



THE
JERE BEASLEY REPORT

MARCH 2017

Beasley Allen

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

CAB GUARD LITIGATION PROMPTS WARNING LABELS ON PRODUCTS

If “heavy truck cab guard” is searched on Google, more than 1.5 million results appear. And, at least on the first page, none of those results will tell you that many of them—if not most—do not work, although a majority of trucks on the road use the devices. What does it look like when a cab guard, which as its name suggests, is intended to protect the truck cab during a crash from shifting load, fails to do so? It will result in either severe injury or death. This was the scenario in a case filed in Alabama on behalf of Larry Albritton’s family. He was killed on Oct. 7, 2013, while driving a log truck when the load on his trailer shifted, causing the log truck to roll over on its side. When the load of logs shifted forward in the rollover, they breached the truck’s cab and struck the driver, resulting in his death.

Few people know the aluminum guards as currently designed are too weak to save a driver’s life. Thousands of log trucks use cab guards that are worthless for protection. The guards attach to the backs of 18-wheelers pulling flat beds, trailers and log trailers and should function to prevent shifting cargo from hitting the cab of large trucks. However, as we have discovered, that’s not the reality. Most of the cab guards are not strong enough to withstand the movement of even one log on a log truck, much less the large numbers that are placed on the trailers.

In a quest to increase profits, cab guard manufacturers often choose to use aluminum rather than something stronger like steel, which would not sacrifice safety, without accurately testing the consequences of the decision. For instance, one brand of cab guard available for purchase through the “heavy truck cab guard” Google search states, “All Cab Racks are tested to uniform static resistance.” In technical terms, it is saying its ability to protect a driver was tested while the truck was not moving. No wreck is static; one log could cause a failure. Cab guard manufacturers’ shortcuts continue to prove costly for consumers who believe they are protected because of a cab guard being in place.

As a result of the cab guard litigation handled by our firm, two of the companies making the cab guards have made significant safety-related changes. Those guard manufacturers now say on their websites that cab guards should not be used as safety devices on log trucks. In fact, when clicking on “cab guard” on one company’s website, a warning box appears stating the device will not prevent serious injury or death. The company now says that the cab guards are not to be used on log trucks. The warnings are a welcome step in the right direction for protecting unsuspecting log truck drivers who think they are safe. In the Albritton case, the jury returned a \$16.8 million verdict against the manufacturer. The changes by the two companies that manufacture and sell cab guards are the direct result of the litigation against them by our firm.

II. MORE AUTOMOBILE NEWS OF NOTE

JUDGE BREYER PRELIMINARILY APPROVES VW’S \$1.2 BILLION 3-LITER EMISSIONS SETTLEMENT

This past month has seen a significant development involving the Volkswagen litigation. On Feb. 16, 2017, U.S. District Judge Charles Breyer, the federal judge who has the U.S. Litigation, granted preliminary approval of a class action settlement worth at least \$1.22 billion, concerning 80,000 3.0 Volkswagen cars implicated by in the automaker’s emission cheat scandal. The class action stems from the Environmental Protection Agency’s (EPA) discovery in 2015 that Volkswagen sold diesel cars equipped with software designed to disguise nitrogen oxide emissions in violation of the Clean Air Act.

The settlement breaks the vehicles down into two “Generations.” The settlement separates the two generations by engine type, and each generation receives different consideration in the settlement. Generation One vehicle owners may select between having VW buy back their cars, or have the cars modified to become more fuel-efficient. These automobile owners will also receive cash compensation ranging \$7,755 to \$13,880. The reason

Generation One car owners have an option of a buy back is due to VW admitting they are not able to “fix” the Generation One vehicles.

VW is unsure whether they will be able to “fix” the remaining 60,000 vehicles in the Generation Two category; therefore, VW has until fall 2017 to discover a “fix” for these vehicles. If an emissions fix is found, VW will implement it on all Generation Two vehicles, and the owners will receive cash compensation of \$7,037 to \$16,114. If VW does not discover a “fix” by fall 2017, owners will have the option to sell their cars back to VW.

In addition to the repairs and buybacks, part of the settlement requires VW to pay \$225 million into a mitigation trust, whose

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purpose is funding projects that reduce NOx emissions. The final approval hearing is set for May 11, 2017. Owners who previously sold their vehicles may still be eligible for cash compensation. Below are the eligibility requirements for both Generation One and Generation Two vehicles.

If an emissions fix is found before the fall of 2017, VW will implement it on all Generation Two cars and drivers will receive a cash compensation ranging from \$7,039 to \$16,114. If not, and Judge Breyer finds good cause, he can grant an extension of the deadline. VW can also literally buy itself more time—under the settlement agreement, the car company can opt for an extension as long as 90 days, and will have to pay \$500 per vehicle for every 30-day period. If a fix isn't discovered, owners will have the option to sell their cars back to VW and lessees will be able to opt out of their leases. That could bring the compensation total up to \$4.04 billion.

ELIGIBILITY REQUIREMENTS

Owners who have owned an eligible vehicle on Sep. 18, 2015, or Nov. 2, 2015, and sold it before Jan. 31, 2017, may still be eligible to participate as an Eligible Former Owner; however, Owners must register by May 1, 2017 to claim benefits under the Settlements. See below for a list of models and description of those who are and are not eligible.

Generation One Vehicles:

- Volkswagen Touareg—2009-2012
- Audi Q7—2009-2012

Generation Two Vehicles:

- Volkswagen Touareg—2013-2016
- Audi Q7—2013-2015
- Audi A6, A7, A8, A8L, Q5—2014-2016
- Porsche Cayenne Diesel—2013-2016

Owners are eligible for relief if:

- The owner currently holds title to an Eligible Vehicle in the United States or its territories or hold it by bill of sale dated before Sept. 30, 2019; or
- On Sept. 18, 2015, or on Nov. 2, 2015, owner held title to an Eligible Vehicle in the United States or its territories or held it by bill of sale dated on or before Nov. 2, 2015; or

- The owner has a lease that is or was issued by VW Credit, Inc., and is a current lessee of, or, on Sept. 18, 2015, or Nov. 2, 2015, were a lessee of, an Eligible Vehicle.

U.S. District Judge Charles Breyer also preliminarily approved a \$372.5 million deal between drivers and parts manufacturer Robert Bosch GmbH for the auto parts manufacturer's role in designing the emissions cheat software. Details of the Bosch settlement appear in the following article.

Beasley Allen lawyers Dee Miles, Archie Grubb and Clay Barnett are performing Plaintiffs Steering Committee duties on behalf of the claimants. If you have any questions, contact Clay Barnett at 800-898-2034 or by email at Clay.Barnett@beasleyallen.com.

JUDGE BREYER PRELIMINARILY APPROVES RELATED CONSUMER SETTLEMENT WITH BOSCH DEFENDANTS

On Feb. 16, 2017, Judge Charles Breyer also preliminarily approved a settlement reached between Robert Bosch GmbH and Robert Bosch LLC (Bosch) with counsel for the consumer class related to defeat device software the VW Defendants installed to bypass emissions standards in certain 2.0-liter and 3.0-liter diesel vehicles manufactured by Volkswagen, Audi and Porsche. The Bosch Settlement is part of litigation called *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case No. 3:15-md-02672-CRB (MDL 2672), in the United States District Court for the Northern District of California. Claims against the Volkswagen, Audi and Porsche defendants also have recently settled (the "2.0-liter Class Action Settlement" and "3.0-liter Class Action Settlement"). The Bosch Settlement is in addition to the VW Settlements and the final approval hearing is set for both settlements on May 11, 2017.

The Bosch Settlement provides additional compensation to vehicle owners, former owners, lessees and former lessees, including reseller dealers who filed or will file approved claims in the VW Settlements. The Bosch Settlement also provides the opportunity for compensation to certain VW Class Members who opted out of or who are otherwise not participating in the VW Settlements.

2.0-LITER CLASS VEHICLES

- Volkswagen Jetta TDI 2009-2015
- Volkswagen Jetta SportWagen TDI 2009-2014
- Volkswagen Beetle TDI 2012-2015
- Volkswagen Beetle Convertible TDI 2012-2015
- Audi A3 TDI 2010-2015
- Volkswagen Golf TDI 2010-2015
- Volkswagen Golf SportWagen TDI 2015
- Volkswagen Passat TDI 2012-2015

3.0-LITER CLASS VEHICLES

- Volkswagen Touareg 2009-2016
- Audi Q7 2009-2015
- Audi A6 2014-2016
- Audi A7 2014-2016
- Audi A8, A8L 2014-2016
- Audi Q5 2014-2016
- Porsche Cayenne Diesel 2013-2016

Bosch will pay \$327.5 million to resolve all claims of consumers and reseller dealers that are pending in the Clean Diesel Cases. Lawyers representing the class will seek attorneys' fees of a maximum of 16 percent of the Bosch Settlement fund plus expenses, but the Court must approve any fees and expenses before they are paid.

Class members in the VW Settlements whose claims in those settlements are approved or will be approved in the future and who do not exclude themselves from this Bosch Settlement will automatically receive a cash payment by way of a check in the mail. Those who did not, and do not in the future, file a claim in either of the VW Settlements, including anyone who opted out of either or both of the VW Settlements or who did not timely register as an Eligible Seller in the 2.0-liter Class Action Settlement or Eligible Former Owner in the 3.0-liter Class Action Settlement, must file a separate claim form to receive a payment from this Bosch Settlement. The deadline for Eligible Sellers and Eligible Former Owners who did not file claims in the VW Settlements to file a claim form is May 1, 2017. The deadline for class members who opted out of the VW Settlements to file a claim form is Aug. 15, 2017.

The Federal Trade Commission (FTC) is an independent government agency whose mission is to prevent business practices that are anticompetitive, or deceptive or unfair to consumers. Acting as an independent third party to the litigation between Class Counsel and Bosch, the Commission's counsel met with Bosch and directed an allocation of the Bosch Settlement fund among members of the Bosch Settlement Class that Commission counsel would recommend that the Commission accept. The FTC required that the parties accept its allocation. Bosch tendered a final offer consistent with this allocation and Class Counsel accepted that allocation.

- Persons eligible to participate in the 2.0-liter Class Action Settlement will receive a total of \$163,267,450, to be shared among 2.0-liter Class Members as set forth below.
- Persons eligible to participate in the 3.0-liter Class Action Settlement will receive a total of \$113,264,400, to be shared among 3.0-liter Class Members as set forth below.

The Bosch Settlement funds will be allocated to individual Class members as follows:

- (i) An Eligible Owner of an Eligible Vehicle in the 2.0-liter Class Action Settlement will receive \$350, except that if an Eligible Seller has identified himself or herself and filed an approved claim for the Eligible Vehicle, or if an Eligible Lessee has identified himself or or if an Eligible Lessee has identified himself or herself and filed an approved claim for the Eligible Vehicle, the Eligible Owner will receive \$175.
- (ii) An Eligible Seller in the 2.0-liter Class Action Settlement who has identified himself or herself and filed an approved claim will receive \$175.
- (iii) An Eligible Lessee in the 2.0-liter Class Action Settlement will receive \$200.
- (iv) An Eligible Owner of an Eligible Vehicle in the 3.0-liter Class Action Settlement will receive \$1,500, with three exceptions:
 1. If an Eligible Former Owner has identified himself or herself and filed an approved claim for the Eligible Vehicle in the 3.0-liter Class Action

Settlement, the \$1,500 payment will be split equally (\$750 each) between the Eligible Owner and the Eligible Seller.

2. An Eligible Owner will also receive \$750 if an Eligible Former Lessee has identified himself or herself and filed an approved claim for the Eligible Vehicle in the 3.0-liter Class Action Settlement.
 3. If two Eligible Former Owners have identified themselves and filed approved claims for the Eligible Vehicle in the 3.0-liter Class Action Settlement, the \$1,500 will be split among the Eligible Owner and the two Eligible Former Owners, with \$750 going to the Eligible Owner and \$375 each to the two Eligible Former Owners.
- (v) An Eligible Lessee in the 3.0-liter Class Action Settlement will receive \$1,200. The above payments are net payments to Class members. They will not be reduced by attorneys' fees or expenses.

The entire Bosch Settlement fund, plus any interest, will be distributed over the course of the settlement process through a combination of one or more payments to Bosch Settlement Class members, and if approved by the Court, payment of attorneys' fees and expenses from the settlement. The full details of the Bosch Settlement are available online at www.BoschVWSettlement.com. Beasley Allen lawyers Dee Miles, Archie Grubb and Clay Barnett are performing Plaintiffs Steering Committee duties on behalf of the claimants. If you need more information contact Clay at 800-898-2034 or by email at Clay.Barnett@beasleyallen.com.

MILLIONS OF PEOPLE STILL AT RISK FROM FAULTY TAKATA AIRBAGS

When people hear the word airbag, most of them immediately relate it to safety. An airbag's purpose is to protect occupants and keep them as safe as possible during a vehicle crash. Unfortunately, as the recall on 46 million airbags manufactured by Japanese automotive supplier Takata Corp. proves, that is not always the case. Approximately 29 million vehicles in the United States are not as safe as they should be due to manufacturer error, an error lawyers at Beasley Allen witnessed

the effects of firsthand during four cases settled for confidential amounts last year. Each case involved a Takata airbag inflator exploding and causing injuries instead of ensuring protection.

In one of the cases, Angelina Sujata was driving her 2001 Honda Civic in 2012 at about 25 miles per hour near Columbia, South Carolina, when the vehicle in front of her slammed on the brakes. The next thing Angelina remembered was a sharp pain in her chest, which was sliced open to the bone. In another case, Jennifer Griffin's airbag exploded in her Honda Civic while she was driving in Orlando, Florida. A two-inch piece of shrapnel was sent flying. When highway troopers found Jennifer with blood gushing from a gash in her neck, they were baffled by the extent of her injuries.

Through a series of conscious decisions, Takata and Honda risked lives for their economic bottom lines. Takata opted to use ammonium nitrate, a compound that destabilizes over time particularly if exposed to high temperatures and humidity, to reduce costs despite other airbag manufacturers refusing to use it over safety concerns. However, Takata continued to pursue its use despite internal red flags.

In a January 2016 deposition taken as part of another personal injury suit against Takata and Honda, Mark Lillie, a former propellant engineer at Takata in the 1990s, when the company first began using the unstable compound in its airbags, 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." Lillie later was interviewed and stated he told Takata that someone would be killed if the design went forward.

We have learned that Takata manipulated tests and data to make its airbags appear safer than they were. Honda was alerted to the safety issues relating to the air bags as early as 2004, when an Accord airbag in Alabama exploded and shot shrapnel throughout the vehicle interior. Honda settled four lawsuits before issuing a small recall in late 2008. Within just six months, Jennifer's airbag, which the recall did not cover, exploded. By August 2009, four injuries and a death were linked to ruptured airbag inflators in Honda vehicles.

Takata and Honda commissioned a study (that per contract could not be linked to them) in 2012 that concluded ammonium nitrate was too sensitive to

changes in pressure to use in airbags. Despite extensive knowledge that ammonium nitrate was not suitable for airbag inflators, Honda did not expand the recall of its airbags until 2014. The recall eventually affected vehicles manufactured by BMW, Chrysler, Daimler Trucks, Ford, General Motors, Honda, Mazda, Mitsubishi, Nissan, Subaru and Toyota.

On Jan. 13, Takata agreed to plead guilty to criminal wrongdoing and pay total of \$1 billion in criminal penalties stemming from the company's fraudulent conduct, according to the U.S. Department of Justice (DOJ). The National Highway Traffic Safety Administration (NHTSA) estimates that only about 12.5 million of the 46 million defective airbags have been repaired. This means that millions of lives continue to be at risk until all of the airbags are repaired. Until that happens, vehicle occupants won't be safe.

Takata Corp. entered a guilty plea to one count of wire fraud in a Michigan federal court last month as part of its plea deal with prosecutors over the company's deadly air bag inflators. The plea agreement is part of the settlement Takata reached with the U.S. Department of Justice in January. The company entered its plea before U.S. District Judge George Caram Steeh. The settlement resolves the DOJ investigation into the company and its affiliates.

Source: Law360.com

FORD HIT WITH THROTTLE DECELERATION DEFECT CLASS ACTION

Our firm, working with several other law firms, has filed a new class action lawsuit against Ford Motor Co. Ford failed to warn customers that certain Mustangs, Lincolns and other Ford models had defective throttles that caused the vehicles to spontaneously stall or decelerate. Customers who owned or leased certain Ford Mustang, Edge, Lincoln MKX and F-150 models equipped with a Delphi sixth-generation electronic throttle body filed the suit, claiming Ford concealed and failed to disclose to consumers that it knew about the throttle defects in the hope that Ford's limited warranty would expire before consumers became aware of the problem.

Plaintiffs Fernando Aviles, Barry Kiery, Michael Kelder and James Cowen complained that the cars would spontaneously stall or suddenly decelerate to a near-idle speed. The abrupt deceleration often happened when traveling at highway speeds

and often caused near-accidents or life-threatening situations, particularly because driving in a highway passing lane or congested traffic, navigating a disabled vehicle to a shoulder or different lane can be extremely dangerous.

The affected cars contained a Delphi sixth-generation electronic throttle body. They include model years 2011 to 2015 Mustang with 3.7L TiVCT engines, model years 2011 to 2015 Edge with 3.5L TiVCT and 3.7L TiVCT engines, model years 2011 to 2015 Lincoln MKX with 3.7L TiVCT engines, and model years 2011 to 2015 F-150 with 3.5L TiCVT and 3.7L TiVCT engines. The complaint states:

Upon information and belief, Ford has known of the aforementioned problems with the Delphi Gen 6 electronic throttle body since at least as early as 2009, but has failed to disclose this material information to the owners and purchasers of class vehicles. Ford first learned that the specific Delphi Gen 6 ETBs placed in class vehicles were defective soon after the vehicles were released in 2011.

Customer complaints began coming in years ago to Ford and the National Highway Traffic Safety Administration (NHTSA) about the throttle defects. In January 2014, Ford investigated identical safety complaints about a specific version of the Delphi sixth-generation electronic throttle body that was installed in different Ford vehicles and Ford claimed then to have discovered and resolved a defect with the throttle body in those vehicles. However, Ford did not resolve the problems with the materially identical versions of the Delphi sixth-generation electronic throttle bodies within the vehicles at the center of the instant class action. Instead, Ford continued to sell a significant number of vehicles with defective ETBs that present enormous safety risks. The complaint states:

Despite its knowledge of these defects, Ford failed to disclose, concealed and continues to conceal, this critical information from plaintiffs and the other members of the class even though, at any point in time, it could have done so through individual correspondence, media release or any other means. Plaintiffs and the other class members justifiably relied on Ford to disclose these material defects in the Ford

vehicles that they purchased or leased, as such defects were hidden and not discoverable through reasonable efforts by plaintiffs and the other class members.

We are seeking to represent a nationwide and statewide classes of Alabama, California and Florida residents who owned or leased the affected Ford vehicles. The Plaintiffs are represented by Dee Miles, Clay Barnett, Archie Grubb and Andrew Brashier from our firm; David S. Stellings, Jason L. Lichtman, Fabrice Vincent and Andrew R. Kaufman of Lief Cabraser Heimann & Bernstein LLP; and Anthony J. Garcia of AG Law.

BMW SETTLES WATER DAMAGE SUIT

BMW of North America LLC has agreed to conduct vehicle checks and repairs and reimburse out-of-pocket expenses to settle a proposed class action lawsuit in New York federal court. The lawsuit involves a design defect that leads to electrical damage through leaky trunks. The proposed class, which is made up of owners and lessees of model year 2004-2010 BMW 5-series vehicles in New York, asked U.S. District Judge Katherine B. Forrest to grant preliminary approval of the settlement. The settlement arises from claims that sunroof drain tubes can become clogged and leak into the trunk of the vehicles, causing damage to the tire pressure monitor and other electronic components that are placed in and around the vehicle's tire well.

Under the terms of the settlement, proposed class members will be able to take their vehicles to authorized BMW centers to receive checks for water damage and electrical failure. If a component is found to be faulty, BMW will replace it, free of charge. The program follows a 2010 technical service bulletin released by BMW detailing the same program. For those who already replaced damaged components through an authorized dealer or third party and paid for the repairs, BMW agreed to reimburse those class members up to \$1,500 each. There are six electronic components covered under both the replacement and reimbursement program, including the tire pressure monitor.

In addition to the replacement and reimbursement, BMW will add a new label to the vehicle warning not to place liquids in the trunk as they may damage the sensi-

tive components underneath. Those accepting the reimbursement will have to submit a claim form detailing the repair, cause and mileage of the vehicle, among other things.

Under the terms of the settlement, owners or lessees who suffered a defect from misuse, such as a failure to adhere to state traffic laws, will be excluded from the reimbursement program. The settlement motion also requested the court to schedule a fairness hearing.

Catalano and the proposed class are represented by Edward A. Wallace and Amy E. Keller of Wexler Wallace LLP, William A. Kershaw, Stuart C. Talley and Ian J. Barlow of Kershaw Cutter & Ratinoff LLP, Stephen M. Harris of The Law Offices of Stephen M. Harris PC, Robert L. Starr of The Law Offices of Robert L. Starr and Joseph R. Santoli of The Offices of Joseph R. Santoli. The case is *Catalano v. BMW of North America LLC et al.* (case number 1:15-cv-04889) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

EUROPEAN PARLIAMENT WANTS TOUGHER CAR TESTING RULES

A European Parliament committee has voted to overhaul the bloc's rules for safety and environmental testing of cars and to strengthen the bloc's oversight of vehicles already on the road. This is said to be an effort aimed at avoiding a repeat of the Volkswagen emissions cheating scandal. The draft bill—which passed the internal market committee by a 33-4 vote—would require EU member countries' market surveillance programs to be approved by the European Commission. The Commission would also be empowered to compel countries to test specific vehicle makes or to conduct the tests itself. European Parliament member Daniel Dalton said in a statement:

With today's vote the Internal Market Committee has sent a clear signal to national governments and consumers that it is about time we addressed the weaknesses that allowed the emissions scandal to take place. We agreed that the key to rebuilding consumer trust in the motor vehicle approval system is more rigorous and systematic oversight at every stage.

Under the proposal, carmakers that fake test results or violate other rules can be

fined up to 30,000, or about \$32,000, per vehicle. And if a member country isn't willing to levy a fine, the Commission will. Those penalties should be directed to supporting market surveillance, recompense affected consumers and for environmental protection if appropriate, according to the statement. The proposal will be voted on by a full house in an upcoming plenary session, according to the statement.

Recently, the European Parliament upheld by a narrow margin a new vehicle emissions plan from the bloc's executive authority that, if finalized, will temporarily raise limits while requiring real-world testing outside a lab. On Feb. 3, members voted 323-317, with 61 abstaining, not to veto the European Commission's proposal to temporarily double nitrogen oxide emission limits from the current 80 mg per kilometer. The limit would eventually be set at 120 mg/km by 2020 in order to ensure automotive manufacturers can actually meet the more difficult to hit real-world limits, according to the parliament announcement. The vote follows promises from the Commission—made up of one Commissioner from each of the bloc's 28 member countries—to implement a review clause for the new requirements.

If implemented, Europe will be the only region in the world to require such testing. Real driving emissions (RDE) testing is thought to be more difficult to fool. However, Parliament cited the Commission as arguing that relaxed limits are necessary because of "technical uncertainties" with the Portable Emission Measurement Systems device and the fact that the on-the-road limits are more difficult to meet than limits tested for in a lab.

It's rather interesting—and actually disturbing—that while European countries are getting tougher on regulation, the United States is heading in another direction. Hopefully, consumer advocates will be able to turn the tide and make safety a real priority for U.S. Regulatory agencies.

Source: Law360.com

NISSAN, BMW AND PORSCHE FACE FUEL ECONOMY PROBES IN SOUTH KOREA

South Korea has filed a complaint against Nissan Motor's South Korean unit alleging that the Japanese carmaker manipulated the fuel economy test results of its Infiniti Q50 sedan. The transport ministry is also investigating BMW and Porsche on a similar matter, according to

Reuters. The Seoul Central District Prosecutors' Office has launched an investigation into Nissan after a criminal complaint was filed by the ministry.

Makers of imported cars, which have surged in popularity in recent years in South Korea, have been facing growing scrutiny in the country following Volkswagen's emissions-test cheating scandal. The latest government action follows an announcement by South Korea's environment ministry in January that the sale of 10 models of Nissan, BMW and Porsche had been banned after the carmakers were found to have fabricated documents on emissions and noise-level tests. The models banned include BMW's X5M and Porsche's Cayenne and Macan models.

The investigation was expanded to whether the three carmakers have falsified documents on fuel economy tests of the 10 models as well. Nissan overstated the fuel economy of the Q50 so that it is 3.4 percent higher than the actual test result. It appears they manipulated the test results of the car "to make the fuel economy look better."

The complaint adds to the troubles in South Korea for Nissan, which is already accused of cheating on emissions of its Qashqai diesel model. A South Korean court has sided with the government, which had said the Japanese automaker used a so-called defeat device in its Qashqai sport utility vehicle to turn off its emissions reduction device during regular driving.

Source: Automobile News

III. PURELY POLITICAL NEWS & VIEWS

U.S. ATTORNEY GENERAL JEFF SESSIONS

Jeff Sessions is now the U.S. Attorney General and is the top law enforcement officer for the nation. Jeff, a lifelong Republican, served in the United States Senate from Alabama from 1997 until 2017. He is the 84th U.S. Attorney General.

Despite the controversy over his nomination, Jeff's confirmation was greeted with warm applause by his constituency, and he extolled the virtue of open, passionate debate in Congress as critical to forward progress. Jeff urged Congressional leaders to work together to reconcile

their differences to move the nation forward. He had this to say:

I can't express how appreciative I am for those of you who stood by me during this difficult time. By your vote tonight, I have been given a real challenge. I'll do my best to be worthy of it.

Jeff graduated from Huntingdon College in Montgomery, Alabama, in 1969 and earned his law degree from the University of Alabama School of Law in 1973. He entered private practice in Russellville before making his home in Mobile, Alabama.

Jeff was an Assistant U.S. Attorney in the Office of the U.S. Attorney for the Southern District of Alabama beginning in 1975. In 1981, President Ronald Reagan nominated Jeff to be the U.S. Attorney for the Southern District of Alabama. The Senate confirmed him and he held that position for 12 years.

Jeff was elected Attorney General of Alabama in 1994. Even though I am a Democrat, I supported Jeff in that race. In 1996, Jeff won the Republican primary for U.S. Senate, after a runoff, and then defeated Democrat Roger Bedford in the November general election. Jeff succeeded my friend Howell Heflin, who had retired after 18 years in the Senate. Jeff won his second and third terms with relative ease.

I believe that Jeff will be an outstanding Attorney General. I have complete confidence that he will follow the law in a fair and impartial manner. Having the Attorney General from Alabama is a tremendous honor for our state. I wish Jeff the very best as he undertakes a huge challenge!

Sources: *The New York Times*, *The Washington Times*, Wikipedia

LUTHER STRANGE SELECTED TO FILL SESSIONS' SENATE SEAT

With the confirmation of Jeff Sessions as the new U.S. Attorney General on Feb. 8, the big question in Alabama was whom Gov. Robert Bentley would appoint to fill the vacant Senate seat. As Jeff Sessions was sworn in as the Attorney General on Feb. 9, Gov. Bentley announced Luther Strange, Alabama's Attorney General, would represent the state in the U.S. Senate. Luther was on the short list to fill the Senate Seat, so the announcement

came as little surprise. However, it was not without controversy.

Luther has announced that he will seek reelection. Some political observers believe he will be the favorite in the race. However, I believe there will be several strong candidates getting into this race. Whether Luther will be the favorite remains to be seen. Ignoring any suggestion of impropriety, upon his appointment Luther pledged to focus on representing the people of Alabama. There is a question as to when the special election will be held. Stay tuned on that question and related matters.

STEVE MARSHALL BECOMES ALABAMA'S ATTORNEY GENERAL

Governor Robert Bentley named Steve Marshall as the state's new Attorney General. Steve has been District Attorney for Marshall County since 2001 and has a strong background in law enforcement. He has done a tremendous job in his role as District Attorney and is universally respected by his peers in the law enforcement community.

Steve also frankly addressed the issue of the potential impeachment investigation of Gov. Bentley. At the time, he said he did not have confirmation that the governor was under investigation. However, just two days after being sworn in, on Feb. 15 Steve confirmed there is an ongoing investigation and he correctly recused himself. He appointed former Montgomery County District Attorney Ellen Brooks to lead the investigation.

Steve Marshall is the 48th Attorney General of the State of Alabama. It's good to have an experienced District Attorney in the most important office. I predict that Steve will be an outstanding Attorney General.

Sources: *Montgomery Advertiser*, WHNT-19 News, ABC News, Yellowhammer News

IV. LEGISLATIVE HAPPENINGS

THE REGULAR SESSION GETS UNDERWAY IN ALABAMA

The first two weeks of the regular session were pretty much uneventful. There are a multitude of problem areas

that must be dealt with. The need for additional revenues is as clear as a bell and that need must be dealt with before any of the major problems such as medical funding, prison reform and needs of public education at every level can be dealt with. It's time for both Gov. Robert Bentley and all of the legislators to face that reality. Hopefully, this will be a session of the legislature where reason and the real interests of the people of Alabama override politics and political agendas. I really don't believe that is too much to ask of our elected officials.

V. THE NATIONAL SCENE

PUBLIC ADVOCATES SUE TRUMP ADMINISTRATION TO STOP ANTI-REGULATION ORDER

Public interest groups are suing the Trump administration over a bullish and "irrational" executive order mandating that federal agencies arbitrarily eliminate two regulations for every new regulation passed. The order, signed by President Trump on Jan. 30, also sets a zero budget for rulemaking this fiscal year, which runs through the end of September. This effectively kills efforts to improve public health and safety by purposefully ignoring the value new rules would have on public protections.

Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America filed the complaint in federal court in Washington D.C. The lawsuit asserts that the executive order not only aims to help big business at the public's expense, but "exceeds President Trump's constitutional authority, violates his duty under the Take Care Clause of the Constitution, and directs federal agencies to engage in unlawful actions that will harm countless Americans, including Plaintiffs' members."

In addition to the President, the complaint also names as Defendants the acting director of the Office of Management and Budget (OMB) and the heads of more than a dozen executive departments and agencies. The complaint asserts that these administrators and directors cannot lawfully comply with the executive order because doing so would violate the statutes under which the agencies operate as well as the Administrative Procedure Act.

The complaint specifies ways in which the executive order would be great for big business, but a blow to consumers. For instance, OMB guidance issued in February “states that regulators can only consider the costs to businesses of new energy consumption standards for home appliances and not the benefits of lower energy costs for consumers when considering the costs of such rules,” according to Law 360.

“No one thinking sensibly about how to set rules for health, safety, the environment and the economy would ever adopt the Trump Executive Order approach—unless their only goal was to confer enormous benefits on big business,” Public Citizen President Robert Weissman said in a statement.

“When presidents overreach, it is up to the courts to remind them no one is above the law and hold them to the U.S. Constitution,” said Patti Goldman, a lawyer with Earthjustice, one of the organizations providing legal counsel for the Plaintiffs. “This is one of those times,” she added.

It will be most interesting to see how this lawsuit turns out. If reason and right prevail the Plaintiffs will win. Public interest would then be well served.

Sources: Law360, Public Citizen and Righting Injustice

MISSISSIPPI ATTORNEY GENERAL SUES TO RECLAIM \$800 MILLION FROM BRIBERY SCHEME

The State of Mississippi has filed a number of civil racketeering lawsuits in state court as officials try to claw back money spent on prison contracts that the state claims were obtained through a bribery scheme that has resulted in several federal convictions. Attorney General Jim Hood filed 11 lawsuits under the state’s Racketeer Influenced and Corrupt Organization (RICO) Act against several major prison services companies as well as several individuals involved in the kickback scheme.

The plot hinged on more than \$1 million in bribes directed toward then-Department of Corrections Commissioner Christopher Epps, in exchange for government contracts—generally through a “so-called consultant,” as the complaint terms the go-betweens. Epps pled guilty in February 2015 in federal court. Attorney General Hood said in a statement:

The state of Mississippi has been defrauded through a pattern of bribery, kickbacks, misrepresenta-

tions, fraud, concealment, money laundering and other wrongful conduct. These individuals and corporations that benefited by stealing from taxpayers must not only pay the state’s losses, but state law requires that they must also forfeit and return the entire amount of the contracts paid by the state.

The complaints allocate the biggest share of the damages claimed by the state to Pittsburgh-based prison health care provider Wexford Health Solutions, with \$294 million in contracts allegedly procured through bribery; Florida-based prison operator GEO Group, with \$256 million in allegedly tainted contracts; Utah-based inmate education and training provider Management & Training Corp., with \$114 million worth; and Mississippi-based prison construction outfit AJA Management & Technical Services Inc., with \$80 million worth.

The state’s complaints say that by law the state is entitled to the full value of the illegally procured contracts. Other companies named in the suit include Health Assurance LLC; Keefe Commissary Network; CGL Facility Management LLC, with \$10.8 million worth; Global Tel-Link Corp.; Branan Medical Corporation/Drug Testing Corp.; AdminPros.; and Sentinel Offender Services.

Source: Law360.com

VI. WHISTLEBLOWER LITIGATION

FALSE CLAIMS ACT CIVIL PENALTIES INCREASED

The Department of Justice (DOJ) has announced that the penalties under the False Claims Act will once again increase. The increases are pursuant to The Bipartisan Budget Act of 2015. The Act requires annual re-indexing of FCA penalties for inflation. On Feb. 3, 2017, the minimum per-claim penalty increased from \$10,781 to \$10,957, and the maximum per claim penalty increased from \$21,563 to \$21,916. These adjusted civil penalty amounts are applicable only to civil penalties assessed after Feb. 3, 2017, whose associated violations occurred after Nov. 2, 2015. As we have mentioned on numerous occasions, the False Claims Act (FCA) provides a means by which whistleblow-

ers may file suit on behalf of the United States to recover for fraud committed against the federal government.

Increasing the FCA’s civil penalties strengthens the government’s negotiating position in FCA cases. This strengthened position helps the government secure additional settlements and larger civil penalties. The penalty increase does more than keep up with inflation; it also is a vital tool that returns additional taxpayer money to the Treasury so it can be spent in the way it was intended.

The war on fraud is fought not by soldiers, but by ordinary citizens, and that is very important. The FCA provides citizens the opportunity to combat fraud accompanied with monetary incentives and statutory protection. Whistleblowers who file FCA claims are eligible for a reward up to 30 percent of the amount recovered by the government. Additionally, the FCA provides protection from retaliation against whistleblowers.

FERA EXPANDS CONSPIRACY LIABILITY UNDER THE FALSE CLAIMS ACT

The Fraud Enforcement and Recovery Act of 2009 (FERA) was signed into law by President Obama on May 6, 2009. This law not only changed the False Claims Act (FCA), but also retroactively overturned a Supreme Court case. Likewise, Congress crafted FERA’s 31 U.S.C. § 3729(a)(1) amendment to have taken effect on June 7, 2008, the date the Supreme Court decided *Allison Engine*. By backdating the effective date of the FERA provision, Congress rendered the unanimous Supreme Court decision worthless.

Before the FERA, a person was liable under the conspiracy provision of the FCA only if that person conspired to defraud the Government by getting a false or fraudulent claim allowed or paid. Looking to the language of the statute, the Supreme Court ruled in *Allison Engine* that 31 U.S.C. § 3729(a)(3) required proof that the Defendant intended the false statement to be material to the Government’s decision to pay or approve the claim. The Court came to that decision due to the phrase “by getting a false or fraudulent claim allowed or paid,” which is how the FCA read prior to FERA.

By removing the phrase “by getting a false or fraudulent claim allowed or paid” from 31 U.S.C. § 3729(a)(3), FERA significantly expanded liability under the conspiracy provision to include conspiracies

to violate any provision of § 3729(a). Therefore, FERA greatly bolsters the FCA by allowing conspiracy claims to encompass not only regular false claims, but also reverse false claims.

A reverse false claim occurs when an entity defrauds the government in order to avoid an obligation to pay, as opposed to an entity defrauding the government in order to obtain some sort of payment. The former is known as a reverse false claim because the subject of the fraud flows opposite of the usual direction. After FERA, the court could hold one liable for conspiring to commit either type of fraud.

WAIVER OF MEDICARE COPAYMENTS COULD LEAD TO FCA LIABILITY

Waiver of Medicare copayments or deductibles could result in liability under the False Claims Act (FCA). A Medicare “deductible” is the amount a Medicare beneficiary must pay before Medicare pays for any items or services. Similarly, a copayment is the amount a Medicare beneficiary must pay before Medicare pays the remaining balance of a medical bill. The routine waiver of deductibles and copayments are unlawful because they result in violations of the Anti-Kickback Statute. Violations of the Anti-Kickback Statute are then actionable under the False Claims Act.

When a provider, practitioner, or supplier routinely waives Medicare copayments or deductibles, they are misstating the actual charge. For instance, suppose a practitioner, who claims \$100 for a particular service, routinely waives the copayment of \$20. The actual charge is \$80, meaning Medicare should be paying 80 percent of \$80 and not 80 percent of \$100, a difference of \$16. The misrepresentation results in Medicare paying an additional \$16 each time the practitioner charges for this service.

Routine waiver of copayments or deductibles could result in violations of the Anti-Kickback Statute (AKS). The AKS makes it illegal to offer, pay, solicit, or receive anything of value as inducement to generate Medicare business. When a provider, practitioner, or supplier routinely waives Medicare copayments or deductibles, for reasons other than financial hardships, they may be violating the AKS by inducing patients to purchase their services or items.

Naturally, when Medicare overpays for any item or service, there are less Medi-

care funds available for needed services. Former Acting Assistant Attorney General Stuart F. Delery stated:

The Justice Department has longstanding concerns about kickbacks and the routine waiver of co-payments, because they can impose significant cost on federal health programs that are not medically justified.

One of the largest areas of FCA litigation is health care fraud. For example, since January 2009, the government has recovered \$19.3 billion from health care fraud actions alone. The FCA contains a *qui tam* provision, which provides an avenue for ordinary citizens to aid the government in detecting and deterring health care fraud. Furthermore, the FCA both protects and rewards those brave individuals who step forward and report fraud. One way to detect health care fraud is to look at the marketing practices of the providers, practitioners, and suppliers. The following are seven marketing practices that could identify those who routinely waive Medicare deductibles and copayments.

- Advertisements stating “Medicare Accepted as Payment in Full,” “Insurance Accepted as Payment in Full,” or “No Out-Of-Pocket Expense.”
- Advertisements promising Medicare beneficiaries will receive “discounts.”
- Routine use of “Financial Hardship” forms, stating the beneficiary is unable to pay the copayment/deductible.
- Collection of copayments and deductibles only when the beneficiary has Medicare supplemental insurance coverage.
- Charges to Medicare beneficiaries that are higher than those made to other persons for similar services or items.
- Failure to collect copayments or deductibles for a specific group of Medicare patients for reasons unrelated to financial hardship.
- “Insurance programs” covering copayments or deductibles only for items or services provided by the entity.

Are you aware of fraud being committed against the federal government, or a state government? If so, the FCA can protect and reward you for doing the right thing by reporting the fraud. If you have

any questions about whether you qualify as a whistleblower, you can contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim. There is a contact form on our firm’s website, or you may email one of the lawyers on our whistleblower litigation team: Andrew.Brashier@beasleyallen.com, Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com or Lance.Gould@beasleyallen.com. You can also call them at 800-898-2034.

Sources: 59 FR 65372-01, 1994 WL 702552 (F.R.), U.S. Department of Justice

\$55 MILLION HEALTH CARE FRAUD SCHEME DISCOVERED AT TWO BROOKLYN MEDICAL CLINICS

Medical clinics Prime Care on the Bay (Prime Care) and Bensonhurst Mega Medical Care, P.C. (Bensonhurst) have pleaded guilty to conspiracy to commit health care fraud. Prime Care and Bensonhurst, located in Brooklyn, New York, along with several individuals associated with the two clinics, submitted \$55 million in false and fraudulent claims to Medicare and Medicaid. The scheme involved subjecting patients to medically unnecessary health services provided by unqualified staff. The two clinics admitted further that, in order to cover up the fraud, occupational and physical therapists falsified patient charts and medical billings. Moreover, one of the Defendants admitted they paid the patients to attend these clinics and the Defendants opened a bank account for the sole purpose of laundering funds and paying these illegal kickback payments.

In the government’s battle against fraud, the False Claims Act (FCA) has become an invaluable weapon. The FCA contains a *qui tam* provision that permits individuals to not only blow the whistle on fraud, it also provides incentives for individuals to step forward and report fraud. These incentives include 15 to 30 percent of the funds recovered by the government, as well as protection against retaliation. The monies recovered through the FCA replenish the tax pool and serve to deter other companies from committing the same fraud.

One of the largest areas of FCA litigation is health care fraud. For example, since January 2009, the government has recovered \$19.3 billion from health care fraud actions alone. The *qui tam* provision provides an avenue for ordinary citizens to

aid the government in detecting and deterring health care fraud. Furthermore, the FCA both protects and rewards those brave individuals who step forward and report fraud.

MEAD JOHNSON WHISTLEBLOWER LAWSUIT CLAIMS BABY FORMULA PACKAGING DEFECTIVE

A whistleblower lawsuit has been filed against Mead Johnson, alleging that its baby formula is vulnerable to spoilage. The whistleblower lawsuit was filed by a former Mead Johnson Nutrition compliance director who claims she was eventually fired after raising concerns about packaging defects. Linda O'Risky, who was a consultant and employee for Mead Johnson for more than 25 years, contends in a lawsuit filed in U.S. District Court in Chicago last month that the Glenview-based maker of pediatric food products "touted its hermetically sealed liquid formula as safer than powdered formula." But in reality, it's alleged, "the seals on the 8-ounce product were prone to leaking, making it easier for microorganisms and other contaminants to enter the packaging."

The lawsuit says the Plaintiff spent seven months in 2015 trying to persuade her managers to comply with Food and Drug Administration (FDA) regulations and contacted the publicly traded company's "integrity concern hotline." But it's alleged that she was eventually excluded from meetings and shunned. The lawsuit says the company later fired her, claiming it was due to a cost-cutting restructuring, but the suit alleges that unlike the 50 other Evansville workers who also lost their jobs, Ms. O'Risky's computer was immediately confiscated, she was told to leave the premises by noon, and she was escorted out of the building. Ms. O'Risky is alleging retaliations in violation of the Food Safety Modernization Act, the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Ms. O'Risky says she learned of defective seals in March 2015, when she was copied on an email stating that Mead Johnson planned to reject nearly a million units of 8-ounce ready-to-use formula. She realized that those manufacturing dates were nearly two months earlier—suggesting there could be more products with a similar problem. The lawsuit alleges that Ms. O'Risky knew from her role in analyzing consumer complaints that there had

been an increased rate of complaints about the ready-to-use formula.

Mead began an inquiry, but the lawsuit says that investigators "falsely claimed" a defective seal didn't constitute a food safety or FDA compliance problem since any spoilage resulting from a defective seal would be obvious. It's alleged:

It became clear that senior management's hope was that the defective products would make their way through the marketplace without any major incidents of harm to consumers and without having to fulfill their legal obligations to report the known problem.

Mead Johnson, whose Enfa family of brands includes Enfamil infant formula, denied the allegations in the complaint. The company claims the packaging matter cited in the suit was thoroughly reviewed by the U.S. Food and Drug Administration, and no action was required.

Ms. O'Risky, who lost her job in November 2015, wants a jury trial and is seeking her job back, as well as two times back pay and compensatory and punitive damages, among other things.

Source: *Chicago Tribune*

JUDGE RULES WHISTLEBLOWER'S OFF-LABEL MARKETING SUIT AGAINST CELGENE CAN PROCEED TO TRIAL

A federal judge in California has ruled that a multi-billion dollar whistleblower lawsuit against biotech giant Celgene Corp. can proceed to a jury trial. The complaint alleges that Celgene marketed two drugs for unapproved uses, causing the government to pay for hundreds of thousands of "off-label" prescriptions. Judge George H. King, of the Central District of California, wrote in an order that former employee Beverly Brown had provided solid evidence to support her claim that Celgene promoted Thalomid and Revlimid for use in cancer patients. The U.S. Food and Drug Administration (FDA) had approved the drugs only for other purposes, and the company was not permitted to market it to doctors for unapproved, or off-label, uses. Judge King wrote:

Brown's evidence shows that Celgene engaged in a systematic campaign to promote off-label uses of Thalomid and Revlimid that physicians who received more promotional contacts prescribed at a

higher rate than those who received fewer contacts, that Celgene knew its promotional activities were delivering results, and that marketing to doctors is generally effective. In addition, Brown presents evidence that hundreds of thousands of claims for off-label uses of Thalomid and Revlimid were presented to government healthcare programs during the years when Celgene was engaged in off-label promotion of these drugs, that Celgene knew Medicare would be called upon to pay for many of these prescriptions, and that Celgene played an active role in facilitating the submission of certain claims.

The biotech company had argued that the whistleblower could not identify a particular claim that was submitted as a result of its off-label promotion. But the court said that Ms. Brown is not required to do so, and that her case can go forward. "False claims were presented as a result of Celgene's conduct," Judge King wrote. The judge also dismissed Celgene's argument that government health care programs were aware of the off-label uses and continued to reimburse them.

Judge King did dismiss some of Brown's claims against Celgene, narrowing the jurisdiction of the case. An allegation that Celgene provided kickbacks to doctors, which caused submission of claims for off-label reimbursement, was dismissed by the judge. While Ms. Brown was hired by Celgene in April 2001 as an immunology specialist, it appears she actually performed sales work.

Ms. Brown says she became concerned when her manager instructed her to call doctors to ask them to change billing codes associated with prescriptions of Celgene's drugs. Ms. Brown said she complained to management about the practice, which she thought was illegal. She later contacted the FDA and then hired a lawyer. In 2010, Ms. Brown filed her "false claims" lawsuit against Celgene on behalf of the federal government, 24 states, the District of Columbia, and the City of Chicago.

It's alleged in the complaint that Celgene illegally promoted Thalomid, which was approved in July 1998 for a rare skin disorder, for a variety of cancer treatments. In May 2006, Thalomid was given a second approval for use, with dexamethasone, in patients with newly diagnosed multiple myeloma. The com-

plaint covers the years 2000 to the present. Celgene won its first approval for Revlimid, in December 2005, for treatment of patients with transfusion-dependent anemia due to myelodysplastic syndromes (MDS). According to the American Cancer Society, about 13,000 people are diagnosed with MDS each year. That drug largely replaced Thalomid. Revlimid's sales last year were \$5.8 billion.

The U.S. Justice Department has not formally joined the case, but it has filed documents supporting its basic arguments. Celgene could be liable for damages for hundreds of thousands of claims submitted to 20 states, Medicare, and other government entities.

Source: statnews.com

VII. PRODUCT LIABILITY UPDATE

PRODUCT LIABILITY PROTECTS LIVES

While much of today's political discussion involves social issues, most people rarely think about the critical laws that protect all of us. Having litigated product liability cases for years, I can say without hesitation that these laws, and our ability to seek justice when a company violates them, protect millions of lives throughout our country every single day. Many companies would cut corners if these laws and our ability to seek justice did not exist, and, too often, cutting corners costs innocent lives. These laws establish an equilibrium of sorts because they protect the assumptions we all make in our everyday lives. We rarely think about these assumptions because these laws exist and because to think otherwise can be too scary to even consider.

Unfortunately, product liability law, and the right to a trial by jury, are under attack. The U.S. Chamber of Commerce, oftentimes mistaken by the public as a branch of government instead of the corporate special interest group that it is, is constantly seeking to erode products liability law and the right to a trial by jury. They are not concerned with safety, but instead with further increasing corporate profits. We see in our practice on almost a daily basis the cost of these efforts—in money, pain and, many times, in human life.

Lawyers in our firm, and especially those in our Personal Injury & Products Liability and Mass Torts Sections, see this pain and heartbreak on a daily basis, and more often than not, the results can be catastrophic. They include instances where:

- Takata airbags explode and maim or kill occupants;
- Airbags fail to deploy;
- Defective seatbelts do not work during an accident;
- Tire defects cause blowouts, and ultimately, deadly rollovers;
- Poor automobile roof design leads to catastrophic roof crush;
- There is sudden, uncontrolled and unintended acceleration of vehicles;
- Ignition switch defects cause vehicles to stall at the worst possible time;
- Defective cab guards on heavy duty trucks allow loads to obliterate the driver's cabin;
- There is faulty or compromised automobile reinforcement structure;
- Poor automobile fuel lines or lubricant storage design cause a vehicle to burst into flames;
- Pressure cookers, heaters and dishwashers burst into flames due to cheap component parts;
- Fire alarms fail to work;
- Poorly-designed hot tubs and baths trap and drown the elderly;
- Children's toys are made with toxic substances, including lead paint;
- E-cigarettes and cell phones explode due to cheap parts or defective batteries;
- ATVs and golf carts roll over effortlessly and kill occupants (many have no roof reinforcement);
- Guardrails impale vehicles and their occupants instead of protecting them;
- Automobile occupant seats collapse or break;
- Automobile door latches fail, causing ejections from belted occupants;
- Diseased food severely sickens or kills;

- Firearms unexpectedly fire without initiating the trigger;
- Toxic cosmetic products, such as talc, cause cancer to users that were told the products were safe;
- Drugs with side effects cause strokes, heart attack or death, like *Vioxx*;
- Defective medical devices, like transvaginal mesh, fail and painfully affect the lives of tens of thousands of people;
- Defective heavy-duty equipment, such as a blowout preventer, contributes to the *Deepwater Horizon* oil spill;
- Products emit dangerous levels of radiation and cause cancer.

In our world of global commerce and trade, one defectively designed product can touch thousands, if not millions, of lives. Most of the time, recalls and corrective action can stop defects in new devices and sometimes catch old defective devices before they reach and hurt consumers but, too often, we find where these products have slipped through the cracks and hurt people notwithstanding corrective action. As a result, the best defense against product liability heartbreak is prevention, and that prevention is product liability law and enforcement. A strong, fair and independent judicial system is essential and absolutely necessary.

The American people should be able to assume that the products they use are safe. The water we drink, the food we eat, the automobiles we drive, the planes we fly, the air we breathe, the safety devices we believe will protect us, the consumer products we use—they all depend on the assumption they are safe. We must never take those assumptions (and the laws that allow us to make those assumptions) for granted.

AN UPDATE ON THE E-CIGARETTE LITIGATION

There have been a growing number of product liability lawsuits filed by consumers alleging that some e-cigarette devices and their lithium-ion batteries are defective. These lawsuits claim that e-cigarettes and/or their lithium-ion batteries exploded unexpectedly causing severe burns and injuries. Plaintiffs have largely focused their actions against retail shops and distributors. For many of these cases, it is difficult to include the manufacturer of the defective products, as they are

often located in other countries such as China.

Recently, a New York court awarded a man \$1.2 million in damages in a lawsuit filed against a retail store following an e-cigarette explosion that left him with severe burns on his torso and thigh. The lawsuit alleged that a 37-volt lithium-ion 18560 battery that was intended for use in electronic cigarettes exploded in the Plaintiff's pocket. Because of the explosion, the Plaintiff underwent debridement of damaged skin, and a skin grafting procedure. The Plaintiff's hospitalization lasted six days. The case involved allegations that the battery was defective and dangerous, that the retail store was strictly liable for the battery's defect, the retail store negligently failed to provide a proper warning, and that the battery's defect constituted a breach of the product's express and implied warranties.

Previously, we reported that a California jury awarded a woman \$1.9 million in damages in a lawsuit filed against a retailer, distributor and wholesaler following an e-cigarette explosion that left the victim with similar burns. In that case, the Plaintiff's attorney used experts to show that the e-cigarette devices and their lithium-ion batteries lack appropriate safety controls to prevent combustion.

Our lawyers are continuing to investigate new e-cigarette explosion claims and are filing cases on behalf of individuals injured by those devices. If you would like more information about these cases, you can contact Will Sutton, a lawyer in our Toxic Torts Section. He can be reached at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: Verdict Search

VIII. MASS TORTS UPDATE

Lawyers in our Mass Torts Section have been very busy. In fact, Andy Birchfield, who heads up this Section, says the lawyers and support staff are busier than ever. Andy has put together a tremendous group in the Section. The lawyers in the Section will investigate any medication or device claim involving catastrophic injury or death. The following are some of the drugs and devices our lawyers and support staff are currently working on:

TALCUM POWDER

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

Lawyers: Ted Meadows, Danielle Mason and David Dearing
Primary Contacts: Katie Tucker, Gwyn Harris or Amy Brown

XARELTO®

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

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

3MTM BAIR HUGGER

The 3MTM Bair Hugger is a forced hot air warming blanket, used primarily to help maintain a patient's body temperature during surgery. The 3MTM Bair Hugger pushes warm air through a flexible hose into a blanket draped over a patient. However, warming blankets can recirculate contaminated air over a patient's body, including over an open surgical site. This may result in infections like MRSA or sepsis. In particular, patients undergoing knee or hip replacement surgery are at risk of infections deep in the joint, which is very difficult to

treat. Complications from these infections include hospitalization, implant revision surgery, limited mobility, permanent disability, amputation and death.

Lawyer: Melissa Prickett
Primary Contact: Penny Davies

INVOKANA®

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

Lawyers: Danielle Mason and Melissa Prickett
Primary Contact: Penny Davies

IVC FILTER

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

Lawyer: Melissa Prickett
Primary Contact: Penny Davies

METAL-ON-METAL HIP REPLACEMENTS

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

Johnson & Johnson/DePuy: ASR Total Hip Replacement and ASR Resurfacing System hip (Recalled on August 24, 2010);

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

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

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

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

PROTON PUMP INHIBITORS

Proton pump inhibitors (PPIs) were introduced in the late 1980s for the treatment of acid-related disorder of the upper gastrointestinal tract,

including peptic ulcers and gastrointestinal reflux disorders, and are available both as prescription and over-the-counter drugs. Popular PPIs include Prilosec, Prevacid, and Nexium. Use of PPIs has increased in the U.S. from 3.4 percent to 7.0 percent among men and from 4.8 percent to 8.5 percent among women from 1999-2000 to 2011-2013, according to the National Health and Nutrition Examination Survey, and 14.9 million patients received 157 million prescriptions for PPIs in 2012.

We are currently investigating cases involving PPI use and Acute Interstitial Nephritis (AIN), which is a condition where the spaces between the tubules of the kidney cells become inflamed. Case reports have linked PPI use to AIN as early as 1992, and observational studies in 2014 and 2015 provided further evidence of the link between PPIs and AIN. The injury appears to be more profound in individuals older than 60. While individuals who suffer from AIN can recover, most will suffer from some level of permanent kidney function loss. In rare cases individuals suffering from PPI-induced AIN will require kidney transplant. Our lawyers are currently investigating PPI-induced acute interstitial nephritis cases.

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

RISPERDAL®

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

Lawyer: James Lampkin
Primary Contact: Crystal Jacks

STEVENS-JOHNSON SYNDROME

Stevens-Johnson syndrome is an immune complex hypersensitivity reaction that can be caused from an infection or immune response to drugs. It is a severe expression of a simple rash known as erythema multiforme. SJS is also known as erythema multiforme major. It affects all ages and genders including pediatric

populations. The most severe form of SJS is toxic epidermal necrolysis (TENS). SJS occurs twice as often in men as in women. Most cases of SJS appear in children and young adults younger than 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as NSAIDs, non-steroidal anti-inflammatory drugs.

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

TESTOSTERONE REPLACEMENT THERAPY

Testosterone Replacement Therapy products for men have been linked to an increased risk of death, heart attack and stroke. Researchers found men who used testosterone therapy were 30 percent more likely to have a heart attack, stroke, or die after three years of use. Furthermore, men who started the study with clear, unobstructed coronary arteries were just as likely to have a heart attack, stroke or die as men who entered the study with established coronary artery disease. Testosterone therapy, such as the prescription topical treatments Androgel, Testim and Axiron, are used to help boost testosterone levels in men who have a deficiency of the male hormone. Symptoms of low testosterone include decreased libido and low energy. Lawyers in the section are currently investigating claims of heart attack, stroke, DVT, pulmonary embolism and prostate cancer.

Lawyer: Matt Teague
Primary Contact: Heather Hall

VIAGRA®

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

percent greater risk of developing Melanoma. Our lawyers are currently looking at cases involving men who are taking or have taken Viagra and were diagnosed with melanoma.

Lawyer: Melissa Prickett
Primary Contact: Penny Davies

ZIMMER NEXGEN KNEE REPLACEMENT

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

Our lawyers will review any cases involving individuals who have had a Zimmer NexGen knee device implanted, or individuals unsure of the type of knee device implanted, if that individual has had revision surgery.

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

ZOFRAN®

Manufactured by GlaxoSmithKline, Zofran® (ondansetron) was approved to treat nausea during chemotherapy and following surgery. Zofran® works by blocking serotonin in the areas of the brain that trigger nausea and vomiting. Between 2002 and 2004, GSK began promoting Zofran® off-label for the treatment of morning sickness during pregnancy, despite the fact the drug has not been approved for pregnant women and

there have been no well-controlled studies in pregnant women. The FDA has received nearly 500 reports of birth defects linked to Zofran®. Birth defect risks include cleft palate and septal heart defects.

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

TAXOTERE

Taxotere is a chemotherapy drug that belongs to a family of drugs called taxanes. Taxotere is administered intravenously and is approved to treat breast cancer and other forms of cancer. In 2007, manufacturer Sanofi-Aventis touted the efficacy results of a clinical study involving Taxotere, but failed to inform the FDA, health care providers, and the public that a number of patients taking Taxotere experienced permanent hair loss. While hair loss during chemotherapy is a well-known side effect, patients undergoing chemotherapy with Taxotere were not warned that they could potentially experience permanent hair loss, which is a devastating condition, particularly for women. In December 2013, the FDA announced that it had ordered Sanofi-Aventis to change Taxotere’s label to warn patients of the risk of permanent hair loss. We are currently investigating cases of women who suffered permanent hair loss following Taxotere chemotherapy.

Lawyers: Beau Darley and Melissa Prickett
Primary Contact: Penny Davies

PHYSIOMESH

Physiomes h is a flexible polypropylene mesh used for hernia repair, designed to reinforce the abdominal wall to prevent future hernias. However, Physiomes h is actually linked to a higher rate of hernia recurrence than other similar meshes. In May 2016, Ethicon issued a voluntary recall of its product, citing unpublished data that showed that people who underwent hernia repair with Physiomes h were more likely to need future surgeries than patients treated with competitor products. Other potential complications include organ perforation, mesh

migration, bacterial infection, sepsis, and even death.

Lawyer: Melissa Prickett
Primary Contact: Penny Davies

In addition to the lawyers listed as primary contacts, there are other lawyers working on these projects. While I only named the primary contacts, if you have difficulty reaching the contact lawyer named for a specific project, contact Melissa Prickett at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com. She will make sure you are contacted by a lawyer who is knowledgeable about your specific request.

FOURTH TALC TRIAL STARTS IN ST. LOUIS

Beasley Allen lawyers returned to St. Louis in early February to begin our fourth talcum powder trial. Our firm represents Ms. Nora Daniels, who was diagnosed with ovarian cancer in May 2013 after having used Johnson & Johnson talc for more than 30 years. The case was a “Defense pick.” Beasley Allen has represented three prior Plaintiffs in talcum powder cases in St. Louis, totaling nearly \$200 million in verdicts against Johnson & Johnson and Imerys Talc America, the mining company which supplies talc to Johnson & Johnson.

Despite three prior trials, Johnson & Johnson still claims that its talcum powder products do not cause cancer. We—on behalf of Ms. Daniels—will counter this assertion by presenting the jury with evidence of studies dating back several decades showing an increased risk of ovarian cancer among genital talc users. Internal documents from its own files will demonstrate that the Defendants knew of these risks. At press time we were still putting on the Plaintiff’s case and Defense was expected to end its case in early March. The lawyers from our firm who are involved include Ted Meadows, Danielle Mason, David Dearing, Roger Smith, Ryan Beattie and Brittany Scott. Ted and Allen Smith are co-leads in the case.

Four additional talc trials are currently set to take place in St. Louis this year. Additional trials are scheduled in Washington, D.C. and California this summer as well. If you need more information on this subject, contact Brittany Scott, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at Brittany.Scott@beasleyallen.com.

XARELTO LITIGATION UPDATE

I mentioned the Xarelto litigation briefly, but more needs to be said on this litigation. Currently, there are approximately 14,000 individual Xarelto cases consolidated before U.S. District Judge Eldon Fallon in the United States District Court for the Eastern District of Louisiana. The cases are part of multidistrict litigation (MDL) as ordered by the Judicial Panel on Multidistrict Litigation. MDL is a consolidation of civil cases transferred from different jurisdictions around the country to a single United States District Court to achieve certain pre-trial efficiencies. The aim of this consolidation is to preserve judicial resources, eliminate duplicities in the fact-finding process, and prevent inconsistencies in pre-trial rulings. In addition to the numerous claims before Judge Fallon in the MDL, claims involving Xarelto are pending in Pennsylvania and California state courts.

Xarelto, a blood thinner developed by Johnson & Johnson unit Janssen Pharmaceuticals, Inc. and Bayer Corp., was initially approved in 2011 to reduce the risk of blood clots, deep vein thrombosis (DVT), and pulmonary embolism (PE) following knee and hip replacement surgery. It was later approved to reduce the risk of stroke and blood clots in patients with non-valvular atrial fibrillation, and to prevent the occurrence of blood clots in patients with DVT and PE. When Xarelto was first released on the market, the manufacturers advertised the drug as being the “first and only once-a-day prescription blood thinner” that was proven to reduce the risk of stroke in patients with AFib not caused by a heart valve problem that didn’t require routine blood monitoring.

Whereas patients taking warfarin, the leading anticoagulant for decades, must undergo regular blood monitoring to be sure the dose is correct, patients taking Xarelto were told they didn’t have to do that. Instead, they had only to take the drug once a day with their evening meal. This was extremely appealing to both doctors and patients and prescriptions of Xarelto skyrocketed. However, Janssen Pharmaceuticals and Bayer failed to warn doctors and the FDA that in clinical trials, patients taking Xarelto had more gastrointestinal bleeds and needed more transfusions than those taking warfarin.

On Jan. 30, 2017, Judge Fallon entered Case Management Order 2D, which postponed each of the previously scheduled bellwether trials by one month due to

ongoing discovery. The first trial involving Plaintiff Joseph Boudreaux is set to begin on April 24, 2017, in the Eastern District of Louisiana. Plaintiff Joseph Boudreaux will argue that he started taking Xarelto to control his atrial fibrillation in January 2014 and less than a month later was hospitalized for dangerous gastrointestinal bleeding requiring multiple blood transfusions. The second bellwether trial involving Plaintiff Joseph Orr, Jr. is set to begin on May 30, 2017, in the Eastern District of Louisiana.

Lawyers in our Mass Torts Section are currently taking cases involving serious injuries or death related to Xarelto use. For more information, contact Andy Birchfield, David Byrne, Beau Darley or Melissa Prickett at 800-898-2034 or by email at Andy.Birchfield@beasleyallen.com, David.Byrne@beasleyallen.com, Beau.Darley@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Sources: Case Management Order No. 2D, *In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592 (E.D. La. Jan. 30, 2017) and *The Legal Examiner*

IVC FILTER LITIGATION UPDATE

More than 1,500 lawsuits are pending around the country against the manufacturers of retrievable IVC filters, with Plaintiffs alleging that they were seriously injured by the devices. Removable IVC filters are cage-like wire devices placed in the inferior vena cava, a large vein that carries blood from the lower body back to the heart. The filters are designed to stop blood clots that form in the legs from reaching the heart and lungs, and are used in patients who cannot take blood thinners like Coumadin.

Permanent IVC filters have been in use since the 1960s with few complications. However, retrievable IVC filters have a high rate of failure. Potential complications from retrievable IVC filters include device fracture, migration, and perforation of the inferior vena cava, which can lead to embolism, organ damage, and death.

Litigation is moving forward against the manufacturers of these devices. Cases involving Cordis IVC filters are consolidated in California state court, while Bard and Cook Medical IVC filter cases each have a multidistrict litigation (MDL) in federal court.

The Bard IVC Filters Products Liability Litigation (MDL No. 2461) is pending in the United States District Court for the

District of Arizona, in front of Judge David Campbell. The Bard MDL is currently in the process of selecting its first bellwether case. The bellwether process involves taking to trial a small number of representative cases. After those cases are tried or settled, the process is repeated until an overall resolution of all of the claims can be reached in some manner.

The Bard MDL started with a group of 48 cases—24 chosen by Plaintiffs’ counsel and 24 chosen by Defense lawyers. This group will be narrowed down to six cases in April. The first of these cases will go to trial in the fall of 2017. The Court has indicated that other bellwether cases may go to trial before the end of this year.

The bellwether process is also underway in the Cook Medical, Inc., IVC Filters MDL. Three cases are currently being prepared for trial. Lawyers are taking depositions of Plaintiffs, treating physicians, and other fact witnesses, including sales representatives who visited the Plaintiffs’ doctors, as well as expert witnesses. The first trial is expected to begin on Oct. 23, 2017, with another trial to follow in May 2018.

Beasley Allen lawyers continue to investigate cases involving injuries caused by retrievable IVC filters. For more information, contact Melissa Prickett or Liz Eiland, lawyers in our firm’s Mass Torts Section, at 800-898-2034 or Melissa.Prickett@beasleyallen.com or Liz.Eiland@beasleyallen.com.

FDA AGAIN WARNS ABOUT HOMEOPATHIC TEETHING TABLETS

We previously reported that the FDA had warned parents against using homeopathic teething products. In September 2016, the FDA announced that it was conducting an investigation into the products in response to more than 400 adverse event reports over the past six years, including 10 reported deaths.

Now, the FDA says that its laboratory analysis found inconsistent amounts of belladonna, a toxic substance, in certain homeopathic teething tablets, sometimes far exceeding the amounts claimed on the product’s label. Janet Woodcock, M.D., director of the FDA’s Center for Drug Evaluation and Research, said “[t]he body’s response to belladonna in children under two years of age is unpredictable and puts them at unnecessary risk.” The FDA again warned parents not to purchase bella-

donna-containing teething tablets and to dispose of any in their possession.

Standard Homeopathic Company has not agreed to conduct a recall of its Hyland's homeopathic teething products. However, according to the company's website, the product is no longer being distributed in the United States.

For more information on this subject, contact Melissa Prickett or Liz Eiland, lawyers in our firm's Mass Torts Section, at 800-898-2034 or Melissa.Prickett@beasleyallen.com or Liz.Eiland@beasleyallen.com.

Sources: Law360.com, FDA.gov and Hyland.com

J&J AND JANSEN PHARMACEUTICALS LOOK TO EXPAND USES FOR INVOKANA

As lawsuits move forward over Invokana, Johnson & Johnson's Type 2 diabetes medication, the pharmaceutical giant's subsidiary Jansen Pharmaceuticals, which manufactures the drug, hopes clinical trial results will be enough to earn it clearance later this year for use in treating diabetic patients' heart problems. Invokana is a prescription medicine that is used along with diet and exercise to lower blood sugar. It is normally taken in combination with another drug, like Metformin or Glucophage, to decrease insulin resistance, because Invokana alone does not lower blood sugars enough to make it an effective single agent for the treatment of diabetes.

When the U.S. Food and Drug Administration (FDA) approved Invokana in 2013, it required Jansen to conduct a randomized controlled trial evaluating Invokana's cardiovascular risks. Jansen launched that clinical trial seven years ago, called Canagliflozin Cardiovascular Assessment Study (CANVAS/CANVAS-R), which is expected to wrap up later this year, according to ThePharmaLetter. The trial includes as many as 10,000 patients living with Type 2 diabetes.

One part of the trial has measured the effect of Invokana on patients' major adverse cardiovascular events including cardiovascular death, non-fatal myocardial infarction and non-fatal stroke. Janssen hopes that the results will allow it to add an indication to reduce the risk of cardiovascular death in adult patients with Type 2 diabetes, like Jardiance (another drug in the same class as Invokana).

The cardiovascular indication may be a pipe dream for Janssen. Invokana squeaked through the FDA approval

process by an 8-7 vote. The FDA Advisory Committee was concerned that during the first month of clinical trials for Invokana, 13 participants receiving the drug had a heart attack or stroke, compared to only one in the placebo group.

Invokana has also been associated with a number of other serious side effects, including diabetic ketoacidosis (DKA). As you may know, DKA is a type of acidosis that develops when insulin levels are too low or during prolonged fasting that can lead to difficulty breathing, nausea, vomiting, abdominal pain, confusion and unusual fatigue or sleepiness. We wrote in a recent edition of this Report that from March of 2013, when the FDA approved it, to October of 2015, the agency received 101 reports of confirmable cases of acute kidney injury, some requiring hospitalization and dialysis. In approximately half of the cases, the acute kidney injury occurred within only one month of starting the drug.

In December, the Judicial Panel on Multidistrict Litigation consolidated 55 cases from across the U.S. into a multidistrict litigation (MDL). It also appointed U.S. District Judge Brian R. Martinotti to preside over the MDL that is pending in New Jersey federal court. The cases allege Jansen failed to properly test the Type 2 diabetes drug and warn of the risks and consequences of using it. As we mentioned in the February issue, Beasley Allen lawyer Danielle Mason was appointed to the Plaintiffs' Steering Committee. She will help guide the process of pursuing justice for those suffering from J&J and Jansen's failures.

ZIMMER BIOMET RECALLS COMPREHENSIVE REVERSE SHOULDER SYSTEM DUE TO EXCESSIVE HUMERAL TRAY FRACTURES

Zimmer Biomet has initiated a Class I Recall of its popular Comprehensive Reverse Shoulder System due to an excessive number of fractures in the humeral tray component. Unlike traditional total shoulder arthroplasty systems, the Comprehensive Reverse Shoulder System swaps the humeral head (ball) and glenoid (cup) to the opposite sides of the glenohumeral joint in hopes of achieving greater range of motion in patients undergoing total shoulder arthroplasties. The humeral tray holds a polyethylene cup at the top of the humerus bone.

The recall is limited to joint systems containing 300 specific lot numbers dis-

tributed between October 2008 and September 2015, and encompasses approximately 3,600 of Zimmer Biomet's shoulder systems. The recall states that patients who experience humeral tray fractures may need surgeries to revise the failed shoulder arthroplasty, and could suffer "permanent loss of shoulder function, infection or, rarely, death."

Zimmer Biomet began contacting patients who received the devices subject to the recall in late December. Persons who had the Zimmer Biomet Comprehensive Shoulder System used in their total shoulder arthroplasty, and have since experienced complications, may have a claim. If you need more information, contact Matt Munson, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Matt.Munson@beasleyallen.com.

IX. INSURANCE AND FINANCE UPDATE

CLASS ACTION LAWSUIT FILED BY BEASLEY ALLEN LAWYERS IN WASHINGTON

Lawyers at Beasley Allen have filed a class action lawsuit in the Eastern District of Washington against Voya Retirement Insurance & Annuity Company (Voya) and Lincoln Life & Annuity Company of New York (Lincoln NY), along with their parent companies, for their unfounded cost of insurance (COI) increases. Both Voya and Lincoln NY are for-profit life insurers, and per an agreement between the companies, as of October 1998, Lincoln NY reinsures and serves as administrative agent for certain Voya policies—policies held by the Plaintiffs to the action. The complaint alleges that the Defendants have implemented the COI increases ultimately to benefit shareholders and rid Voya and Lincoln of near-term liabilities they have accrued due to their past poor investments and wrongful use of captive reinsurance companies.

Due to heavy investments in illiquid mortgage-backed securities just before the financial crisis of 2008, the Defendants became severely financially distressed. As a result, they devised a scheme to conceal their true financial condition by moving billions of dollars of liabilities for policyholder claims off their balance sheets by using wholly owned captive reinsurance transactions. But in reality, these liabilities

remain with the insurer, since the wholly owned captive reinsurance companies (unlike traditional reinsurance with third-party reinsurers) are incapable of satisfying the assumed obligations. This allowed Defendants to “free up” billions of dollars they otherwise would be legally required to hold as reserves—dollars that Defendants could now use to pay shareholder dividends. Conveniently, the finances of these captives are hidden from consumers, the public, and even most regulators, and both the Lincoln and Voya Defendants used this lack of transparency to further their scheme.

However, because the captive reinsurance transactions did not actually transfer the underlying risk associated with these liabilities, Voya and Lincoln NY remain responsible for meeting these insurance obligations as they come due. Importantly, this included a need for cash to cover the billions of dollars of insurance obligations for universal life policies issued by Voya and reinsured and administered by Lincoln National and Lincoln NY.

In order to find new cash with which to fund future dividends, and delay the inevitable financial disaster that could occur because of its near-term liabilities, the Lincoln and Voya Defendants conspired with each other to generate more cash, or cause policyholders to lapse or surrender their policies, thereby erasing Defendants’ liabilities, by hitting policyholders with exorbitant charges that Defendants falsely told policyholders were based on COI increases.

In reality, the dramatic increases in monthly payments that Defendants levied on policyholders are not due to legitimate COI increases but are the direct consequence of the Lincoln and Voya Defendants’ scheme to continue taking cash out of their insurance company subsidiaries while masking their troubled financial condition from the public. The improper increases are not permitted under the terms of the policies.

These charges do not result because of an increase in the COI, but rather are a result of a conspiracy on the part of Defendants to address past practices of funneling billions of dollars out of their insurance subsidiaries despite their financial distress by raiding policyholder accounts and improperly charging insureds who have dutifully paid premiums to Defendants for years, often decades. Because of these actions, Plaintiffs and Class Members are seeking relief under the Racketeering Influenced and

Corrupt Organizations (RICO) Act, the common law, and other statutory provisions.

Lincoln and Voya are not the only insurance companies raising premiums and cost of insurance in order to account for wrongful use of captive reinsurance schemes. Multiple other life insurers have sent their universal life and/or flexible premium policyholders letters informing them of an upcoming raise in costs—usually claiming these increases are due to “an increase in mortality rates.” In order to avoid a loss of coverage, consumers are paying these increases—often times tripling or quadrupling the policyholders’ original costs.

Lawyers at Beasley Allen have also filed lawsuits against Banner Life Insurance Company and Transamerica, and they are currently preparing to file complaints against other companies, alleging similar wrongful activity. If you have seen this practice by any life insurance company, there may be a valid claim. If so, our firm would like to investigate those potential claims. You can contact Andrew Brashier or Rachel Boyd, lawyers in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Andrew.Brashier@beasleyallen.com or Rachel.Boyd@beasleyallen.com.

MSA AWARDED \$47 MILLION IN PUNITIVES AS A RESULT OF INSURER’S BAD FAITH

A Pennsylvania state court judge has awarded MSA LLC, a subsidiary of safety equipment manufacturer MSA Safety Inc., nearly \$47 million in punitive damages. This came after a long-running insurance coverage dispute with North River Insurance Co. The punitive damages awarded by Allegheny County Court of Common Pleas Judge Alan Hertzberg are in addition to the \$10.9 million awarded by a jury to MSA LLC (formerly known as Mine Safety Appliances Co.) in a breach of contract lawsuit. The punitive damages were awarded under a Pennsylvania statute covering bad-faith claims-handling matters. Kenneth Krause, MSA Safety Chief Financial Officer, said in a statement:

We believe the outcome of this case demonstrates that our subsidiary MSA LLC has strong legal positions concerning its rights to insurance coverage and the overall collectability of the amounts owed to MSA LLC

by several insurance carriers, including North River.

The litigation began in 2010, when North River sued MSA seeking a declaratory judgment that it was not obligated to cover asbestos product liability claims under three personal injury policies together dating from 1980-1983. MSA filed counterclaims for breaches of contract and bad faith.

The case went to a jury trial in September, and on Oct. 6 the jury found that North River breached the three contracts at issue. That led to the award of \$10.9 million in compensatory damages, the full amount of the contractual damages at issue in the case. Judge Stanton Hertzberg then held a nonjury trial in December on the question of bad faith, which led to the most recent damages award.

MSA continues to do battle with North River and other insurers in several venues. One of these cases is scheduled to go to trial in April in the Superior Court of Delaware. Mine Safety Appliances is represented by George Stewart, Brian Himmel, Robert Nicholas and Michael Sampson of Reed Smith LLP. The case is *North River Insurance Co. v. Mine Safety Appliances Co. et al.* (case number GD-10-007432) in the Court of Common Pleas of Allegheny County.

Source: Law360.com

X. PREMISES LIABILITY UPDATE

\$227 MILLION SETTLEMENT REACHED IN DEADLY CENTER CITY COLLAPSE CASE

The 17-week-long civil trial of lawsuits filed in the deadly 2013 Center City building collapse came to an abrupt close on Feb. 8 with the announcement of a \$227 million settlement with the Salvation Army and New York real estate speculator Richard Basciano. This civil trial was called the longest in Philadelphia state court history by Common Pleas Court Judge M. Teresa Sarmina when the jury was told of the settlement. This settlement was also the largest personal injury settlement in Pennsylvania state court history, according to reports. The settlement proceeds will be divided among the families of the seven people who died and the 12 who were injured as a result of the June 5,

2013, collapse of a Basciano building being demolished. The adjacent Salvation Army thrift store was crushed when the building collapsed.

The manner in which the money will be apportioned among the 19 Plaintiffs will be up to an arbitrator who will evaluate the individual claims. As with most civil trials involving death and personal injury, awards are based on such factors as lost earning potential, medical bills, and the impact on victims' families. The Plaintiff who will definitely receive the largest portion of the settlement is Mariya Plekan, a Ukrainian immigrant and regular customer of the thrift store. Ms. Plekan, then 52, was buried under the store's rubble for 13 hours. Her injuries were so severe she underwent a "guillotine amputation," the surgical removal of the lower half of her body at the hips. Ms. Plekan has undergone 30 surgeries, survived kidney failure and lung problems, and lost her ability to speak because of throat damage from months on a respirator. She will require round-the-clock nursing care for the rest of her life and her future medical expenses are estimated at \$50 million.

It was reported that \$200 million of the settlement will come from the Salvation Army and \$27 million from the 91-year-old Basciano. No money is being paid by Defendants Plato A. Marinakos Jr., an architect hired by Basciano to monitor the demolition of the vacant four-story building; demolition contractor Griffin Campbell; and Sean Benschop, Campbell's excavator operator. Federal court records show that Marinakos emerged from bankruptcy in 2012, the year before the collapse. It was reported that his liability insurance coverage was exhausted. Campbell and Benschop, the only two criminally convicted in the disaster, are serving long prison terms and are indigent.

It was reported that the deciding factor in reaching a settlement was the fact that the Salvation Army's liability insurance was capped at \$100 million. The balance of the settlement will have to come from the Salvation Army. Interestingly, according to the Salvation Army's 2015 annual report, which is on its website, the national organization has \$14.8 billion in assets and took in \$2.9 billion in revenue that year.

The Salvation Army's thrift store building was destroyed and two of its workers were killed. The Salvation Army was sued for ignoring warnings of an imminent collapse of the building from Basciano's top aide, Thomas Simmonds, and for not

telling workers and customers about the potential danger. Salvation Army officers testified that they did not believe Simmonds' warnings. But the jury, in its liability verdict on Jan. 31, found that the charity bore 75 percent of the responsibility for the shoppers being killed and injured in the collapse. The jury found that Basciano and his STB Investments Corp. were responsible for a total 18 percent of the harm to shoppers killed and injured in the collapse and 68 percent of the harm to thrift store workers killed and injured.

Trial testimony showed that Basciano and his top aide failed to do due diligence research before hiring Marinakos, who had no major experience monitoring a large commercial demolition. The testimony also showed Basciano accepted without investigation Marinakos' recommendation to hire Campbell, an inexperienced and unlicensed contractor, to handle the demolition project. All of this was a recipe for disaster.

The settlement's announcement came after three days of testimony from several survivors and families of one of the decedents. At the time of the settlement, the jury was deliberating on damages to compensate the victims for their injuries and losses. Had the trial continued, the jurors would have been in deliberations on punitive damages against Basciano and the Salvation Army.

The Plaintiffs are represented by Robert Mongeluzzi, Larry Bendesky, Andrew Duffy and Jeffrey Goodman of Saltz Mongeluzzi Barrett & Bendesky PC, Steven Wigrizer and Jason Weiss of Wapner Newman Wigrizer Brecher & Miller PC, Andrew Stern and Elizabeth Crawford of Kline & Specter PC, Harry Roth and James G. Begley of Cohen Placitella & Roth PC, Adam Grutzmacher of Clearfield & Kofsky, James Golkow of Golkow Hessel LLC, Bernard Smalley Sr. and Jasmine Johnson of Tucker Law Group, the Law Offices of R. Emmett Madden Esq., Joseph Marrone, Michael Pomerantz, Brian Marchese and Keith West of the Marrone Law Firm LLC, Jonathan Cohen of Jonathan M. Cohen LLC, and the Law Offices of Jerome Gamburg. The case is *Angelo Harmon as administrator of the estate of Juanita Harmon, et al., v. The Salvation Army, et al.* (case number 130700720) in the Court of Common Pleas of Philadelphia County.

Source: Phillynews.com

CON ED AGREES TO \$153 MILLION SETTLEMENT IN DEADLY NEW YORK CITY GAS EXPLOSION

New York State and Con Edison have reached a \$153.3 million settlement over a 2014 East Harlem gas explosion that destroyed two buildings and killed eight people. The settlement was announced by Gov. Andrew Cuomo's office that called the agreement the largest gas-safety related financial settlement in state history. The settlement was approved by the New York State Public Service Commission and Consolidated Edison. It includes a fund of more than \$25 million specifically for the company's gas customers. That money will be spent in a way to be determined by the commission.

Con Edison also agreed not to seek reimbursement from consumers for \$125.5 million spent on leak-response activities since the explosion. Attorney General Cuomo said in a statement:

The East Harlem explosion was devastating and entirely avoidable. This landmark action is a pointed reminder to the energy companies of their awesome responsibility to maintain safety first and foremost.

The Attorney General's settlement does not resolve outstanding civil liabilities related to the explosion brought by individuals against the company. The settlement follows a 2015 report by the Department of Public Service that found Con Edison violated safety regulations in the lead-up to the explosion. According to the governor's announcement, the company failed to properly qualify employees to perform certain tasks and did not install valves capable of shutting down the gas system during emergencies.

National Transportation Safety Board (NTSB) investigators in 2015 said in a public hearing that a line installed in an adjacent building to the two that were destroyed was improperly fused to the main line. When the main line began to sag due to soil erosion caused by a nearby sewer main rupture, the newly fused line began to separate, which allowed gas to seep through the ground and into the two buildings.

The New York City Department of Environmental Protection was faulted because it had been notified of the rupture as early as 2006 but decided to leave it be. That hole in the sewer line allowed groundwater to seep into the area and erode the soil around the gas pipeline, causing it to sag. The NTSB investigators found, had the gas

segment been fused properly to the then-sagging main line, soil erosion wouldn't have mattered. What resulted was a blast that not only killed eight, but injured 50 and displaced twice that number, according to an NTSB report.

The explosion, which occurred in March 2014 at around 9:30 a.m., collapsed two five-story buildings on Park Avenue and sent so much debris flying that Metro-North Railroad had to shut its service down for seven hours to clear material blown onto its elevated tracks.

Source: Law360.com

\$248,000 JURY VERDICT IN LAWSUIT OVER DAMAGE TO HOME

A Texas family has won their case claiming the LBJ freeway expansion damaged their home. The Plaintiffs, Aurora and Felipe Rodriguez, were the first of 223 Plaintiffs to go to trial against Trinity Infrastructure. The Plaintiffs all claim the construction caused the homes to shift and crack and be damaged. The jury awarded the Plaintiff \$248,000 to rebuild their home, finding the contractor behind the project at fault. The Rodriguez family's case was a test case meant to gauge a jury's response to the homeowners' arguments and damages.

Unlike some houses that have backyards running up to the LBJ freeway, the Rodriguez family lives a quarter mile away. Their victory was seen as highly significant for other homeowners who have also filed suit. During the trial, lawyers for Trinity argued that there was no evidence to prove the homeowners' claims. But the jury disagreed. However, the jurors did not find the company owed the Rodriguez family any money for the "nuisance" it caused. Dallas lawyer Dean Gresham represented the Plaintiffs in this first case.

Source: CBSDFW.COM

XI. WORKPLACE HAZARDS

NEW YORK COURT DENIES NFL BID TO DISMISS INDIVIDUAL CONCUSSION SUIT

Beasley Allen, along with lawyers from Leiff Cabraser and Tom Sinclair of Sinclair Law Firm, represent Art DeCarlo and his

family in an individual suit against the National Football League (NFL). Justice Manuel J. Mendez of the Supreme Court of New York State denied the NFL's motion to dismiss the complaint filed by the deceased player's son, ruling he had sufficiently asserted his claims of fraud, concealment and negligence for the wrongful death suit to move forward.

Art DeCarlo Sr. was drafted by the Bears in the 1953 draft, but began his professional career with the Pittsburgh Steelers. For the next two years, though, he served in the military and returned to play for the Washington Redskins in 1956. Ultimately, he retired from the Colts. While playing for the Colts, DeCarlo played in back-to-back championships in 1958 and 1959, including the game dubbed "The Greatest Game Ever Played."

According to the complaint, the player suffered numerous concussive and sub-concussive blows during his years playing professional football. In his later years, and as a result of what we now know to be stage IV out of IV Chronic Traumatic Encephalopathy (CTE), DeCarlo suffered a slow decline in his cognitive abilities. Unfortunately for DeCarlo, there is no way to diagnose CTE until a *post mortem* autopsy can be performed.

That CTE cannot be diagnosed until after death is a major part of why Judge Mendez denied the NFL's Motion to Dismiss. In making the ruling, Judge Mendez described the disease as being akin to asbestos because "damage caused by both can take up to 20 to 40 years to manifest." The judge said in his order:

If plaintiff was suffering from a latent condition, and the ability to diagnose the condition is not available until the death of the injured party, then under the discovery rule the cause of action arises upon the discovery of the latent disease, i.e., at the time an autopsy is performed.

The discovery rule, combined with the latent nature of CTE and that the rule was designed exactly for these types of injuries, meant the claims were not time-barred. Judge Mendez wrote further:

The date of Mr. DeCarlo's death is Dec. 21, 2013 and Plaintiff commenced this action on Nov. 15, 2015. Therefore, plaintiff's claims are timely as the date of accrual for the causes of action under these circumstances was the date of DeCarlo's death.

The case will now proceed in New York state court. In April, a Pennsylvania federal judge approved an uncapped settlement in multidistrict litigation (MDL) between the NFL and about 5,000 former players seeking damages for concussions and degenerative neurological conditions resulting from their playing days. In October, dozens of ex-NFLers filed a new head injury class action in Louisiana federal court against the NFL and football helmet maker Riddell Inc. over the harmful effects of repeated head injuries and concussions in football, alleging they conspired to mislead players and the public about the known risks.

This ruling by Judge Mendez is not only a win for the DeCarlo family, but a win for all those with cases involving latent injuries. Recognizing the inherent impossibility of filing a claim within a traditional limitations period without any diagnosis, as would be required had the court treated CTE as the NFL argued, Judge Mendez entered a well-reasoned and supported ruling that allows this case to go forward as it should. If you need more information on this matter, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Sources: Law360.com, the opinion, and the complaint

AUSTAL ALLOWED USE OF A TOOL IT KNEW WAS DANGEROUS

Since 2011, dozens of workers at the Austal ship manufacturing plant in Mobile, Alabama, have been injured by a dangerous cutting tool. It was reported that management at the company had referred to the tool as the "widow maker." Between January 2011 and March 2015, 53 workers were injured by the tool, suffering gashes to face, neck and arms, while some even lost fingers. This information came from Austal injury logs obtained as part of an investigation by the Center for Investigative Reporting (CIR).

It was reported that Austal workers on the manufacturing side of the business had raised concerns to health and safety officials at the company in March 2011. Workers had complained about the cutting tool, calling it "unsafe" and warning that "someone is going to get hurt."

The tool, originally a grinding device manufactured by Metabo, is designed to cut through metal in straight lines, but

Austal swapped out the original discs for saw blade-style discs that are faster and can carve around edges. The operating manuals that come with the tool specifically warn against using saw blades, stating in the operating manual that “such blades create kickback and loss of control.”

Despite \$60,000 in fines and penalties handed down by the Occupational Safety and Health Administration (OSHA) for exposing workers to “amputations, severe lacerations, and other injuries,” it appears that a quarter of the 4,000-strong workforce at Austal may still be using the tool today. “The government expects that contractors, such as Austal, should not only deliver a good product, but also conduct operations in a safe manner,” Joseph Roesler, OSHA’s area director in Mobile, said when he announced fines against the company in 2014.

Austal has appealed the fines and penalties. Interestingly, it was reported that Austal’s top safety manager stated in a 2015 email to employees that all injuries sustained from the cutting tool were because of “carelessness, improper use and complacency.” However, current and former Austal employees have filed a lawsuit against the company, claiming it intentionally endangered them by forcing them to use the cutting tool that managers knew to be dangerous. Metabowerke GmbH and Metabo, manufacturers of the tool, are also named in the suit along with Southern Gas and Supply Inc., which supplied the tools to Austal. Brian Duncan, a lawyer for the workers, stated:

How does any company in America sit there and say, ‘I’m going to have dozens and dozens of my employees injured using the same tool,’ and not get another tool? To me, it rises to the level of intentional misconduct.

The lawsuit has been allowed to move forward by the court. However, Austal has already appealed to the Alabama Supreme Court to have the suit dismissed. The appeal is pending. J. Brian Duncan Jr., a lawyer with the Mobile firm Cunningham & Bounds, represents the employees in this litigation.

Source: *Mobile Press Register*

CALIFORNIA EXPANDS DUTY OF CARE TO COVER HOUSEHOLD MEMBERS

The California Supreme Court recently ruled that employers using asbestos in the workplace have a duty of care to protect employees’ household members from exposure to that asbestos brought home by the employee. The court’s opinion was issued on two coordinated “take-home” asbestos cases.

- One Plaintiff, who was diagnosed with mesothelioma, linked his exposure to his uncle who brought home asbestos fibers lodged in his clothing from his work in a Pneumo Abex plant.
- The second case was filed on behalf of a mother who passed away from mesothelioma after also having been exposed to asbestos fibers found on her husband’s clothing after working at BNSF Railway Company.

The court ruled that employers have a duty to take reasonable care to prevent the transmission of asbestos where it is reasonably foreseeable that workers or their clothing will act as “vectors carrying asbestos from the premises to household members.” This duty also applies to premises owners who use asbestos on their property and extends to cover any household member, regardless of whether they are a relative.

Addressing the Defendants’ concerns that creating such a blanket duty could lead to tenuous claims, the court limited the duty only to household members who are “in close and sustained contact with the worker over a significant period of time.” The court reasoned this would limit potential Plaintiffs to an identifiable category of persons who likely suffered legitimate, compensable damage.

The court ultimately determined that the Plaintiffs’ exposures to take-home asbestos was foreseeable and that this sustained contact with asbestos increased their likelihood of contracting mesothelioma. The court rejected the Defendants’ argument that a scientific consensus is required to establish foreseeability in the context of duty analysis.

Instances such as these illustrate how easily those not directly exposed to dangerous particulates can contract deadly lung diseases. Thus, it is imperative for employers to ensure that workers exposed to such particulates decontaminate themselves and do not endanger the health of their household members.

Lawyers in our Toxic Torts section are investigating severe lung injury cases involving workers exposed to harmful chemicals on the job. If you have any questions about these cases, contact Chris Boutwell or Ryan Kral, lawyers in the Section, at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com or Ryan.Kral@beasleyallen.com.

XII. TRANSPORTATION

FIRM SETTLES WRONGFUL DEATH CASE AGAINST NATIONWIDE TRUCKING COMPANY

On Feb. 9, 2014, Desmond Rachard Woods was driving his 1989 Ford Crown Victoria northbound on Interstate 65 in Autauga County, Alabama, when the vehicle experienced mechanical problems and shut off. The vehicle stalled in the right-hand lane of the interstate. 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. They remained inside while the other passengers were outside 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 vehicle. As a result of the collision, both vehicles caught on fire and the two passengers in the Woods vehicle burned alive.

Chris Glover, a lawyer in our firm, along with Robert Bruner of the Birmingham firm Belt & Bruner, represented the Plaintiffs in this case. Plaintiffs brought negligence and wantonness claims against the truck driver and the trucking company, and negligent hiring, training and supervision claims against the trucking company. It was discovered through our investigation that the Defendant truck driver suffered from sleep apnea, and that he had lied about this 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 driver testified in his deposition that he deliberately withheld this information for fear he would not get a commercial driving job. However, the driver was truthful about his diabetes diagnosis. The driver was still allowed to drive, despite the company’s 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 Defendant trucking company had no system in place to monitor and enforce its own safety policy regulations and 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.

We were able to secure settlements for both families. The amounts are confidential at the request of the Defendants. Chris and Robert were honored to represent the families of Kimberly Livingston and Marquita Speer.

THERE WAS A LARGE INCREASE IN TRAFFIC DEATHS ON U.S. HIGHWAYS LAST YEAR

The number of people killed in car crashes last year exceeded 40,000 for the first time in a decade, reversing a trend that saw traffic fatalities dwindle for several years. Officials attribute the increase mostly to the improved economy and lower gas prices, which have led to more people driving for work and pleasure. The statistics released by the National Safety Council offer the first full picture of fatalities on the country's roadways in 2016. The numbers were significantly higher than those projected by the National Highway Traffic Safety Administration (NHTSA) due to a simple mathematical difference.

The National Safety Council data shows a 6 percent increase in deaths last year when compared with 2015 and a corresponding 3 percent increase in the number of miles Americans drove last year. NHTSA statistics for 2016 will be released later this year. Given the disparity in methods of calculations, NHTSA counted 35,095 traffic fatalities in 2015, a 7.7 percent increase from the previous year, while the National Safety Council recorded 37,757. Deborah A.P. Hersman, president of the National Safety Council and former chair of the National Transportation Safety Board (NTSB), said:

Motor vehicle fatality numbers have been ringing the alarm for two

years. Unfortunately, we have been tone deaf to the data and the carnage on our roadways. If we fail to take action, the death toll will continue to rise.

About 4.6 million people required medical treatment after crashes, the safety council said, an increase of 7 percent over 2015. The cost of deaths, injuries and property damage attributed to crashes was \$432.5 billion, up 12 percent from 2015. The safety council found a more than 20 percent increase in traffic fatalities in seven states: New Mexico, Alaska, Hawaii, Iowa, Alabama, Kansas and New Hampshire. Crash deaths declined by more than 10 percent in Wyoming, South Dakota, North Dakota, Montana and Nebraska. There were less significant drops in Delaware, Maryland, Minnesota, Pennsylvania, Virginia and Washington state. The District had 28 traffic deaths in 2016, an 8 percent increase from the previous year.

Source: *The Washington Post*

THE HIDDEN HAZARDS OF HIGHWAY DESIGNS

Many folks do not realize that there can be hidden hazards in how a highway was designed that often create safety issues that contribute to causing deaths or injuries each year in accidents. These hidden hazards are becoming more visible because most of the highways and bridges in the United States were built in the 1950s and are now well past the end of their projected 50 years' life expectancy. Many of them are in desperate need of repair or replacement. Even if the highway or bridge is not 50 years old, and, despite the advances in roadway engineering and design in the last century, errors in design and construction still contribute to far too many motor vehicle accidents.

There are two overall types of unsafe roadway cases: poorly designed roads and poorly maintained roads. "Poorly designed roads" can include such things as tight curves that cannot accommodate posted speeds limits, inadequate or unclear road markings, hidden or improper signs, dangerous trenches, potholes or drop-offs; blind intersections that put pedestrians and bicyclists at risk, improper grading or uneven roadways, or the lack of protective equipment, such as guardrails.

"Poor road maintenance" can also lead to serious car accidents and injuries. Examples of dangerous, defective mainte-

nance include severe potholes, construction debris, items or equipment left in the path of traffic, excessive gravel or oil, or poor drainage that allows water to pool on the highway.

Several years ago, our firm handled a wrongful death case related to the death of 15-year-old young man. This young man died because of injuries he received in a one-vehicle accident that occurred in a highway construction zone on U.S. Highway 80 near the Montgomery Airport. The car was going through a temporary detour lane when it encountered a standing pool of water that covered nearly the entire width of the detour lane. The water caused the vehicle to hydroplane and crash into a temporary barrier wall and overturn.

Evidence showed that the construction company doing work on behalf of the State of Alabama had failed to properly maintain a drainage culvert, which caused water to pool and back out onto the highway. Although the State was responsible for designing the construction project, the general contractor had the responsibility under state specifications for providing continuous maintenance and upkeep of the construction site to provide for the safety of the traveling public.

Depending on what type of road is involved, responsibility for the roadway design or maintenance problems could lie with the state-level transportation department or a city/county municipality. Unfortunately, many government agencies are immune from certain types of injury claims. This immunity, commonly known as "sovereign immunity," can prove difficult for personal injury claims. In the case mentioned above, there was a private contractor hired by the State of Alabama that was responsible for the highway defect.

These are just a few of the potentially dangerous roadway conditions faced by drivers every day that could result in an injury-causing car accident. Mike Crow, Julie Beasley and Ben Baker, lawyers in the Personal Injury & Product Liability Section, have successfully handled a number of roadway design cases. If you have any questions or if you would like to discuss a potential case, they can be contacted at 800-898-2034 or by email at Mike.Crow@beasleyallen.com, Julia.Beasley@beasleyallen.com. or Ben.Baker@beasleyallen.com.

**FEDERAL MOTOR CARRIER SAFETY RULES
ESTABLISHED NO MINIMUM HOURS OF DRIVER
TRAINING FOR TRUCK AND BUS DRIVERS**

In July of 2012, Congress mandated certain rules in the trucking industry under the “Move Ahead for Progress in the 21st Century” Act, also known as MAP-21. The Federal Motor Carrier Safety Administration (FMCSA) was to establish minimum training standards for entry-level driver training.

In 2014, the FMCSA announced its intention to establish regulations for entry-level drivers training for drivers operating commercial motor vehicles both interstate and intrastate. On Dec. 7, 2016, the FMCSA announced a final rule establishing a comprehensive national minimum training standard for entry-level commercial truck and bus operators seeking to obtain a commercial driver’s license (CDL). These standards address the knowledge and skill necessary for safe operation of a commercial motor vehicle and provide entry-level driver training. However, the initial proposed rule issued in 2014 set forth 30 hours of training with a minimum of 10 hours of behind-the-wheel. The final rule issued on Dec. 7, 2016, did not mandate the 10 hours of behind-the-wheel training.

On Jan. 3, 2017, the Advocates for Highway and Auto Safety, the owner/operator independent driver’s association, Truck Safety Coalition, and Citizen’s for Reliable and Safe Highways filed a petition for reconsideration asking the Federal Motor Carrier Safety Administration to strengthen the rule to ensure that candidates applying for a commercial driver’s license log a minimum number of behind-the-wheel hours actually operating a commercial truck on the public roads. Advocates argue that without a minimum hour requirement for behind-the-wheel training, sufficient to provide exposure to actual operation of equipment, the final rule as published includes no measurable means or minimum metric to ensure commercial driver’s license applicants will obtain some minimum training and experience both on the road and range.

Since the minimum final rule is not anchored in any measureable or quantifiable performance metric, the final rule provides no means for insuring any instructors will not take the easy, “one and done” alternative and render the final rule ineffective.

Requiring candidates to drive a minimum number of hours of behind-the-

wheel training will help reduce crashes involving inexperienced truck drivers. Furthermore, the leading commercial driver’s license training schools already require their students to complete a minimum number of hours behind-the-wheel training. The new federal standard falls short of even that.

The current rule provides that training providers must determine that each CDL applicant demonstrates proficiency in all required elements of the training in order to successfully complete a program. The current rule that was issued on Dec. 7, 2016, would go into effect on Feb. 6, 2017, with full compliance by February of 2020.

It is hard to believe that a new truck driver does not receive any hours-behind-the-wheel training. Persons obtaining a private pilot’s license have a minimum of 10 hours of solo flying; persons wanting to become a train engineer have 16 weeks of on-the-job training where they actually would control the train; and persons wishing to obtain a boat captain’s license have to be on a boat in the water for at least 90 days of the prior 360 days prior to issuance of a license.

The final rule that was issued is not in the public interest because it does not advance safety beyond the current practice in which any and all untrained CDL applicants can perform basic minor movements of commercial motor vehicles and obtain a commercial driver’s license without being exposed to the real world experience of driving a commercial motor vehicle on public roads while receiving instruction from a qualified instructor.

Hopefully the Federal Motor Carrier Safety Administration will reconsider the final rule that was issued and put in a minimum number of hours that new applicants are required to spend behind the wheel of a truck or bus. If you need more information on this subject, contact Mike Crow, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Mike.Crow@beasleyallen.com.

Sources: www.fmcsa.dot.gov, www.fleetowner.com and Law360.com

**U.S. MILITARY HANGS ON TO OSPREY-STYLE,
TILT-ROTOR DESIGN FOR NEXT-GENERATION
AIRCRAFT**

Tilt-rotor aircraft technology, similar to technology incorporated in the design of the U.S. Marine Corps V-22 Osprey, is not going away despite its reputation as a dan-

gerous aircraft. In fact, Scout Warrior reports that the U.S. Army is working with Bell Helicopter and the team from Sikorsky Aircraft and The Boeing Company to create a new fleet of aircraft that will include a tilt-rotor technology design.

As development and production continues, the Army-led effort known as the Joint Multi-Role Technology Demonstrator has finished two high-tech, future oriented demonstrator helicopters. The demonstrators, slated for ground testing later this year, anticipate taking their first flight next year. Designs for the new aircraft fleet, or the Future Vertical Lift (FVL) program, will allow the aircraft to travel much faster at 230 knots and have a longer combat radius of 434 kilometers. New designs and technology will also allow the next-generation aircraft to operate in “high-hot” conditions of 6,000 feet and 95 degrees Fahrenheit—both of which create difficult operating environments for helicopters. Scout Warrior reports that advanced safeguards include future-oriented sensors, weapons and guidance technologies, and minimal rotor downwash.

Designed to operate as both an airplane and a helicopter, the tilt-rotor technology included in the Osprey’s design is a compromise that does not work, as reported previously in *The Jere Beasley Report* (December 2016). Its tragically flawed design has claimed 37 service members’ lives as a result of multiple issues over the course of its lifespan, reports Righting Injustice. During one deadly accident in April 2000, an Osprey plummeted to the ground while attempting to land at Arizona’s Marana Northwest Regional Airport.

The phenomenon known as the vortex ring state (VRS) was responsible for the deaths of all 19 Marines on board at the time of the tragic incident. Quadcopter101 explains that VRS occurs when a rotorcraft descends vertically too quickly. The propeller blades descend into the turbulent downwash beneath the aircraft. Although VRS is a common problem for all rotorcraft, the Osprey’s unique design can intensify the effect of the VRS by producing a sudden hard roll if only one of the lateral rotors is affected.

BreakingDefense explains that the Osprey’s rotors are about five feet shorter than what is ideal for its missions. The blades’ shorter-than-optimal length is necessary in order for the aircraft to fit on the deck of an amphibious assault ship. Further, the blades are twisted more than a helicopter’s, which allows them to grab

the air better when flying in airplane mode. The short, highly twisted blades create downwash that can increase the risk of VRS. The significant downwash during brownout landings where dust and dirt swathe the cockpit makes it nearly impossible to land the craft safely—something that is unavoidable in modern combat locations.

The Bell-Boeing team, which currently makes the V-22 Osprey, recently received \$138 million in additional funding for supplementary work for V-22 aircraft that will be sold to Japan. The team also received additional funding to complete repairs for the U.S. Navy's version of the Osprey.

While the Bell-Boeing team benefits from the supplemental contract funding, which UPI reports could total \$545 million if all options are exercised, for the existing tilt-rotor aircraft, the industry giants all claim their designs are substantially advancing tilt-rotor technology. Bell's V-280 Valor is a third generation tilt-rotor aircraft with straight wings, which Bell claims reduces the complexity of maneuverability. The Valor will include additional flapping in the rotor system along with individual controls making it easier for the aircraft to operate and move at low-speed.

The Sikorsky-Boeing duo's Defiant uses coaxial technology or large counter-rotating rotor blades and some thrusting technology at the back. Details remain limited as the designs continue to unfold, yet critics question whether the design changes, evolving technology and promises for better safeguards will go far enough and better protect the pilots and crews than the first generation of the hybrid technology.

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

Sources: Scout Warrior, UPI, and cases handled by Beasley Allen

STATE PRODUCT LIABILITY LAW AND FEDERAL FIELD PREEMPTION IN AN AVIATION CASE

Brenda Houston was an experienced pilot who flew Boeing 737s, 757s and 767s for United Airlines. On the evening of July 28, 2008, Ms. Houston was flying a much smaller airplane, a 1976 Cessna 172N, and it would be her last flight. The Seattle

Times reported that she was accompanied by her 10-year-old daughter, Beth Crews, and a 58-year-old retired orthopedic surgeon, Dr. Virgil Becker. The three were flying from Roche Harbor to Auburn, Washington, when the plane crashed just after 8:30 p.m. in the rugged terrain of the Bald Mountain area. The crash claimed the lives of all three occupants.

The National Transportation Safety Board (NTSB) and the Federal Aviation Administration's (FAA) local office investigated the crash. Based upon the federal investigators' findings, Dr. Becker's family claimed that a poorly manufactured carburetor float caused the engine to stall, which ultimately caused the crash. The NTSB examined the carburetor float and found that one of the float's chambers was completely filled with aviation fuel. Court documents explain that, "[a] float filled with fuel can force the engine's fuel feed to remain open, causing the engine to flood and stall out." The federal investigation did not offer a reason for the filled float; however, the family alleged that the leak occurred because Forward Technology Industries Inc. (FTI), the company that built the carburetor, failed to weld it correctly.

The family filed suit against FTI alleging a number of claims including a state product liability claim. The King County Superior Court agreed with FTI's argument that federal law, the Federal Aviation Act of 1994 (Act), preempted the state's product liability law because the Act's regulations were so pervasive that it excluded any other law's authority—implied field preemption. The King County Superior Court granted FTI's motion for summary judgment—dismissing the claim against FTI. The Washington State Court of Appeals agreed with the lower court. However, the state Supreme Court overturned the ruling, holding that the Act did not preempt state product liability law.

The Washington State Supreme Court recognized two general guiding principles about state product liability law and federal preemption. In general, state law governs product liability claims and, typically, there is a presumption against finding implied federal preemption. It then relied on two recent federal courts' opinions about a similar question of law to support its applying these principles to the case at hand.

The Third Circuit, in *Sikkelee v. Precision Airmotive Corp.*, held that although the Act preempts the field of aviation safety, it does not preempt all design and

manufacturing claims. It also held that the Act directed the FAA to create federal "minimum standards" for aviation safety, but never intended to regulate the whole industry.

Two Ninth Circuit decisions also provided guidance in Becker. In *Montalvo v. Spirit Airlines*, the Ninth Circuit held that the federal Act did preempt state law because the issue in that case, failure to warn about the increased risk of deep vein thrombosis from sitting for prolonged periods in cramped airplane seats, did fall within the FAA's pervasive regulations of passenger warnings. The Ninth Circuit narrowed that holding in *Martin v. Midwest Express Holdings, Inc.* After falling down airstairs, a passenger sued the airlines under state product liability law. The court agreed that state law should prevail because the FAA had not "comprehensively regulated" the stairs and, therefore, had not intended to preempt state law.

Additionally, the Washington State Supreme Court also determined that the history of the Act showed no Congressional intent to preempt state law. On two separate occasions, in 1989 and 1993, proposed legislation would have preempted all state tort liability for general aviation accidents. Congress rejected both of these attempts to preempt state law. Specifically, in 1989, a Senate Judiciary committee report explained that committee members did not want to take this right from the states. The committee members believed states should be able "to determine their own standard of liability."

Aviation cases in the future now have a clear framework for determining when federal preemption applies. Based on *Becker* and decisions from the Third and Ninth Circuits, federal preemption will be a seldom occurrence. If you have any questions contact Mike Andrews at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

Sources: *Seattle Times* and Mondaq

XIII. ENVIRONMENTAL CONCERNS

CALIFORNIA CLEARED TO PLACE HEALTH WARNING LABEL ON ROUNDUP

During 2014, farmers sprayed almost a pound of glyphosate—the active ingredient in brand name Roundup weed killer—on every acre of cultivated farmland in the United States. It is by far the most widely used herbicide in America, according to recent data findings. However, its popularity could pose potential health risks. By the end of January, California's Environmental Protection Agency (Cal/EPA) cleared a major hurdle in its efforts to list glyphosate as a human carcinogen, according to *U.S. News & World Report*. A state court judge ruled against Monsanto, the manufacturer of Roundup, saying the state can require it to label its weed killer as a possible cancer threat.

Glyphosate, a phosphonate compound that has no color or smell, has been linked to cancers, particularly non-Hodgkin's lymphoma, and other health and environmental concerns, prompting Cal/EPA's action. However, Monsanto has insisted consistently that it poses no risk to humans. The company claims the proposed label would have "immediate financial consequences for the company." Monsanto sued California saying officials illegally based their decision for the warning label on the International Agency for Research on Cancer's (IARC) classification of glyphosate as a "probable human carcinogen." IARC is a branch of the U.N. World Health Organization based in Lyon, France.

The suit claimed that California violated the state constitution by delegating authority to an unelected foreign body. However, the state maintained that IARC is the "gold standard" for identifying human carcinogens and is used by other states and the federal government as a source for health information. Cal/EPA is waiting until the judge officially issues a formal decision, but if the proposed label is carried out as expected, California would be the first state in the U.S. to order the label be placed on Roundup. In that event, Monsanto, which is expected to challenge the ruling, would have a year to comply.

Source: *U.S. News & World Report*

JUDGE RULES THAT MONSANTO CAN'T ESCAPE PCBs SUIT

A California federal judge has ruled that Monsanto Co. can't escape separate public nuisance suits filed by San Jose, Oakland and Berkeley seeking cleanup costs for allegedly contaminating the San Francisco Bay with polychlorinated biphenyls (PCBs). U.S. District Judge Edward J. Davila ruled that the cities have a legitimate property interest in captured stormwater under the state's water code.

The judge previously had granted Monsanto's motion to dismiss because the cities couldn't show they owned stormwater that flows through municipal pipes to the bay, a requirement of a public entity to bring a non-representative nuisance action for damages. However, since then, new rules under California's water code that give cities a right to capture stormwater and put it to use have cleared a path for San Jose, Oakland and Berkeley to make their nuisance claims against the agrochemical company.

While Judge Davila noted that public entities generally can't bring nuisance claims against manufacturers, he said an exception exists if the Defendants "create or assist in creating a system that causes hazardous wastes to be disposed of improperly or ... instruct users to dispose of wastes improperly." Judge Davila also rejected Monsanto's argument that a statute of limitations bars any claims against them since they stopped manufacturing PCBs in 1979, finding the cities' allegations of a causal connection between Monsanto's distribution of PCBs, contamination of the bay and the alleged public nuisance were sufficient. The cities pled facts showing that Monsanto instructed users to improperly dispose of PCB waste, the judge added.

This was the latest in a series of legal battles playing out across the West Coast between the agricultural biotechnology giant and local governments over its use of PCBs from 1930 through 1977. Congress had banned the toxin in 1977. The suits allege that local governments have to pay to reduce the level of PCB discharge into San Francisco Bay waters, which occurs from stormwater runoff collected by their municipal stormwater systems. Berkeley, Oakland and San Jose brought the instant suits against Monsanto and units of Pfizer Inc. and Eastman Chemical Co., which used to be part of Monsanto, over the past two years.

Judge Davila dismissed them with leave to amend in August, finding that the cities did not adequately show they have a property interest affected by the PCBs. The cities simultaneously filed amended complaints in September that alleged a single cause of action, seeking compensatory and punitive damages for an alleged public nuisance in the San Francisco Bay.

The U.S. Environmental Protection Agency (EPA) has classified PCBs as probable human carcinogens, and PCBs may also cause noncarcinogenic effects, including reproductive effects and developmental effects, primarily to the nervous system. The chemical tends to accumulate in the human body in the liver, fatty tissue, skin and breast milk.

San Jose is represented by J. Richard Doyle and Nora Valerie Frimann of the Office of the City Attorney of San Jose. Oakland is represented by Maria Bee, Barbara J. Parker and Otis McGee Jr. of the Oakland City Attorney's Office. Berkeley is represented by Lynne Sarah Bourgault and Zachary Cowan of the Berkeley City Attorney's Office. All three cities are also represented by Carla Michelle Burke, Celeste A. Evangelisti, Paul Scott Summy and Brett Land of Baron & Budd PC and John Paul Fiske and John H. Gomez of Gomez Trial Attorneys. The cases are *City of Berkeley v. Monsanto Co. et al.* (case number 5:16-cv-00071); *City of Oakland v. Monsanto Co. et al.* (case number 5:15-cv-05152) and *City of San Jose v. Monsanto et al.* (case number 5:15-cv-03178) all in the U.S. District Court for the Northern District of California.

Source: Law360.com

DUPONT SETTLES LAWSUITS OVER LEAK OF CHEMICAL USED TO MAKE TEFLON

DuPont and Chemours Co have agreed to pay \$671 million to settle thousands of lawsuits involving a leak of a toxic chemical used to make Teflon. According to Chemours, it will pay half of the settlement, even though liability for litigation related to the chemical was passed on to the company when DuPont spun it off in 2015.

The companies settled about 3,550 personal injury claims arising from the leak of perfluorooctanoic acid, which is also known as PFOA or C-8, from its plant in Parkersburg, West Virginia. The leak allegedly contaminated local water supplies and has been linked to six diseases, including testicular and kidney cancers.

Rob Bilott, a lawyer for the Plaintiff, said in a statement:

We look forward to working with DuPont to finalize this settlement and get these injured class members paid as quickly as possible.

DuPont said in a statement that it had stopped using C-8 in operations at the West Virginia plant more than a decade ago. It had used the chemical there since the early 1950s. The settlement comes as DuPont and Dow Chemical Co. expect to close their \$130 billion merger later this year. In 2001, residents brought a class action against DuPont over C-8 exposure. The company agreed in 2004 to fund medical monitoring programs and install new water treatment systems.

DuPont convened a panel of scientists to determine whether any diseases were linked to C-8. The panel concluded that there was a probable link with six illnesses: kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension and high cholesterol. Members of the class action lawsuit also sued DuPont individually, and the litigation was consolidated in federal court in Columbus, Ohio. The company agreed not to challenge whether C-8 can cause the diseases.

Three verdicts in the litigation totaled \$19.7 million. Most recently, a jury ordered DuPont to pay a plaintiff \$12.5 million, including \$10.5 million in punitive damages. The case is *In re E.I. Du Pont De Nemours and Company C-8 Personal Injury Litigation* (case No. 13-2433) U.S. District Court for Southern Ohio.

Source: Reuters

ALABAMA WATER POLLUTION LAWSUIT TO PROCEED

The lawsuit in a federal court against 3M and others over chemical pollution of the Tennessee River near Decatur, Alabama, will proceed. U.S. District Judge Abdul K. Kallon denied three motions to dismiss filed by Defendants in the case. As we have previously reported, the lawsuit, filed by environmental group Tennessee Riverkeeper, alleges that synthetic chemicals manufactured by 3M at its plant in Decatur have been entering the Tennessee River, including Wheeler Reservoir, a major source of drinking water for decades, and that these chemicals pose a threat to human health and the environment.

The lawsuit, filed under the federal Resource Conservation and Recovery Act (RCRA), seeks to force 3M, BFI Waste Systems of Alabama, the City of Decatur, Morgan County and other entities to clean up landfills and wastewater treatment plants the Plaintiffs say are still releasing those chemicals into the Tennessee River and local groundwater.

In the motions to dismiss, the Defendants argued that they were already acting with the Alabama Department of Environmental Management (ADEM) to clean up some of the contaminated sites along the Tennessee River and that the chemicals in question—perfluorooctanoic acid (PFOA) and perfluorooctyl sulfonate (PFOS)—did not fit the definition of hazardous materials in the RCRA. But Judge Kallon ruled the case could continue, noting “RCRA itself does not include a list of hazardous wastes nor a specific method for determining whether a waste is hazardous,” and that whether PFOA and PFOS were hazardous would be the “crux of this dispute.” David Whiteside, Tennessee Riverkeeper’s founder and executive director, said in a news release:

After nearly five decades of 3M’s pollution of the Tennessee River, where no one has held the defendants accountable, Riverkeeper needed to act to protect this precious resource and all the wildlife and restore justice to the hundreds of thousands of people who rely upon her waters everyday. We don’t mind 3M making profitable products—but, we cannot tolerate the defendants putting profit ahead of the health of people, the environment, and our water.

The chemicals do not occur naturally, but according to U.S. Environmental Protection Agency reports, some levels of PFOA and PFOS can be found in the bloodstream of nearly every person on Earth because they are highly resistant to breaking down in the environment and build up in animal tissue over time. Last year the EPA revised its guidelines regarding these chemicals, warning new research had shown the chemicals could be harmful to humans in lower concentrations than the Agency previously thought.

According to the EPA advisory, potential health effects of long-term exposure to these PFCs could include “developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal variations),

cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes).”

Both chemicals were used primarily in manufacturing to create stain-resistant or non-stick coatings on cookware, carpets, furniture fabric and other consumer products. The chemicals were used in commercial products Teflon and Scotchgard, as well as common firefighting foam, until the health risks became more apparent. The EPA Health Advisory recommended drinking water contain no more than 0.07 parts per billion combined of PFOA and PFOS to avoid long-term health impacts from drinking the water over a number of years. That announcement caused eight Alabama water systems to change their water sources to reduce concentrations of PFCs below the advisory threshold. One water provider, the West Morgan East Lawrence Water Authority, issued a “do not drink” recommendation to its customers until it could bring in outside water to dilute its supply, and then install a permanent filter.

In its lawsuit, Tennessee Riverkeeper claims groundwater testing from the 3M facility in Decatur showed “[c]oncentrations of PFOA as high as 4,980 [parts per billion] and PFOS as high as 3,890 ppb,” thousands of times higher than the EPA advisory threshold.

Other litigation involving these chemicals continues in north Alabama, and around the country. The West Morgan East Lawrence Water Authority has a separate lawsuit against 3M and other manufacturing operations along the Tennessee River, seeking to force them to pay for additional filtration equipment to remove PFCs from the water it takes from the river. Daikin America, one of the Defendants in that suit, agreed last year to settle the claims against it for \$5 million.

Source: AL.com

XIV. UPDATE ON NURSING HOME LITIGATION

NURSING HOME OVERSIGHT AND REVIEW

Recently, South Haven Health and Rehabilitation, a Montgomery, Alabama,

nursing home, was notified that it would be losing its Medicare and Medicaid funding. Local news outlet WSFA reported that South Haven was losing Medicare and Medicaid benefits for its residents beginning March 1, 2017. The decision was made at the suggestion of the Alabama Department of Public Health (ADPH) in conjunction with the Centers for Medicare and Medicaid Services (CMS).

CMS is the federal agency that oversees the operation of long-term care facilities, such as South Haven, that receive government benefits for their residents. It is a rare occasion when a nursing home loses its certification and benefits. In the case of South Haven, it is not known completely at this time what the basis for the decertification is, but history tells us that the offenses must be multiple. The ADPH has reported numerous violations of federal law that warrant the withdrawal of governmental benefits.

The decertification of this facility provides a clear sign to residents of these facilities not to rely too heavily on the “star” rating system. A search of this facility reveals that it has received four or more stars on a five-star rating system, indicating this is a quality health care facility. In fact, the investigation of the government agencies reveals just the opposite.

Federal regulations require that nursing homes comply with 42 CFR Part 483, Subpart B, in order to receive Medicare and Medicaid benefits. Inspections of nursing homes are supposed to be unannounced, and inspection of the facilities may cover many days. Inspections cover a host of issues, such as staffing, training of staff, health condition of the residents, number of reported incidents, quality of the facilities, competency of staff, record keeping and recording, and the like.

Our firm has a case pending against this facility and is currently investigating at least one other. The facility is owned by Sava Senior Care, a health care company that owns nursing homes in several states.

The issues with South Haven highlight concerns that our firm has had with Alabama’s law that tend to protect these facilities. Nursing homes and other long-term care facilities are allowed to use that unconscionable benefit of arbitration. The claims filed against these facilities, especially those that are relegated to arbitration proceedings, occur in relative secrecy. Also, when a lawsuit is filed against these facilities where the allegations relate to substandard patient care, an

injured party’s lawyer may not discover how many patients have been similarly harmed. Even if that information can be collected by other means (such as a request upon the ADPH or CMS), the information collected cannot be admitted into evidence in the arbitration proceeding.

Our senior citizens who have reached a point in their lives where long-term care is in their best interests need more protections than are presently being afforded to them. Expanded discovery and relaxed evidentiary rules are a must for nursing home patients in Alabama. The legislature needs to make changes in the current state of the law in Alabama. If you have any questions relating to Nursing Home Litigation, contact Ben Locklar, who handles Nursing Home litigation for the firm, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Sources: WSFA.com and CMS.gov

JURY AWARDS \$5.2 MILLION IN NURSING HOME DEATHS LITIGATION

A North Carolina federal jury found that a nursing home was at fault, causing the deaths of three residents, and that it acted with reckless disregard to their rights. Their families were awarded \$5.2 million in compensatory and punitive damages. The jury determined that medical care given by nursing home Blue Ridge Health Care Center and management companies Care Virginia Management LLC and Care One LLC was grossly negligent, intentional or in reckless disregard of the rights of the three residents, Del Ray Baird, Elizabeth Jones and Bettie Mae Kee, and caused their deaths. The suit alleged that the nursing home’s medical staff failed to properly monitor the patients, allowing them to remove their own breathing tubes without proper safeguards in place, among other claims. The estates had alleged:

- the patients all required ventilator or tracheotomy tubes, which the distressed patients were able to repeatedly remove on their own without medical staff intervention.
- Alarms that were supposed to monitor the machines were found either turned off or were manually turned off by staff.
- The nursing home is also accused of administering anti-anxiety medication without proper monitoring; and

- allowing the patients to suffer multiple falls and develop several infections due to substandard care.

The jury awarded the estates of Baird, Jones and Kee compensatory damages of \$50,000, \$300,000 and \$300,000, respectively, and punitive damages to each estate in the amount of approximately \$1.5 million.

The estates were represented by Rachel A. Fuerst, Carmaletta L. Henson and Thomas W. Henson Jr. of Henson & Fuerst PA. The case is *VanDevender et al. v. Blue Ridge of Raleigh LLC et al.* (case number 5:14-cv-00150) in the U.S. District Court for the Eastern District of North Carolina.

Source: Law360.com

XV. AN UPDATE ON CLASS ACTION LITIGATION

JUDGE APPROVES TRANSOCEAN, HALLIBURTON AGREEMENTS FOR CERTAIN DEEPWATER HORIZON OIL SPILL CLAIMANTS

U.S. District Judge Carl Barbier has approved two separate settlements for punitive damages worth a combined \$1.24 billion involving Halliburton and Transocean and private claimants harmed by the 2010 Deepwater Horizon oil spill.

The settlements, initially reached in June 2016, will pay about \$903 million to a “New Class” of claimants including commercial fishermen, and other groups that were part of certain claims categories involving punitive damages under general maritime law.

The settlements also pay about \$338 million to an assigned claims class, including several hundred thousand businesses that previously filed economic loss claims as a result of the BP oil spill. The assigned claims cover those that BP lodged against its Deepwater Horizon partners Transocean and Halliburton as part of a \$9.2 billion settlement the energy giant reached in 2012 resolving economic and property damages.

BP has also paid about \$13 billion in economic and medical claims as part of an uncapped settlement in addition to a \$20 billion settlement resolving economic and

environmental claims filed by federal, state, and local governments.

Sources: Law360 and Nola.com

SEARS AND CLASS REACH \$40 MILLION SETTLEMENT ON 266-STORE REIT DEAL

A shareholder lawsuit involving Sears Holdings Corp. has been settled. The settlement resolves complaints that conflicted insiders acquired control of \$2.7 billion in company real estate while paying only about 60 percent of the overall value of its share. The suit, filed in mid-2015 as a derivative case on the company's behalf, accused company CEO and majority owner Edward S. Lampert—along with a hedge fund Lampert controls and seven directors—of playing a role in unfair, undervalued agreements involving 266 of Sears Holdings' most valuable properties, including both Sears and Kmart sites.

Seritage Growth Properties, a real estate investment trust (REIT), controlled by Lampert and ESL Investments Inc., acquired the properties by way of a rights offering structured to limit control or changes of control in the REIT. In turn, Seritage gained rights in some cases to evict Sears or Kmart and market the properties for more lucrative leases or redevelopment—a process already begun. The complaint alleged:

While [Sears Holdings] may be facing bankruptcy, Seritage has increased in value and attracted sophisticated investors because of the properties it obtained in the Seritage transaction and the terms of the master lease which favor Seritage.

There were claims in the complaint that the property maneuvers and fiduciary breaches could lead to a bankruptcy filing by Sears Holdings, at one time the nation's third largest retailer. However, those named in the suit or their insurers will pay the \$40 million, and not the company itself.

The lawsuit stems from Sears Holdings' announcement in April 2015 of its plans to form Seritage as part of larger efforts to boost liquidity. At the time of the Seritage rights offering and store site acquisitions, half of the members of Sears Holdings' board were affiliated with either ESL or Fairholme Capital, the company's second-largest investor. The lawsuit stated:

The Seritage transaction is part of Lampert's ongoing strategy to strip [Sears Holdings] of its valuable core assets. [Sears Holdings] board minutes confirm that Lampert was the driving force behind the deal.

Other funds, including Fairholme Capital and affiliate Fairholme Funds, were accused of aiding and abetting director breaches of duty. The suit alleged that four Sears Holdings directors had direct connections to the Fairholme funds or ESL and, as a result, stood on both sides of the store transactions. Fairholme Capital owns 25 percent of Sears Holdings' common stock, while Lampert and ESL own 54.6 percent. Seritage, meanwhile, was directly controlled by Lampert and ESL, and "was privy to all information about the relative values of the properties" involved in the deal. All the directors involved, the suit said, "were acting at the behest of Lampert and ESL to approve the transaction. Seritage knew there was no independence between the parties." The settlement, fee and incentive awards as well as broad liability releases agreed to by both sides all require approval by Vice Chancellor J. Travis Laster.

The Plaintiffs are represented by Christine S. Azar and Ralph N. Sianni of Labaton Sucharow LLP; Daniel C. Girard and Adam E. Polk of Girard Gibbs LLP; Brian J. Robbins, Stephen J. Oddo and Nichole T. Browning of Robbins Arroyo LLP; Peter B. Andrews and Craig J. Springer of Andrews & Springer LLC; Alexander Arnold Gershon and Michael A. Toomey of Barrack Rodos & Bacine; and Edward A. Wallace and Mark R. Miller of Wexler Wallace LLP. The case is *In re: Sears Holdings Corp. Stockholder and Derivative Litigation* (case number 11081) in the Delaware Court of Chancery.

Source: Law360.com

XVI. THE CONSUMER CORNER

ACTOS ANTITRUST LAWSUIT KEPT ALIVE BY THE SECOND CIRCUIT

On Feb. 8, 2017, the Second Circuit Court of Appeals ruled that a class of Actos purchasers plausibly alleged that drug company, Takeda, delayed market entry by Teva with respect to their generic

version of Actos and allowed the Plaintiffs' case to proceed on limited grounds.

A group of employee health funds and purchasers of diabetes drug Actos filed a class action case against Takeda for allegedly delaying generic competition for the drug Actos. Takeda supposedly lied to the U.S. Food and Drug Administration (FDA) about its patents to improperly extend its market exclusivity for Actos.

The case concerns three Takeda patents for Actos that were set to expire in January 2011, and two follow-up patents that were to expire in June 2016. The Plaintiffs alleged that Takeda falsely stated to the FDA that the two follow-up patents covered Actos ingredients, rather than methods of using the drug. That misrepresentation triggered a six-month exclusivity period for three generic drug companies that were the first to seek approval from the FDA to make generic versions of Actos, as well as a waiting period for six other generic drug companies that also wanted to produce generic versions of the drug. The Plaintiffs alleged that Takeda's misrepresentations to the FDA prevented competitors from timely marketing a generic version of Actos.

Specifically, the Plaintiffs claim that Takeda's false patent descriptions channeled its competitors into a generic drug approval process that granted the first-filing applicants a 180-day exclusivity period, which in turn acted as a 180-day "bottleneck" to all later-filing applicants. Of the 10 generic applicants, nine took that route. Teva, on the other hand, sought approval through another regulatory mechanism, but was thwarted when the FDA announced that all generic manufacturers would be required to take the "bottlenecked" route, which was expressly based upon Takeda's misrepresentation to the FDA regarding its patents.

After the generic drug companies filed their applications with the FDA to manufacture their own generic versions of Actos, Takeda sued the generics companies for patent infringement. The Plaintiffs alleged that Takeda's settlement with the generic manufacturers resulted in a delayed market entry until August 2012 for the three first-filers and Teva and until February 2013 for the remaining six generics companies. The Plaintiffs ultimately alleged that they were wrongfully obliged to pay monopoly prices for Actos from January 2011, when Takeda's patent on the active ingredient in Actos expired, to at least February 2013, when the mass of generic market entry occurred.

At the lower court level, U.S. District Judge Ronnie Abrams dismissed the Plaintiffs' antitrust claims for failing to plausibly allege that Takeda's false patent descriptions caused any delay in generic market entry. The district court reasoned that the Plaintiffs failed to identify a viable regulatory route for generic drug approval that would have avoided the 180-day bottleneck, and that even if they had, they failed to plausibly allege how the generic manufacturers would have avoided Takeda's infringement lawsuits, all of which were voluntarily settled. The Court ruled that it was incumbent upon the Plaintiffs to allege that the generic companies knew of Takeda's supposedly false patent descriptions to the FDA when they filed applications to manufacture their own versions of the drug but they failed to do so. The Plaintiffs then appealed the ruling to the Second Circuit, which vacated a portion of the District Court's decision and revived the Plaintiffs' case.

The Second Circuit agreed with Judge Abrams only with respect to the generic companies other than Teva. The Second Circuit held that with respect to Teva, because the Plaintiffs' theory does not require any knowledge on Teva's part of the false patent descriptions, the Plaintiffs plausibly alleged that Takeda delayed Teva's market entry. Unlike Teva, the court held that the other generic drug companies would have to be aware of Takeda's allegedly false patent descriptions when they filed their applications for the Plaintiffs to have a viable case. The Second Circuit held that Teva, however, did not need to have knowledge of the deceptions because its bid to market generic Actos was thwarted by the FDA based on Takeda's patent descriptions.

The Second Circuit's ruling that the class action Plaintiffs may pursue allegations that Takeda delayed Teva's market entry due to its misrepresentations to the FDA is a positive ruling for class Plaintiffs.

Beasley Allen has handled a large number of cases involving fraud, deceit, and anticompetitive conduct within the pharmaceutical industry. If any of our readers are aware of these type of anticompetitive acts, contact Ali Hawthorne, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.

Source: Law360.com

WHOLE FOODS AND KOMBUCHA MAKER WIN \$8 MILLION MISLABELING SETTLEMENT APPROVAL

A California federal judge has granted preliminary approval to an \$8.25 million settlement agreed to by consumers and Millennium Products Inc., and Whole Foods Market Inc. over mislabeling claims regarding the product's antioxidant, alcohol and sugar content. U.S. District Judge Philip S. Gutierrez had rejected a previous settlement in September. The judge signed off on this agreement, which in addition to the monetary payout to the class, requires certain labeling changes by Millennium Products Inc., the maker of the carbonated fermented tea drink known as kombucha. Judge Gutierrez wrote in his order:

The maximum settlement amount of \$8.25 million ... represents approximately 21 percent of the estimated potential recovery, which falls well within the range of possible approval.

Jonathan Retta, Kirsten Schofield and Jessica Manire had claimed that Millennium mislabeled its GT's Kombucha product by using the term "antioxidant" when the drink allegedly doesn't contain any; saying the drink was "nonalcoholic" when it actually does contain alcohol; and understating the amount of sugar in the drink. Their suit was consolidated in November with a related action in which consumers Nina Pedro and Rosalind Lewis alleged that the fermented beverage leaks and can explode due to inadequate packaging and excessive carbonation.

Under the proposed settlement, Millennium has agreed to stop ordering and printing labels with the term "antioxidant;" to add a warning label that the drink contains naturally occurring alcohol; to add a warning label that "contents are under pressure" and that a failure to refrigerate can "increase pressure, causing product to leak or gush;" and to also ensure the accuracy of sugar content representation on the labels. The judge's order certified the consumer class; appointed Retta, Schofield and Manire as class representatives; appointed Bursor and Fisher PA as class counsel; and also ordered memoranda for the justification of proposed \$2,000 incentive awards for the class representatives and for future attorneys' fees requests.

Between March 2011 and October 2016, Millennium sold nearly 275 million bottles of kombucha to distributors, according to

the court's order. The class that was certified includes people in the U.S. who purchased one or more of Millennium's kombucha drinks from March 11, 2011, to the notice date, which could comprise millions of consumers.

In March 2015, Millennium was named as the sole Defendant. The Plaintiffs later added retailer Whole Foods, which sells and distributes GT's Kombucha in its stores, to the suit. The complaint ultimately alleged violations of California's Consumer Legal Remedies Act, Unfair Competition Law and False Advertising Law; New York's Deceptive and Unfair Trade Practices Act and General Business Law; and other claims including fraud and unjust enrichment.

In September Judge Gutierrez denied preliminary approval of an earlier settlement agreement, among other things, due to the relationship between the amount of the settlement fund and alleged harm suffered by class members. The judge had also expressed concern over the disparity in value between the cash and voucher options in terms of the award to be distributed to class members. Under the current agreement, the cash award was increased to \$3.50 for each purchased product, and a voucher is assigned the equivalent value.

Judge Gutierrez noted that since the maximum recovery at trial could amount to \$38 million, the current \$8.25 million settlement falls within the range of approval, "in particular considering the risks and expenses associated with continued litigation." The consumers are represented by Annick Marie Persinger, Lawrence Timothy Fisher and Yeremey O. Krivoshey of Bursor and Fisher PA; Clayeo C. Arnold and Joshua H. Watson of Clayeo C. Arnold APC; and John A. Yanchunis of Morgan & Morgan Complex Litigation Group. The case is *Jonathan Retta et al. v. Millennium Products Inc. et al.*, (case number 2:15-cv-01801), in the U.S. District Court for the Central District of California.

Source: Law360.com

COOKIE DOUGH COMPANY OWNERS TO STEP DOWN AFTER LISTERIA RECALLS

A cookie dough maker at the center of recalled ice creams made by Blue Bell and other brands for listeria contamination has said that its owners are stepping away from the company following a recent U.S. Food and Drug Administration (FDA) warning letter. The owners of Iowa-based

Aspen Hills Inc., which supplies frozen cookie dough and other products, have decided to cease their involvement in the company and are looking to wind up their affairs through a sale “or other orderly disposition,” according to a spokesman for the company.

The process to step down has been started and the company ended production at the end of December, according to spokesman Jon Austin. He said in a statement:

Even so, we are committed to addressing any questions raised by the FDA so that the agency can be assured that our commitment to the safety and wholesomeness of our products will not waver even as we exit the market. To that end, we have detailed for the agency the many changes to our procedures and practices we put in place in response to its oversight; we appreciate the partnership and professionalism of its personnel throughout this process.

Texas-based Blue Bell Creameries Inc. recalled all of its products in April 2015 after 10 illnesses, including three deaths, were reported. The illness onsets ranged from January 2010 to January 2015, with incidents reported in Arizona, Kansas, Oklahoma and Texas. The three deaths were in Kansas, according to the U.S. Centers for Disease Control and Prevention.

In September, the ice cream maker announced—shortly after Blue Bell ice cream returned to stores in the Carolinas and Georgia—that it was recalling ice cream products made in its Sylacauga, Alabama, plant because there was a potential that an Aspen Hills cookie dough ingredient contained listeria. Other companies, including Weight Watchers and Cedar Crest Specialties Inc., also recalled ice cream products made with Aspen Hills-supplied cookie dough. Aspen Hills also issued its own recall, according to the FDA’s letter.

The FDA visited Aspen Hills in September and October, according to a Jan. 10 warning letter, and found listeria in swabs taken from a number of areas in its processing facility. FDA staff wrote in the letter:

The presence of Listeria monocytogenes in your facility is significant because it demonstrates your cleaning and sanitation practices are

inadequate to effectively control pathogens in your facility to prevent contamination of food. Furthermore, Listeria monocytogenes found in the environment of your facility increases the risk of your finished product becoming contaminated.

The FDA acknowledged in the letter that Aspen Hills had taken steps to address the listeria issue, including hiring a third-party laboratory and consultant and revising its testing, cleaning and pathogen monitoring procedures.

Genetic testing of the samples taken from Aspen Hills showed that the listeria strain matched two samples taken from ice cream products tested by a commercial lab and one taken from a cookie dough ingredient sample taken by the state of Texas in 2016, according to the FDA.

Source: Law360.com

COMPANY TO PAY \$2.5 MILLION FOR TRACKING AND SELLING DATA ON 11 MILLION CUSTOMERS

If you own a Vizio smart TV, it’s very likely that your viewing habits have been tracked and sold to marketers. Television manufacturer Vizio will pay \$2.5 million to settle claims it tracked consumer viewing habits and then sold the information. The agreement—which includes \$1.5 million to the Federal Trade Commission (FTC) and \$1 million to New Jersey, the state that launched the investigation – was announced on Feb. 5. Kevin Moriarty, a lawyer with the FTC’s Division of Privacy and Identity Protection, stated:

This settlement stops Vizio’s unauthorized tracking, and makes clear that smart TV makers should get people’s consent before collecting and sharing television viewing information.

Vizio also agreed to delete any user data collected before March 1, 2016. According to the FTC, Vizio installed software on 11 million smart TVs to track viewing habits without consumers’ knowledge. The data included second-by-second information from cable, internet, set-top boxes, DVD players, over-the-air channels and streaming devices. The tracking began with sets produced in 2014 but was added via software updates on older models as well. For its part, Vizio said it never paired the data with personal information such as names or contact details. The FTC said if you

own a Vizio TV, you should go to your TV’s settings menu and look for information about automated content recognition (ACR). You can find out more information on disabling those features there.

Sources: Leada Gore with AL.com

FDCPA VIOLATIONS RESULT IN SETTLEMENT

The Federal Trade Commission (FTC) recently announced that GC Services, a third party debt collection company, has agreed to a settlement to resolve claims that it violated the Federal Fair Debt Collection Protection Act (FDCPA). Pursuant to the Settlement, GC Services agreed to pay \$700,000 in civil penalties and comply with the FDCPA’s requirements. GC Services was accused of a number of FDCPA violations, including repeatedly contacting persons other than the debtor in an attempt to collect the debt. This is prohibited by the FDCPA because it not only constitutes harassment of persons that do not owe the debt, it also has the potential to embarrass the debtor if the person contacted knows the debtor.

The FDCPA is a federal statute intended to protect consumers from abusive debt collection practices perpetrated by third party debt-collection agencies. Acts prohibited by the FDCPA include contacting debtors after 9 p.m., threatening arrest, or using abusive language when contacting a debtor. The collection agency also may not disclose debt related information to anyone other than the debtor, the debtor’s spouse, and the debtor’s lawyer.

The FDCPA is enforced by the Federal Trade Commission and the Consumer Financial Protection Bureau. However, it also provides a private right of action. While the remedies available in court under the FDCPA are somewhat minimal, it is highly likely that the collector’s activities constitute a violation of the Telephone Consumer Protection Act (TCPA). The TCPA prohibits unsolicited phone calls and imposes a statutory minimum penalty of \$500 per phone call. In order to invoke this provision, however, the debtor must request that the debt collector cease its phone calls.

If you would like to discuss anything relating to the FDCPA or TCPA, contact Jeff Price, a lawyer in our firm’s Toxic Torts Section, at 800-898-2034 or by email at Jeff.Price@beasleyallen.com.

FDA RELEASES ADVERSE EVENT REPORT DATA TO THE PUBLIC

The Food and Drug Administration (FDA) announced in December of last year that it would begin releasing data related to Adverse Event Reports (AERs) received by the FDA's Center for Food Safety and Applied Nutrition (CFSAN), which oversees food and cosmetic safety. In the past, the CFSAN Adverse Event Reporting System (CAERS) has not made this information public, except through Freedom of Information Act requests. However, in December CFSAN released the raw data for all AERs from Jan. 1, 2004, through Sept. 30, 2016, with plans to continue to release data on a quarterly basis.

The public availability of this data is seen as a win for both consumers and health care professionals hoping for more transparency with regard to food and cosmetics. The ability to compile and review AERs about a particular product may assist in spotting hazards. In a blog post about the release, FDA officials stated, "We're hoping that this increased transparency will result in more detailed and complete reports that will help us to more rapidly identify red flags about a possible safety issue with products we regulate."

However, the release of data comes with several caveats. First, the FDA will only release the raw data associated with an AER. There is no conclusion of causation or risk. Second, the information is not filtered or verified in any way. Finally, there is currently no requirement that food and cosmetic manufacturers report adverse events to the FDA. Therefore, it is possible that many adverse events go unreported and will not be included in this data. Therefore, while consumers can use this information as one means of identifying potential risks, it does not provide a full picture.

For now, it is too early to see how this data will be used, including how it will affect regulations, recalls and litigation, but the FDA has indicated that it will continue to modernize and streamline the adverse event reporting process in hopes of creating a more effective database.

XVII. RECALLS UPDATE

We are again reporting a large number of safety-related recalls. We have included some of the more significant recalls that

were issued in February. 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.

NISSAN RECALLS 341,000 ALTIMAS OVER DOOR OPENING DEFECT

Japanese automaker Nissan Motor Co. is recalling 341,000 Altimas in the U.S., citing a defect that causes a rear door to inadvertently unlatch and open if its window is rolled down. In paperwork filed with the National Highway Traffic Safety Administration (NHTSA), the car company says the issue stems from improper routing of the latch-lock cable, which can block the window regulator, causing the rear passenger door to unlatch when the window mechanism is lowered. "If the rear passenger doors inadvertently open while the vehicle is in motion, it may increase the risk of injury to the rear passengers," Nissan said in a recall report.

The problem can be solved with modification at a dealership, where a harness protector patch and possibly a sealing screen replacement can be installed to prevent the wires from interfering. The defect only affects 2015 through 2017 models, all of which are still under warranty. The car company first became aware of the problem in August 2016, when Nissan was notified of a field incident involving the defect, according to NHTSA filings. In September, the company was able to identify the issue, and concluded it was an isolated assembly error, but implemented improvements in the manufacturing process to prevent it from happening again. But over the next several months, Nissan continued to review its manufacturing process and found the misrouting continued to occur during installation of its trim panels. The carmaker reviewed reports and learned of other incidents that may have been caused by the defective door, and on Jan. 10 decided to issue a recall. The company said it will notify all owners over the next two months.

Nissan spokesman Steve Yaeger said in an email that the recall was voluntary and would come at no cost to consumers. "Nissan is committed to the safety and security of our customers and their passengers," he wrote. "Owners of affected vehicles will be notified in early March,

asking them to bring their vehicle to an authorized Nissan retailer for remedy. "

AUDI TO RECALL 600,000 VEHICLES OVER AIR BAG AND PUMP ISSUES

German automaker Audi will recall more than 600,000 vehicles in the U.S. over defects with airbags that could injure or kill passengers and coolant pumps that could catch fire. Forms the car company filed with the National Highway Traffic Safety Administration (NHTSA) and published by the agency indicate that coolant pumps could clog and catch fire in more than 340,000 vehicles of multiple model types with powerful two-liter TFSI engines. That problem can be solved with a free software update that will cut power to the coolant pump and alert drivers if it becomes clogged, the company said.

A second notice said 234,000 Audi Q5 crossover SUVs between model years 2011 and 2017 were recalled starting in February to replace or protect their side curtain airbag canisters. Problems with the vehicles' panoramic sunroof drainage systems could dampen and corrode the airbag canisters, Audi said. "If this happens, the airbag canister could fracture without airbag deployment, propelling fragments into the passenger compartment, striking and causing serious injury to vehicle occupants," the notice said. The Q5 airbag problem, which Audi first observed in cars in China and Israel last year, will require the cars to be partly disassembled by dealerships so the airbag canisters can be inspected and possibly replaced. The issue was addressed in the manufacturing process in July by adding a plastic liner around the canisters.

Nearly half of the Audi vehicles affected by the coolant-pump problem are also Q5s, with almost 146,000 such vehicles of model years 2013 to 2017 impacted. About 105,000 Audi A4 sedans spanning model years 2013 to 2016 will also need the software update, with the balance of affected vehicles made up of A5s, A5 Cabriolets, A6s and A4 Allroad vehicles built over a similar timespan with the two-liter TFSI engines.

Another notice published on the NHTSA's website recently said 33,421 Audi cars with defective passenger seat airbag inflators made by the scandal-wracked Japanese airbag supplier Takata would also be recalled. Prolonged exposure to high temperatures, high humidity and frequent temperature fluctuations, or

cycling, increases the risk of the canister exploding into fragments that could injure or kill a passenger in an accident, said the notice, which was dated Jan. 20. Audi, a unit of the German automaker Volkswagen AG, began notifying dealers and owners of the Takata-related recall in February.

LAMBORGHINI RECALLS 1,400 CARS FOR FIRE RISK

Lamborghini is recalling 1,453 super-cars in the U.S. that suffer from a defect that could result in fires during “particular maneuvers” such as over-revving the engine while the vehicle is idle. A recall report was posted by the National Highway Traffic Safety Administration (NHTSA). Automobili Lamborghini SpA submitted the recall report for model year 2012 to 2017 Lamborghini Aventador, including all limited editions. This includes the Anniversario, Miura Homage, Pirelli Edition, Super Veloce and the ultra-rate “one shot” projects: Veneno Coupe and Roadster. The company estimated that every one of these vehicles is affected by the defect, and media reports showed that more than 5,000 cars would be recalled worldwide.

Specifically, if the car’s fuel tank is over-filled, certain conditions can cause liquid fuel to reach the car’s carbon canister, which is part of its evaporation control system. If fuel reaches the purge valves, which control the amount of fuel vapor that’s purged from the canister, it can affect the operation of the vehicle’s fuel evaporation system. This situation is exacerbated in the winter, the company’s report said. Faults in the evaporation system could mean that fuel vapors aren’t properly treated, and without that proper treatment, maneuvers such as over-revving could bring fuel vapor into contact with hot gasses. Such a situation risks fire, especially if the car has an unapproved aftermarket exhaust system, the company said. The smell of gas outside of the car could tip owners off to a possible problem, the report said.

The company plans to notify everyone who owns an affected vehicle and will instruct them to make an appointment with an authorized Lamborghini dealer who will upgrade the evaporation system for free. The upgrade includes new purge valves that will prevent the fuel tank from overflowing, the company said. Dealers were notified on Feb. 17 through Lambo-

rhini’s dealer portal while car owners were to receive notification in the mail between Feb. 24 and March 24.

Last year, the NHTSA concluded that tire pressure monitors in cars made by Lamborghini, Tesla Motors Inc. and Ferrari North America Inc. that don’t light up when they should aren’t a danger to the public. The decision came after the three automakers reported the defect to the NHTSA in 2014 and petitioned the agency to declare the problem inconsequential to motor vehicle safety. All three said they weren’t aware of any customer complaints, incidents or injuries related to the issue.

According to the NHTSA, the tire pressure monitors turn on as they should upon detecting a tire problem, but the light doesn’t turn back on immediately after the cars have been turned off and restarted. Instead, they turn on after the vehicles exceed 20 to 25 miles per hour for at least 90 seconds. The agency determined that because the problem only occurs at low speeds, it poses little risk to vehicle safety.

ZIMMER BIOMET RECALLS COMPREHENSIVE REVERSE SHOULDER SYSTEM DUE TO EXCESSIVE HUMERAL TRAY FRACTURES

On Feb. 16, 2017, Zimmer Biomet initiated a Class I Recall of its popular Comprehensive Reverse Shoulder System due to an excessive number of fractures in the humeral tray component. Unlike traditional total shoulder arthroplasty systems, the Comprehensive Reverse Shoulder System swaps the humeral head (ball) and glenoid (cup) to the opposite sides of the glenohumeral joint in hopes of achieving greater range of motion in patients undergoing total shoulder arthroplasties. The humeral tray holds a polyethylene cup at the top of the humerus bone.

The recall is limited to joint systems containing 300 specific lot numbers distributed between October 2008 and September 2015, and encompasses approximately 3,600 of Zimmer Biomet’s shoulder systems. The recall states that patients who experience humeral tray fractures may need surgeries to revise the failed shoulder arthroplasty, and could suffer “permanent loss of shoulder function, infection or, rarely, death.” Zimmer Biomet began contacting patients who received the devices subject to the recall in late December.

BOLTON FURNITURE 4-DRAWER DRESSER RECALL

Bolton Furniture has recalled an estimated 1,000 Two-Over-Two 4-Drawer Dressers due to risk of serious tip-overs and consequential child entrapment, injury and death hazards. This recall involves certain Bolton Furniture Two-Over-Two style 4-Drawer Dressers. The models included in the recall are Cambridge (model number 8614), Emma (model number 8314), Essex (model number 6614), Wakefield (model number 8014) and the Woodridge (model number 8414). The recalled dressers were sold in cherry, chestnut, espresso, honey, ivory, natural and white finishes. Model names and numbers can be found on the QC/production sticker located on back of each dresser.

According to the CPSC, the recalled Dressers are unstable if they are not anchored to the wall, posing a serious tip-over and entrapment hazard that can result in death or injuries to children. The dresser, therefore, do not comply with the performance requirements of the US voluntary industry standard (ASTM F2057-14). If you believe you have purchased or have in your possession any of the recalled dressers, please do not use them. Instead, move the Dresser into an area in your home that children cannot access. You can then contact Bolton Furniture for a free retrofit kit. You can install this retrofit kit or the tip-restraint strap originally sold with the Dressers themselves, or contact Bolton who will provide a one-time, free in-home installation.

These Dressers were sold at Full Line Furniture and children’s specialty stores nationwide and online at Amazon.com, Overstock.com, Target.com, ToysRUs.com, Wayfair.com, Zulily.com and other online retailers from February 2011 to October 2016 for about \$700.

Contact Bolton Furniture at 800-545-8982 from 8 a.m. to 4:30 p.m. ET Monday through Friday or online at www.bolton-furniture.biz and click on the “News” section and then Safety Recall. Photos available here: <https://cpsc.gov/Recalls/2017/Bolton-Furniture-Recalls-Dressers>

LA-Z-BOY RECALLS POWER SUPPLIES SOLD WITH LIFT CHAIRS DUE TO SHOCK HAZARD

La-Z-Boy Incorporated, of Monroe, Michigan, has recalled about 2,500 power supplies sold with lift chairs in the U.S.

and an additional 210 in Canada. The lift chair's power supply cover can crack within the screw housing and break, causing the cover to detach and exposing the power supply's electrical components, posing a shock hazard to users. The recall involves the power supplies sold with Gold Series electric Lift Chairs, the Clayton Luxury-Lift (Model 1HL562) and Power Lift (Model 1ML562), and Luxury-Lift (Models 1LF505 and 1LF819). They were also part of conversion kits for older lift chairs with Models 1LL320, 1LL508, 1LL515, 1LM320, 1LM508 and 1LM515. The power supply enables the chair's seat to lift a consumer from a seated into a standing position. The power supply casing is a black, plastic rectangular box measuring approximately 6 inches by 3½ inches by 3½ inches. Only power supplies with LOT #150113 are included in this recall. The model name, model number and lot number are printed on the back of the power supply.

The chairs were sold at La-Z-Boy Furniture Galleries and independent furniture stores nationwide and online at la-z-boy.com from September 2015 through November 2016 for between \$1,900 and \$2,800. The power supplies were also sold separately for about \$170 and provided free under warranty as replacements for use with previously-purchased chairs. Consumers should immediately stop using the power supplies to power the lift chairs and contact La-Z-Boy for a free replacement power supply. Contact La-Z-Boy toll-free at 855-592-9087 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.la-z-boy.com and click on the Recall button for more information. Photos available at: <https://www.cpsc.gov/Recalls/2017/La-Z-Boy-Recalls-Power-Supplies-Sold-With-Lift-Chairs>.

B&N RECALLS 147,000 NOOK TABLET CORDS DUE TO SHOCK HAZARD

Barnes & Noble is recalling about 147,000 power adapters associated with its new seven-inch Nook Tablet device, citing a potential for the adaptor casing to break when plugged into an electrical outlet, exposing users to electrical shock. In a statement detailing the voluntary recall posted on its website and through the U.S. Consumer Product Safety Commission, the book retailer said it had received four reports of the power adapter breaking or pulling apart while charging the Nook Tablet 7", exposing the metal

prongs inside, though no injuries had been reported. "Consumers should immediately stop using the recalled power adapters and register online for a free replacement adapter along with a Barnes & Noble \$5 gift card," the company said.

B&N said it's offering customers free shipping to return the recalled adapter and receive a replacement adapter in the mail. Until the new adapter is received, owners were advised to charge their device through their computers using a USB cable, the statement read. The Nook Tablet 7", B&N's latest installment of its popular paperless reading device, hit the market on Nov. 25 and sells for about \$50, though the device is not currently available for sale on the company's website. Barnes & Noble is only the latest company forced to issue a callback on account of a handheld device charger. On Feb. 2, 2016, Microsoft Corp. recalled 2.25 million power cords associated with an assortment of its Surface Pro tablet computers after concluding they posed a risk of overheating and shocking users.

Then in September, mobile phone maker Samsung Electronics announced it would halt all sales of its Galaxy Note 7 smartphone and replace about 2.5 million units on account of a propensity to catch fire resulting from a battery defect. A month later, Samsung officially threw in the towel on the Galaxy Note 7, announcing on Oct. 11 that it was halting production and would no longer stock the device on its shelves.

CASUAL LIVING WORLDWIDE RECALLS SWIVEL PATIO CHAIRS DUE TO FALL HAZARD

Casual Living Worldwide, of Simpsonville, Kentucky, has recalled its Swivel Patio Chairs. The base of the chairs can break during normal use, posing a fall hazard to the user. This includes about 2 million (in addition, about 30,000 were sold in Canada and about 14,000 were sold in Mexico). This recall involves Hampton Bay Anselmo, Calabria, and Dana Point chairs as well as Martha Stewart Living branded Cardona, Grand Bank and Wellington swivel patio chairs. The chairs are made of aluminum and steel with a round swivel base and arm rests. The chairs were sold as a pair and as part of a seven-piece patio set with accompanying tables. The company has received 25 reports of the chairs breaking, resulting in bruising and scrapes from falls.

The chairs were sold exclusively at Home Depot stores nationwide and online at HomeDepot.com from January 2007 to February 2016 for about \$190 for two-piece patio set and \$500 for a seven-piece patio set. Consumers should immediately stop using the recalled chairs and contact Casual Living Worldwide for a free repair kit. Contact Casual Living Worldwide toll-free at 855-899-2127 from 8 a.m. to 5 p.m. ET on Monday through Friday or online at www.casualivingoutdoors.com and click on "Recall Information" for more information. Photos available here: <https://cpsc.gov/Recalls/2017/Casual-Living-Worldwide-Recalls-Swivel-Patio-Chairs>

BROWN JORDAN SERVICES RECALLS SWIVEL PATIO CHAIRS DUE TO FALL HAZARD

About 1,500 Swivel Patio Chairs have been recalled by Brown Jordan Services, Inc., of Simpsonville, Kentucky. The base of the chair can break during normal use, posing a fall hazard to users. This recall involves La-Z-Boy Kayla swivel dining and lounge patio chairs. The chairs are made of aluminum and steel with a round swivel base. The chairs have dark blue fabric covered cushions. La-Z-Boy is printed on a gold-colored tag on the back of the chairs. The chairs were sold in a four-piece lounge set and a five-piece dining set. The company has received 16 reports of the swivel chairs breaking. No injuries have been reported.

The chairs were sold exclusively at Online at Sears.com from January 2016 through July 2016 for about \$1,260 for the four-piece lounge set and \$1,300 for the five-piece dining set. Consumers should immediately stop using the recalled 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 can click on "Customer Care" and then "Recall Information" for more information. Photos available at: <https://cpsc.gov/Recalls/2017/Brown-Jordan-Services-Recalls-Swivel-Patio-Chairs>

BAR CHAIRS MADE BY 3i CORPORATION RECALLED DUE TO FALL HAZARD

3i Corporation, of Hong Kong, has recalled about 315,000 bar chairs. The legs can become detached from the center post at the weld, posing a fall hazard. This

recall involves allen + roth brand Safford model and Garden Treasures brand Lakeview model bar chairs sold in sets of four. The chairs have a brown, aluminum frame and a beige sling fabric cover. The 4-foot-tall chairs swivel 360 degrees and have arm rests on each side of the chair. The company has received 457 reports of the bar stool base breaking, resulting in 10 reports of injury including head injuries, broken ribs, bruising and scrapes.

The chairs were sold exclusively at Lowe's stores nationwide and online at www.lowes.com from November 2008 to August 2016 for about \$700 for the set. Consumers should immediately stop using the recalled chairs and contact 3i Corporation for a free replacement base and a repair kit. Contact 3i Corporation toll-free at 866-267-7772 between 9 a.m. and 5 p.m. ET Monday through Friday or online at www.lakeview-safford.com. Photos available at: <https://cpsc.gov/Recalls/2017/Bar-Chairs-Sold-at-Lowes-Stores-Recalled>

TARGET RECALLS 1,300 PATIO BENCHES DUE TO FALL HAZARD

Target has recalled 1,300 threshold patio benches due to a fall hazard, according to the U.S. Consumer Product Safety Commission. Target initiated the recall after receiving six reports of the patio benches collapsing while in use, resulting in one report of a knee injury. This recall involves Threshold Aluminum Top/Steel X Base patio benches that were sold individually—for about \$150—and as part of a six-piece dining set—for about \$1,000. The benches were sold in Target stores and on its website from January 2016 through July 2016. Consumers should stop using the recalled benches and return them to any Target store for a full refund. For more information, call Target at 800-440-0680 from 7 a.m. to 8 p.m., visit target.com or go to Target's Facebook page.

BRITAX RECALLS STROLLERS DUE TO FALL HAZARD

About 676,000 Britax B-Agile and BOB Motion Strollers with Click & Go receivers have been recalled by Britax Child Safety Inc., of Fort Mill, South Carolina. An additional 36,400 were sold in Canada and about 4,600 were sold in Mexico that are included in the recall. A damaged receiver mount on the stroller can cause the car

seat to disengage and fall unexpectedly, posing a fall hazard to infants in the car seat. This recall involves Britax B-Agile and BOB Motion strollers (when used as a travel system with a car seat carrier attached). All models are folding, single or double occupant strollers and have Click & Go receiver mounts that attach the car seat carrier to the stroller frame. All colors of the stroller are included. The model number can be found on the inside of the stroller's metal frame near the right rear wheel for single strollers and in the front middle underside of the frame on double strollers.

Britax has received 33 reports of car seats unexpectedly disconnecting from the strollers and falling to the ground, resulting in 26 reports of injuries to children, including scratches, bruises, cuts and bumps to the head. In addition, Britax is aware of 1,337 reports of strollers with damaged Click & Go receiver mounts. The strollers were sold at Babies R Us, buy buy Baby, Target and other stores nationwide, and online at Amazon.com, albeebaby.com, buybuybaby.com, diapers.com, ToysRUs.com and other websites from May 2011 through February 2017 for between \$250 and \$470 for the strollers and travel systems. Consumers should immediately stop using their Click & Go receiver mounts and contact Britax for a free repair kit for single strollers. Owners of the recalled double strollers should stop using them with car seats attached. Consumers can continue to use their stroller or car seat independently without the car seat attached to the stroller. Contact Britax online at www.us.britax.com and click on the Safety Notice on the homepage or visit us.britax.com/recall, call toll-free at 844-227-0300 from 8:30 a.m. to 7 p.m. ET Monday through Friday and from 9 a.m. to 3 p.m. ET Saturday or email Britax at stroller.recall@britax.com. Photos available here: <https://www.cpsc.gov/Recalls/2017/Britax-Recalls-Strollers>

TEUFELBERGER RECALLS RESCUE ROPES AND THROWLINES DUE TO FALL AND INJURY HAZARDS

Teufelberger Fiber Rope Corp., of Fall River, Massachusetts, has recalled about 95 Static ropes and throwlines. The recalled static ropes and throwlines are mislabeled as being certified to specific voluntary NFPA safety standards and cannot be relied upon for any purpose, posing fall and injury hazards to users. This recall involves CMC and New

England Ropes brand 7.5 mm and 8 mm static ropes and throwlines used for rescue operations. The recalled rope models are the CMC Escape Line 5/16"/8mm (orange with yellow tracer), New England Ropes Aramid 7.5mm (tan with black tracer) and New England Ropes KM-III 5/16"/8mm (white with blue tracer). The recalled throwline model is New England Ropes NFPA (yellow with red tracer). Only ropes and throwlines with lot numbers that begin with 160101 through 1609915 are included in this recall. The model name and lot number is printed on the end band label on the rope and on the product's packaging. The ropes and throwlines were sold in lengths ranging from 150 to 2,400 feet.

The rope was sold at CMC Rescue in Goleta, Calif., Extractor Sled in Escondido, Calif., Excalibur in Sandy, Utah, Liberty Mountain in Sandy, Utah, Rescue Technology in Carrollton, Ga., Rock-n-Rescue in Butler, Pa., Tahoe Sports in South Lake Tahoe, Calif., and West Marine in Watsonville, Calif. from January 2016 through September 2016 for between \$140 and \$1,800. Consumers should immediately stop using the recalled ropes and throwlines and contact Teufelberger for a free replacement. Contact Teufelberger Fiber Rope Corp. toll-free at 844-361-7041 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.teufelberger.com and click on the "Static Rope Safety Notice" link for more information. Photos available at: <https://cpsc.gov/Recalls/2017/Teufelberger-Recalls-Rescue-Ropes-and-Throwlines-Due>

DISNEY RECALLS MICKEY MOUSE NIGHT LIGHTS DUE TO FIRE HAZARD

The Walt Disney Co. has recalled approximately 3,000 nightlights due to fire hazard concerns. The recall involves the Happy Holidays! Mickey Mouse Nightlight, which feature a Mickey Mouse head wearing a Santa hat. The hat is filled with liquid and glitter. Liquid from the night light can leak, potentially causing a fire hazard if the liquid comes into contact with an electrical outlet. Two incidents have been reported, including one electrical fire, according to the U.S. Consumer Product Safety Commission. The product was sold at Walt Disney World, Disneyland and via the Shop Disney Parks mobile app and DisneyStore.com from July 2016 through November 2016. Consumers should look for the date code FAC #

019808-16150 printed on the bottom rear of the night light and the UPC code 400009489637 printed on a sticker on the bottom of the product packaging to identify recalled night lights.

Consumers should stop using the night lights immediately and request a refund from Walt Disney Parks and Resorts U.S., Inc. Call toll-free at 844-722-1444 from 9 a.m. to 5:30 p.m. ET Monday through Friday, or contact the company online at www.disney.com and click on “Safety Recall” at the bottom of the page.

RESTORATION HARDWARE RECALLS ANTIQUED MIRRORS

Restoration Hardware is recalling 1,400 of its 18th Century Venetian style glass beveled mirrors because they could cause lacerations. The glass is not properly glued to the mirror’s backing, and it can fall off and shatter. The affected mirrors are antiqued silver with wood backings and are available in several different sizes and two shapes, according to the Consumer Product Safety Commission on Thursday. The mirrors are either rectangular or round. This recall only applies to mirrors with a “Hangman” hanging system on the back with a production date after April 1, 2015. The month and year of production (04/2015) are stated on a green sticker affixed to the back of the mirrors. The mirrors range from \$845 to \$1795. The following products have been recalled:

- 40200969SIL Framed Rectangle
36 x 48 \$845
- 40200565SIL Framed Rectangle
36 x 48 \$895
- 40200968SIL Framed Rectangle
42 x 78 \$1595
- 40200967SIL Framed Rectangle
24 x 80 \$895
- 40200966SIL Framed Rectangle
32 x 64 \$945
- 40200965SIL Unframed Round
60 \$1795
- 40200964SIL Unframed Rectangle
36 x 48 \$895
- 40200963SIL Unframed Rectangle
30 x 40 \$645
- 40200962SIL Unframed Rectangle
30 x 48 \$695

- 40200563SIL Unframed Rectangle
42 x 78 \$1595
- 40200562SIL Unframed Rectangle
24 x 80 \$995
- 40200561SIL Unframed Round
60 \$1795
- 106373SIL Framed Rectangle
30 x 40 \$659
- 106372SIL Unframed Round
30 \$579

SARGENTO CHEESE RECALL PROMPTS LISTERIA WARNING IN ALABAMA AND 11 OTHER STATES

A Listeria warning by Sargento Cheese Company last month has prompted another recall by Country Fresh of Texas. The Marketside Garlic Cheese Stuffed Mushrooms are among products that could be contaminated with Listeria. The U.S. Food and Drug Administration (FDA) said Country Fresh is recalling 2,552 cases of mushroom and fresh fruit and hatch pepper cheese products because they contain Sargento-branded cheeses, which could be contaminated with Listeria. The items were shipped to retail locations in Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. No illnesses have been confirmed. Young children, frail or elderly people, individuals with weak immune systems and pregnant women are most at risk from Listeria infection, which can cause high fever, severe headache, stiffness, nausea, abdominal pain, diarrhea, miscarriages and stillbirths. Customers may return the affected products to the place of purchase for a full refund. To ask questions, contact the company at 281-453-3305. There have been several other Listeria-related cheese recalls this month. Visit the FDA website to learn more.

Product Description	Description of Packaging	UPC	Best-By Dates
Country Fresh Tuscan Style Mushroom	Foam Overwrap Tray	74641-07211	February 14, 2017 thru February 17, 2017
Country Fresh Stuffed Mushrooms	Foam Overwrap Tray	74641-07207	February 14, 2017 thru February 17, 2017
Southwest Stuffed Mushrooms	Foam Overwrap Tray	72036-88471	February 14, 2017 thru February 17, 2017
Marketside Garlic Cheese Stuffed Mushrooms	Clamshell	681131-14821	February 15, 2017 thru February 17, 2017
Ready Fresh Go Fruit and Hatch Pepper Cheese	Clamshell	41220-03680	January 19, 2017 thru February 16, 2017

The product bears “BEST IF USED BY” dates between Jan. 19, 2017 (1/19/17)

through Feb. 17, 2017 (2/17/17). No products except those on this list are subject to this recall. To date, no illnesses have been confirmed by public health authorities. Sargento Cheese advised Country Fresh of the issue and Country Fresh is taking this action in the interest of protecting the public health. “Nothing is more important than ensuring that consumers enjoy nothing but high quality, nutritious, and safe and wholesome products from us” said Bryan Herr, Country Fresh’s President.

Consumers who have purchased any of these products are urged to dispose of the product or return it to the place of purchase for a full refund. Consumers with questions may contact the company at 281-453-3305, Monday through Friday, 9 a.m.-5 p.m. CDT.

DOG FOOD RECALLED AFTER EUTHANASIA DRUG FOUND IN CAN

It was New Year’s Eve when Nikki Mael fed her four pugs—Tito, Tank, Tinkerbelle and Talula—the single can of dog food, Evanger’s Hunk of Beef, as a treat. Within 15 minutes, the pugs were “acting drunk” and “falling over.” Mael, who is from Washougal, Washington, quickly rushed them to the local emergency vet, where the four dogs were placed in the intensive care unit. One of the pugs that ate the most canned beef died. A toxicology report later revealed the cause of her death. A drug called pentobarbital, a euthanasia agent, was found in both the dog’s stomach and the Evanger’s dog food. “If this sample came directly from a can,” the toxicologist wrote, “this is an urgent matter.”

According to a U.S. Food and Drug Administration (FDA) statement, Evanger’s, a family-owned-and-operated cat and dog food business, decided to volun-

tarily recall five lots of the product—all of the Hunk of Beef products that were man-

ufactured that same week. The products were distributed to retail locations and sold online in 15 states: Washington, California, Minnesota, Illinois, Indiana, Michigan, Wisconsin, Ohio, Pennsylvania, New York, Massachusetts, Maryland, South Carolina, Georgia and Florida.

Despite having worked with the supplier of this specific beef for about 40 years, Evanger's cut its ties with the supplier, which also serves a number of other companies. "Something like this seemed impossible," Evanger's said in its statement. "All of our raw materials are sourced from USDA-inspected facilities, and many of them are suppliers with whom we have had long-standing relationships."

The source of the contamination is still unknown. But since pentobarbital is routinely used to euthanize animals, the most likely way it could get into dog food would be in rendered animal products, according to a 2002 FDA report. Rendered products undergo a process that converts animal tissues to feed ingredients, the report stated, and pentobarbital seems to be able to survive this process. If animals are euthanized with pentobarbital and subsequently rendered, pentobarbital could remain in the rendered feed ingredients. But, Evanger's said, research suggests pentobarbital is most pervasive in dry dog foods that source rendered ingredients, unlike Evanger's, which primarily manufactures canned foods that would not contain any rendered materials.

The company said it was previously "unaware of the problem of pentobarbital in the pet food industry." It said that after looking into it and speaking with several suppliers, it discovered a number of holes in regulations by the Food and Drug Administration and U.S. Department of Agriculture. Chelsea Sher, whose parents own the company, said in a video statement that the company's goal is now to "close that gap" to ensure that no euthanized animal ever makes it into the pet food stream.

Evanger's donated the full \$5,800 fundraising goal on the crowdfunding page that Ms. Mael created to raise money for her pugs' veterinary bills. "We at Evanger's are deeply horrified about this," the company said in a message to Ms. Mael, adding "we also feed our own dog, Lilly, this food." The company later said it would be making a donation to a local shelter in honor of Talula.

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.

XVIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

TRACY EDGE

Tracy Edge, a Legal Assistant to Beau Darley in the Mass Torts Section, has been with Beasley Allen almost two years. However, she has spent nearly 24 years working in the legal field. Some of the litigation Tracy is currently helping with involves transvaginal mesh and the chemotherapy drug Taxotere.

Tracy grew up in Talladega, Alabama, and graduated high school there before receiving her Paralegal Certificate through PCDI in 2004. She and her husband Marty, who works as the Financial Advisor for First Community Bank of Central Alabama, will be married 10 years this upcoming July. Together, the couple has shared three children: Tucker, age 28, Peyton, age 21, and the youngest, Garrett, age 19. Tracy and Marty also have one grandson, Jaxson, age 18 months, and who she describes as a daughter-in-"love," Jessica.

In their spare time, Tracy and Marty enjoy traveling, watching both national and college football, kayaking, whitewater rafting, exercise and spending time with their family. The couple also helps with the children's ministry at their church, East Memorial Baptist Church. Tracy is a hard-working, dedicated employee who does very good work. We are fortunate to have her with us.

REBECCA GILLILAND

Rebecca Gilliland joined Beasley Allen as a law clerk in November 2010 and a

lawyer in October 2012. She is currently working in our firm's Consumer Fraud & Commercial Litigation Section on cases related to Average Wholesale Pricing (AWP) / Medicaid Fraud litigation, which seeks to recover millions of dollars lost by state Medicaid agencies as a result of fraudulent price reporting by the nation's largest drug manufacturers. Rebecca also is currently involved in several class actions, including claims against Angie's List, ACE American Insurance Company and Aramark, and multidistrict litigation against Blue Cross and Blue Shield.

Rebecca landed in the legal profession in perhaps a less direct way than most. She always planned to follow her father into the medical field, but after completing her commitment to the U. S. Marine Corps with an honorable discharge and pursuing her bachelor's degree at the University of West Florida, she was not so sure of her path. Rebecca jumped majors—from studio art to accounting—and finally landed in criminal justice, the only legal-related degree her college offered. Upon graduating with her bachelor's degree, she began pursuing her master's degree, but switched courses after moving to Montgomery with her husband, who suggested she try law school.

Though she was not always set on being a lawyer, Rebecca has found she cannot imagine doing anything else. She says her favorite part of practicing law is not actually litigation related. Rebecca's favorite aspect of her job is helping clients talk through their issues, finding that some of those who come to her for legal assistance just need advice and have complaints that can be resolved without a lawsuit. She finds tremendous satisfaction in knowing that she has helped someone find an easy solution for a dispute, and she credits the atmosphere at Beasley Allen for allowing her to do that.

Rebecca says the best part of working for the firm is the culture that allows her to counsel potential clients in how to resolve disputes, even if that does not involve litigation. Ultimately, she believes it is the firm's goal of striving to help those in the community, whether they be clients or neighbors, that sets it apart.

Rebecca is married to Keith Gilliland, and they make their home in Wetumpka, Alabama. They have four children, Scott, Will, Lilly and Kaden, and attend First Baptist Church in downtown Montgomery. Rebecca is a talented lawyer who does exceptionally good work. She is totally dedicated to serving her clients'

best interests. We are blessed to have her with us.

STEPHANIE MONPLAISIR

Stephanie Monplaisir started with the firm as a Law Clerk in our Personal Injury & Products Liability Section in April 2011. She had graduated Summa Cum Laude from Troy University in 2007 with a double major in Political Science and Psychology. Stephanie also graduated Summa Cum Laude from Thomas Goode Jones School of Law in May 2011. While in law school, she received 10 Best Paper Awards and the Best Advocate Award in Trial Advocacy. Stephanie served as a Senior Editor on the Faulkner Law Review and as a Senior Member of the Board of Advocates.

Stephanie became a Staff Attorney in the Personal Injury & Products Liability Section after passing the Alabama Bar Exam in October 2011. Her practice in that section focused on complex litigation and appellate proceedings for the Section. Thus far, Stephanie has been a part of trial teams that have obtained more than \$30 million in verdicts or settlements.

From a very young age, Stephanie says she knew she wanted to become a lawyer. She feels as though God made her to be a peacemaker and practicing law allows her to fit that role. Stephanie says that she is convinced Beasley Allen is blessed with some of the greatest trial lawyers in the nation and that she is fortunate to have been mentored by them. She also believes young lawyers like herself can thrive by the example of those lawyers and practice law with integrity.

Stephanie and her husband, David, are members of Frazer United Methodist Church. They enjoy spending time with their daughter, family and friends. Stephanie is a very good lawyer, who works very hard and is totally dedicated to representing her clients. She does exceptionally good work especially on motion practice and appellate work. We are blessed to have her with the firm.

VALERIE SCROGGINS

Valerie Scroggins began her tenure at Beasley Allen in 2000—almost 17 years ago—as a receptionist in the Consumer Fraud section. She then moved to work in Public Relations where she helped publish the Jere Beasley Report. Afterward, she became a Legal Secretary to Roman Shaul and the late Ron Canty. However, upon Canty's passing, she moved to work as a Legal Secretary for Larry Golston in April 2004, where she has since stayed and

assists with case management, client contact and general secretarial duties.

Valerie and her husband Mike have been married 14 years. She has two children by a previous marriage who have blessed her with four grandsons, as well as three stepchildren who have blessed her with nine more grandchildren. Valerie and Mike also have a great grandchild.

In her spare time, Valerie and her family serve God and her church family at First Baptist Church Posey Crosswoods in Prattville, Alabama. Her hobbies include spending time with her family, reading and cheering on the Alabama football team.

WILL SUTTON

Will Sutton, an Associate in our firm's in our Toxic Torts Section, graduated from Auburn University in 2007 with a B.A. in Political Science. Will then went on to obtain his Juris Doctor degree at Thomas Goode Jones School of Law in 2010. He also studied international criminal law abroad at the University of Amsterdam. He says he decided to become a lawyer upon realizing his love for helping others through his strengths of reading, writing and analysis. While attending law school, Will worked as a Law Clerk in our Consumer Fraud & Commercial Litigation Section. He is a member of the American Association for Justice.

Will's favorite part of being a lawyer is assisting families that truly need a helping hand. He has learned through experience that lawyers are responsible for helping families get through what is usually one of the greatest problems they will encounter in their lives.

Will says he believes Beasley Allen provides a unique working environment in that it is similar to one big family. He says the entire firm focuses itself to helping one another, allowing the firm to be in a better position to help our clients. Will is a very good lawyer. He too is a hard worker and is totally dedicated to the mission of the firm. We are very fortunate to have Will with us.

APRIL WORLEY

Since joining Beasley Allen in 2001, April Worley has worked in our firm's Mass Torts Section. She currently assists Roger Smith as a paralegal and helps handle Actos, Mirena IUD, proton pump inhibitor, selective serotonin reuptake inhibitor and Zofran litigations. Additionally, April works to resolve bankruptcy issues for the section.

April has earned a bachelor's degree in justice and public safety, master's degrees in both judicial administration and public administration, and her paralegal certificate over the course of her studies.

With a teenage son and three small dogs with huge personalities, April stays busy both in the office and at home. Her son, Micah, is 17 years old and plays football for Prattville High School. He is a cancer survivor and completed 28 months of chemotherapy in August 2013. The two love to watch college football together and try to attend as many Alabama football games as they possibly can. Micah hopes to attend the University of Alabama when he graduates next year. April considers her family to be incredibly blessed.

In addition to her love of football, April says she enjoys dining out—because “who does not love a great meal?” She also enjoys traveling, especially taking road trips. April is a dedicated, hard-working employee, who does very good work. We are fortunate to have her with the firm.

XIX. SPECIAL RECOGNITIONS

AUTO SAFETY ADVOCATE CLARENCE DITLOW LEAVES BEHIND A LIFE-SAVING LEGACY

Clarence Ditlow, an unrelentingly fierce auto-safety advocate who crusaded for airbags, seatbelts, crash avoidance systems, numerous recalls, and other life-saving measures, died on Nov. 10 at the age of 72. Lawyers in our firm had very good personal and professional relationships with this man. The American people owe Clarence a tremendous debt of gratitude for all that he did during his lifetime. He fought the good fight and did so against tremendous odds. Interestingly, Clarence was both an engineer and a lawyer, having graduated from Harvard Law School, and he used that combination effectively in his work.

“He was the nightmare of the misbehaving auto industry and the dream of safety-conscious motorists,” Ralph Nader, who mentored Clarence and collaborated with him on a number of safety campaigns and projects, told *The New York Times*. “He was also honest, ethical and self-effacing.”

Clarence, who died at George Washington University Hospital in Washington D.C. from cancer, leaves behind a legacy

that will continue to shape the auto industry and save lives for years to come.

As head of the Center for Auto Safety in Washington D.C., Clarence played a critical role in tackling some of the deadliest defects and scandals to rock the auto industry in the past 40 years. These issues included sudden acceleration in Toyota vehicles, Ford Pintos with gas tanks prone to exploding, and General Motors pickup trucks with flawed gas tanks that also exploded in crashes.

“With a budget of less than half the cost of one General Motors Super Bowl commercial, Clarence took on auto industry giants in lawsuits that tightened standards for ignition systems, airbags and fuel efficiency. He lobbied government agencies to ban driving while texting or using cell-phones. Clarence also helped to bring about ‘lemon laws’ in all 50 states that made it easier for buyers to return defective vehicles,” *The New York Times* reported. Clarence’s work also “called attention to vehicles prone to roll over, slip out of gear from park to reverse, and experience a complete loss of power during operation.”

In a 2014 article in *The New York Times*, Clarence and Ralph Nader jointly wrote, “When regulators sleep and auto companies place profits over safety, safety defects pile up.” These two consumer advocates stated in the article:

A record number of vehicles—more than 50 million—have been recalled this year, a result of congressional hearings and Justice Department prosecutions, which exposed a mass of deadly defects that the auto industry had concealed.

We will all miss our friend Clarence Ditlow, a great American, and a good man in every respect. His tremendous work benefited this country and its people beyond measure.

Source: *The New York Times*

XX. FAVORITE BIBLE VERSES

My friend, John Gibbons, the State Director for the Fellowship of Christian Athletes (FCA), furnished two verses for this issue. Paul’s challenge to “finish” the race and complete the task the Lord has

given us is a great inspiration to live our lives with a relentless effort to share the good news of God’s grace to all, no matter how fierce the opposition. Paul faced imprisonment, hardship in every city, but was willing to count it all worthy to suffer for God’s glory and to finish strong.

However, I consider my life worth nothing to me; my only aim is to finish the race and complete the task the Lord Jesus has given me—the task of testifying to the good news of God’s grace. Acts 20:24

Greater love has no one than this: to lay down one’s life for one’s friends. You are my friends if you do what I command. John 15:13-14

John says he finds great encouragement from our Lord’s declaration that we are His friends by His sacrificial death on the cross. Jesus in return asks us to love others as He loves us. That is impossible to do unless we fully understand He went to the cross on our behalf, while we were yet sinners and all unworthy of Jesus’ unconditional love.

Robin Parkhurst, who works in our firm’s Accounting Department, also furnished two verses this month. She says these verses have helped her to deal with situations in her life that caused her to worry and be concerned at times. Robin says she has learned to trust God and to have hope.

That is why I tell you not to worry about everyday life—whether you have enough food and drink, or enough clothes to wear. Isn’t life more than food, and your body more than clothing? Matthew 6:25

Trust in the LORD with all your heart; do not depend on your own understanding. Proverbs 3:5

Rebecca Gilliland, a lawyer in our firm’s Consumer Fraud & Commercial Litigation Section, sent in a message from Philippians for this issue. Rebecca says she shares a journal with her best friend back home in Florida. They take turns writing devotionals and mail the book back and forth. The last one that Rebecca sent was about Philippians. She chose verses 6 and 7, not for the “peace beyond all understanding” language that most people know it for, but for verse 6.

Be anxious for nothing, but in everything, by prayer and petition,

with thanksgiving, present your requests to God. And the peace of God, which surpasses all understanding, will guide your hearts and your minds in Christ Jesus. Philippians 4:6-7

Rebecca had this to say:

Besides the obviously comforting intent of the passage, I find solace in these words for other reasons. It is not only a passage about finding peace in God, but is a reminder that you must continually place your burdens upon Him. It is a reminder to prayerfully and thankfully place your burdens on the Lord. Do not expect to be given an easy or peaceful life—you must offer your burdens to the Lord—and, as you do so, thank God that he is there to take your burdens. Once you have prayerfully and thankfully placed your burdens at His feet, THEN the peace beyond all understanding comes to you and will guide your heart and mind. God freely grants his love and peace when it is sought, but we must be mindful to constantly seek it.

ReNay R. Robertson, a legal secretary in our firm, furnished a verse for this issue. She says Romans 8:28 speaks to her in every situation. In good times, it’s easy to praise God for His goodness and blessings. She stated:

All Things! In sad times, we ask for peace and comfort that only He can give. All things. In times of trouble and uncertainty when our very nature is to be angry and ask “why me,” “why my child,” “Lord, why won’t you”—that little word “all” is so hard to say. all things.... These are the times when it’s hard to trust God and pray “Your will be done, Lord.” All Things! We must ask God what He’s trying to teach us in all situations—that we may serve Him better.

And we know that all things work together for good to them that love God, to them who are the called according to His purpose. Romans 8:28

My good friend, Dr. Terry Stallings, furnished three verses dealing with “faith” for this issue. Terry is a man who not only “talks the talk” he “walks the walk” daily

and has been a real inspiration to lots of folks.

In this you greatly rejoice, though now for a little while, if need be, you have been grieved by various trials, that the genuineness of your faith, being much more precious than gold that perishes, though it is tested by fire, may be found to praise, honor, and glory at the revelation of Jesus Christ. 1 Peter 1:6-7

Now faith is the substance of things hoped for, the evidence of things not seen. Hebrews 11:1

But without faith it is impossible to please Him, for he who comes to God must believe that He is, and that He is a rewarder of those who diligently seek Him. Hebrews 11:6

Julia Anne Beasley, a lawyer in the firm, supplied a timely verse for this issue:

Love suffers long and is kind; love does not envy; love does not parade itself, is not puffed up; does not behave rudely, does not seek its own, is not provoked, thinks no evil; does not rejoice in iniquity, but rejoices in the truth; bears all things, believes all things, hopes all things, endures all things. Love never fails. But whether there are prophecies, they will fail; whether there are tongues, they will cease; whether there is knowledge, it will vanish away. 1 Corinthians 13:4-8

XXI. CLOSING OBSERVATIONS

JOHNSON & JOHNSON USES AMERICAN TORT REFORM ASSOCIATION AS ATTACK DOG

Johnson & Johnson has put out lots of information over the past few months that can be put in the category of “alternative facts” relating to the talcum powder litigation ongoing in Missouri and other states. The giant drug company has used the American Tort Reform Association as its primary attack dog. It’s quite obvious that Johnson & Johnson is trying to influence the judicial and legislative branches of government. The company may also be attempting to prejudice the public and

potential jurors as part of its strategy in defending the ongoing litigation. The following is an op-ed piece in opposition to what Johnson & Johnson is doing that appeared in a St. Louis newspaper.

DON'T FALL FOR CORPORATE LOBBYISTS' JUNK SCIENCE, 'JUDICIAL HELLHOLE' CLAIMS

What should we think when a corporate-funded lobbying group places our local courts at the very top of its annual “Judicial Hellholes” list? That was the message last month from the American Tort Reform Association, a group funded by large tobacco, pharmaceutical, insurance, energy and chemical corporations.

With a page straight from Big Tobacco’s playbook, the ATRA is deliberately ignoring difficult facts and is trashing our courts through a negative public relations campaign to change the rules of our courts and shield its corporate funders from responsibility. Don’t be fooled; there is no methodology behind the “Hellhole” list. St. Louis and every other court deemed a “Judicial Hellhole” are singled out for one reason only—these are courts in which citizen jurors have found big corporations liable for dangerous products and practices.

Our city drew the attention of this big-business cheerleader based on three recent verdicts against Johnson & Johnson. In each of these trials, jurors considered three weeks of testimony before concluding that Johnson & Johnson had ignored dozens of published medical and scientific studies and decades of mounting evidence highlighting links between genital application of talcum powder by women and ovarian cancer. These juries punished Johnson & Johnson for a culture that places profit over safety.

Thanks to the central location and efficiency of our courts, dying women have been given a voice. Our juries have seen documents that Johnson & Johnson would prefer to keep hidden, including a 1974 letter to the U.S. Food & Drug Administration in which the corporation pledged to discontinue talc products if any scientific studies revealed ques-

tions about talc’s safety. Shamefully, those products remain available despite a raft of studies and meta-studies that have drawn lines from talc use to ovarian cancer. Johnson & Johnson’s own toxicologist wrote in 1994, “Anybody who denies (the published research) risks that the talc industry will be perceived by the public like it perceives the cigarette industry: denying the obvious in the face of all evidence to the contrary.”

St. Louis juries were no doubt alarmed to learn how Johnson & Johnson aggressively marketed its talc products to African-American and Hispanic women even after these safety concerns became apparent. They even heard from a Johnson & Johnson whistleblower who testified that supervisors instructed her to alter hundreds of Adverse Event Reports, which the FDA often relies upon to monitor product safety issues.

Naysayers and corporate lobbyists now shout “junk science” only because scientific research from some of the most respected scientists and medical experts in the world doesn’t agree with the bottom line and because they want our lawmakers to change the legal rules to their benefit.

Rather than respecting our civil justice system—a uniquely American institution consecrated in the Seventh Amendment of the U.S. Constitution—Johnson & Johnson and the ATRA are trying to dodge responsibility with a massive negative PR campaign. Their embrace of the term “junk science” comes straight from Big Tobacco’s unsuccessful attempts in the 1970s to polarize debate and discredit the scientific evidence linking tobacco to cancer. They’d prefer to take these women out of court and to closed-door arbitration, where the cards are stacked against individuals and any testimony and results are hidden from the public.

Use of the term “Hellhole” ignores the plight of those truly going through hell—the 24,000 women diagnosed with ovarian cancer in the U.S. every year, as well as the families of approximately 14,000 women who die from the disease annually. A 1999

Harvard study concludes that banning talc use would reduce the number by at least 10 percent.

I've been trying cases in St. Louis courts for more than 30 years, and I've seen first-hand how our jurors take their work seriously and do their best to get it right. Maybe these pro-business lobbyists should visit St. Louis and sit through a monthlong trial before making such a baseless claim. The group would find a diverse and business-friendly city that inspires startups. And perhaps they would get a better, more accurate answer to their question.

Roger Denton is a St. Louis attorney. He is not involved in the litigation against Johnson & Johnson.

Source: *St. Louis Post Dispatch*

OUR MONTHLY REMINDERS

If my people, who are called by my name, will stumble 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

XXII. PARTING WORDS

We can all learn some valuable life lessons from the world of sports and a prime example was the 51st Super Bowl. This was a great game with a number of records being set. No team had ever done what the New England Patriots did in coming back from a 25-point deficit to win a thriller in overtime. In fact, no team had ever been behind by more than 10 points and gone on to win a Super Bowl. The Patriots won their 5th Super Bowl as did Tom Brady. This was also the first overtime game in Super Bowl history.

While the win was a team effort by the Patriots, Tom Brady was the key to keeping his team in the game. The veteran quarterback kept his team believing they

could still win when that seemed absolutely impossible. To do this required tremendous leadership skills and Brady came through with flying colors.

The Atlanta Falcons, a very good football team with a 25-point lead, seemed to have the game in the bag with a little over seven minutes left in the third quarter. However, for the rest of the game the Falcons were no match for the Patriots. There were lots of lessons to be learned from this game.

The outcome was a classic example of a “never give up” attitude. After the Falcons made the score 28-3 early in the third quarter, how many of those watching the game believed that the Tom Brady-led Patriots had a chance to even make the game close—much less to win it? I must confess I thought it was over at that juncture. However, it was evident that the Patriots, and especially Tom Brady, had no intention of giving up.

The lessons learned in sports carry over into all aspects of life. There will be times when things appear to be so bad for us that we have no chance of turning whatever faces us around. Many of us have a tendency to give up when things are going really bad for us. There will be “storms” in our lives and we have to find ways to survive those storms.

Most all of us will have experienced defeats and have known suffering, struggles and losses at some point. We might be facing health problems, financial issues, family problems or difficulties at work and there simply won't appear to be any answers available to us for those problems. That is when we have to rise up and elect not to give up. We have to remember that God is always with us regardless of what problems are facing us and that nothing is impossible for Him.

My prayer is for each of us to never give up on anything of importance in life and to trust God to help us deal with the problems that we will certainly face.

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