THE JERE BEASLEY REPORT

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Beasley Allen

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
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I. CAPITOL OBSERVATIONS

New Developments In The Talcum Powder Litigation

Talc litigation continues to move forward at a rapid pace and there have been a number of new developments this summer. I will briefly discuss some of them. On July 15, a Motion for Consolidation and Transfer was filed before the United States Judicial Panel on Multidistrict Litigation (JPML), requesting consolidation of more than 20 talcum powder cases currently filed in federal court. Consolidation into multidistrict litigation relocates all cases pending in federal court to one venue for purposes of pre-trial discovery.

Our firm filed an objection to consolidation, contending that these cases are not proper for consolidation at this time. All parties to any pending federal talc case had the opportunity to file a brief in support of or in opposition to consolidation. In September, all interested parties will appear before the JPML and argue their respective positions on consolidation. Beasley Allen lawyers will attend oral arguments and present the reasons for our opposition to consolidation. Following the hearing, the Panel will issue an order either denying consolidation or consolidating and relocating all federal cases to one venue.

Kemp hearings began on Aug. 8, 2016, in Atlantic County, N.J. In *Kemp v. State of New Jersey*, 2002 WL 1901333, *12 (N.J. August 20, 2002), the Court chose not to adopt the more specific and rigorous criteria applied by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Atlantic County Judge Nelson Johnson required hearings after the defendants filed Kemp motions challenging plaintiffs' experts even though a federal court has denied similar Daubert motions in another case and expert challenges in the two St. Louis cases that went to trial earlier this year.

During Kemp hearings, experts expected to testify at trial are questioned as to their qualifications and methodology since experts often provide vital testimony regarding causation, the mechanisms of harm, and other essential proofs. Both Plaintiff and Defense lawyers questioned numerous expert witnesses over the course of two weeks and made closing arguments on Aug. 19. A ruling is expected very soon.

On Sept. 26, 2016, Beasley Allen lawyers will travel back to St. Louis to begin the third trial against Johnson & Johnson and Imerys, the talc manufacturer that provides talcum powder to the Johnson & Johnson Defendants, on behalf of Deborah Giannecchini. She was diagnosed with ovarian cancer in 2012 when she was 59 years old. This came after she used Johnson's Baby Powder for feminine hygiene for more than 45 years.

You will recall we reported on the first two verdicts after two St. Louis juries found in favor of Jacqueline Fox and Gloria Ristesund as a result of their ovarian cancer being caused by the use of Johnson and Johnson's Baby Powder and Shower to Shower. Those verdicts came down in February and May of this year and totaled $72 million dollars—$62 million of which was punitive in nature—and $55 million dollars—$50 million of which was punitive in nature—respectively.

Additionally, there are more trials set for the end of this year and 2017. On Oct. 11, our talcum powder trial team will go to New Jersey to begin trial. Additional trials are set for January 2017 in both New Jersey and St. Louis, Mo., courts. Plaintiffs in the Talc litigation are being represented by Beasley Allen lawyers, along with Allen Smith of The Smith Law Firm in Mississippi, and lawyers with the St. Louis firm of Onder, Shelton, O'Leary & Peterson. Lawyers with the Pennsylvania firm of Golomb & Honik and the D'Amato Law Firm in New Jersey are involved in the New Jersey case.

If you have any questions regarding these cases or any aspect of the litigation, contact Ted Meadows, who heads up our Talc Litigation Team, at Ted.Meadows@beasleyallen.com or 800-898-2034.

II. AUTOMOBILE NEWS OF NOTE

An Update On The Volkswagen Litigation

The parties announced on June 28, 2016, that Volkswagen AG reached settlement agreements with the United States Department of Justice (DOJ) and the State of California; the U.S. Federal Trade Commission (FTC); and private Plaintiffs represented by the Plaintiffs' Steering Committee (PSC) to resolve civil claims regarding nitrogen oxide

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emitting Volkswagen and Audi 2.0L TDI diesel engine vehicles in the United States. Approximately 460,000 Volkswagen and 15,000 Audi vehicles are currently in use and eligible for buybacks and lease terminations or emissions modifications, if approved by regulators.

The parties submitted three agreements to Judge Charles R. Breyer of the United States District Court for the Northern District of California, who presides over the federal Multi-District Litigation (MDL) proceedings related to the diesel matter. Judge Breyer is considering: (1) a Consent Decree filed with the Court by the DOJ on behalf of the Environmental Protection Agency (EPA) and by the State of California by and through the California Air Resources Board (CARB) and the California Attorney General; (2) a Consent Order submitted by the FTC; and (3) a proposed class settlement agreement with the PSC on behalf of a nationwide settlement class of current and certain former owners and lessees of eligible 2.0L TDI Volkswagen and Audi vehicles. The parties continue to work expeditiously to reach an agreed resolution for affected vehicles with 3.0L TDI V-6 diesel engines.

Additionally, Volkswagen reached a settlement with the attorneys general of 44 U.S. states, the District of Columbia and Puerto Rico to resolve existing and potential state consumer protection claims related to the diesel matter for a total settlement amount of approximately $603 million.

Proposed 2.0L TDI Settlements

Subject to Court approval of the proposed 2.0L TDI settlement program, Volkswagen has agreed to:

- Buy back or terminate the leases of eligible vehicles, or provide free emissions modifications (if approved by the EPA and CARB), and also make cash payments to affected current and certain former owners and lessees.
- Volkswagen will establish a single funding pool to cover the 2.0L TDI settlement program. The maximum funding amount will not exceed $10.033 billion and is dependent on how many customers participate in the program and which option they choose if proposed modifications are approved.
- Customers can choose to sell back their vehicle to Volkswagen or terminate their lease without penalty, or, if a modification is approved, choose to have their vehicle modified free of charge and keep it. Customers who select any of these options will also receive a cash payment from Volkswagen.
- An eligible vehicle's value for a buyback will be determined based on the Clean Trade-In Value as published in the September 2015 edition of the NADA Used Car Guide, with adjustments for factory options and mileage.
- Pay $2.7 billion over three years into an environmental trust, managed by a trustee appointed by the Court, to remediate excess nitrogen oxide (NOx) emissions from 2.0L TDI vehicles.
- Invest $2.0 billion over 10 years in zero emissions vehicle (ZEV) infrastructure, access and awareness initiatives.

The settlement program will go live as soon as Judge Breyer grants final approval of the agreements. Approval will likely occur in the fall of 2016. Individual class members received packets detailing their rights and options (including the option to "opt out" of the settlement agreement) after the Court granted preliminary approval of the proposed class settlement at the latest hearing on July 26, 2016. 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 (2009-2015)
- 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. More information about the proposed 2.0L TDI settlement program, including the settlement agreements in full, can be found at www.VWCourtSettlement.com or www.AudiCourtSettlement.com. Beasley Allen lawyers handling this litigation are Dee Miles, Archie Grubb and Clay Barnett. Our primary staff contacts are Michelle Fulmer and Whitney Gagnon.

Tesla Has Another Autopilot Crash

There was another highway crash in August involving one of Tesla's Model S cars. The vehicle was being driven in autopilot mode on the streets of Beijing at the time. It appears there were no injuries to the driver or others around the crash site. After looking into the incident and at footage from the driver's dash camera, a Tesla Motors Inc. spokesperson told Law360 that the driver's hands were not on the wheel when the accident occurred, as is required when the Model S is in autopilot. It should be noted that Tesla is saying that the feature is marketed as an "advanced driver assistance system" and not a fully "self-driving car."

Tesla says the vehicle in the accident was being driven on a highway in China's capital where a vehicle parked in the left side shoulder was also straddling the left lane, and that the Tesla was "following closely" behind the car directly in front of it which swerved to avoid the parked car. The Tesla spokesperson said:

> *The driver of the Tesla, whose hands were not detected on the steering wheel, did not steer to avoid the parked car and instead scraped against its side. As clearly communicated to the driver in the vehicle, autosteer is an assist feature that requires the driver to keep his hands on the steering wheel at all times, to always maintain control and responsibility for the vehicle, and to be prepared to take over at any time.*

Tesla's spokesperson stated that autopilot and features like autosteer are disabled by default in a Model S in order to ensure "that those using the feature do

so knowingly and deliberately." The accident comes about three months after a much more severe crash involving a Model S being test driven in autopilot mode occurred in Florida, resulting in the death of the Tesla test driver.

In that crash, neither the Tesla nor the driver was able to see a 53-foot white tractor-trailer that pulled in front of the car in time to apply the brakes due to a lack of contrast against a bright lit sky. While the fatality is believed to be the first in 130 million miles of autonomous test driving done by Tesla, consumer advocacy groups in July said the crash proves the technology "has no place on public roads," according to a letter urging the Obama administration to slow the process of self-driving car regulation. The groups also said other, nonfatal Tesla autopilot crashes have come to light since the May accident, and the technology should not be allowed on the road until it's proven safe through the National Highway Traffic Safety Administration's investigation into the matter.

As we have reported previously, *Consumer Reports* magazine has also urged Tesla to entirely disable autopilot technology in its vehicles until additional safety enhancements are developed. About two weeks ago, however, the National Transportation Safety Board said the test driver in the fatal Florida crash was driving almost 10 miles over the speed limit, but made clear that its preliminary report does not present a probable cause for the crash. I fear there will be many more problems with these vehicles before the technology is fully developed.

Source: Law360.com

NHTSA Upgrades ARC Air Bag Probe After Driver's Death

The National Highway Traffic Safety Administration (NHTSA) has upgraded its investigation into certain air bag inflators manufactured by ARC Automotive Inc., which are used by a number of automobile manufacturers. This upgrade came after a driver was killed in Canada in July after an air bag rupture.

NHTSA's Office of Defects Investigation (ODI) is upgrading its preliminary evaluation of the air bag inflators, which it opened in July 2015, to an engineering analysis. The agency said about 8 million inflators were manufactured to be used in automobiles made by Chrysler, General Motors, Kia and Hyundai through 2004. NHTSA, in its announcement of the upgrade, said:

> *ODI's investigation will focus on determining the entire U.S. population of ARC-manufactured driver air bag inflators, single- and dual-stage, identification of affected vehicle manufacturers, and whether any single-stage driver air bag inflators manufactured at ARC's facility in China were used in vehicles produced for sale or lease in the United States. Additionally, ODI will conduct a program to recover the subject ARC inflators from vehicles in the field for further testing and evaluation in support of root cause analysis.*

NHTSA launched its preliminary investigation after receiving two reports that ARC air bag inflators ruptured and caused injury, one involving a 2002 Chrysler Town & Country and another involving a 2004 Kia Optima. The investigation initially projected that 420,000 Chrysler Town & Country minivans could be affected along with 70,000 2004 Kia Optima vehicles. During the course of the preliminary investigation. NHTSA found that the affected inflators also affected certain GM and Hyundai vehicles.

NHTSA said in July it was told by Transport Canada—a Canadian transportation regulator—that an air bag ruptured in a 2009 Hyundai Elantra, killing the driver. It said the inflator was manufactured by ARC and ruptured in relatively the same way the inflators did in the two prior incidents mentioned above. NHTSA said the driver air bag module in the Elantra used a single-stage inflator made by ARC's China facility.

Source: Law360.com

Class Action Lawsuit Filed Against Chrysler Over Gearshift Malfunctions

A proposed class of drivers filed suit recently against Fiat Chrysler Automobiles (FCA) in a New York federal court. The lawsuit is over the transmission problem that was responsible for the death of Star Trek actor Anton Yelchin. The complaint alleges that the company continued to market and sell cars with defective gear shifters even after it became clear they were unsafe. It's alleged further that soon after FCA started selling cars with the faulty electronic gear shift system, which was supplied by ZF Friedrichshaffen AG in 2011, FCA received complaints from customers who thought their cars were in park when they were actually in drive, causing rollaways and collisions. The National Highway Traffic Safety Administration (NHTSA) had received several complaints by December 2013 and FCA had started to phase out use of the shifters in 2014. However, FCA didn't issue a recall until April 2016.

In February 2011, FCA started using the ZF electronic gear shift system, which uses electronic signals and not traditional mechanical links to convey gear switch requests to the transmission. The technology uses a monostable shifter, which doesn't stay in place when a driver shifts gears, but springs back like a "joystick." NHTSA has received hundreds of complaints about the device, which the lawsuit says "clearly describe a pattern of failed gear selection."

In August 2015, NHTSA's Office of Defects Investigation (ODI) started looking into the Jeep Grand Cherokee. Findings in February catalogued 306 rollaway incidents, 117 of which ended in crashes, 28 involving injuries. FCA announced it had initiated a recall on cars with the shifter in April 2016. FCA sent a letter to all owners and lessees warning them that their "vehicle may roll away, striking and injuring you, your passengers or bystanders if the vehicle's engine is left running, the parking brake is not engaged and the transmission is not in the 'PARK' position before exiting the vehicle."

On June 24, 2016, five days after Anton Yelchin was crushed to death when his parked Jeep Grand Cherokee rolled into him, FCA issued a follow-up recall notice offering a software patch that would install an "auto park" function to avoid rollaways. NHTSA closed its engineering analysis after the recall was announced, but complaints continued to come in about other transmission issues not related to parked cars. It's alleged in the complaint that the software patch has "proven ineffective," and that it didn't address dangers caused by other gear changes, such as when a

driver makes a three-point turn. It appears that FCA has not offered any additional remedial measures to resolve the safety issues associated with the ZF Shifter.

This suit seeks certification for a nationwide class and a New York subclass of anyone who purchased or leased an FCA car with the ZF shifter. Those models include the 2012-2014 Chrysler 300, the 2012-2014 Dodge Charger and the 2014-2015 Jeep Grand Cherokee. The nationwide class could include more than 800,000 U.S. drivers, according to the complaint.

The suit accuses FCA of violating the Magnuson-Moss Warranty Act, the New York Deceptive Practices Act and the New York False Advertising Act. The complaint also includes claims for breach of implied warranty of merchantability, breach of express warranty and unjust enrichment. The class seeks compensatory damages, treble damages, statutory damages, punitive damages, award restitution, disgorgement of revenues to class, award prejudgment interest and attorneys' fees.

The Plaintiff in the suit is represented by Douglas G. Blankinship and Jeremiah Frei-Pearson of Finkelstein Blankinship Frei-Pearson & Garber LLP. The case is *Lynd v. FCA US LLC* in the U.S. District Court for the Northern District of New York.

Source: Law360.com

III. PURELY POLITICAL NEWS & VIEWS

The Presidential Race Will Be Heating Up

As we approach Labor Day, it appears that the presidential race is definitely beginning to take shape. While Hillary Clinton is leading Donald Trump in all the polls by a large margin at this stage, I don't believe the race is over. Both campaigns will move into another and higher gear very soon. This race promises to be a knock down, drag out affair.

It has been most interesting to watch Trump's new campaign managers try to make their candidate look "normal" and less "unstable." They have a difficult task and I am not sure they can do it. In any event, we will see if his new managers can do a needed make-over now that the race is really beginning to heat up. Regardless of who tries to change him, and how hard they try, I predict Trump will continue to be Trump. The man has changed positions on all of the key issues so many times that the confusion he has caused actually seems to help him. The next few months will at least be interesting!

Alabama Legislature Elected McCutcheon As Speaker Of The House

The Republican Caucus in the Alabama House of Representatives nominated Rep. Mac McCutcheon last month as their candidate for Speaker of the House. When the legislature convened for a special session on Aug. 15, McCutcheon was elected Speaker by a vote of 68-28. He was then officially sworn in as Speaker.

McCutcheon has represented District 25, which includes parts of Madison and Limestone counties, since 2006, and chaired the Rules Committee. McCutcheon replaces Mike Hubbard, who was convicted on June 10 by a Lee County jury on 12 felony ethics violations, removing him from office.

In his new role, Speaker McCutcheon indicated his goal is to serve the people of Alabama, and to work with all members of the House. He pulled no punches in noting that his predecessor had a different focus. Addressing the House membership, he said, "To put it bluntly, the days of the imperial speakership are over." The new Speaker later told the media that he is honored and humbled to have the support of his colleagues in the House and is ready to go to work.

Speaker McCutcheon is retired from the City of Huntsville, where he worked as a police officer, detective, probation officer and zoning coordinator. He also has worked as a farmer, and as an associate pastor in the College Park Church of God. He is a U.S. Army veteran, and earned his bachelor's degree in criminal justice from Trinity University. The new Speaker and his wife, Debbie, have two children. I predict that McCutcheon will do an outstanding job as Speaker. From all accounts, he appears to be a good, decent man with no personal agenda. That's a breath of fresh air!

Sources: WHNT, Al.com, *Montgomery Advertiser*

IV. COURT WATCH

United States Supreme Court Rules Federal Securities Laws Do Not Preempt State Suits

Earlier this year, the Supreme Court of the United States ruled, in a unanimous opinion, that the Securities Exchange Act does not bar shareholders from bringing their claims in state court. The opinion, authored by Justice Elena Kagan, arose from a shareholder suit against a unit of Merill Lynch and other Wall Street firms that was filed in New Jersey state court. The suit alleged that the Defendants engaged in a deceptive short-selling campaign against the shareholders in violation of New Jersey's stringent securities and racketeering laws, as well as common law claims.

The decision in *Merrill Lynch v. Manning* was before the Supreme Court on appeal from the Third Circuit. Merrill Lynch removed the case to federal court even though the claims arose under state law. The Third Circuit held that Merrill Lynch and others could not litigate the suit in federal court despite the complaint's reference to Securities & Exchange Commission (SEC) rules concerning short-selling stocks. Upholding this decision, the United States Supreme Court ruled that the Securities Exchange Act does not prevent shareholders from bringing their claims in New Jersey state court under the state's securities and anti-racketeering laws. In the unanimous opinion, Justice Kagan wrote:

> *We will not lightly read the statute to alter the usual constitutional balance, as it would by sending actions with all state-law claims to federal court just because a complaint references a federal duty.*

Suggesting a narrow reading of Section 27 of the Securities Exchange Act, Merrill Lynch argued that Section 27 gives federal courts exclusive jurisdiction over all suits that seek to enforce any duty created by the act or its regulations, even if the suit is also brought to enforce state law.

The Supreme Court held that the jurisdictional test applied under Section 27 of the Securities Exchange Act, which grants federal jurisdiction over all cases "brought to enforce any liability or duty

created by" the statute, is governed by the same test used to determine federal question jurisdiction under Section 1331 of the U.S. Code, which confers federal jurisdiction on "all civil actions arising under" federal law. Therefore, regardless of the potential differences between claims "arising under" federal law and claims "brought to enforce" the securities statute, the jurisdictional test is the same.

Essentially, the Supreme Court ruled that Plaintiffs' references to SEC rules concerning short selling stocks were not sufficient to create federal jurisdiction pursuant to the general "arising under" standard and that Plaintiffs' claims were not brought to enforce liabilities created by federal law. Justice Kagan added:

> *Applying a different test for jurisdiction of claims "brought to enforce" a statute versus those "arising under" federal law would "undermine important goals of interpreting jurisdictional statutes.*

In the concurring opinion, joined by Justice Sotomayor, Justice Thomas agreed that federal jurisdiction was absent, but disagreed that Section 27 should have the same jurisdictional test, writing that the Exchange Act confers federal jurisdiction over any complaint that alleges claims "that necessarily depend on establishing a breach of an Exchange requirement."

This unanimous Supreme Court decision resolves a split among the circuits regarding the jurisdictional reach of Section 27 of the Exchange Act and may encourage plaintiffs to file more state law claims in state court.

If you would like to know more about this decision, or if you have any security cases that you would like for lawyers at Beasley Allen to investigate, contact Ali Hawthorne, a lawyer in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.

Source: Law360.com

V. THE CORPORATE WORLD

Cephalon To Pay $125 Million To Settle Provigil Antitrust Litigation

Cephalon Inc. has reached a $125 million settlement with 48 states including New York, New Jersey, Florida, Pennsylvania and Texas to resolve allegations it paid generic-drug makers to delay launching their own version of narcolepsy treatment Provigil. Cephalon, Barr Pharmaceuticals Inc. and their parent company Teva Pharmaceutical Industries Ltd. have agreed to pay $125 million to the 48 states and the District of Columbia, as well as individual consumers. This will bring to an end a multistate investigation into allegations the companies delayed the entry of generic versions of Provigil in violation of various antitrust and consumer protection laws. New York Attorney General Eric Schneiderman, who led the investigation, said in a press release:

> *When pharmaceutical companies put profits ahead of people by illegally restricting competition, it harms patients across our state. This misconduct, which drives up the cost of prescription drugs, will not be tolerated.*

The settlement, which comes out of an escrow fund from Cephalon's $1.2 billion settlement with the Federal Trade Commission (FTC) in May 2015, provides $90 million to the states and $35 million to consumers who were harmed by the conduct. The settlement is subject to court review and must get court approval. The antitrust litigation—which includes a number of suits brought by direct purchasers, end payors and the FTC—arises from a series of reverse payment settlements worth about $300 million that Cephalon reached with four generic-drug makers in 2005 and 2006 to resolve patent infringement litigation over the blockbuster narcolepsy treatment. The generics companies all sought approval to market their own versions of the drug on the same day, meaning that all four were eligible for the initial 180-day exclusivity window granted to first filers under the Hatch-Waxman Act. In April 2015, Cephalon, Barr and Teva agreed to pay $512 million to settle with the direct purchaser class Plaintiffs in the lawsuit styled *King Drug Co. of Florence Inc. v. Cephalon Inc.*

Source: Law360.com

Jury Finds PG&E Obstructed Investigation And Violated Safety Laws

The California utility company whose faulty high-pressure gas lines exploded and leveled an entire San Francisco Bay Area neighborhood in 2010 was convicted by a federal court jury last month on one criminal charge of obstruction and five safety violations. Pacific Gas & Electric (PG&E), California's biggest utility company, violated pipeline record-keeping, evaluation, and testing requirements mandated by the U.S. Natural Gas Pipeline Safety Act for high-pressure transmission lines. The utility company also misled authorities with the National Transportation Safety Board (NTSB) which was investigating the deadly blast, which killed eight people and injured dozens more. The company was acquitted of six other charges.

Federal prosecutors contended during the trial that PG&E intentionally misled federal investigators about the standards it used to identify pipelines at high risk of failure. The NTSB concluded that the San Francisco-based utility's "sloppy maintenance practices and poor record keeping" paved the way for the blast, facilitated by "too-lax oversight by the Public Utility Commission."

The disaster arose from an underground high-pressure natural gas pipeline that had a defective weld, but was incorrectly listed in PG&E's records as seamless. It was reported that eight people in San Bruno lost their lives, 38 homes were destroyed, a neighborhood was obliterated and a city was traumatized. Many San Bruno residents who lost their homes and suffered a multitude of injuries including burns and disfiguring scars settled civil lawsuits with the utility in 2013. Additionally, the state's Public Utility Commission hit PG&E last year with $1.6 billion in penalties for violations it found played a role in the disaster.

It was reported that during the trial, prosecutors unexpectedly asked the court to dismiss most of the potential punishment, which reduced total liability down to $6 million. In the end,

PG&E was ordered to pay just half that amount. This apparently came as a surprise to many observers.

Sources: *The East Bay Times*, *The Los Angeles Times*, NPR, and *The San Francisco Examiner*

Defense Auction Company Accused Of $106 Million Insider Trades

An investor has sued executives at Liquidity Services Inc., (LSI) an auction company, on behalf of the company. It's claimed that the executives knew an attempt to lessen the company's reliance on defense contracts was failing, but didn't tell investors. Instead, the named Defendants—all executive board members—allegedly made $106 million off of insider trades. In the suit, filed in Washington, D.C., federal court, Thomas Billard, the named Plaintiff, claims that LSI founder and CEO William P. Angrick III, former CFO James M. Rallo and eight current or former board members misled the public about the auction company's finances between 2012 and 2014. It's alleged that all but two of three directors engaged in insider trading.

Billard alleges that the company, which had historically received a majority of its revenue from contracts to auction off scrap for the U.S. Department of Defense (DOD), made failed attempts in 2012 to diversify its business by buying two other companies. The companies, GoIndustry and Network International, auction competitors, did not perform well after merging with LSI. It appears the executives did not fulfill their responsibility to disclose that fact to investors.

Attorneys for the Plaintiff are Elizabeth K. Tripodi and Donald J. Enright of Levi & Korsinsky LLP and Peter C. Harrar, Benjamin Y. Kaufman, Daniel Tepper, Gloria Kui Melwani of Wolf Haldenstein Adler Freeman & Herz LLP. The case is Billard v. Angrick et al., in U.S. District Court for the District of Columbia.

Source: Law360.com

CEO Convicted Of Fraud Related To World Trade Center Construction Projects

Larry Davis, the CEO of DCM Erectors, was convicted last month of fraudulently representing that work on the new World Trade Center (WTC) and a related transportation hub was being performed by women- and minority-owned contractors. A jury in Manhattan, N.Y., determined that Davis deceived New York and New Jersey officials overseeing the project in order to secure the projects under a provision that was designed to ensure diversity in the workforce. The combined value of the jobs was $586 million.

Canadian contractor DCM acquired the $256 million contract for One World Trade Center in 2007 and a subsequent $330 million contract for the transportation hub in 2009. Davis, 65, was charged in 2013 with conspiracy and wire fraud along with his company, which also was convicted. His defense was basically that he did not intend to commit fraud during the time the contracts were being fulfilled. Obviously, the jurors, after hearing the evidence, disagreed.

Prosecutors alleged Davis concocted the scheme with Ecuador-born Johnny Garcia of Solera Construction Inc., who they say gained $200 million through the scheme, and Gale D'Aloia of GLS Enterprises Inc., who allegedly made hundreds of thousands of dollars as a result of the fraud. Both Garcia and D'Aloia pleaded guilty to their role in the deception and testified against Davis.

Source: Law360.com

Company Sold 'Defective' Combat Helmets To Pentagon

A government investigation found "endemic manufacturing problems" at a company that was selling combat helmets to the federal government. The people found that Federal Prison Industries (FPI) had sold millions of dollars' worth of defective combat helmets. The Justice Department's inspector general released a scathing report on practices at the company, a government-operated group that employed inmates to manufacture nearly 150,000 military helmets.

The helmets produced contained serious "deformities," according to the report, including "ballistic failures," "blisters" and "expired paint." The helmets were also manufactured with "unauthorized methods." The report found:

> *A surprise inspection by the [inspector general's office] and military personnel uncovered inmates … openly using improvised tools on the helmets, which damaged the helmets' ballistic material, and created the potential for the tools' use as weapons in the prison.*

The inspector general also discovered "testing and quality control" problems, as FPI "pre-selected helmets for inspection," violating the terms of a Defense Department contract that called for random testing. The report also said that the company instructed inmates to forge documents to make it appear helmets had passed inspection.

The inspector general's office said it found no information of any soldiers who had been killed or injured as a result of the defective helmets. The military recalled the helmets in 2010 and production stopped at that time. Federal Prison Industries had two contracts to manufacture military helmets. The Pentagon had paid ArmorSource, an Ohio-based private military contractor, more than $30 million to build more than 126,000 helmets. ArmorSource later subcontracted with FPI.

The Defense Department also hired FPI directly to build another 23,000 helmets, but it was never paid for these helmets after they were "quarantined." The FPI manufacturing facility where these helmets were built was shut down and ArmorSource agreed to pay a $3 million settlement for what the inspector general called a lack of oversight.

Source: TheHill.com by Tim Devaney

Furukawa Settles Car Parts Antitrust Claims For $42.5 Million

Japanese auto wiring supplier Furukawa Electric Co. will pay $42.5 million to settle claims that it secretly agreed with other companies to rig the price of in-car electronic systems beginning in the late 1990s. In the event the settlement is approved by the court only three manufacturers of so-called automotive wire harness systems out of the 12 originally sued will remain in the case. The other Defendants have settled: Mitsubishi paid $64 million to resolve price-rigging claims for wiring and other auto parts; and a group of other parts manufacturers agreeing to pay $225 million. Furukawa has agreed "to provide substantial discovery cooperation" as the case moves forward in the

form of interviews, documents and sales data.

The litigation arises from a massive investigation by U.S., Japanese and European authorities in and around 2011 that yielded approximately $2.4 billion in criminal fines paid to the U.S. Department of Justice (DOJ), including $200 million paid by Furukawa over its admitted role in price-fixing and bid-rigging between 2000 and 2010. Several of the company's executives went to jail for their role in the scheme.

While it's not clear as to the size of the Furukawa class of so-called end payors, the claims extend from 1998 to 2016. The Plaintiffs said in their complaint that the company controls about 4 percent of the global market for wire harness systems. The parties that haven't yet settled are Chiyoda Manufacturing Corp., G.S. Electech Inc. and Asti Corp. and their affiliates.

The proposed class of end-payor Plaintiffs is represented by Steven N. Williams, Elizabeth Tran and Demetrius X. Lambrinos of Cotchett Pitre & McCarthy LLP; Hollis Salzman, Bernard Persky and William V. Reiss of Robins Kaplan LLP; and Marc M. Seltzer and Steven G. Sklaver of Susman Godfrey LLP. The case is *Wire Harness—End Payor Actions* in U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

Distribution Model For Halliburton & Transocean Settlements Released

The massive oil spill that occurred in the Gulf of Mexico in 2010 resulted in a huge settlement by BP and that has been widely reported. With the passage of time, however, lots of folks have forgotten that BP was not the only company bearing fault in the explosion aboard the Deepwater Horizon oil rig and the subsequent oil spill. Halliburton Energy Services, Inc. and Transocean Holdings, LLC were co-Defendants, along with BP, in litigation. As the litigation progressed, the Defendants all sought to assign blame to each other for the nation's worst environmental disaster in history. While BP was designated the "Responsible Party" under the Oil Pollution Act, both Halliburton and Transocean were also found comparatively negligent for 3 percent and 30 percent respectively. Ultimately, Halliburton paid out more than $1 billion in settlements while Transocean agreed to a $212 million settlement.

Unlike the Deepwater Horizon Economic & Property Damages settlement struck with BP, the Halliburton and Transocean (HESI/TO) settlements will not pay for any economic loss or personal injury claims. Instead, the two settlements, which total to $1,239,750,000, cover claims that could have been asserted for punitive damages as well as certain assigned claims from the BP settlement. The Court-appointed Allocation Neutral, United States Magistrate Judge Joseph C. Wilkinson, Jr., proposed that the HESI/TO settlements be distributed to two different classes of claimants:

> The "New Class" consists of class members whose real or personal property was physically oiled and, as a result, would be entitled to punitive damages under general maritime law. Importantly, this includes previously excluded groups (such as local governments, menhaden/pogy fishermen), individuals/entities that opted out of the BP settlement, and BP settlement class claimants such as commercial fisherman, charterboat operators, and subsistence fishermen. This class is set to receive $902,083,250 (or 72.8 percent) of the aggregate fund.
>
> The "Old Class" is comprised of thousands of business and individuals who were previously compensated in the BP settlement. A precondition to that settlement was BP agreeing to assign to the Old Class certain claims it asserted against Halliburton and Transocean. This class is set to receive the remaining $337,666,750 (or 27.2 percent) of the fund on a pro rata basis according to the amount a claimant received in the BP settlement.

Although we will not learn as much about the potential distributions to Old Class members until BP claims processing wraps up, the distribution model for the New Class reveals what these class members can expect to receive. According to HESI/TO Claims Administrator Michael Juneau, the distribution model affords the greatest priority to claim types that have the clearest and longest recognized standing to assert claims for punitive damages under the Robins Dry Dock line of cases. Consequently, the recommended allocation amongst claim categories is as follows:

- 80 percent—Real Property owners
- 0.6 percent—Personal Property owners
- 17.8 percent—Commercial Fishermen
- 0.2 percent—Charterboat Fishermen
- 1.4 percent—Loss of Subsistence Fishermen

Most HESI/TO claimants will not have to submit any new documents because their claim will automatically transfer to the new HESI/TO settlement program after their claim is fully processed under the BP settlement. Claimants who did not file a BP claim will be required to submit a claim form and supporting documents required by the BP settlement as well as proof of that claimant's timely preservation of rights pursuant to Pre-Trial Order 60.

Lawyers in our firm's Toxic Torts Section, who have worked on the litigation, believe the proposed distribution model offers a fair and expedient way to resolve claims. Judge Carl Barbier will hold a hearing on Nov. 10, 2016, to determine whether to approve the HESI/TO settlements. This hearing will come two weeks after the fairness hearing is held on Oct. 20, 2016.

VI. WHISTLEBLOWER LITIGATION

The Implied Certification Theory Of FCA Liability

In June of this year, the U.S. Supreme Court upheld that businesses could violate the False Claims Act (FCA) through implied false certifications. The implied certification theory of FCA liability is applicable when a business or person misrepresents compliance with federal statutes or regulations, which then induces payment of federal funds. Therefore, when a business fails to satisfy a material statute or regulation, it could result in an FCA violation. The Supreme Court decision in Escobar has left lower courts with the question as to how connected the ancillary laws or

regulations have to be in order for the violation of a statute or regulation to constitute an FCA violation.

In *Universal Health Servs., Inc. v. Escobar*, the Court upheld an implied false certification theory can be a basis for liability under the FCA. 136 S. Ct. 1989, 1995 (2016). In Escobar, the relators were the parents of a child who tragically had a seizure and died after being diagnosed as bipolar and taking the medications for that disorder. 136 S. Ct. at 1993. The practitioner who diagnosed the daughter represented to the parents that she had a Ph. D., but did not mention that the degree came from an unaccredited internet college nor that the State of Massachusetts rejected the practitioner's application to become a licensed psychologist. *Id.* at 1997.

The relators alleged that Universal Health submitted reimbursement claims, which represented that specific services were being provided by specific types of professionals – even though that was rarely the case. Id. at 1998. The Supreme Court vacated the judgment of the First Circuit and remanded the case, holding that an implied false certification theory is a basis for liability under the FCA. *Id.* at 2004.

The holding in *Escobar* will soon be interpreted by the District Court of New Jersey in *United States v. Premier Education Group*. The relators in this pending action alleged that Premier Education Group, who owns and operates 27 private colleges, has been fabricating various statistics. Civil No. 1:11-CV-3523-RBK-AMD. These statistics include the job placement of their graduates, the accreditation status of their programs, and the academic progress of their students. Id. These falsified statistics violate numerous federal regulations including 34 C.F.R. § 668.32 (concerning student eligibility) and 34 C.F.R. § 668. 22(b) (concerning student attendance). The relators contend that as a result of these fabricated statistics, the federal government has given financial aid and assistance to Premier Education Group. *Id.*

Oral arguments are set for the ninth of this month to determine whether the falsified certifications give rise to FCA violations. In determining whether the false information concerning compliance is sufficiently connected to constitute FCA violations, the court must determine whether the alleged falsified statistics are material to the government paying Premier Education Group. Materiality is met when either a reasonable man would consider it to be material, or when the Defendant possesses actual knowledge that the recipient attaches importance to the matter. *Escobar*, 136 S. Ct. at 2002.

The relators contend that the government would not have given Premier Education financial assistance had they known of the regulation violations. Relators allege that Premier Education's falsified statistics were directed to the government to obtain Title IV financial aid. Therefore, it is likely that the Relators have alleged a viable implied false certification theory by demonstrating the materiality of the false statistics provided to the government.

If any of you are aware of fraud being committed against the federal government, or a state government, the FCA can protect and reward you for doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, you can contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim. You can email one of the lawyers on our whistleblower litigations team: Andrew Brashier (Andrew.Brashier@beasleyallen.com), Archie Grubb (Archie.Grubb@beasleyallen.com), Larry Golston (Larry.Golston@beasleyallen.com) or Lance Gould (Lance.Gould@beaselyallen.com). You can also call these lawyers at 800-898-2034.

Sources: *United States v. Premier Education Group,* Civil No. 1:11-CV-3523-RBK-AMD, *Universal Health Servs., Inc. v. Escobar*, 136 S. Ct. 1989 (2016) and Law360.com

SEC Fines Another Company Over Anti-Whistleblower Agreements

The U.S. Securities and Exchange Commission (SEC) is clamping down on companies that attempt to restrict whistleblowers. The SEC is scrutinizing employment agreements used by the companies. For example, the SEC fined Health Net Inc., a health insurer whose severance agreements allegedly limited former employees' rights to whistleblower fees. Health Net agreed to pay a $340,000 penalty. It was alleged that the company impeded the agency's whistleblower program by requiring exiting employees to waive their right to a monetary award for providing tips to the agency. This came just six days after the SEC issued its first fine over such waivers against Atlanta building products distributor BlueLinx Holdings Inc.

Antonia Chion, an associate director of the SEC's Enforcement Division, highlighted the importance of financial incentives to the whistleblower program as she announced the latest charges in a statement saying:

> *Financial incentives in the form of whistleblower awards, as Congress recognized, are integral to promoting whistleblowing to the Commission. Health Net used its severance agreements with departing employees to strip away those financial incentives, targeting the Commission's whistleblower program.*

The SEC's rules that enable whistleblowers to collect 10 to 30 percent of the total award when giving information that leads to an action recovering at least $1 million, known as Rule 21F-17, were passed in August 2011 as part of the Dodd-Frank Act.

Source: Law360.com

The Dermagraft FCA Investigation Results In A $350 Million Settlement

Shire Pharmaceuticals PLC has reached a tentative $350 million settlement with the U.S. Department of Justice (DOJ) to settle False Claims Act (FCA) violations and Medicaid-related claims over the sales and marketing practices by the Massachusetts-based biotech company. This settlement arises from the ongoing investigation into the sales and marketing practices of the skin substitute product Dermagraft. Shire picked up the product when it acquired Advanced Biohealing Inc., now known as Shire Regenerative Medicine Inc., as part of a $750 million deal in 2011.

Even though Shire divested the Dermagraft product in January 2014, it retained the liability that could come from the DOJ's investigation. Shire has agreed to a civil settlement in the amount of $350 million plus interest, subject to negotiating a final settlement agreement and obtaining final approvals. The filing with the court stated:

> *The tentative settlement proposal would settle the federal government's claims under the federal*

False Claims Act and the Dermagraft Medicaid-related claims for states that opt into the settlement. Some states with Dermagraft Medicaid-related claims might elect to opt out of any final settlement, and those states' claims would remain unresolved.

The DOJ initiated both civil and criminal investigations in June 2011, with U.S. attorneys in Florida and Washington, D.C., participating in the process. Shire mentioned the investigation two-and-a-half years later when it sold off Dermagraft at a loss of $650 million, saying that it would retain the liabilities of the investigation. The proposed settlement, if finalized, will be the second that Shire has reached with the government over FCA violations in as many years. In September 2014, Shire reached another settlement for $56.5 million over the marketing and promotion of drugs used to treat attention deficit hyperactivity disorder and ulcerative colitis.

The Dermagraft settlement was the fourth FCA settlement the DOJ reached in one week last month. Other cases include two shippers settling allegations of overbilling, a South Carolina hospital paying $17 million to resolve a whistleblower suit over FCA allegations, and the University of Pittsburgh Medical Center agreeing to pay $2.5 million to also settle a whistleblower suit with FCA claims.

Source: Law360.com

Atrium Medical Corp. To Pay $11.5 Million Over Kickbacks

Atrium Medical Corp. has agreed to pay $11.5 million to settle a False Claims Act (FCA) lawsuit in a Texas federal court. It was alleged that the medical device company paid physicians kickbacks in exchange for promoting unapproved uses of medical stents. Esther Grace Sullivan, who worked as a sales representative and territory business manager from 2007 through 2012, accused Atrium in March 2013 of promoting its iCast for use in the vascular system when it had only been approved to treat tracheobronchial obstructions. The federal government in March 2014 declined to intervene in the qui tam suit.

New Hampshire-based Atrium held dinners and provided financial grants, among other alleged kickbacks, to persuade physicians to use the stents in the vascular systems of elderly patients and then billed Medicare for the procedures. Between 2007 and 2012, Atrium sold about $382 million in iCast stents. According to the whistleblower, 100 percent of those were for unapproved uses, and Medicare, Medicaid, military hospitals and the U.S. Department of Veterans Affairs paid for 70 percent of them. The majority of the settlement money will go back to the government. This is one of the largest settlements reached under the FCA for a medical device company in which the government didn't intervene.

Ms. Sullivan is represented by Chris Hamilton, Meagan Martin and Kevin Colquitt of Standly Hamilton LLP, Loren Jacobson, Charles S. Siegel and Caitlyn E. Silhan of Waters & Kraus LLP, Michael A. Kornbluth of Taibi Kornbluth Law Group PA, and Jeffrey A. Newman of The Law Offices of Jeffrey A. Newman. The case is *United States of America ex rel. Esther Sullivan, Relator et al. v. Atrium Medical Corp. et al.* in the U.S. District Court for the Western District of Texas.

Source: Law360.com

Tax Court Orders IRS To Pay Whistleblower Pair $17.8 Million

A husband and wife who provided tips and information to the Internal Revenue Service (IRS) whistleblower program that led to tax restitutions, criminal fines, and civil forfeitures totaling more than $74.1 million will receive a whistleblower award after originally being denied one. On Aug. 3, Judge Julian Jacobs of the U.S. Tax Court awarded the unidentified pair $17.8 million in a decision that marks the first time whistleblowers have been awarded a percentage of the criminal fines and civil forfeitures in addition to part of the tax recovery. The decision reverses the IRS's stance that criminal and civil forfeitures don't count as part of the collected proceeds.

We believe this award, which amounts to 24 percent of the total collected proceeds, could serve to provide encouragement and incentive to other potential whistleblowers who are witnesses to tax fraud—including cases of offshore tax fraud—and that could result in even larger whistleblower awards.

While the Tax Court's decision did not disclose the name of the institution found guilty of tax fraud, it's believed the $74-million recovery was in the case against Wegelin, Switzerland's oldest bank. A federal judge ordered Wegelin to pay $74 million in January 2013. That ruling was the first time a criminal sentence had been handed down to a foreign bank found guilty of violating U.S. law. Wegelin was just one overseas bank to be prosecuted by the U.S. government for providing a place for U.S. tax evaders to hide their money. Federal prosecutors accused Wegelin of hiding more than $1.2 billion from the IRS in undeclared accounts.

The latest whistleblower award of $17.8 million will likely remove the largest hurdle barring would-be whistleblowers from exposing large-scale tax fraud in the future, including cases involving giant foreign banks and offshore tax shelters. Whistleblowers who provide tips to the IRS that result in an enforcement action and recovery are entitled to receive up to 30 percent of the amount the government collects. According to the Wall Street Journal, the IRS has paid 99 whistleblower awards totaling $103.5 million.

Are you aware of tax fraud being committed against the federal government, or a state government? If so, the FCA can protect and reward you for doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, you can contact one of the lawyer's on our firm's Whistleblower litigation team for a free and confidential evaluation of your claim. You can email one of the lawyers on the firm's Whistleblower Litigation team, Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com. You may also call them at 800-898-2034.

VII. PRODUCT LIABILITY UPDATE

A Look At An Important Case Involving Rear Seat Defects

Our firm represents the family of a 10-year-old girl who was paralyzed in a car crash in south Alabama. Our young client was seated in the rear seat of her family car (believed to be the safest spot) and was properly wearing her seatbelt. Unfortunately, the car, a 2002 Pontiac Grand Am, was involved in an accident when it struck another vehicle while crossing an intersection. After the vehicles came to rest our little girl was still wearing her seatbelt, but was unconscious and completely unresponsive. Her sister, who was seated next to her in the back seat, was completely unharmed.

After our client was removed from the car and transported to the hospital, doctors discovered devastating injuries, including spinal injuries to her neck, destruction of portions of her intestines, and paralyzing spinal injuries mid-abdomen. Even though she was properly restrained (seat-belted) and her sister was uninjured, our young client is now confined to a wheelchair. Our inspection of the car after the crash revealed that the rear seat where the little girl was sitting was broken by cargo moving forward from the trunk.

The need to restrain occupants within vehicles in order to provide crash protection has been well known for many years in the automobile industry. It has also been the subject of numerous public safety campaigns and advertisements.This protection has traditionally been provided through the use of seat belts. In many cases, the need to wear seat belts is included in driver's education programs. The purposes of a seat belt include:

- To prevent occupant ejection from the vehicle;
- To couple the occupant to the vehicle taking advantage of the energy management properties provided by the crush of the vehicle's structure, thereby allowing the occupant to "ride down" the forces produced during the crash by applying and distributing the restraint loads to the strongest portions of the body; and
- Minimize the "second collision" of the occupant against the interior surfaces of the vehicle.

Seat belts are designed to distribute loads to the strong bony portions of the occupant. For a typical three-point seat belt system, the shoulder belt applies the crash loads to the sternum and clavicle. The lap belt is designed to restrain the pelvis by applying the restraint loads to the pelvis. By applying restraining forces to these strong areas of the occupant's body, properly designed and worn seat belts are able to prevent or minimize this "second collision" for most crashes and maintain the occupant's body in an optimal position to protect the head and spine. By minimizing the impact of this "second collision," the severity of any injuries to the occupant are minimized or eliminated.

The need to protect an occupant from intruding cargo has also been well known in the automobile industry and among safety experts for years. Many vehicle manufacturing regulatory bodies require that seats and seatbacks meet an established minimum performance level in order to provide maximum protection to vehicle occupants. The principles of this concept are based on physics. The items in the vehicle will essentially want to continue moving at the pre-impact speed while the vehicle itself (and restrained passengers in the vehicle) are being abruptly stopped. Any unrestrained cargo would be moving toward the impact point at its pre-impact speed. This means that when a vehicle hits a wall at 30 mph and stops, the restrained passenger does also, but unrestrained items continue to move at 30 mph until stopped by some other force. And if the rear seat fails to protect occupants from cargo in the trunk, devastating injuries can occur.

When GM designed and built the vehicle in this case, the automaker had many available materials it could have used to build the rear seat. Many manufacturers, including GM, have used metal springs and metal seat frames for years. Unfortunately for our family, GM chose to build the rear seat of the 2003 Grand Am out of plastic. The only barrier between the rear seat occupant and the trunk was a plastic seat back. As a result, when the crash forces caused a spare tire in the trunk of this car to move forward, there was not a sufficient barrier to protect our young client.

The tire broke through the back of the rear seat and broke the little girl against her own seatbelt. Her seatbelt was designed to protect her in a crash, but not with the added weight of cargo from the trunk. Testing has shown that plastic seatbacks such as this are defective and cannot withstand even mild crash forces. It's difficult to believe, but GM maintains that a plastic seat is safe.

Lawyers in our firm are preparing this important case for trial in the Middle District of Alabama and we look forward to presenting this evidence to a jury. Mike Andrews, a lawyer in our Personal Injury/Products Liability Section, is the lead lawyer for the firm in the case. We will include updates as this case develops.

Beasley Allen Lawyers Are Handling Cases Involving Recalled Takata Airbags In Honda Vehicles

Lawyers in our firm are handling a number of claims involving Honda vehicles equipped with recalled Takata airbags which caused shrapnel-related injuries. As we have previously reported, components of the airbags break off and can cause blunt force trauma or lacerations of occupants. These Takata airbags are subject to the largest recall in the history of automotive industry. It became known that the inflators in these airbags were made with a propellant that could degrade over time and which led to ruptures that have been blamed for numerous deaths and injuries worldwide.

Airbag inflators aren't filled with air, but are instead filled with gases that are created by burning propellants. Propellants are used in jet aircraft, gun chambers and demolition explosives. In airbags, the propellant is compressed into aspirin-size tablets and placed in a metal tube called an inflator. During a crash, the propellant tablets are ignited and converted from solid into a gas, which erupts out of the inflator and into the airbag in a matter of milliseconds.

Ammonium nitrate swells and shrinks with temperature changes. Eventually the propellant tablets will break down over time into powder. Water and humidity speed the process. Powder is less stable and burns more quickly than a tablet, so that an airbag inflator whose

tablet had turned into powder would likely deploy too aggressively. Takata is the only airbag inflator manufacturer to use ammonium nitrate.

Mark Lillie was a propellant engineer at Takata in the 1990s. While at Takata, Lillie rejected ammonium nitrate as a propellant. However, he was overruled by Takata executives. In a January 2016 deposition, taken as part of another personal injury suit against Takata and Honda, Lillie testified that there was "[n]ever any evidence, never any test results, never any test reports, nothing to substantiate they had overcome the phase stability problem." His sworn testimony clearly shows that Honda could not have seen any testing substantiating that the phase stability problem was overcome. Lillie was interviewed and later stated that he told Takata that "someone will be killed if the design goes forward."

Ignoring Lillie, Takata executives followed the advice of Paresh Khandhadia on the issue of ammonium nitrate. Khandhadia testified last year, but was virtually silent due to citing his Fifth Amendment right not to testify against himself. Mr. Lillie left the company in 1999, in part because the company ignored his warnings about ammonium nitrate. Lillie testified further in his deposition that a Takata engineer wasn't allowed to investigate an inflator that ruptured during testing, and when he protested, was reassigned.

Takata has consistently manipulated and lied about test data. A prime example is a November 2000 memo from a Takata product engineer that states:

> *The objective of this cover letter is to point out that the Honda test report has incorrect data, data that cannot be validated, data that was incorrectly labeled, or data that does not exist.*

In January 2005, Takata propellant engineer Bob Schubert was concerned about ammonium nitrate, writing to his boss that the company was "prettying up" data sent to Honda. At one point, the inflators were said to have passed tests that never occurred. "It has come to my attention that the practice has gone beyond all reasonable devices and likely constitutes fraud." In 2006, a Takata engineer manager sent an email to a college friend that data about potential problems with product tests were being hidden or ignored. The email states, "It is yet another mess-o-shit we will be handed with no real fix possible. The plant should have been screaming bloody murder long ago."

However, Honda cannot hide behind the lies Takata told. In 2004, a Honda Accord airbag exploded on an Alabama highway, shooting shrapnel throughout the vehicle interior. Honda was put on notice of the safety problem at that time. Instead of investigating, uncovering and then solving the problem, Honda settled a lawsuit arising out of the incident for a confidential amount. Honda was made aware of three additional ruptures in 2007. Once again, Honda settled those claims for confidential amounts.

Honda issued a small recall of about 4,200 vehicles in late 2008, but within six months should have been made aware that the recall was insufficient because Jennifer Griffin's airbag exploded in Orlando, Fla., in her Honda Civic. Her Honda Civic was not among the recalled vehicles. The airbag explosion in the vehicle sent a two-inch piece of shrapnel flying. When state troopers found Ms. Griffin, then 26, with blood gushing from a gash in her neck, they were baffled by the extent of her injures. Honda soon linked the airbag explosion to the previous ruptures.

Neither Honda nor Takata can deny knowledge about the dangers of ammonium nitrate, something they knew long before the vehicles were eventually recalled. Renault refused to buy airbags with the dangerous propellant. Since 2008, Takata in Europe has sold airbags with the safer guanidine nitrate.

By August of 2009, ruptured airbag inflators in Honda vehicles were linked to at least four injuries and a death. Honda quietly requested a design change, but did not notify U.S. regulators. The 2009 memo from Honda shows the automaker's knowledge of the deadly design years before it became common knowledge to the public. The memo showed that Honda requested a "fail-safe" airbag inflator as replacement parts to deal with the widespread Takata airbag flaw. That requests shows that Honda understood as early as 2009 the safety risk posed by the inflators. Honda had reported death and injury tallies to the National Highway Traffic Safety Administration (NHTSA) in a confidential submission in December 2011, at which time the company issued its fifth recall.

In the spring of 2010, Honda and Takata commissioned the High Pressure Combustion Laboratory at Pennsylvania State University to study ammonium nitrate. Representatives from Honda and Takata met with the lab personnel at Penn State to begin the study. As a condition of the study, the lab was not permitted to publicly link the research to Takata or Honda. The findings were published in a scientific journal, but Takata forbid disclosure that it had paid for the study. The Honda and Takata study at Penn State, concluded in 2012, found that ammonium nitrate was too sensitive to changes in pressure.

In March 2012, Angelina Sujata was driving her 2001 Honda Civic at about 25 miles per hour near Columbia, S.C., when the vehicle in front of her slammed on the brakes. The next thing she remembered was a sharp pain in her chest. Her chest was sliced open to the bone. In 2013, Takata publicly filed a defect report with U.S. regulators stating that certain passenger side airbags could rupture as a result of manufacturing errors that were exacerbated when the airbags were exposed to heat and humidity.

Despite the overwhelming evidence that ammonium nitrate was not suitable for airbag inflators, Honda did not expand the recall of these airbags until 2014. The accidents in the four recently settled cases did not occur until 2015.

Takata was forced to pay a fine of $70 million and that could go to $130 million if the company fails to meet its commitments. NHTSA says the civil penalty is the largest the agency has ever imposed and the extent of the oversight into Takata is unprecedented. Three independent investigations have come to the same conclusion about the lethal airbags: long-term exposure to changes in temperature and moisture can make ammonium nitrate propellant dangerously powerful. Mark Rosekind, the head of NHTSA, said:

> *The science now clearly shows that these inflators can become unsafe over time, and faster when exposed to high humidity and high temperature fluctuations.*

One of Takata's product safety engineers, Schubert, said in a deposition that the ammonium nitrate propellant doesn't cause problems "until the degra-

dation process has proceeded a very long way, and then the results fairly quickly go to rupture." He suggested the process could take 10 years. This explains why most of the deaths and injuries have occurred since 2011 when the vehicles were manufactured roughly 10 years before.

If you have any questions or have a case involving these claims, you can contact Chris Glover, a lawyer in our firm's Personal Injury/Products Liability Section at 800-898-2034 or by email at Chris.Glover@beasleyallen.com. There is a great deal of additional information relating to this subject, but due to space limitations we couldn't include all of it in this issue. Chris will be glad to talk with you on all that we have learned.

VIII. MASS TORTS UPDATE

J&J Unit Settles In Tylenol Death Suit

The mother of an 11-year-old boy has agreed to settle her claims that bacteria-contaminated Children's Tylenol killed her young son. The settlement came eight months after a trial in a California federal court resulted in a mistrial. It was claimed that McNeil, a Johnson & Johnson unit, knew the harmful bacteria *Bacillus circulans* was present in an ingredient used to make the batch of Children's Tylenol that was given to Tyler Robertson shortly before he died of sepsis and bacterial pneumonia. The terms of the settlement are confidential and can't be disclosed.

The suit was filed against McNeil in 2011 after the child died of sepsis caused by pneumonia several days after ingesting Children's Tylenol from a batch included in a voluntary recall in September 2009. The bottle was tested for contamination and it was found to be positive for bacteria. There had been two previous trials involving the claims against McNeil, the most recent being in January.

Jurors told the judge after deliberating for a full day that they were deadlocked and couldn't come to a unanimous decision. Judge Kronstadt told the lawyers—outside the jury's presence—that he wasn't sure if it would be productive to bring them back for another day.

McNeil had originally prevailed in the suit, when another jury in November 2014 found that the company wasn't negligent in producing the children's pain reliever. But in July 2015, the judge set aside the verdict and ordered a new trial, saying that a jury member who Googled information about recalls made it reasonably possible that the verdict was influenced. Judge Kronstadt said the juror's admission that she looked up information about Tylenol recalls on Google one night at home during jury deliberations may have affected the outcome of the trial.

The Plaintiff is represented by Daniel K. Balaban and Andrew J. Spielberger of Balaban & Spielberger LLP, Robert P. Goe and Elizabeth Larocque of Goe & Forsythe LLP and Browne Greene of Greene Broillet & Wheeler LLP. The case is *Peter Robertson et al. v. McNeil-PPC Inc. et al.* in the U.S. District Court for the Central District of California.

Source: Law360.com

Suit Filed Against Johnson & Johnson Over Nerve-Damaging Antibiotic

A proposed class action lawsuit has been filed against Johnson & Johnson Consumer Inc. and Janssen Pharmaceuticals Inc., in a Pennsylvania federal court. The companies are accused of fraudulently misrepresenting and selling a class of antibiotics that allegedly causes irreversible nerve damage. It's alleged in the suit that Johnson & Johnson and subsidiary Janssen intentionally concealed the risk associated with taking a class of antibiotics known as fluoroquinolones, which is sold as Levaquin.

Michelin Rowell, a resident of North Carolina, who is the named Plaintiff, alleges she developed irreversible nerve damage—technically called peripheral neuropathy—after taking Levaquin. She is seeking class designation on behalf of herself and other persons who developed the condition after using Levaquin. She also contends in the complaint that any statute of limitations should be tolled because of the fraudulent concealment of the drug's risks. Janssen manufactures, tests, advertises and sells Levaquin to treat sinus, skin and urinary tract infections caused by bacteria.

The suit alleges that between 2004 and 2013, Levaquin's label misled patients and physicians by saying patients develop nerve damage after taking the antibiotic on "rare" occasions and patients can avoid nerve damage by stopping treatment. At the time, it's alleged that scientific evidence had established a clear association between the drug and developing peripheral neuropathy that is at its worst irreversible.

The U.S. Food & Drug Administration (FDA) notified the drug makers in 2002 and 2003 that "numerous reports" had been submitted to the agency alleging peripheral neuropathy continued long after patients stopped taking the antibiotic. In 2013, the FDA determined the drug labels were inadequate, and, as a result, Janssen removed phrasing indicating that nerve damage only occurred in "rare" cases. In July, the FDA signed off on safety labeling changes for fluoroquinolones warnings about a link with potentially permanent side effects.

Concerns about Levaquin's impact on the nervous system first arose in the scientific community in 1992 when a doctor submitted a letter to The Lancet, a peer-reviewed medical journal, describing a 37-year-old patient who developed nerve damage after she took fluoroquinolones, according to the suit. Four years later, another study was published that linked the antibiotic to nerve damage based on 37 separate reports, and in 2001 an American doctor published a report with similar results that studied 45 patients.

Between 1997 and 2012, according to the complaint, there were 539 reports of nerve damage out of about 46,000 adverse incidents associated with the drug. A 2014 study that compared a group of 48- to 80-year-old men taking the antibiotic with a control group showed that the men were at higher risk of developing nerve damage.

Since 1992, five drugs made of fluoroquinolones have been removed from the U.S. market because of their adverse health effects, but Levaquin is still on the market. In 2006, Levaquin was the top prescribed antibiotic in the world, generating $1.6 billion in revenue and representing 6.5 percent the company's total revenue. The FDA approved Levaquin in December 1996, and in 2003 it became the top prescribed antibiotic in the U.S.

The suit is making several claims against Johnson & Johnson and Janssen. The drugmakers are accused of failing to warn, negligence, breach of warranty, negligent misrepresentation, fraud and

fraudulent concealment. The Plaintiff seeks medical expenses, attorneys' fees, punitive and compensatory damages, and refunds for money spent on purchasing Levaquin on behalf of herself and other class members.

Ms. Rowell is represented by Russell Budd and Sindhu S. Daniel of Baron & Budd PC. The case is *Rowell v. Johnson & Johnson et al.* in the U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

Retrievable IVC Filter Litigation

I am reasonably sure that many of our readers have heard of the blood thinner Coumadin. Doctors prescribe Coumadin and similar blood thinners as a first line treatment for someone diagnosed with a blood clot, such as a deep vein thrombosis (DVT) or pulmonary embolism (PE). In some patients, blood thinners can't be used. In cases of trauma, for example, where doctors are working to stop bleeding, Coumadin would only make matters worse. In those situations, the use of inferior vena cava (IVC) filters is the second-line treatment. IVC filters are small, cage-like devices inserted into the inferior vena cava to capture blood clots and prevent them from reaching the lungs. The inferior vena cava is the main vessel returning blood from the lower half of the body to the heart. (*FDA Safety Communication*, May 6, 2014.)

The original IVC filters were intended to be permanent filters and required surgical implant into the vein. Later versions of the permanent IVC filter were developed for percutaneous (non-surgical) placement using a catheter. More recently, manufacturers are marketing "removable" or "retrievable" IVC filters, in part due to an increased risk of DVTs seen with permanent IVC filters after being implanted for two years.

While removable IVC filters are approved for permanent use, product instructions for removable filters include a statement that the filter "may be retrieved in patients who no longer require a filter." The use of IVC filters has increased exponentially since the late '70s, from 2,000 IVC filters placed in 1979 to approximately 260,000 IVC filters placed in 2012. Studies show that most retrievable IVC filters remain in place.

Numerous medical studies have revealed retrievable IVC filters are causing a significant number of injuries. A 2011 study revealed that 40 percent of the Bard Recovery© filters fractured after five and a half years, and a 2014 medical study revealed that 37.5 percent of Bard G2© filters fractured after five years. Other studies have shown that 100 percent of the Cook Tulip© and Celect© filters perforated the inferior vena cava after 71 days and 40 percent tilted.

In a 2010 FDA communication, the FDA reported that since 2005, it had received 921 adverse event reports involving IVC.

The injuries reported involved the IVC filter migrating (or moving) within the inferior vena cava (328 reports), the IVC filter completely detaching from the inferior vena cava wall and traveling to the heart or lungs (146 reports), the IVC filter tearing the wall of the inferior vena cava (70 reports), and the IVC filter fracturing or breaking into pieces (56 reports). A follow-up FDA communication in 2014 identified the following adverse outcomes:

> *device migration, filter fracture, embolization (movement of the entire filter or fracture fragments to the heart or lungs), perforation of the IVC, and difficulty removing the device. The FDA suggests the risks may be related to the length of time the IVC filter is in the body. The FDA suggests removing retrievable IVC filters as soon as protection from pulmonary embolism is no longer needed.*

Evidence is mounting that manufacturers of retrievable IVC filters were aware of high failure rates with their IVC filters years ago, yet there has never been an official recall. As a result, many people have already been injured; and many more have a retrievable IVC filter in place with a high likelihood of failure in the future.

Beasley Allen lawyers are currently investigating a number cases involving injuries resulting from retrievable IVC filters. If you have been injured by a defective retrievable IVC filter, or if you currently have one of the retrievable IVC filters in place, or you just need information on this litigation, contact Roger Smith, a lawyer in our firm. If you need a list of the various products involved in the litigation, Roger will have them. You can contact Roger, who is in our firm's Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com. He will be glad to talk with you.

Kentucky Files Pelvic Mesh Deceptive Marketing Suit

The Kentucky Attorney General has filed suit against Johnson & Johnson and its Ethicon Inc. unit in state court, accusing them of deceptively marketing transvaginal mesh (TVM) devices and hiding from women and their doctor's risks such as chronic pelvic pain. Attorney General Andy Beshear said in the complaint, which seeks millions of dollars in civil penalties under the state's Consumer Protection Act, that J&J misrepresented that its products were approved by the U.S. Food and Drug Administration (FDA), when in fact they had only been cleared by the agency under its 510(k) process, which evaluates whether a product is substantially equivalent to one already on the market.

FDA-approved products undergo about 1,200 hours of review for their safety and efficacy, whereas the review for an FDA-cleared device only takes about 20 hours. J&J knew that representing that a device that had received FDA approval leads doctors and patients to believe that the product has been well-studied and scrutinized, the state attorney general said. The following is alleged in the complaint:

> More than 15,000 women in Kentucky had transvaginal mesh implanted, but J&J and Ethicon failed to provide sufficient information about known risks so they and their doctors could make informed medical choices. In addition to chronic pelvic pain, those risks include urinary dysfunction, pain from sexual intercourse and the loss of sexual function entirely. J&J's own staff urged the company to include more complete disclosures of the risks of the transvaginal mesh, but the company failed to do so. In 2005, Axel Arnaud, J&J's medical director, proposed stronger warnings on the device in an email. Arnaud proposed including this disclosure: "WARNING: Early clinical experience has shown that the use of mesh through a vaginal approach

can occasionally/uncommonly lead to complications such as vaginal erosion and retraction, which can result in an anatomical distortion of the vaginal cavity that can interfere with sexual intercourse."

J&J never included the needed disclosure in its marketing or promotional materials. A J&J medical director noted that after their surgeries patients were reporting that they didn't believe they had been provided adequate information before surgery on the possible complications, and that additional disclosures might be needed. But the company continued to conceal risks of those possible complications, according to the suit. Attorney General Beshear said in a statement:

The way this company clearly chose profits over people is outrageous. My office has talked to victims whose lives have been devastated by this company's deceitful practices. We may not be able to give them back the lives they once had, but my office will do everything we can to hold this company accountable.

Seven separate multidistrict litigations (MDLs) comprising 70,000 cases against J&J and other companies are pending in West Virginia over the allegedly defective products. The FDA recently reclassified pelvic mesh devices such as those at issue in the suits as high-risk devices that must undergo the agency's most stringent safety evaluation before hitting the market.

Source: Law360.com

IX. BUSINESS LITIGATION

Trust & Estate Litigation—Where Will Prince's Estate Go?

The unexpected passing of legendary music icon Prince Rogers Nelson has the fate of his vast estate tied up in litigation. In court, Prince's sister stated that she is unaware of any will or estate plan left by her brother. Estate planning allows people to control their property while they are alive, care for their loved ones and give what they want to who they want. If you don't have an estate plan, state law will control administering the estate and distributing assets to your heirs. The court in this case has determined that all possible heirs have been reached and provided the opportunity to be included in the proceedings. Under Minnesota law, with no spouse or children, Prince's estate will likely be divided among his sister and his five half-siblings.

Dividing up all of Prince's assets could get real messy. Dividing dollars among six people is one thing, but dividing guitar collections, unreleased songs or an unfinished piece of music could be most difficult. Additionally, certain assets will have to be sold in order to pay taxes. Without an estate plan, more than half of Prince's estate will go to state and federal taxes. Minnesota requires residents to pay a 16 percent estate tax on top of the 40 percent federal tax. Current estimates value Prince's estate at nearly $300 million.

Lawyers at Beasley Allen are currently involved in litigating probate disputes in several states involving wills, trusts, and estates. This litigation covers a multitude of situations like the one described above, cases involving undue influence and lack of capacity, as well as cases involving financial elder abuse. If you have a possible probate litigation issue, and need any type advice or counsel, contact Lance Gould or Leslie Pescia, lawyers in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Lance.Gould@beasleyallen.com or Leslie.Pescia@beasleyallen.com.

X. AN UPDATE ON SECURITIES LITIGATION

Improper Retirement Plan Fees Are A Growing Area For ERISA Litigation

Several prominent universities have all been hit with claims under the Employee Retirement Income Security Act (ERISA) recently. Specifically, New York University, the Massachusetts Institute of Technology, Yale University, Duke University, the University of Pennsylvania, Johns Hopkins University, and Vanderbilt University all face proposed class actions accusing the schools of causing retirement plan participants to pay millions of dollars in excessive fees.

In the similar suits, beneficiaries alleged that the institutions, as employee retirement plan sponsors, breached their fiduciary duty under the ERISA by causing plan participants to pay excessive fees for record keeping, administrative and investment services of the plans.

The complaints also similarly allege that each school improperly selected and retained numerous high-cost and poor-performing investment options as compared to available alternatives, which substantially reduced the retirement assets of the employees and retirees.

The firm representing Plaintiffs and proposing to be lead counsel, Schlichter Bogard & Denton, successfully appealed a case last year involving retirement plan fees to the U.S. Supreme Court, *Tibble v. Edison International*, which is currently pending. The types of plans involved differ slightly with MIT offering its employees a 401(k), while the others offer their employees 403(b) plans, which are retirement plans for certain employees of public schools or nonprofit corporations or organizations. Jerry Schlichter of Schlichter Bogard & Denton, said his clients have the same rights to build retirement assets as corporate employees. He said in a statement:

The universities don't have high-priced retail mutual funds in their billion-dollar endowments, yet they have high-priced retail funds in their employees' retirement plans. This is diminishing their employees' and retirees' retirement savings.

The Plaintiffs claim in all of the cases that had the schools adhered to their fiduciary monitoring duties, the plans would not have suffered the alleged losses. It's alleged that, as a direct result of the breaches of fiduciary duty alleged herein, "the plans, the Plaintiffs and the other class members lost tens of millions of dollars of retirement savings." In the case of MIT, the complaint against that school also alleges that MIT has retained Fidelity Investments as recordkeeper for nearly two decades without a competitive bidding process. The fact that Fidelity Investment CEO Abigail

Johnson is also a member of the Board of Trustees for MIT, according to the complaint, shows the school and the company share an overly close relationship.

Sources: Law360.com

XI. INSURANCE AND FINANCE UPDATE

Ironshore Specialty Insurance Cannot Escape Policy

In the Northern District of California, a federal judge recently ruled that Ironshore Specialty Insurance Co. cannot use a policy exclusion to bar a genetic testing company's request for coverage of proposed class claims that the tests are inaccurate. 23andMe Inc. is a genetic testing company that sells $99 kits that provide customers with analysis of their genetic code, including ancestry and various health risks. In November 2013, the FDA demanded that the company discontinue providing health testing results because the product was not approved by the FDA and could lead to false positives, which could lead to unnecessary surgery, or false negatives, which could leave its customers unaware of health risks.

Consumers filed several class actions after the FDA letter alleging that 23andMe falsely marketed the tests and misled customers about the test's approval. 23andMe also received an investigative demand from Washington's attorney general. Ironshore agreed to defend the company against the allegations, but in 2014 it asked for a declaration that it no longer has to defend or indemnify 23andMe in the actions. Ironshore argued that a contractual liability exclusion prevented coverage. Although no California precedent addressed the issue, the Court looked at other jurisdictions and found that Ironshore's reading of the exclusion was inaccurate. The Court did determine, however, that Ironshore is not responsible for covering the cost of responding to the Washington investigative demand.

Source: Law360.com

Settlement In PricewaterhouseCoopers Case

A case in a Florida state court in Miami was expected to answer a critical accounting question—"to what degree are auditors responsible for catching fraud?" PricewaterhouseCoopers (PwC) faced civil claims filed in 2013 seeking to hold the company liable for missing signs of fraud that led to one of the biggest bank collapses of the Great Recession. However, the parties settled the case just as this issue was going to the printer. I am told the amount to be paid by PwC is confidential.

The bankruptcy trustee for Taylor Bean & Whitaker Mortgage Corp. had alleged that PwC auditors should have uncovered a fraud scheme perpetrated by Taylor Bean chairman Lee Farkas, along with employees of Colonial BancGroup Inc., which ultimately cost the federal regulators' deposit insurance fund an estimated $3.3 billion and led to the bankruptcy of Taylor Bean and 2009 collapse of Colonial Bank.

Farkas was convicted on fraud charges in 2011, and five other Taylor Bean executives and two Colonial employees pleaded guilty to participating in the fraud. The trustee contended that PwC "failed to audit billions of dollars of transactions, failed to certify assets and relied on unsigned contracts," overlooking what they deem was obvious fraud. However, PwC contended that their auditors could not be expected to uncover the fraud when representatives from both Taylor Bean and Colonial also missed the deception. However, it is interesting to note that PwC's former global chairman Dennis Nally, in a 2007 interview with The Wall Street Journal, has gone on record as saying that "the audit profession has always had a responsibility for the detection of fraud."

In addition to Taylor Bean, PwC is facing litigation in an Alabama federal court from Colonial BancGroup's bankruptcy trustee, as well as the Federal Deposit Insurance Corp. Those cases are scheduled to go to trial in February of 2017. The Taylor Bean case is in Miami-Dade County Circuit Court. So perhaps there will be a clearer answer to the question posed in the Florida case.

Sources: *The Wall Street Journal*, *Miami Herald* and Associated Press

CFPB Must Get Tougher On Payday And Title Lenders

In June, federal regulators 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. The rule is currently pending a public comment period, which runs through Sept. 14. After that time, the CFPB is expected to issue its final rule.

In the meantime, payday and title lenders continue to try to avoid regulations in order to gouge the poor by trapping them into a cycle of debt. They sell "easy" loans that are tied to astronomically high interest rates, with no regard for whether or not the borrowers have the ability to pay the loan back. In fact, the system is designed to push borrowers from one loan to the next, borrowing again and again to pay off previous loans, which of course they are unlikely to do.

Campaign for America's Future (CAF), which is working to help stop payday lenders, recently shared some statistics from Americans for Payday Lending Reform (a project of People's Action). These are just a few of those facts:

- Thirty-five states allow payday lending with an average of 300 percent APR or more on a two-week loan. [Philadelphia Inquirer, 6/23/13]
- CFPB: 80 percent of payday loans are rolled over into new loans within 14 days. [Yahoo Finance, 8/13/14]
- CFPB: 60 percent of payday loans are renewed seven or more times in a row, typically adding a 15 percent fee for every renewal. [Times Picayune, 5/8/14]
- CFPB: half of all borrowers took out at least 10 sequential loans. [Cleveland Plain Dealer, 6/13/14]
- Only 15 percent of borrowers were able to repay their initial loans without borrowing again within two weeks. [Cleveland Plain Dealer, 3/26/14]

While the rules proposed by the CFPB are a good start, the only true way to stop payday and title lenders from

taking advantage of the poor is to require them to only loan to borrowers who can afford to repay their debt. According to CAF:

A single unaffordable payday loan is one loan too many. The proposed rule gives a "free pass" to payday lenders to make six bad loans, allowing lenders to sink people into a dangerous debt trap before the rule kicks in. The CFPB was right to base their proposal on the standard that borrowers should be able to repay their loan, but that standard must be on every loan, from the first loan. The CFPB should also enact protections to prevent lenders from stringing people along by ensuring a 60-day break between loans and limiting 'short term' loans to 90 total days of indebtedness per year.

As I have stated on numerous occasions, I am no fan of predatory lenders. How can you help? Before the public comment period ends, you can let the CFPB know that they must make their rules even stronger. CAF has a simple online form that will allow you to submit your comments. Visit www.stoppaydaypredators.org/CAF.

Sources: Bloomberg News, CAF

XII. PREMISES LIABILITY

Recent Amusement Park Injuries Demonstrate Need For Better Safety Regulations

Three major amusement park accidents that occurred in less than a week have ignited concerns that state and federal regulators are not doing enough to set safety standards for the amusement park operators and their attractions. Fears were stoked about the safety of some amusements after 10-year-old Caleb Schwab was decapitated on the world's tallest waterslide at Schlitterbahn Kansas City waterpark on Aug. 7.

The very next day, three girls were injured after falling more than 30 feet from a Ferris wheel at the Greene County Fair in Greeneville, Tenn. One of the victims suffered a traumatic brain injury. Then just days later, a 3-year-old boy was airlifted to a pediatric hospital after he was thrown from a roller coaster in a Southwestern Pennsylvania amusement park.

Safety advocates say these preventable accidents illuminate severe safety deficiencies within the amusement industry and underscore the need for consistent rules and standards from state to state, using federal oversight, if necessary.

The need for safety reforms is especially urgent now that many parks are building rides that are more extreme in height and speed than ever before. The designers of the Verrückt waterslide, whose name is German for "insane," had to rebuild the slide several times after rafts went airborne off the slide and other safety tests failed. There were also concerns about malfunctioning Velcro harnesses and lax weight restrictions. The slide had been open to the public less than two years when Caleb Schwab was killed.

Family Attractions Amusement Co., the Georgia company that owns and operates the Ferris wheel that malfunctioned at the Tennessee fair, is linked to an accident three years ago at the North Carolina State Fair that injured five people.

While some states have better regulations and enforcement in place, some states, such as Kansas, largely rely on amusement owners and operators to ensure their own safety. The Kansas Department of Labor has the authority to inspect amusement rides at random, but there is no evidence that state regulators conduct such inspections, leaving it to amusement park operators to self-regulate.

A 2013 study of amusement park injuries by the Nationwide Children's Hospital found that 92,885 children younger than 18 were treated in U.S. emergency rooms for amusement ride-related injuries from 1990 to 2010. Because more than 70 percent of those injuries occurred in the warmer months of May through September, the injury statistics indicate that about 20 people are injured on amusement rides each day.

If you need more information on amusement park litigation and related safety issues, contact Kendall Dunson, Mike Crow or Evan Allen, lawyers in our firm's Persons Injury &Products Liability Section, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com, Mike.Crow@beasleyallen.com or Evan.Allen@beasleyallen.com.

Sources: *USA Today,* Associated Press, RightingInjustice.com

XIII. WORKPLACE HAZARDS

Jury Awards Another $48 Million To Families Of 2008 Crane Collapse Victims

A jury has awarded $24 million in punitive damages to each of the families of the two workers killed when a crane tower collapsed in New York City in 2008. This increases the total damages awarded in the litigation to more than $96 million. This winds up one of the longest civil trials in New York City history. The punitive award follows the jury's earlier decision that the crane's owner, James F. Lomma, and his companies, should pay more than $48.3 million in compensatory damages to the victims' families to cover economic losses and pain and suffering.

Lomma, who had been acquitted of criminal charges stemming from the collapse, was found in civil court to be at fault because he knew a part of the crane that caused the accident was defective. On May 30, 2008, the crane separated from the tower and collapsed, killing Donald C. Leo, the crane operator, and Ramadan Kurtaj, a construction worker, who were on the street below. The civil trial, which began in September in State Supreme Court in Manhattan, took 120 days to complete.

It was proved that Lomma used an unqualified Chinese company to repair the crane to save money. It was claimed and proved that the crane gave way because of shoddy welding and that Lomma, aware of the shortcomings of the crane, should have taken it out of service. Lomma's lawyers claimed that the crane operator hoisted too heavy a load, causing the line to snap, which knocked the crane off balance. Mr. Leo, who had followed in his father's footsteps to become a crane operator, died weeks before he was scheduled to be married. Mr. Kurtaj, who had emigrated from Kosovo, was working on water and sewer lines when he was crushed in the collapse.

Source: *New York Times*

Transcontinental Pipeline Company Fined $1.6 Million Over Fatal Blast

The Transcontinental Pipeline Company, a subsidiary of Williams Partners LP, has been hit with a proposed $1.6 million in civil penalties by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA). This arises out of a fatal 2015 compressor station explosion in Louisiana. PHMSA has sent a notice of a probable violation and proposed compliance order to the company, saying the administration found noncompliance issues with federal pipeline safety regulations. The incident occurred on Oct. 8, 2015, near Bayou Black, La.

The incident at the Transco Compressor Station 62—which gets unprocessed natural gas by way of a pipeline from Gulf of Mexico offshore producers—resulted in the death of four Transcontinental employees from either fire or smoke as well as the evacuation of nearby residents and closure of a state highway. The PHMSA letter said:

> *The proposed compliance order incorporates remedial actions that correspond to each alleged violation to ensure compliance with pipeline safety regulations and improve safety.*

PHMSA said that Transcontinental didn't provide all the relevant facts of the incident when it first told the National Response Center (NRC) about it, including the number of deaths and injuries. The explosion occurred at 11 a.m. on Oct. 8. The call to the NRC was made just after 12 p.m. The PHMSA letter said further:

> *Media reports released as early as 11:32 a.m. included information indicating that at least one fatality and four injuries had occurred, and it was known to the operator that injuries and at least one fatality had occurred at the time the report was filed with the NRC.*

PHMSA says that Transcontinental didn't take adequate steps to minimize the danger of an accidental ignition in an area where there was a combustion hazard because of the presence of gas during welding in the same area. PHMSA said further that Transcontinental didn't stop work when gas was detected. Transcontinental was also alleged to have allowed contractors without the prerequisite training to assume safety and monitoring responsibilities.

Transcontinental has 30 days to respond to PHMSA's allegations. If the company doesn't respond, it waives its right to contest the allegations and authorizes the associate administrator for pipeline safety to issue a final order. PHMSA also said the company must further comply with pipeline safety regulations and improve safety.

Source: Law360.com

GD Copper Fined $197,000 For 'Serious Safety Hazards'

GD Cooper, a Copper tubing manufacturer located in Pine Hill, Ala., has been fined $197,000 for "serious safety hazards." Federal inspectors cited more than a dozen different issues and ordered the plant to address them on or before Aug. 15. According to inspectors, workers at the plant were exposed to fall dangers, shock hazards and unguarded safety equipment. The U.S. Occupational Safety and Health Administration (OSHA) said that in one case GD Copper workers used a platform 14 feet above a concrete floor, but without "a standard handrail which included a mid-rail." According to the OSHA report, the plant corrected five of the issues during inspection. Officials have 15 days to contest the findings. Joseph Rosesler, OSHA's Mobile area director, said in a statement:

> *Our inspection has identified numerous serious safety hazards that put employees at risk of injury or death. GD Copper must be more proactive in identifying these hazards and taking action to correct them.*

GD Copper's violations included: exposing employees to unguarded machine parts; lacking safety rails that put workers at risk of falls; not conducting annual audits of energy control procedures; not evaluating a permit required for confined space before workers entered it; exposing workers to potential electric shock; failing to train employees on an emergency action plan; not training workers in first aid; and not providing fire extinguishers.

GD Copper, which employs about 390 workers, manufactures precision copper parts for use in appliances like air conditioners, and the work involves heat and fast machines. In two separate citations, OSHA inspectors said an employee faced "amputation hazards" in February from a "partially guarded rotating belt and pulley." Inspectors also said employees risked electric shock from defective or improperly connected equipment. OSHA's report said the company addressed some but not all of the machine and electrical violations during inspections.

Inspectors also said walking surfaces had oil, hydraulic fluid or copper tubing scattered over them, creating tripping hazards. The report also faults GD Copper for not providing proper training on the machines used in the plant. Inspectors also said there was "neither an infirmary, clinic or hospital used for treatment of all employees in near proximity to the workplace" and that the plant "did not ensure persons were trained to render first aid" for injured workers.

GD Copper, the American branch of China-based Golden Dragon Precise Copper Tube group, opened early 2014 and currently employs about 390 people in Pine Hill. OSHA has previously cited GD Copper for violations. GD Copper had 15 business dates from the citation to comply or contest the findings.

Source: *Montgomery Advertiser* and AL.com

Tyson Faces More Than $250,000 Fines For Texas Plant Hazards

Federal officials have proposed almost $264,000 in fines against a Tyson Foods chicken processing facility in Texas after an employee's finger was amputated on the job. The Occupational Health and Safety Administration (OSHA) says Tyson, the U.S.'s largest meat and poultry processing company, also exposed workers to high levels of carbon dioxide and peracetic acid without providing personal protective equipment.

OSHA said the worker suffered an amputation when his finger became stuck in an unguarded conveyor belt as he worked in the plant's deboning area and tried to clear chicken parts that were jammed in the belt. Inspectors at Tyson's Center, Texas, plant identified two repeated violations and 15 serious violations. According to OSHA, one repeat offense was not separating compressed gas cylinders of oxygen and

acetylene while in storage. Inspectors had already cited Tyson in 2013 for similar problems at its Albertville plant.

Violations included failing to ensure proper safety guards on moving machine parts, allowing carbon dioxide levels above safety limits and not training employees on the dangers of peracetic acid. The disinfectant can cause burns and respiratory illness if used improperly. In addition, inspectors found slip and fall hazards due to lack of proper drainage, and fire hazards. Dr. David Michaels, Assistant Secretary of Labor of OSHA, said the company must do more to prevent injuries. He added: "As one of the nation's largest food suppliers, it should set an example for workplace safety rather than drawing multiple citations from OSHA for ongoing safety failures."

Source: William Thornton at AL.com

XIV. TRANSPORTATION

Fatigue Related Wrongful Death Lawsuit Involving Sleep Apnea Against Nationwide Trucking Company Is Settled

Our firm, working with Belt & Bruner, a Birmingham firm, has settled a very important case against a national trucking company. On Feb. 9, 2014, Desmond Rachard Woods was driving his 1989 Ford Crown Victoria northbound on Interstate 65 in Autauga County, Ala., when the vehicle experienced mechanical problems and shut off. The vehicle stalled in the right-hand lane of Interstate 65. Woods and two other passengers got out of the vehicle to check under the hood. Kimberly Livingston and Marquita Speer, two sisters, were back-seat passengers in the Woods' car and remained inside while the others were looking to see why the car had stalled.

While Woods was checking under the hood, a truck driver for a nationwide trucking company drove his 18-wheeler into the back of the Woods's vehicle. Both vehicles caught on fire and the two women in the Woods' vehicle were burned alive. An eyewitness to the crash said that the truck driver had been swerving in the highway for miles leading up to the impact. The truck driver testified in deposition that he never saw the disabled vehicle in front of him.

The families of the women were represented by Chris Glover, a lawyer in our firm's Personal Injury/Products Liability Section, and Robert Bruner with the Birmingham firm of Belt & Bruner. Negligence and wantonness claims were brought against the truck driver and the trucking company. In addition, negligent hiring, training and supervision claims were brought against the trucking company. It was revealed through our investigation that the truck driver suffered from sleep apnea, and that he had lied about his problem to his employer. The truck driver was also taking medication to combat daytime sleepiness and shift work disorder, which he also failed to disclose to his employer.

The truck driver testified in his deposition that he deliberately withheld this information for fear he would not get a commercial driving job. However, he was truthful about his diabetes diagnosis. The driver was still allowed to drive by the company despite its own internal policy not to hire drivers with a glucose of more than 200 mg/dl. Commercial carriers have the responsibility to make sure their drivers are medically qualified. This trucking company had in its possession the driver's Department of Transportation (DOT) long form indicating he was diabetic. Therefore, he was not medically qualified to drive. The trucking company had no system in place to monitor and enforce its own safety policy regulations and therefore exposed the public to danger and risk of serious harm.

Further, the company lacked any fatigue management program or program to monitor its drivers' medical exams and medical conditions. Particularly alarming is that this large trucking company stuck its corporate head in the sand and did nothing to determine if its at risk drivers suffered from sleep apnea. Our lawyers know from litigation experience that sleep apnea is a very big problem in the trucking industry, resulting in numerous injuries and deaths.

Our two firms were honored to represent the families of Kimberly and Marquita, and were able to achieve a very good settlement for the families. Chris Glover and Bob Bruner did a very good job in this case. If you need more information on this case, contact Chris Glover at 800-898-2034 or by email at Chris.Glover@beasleyallen.com.

Lax Hot Air Balloon Regulations Could Expose Passengers To Serious Injury And Death

A number of deadly hot air balloon crashes have occurred in the U.S., but none of the crashes had called attention to hot air balloon safety regulations—or the lack of them—until the July 30 crash that killed 16 people on a sunrise balloon cruise in central Texas. This crash received tremendous media attention and brought attention to the need for better regulation.

The Heart of Texas balloon operated by the pilot Alfred Nichols ascended from a field in Lockhart around 5:45 a.m. Two hours later, the balloon and its basket lay smoldering on the ground underneath some high-voltage power lines. At press time, investigators didn't know how or why the balloon drifted into the lines. Patches of fog were seen in the area that Saturday morning, but the ground crew said that the weather was clear during takeoff.

Alfred Nichols continued to pilot hot air balloons for years despite having been convicted of drunk driving at least four times. He also had a drug-related conviction and two prison sentences. Nichols was also a recovering alcoholic. Any one of those problems would be enough to get a professional airplane or helicopter pilot grounded, but hot air balloon operators aren't held the same standards, or anything close to them.

The National Transportation Safety Board (NTSB), which investigates transportation accidents and makes recommendations to federal regulators, has repeatedly called on the Federal Aviation Administration (FAA) to take measures to improve hot air balloon safety. Thus far there have been no response to the agency's recommendations.

Former NTSB Chairwoman Deborah Hersman told CNN that she formally urged the FAA to address "operation deficiencies" within the hot air balloon industry after a series of accidents in 2007, 2008 and 2013. She also pressed the agency for tighter restrictions and oversight. Ms. Hersman told CNN:

The FAA has not responded in an affirmative way. The NTSB (has) classified that recommendation 'open-unacceptable,' which means

they really haven't done what the NTSB asked.

The FAA's decision to stay out of the hot air balloon industry has created a "disparity" in the requirements for balloon operators compared to other commercial pilots, according to NTSB member Robert Sumwalt. For instance, pilots applying for an FAA ballooning certificate do not have to disclose any drunken driving convictions or drug offenses. Licensed balloon operators are not required to report any new alcohol or drug convictions to the FAA the same way helicopter and airplane pilots must.

It should be noted that balloon pilots do not have to get regular medical exams with FAA-certified physicians, whereas airplane and helicopter pilots must undergo physicals every six months. This loophole allows for the possibility of endangering hot air balloon passengers in the event their pilot suffers a debilitating medical emergency during flight. It's quite evident that this industry—including involved pilots—needs to be properly regulated.

Sources: Associated Press, *USA Today* and *CNN*

XV. ENVIRONMENTAL CONCERNS

Discovery May Help Ensure Accuracy Of Mesothelioma Diagnoses

Mesothelioma is a rare and aggressive form of cancer that develops in the mesothelial tissue lining the lungs, abdomen, or heart. Mesothelioma is caused by exposure to asbestos, and though long-term exposure leads to a greater risk of developing the disease, short-term and one-time exposures to asbestos are also known to cause this cancer. Asbestos use in the United States has dropped dramatically in recent decades, and yet a steady number of people continue to be diagnosed with mesothelioma each year due to the fact that it can take anywhere from 20 to 50 years after asbestos exposure for symptoms to appear. Approximately 3,000 people are diagnosed with mesothelioma each year in the United States, with the disease occurring more often in men than in women.

Doctors have traditionally used a few basic methods to test for mesothelioma. Most patients initially undergo a basic chest x-ray to check for abnormalities, with more detailed imaging scans (such as a PET, CT, or MRI scan) being recommended if any growth is detected. If cancer is suspected, the doctor will usually take a tissue sample, called a biopsy, to definitely confirm the presence of mesothelioma cells. Blood tests have been available as well, but the tests could not confirm the presence of mesothelioma to the same degree of accuracy as imaging scans and biopsies. Due to the limitations of these tests, it has been estimated that up to 10 percent of mesothelioma cases are being misdiagnosed in the United States each year.

However, researchers at the University of Hawaii Cancer Center have recently identified another tool for diagnosing pleural mesothelioma. Dr. Michele Carbone and his research team have discovered that a tumor-suppressing protein called BAP1 can help oncologists accurately differentiate mesothelioma from other lung cancers, insofar as people lacking the BAP1 protein are more likely to develop mesothelioma than the general population. Specifically, the study found that all 45 non-small lung cancer samples tested positive for normal BAP1 expression, whereas only half of the 35 pleural mesothelioma samples tested positive for BAP1.

Based on these results, researchers believe that the diagnostic accuracy of mesothelioma tests would be better if BAP1 were included in the recommended panels. Given that the inability to diagnose mesothelioma in the earliest stages is a major reason why the life expectancy of a mesothelioma patient is so short (6-18 months), better early detection accuracy could greatly expand a patient's treatment options.

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

Source: https://www.asbestos.com/news/2016/08/04/bap1-protein-accurate-mesothelioma-diagnosis/

Chevron And DOJ Reach $143 Million Settlement For Mine Cleanup

The U.S. Department of Justice (DOJ) and the State of New Mexico have reached a proposed $143 million settlement with Chevron Mining Inc. This involves the next phase of cleanup of the Chevron Questa Mine Superfund site. The proposed consent decree, submitted last month to a New Mexico federal court, requires Chevron to perform a pilot project cleaning up about 275 acres of mine waste, operate a water treatment plant and install groundwater extraction systems. Chevron will also have to pay more than $5.2 million to reimburse the Environmental Protection Agency (EPA) for overseeing cleanup work at the site, according to a DOJ press release. The mine was operated intermittently from 1919 through 2014, when it was permanently closed.

Chevron and the DOJ previously reached a consent decree in September 2015, which also involved state agencies, resolving claims for natural resources at the site. The DOJ reports that Chevron has already paid more than $4.2 million to restore and replace natural resources at the site that had been damaged by its mining activities.

U.S. Attorney Damon P. Martinez of the District of New Mexico said in a news release that the settlement provides for crucial cleanup work and protective measures to prevent further contamination, as well as extensive monitoring for compliance with the cleanup work. He said in the release:

> *This settlement builds on the consent decree entered into in September of last year and represents another affirmative step towards remedying the serious environmental damages suffered by this beautiful area of New Mexico as a result of decades of extensive mining activities.*

The cleanup is part of the federal Comprehensive Environmental Response, Compensation and Liability Act, otherwise known as the EPA's Superfund program. The proposed consent decree, which has a 30-day public comment period and is subject to court approval, has been attended to under previous agreements with EPA, including the cleanup of Eagle Rock

Lake and the removal of numerous tailing, or mine waste, spills.

When the mine was first closed, about 328 million tons of acid-generating waste rock were excavated from the site, according to the DOJ. This latest cleanup agreement will focus on the 275 acres of the tailings facility and water facilities that keep contaminated water from reaching the Red River, as well as operating and maintaining a water treatment plant. The consent decree provides for the cleanup work that Chevron must undertake, including monthly reporting requirements, emergency response guidelines and dispute resolutions. The proposed settlement also requires monitoring of the site to see how effective the cleanup remedies are in the long-term. Per the terms of the proposal, Chevron does not admit any liability or acknowledge that there are any threats to public health or the environment.

The $5.2 million Chevron will be required to pay will be deposited into the Chevron Questa Mine Superfund Site Special Account in order to be used for future cleanup at the site or be transferred elsewhere by the EPA, according to the proposed consent decree. The proposed settlement is the largest of its kind for cleanup work in EPA Region 6, according to the DOJ's press release on the matter.

Source: Law360.com

Amendments To The Toxic Substance Control Act

The Toxic Substance Control Act (TSCA) is a little known Federal law that has been on the books since 1976. However, due to recent amendments, this Act could have a huge impact on consumer safety. The purpose of the TSCA is to prevent the introduction of harmful substances into the United States by subjecting all new chemicals to a screening process. If a new chemical is determined to be unduly harmful to consumers, it can't be manufactured or used in products in the United States. However, due to deficiencies in the Act, the Environmental Protection Agency (EPA), which oversees its implementation, has been unable to effectively enforce the Act's provisions.

The TSCA was first signed into law in 1976. Since that time, the numerous attempts to strengthen and modernize the Act have had virtually no success. Problems with the Act prior to the recent changes include grandfathering in 62,000 pre-existing chemicals, a lack of funding, and ineffective tools to actually implement the screening process for new chemicals.

On June 22, 2016, President Obama signed into law numerous amendments to strengthen and modernize the TSCA. The EPA finally has power and the duty to effectively regulate the introduction of new chemicals into this country. Under the revised Act, the EPA must make a determination on the safety risk of those chemicals that were previously exempted from the law. Since the vast majority of substances used in everyday life were already in existence in 1976, this new authority will go a long way toward protecting consumers from dangerous substances. While the review of many thousands of pre-existing chemicals will take some time, the EPA is working on a risk-based approach to prioritize the review of chemicals most likely to pose a risk to consumers.

For new chemicals, the EPA now has the authority to delay the introduction of those chemicals and require the manufacturer to produce additional information. The previous version of the Act only allowed a 90-day ban before the chemical could legally be introduced, and the legal standard for enforcing a ban was one the EPA had a difficult time overcoming. If the EPA had not reached a determination prior to the expiration of the ban, the chemical could be introduced into the marketplace. Given the amount of testing necessary to determine if a new chemical is safe, this was not effective. Under the Act, new chemicals are now banned until the EPA reaches a determination. The EPA must reach a determination about the safety of new chemicals, and can require the manufacturer to perform additional testing and, importantly, to fund the EPA's review.

The implementation of the revised Act could be the subject of litigation. The Act provides the EPA with both rulemaking and enforcement authority. Because a Federal Agency is tasked with writing the underlying standards and implementation procedures, this process could lead to challenges in court about the appropriateness of the EPA's rulemaking and conclusions reached by the EPA.

The revised Act also may require manufacturers to provide what they contend would be confidential business information in its disclosures to the EPA. The new Act requires that its safety assessments for chemicals be a matter of public record, with the results to be published on the Web. While this is a good thing, big companies could file litigation over the breadth of information provided in the EPA's published results.

Overall, I think the amendments to the Act is an improvement for consumers.

Sources: Law360.com and EPA.gov

XVI. HEALTH ISSUE CONCERNS

Workers May Be On A Collision Course For Severe Lung Disease

Severe lung disease in the workplace relates to a number of dreadful and debilitating lung diseases that arise due to chemical, vapor, dust, metal, mold or other hazardous substance exposure. Exposure can damage or destroy the airways (bronchi and bronchioles, which lead to COPD, Emphysema, Asthma or Bronchiolitis Obliterans), the pleura (asbestosis, mesothelioma), or the alveoli and tissue around the alveoli air sacs (black lung, silicosis, beryllium lung disease, as well as many other hypersensitivity pneumonitis and pneumoconiosis lung diseases). These diseases manifest in a number of ways, including rapid failure (acute respiratory distress syndrome, or ARDS), difficulty inhaling as a result of granulomas or fibrosis, difficulty exhaling air due to airway obstruction, or cancer.

Predictably, some employers place workers in harm's way more frequently than others, and as a result, those workers are more likely to develop severe lung disease if they work in certain professions. Examples include:

- **Railroad Industry:** As we have written previously, railroad workers are exposed to numerous dusts, chemicals and exhaust. Asbestos is a major threat for workers in this industry. As a result, we see a number of job-related severe lung diseases, including COPD / emphysema,

various lung cancers, bronchiolitis obliterans, lung diseases that cause pulmonary fibrosis, asbestosis, and mesothelioma.

- **Foundry Workers:** Foundry workers are exposed to a number of hazardous vapors, dusts, chemicals, the smelting process, and asbestos, all of which can cause severe lung disease.
- **Metal Work:** Workers that grind, solder, recycle, paint, weld or perform other work with metals are at risk to develop severe lung disease. The interstitial lung diseases, which oftentimes end in pulmonary fibrosis, are of particular concern.
- **Miners:** Miners face a number of inhalation hazards. For one, coal dust can be lethal, as over time, inhalation can cause COPD, lung cancer, or pulmonary fibrosis. In addition, diesel exhaust is a known carcinogen—particularly in confined areas, and can also cause a variety of severe lung diseases in a confined area.
- **Construction:** Due to potential asbestos, dust, paint and abrasive exposure, construction workers are prime targets for severe lung disease.
- **Farmers:** Farmers can be exposed to a significant amount of mold-based agricultural products (hay, corn, mushrooms, soybeans, etc.) capable of causing hypersensitivity pneumonitis. In addition, many farmers use a number of different crop chemicals, paints, lubricants and solvents that could be hazardous to the lungs.
- **Food and Beverage Processing and Manufacturing:** Flavoring additives are known to cause bronchiolitis obliterans, a devastating airways disease. Cases of bronchiolitis obliterans have occurred in various different food processing facilities, including most recently where large volumes of coffee beans were roasted or ground.
- **Boat Builders and Fiberglass / Styrene (or styrene resin) Workers:** Workers exposed to blown fiberglass, styrene or styrene resin have been documented to develop various airways diseases, including bronchiolitis obliterans.
- **Aerospace Work, Nuclear Weapons, Missile Parts, Guidance Systems and Optical Systems:** These workers can be exposed to beryllium, which causes beryllium lung disease (oftentimes mistaken for sarcoidosis).
- **Automotive Work:** Automotive work can expose a worker to a number of hazardous materials, including asbestos, metal fibers and beryllium.
- **Ceramic Manufacturing:** Ceramics manufacturing, particularly for semiconductor chips and rocket covers, can expose workers to beryllium.
- **Dental Labs:** Dental lab technicians could be exposed to beryllium through working with alloys in crowns, bridges and dental plates.
- **Electronics Work:** Electronics work requires the use of many specialty metals, including beryllium. The primary products of concern are x-ray machines, computer products, telecommunication parts, and automotive parts.
- **Coal Gasification and Coke Production:** Due to exposure to coal tar, coal-tar fumes, arsenic, benzene and PAHs, these jobs can be hazardous to the lungs.
- **Jewelers:** In the past, jewelers worked with nickel, which is an extremely toxic substance to the lungs. Great care should be taken with handling, grinding or working with nickel.
- **Work with Ammonia or Chlorine:** Ammonia and chlorine are two leading causes of chemical acute lung injury. These injuries can be irreversible, can happen quickly and result in sudden death or significant lung damage.
- **Shipyard Work:** Due to exposure to numerous metal dusts, as well as asbestos, shipyard work can lead to numerous severe lung diseases if the lungs are not protected.

If you need more information on any of the above, contact Parker Miller, Chris Boutwell or John Tomlinson at 800-898-2034 or by email Parker.Miller@beasleyallen.com, Chris.Boutwell@beasleyallen.com or John.Tomlinson@beasleyallen.com.

Defective Safety Gear Can Lead To Severe Lung Diseases

Workers who wear respirators and dust masks may assume they are safe from hazardous substances in the workplace. However, a series of recent verdicts reveals their assumption may not always be true. In March 2016, a Kentucky miner won a $8 million verdict after he contracted black lung due to a defective mask. On June 2, 2016, a worker won a $32.8 million verdict due to his respirator using a flawed two-point strap system.

The most troubling feature of a defective mask case is the fact that the mask effectively encourages the worker to work unprotected in a hazardous environment for an extended period of time. The two-point strap system is a particularly troubling design because it increases the risk that the protective hold will fail. Even when fitted properly and unknown to the user of the device, some masks can fail after limited use due to their design.

Lawyers in our firm's Toxic Torts Section are investigating cases where workers developed a severe lung disease from an occupational exposure even though the workers in each case wore a protective mask. If you are going to wear a mask, make sure you have been properly fitted and that the mask is suitable to protect you from known hazards. If you have any questions about these cases, contact Parker Miller at 800-898-2034 or Parker.Miller@beasleyallen.com.

Acute Respiratory Distress Syndrome

Acute respiratory distress syndrome, also known as ARDS, is a rapidly developing, life-threatening condition where the lungs are damaged and can no longer function. Onset of the syndrome can occur suddenly or can develop over a period of 24 hours. ARDS occurs when gas exchange deep in the lungs has been hampered, leading to dangerously low blood oxygen levels or dangerously high carbon dioxide levels in the blood.

Exposure to dangerous substances can cause ARDS by damaging or inflaming lung tissue, thereby setting off a domino effect in the lungs. For instance, chlorine, ammonia, sulfur dioxide, hydrogen chloride, nitrogen dioxide, phosgene and ozone exposure are known to cause immediate lung injury,

which leads to ARDS. Less water soluble gases, such as nitrogen dioxide, phosgene and ozone are particularly troubling because they do not show early warning signs (irritation) that would alert a victim to leave the area. In other scenarios, particularly after exposure to ammonia, nitrogen oxide, sulfur dioxide and mercury, a victim may develop bronchiolitis obliterans within 10 to 14 days after exposure, but then progress to ARDS thereafter.

Lawyers in our firm are investigating cases where a person was exposed to chemical fumes and later developed bronchiolitis obliterans, or ARDS, as a result. If you have any questions about ARDS, contact Parker Miller at Parker.Miller@beasleyallen.com or by phone at 800-898-2034.

TVA Coal Ash Spill Cleanup Workers Suffering From Severe Lung Disease

In December 2008, TVA's Kingston Power Plant coal ash dam collapsed, setting off one of the worst industrial accidents in U.S. history. The event caused toxic coal ash to inundate nearly 400 acres, destroying homes and saturating rivers with the thick, gray substance. The scale of the disaster required the work of hundreds of cleanup workers, and for months, crews worked nonstop in an attempt to clean up the wasteland.

In the beginning, the coal ash was thick and wet. Over time, the coal ash dried, forming a gray dust that overtook work sites in the affected areas. Workers were seen coated with dust, and a recent article detailed how the insides of cabbed cleanup machines were completely overtaken by gray matter. The dust infiltrated just about everything, including floorboards, dashboards, windows, the lunch trailer, portable toilets and workers' cars. Many described it as having a chalky taste with a chemical smell, and workers described the ash dust at night, saying that the particles hung in the air and sparkled in moonlight.

Workers have informed that TVA, on numerous occasions, told them that the ash was safe. Initially after the spill, TVA issued multiple statements on the potential health hazards posed by the spill, but afterward, TVA's inspector general criticized the release statements as containing "inaccurate and inconsistent information." TVA public-relations employees, for example, were noted as taking a red pen to one "talking points" memo, deleting references to the ash's "risk to public health and risk to the environment" and inserting descriptions of the coal ash as "mostly … inert."

Gregory Button, a retired anthropology professor at the University of Tennessee who studied environmental disasters, says that "TVA was downplaying and denying … the disaster." He interviewed dozens of residents, workers and officials about the spill, and remembers utility employees and contractors insisting the ash was harmless. Governmental testing further contradicted TVA's information campaign. Arsenic was detected 149 times above safety standards after the spill. A team of researchers from Duke found high levels of arsenic and radium in the ash itself. These researchers warned that airborne dust could pose "a severe health impact on local communities and workers."

Predictably, years after the spill, cleanup workers are starting to feel the health effects. The microscopic particles, which contain 17 different metals, arsenic up to 300 times higher than safety standards, and sharp edges that increase their toxicity to the lungs, are giving way to numerous cases of COPD and other chronic lung diseases (including lung cancer). It is estimated that 200 of the 900 workers were provided protective gear. Now, lawsuits are starting to mount against TVA for these cases as lung diseases begin to manifest.

Beasley Allen lawyers served in a leadership role in the TVA coal ash spill litigation that led to a $27.8 million settlement. If you have any questions about this subject, contact Rhon Jones, or Parker Miller at Rhon.Jones@beasleyallen.como or Parker.Miller@beasleyallen.com, or by phone at 800.898.2034.

Exposure To Vinyl Chloride Has Been Linked To Liver Cancer

Vinyl chloride, a manmade substance that does not occur naturally in the environment, has been linked to liver cancer. The substance has been used for decades to make a variety common consumer products that we use every day, including pipes, plastic bottles, wire coatings, and plastic packaging materials. There are other uses of vinyl chloride, including furniture and automobile upholstery, wall coverings, housewares, and automobile parts.

At room temperature, vinyl chloride is a colorless, sweet smelling gas that can be dissolved into the air we breathe or the water we drink. Despite the fact that we probably come into contact with products made using vinyl chloride daily, dangerous exposures to the gas are most likely to happen in or around factories where it is used or near landfills where products containing vinyl chloride are disposed.

The most likely way to be exposed to vinyl chloride is by breathing it. However, people can also be exposed by eating or drinking contaminated food or water. Similarly, work exposure occurs primarily from breathing air that contains vinyl chloride, but workers are also exposed when vinyl chloride contacts their skin or eyes.

As early as 1960, studies have linked vinyl chloride to cancer. In recent years the U.S. Department of Health and Human Services, U.S. Environmental Protection Agency, and the Agency for Toxic Substances and Disease Registry have officially classified vinyl chloride as a substance known to cause cancer in humans. Studies of workers who breathed vinyl chloride over an extended period of time revealed an increased risk of liver cancer (angiosarcoma), as well as brain and lung cancer. Studies have also shown that people exposed to vinyl chloride may not develop cancer for as many as 20 years after their exposure.

Lawyers at Beasley Allen are currently investigating potential claims on behalf of individuals suffering from vinyl chloride induced angiosarcoma of the liver. They were either exposed to vinyl chloride in the workplace or by living near a factory where it was used in the manufacturing process. If you would like more information or have questions; you can contact Chris Boutwell (Chris.Boutwell@beasleyallen.com) or Grant Cofer (Grant.Cofer@beasleyallen.com), lawyers in our Toxic Torts Section, at 800-898-2034.

Source: The Daily Beast

XVII. UPDATE ON NURSING HOME LITIGATION

$30 Million Judgment Against Tennessee Nursing Home

A Shelby County, Tenn., jury has awarded a $30 million judgment against a Memphis nursing home where poor care led to a resident's death. The verdict includes $28 million in punitive damages against Allenbrooke Nursing and Rehabilitation Center LLC, as well as its two owners in New York and related companies. The case was filed in 2010 by the family of Mrs. Martha Jane Pierce, a woman in her early 80s who was a resident of the Allenbrooke nursing home in 2008 and 2009.

Mrs. Pierce was living in a shared room with her husband, William Pierce, when she developed pressure sores on her right foot that went to the bone. The sores became infected with fecal bugs and required her leg to be amputated in October of 2009. She died two months later. The jury returned its verdict finding Allenbrooke liable for negligence, violations of the Tennessee Adult Protection Act including fraudulent records of her care and medical malpractice.

The jury awarded $1.9 million for negligence and $129,000 for violations of the protection act. The breakdown of the $28 million punitive damages award is as follows: $2 million each for four companies and $10 million each for the owners, Donald Denz and Norbert Bennett. Cameron Jehl, a Memphis lawyer, represented the family along with another Jehl Law Group lawyer, Carey L. Acerra.

Source: *The Commercial Appeal*

Alabama Budget Woes Affecting Nursing Home Policing

It is well-documented that Alabama's budget deficits are affecting an important aspect of health care for Alabama citizens. The Medicaid funding crises has caused tremendous problems for not only Medicaid recipients, but there are also other problems. Medicaid needs an additional $100 million to meet its current needs.

More than one million Alabamians benefit from Medicaid. Of that number, 56 percent of recipients are children, and 28 percent are the elderly and disabled. While most individuals older than 65 who are residents in a nursing home received Medicare (federal) benefits, a large portion of nursing home residents do not.

The financial crisis for Medicaid has had a trickledown effect on other agencies involved in health care, such as the Alabama Department of Public Health, resulting in fewer nursing home investigators being hired or retained to investigate complaints brought by family members against nursing homes.

According to State regulations, nursing homes are to be inspected at least bi-annually by a Department of Public Health investigator. For 2016, the State's budget allows for a total of nearly $713 million for the State Health Department, with only $22 million coming from the State coffers, compared to the 2016 Medicaid budget of $937 million with most of that amount ($705 million) coming from the General Fund budget.

So what does all of this mean for Alabama nursing home residents? With fewer budget dollars, State government is no longer able to provide for investigations of long-term care facilities as they once did. Our firm has been receiving feedback from individuals who call our office and ask for assistance with nursing homes. Some of the people who call our office seeking help are telling us they asked the Health Department for help, but officials are telling them that there is nothing that can be done. When the State lacks the budget to investigate complaints of neglect and abuse, our senior citizens, who are already at a high risk of harm, are left largely defenseless.

Our hope is that the State finds the budget dollars to hire enough investigators to investigate poorly run or managed nursing homes and correct the health risks to our parents, grandparents and loved ones who are in nursing homes. Ben Locklar heads up our firm's Nursing Home Litigation team. If you have any questions or have a potential nursing home claim, contact Ben at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Source: http://budget.alabama.gov/pages/appropgf.aspx; AL.com and ABC3340.com

XVIII. AN UPDATE ON CLASS ACTION LITIGATION

AIG And CVS Will Pay $310 Million To Settle Investors' Fraud Suit

An Alabama circuit judge has approved a $310 million settlement between American International Group Inc., (AIG), CVS Health Corp. and a class of investors who claimed Caremark Rx and the insurer defrauded investors when settling securities-fraud lawsuits in 1998. The class of 20,000 investors had claimed Caremark, then known as MedPartners Inc., and AIG told investors they could only afford to pay $56 million to settle several securities fraud lawsuits, when AIG was actually providing unlimited coverage. Jefferson County Circuit Judge Pat Ballard granted final approval to the settlement last month. AIG will pay $230 million and CVS $80 million in the settlement.

MedPartners changed its name to Caremark Rx in 2000, and then in 2007 merged with CVS. In 1998, MedPartners was hit with more than 20 securities fraud suits alleging the company lied about its financial condition and prospects, class counsel said. Those suits were then combined, and MedPartners paid out $56 million to settle the case. AIG had told investors they couldn't afford to pay any more as MedPartners was facing bankruptcy. The instant suit was filed in 2003.

MedPartners had been run by Richard Scrushy, who was hit with a $2.8 billion judgement in 2009 for his alleged role in another fraud at HealthSouth. After he left HealthSouth, the company said Scrushy had hidden around $600 million in offshore bank accounts and wouldn't help cover the judgment. Although Scrushy has denied any wrongdoing, a judge found him liable in a derivative shareholder suit after concluding that Scrushy participated in the accounting fraud and willfully breached his fiduciary duties as CEO of HealthSouth.

The investors are represented by Scott Powell (lead class counsel) , John Haley, Ralph Cook, Bruce McKee, Brian Vines and Tempe Smith who are with Hare, Wynn, Newell & Newton, a Birmingham firm, along with John Somerville of

Somerville LLC and Tim Francis of Francis Law LLC. These lawyers did an outstanding job in this case, working for more than 12 years to bring it to a tremendous settlement.

Source: *Birmingham News*

Pfizer To Pay $486 Million To Settle Celebrex And Bextra Securities MDL

Pfizer Inc. will pay $486 million to settle long-running multidistrict litigation (MDL) accusing the drug company of misleading investors about the risks of its pain treatments Celebrex and Bextra. The lawsuit, filed in 2004, accused Pfizer and its top executives of repeatedly misleading investors regarding the safety of Celebrex and Bextra. The settlement is subject to the negotiation of a final settlement agreement and court approval.

The underlying suit alleged that Pfizer and top executives, including former CEO Henry McKinnell, knew that drug safety studies conducted between 1998 and 2004 showed Celebrex and Bextra posed serious cardiovascular risks, but that they concealed the information from the public.

A consolidated class action complaint was filed in February 2006. U.S. District Judge Laura Taylor Swain in July 2012 certified a class led by the Teachers Retirement System of Louisiana. But in May 2014, Judge Swain excluded University of Chicago law professor Daniel Fischel from testifying on behalf of the shareholders. She then dismissed the case in July. Pfizer had argued that the investors could no longer sustain key elements of their claim.

The Second Circuit Court of Appeals found that the district court judge had abused her discretion and had incorrectly excluded Professor Fischel. The Second Circuit found Judge Swain was within reason to find that the expert's adjustments to the price study were unreliable, but said that she should have allowed him to present his findings on loss causation and damages. The appeals court said Professor Fischel was properly barred from testifying about his adjustment, but could testify in the two designated cases.

The $486 million settlement is likely among the last major payments Pfizer will have to make over its Celebrex and Bextra problems. The company previously paid $894 million to settle product liability and consumer fraud suits brought by Celebrex and Bextra users and state attorneys general. Pfizer also paid $1 billion to settle civil cases alleging it fraudulently promoted and marketed Bextra. The company also pay a $1.3 billion criminal fine—at the time the largest criminal fine ever imposed in the U.S.—for the same fraudulent misbranding.

The investors are represented by Gregory P. Joseph, Douglas J. Pepe and Sandra M. Lipsman of Joseph Hage Aaronson LLC, Jay W. Eisenhofer, Richard S. Schiffrin, James J. Sabella, Charles T. Caliendo, Brenda F. Szydlo, Geoffrey C. Jarvis and Mary S. Thomas of Grant & Eisenhofer PA, Jonathan S. Massey of Massey & Gail LLP and David Kessler, Andrew L. Zivitz, Matthew L. Mustokoff and Michelle M. Newcomer of Kessler Topaz Meltzer & Check LLP. The case is *In Re: Pfizer Securities Litigation* in the U.S. District Court for the Southern District of New York.

Source: Law360.com

$300 Million State Street Settlement Gets Early Approval

A federal judge in Boston has given preliminary approval to a $300 million settlement in lawsuits brought by a class of investors who said they were victims of fraudulent foreign exchange practices by State Street Corp. U.S. District Senior Judge Mark L. Wolf ruled from the bench last month that the settlement—which, if given final approval, will also allow the bank to settle for $155 million with the U.S. Department of Justice (DOJ) and $75 million with the U.S. Securities and Exchange Commission (SEC)—could move forward toward notifying a class of about 1,300 institutional investors.

The private suit brought by the investors alleges that from 1998 to 2009, State Street cheated its customers out of millions of dollars a year by manipulating its exchange rates on foreign trades that it carried out on investors' behalf. State Street allegedly told its clients that it would get the best exchange rates possible when buying for them. In fact, State Street charged some of the highest rates in the market. It was alleged further that State Street sold the currency at a much more favorable rate and kept the difference. Judge Wolf said that he found that the proposed settlement "appears to be sufficiently fair, reasonable and adequate."

Judge Wolf asked the opposing sides to provide more clarity on a few issues—first of all, more input from State Street about the settlement. Lawyers for the proposed class said that the $300 million settlement is only 20 percent of what they believed they could receive if they won at trial. The judge also asked the two sides for more clarity on how money was going to be allocated among the different types of investors.

Plans that operated under the Employee Retirement Income Security Act (ERISA), like pension funds, will receive more money and, depending on the percentage of attorneys' fees that winds up being awarded, may have to pay less in fees. State Street and the investors told Judge Wolf that is due to the way that ERISA statutes and obligations are structured.

The settlement is based on trading volume, except that ERISA plans will receive 20 percent of the total settlement, or proportionally more than they otherwise would have. In addition, there is a cap on the amount that would have to come out of the ERISA plans' allocation. Judge Wolf instructed the two sides to be more clear about it in further documents.

Separately, if the private class action gets final approval, State Street will pay the DOJ a $155 million penalty, and the SEC a $75 million penalty. Of the $300 million, a certain amount has been set aside for mutual fund investors to settle the SEC allegations. A potential settlement with the U.S. Department of Labor would require $60 million to go to ERISA plans. If enough people object to the settlement, State Street could opt out of it. The bank also has the option of backing out of its settlements with the government if the class action settlement doesn't get final approval.

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

Source: Law360.com

10th Circuit Court Of Appeals Decision Revives RICO Claims

The Tenth Circuit Court of Appeals has reversed a Colorado federal court's dismissal of class claims against Bank of America Corp. (BofA) and others involving the federal Home Affordable Modification Program (HAMP). The appeals court found that homeowners sufficiently proved a possible Racketeer Influenced and Corrupt Organization (RICO) Act enterprise. A three-judge panel disagreed with the lower court's finding that the homeowners did not sufficiently plead a case for their RICO claims against BofA and Urban Settlement Services or for their promissory estoppel claim against BofA. The homeowners had alleged that the two companies teamed up to fraudulently deny HAMP loan modifications to qualified homeowners and specifically that the bank had broken written promises to do so.

As a recipient of Troubled Asset Relief Program (TARP) funds from the U.S. Department of the Treasury, BofA was required to participate in HAMP and follow guidelines that it collect financial information from at-risk borrowers, evaluate their eligibility for HAMP modifications, allow them to show they can make lower monthly payments then permanently modify loans for qualified borrowers.

The four named Plaintiffs, each of which had a mortgage through BofA and applied for a HAMP modification, sued the companies in July 2013, saying they formed a RICO enterprise with the common goal of denying HAMP modifications to qualified homeowners. The companies furthered the scheme by saying they received no application documents when they did and by misleading borrowers about their applications' status, the court said. BofA argued that the alleged RICO enterprise was only its own employees and that the homeowners never said the bank conducted any affairs other than those of the bank itself, thus rendering it not a RICO enterprise.

The homeowners claimed that BofA and Urban, two separate entities, joined together and with others to form the alleged enterprise. Then this group conducted its own affairs—including handing out as few HAMP modifications as possible—rather than BofA acting alone as a bank. The Tenth Circuit found that the lower court mischaracterized Urban as an outside contractor with no official position in the RICO enterprise. Although Urban had no position in BofA, the bank alone was not the alleged enterprise. It was further found by the court that the homeowners adequately showed that BofA and Urban engaged in a pattern of racketeering, even though the lower court declined to decide this issue.

The homeowners had alleged that BofA and Urban committed several acts of mail and wire fraud while conducting the RICO enterprise's affairs by making false statements and promises to borrowers. The homeowners had alleged specifically that when Urban employees answered calls from customers, they identified themselves as working for BofA.

Finally, on the promissory estoppel claim, the appeals court said the homeowners alleged that BofA reneged on its promises to provide permanent HAMP modifications for eligible borrowers and that the homeowners relied on the bank's false statements.

The homeowners are represented by Kevin K. Green and Steve W. Berman of Hagens Berman Sobol Shapiro LLP. The case is *George et al. v. Urban Settlement Services et al.*, in the U.S. Court of Appeals for the Tenth Circuit.

Source: Law360.com

BP Reaches $67 Million Settlement In Solar Panel Suit

BP LLC and a proposed class of consumers who had claimed that the oil company produced defective solar panels have agreed to a settlement worth more than $67 million. The settlement class of solar panel owners and the oil company, which is no longer in the solar business, agreed that BP will either fully or partially replace and inspect all class members' panels, largely paid for with money held in a common fund established by BP and administered by an independent claims administrator.

The consumers' complaint, which was originally filed in California state court and removed to federal court in February 2014, alleges that defects in BP's solar panels caused the shoulder joint of the panels to overheat. The heat melted the junction box, burned the cables and the solar panel and shattered the panel's glass cover. The settlement class is made up of all individuals or entities in the U.S. that either purchased the panels to install themselves or bought properties where the panels were already in place.

Under the proposed settlement, BP will cover the full replacement of solar panels for class members with certain models that have higher failure rates. All other class members will get individual failed panels replaced, but will be eligible for full replacement if their system's failure rates jump past 20 percent. BP will also install for free a new inverter with advanced safety technology.

Owners of large, nonresidential systems can get a mediated commercial negotiation with BP, and will be free to opt out of the settlement if unsatisfied with any proposed compromises coming out of the mediation. The settlement, valued at more than $67 million, also includes nearly $12 million in attorneys' fees and $7,500 service payments to lead Plaintiffs Michael Allagas, Arthur Ray and Brett Mohrman, and $3,500 to Plaintiff Brian Dickson.

In their original complaint, the Plaintiffs said that because BP's subsidiary BP Solar International Inc. is now defunct, BP can neither replace nor repair the allegedly defective panels. The three named Plaintiffs say that they all reported solar panel failures to BP in 2013, after its solar arm had shut down. In response, the company offered to reimburse each of the Plaintiffs for a little more than a third of the total cost of removing and replacing the defective solar panels.

The Plaintiffs are represented by Robert J. Nelson, Nimish R. Desai and John T. Spragens of Lieff Cabraser Heimann & Bernstein LLP, and David M. Birka-White and Mindy M. Wong of the Birka-White Law Offices. The case is *Michael Allegas et al. v. BP Solar International Inc. et al.*, in the U.S. District Court for the Northern District of California.

Source: Law360.com

Cipro Buyers Seek Approval For $100 Million Pay-For-Delay Settlement

Sanofi-Aventis and Allergan PLC units have agreed to pay classes of consumers and third-party payors $100 million to settle pay-for-delay claims involving Bayer Corp. illegally paying generic-

drug manufacturers $400 million to delay launching lower-cost versions of its blockbuster antibiotic Cipro. If the settlement involving Sanofi's Hoechst Marion Roussel Inc., its former owner, The Rugby Group, and Allergan's Watson Labs, is granted preliminary approval, it would end nearly all claims in litigation that had been in court for more than 15 years.

Teva Pharmaceutical Industries Ltd-owned Barr Pharmaceuticals is the sole remaining Defendant. The all-cash settlement will be placed in an escrow account that the Plaintiffs recommended be administered by Citibank NA, which had been the administrator in a related settlement with Bayer. Each named consumer plaintiff would get up to $1,500 and each named third-party payor Plaintiff would receive up to $9,000.

The settling Defendants agreed to help the Plaintiffs as they pursue their claims against Barr, including making employees or representatives available and allowing some business records at trial. California consumers and insurance groups brought their lawsuit against the pharmaceutical companies in California Superior Court in San Diego County in 2002, challenging the settlement Bayer reached with Barr in 1997 that paid the generic-drug maker $398 million.

In 2009, the trial court granted the drugmakers summary judgment based on a 2006 Second Circuit ruling laying out the rule that courts should presume pharmaceutical patent settlements to be legal as long as they don't exceed the scope of the patent. That ruling was overturned in the U.S. Supreme Court's landmark 2013 ruling in *FTC v. Actavis.* In May 2015, the California Supreme Court decided that the U.S. Supreme Court's decision allowing Hatch-Waxman Act payments to be challenged under federal antitrust law also supported permitting similar lawsuits under state competition laws. The ruling overturned decisions by two lower courts regarding the long-running litigation and paved the way for Cipro purchasers to forge ahead with their claims against Watson, HMR and Rugby.

Bayer itself has settled for $74 million with the Plaintiffs shortly before Actavis. The California justices said lower courts should use the rule-of-reason test, which balances the harm an agreement would cause to competition against its benefits, to evaluate pharmaceutical patent settlements. The ruling further instructed courts to determine whether a settlement delayed generic market entry based on the chance the patent had of being upheld if the drugmakers had litigated a challenge to its conclusion.

The Plaintiffs are represented by Richard M. Heimann, Eric B. Fastiff, Dean M. Harvey, Lin Y. Chan, Yaman Salahi and Wilson M. Dunlavey of Lieff Cabraser Heimann & Bernstein LLP, Dan Drachler of Zwerling Schachter & Zwerling LLP and Joseph R. Saveri and Ryan J. McEwan of Joseph Saveri Law Firm Inc. Ralph B. Kalfayan of Krause Kalfayan Benink & Slavens, LLP is Plaintiffs' local liaison counsel.

Source: Law360.com

Uber's $100 Million Labor Settlement With Drivers Is Rejected

A California federal judge has rejected a proposed $100 million class action settlement with Uber drivers who allege they were shorted tips and work expenses. U.S. District Judge Edward M. Chen stated the settlement isn't fair, adequate and reasonable. He ruled that, while the drivers in the suit face litigation risks because of an arbitration provision that may be enforced by the Ninth Circuit, the settlement favors Uber Technologies Inc. in more ways than it should. Clearly, this is a major setback to Urber.

The settlement doesn't clarify whether drivers should be classified as employees or independent contractors. It also provides for the release of a claim under the state's Private Attorneys General Act for just $1 million, even though the Plaintiffs' lawyer had claimed earlier in the suit such a claim would be worth $1 billion. Judge Chen wrote in his order:

Although the litigation risks to the plaintiffs are substantial, absent the sweeping releases conferred by the settlement agreement, Uber faces significant risks and costs, regardless of the outcome of pending interlocutory appeals. The settlement as a whole as currently structured is not fair, adequate, and reasonable.

Uber announced the proposed $84 million settlement in April, seeking to end the two class actions alleging the ride-hailing company misclassified drivers as independent contractors and denied them proper tips. The proposed agreement sought to keep drivers listed as independent contractors while changing a few policies around how drivers are rated and deactivated from the service.

The settling classes of drivers are represented by Shannon Liss-Riordan and Adelaide Pagano of Lichten & Liss-Riordan PC and Matthew D. Carlson of Carlson Legal Services. The cases are O'Connor et al. v. Uber Technologies Inc. et al., and Hakan Yucesoy v. Uber Technologies Inc. et al., in the U.S. District Court for the Northern District of California.

Source: Law360.com

XIX. THE CONSUMER CORNER

Court Rejects Volkswagen's Attempt To Arbitrate The Hybrid Brake Defect Suit

A California judge has rejected Volkswagen's attempt to require a Jetta Hybrid owner's putative class action lawsuit to go to arbitration. Los Angeles Superior Court Judge Elihu M. Berle ruled that VW can't enforce an arbitration agreement the owner signed with the dealership that sold him his car. Judge Berle said he would not grant Volkswagen Group of America Inc.'s motion to compel individual arbitration of named Plaintiff Peter Bryan Burra's lawsuit, which claimed model year 2013 Jetta Hybrids have defective braking systems.

VW had argued that Burra agreed to an arbitration clause when he signed his sales contract with Los Angeles dealership Volkswagen of Van Nuys, and that the clause applies to "any claim or dispute" which "arises or relates to" his buying the Jetta—which includes his current product liability claims. Although VW was itself not a signatory to that purchase agreement, the automaker argued that the clause specifically stated that it applied to third parties who didn't sign the agreement, but whose claims or disputes were covered by the agreement. VW also argued that because Burra's own suit

relies on the contract by claiming the defective brakes violated what he was promised when he purchased the vehicle, Volkswagen can also rely on the contract.

Judge Berle correctly rejected VW's contentions and denied the automaker's motion for arbitration, saying the Plaintiff's claims are not "intertwined" with the contract, which specifically avows that it is not a warranty for defective vehicle problems, and that given how much influence VW has over its dealerships, it must bear the responsibility for the ambiguous contract. Judge Berle stated: "If the manufacturer desired to be explicitly encompassed by arbitration clause, it could have done that. The contact does not do that."

Burra filed suit in August 2015, contending that the 2013 Jetta Hybrid, like the Toyota Prius and other hybrid vehicles, contains a "regenerative braking system" that converts the kinetic energy generated by a slowing or stopping car into electricity to be used in the vehicle's hybrid motor system, improving fuel efficiency and helping the brakes to last longer. The Jetta Hybrid also contains a conventional braking system.

Burra alleged he bought the Jetta due to its reputation for safety, but found that the regenerative braking system performs "in an unpredictable manner" making it hard to impossible for drivers to accurately predict how much distance and time they'll need to safely come to a stop. Burra alleged that as a result of this unpredictability, he rear-ended other drivers twice, once in August 2013 and once in June 2015.

Burra is represented by Robert L. Starr of the Law Offices of Robert L. Starr APC and Stephen M. Harris of the Law Offices of Stephen M. Harris APC. The case is *Peter Bryan Burra v. Volkswagen of America Inc.* in the Superior Court of the State of California for the County of Los Angeles.

Source: Law360.com

Judge Slams "Legal Fiction" In Rejecting Uber Arbitration Bid

Uber Technologies Inc. will not be allowed to force a customer to arbitrate his proposed class action alleging the company and its CEO fixed ride prices. U.S. District Judge Jed Rakoff issued a very tough order, calling consumer consent to arbitration agreements online a "legal fiction." Judge Rakoff, a well-respected judge, denied Uber's bid to force rider Spencer Meyer's suit, accusing the company's CEO, Travis Kalanick, of colluding with drivers to hike prices, into arbitration. Judge Rankoff also took aim at the way courts view assent to arbitration agreements in general.

In the world of the internet, Judge Rakoff wrote, consumers are deemed to have waived their right to a jury trial and given up access to the courts altogether by clicking a button or sometimes just continuing to use a service if the company providing that service has given them some form of notice of its terms and conditions. Judge Rakoff said that consumers have no realistic power to negotiate arbitration terms and generally are not even aware of them. Judge Rakoff, quoting from the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, wrote in his order:

> *This legal fiction is sometimes justified, at least where mandatory arbitration is concerned, by reference to the liberal federal policy favoring arbitration. Application of this policy to the internet is said to inhere in the Federal Arbitration Act, as if the Congress that enacted that act in 1925 remotely contemplated the vicissitudes of the World Wide Web.*

Judge Rakoff analyzed a number of other online consumer arbitration cases, including ones in other districts to which his decision isn't bound, to arrive at his conclusion that the contract to which Meyer had allegedly agreed couldn't be enforced.

When Meyer signed up to use Uber, reaching the company's arbitration clause would have taken several large leaps of attention, Judge Rakoff noted in his order. To get to it, Meyer would have had to scroll past the button authorizing his registration for the service to click on a small hyperlink that would have directed him to a company webpage. From there, Judge Rakoff said Meyer would have had to click on a button guiding him to the terms, and then gotten all the way to Page 7 of those terms before seeing some bolded text about arbitration. In his order, Judge Rakoff wrote:

> *When contractual terms as significant as the relinquishment of one's right to a jury trial or even of the right to sue in court are accessible only via a small and distant hyperlink titled "Terms of Service & Privacy Policy," with text about agreement thereto presented even more obscurely, there is a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for 'a manifestation of mutual assent.*

Meyer filed the proposed class action in December against Kalanick. Uber later asked to be added as a co-Defendant, and Judge Rakoff granted that request. The suit alleges a scheme in which drivers were agreeing to rig prices for rides and in which Kalanick was working with each driver to fix prices. Meyers alleges that the fixed prices kill competition that would benefit riders. In March, Judge Rakoff found that Meyer had sufficiently alleged that the drivers were all agreeing to work in a market where they know they won't be undercut on price by other drivers, and that because Kalanick sometimes drives for the service, he is a part of the scheme.

In May, Uber requested arbitration in the suit, saying Meyer had initially accused Kalanick specifically of price-fixing to try to get around his waiver of a right to a jury trial. Uber also argued that Meyer and other app users agreed to terms and conditions that contain a "clear and conspicuous" arbitration provision. As a side note, the parties have also done battle over alleged shady tactics by a firm called Ergo, hired by Uber to investigate Meyer and his lawyer. Judge Rakoff earlier blasted the ride-hailing service and its investigator for relying on unlicensed investigators who lied to Meyer's friends to get personal information. Meyer will ask the court to allow him to add a few more Plaintiffs to the suit. This could possibly lead to a bid for class certification.

Meyer is represented by Matthew L. Cantor and David A. Scupp of Constantine Cannon LLP; Bryan L. Clobes and Ellen Meriwether of Cafferty Clobes Meriwether & Sprengel LLP; Andrew Arthur Schmidt of Andrew Schmidt Law PLLC; John C. Briody, James H. Smith and Lewis T. LeClair of McKool Smith PC; and Brian M. Feldman, Jeffrey A. Wadsworth, Edwin M. Larkin and A. Paul Britton of Harter Secrest & Emery LLP. The case is *Spencer Meyer v. Travis*

Kalanick in the U.S. District Court for the Southern District of New York.

Source: Law360.com

More Teens Are Using E-cigarettes

According to a recent study by the Centers for Disease Control and Prevention (CDC), there is a link between exposure to e-cigarette advertisements and the use of e-cigarettes by middle and high school students. The study assessed current (past 30-day) use of e-cigarettes and exposure to e-cigarette advertising in four different types of media: retail stores, the internet, TV/movies, and magazines/newspapers. The study surveyed more than 22,000 middle and high school students

CDC researchers found that the greater the exposure to e-cigarette advertisements among middle and high school students, the more likely they are to use e-cigarettes. The researchers noted that spending on e-cigarette advertising rose from $6.4 million in 2011 to an estimated $115 million in 2014. During the same time, current e-cigarette usage among youth soared; from 1.5 percent in 2011 to 13.4 in 2014 among high school students, and from 0.6 percent in 2011 to 3.9 percent in 2014 among middle school students. In 2014, e-cigarettes became the most commonly used tobacco product among youth, exceeding traditional combustible cigarettes. CDC Director Dr. Tom Frieden, M.D., M.P.H. said:

> *E-cigarettes are now the most commonly used tobacco products among youth, and use continues to climb. We want parents to know that nicotine is a dangerous and addictive drug for kids at any age, whether it's an e-cigarette, hookah, cigarette or cigar, and may cause lasting harm to adolescent brain development, promote addiction, and lead to sustained tobacco use.*

In response to the growing of issues and concerns relating to e-cigarettes, the U.S. Food and Drug Administration (FDA) recently implemented rules that will directly regulate the advertising and sale of e-cigarettes. Under the new rules, companies will have to provide the agency with a list of product ingredients and place health warnings on their product packaging and in their advertisements. The new rule also bans sales of e-cigarettes to anyone younger than 18. Unfortunately, the announcement of these new regulations prompted a rush of new e-cigarette products to the market ahead of the new regulations. E-cigarette devices introduced before the regulations took effect can be sold for up to three years while companies apply and wait for regulatory review.

The CDC study concluded that multiple approaches are warranted to reduce youth e-cigarette use and exposure to e-cigarette advertisements, some of which are covered by the FDA's new rules. For example, the CDC study concluded that efforts to reduce youth access to the settings where e-cigarettes are sold and regulation of youth-oriented e-cigarette marketing would likely be effective. The implementation of these approaches, in coordination with state tobacco control programs, has the potential to reduce e-cigarette use among youths.

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

Source: Centers for Disease Control and Prevention

XX. RECALLS UPDATE

We have once again reported a large number of safety-related recalls this month. Some of the more significant recalls are included that were issued in August 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.

Volkswagen Recalls Audi SUVs Over Faulty Air Bag Software

Volkswagen will recall more than 14,500 model year 2017 Audi Q7 sport utility vehicles to fix front air bags that deploy with too much force during a crash because of a software problem, the National Highway Traffic Safety Administration (NHTSA) announced. The 14,535 vehicle recall stems from a software issue in the vehicles' air bag control module, which causes the air bags to initiate at a force higher than allowed by federal vehicle safety standards for occupant crash protection. The increased force creates a higher risk of injury during a crash, NHTSA said. To fix the issue, Volkswagen Group of America Inc. will update the air bag control module software, free of charge to owners. The company did not say when it would begin recalling the defective Q7 vehicles or when it would begin notifying customers.

An Audi spokesperson said that the company identified the issue during testing and is not aware of any incidents related to this issue. The SUVs affected by the recall were manufactured between Aug. 30, 2015, to May 8, 2016. This is the first recall of Q7 vehicles for model year 2017. The Audi Q7 represented approximately 10 percent of the car maker's total sales in 2015 and has accounted for more than 15 percent of sales so far from January 2016 to June 2016, according to company sales figures.

Ford Adds 830,000 Vehicles To Door Latch Recall

Ford Motor Co. has recalled approximately 830,000 vehicles equipped with side door latches that could break and open while driving, or may not close at all, bringing the number of affected cars to more than 1.3 million, the company said in a statement Thursday. The automaker's recall includes model year 2013 to 2015 Ford C-Max and Escape vehicles, and 2012 to 2015 model year Focus vehicles. The recall also includes 2015 Mustang and Lincoln MKC models, as well as 2014 to 2016 model year Ford Transit Connect vans.

In addition, Ford announced a new customer survey to examine vehicles outside the scope of the recall to see if other customers experienced door latch issues. "If a vehicle exhibits a broken door latch, Ford will provide a one-time replacement at no charge for the life of the vehicle," Ford said in a statement. The automaker said the affected vehicles may have door latches with a broken pawl spring tab, which may prevent the door from latching. If the door did close, it could come open

while driving and increase the risk for injury.

Ford says one injury may have been caused by a faulty door latch when a rear door opened and then closed on a passenger's arm. The recalled vehicles are mostly from states with higher ambient temperatures, including Texas, California and Florida, where Ford said a larger portion of the reports of faulty door latches originate. Dealers will replace side door latches free of charge to the customer, Ford said. The company said it will begin notifying customer by mail by the week of Sept. 5, 2016.

This recall adds to nearly 550,000 vehicles already recalled over faulty door latches since 2015. The first recalls came in a January 2015 with 205,000 Ford Taurus sedans. Ford announced another recall of 213,000 Ford Explorer and Police Interceptor SUVs in March 2015. The automaker recalled 156,000 model year 2011 to 2014 Ford Fiestas and 2013 to 2014 Ford Fusion and Lincoln MKZ vehicles in May 2015, adding to a similar recall of 390,000 of the vehicles just a week earlier.

Ford is also the subject of an investigation launched in January 2016 by NHTSA after the agency received nearly 75 complaints over faulty door latches on model year 2012 and 2013 Ford Fiestas. That investigation is ongoing.

Toyota Recalls 337,000 Vehicles For More Suspension Issues

Toyota Motor Corp. is recalling about 337,000 vehicles to fix a potential suspension problem linked to repairs made during a previous recall. Toyota said it will have to remedy problems with 337,000 Toyota RAV4 from model years 2006-2011 and Lexus HS 250h vehicles from model year 2010 to have their suspension arm assemblies replaced. The company said that if the nuts used in the earlier recall for adjusting the rear wheel alignment weren't properly tightened when an alignment was performed, rust could form on the suspension arm threads. "If this occurs, and if the condition is not identified and remedied during servicing or repair under the existing remedy procedure, the threads can wear over time, causing the arm to separate, which could result in a loss of vehicle control," Toyota said in its announcement.

Mitsubishi Recalls 82,000 Vehicles Over Acceleration Issues

Mitsubishi is recalling more than 82,000 vehicles over transmission issues that could delay acceleration in certain driving conditions. Mitsubishi Motors North America Inc.'s recall encompasses 82,436 model year 2016 Mitsubishi Lancer sedans and Outlander sport utility vehicles, as well as 2015 to 2016 model year Outlander Sport SUVs. The vehicles are equipped with an constant velocity transmission, an automatic transmission that, if defective, will briefly cause hesitation during acceleration and can increase the risk of a crash.

The recall arises from consumer complaints between January and February 2016. An investigation by Mitsubishi and the CVT manufacturer Jatco Inc. found that a decrease in contact pressure between two electrical terminals caused a signal relay issue that led to the transmission malfunction. This issue caused the reduction in engine torque that led to acceleration hesitation, Mitsubishi said. To fix the issue, Mitsubishi will reprogram the CVT control unit with modified software, free of charge to owners. Mitsubishi says it's not aware of any reported deaths or injuries relating to the CBT acceleration delay issue. The recall is Mitsubishi's first in 2016. The automaker's recall began on Aug.15.

Mazda Recalls 190,000 SUVs Over Possible Steering Failure

Mazda North America is recalling about 190,000 of its CX-7 SUVs over a defective suspension ball joint that can lead to total loss of steering control. Although there are no reported injuries from the defect, Mazda told NHTSA that it will be recalling the CX-7 between model years 2007 and 2012 beginning in early October. Repairs to the defective parts will be performed at no cost to drivers. The purported defect surrounds a ball joint in the car's lower control arm that is particularly susceptible to water entry. If that water contains salt, as would happen from driving during winter months on snowy roads that have been treated, "the ball joint may corrode and separate from the lower control arm, resulting in a loss of steering control," according to NHTSA.

Mazda told NHTSA that when the recall begins, it intends to start with the oldest possibly affected CX-7's and those in states where salt is used on roads in winter months and then carry out repairs on remaining vehicles. All of the potentially affected vehicles were manufactured in Mazda Motor Corp.'s plant located in Hiroshima, Japan.

Jaguar Land Rover Initiates First Round Of Takata-Related Recalls

In accordance with the requirements of the National Traffic and Motor Vehicle Safety Act, Jaguar Land Rover North America announced it has begun notifying owners of certain 2009-2011 Jaguar XF and 2007-2011 Land Rover Range Rover vehicles of a recall affecting the safety of passenger side airbags fitted to these vehicles.

For the first phase of this recall, owners of the identified vehicles that are currently, or have ever been, registered in the following areas are encouraged to visit www.SaferCar.gov and enter their Vehicle Identification Number (VIN) to find out if their vehicle is included in this recall at this time:

- **U.S. States:** Alabama, California, Florida, Georgia, Hawaii, Louisiana, Mississippi, South Carolina and Texas
- **U.S. Territories:** Puerto Rico, American Samoa, Guam, the Northern Mariana Islands (Saipan), and the U.S. Virgin Islands

As parts become available, later this year, affected owners will be notified by a second mailing and instructed to schedule an appointment to take their vehicle to a Jaguar or Land Rover retailer who will replace the front passenger airbag module free of charge. In the interim, owners of potentially affected vehicles can contact the Jaguar Land Rover North America Customer Relationship Center for further information by calling 800-637-6837 (Option 9 for Land Rover) or 1-800-4JAGUAR; visiting www.LandRoverUSA.com or www.JaguarUSA.com; or writing to: Jaguar Land Rover North America, LLC; ATTN: Customer Relationship Center; 555 MacArthur Boulevard, Mahwah, NJ 07430.

Given the size and complexity of the recall, replacement parts are not immediately available for the affected vehicles. Jaguar Land Rover says it is working closely with its suppliers to

produce components for this repair as quickly as possible. Affected vehicles are being prioritized for repair—split into four separate phases—based on geographic zone and vehicle age. Additional phases of this recall will be added through 2019 based on risk-assessed priority. As the recall is expanded to other geographic zones or vehicle age groups, owners of Jaguar Land Rover vehicles that are affected will be notified as well.

This recall is part of the May 4, 2016, expansion of what was already the largest and most complex safety recall in U.S. history, affecting approximately 68 million cars and trucks on the road today fitted with Takata non-desiccated ammonium nitrate airbag inflators. Approximately 54,000 Jaguar and Land Rover vehicles of a total affected population of 108,000 are included in the first wave of this recall. Additional remaining affected vehicles will be addressed at a later date, as per the National Highway Transportation Safety Administration specific priority scheme. Reportedly, no current model year Jaguar or Land Rover vehicles are affected.

John Deere Recalls Utility Vehicles For Fire Hazard

John Deere is recalling certain High-Performance Gator utility vehicles because they pose a fire hazard to consumers. The recall includes the RSX860i TB and RSX860i TE four-wheel vehicles made in June 2016 with serial numbers beginning with 1M0860T. A notice on the Consumer Product Safety Commission's website said the fuel hose can leak or separate when pressure is applied to the fuel system and cause a fire. "Consumers should immediately stop using the recalled utility vehicles and contact a John Deere dealer for a free repair," the recall notice said. "John Deere is contacting all registered owners of the recalled utility vehicles directly." No injuries have been reported. The products, which were made in the U.S., were sold for $12,300 to $14,000 from June to July at John Deere dealers nationwide.

More John Deere Vehicles Under Recall

John Deere has added another vehicle to its recall list. Only a week after recalling its Gator utility vehicles, the company said certain green and yellow lawn and garden tractors pose a laceration hazard to bystanders because the reverse implement option (RIO) system that shuts off power to the mower blades when the machine is in reverse can fail. Recalled John Deere models include X710, X730, X734, X738, and X739 lawn and garden tractors with serial numbers beginning with 1M0X. "Consumers should immediately stop using these recalled tractors and contact a John Deere dealer for a free repair," a notice said on the Consumer Product Safety Commission website. "John Deere is contacting all registered owners of the recalled lawn and garden tractors directly." The American-made products were sold for $8,800 to $11,700 from December 2015 to July 2016. No injuries have been reported.

SpeeCo Recalls Fence Wire Stretchers Due To Laceration Hazard

About 60,000 fence wire stretchers were recalled by SpeeCo Inc., of Golden, Colo. A recoiling wire can be released from the stretcher unexpectedly and strike bystanders, posing a laceration hazard. This recall involves SpeeCo's fence wire stretchers, with or without a ratchet control, used for gripping and tightening any type of wire. The black stretcher has a rubber grip on the lever handle. It measures about 12 inches high, 1 inch wide and 32 inches long. SpeeCo and model S16111500, S161115TSC or S16112000 is printed on a label on the product packaging. The company has received two reports of a recoiling wire releasing from the stretcher unexpectedly, which caused cuts, abrasions and scratches to the user.

The stretchers were sold at Ace and True Value hardware stores and other supply and farm ranch stores nationwide and online at Amazon.com from April 2015 through August 2016 from about $40. Consumers should immediately stop using the recalled fence wire stretchers and contact SpeeCo to receive a full refund. Contact SpeeCo toll-free at 855-271-7189 from 8 a.m. to 5:30 p.m. CT Monday through Friday or online at www.speeco.com and click on Recalls for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/SpeeCo-Recalls-Fence-Wire-Stretchers/

All Power Portable Generators Recalled By J.D. North America Due To Explosion, Fire And Burn Hazards

About 12,200 All Power portable gasoline generators have been recalled by J.D. North America Corp., of Charlotte, N.C. The fuel tank can leak, posing explosion, fire and burn hazards. This recall involves All Power portable gasoline generators with model numbers APGG6000 and APGG7500. The black and red generators have a black fuel tank on top of the units. Model APGG6000 generators are rated at 6,000 watts and have UPC code 8 4676600055 3 and serial number JD29014S18035 through JD29014U020742. Model APGG7500 generators are rated at 7,500 watts and have UPC code 8 4676600056 0 and serial number JD42014S16027 through JD42014T210606. The model number is located on both sides of the unit. The UPC code and serial number can be found on a silver plate on the upper right hand-side of the back side panel. The company has received 21 reports of fuel leakage. No injuries or property damage have been reported.

The generators were sold at Big Sandy Superstores, Family Farm & Home, Inc., Home Owners Bargain Outlet, Mills Fleet Farm Corp., Nexcom West Coast and other stores nationwide and online at Bluestem.com, BrandsmartUSA.com, HomeDepot.com, hoboonline.com, jbtoolsales.com and other online retailers from March 2014 through May 2016 for between $510 and $725. Consumers should immediately stop using the recalled generators and contact J.D. North America to schedule a free replacement fuel tank, including installation. Contact J.D. North America toll-free at 844-287-4655 from 9 a.m. to 5 p.m. ET Monday through Friday, by email at apggrecall@jdna.com, or online at www.allpoweramerica.com and click on the APGG Recall link for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/All-Power-Portable-Generators-Recalled-by-JD-North-America/

Kohler Power Systems Recalls Portable Generators Due To Shock Hazard

About 7,000 Kohler portable generators have been recalled by Kohler Power Systems of Kohler, Wis. The generators have a wiring error, which can result in

an electrical shock risk if an electrical device is plugged into the generator. This recall involves the following Kohler portable generator models: PRO3.7, PRO3.7E, PRO5.2, PRO5.2E, and GEN5.0 with Spec Number PA-GEN50-3003. These generators have black frame assemblies and blue fuel tanks. The PRO3.7, PRO5.2 and GEN5.0 models have manual recoil start. The PRO3.7E and PRO5.2E have both manual recoil and electric start. Only generators with serial number 4528733735 or lower, and a manufacture date prior to 06 2016, representing the months and year of manufacture, are included in this recall. Model numbers, serial numbers, spec number and manufacturing date codes are on a silver label placed on each generator on the lower black frame assemblies.

The generators were sold at Authorized Kohler distributors and dealers from June 2014 through May 2016 for between $740 and $1,400. Consumers should immediately stop using the recalled generators and contact Kohler to schedule a free repair by the closest authorized dealer. Contact Kohler Power Systems toll-free at 866-667-4835 from 8 a.m. to 5 p.m. CT Monday through Friday, or email generator.feedback@kohler.com or online at http://power.kohler.com, and click "Contact Us" on the upper-right side of the page. Photos available at http://www.cpsc.gov/en/Recalls/2016/Kohler-Power-Systems-Recalls-Portable-Generators/

Flos Recalls Pendant Light Fixtures Due To Risk Of Injury

Flos Inc., of Brooklyn, N.Y., has recalled about 2,900 Pendant light fixtures. The dome on the light fixture can detach and fall unexpectedly, posing a risk of injury from impact. This recall involves the Flos Skygarden halogen pendant light fixtures with models S1 and S2. The model number is printed on a label on the lightbulb socket. The light fixtures are made of glass, gypsum and steel. They have a gold, brown, black or white dome with a white plaster interior. Skygarden model S1 domes measure about 24 inches in diameter and Skygarden model S2 dome about 35 inches in diameter.

The light fixtures were sold at Design Within Reach, Flos Project Sales, Lumens, and other lighting stores and online at Flos.com and ylighting.com from January 2008 through July 2016 for between $2,500 and $4,400. Consumers should contact the company or place of purchase to schedule the installation of a free repair kit by a qualified technician. Consumers should prevent people from going into the immediate area under the fixtures until repaired. Contact Flos toll-free at 888-952-9541 from 9 a.m. to 6 p.m. ET Monday through Friday, via email at info@flosusa.com or online at www.flos.com and click on "Skygarden Notice to Customers" for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/Flos-Recalls-Pendant-Light-Fixtures/

Porta Recalls Residential Elevators Due To Serious Fall Hazard

About 60,000 residential elevators with electro mechanical door locks (EMDLs) have been recalled by Porta Inc., of Arlington Heights, Ill. The plastic locks can allow the landing door to open before the elevator car arrives, posing a serious fall hazard to consumers attempting to board the elevator. This recall involves residential elevators with plastic electro mechanical door locks. The EMDLs are installed as part of a complete residential elevator system. Locks included in this recall have a plastic generation 1, 2, 3 or 4 latch and keeper attached to the upper corner on the elevator side of each landing door. A UL or ETL label affixed to the bottom of the EMDL box has "Porta Inc." printed on it. The company has received two reports of lock failure. No injuries have been reported.

The elevators were sold by elevator manufacturers nationwide from January 2005 through December 2011 for between $20,000 and $40,000. Consumers should immediately stop using elevators equipped with the electro mechanical door locks and contact their elevator service company to have the plastic locks replaced with metal parts. Consumers should contact their elevator service company. Consumers can also contact Porta Inc. toll-free at 844-719-9037 from 8 a.m. to 1 p.m. CT Monday through Thursday or online at www.emiporta.com and click on "Important Product Safety Notice" for more information. Consumers also can email emdlinfo@emiporta.com. Photos available at http://www.cpsc.gov/en/Recalls/2016/Porta-Recalls-Residential-Elevators/

BYA Sports Recalls Hammocks Due To Fall Hazard

About 750 Bring Your Adventure (BYA) Sports hammocks have been recalled by BYA Sports, of Louisville, Colo. A weld on the ring of the hammocks can fail, allowing the hammock to pull free and fall while in use, posing a fall hazard to the user. This recall involves BYA Sports Double Hammocks sold in blue or orange. The nylon hammocks measure about 12 feet by 6.5 feet with an attached nylon stuff sack and metal ring on the ends. The BYA logo is printed on the front of the stuff sack. Hammocks with the following UPC bar codes printed on the back of the merchandising card attached to the hammock are included in the recall: 7456112010186 (orange) and 7456112010193 (blue). The BYA logo and "DOUBLE HAMMOCK" is printed on the front of the merchandising card. The company has received two reports of ring failure, including one report of bruising from a fall.

The hammocks were sold at Gander Mountain stores nationwide and online at amazon.com, dicksportinggoods.com, promotive.com and target.com from January 2015 through March 2016 for between $60 and $75. Consumers should immediately stop using the recalled hammocks and contact BYA Sports for a free replacement hammock. Contact BYA Sports collect at 303-443-0163 from 8 a.m. to 5 p.m. MT Monday through Friday or online at www.BYAsports.com and click on the Recall Information tab for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/BYA-Sports-Recalls-Hammocks/

Brown Jordan Services Recalls Swivel Patio Chairs Due To Fall Hazard

Brown Jordan Services, of St. Augustine, Fla., has recalled about 265,000 Swivel dining and lounge chairs. The base of the chair can break during normal use, posing a fall hazard. This recall involves Hampton Bay Fall River swivel dining and lounge chairs. The chairs are made of steel with a round

swivel base and arm rests. The chairs have a red or green cushion, or are prepared for a custom slipcover with white liner fabric covering the cushions. Chairs were sold in either sets of two or as part of patio sets, which included accompanying patio tables. The company has received 410 reports of the swivel chairs breaking, including 16 reports of injuries, primarily bruises and abrasions resulting from falls.

The chairs were sold exclusively at: Home Depot nationwide and online at homedepot.com from October 2012 through January 2015 for about $200 for a set of two chairs to $550 for a 7-piece patio set. Consumers should immediately stop using the chairs and contact Brown Jordan Services for a free repair kit. Contact Brown Jordan Services toll-free at 855-899-2127 from 8 a.m. to 5 p.m. ET on Monday through Friday or online at www.bjsoutdoor.com and click on "Customer Care" and then "Recall Information" for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/Brown-Jordan-Services-Recalls-Swivel-Patio-Chairs/

Whirlpool Recalls Microwaves Due To Fire Hazard

About 15,200 Whirlpool brand microwave hood combinations have been recalled by Whirlpool Corporation, of Benton Harbor, Mich. Internal arcing during use can ignite an internal plastic component, posing a fire hazard. This recall involves Whirlpool brand microwave hood combinations. The microwave ovens were sold in stainless steel, black and white. Model numbers and serial numbers are located on the inside of the unit, above the oven cavity on the left hand side. A complete list of model and serial numbers included in this recall is posted on the company's website at http://repair.whirlpoolcorp.com. Whirlpool has received five reports of incidents, including one home fire, two fires involving the surrounding cabinets, one report of smoke, and one report of a burning odor.

The microwaves were sold at Best Buy, HH Gregg, Lowes, Sears and other home improvement, home appliance and retail stores and by homebuilders nationwide from January 2014 through April 2016 for between $370 and $470. Consumers should immediately stop using the recalled microwaves, unplug the units and contact Whirlpool for a free replacement product. Contact Whirlpool Corporation at 800-990-6254 from 8 a.m. to 8 p.m. ET Monday through Friday, or online at http://repair.whirlpoolcorp.com. Consumers can also visit www.whirlpool.com and click on "Product Recall" for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/Whirlpool-Recalls-Microwaves/

Crownplace Brands Recalls Kerosene Lamp Burners Due To Burn And Fire Hazards

About 500 lamp burners have been recalled by Crownplace Brands Ltd, of Dalton, Ohio. The burner's threads can disengage, allowing the burner to disconnect from the base, posing burn and fire hazards to the user. This recall involves Crownplace Brands' Aladdin MaxBrite kerosene lamp burners. The solid brass lamp burners measure about four inches tall and three inches in diameter. The burner thread is about 3/8 inches long (about 9mm). "Aladdin MAXBrite500" is printed on the burner knob. The patent number is 3551086. "Aladdin" and the patent number are printed on the barrel of the burner. The company has received one report of thread failure, resulting in a first degree burn.

The lamps were sold at hardware and antique stores nationwide and online at www.amazon.com from July 2015 through July 2016 for between $100 and $400. The lamp burners were sold separately and as part of a lamp assembly. Consumers should immediately stop using the recalled lamp burners and contact Crownplace Brands for a free replacement at 800-457-5267 from 9 a.m. to 4:30 p.m. ET Monday through Friday, via email at info@aladdinlamps.com or online atwww.aladdinlamps.com for more information. Photos available: http://www.cpsc.gov/en/Recalls/2016/Crownplace-Brands-Recalls-Kerosene-Lamp-Burners/

Cree Recalls LED T8 Lamps Due To Burn Hazard

Cree Inc., of Durham, N.C., has recalled about 104,000 Cree® LED T8 Replacement Lamps. The recalled lamps can overheat and melt, posing a burn hazard. This recall involves Cree LED T8 Replacement Lamps, including lamps that were provided as free replacements for a previous recall (http://www.cpsc.gov/en/recalls/2015/cree-recalls-led-lamps/) in June 2015 and new lamps sold since the recall. These lamps are used indoors to replace traditional two-pin T8 fluorescent tubes. The white lamps have a cylindrical shape and measure 48 inches long. "Cree," "BT848 Series Lamp," the product number and a four-digit date code are printed on the lamp or on a white label affixed to the lamp. Cree has received 12 reports of the recalled lamps overheating and melting. No injuries have been reported. The lamps were sold at Home Depot stores nationwide and online at Amazon.com from September 2015 through May 2016 for about $23 per tube and $230 per 10-pack. This recall includes LED T8 lamps consumers received as free replacements from June 2015 through May 2016 for the previous recall. Consumers should immediately stop using, disconnect or switch off the fixture, remove the recalled lamp, put it in a safe place and contact Cree to receive a full refund. If consumers have received a free replacement lamp as part of the previous 2015 recall (http://www.cpsc.gov/en/recalls/2015/cree-recalls-led-lamps/), they also should stop using the replacement lamps and contact Cree. Contact Cree toll-free at 888-338-7883 from 8 a.m. to 5 p.m. CT Monday through Friday, email at T8Rledlamps@cree.com or online at www.cree.com and click on "Recalls" for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/Cree-Recalls-LED-T8-Lamps/

Xenith Recalls Football Helmets Due To Head Injury Hazard

Xenith LLC, of Detroit, Mich., has recalled 5,900 football helmets. The shells of the football helmets can crack, posing a risk of head injuries to football players. This recall involves Xenith Epic Varsity, X2 Varsity, X2E Varsity and Youth football helmets with a gloss or metallic-painted polycarbonate shell sold or factory-reconditioned between May 1, 2015, and March 18, 2016. The helmets were sold in multiple sizes depending on the model, and in varying colors and custom-p designs. They have a facemask and a chin cup, available in

different styles and varying colors, and may have an optional eye shield. The serial number is printed on a white sticker inside the top of the helmet. A complete list of the serial numbers included in this recall is available at www.xenith.com/recall. The company received 29 reports of cracking helmets; no injuries reported.

The helmets were sold through team dealers and direct school sales, and at BSN, Buddy's All Stars, Carey's Sporting Goods, End Zone Sports and Sports, Inc. and other stores nationwide and online at Eastbay.com, Footlocker.com, SafetyFirstSports.com, SportsUnlimitedInc.com and Xenith.com from May 2015 through March 2016 for between $140 and $400. Football players should immediately stop using the recalled helmets. Players, coaches and parents should contact Xenith to receive a free new replacement helmet at 800-956-9022 from 9 a.m. to 6 p.m. ET Monday through Friday or online at www.xenith.com and click on the "Helmet Shell Recall" link on the homepage for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/Xenith-Recalls-Football-Helmets/.

Shocker Paintball Recalls Paintball Markers

Shocker Paintball, located in Loyalhanna, Penn., is recalling about 5,200 Shocker RSX paintball markers/guns. The chamber part assembly can unexpectedly eject from the rear of the marker, posing a risk of impact injury to the user. The company has received eight reports of main chamber failures. In all cases the chamber assembly was ejected out the rear of the gun with force. No injuries have been reported. This recall involves Shocker RSX paintball markers equipped with a blue main chamber. The Shocker RSX is an electropneumatic paintball marker which utilizes compressed air to fire .68 caliber gelatin encapsulated paintballs. The markers are 8.5 inches tall by 8 inches long (without the barrel).

Markers included in this recall have a blue main chamber with three large rectangular cut-outs on the main body and a ring of seven small perpendicular holes in the neck of the chamber. All Shocker RSX markers are subject to this recall. The paintball markers, manufactured in Taiwan, were sold at paintball dealers and distributors nationwide and online at ShockerPaintball.com from May 2015, to August 2016, for between $800 and $1,000. Consumers should immediately stop using the recalled marker and properly dispose of the blue chamber. Consumers can contact Shocker Paintball for a free replacement high-flow chamber or an authorized dealer to have the free replacement high-flow chamber installed at no charge. Consumers may contact Shocker Paintball toll-free at 866-253-2338 from 9 a.m. to 5 p.m. (ET) Monday through Friday, or online at Recall.Shocker-Paintball.com.

Starbucks Recalls Stainless Steel Beverage Straws To Provide New Warnings

Starbucks Corp., of Seattle, Wash., has recalled about 2.5 million stainless steel straws in the U.S. Another 301,000 were sold in Canada and are also part of the recall. The stainless steel straws are rigid and can poke children in the mouth, posing a risk of injury. Consumers should not allow children to handle or use the stainless steel straws. This recall involves reusable stainless steel Cold-to-Go food grade drinking straws in two sizes. The straws were packaged and sold in sets of three and were also sold as a component of two sizes of stainless steel beverage cups: Grande 16-ounce cups and Venti 24-ounce cups. The straws feature a ridge at the bottom that keeps the straw attached to the lid. The Grande straws measure approximately 9.5 inches and the Venti straws measure approximately 10.4 inches. The company has received three reports of mouth lacerations to young children while drinking.

The straws were sold exclusively at Starbucks stores nationwide and online at Starbucks.com from June 2012 through June 2016 for about $6 for a set of three straws. The beverage cups with straws were sold for between $11 and $30. Contact Starbucks at 800-782-7282 from 3 a.m. to Midnight PT daily or online at https://news.starbucks.com com and click on "stainless steel straw warnings" for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/Starbucks-to-Recall-Stainless-Steel-Beverage-Straws-to-Provide-New-Warnings/

Mars Retail Group Recalls M&M'S-Branded Jewelry Due To Violation Of Lead Standard

Mars Retail Group, of Mount Arlington, N.J., has recalled about 52,400 M&M'S®-branded jewelry. The jewelry can contain high levels of lead. Lead is toxic if ingested by young children and can cause adverse health issues. This recall involves all M&M-branded jewelry, including some children's jewelry. Recalled items include earrings, rings, bracelets and necklaces sold between May 2015 and July 2016. Jewelry items included in the recall have the M&M'S logo "M" as a charm or other feature. No injuries or incidents have been reported in connection with these products.

The jewelry was sold at M&M'S® World Stores in New York; Orlando, Fla.; Las Vegas; and Henderson, Nev., from May 2015 to June 2016 for between $6 and $18. Consumers should immediately stop using the recalled jewelry, place the items out of the reach of children, and contact M&M'S World or visit an M&M'S World store to return the jewelry for a full refund. Contact M&M'S World at 866-915-5058 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.mmsworld.com and click on the "Product Safety & Recalls" link at the bottom of the page for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/Mars-Retail-Group-Recalls-MMs-Branded-Jewelry/

McDonald's Recalls "Step-iT" Activity Wristbands Due To Risk Of Skin Irritation Or Burns

McDonald's Corp., of Oakbrook, Ill., has recalled about 29 million "Step-iT" Activity Wristbands. The recalled wristbands can cause skin irritation or burns to children. This recall involves "Step-iT" activity wristbands, which come in two styles—"Activity Counter" and a motion-activated "Light-up Band." The Activity Counter comes in translucent plastic orange, blue or green and features a digital screen that tracks a child's steps or other movement. The Light-up Band comes in translucent plastic red, purple, or orange and blinks light with the child's movement. Both styles of activity wristbands have a square face with the words "STEP-iT" printed on

them and a button to depress and activate the wristband. The back of the square face contains the etched words "Made for McDonald's." McDonald's has received more than 70 reports of incidents, including seven reports of blisters, after wearing the wristbands.

The bands were distributed exclusively by McDonald's restaurants nationwide from Aug. 9, 2016, to Aug. 17, 2016, with Happy Meals and Mighty Kids Meals. Consumers should immediately take the recalled wristbands from children and return them to any McDonald's for a free replacement toy and either a yogurt tube or bag of apple slices. Contact McDonald's at 800-244-6227 from 7 a.m. to 7 p.m. CT daily, or online at www.mcdonalds.com and click on "Safety Recall" for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/McDonalds-Recalls-Step-iT-Activity-Wristbands/

ALEX Toys Recalls Infant Building Play Sets Due To Choking Hazard

ALEX Toys, New Jersey, has recalled about 91,000 ALEX Jr. Baby Builder, First Pops and First Snaps. Small parts of the plastic toy building sets can detach, posing a choking hazard to young children. This recall involves three ALEX Jr. branded sets of infant building toys, the Baby Builder, model 1982, First Pops, model 1981P, and the First Snaps, model 1981S produced prior to November 2010. The sets include an assortment of plastic shapes in bright colors. The pieces are designed to be pulled, pushed, snapped and twisted and come in stackable plastic jars. They were sold in sets of 14 and 26 pieces. The recalled First Snaps sets' containers have the following batch codes, on a sticker above the UPC code on the container: P0002073; P0001713; P0001330; P0000954; P0002107; P0001628; P0001009; P00000814; P0001948; P0001536; P0001098; P0001677; P0001427; or P0000983.

There have been 22 reports of the ends of small parts detaching from the building sets. No injuries have been reported. The toys were sold at Barnes & Noble and Land of Nod and online at www.Zulily.com. The Baby Builders were sold from December 2009 through June 2016 for about $28, First Pops sold from March 2009 through June 2016 for about $18, and First Snaps distributed from March 2009 through October 2010 for about $18. Consumers should immediately take the recalled building sets away from children and contact ALEX for a prepaid shipping envelope to return the product(s). ALEX will send consumers a full refund upon receipt of returned sets. Contact ALEX toll-free at 844-310-6691 anytime or online at www.alexbrands.com and click on the "Recall Information" link beneath the carousel for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2016/Alex-Toys-Recalls-Infant-Building-Play-Sets-Due-to-Choking-Hazard/

Cambridge Farms Recalls Corn Sold In Alabama

Certain packages of frozen cut corn sold in Alabama and 14 other states are under recall because they may be contaminated with Listeria monocytogenes. Cambridge Farms is recalling bags of Laura Lynn, Key Food and Better Valu brand corn after discovering through a routine sampling program by the North Carolina Department of Agriculture that the products may contain the bacteria. "In an abundance of caution, the company has included all cut corn products which may have been produced using the same lot of cut corn," the Pennsylvania company said. "Cambridge Farms, LLC has ceased the production and distribution of the product and continues their investigation as to what caused the problem." Young children, frail or elderly people, those with weak immune systems and pregnant women are most at risk of infection. Common symptoms include severe headache, stiffness, nausea, abdominal pain and diarrhea. The recall list includes the following items and production numbers:

- Laura Lynn Frozen Cut Corn in a 16-ounce polybag – UPC 8685401734
- Code SWFF/R10312, Best by 4/11/18
- Code SWFFR/10452, Best by 5/09/18
- Code SWFF/R10609, Best by 6/6/18
- Laura Lynn Frozen Cut Corn in a 32-ounce polybag – UPC 8685401717

  Code SWFF/R 10482, Best by 5/10/18
- Key Food Frozen Cut Corn in a 16-ounce polybag – UPC 7329607091
- Code SWFF/R10320, Best by 4/11/18
- Code SWFF/R10405, Best by 5/2/18
- Better Valu Frozen Cut Corn in a 14-ounce polybag – UPC 7980124561
- Code SWFF/R10308, Best by 4/11/18

In addition to Alabama, the products were sold through retailers in North Carolina, South Carolina, Tennessee, Georgia, Virginia, New York, Connecticut, New Jersey, Pennsylvania, Ohio, West Virginia, Kentucky, Maryland and Florida. No illnesses have been reported. Refunds are available to customers who have purchased the products. To ask questions, call the company at 1-717-945-5178 from 8 a.m. to 5 p.m. EDT Monday through Friday.

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

XXI. FIRM ACTIVITIES

Employee Spotlights

JULIE GAY

Julie Gay has been with Beasley Allen a total of six years, working in the firm's Toxic Torts Section. As the Legal Assistant to John Tomlinson, some of Julie's responsibilities include assisting with business claims resulting from the BP oil spill and gathering important documents for cases involving benzene exposure.

Julie, a native of Dothan, Ala., graduated from the University of Alabama at Birmingham with a Bachelor of Science degree in Criminal Justice and a minor in Sociology. Following her graduation,

Julie continued her education by attending Samford University, where she received her Legal Assistant's certificate.

Julie and Billy Gay celebrated their one-year anniversary in June of this year. They have two dogs and two cats, who are "happy campers." Some of Julie's hobbies include NOW Total Fitness, where she does boot camp, boxing and kickboxing, as well as spending time with her friends, family and pets. She also enjoys the beach and is an avid Auburn football fan.

Julie is a dedicated employee, who works hard, and is an asset to the firm. We are fortunate to have her with us.

CRYSTAL JACKS

Crystal Jacks, a Legal Assistant in our firm's Mass Torts Section, began working at the firm as a temporary employee in August 2014. She was offered a full-time position in December 2014. Crystal is heavily involved in both the Risperdal and transvaginal mesh litigations, which keeps her extremely busy.

Crystal was born and raised in Prattville, Ala., where she still lives today along with her parents, sister and other family members. Upon graduating from Prattville High School, she attended Auburn University Montgomery and Huntingdon College in order to receive her Paralegal degree. Her 15-year-old son, Jarrett, who was adopted from Ukraine when he was only 14 months old, is also a student of Prattville High School.

In her spare time, Crystal enjoys spending time with her friends and family, grilling out, watching Food Network, trying new recipes and going to the beach. While her son Jarrett was in Cub Scouts, Crystal was an Assistant Den Leader for two years, assisting with the group's Blue and Gold Banquet and various other activities. She was also a Co-Facilitator for the Alabama Post Adoption Connection. The group encourages families with adopted children to make new friends at monthly events, such as the annual Easter Egg Hunt, Family Picnic and Christmas Party.

Crystal is another hard working employee, who does very good work, and is dedicated to the interests of clients of the firm. We are fortunate to have her with us.

MATTHEW YAREMA

Matthew Yarema, who has been with the firm for more than 10 years, was first hired in May 2006 to assist in the Mass Torts Section. After working for five years in various litigations such as Vioxx, Celebrex and Bextra, Matt moved to Toxic Torts to help with the BP oil spill litigation. He is now the Legal Secretary for Parker Miller, and is involved with a number of important cases, as well as handling other day-to-day responsibilities.

Matt graduated from Auburn University Montgomery in 2006, receiving both a Bachelor's of Science in Legal Studies and his Paralegal certification. He married his wife Alyson about two years later, with whom he now has two children– 4-year-old Parker and 18-month-old Harper.

In his spare time, Matt likes to watch Auburn football, spend time with his family, go to the beach, and cook out with neighbors. When given the opportunity, Matt says he enjoys spending date nights with his wife. The couple especially enjoys taking the top off of his Jeep and going on long country-road rides together.

Matt is a very good employee, who works hard, and is dedicated to helping clients in their cases. We are fortunate to have him with the firm.

United Way Will Kick Off Its Annual Fundraising Campaign

The River Region United Way will kick off its annual fundraising campaign this month. Of course, they say it starts in August, but everybody involved has been working diligently for months gearing up to be ready for the big day. This year is no different and we are extremely pleased to have two people from Beasley Allen working to make the campaign a success.

Tom Methvin, our Managing Shareholder, will be serving on the Campaign Cabinet. The campaign is led by community volunteers and the Campaign Cabinet gives considerable time and talent to support the fundraising campaign that funds the programs supported by the River Region United Way.

Helen Taylor, the Public Relations Coordinator for our firm, will be serving as a Loaned Executive for the campaign this year. As a Loaned Executive, Helen will serve as a primary liaison to local businesses to support and grow their individual campaigns. Our River Region United Way does a great job in supporting those in our community who need help the most. We at Beasley Allen believe it's important to help support the United Way in that effort.

The Leukemia & Lymphoma Society

As many of you will recall, Beasley Allen lawyers and staff recently had the opportunity to work with a tremendous organization, Magic Moments, to provide a 6-year-old boy, TJ Esco, from Tallassee, Ala., with a trip to Disney World. TJ was diagnosed with acute lymphoblastic leukemia in 2015 and has been battling the disease ever since. Along with Magic Moments, there are many other organizations that provide tremendous support to cancer victims and their families. It was brought to my attention recently that one of our lawyers, John Tomlinson, made a generous donation to The Leukemia & Lymphoma Society.

The mission of The Leukemia & Lymphoma Society (LLS) is to cure leukemia, lymphoma, Hodgkin's disease and myeloma, and improve the quality of life of patients and their families. LLS is the leading source of free, highly specialized blood cancer information, education and support for patients, survivors, families and health care professionals. This support is provided to patients in their communities through chapters across the U.S. and Canada. LLS has a very active Alabama/Gulf Coast chapter. According to LLS, an estimated combined total of 171,550 people in the US were expected to be diagnosed with leukemia, lymphoma or myeloma in 2016. New cases of leukemia, lymphoma and myeloma are expected to account for 10.2 percent of the estimated 1,685,210 new cancer cases diagnosed in the US in 2016.

Through his work with clients in our Toxic Torts section, John has seen the devastating effects of leukemia and lymphoma caused by benzene and other carcinogenic chemicals caused by environmental and occupational exposure. As we have reported in previous issues, studies have linked benzene exposure to leukemia, as to well as other forms of cancer. I would encourage our readers to follow John's lead and get involved in some manner with this organization by

donating or volunteering time. For further information regarding the Leukemia & Lymphoma Society, you can go to their website at www.lls.org.

Seventh Annual Seat Check Saturday Event Set For This Month

On Sept. 24 Beasley Allen will host the seventh annual Seat Check Saturday event. I am proud to say that we have had the opportunity to provide this event over the years and have installed and inspected hundreds of child safety seats!

Every year, thousands of children are killed in automobile accidents, the leading cause of death for children ages 3-6 and 8-14. The importance of safety seats is undisputed. Unfortunately, they simply cannot work if they are not installed correctly. Three out of four child restraints are not used properly, resulting in these deaths and injuries.

The seventh annual Seat Check Saturday check point will be located in the Dillard's parking lot at the Shoppes at Eastchase from 9 a.m. to noon on Sept. 24. Certified technicians will be on hand to install, inspect and instruct caregivers. There is no charge, but it is recommended that you make an appointment. To schedule an appointment, contact Helen Taylor by email at Helen.Taylor@beasleyallen.com.

Beasley Allen Helps Children Learn About Science By Sponsoring Annual Gross-Out Camp

The last week of summer before children got back into the swing of school was far from boring for the 30 children participating in "Gross Out Camp" at The Alabama Wildlife Federation Lanark Nature Center. Gross Out Camp is a partnership with Fresh Air Family, a state-wide outdoor education non-profit. The camp is sponsored by Beasley Allen.

Gross Out Camp is an award-winning science camp where children learn through hands-on field biology. Campers spent most of their time "in the field" searching for macroinvertibrates, bugs, plants, rocks and more. We learned that the children had the most fun spending time in the creek and hiking. We are pleased to have partnered once again with Fresh Air Family to bring this unique camp to our area.

You can get more information on Fresh Air Family by going to www.FreshAirFamily.org. For more information on Gross Out Camp, you can go to www.GrossOutCamp.org. You can also get more information by contacting Helen Taylor at 800-898-2034 or by email at Helen.Taylor@beasleyallen.com.

XXII. SPECIAL RECOGNITIONS

Alabama Children First

It goes without saying children in every state are a most valuable resource and they deserve to be treated in a special manner by state leaders. Unfortunately, that doesn't always happen. Sadly, the welfare of children in Alabama hasn't always been a real top priority over the years for governors and the Alabama Legislature. That has been the case quite often and that must change. There is a great need in Alabama for both the governor and our state legislators to be made aware of the real needs of children in our state. That means groups must be available to help educate those elected officials. Alabama Children First (ACF) is one such group.

ACF is a combination of two entities: the Children First Alliance of Alabama and the Children First Foundation. Both are non-profit organizations that work to improve the overall well-being of Alabama's children in the following ways:

- through ***Advocacy***, with policymakers and political leaders;
- ***Awareness***, to bring children's needs and issues to the attention of Alabama's policymakers, political leaders and citizens; and
- ***Accountability***, to serve as a watchdog over children's programs and services and over policymakers on children's issues.

The Foundation primarily does lobbying work for children and the Alliance carries out the non-lobbying duties of the organization. Many believe ACF's biggest accomplishment thus far has been the establishment of the Children First Trust Fund. Each year, an estimated $40 million dollars from this fund is dedicated solely to children's services.

The organization has also been instrumental in the passage of legislation dealing with juvenile justice, child death, driver license requirements, school entry age and child abuse. In recent years, ACF worked very hard attempting to make sure the state's General Fund Budget adequately funds children's services, particularly the state's Medicaid program. The "#IamMedicaid Campaign" was conceptualized, designed and promoted by Alabama Children First. The campaign has been instrumental in the delivery of the message of children's needs to the governor and state lawmakers and also to the people of Alabama. Unfortunately, some of our leaders appear to have either refused to listen or for whatever reason, just don't understand these needs. The needs in Medicaid are a prime example.

The primary focus of ACF is, and always has been, to provide a voice for children at the Statehouse on issues that affect children. It should be noted that all of the special interests have lobbyists who speak for them. Many of these special interests are extremely powerful and that makes the work of their lobbyists very easy. In an environment where children have so little voice, ACF is trying hard to provide that voice. Currently, the organization has a limited budget and a very small staff. It is critically important for Alabama Children First to be able to educate the governor and the Alabama lawmakers as they make decisions regarding funding and on other matters that *directly impact* children in Alabama and their families.

I encourage our Alabama readers to find out more about Alabama Children's First. If you agree that Alabama children need a strong voice in the State House in Montgomery, support ACF. It would be a very good investment for Alabama's children. Christy Cain is the Executive Director of ACF. You can contact her at 1425 I-85 Parkway, Suite C, Montgomery, Alabama, 36106 or by phone at 334-396-6314.

XXIII. FAVORITE BIBLE VERSES

Dana Taunton, a lawyer in our Personal Injury & Products Liability Section, sent in verses from chapter 27 of Psalms for this issue. Dana had this to say:

In Psalm 27, we see that David's life had its ups and downs. The ups were the good times. The downs were the difficult times. This happens to us also. My dad passed away a couple of years ago. The year before and the two years since have very been hard on my family, especially my mom, who had been married to my dad for almost 54 years. During this time, during one of my devotions, God gave me these verses and I have clung to and prayed them since then. Life will be difficult at times and it may seem like those difficult times will never end. But they will. God has not forgotten us. What was the belief that which supported David? It was that he would see the goodness of the Lord. There is nothing like the hope of eternal life to keep us from falling in hard times. Even the best saints are subject to faint when things get hard and the burdens seem overwhelming. But it is our faith in Jesus that keeps up hoping, praying, and waiting. And it is our faith that will deliver us because we can have "confidence" that we will see the "goodness of Lord."

I remain confident of this: I will see the goodness of the Lord in the land of the living. Wait for the Lord; be strong and take heart and wait for the Lord. Psalm 27: 13-14

Scott Gunn, a staff assistant in the firm's Mass Torts Section, furnished two verses this month.

But without faith, it is impossible to please him [God]: for he that cometh to God must believe that he is, and that he is a rewarder of them that diligently seek him. Hebrews 11:6

Follow peace with all men, and holiness, without which no man may see the Lord. Hebrews 12:14

Joe Hall, who has worked for the past 49 years as a State Farm Agent in the Southeastern Region, furnished the following scriptures that he says he learned as a child and memorized. Joe's mother would give him a dime to memorize scriptures, which was quite innovative and it paid off.

For God so loved the world that He gave His only begotten Son that whoever believes in Him should not perish but have everlasting life. John 3:16

I can do all things through Christ Who strengthens me. Philippians 4:13

Amber Peden, who is also a staff assistant in the Mass Torts Section, furnished two verses this month, and they are quite timely.

For we live my faith, not by sight. 2 Corinthians 5:7

The Lord our God is merciful and forgiving, even though we have rebelled against him. Daniel 9:9

XXIV. CLOSING OBSERVATIONS

Car Seat Safety Requires More Than Crash Testing

I asked Stephanie Monplaisir, a lawyer in our Personal Injury/Products Liability Section, to write this month on an important matter that involves children and automobile safety.

As a new Mom, I was overwhelmed with the amount of safety decisions I had to make for my baby before she even arrived! Will she sleep in a bassinet, in a crib, or in the bed with me? Do I put her on her back, on her stomach, or on her side to sleep? Should I breastfeed or bottlefeed? Are vaccinations safe, or do they cause long-term health problems? But none of these decisions compared to picking out a car seat.

My husband and I "test-drove" multiple car seat and stroller combinations. We looked at safety ratings and customer reviews. We tested the installation for ease and security. We experimented with how the car seats and strollers would fit with my body type. We thought we had all safety issues covered.

But, since becoming a Mom, I have learned that there is more to car seat safety than how it responds in a crash. In 2016, there have been at least 23 children who have died in hot cars. Janette Fennell, founder and president of KidsAndCars.org, said the number of hot car deaths started to rise in the 1990s when the law started requiring children to be placed in the back seat to avoid airbag injuries. In the last two decades, heatstroke deaths have fluctuated, with the highest being 49 deaths in 2010. States with warmer climates, like Alabama, experience more car deaths than States in colder climates.

There are several steps a parent can take to prevent hot car deaths. Parents should get into the habit of always opening their back doors when they leave the vehicle. For instance, I always put my purse in the back seat so that I have to open my back door before I go into work. I do this even when my baby girl is not with me. I also have my daycare worker call me if my baby has not arrived by her usual time.

Technology can also help remind parents to look in the backseat. Evenflo Sensor Safe car seats contain a sensor on the car seat buckle that alerts the driver when the car turns off. General Motors will have as a standard feature in their 2017 GMC Acadia sport utility vehicle a system that monitors its rear doors to remind drivers who have just parked to check their rear seats if they'd opened rear doors at the start of their trip. It seems that awareness and education are key to preventing these tragic accidents.

If you need additional information on this subject, contact Stephanie at 800-898-2034 or by email at Stephanie.Monplaisir@beasleyallen.com.

Our Monthly Reminders

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

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

XXV. PARTING WORDS

On the evening news we constantly hear about cases where an adult has abused a child in some manner. It is absolutely impossible to comprehend how any adult could abuse a child. However, it happens quite often. There is a tremendous need for organizations whose mission is to protect children. Child Protect, a group heavily involved in the battle against child abuse, was incorporated in November 1989 as the Children's Advocacy Center. They serve Montgomery, Autauga, and Elmore counties. It is a 501(c)3 non-profit agency.

Child Protect assists the Department of Human Resources and law enforcement agencies in their investigation of child sexual abuse and child physical abuse. The evidence gathered by Child Protect during forensic interviews is turned over to the District Attorney's office for prosecution. Currently, Child Protect serves two judicial circuits; the 15th, which is Montgomery County, and the 19th, which includes Autauga and Elmore counties. Darryl Bailey is the District Attorney for the 15th Circuit and Randall Houston is the District Attorney in the 19th Circuit. Each do a tremendous job of protecting children and we are most fortunate to have them in their offices.

Jannah Morgan Bailey is the Executive Director of Child Protect. She is truly a blessing and does a tremendous job. Child Protect is a charter member of the National Children's Alliance, a River Region United Way partner and part of the Alabama Network of Children's Advocacy Centers (ANCAC). Kate Vance, who is the wife of Gibson Vance, serves on the Board for Child Protect. She said: "It is a privilege to serve on the Board of Child Protect. This is an organization that plays an integral part in protecting children and getting abusers behind bars. Unfortunately, the need for their services has never been higher."

I encourage our Alabama readers to learn more about Child Protect and find out how to help them. We cannot tolerate child abuse and must do whatever it takes to see that our children are protected. Those who abuse children must be prosecuted to the full extent of the law. Child Protect needs our support. Our readers can learn more about Child Protect by contacting Jannah at 935 South Perry Street, Montgomery, AL 36104 or by phone at 334-262-1220. You can also email her at info@child-protect.org.

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