shaped, about six inches long and about two inches in circumference. They are brownish gold in color with a black center insert. "Southwire," the model number and the CE and UL listing symbols are printed on the voltage detectors. They have red LED lights to indicate the presence of live electric current. Model 40110N detects voltage from 100 to 1,000 VAC. Model 40120N detects voltage from 24 to 1,000 VAC. Southwire is aware of one report of an incident of a false reading by the voltage detector. The consumer received an electrical shock and fell off a ladder.

The detectors were sold at Lowe's and other home and hardware stores nationwide and online at lowes.com and other websites from June 2013 through February 2016 for about \$15. Consumers should immediately stop using the recalled voltage detectors and contact Southwire for instructions on returning them for a free replacement voltage detector. Contact Southwire toll-free at 855-798-6657 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.southwire.com and click on Product Recall

for more information. Photos are available at <http://www.cpsc.gov/en/Recalls/2016/Southwire-Recalls-Voltage-Detectors/>.

360 ELECTRICAL RECALLS SURGE PROTECTORS DUE TO SHOCK AND FIRE HAZARDS

360 Electrical LLC, of Salt Lake City, Utah, has recalled about 9,300 surge protectors. An additional 1,000 recalled surge protectors were sold in Canada. The surge protectors can short circuit when non-grounded plugs are connected, posing a shock or fire hazard. This recall involves three models of surge protectors, Idealist (360320), Idealist 2.4 (360321) and Agent (360322). The model number is located on the underside of the unit. The units have seven outlets, come in black or white and measure 14.5 inches long by 2.5 inches wide by 1.5 inches tall. "360electrical" is printed on the front of the units. Recalled surge protectors do not have a single check mark engraved on the underside of the unit, right next to the model number.

The surge protectors were sold at B&H Photo stores nationwide and online at Amazon.com and bhphotovideo.com from July 2015 through February 2016 for between \$33 and \$40. Consumers should immediately stop using the recalled surge protectors and contact 360 Electrical for a free replacement. Contact 360 Electrical toll-free at 844-827-4207 from 9 a.m. to 5 p.m. MT Monday through Friday or online at www.360electrical.com, hover over "Support" at the top of the page and click on "Warranty," then click on "Agent, Idealist and Idealist 2.4 RECALL INFO" for more information. Photos Available At <http://www.cpsc.gov/en/Recalls/2016/360-Electrical-Recalls-Surge-Protectors/>

AULDEY TOYS RECALLS SKY ROVER TOYS DUE TO FIRE HAZARD

Auldey Toys North America, of Quincy, Mass., has recalled about 325,000 Sky Rover toys. The USB charging cord sold with the toy can overheat, posing fire and burn hazards to consumers. This recall involves yellow USB charging cords sold with Aero Spin and Aero Cruz Sky Rover remote-controlled flying toys. The toy is shaped like ball with two blades on top, wings on the side and measures about 3 1/2 inches tall by 5 inches wide. They are operated by a small one-channel remote control unit. The following item numbers are included in the recall: YW859110-2, YW859110-3, YW859110-5, YW859110-6 or TTYW859110-5. The item number is printed on a white sticker on the toy's packaging. They were sold in red, orange and citron green. Only yellow USB charging cords are included in this recall. The company has received 35 reports of charging cords overheating. No injuries have been reported.

The toys were sold at Walmart and other mass merchandisers and independent toy stores nationwide and online at Amazon.com from January 2015 through January 2016 for between \$11 and \$15. Consumers should immediately stop using the USB cords and contact the firm for instructions on obtaining a free replacement charge cord. Contact Auldey Toys toll-free at 844-303-8936 from 9 a.m. to 5 p.m. ET Monday through Friday, by email at aeroproducts@auldey.us or online at <http://www.Auldey-Toys.us> and click on "Safety Recall" at the bottom of the page banner for more information.

FAR EAST BROKERS RECALLS CHILDREN'S CHAIRS AND SWINGS DUE TO VIOLATION OF FEDERAL LEAD PAINT STANDARD

Far East Brokers and Consultants Inc., of Jacksonville, Fla., has recalled about 6,000 Chairs and swings. The screen-printing on the fabric of the chairs and swings contains excessive levels of lead, which is a violation of the federal lead paint standard. This recall involves Leisure Ways® pink butterfly themed children's camp chairs, moon chairs, and swings. The chair and swings have a metal frame with large red butterfly images and other colorful images on the pink polyester fabric. "Distributed by: Far East Brokers and Consultants, Inc." and "Tracking # November/2015" are printed on the tracking label sewn into the seat of each chair.

The chairs and swings were sold at Weis Markets, wholesale distributors, grocery and drug stores nationwide from January 2016 through April 2016 for between \$10 and \$50. Consumers should immediately stop using the recalled chairs and swings, take them away from children and return them to the place of purchase for a full refund. Contact Far East Brokers toll-free at 888-753-9040 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.fareastbrokers.com and click on "Product Recalls" at the right of the page for more information. Photos Available At <http://www.cpsc.gov/en/Recalls/2016/Far-East-Brokers-Recalls-Childrens-Chairs-and-Swings/>

RHINO METALS RECALLS HANDGUN SECURITY SAFES DUE TO A SERIOUS RISK OF INJURY

Rhino Metals Inc., of Caldwell, Idaho, has recalled 600 Bighorn handgun security safes. The handgun security safes can be opened without the use of a combination allowing unauthorized access to a handgun, posing a serious risk of injury to children and others. This recall involves all Bighorn P-20 handgun security safes. The gray and black safes are made out of metal, measure about 3.25 inches high by 12 inches wide by 10.5 inches deep and weigh about 15 pounds. The Bighorn logo in blue and a

four-button, back-lit electronic key pad are located on the top of the safe. The handgun security safes have serial numbers 1412160001 through 1412163000 printed on a sticker on the right hand side.

The safes were sold at Canyon Sports, Coastal Farm & Ranch, Dean Safes, High Noble Safe, Co., North River Customs and other stores nationwide from March 2015 through March 2016 for about \$75. Consumers should immediately stop using the recalled handgun safes and contact Rhino Metals for instructions and how to return the safe for a full refund. Contact Rhino Metals at 800-701-9128 ext. 5844 from 7:30 a.m. to 4 p.m. MT Monday through Friday, via email at techsupport@rhinosafe.com or online at www.rhinosafe.com and click on Recall Information at the center of the page for more information. Photos Available At <http://www.cpsc.gov/en/Recalls/2016/Rhino-Metals-Recalls-Handgun-Security-Safes/>

STIHL RECALLS BATTERY-POWERED HEDGE TRIMMERS DUE TO LACERATION HAZARD

About 8,000 STIHL battery-powered hedge trimmers have been recalled by STIHL Inc., of Virginia Beach, Va. The hedge trimmer can operate faster than expected, continue running after the trigger is released or operate by depressing either the trigger or the front handle switch individually, posing a laceration hazard. This recall involves STIHL model HSA 65 battery-powered hedge trimmers. "STIHL" and "HSA 65" are printed on the side of the battery compartment between the trigger and the loop handle. The hedge trimmer is gray and orange, with a loop handle, removable battery and a 20 inch hedge trimming blade. STIHL Inc. has received seven reports of the trigger or front handle switch not operating properly. No injuries have been reported.

The trimmers were sold at authorized STIHL dealers nationwide from June 2010 through April 2016 for about \$300. Consumers should immediately stop using the recalled trimmer and return it to an authorized STIHL dealer for a free replacement battery-powered hedge trimmer. Contact STIHL Inc. at 800-610-6677 from 8 a.m. to 8 p.m. ET Monday through Friday, email stihl-recall@stihl.us or online at www.stihlusa.com and click on Information and then Product Recalls for more information. Photos Available At <http://www.cpsc.gov/en/Recalls/2016/STIHL-Recalls-Battery-Powered-Hedge-Trimmers/>

DIRECT DISTRIBUTORS RECALLS ANGLE GRINDERS DUE TO RISK OF LACERATION

About 200 4-inch air angle grinders have been recalled by Direct Distributors Inc., of Garner, N.C. The spring-loaded safety switch can fail and allow the grinder to turn

on even with the safety switch locked in place, posing a finger, hand or other laceration risk. This recall involves 4-inch air angle grinders with model number 20687. The model number is printed on the packaging. The grinders have a blue handle and some models have the ASC logo on the top. The company has received one report of the safety spring failing, resulting in a finger laceration.

The grinders were sold exclusively at Agri Supply stores in Georgia, North Carolina, South Carolina and Virginia and online at www.agrisupply.com from January 2015 to April 2016 for about \$40. Consumers should immediately stop using the recalled angle grinder and return it to Direct Distributors or any Agri Supply Company location for a full refund. Contact Direct Distributors toll-free at 877-564-8669 from 8 a.m. to 5 p.m. ET Monday through Friday, by email at recall@ncddi.com, or online at www.agrisupply.com and click on "Safety Recall Notice" for more information. Photos Available At <http://www.cpsc.gov/en/Recalls/2016/Direct-Distributors-Recalls-Angle-Grinders/>.

AR500 ARMOR RECALLS LEVEL III BODY ARMOR DUE TO RISK OF GUNSHOT INJURY OR DEATH

AR500 Armor, of Phoenix, Ariz., has recalled about 10,000 Level III Body Armors. The body armor can fail to meet performance requirements for Level III body armor, allowing a bullet to penetrate, and pose a risk of gunshot injury or death. This recall involves AR500 Armor Level III body armor, including chest plates, side plates and ABS panels. The black, steel-core body armor is rated for protection against rifle calibers up to 7.62X51 M80 Ball (.308) at 2,800 feet per second. AR500 Armor is printed on a white label on the back side of the armor. Only AR500 Level III body armor with the manufacture date code of February 2016 and March 2016 are included in the recall.

The armor was sold at AR500 Armor dealers and directly to customers and online at www.ar500armor.com from February 2016 through March 2016 for between \$30 and \$110. Consumers should immediately stop using the recalled body armor and contact the company for instructions to receive replacement body armor. AR500 will contact all known purchasers about the recall. Contact AR500 Armor toll-free at 844-887-8824 from 8 a.m. to 5 p.m. PT Monday through Friday, email at support@ar500armor.com or online at www.ar500armor.com and click on "Safety Recall" for more information. Photos are available at <http://www.cpsc.gov/en/Recalls/2016/AR500-Armor-Recalls-Level-III-Body-Armor/>

CHILDREN'S JEWELRY MAKING KIT RECALLED FOR HIGH AMOUNTS OF LEAD

Almost 175,000 toy jewelry kits have been recalled due to high amounts of lead. The Cra-Z-Jewelz Gem Creations kits, made by LaRose Industries, have a slider bracelet which contains the lead. The Creations kit recall has three different versions: the Shimmer N' Sparkle Cra-Z-Art Cra-Z-Jewelz Gem Creations Ultimate Gem Machine, the My Look Cra-Z-Art Cra-Z-Jewelz Gem Creations Ultimate Gem Machine, and the refill kit Shimmer N' Sparkle Cra-Z-Art Cra-Z-Jewelz Gem Creations Gem Charm and Slider Bracelets. The UPC codes are 884920174504, 884920174849, and 884920466340. The products were imported from China. Lead is toxic if ingested, can have devastating effects on children, and can cause brain damage, according to the CPSC. No injuries have been reported to the commission. The toy kits are sold at Kmart, Toys R Us, Walmart, Target, and other popular retail chains. If your child has one of these kids, CPSC officials said to take the product away and contact LaRose Industries for a refund. To do this, call (855) 345-4693, email recall@laroseindustries.com, or go to the website at www.laroseindustries.com and click on recalls.

STORE AND VENDING MACHINE SNACK PRODUCT RECALL ISSUED

Peanut residue detected in flour has prompted Frito-Lay and Hostess to recall some of their snack products. Frito-Lay this week issued a voluntary recall of several varieties of Rold Gold pretzels that can be found in stores and vending machines. The move follows Hostess's voluntary recall last week of 710,000 cases of snack cakes and doughnuts. The recalled products include Ding Dongs, Zingers and different flavors of snack doughnuts. The companies cite supplier Grain Craft's recall of a certain type of flour that included peanut residue. The Food and Drug Administration (FDA) says Grain Craft only sells to other companies and not to consumers. A list of other products recalled over the flour can be found on the FDA's website.

NUT, SEED AND RAISIN MIX ARE RECALLED BECAUSE OF HEALTH RISK

Prepackaged containers of nut, seed and raisin mix at Publix are part of a new recall for possible Listeria contamination. Publix said it has received notification from sunflower seed supplier Flagstone Foods that the products may be adulterated with Listeria. The mix was sold in Alabama, Tennessee, Georgia, South Carolina, North Carolina and Florida. Maria Brous, Publix media and community relations director, said there have been no reported illnesses from cus-

tomers who have purchased the food. "As part of our commitment to food safety, potentially impacted product has been removed from all store shelves," she said in a statement. A full refund is available to customers who have one of the products, which have a UPC of 000-41415-08886, 002-25143-00000 and 004-00002-10396. To ask questions, call 800-242-1227 or visit www.publix.com. Customers can also contact the Food and Drug Administration at 888-SAFEFOOD.

KASHI RECALLS MORE PRODUCTS FOR POSSIBLE LISTERIA CONTAMINATION

More Kashi products are under recall because they may contain Listeria. The company has expanded its previous recall to include two Kashi brand snack bars and two varieties of Bear Naked granola. The snacks feature sunflower seed-based ingredients from SunOpta, the supplier behind many recent Listeria-related recalls in the U.S. and Canada. "People who have purchased affected product should discard it and contact Kashi for a full refund," Kashi said on the U.S. Food and Drug Administration (FDA) website. The recalled Kashi products previously recalled included Kashi Trail Mix Chewy Granola Bars and Bear Naked Soft Baked Granola, Cinnamon + Sunflower Butter.

HOSTESS RECALL INCLUDES POPULAR ZINGER AND DING DONG PRODUCTS

Several popular Hostess products have been recalled because they may contain low levels of undeclared peanut residue. Hostess Brands is recalling 710,000 cases of snack cakes and donuts after learning that a certain lot of Grain Craft flour used to make the products may have peanut residue, which could cause a serious or life-threatening reaction to those who are allergic or sensitive to peanuts. "... The amount of peanut exposure from use of the flours and affected products is considered to be low and not expected to cause adverse health effects in the vast majority of peanut allergic consumers," the company said on the U.S. Food and Drug Administration (FDA) website. Hostess said it had received notice of two allergic reactions related to the product covered by this recall. The recall includes well-known Hostess brands such as Zinger and Ding Dong. Full refunds are available to customers who have purchased the items. Contact 800-686-2813 or visit www.hostesscakes.com for information.

Once again there have been a large number of recalls since the last issue. While we weren't able to include all of them in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed

above, visit our firm's web site at www.BeasleyAllen.com or www.RightingInjustice.com. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasley-allen.com for more recall information or to supply us with information on recalls.

XX. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

BEN BAKER

Ben Baker, a lawyer in our firm's Personal Injury/Products Liability Section, has been with Beasley Allen since 2001. As a graduate from Auburn University with a degree in architecture, Ben originally planned to practice construction law so he could combine his knowledge in architecture with a law degree. However, after working his first clerking job at a Plaintiffs' personal injury firm, he discovered his passion for helping those in need instead of resolving contract disputes in construction.

Ben graduated from the Cumberland School of Law in 1993, and began his law practice in Birmingham. He was a partner in the firm of Hogan, Smith & Alspaugh prior to joining Beasley Allen. Ben says he quickly found his new firm to be unique in that it focuses on ordering its lawyers' lives as God first, family second and work third. Ben believes his favorite part of practicing law is being able to piece facts together and help families understand how to best help their loved ones.

In December 2008 and 2010, Ben was selected as Beasley Allen's Lawyer of the Year for the Product Liability Section. In 2012 and 2014, Ben was selected as the firm's Litigator of the Year. The Litigator of the Year award is presented to the lawyer who demonstrates exceptional professional skill throughout the course of the year and best represents the firm's ideal of "helping those who need it most."

Born and raised in Ozark, Ala., Ben is married to the former Kimberly Strag of Philadelphia, Penn. They have one daughter and two sons. Ben is a board member of the Paseo movement in Alabama, which is a worldwide movement of the Anglican Church. Ben and his wife are members of the Christchurch, an Anglican Parish in Montgomery. Ben is also a past board member of the Landmarks Foundation of Montgomery, a non-profit organization committed to preserving historic structures.

Ben is a tremendously talented lawyer—a hard worker—and he is totally dedicated to his clients. He has handled a number of

highly significant cases. We are blessed to have Ben in the firm.

MIKE CROW

Mike Crow, a lawyer in our Personal Injury and Product Liability Section, handles a wide range of car, truck and premises liability cases. He is especially known for successfully litigating against the "Big Box Stores," such as Walmart and Home Depot. However, despite his outstanding legal success, Mike was not always interested in becoming a lawyer.

Prior to his going to law school, no one in Mike's family had been a lawyer or had even gone to college. It wasn't until his senior year of college when Mike became interested in going to law school. That came about when he was selected to sit on the Grand Jury for a case. From that point on Mike wanted to become a lawyer. Upon graduating from the Jones School of Law, J.D. 1987, he then joined Beasley Allen to work full-time helping those who need it most.

When asked what his favorite part of practicing law is, Mike says he enjoys coming into an unpredictable office filled with different stories, issues and challenges, all in hopes of making a difference in his clients' lives. Mike says Beasley Allen is different from most law firms in that it is one big family. Not only does Mike believe the firm dedicates itself to our clients, but also to one another in times of need. Mike says he finds that by everybody in the firm focusing on helping one another, it helps put the firm in a better position to help our clients.

Mike is married to the former Marla Taylor of Hope Hull, Ala. They have two children Cade and Carson Ann. The Crow family attends Frazer United Methodist Church in Montgomery. Mike is an avid Waterfowl hunter. He also is active in Retriever Field Trials. He judges events across the country and campaigns two of his own Labrador retrievers. Mike is the President of the Montgomery Retriever Club. Mike is a very good lawyer who is totally dedicated to the welfare of his clients. We are blessed to have Mike in the firm.

ANNA PENDER-PIERCE

Anna Pender-Pierce, a veteran of the firm since October 1990, was previously the Executive Assistant to Managing Shareholder Tom Methvin. She now works as the Referring Attorney Liaison for our Mass Torts section. Calling herself the "one-stop shop for lawyers outside the firm," Anna keeps our referring lawyers up to date on the section's latest drug litigation. She also sends out intake packets to lawyers wishing to refer cases to the section. She also is responsible for making sure referring lawyers receive the fee split agreements involving their cases the Section has accepted for investigation.

A native of Detroit, Mich., Anna made it through the U.S. Navy at NAS Pensacola, Fla., prior to moving to Montgomery in 1988. Despite having no legal experience,

Anna applied for a job and was hired by another local law firm before coming to work at Beasley Allen. After nearly 26 years with the firm, Anna believes her time with Beasley Allen has been an education unto itself and is truly grateful for the opportunity to work for a firm that has had a positive impact on the lives of countless people.

In her spare time, Anna enjoys reading biographies and supporting her favorite sports teams, the Detroit Tigers and the University of Michigan Wolverines. She also enjoys trying out new recipes with her husband John Pierce, to whom she has been married since January 2002.

ASHLEY PUGH

Ashley Pugh works as the firm's Litigation Technologist in the Consumer Fraud and Commercial Litigation Section. She is also the Secretary to Section Head Dee Miles. Having been with the firm almost 18 years, Ashley first worked in the firm's Accounting Department. She later moved to work for Managing Shareholder Tom Methvin. In 2006, she began handling trial technology prior to moving full time to her current position in 2011.

A native of Montgomery, Ashley now resides in Mathews, Ala., with her husband Patrick Pugh, who works as a Manufacturing Engineer for Knox Kershaw. Together, the couple has one 12-year-old son, J.P., who is starting the 7th grade at Macon East Academy.

The Pugh family enjoys supporting their son's hobbies, such as football, dirt-biking and baseball, as well as going fishing together. Ashley and her husband also have a full-time cattle farm, which requires lots of hard work, but yields plenty of reward. They are currently enjoying raising two baby calves on the farm. Ashley enjoys both reading and spending time with her friends when she has free time.

Ashley's work both prior to and during trial is very important. If a person has never attended a trial involving our firm, they have missed a real treat. The technology involved in a trial is truly high-tech! Ashley does outstanding work and we are most fortunate to have her with us.

MEGAN ROBINSON

Megan Robinson joined Beasley Allen in July 2015 as a lawyer working on cases related to dangerous drugs and medical devices. In 2007, Megan graduated from Texas State University with a B.A. in Psychology. She later graduated from the Jones School of Law, receiving her J.D. in 2014. While at Jones, Megan worked in the school's Mediation Clinic. She also interned with her father at the Law Office of Allen Moore. Megan works in the firm's Mass Torts Section.

Megan says her father was always the driving force behind her dream to become a lawyer. She says that as one of the very best trial lawyers, her father was always focused on helping the underdog and doing the right thing. Now that she is a lawyer, Megan says

her favorite part of practicing law is helping others like her father has done. She says her best days are the ones when she can go home from work knowing she has made a difference in a client's life.

Megan says she found Beasley Allen to be the epitome of the firm she's always wanted to be a part of. She says the fact that our firm fights with a passion for the underdog in the legal system motivates her as a lawyer to do her very best. Megan also says that the firm is dedicated to the same principles that she holds dear and that she wants to help others because it's the right thing to do.

Megan met her husband, Noah Robinson, while attending Jones School of Law. Noah works as vice president of a manufacturing company in Montgomery. Megan is already a very good lawyer and will continue to get better as she works on some most interesting cases. She is a very hard worker and is dedicated to her clients. We are most fortunate to have her with us.

JOSEPH VANZANDT

Joseph VanZandt rejoined the firm this year as an Associate in our Mass Torts section and is currently working on cases related to the blood thinner drug Xarelto. Prior to coming back to Beasley Allen, Joseph worked as a lawyer for Holtsford, Gililand, Higgins, Hitson & Howard, a very good law firm in Montgomery that does defense work and does it well. We are glad Joseph decided to come back to the firm.

Joseph obtained a broad range of legal experience in law school, working for the Alabama Attorney General's Office, the Elmore County District Attorney's Office and Judge Truman M. Hobbs, Jr., Fifteenth Judicial Circuit of Alabama. Joseph also previously worked in Beasley Allen's Mass Torts section, handling cases related to transvaginal mesh.

A graduate from the Jones School of Law, J.D. 2012, Joseph has wanted to become an attorney since 6th grade, stating his desire to help people face problems in life as his main driving force. The decision to work with Beasley Allen was due to the firm's reputation for extraordinary commitment to each and every client. Joseph finds the practice of law to be a challenging, yet humbling and noble profession.

Joseph and his wife Brittany live in Pike Road, Ala., and are active members at the University Church of Christ in Montgomery. On June 14, Brittany gave birth to a son, Levi James. Joseph is a very good lawyer and a hard worker. He is dedicated to the welfare of clients he represents. Joseph is a real asset to the firm and we are blessed to have him with us.

SANDRA WALTERS

Having been with the firm since June 1992, Sandra Walters worked her way up the ranks to become the Section Head Administrator of Beasley Allen's Toxic Torts Section. In this position, Sandra works as the Legal Assistant to Section Head Rhon Jones, as well as managing the Section's support staff.

Sandra is highly skilled in administration of environmental cases. Her work was credited to the success of the State of Alabama v. BP case. Sandra did an excellent job of managing the firm's activities in that case. Before BP, Sandra was a key contributor in the TVA/Coal Ash, Dupont/NJ, and 3M/Minnesota cases.

Sandra is married to Johnny Walters, and they have three children: Melanie Seithalil, a recent graduate of Auburn University Montgomery; Holly Busler, another outstanding employee of the firm for nearly 14 years; and Hunter Walters, who is currently enrolled as a senior at Auburn University.

Sandra is also a grandmother of four—Taylor Stroh, Drew Stroh, J.P. Seithalil and Pruitt Busler. In her free time, Sandra enjoys exercise and weight training. She often spends time attending her grandchildren's sporting events and living on her small hobby farm. She says her favorite "character" on the farm is a very comical and affectionate 3-year-old burro.

Sandra's favorite quote is "Look in the mirror; that's your competition." ~Author Unknown. One of her favorite Bible verses is Joshua 1:9—"Have I not commanded you? Be strong and courageous. Do not be afraid, do not be discouraged, for the Lord your God will be with you wherever you go."

Sandra is a very important employee and a tremendous asset to the firm. She does outstanding work in her supervisory role in the Toxic Torts Section. We are blessed to have Sandra with us.

XXI. SPECIAL RECOGNITIONS

BEASLEY ALLEN SUPPORTS KASEM CARES FOUNDATION TO PREVENT ELDER ABUSE

Beasley Allen recently joined forces with the CBC Law Group in an elder abuse lawsuit filed on behalf of the children and grandchildren of Gerald Kessler, the founder of Natural Organics, Inc. The dispute is over an Amendment in 2013 to the Gerald A. Kessler Revocable Trust, which gave Melanie Kay Williams (an actress also known as Meadow Williams) control over most of Mr. Kessler's assets upon his death in March 2015. The family alleges in their lawsuit that Ms. Williams, who is 31 years younger than Mr. Kessler, manipulated and unduly influenced him to execute new estate planning documents through elder abuse.

The Kessler family members who were very close to their father say they have had a hard time accepting how he was treated and what little control they were allowed to have to help him during his final days. A few months ago, family members reached out to

Kerri Kasem, daughter of the late American DJ icon Casey Kasem, after hearing about her work to improve elder care and protect this vulnerable part of our society.

Kerri started The Kasem Cares Foundation to assist the thousands of adult children and family members all over the United States whose ability to visit and/or communicate with an ailing parent or family member has been terminated, unreasonably restricted, or otherwise obstructed by a later-in-time step-parent or other legal caretaker. The Foundation's purpose is to give adult children and family members in these unfair circumstances legal recourse—a way to fight for their right to spend time with an ailing parent or other family member. That's because at present there is no legal recourse, right, process or procedure for adult children/family members who find themselves in this situation in the United States (outside the outrageously expensive and time-consuming conservatorship/guardianship process) available to them.

Dedicated and determined to rectify this injustice, Kerri Kasem, through the Kasem Cares Foundation, started her work with California Assemblyman Mike Gatto, who introduced AB2034—groundbreaking legislation for California—that created a first-of-its-kind legal process allowing adult children and family members to file a petition in a court requesting to visit their ailing family member when visitation is being denied by a spouse or other legal caretaker. With the public's help and continued support, Kerri and the Kasem Cares Foundation state that they will not stop until this important legislation is passed into law in each of the other 49 states.

Kerri Kasem held the Kasem Cares Conference on Aging recently in Orange County, Calif. More than 220 persons attended the inaugural conference, which was American Public Health Association (APHA) accredited for physicians, nurses, and health educators to receive continuing education credits. The educational goal of the Kasem Cares Conference on Aging is to offer health care professionals and practitioners the opportunity to enhance their knowledge, exchange information on best practices, and learn about the latest research and trends. The conference covered issues including aging, elder abuse awareness and prevention, and quality of life for older adults.

Elder abuse can happen to any individual and any family regardless of socioeconomic status. The Foundation aims to make this country a better and safer place in which to age with integrity. This national conference raised awareness and drew attention to the aging population. Featured keynote speakers were Fritz Coleman and Paul Greenwood. Educational programs, exhibits and speakers also included a collaborative effort among community based service providers, law enforcement, attorneys and area agencies on aging.

Our firm's involvement with the Kessler case exposed our lawyers to the significant

problem with the isolation and abuse that exists with our elderly family members in our country. We are proud to join CBC and the Kasem Cares Foundation in support of this cause. Visit www.kasemcares.com for more information and for more information on the 2016 Kasem Cares Conference on Aging, visit www.agingandeducation.com.

Beasley Allen lawyers Dee Miles, Lance Gould and Leslie Pescia are working with David J. Callahan, III, managing partner of the CBC Law Group, and Constance L. Akridge and Tamara Reid from Holland & Hart LLP in Reno, Nev., on behalf of the Kessler family.

If you have questions about this case or would like to discuss a legal matter involving estate issues, elder abuse or other litigation, contact Lance Gould, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 334-269-2343 or email Lance.Gould@beasleyallen.com. You can also contact David Callahan, the lawyer who is mentioned above, at 615-988-9635 or David@cbcfirm.com.

XXII. FAVORITE BIBLE VERSES

Dr. Thomas H. Williams, III, who is a very good dentist in Montgomery, sent in a timely verse for this issue.

It is not fitting for a fool to live in luxury how much worse for a slave to rule over princes! A person's wisdom yields patience; it is to one's glory to overlook an offense. A king's rage is like the roar of a lion, but his favor is like dew on the grass. Proverbs 19:10-12

Chinet Murray, who is a staff assistant in our Toxic Torts Section, sent in two verses for this month:

Trust in the Lord with all thine heart; and lean not unto thine own understanding. In all thy ways acknowledge him, and he shall direct thy paths. Proverbs 3 5:6

But my God shall supply all your need according to his riches in glory by Christ Jesus. Philippians 4:19

Dewayne Rembert, who is with Montgomery-based Flatline Movement, sent in three verses this month.

Know this, you and all the people of Israel: It is by the name of Jesus Christ of Nazareth, whom you crucified but whom God raised from the dead, that this man stands before you bealed. He is 'the stone you builders rejected, which has become the capstone.' Sal-

vation is found in NO ONE ELSE, for there is NO OTHER NAME under heaven given to men by which we must be saved. Acts 4:10-12

Jesus answered, I am the way and the truth and the life. NO ONE comes to the Father except through me. John 14:6

For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life. John 3:16

Katie Tucker, who works in our firm's Mass Torts Section, heads up the support staff in the on-going Johnson & Johnson Talc Litigation. She has done an excellent job. Katie provided five verses and since they are right on target, we are including all five for this issue.

And I have been a constant example of how you can help those in need by working hard. You should remember the words of the Lord Jesus: It is more blessed to give than to receive. Acts 20:35

And don't forget to do good and to share with those in need. These are the sacrifices that please God. Hebrews 13:16

Don't be selfish; don't try to impress others. Be humble, thinking of others as better than yourselves. Don't look out only for your own interests, but take an interest in others, too. Philippians 2: 3-4

For we are God's masterpiece. He has created us anew in Christ Jesus, so we can do the good things he planned for us long ago. Ephesians 2:10

So encourage each other and build each other up, just as you are already doing. 1 Thessalonians 5:11

Jamie Collins Doss, who is originally from Sand Mountain in North Alabama and is now a Tennessee resident, is one of Sara's very good friends. Jamie sent in a most timely verse for this issue. This tells us how we should operate on a daily basis.

Do to others as you would have them do to you. Luke 6:31

My long-time friend, Dr. Terry Stallings, came by for a visit recently. It was really good seeing Terry and having an opportunity to catch up on things with him. Terry furnished a verse for this issue.

Paul's prayer for the Ephesians: For this reason, ever since I heard about your faith in the Lord Jesus and your love for all the saints, I have not stopped giving thanks for you, remembering you in my prayers. I keep asking that the God of our Lord Jesus

Christ, the glorious Father, may give you the Spirit of wisdom and revelation, so that you may know him better. I pray also that the eyes of your heart may be enlightened in order that you may know the hope to which he has called you, the riches of his glorious inheritance in the saints, and his incomparably great power for us who believe. That power is like the working of his mighty strength, which he exerted in Christ when he raised him from the dead and seated him at his right hand in the heavenly realms, far above all rule and authority, power and dominion, and every title that can be given, not only in the present age but also in the one to come. And God placed all things under his feet and appointed him to be head over everything for the church, which is his body, the fullness of him who fills everything in every way. Ephesians 1:15-23

XXIII. CLOSING OBSERVATIONS

BIG PHARMA'S NEW SCHEME IS TO USE COPAY CHARITIES TO BANKRUPT THE HEALTHCARE SYSTEM

Our firm deals with pharmaceutical companies on a regular basis in litigation. We have learned lots about Big Pharma operations. Unfortunately, in the world of big pharma, drug companies rarely provide benefits that have no self-serving return. Thus, drug companies have now turned charitable giving into a profitable investment. By funding charities that assist with copays of drugs that are subject to a price increase, drug companies can ensure consumers will not switch to an alternative drug and use taxpayers to fund the remaining cost. A million-dollar contribution from a pharmaceutical company to a copay charity can keep hundreds of patients from abandoning a newly pricey drug, enabling the donor to collect many millions from Medicare. Moreover, these contributions may be tax deductible.

Pharmaceutical companies are not allowed to give direct help to Medicare patients, as it can be considered an illegal kickback to influence patients to use their particular drug. Independent charities, however, are allowed to provide assistance to Medicare patients with their drug costs. Moreover, these drug companies are able to fund charities that mostly support their own drugs. Drug companies, thus, fund these charities to ensure their high-priced drugs continue to generate revenue as the expense of the government-funded Medicare

program. Drug companies make a donation to the charity, the charity covers the copay for the drug, and the drug company receives the full Medicare payment for its drug and enjoys a tax write-off from its self-serving donation.

Although the charities claim they make decisions independent from their donors, their presentations and marketing materials have focused on explaining to drug companies how their contributions can help their bottom line. For example, a brochure published by Chronic Disease Fund stated that contributions to these charities can be more profitable than many of the for-profit initiatives. In light of this potentially illegal scheme, the federal government has served subpoenas on multiple drug companies and charities to determine whether these companies are violating the law.

Gilead Sciences Inc., Biogen Inc. and Jazz Pharmaceuticals Plc recently received subpoenas following a subpoena to Valeant Pharmaceuticals International, Inc. several months ago. If a charity supported a donor company's drug over another company's drug when they both treat the same disease, that support might violate Medicare's anti-kickback rules.

Source: *Bloomberg News*

INDIAN NATION GETS FREE RIDE AT THE EXPENSE OF ALL OTHERS

Our firm is currently handling several lawsuits against the Poarch Creek Indians. As is quite evident, the Indian Nations came to realize during the 1970s and 1980s that running casinos was a profitable business venture. There has been lots written and said in the media relating to the casino operations in Alabama.

In one of the lawsuits that we are handling, two young college students were injured as a result of a car wreck that occurred off Indian property. One of the students, a young woman, was severely injured and was in a coma for approximately a week. The parents of these youngsters are fortunate to have both of them alive today.

The incident, which has affected each of these young women, actually started back in October of 2013, when the Wind Creek Casino hired a woman to be an assistant to the facility manager of the casino in Wetumpka, Ala. This woman was hired without her previous employer being contacted. Had the Poarch Creek Indians checked her previous work history, they would have found out she had been terminated from her previous job because she showed up to work intoxicated.

After being on the job at the Wetumpka casino for approximately two months, the woman was tested because it was suspected she had been drinking alcoholic beverages. The test revealed that her level of intoxication was close to the level of a person being charged with driving under the influence. Unfortunately, this employee was not termi-

nated from her job at that time. In fact, she was subsequently promoted several months later. On the morning of Jan. 1, 2015, this employee came to work at the casino at 8 a.m. after she had been up all night drinking alcohol.

This employee always had the authority to operate the casino's vehicles. She left the casino about 9 a.m. that morning to pick up some equipment at a local warehouse in Montgomery, Ala. About 10:30 a.m., she was involved in a head-on collision with our two clients. The employee was charged criminally for her conduct and has been sentenced to jail time.

Lawyers in our firm sued the Poarch Creek Indians and the casino that it operates in Wetumpka. Recently the Judge hearing the case dismissed the casino and the Poarch Creek Indians, saying that the Court did not have jurisdiction to hear the lawsuit. This was because, like other Indian tribes, the Poarch Creek Indian tribe is a sovereign nation unto themselves. Therefore, the tribe has legal immunity from lawsuits filed against it, regardless of whether the wrongful conduct occurs on or off the Indian property.

A reasonable person would most likely ask how the Indian nations and business enterprises they operate can avoid legal responsibility for their wrongful conduct. It all started back in 1934 when Congress enacted the Indian Reorganization Act (IRA) of 1934. This Act gave federal recognition to Indian tribes. At that time, the Poarch Creek Indians did not exist as a tribe and were not recognized by the 1934 Act. I don't believe there is any dispute as to whether the tribe existed in 1934.

In 1984, the Department of Interior granted the Poarch Creek Indians' application to be recognized as a tribe. Interestingly, one year later the Poarch Creek Indians opened its first casino. That may have been just a coincidence, but on the other hand it may not have been. In either event, the new tribe has benefited greatly from a financial perspective as casino owners and operators.

There have been several cases in Alabama courts, as well as cases across the country, challenging whether the Department of Interior had the power to grant an Indian group, which was not a tribe, the status of being recognized as a tribe. Unfortunately, the U. S. Supreme Court, and other U.S. Appellate Courts, have looked at the issue of sovereign immunity for Indian tribes and a majority have said that Congressional action is required to change the law.

Congress has the power over Indian tribes pursuant to the U. S. Constitution and the Indian Commerce Clause. Article I Section 8 gives Congress the power to regulate the affairs of Indian nations. Currently, Indian nations have sovereign immunity, which is akin to diplomatic immunity. This basically means that an Indian tribe can't be sued for any wrongs they commit, either in state and federal courts, and that's not right. In fact, that is just flat wrong and an injus-

tice to all persons who are damaged by wrongdoing in an Indian nation.

We will continue to fight this injustice. Hopefully, the U.S. Congress will change the law so that Indian nations and Indian enterprises will be held to the same standards of responsibility as private citizens and businesses are held to. That's something that is badly needed. If you agree, let your members of Congress know how you feel.

The cases in our firm are being handled by Mike Crow and Graham Esdale. If you need any additional information, Mike and Graham can be contacted at 800-898-2034 or by email at Mike.Crow@beasleyallen.com or Graham.Esdale@beasleyallen.com.

OUR MONTHLY REMINDERS

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

I am still determined to be cheerful and happy, in whatever situation I may be; for I have also learned from experience that the greater part of our happiness or misery depends upon

our dispositions, and not upon our circumstances.

Martha Washington (1732—1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

Vincent Lombardi

XXIV. PARTING WORDS

Along with almost every American, I was shocked and deeply saddened by the mass shootings in Orlando last month resulting in 49 deaths. We are still shocked even though we have had far too many senseless and horrific incidents of this kind over the past several years. When you think about it, one such incident should be enough to get our nation's full attention.

However, I am afraid that we have become somewhat insensitive about what has been happening. We are shocked when a mass killing happens, but that shock subsides with the passing of time. These mass murders have happened in schools, at parades, in churches, in movie theaters, in other public places and now in a crowded night club. Forty-nine innocent victims were slaughtered by a single man using a rifle, one designed for military use and intended to be used by our military to kill enemy soldiers. The deranged killer also had a Glock handgun. He had a huge amount of ammunition.

My prayers go out to the families of those persons who were killed and to the survivors who were in the club. I have read with interest the comments by public officials and some aspiring politicians and find some of them saying pretty much the same thing. Fortunately, most have taken a strong stand against hate and terrorism, regardless of the source, and those are to be commended. It's time, however, for action and not just words. Without any doubt, it is high time that we all get together as a nation join hands and work to find a workable solution to a growing and extremely dangerous problem. It is a national crisis that demands prompt attention by Congress.

We also have to recognize that public comments made by prominent public officials must be of a nature that are both reassuring and calming to all citizens in our country as well as being a stern and strong warning to those in and outside the United States who would do us harm. We have seen comments of that sort from President Obama, Gov. Scott of Florida, Orlando Mayor Buddy Dyer, and Florida Senator Marco Rubio. Each of those officials are to be commended for what they said and how they said it.

I believe we can all agree that this is no time to play political games. To use this tragic occurrence as a means of achieving personal gain of any kind is totally inappropriate and wrong and should be strongly condemned. Putting our country first is certainly not too much to ask of our public officials and political candidates. In fact, that should be demanded of them.

My thoughts and prayers today are for our national and local officials, and for all non-elected leaders, as they jointly seek understanding as how best to curb the acts of gun violence, hatred and terrorism. My specific prayer today is that one day and very soon such violence, hatred and terrorist activity will end once and for all. We must include God in the problem-solving efforts and that is an absolute necessity. I firmly believe with all my heart that God is the only answer!

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