I. CAPITOL OBSERVATIONS

A MOST UNUSUAL PRESIDENTIAL RACE

I don’t believe I have ever seen a more confused state of affairs in the Republican primary battles than what we are currently experiencing. The Democratic primary also has an interesting twist, but it’s rather tame compared to the GOP debacle. We are still more than a year away from the election in November of next year and the candidates are running like the voting will take place this month. It’s become quite evident that the GOP—regardless of how hard the party bosses try—can’t get rid of Donald Trump. He had seemed invincible, getting away with making really “dumb” statements and insulting almost every American institution and all of his opponents. Nothing the man says or does had seemed to hurt him. The worse Trump acted, the stronger he appeared to be. Up to this juncture, Trump had always been in the lead, but then all of a sudden he had to deal with being second in the polls.

Dr. Ben Carson, the man who had been running second in all of the polls, except for the ones in Iowa, is much more likeable and civil and that should help him as the campaign gets further down the road. Dr. Carson’s weaknesses haven’t been exploited so far and he has been able to say very little about such important items as U.S. foreign policy. Thus far, his sole message is that he is an outsider looking in and that appears to be working. Nevertheless, on Oct. 27 Dr. Carson surged into the lead in the national polls. The first question now is how long will he be able to hold the lead? The second question is how will Trump handle adversity?

The rest of the GOP field seems to be either treading water or slowly sinking. I don’t see how Jeb Bush—the man I thought would be the GOP nominee—can stay in this race unless his poll numbers increase drastically. He has the look of a confused man and appears extremely weak. Sen. Ted Cruz seems to be working behind the scenes to inherit the votes now held by the frontrunners who he seems to think won’t be able to maintain their current poll status. His strategy may work, but I seriously doubt it. I don’t believe Sen. Cruz can be elected president regardless of what happens to Donald Trump and Dr. Carson. There is not another candidate in the race who will be able to stay in through December with the possible exception of Florida senator Marco Rubio and his chances of getting the nomination are not good.

On the Democratic side, Sen. Bernie Sanders is the poor man’s Donald Trump. Even though he is in the U.S. Senate, he runs like he’s not. Voters seem to like that he is he is anti-establishment to the core. But unlike Trump and Dr. Carson, he has a very clear message. I believe he really is a socialist. The front runner Hillary Clinton seems to have gotten an early “second wind” and is now more relaxed and likeable. She received excellent reviews from both the first debate and the Congressional hearing. But the best news for the Clinton camp so far is that Joe Biden is not going to run. His announcement on Oct. 21 put to rest the speculation that he would enter the race. Had the Vice President gotten in the race he would have been a very strong candidate. In my opinion his decision virtually guarantees the nomination for Hillary.

II. UPDATE ON VOLKSWAGEN

THE VOLKSWAGEN SAGA UPDATE

I was hesitant to write about the ongoing saga involving Volkswagen and that’s because the landscape changes daily with nothing good so far for the automaker. But I will give an update on the situation at this juncture. Volkswagen is hiring a Daimler executive to lead a new post devoted to integrity and legal affairs. In mid-October, the German automaker announced that Christine Hohmann-Dennhardt would become its new board member for integrity and legal affairs as of Jan. 1, 2016. While that move is a step in the right direction, there was an urgent need for ethical conduct at Volkswagen long before this hiring took place.

Hohmann-Dennhardt held an identical role at Daimler until it recently agreed to terminate her contract early at Volkswagen’s request. The new position puts Hohmann-Dennhardt at the center of the global crisis that has enveloped Volkswagen in the wake of the U.S. Environmental Protection Agency’s (EPA) disclosure that the company installed manipulative software on diesel cars to fool regulators into believing the vehicles met emissions standards. The cheating software affects up to 11 million cars worldwide, including nearly 500,000 in the U.S. On Oct. 15, Volkswagen ordered a recall of 8.5 million vehicles in Europe—the first step toward fixing the non-compliant cars.

U.S. owners of Volkswagen cars can now determine whether their vehicle is fitted with the manipulative software. Volkswagen announced that owners can input their Vehicle Identification Number (VIN) into an online database to ascertain the status of their vehicles. The 2-liter, 4-cylinder diesel cars affected by the crisis include models ranging from 2009 to 2015. To find the VIN, vehicle owners should check the identification plate on the driver’s vertical doorframe. The VIN database is available at www.VWdieselinfo.com.

It’s quite obvious that Volkswagen is facing a massive recall of vehicles and it appears the recall will begin in January.

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While the automaker says it’s planning to fix all of the recalled vehicles included in the emissions-rigging scandal by the end of 2016, I seriously doubt that can be done that quickly. Volkswagen has previously said that up to 11 million vehicles worldwide across several of its brands contain the diesel engine with the software used to cheat on U.S. emissions tests. The company will have to fix the EA 189 diesel engine “in combination with various transmissions and country-specific designs.”

Older models will be particularly difficult to fix because they will require hardware and software changes. At press time Volkswagen hadn’t proposed an official fix to U.S. regulators. As for the emissions defeat program, the software causes vehicles to emit nitrogen oxide—which can exacerbate respiratory conditions such as asthma—at rates of up to 40 times U.S. standards. But in controlled regulatory tests, the software runs the vehicle in clean mode, to make it appear compliant. Volkswagen is already the target of numerous investigations, including a U.S. Justice Department criminal probe and European inquiries.

Volkswagen claims that a software update will suffice to fix the problem in most cases, but that some vehicles could need new injectors and catalysts. The automaker says it may need to set up temporary specialist workshops to deal with the more complex cases. Volkswagen so far has set aside €6.5 billion euros ($7.3 billion) to cover the cost of recalls and other efforts to win back customers’ trust. Volkswagen can expect to face fines from U.S. Environmental Protection Agency, which in theory amount to as much as $18 billion.

Volkswagen has hired the law firm Jones Day to conduct an internal investigation into the cheating scandal. Interestingly, House lawmakers were told by Volkswagen Group of America President and CEO Michael Horn that the installation of defeat devices in the Volkswagen vehicles was “not a corporate decision,” but instead the work of a few rogue engineers. He claims that neither he nor anyone else at VW of America knew the software was installed in VW vehicles until a few days before the information became public. Where have we heard that line before?

The bottom line simply put is this—Volkswagen has no fix available that will both maintain high performance and also meet the emission requirement. It just can’t happen and therein lies the problem. Our firm has partnered with several nationally recognized class action law firms to file two class action lawsuits, one in New Jersey and the other in California. Dee Miles, Archie Grubb and Clay Barnett from our firm are handling the cases.

Volkswagen is working hard to steer the hundreds of class-action lawsuits over its emissions-cheating software to the court nearest its current U.S. headquarters or to Detroit, its former location. The automaker has asked a panel of federal judges to combine the more than 350 lawsuits filed against it in federal court in Alexandria, Va. Detroit was listed by Volkswagen as an alternate choice. We believe the proper court would be in New Jersey. A hearing before the Judicial Panel on Multidistrict Litigation to decide where the cases will be consolidated is set for Dec. 3 in New Orleans. The seven-judge panel will determine whether the cases will be combined and which judge will oversee the suits. We are confident the lawsuits will be combined in an MDL. If you need more information concerning any aspect of the ongoing saga, contact Dee Miles, Archie Grubb or Clay Barnett at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Archie.Grubb@beasleyallen.com or Clay.Barnett@beasleyallen.com. They will be glad to assist you.

III. MORE AUTOMOBILE NEWS OF NOTE

**Lawsuit Involving A Burning Chevy Silverado Filed Against General Motors**

The family of a Texas man who died when his 2008 Chevy Silverado burst into flames has filed suit against General Motors LLC. The suits contend that the automaker is liable for a design defect. The suit, filed in state court in August and now removed to federal court, alleges GM’s engine part components were defective and caused the fire. GM removed the case, citing diversity of citizenship and saying there is “substantial evidence” about the Defendants’ “longstanding knowledge of the dangers and occurrence of air bag excessive deployment incidents.” Ms. Mincey filed suit against Duval Motors and Honda, Takata and their subsidiaries in January, saying she was injured in a June 2014 car crash because her driver’s side air bag in a 2001 Honda Civic didn’t deploy. The resulting injuries to her spine left Ms. Mincey quadriplegic. It appears that Honda recalled the air bag in her vehicle four days after her crash. It’s alleged by the Plaintiff.

**PUNITIVE DAMAGES SOUGHT IN AIR BAG SUIT AGAINST HONDA AND TAKATA**

A woman suing Takata Corp. and American Honda Motor Co. Inc. over the infamous air bag inflator defect which has caused the historic recall of some 34 million vehicles this year is seeking punitive damages for the auto companies’ concealment of the defect. The Plaintiff, Patricia Mincey, is seeking to amend her complaint to include a request for punitive damages, saying that there is “substantial evidence” about the Defendants’ “longstanding knowledge of the dangers and occurrence of air bag excessive deployment incidents.” Ms. Mincey filed suit against Duval Motors and Honda, Takata and their subsidiaries in January, saying she was injured in a June 2014 car crash because her driver’s side air bag in a 2001 Honda Civic didn’t deploy. The resulting injuries to her spine left Ms. Mincey quadriplegic. It appears that Honda recalled the air bag in her vehicle four days after her crash. It’s alleged by the Plaintiff.

**The Takata and Honda defendants misleadingly promised safety and trust, while at the same time purposely concealing evidence of air bag defects in the air bag systems in vehicles, including Honda vehicles,**
from the American public. They also hid their alleged knowledge of deaths arising from the defect.

As we have reported previously, so far there are at least eight deaths linked to the Takata air bag defect. Takata and Honda knew about the problem as early as 2001. Takata air bags had exploded in several models including a 2001 Honda Passport.

Ms. Mincey made claims against Honda and Takata for negligence, strict liability and fraudulent concealment. A trial in her case has been scheduled for next August. Her suit was sent from federal court back to state court earlier this year.

Source: Law360.com

**Volvo Will Accept Liability For Self-Driving Car Crashes**

Volvo announced last month that it will accept full liability if one of its cars crashes while driving in autonomous mode. It was said to be an effort to promote the growth and regulation of the self-driving car industry. This appears to be the first promise of its kind by any automaker. Volvo AB President and Chief Executive Hakan Samuelsson made the promise official during a seminar on self-driving cars at the House of Sweden in Washington, D.C.

Volvo is urging government officials to improve federal guidelines for the testing and certification of autonomous vehicles. The National Highway Traffic Safety Administration (NHTSA) has the responsibility to make sure Volvo and all other automobile manufacturers do all necessary testing on the self-driving vehicles. I don’t believe that rushing these vehicles into production is the prudent thing to do.

Source: Law360.com

**Ford Explorer Owners Win Class Certification In Exhaust Fume Lawsuit**

A Florida federal judge has agreed to certify a class of Florida drivers alleging Ford Motor Co. used a defective exhaust system that exposes passengers to dangerous levels of carbon monoxide. The automaker’s objection that the certification requirements weren’t met was rejected by U.S. District Judge William P. Dimitrouleas.

The judge did agree with Ford in his order that the Plaintiff, Angela Sanchez-Knutson, can’t use a straight arithmetic damages model to support the predominance requirement. However, Judge Dimitrouleas found an alternative damages model acceptable and approved class certification. He wrote:

*The court accepts plaintiff’s proffered expert’s proposed conjoint analysis damages model for purposes of class certification, finding that it is sufficiently tied to plaintiff’s legal theory and her proffered evidence that her Explorer shares the same defect as all others in its product line and meets the predominance requirement.*

While Judge Dimitrouleas ruled that the Plaintiff met the numerosity, commonality, typicality and adequacy requirements, he rejected her attempt to certify a Rule 23(b)(2) class action, which allows for final injunctive relief or declaratory relief, and sometimes monetary damages, for the class as a whole. Judge Dimitrouleas said in his order:

*The court finds that the injunctive relief that plaintiff requests is the equivalent of the judicial recall claim that plaintiff withdrew at the motion to dismiss stage in order to avoid Ford’s preemption and primary jurisdiction arguments. Having abandoned her claim for a judicial recall when faced with Ford’s preemption and primary jurisdiction arguments, plaintiff cannot resurrect a comparable remedy at this stage in order to seek a Rule 23(b)(2) certification.*

Judge Dimitrouleas otherwise approved the motion and certified a class of all people who bought or leased a 2011-2015 Ford Explorer during the class period from authorized Ford dealers in Florida. Ms. Sanchez-Knutson sued Ford in June 2014, claiming she and her daughter suffer from chronic headaches as a result of exposure to dangerous levels of carbon monoxide from driving in her 2013 Ford Explorer. She soon moved for class certification, but Judge Dimitrouleas denied the request as being premature.

Judge Dimitrouleas also dismissed additional claims brought by Ms. Sanchez-Knutson in July, granting a Ford motion to dismiss. The judge ruled she only had standing to represent the claims of a proposed Florida class who had purchased Explorers between 2011 and 2013. Ms. Sanchez-Knutson is represented by John J. Uustal, Jordan M. Lewis and Michael A. Hersh of Kelley Uustal PLC.

Source: Law360.com

**Lawsuit By Subaru Drivers Says Defect Causes Hood To Fly Open**

A lawsuit was filed last month against Subaru of America Inc. in a New Jersey federal court. The proposed class action alleges certain vehicles have a defect that causes the hood to fly open at high speeds and crack the windshield, endangering drivers and diminishing the value of their cars. It’s alleged that the National Highway Traffic Safety Administration (NHTSA) has received 17 complaints about the hood of the 2006 Subaru B9 Tribeca unlocking and smashing the windshield while being driven. It’s alleged further that Subaru won’t do anything to fix the alleged defect. The complaint states:

*Despite longstanding knowledge of the defect through public complaints and internal testing, Subaru has failed to take responsibility for the problem, refusing to issue a recall and denying consumer requests to pay for necessary repairs occasioned by the defect.*

The hood of the Plaintiff’s vehicle flew open in May while she was driving at approximately 65 miles per hour, cracking her windshield and dislodging the rear-view mirror, according to the complaint. The Plaintiff said she was unable to see the road because of the broken hood but managed to safely make it to the side of the road, where she was helped by passing drivers.

The Plaintiff says when she contacted Subaru about the accident, the automaker wouldn’t take responsibility for the alleged defect, wouldn’t compensate her for the cost of repairs and refused to even look at the vehicle. Apparently the Plaintiff’s experience is not an isolated incident. While numerous consumers have complained online about the same alleged defect, NHTSA has received 17 complaints about the 2006 B9 Tribeca describing a similar experience to that of the Plaintiff.

It’s alleged in the complaint:

*It is well known that car manufacturers, in general, and Subaru in particular, closely monitor NHTSA complaints, so there can be no doubt that Subaru has long known of this issue from the NHTSA website.*

The Plaintiff contends that Subaru actively concealed the alleged defect, which she said tells her claims, and failed to disclose that the alleged defect would diminish the value of the vehicle. The Plaintiff is asking for certification of a national and Pennsylvania class of drivers who bought or leased the 2006 Subaru B9
The company is well aware of the problem engine failure and repairs. It’s said that have excessive valve guide wear that leads. It’s alleged that model years 2006 to 2014 proposed class action against General owners or lessees of the affected cars had the “wiggle method” is being utilized. The owners claimed that even cars with significant expenses for inspection and manufacture of the engine make it prone to mechanical failure. Thus far there has been no recall of the vehicles.

The Plaintiffs say they have incurred significant expenses for inspection and repairs of the cars, according to the complaint. It’s alleged that even cars with extremely low mileage have shown a high degree of wear. It’s stated in the complaint that an investigation technique known as the “wiggle method” is being utilized. Using this test, a high proportion of owners or lessees of the affected cars had “out of specification valve guides.” The drivers allege:

When GM determined that its adopted test would lead to more repair and investigations than it wished to perform, the test was summarily rejected. In dealing with multiple complaints concerning the subject engine in the class vehicles, GM acted, at all times, to deflect criticisms, defer investigations and repairs, and minimized the extent of the problems.

The drivers said GM still hasn’t come up with a solution to the alleged problem and, based on reports that our lawyers have seen, it’s a correct statement.

Source: Law360.com

Class Action Lawsuit Filed Against GM Over Corvette Engine Defect

A group of Corvette drivers has filed a proposed class action against General Motors (GM) in a California federal court. It’s alleged that model years 2006 to 2014 have excessive valve guide wear that leads to engine failure and repairs. It’s said that the company is well aware of the problem. The complaint includes claims by 19 owners and lessees of the affected models that allege violations of the RICO Act, unjust enrichment, negligence and fraud. The Corvette drivers claim that GM broadly advertised the 7.0 liter V8 engine—used in the Chevrolet Corvette 427 and Chevrolet Corvette Z06 cars from 2006 through 2014—as high quality and durable, but that defects in the design and manufacture of the engine make it prone to mechanical failure. Thus far there has been no recall of the vehicles.

The Plaintiffs say they have incurred significant expenses for inspection and repairs of the cars, according to the complaint. It’s alleged that even cars with extremely low mileage have shown a high degree of wear. It’s stated in the complaint that an investigation technique known as the “wiggle method” is being utilized. Using this test, a high proportion of owners or lessees of the affected cars had “out of specification valve guides.” The drivers allege:

When GM determined that its adopted test would lead to more repair and investigations than it wished to perform, the test was summarily rejected. In dealing with multiple complaints concerning the subject engine in the class vehicles, GM acted, at all times, to deflect criticisms, defer investigations and repairs, and minimized the extent of the problems.

The drivers said GM still hasn’t come up with a solution to the alleged problem and, based on reports that our lawyers have seen, it’s a correct statement.

Source: Law360.com

NHTSA Digs Deeper Into Ford Truck Brake Defect Investigation

The National Highway Traffic Safety Administration (NHTSA) has announced that it’s proceeding with a deeper investigation into a potential brake defect in more than 250,000 Ford F-150 pickup trucks. This came after NHTSA found hundreds of complaints and thousands of warranty claims related to the problem during a preliminary investigation. Ford Motor Co. provided NHTSA with almost 400 complaints of increased brake pedal effort in 2011-2012 Ford F-150 pickup trucks equipped with 3.5L GTDI engines, resulting in extended stopping distance while in traffic.

This development came after NHTSA decided in late June to take a preliminary look into dozens of separate complaints that it had received related to the problem. Ford also gave the agency information regarding seven incidents of crashes or fires, resulting in one injury, and nearly 6,500 warranty claims, all stemming from the brake pedal issue.

NHTSA said that the problem is caused by corrosion to a standard electric vacuum pump booster, which provides power assist for braking and is intended to provide a “consistent brake pedal feel,” damage that can lead to total loss of electric vacuum pump function.

The second phase investigation, according to NHTSA, will encompass an engineering analysis, which will test the trucks under other operating conditions, such as low-speed driveway braking after a cold start, and possible human contributions to assess the “scope, frequency and safety-related consequences of the alleged defect.”

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

Source: Law360.com

GM Sierra Headlights Said Not To Be Safe For Night Travel

A class action lawsuit was filed last month against General Motors in which Plaintiffs and class members claim that the headlights in various 2014 and 2015 GMC Sierra vehicles are defective. The lawsuit alleges that the headlights do not provide enough light for night driving, which puts vehicle owners, other drivers and pedestrians at risk.

Traditionally, GMC Sierras were equipped with three separate bulbs for high beams, low beams, and fog lights. But starting in 2014, the headlight assembly reportedly included only one bulb for both the high and low beams. The Plaintiffs have alleged that the new system does not produce enough light for drivers to travel at night, and is particularly inadequate at the periphery of the vehicle. After it made the switch in 2014, GM started receiving complaints almost immediately about the headlights’ inadequacy. Despite the complaints, GM still chose to expand the new headlight system to all 2015 Sierra models.

Online reviewers frequently complained of feeling unsafe to drive at night and called the headlights “terrible” and “the worst I’ve ever experienced.”

As a result of the alleged defects, Plaintiffs filed a class action suit, accusing GM of knowing about the headlight system defect, but intentionally concealing it by never advising any vehicle owners or purchasers of the potential safety risk. The Plaintiffs state that “headlights are critical safety features that function to both illuminate the road for the driver and to notify other vehicles and pedestrians of a vehicle’s presence.” They continue by claiming “Safe and functional headlights were material to plaintiffs and class members’ decision to buy or lease the vehicles. A reasonable consumer expects and assumes that when they buy a vehicle, it includes safe and functional headlights.”

The complaint asserts seven counts against GM for breach of express and implied warranty, unfair and deceptive acts and practices, fraudulent concealment, and unjust enrichment, among others. The plaintiffs are seeking to certify a nationwide Class of individuals who leased or purchased the vehicles with allegedly defective headlights, as well as a California subclass. The affected models are the GMC Sierra 1500 (model years 2014 and 2015), GMC Sierra 2500HD (model year 2015) and GMC Sierra 3500HD (model year 2015).

At this time, Plaintiffs are seeking only injunctive relief and costs of litigation, but no monetary damages. However, a notice has been sent to GM pursuant to the Cali-
fornia Legal Remedies Act. If the Defendant denies relief, however, it’s likely the plaintiffs will amend their complaint to add a claim for damages under that Act.

Sources: thetruthaboutcars.com; Law360.com and topclassactions.com

IV. AN UPDATE ON THE BP SETTLEMENT

BP FINALIZES $20 BILLION OIL SPILL SETTLEMENT WITH THE FEDERAL GOVERNMENT AND GULF COAST STATES

The U.S. Department of Justice (DOJ) revealed the final terms of the historic settlement it and other Gulf coast states reached with BP in July. Before a ruling on the potential Clean Water Act penalties was expected from U.S. District Judge Barbier, BP agreed to pay $20 billion to settle federal and state claims arising from the 2010 Deepwater Horizon oil rig explosion and subsequent oil spill. Now, the largest pollution judgment in U.S. history is being sent to Judge Barbier for approval after a 45-day comment period.

The DOJ’s consent decree settles federal and state claims made by Alabama, Florida, Louisiana, Mississippi and Texas as well as more than 400 local governments. The $20 billion settlement is comprised of the following damages:

• $5.5 billion in Clean Water Act penalties to be paid over a 16-year period. The DOJ said this would be the largest civil penalty in the history of environmental law and that 80 percent of it will go to restoration efforts to affected states pursuant to the RESTORE statute within the Gulf Coast States Act.

• $7.1 billion will be paid to the U.S. and five Gulf states over 16 years for natural resource damage in addition to the $1 billion already committed to early restoration. BP will also pay $700 million to cover natural resource damages that are yet to be determined.

• $4.9 billion will be paid to the Gulf states over 18 years to settle all economic and other claims, with up to $1 billion going to resolve claims made by local government entities.

• $600 million will go to the federal government for oil spill response costs, previously unreimbursed natural resource damages, and to resolve a False Claims Act investigation.

This settlement resolves BP’s largest outstanding litigation liability as it seeks to settle various lawsuits stemming from the oil spill. BP is still funding the Deepwater Horizon Economic & Property Damages Settlement Program, which is reviewing claims filed by private individuals and business entities. Still pending are thousands of lawsuits filed by private businesses and individuals who opted out of this Settlement Program and are proceeding against BP directly in jurisdictions throughout the Gulf region.

We felt that BP was feeling the heat of potential Clean Water Act penalties that could have been levied by Judge Barbier. I believe that factor, coupled with the significant progress being made in the State of Alabama’s case, was weighing heavily on the corporate giant. Our firm joined with the Attorney General’s office in prosecuting the first state case that was set for trial and made headway in the discovery process before the settlement was reached. Governor Robert Bentley, Attorney General Luther Strange, and the lawyers in our firm, led by Rhon Jones, are extremely pleased with the outcome and the benefits this settlement will provide to the State of Alabama, which is in dire financial straits.

Source: Law360.com

STATE OF ALABAMA WILL RECEIVE $20 MILLION FROM TRANSOCEAN IN A SETTLEMENT OF DEEPWATER HORIZON CLAIMS STEMMING FROM 2010 OIL RIG EXPLOSION AND SPILL IN THE GULF OF MEXICO

Governor Robert Bentley announced on Oct. 22 that the State of Alabama has settled its claims against Transocean for damages caused by the Deepwater Horizon oil spill in the Gulf of Mexico. Under this settlement, the State of Alabama will receive $20 million, which will immediately go into the State’s General Fund.

Beasley Allen lawyers Rhon Jones, Parker Miller, Jenna Day Fulk and Rick Stratton represented Governor Bentley in the case against Transocean and were also deputized by Alabama Attorney General Luther Strange as deputy attorneys general for the State of Alabama in this case. Rhon had this to say:

Beasley Allen is pleased to have played an active role in helping the State of Alabama recover $20 million from Transocean for damages it caused the State. This settlement with Transocean is another positive step as Alabama continues to recover from the effects of this environmental and economic disaster.

As reported in this issue, earlier this year, an agreement in principal was reached with BP that resulted in an agreement to pay the State of Alabama $2.3 billion, with $1.5 billion earmarked for the State’s Gulf Coast region and $1 billion to be paid to the State.

BP REQUESTS THE FIFTH CIRCUIT TO MODIFY SETTLEMENT CALCULATION FRAMEWORKS

BP asked the Fifth Circuit Court of Appeals last month to approve a so-called accrual-style framework to calculate Business Economic Loss (BEL) claims filed under the 2012 Deepwater Horizon Economic & Property Damages Settlement. BP has already succeeded in changing the BEL calculation methodology, when in October 2013, the Fifth Circuit ordered Claims Administrator Patrick Juneau to issue a policy that would match a claimant’s revenue to the expenses incurred to generate that revenue rather than calculate a claim based on a claimant’s contemporaneously maintained monthly profit and loss statements. Since 2014, claims have been calculated under Policy 495 pursuant to the Fifth Circuit’s order.

While Policy 495 does not prohibit calculating claims on non-accrual based accounting methodologies, BP alleged that such claims—in particular cash-basis claimants that are based on cash receipts and disbursements whenever they are recorded—result in “fictitious, inflated and irrational awards.” Instead, BP argued, an accrual formula based on when revenue is earned and expenses incurred more accurately depicts a business’ financial situation at the time.

BP also argued that an appeal lodged by Class Counsel against certain aspects of Policy 495 implicitly meant that the Plaintiffs also urged the court to overturn its own decision. Class Counsel’s response brief, however, merely challenged what it contends were gross departures from the original calculation methodology agreed upon by the parties in the settlement and argued that the policy goes beyond what the Fifth Circuit intended. Class Counsel specifically objected to Policy 495’s reliance on “vague and subjective determinations on when revenues may have been earned” rather than using a claimant’s contemporaneous profit and loss statements to calculate the claim under an objective calculation methodology.

BeasleyAllen.com
The legal battles over this issue have gone on now for more than three years. This appeal is BP's latest attempt to change the calculation methodology originally agreed to by the parties in the settlement. Class Counsel are doing a phenomenal job holding BP accountable to this settlement it not only agreed to, but publicly lauded for months, and now wishes it never signed. This is just another case of a huge corporation having buyer's remorse and doing anything it can to renege on an agreement, leaving behind untold numbers of damaged businesses and individuals. So much for being “committed to the Gulf” as BP likes to say.

Source: Law360.com

V. DRUG MANUFACTURERS FRAUD LITIGATION

MISSISSIPPI SUPREME COURT AFFIRMS THE STATE’S $30 MILLION AWP VERDICT

Just as we were sending this issue to the printer, Dee Miles in our firm got word that the Mississippi Supreme Court had just affirmed our firm's AWP verdict. Mississippi will now receive $30 million from Sandoz. I will write more on this important development in the next issue. We have one more case on appeal in Mississippi against Watson Pharmaceuticals that has identical issues. As I have previously written our firm has successfully represented eight states in the AWP litigation.

COURT WILL APPROVE TEVA’S $512 MILLION PROVIGIL SETTLEMENT

A Pennsylvania federal judge said last month that he would approve a $512 million settlement between direct purchasers and Teva Pharmaceutical Industries Ltd. and its subsidiaries Cephalon Inc. and Barr Pharmaceuticals Inc. in pay-for-delay litigation over Cephalon's narcolepsy drug Provigil. U.S. District Judge Mitchell S. Goldberg presided over a fairness hearing held Oct. 15 to determine if the proposed settlement agreed to in April should be approved. This is the largest settlement ever in a pay-for-delay case on behalf of direct purchasers. "I've never seen a proceeding go this quickly with so much money involved," Judge Goldberg told the lawyers before advising them to anticipate that he would approve the settlement.

The suit is one of several brought by direct purchasers, end payors and the Federal Trade Commission (FTC) challenging a series of patent infringement settlements that Cephalon reached with generic-drug companies in 2005 and 2006 over Provigil. While Teva, which acquired Cephalon in 2012, and its related entities agreed to pay the direct purchasers $512 million to resolve the dispute in April, the agreement did not include Mylan Pharmaceuticals Inc. and Ranbaxy Pharmaceuticals Inc.

The settlement is factored into a larger, $1.2 billion disgorgement deal between the FTC and Teva, but it doesn't end the Provigil pay-for-delays claims against Mylan and Ranbaxy. The Third Circuit Court of Appeals has said that it would hear the appeal by those two drugmakers' of Judge Goldberg's decision to certify the class of direct purchasers.

Source: Law360.com

VI. COURT WATCH

U.S. SUPREME COURT LOOKING AT ARBITRATION AGAIN

The United States Supreme Court has been looking at multiple arbitration cases for several terms now. In the latest term, the High Court has decided to look at yet another case. The arbitration agreement at issue is between Managed Health Network (MHN), a government contractor, who employed licensed health and behavioral counselors to work at U.S. military bases. The counselors allege that they were labeled as "independent contractors," when they should have been classified as "employees." As such, the counselors were not paid overtime for the work they performed each week, in violation of the Fair Labor Standards Act (FLSA). Among other things, the FLSA requires that all workers be paid time and one-half for all hours worked in excess of 40 hours each week.

In response to the class action lawsuit, MHN attempted to get the court to dismiss the case and rule that each individual employee must have their own case, instead of a class action. Additionally, MHN wanted the court to rule that the counselors could not even use the court system to resolve their case, but must resolve it under a specific arbitration agreement each counselor was required to sign when they were hired. The court refused to make the counselors arbitrate. Instead, the court held that the arbitration agreement was unenforceable because of its one-sided terms.

In order to sue under the arbitration agreement, each counselor would have had to pay a filing fee of $2,600. That is more than seven times what they would have to pay in court and more than 15 times what they would have to pay to arbitrate in other arbitration venues. Importantly, the arbitration only gave the counselors a six-month statute of limitations, whereas the law clearly gives them two years—and 23 years if they can prove MHN's actions were intentional.

Not at all happy with the trial court’s actions, MHN appealed the case to the Ninth Circuit Court of Appeals. There, a three-judge panel again ruled that the entire arbitration clause was invalid and unenforceable and that the employees did not have to arbitrate. MHN’s last chance is now with the U.S. Supreme Court. The lawyer for the counselors has stated that:

[W]e are confident that the court will agree with the dozen federal and state court judges who have held this unusually unconscionable arbitration clause to be so one-sided and unfair as to be unenforceable.

MHN believes the Supreme Court will recognize that the California courts have shown "hostility" to arbitration agreements in violation of federal law. They further argue that, at most, the court should invalidate only the offending parts of the arbitration agreement and not the entire agreement. This case has the potential to be a powerful sword for employees or a tremendous shield for employers, and will most likely be analyzed a great deal in the months leading up to the Court’s final opinion.

VII. THE CORPORATE WORLD

SUPREME COURT DEALS BLOW TO INSIDER TRADING PROSECUTORS

It appears that the U.S. Supreme Court has dealt a serious blow to prosecutors in insider-trading cases. The high court last stand a major insider-trading ruling that threatens at least 10 convictions and creates what the Obama Administration calls a road map for securities fraud. Rejecting an administration appeal without comment, the justices refused to
consider reinstating the overturned convictions of hedge fund managers Todd Newman and Anthony Chiasson.

This ruling is seen as a blow to U.S. Attorney Preet Bharara, the New York prosecutor, who had more than 80 insider-trading convictions during a six-year attack on “crooked fund managers, corporate insiders and consultants.” The lower court ruling had been issued by the New York-based federal appeals court that is considered especially influential in securities-fraud cases. The decision raised the bar for prosecutions arising from information passed by a corporate insider to a friend, relative or business associate.

The Obama Administration believes the decision immunizes conduct that had long been understood to be criminal. The ruling “insulates from liability deceptive acts that undermine the integrity of the markets,” U.S. Solicitor General Donald Verrilli argued in the government’s appeal. The Supreme Court said in 1983 that people who trade on confidential information can be prosecuted only if the insider reaped a benefit from the leak. At issue in this appeal was whether that benefit must be a concrete one, as the lower court ruled. The Obama Administration argued that it was enough if the insider made a gift of the information to a friend or relative.

Analysts for Newman, a former portfolio manager at Diamondback Capital Management, and Chiasson, co-founder of Level Global Investors, were part of a group of information-swapping friends who called themselves the “Fight Club,” which came from a Brad Pitt movie. The two men were convicted of trading based on leaks that reached Newman and Chiasson through friends of Jefferson County officials so J.P. Morgan could obtain $5 billion in county bond business. Lawyers for the SEC have notified U.S. District Court Judge Abdul Kallon that a proposed settlement with former J.P. Morgan Securities Inc. executives Charles LeCroy and Douglas MacFaddin “on all outstanding issues” had been reached in the 2009 lawsuit. The parties had been in mediation when the settlement was reached.

It should be noted, however, that the settlement is not final. It can’t be presented to the judge until the five-member commission approves it. Once approved, the commission will then file proposed final judgments with the court to end the case. It’s expected that the process of obtaining commission approval will take 60 days. The judge was asked to stay the case for 60 days so that the process can be completed. If the SEC declines to approve the settlement, it would mean moving the date for the trial to late March. Judge Kallon had set the trial for Jan. 25, 2016, and had ordered the case to mediation for a possible resolution. Both sides had until Oct. 31 to reach a settlement or face having the trial. At press time we had not heard from the court.

The SEC filed the lawsuit in 2009 against LeCroy and MacFaddin claiming the two men paid $8.2 million to friends of Jefferson County officials so J.P. Morgan could obtain $5 billion in Jefferson County municipal bond offerings and swap agreement transactions. A trial in the case had been postponed for several years, waiting for the deposition of a key witness, Douglas Goldberg, in the case. Goldberg, a former official with CDR Financial Products Inc. based in Beverly Hills, Calif., pleaded guilty in March 2010 to charges in a New York federal court that he conspired to rig bids for investment agreements or other municipal finance contracts. He was sentenced to probation in May 2014. Goldberg refused to give a deposition in the Jefferson County case until after he had been sentenced.

Jefferson County’s sewer financing problems began when it borrowed money to comply with a 1996 court order to stop sewage leaks from polluting area streams. Construction overruns and later bond swaps ultimately increased the cost of the sewer project to more than $3 billion. A number of persons have either served time or are currently in prison because of their involvement in the scandal.

The Securities and Exchange Commission (SEC) has reached a settlement in a civil fraud lawsuit that claims two bankers paid $8.2 million to friends of Jefferson County officials so that their company could obtain $5 billion in county bond business. Lawyers for the SEC have notified U.S. District Court Judge Abdul Kallon that a proposed settlement with former J.P. Morgan Securities Inc. executives Charles LeCroy and Douglas MacFaddin “on all outstanding issues” had been reached in the 2009 lawsuit. The parties had been in mediation when the settlement was reached.

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TheBostonNews

SEC SETTLES WITH FORMER J.P. MORGAN EXECUTIVES

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$360 MILLION SETTLEMENTS IN PRICE-FIXING LAWSUIT APPROVED

Korean Air Lines, Singapore Airlines and two other major airlines have received final approval in New York federal court of settlements worth more than $360 million. It has been alleged in litigation that they conspired with other carriers to fix the price of air cargo services. U.S. District Judge John Gleeson found the settlements were fair to the thousands of companies that purchased air cargo services directly from the airlines and claimed the carriers participated in the plot to hike rates.

The group of settlements includes three of the largest settlements to date, led by the $115 million accord with Korean Air Lines Co. Ltd. Both Singapore Airlines Ltd. and China Airlines Ltd. agreed to settle settlements worth more than $90 million. The fourth airline, Cathay Pacific Airways Ltd., will pay $60 million. The agreements amount to the fourth round of settlements in the multidistrict litigation, which started in 2006 with more than 90 consumer lawsuits against more than two dozen airlines.

Under the settlement, Korean Air and the others will cooperate with the Plaintiffs as they pursue claims against the four Defendants that remain in the litigation.
Those four—Air China Ltd., Air India Ltd., Air New Zealand Ltd. and Polar Air Cargo Inc.—are scheduled to go to trial in March.

Consumers began bringing lawsuits after the U.S. Department of Justice and the European Commission started investigating the air freight industry. Authorities said the conspirators used meetings, conversations and other communications to determine the rates the airlines should charge for various routes. The airlines and former executives then imposed the agreed-upon rates and participated in subsequent meetings in the U.S. and other countries to enforce the price-fixing plots, the government alleged. Settlements have been reached since the consolidation of the complaints in New York federal court, yielding the Plaintiffs more than $1 billion.

Source: Law360.com

VIII. WHISTLEBLOWER LITIGATION

THE U.S. JUSTICE DEPARTMENT CONTINUES TO COMBAT DEFENSE FRAUD

On Sept. 28, the U.S. Justice Department (DOJ) filed suit against Odyssey Marketing Group Inc., a Georgia based company, for allegedly producing marketing materials under an invalid contract. The company was hired in 2007 to produce materials, such as commemorative coins and flags, for the Army Reserve Family Program (ARFP). This agreement was expanded and the government created a website that allowed the company’s owners, Roderick and Terri MacKenzie, to sell ARFP merchandise online.

The company has prior contracting experience with the federal government, including more than 50 contracts worth $13 million since 2009. The complaint alleges that Mr. and Mrs. MacKenzie entered into agreements with ARFP through employees who did not have the authority to issue contracts. Then, despite these allegedly invalid contracts, they invoiced the government for services from 2009 until 2014. The federal government alleged, among other violations, that Odyssey committed three counts of violating the Federal False Claims Act, and that they “had actual knowledge, deliberately ignored, or recklessly disregarded the fact that the claims submitted were false or fraudulent…”

A 2011 Department of Defense (DOD) report revealed that there is active fraud within the U.S. defense contracting community. In fact, from 2001 to 2011, 54 contractor companies were criminally charged and more than 300 entered into “settlement agreements or had civil judgments rendered against them.” For example, in 2014, First RF Corporation (First RF) settled with the Justice Department for $10 million after the government alleged that it submitted false data on the cost of electronic warfare antennas sold to the U.S. Army, and then used that data to inflate the price its product. Frank Robey, Director of the U.S. Army Criminal Investigation Command’s Major Procurement Fraud Unit stated:

*Shortchanging our troops or the American taxpayers in any way, shape or form will not be tolerated and we are committed to investigating all allegations of possible fraud or misrepresentation of costs with great interest.*

As we have mentioned previously, the Federal False Claims Act is often referred to as the “Informer’s Act” or “Lincoln’s Law” because it was created during the Civil War to combat fraud by Union suppliers. The purpose of the Act is to stop fraud and deter others from committing violations in the future. Since 1986, more than $40 billion has been recovered by the federal government in this sort of case. The success of this Act revolves around whistleblowers who report fraud, which the government incentivizes by awarding them 15 percent to 30 percent of the funds recovered. In fact, nearly $2 billion has been awarded to whistleblowers for helping the federal government fight fraud.

Any person who is aware of fraud within U.S. defense contracting system can be rewarded for stepping forward and reporting the fraudulent conduct. Lawyers at Beasley Allen continue to vigorously investigate fraud committed by defense contractors and they encourage anyone who knows of fraudulent activities to step forward. Potential whistleblowers have the right to not be retaliated against for doing the right thing and reporting the fraud they have witnessed. Anyone considering blowing the whistle is strongly urged to seek legal advice before doing so.

Lawyers in our firm’s Consumer Fraud Section are very familiar with the federal False Claims Act and its state counterparts. They have experience shepherding whistleblowers through the process. If you have any information and would like to speak with a lawyer about a potential case, contact Andrew Brasher at Andrew.Brasher@beasleyallen.com; Archie Grubb at Archie.Grubb@beasleyallen.com; Lance Gould at Lance.Gould@beasleyallen.com; or Larry Golston at Larry.Golston@beasleyallen.com or at 800-898-2034 or 334-269-2343. If you simply want more information about the Federal False Claims Act, contact one of these lawyers, each of whom handles whistleblower litigation. All consultations are free and confidential.

Sources: Justice Department; Department of Defense; and bizjournals.com

EX-WARNER CHILCOTT EXECUTIVE CHARGED IN KICKBACK SCHEME

A former president at Warner Chilcott was arrested on Oct. 29 and charged in a criminal kickbacks conspiracy. In addition, the drugmaker agreed to pay $125 million as part of a False Claims Act (FCA) settlement and felony charge of health care fraud W. Carl Reichel, president of Warner Chilcott PLC’s pharmaceuticals division from 2009 to 2011, was charged with conspiring to pay kickbacks to physicians. The indictment is seen as vindication of the Justice Department's much-publicized promise to hold executives accountable for company wrongdoing. It appears the DOJ wasn’t bluffing. Carmen Ortiz, the U.S. attorney for Massachusetts, said in a statement:

*Today’s enforcement actions demonstrate that the government will seek not only to hold companies accountable but will identify and charge corporate officials responsible for the fraud.*

The DOJ also said that a Warner Chilcott subsidiary will pay $102 million to resolve FCA allegations brought by whistleblowers and a $23 million criminal fine after pleading guilty to a felony health care fraud charge. Warner Chilcott was purchased in 2013 by Actavis PLC, which is now Allergan PLC.

In addition, four other individuals are facing criminal punishment as part of an illegal marketing scheme involving numerous prescription drugs. They include two former district managers who have pled guilty to health care fraud and violations of the Health Insurance Portability and Accountability Act. A third district manager has also been charged with HIPAA violations, and a doctor has been charged with accepting kickbacks in exchange for prescribing Warner Chilcott’s osteoporosis drugs.

The announcement of the arrest described sweeping criminal misconduct at Warner Chilcott from 2009 to 2013, including sham medical education events.
designed by management as cover for supplying physicians with expensive freebies. Company management, according to the government, directed a scheme in which money and lavish meals were given to doctors, especially high-prescribing doctors who received kickbacks disguised as speaking fees. I could write a book about what all this company was doing and it would be a best seller. If you want the full story, contact Andrew Brasher at 800-898-2034 or by email at Andrew.Brasher@beasleyallen.com.


**NOVARTIS AGREES TO $390 MILLION FCA SETTLEMENT OVER PHARMACY DISCOUNTS**

Novartis AG has tentatively agreed in principle to pay out $390 million to settle a whistleblower’s False Claims Act (FCA) suit. It’s alleged that improper kickbacks were made to pharmacies in order to boost sales of several prescription drugs. The U.S. Department of Justice (DOJ) joined the case in 2013. The case had been set for trial this month. The “settlement in principle” is with the DOJ, various intervening states and whistleblower David Kester, a former Novartis sales manager.

If finalized, the settlement will resolve allegations of improper discounts and rebates to specialty pharmacies in connection with immunosuppressant Myfortic, iron overload drug Exjade and several other medications. The drugmaker was specifically accused of corrupting pharmacist judgment by tying financial incentives to the dispensing of Novartis drugs that were often costlier and less effective than rival products.

The settlement comes about five years after Novartis agreed to a $420 million settlement of FCA and misdemeanor criminal allegations involving off-label promotion and kickbacks to doctors. The company entered into a five-year corporate integrity agreement as part of that settlement.

Co-defendants Accredo Health Group Inc. and BioScrip Inc. had previously agreed to pay $60 million and $15 million and were dismissed from the case. They also agreed to cooperate with the DOJ’s case against Novartis. The whistleblower, Kester, is represented by William Christopher Carmody, Arun Subramanian, Steven Shepard, Elisha Barron, Shawn L. Raymond, James Hoke Peacock III, Jonathan Bridges, Kristin Malone and Matthew R. Berry of Susman Godfrey LLP and Shelley R. Slade, Robert L. Vogel, Andres C. Healy and Janet L. Goldstein of Vogel Slade & Goldstein LLP.

The government is represented in the case by David J. Kennedy, Tara Marie La Morte, Ellen Melissa London, Jeffrey Kenneth Powell, Li Yu, Peter Max Aronoff, Rebecca C. Martin and Robert William Yalen of the DOJ and the U.S. Attorney’s Office. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

**$85 MILLION WHISTLEBLOWER SETTLEMENT IS ANOTHER VICTORY FOR THE GOVERNMENT AND TAXPAYERS**

The United States Department of Justice (DOJ) announced last month that Fifth Third Bank (FTB) has agreed to pay $85 million to settle claims under the Federal False Claims Act (FCA). The suit was brought by a whistleblower under the *qui tam* provisions of the FCA, which permits private parties to sue on behalf of the government when they believe an individual or company has been committing fraud against the government.

FTB was required to self-report any serious deficiencies, patterns of noncompliance, or fraud to the U.S. Department of Housing and Urban Development (HUD) within 60 days of learning of the incidents. FTB violated that requirement. The bank had been unlawfully certifying loans as materially defected loans, 36 percent of which defaulted, forcing HUD to pay the insurance claims.

Federal insurers rely on banks when determining when to provide insurance. When a bank fraudulently assures the government a loan is eligible for the FHA insurance, the government is forced to pay the insurance claims when the loan inevitably defaults, which results in taxpayer money being spent as a result of the fraud.

FTB voluntarily disclosed the information without knowledge of the whistleblower compliant. The bank admitted the wrongdoing and accepts responsibility for its violations. As a result, the bank has revamped its business practices, including terminating the employees responsible for the false mortgage violations and fraudulent appraisal practices. The government intervened in this whistleblower lawsuit and entered into this settlement with FTB. This $85-million settlement does two things:

- It restores taxpayer dollars, and
- It deters other banks from profiteering on non-compliance with the law.

George Mann, former FTB employee, the whistleblower who reported the fraud, had this to say:

*The culture of the Bank at that time emphasized profits over compliance with federal regulations. This type of behavior is exactly what led to the financial crisis and, no matter what the outcome, I felt it was my responsibility to speak up and do the right thing.*

The *qui tam* provision of the FCA provides incentives for whistleblowers to do the right thing and speak up. These incentives include 15 to 30 percent of the funds the government recovers. For example, Mr. Mann, the whistleblower, could receive up to $25.5 million for his critical role in the case. If you are aware of fraud being committed against the federal or state governments, you could be rewarded for doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, feel free to contact one of the lawyers at Beasley Allen listed above in this issue for a free and confidential evaluation of your claim.

Sources: prnewswire.com and justice.gov

**PHARMERICA AGREES TO A $9 MILLION FCA SETTLEMENT OVER KICKBACK ALLEGATIONS**

The U.S. Department of Justice (DOJ) announced last month that PharMerica Corp. will pay $9.25 million to settle False Claims Act (FCA) whistleblower charges that it sought and received kickbacks from Abbott Laboratories in exchange for pushing a seizure medication on nursing home patients. The settlement resulted from involvement of Kentucky-based PharMerica, the second-largest nursing home pharmacy in the United States, in Abbott’s far-reaching FCA and kickback scheme relating to the anti-seizure medication Depakote. Abbott had entered into a $1.5 billion civil and criminal resolution in 2012.
The DOJ said PharMerica received kickbacks disguised as rebates, educational grants and other financial support in exchange for recommending that physicians prescribe Depakote to nursing home residents. Benjamin C. Mizer, head of the Justice Department’s Civil Division, said in a statement:

Elderly nursing home residents suffering from dementia have little control over the medications they receive and depend on the unbiased judgment of health care professionals for their daily care. Kickbacks to entities making drug recommendations compromise their independence and undermine their role in protecting nursing home residents from the use of unnecessary drugs.

Two former Abbott employees, Richard Spetter and Meredith McCoyd, filed separate cases against the pharmaceutical company in West Virginia in 2010 and 2007, respectively. While those charges were resolved in the global, May 2012 settlement, ancillary litigation against PharMerica continued. The nursing home pharmacy has now agreed to pay $9.25 million to settle the case. Ms. McCoyd will receive $1 million of the settlement for her role as relator. According to the DOJ, Abbott routinely gave PharMerica employees special grants, rebates and other perks for recommending that nursing home physicians prescribe Depakote as a treatment for seizures, mood disorders and migraines. Nick DiGiulio, of the U.S. Department of Health and Human Services’ Office of Inspector General, said in a statement:

Nursing home pharmacies accepting kickbacks from drugmakers in exchange for prescribing certain prescription drugs puts vulnerable residents at risk for receiving unnecessary medications, corrupts medical decision-making and inflates health care costs. Our agency will continue to root out such corrosive practices from our health care system.

As part of the settlement, the United States will receive $6.7 million while states participating in the settlement will get $2.5 million for Medicaid claims. PharMerica in May agreed to pay $31.5 million, including more than $4 million to a whistleblower, to settle claims of violations of the FCA and the Controlled Substances Act tied to dispensing painkillers without valid prescriptions.

The settlement featured a $23.5 million payout that ended an FCA suit filed in 2009 by pharmacy operations manager Jennifer Buth, (formerly known as Jennifer Denk), alleging that the pharmacy gave patients oxycodone, fentanyl and other drugs in nonemergency situations without first getting a doctor’s written prescription. That misconduct resulted in submission of improper billing claims to Medicare Part D from January 2007 to January 2013, according to the settlement agreement. Ms. Buth will receive $4.3 million for bringing suit. W. Scott Simmer, the managing partner of Simmer Law Group, who represented the first-filed relator in the suit, told Law360 that he hopes the case will send “a powerful signal” to people who care for the elderly. He added:

The important lesson from the PharMerica settlement is that both parties—the payor and the payee—may be liable under the Anti-Kickback Act. The most appalling thing about this case is that it shows how the trust of some of the most vulnerable Americans—the elderly—can be violated.

The United States is represented by Rick A. Mountcastle of the U.S. Attorneys Office, Western District of Virginia and Brian McCabe and Edward C. Crooke of the DOJ. The cases are both in the U.S. District Court for the Western District of Virginia.

Source: Law360.com

$4.7 MILLION SETTLEMENT RESOLVES ALLEGATIONS OF GOVERNMENT FRAUD RELATED TO LOBBYING ACTIVITIES

The U.S. Justice Department announced recently that Sandia Corporation, a subsidiary of Lockheed Martin, had agreed to pay $4,790,042 to resolve charges that it used federal funds for lobbying, violating the Byrd Amendment and the Federal False Claims Act (FCA). It was alleged that the federal funds Sandia used for lobbying were intended to fund the important mission held by our national laboratories to enhance national security through the military application of nuclear science. The funds, however, were allegedly used to lobby congress and other federal officials to obtain a non-competitive extension of a government contract that allowed Sandia to operate a laboratory connected with the National Nuclear Security Administration’s (NNSA) nuclear weapons complex.

The Byrd Amendment prohibits the use of federal funds for lobbying, and the Federal False Claims Act gives the government a vehicle for detecting and correcting fraud. It appears that Sandia violated both:

- First, using federal funds for lobbying clearly violates the Byrd Amendment.
- Second, the government granted Sandia funds for a particular purpose, the operation of the laboratory conducting important research. If the funds were then used in another way, lobbying for more money, then Sandia committed fraud against the government.

Since January 2009, the United States has recovered more than $24.9 billion through Federal False Claims Act cases. If you are aware of fraud being committed against the federal or state governments, you could be rewarded 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 www.beasleyallen.com, or you may email one of the lawyers on our whistleblower litigation team: Andrew Brashier, Archie Grubb, Larry Golston or Lance Gould at 800-898-2034 or by email at Andrew.Brashier@beasleyallen.com, Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com or Lance.Gould@beasleyallen.com.

IX. PRODUCT LIABILITY UPDATE

IMPORTER LIABILITY: THE EPIDEMIC OF IMPORTED DEFECTIVE PRODUCTS

The United States is facing an epidemic of defective products that are being imported from other countries, mainly China. Often times, the actual Chinese manufacturer of the defective and dangerous product is out of reach of the jurisdiction of the American court system. However, the American companies that import these defective products into the U.S. are not immune from suit. In fact, the federal government has placed specific duties and responsibilities on these importers to insure that the products they import are not defective. Unfortunately, there are numerous importers who don’t know about these regulations or, even more scary, don’t care about these regulations and ignore them all in the name of making money.
This problem was recently highlighted in two lawsuits brought by the Department of Justice (DOJ) against two different companies that were importing defective products. On Oct. 6, the Department of Justice announced that it had filed two civil actions in federal court that sought to prevent the importation and sales activities of two California companies and three individuals in connection with their importation of illegal and dangerous children's products. The Department filed the two actions at the request of the Consumer Product Safety Commission (CPSC), alleging that the Defendants were responsible for importing children’s products containing, among other things, lead, phthalates and small parts posing a choking hazard for children younger than 3.

Both complaints allege that the Defendants imported toys and other children’s products in violation of the Consumer Product Safety Act (CPSA) and the Federal Hazardous Substances Act (FHSA). One complaint was filed against Brightstar Group Inc., a Los Angeles importer and retailer of children’s products and toys, and its owner, Sherry Chen, 61, of Arcadia, Calif. The complaint alleges that, since August 2013, CPSC collected dozens of samples from Brightstar’s import shipments as they attempted to enter the Port of Los Angeles/Long Beach, Calif., and from Brightstar’s Los Angeles facility. Based on its findings, CPSC issued nine Letters of Advice between September 2013 and April 2015 notifying the Brightstar Defendants that their products violated federal standards. CPSC found numerous children’s products, including a fire engine set, a tea set, toy boxing gloves, collapsing stroller and marbles, in violation of the CPSA, the FHSA and their implementing regulations. Most of the products were stopped at import and were not sold to consumers.

Chen is also sued for violations that include importing infant rattles, which occurred while she was the manager of Taifung Corp., a now-dissolved California corporation owned by her husband that also imported and sold children’s products and toys.

A second action was filed against Unik Toyz Trading Inc. (Unik), a Los Angeles importer and retailer of children’s products and toys, its owner, Julie Tran, 35, and its manager, Kiet Tran, 38, both of Arcadia, Calif. The complaint alleges that, since September 2011, CPSC identified 39 samples of children's products imported by Unik, including toy cars, toy trains, bubble guns and art materials, that violate federal standards for children’s toys. These violations include illegal levels of lead content and toys intended for children younger than 3 that contain small parts and accessible batteries. Most of these defective toys were stopped at import at the Port of Los Angeles/Long Beach and were not sold to consumers.

Stopping imported defective products from reaching the consumer, however, is oftentimes difficult. Our firm is currently handling a case against an importer of a defective motorcycle helmet. A young man was riding a motorcycle in Georgia when, in effort to avoid a collision with a car, he had to lay down his motorcycle in the roadway. Although the helmet was supposed to protect him in this specific type of an accident, it failed miserably. The helmet failed to stay on during the accident and, as a result, the young man suffered devastating and fatal head injuries. His widow brought negligence and product liability actions against the Chinese manufacturer of the helmet and the importer/distributor of the helmet. The Chinese manufacturer was dismissed from the action because the trial court held that it lacked jurisdiction over the Chinese company. Unbelievably, the U.S. importer/distributor also sought to be dismissed because it claimed it was not the manufacturer and thus could not be held responsible for the product’s defect, even though it was the exclusive importer and sole distributor of this helmet throughout the U.S.

As you have been reading this report, you know the National Highway Traffic Safety Administration is the federal agency responsible for issuing and enforcing safety standards concerning the manufacture of motor vehicles and motor vehicle equipment (including motorcycle helmets). NHTSA is the agency that investigates alleged defects in the vehicles and equipment. Some of the standards that it enforces are found in the National Traffic and Motor Safety Act. The Safety Act defines “manufacturer” to include any company “importing motor vehicles or motor vehicle equipment for resale.” Thus, importers are considered by the federal government as the “manufacturer” of the product and, thus, the same duties and responsibilities of the manufacturer are transferred to the importer.

As the helmets’ “manufacturer” under the Safety Act, the importer had responsibilities under the Safety Act and NHTSA’s implementing regulations to assure compliance with NHTSA’s regulatory requirements. The importer thus was responsible for the safety of helmets imported into the United States. In a nutshell, the importer had the following responsibilities as the “manufacturer” of record for the imported helmets:

- To fully understand the importer’s obligations under motor vehicle safety statues and regulations.
- Exercise great care in selecting foreign fabricating manufacturers.
- Inspect foreign manufacturing facilities evaluating the fabricating manufacturer’s company, factory, and staff. This includes, among other things, assuring quality control; reaching agreement on whether products are substandard, non-conforming, or defective; contract considerations; and monitoring compliance with contract requirements.
- Inspect goods before they are exported to or distributed in the United States. This includes monitoring production outputs; sampling, inspecting, and testing products; and post-production quality control.
- Identify the product. This includes, among other things, identifying (on the product or its packaging) the product’s country of origin and its fabricating manufacturer, as well as its importer.
- Establish a consumer service program. This includes, among other things, an effective program to locate products that contain apparent safety-related defects, and help to prevent problem products from being delivered to consumers; and paying close attention to early warning reporting (EWR) data because that information may be useful in identifying safety-related problems early in the product’s history.
- Contact NHTSA concerning manufacturer/importer reporting requirements, safety compliance, defect issues, and regulations.

Further, if the importer becomes aware that a product does not comply with the federal standards or the product contains a defect, it is required by law to notify NHTSA, as well as the owners and dealers. It’s stated:

*If an importer becomes aware that a vehicle or equipment item it has imported does not comply with an applicable [Federal Motor Vehicle Safety Standards] FMVSS or contains a defect related to motor safety, it must provide NHTSA, as well as owners and dealers of the affected vehicles or equipment, with notification of the noncompliance or defect and must remedy the noncompliance or defect, usually without charge to the consumer.* (Recommended Best Practices at (a)(vi),...
Not only do these regulations place the responsibility on the importer to contact NHTSA, on the flip side, if the federal government becomes aware of a problem, it does not contact the Chinese manufacturer, but instead it contacts directly the “manufacturer” of record—the importer.

Sadly, a good number of importers don’t follow these regulations and blindly import defective products into the U.S. all for sake of profits. The importers of defective products can be and should be held accountable to consumers who are injured and/or killed as result of those imported products. The importers should not be overlooked as a potential Defendant in any case where death or catastrophic injury has resulted from a product manufactured in a foreign country. If you have any questions about importer liability, feel free to contact Chris Glover, Rick Morrison or Dana Taunton, lawyers in our firm’s Personal Injury/Products Liability Section, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com, Rick.Morrison@beasleyallen.com, or Dana.Taunton@beasleyallen.com.

Source: Justice.gov

Lawsuit Involves General Motors’ Crash System

A lawsuit has been filed against General Motors LLC (GM) in a Colorado federal court involving the crash avoidance system in an amputee’s 2009 Chevy Malibu. It alleged that the system failed to engage when the driver, Kristin Hopkins, lost control of her vehicle on a mountain road in 2014 and careened off a cliff. Ms. Hopkins claims that her car’s electronic stability control system, brake apply sensor and power steering functions failed because of negligent designs and defects allowed by GM. She contends further that GM is liable for putting her in an unreasonably dangerous vehicle that nearly cost her her life when it tumbled down a mountainside, trapping her for six days with life-threatening injuries. The suit says:

Defendant is strictly liable to plaintiff for the injuries and damages caused by the ... defects and inadequacies in the design and manufacture of the Malibu.

Ms. Hopkins had been driving her Malibu through the mountains in April 2014 when she entered an “S curve” and her vehicle lost traction with the road. The Malibu’s electronic stability control system failed to engage, her electronic power steering suddenly gave out, and her car literally flew off the side of the mountain, falling nearly 300 feet and coming to rest in a wooded area that could not be seen from the road. Ms. Hopkins was trapped for nearly 120 hours in below-freezing temperatures until she was finally rescued and flown to a hospital, where her legs were amputated and she underwent several surgeries to repair brain, heart and bone injuries, the complaint says.

When she returned home from the hospital in July 2014, Ms. Hopkins received a letter from GM notifying her that it was issuing a recall on Chevy Malibus built between 2004 and 2012 for a defect related to the cars’ traction control, electronic stability control and panic braking assist features. She received a second letter from GM in September alerting her that the steering column torque sensor control in some 2009 Chevy Malibus contained a defect that may cause the electric power steering assist to suddenly fail.

Documents provided to the National Highway Traffic Safety Administration in the Chevrolet’s first recall indicated that the body control module’s failure to communicate with the electronic brake control module was first seen by GM in 2008, one year prior to Hopkins’ vehicle having been built and six years prior to the accident. It’s alleged in the complaint:

Without electronic stability control directing the appropriate throttle to the appropriate wheels and braking the appropriate wheels, coupled with the sudden loss of electronic power steering, Ms. Hopkins could not avoid the crash: without these critical safety features, she was handcapped in ways she didn’t understand, rendering her panic maneuvers meaningless.

Ms. Hopkins continues to undergo extensive rehabilitation and medical treatment for her injuries, and will require a lifetime of physical and mental assistance. Ms. Hopkins is represented by Kurt Zaner, Marc Harden and Elliot Singer of Zaner Harden Law LLP. The case is in the U.S. District Court for the District of Colorado.

Source: Law360.com

NTSB Will Release Long-Awaited Tire Safety Recommendations

Our firm has handled numerous cases where individuals have been seriously injured or killed because of an aged or recalled tire on their vehicle failed. The dangers of recalled tires are obvious. However, currently there is no adequate warning system in place. Tire aging is perhaps the most dangerous tire defect because it cannot be seen and most people are not aware of the dangers of aged tires. A tire might look brand new and might not have ever been used, but research and testing shows that when tires reach a certain age, those tires can break down from the inside, de-treading upon use and causing fatal accidents. Since 2005, car makers have warned that a tire should be replaced and not used after six years regardless of use or appearance. Tire makers warn that tires should be replaced after 10 years.

Deaths and injuries in crashes caused by aged and recalled tires are entirely preventable, but neither the tire industry nor the National Highway Traffic Safety Administration (NHTSA) has been inclined to do anything to prevent them. This month, the public might finally see some leadership on this issue from the National Transportation Safety Board (NTSB). The board is meeting to discuss its new report on tire-related passenger vehicle crashes and the safety issues uncovered during these investigations at the December 2014 NTSB tire symposium.

In February 2014, two tragic, fatal, and high-profile tire crashes on U.S. highways may change tire safety. One crash involved an 11-year-old Michelin Cross Terrain tread separation on a 2004 Kia Sorrento that led to a crash into a school bus carrying 34 members of a Louisiana high school baseball team in Centerville, La. Four of the Kia occupants died, and the fifth was severely injured. The other involved the failure of a recalled BF Goodrich tire that was on the left rear tire on a 2002 Ford 350 XLT 15-passenger on an interstate in Lake City, Fla. The driver lost control, and the van swerved onto an embankment and rolled over. Two adults died, and all of the other occupants, including several children, suffered injuries.

Within 10 months of these horrific crashes, the NTSB resolved to take up the issue of tire safety and convened, in lieu of formal hearings, a two-day tire symposium in which interested parties presented information on tire age, the recall system, tire construction, technology and tire-related crash data. The NTSB should be commended for taking some initiative on this important safety issue. Hopefully, its recommendations will be in a positive direction and help with an important tire safety issue.
$16 MILLION JURY VERDICT AGAINST GOODYEAR IN TIRE FAILURE CASE

A Michigan jury has awarded $16 million to an Indiana man in his case against Goodyear Tire & Rubber Co. The Plaintiff was rendered quadriplegic after a tire tread separated causing him to crash his vehicle. The jury found that the man’s injuries were caused by the company’s negligence.

The jury in Berrien County, Mich., returned the verdict in favor of Plaintiff Harishkumar Patel. The jurors heard evidence during the trial that Goodyear reduced quality control inspections as it ramped up production. The jurors also heard that the company decided not to put a nylon cap ply on the tire that could have prevented the tread separation. Craig Hilborn, one of the Plaintiff’s lawyers, said in a written statement:

“They (Goodyear) decided to roll the dice with the lives of consumers to save a few pennies of profit. It was morally wrong and the wrong business decision.”

The crash occurred on July 6, 2012. The Plaintiff was driving his 1998 Nissan Pathfinder north on U.S. Highway 31 in Berrien Springs, Mich., when the tire tread separated, causing the vehicle to rollover and crash. The tire still had half of its tread life left and was perfectly maintained when it disintegrated, Mr. Hilborn told Law360 in an interview. In addition, he said company employees at the plant in Fayetteville, N.C., became so frustrated when managers put defective tires back on the line that they came up with the mocking motto, “round and black and out the back.” The tire was made at a Goodyear factory in Fayetteville, N.C.

As part of the $16-million verdict, jurors awarded $3 million for past pain and suffering and $5.7 million for future pain and suffering. However, Michigan law currently caps noneconomic damages for product liability cases at $795,000, according to Mr. Hilborn. The Plaintiff is represented by Craig Hilborn and Kevin Riddle of Hilborn & Hilborn PC; John Gsanger of The Edwards Law Firm; and Barry Conybear. These lawyers did a very good job in the case, which was tried in the Michigan Circuit Court for the County of Berrien.

Source: Law360.com

FLORIDA APPEALS COURT UPHOLDS $11 MILLION VERDICT AGAINST CONTINENTAL TIRE

A Florida appeals court has upheld an $11 million jury verdict against Continental Tire North America Inc. The Fourth Court of Appeals affirmed the jury verdict that had been returned in favor of the Plaintiff Tracey Parker. The Plaintiff spent 107 days in the hospital following a tire blowout in May 2009 that caused her vehicle to roll over several times. The appellate court rejected Continental Tire’s argument that the court deprived it of a fair trial by allowing the Plaintiff to rely on an expert Continental Tire had withdrawn and by excluding evidence that the alleged defect hadn’t occurred before. The tire manufacturers also complained about animations and stills depicting the company’s manufacturing process.

Ms. Parker was driving to her job in Port Saint Lucie, Fla., on Interstate 95 when the right rear tire on her 2006 Chevy Cobalt failed. She had to be airlifted to a trauma center in West Palm Beach, Fla., where she spent more than a month in a coma and had to undergo 17 surgeries. It was alleged that the tire’s failure was caused by a design and manufacturing defect. According to the evidence, the tire was, at the time of the accident, well-maintained and did not have uneven tread wear or repairs, and had three years left on its warranty.

Continental Tire argued that the tire couldn’t have been manufactured with wires sticking out of the rubber, as the Plaintiff had claimed. The company argued further that even though the tire had suffered earlier damage to the rim that caused it to lose air, the Plaintiff drove on the tire anyway. The jury rejected the Plaintiff’s design defect theory, but found that the tire had a manufacturing defect that led to her injuries. Continental Tire was found to have been negligent in manufacturing the tire. The jury awarded $9.9 million to Ms. Parker and $1 million to her husband.

The Plaintiff pointed out in her brief that Continental Tire failed to address the negligence ruling, saying that the company “conspicuously omits” that her tire lacked an inspection stamp that each tire leaving its factory was required to have. It was argued in the Plaintiff’s brief:

Appellate courts do not reverse cases where the losing defendant fails to assert prejudicial error on one of the plaintiffs’ winning theories of liability; i.e., [Continental Tire] agreed that Mrs. Parker’s tire had no ‘inspection stamp,’ which supported the jury’s finding of negligence, and CTA has not challenged any issue related to that finding.

After hearing arguments, the appellate court agreed with the lower court’s decision in its entirety. Ms. Parker and her husband are represented by Julie Littky-Rubin of Clark Fountain La Vista Prather Keen & Littky-Rubin LLP, a firm located in West Palm Beach, Fla. She did a very good job in this case. The appeal was heard in the District Court for Appeal for the Fourth District of Florida.

Source: Law360.com

JURY AWARDS $1.9 MILLION IN EXPLODING E-CIGARETTE TRIAL

A California jury awarded $1.9 million last month to a woman whose e-cigarette exploded and seriously burned her. The manufacturer and seller of the product were found by the jurors to be liable for her injuries. The e-cigarette industry is unregulated, a recipe for disaster, and this jury acted appropriately and found fault. The Plaintiff Jennifer Ries filed her lawsuit in June 2013 against distributor VapCigs, wholesaler La Verne Car Wash Inc., and e-cigarette shop The Tobacco Expo.

The Plaintiff alleged in the suit that the “E-Hookah E-Cigarette Starter Kit” that she bought at the Tobacco Expo store in Corona, Calif., exploded while she was charging it just four days later. The Plaintiff and her husband were on the way at the time to the airport for a charity mission in Brazil. She said in her complaint that she was sitting in the passenger seat of their car with her husband driving when the e-cigarette’s battery blew up. The blast sent metal shrapnel throughout the car and set fire to her seat and her dress. Her husband pulled over and poured his iced coffee onto the flames on her lap, but his wife received second-degree burns on her legs, buttocks and hands.

A statement released by the law firm said Ms. Ries is “forever reliving the nightmare caused by the dangerous, defective product.” She is represented by Gregory L. Bentley and Clare Lucich of Shernoff Bidart Echeverria Bentley LLP, a law firm located in Claremont, Calif. These lawyers did a very good job in this case, which is in the Superior Court of the State of California, County of Riverside.

Source: Law360.com

E-CIGARETTE EXPLOSION PUTS FLORIDA MAN IN COMA

A recent incident in Florida is just another indication of how dangerous the e-cigarettes really are. A 21-year-old Florida
man was put in a medically induced coma after an e-cigarette exploded in his face. Evan Spahlinger suffered internal burns and also inhaled a piece of the e-cigarette, which caused internal burns. He was in critical condition in a Miami hospital at press time.

Source: The Naples Daily News

**SUIT FILED BY ESTATE OF OREGON WOMAN WHO DIED IN MURPHY BED**

The estate of 76-year-old Penelope Martens, an Ashland, Ore., woman who died after the Murphy bed she was sleeping in collapsed and locked shut, has filed a wrongful death lawsuit against the bed’s manufacturer and the store that sold it. The victim was asleep in the fold-up bed on April 16 when the frame pulled away from the wall and struck her in the head. It’s alleged that the frame and mattress locked in the closed position, trapping Ms. Martens and killing her. The lawsuit was filed in Jackson County Circuit Court.

Westcott Designs of California, a Defendant in the case, was said to be at fault for the bed’s poor design. The suit also lists Beds For Less as a Defendant and it’s said to be liable for improperly installing the bed in Ms. Martens’ home. The suit states that the bed frame was fastened to drywall, not wall studs.

Murphy beds, also known as wall beds, can be lifted to be stored vertically within a wall to save space. There have been other deaths associated with these beds. In 2005, two sisters, ages 62 and 68, died when the wall unit of side-by-side Murphy beds fell onto them while they vacationed in Spain. In 2012, a 33-year-old New York man died when a bed he was installing suddenly snapped up on him, crushing his skull and severing his spine.

Michael Gutzler, a lawyer from Portland, Ore., and Jeffrey McCollum, a lawyer with Davis, Hearn, Anderson & Turner from Ashland, Ore., are representing the estate in the Marten’s case. It will be interesting to see if the defendants will let this case go to trial. It’s very likely it will be settled.

Source: Insurance Journal

**SEN. HARRY REID SUES EXERCISE BAND MAKER OVER EYE INJURY**

Harry Reid, a respected U.S. Senator, has filed suit against exercise equipment maker Hygenic Corp. The product liability lawsuit by the Senate Minority Leader was filed in a Nevada state court last month. It was alleged that an elastic workout band Sen. Reid was using broke or slipped from his hand, causing him to hit his face on a cabinet. The senator, who is joined in the suit by his wife Landra Gould, says that Hygenic Intangible Property Holding Co. and its Ohio-based subsidiary Hygenic Corp. knew or had constructive knowledge that its TheraBand elastic resistance band was dangerous for use by the elderly, but failed to include any warning inside the packaging of the product that the band could break or slip from a user’s hand while exercising.

It’s alleged in the complaint that Hygenic Corp. acted negligently by failing to design, make or sell their exercise band in a reasonably safe condition that was free from any dangerous hazards, and breached their implied warranty by selling a product that was defective and dangerous for the elderly to use. Sen. Reid, who is 75, had the TheraBand mounted to a sturdy object in the bathroom of his Henderson, Nev., home the morning of Jan. 1. He was using it to work out when the elastic band either broke or slipped out of his hand, causing him to spin around and strike his face on a cabinet, according to the complaint. Sen. Reid broke several bones in his face around his right eye, causing his partial loss of vision. He also broke several ribs, injured his hand and suffered a concussion.

The complaint refers to a portion of the patent application that the Defendants submitted for the TheraBand back in March 2013. It describes the background of their invention and acknowledges that elastic exercise bands in general can be hard for an elderly person or someone with extensive muscle damage of the hands or feet to grip. Sen. Reid contends that Hygenic Corp. had knowledge that folks who exercised with elastic bands may mount them to sturdy objects, and that elastic bands might be difficult for the elderly to use, but still failed to warn him of its dangers. Had he known, Sen. Reid says he would have taken precautions to avoid injuries. Sen. Reid and his wife are represented by James M. Morgan of Lanzone Morgan LLP, a firm located in Long Beach, Calif. The case is in the District Court of Nevada, Clark County.

Source: Law360.com

**SANDY HOOK FAMILIES WIN A FIRST ROUND VICTORY**

A federal district court made a ruling that constitutes an important victory to the 10 Sandy Hook families who had filed suit against the manufacturer, distributor and seller of the Bushmaster assault rifle used in the shooting at Sandy Hook Elementary School in 2012. The Court ruled that the families’ lawsuit should proceed in Connecticut state court where it was initially filed. Shortly after the families filed suit last year, Bushmaster removed the case to federal court, and now the case is back in state court. The order of remand is a good thing.

Bushmaster claimed that a federal law granting broad immunity to the gun industry provided a basis to dismiss the Plaintiffs’ case against Riverview Sales, the store that sold the Bushmaster assault rifle. Bushmaster urged the Court to find that the Plaintiffs’ claims against Riverview were meritless and that Riverview was “fraudulently” named as a Defendant in the case. The ruling by the district court was an unequivocal rejection of that argument.

It’s contended that Bushmaster and the other Defendants should be held accountable for their decision to entrust a highly lethal assault weapon to the general public without any of the safeguards that are present in the military or law enforcement. Katie Mesner-Hage, one of the lawyers in the case, who is with Koskoff, Koskoff & Bieder, stated:

*The AR-15 assault rifle was designed as a military weapon. The defendants chose to make that weapon available to Connecticut citizens and to market it in explicitly militaristic terms—even in the wake of Columbine, Aurora, and countless other tragedies. A Connecticut jury should have the opportunity to evaluate that choice and decide whether defendants bear some responsibility for what happened at Sandy Hook Elementary School.*

I have great difficulty in seeing how any private citizen would ever have a need for an assault rifle. No real hunter needs a military weapon, which is designed to kill people in combat. The Second Amendment should never be constructed in a manner that would put an assault rifle, which can have a magazine with a capacity to hold 30 rounds of ammunition, in the hands of a private citizen. It will be most interesting to see how the Sandy Hook lawsuit fares. I know the NRA and gun manufacturers will do everything in their power to derail this lawsuit. Stay tuned!

Source: PRNewswire

**APPEALS COURT UPHOLDS BANS ON ASSAULT WEAPONS**

A federal appeals court has upheld New York and Connecticut laws banning
“assault” weapons and magazines holding more than 10 rounds. Legislatures in those two states passed the laws after the Sandy Hook massacre in 2012. In a ruling, the U.S. 2nd Circuit Court of Appeals found that the core of the laws, passed in 2013, did not violate the Second Amendment. Gun rights groups, businesses and individuals had filed federal lawsuits to challenge the laws in both states. The district court in New York upheld the main parts of the New York law, while the district court in Connecticut fully upheld that state’s law. The Plaintiffs appealed to the 2nd Circuit. The Second Circuit’s ruling applied to both cases.

The appeals court ruled that although the bans placed a burden on 2nd Amendment rights, each law passed constitutional muster because the laws substantially served an important governmental interest—crime prevention and public safety. The opinion says the state legislatures relied on substantial evidence in passing the laws.

The opinion says that the banned weapons, when used, result in “more numerous wounds, more serious wounds and more victims.” It also says the banned weapons are “disproportionately used to kill law enforcement officers.” The judges found that large capacity magazines are “disproportionately used in mass shootings,” including the one in Connecticut, in which the shooter fired 154 rounds in less than five minutes. The shooter, Adam Lanza, used a semiautomatic Bushmaster AR-15 and 30-round magazines. He killed 20 children and six adults at the school before taking his own life.

The laws define assault weapons as semiautomatic weapons that have any one of a list of military style features, including a telescoping stock, conspicuously protruding pistol grip, bayonet mount, thumbhole stock, flash suppressor and others. The National Rifle Association denounces use of the term “assault” weapon for guns like the AR-15, which it says are among the most popular rifles for home protection. The NRA says magazines holding more than 10 rounds are standard equipment for many rifles and handguns used for self defense. In its decision, the appeals court said there was a “dearth of evidence” that law abiding citizens typically use assault weapons for self-defense. The court ruled against two provisions in the laws—Connecticut’s ban on the Remington 7615, which is not a semiautomatic, and New York’s seven-round load limit.

Source: AL.com

**Remington Rifle Wrongful Death Suit Reinstated**

A widow’s wrongful death suit against the Remington Arms Co. has been reinstated after a divided Eighth Circuit Court of Appeals said sufficient circumstantial evidence pointed to a defect that could affect as many as 2 million rifles. The court ruled that the Plaintiff’s expert testimony that any of the company’s Model 700 .243 caliber bolt-action rifles made before 1975 are susceptible to inadvertent discharge was enough to put the case before the jury under South Dakota law.

The Plaintiff’s husband was killed in a hunting accident by a Remington rifle, with a known defect. The appeals court reversed a lower court ruling. On Nov. 9, 2008, Lanny O’Neal was shot and killed when his Remington Model 700 .243-caliber bolt-action rifle, which he had loaned to a friend during a deer-hunting expedition near Eagle Butte, S.D., discharged when its safety lever was moved, without the trigger being moved.

Ms. O’Neal filed a products liability wrongful death lawsuit against the Madison, N.C.-based firm. The gun had been manufactured in 1971, and the company knew as early as 1979 that there was a defect in the rifle’s trigger that could lead to its firing without having the trigger pulled, according to the court’s ruling.

Remington contended, however, that Ms. O’Neal could not prove that the gun had not been altered or modified after its manufacture. Mr. O’Neal’s stepfather, from whom he had obtained the gun, said it had not been altered since he obtained it in the mid-1980s. Ms. O’Neal had asked a friend to destroy the gun because it reminded her of her husband’s death.

The U.S. District Court granted Remington summary judgment dismissing the case, on the grounds that Ms. O’Neal could not show her husband’s death was not the result of a post-manufacture alteration or modification to the rifle. A divided appellate court reversed that ruling and reinstated the case. The opinion stated:

South Dakota law allows a plaintiff in a products liability suit to use circumstantial evidence to prove that a defective product caused an injury, and that the injury existed when the product left the defendant’s control.

The court said evidence presented shows that had the gun been altered, “it is highly unlikely the rifle could have been used as many times as it was over the span of the next 20-plus years without incident.” The dissenting opinion in the case said because Ms. O’Neal had the rifle destroyed before the lawsuit was filed, she cannot prove the defect that was present when the gun left the manufacturing plant in 1971 killed her husband 37 years later.

Source: Businessinsurance.com

**Jury Verdict For Injured Police Officers in Suit Against Wisconsin Gun Shop**

A jury has ordered Badger Gun Shop to pay nearly $6 million in a lawsuit filed by two Milwaukee, Wis., police officers who were seriously wounded when shot by a gun purchased at the store. Jurors found that Badger Guns was negligent. The gun that was used to shoot Officers Bryan Norberg and Graham Kunisch was purchased by a straw buyer. That’s a person who buys a gun for another person who can’t legally purchase one. Officer Bryan Norberg and Officer Graham Kunisch, who is now retired, were shot by a man they stopped in 2009. Jurors awarded Norberg $1.5 million and Kunisch $3.6 million, and ordered the store to pay $730,000 in punitive damages.

The case has drawn attention because it could set gun law precedent if jurors find the gun shop owners can be held legally responsible for a crime committed with a weapon purchased at their store. Patrick Dunphy, who represented the Plaintiffs, told jurors there were several tipoffs that should have been sufficient to cancel the sale, including improperly marked forms and the behavior of the buyer, Jacob Collins, and the eventual recipient, Julius Burton, who was too young to buy the gun. Burton was with Collins when the purchase was made. Dunphy also said the shop failed to verify Collins’ identification at the time of the transfer.

More than 500 firearms recovered from crime scenes have been traced back to Badger Guns and Badger Outdoors, the store’s predecessor, making it the “No. 1 crime gun dealer in America,” according to a 2005 charging document from an unrelated case. A former federal agent has also said the shop had failed take necessary precautions to prevent straw purchases. The two officers were shot after they stopped Burton for riding his bike on the sidewalk in the summer of 2009. A bullet shattered eight of Norberg’s teeth, blew through his cheek and lodged into his shoulder.

While Kunisch has remained on the force, he says his wounds have made his work difficult. The officer was struck several times, losing an eye and part of the frontal lobe of his brain. He says the wounds forced him to retire. Burton pleaded guilty to two counts of first-degree attempted intentional homicide and is serving an 80-year sentence; Collins
Wyeth, Inc. (now owned by Pfizer, Inc.) manufactures the hormone replacement therapy (HRT) drugs Premarin, Prempro, and Premphase. HRT is approved for the prevention of postmenopausal osteoporosis and to treat vasomotor symptoms associated with meno phase (e.g., hot flashes, night sweats) and vaginal atrophy. Wyeth marketed HRT not only for the approved purposes but for non-approved, off-label uses, including the prevention of cardiovascular disease, dementia, and Alzheimer’s disease. Wyeth also systematically used marketing efforts to assure physicians and patients that HRT did not increase the risk of breast cancer. In truth, HRT increased the risk of breast cancer as well as the risk of cardiovascular disease, dementia, and Alzheimer’s disease.

A class action on behalf of all California purchasers was filed against Wyeth for falsely advertising and deceptively marketing the HRT drugs in violation of California’s Consumer Legal Remedies Act and California’s Unfair Competition Law. In March 2011, the United States District Court of the Southern District of California certified a class of California women who purchased HRT between January 1995 and January 2003 who were exposed to Wyeth’s massive advertising campaign at trial. The court found that “HRT users and physicians were systematically exposed to Defendants’ material misrepresentations during the class period through Defendants’ massive advertising campaign, which included, among others:

- sales calls designed to mislead and/or omit crucial health risk information;
- funding of various media advertisements and press releases;
- funding and publication of newsletters, brochures, medical studies, and other written media that downplayed, among others, breast cancer risks and promoted fictitious health benefits;
- funding and creation of physician and patient outreach and informational programs; and
- funding, publication, and dissemination of “Dear Doctor” letters.

The Court also agreed with the Plaintiff that every California woman who purchased HRT drugs during the class period was exposed to Defendants’ material misrepresentations through Defendants’ drug labels originating from Defendants. The Court denied Wyeth’s motion to decertify the class and adopted Plaintiffs’ suggested class definition:

All California consumers who purchased Wyeth’s Hormone Replacement Therapy products, Premarin, Prempro, and/or Premphase, for personal consumption between January 1995 and January 2003, and who do not seek personal injury damages resulting therefrom.

The class is represented by Leigh O’Dell, Andy Birchfield and David Byrne, all lawyers in our firm’s Mass Torts Section, Eileen McGeever, and Gary Holt. Leigh O’Dell had this to say:

We are very pleased with the Court’s ruling and believe that it brings us one step closer to vindicating the rights of women in California who purchased Wyeth’s hormone replacement therapy drugs (HRT) during the 1995 to 2003 timeframe. We look forward to presenting all of the evidence of Wyeth’s fraudulent marketing campaign at trial.

I have always felt that the persons who are responsible for the problems caused by the HRT drugs would be held fully accountable. I am now convinced that it will happen.

**BOSTON SCIENTIFIC MESH VERDICT REDUCED TO $10 MILLION**

A Delaware state judge has reduced the $100 million verdict against Boston Scientific Corp. in a case over injuries from the company’s pelvic mesh to $10 million. U.S. District Judge Mary M. Johnston found the verdict to be excessive, but refused to grant a new trial. The judge said the $25 million in compensatory damages for Plaintiff Deborah Barba and $75 million in punitive damages are out of line. Judge Johnston said, given the financial claims made by Barba, $2.5 million is more appropriate. She upheld the ratio of compensatory to punitive damages, reducing the new punitive amount to $7.5 million.

Judge Johnston ruled that the jury’s liability verdict was proper given the evidence presented during the 14-day trial. Ms. Barba had surgery in May 2009 to implant the company’s Advanta Fit and Pinnacle mesh products to treat pelvic organ prolapse and urinary incontinence. Afterward, she suffered serious complications that required two surgeries. Ms. Barba initially sued the doctor who performed the procedure for malpractice in August 2011, but dropped those claims and instead filed suit against Boston Scientific in January 2012. She accused the company in her lawsuit of negligent product design, negligent manufacturing, failure to warn, breach of implied warranty of merchantability, fraud, fraud by concealment, and violations of Delaware consumer protection law.

The jury found in favor of Ms. Barba on all but a loss of consortium claim. Boston Scientific said it intends to appeal the decision. Ms. Barba is represented by Fidelma Fitzpatrick and Fred Thompson of Motley Rice LLC and Philip T. Edwards of Murphy & Landon. These lawyers have done a very good job in this case. The case is in the Superior Court of the State of Delaware in New Castle County.

Source: Law360.com

**GSK WILL HAVE TO DEFEND Paxil PRODUCT LIABILITY SUIT**

An Ohio federal judge ruled last month that GlaxoSmithKline (GSK) must face a product liability suit brought by a woman whose child was born with heart defects after she took the antidepressant Paxil during her pregnancy. U.S. District Judge
Edmund A. Sargus ruled that she had successfully pled fraud in her complaint. He denied GlaxoSmithKline LLC’s motion for judgment on the pleadings. GSK argued that the claims were time-barred. Judge Sargus rejected that argument.

GSK contended that Plaintiff Kathryn Kiker’s claims accrued in September 2005, when the company told the medical community about the serious risks of birth defects, and are thus abrogated by the Ohio Product Liability Act (OPLA), which was amended in 2005 and abrogate common law liability claims in the state. However, Judge Sargus agreed with Ms. Kiker’s argument that her claims accrued when her child, referred to as C.S., was born in 2001.

Judge Sargus said that a provision in the 2005 Tort Reform Act incorporates a discovery rule so that a bodily injury claim may be extended to a date when it was reasonable for the injured party to have discovered her injury was related to a product. The judge said:

That is, the statute of limitations provision that includes the discovery rule relied upon by defendant does not dictate the date that plaintiffs’ claims arose for purposes of determining whether the 2005 amendments to the OPLA apply to their claims.

Judge Sargus also found that the fraud allegations in Ms. Kiker’s proposed amended complaint were sufficiently particular, and granted her leave to file the amended complaint. According to the proposed amended complaint, the baby suffered from birth from infant respiratory distress syndrome and ventricular septal defect, a serious heart defect. It was alleged by the Plaintiff:

Thus, prior to Ms. Kiker’s pregnancy with C.S., GSK had the knowledge, the means and the duty to provide the medical community and the consuming public with a stronger warning regarding the association between Paxil and birth defects through all means necessary including but not limited to labeling, continuing education, symposiums, posters, sales calls to doctors, advertisements and promotional materials, etc. GSK breached this duty.

Ms. Kiker is represented by Benjamin Anderson of Anderson Law Offices LLC and Bryan F. Aylstock, James D. Barger, Bobby J Bradford, Roger P. Cameron and R. Jason Richards of Aylstock Witkin Kreis & Overholtz. The case is in the U.S. District Court for the Southern District of Ohio.

Source: Law360.com

An Update on The Lipitor Litigation

It has been a busy year for our firm’s Lipitor litigation team. These lawyers have investigated thousands of claims involving women who took the drug to prevent cardiovascular events, but later developed Type 2 diabetes. At the beginning of the year, the Plaintiffs’ Steering Committee (PSC) in the multidistrict litigation (MDL) disclosed a total of 14 experts to testify on various topics including the warning label, epidemiology, diabetes, and whether Lipitor provided a benefit for women. Several cases were also selected for bellwether trials. By mid-August, all of the Plaintiff and Defense experts, as well as the Plaintiffs and their case-specific witnesses, had been deposed and discovery was completed. This was a monumental effort by all of the firms and lawyers involved, including Frank Woodson and Matt Munson from our firm.

In late September, U.S. District Judge Richard Gergel of Charleston, S.C., held two full days of hearings on the admissibility of the expert testimony offered by the parties. Additional hearings were held on Oct. 22. Additionally, you may recall from previous updates that the first trial was scheduled for November 2015. Unfortunately, Judge Gergel has not issued any rulings based on September and October hearings and we eagerly await his decisions. If you need information relating to this litigation, contact Frank Woodson or Matt Munson, lawyers in our firm’s Mass Torts Section, at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com or Matt.Munson@beasleyallen.com.

XI. AN UPDATE ON SECURITIES LITIGATION

LONDON WHALE CLASS ACTION PROCEEDS AGAINST JPMORGAN

Shareholders just had a major victory in the “London Whale” litigation, which caused a $6.2 billion loss, against JPMorgan Chase & Co—permission to pursue their securities fraud lawsuit against the bank as a class action. Arguing against class certification, JPMorgan Chief Executive Officer Jamie Dimon and former Chief Financial Officer Douglas Braunstein said shareholders would be unable to show they relied on alleged misstatements about the bank’s risk management, or prove damages on a class-wide basis.

U.S. District Judge George Daniels in Manhattan rejected the largest U.S. bank’s arguments against class action certification. The lawsuit arose out of the oversight by JPMorgan’s Chief Investment Office of a synthetic credit portfolio that caused the $6.2 billion loss and was linked to traders in the bank’s London office including Bruno Iksil, the so-called “London Whale.”

Shareholders, led by pension funds in Arkansas, Ohio and Oregon alleged that JPMorgan, Dimon and Braunstein knowingly hid increased risks at JP Morgan’s Chief Investment Office. In an April 13, 2012 conference call, Dimon called reports about the synthetic portfolio a “tempete in a teapot.” The class period runs from April 13 to May 21, 2012, a period when JPMorgan’s share price fell by

BeasleyAllen.com
roughly one-quarter, wiping out more than $40 billion of market value. JPMorgan agreed in November to pay roughly $1.01 billion to resolve almost identical probes by U.S. and European regulators. Five other banks, Bank of America, Citigroup, HSBC, RBS, and UBS, also settled with regulators in November for an additional $3.3 billion.

Former traders Javier Martin-Artajo and Julien Grout have been criminally charged in the United States with hiding losses linked to Iksil, who has been cooperating with prosecutors. Three related investor lawsuits against JPMorgan executives and directors over the trading loss have been dismissed. The case is in the U.S. District Court, Southern District of New York.

Source: Reuters

XII.

EMPLOYMENT AND FLSA LITIGATION

FIVE SUPREME COURT EMPLOYMENT CASES TO WATCH

Every year the United States Supreme Court is faced with the task of deciding what cases it will accept on appeal. There is no way the Court can hear all the cases folks file, nor is it necessary for the justices to hear them all. The Court receives approximately 10,000 petitions for writ of certiorari each year, but only accepts between 75-80 cases. Some of the cases can be of such great importance that the result will affect the lives of every American. Other cases, however, only affect the parties to the lawsuit. Many cases fall somewhere in between. Below is a list of upcoming labor and employment cases that the Unites States Supreme Court has decided to accept. These cases could well have a very big impact on a significant number of American workers.

TYSON FOODS INC. v. BOUPAHKEO

In June, the U.S. Supreme Court decided it would hear a case where a jury had returned a verdict for $5.8 million, in favor of a group of employees. The employees were workers at a pork processing facility who brought a wage and hour class action/collective action against alleging Tyson Foods, Inc. didn’t pay them the correct amount of overtime and minimum wages. The trial judge approved the jury verdict and the Eighth Circuit Appeals affirmed.

Tyson Foods is arguing that the case should have never been certified because of the vast differences in the individual Plaintiffs. Similarly, they argue that past U.S. Supreme Court opinions, if applied correctly, would have prevented the trial court from certifying the case as a class action.

The reason that this case is so significant is that employees in class actions are almost never identical. Individual employees have “similar” situations and working conditions, but can often react and be treated differently and can certainly be paid different amounts in their jobs. If these differences are deemed to be a barrier to class action treatment, then this may mark the end of class action lawsuits in the employment arena.

FRIEDRICH V. CALIFORNIA TEACHERS ASSOCIATION

This case was brought by a group of California teachers who wanted to challenge the rule that public employers could require nonunion workers to pay union fees in union-represented bargaining deals. This case is significant because a decision siding with the teachers could hurt unions in the public sector by cutting into their financial support. As many are aware, union participation in America has declined over the years. This case could be a chance to reverse the trend for unions or expedite their troubles.

MHN GOVERNMENT SERVICES INC. ET AL. v. ZABOROWSKI ET AL.

This is an arbitration case that has been previously discussed in this report. Managed Health Network, Inc. (MHN) is a defense contractor that required its employees to sign a very restrictive arbitration agreement. As a condition of employment, MHN required its employees and contractors to waive their constitutional right to a jury trial and refrain from suing them in court. In addition to the jury trial waiver, MHN’s arbitration agreement severely limits the amount of time an individual has to file an action and requires a filing fee that is 7-15 times higher than normal. The employees and contractors of MHN challenged the arbitration agreement before a federal district court in California. The trial court ruled that the agreement was so restrictive that it was, in fact, unconscionable and not legally enforceable. On appeal, the employees successfully persuaded three judges that they were correct. The court also ruled that the arbitration agreement was not legally enforceable.

MHN will argue that the California rulings were against U.S. Supreme Court precedent and that the law requires the arbitration agreement to be enforced as written. Alternatively, MHN will argue that any parts of the arbitration agreement that are unenforceable should be stricken and the remaining parts of the agreement enforced. The ruling in this case could have far reaching implications concerning how far a company can go in requiring its employees to give up rights as a prerequisite to employment.

GREEN v. BRENNAN

This next case concerns how long an employee has to file a claim for discrimination when he knew or should have known there was a problem. Ex-postmaster Marvin Green sued the postal service for race discrimination based on a few different incidents that occurred over a certain time period. Green’s lawsuit was ultimately dismissed because the federal district court said he failed to allege wrongdoing within the amount of time allowed by law. Green argues that the time with which he had to file the lawsuit should start running from the time of the later incidents, and not the earlier incidents. How the Court resolves this case will be helpful to both employees and employers. The final opinion is likely to clarify how long someone has to bring a claim and what episodes trigger when to start counting.

MONTANILE v. BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN

This last case deals with a very common issue. Every day, individuals are injured in accidents through no fault of their own. Many victims’ injuries are covered by medical insurance they paid for through their job. What many people don’t realize is that the health insurance company, or health plan, may want their money back in the event the employee recovers money from the person responsible for causing the accident.

In late 2008, Robert Montanile was involved in a car accident that resulted in significant injuries. Montanile argued that the insurance plan should have to pay for the treatment he received, and the company agreed. However, the company then tried to withhold money from other settlements that Montanile received for his injuries. Montanile challenged this decision in court, and a federal district court ruled in his favor. The case was appealed to the Second Circuit Court of Appeals, which also ruled in Montanile’s favor. Montanile then appealed to the Supreme Court, which has now agreed to hear the case.
anile was covered by an employee health benefit plan administered by the Board of Trustees of the National Elevator Industrial Health Benefit Plan (Plan). After Montanile’s accident, the Plan dispersed over $120,000 to cover his medical expenses. Montanile later sued the driver of the other car involved in the accident, eventually obtaining a $500,000 settlement. Per its terms, the Plan then requested that Montanile reimburse the initial $120,000 disbursement. When Montanile and the Plan were unable to reach an agreement, the Plan sued Montanile.

The Plan is governed by the Employee Retirement Income Security Act of 1974 (ERISA), which allows plan administrators to recover overpayment from a beneficiary when the recovery would constitute “appropriate equitable relief”. The trial court held that the terms of the Plan required Montanile to repay the initial $120,000, and that this repayment was appropriate equitable relief in part because the Plan was able to identify a source of funds within Montanile’s possession— the $500,000 settlement. Montanile appealed and claimed that the repayment would not be equitable relief because the settlement had been spent or disbursed to other parties. The U.S. Court of Appeals for the Eleventh Circuit held that, because the Plan had a right to reimbursement, the Plan’s lien against Montanile’s $500,000 settlement attached before Montanile spent or disbursed the funds. Therefore, Montanile could not evade the repayment by claiming the settlement funds had been spent or disbursed.

In other words, the questions is should Montanile have to reimburse his health plan if the money they are requesting has already been spent or disbursed to others? The outcome of this case may have an impact on how insurance companies and health plans settle cases in the future. A ruling against Montanile may also make cases more difficult to settle if health plans are able to demand full reimbursement under any and all circumstances.

We will continue to monitor these cases and will give updates as appropriate. If you need information about any of the cases or the process involved, contact Roman Shaul at 800-898-2034 or by email at Roman.Shaul@beasleyallen.com.

**FedEx’s $227-Million Driver Settlement Wins Approval**

The old saying, “If you first don’t succeed, try and try again,” certainly applies to FedEx Corp. It took three attempts, but the $227-million settlement by FedEx with California FedEx Ground drivers, who said the company misclassified them as independent contractors, has finally received preliminary approval. U.S. District Court Judge Edward Chen requested only minor changes to the class notice before approving the settlement last month.

In August, the judge had postponed ruling on the settlement, saying he was concerned about asking the Plaintiffs to release their meal and rest break claims. Although the parties returned with a revised settlement in September, Judge Chen once again put off taking action after an aspiring intervenor claimed the settlement wasn’t fair to some drivers who allegedly didn’t receive breaks. Judge Chen has now satisfied his concerns and granted his approval.

Source: Law360.com

**Foot Locker, Assistant Managers Settle FLSA Suit for $600,000**

Assistant managers at Foot Locker Inc. have agreed to settle a Fair Labor Standards Act (FLSA) class action lawsuit with the shoe and apparel retailer for nearly $600,000. Under the agreement, Foot Locker will pay out $596,150.70 to settle claims that it violated the FLSA and New York state labor law by failing to compensate assistant managers and sales workers for unpaid and overtime wages. The amount Foot Locker will pay is about 65 percent of the amount of claimed damages of approximately $624,000, which was based on the Plaintiffs’ claimed number of hours worked and claimed method of calculation. The amounts were in dispute.

The suit, filed in early 2006, alleged that store managers altered workers’ time sheets to decrease their recorded work hours in order to meet company quotas and that assistant managers and sales workers lost out on wages and overtime pay as a result. The Plaintiffs are represented by Judith Broach and Amy Shulman of Broach & Stulberg LLP. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

**Comcast To Pay $190,000 To Settle Overtime Class Action Lawsuit**

A Comcast Corp. unit has agreed to pay more than 40 customer account executives $190,000 to settle a consolidated collective action alleging that the company failed to properly pay them overtime. Comcast Cable Communications Management LLC agreed to the settlement with named Plaintiff Joel Faust, who represents at least 37 opt-in Plaintiffs, as well as named Plaintiffs in three related individual actions who claim they were cheated on overtime pay for performing various tasks in violation of the Fair Labor Standards Act (FLSA) and Maryland state statutes.

The dispute goes back to two proposed class actions filed by lead Plaintiffs Joel Faust and Marshall Feldman in August 2010 and Ishmael Andrews in October 2012, alleging that Comcast violated the FLSA, the Maryland Wage and Hour Law and the Maryland Wage Payment and Collection Law when it required customer account executives in separate Maryland call centers to undergo a series of login- and logout-related procedures without compensation.

The Plaintiffs are customer account executives for Comcast who provide service and support over the phone to current and prospective customers and review company emails to stay informed regarding its newest products and services, according to court documents. The suits claimed that Comcast didn’t compensate them for overtime worked while booting up computers, opening software applications and reviewing emails.

Source: Law360.com

XIII.

**WORKPLACE HAZARDS**

**Alabama Judge Awards $3.5 Million In Mesothelioma Death Case Involving TVA Plant**

The family of a Florence, Ala., woman who died in 2013 from the lung disease mesothelioma will receive a $3.5 million award for her pain and suffering and medical expenses. Barbara Bobo inhaled secondhand asbestos fibers while laundering her husband’s work clothes for more than two decades. Her husband did cleanup work for a period of time after asbestos insulation was installed at the Athens-based Browns Ferry Nuclear Plant, which
is owned and operated by the Tennessee Valley Authority (TVA).

James Bobo, who began working for the plant in 1975, died of asbestos-induced lung cancer in 1997. His wife was diagnosed with malignant pleural mesothelioma, a rare lung cancer caused by asbestos exposure, in November 2011. Judge Lynwood Smith of the U.S. District Court for the Northern District of Alabama issued a judgment in favor of Melissa Ann Bobo and Shannon Jean Bobo Cox, Bobo's daughters and the co-personal representatives of her estate. Judge Smith found Browns Ferry violated worker safety regulations set by the Occupational Safety and Health Administration, as well as its own safeguards.

Mrs. Bobo underwent surgery after her 2011 diagnosis to remove the lining in her affected lung. She also received chemotherapy treatments, which were painful and resulted in adverse side effects. Mrs. Bobo, who was never an employee or contractor of TVA and was never physically inside the plant, would shake out her husband's work clothes in her home washroom, causing dust to disperse into the air. She would clean the floors of the washroom with a broom and dustpan, creating airborne dust she breathed. Mrs. Bobo also had non-occupational exposure to asbestos from 1965-1975 when her husband worked as a machine operator for the Alabama Wire Plant in Florence. She was also exposed to asbestos during her years working as a beautician in Florence.

Source: AL.com

**South Carolina Jury Returns $14 Million Asbestos Verdict**

A South Carolina jury has found Celanese Corporation liable for a worker's exposure to asbestos at one of the industrial chemical company's facilities that resulted in a fatal case of mesothelioma, awarding his family $14 million damages. The jury awarded Dennis Seay's family $12 million in compensatory damages and $2 million in punitive damages, finding Celanese Corp. negligent in its operation of the plant where Seay worked from about 1971 to 1980. The jury found in favor of John Crane, the maker of the some of the asbestos-containing gaskets that Seay said he worked with. Seay filed the suit in September 2013, a month after he was diagnosed with mesothelioma. He died in December 2014 at age 70. Seay was employed by Daniel Construction Co., a contractor hired by Celanese.

Chris Panatier, a lawyer for Seay, argued during closing arguments that Celanese had an obligation to audit the safety program at Seay's employer and that the company was in “complete control” of safety policy on its premises. “This case for Celanese is full of red flags,” Panatier told the jury, stacking piles of articles on asbestos hazards published throughout the 1950s in industrial hygiene research journals through the courtroom and placing around two dozen red flags on top. “It wasn’t a company that just maybe heard something, this was a company that received and read this information,” Panatier said. The lawyer who represented Celanese, H. Lane Young, told jurors that the real issue was whether Celanese knew that Daniel Construction was going to subject Seay to exposure.

Source: Law360.com

**DuPont Settles Wrongful Death Suit**

DuPont Co. has reached a settlement with one of the families of four workers who were killed after a chemical release at the company’s La Porte, Texas, plant in November. The company has agreed to pay an undisclosed amount to resolve negligence claims brought by Jasmine Rae Wise, the daughter of deceased DuPont worker Chrystle Rae Wise. DuPont also agreed to institute a yearly moment of silence for the next decade to remember the workers killed after a toxic chemical leak.

The workers died after a leak of methyl mercaptan, a product used to add smell to natural gas for safety and used in insecticides and fungicides. The families said a faulty valve at the plant released the chemical into the air, Judge Brent Gamble concluded the actions for discovery purposes in September. The Wise lawsuit, filed in November 2014, alleged that DuPont failed to inspect, repair and maintain “faulty and defective equipment” and said its review of state records show the plant was cited at least two dozen times by the Texas Commission on Environmental Quality, including for the failure to perform routine safety inspections.

Under the settlement, DuPont will also make a contribution to a local animal protection group. Brent Coon, one of the lawyers representing Ms. Wise, said that he commends DuPont for crafting an “out-of-the-box” settlement that pays tribute to the things that mattered most to Chrystle Wise. He added, “This helps with closure for the family because they know they’re establishing some lasting legacy.”

In May, the U.S. Department of Labor cited DuPont for 11 safety violations related to the accident, saying the workers wouldn’t have died if the company had taken steps to protect them. The Occupational Safety and Health Administration (OSHA) imposed a $99,000 fine for citations including one repeat violation, nine serious violations and one “other than serious” violation. After the preliminary investigation, the agency found hazards that prompted further inquiry, leading to the July issuance of an additional $273,000 in penalties for three willful, one repeat and four serious violations at the La Porte plant. The U.S. Chemical Safety Board is also conducting an investigation into the incident and released an interim report on Sept. 30, making recommendations to correct flawed safety procedures, design issues and insufficient planning.

Ms. Wise is represented by Brent Coon, Sidney F. Robert and Robert A. Schwartz of Brent Coon & Associates, a firm headquartered in Beaumont, Texas.

Source: Law360.com

**GAS PIPELINE EXPLOSION KILLS THREE WORKERS IN LOUISIANA**

Three workers were killed on Oct. 8 in a pipeline explosion in Louisiana's Terrebonne Parish. Two of the victims were employed by Danos, an oil and gas service company. The incident occurred at the Transcontinental Gas Pipeline Co. facility in Gibson, La. Transcontinental is a subsidiary of the major natural gas supplier Williams Partners.

One of the victims was a contract employee for Furmanite, an oilfield maintenance company. Eight of Danos' employees were working at the plant when the explosion occurred. Two of them were treated for minor injuries. The explosion erupted during the morning hours and the cause is under investigation.

Source: Insurance Journal

**Judge Affirms OSHA Violations Against Alabama Manufacturer**

The Occupational Safety and Health Review Commission (OSHRC) has affirmed seven citations against Matsu Alabama following an incident at its Huntsville facility that left a worker permanently disabled. Last year, Matsu Alabama, a division of Matcor Automotive, was originally issued eight safety citations by OSHA, with $75,000 in proposed penalties. This came after a temporary employee's right lower arm and three fingers on his left hand were amputated by a mechanical power press in Huntsville.

On April 3, 2013, OSHA initiated the inspection in response to a complaint of an employee suffering amputations while
loading parts into a mechanical power press. The company, which was using an on-site temporary staffing service known as Surge Staffing at the time of the accident, was cited for the following violations:

- One “repeat violation” for failure to guard rotating chucks and spindles on milling and drilling machines.
- Guard the point of operation on a mechanical power press, which led to the amputation.
- Provide safety procedures to prevent machinery from starting up during maintenance and servicing.
- Conduct power press inspections to ensure safety devices and auxiliary equipment were effective and operating properly.
- Provide training and instruction on safely operating the mechanical power press.
- Reduce compressed air for cleaning to less than 30 pounds per square inch.
- Prevent press operators from changing the press mode without supervision.

There was one “other-than-serious citation” issued by OSHA and it was for failing to:

- Record an amputation incident and the resulting lost time on the OSHA 300 log within seven days. Matsu contested OSHA’s citations and an OSHRC hearing was scheduled.

OSHA said Review Commission Judge John Gatto ordered that the serious citation for “failure to prevent press operators from changing the press mode without supervision” be deleted on Sept. 29. The other seven citations remain in effect. Judge Gatto also increased the repeat violation to $70,000, which is the maximum amount. The total penalties against Matsu Alabama equal $103,000, according to OSHA. Kurt Petermeyer, OSHA regional administrator in Atlanta, said the injured employee, whose name has not been released, was assigned to janitorial duties and had no experience with a mechanical power press when the incident occurred.

Matcor Automotive is a manufacturer and supplier of auto parts for companies like General Motors, Chrysler, Honda, Toyota and Nissan. It will be most interesting to see how this matter winds up.

Source: AL.com.

WORkPLACE InJuries LEAD To $1.4 MillIon in FINES For OHIO CHICKEN PRocESSOR

A supplier of fast food and supermarket chicken is facing more than $1.4 million in fines this year for worker safety and health violations at Ohio facilities, including several that led a teenage worker to suffer the amputation of his lower leg, according to federal safety officials. The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) levied the latest penalties against Case Farms Processing Inc. for 16 violations at the chicken processor’s Canton, Ohio, facility. The safety failures resulted in two serious injuries to workers while they cleaned machines. A 17-year-old worker, employed by cleaning subcontractor Cal-Clean, had his left leg amputated from the knee down, and a 24-year-old Case Farms employee lost two fingertips. Both workers were fired after the incidents.

OSHA cited Case Farms for two “willful,” 10 “repeated,” and four “serious” safety violations with proposed penalties of $424,600 on Sept. 24. The agency also penalized Cal-Clean’s owner, Callaghan and Callaghan, with $179,700, issuing fines on Sept. 28 for two willful, five serious and three other-than-serious safety violations. Both companies were cited for exposing workers to amputation, fall, electrical and other serious hazards.

In August, OSHA placed Case Farms in the agency’s Severe Violator Enforcement Program after it assessed $861,500 in penalties after investigations at the company’s Winesburg, Ohio, facility. Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, stated:

A teenager’s life has been forever altered because of a devastating leg injury just weeks after starting this job. How many injuries will it take before Case Farms stops exposing workers to dangerous machinery parts?

The inspections that resulted in the September citations found: On March 25, a 24-year-old Case Farms employee was cleaning a fat sucker machine when the operating parts of a plunger amputated the fingertips of his right middle and ring fingers. The machine should have been prevented from operating during the cleaning process. The worker, who had been an employee for nearly a year and a half, was suspended from his job for 10 days and subsequently fired.

On April 7, a 17-year-old employee at Callaghan and Callaghan (doing business as “Cal-Clean”) suffered the amputation of his left leg from the knee down when he was cleaning the liver-giblet chiller machine. The teen has been unable to return to work due to his injuries, and he was fired after the incident.

Case Farms does not supervise the sanitation contractor employees working at its facilities, but the company is responsible for exposing the Cal-Clean employee to operating parts of machinery because it failed to install safety mechanisms. OSHA also cited Cal-Clean for failing to report the amputation to the agency within 24 hours, as required. Howard Eberts, OSHA’s area director in Cleveland, said:

In the past 25 years, Case Farms has done little to change a corporate culture where workers are endangered despite repeated OSHA inspections and commitments from the company to fix its safety and health programs. Both Case Farms and Cal-Clean need to make safety a priority for employees who work at dangerous meat processing facilities.

Two other inspections remain open at Case Farms’ Canton facility. In June, OSHA opened an investigation into deficiencies in the ammonia refrigeration system. Exposure to ammonia can cause serious respiratory illness, and accidental releases of ammonia from pressurized pipes and vessels may have catastrophic consequences. In July, OSHA opened an investigation into allegations that poultry workers were experiencing symptoms of campylobacter infection, a food-borne illness.

In 2013, Case Farms agreed to address safety violations in a settlement agreement with OSHA after an inspection found workers exposed to dangerous machinery and other hazards at its Winesburg facility. However, follow-up inspections led to the issuance of citations on May 28, 2015, and most recently on Aug. 13, 2015.

Source: Insurance Journal

IDAHO SHOP OWNER ORDERED TO PAY $100,000 TO WORKER FIRED AFTER SAFETY REPORT

A federal judge has ordered a northern Idaho gas station owner to pay $100,000 to a former employee who was fired after reporting safety violations, including exposed wiring near water leaks and a lack of first aid equipment. U.S. District Judge B. Lynn Winmill upheld the findings...
of a U.S. Department of Labor investigation and entered the judgment against Sandpoint Gas N Go Lube Center owner Sydney Oskou. Oskou says he will appeal Winmill’s ruling, contending that the case was handled unfairly and that he is facing discrimination because he is from Iran.

The case arose in 2012 after Daniel Kramer reported to the Occupational Safety and Health Administration (OSHA) that he believed employees were working in unsafe conditions. It was said that open automobile bays lacked nets and that exposed wiring near water leaks presented a risk of electric shock. Employees didn’t have hard hats or basic first aid equipment, according to the report by Kramer.

The federal safety agency inspected Kramer’s claims, found several safety violations and told the business that citations and penalties would be coming. A few days later, Kramer was fired. He later filed a complaint alleging that the company fired him for raising safety concerns. But Oskou claims that Kramer was a poor employee who was only hired on a temporary, part-time basis while another employee finished getting a degree. The station owner said that Kramer’s dismissal was bad timing, but not in response to the OSHA complaint and that Kramer used racial slurs toward him.

Judge Winmill ordered Oskou to pay the former employee nearly $1,000 in lost wages as well as $100,000 in punitive damages. Department of Labor Regional Solicitor Janet Herold said in a prepared statement: “The court got this one right. By awarding punitive damages, the court sent a message that retaliation against workers who report safety violations will not be tolerated.”

Source: Insurance Journal

**Texas Auto Parts Maker And A Staffing Firm Cited For Safety Violations**

Federal safety officials have cited Corvac Composites LLC, a San Marcos, Texas, auto parts maker and Priority Personnel Inc., its staffing employer, for heat, noise and other workplace hazards. The companies were fined a total of $43,000 by OSHA. Corvac Composites was fined $31,000 and Priority Personnel was fined $12,600. OSHA said Corvac Composites was cited for six serious violations for failing to:

- Keep exit routes free from flammable objects.
- Establish an energy control program for shutting down machinery.
- Develop and implement hazard communication and hearing conservation programs.
- Provide a suitable eye and body wash facility for emergency use.
- Reduce or eliminate employee exposure to excessive heat.
- Provide personal protective equipment where hazards exist.

Corvac received two other citations for failing to illuminate exit signs or post warning signs for electrical hazards. Priority Personnel, a staffing agency that provides temporary workers for Corvac, was cited for two serious violations for failing to develop and implement a hearing conservation program and reduce or eliminate exposure to excessive heat. Corvac Composites is headquartered in Kentwood, Mich., and Priority Personnel is headquartered in San Marcos. Both companies have 15 business days from receipt of their citations to comply, request an informal conference with OSHA’s area director, or contest the citations and penalties before the independent Occupational Safety and Health Review Commission.

Source: Insurance Journal

**Texas Jury Awards $8.2 Million Against DuPont In Exposure Case**

A jury in Dallas, Texas, awarded $8.2 million last month to a 60-year-old man battling a form of leukemia caused by his on-the-job exposure to paint and thinners manufactured by DuPont Co. Virgil Hood handled DuPont’s products on the job daily between 1973 and 1996 when he worked as a painter for Continental Airlines and a company that builds semi-trailers. He is the Plaintiff in the suit and was a victim of DuPont’s unwillingness to remove benzene, a toxic chemical that causes bone marrow disease and leukemia, from its products or warn about its potential danger.

The jury awarded Mr. Hood $6.7 million in compensatory damages and $1.5 million in punitive damages against DuPont for failing to warn about the dangers of benzene in its products. DuPont is responsible for 80 percent of the compensatory award, and the Plaintiff’s former employer, Timpte Trailers, is directed to pay the remainder. For decades, the manufacturers of benzene-contaminated products have attempted to deny their accountability for injuring hard-working Americans. The evidence in this trial proved that from 1938, DuPont knew that benzene exposure causes bone marrow disease. By 1954, DuPont had warned others to remove benzene from paints but it elected not to and decided not to warn workers about the hazards.

Mr. Hood was diagnosed with myelodysplastic syndrome/acute myeloid leukemia in 2012 and has since undergone chemotherapy and a bone marrow transplant that
resulted in a series of complications including temporary blindness and a drop in weight to 110 pounds. After the transplant, he was forced to retire and is currently dealing with the side effects. The suit, which was filed in 2013, initially included several other corporate Defendants. Those companies were either dismissed from the case or settled with the Plaintiff before trial.

The Plaintiff is represented by Peter A. Kraus, Susannah Cutter-Schindler and Jonathan A. George of Waters Kraus & Paul LLP and Scott R. Frielings of Allen Stewart PC. They did a very good job in this most significant case, which was tried in the 160th Judicial District Court of Texas. Source: Law360.com

XIV. TRANSPORTATION

**Truck Safety Act 2015**

Senate Bill 1739, the Truck Safety Act, has been introduced in the U.S. Senate. It was assigned to the Commerce, Science, and Transportation Senate Committee. This Act would address several safety related topics, including:

- Required rule making for collision avoidance systems in commercial motor vehicles;
- Finalize regulations to equip commercial motor vehicles with speed limiting devices;
- Establish a study on the effects of excessive commuting for commercial vehicle operators;
- Mandate employers to pay drivers from hours worked as opposed to miles driven;
- And finally, raise the minimum insurance limits from $750,000 to $1,500,000.

Federal road construction funding is also tied to this bill. Since the bill stalled in committee, Congress passed another temporary patch for federal road funding through Oct. 31, 2015. Trucking safety is still a very high priority among American drivers. Most drivers believe change should happen in the trucking industry. But Congress continues to do the trucking industry's bidding by frustrating the very regulators the government has employed to oversee motor carriers. Congress has:
The inequality of who dies in car crashes

Motor vehicle crash deaths per 100 million vehicle miles traveled among people aged 25 or older. Shading indicates 95% confidence intervals.

**It’s true that there are big differences in the quality of the residential environments that people have in terms of their risks of accidental death as pedestrians.**

The role of behavioral differences is not so clear. While some studies show lower seat-belt use among the less-educated, seat-belt use has also increased faster among that group over time. That would indicate that socioeconomic differences insofar as seat belt use is concerned, are narrowing. Data on alcohol use is also conflicting. The chart shown above, based on National Center for Health Statistics data used by the researchers, captures miles traveled not just by car, but also bus or other motor vehicles. It is evident that lower income folks are more likely to use transit, while the wealthy travel more by private car. The fatalities also include the deaths of pedestrians and cyclists hit in car crashes.

In 1995, these death rates—adjusted for age, sex and race—were about 2.5 times higher for people at the bottom of the education spectrum than those at the top. By 2010, they were about 4.3 times higher. That means the inequality of traffic fatalities is getting worse. We increasingly hear about new technologies that will save us from our own driving errors. There are to be cars that will brake for us, spot cyclists that we can’t see, and even take over all the navigation. It’s reasonable to anticipate that, at first, those benefits will mostly go to the more wealthy.

Source: The Washington Post

**XV. ENVIRONMENTAL CONCERNS**

**DID OIL GIANT EXXONMOBIL INFLUENCE CLIMATE CHANGE INFORMATION?**

In September a nonprofit news organization published a series of articles illustrating the role Exxon (now ExxonMobil) has played for decades in the argument about climate change. Titled “Exxon: The Road Not Taken,” the series published by Inside Climate News, asserts Exxon knew for decades that traditional fossil fuels have a cumulative effect on the environment, leading to potentially catastrophic climate change. The oil giant began studying the effects of greenhouse gases as early as the 1960s, but, despite its own findings that supported the role of fossil fuels in climate change, the company began to work against the evidence and to create confusion around the issue, the series authors say.

The series has created almost as much back-and-forth debate as the issue of climate change itself. In an opinion piece for The New York Times, Naomi Oreskes, a professor of the history of science at Harvard, points to the Inside Climate News series as evidence of a “campaign of disinformation” by the oil company in putting profits over scientific evidence. “We have lost precious time as a result,” she writes.

But Michael Lynch, a former MIT researcher at the Energy Laboratory and Center for International Studies, who now analyzes petroleum economics and energy policy for Forbes magazine, says the case being levied against ExxonMobil isn’t balanced. While it’s true, he asserts, that Exxon funded more than 30 organizations that would presumably argue against climate change, the company also funded independent academic climate change research—including at his alma mater, MIT—and participates on the Intergovernmental Panel on Climate Change (IPCC).

Oreskes admits that internal documents uncovered by the investigative series demonstrate that Exxon did, for a time, encourage climate change research, including by its own team of scientific investigators. The company even acknowledged “potentially catastrophic events that must be considered.” But then, she writes in her opinion piece, the company did an about-face and “chose the path of disinformation, denial and delay.”

Lynch, on the other hand, says the issue surrounding what Exxon did or didn’t do is more about public policy than science. Those who believe fossil fuels definitely are affecting climate change tend to demonize the oil industry, he says, while those with the opposing view say their opponents are more interested in securing government funding using the industry as an easy target. The truth, he says, probably lies somewhere in the middle ground.


**XVI. UPDATE ON NURSING HOME LITIGATION**

**THE MOST COMMON INFECTIONS IN THE ELDERLY**

I suspect at least some of our readers may have heard of the organization, “A Place for Mom.” For those who haven’t, I suggest they go to the agency’s website www.aplaceformom.com. There they will find a useful tool for those who are looking for senior living options, either for themselves or on behalf of an aging loved one.

Among the resources on this website, a blog is frequently posted that addresses matters of concern to our aging population. A regular contributor to that blog, Sarah Stevenson, an author from California, has written a number of extremely
good and helpful articles, including a recent article titled, “8 Predictions about the Future of Assisted Living.” Ms. Stevenson also wrote an interesting, and accurate, overview of infections in the elderly, titled “The 5 Most Common Infections in the Elderly.”

In reviewing potential nursing home claims, lawyers in our firm frequently see infections playing a role in the injury or death of a nursing home patient. Ms. Stevenson notes in her blog piece that, according to the American Academy of Family Physicians (AAFP), about one-third of all deaths of people older than 65 result from infectious diseases. That number is highly significant.

Being educated about the types of infections that are most common, as Ms. Stevenson points out, likely will assist the family members and the caregivers to more quickly observe changes in the patient’s behavior or attitude and more timely diagnose and treat infections in the elderly. Quoting from Infectious Disease Clinics of North America, Ms. Stevenson notes: “Nonspecific symptoms such as loss of appetite, decline in functioning, mental status changes, incontinence, and falls may be the presenting signs of infection.”

If a family member were to see an aged loved one exhibiting these signs or symptoms, several possible causes might be involved, including over-medication, underlying health issues, or simply failing health. But the problem also could be an acute issue, such as infection. Most infections can be eliminated if timely treatment, such as antibiotics, is provided. Also, the effects of infections, including sepsis, gangrene and the like, can be largely eliminated if timely and appropriate treatment is provided. Ms. Stevenson in her blog piece observes that the following five forms of infection are most common in senior adults:

- Urinary tract infections (UTIs);
- Skin infections;
- Bacterial pneumonia;
- Elderly influenza; and
- Gastrointestinal (GI) infections.

Ms. Stevenson notes that UTIs are the most common infection seen in the elderly. That’s consistent with what our lawyers find in nursing home litigation. Ms. Stevenson notes that this is common in patients with catheters or who suffer from diabetes, but our observation is that it goes far beyond this. Other contributing causes that we see, though not empirically supported, are dehydration and poor hygiene care of elderly patients in long-term care facilities. Medications may also indirectly contribute to the formation of UTIs, since some medications promote dehydration. As Ms. Stevenson notes, it is imperative that nursing home patients remain well hydrated. It is also important that UTIs are quickly diagnosed and treated.

The second type of infection noted by Ms. Stevenson is skin infections. Without a doubt, one of the top three types of cases lawyers in our firm review in the nursing home arena involves the formation of sores, pressure sores or decubitus ulcers. Any area of open skin dramatically increases the risk of bacterial infection, and the presence of bacteria in an open wound greatly increases the probability of the onset of sepsis. Once an elderly patient becomes septic, the risk of death is much more likely, especially if the sepsis becomes systemic. Ms. Stevenson notes some bacteria-reducing measures that can be followed, such as good handwashing, but there is no substitute for prevention of sores or open skin tears in the elderly.

Next, Ms. Stevenson lists bacterial pneumonia. Again, in our review of potential nursing home claims, we see a number of individuals who develop pneumonia. According to AAFP, referenced by Ms. Stevenson, “[m]ore than 60 percent of seniors older than 65 get admitted to hospitals due to pneumonia.” Ms. Stevenson lists a number of factors that increase the risks of pneumonia in the elderly, including reduced lung capacity, other morbidity factors (such as existing cardiopulmonary disease), diabetes and the like. Reduced activity among the elderly and lowered immune system function no doubt also greatly increase not only the risk of developing pneumonia but recovering from the onset of that illness. Vaccination against some forms of pneumonia is also not a bad idea either.

Ms. Stevenson also lists two other common infections among the elderly, and those are elderly influenza and GI infections. These, too, are serious medical conditions that need to be prevented, where possible, or timely treated where the onset cannot be avoided.

The most important thing for family members to remember, however, is that it is imperative to watch for change in the medical state of elderly persons. Increased weakness, confusion, difficulty breathing, difficulty communicating, or any other sudden onset of change in status should be quickly assessed. If the facility where a loved one is located will not assess the patient to the family’s satisfaction, it might be beneficial to insist on a transfer of the loved one to an emergency room for a full medical workup and evaluation.

Most of these issues can be determined through lab analysis, diagnostic evaluations such as x-rays, or by visual observations. Time is critical for those who are getting older in making sure the proper care is provided to maintain or improve the quality of life.

If you need more information, contact Ben Locklar, a lawyer in our firm who handles Nursing Home Litigation, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.


XVII. AN UPDATE ON CLASS ACTION LITIGATION

U.S. SUPREME COURT WILL DEAL WITH CLASS ACTIONS IN ITS BUSINESS DOCKET

The court returned for its new term on Oct. 5 with three major class action cases already scheduled for oral arguments this fall. In those cases, big business is urging the U.S. Supreme Court to curb class action litigation in a series of cases that will dominate the court’s business docket in the coming months. In other business cases of interest that will be decided before the term ends in June, the nine justices will hear a challenge to government regulation of the electricity markets and decide whether U.S. civil racketeering laws can apply to a company’s actions overseas. The class action cases give the conservative-leaning court another opportunity to cut back on such litigation, as it has done in a series of rulings in recent years. The most significant of those handed victories to Wal-Mart Stores Inc. and Comcast Corp.

In all three new cases, the U.S. Chamber of Commerce and other big business groups have filed court papers backing the businesses sued by workers and consumers. Thanks to the prevalence of arbitration clauses and the expense of fighting big businesses in court over lower individual damage amounts, a class action—in many cases—is the only way consumers can pursue grievances against huge corporations. Paul Bland, executive director of the consumer advocacy group Public Justice, said all three of the new cases are seeking “fairly dramatic change to the law that will really hammer class actions.” Let’s take a look at these three cases.
Tyson Foods

In one of the cases, scheduled for oral argument Nov. 10, the court will consider Tyson Foods Inc’s appeal of a $5.8 million judgment against the company over worker pay at an Iowa meat-processing facility. There are two issues on appeal in this case: whether liability and damages can be determined using statistical techniques that presume all class members are identical to the average observed in a sample as opposed to on an individual basis that would defeat class certification; and whether a class can be certified when it contains members who were not injured.

Spokeo

Another case, scheduled for argument Nov. 2, involves online people-search service Spokeo Inc. It focuses on whether Plaintiffs can sue for a technical violation of federal law even when they cannot show they have been harmed economically. The key here is the existence of congressionally created standing to bring a private right of action; the Court will need to decide whether Congress has the authority to legislatively create standing that satisfies the Constitutional harm requirement or whether evidence of actual harm is required in spite of Congressionally created standing. Businesses including Facebook Inc and Google Inc joined friend-of-the-court briefs backing Spokeo’s position, saying allowing such lawsuits to go forward encroaches abuse of the class action process.

Campbell-Ewald Co.

The third case concerns alleged violations of a federal consumer law by advertising agency Campbell-Ewald Co. The court, which heard argument Oct. 14, will decide whether litigation ends if the named Plaintiff is offered the maximum available damages. If so, the Court must then decide if the case could continue as a class action lawsuit that would potentially benefit multiple Plaintiffs. Consumer advocates say a ruling for the company would allow Defendants to nip class action lawsuits in the bud by, essentially, paying off the named Plaintiff; class actions would then have to start over and name a new Plaintiff (who would then be paid off, and so on). What is most interesting about this question, however, is that the Defendants here argue that a mere offer of complete relief moots the controversy.

Combined, these cases have the potential to eviscerate class-action cases. The individual calculation of damages prior to certification and ability of a Defendant to simply make an offer of complete relief place a very high barrier in front of the ability to achieve class certification. More than that, removal of congressionally created standing for certain federal laws would allow corporate Defendants to violate citizens’ rights with impunity. In all cases, injured persons are far less likely to bring claims asserting their rights; these three cases have the potential to be extremely dangerous to individuals’ rights to seek redress for wrongs they suffer.

Additional source: Scotusblog.

Shipping Companies To Pay $197.6 Million To Settle Price-Fixing Suit

Freight-forwarding companies accused of participating in an international price-fixing scheme have agreed to pay a total of $197.6 million in 11 separate settlements. This will bring to an end a long-running putative antitrust class action filed by purchasers. Lawyers for the putative class of purchasers filed a motion asking a New York federal judge for final approval on 11 separate settlements with companies that include Agility Logistics Corp., Hankyu Hanshin Express Holding Corp., Kintetsu World Express Inc., United Parcel Service Inc. and others. They said the total $197.6 million settlement—which makes up the second round of settlements in the nearly eight-year-long antitrust litigation over the alleged international price-fixing conspiracies—is fair and reasonable, and gives concrete cash benefits to a putative class made up of hundreds of thousands of customers.

The putative class is made up of hundreds of thousands of customers and businesses that use freight-forwarding services. It includes large businesses like Intel Corp., Apple Inc., Motorola Inc., Nike Inc. and other multinational companies, as well as small businesses and individuals, according to the motion. This second round of settlements will cover claims against Defendants that include Agility Holdings Inc., Agility Logistics Corp. and affiliates; Dachser GmbH & Co. KG; DHL Global Forwarding, DHL Express (USA) Inc., DHL Forwarding Japan K.K. and DHL Japan Inc.; and affiliates for the Japanese, severed-claims only.

The settlement also applies to DSV A/S; Geodis SA; Hankyu Hanshin Express Holding Corp.; Japan Aircargo Forwarders Association (Jafa); Kintetsu World Express Inc. and its U.S. subsidiary Kintetsu World Express USA Inc.; “K” Line Logistics Ltd. and its U.S. subsidiary “K” Line Logistics USA Inc.; MOL Logistics (Japan) Co. Ltd. and its U.S. subsidiary MOL Logistics (USA) Inc.; Nippon Express Co. Ltd. and its U.S. subsidiary Nippon Express USA Inc.; and Nissin Corp. and its U.S. subsidiary Nissin International Transport USA Inc.

Other settling Defendants include Yamato Global Logistics Japan Co. Ltd. and its U.S. affiliate Yamato Transport USA Inc.; Yusen Air & Sea Service Co. Ltd. and its U.S. subsidiary Yusen Air & Sea Service USA Inc.; Jet Speed Logistics Ltd. and affiliates; Panalpina World Transport (Holding) Ltd. and Panalpina Inc.; SDV Logistique Internationale; Toll Global Forwarding USA Inc.; and United Parcel Service Inc. and UPS Supply Chain Solutions Inc. This group of settlements comes more than two years after the New York federal court approved the first round of settlements in August 2013. Those comprised 10 settlement agreements that established a $112 million fund.

The litigation dates to January 2008, when the purchasers—including Mail Boxes Etc. Inc., Precision Associates Inc. and JCK Industries Inc.—first filed suit, alleging numerous freight forwarders were involved in 11 conspiracies to fix prices in violation of the Sherman Act. The purchasers alleged that shortly after the Sept. 11, 2001, terrorist attacks, the freight forwarding companies conspired to pass on all post-9/11 surcharges to their customers by agreeing to “fix, inflate and maintain” several subsequently arising surcharges for U.S. Freight Forwarding Services. The alleged agreement encompassed all new surcharges from carriers.


Source: Law360.com

Flushable Wipes Class Actions Stayed Pending FTC Inquiry

A federal judge in New York has ordered a stay in six proposed class action lawsuits accusing various manufacturers of selling...
“flushable” wipes that clogged pipes, causing damage to both home plumbing systems and those in municipal wastewater treatment systems. The wipes allegedly damaged these systems because they failed to disintegrate after being flushed, which, according to the Plaintiffs, contradicts their claim to be “flushable” and amounts to false and deceptive advertising. Similar lawsuits filed across the country have not been stayed.

The Federal Trade Commission (FTC) is currently investigating the meaning of the term “flushable” to determine whether the wipes are falsely marketed and sold. U.S. District Judge Jack B. Weinstein stated that an FTC ruling clarifying this term will help prevent inconsistent judgments across various jurisdictions. The judge also noted that one manufacturer, Nice-Pak Products, Inc., whose products are sold by CVS and Costco Wholesale Corp., among others, had already reached a tentative agreement with the FTC. Under the terms of this agreement, Nice-Pak would stop advertising its wipes as being “flushable” unless it could substantiate that claim, and it would also cease providing retail customers with information used to make that claim on its products.

The flushability of these wipes has recently been questioned across various platforms. News reports have documented the extensive damage caused by collected heaps of wipes to both individual and municipal waste water disposal systems and ultimately advised people against flushing them. Even municipalities have taken action, including New York City Council members who proposed legislation cracking down on the “flushable” marketing statements, and cities such as Seattle issuing warnings to their residents.

Source: Law360.com

XVIII.
THE CONSUMER CORNER

15 MILLION CONSUMERS AFFECTED BY EXPERIAN DATA BREACH

T-Mobile USA announced last month that as many as 15 million of its customers may have been affected by a data breach at Experian North America, a California-based credit bureau and consumer data broker. Experian handled financing for the wireless service provider. It is believed the data breach may have lasted as long as two years (Sept. 1, 2013 to Sept. 16, 2015). An Experian spokesperson says the company detected the breach Sept. 15, 2015, and that it was verified that the T-Mobile data was stolen on Sept. 22, 2015.

Experian says the T-Mobile files stolen did not contain consumer credit or debit card information, or any other banking information. However, the compromised file did contain names, dates of birth, addresses, Social Security numbers, drivers’ license numbers if provided, and any other additional information used in T-Mobile’s credit assessment process. As a result of the data breach, Experian and T-Mobile will very likely be the subject of multidistrict litigation (MDL). It was reported by Law 360 that the U.S. Judicial Panel on Multidistrict Litigation will decide if the pending cases will be combined, along with any future similar cases lodged against the two companies. Beasley Allen lawyer Andrew Brasher had this to say about the MDL:

The MDL process is a way to concentrate and consolidate pre-trial motions and discovery before one court. This serves to efficiently handle common issues and disputes instead of litigating those issues across courts nationwide, where different and inconsistent rulings could occur. I believe the Experian data breach cases should be placed into an MDL and am confident that the Judicial Panel on Multidistrict Litigation (JPML) will likely agree. The key question will be, Where does the JPML see fit to place the MDL?

If you are a T-Mobile customer and believe your personal information may have been compromised in the Experian data breach, you may have reason to file a claim against the companies. For more information or to talk to a lawyer about your potential claim, contact one of the lawyers in our Consumer Fraud section: Andrew Brasher, Archie Grubb, Larry Golston or Lance Gould at 800-898-2034 or by email at Andrew.Brasher@beasleyallen.com, Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com or Lance.Gould@beasleyallen.com.

Sources: Krebs on Security, Law360.com

CHRYSLER TRICKS CONSUMERS INTO SIGNING ARBITRATION AGREEMENTS

What does a discount on a new vehicle actually cost you? As it turns out, it may cost you your rightful day in court. Each of Detroit’s Big Three automakers offer an employee “friends and family” discount on new vehicles, but only one, Fiat Chrysler, requires those using the discount to give up their constitutional right to a jury trial in return for saving a few hundred dollars. Rosemary Shahan, president of the Sacramento advocacy group Consumers for Auto Reliability and Safety, had this to say, “This discount is like the piece of cheese on the trap that kills the mouse.” Although arbitration clauses are prevalent in consumer contracts today, Chrysler is taking it to another level by attempting to incentivize and encourage consumers to forego their constitutional right to sue.

Chrysler uses a Group Employee Advantage form, in addition to mounds of other paperwork, that contains a fine print arbitration clause stating that in return for the discount the buyer “will not be able to bring a lawsuit for any warranty disputes relating to this vehicle” and will instead agree to “mandatory arbitration.” The form says at the top that it is for a “Friends and Family” program. The buyers don’t know they are taking part in any such program. To make matters worse, dealers rarely, if ever, point out to their customers that they are signing away their right to sue the manufacturer in exchange for a couple hundred dollars.

Instead of being able to file suit in the courts, consumers will be forced to arbitrate with an arbitrator chosen by Chrysler, in a forum chosen by Chrysler and under rules written by Chrysler. Before agreeing to any of the offered discounts, especially when buying a Chrysler, Dodge, Jeep, or Fiat, I would suggest that you decide if you really want to give up your constitutional right to a jury trial in the event you later find out you have a vehicle with a serious safety defect and need access to the courts.

Sources: The Consumerist and L.A. Times

FRAUD CLASS ACTION CLAIM FILED AGAINST FANTASY SPORTS SITES

A lawsuit was recently filed against two large fantasy sport companies over their employees’ possible use of insider information. FanDuel and DraftKings are companies that allow fans to formulate their own “fantasy teams” from the athletes playing in the professional sporting leagues. Some players are worth more than others and how those players perform determine whether the fan wins and how much. Each week, the fans play in “pools” against other fans and select players using metrics set by the fantasy sporting companies. Some pools cost as low as $20 to play, while others cost several thousand dollars. The larger the pool, the larger the payout. The lawsuit alleges that employees of the fantasy sport companies had early access to certain metrics and betting trends that
the average fan and player did not have.
The lawsuit alleges that this material information was not disclosed and should have been. The fantasy sport companies have confirmed that their employees have won approximately $6 million, out of a total of more than $2 billion that has been paid out to date.

This lawsuit is the latest fallout from a controversy that erupted when it was discovered that a DraftKings employee had inadvertently released information about which athletes were most likely to end up on the rosters. The week before the employee, Ethan Haskell, had won $350,000 playing in contests on FanDuel, raising questions about whether he had used proprietary information to gain an edge on the competition.

The lawsuit questions the companies’ decision to let their employees play on other sites. Until recently, workers at FanDuel and DraftKings didn’t seem to see anything wrong with playing fantasy sports while running fantasy sports companies. Both companies had banned players from playing on their own sites, but didn’t restrict any other action. At DraftKings, employees were actively encouraged to play on FanDuel, according to a former employee. Thomas Starr, who worked for both DraftKings and Draftstreet, another daily fantasy sports company, said one of the draws of working at a fantasy company was spending the day talking about playing the games.

“It’s an ongoing conversation all day, like an open forum, who’s betting on what, who’s the sleeper today,” he said. DraftKings and FanDuel have now banned their workers from playing fantasy sports for money, a restriction that parallels the practices of some casino companies that prohibit employees from placing bets at competing casinos.

Although the class action lawsuit was filed on behalf of fans who played in DraftKings and FanDuel pools, these companies are also under investigation by the New York Attorney General and are facing calls for congressional hearings. The powerful and influential Nevada Gaming Control Board has issued a “cease and desist” order barring both companies from operating in Nevada unless they apply for and are granted gaming licenses. The companies may well face scrutiny by the U.S. Federal Trade Commission over possible violations of consumer-protection laws. We will continue to monitor this matter and will do an update in the December issue.

Source: Insurance Journal

Lumber Liquidators To Pay $13.2 Million Settlement With The Federal Government

Lumber Liquidators will pay $13.2 million to settle a Department of Justice (DOJ) investigation primarily related to hardwood flooring imported from foreign suppliers, including Eastern Russia, that harvested more timber than permitted. As part of the settlement, which still requires court approval, Virginia-based Lumber Liquidators agreed to plead guilty to violations of federal customs law and the Lacey Act, a U.S. conservation law regarding the protection of plants, fish and wildlife. This settlement is unrelated to current California Air Resources Board-related claims related to the sale of Chinese-made flooring that exceeds the state agency’s standards for safe formaldehyde emissions.

This agreement is with the Environment and Natural Resources Division of the federal law enforcement agency. Lumber Liquidators pled guilty to four misdemeanor due care violations of the Lacey Act and a single felony charge for entry of goods by means of false statements. In addition to the $10 million settlement, which includes “community service contributions” totaling more than $1.2 million to the National Fish and Wildlife Foundation and the Rhinoceros and Tiger Conservation fund, there also is a $3.2 million payment in lieu of civil forfeiture of the non-compliant flooring. In exchange for the payment, the company will be permitted to sell the product and retain the proceeds.

According to the operative complaint, Lumber Liquidators reported gross margins that were significantly higher than those of its major competitors, Home Depot and Lowe’s Companies Inc., which it attributed to partnerships in China that allowed it to cut out middlemen and work directly with suppliers. In reality, the company was buying engineered and laminate flooring manufactured in China that contained and emitted dangerously high and illegal levels of formaldehyde, as well as wood that had been illegally harvested from protected forests in the Russian Far East, home to the critically endangered Siberian tiger and Far East leopard, which are both among the rarest animal species on the planet, according to the complaint.

The scheme was only discovered when independent analysts began investigating the company, followed by federal regulators and most recently, journalists at “60 Minutes,” the complaint said. Unhappy customers have also filed proposed class actions accusing the retailer of duping consumers by falsely touting that its inventory from China complies with emissions standards for formaldehyde, a toxic chemical. Two false advertising complaints—filed in March in California and South Carolina federal courts, respectively—alleged that Lumber Liquidators routinely sells Chinese-made flooring that greatly exceeds California Air Resource Board standards for safe formaldehyde emissions.

Source: Law360.com

LinkedIn To Pay $13 Million To Settle Lawsuit Regarding Unwanted Emails

LinkedIn, the social networking site, has agreed to pay $13 million to settle a lawsuit from members who complained that unwanted emails were sent out on their behalf. On Oct. 2 LinkedIn emailed users informing them of the class action settlement. As part of the settlement, LinkedIn agreed to tell members that two email reminders may be sent to each requested connection. By next year, users will also be able to stop reminder emails from being sent.

The customers can get up to $1,500 each from the settlement. The amount will be calculated based on how many LinkedIn users file claims. The settlement affects LinkedIn members who used the site’s “Add Connections” feature between Sept. 17, 2011, and Oct. 31, 2014. If there are so many approved claims that the award to each customer would be less than $10, then LinkedIn will put forward another $750,000. The suit was filed against the company in 2013. LinkedIn members who used the “Add Connections” feature were upset that address book contacts they’d requested to connect with had received multiple reminder emails. While the members had agreed to send an initial email inviting the contact to connect, they weren’t aware that up to two reminder emails would be sent to the contact.

Affected LinkedIn members have until Dec. 14 to submit a claim form to be included in the settlement. They must attest to the fact that they used “Add Connections” to import contacts and send emails to one or more contacts during the specified time frame.

Source: CNN Wire Service

$2.5 Million Verdict Returned In Cancer Misdiagnosis Lawsuit

A tragic case filed by woman, who was the victim of a most serious mistake made by a hospital, is certainly noteworthy. Five years ago, 44-year-old Zoraida Zambrana was diagnosed with thymic cancer, a rare cancer of the thymus gland in the chest.
Mrs. Zambrana underwent three months of painful chemotherapy, but the treatment didn’t work. Her doctors said they were puzzled and then they made a startling discovery—the woman didn’t have cancer. Further research revealed her biopsy slides had been mixed up at Richmond University Medical Center with those of another patient, who did have thymic cancer.

Last month, in the case filed by Mrs. Zambrana, a jury found Richmond University liable for the woman’s pain and suffering and mental anguish. She was awarded $2.5 million in damages. Mrs. Zambrana, who is now 46, suffers from permanent fatigue and shortness of breath and has lost her sense of taste due to the chemotherapy.

The thymus is a small gland in the upper part of the chest extending upward into the root of the neck, according to the website of the Foundation for Thymic Cancer Research. The gland helps produce white blood cells in childhood, which aids the body’s immune system. The thymus slowly decreases in size during adulthood and is gradually replaced by fat tissue, said the foundation. A mass had been found in Mrs. Zambrana’s chest and she went to Richmond University on Oct. 26, 2010, to undergo a biopsy to determine whether the mass was cancerous.

Mrs. Zambrana was told her biopsy came back positive and she that had thymic cancer. Thymic cancer often proves deadly if not diagnosed and treated early. After breaking the news to her children and husband Emmanuel, a Coast Guard chief warrant officer, Mrs. Zambrana elected to undergo chemotherapy at Memorial Sloan Kettering Cancer Center in Manhattan. She received chemo for three months, during which time her hair fell out and she suffered with fatigue, loss of breath and other symptoms. However, the treatment appeared to have no effect on the mass, which was quite puzzling to her doctors. They decided to remove the mass and to their surprise tests showed it was benign.

An “extensive investigation” followed. Mrs. Zambrana’s DNA was checked against the DNA in the cancerous sample and it didn’t match. The doctors realized the cancerous sample belonged to another person, and that Mrs. Zambrana’s slide had apparently been mixed up with the other person’s at Richmond University. That turned out to be exactly what happened.

Source: Staten Island Advance

**Dresser Tip-Over Concerns Continue Despite Recall**

IKEA recalled millions of dressers after acknowledging that two toddlers died after its units crashed onto them. It now appears that the company is still selling these dangerous products. It should be noted that IKEA doesn’t believe its dressers have to comply with the industry’s voluntary stability standard. The company has refused to say whether it has tested or made design changes to the two MALM dressers involved in the 2014 deaths of a 23-month-old boy and 2-year-old Curren Collas.

The Philadelphia Inquirer has been looking into the dressers for a good while. The Inquirer bought each of these dressers at IKEA’s Philadelphia store and had them tested by an independent lab. The dressers failed even the least onerous stability test. When their unloaded drawers were extended, the dressers craned, then crashed forward. Under the pressure of 50 pounds hung on one drawer - meant to represent the weight of a child—the dressers toppled over. Bobby Puett of Diversified Testing Laboratories, which reviewed the dressers, stated:

“It’s so quick. You put the weights on it. You have to have your hands up - [because] it’s coming down.

IKEA has sold at least seven million MALM dressers in the United States. In its July 22 announcement, issued along with the safety commission, the Swedish furnishings giant said it would offer new anchoring hardware for those and 20 million other dressers and would launch a public awareness campaign on tip-overs. IKEA, which has its U.S. headquarters in Conshohocken, Penn., stopped short of asking customers who bought the dressers to return or replace them. It promoted the initiative as “a repair program,” in order to keep from using the word recall. In August, the Canadian government issued its own recall of six million IKEA dressers.

More than 75 children in the United States died in 2010 and 2011 when furniture, televisions, or appliances tipped onto them, according to federal data. Many dresser manufacturers, including IKEA, provide restraints with their units, but advocates argue furniture should be stable on its own because consumers are unaware of the danger and often don’t use the tethers. Federal regulators have called for changes and criticized the industry for lacking the will to solve the problem. However, the safety commission has also been criticized for not ordering a full recall of the MALM dressers.

Source: Philly.com

**Japanese Suppliers Admit Falsifying Building Materials Data**

Two Japanese companies have admitted falsifying data on the quality of building materials, raising concerns about the safety of rubber goods and other materials used for ships, trains and buildings. One of the companies, Toyo Tire & Rubber Co., said that an internal probe found the company over 10 years manipulated testing data for products supplied to 18 customers. Separately, Asahi Kasei Corp., the other company, said its construction materials unit modified data on the installation of foundation piles for condominium construction. The admissions raise questions about the safety of buildings and products in Japan—a country long known for the quality of its manufacturing—and that is a major concern.

Toyo’s previous chairman and president announced their resignations in June, months after the company admitted to selling substandard quake-resistant components for buildings. Minoru Matsuno, president of Value Search Asset Management Co., a Tokyo-based investment advisory firm that does not own Toyo Tire shares, stated:

“This is a hopeless company that could damage Japan’s image for high quality. They need to bring in a new president from outside.

Toyo said the company will expand its investigation and check products made over the past two decades. The rubber products identified aren’t used in bullet trains or aircraft, a transport ministry official told reporters in Tokyo. The ministry said it has yet to identify which ships and trains are using them, but that the Toyo products likely don’t pose any immediate threat. Spokesmen for Central Japan Railway Co. and West Japan Railway Co. have confirmed that some of their trains use affected Toyo Tire rubber products. Yu Sunagawa, a spokesman for East Japan Railway Co., said the company uses some Toyo Tire products but was still checking whether or not it uses the products in question.

Toyo Tire said in its statement that it has yet to collect enough information to estimate the effect on its earnings. In the case of Asahi Kasei, the company said it modified the construction data under a subcontract with Sumitomo Mitsui Construction Co. Sumitomo Mitsui shares, which had dropped 31 percent, surged 24 percent after Asahi Kasei said it would bear the costs for reinforcement, renovation and examination of other buildings. Asahi Kasei said it is investigating the cause.

Source: Claims Journal
GM RECALLS MORE THAN 400 VEHICLES OVER TAKATA AIR BAG DEFECT

General Motors (GM) has recalled more than 400 vehicles including 2015 model Buick LaCrosse, Cadillac XTS and Chevrolet Camaro cars over the deadly defects in Takata Corp.’s air bag inflators that have already caused the recall of some 34 million vehicles this year. General Motors Co. disclosed to NHTSA that it is recalling a total of 414 cars and SUVs—395 in the U.S.—because of potential issues in the front seat-side air bag inflators. GM said in a statement that it is “unaware of any incidents involving vehicles with these components” and that it believes that a small percentage of the recalled vehicles may contain the defect. It said also that the components behind this recall are part of a batch in which one of the inflators didn’t pass a test by GM’s supplier.

The GM vehicles being recalled include 2015 model Buick LaCrosse, Cadillac XTS, GMC Terrain and Chevrolet Camaro, Equinox and Malibu vehicles. The automaker said it is contacting customers affected by the recall through overnight letters and that dealers will fix the defect for free. GM said in its statement:

The rupture could cause metal fragments to strike the vehicle occupants, potentially resulting in serious injury or death. Dealers will replace the side air bag module or modules in affected vehicles. Including Canada, Mexico and exports, the total population of the recall is 414.

GM estimates 1 percent of the recalled vehicles may have the defect.

2016 BUICK ENCLAVE, CHEVROLET TRAVERSE AND GMC ACADIA SUVS ARE RECALLED

Owners of some popular new crossover SUVs are being warned not to use their windshield wipers. General Motors has recalled 2016 Buick Enclave, Chevrolet Traverse and GMC Acadia SUVs because a wiper motor can encounter an electrical short and catch on fire. The vehicles are being repaired through replacement of wiper motor covers. The problem was found when one of the motors overheated at a GM factory. Only 6,400 of the nearly 32,000 crossovers were sold, according to GM. The remainder are at dealerships, where the automakers say they will stay until they are repaired. Because of the no-drive warning, GM is offering to come to customers for the repair if they can’t come to the dealership. The automaker is also offering provide rental vehicles to owners whose dealers are telling them they can’t get repair parts.

TOYOTA RECALLS 6.5 MILLION VEHICLES DUE TO POWER WINDOW PROBLEM

Toyota has recalled 6.5 million vehicles worldwide due to power-window switches that do not have enough grease and could catch fire. The problematic switches according to Toyota, will be either fixed or replaced in less than an hour. The affected cars were produced between 2005 and 2010, and include Toyota’s Yaris, Corolla, Matrix, Camry, RAV4, Highlander, Tundra, and Sequoia models, among others. Scion xB and Scion xD models are also included in the recall. The automaker said it had received 11 reports of burnt door trim, and one report from the U.S. of a customer who suffered a burn on their hand. About 2.7 million of the cars were sold in North America, 1.2 million in Europe, and 600,000 in Japan, according to Toyota.

HONDA TO RECALL 143,000 CIVICS AND FITS DUE TO REMEDY FAULTY SOFTWARE AND A WEAK TRANSMISSION

Honda has recalled all 2015 model-year Fit vehicles because of a software issue. The recall involves 143,000 Civics and Fits in the U.S. to update faulty software that damages the vehicles’ transmissions and increases the risk of crashes. The software, which manages the continuously variable transmission, or CVT, system in the vehicles, has been written to use more hydraulic pressure during certain operating settings than the cars’ transmissions can handle, according to Honda. Because some parts of the CVT systems in these cars were produced at the low end of the required hardness specifications, excessive pressure can break the vehicles drive pulley shafts, which can in turn cause the cars to lose acceleration or front-wheel steering. This issue, which was discovered during Honda’s warranty claim process in the U.S., has not lead to any crashes or injuries, according to the Japanese carmaker. But the faulty software puts drivers at a greater risk. Civic and Fit owners will be able to take their vehicles to their local Honda dealer and have the software fixed free of charge.

KIA SET TO RECALL 377,000 SORENTO OVER ROLL-AWAY RISKS

Kia Motors has agreed to recall more than 377,000 of its Sorento vehicles in line...
with National Highway Traffic Safety Administration (NHTSA) regulations after receiving reports of injuries caused by a brake shift malfunction that allows a parked car to roll away. NHTSA said Kia Motors America Inc. notified the agency of its intention to begin a recall of 377,062 Sorento crossover sport utility vehicles between model years 2011 and 2013 by the end of this month due to three reports of injury caused by the car’s transmission shifting out of park without stopping on the brake pedal.

The malfunction is caused by chips or cracks in the car’s park position catch resulting from repeated “excessive force” applied to the gear shift lever. All of the recalled vehicles are estimated to be affected by the issue, according to NHTSA documents. “A vehicle that is shifted out of park without depressing the brake pedal can allow the vehicle to roll, creating a risk of crash and/or injury, especially if a driver is not present,” the agency said in a safety report.

Kia has reviewed field data for 2011 to 2013 Sorentos and found 54 warranty claims, 14 customer complaints and three alleged injuries, according to NHTSA documents.

**Nissan Recalls 300,000 Versas Over Road Salt Corrosion**

Nissan has agreed to recall more than 300,000 of its Versa cars sold across so-called salt-belt states in the U.S and in Canada over concerns that front coil springs will corrode and fracture with continued exposure to road salt. Nissan said the recall will affect 218,019 model year 2007 to 2012 Versas sold in 21 eastern states and 101,488 sold in Canada. Corrosion in the cars results from driving heavily salted roads in colder months and leads to fracturing of front coil springs and ultimately failure of the car’s front suspension and tires.

Nissan will notify owners of potentially affected vehicles and will ask them to bring their vehicle to a Nissan dealer to have both front springs replaced at no cost to the vehicle’s owner for parts and labor related to the recall repairs. The recall is expected to begin by mid-November, according to the National Highway Traffic Safety Administration (NHTSA), which launched an investigation into the problem in May after receiving 93 complaints of front coil spring fractures and one complaint of a crash related to the defect. In its preliminary analysis, the agency found that coil spring failures could happen without warning and at any speed.

One consumer stated that the passenger-side coil spring in their Nissan Versa fractured while the car was driving at 65 miles per hour, leading to sudden tire failure. Another complaint said a passenger-side coil spring fractured at 40 mph, resulting in tire puncture and brake line failure. Nissan says it has received no reports of accident or injury related to the issue. The Versa recall comes less than one month after Nissan announced a recall of almost 300,000 other Versa and Versa Note cars over an obstruction near the vehicles’ acceleration pedal that could catch a driver’s shoe when they went to press the brakes. That recall, prompted by a California lawsuit over the same issue, affected 298,747 vehicles among Nissan’s model year 2012-2015 Versas and 2014-2015 Versa Notes.

According to the California suit, the defect caused the driver of a 2012 Versa to swerve onto a sidewalk, killing a woman and severely injuring her sister and daughter. The Plaintiff in the case filed a motion to dismiss the suit in August due to a problem with diversity jurisdiction.

**Fiat Chrysler Recalls 180,000 Vehicles Over Safety Risks**

Fiat Chrysler is recalling nearly 180,000 vehicles worldwide over concerns about a potential fire hazard in certain Jeep Cherokees and a problem with the rear axle of Ram 1500 pickups. Fiat Chrysler Automobiles US LLC is recalling an estimated 75,000 2015 Jeep Cherokees in the U.S. because the air conditioning lines in some vehicles were installed close to the engine’s exhaust manifold, resulting in a fire risk under certain conditions. The recall also includes approximately 7,600 vehicles in Canada, 4,000 in Mexico and 7,000 in other countries. The automaker said it launched an investigation after NHTSA said it received two complaints about smoke and fire.

In a separate statement, Fiat Chrysler said it is also recalling nearly 66,000 2015-2016 Ram 1500 pickups after an investigation revealed that one of its suppliers produced axle shafts that weren’t properly heat-treated. The automaker said this could contribute to increased wear and tear and cause the vehicle’s anti-lock brake system warning light to illuminate and potentially lead to a fracture and wheel separation. Most of the affected vehicles in the U.S. are in dealers’ hands. Additional vehicles in other markets are affected. Fiat Chrysler said, including approximately 16,600 vehicles in Canada, 1,900 in Mexico and 1,700 in other countries. For both recalls, the company said affected customers will be notified when they can schedule their vehicles for service, which it said it will provide for free.

**Volkswagen To Recall 8.5 Million European Unit Vehicles Over Emissions Scam**

On Oct. 15, Germany’s automotive regulator rejected Volkswagen AG’s remediation plan for diesel vehicles equipped with the software designed to cheat emissions tests. Instead, the automaker was instructed to initiate a recall covering about 8.5 million vehicles across the European Union. The German Federal Motor Transport Authority (KBA), which is overseeing the scandal as the lead regulator among national EU agencies, has determined that 2.4 million vehicles will be recalled in Germany alone, according to a statement from Volkswagen.

**13 Manufacturers And Distributors Recall Bicycles**

A crash hazard has prompted the recall of more than 1.5 million bicycles with front disc brakes and quick release levers. The recall involves 13 manufacturers and distributors and covers more than a dozen brands, including Diamondback, Cannondale, and Jamis. An open quick release lever on the bike’s front wheel hub can come into contact with the front disc brake rotor, causing the front wheel to come to a sudden stop or separate from the bike, causing the rider to crash. There have been three incidents reported, including one with injuries. Bicycle stores nationwide sold the bikes from 1998 through this year. Consumers can get free installation of a new quick release.

Bikers can visit this recall website to find out details and if their bike is part of the recall. Anyone with a bike subject to the recall should stop riding it and take it to a bike dealer to have a new quick-release installed, sometimes in as little as five minutes. “Rider safety is our top priority,” said Patrick Cunnane, chairman of the Bicycle Product Suppliers Association. “We are pleased to be able to serve a role in bringing together the participating companies and facilitating this unprecedented large group effort.” The recall is being conducted by the 13 companies in conjunction with the U.S. Consumer Product Safety Commission, Health Canada, and the Consumer Protection Agency of the United Mexican States.

About 1.3 million of the recalled bikes were sold in the United States. About
About 2,500 Katerina Swivel Armchairs have been recalled. The swivel armchair can tip backward while rocking and consumers can fall off, posing a fall hazard. This recall involves Pier 1 Imports’ Katerina model outdoor patio swivel armchairs. The chair is black/brown powder-coated aluminum and swivels and rocks. The chairs measure about 29 inches wide, 32 inches deep and 38 inches high. The chair has SKU number 2899742. Pier 1 Imports, Katerina and the SKU number are printed on the chair’s hangtag. Pier 1 Imports has received five reports of the chair tipping over in stores with consumers in them, including one report of a consumer who received contusions and scratches. The armchairs were sold exclusively at Pier 1 Imports stores nationwide and online at www.Pier1.com from December 2014 through July 2015 for between $375 and $580.

Consumers should immediately stop using the recalled swivel armchairs and return them to any Pier 1 Imports store for a full refund or for a store credit. Contact Pier 1 Imports at 800-245-4595 from 8 a.m. to 5 p.m. CT Monday through Friday, Saturday from 9 a.m. to 5 p.m. CT or Sunday from 10 a.m. to 6 p.m. CT, or online at www.Pier1.com and click on Product Notes & Recalls at the bottom of the page for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/Pier-One-Imports-Recalls-Outdoor-Patio-Swivel-Armchairs/.

About 6,000 DaVinci Cribs have been recalled by Bexco Enterprises Inc., of Montebello, Calif. A metal bracket that connects the mattress support to the crib can break, creating an uneven sleeping surface or a gap. If this occurs, a baby can become entrapped in the crib, fall or suffer lacerations from the broken metal bracket.

Consumers should immediately stop using the recalled cribs and contact Bexco for a free replacement mattress support which includes replacement brackets. In the meantime, parents are urged to find an alternate, safe sleeping environment for the child, such as a bassinet, play yard or toddler bed depending on the child’s age. Contact DaVinci toll-free at 888-673-6652 from 8:30 a.m. to 5:15 p.m. PT Monday through Friday. Consumers can also visit www.davincibaby.com/safetyrecall3 or www.davincibaby.com and click on “Safety Recall” for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/Bexo-Expands-Recall-of-DaVinci-Brand-Cribs/

The cribs were sold at Target and juvenile products stores nationwide and online at Amazon.com from May 2012 to December 2013 for between $150 and $250. The recall includes DaVinci brand full-size cribs including the Reagan crib (model #M2801), the Emily crib, (model #M791), the Jamie crib (model #M7501), and the Jenny Lind crib (model #M7391) manufactured from May 2012 through December 2012. The model number, serial number and manufacture date are printed on a label affixed to the bottom right hand side panel of the crib. Cribs included in the recall have serial numbers that begin with “N00,” followed by one of the following numbers. The previous recall included the same model numbers, but had different serial numbers. The firm has received five additional reports of the mattress support brackets breaking and detaching. No injuries have been reported.

Ross Procurement Inc., of Dublin, Calif., has recalled about 500 of their Rattan Arm Chairs. The chair may tip or slide backward, posing a fall hazard to consumers. This recall involves Ross rattan arm chairs. The round chairs measure 48 inches high by 23 inches wide. The brown wicker chairs were sold with SKU number 400119000982 printed on a hang tag. The firm has received eight reports of minor injuries including scrapes and bruises.

The chairs were sold exclusively at Ross stores nationwide from May 2013 through May 2015 for about $120. Consumers should immediately stop using these recalled highchairs and contact the firm to receive instructions on receiving a new tray with labels. Contact Safety 1 st toll-free at 877-717-7823 from 8 a.m. to 5 p.m. ET Monday through Friday, email at decorwoodhighchair@digusa.com or online at http://www.safety1st.com and click on “Safety Notices” at the top of the page for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/Safety-1st-Recalls-Decor-Wood-Highchair/.

Clothing store chain Madewell is expanding a sandal recall because the shoes pose the risk of a fall. The sandals are “Katya” model women’s sandals from the company’s spring 2015 collection. A metal shank can dislodge and break through the bottom of the shoes, posing a risk that the wearer could fall, according to the U.S. Consumer Product Safety Commission. The shoes were sold for about $100 by Madewell in its stores and online from April through August. The company has received one report of a metal shank dislodging and breaking through the bottom. No injuries have been reported, however. The expansion involves about 570 units sold in the U.S. and three in Canada, the commission said in a news release. The company recalled 50,600 women’s “Sightseer” sandals in August. Consumers were advised to stop using the recalled shoes and contact Madewell for a full refund or for a store credit. Contact Madewell toll-free at 800-261-2040 from 8 a.m. to 5 p.m. CT Monday through Friday, email at help@madewell.com or online at http://www.madewell.com and click “Help & Support” then “Customer Service” then “Returns” then “Product Return” then “Request a Return” then “Submit” and follow the prompts. Photos available at http://www.cpsc.gov/en/Recalls/2016/Madewell-Expands-Recall-Of-Katya-Sandals-Due-To-Fall-Hazard/.

RATTAN ARM CHAIRS RECALLED BY ROSS STORES DUE TO FALL AND INJURY HAZARD

SAFETY 1ST RECALLS DECOR WOOD HIGHCHAIRS DUE TO FALL HAZARD

MADEWELL EXPANDS SANDAL RECALL DUE TO FALL HAZARD
refund, the commission said. Madewell is owned by J. Crew Group Inc. Madewell’s toll-free number is 866-544-1937 or online at www.madewell.com.

**Big Game Recalls Tree Stands Due To Fall Hazard**

BGHA, Inc. dba Big Game, of Windom, Minn. has recalled about 12,200 Climbing tree stands. The cable assembly on the climbing tree stand can release, posing a fall hazard to the user. This recall involves three model year 2014 Big Game climbing tree stands models: CL050 (The Outlook) with batch number 9B-0414, CL100-A (The Cobalt) with batch numbers 9B-0214 and 9B-0514, and CL500-AP (The Fusion) with batch numbers 9B-0214 and 9B-0514. These climbing tree stands are used to hunt from an elevated position and were sold with an accessory bag. The black metal tree stands include the main stand platform with a nylon hanging strap assembly. The Outlook has a nylon netted seat without a backrest. The Cobalt and The Fusion have a camouflage-print, padded seat with the Big Game logo at the front of the backrest. The batch number starts with BN and can be found on a small tag located on the frame below the seat. Global Manufacturing Company has received one report of the cable assembly releasing; which resulted in a broken vertebra, fractured rib and sprained shoulder.

The stands were sold at Menards and Rogers Sporting Goods stores nationwide and online from June 2014 through June 2015 for between $140 and $180. Consumers should immediately stop using the recalled tree stands and return them for free replacement cables. Contact Global Manufacturing Company at 888-393-9611 from 8 a.m. to 4:30 p.m. CT Monday through Friday or online at www.apioutdoors.com and click on Recall Notice for more information. Consumers can also write to the firm at Global Manufacturing Company/API Outdoors, P.O. Box 24, Windom, MN 56101. Photos available at http://www.cpsc.gov/en/Recalls/2016/Global-Manufacturing-Company-Recalls-API-Outdoors-Tree-Stands/.

**Horizon Hobby Recalls E-flite Chargers Due To Fire Hazard**

About 1,300 E-flite Ultra Micro-4 AC/DC Battery Chargers have been recalled by Horizon Hobby LLC, of Champaign, Ill. The chargers can overcharge the batteries and overheat, which could result in a fire, property damage and injury. This recall involves the EFLC1105 E-flite Ultra Micro-4, 4x9W, AC/DC Battery Charger from E-flite. The charger has four independently functioning charge circuits with a LED status display. Each port can charge one 30–150mAh 2S pack equipped with a JST-PH, 3-wire connector. The charger measures 5 inches tall by 7 inches wide by 1.5 inches deep. The charger is blue with a gray, black and blue faceplate with white and black type. “E-flite Celestra UMX-$ Battery Charger” is printed across the center of the charger.

The chargers were sold exclusively at Horizon Hobby stores nationwide and online at www.HorizonHobby.com and click on Support, then Safety Notices for a free inspection and repair. Contact BSH Home Appliances Repair Hotline toll-free at 888-965-5813 from 8:00 a.m. to 8:00 p.m. EST Monday through Sunday or the brand Web site for more information.

**BSH Home Appliances Recalls Dishwashers Due To Fire Hazard**

About 149,000 Bosch, Gaggenau, Kenmore Elite and Thermador Dishwashers have been recalled by BSH Home Appliances Corp., of Irvine, Calif. The power cord can overheat, posing a fire hazard. This recall involves power cords supplied with certain Bosch, Gaggenau, Kenmore Elite and Thermador brand dishwashers that were manufactured from January 2008 through December 2013. Model and serial numbers are located on the top side of the dishwashers’ inner door panels. BSH Home Appliances has received 10 reports of the electrical cord overheating, including five reports of fire resulting in property damage. No injuries have been reported.

The dishwashers were sold at appliance and specialty retailers, department stores, authorized builder distributors, home improvement stores nationwide and online between January 2009 and May 2014 for between $850 and $2600. Consumers should immediately stop using the dishwasher and contact BSH Home Appliances for a free inspection and repair. Contact BSH Home Appliances Repair Hotline toll-free at 888-965-5813 from 8:00 a.m. to 8:00 p.m. EST Monday through Sunday or the brand Web site for more information.

**Global Manufacturing Company Recalls API Outdoors Tree Stands Due To Fall Hazard**

Global Manufacturing Company, of Windom, Minn., has recalled about 5,300 climbing tree stands. The cable assembly on the climbing tree stand can release, posing a fall hazard to the user. This recall involves model year 2014 API Outdoors climbing tree stands model GCL300-A (The Marksman) with batch numbers 9G-0114 and 9G-0614. The climbing tree stands are used to hunt from an elevated position and were sold with an accessory bag. The light green metal tree stands include the main stand platform with a nylon hanging strap assembly. They have a nylon netted seat without a backrest. The batch number starts with BN and can be found on a small tag located on the frame below the seat. Global Manufacturing Company has received one report of the cable assembly releasing; which resulted in a broken vertebra, fractured rib and sprained shoulder.

The stands were sold at Bass Pro Shop, Cabela’s, Menards, Rogers Sporting Goods and Sportsman’s Guide stores nationwide and online from June 2014 through June 2015 for between $130 and $380. Consumers should immediately stop using the recalled tree stands and return them for free replacement cables. Contact Big Game at 800-268-5077 from 9 a.m. to 4:30 p.m. CT Monday through Friday or online at www.biggametreestands.com and click on Recall Notice for more information. Consumers can also write to the firm at Global Manufacturing Company/API Outdoors, P.O. Box 382, Windom, MN 56101. Photos available at http://www.cpsc.gov/en/Recalls/2016/Global-Manufacturing-Company-Recalls-API-Outdoors-Tree-Stands/.


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**United States Stove Company Recalls Pellet Stoves Due To Fire Hazard**

About 4,400 Pellet Heater/Stove have been recalled by United States Stove Company, of South Pittsburg, Tenn. The internal fire box baffle can degrade, overheat and pose a fire hazard. The recall includes United States Stove Company’s HomComfort 2400 24K BTU Pellet Heater/Stoves. These steel and polycarbonate products are grey and are used as a window mounted heating appliance. The heaters measure about 21.5 inches high by 24.5 inches deep by 23 inches wide. Serial numbers included in the recall are 0451 through 4420, 5681 through 5890 and 6301 through 6310. The firm name and serial number are printed on the faceplate attached by screws on the front bottom of the unit. The United States Stove Company has received 16 reports of fire and property damage. No injuries have been reported.

The stoves were sold Northern Tool, Orsheln, Orgill Brothers and Rural King home heating retailers and online at www.HomeDepot.com, www.Lowes.com and www.NorthernTool.com from April 2010 through March 2012 for about $1000. Consumers should immediately unplug these units, stop using the product and return the circuit board and serial face plate to the firm for $868 cash or $1,200 credit towards the purchase of any United States Stove Company product. Contact United States Stove Company toll-free at 844-211-6025 from 8 a.m. to 5 p.m. CT Monday through Friday, email at productreturns2@uststove.com or online at www.unitedstove.com. For a direct link to the product return site please visit www.rebateoffer.biz. Photos available at http://www.cpsc.gov/en/Recalls/2016/United-States-Stove-Company-Recalls-Pellet-Stoves/

**Bed Handles Inc. Reannounces Recall Of Adult Portable Bed Handles**

The U.S. Consumer Product Safety Commission (CPSC) and Bed Handles Inc., of Blue Springs, Mo., are reannouncing the voluntary recall of about 113,000 adult portable bed handles following a fourth reported death. A 90-year-old woman living in a senior residence in Castro Valley, Calif., died after being entrapped in the gap between her mattress and the bed handle. When attached to an adult’s bed without the use of safety retention straps, a handle can shift out of place creating a dangerous gap between the bed handle and the side of the mattress. This poses a serious risk of entrapment, strangulation and death.

As previously reported, three other women died after becoming entrapped between the mattress and the bed handles. They include an elderly woman, age unknown, who died in an Edina, Minn., assisted living facility; a 41-year-old disabled woman who died in a Renton, Wash., adult family home; and an 81-year-old woman who died in a Vancouver, Wash., managed care facility. The recall involves adult portable bed handles sold by Bed Handles, Inc. from 1994 through 2007 that do not have safety retention straps to secure the bed handle to the bed frame to keep the bed handle from shifting out of place and creating a dangerous gap. Recalled models include the Original Bedside Assistant® (BA10W), the Travel HandlesT (BA11W) which is sold as a set of two bed handles, and the Adjustable Bedside Assistant (AJI).

The L-shaped bed handles are made out of 3/4 inch tubular steel, measure 20 inches wide, 16 to 20 inches tall and have 3 ft. poles that extend under the mattress. The Original Bedside Assistant® (BA10W) and the Travel HandlesT (BA11W) have a white handle with white poles that go under the mattress. The Adjustable Bedside Assistant (AJI) is gold in color and has a black cushioned foam handle. The bed handles are intended to assist adults with getting in and out of bed by giving them a bar to grip. Bed Handles, Inc. and the model number are printed on a white label on the bed handles. They were sold by home health care stores, drug stores and medical equipment stores nationwide and in home and health care catalogs from January 1994 through December 2007 for about $100. They were manufactured in the United States.

Consumers should immediately stop using all recalled bed handles that were sold without safety retention straps. Contact Bed Handles, Inc. for free safety retention straps to secure the bed handle to the bed frame, new assembly and installation instructions for models BA10W, BA11W and AJI and a warning label to attach to the bed handles. The bed handles should be used only with the safety retention straps securely in place attaching the bed handle to the bed frame in order to prevent a gap.

Contact Bed Handles Inc. at 800-725-6903 from 8:30 a.m. to 4:30 p.m. CT Monday through Friday, or online at http://bedhandles.com/recall.html

**TCC Cooking Company Recalls CHEFS Vertical Roasters Due To Burn And Laceration Hazards**

About 4,000 vertical roasters have been recalled by TCC Cooking Company of Colorado Springs, Colo. The vertical roasters can break or shatter, posing burn and laceration hazards. This recall involves CHEFS-branded flameproof ceramic vertical roasters. The black roasters consist of a round roasting pan with handles and a removable insert. The roasting pan measures 11.75 inches in diameter on the inside and 2.5 inches high and the removable insert measures 7.5 inches in diameter at the base and 4.5 inches high. The underside of the handles are slightly recessed for grip. The CHEFS logo is at the center of the rimmed base.

The roasters were sold at Chefscatalog.com, Cooking.com, Target.com and other online retailers from April 2014 through May 2015 for between $35 and $50. Consumers should immediately stop using the recalled roasters. Consumers who purchased the roaster through Target.com should return the product to any Target store for a full refund. All other consumers should discard the product and contact TCC Cooking Company to receive a gift card equal to the purchase price. Contact TCC Cooking Company at 800-338-3252 from 8 a.m. to 5 p.m. MT Monday through Friday, or online at www.chefscatalog.com and click on the Product Recalls link under the Need Help section. Consumers can also write to the firm at CHEFS Customer Care, 5070 Centennial Boulevard, Colorado Springs, CO 80919. Consumers can contact Target at 800-440-0680 from 7 a.m. to 6 p.m. CT Monday through Friday or online at www.target.com and click on the Product Recalls link at the bottom of the homepage under the Help section or click on the Product Recalls tab on Target’s Facebook page for more information.


**Calphalon Recalling 328,000 Pizza Cutters Due To Laceration Hazard**

Calphalon has recalled 328,000 pizza cutters because the handle can break during use, which has caused some people to cut their fingers. The company has so far received 11 incident reports, including six reports of finger lacerations. One person required stitches and another received medical attention to close their wounds. The pizza cutters were sold at Bed Bath & Beyond, J.C. Penney, Kohls, Target, Walmart, and other stores nation-
Chewbeads Recalls Pacifier Clips Due To Possible Choking Hazard

New York-based Chewbeads Inc. has recalled more than 45,000 pacifier clips due to a possible choking hazard. The company, known for non-toxic jewelry for moms, has recalled more than 45,000 pacifier clips in the United States and Canada due to a possible choking hazard.

According to the Consumer Product Safety Commission, the company, Chewbeads Inc., has received seven reports of beads detaching from the products but no reports of injuries. The recall applies to five styles of Chewbeads Baby pacifier clip holders, called “Where’s the Pacifier?”, those with shapes of a butterfly, a dinosaur, a heart, a sheriff’s badge, a white baseball with red stitching, and a major league baseball team logo. The pacifier clips have eight multi-colored beads threaded through a narrow satin ribbon that is connected to a pacifier on one end and a plastic D-ring on the other. The clip and beads measure about 6 inches long. The products were sold at Buy Buy Baby and small boutique retail stores in the U.S. as well as in Canada from September 2014 through June 2015. The baseball-themed clips were sold for $16.50, and the other styles were sold for $15. About 45,000 of the clips were sold in the U.S., while an additional estimated 5,900 were sold in Canada. The recalled clip has one of the following number codes on the back of the plastic clip: 3/31/14, 08/08/14, 12/01/14, 14/30/09, 15/02/09, 25/04/14, and the products were manufactured in China. Chewbeads and the Consumer Product Safety Commission advised consumers who bought the pacifier clips to immediately take them away from children and contact the company for either a refund or a replacement.

Build-A-Bear Recalls Stuffed Animals Due To Choking Hazard

About 33,600 Starbrights Dragon stuffed animals have been recalled by Build-A-Bear Workshop Inc, of St. Louis, Mo. The satin seam of the stuffed animal can open, allowing the stuffing material to be exposed, posing a choking hazard for young children. Starbrights Dragon is covered in a blue furry fabric with silver satin tummy, feet pads, wings and horns. The horns light up and the toy makes a musical sound when the hand is squeezed. The stuffed animal is about 17 inches high. The tracking label ending with 9333 or 9334 for USA and 9337 or 9495 for Canada can be found on the label sewn on the backside of the leg.

The animals were sold at Build-A-Bear Workshop stores and online at www.buildabear.com between April 2015 and August 2015 for about $25. Consumers should immediately take the recalled stuffed animal away from children and return it to any Build-A-Bear Workshop store to receive a coupon for any Build-A-Bear stuffed animal. Contact Build-A-Bear toll-free at 866-236-5638 from 8 a.m. to 8 p.m. CT Monday through Friday, from 9 a.m. to 6 p.m. CT on Saturday and from 10 a.m. to 7 p.m. CT on Sunday; email ProductHotline@buildabear.com or go to www.buildabear.com and click on Product Recall at the bottom of the page for more information. Photos available at http://www.cpsc.gov/en/Recalls/2016/Build-A-Bear-Recalls-Stuffed-Animals/

Golden Horse Recalls Children’s Denim Pants Due To Choking Hazard

Golden Horse Enterprise NY Inc., of New York, N.Y. has recalled about 8,380 Children’s denim pants. The zipper pull can detach, posing a choking hazard to young children. The recall involves “Nursery Rhyme Play” brand children's five pocket 100 percent denim pants. The pants have a zipper fly, two front pockets with a coin pocket and two back pockets. The pants were sold in infant sizes 6/9M through 24M. The size label is sewn in on the back of the waistband. Only pants with style number 4122186 or 4122185 printed on a white tracking label sewn into the lower left inside seam are included in the recall. Manufacture date codes 0415 or 0515 are also printed on the tracking label. The pants were sold exclusively at Belk and online at www.belk.com and click on the Customer Service tab at the bottom of the page for more information. Photos are available at http://www.cpsc.gov/en/Recalls/2016/Golden-Horse-Recalls-Childrens-Denim-Pants/

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.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.

Firm Activities

Lawyers at Beasley Allen Continue to Support Volunteer Lawyer Programs

October brought about the annual National Pro Bono Celebration, recognizing lawyers who donate their time and skills to provide free legal services for those in need. “Pro bono” is short for the Latin term “pro bono public,” which means “for the public good.” In the legal profession, it involves providing free legal services to the poor, who would be otherwise unable to afford a lawyer.

In Alabama, this service is organized through the Volunteer Lawyer Program (VLP) which was established by the Alabama State Bar in 1990. It began serving clients in 1991. There are local VLP programs throughout the state that work in conjunction with the State Bar.

The Montgomery County Volunteer Lawyer Program (MVLP) is supported by the Alabama Civil Justice Foundation, the Alabama Law Foundation, City of Montgomery, Legal Services Alabama, Montgomery County Bar Association (MCBA), Montgomery County Bar Foundation and the generosity of the legal community. The MVLP operates a walk-in clinic each month for those seeking legal assistance. This program was recently expanded from one to two days a month, on the first and third Thursday of each month from 3-5 p.m. at the Montgomery Community Action Agency. To date, the program has served 194 clients.

Tom Methvin, from our firm, is serving on the Board of Directors for the MCBA.
He has been an active advocate of pro bono service since his successful tenure as President of the Alabama State Bar in 2009-2010. A number of Beasley Allen lawyers are part of the Volunteer Lawyers Program. Stephanie Monplaisir, a lawyer in our firm, recently won a pro bono case on appeal. She had met her client at the clinic. The woman faced losing her house as a result of a bad loan agreement with terms that had been changed without her approval. The client had won her case, which started in 2000, but the other party appealed the decision. Stephanie did a really good job for the woman.

The MCBA designated the MVLP as beneficiary of its Centennial Gala fundraiser, which celebrated the 100-year history of the Montgomery County Bar Association and honored the organization’s past presidents. Beasley Allen was honored to serve as Presidential Sponsor for the Centennial Gala. All proceeds from this year’s event went to the MVLP. Mike Martin, MVLP director, who is doing an outstanding job, said:

We are indebted to MCBA, not only for the financial support we receive, but for the continued commitment from its members to provide pro bono assistance to the low-income Montgomery County residents facing civil legal issues. To those from whom we receive financial support and those who give of their time and expertise, again, we say thank you.

Since the MVLP program has expanded to two clinics per month, volunteer lawyers are needed now more than ever. Any Alabama lawyer who is willing to work at the walk-in clinics to assist clients and provide pro bono service, should contact the MVLP at 334-265-0222. For more information, visit www.montgomeryvlp.org.

Beasley Allen Selected As One Of Law 360’s Most Feared Plaintiff Firms

Our law firm has been selected for inclusion on the Law 360 Most Feared Plaintiffs Firm list for our accomplishments in the past year. The list identifies law firms nationwide that have secured the largest awards for their Plaintiff clients. Eleven firms were selected for inclusion on the List. We are honored to be selected to the Law 360 Most Feared Plaintiff’s Firms list. Our lawyers and support staff are dedicated to our firm’s mission of “helping those who need it most,” and make it our goal to secure justice for our clients.

The firms selected had huge wins for their clients in complex cases that have a wide impact on the law and legal business. The firm was selected based on cumulative wins over the last year, but the following cases in particular set the firm apart from others and earned it a spot on the list:

- In the BP Oil Spill litigation, Alabama lawyers from our firm helped resolve the state’s claims against BP PLC for economic loss. This accounted for about half the state’s compensation in the record-breaking settlement. Alabama received $2 billion of this year’s proposed $18.7 billion settlement with BP over the Deepwater Horizon oil spill.
- Working alongside Georgia lawyer Lance Cooper, the firm helped secure a settlement for the parents of Brooke Melton, the 29-year-old nurse who died in an accident in 2010 while driving her 2005 Chevrolet Cobalt. The case was critical in uncovering the GM ignition switch defect, which led to the creation of an MDL and the criminal investigation and fine.
- In March, Beasley Allen secured a nearly $19 million verdict against truck dealer Empire Truck Sales, in favor of a man who became paralyzed when the freightliner he was driving spun out of control after Empire serviced the truck.
- The firm’s Mass Tort section, under the leadership of section head Andy Birdfield, helped secure a $2.4 billion settlement for victims of diabetes drug Actos, which has been linked to bladder cancer.
- The most recent verdict was earlier this month when a Georgia Federal court found in favor of Cheryl Bullock and awarded $8 million against Volkswagen AG in a sudden unintended acceleration crash that caused her serious injuries.

Rhon Jones, head of the firm’s Toxic Torts section, worked on the Plaintiffs’ steering committee for the BP oil spill litigation. He told Law 360 that hard work has its own rewards, in addition to courtroom victories. Rhon said:

"I know it may sound strange, but it is fun to work on these high-profile cases that are on the cutting edge of the litigation that’s going on in all of our country. Being a lifelong Alabamian, it’s a real privilege to be able to represent your state and work for your governor in a case this important."

While I don’t mind our firm being “feared,” by huge corporations that put defective and dangerous products on the market, I believe it’s also very important to be “respected.” Lawyers in our firm try their best to do things both well and in the right way. Both are very important. I have to believe that’s why our firm is both feared and respected.

XXI. SPECIAL RECOGNITIONS

Grant Enfinger Is The First ARCA Champion From Alabama

Grant Enfinger, the pride of Fairhope, Alabama, is the first-ever ARCA Racing Series national champion from the State of Alabama. Grant won the 2015 title last month at Kansas Speedway. He becomes the 35th different ARCA national champion in 63 consecutive seasons. Grant’s third-place finish in Kansas also secured the 2015 car owner championship for Maury Gallagher and the Valvoline Lap Leader Award. Grant actually led 792 laps over the 2015 season. He also picked up the Menards Pole Award presented by Ansell year-end honors.

There was one other award—decided several races ago—the Hoosier Tire Most Victories award. Grant and his No. 23 GMS Racing team won that award several races before the finale. Grant won six races during the season, including Daytona, Mobile, Nashville, Berlin, Springfield and Salem. Grant—without a doubt—has a bright future in his chosen line of work. We are proud of him!

XXII. FAVORITE BIBLE VERSES

John Schmidt, Senior Pastor at Center-Point Fellowship Church in Montgomery, sent in a passage this month he says means a great deal to him. John says he likes this verse because it reminds him that talk is cheap. He is correct in that true love involves action not just emotion. John says he wants to practice authentic faith and demonstrate his love for God and for others through his actions as well as his words.
Dear children, let’s not merely say that we love each other; let us show the truth by our actions. 1 John 3:18 (NLT)

Rachel Youngblood, one of our firm’s employees, says 1 Thessalonians 5:25 is directed to Christ’s church. As Christians, she says we are to pray for each other and we are to lift up each other to our Heavenly Father. Rachel says, this is not only an instruction, but also an encouragement to know that her Brothers and Sisters in Christ are praying for her.

Brothers and Sisters, Pray for us. 1 Thessalonians 5:25

Aigner Kolom, a lawyer in our firm, furnished a verse for this issue. Aigner says this scripture reminds her of that which is most important in her life.

But seek first the kingdom of God and his righteousness, and all these things will be added to you. Matthew 6:33

Brittany Scott, another lawyer in our firm, also sent in a verse this month. She says this verse is a very powerful reminder that no matter how much worldly security we have, we must rely on God each day.

Give me neither poverty nor riches, but give me only my daily bread. Otherwise, I may have too much and disown you and say, ‘Who is the Lord?’ Or I may become poor and steal, and so dishonor the name of my God. Proverbs 30:8-9

Laurie Weldon, a Legal Assistant in our firm’s Personal Injury/Products Liability Section, says that a passage in Ruth is one of her favorites. Laurie says this passage is one of my favorite passages in that it speaks to the meaning of loyalty. Laurie says loyalty is a necessary ingredient in her life. Laurie also asked us to include the following verse for a very special reason. Her step-father died recently and is now in heaven.

He will wipe away every tear from their eyes, and death shall be no more, neither shall there be mourning, nor crying, nor pain anymore, for the former things have passed away.” Revelation 21:4 English Standard Version (ESV)

My friend, Mitchell Dubina, a well respected Montgomery businessman, sent in the following verse for this issue:

This is what the Lord says to you: Do not be afraid or discouraged because of this vast army. For the battle is not yours, but God’s. 2 Chronicles 20:15

Roger Smith, a lawyer in our Mass Torts Section, furnished words from a hymn that he says he sings daily as an expression of praise to God. While this is not a verse in the Bible, it’s recommended for even those who can’t sing very well.

Praise God, from Whom all blessings flow; Praise Him, all creatures here below; Praise Him above, ye heavenly host; Praise Father, Son and Holy Ghost.

I really appreciate folks sending in some of their favorite Bible verses each month. We try to use as many as we can. But even if not used, I can assure you they are read.

XXIII. CLOSING OBSERVATIONS

Is NRA SQUASHING PUBLIC HEALTH STUDIES ON GUN VIOLENCE?

Despite rising reports of gun violence including murders, mass murders and suicides, funding for research into gun-inflicted injuries and deaths has steadily declined. It has been reported that the current funding for all gun violence research projects is less than $5 million. To put that in perspective, a grant for one single study in another public health area like autism, cancer or HIV may be twice as much. Public health officials blame the dearth in funding on the National Rifle Association (NRA), which they say has forced Congress to eliminate funding for gun-violence research.

But let’s back up a bit. For years, gun homicides were treated as a criminal justice issue. Gun suicides were treated as a mental health issue. However, in the late 1970s, researchers made a case for treating gun-related deaths as a public health issue, which makes sense. Gun-related homicide and suicide, they pointed out, consistently rank among the nation’s 15 leading causes of death. Gun-inflicted injuries currently rank in the top five killers of people ages 1 to 64—this is more folks than die as a result of traditional public health targets as influenza or food poisoning.

The campaign to make gun-related injuries and deaths the subject of public health studies gained momentum, and, in 1992, the Centers for Disease Control and Prevention (CDC) established the National Center for Injury Prevention and Control. The Center emphasized research into gun violence.

However, in 1995, the NRA began a campaign against the CDC injury center, claiming the research contained a hidden political agenda against gun ownership. The NRA encouraged lawmakers to eliminate the Center. While that didn’t actually happen, Congress began to divert funds previously earmarked for the Center to other public health programs. Legislators sympathetic to the NRA also inserted language into the budget that specifically restricted CDC injury research funding from going into any programs that might advocate or promote gun control.

Dwindling funding made gun-violence research a shaky career path, discouraging younger researchers from pursuing the study, and driving others out of the field. In addition, those already working in the programs were often threatened with angry emails and even death threats from people who felt their work threatened gun ownership rights. It’s been real easy to sell the myth that “they are going to take your guns!”

The CDC does still conduct some gun-specific research. A paper published by the journal Preventive Medicine in June examined recent gun injury statistics. CDC researchers found deaths from gunfire total about 32,000 a year. Rates of gun murders and unintentional shooting deaths have dropped, but firearm suicides are rising, and currently account for 60 percent of gun deaths. Additionally, nonfatal shooting injuries are at their highest level since 1995.

Researchers say it is nearly impossible to collect information that is critical to understanding gun-related deaths; namely, the exact number, type and distribution of guns, and who owns them, and how people got them. Currently there is no agency that tracks U.S. gun ownership, so there is no way of knowing how many guns are in the United States.

One bright spot appeared in 2013. The National Institutes of Health (NIH) announced it had secured three new funding sources for violence research, including gun-specific programs. But despite initial excitement, progress is still moving at a snail’s pace. The NIH has received 136 applications for research funding. Of that number, NIH has only been able to make nine awards, and only two of those specifically focus on guns. Those two projects will receive about $600,000 in funding—combined.

After each mass shooting incident, there is a brief public outcry, “Why is this happening? What can be done?” And then it seems we are back to business as usual. The NRA is a powerful, rich lobbying or-
nization. Its supporters are vocal and often vitriolic. If the NRA continues to call the shots—pardon the pun—I don’t see how any meaningful research can proceed, and the questions of the American people will continue to go unanswered. And, unfortunately, we are almost guaranteed the questions will be asked again and again.

As I have asked before—repeatedly—when will the American people say enough is enough and demand that Congress take action and enact sensible gun control legislation?

Source: Claims Journal

**OUR MONTHLY REMINDERS**

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

**XIV. PARTING WORDS**

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

I watched the debate on Oct. 28 featuring the top GOP candidates and it was quite a show. I have come to the conclusion that the candidates really don’t like each other very much. With the exception of Dr. Ben Carson and Sen. Marco Rubio, the candidates seemed mad at the world and certainly at each other. Even Gov. Jeb Bush—who normally is the mild-mannered Clark Kent type—showed a little anger on occasion. I believe a good dose of civility is in order for this group, each of whom wants to be our leader.

Unfortunately, we see the same sort of thing on a daily basis in Congress. According to the polls, the American people are fed up with Congress and how it operates. I really believe that most folks expect members of Congress to work together in an effort to solve our country’s problems. That simply isn’t happening and the American people are being shortchanged. So where do we turn for help?

We badly need a spiritual revival in America and I have to believe that would be the solution to the vast majority of our nation’s problems. An immediate result would be that our political leaders would start to get along much better and would then start to find common ground in areas of concern. The next step would be to start working together in Congress to find workable solutions for our problems.

My prayer today is for a spiritual revival in the United States of America. We must call on God to heal our land. Before that happens, however, the American people must heed the instructions found in 2 Chronicles 7:14, which are as clear as a bell.

*If My people who are called by My name will humble themselves, and pray and seek My face, and turn from their wicked ways, then I will hear from heaven, and will forgive their sin and heal their land.* 2 Chronicles 7:14

May God bless America and all of its people!

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Jere L. Beasley, Principal & Founder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley’s law firm, established in 1979 with the mission of “helping those who need it most,” now employs over 75 lawyers and more than 175 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 35 years.