



THE
JERE BEASLEY REPORT AUGUST 2009

Beasley Allen

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Attorneys at law

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I. CAPITOL OBSERVATIONS

A TRIBUTE TO THE FOURTH OF JULY AND FREEDOM

I had intended to write on the Fourth of July in last month's issue, but was involved in a lengthy trial and never got to it. Fortunately, my good friend Walter Albritton, one of the pastors at Saint James United Methodist Church, sent in the following article which deals with this holiday and the freedoms we as Americans all enjoy. I am setting Walter's article out below because of its timing and significance. We are indeed fortunate to live in this country and to be able to speak out on matters of importance when we deem it necessary, and we can even differ politically on occasion. It's great to be an American!

GIVE THANKS FOR THE FREEDOM WE ENJOY IN AMERICA

America is not a perfect nation but we who are its citizens enjoy a freedom that is unprecedented in the history of nations. It is right that our hearts should swell with pride when we sing together, "Sweet Land of Liberty." Our country is indeed a land of sweet liberty where, within the boundaries of our laws, all of us enjoy many precious freedoms.

We are blessed with a godly heritage. Though secularists continue their efforts to rewrite the history of our nation, trying to eradicate all references to God, it remains true that we have a godly heritage. The spiritual roots of America are very deep.

The goal of our Founding Fathers was to build a nation that recognized its dependence upon almighty God. Our ancestors built upon these foundational stones: 1) Faith in God; 2) The dignity and

sacred worth of man; 3) Respect for the rights and property of others; and 4) The need to worship God.

Today quietly reflect on some of the treasures for which we Americans can thank God:

- Our motto is still "In God We Trust." It is printed on our money and engraved on the walls of Congress. As we handle money daily we are reminded that we do not trust in the power of the state, but in the power of God.
- Religious holidays are legally established in our nation. Two of these, Good Friday and Christmas, are Christian holidays—or holy days. Thanksgiving is a holiday that completely rejects the claim that ours is a secular state. We owe this day of national Thanksgiving to President Abraham Lincoln. Every President since him has called our nation to a reverent recognition of the blessings of almighty God. Thanksgiving belongs to everyone. By being on a Thursday, it is wonderfully trans-denominational.
- Our Pledge of Allegiance still contains the phrase, "one nation under God." The salute to the flag rejects secularism. The words, "under God," were used by President Lincoln in his Gettysburg Address in November 1863. Where did Lincoln get it? No doubt he got it from his Bible; it appears in the address to King James in the version of the Bible Lincoln read as a boy. So, when we salute the flag, we are declaring the sovereignty of God.
- Our Congress still opens its sessions with prayers asking for the divine guidance of almighty God. This is a tradition that distinguishes our country from countries that have completely secular governments.
- The Holy Bible is still used in the inaugurations of our Presidents. This important tradition has not been changed by those who would "remove God" from the realm of government.

- We still appoint Chaplains to serve in the Armed Forces and in Congress. Thus do we as a nation acknowledge the need of all people for spiritual guidance.
- Our nation continues to provide freedom from taxation to church bodies, including seminaries. This relieves religious societies of an enormous tax burden, giving churches greater freedom to propagate scriptural truth.

"God Bless America" is a very popular song that unites us as Amer-

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icans. Whenever we sing it, we should remember to thank God that he has indeed blessed our nation. Let us give him thanks for all he has done and resolve to do all we can to preserve the precious freedoms we enjoy as American citizens.

Walter Albritton
July 5, 2009

PRESIDENT OBAMA SELECTS ALABAMA DOCTOR AS SURGEON GENERAL

President Barack Obama has chosen Dr. Regina Benjamin, a well-known and highly-respected Alabama family doctor, to be the next Surgeon General. Dr. Benjamin, a 1984 graduate of the University of Alabama at Birmingham School of Medicine, is an outstanding selection for this position. The President announced her nomination on July 13th.

Dr. Benjamin was the first black woman to head a state medical society, received the Nelson Mandela Award for Health and Human Rights, and just last fall received a MacArthur Foundation “genius grant.” She made headlines in the wake of Hurricane Katrina, with her determination to rebuild her rural health clinic in Bayou La Batre, Alabama, which serves 4,400 patients who would be hard-pressed to find care elsewhere. In my opinion, this selection of Dr. Benjamin to become Surgeon General will prove to be a great one. It’s a high honor to have an Alabamian—and especially one with such an outstanding background and record of dedicated service—chosen for this highly-coveted post.

LAWYERS OFFERING DISCOUNTS TO MILITARY PERSONNEL

The Alabama State Bar is offering help at a reduced price to military personnel. This is due to the work of a former judge advocate general working along with the State Bar. The Bar Association’s Lawyer Referral Service helps connect military members with legal services in Alabama—at a discounted rate—and that’s a good thing.

Currently, the service only applies to members of the Alabama National Guard and the Alabama State Defense Force. But in October, the service will expand to all military members.

Retired Air Force Col. George Schrader proposed the service last year, and the State Bar took up the issue. Col. Schrader, a Montgomery resident, got the idea from the Military Officers Association of America. The national organization has a program in which lawyers volunteer to provide discounted services to the military. When a military member calls the State Bar’s Lawyer Referral Service, he or she will be directed to a lawyer who is willing to offer a 25% discount to service members. If a participating lawyer isn’t in the service member’s area, they will be referred to the nearest lawyer who offers the discounted rate.

The military discount is an additional option within the Bar’s referral service. Lawyers pay a \$100 fee to participate in the program. In about a year, the number of participating lawyers has nearly doubled with 235 across the state currently participating. Renee Avery, director of the program, expects that number to double again during the recruitment process in September when lawyers join or renew memberships to the state bar and can opt into the program.

Thus far most lawyers have elected to get in the program and that will provide more support to the military. Col. Schrader spends a lot of time at meetings, visiting various military installations and attending conferences. He is a tremendous promoter of the program. After each of Col. Schrader’s visits, the Bar Association gets at least five calls from new people wanting to use the service, according to Ms. Avery. She says that the Bar Association gets lots of calls from military members looking for help with will and estate planning and also child-custody cases. For more information or to reach the Lawyer Referral Service, you can call (334) 269-1515 or visit <http://www.alabar.org/lrs/>.

Source: *Montgomery Advertiser*

JOHNSON & JOHNSON LIKES THE COURT SYSTEM

It appears that Johnson & Johnson likes the American court system, but only when they are the Plaintiff in a lawsuit asking for money damages. Recently, a federal court jury returned a \$1.67 billion verdict for J&J against Abbott Laboratories in a patent infringement suit over the company’s rheumatoid arthritis drugs. Abbott’s best-selling drug, Humira, competes with the drug Remicade, made by Centocor, a unit of J&J.

In 2007, J&J Centocor and New York University filed a patent infringement suit against Abbott in a Texas federal court. As you may know, Humira has been an instrumental part of Abbott’s success story in recent years, gaining approvals for half a dozen uses, including psoriasis and Crohn’s disease. Abbott had \$4.5 billion in Humira sales in 2008. This verdict is being viewed as a major victory for J&J.

Source: *Lawyers USA Online*

ANOTHER NATIONAL DRUG SETTLEMENT

A \$5.4 million settlement has been reached by 35 states with drug makers in a dispute over two cholesterol medications. Merck & Co. and Schering-Plough Corp. will pay the money to settle claims with the states. It was alleged that the companies covered up test results that cast doubt on the effectiveness of the drugs Vytorin and Zetia.

The settlement resolves an investigation into the companies’ lengthy delay in releasing the negative results of a clinical trial involving the cholesterol-lowering drug Vytorin, a combination of the drug Zetia and simvastatin, another cholesterol-lowering drug. The states’ investigation revealed that in a clinical trial, Vytorin was shown to be no more effective in reducing the formation of plaque in carotid arteries than the cheaper, generically-available simvastatin.

Although the clinical trial was completed in May 2006, the companies failed to release a partial reporting of the negative results until January 2008. A complete reporting was not made

until the following April. Prior to the release of the results, Vytorin was still being heavily marketed by the companies. As you may recall, in 2008, the states reached an agreement with Merck over allegations related to the sale of the drug Vioxx, which involved allegations similar to those made about the sales of Vytorin and Zetia. But the original Vioxx settlement did not cover the allegations related to Vytorin and Zetia, because Merck marketed the two drugs through an agreement with Shering-Plough Corporation.

While the amount of money actually to be paid is very small and will barely pay the states' expenses incurred, fortunately there is more to the settlement. The companies must now adhere to several injunctive terms, including a requirement to obtain pre-approval from the U.S. Food and Drug Administration for all direct-to-consumer television advertisements; compliance with FDA suggestions to modify drug advertising; registration of clinical trials and publication of the results; and compliance with detailed rules prohibiting the deceptive use of clinical trials.

The following states participated in the agreement: Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, Washington, and Wisconsin, as well as the District of Columbia.

Source: *Forbes*

600 ALABAMIANS LOSING INSURANCE WEEKLY

A recent study says that each week almost 45,000 Americans lose their health coverage, including about 600 folks in Alabama, and those are alarming numbers. The study, "The Clock is Ticking: More Americans Losing Health Coverage," released on July 15th by a group promoting health care reform, is not good news. The study found that the pace of people losing

health coverage has picked up as the economy has worsened. The report by Families USA said:

Americans are not only losing their jobs and their homes—they are also losing their health coverage at an alarming rate.

The rate of insurance loss in Alabama is 590 people a week, or 2,550 per month, or 30,570 a year, according to the report. It was estimated that the number of people in Alabama expected to lose health coverage between 2008 and 2010 is 91,710. Nationally, people are losing insurance at a rate of 44,230 a week, and 6.9 million Americans are expected to lose their insurance between 2008 and 2010, according to the report.

Source: *Birmingham News*

II. PURELY POLITICAL NEWS & VIEWS

RILEY CABINET MEMBER ENTERS THE ALABAMA GOVERNOR'S RACE

Bill Johnson, who for the past four years has served as Director of the Alabama Department of Economic and Community Affairs, has declared his candidacy for Governor. Holding this most important position with the Riley Administration put Bill in contact with lots of politically-active Alabama citizens. In my opinion, that has to be a positive for the candidate. In making his intentions known, Bill had this to say:

I think I have demonstrated over my years in public service that I am a passionate conservative Republican who believes small government is best and in low taxes. But I also feel government has a role and responsibility to help those citizens who cannot help themselves.

This entry makes a half-dozen seeking the Republican Party nomination for Governor in next June's

primary. Bill, who now lives in Prattville, was encouraged to run by a host of folks across the state who apparently told him they hadn't found a candidate to their liking among the other five Republicans. The former Riley confidant said that "every time another one of the other candidates would announce" he would get a "phone call from someone" encouraging him to get into the race." After a number of such calls, Bill says he began strongly considering a bid and decided to get in the race. His former boss, Governor Riley, praised the work Bill has done at a most powerful state agency and had this to say:

Bill Johnson has done a great job at ADECA and I am truly grateful to him for his outstanding service to the people of Alabama.

Bill's entry makes it a crowded GOP field. Bradley Byrne, Roy Moore, Dr. Robert Bentley, Kay Ivey, and Tim James are the other declared candidates. Of course, there may be more Republicans jumping in the race before the end of the year.

The only Democrats in the race thus far are Artur Davis and Ron Sparks, and I believe that pretty much completes the field insofar as serious candidates are concerned. I doubt if any other serious candidates will get in on the Democratic side. I believe that Artur will be the Democratic nominee, but since I am serving as his campaign chairman, I don't pretend to be objective in the race. Nevertheless, all of the polls that have been run so far indicate that outcome. While Ron will work hard and run a "spirited" race, I don't see him being a very strong candidate for Governor. I suspect some who supported him in the past for Agriculture Commissioner have already lined up with other candidates.

DEMOCRATS EYE ALABAMA ATTORNEY GENERAL RACE

It was reported a few weeks ago that Tommy Chapman, a veteran district attorney, and two prominent lawyers were considering running as Democ-

rats for Attorney General. But Tommy announced on July 8th that he won't be a candidate. This race already features Troy King, the incumbent, facing Luther Strange, a lawyer-lobbyist from Birmingham, in the GOP primary. The two lawyers, Montgomery resident James Anderson and Giles Perkins, who is from Jefferson County, still say they are considering whether to run in the Democratic primary in June 2010.

MORE RESULTS FROM SPECIAL LEGISLATIVE ELECTIONS

SENATE DISTRICT 19

State Representative Priscilla Dunn of Bessemer defeated Merika Coleman, another House member, in the Senate District 19 runoff election. Since there is no Republican opponent, the Democratic primary winner will go to the Senate.

HOUSE DISTRICT 6

Republicans picked up another seat in the Alabama House when Phil Williams defeated Jenny Askins in a special election for the House District 6 seat in Madison County. Williams got 60% of the vote and will join the other Republicans in the House of Representatives. The GOP now holds 44 seats in Alabama's 105-member House.

BILLY BEASLEY WILL RUN FOR THE STATE SENATE

State Representative Billy Beasley, a native of Clayton, will run for the Alabama State Senate in 2010. Billy's decision was delayed until he made sure his good friend Myron Penn was not going to run for reelection. He made it known that he wasn't going to run if Myron ran for a third term. Myron has done an outstanding job of representing the people in his district and he will be missed in the Senate. But, he elected to retire from the Senate and get back into the full time

practice of law. The Bullock County native has offices in Clayton and Union Springs. Billy had this to say in his announcement:

Having run a small business over the past several years in my home county, and having served in the House of Representatives for the past 11 years, I am convinced I can represent the citizens in Senate District 28 well and make sure that they are represented in a progressive and productive manner. I will make economic development and the creation of jobs, education, healthcare, and agricultural programs the top priorities for all of the counties in the district. My experience on the committee in the House of Representatives that handles the appropriations for the general fund has given me a good insight into how state government works. I will use that knowledge and experience to benefit the citizens in all of the counties in the 28th Senate District.

As many of you know, Billy is my younger brother. He and I grew up in Barbour County where our family settled in 1819 in a little place called Pratt's Station, which is located between Clayton and Louisville. Our grandparents, Martin Luther and Julia Hurst Beasley, later moved to "town," and made Clayton their home. After graduating from Auburn, serving in the Army, and then working as a pharmacist in Tuscaloosa, Clanton, and Greenville, in 1979 Billy returned to our hometown of Clayton. Billy is an extremely hard worker and has done a very good job in the House of Representatives. I am convinced that Billy will be an outstanding member of the Senate—if elected—and will represent all of the people in the 28th Senate District in a professional and effective manner.

AN UPDATE ON THE DAVIS CAMPAIGN

I have received a great number of contacts from folks who want to become involved in the campaign to

help elect Artur Davis Governor of Alabama. If any of our readers want to get on board, you can let me know and I will see that you are contacted by the campaign. If you want more information on the candidate or his plans for Alabama go to www.ArturDavis2010.com. You can receive campaign updates and action alerts by checking your email box daily.

I'm convinced that Artur is the candidate to lead our state into the 21st century. He has definite plans for doing this which include creating a partnership between business and education to strengthen our state's workforce, passing the strongest ethics reforms in Alabama history, and writing a new constitution for our times. Artur Davis has a vision for Alabama that includes all of the people of Alabama and nobody under his plan will be left out or left behind.

But Artur needs help to make his vision become reality. If you want to join the campaign, you can write me at PO Box 4160, Montgomery, Alabama, 36103 or email me at DavisCampaign@BeasleyAllen.com. You can also go directly to the campaign by writing to Artur Davis, PO Box 1845, Birmingham, Alabama 35201. If you want to contribute in any amount to the campaign, make your check to Artur Davis for Governor and mail it to the above address.

III. UPDATE OF THE MEDICAID FRAUD LITIGATION

A MISTRIAL IN THE STATE'S LATEST MEDICAID FRAUD CASE

We tried the State of Alabama's Medicaid fraud case against the three Watson companies starting on June 22nd. While the trial, which lasted for three weeks, went extremely well, the jury was unable to reach a verdict and Judge Price had to declare a mistrial. The case tried as well—if not better—than any of the cases we tried previ-

ously against four other drug companies. All of those cases resulted in substantial verdicts for the State.

The jurors in the Watson trial reported that they were deadlocked within a short time after going out to deliberate. I understand that the count was 8-4 throughout the jury deliberations in the State's favor and that toward the end two jurors said they would compromise for a lesser amount of damages and vote for the State. That would have made the count 10 to 2. However, one of the jurors reportedly said she would never return a verdict for the State and that forced a mistrial.

I must admit that I was surprised at a mistrial in what we all considered to be a very strong case. For example, we had an internal company document that came directly from a meeting of Watson officials and lawyers in 2000 admitting that what had been taking place on the reporting of false prices would be considered "fraud." We also had a document that said the reported prices would serve as a "smoke screen" to the true prices being reported to the state Medicaid agencies.

Regardless of the outcome in this case, I believe strongly in the civil justice system and in folks who serve on juries and who are so important to the judicial process working as it should. I am convinced that jury service is one of the most important duties of citizenship in this country. I sincerely believe that, and know that without the jury system ordinary folks would have absolutely no chance in many situations that arise and affect them. Our history is full of good examples of this basic truth. Unfortunately, there are many groups in our country working hard to destroy the civil justice system and specifically to take away the right to trial by jury. Hopefully, these groups will never succeed.

I trust the jury system and take full responsibility for not doing my job well enough in the Watson case. During the trial, we had an opportunity to settle with four companies, including Watson, for \$40 Million. But since our actual damages for those four companies exceeded \$102 Million, and the Defendants' offer would include no punish-

ment for what we knew to be bad conduct by this group of Defendants, we turned their combined offer down. We had tried cases against four other companies already and separate juries had returned verdicts against them totaling \$500 Million. In addition, we had also settled with a relatively small group of companies for a total of \$124.5 Million. Currently, there are still cases pending against 55 other companies. All told, the drug manufacturers cheated Alabama Medicaid out of over one billion dollars and that we believe is a conservative number.

We will try the Watson case again starting on December 7th and hope for a good result. I take the responsibility of representing the State of Alabama, and especially the Medicaid Program, very seriously. I let lots of folks down in this trial, especially those who depend on Medicaid, and I feel badly for them. Hopefully, we all learned from this experience and if at all possible we will do a better job next time and in all other future trials.

AN OVERVIEW OF THE MEDICAID FRAUD LITIGATION

Perhaps, it is a good time to do an overview of the Medicaid fraud litigation, which has been referred to as the AWP (Average Wholesale Price) litigation. This litigation continues to flourish, not only in Alabama, but all over the nation. Alabama has been blessed with four separate jury verdicts over the past year and a half in this ongoing litigation. The jury verdicts in Alabama were:

- AstraZeneca—\$250 Million reduced by the trial court to \$160 Million;
- GlaxoSmithKline—\$81 Million;
- Novartis—\$33 Million; and
- Sandoz—\$78.4 Million.

Alabama's next trial will be against Watson Pharmaceuticals and the Mylan Companies, both of which had to be rescheduled for trial sometime this Fall. A scheduling conference was held before Judge Charles Price for those Defendants on July 28th. Watson will be

tried on December 7, 2009 and Mylan on January 22, 2010. Next April, Alabama is already scheduled to try four brand pharmaceutical companies: Johnson & Johnson, Wyeth, Merck and Hoffman LaRoche. To date, no jury in Alabama has returned a verdict for the pharmaceutical industry in the Medicaid fraud litigation.

In other states, Kentucky recently won a \$16 Million verdict against Sandoz, Inc., and in Wisconsin, a jury returned a \$9 Million verdict for the State. In both of those trials, the jury found that punitive damages must be imposed in the form of civil penalties. The procedure in those states is that the Court must impose those penalties as prescribed by the State's penalty statutes. In Wisconsin, the penalty statute mandates a fine for each fraudulent price reported of not less than \$100, and not more than \$15,000. In Kentucky, the law states that the court may award up to \$2,000 as a penalty for each fraudulent price reported. The Wisconsin jury found 1,440,000 separate fraudulent prices reported and the Kentucky jury found 2,900 violations of the same type of fraudulent price reporting. Neither of the judges in those cases has ruled on the penalties as of the date of this report, but stay tuned.

The State of Hawaii will have its first Medicaid fraud case trial on October 21, 2009 in Honolulu, Hawaii, against the Watson Defendants. There will be two more trials in November against Sandoz and in January against two Defendants, GlaxoSmithKline and Novartis. Our firm will be trying these cases along with the Miner, Barnhill firm out of Chicago and a local firm, Price Okamoto, located in Honolulu, Hawaii. We look forward to trying these cases with our co-counsel and the Hawaii Attorney General Mark J. Bennett.

There are also trials set in the state of Kentucky against AstraZeneca on September 21, 2009, and in the State of Wisconsin in January against Johnson & Johnson. Trial settings have also been set against various Defendants in the States of Mississippi, Kansas, Utah, Texas, and Alaska. In addition, the

Federal Government's cases against the pharmaceutical industry continue to develop with two recent settlements being announced by the Department of Justice against Schering-Plough/Warrick and Aventis/Sanofi.

As mentioned above, Alabama has settled with fifteen companies for \$124.5 million, the most of any of the litigating states, and we are currently engaged in settlement talks with several other companies. Our firm is also engaged in settlement discussions with Defendants here and in some of the other states that we represent (Mississippi, South Carolina, Hawaii, Alaska, Kansas and Utah). It appears the industry is beginning to come to terms with the fact that it has been caught committing its fraudulent pricing scheme on the State and Federal Medicaid programs and it's time to pay for their intentional wrongdoing.

This litigation is extremely important to the citizens of this country because it is just one of many examples of how corruption and greed are not only destroying this country's health care system, but the financial stability of our economy. An untold number of this country's citizens were forced to do without proper healthcare because of the billions of dollars that the pharmaceutical industry literally stole from the State and Federal Medicaid programs as a result of this fraudulent pricing scheme.

It's good to see that our judicial system is at work rectifying this egregious corporate fraud committed in our country. When you consider that Medicaid programs are designed to benefit the poor, the disabled, the young and the elderly citizens, it makes this corporate boardroom fraud even worse. As a law firm, we are proud to be a part of these important cases.

A LATE SETTLEMENT WITH BAXTER IN ILLINOIS

The state of Illinois settled its Medicaid fraud lawsuit against Baxter International Inc., for \$6.8 million. The settlement with the medical product giant came in the lawsuit where Baxter had been accused of inflating prices of

drugs used by poor patients to the State of Illinois.

Attorney General Lisa Madigan filed the lawsuit against Baxter and other drugmakers in 2005, alleging the companies used practices that manipulated the prices of many prescription drugs. The settlement covers more than two dozen Baxter drugs. The fraud in Illinois was the very same as in Alabama and all of the other states.

IV. GENERAL MOTORS & CHRYSLER BANKRUPTCIES

AN UPDATE ON GENERAL MOTORS & CHRYSLER

I asked Greg Allen, who is the most experienced products liability lawyer in our firm, to give us an update on the effect of the General Motors and Chrysler bankruptcies. Most folks don't realize what a travesty of justice these very unusual bankruptcies were for all American citizens.

THE BANKRUPTCIES

The bankruptcy petitions of both Chrysler and General Motors have now been approved. Most Americans still are unaware of the ramifications of these bankruptcy filings on people injured by defective Chrysler and General Motors cars and trucks. The Chrysler bankruptcy ruling basically immunizes all Chrysler products that are currently on the road. When Fiat purchased the "new Chrysler," it agreed to accept responsibility for warranty items and recalls. But, Fiat did not agree to accept liability for defects in the Chrysler products currently on the market. There are millions of Chrysler cars and trucks on the road and many Chrysler products that have defective designs and contain parts that were defec-

tively manufactured.

There are many people who have valid claims that are now essentially wiped out. When somebody is hurt or killed as a result of a defect, the only entity that may have liability now is the old Chrysler company, which will have virtually no assets. The claimants are now considered unsecured creditors. As it stands now, Fiat will stand behind a product if it is recalled or has a warranty issue, but if someone is injured or killed as a result of that same defect or warranty issue, there will be no funds available to pay the claim. The U.S. taxpayers may wind up paying for the injuries by way of Social Security disability benefits, Medicaid, Medicare, or other social programs.

To get a true picture of the current situation, imagine driving down the road with your family and a Chrysler product is approaching from the opposite direction. If a ball joint breaks on that Chrysler product because of a manufacturing or design defect, and the Chrysler crosses the center line, crashing into you and your family resulting in one your family members being paralyzed, there is simply no cause of action against Fiat or the new Chrysler. There will be no recovery from the old Chrysler because it will have no funds or assets. You may have a claim, however, against the dealer that sold the vehicle, or a parts supplier, such as the ball joint manufacturer. Obviously, this will put an economic strain on dealers and automotive parts suppliers.

The U.S. taxpayers supported Chrysler with tax dollars and the company has now been turned over to Fiat, along with total immunity from all claims, and left lots of victims in their wake. The taxpayers will now foot the bill for injuries or damages

caused by Chrysler products. I have not talked to anyone yet who believes that this is fair or just.

In addition to being grossly unfair to the U. S. taxpayers, it is also unfair to other manufacturers. As an example, Ford now has to compete against a company that does not have to stand behind its products. This puts Ford at a competitive disadvantage. Fiat should have been required to stand behind Chrysler products, not only for the warranty and recall issues, but also for the harm that has been caused by the defective Chrysler products and the harm which will be caused in the future.

In its bankruptcy petition, General Motors was asking for the same protection as Chrysler, but as a result of strong political pressure, GM agreed to accept liability for future injuries or deaths caused by their defective products. For those injuries or deaths that occurred prior to the day of the filing of the bankruptcy petition, however, those victims are left out in the cold. There are many cases involving folks who are brain damaged or paralyzed as the result of defective GM vehicles. Many families lost loved ones due to a defective General Motor product. As it stands now, those people have no recourse. Once again, the taxpayers will pick up the bill for these injuries.

When I was in law school, I was taught that one of the basic premises of products liability is that corporations that profit from a defective product should bear the financial responsibility for injuries or deaths caused by them. While many corporations have subsidized public relations campaigns through organizations like the U. S. Chamber of Commerce touting personal responsibility, they are very silent when it comes to corporate responsibility. Unfortunately, the people who are severely hurt by defective prod-

ucts do not have a strong political voice or a lobbying group like the U. S. Chamber of Commerce that spends millions of dollars each year attacking and ridiculing lawyers who represent people injured by defective products. It's a sad state of affairs when you consider how these bankruptcies came about and who all will be hurt as a result.

*Greg Allen
August 1, 2009*

I appreciate very much Greg doing this piece. If you have any questions after reading this report, feel free to contact Greg at 800-898-2034 or Greg.Allen@beasleyallen.com.

V. RECENT FILINGS AND SETTLEMENTS BY THE FIRM

\$3.5 MILLION WRONGFUL DEATH VERDICT

Our firm had the privilege of representing Mrs. Annie Sanderson and her children in a wrongful death trial in Chilton County, Alabama. This case arose out of the death of Mrs. Sanderson's husband, James Sanderson. At the conclusion of the trial, the jury returned a \$3.5 million verdict against Ken Gorum Trucking and one of its employees, Gary Fruge.

Mr. Sanderson was killed when his work van was struck from behind by a log truck being driven by Gary Fruge who was working for Ken Gorum Trucking at the time. After being hit, Mr. Sanderson's van was pushed into logs from another log truck that had stopped in front of Mr. Sanderson. Fruge was operating his truck in excess of the posted speed limit, although he claimed he was traveling under the speed limit. In addition to the speeding issue, the Gorum Trucking vehicle had inoperative and defective brakes. Testimony at trial revealed that Fruge had 1,000 feet in which to stop his truck

but failed to do so. If he had been traveling at 45 mph, as he claimed, Fruge would have been able to stop his truck within 360 feet. Brian Buckner, an accident reconstruction expert, did an excellent job of reconstructing the accident sequence.

The only damages allowed in a wrongful death action in Alabama are punitive in nature and are awarded for the purpose of preserving precious human life and discouraging similar wrongful acts in the future. The Defendants argued that this wreck was a result of momentary inattentiveness on the part of Fruge and, therefore, didn't deserve any punishment. But, the evidence showed that there is an ongoing trend in the log trucking industry of violating Alabama Department of Transportation Safety Regulations. Our lawyers argued on behalf of the Sandersons that the verdict should be large enough to preserve human life and deter similar conduct in the future by others in the log trucking industry. The jury was courageous to stand up in this manner and we believe the verdict will have an impact for good on the trucking industry in Alabama and certainly for safety on our state's highways.

Progressive Insurance Company, the liability insurance company for the Defendants, refused to settle the case prior to trial. Instead, the insurance company insisted that the Defendants conduct was just a mere "mistake" and that such conduct would never result in a large verdict. Apparently, Progressive hoped to continue with business as usual in the industry. Fortunately, the 12 citizens of Chilton County who served on this jury sent Progressive and the trucking industry a very different message. We are pleased to have had the opportunity of representing the Sanderson family. Ben Baker and Cole Portis from our firm represented this family and did an outstanding job, both in preparation and at trial, for them.

FIRM SETTLES BEXTRA/CELEBREX CLAIMS

Pfizer entered into settlement agreements last year with a number of law firms, including our firm, to resolve many of their Bextra/Celebrex clients'

claims. Our firm represented approximately 1400 clients in this litigation. Our lawyers and staff have been working diligently over the past several months to comply with the specific requirements of the agreement. All the claims had to be evaluated, the agreement terms explained to clients and documents gathered to submit by a set deadline.

Our clients' documents were provided to Pfizer in a timely fashion on July 1st by our lawyers and staff personnel. Once all of the information is verified and confirmed, the parties to the settlement will agree to release the settlement funds in order that compensation can be paid to qualifying clients. Our firm has been involved in this litigation for the last four to five years and we hope to be able to conclude this matter and pay compensation to our clients this fall.

As you will recall, Bextra was pulled from the market for having an increased risk of heart attacks and for causing a skin reaction called Stevens-Johnson Syndrome. While higher doses of Celebrex are no longer available on the market, the Celebrex 200mg dose is still available for sale. The FDA now requires that all NSAID medications, including this dose of Celebrex, carry a warning about increased risk of heart attacks.

If you have any questions about any of the above, contact Frank Woodson at 800-898-2034 or Frank.Woodson@beasleyallen.com.

ROAD RAGE CASE SETTLES IN AN ALABAMA COURT

We recently settled a road-rage lawsuit that was filed in an Alabama state court. In September of 2006, our client was driving an escort vehicle on I-20 just west of Oxford. She and her husband were certified safety drivers and were in the process of escorting an oversized rig. Our client's husband was the lead vehicle and our client was driving the rear vehicle behind the oversized load. They were traveling through a construction zone at the posted speed limit. The construction zone limited the speed and

the flow of traffic.

The Defendant was driving in traffic several cars behind our client. Apparently, he wanted to go faster than the rest of the vehicles on the interstate that day. The Defendant was going from lane to lane, blinking his headlights and trying to pass other vehicles in the construction zone traffic. After the road construction ended, the Defendant passed our client's vehicle in the emergency lane or apron. Unbelievably, the Defendant then slammed on his brakes and positioned his car right next to our client's car while traveling at highway speeds. As he yelled and shook his hand at our client, the Defendant tried to force her off the road. He then clipped the back of our client's vehicle with the right front corner of his vehicle, causing our client's vehicle to go out of control and roll over several times in the median. The Defendant was charged with "reckless driving" and subsequently pled guilty to unintentional assault.

As a result of the accident, our client suffered multiple injuries. She sustained a closed head injury, blunt chest trauma and injuries to her lower extremities. She also suffered two compression fractures to her lower back which, unfortunately, left her permanently disabled and dependant on the care of others for most of the daily activities of her life.

This case is a classic example of how dangerous our highways can be when a driver experiences road rage. We have all seen people operating their vehicles, become angry, and then express their anger towards other motorists. The case demonstrates one of the worst examples of road rage I have ever heard of. Our client's life was forever changed simply because the Defendant could not go as fast as he wanted and had no respect for either the law or others on the highway that day.

Rick Morrison and Cole Portis handled this case and did an outstanding job for our client. The case was pending in an Alabama State Court when it settled. The terms of the settlement, including the parties' identities, are confidential by agreement of the parties and specifically at the request

of the liability insurance carrier for the Defendant.

ORAL SODIUM PHOSPHATE LITIGATION

Our firm is investigating claims involving acute phosphate nephropathy, an acute kidney injury, caused by oral sodium phosphate (OSP) products. OSPs, such as Fleet Phospho-soda, have been available for years as a laxative. More recently, OSPs have been used as a bowel cleanser prior to colonoscopy and other medical procedures.

Acute phosphate nephropathy (or acute nephrocalcinosis) is caused by calcium-phosphate crystal being deposited in the renal tubules. The deposits cause permanent renal function impairment. In some cases, renal function gradually worsens requiring dialysis and eventually renal transplant.

On December 11, 2008, the Food and Drug Administration issued a statement requiring the manufacturers of Osmo-Prep and Visicol, the two OSPs available by prescription, to include a Boxed Warning in their product labels. The FDA further stated that over-the-counter laxatives, such as Fleet Phospho-soda, should not be used for bowel cleansing procedures. As a result of the FDA's statement, on December 12, 2008, C.B. Fleet issued a product recall of both Fleet Phospho-soda Oral Saline Laxative and Fleet Phospho-soda EZ-PREP Bowel Cleansing System.

Thus far our firm has filed two lawsuits for individuals who now suffer chronic renal failure as a result of ingesting Fleet Phospho-soda. We are investigating numerous other claims involving Fleet Phospho-soda, and we will be filing additional lawsuits in the near future. If you need more information contact Roger Smith at 800-898-2034 or Roger.Smith@beasleyallen.com.

VI, LEGISLATIVE HAPPENINGS

A LOOK AHEAD TO 2010 AND BEYOND IN ALABAMA

The State of Alabama will have to make some tough fiscal decisions during the remainder of this year and certainly in 2010. Had not the federal stimulus money been available this year, state government would have been in an impossible situation concerning the funding of governmental functions. Even with that money, the State is having serious fiscal problems. From all accounts 2010 will be a difficult year and 2011 even worse relating to budgets for both general fund and education—and that's not good news for either the Democrats or Republicans in the Legislature.

Hopefully, our economy will bounce back faster than anticipated so that tough decisions can be avoided. If that doesn't happen, the next Governor and Legislature will have to find more revenues or will have to drastically cut state services. For years, we have avoided facing up to fiscal problems and solving them on a permanent basis. Another patchwork approach won't work in 2011, and since 2010 is an election year, you can rest assured nothing of significance will happen during the year and that's most unfortunate.

VII. COURT WATCH

SENATE PANEL APPROVES JUDGE SOTOMAYOR FOR SUPREME COURT

Judge Sonia Sotomayor's nomination to the U.S. Supreme Court was approved on July 28th by the Senate Judiciary Committee. The committee voted 13-6, with all 12 Democrats and only one Republican, Sen. Lindsey Graham of South Carolina, in support of this outstanding nominee. It's diffi-

cult for me to see how any Senator could vote against Judge Sotomayor who will be the most qualified candidate—based on her experience and excellent record as a federal judge—to join the High Court in years. Her nomination will be approved by the full Senate in short order.

ACCESS TO JUSTICE FOR ALL AMERICANS

While Congress and most Americans are focused on President Obama's efforts to deal with the economic crisis he inherited, many large companies in Corporate America and their cadre of powerful lobbyists are focused on getting federal money and also working behind the scenes to get immunity from lawsuits and keep millions of victims of corporate wrongdoing and abuse out of the court system. These lobbyists are pushing federal preemption, mandatory and binding arbitration, class action bans, secrecy in the civil justice system, and attacks on the right to trial by jury in numerous forms.

The American people would be totally against these efforts if they just knew what all was going on. That's why it's so critically important to inform the public and to expose, fight and defeat these efforts. When you consider that it was a lack of regulation of the financial institutions, combined with the work of lobbyists for those institutions that took our economy to the lowest levels since the Great Depression, it is morally wrong for the bad guys to benefit from the bailouts and not have to account for their bad behavior.

The fight is really for justice, and reaching that goal is impossible if access to justice is denied. The U.S. Supreme Court had this to say about the access to justice that all Americans should enjoy:

The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

Chambers v. Baltimore & Ohio Railroad Company, 207 U.S. 142 (1907)

I only wish this had been said in 2009 by the Justices currently on the High Court instead of over 100 years ago, but it's as true now as it was when first written. The fight to save and preserve the civil justice system was important then and has taken on even more importance over the years. The poor and powerless have nowhere else to go—other than to the courts when they are victims—and that's a proven fact. And it's not just the poor—but all persons who have an interest in access to justice, regardless of who they are or their standing in their communities.

The environment, consumers' rights, workers' rights, accountability in governments at every level, as well as accountability in the corporate world, are all matters that depend on the courts being open, free from undue influence and totally independent. When we recite the Pledge of Allegiance, the words "freedom and justice for all" should be more than mere words. They must have real meaning for all citizens of this country.

Source: Public Justice

SUPREME COURT MAKES IT HARDER TO PROVE AGE DISCRIMINATION

On June 9th, the United States Supreme Court made it harder for employees in America to prove a claim of age discrimination. In a 5-4 decision, written by Justice Clarence Thomas, the High Court ruled that the workers can no longer simply prove that age was a motivating factor in their demotion or firing. Rather, the Supreme Court held that workers must now bear the burden of proving that their age was the decisive factor behind the employer's adverse employment action.

The ruling overturned a \$47,000 jury verdict in favor of Jack Gross, a 54-year old insurance claims adjuster from Iowa. Gross was demoted by his employer when it underwent a company-wide reorganization and his job was given to another employee in her 40s. Gross sued his employer for violating the Age Discrimination in

Employment Act of 1967 (ADEA) and the trial judge instructed the jury that Gross had to prove that age was a “motivating factor” in the demotion. The judge also said the company had to establish that it had other reasons, besides age, for replacing Gross.

In *Gross v. FBL Financial Services, Inc.*, the U.S. Supreme Court ruled that employees must prove that “age was the ‘but-for’ cause of the challenged employment action.” Under this new decision, workers must now prove that age and age alone caused their demotion or firing. In a strong rebuke of the majority decision, Justice John Paul Stevens accused the court’s majority of “an unabashed display of judicial law-making.” Justice Stevens noted that the Supreme Court and Congress had previously said that when “mixed motives” are involved in an employment case, such as a racial discrimination case, the employer must defend its decision. Justice Stevens reasoned that the same approach should apply in age discrimination cases. Many experts view the High Court’s ruling in *Gross* as a big win for big business and a real loss for workers. The problem can only be resolved now by Congress.

Source: *Los Angeles Times* and *Law.com*

HIGH COURT RULES FOR INJURED SEAMAN ON PUNITIVE DAMAGES ISSUE

The U.S. Supreme Court has ruled that seamen injured on the job may sue for punitive damages when employers refuse to pay for medical care and time off. The Court, by a 5-4 vote, decided in favor of Edgar L. Townsend, a tugboat crew member who injured his arm and shoulder when he slipped and fell on the boat’s steel deck. The boat’s owner, Atlantic Sounding Co., preferred to not pay Townsend for medical care and time off. Each side filed a lawsuit.

The seaman’s suit included a claim for punitive damages, which as we all know is intended to punish a party for its behavior and prevent a recurrence of that behavior. Justice Clarence Thomas, writing for the Court, said the seaman has the right to pursue the punitive damages claim. The Justice said that the Court could “find no legal obstacle to his

doing so.” The suits have been on hold pending the Court’s decision.

Source: *Associated Press*

HIGH COURT RULES STATES CAN ENFORCE FAIR LENDING LAWS

State Attorneys General have won a major turf battle in the U.S. Supreme Court. The High Court held that states may enforce their anti-discrimination and consumer protection laws against national banks. The Court, in a 5-4 ruling, struck down a regulation issued by the chief federal regulator of national banks that pre-empted the states’ power to enforce those laws. Justice Antonin Scalia, writing for the majority, said the regulation was an unreasonable interpretation of the National Bank Act.

This decision affirms the critical role states play in this type litigation. It’s important because the federal government hasn’t enforced these state consumer-protection and fair-lending laws in the past. This case was being watched closely not only by the banking industry, but by major civil rights and consumer organizations, and public and private state regulatory groups.

The case before the Court began in 2005 when then-New York Attorney General Eliot Spitzer sought nonpublic data and information regarding the mortgage lending practices of several national banks and their subsidiaries. Publicly reported data by those banks showed significantly higher-interest, residential mortgage rates charged to minorities compared with white borrowers and that suggested a prima facie case of race discrimination in violation of state and federal fair-lending laws. The Office of Comptroller of the Currency, asserting exclusive “visitorial” authority over national banks, and the Clearing House, a consortium of national banks, successfully enjoined the state’s data request.

At issue in the High Court challenge, brought by New York Attorney General Andrew Cuomo, was a 2004 regulation that said states had no right “to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the

content or conduct of activities authorized for national banks under Federal law.” Writing for the majority, Justice Scalia acknowledged some “ambiguity” in the National Bank Act’s term “visitorial” powers. But he said the Court’s cases have always understood the term as the comptroller’s right to oversee corporate affairs, “quite separate from the power to enforce the law.” The act, he said, preempts states from the former, not the latter. Justice Scalia wrote further:

If the Comptroller’s exclusive exercise of visitorial powers excluded law enforcement by the States, it would also preclude law enforcement by federal agencies. Of course it does not.

The majority of the Court ruled that New York did not have the right to enforce its law through an administrative act or by threat of subpoena. States must pursue enforcement in court. Justice Clarence Thomas, joined by Chief Justice John Roberts Jr. and Justices Anthony Kennedy and Samuel Alito Jr., dissented, saying the text, structure and history of “visitorial powers” supported the comptroller’s “reasonable” interpretation.

Source: *Law.com*

A PROBLEM CREATED BY THE U.S. SUPREME COURT MUST BE CORRECTED

In the last issue of the Report, we mentioned a decision by the U.S. Supreme Court that made a drastic change in the way trial courts in the federal system deal with initial pleadings in civil lawsuits. As a result, Congress has had to wade into the debate over the “pleading standard” for civil lawsuits. Two Supreme Court decisions, including the most recent one, have effectively upended longstanding precedent. Senator Arlen Specter filed legislation last month designed to return the standard to what it had been for years. The most recent case—*Asbcraft v. Iqbal* decided in the most recent term—has raised the standard that pleaders must meet to avoid having their cases dismissed on a motion to dismiss.

Senator Specter, in discussing his bill, accused the Justices in the majority of the Court of making an end run around precedent. In this regard, he observed:

The effect of the Court's actions will no doubt be to deny many Plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries. I think that is an especially unwelcome development at a time when, with the litigating resources of our executive branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants.

At issue is how specific a pleading must be under the Federal Rules of Civil Procedure. Rule 8 requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief," while Rule 12 allows for the dismissal of complaints that are vague or that fail to state a claim. Hopefully the Justices in the majority in *Iqbal* simply didn't realize what they were doing or perhaps didn't realize the significance of their decision. In either event, the Court has created a real mess.

Under *Iqbal*, a 5-4 decision written by Justice Anthony Kennedy, many courts are now requiring more-precise facts that, in many cases, aren't even available until discovery is done. Senator Specter's bill directs federal courts to interpret the rules as the Supreme Court had done in all earlier decisions. See for example, *Conley v. Gibson* (1957). The bill was assigned to the Senate Judiciary Committee. It should be passed and signed into law.

Source: NLJ

VIII. THE NATIONAL SCENE

AL FRANKEN FINALLY BECOMES AN ELECTED MEMBER OF THE U.S. SENATE

Al Franken is finally a member of the U.S. Senate. Minnesota's Supreme Court dismissed former Senator Norm Coleman's challenge to the state's November election results and declared his Democratic challenger the winner in late June. The Court's unanimous opinion declared that now Senator Al Franken "received the highest number of votes legally cast" and was entitled "to receive the certificate of election as United States senator from the state of Minnesota."

Now that Al Franken has joined the Senate, there will be 60 members in the Senate Democratic caucus. It took a long time for this fight to finally end and now the citizens of Minnesota have two senators to represent them. Sometimes it takes a long time for a good thing to happen and in this case the result was a good thing for the people of Minnesota and I believe for the country.

Source: CNN

SOLDIERS SUE POLITICALLY-CONNECTED FIRM FOR CHEMICAL EXPOSURE IN IRAQ

When Russell Powell returned from Iraq, he began to have a number of health-related issues. Following his year-long tour of duty that ended in 2004, he returned home to pick up his life and do all of the things he enjoyed doing before going to Iraq. Mr. Powell was discharged from the West Virginia Army National Guard for medical reasons at the end of 2008 because he was unable to meet physical requirements. He started a new job as a corrections officer for a West Virginia prison earlier this year, but his medical problems that came with him from Iraq have continued.

In February, Mr. Powell, who had been a sergeant in the 1092d Engineer Battalion, received a most significant

letter from the state surgeon of the West Virginia Army National Guard. This letter explained why Mr. Powell had been out of breath and nauseous, suffering from rashes and sick to his stomach for the last five years. It also explains why, for three months in Iraq, he constantly coughed up blood, had frequent bloody noses and, at one point, passed out, waking up in a hospital with blackened lips and a blistered face. The letter said Mr. Powell and other soldiers in his unit may have been exposed to sodium dichromate, an industrial chemical, which had been used to prevent the corrosion of pipes at a water treatment facility near Basrah, Iraq.

The chemical contains hexavalent chromium, which can cause sores inside the nose and on the skin, general skin irritation, nose bleeding, wheezing, coughing and pain in the chest when breathing, fever, nausea and upset stomach. It also has been linked to cancer. As you may recall, Hexavalent chromium was the subject of the 2000 film *Erin Brockovich*, which followed the true story of folks in a California town who developed health problems following exposure to the chemical. They sued Pacific Gas and Electric Co., settling in 1996 for \$333 million.

Before Mr. Powell received his letter, he did not realize he had been exposed to the chemical during the three months he worked at the plant in Iraq. Doctors who were shown the letter tested Mr. Powell for cancer and fortunately the tests results were negative. On June 25th, Mr. Powell and six other members of his company in the 1092d, filed suit against KBR, the firm in charge of rebuilding the water treatment facility. The lawsuit alleges that KBR managers knew about the site contamination and the threat it posed, and "disregarded and downplayed the extreme danger" to West Virginia National Guardsmen. It alleges that the Guardsmen are entitled to payment or reimbursement for all medical expenses resulting from exposure to the deadly chemical.

Kellogg, Brown & Root Services Inc., describes itself on its Web site as the U.S. Army's largest contractor and a "technol-

ogy-driven engineering, procurement and construction company.” The Army gave KBR a contract to rebuild the wrecked water treatment facility plant, which pumps water into the ground to force oil out. When the plant was demolished, bags that contained sodium dichromate were left throughout the plant and surrounding area.

A United Nations assessment of the plant site before KBR’s arrival found sodium dichromate. Also, internal KBR reports revealed that 60% of its employees experienced symptoms of exposure. Interestingly, in June, while in arbitration, KBR civilian employees reached a settlement with the company. Another lawsuit on behalf of mostly Indiana National Guardsmen against KBR is still pending.

KBR—the politically-connected government contractor, which enjoyed very close ties to the Bush Administration and specifically to Dick Cheney—must have known about the health hazards created by the sodium dichromate. Even after its own employees and military personnel began getting sick, KBR covered up the known problem.

Source: *Pittsburgh Post-Gazette*

KBR BLAMED FOR SYSTEM FAILURE RESULTING IN DEATH

In another KBR matter, it has now been determined that military leaders and a major military contractor failed to protect a Green Beret who was electrocuted while showering in his barracks in Iraq. The Defense Department’s Inspector General made this determination last month. We had reported on the 2008 death of Staff Sgt. Ryan Maseth, 24, of Pittsburgh, which triggered the investigation by the IG. The investigation also reviewed 17 other electrocution deaths in Iraq. There were electrical inspections of about 90,000 U.S.-maintained facilities in Iraq, which are still ongoing. The Inspector General says in its findings that “multiple systems and organizations” failed and exposed Sgt. Maseth to “unacceptable risk.”

Last fall, Gen. David Petraeus, then the commander in Iraq, ordered an inspection of about 90,000 U.S.-main-

tained facilities in Iraq by a task force called Task Force SAFE. Of the 67,000 inspected so far, about 18,000 have been found to have major deficiencies. About 11,000 of the major deficiencies have been repaired. I have to wonder how much longer KBR will be allowed to secure military contracts and operate in the manner that has now been exposed in Iraq.

Source: *Associated Press*

CONGRESS SHOULD CREATE A STRONG CONSUMER PROTECTION AGENCY

The Treasury Department has warned the financial services industry that it won’t back down from its proposal to create a new consumer protection agency. This warning came even while lobbyists were building a financial war chest and devising a strategy to defeat the plan. The new agency, part of a wider revamp of U.S. financial rules proposed by the Obama administration, would have the power to regulate products like mortgages and credit cards. It would be what advocates have likened to a safety commission for financial products. As expected, the proposal, detailed in a draft bill sent to Congress in early July, has drawn fire from financial service companies. But it has also galvanized consumer groups, setting the stage for a tough legislative battle. Hopefully, the agency will be created and will have the authority and the will necessary to carry out its mission.

President Barack Obama is committed to the Consumer Finance Protection Agency and will fight for its passage through Congress. This warning message was delivered to the American Bankers Association by Michael Barr, Treasury assistant secretary for financial institutions. He told ABA members the current regulatory system “has failed to protect the American people and needs to be fixed in a fundamental way.” Officials in the Administration believe that a new system of regulation will discourage the kind of high-risk lending that spurred a runaway housing market for five years and ended in the current bust of record foreclosures.

Mortgages with low early payments were popular in once-hot housing markets, but many home buyers could not shoulder the hidden costs of those loans. The Administration is busy meeting with industry and community leaders to explain how the Consumer Financial Protection Agency would work. Hopefully, with a strong and continuing push for consumers nationwide, the Administration will win this battle.

Bill Himpler, executive vice president of the American Financial Services Association, the industry trade group, is coordinating opposition to the proposed consumer agency. The industry will use advertising and grass-roots political tactics to turn lawmakers against the concept. Fortunately, a coalition of nearly 200 labor and consumer organizations has formed a pressure group encouraging Congress to ratify the Treasury’s plans. This is a battle that the consuming public can’t afford to lose.

Source: *Reuters*

IX. THE CORPORATE WORLD

PRISONER 61727-054 GETS HIS DUE

Bernard Madoff (who is now known as Prisoner 61727-054) and his wife have been stripped of their vast riches. The government seized all of Madoff’s property in an agreement that also forces his wife to give up homes and property worth millions. Federal prosecutors obtained a \$170 billion judgment against Madoff, who, as most Americans now know, masterminded the largest and most sweeping Ponzi scheme ever. They will try to collect as much of it as possible. Madoff will spend the rest of his natural life in prison. Madoff was sentenced in a federal court in Manhattan to 150 years and has already been sent to prison.

Thus far, federal investigators have identified 1,341 investors in Madoff’s firm, with losses exceeding \$13 billion

and the full amount of damages is still being counted. Many of the victims said they had banked their life savings with Madoff's firm and they were ruined as a result of his scam. There are two ways for victims to get compensated, or at least partially compensated, for their losses: through seized assets and through the Securities Investor Protection Corporation, an organization that shields investors in brokerage firms.

The value of the Madoff assets will eventually be used to compensate victims, based on how much they invested in Madoff's firm. Also, SIPC will pay up to \$500,000 for any eligible claimant who lost money to Madoff, based on how much they put in. This coverage comes from dues paid by brokerage firms.

During a Congressional hearing in January, testimony from a whistleblower who had repeatedly alerted the Securities and Exchange Commission about his suspicion that Mr. Madoff was operating a gigantic fraud got a great deal of media attention. An internal investigation is now under way at the SEC to determine why the agency did not detect Madoff's scheme and shut it down years ago. The SEC and the Securities Investor Protection Corporation, a government-chartered program to compensate customers of failed brokerage firms, have been criticized repeatedly over the Madoff matter. If nothing else, the litigation already filed in and around the Madoff case will help shape how regulators, the courts and SIPC respond to large-scale Ponzi scheme losses in the future. How the losses of victims will be addressed is just one of many open questions.

The criminal investigation is continuing, as prosecutors try to determine who else bears responsibility for the crime. So far, only Madoff's accountant has been arrested on criminal charges, but securities regulators have filed civil suits against several of his long-term investors, accusing them of knowingly steering other investors into the fraud scheme for their own gain. The bankruptcy trustee has sued more than a half-dozen hedge funds and large investors, seeking to recover more than \$10 billion withdrawn from the fraud

in its final months and years. It's uncertain how much money will be recovered to share among the victims and how long that effort will take. The sentence itself is likely to leave a mark as well, according to legal experts, on white-collar crime. Hopefully, it got the attention of others who might be tempted to cheat and hope to get away with it like Madoff did for much too long.

Source: CNN Money

X. CONGRESSIONAL UPDATE

MEMBERS OF CONGRESS HAVE THEIR HANDS FULL

There are so many major issues being debated in Washington these days, including reform of our healthcare system, legislation designed to save our economy, regulation of the financial institutions and much more, that I won't attempt to write in depth on any of them. The healthcare debate is perhaps the hottest item, but there are many other important issues being considered. It appears the Republican Party is simply opposing any change in our Nation's Capitol, while offering nothing of substance to the debates, and that's unacceptable. Hopefully, in September, a report can be made on the progress that was made this month in Congress. While healthcare is getting most of the attention, members of Congress should not forget that fixing the nation's economy is the top priority.

INSIDER TRADING IN CONGRESS SHOULD BE STOPPED

The federal government has finally gotten the message that it's time for stronger oversight of Wall Street and the financial services sector. It's the opinion of my friends at Public Citizen that it's also time to put an end to secret spending and insider trading by some in Congress and in the federal government. Public Citizen says a dan-

gerous legal loophole still exists which allows members of Congress and high-powered executive branch appointees to exploit "insider" knowledge of the financial industry in order to turn personal profit. The consumer advocacy group believes that under current law, those who have access to the privileged "non-public information" gathered through official oversight proceedings, may be using that information for personal benefit in securities and commodities trading. Here's what Public Citizen had to say about that:

Equally as abhorrent, lobbyists and traders who haunt the halls of Congress seeking insider tips from staff—known as “political intelligence consultants”—may also enrich themselves and their clients off of this confidential information. This type of “insider trading” would be illegal for you and me—so why should it be legal for government officials?

I agree with Public Citizen that this loophole must be closed and there is legislation pending that will get the job done. Congress should pass the "Stop Trading on Congressional Knowledge Act," which was introduced by Reps. Brian Baird (D-WA), Louise McIntosh Slaughter (D-NY) and Tim Walz (D-MN). This legislation (H.R. 682)—if passed—would ensure that the same insider trading restrictions on others would apply to members of Congress and their staff as well as to others in the federal government. The proposed legislation prohibits officials from using non-public information for personal gain. The time to pass this vital legislation is now! If you agree, ask your Representatives and Senators to support H.R. 682.

Source: Public Citizen

XI. PRODUCT LIABILITY UPDATE

THE SINGLE VEHICLE ACCIDENT: A SERIES HIGHLIGHTING OFTEN OVERLOOKED PRODUCT CLAIMS

Several months ago, we began a series of articles discussing product liability claims that arise from single vehicle accidents. A product liability claim focuses on whether or not a product is defective. The purpose of this series is to educate you on the different kinds of product liability claims that are out there. In automobile cases, the defective product could be the entire vehicle, or a component part such as the seat belt or tires. Unfortunately, the average motorist has no idea how unprotected he will be in an accident as a driver or passenger in a defective vehicle. Our attorneys are trained to recognize defect claims in motor vehicle accident cases. Any single vehicle accident involving serious injury or death, including paralysis, loss of limb or brain damage, should be carefully analyzed for possible product liability claims. Last month, we looked at fuel-fed fires and the injurious consequences of those defects. This month, we look at electronic stability control.

Electronic Stability Control (ECS)

Stability control is a sophisticated braking control system which allows a vehicle to sense tire slide. Stability control systems prevent vehicles from getting out of control, which may lead to a rollover. The computer system, by use of sensors, can monitor how well the vehicle is responding to a driver's steering input. If a vehicle starts straying from its intended line of travel, which can occur in high-speed maneuvers or on slippery roads, the electronic stability control (ECS) applies the brakes for the individual wheels, which causes the vehicle to stay under control.

Over 15,000 people die each year from single vehicle crashes. Two-thirds of single vehicle crashes are rollovers. A

new study by the Insurance Institute for Highway Safety found that stability control systems could reduce the likelihood of a fatal single vehicle crash by 56%. Thousands of lives could be saved each year with this technology. According to an Institute for Highway Safety study, ECS can reduce the risk of involvement in single vehicle crashes by more than 50%. The system is less effective in multiple vehicle crashes. The Institute researchers analyzed crash reports from seven states over two years. They also studied the Federal Fatal Analysis Reporting System or FARS data. The study isolated cars and SUV's that had ECS equipment versus vehicles without the equipment. Some car manufacturers have been using stability control devices for about ten years. Others are just now starting to recognize the value of the system.

The National Highway Traffic Safety Administration also performed a study and found a 35% reduction in single vehicle crash risk for cars and a 67% reduction for sport utility vehicles. The fatal single vehicle crashes were reduced by about 30% for cars and 63% for SUV's. The Insurance Institute projected that if all vehicles in the U. S. had ECS, about 800,000 single vehicle crashes could be avoided which would save more than 7,000 lives each year.

If you would like more information on the above subject or have a question, you can contact Ben Baker (Ben.Baker@beasleyallen.com) or Greg Allen (Greg.Allen@beasleyallen.com) in our office at 800-898-2034.

AN UPDATE ON SUDDEN UNINTENDED ACCELERATION LITIGATION

On February 5, 2007, Bulent and Anne Ezal were headed to lunch at the Pelican Point Restaurant in Pismo Beach, California. The restaurant is located on the edge of a cliff, affording dramatic views of the Pacific Ocean below. Since the parking lot was downhill of the restaurant, Mr. Ezal rode the brakes of his 2005 Camry as he approached a parking space. He was at a complete stop, when the Camry suddenly accelerated, jumping a small curb, crashing through a fence and

over the bluff. The vehicle then fell 70 feet to the rocks below, and turned over once, coming to rest in the surf. Anne Ezal died of her injuries in the crash. Bulent Ezal later recovered.

Seven months later, Jean Bookout and her friend Barbara Schwarz were exiting Interstate Highway 69 in Oklahoma—also in a 2005 Camry. As she exited the ramp, Ms. Bookout, the driver, realized that she could not stop her car. She pulled the parking brake, leaving a 100-foot skid mark from right rear tire, and a 50-foot skid mark from the left rear. But the Camry continued down the ramp, across the road at the bottom, and finally came to rest after it crashed into an embankment. Barbara Schwarz died of her injuries and Jean Bookout spent two months in the hospital and is still recovering from head and back injuries.

These two incidents involved the same make of vehicle, the same model, and the very same problem. The result was two severe crashes—two deaths—two cases of serious injury. According to the National Highway Traffic Safety Administration, the Toyota Camry doesn't have a problem with sudden unintended acceleration (SUA). In between these horrific crashes, NHTSA denied a petition requesting a defect investigation from the owner of a 2006 Camry, who complained that the engine of his current car, and the 2005 Camry that he previously owned, repeatedly surged. NHTSA's Office of Defects Investigation briefly looked into the complaint, but came up empty and took no action.

NHTSA hasn't identified a vehicle-based defect that would have produced the alleged engine surge in the petitioner's vehicle, nor was it able to witness such an event when road testing the petitioner's vehicle. According to reports, evaluation of a suspect throttle actuator removed from the petitioner's vehicle didn't reveal a component problem. Also, warranty and parts sales of the actuator were found to be unremarkable. NHTSA concluded in an April 2007 decision this data doesn't support "the existence of a wide-spread defect or ongoing concern."

So the bottom line is that another SUA inquiry closed with no action being taken and without a satisfactory explanation for a phenomenon that has plagued various makes and models for vehicles for about 30 years. Since 1999, the agency has received seven defect petitions asking NHTSA to investigate sudden unintended acceleration. The agency launched eight SUA investigations into GM, Ford, Toyota and Volkswagen models. In the last decade, manufacturers have announced 31 recalls. More typically, manufacturers have consistently denied a mechanical problem and have blamed the problem on “driver error.” When the complaint numbers are high, the car makers blame that on a “media-induced frenzy.” NHTSA has gone through a series of opening—and then closing—investigations never finding a defect. This has led some to conclude that SUA is solely the province of pedal misapplication and stuck floor mats.

Graham Esdale from our firm represents the victims of the Oklahoma crash. He says it’s frustrating that the NHTSA can’t or won’t determine the causes of SUA. Graham made this observation:

We know this is happening out there. Unfortunately, if the person is elderly they are certainly going to be blamed for causing the accident, when we know that is not the case. Instead of trying to fix the problem, they blame the driver.

Indeed, the history of sudden unintended acceleration involves poor research, regulatory omissions and industry success in holding off any serious outside examination of malfunctions within a vehicle’s electronic systems. Sudden unintended acceleration is a complex problem. There are multiple causes when a vehicle shoots forward or back in apparent contradiction to the driver’s commands: design defects which induce driver error—such as poor pedal placement, the lack of a shift interlock, floor mat interference, mechanical or electromechanical defects and electronic defects.

Electronic defects—which are the

most difficult to pinpoint—are nonetheless a more likely possibility as vehicle systems rely more heavily on sophisticated computer-driven electronics. And yet, automakers and NHTSA behave as though it’s perfectly rational to assume that electronics housed in the hostile automotive environment—including the fault detection system—will always function as intended, and that malfunctions will be easily reproduced in a laboratory setting.

But it should be noted that the case has been persuasively made that NHTSA and automakers have ignored the real possibility of intermittent and other faults in the electronic systems of today’s automobiles. The 2003 reference book, *Sudden Acceleration*, by Carl E. Nash, of the National Crash Analysis Center at George Washington University, Clarence Ditlow, of the Center for Auto Safety, James Castelli and Michael Pecht, Professor and Director CALCE Electronic Products and Systems Center at the University of Maryland, argue that the auto manufacturers lag behind those in other industries whose products rely on electronic systems in understanding the myriad of ways their microprocessors and electronics components can fail. NHTSA, the authors conclude, has also failed miserably in its attempts to find a cause other than a floor mat or driver error, because the agency employs an arbitrarily narrow definition of SUA—that it must occur from a standstill—and has conducted its investigations on incorrect assumptions and illogical reasoning.

Drivers have been complaining about sudden unintended acceleration events for a quarter of a century and continue to lodge these complaints with manufacturers and NHTSA. Yet, NHTSA has made virtually no substantive progress toward understanding how electronic systems housed in an environment subject to heat, vibration, sudden shocks, various levels of electromagnetic interference, moisture, and other corrosive conditions could fail; or how they could be detected; or what appropriate countermeasures must be instituted other than expecting drivers to somehow overcome an open throt-

tle on a runaway vehicle. They slumber, while vehicles grow ever more stuffed with electronics that control the vehicle’s braking, stability and speed.

Don Slavik, who is both a lawyer and engineer, represents Mr. Ezal in his case. Don wants NHTSA to take a second look at the problems of the 2005 Camry—although he isn’t sanguine about the outcome. Don, who is with the Milwaukee firm of Habush, Habush & Rottier, had this to say:

It’s clear the NHTSA lacks the resources to fully investigate this. NHTSA does not have special staff with experience in electronic control systems—and their small staff is tasked with a wide range of responsibilities. That’s where the tort system comes in to assist more fully in investigating this problem, which affects millions of vehicles.

Sean Kane, who is president of Safety Research Strategies, Inc., agrees, and says:

SUA presents a unique and resource-intensive investigation that can quickly overwhelm the NHTSA defects office. Further, the agency has a history of dismissing SUA unless there are mechanical or driver error issues, which only complicates matters.

If you want more information on any of the above, contact Graham Esdale at 800-898-2034 or Graham.Esdale@beasleyallen.com.

PRODUCT LIABILITY VICTIM ENTITLED TO PUNITIVE DAMAGES

The State of Washington’s policy against punitive damages did not prevent a product liability Plaintiff from recovering punitives for the fraudulent conduct of a California company, the Washington Court of Appeals has ruled in affirming an \$8.5 million award. The Plaintiff needed a heart transplant in order to save his life because of a malfunction in a heart monitor manufactured by the Defendant. The Plaintiff sued for strict liabil-

ity under Washington law and sought punitive damages based on evidence that the Defendant had known for years about a defect in the heart monitor.

The Defendant, a California company, argued that the claim for punitive damages was barred under Washington law. But the Court applied a “most significant relationship” choice-of-law test to decide that punitive damages could be awarded in accordance with California law. The Court said:

Even though Washington has a strong policy against punitive damages, it has no interest in protecting companies that commit fraud. Where, as here, an entity headquartered in California committed the conduct in California that resulted in the Plaintiff's damages, California had the greater interest in deterring such fraudulent activities.

This is a logically-correct decision and one that recognizes the importance of punitive damages in the scheme of things. Bad conduct must be punished and punitive awards allowed to not only punish, but to deter further conduct of a like nature.

Source: *Lawyers USA Online*

ALABAMA RESIDENTS SUE FEMA TRAILER MANUFACTURERS

Sixty-six people in Mobile County have filed lawsuits in federal court against the manufacturers of travel trailers which they say exposed them to dangerous levels of formaldehyde after Hurricane Katrina. The Plaintiffs join about 23,000 others who have filed suits in Mississippi, Louisiana and Texas. The Alabama suits name seven manufacturers, along with those who won no-bid contracts to install the trailers. The complaints in the civil lawsuits contend that the Plaintiffs, who live mainly in south Mobile County, developed conditions such as asthma and are at an increased risk of cancer.

Lawyers handling the litigation say the Federal Emergency Management Agency will be added as a Defendant,

but that can't happen under federal law until after a 180-day waiting period. This suit—along with other civil lawsuits that lawyers plan to file by August 1st—will be transferred to a federal judge in New Orleans. That judge has been appointed to oversee all of the travel trailer litigation along the Gulf Coast.

It's alleged in the lawsuits that the companies resorted to substandard materials in order to expedite the manufacture of the housing units and failing to warn the government. The way the contractors installed the trailers caused stress and flexing on their frames, increasing moisture and formaldehyde exposure, according to the allegations. Internal FEMA e-mails uncovered by a Congressional investigation showed that government officials were more concerned with potential lawsuits than in ensuring the health and safety of some 150,000 families that needed temporary housing after Katrina and Hurricane Rita.

Ronnie Penton, a lawyer from Slidell, Louisiana, is representing the Plaintiffs in this litigation. It appears the evidence is clear that government officials knew about the formaldehyde risks and failed to tell the public about it. The first of the FEMA trailer lawsuits is scheduled to go to trial in New Orleans in September. The federal judge in New Orleans will handle all pretrial matters in the Alabama cases before sending them back to Mobile for trial. The Plaintiffs seek compensation for past and future injuries, as well as punitive damages against the manufacturers and contractors.

Source: *Mobile Press Register*

JURY RULES FOR A FORMER DRYWALLER WITH MESOTHELIOMA

A jury in San Francisco has found in favor of a former drywaller suffering from mesothelioma and awarded \$8.4 million in damages. In his products liability trial against Hamilton Materials, Inc., Jack Reynolds presented evidence showing that when used as intended, Hamilton's “Red Dot” brand joint compound released respirable asbestos. Exposure to asbestos ultimately caused this man's mesothelioma.

After determining that Defendant Hamilton Materials, Inc. was liable, the jury assessed \$468,759 in economic damages, and \$8,000,000 in non-economic damages, due to Hamilton Materials, Inc.'s contribution in causing Mr. Reynolds' mesothelioma, which as you probably know is an asbestos-caused fatal cancer of the pleura surrounding the lungs.

Jack Reynolds served in the US Navy from 1954–1964 primarily aboard two naval vessels—USS Mason, a naval destroyer, and USS Ranger, an aircraft carrier. Aboard these ships, he worked primarily as a painter and in the laundry service department. After his discharge from the Navy, Mr. Reynolds went to work for a business installing and finishing drywall in primarily residential construction. He did this until approximately 1973 when his employment changed from construction to the travel industry and he retired in 1999. His last occupational exposure to asbestos occurred in 1973. In 2008, Mr. Reynolds was diagnosed with left-sided malignant mesothelioma. He has received chemotherapy, multiple drainings of pleural effusions as well as a talc pleurodesis designed to help prevent further chest fluid accumulation.

Mesothelioma is an invariably-fatal cancer of the lining of the chest wall caused by exposure to asbestos. It most often presents itself many decades after exposure to asbestos, depending on a worker's individual susceptibility. Defendant Hamilton Materials, Inc., based in Orange, California, was a manufacturer and supplier of “Red Dot” brand asbestos-containing joint compound from 1963–1977, a product used to fill joints between sheets of drywall which is sanded after application emitting large amounts of dust.

At trial, evidence was presented showing that when used as intended, Hamilton Materials, Inc.'s asbestos-containing joint compound products had to be applied, sanded, disturbed, and cleaned up—all of which released hazardous respirable asbestos dust. The jury assigned 20% of the liability to Hamilton Materials, Inc. I understand other Defendants settled prior to the jury verdict. Gil Purcell, Andrew Chew

and Hallie Albert, who are with the law firm of Brayton Purcell, represented Jack Reynolds and did a very good job.

Our firm is heavily involved in the mesothelioma litigation. If you need more information on any aspect of the mesothelioma litigation you can contact Mike Andrews, Ben Locklar or Cole Portis in our firm at 800-898-2034 or Micheal.Andrews@beasleyallen.com, Ben.Locklar@beasleyallen.com or Cole.Portis@beasleyallen.com.

Source: Yahoo News

XII. MASS TORTS UPDATE

UPDATE ON PERMAX AND DOSTINEX LITIGATION

Several Permax and Dostinex cases have been recently filed across the country for injuries involving valvular heart disease. These drugs were prescribed mainly for the treatment of Parkinson's disease or Restless Leg Syndrome. However, articles and/or studies that were published in the *New England Journal of Medicine* in January, 2007, confirmed what earlier studies showed regarding a strong association between these drugs and heart valve damage. Specifically, these studies reported that users of these drugs had an increased risk of suffering from aortic, mitral, and/or tricuspid heart valve regurgitation. Heart valve regurgitation is the backward flow of blood across the heart valves causing damage to the heart ranging from congestive heart failure, heart valve replacement, and/or death. An ultrasound of a person's chest, called an echocardiogram, is typically used to identify if any heart valve damage exists.

A March 2010 date has been set for the first Permax trial in the country, to be held in Miami, Florida against the makers of Permax and Pergolide (the generic form of Permax). This Florida Permax case involves a claimant who used Permax for over 50 months, which resulted in her suffering congestive heart failure and a mitral heart

valve replacement. A second date in July, 2010 has been set for an additional Permax trial. This case is located in Colorado and involves a claimant who used Permax for over 20 months, which resulted in damage to her aortic heart valve.

There are a few other Permax, Dostinex, or combination cases that have already been filed or are in the process of being filed in Texas, Ohio, and Minnesota. Each of these claimants has used these drugs for an extended period of time and has suffered aortic, mitral, or tricuspid heart valve regurgitation. Additional trial dates are expected to be set in late 2010 and early 2011. If you want additional information, contact Navan Ward at 800-898-2034 or Navan.Ward@beasleyallen.com.

LANTUS LINKED TO CANCER

The U.S. Food & Drug Administration recently notified health care professionals and patients that it is aware of four recently published observational studies that looked at the use of Lantus (insulin glargine) and possible risk for cancer in patients with diabetes. Three of the four studies suggest an increased risk for cancer associated with the use of Lantus. The studies, published in the online journal *Diabetologia* in June, include 301,136 patients treated with insulin in Germany, Sweden and Britain. Findings were significant enough to cause concern, and calls for further testing.

Prescription Lantus is manufactured by French drug maker Sanofi-Aventis, and is used for adults with type 2 diabetes or adults and children (six years and older) with type 1 diabetes who require long-acting insulin for the control of high blood sugar. The company also makes Lantus SoloSTAR, which is a disposable prefilled insulin pen. If you need additional information on this subject contact Ted Meadows at 800-898-2034 or Ted.Meadows@beasleyallen.com.

AN UPDATE ON THE REGLAN LITIGATION

According to the Food and Drug

Administration, there are more than two million patients using Reglan or its generic counterpart, metoclopramide. Reglan is prescribed for treatment of certain digestive disorders, nausea and vomiting. It has also become a popular remedy for the treatment of morning sickness in pregnant women.

Metoclopramide has been on the U.S. market since 1979, and studies suggest a strong link between the long-term use of metoclopramide and Tardive Dyskinesia. Long-term use is characterized as consistent use longer than three months. Tardive Dyskinesia is an involuntary muscle movement disorder that can affect the muscles in the face, arms, legs and body. Symptoms include facial grimacing, tongue twitching and protrusion, lip smacking or puckering, rapid eye blinking, jerking movements in the legs, arms, or torso, and involuntary movement of the fingers. It is estimated that 3 to 5% of long-term users will develop Tardive Dyskinesia each year.

After a recent study suggested that patients were taking Reglan much longer than the recommended three months, the FDA required the makers of Reglan to issue a black box warning emphasizing the risks of developing Tardive Dyskinesia when using Reglan. A black box warning is the strongest warning the FDA can require. The FDA also directed these manufacturers to implement a risk evaluation and mitigation strategy to ensure that patients are provided with the medication safety guide when Reglan or metoclopramide is prescribed.

The number of people suffering from metoclopramide-induced Tardive Dyskinesia is on the rise, and current trends suggest that these numbers will only get higher. According to the FDA's Adverse Event Reporting System, the number of reported cases rose by more than 6% in the fourth quarter of 2008 and by more than 14% over the second half of 2008. This rise in reporting is significant because this type of increase usually comes after the FDA publicly issues a warning. Here, the FDA did not announce its black box warning until February 2009; therefore, the increased reporting was not attrib-

utable to the FDA's recent warning.

While there are other involuntary muscle movement disorders, Tardive Dyskinesia is potentially irreversible, even if the drug dosage is reduced or discontinued altogether. In some instances, complete withdrawal from the drug can make symptoms worse. This disorder can be extremely debilitating and can have an enormous impact on a patient's quality of life.

For more information about Reglan and Tardive Dyskinesia, please contact Chad Cook at Chad.Cook@beasleyallen.com, or Danielle Mason at Danielle.Mason@beasleyallen.com.

ROCHE PULLS ACCUTANE OFF MARKET AFTER JURY VERDICTS

Roche Holding AG, the world's biggest maker of cancer drugs, has pulled its Accutane acne medicine from the U.S. market. The withdrawal comes after juries awarded at least \$33 million in damages to users who blamed the drug for bowel disease. Roche notified the U.S. Food and Drug Administration on June 26th, saying it was withdrawing Accutane after a "reevaluation" of its product lines showed it faced serious challenges from generic competitors.

Roche, which is based in Switzerland, faces about 700 personal injury suits from Plaintiffs who claim they developed inflammatory bowel disease because of Accutane. Most of the suits have been consolidated in state court in New Jersey, where Accutane is manufactured by Hoffman-LaRoche, a U.S. subsidiary of Roche.

Roche has lost all six Accutane personal injury trials, with damages totaling more than \$33 million. In the most recent trial last November, a New Jersey jury awarded a total of \$12.9 to three Florida Plaintiffs. The suits accuse Roche of failing to warn doctors and patients—many of them teenagers—about the risks of developing chronic bowel diseases, such as ulcerative colitis and Chron's disease. Accutane has also been linked to birth defects and depression.

About 13 million people have taken Accutane since it went on the market in 1982. The medication was Roche's

second-biggest selling drug before the patent expired in 2002 and rivals started selling generic versions. Roche's prescription market share of the drug is now below 5%, according to the company.

So far every jury in every Accutane trial has reached the same conclusion and that is Roche failed to warn about the increased risk of inflammatory bowel disease. The next trial is scheduled for August in Illinois state court.

Roche knew of the connection between Accutane and inflammatory bowel disease as far back as 1994, but failed to report the link to the FDA or to change the labeling. The company says that it provided adequate warnings, and that the removal of the drug from the market was not for safety reasons.

The drug also has been pulled off the market in 11 other countries including France, Denmark, Austria, Germany, Portugal, Norway and Spain. Roche claims Accutane's safety wasn't a factor in the decision to pull it off the U.S. market. Roche says it "stands behind the safety of Accutane and the rigorous risk-management program Roche developed over decades of cooperation with the FDA." In November, a state-court jury in New Jersey found company officials didn't properly warn doctors about Accutane's health risks and awarded three men a total of \$12.9 million in damages.

Sources: *Bloomberg and Lawyers USA*

MASS TORTS DESIGNATION ORDERED IN LEVAQUIN LITIGATION

The New Jersey Supreme Court has designated litigation over Levaquin, the Johnson & Johnson antibiotic, as a mass tort and has assigned the case to Judge Carol Higbee. The suits allege that the drug, which is prescribed for bacterial infections of the lungs, urinary tract and skin, has caused Achilles' tendon ruptures and other damage. The litigation could likely involve thousands of cases with the same Defendants, similar complex issues of law and fact, and Plaintiffs with a high degree of commonality in their injuries and damages.

Levaquin, made by J&J subsidiary

Ortho-McNeil Pharmaceutical Inc., was approved by the Food and Drug Administration in 1996. But in July 2008, the FDA warned that Levaquin, and other drugs in the fluoroquinolone class of antibiotics, put users at heightened risk of developing tendonitis and tendon ruptures. The FDA ordered Ortho-McNeil to include on Levaquin's label a warning about the incidence of those injuries.

The most common injury associated with Levaquin, a ruptured Achilles' tendon, may require surgery to repair and frequently entails two months of immobility, then surgery and a rehabilitation period of six months or more, says Michael London of Douglas & London. Other reported injuries are ruptures of the rotator cuff, hand, biceps and thumb. Most ailments occur during or soon after a course of Levaquin, although cases occurring several months after completion have been reported. Injuries are most frequent in users over age 60, people taking steroids, or persons who have had a kidney, heart or lung transplant.

Interestingly, in this case, Johnson & Johnson actually supported mass-tort designation, but asked for the case to be in Middlesex County, New Jersey, where its corporate headquarters is located. But geographical location of the parties and lawyers, as well as proximity to airports and highways, were said to favor Atlantic County as the proper venue. The experience of Atlantic County Superior Court Judge Carol Higbee and her staff in handling high-volume product-liability cases was also a definite factor.

It should be noted that Public Citizen, which originally urged the FDA to issue its labeling order and has reviewed the agency's database, has turned up 262 reported cases of tendon ruptures, 258 cases of tendonitis and 274 other tendon disorders between November 1997 and December 31, 2005, that were associated with Fluoroquinolone antibiotics. Sixty-one percent of the ruptures were associated with Levaquin.

Source: *Law.com*

ACETAMINOPHEN USE CAUSES HEALTH CONCERNS

Each year, more than 400 people die and an estimated 42,000 people are hospitalized due to liver damage associated with overdoses of acetaminophen, the ingredient found in over-the-counter medications such as Tylenol and Excedrin. When acetaminophen is combined with a narcotic, as it is in prescription drugs such as Vicodin and Percocet, the risks of liver damage and even death increase. This finding prompted the Food and Drug Administration to look more closely at these combination drugs. Recently, an FDA advisory panel voted to recommend a ban on these prescription drugs as well as a recommendation to reduce the maximum doses of acetaminophen in over-the-counter remedies.

One reason for the FDA's action is the enormous popularity of these drugs. Acetaminophen is one of the most widely used drugs in the United States with approximately 28 billion doses consumed each year. Total sales of all acetaminophen drugs was \$2.6 billion in 2008 and 80% of that amount was from over-the-counter products. Vicodin and its generic equivalents, for example, are prescribed more than 100 million times a year. The panel noted that patients who are prescribed these combination drugs for a long period of time require higher and higher dosages of acetaminophen to achieve the same effect. In turn, the higher dosages of acetaminophen are leading to severe liver injury and even death. Sometimes, even following recommended doses can still cause liver damage in some people.

At press time, the panel hadn't yet decided on safety restrictions for over-the-counter acetaminophen, including changes to packaging and labeling, but decisions regarding these matters should be made soon. The panel also looked into over-the-counter children's medicines containing acetaminophen and decided to limit these medications to a single formulation instead of selling them in two different concentrations. But the panel rejected a similar proposal to ban over-the-counter cough and cold medicines such as

NyQuil, which also contain combinations of pain relievers and acetaminophen, because the risk associated with these combinations were not as great.

While the FDA isn't required to follow an advisory panel's recommendations to ban certain drugs from the market, the FDA usually does. Along with the ban, the panel's recommendation also includes limiting the maximum single dose of over-the-counter acetaminophen to 650 milligrams, down from the 1,000 milligram dose found in many extra strength over-the-counter varieties. Panel members suggested that the best way to protect yourself as a consumer is to become better educated about the risks associated with popular medications and to keep track of what you are taking in order to prevent accidental overdose. If you need additional information on the matters discussed above, you can contact Danielle Mason in our firm at 800-898-2034 or Danielle.Mason@beasleyallen.com.

Sources: Associated Press and *The New York Times*

BAYER SUED OVER SAFETY OF POPULAR BIRTH CONTROL PILLS

Four significant lawsuits have been filed in federal courts against Bayer HealthCare Pharmaceuticals involving the safety of Yaz and Yasmin, two of its popular birth control pills. The lawsuits were filed last month in federal courts—three in Ohio, one in Wisconsin—and there will be more to come. Bayer had reached an agreement with the Food and Drug Administration in 2008 to run a \$20 million corrective ad campaign for overstating the benefits of Yaz and downplaying its risks. The FDA had issued Bayer a warning letter about the ads, noting that Yaz actually has additional risks compared to other birth control pills because it contains the progestin drospirenone, which can increase potassium levels.

There are many more adverse events reported to the FDA for Yaz and Yasmin than for other birth control pills that have been around longer. Yaz received FDA approval in 2006 and Yasmin in 2001. Doctors are largely unaware of these adverse events unless they figure

it out for themselves. The drug companies have known about the adverse effects for some time, but have failed to warn the doctors or their patients.

The lawsuits allege that Bayer failed to warn women and their doctors of the pills' increased risk of injury—most notably blood clots—while over-promoting the benefits of the drugs. The FDA letter will be used as evidence in this litigation. Janet G. Abaray, a lawyer in the Cincinnati office of Burg Simpson Eldredge Hersh & Jardine, is representing the Plaintiffs in the four cases referred to above.

Source: *Law.com*

XOLAIR LINKED TO INCREASED RISK OF HEART ATTACK AND STROKE

Xolair is an injectable prescription drug prescribed for patients with moderate to severe persistent asthma. Recently, an ongoing study of Xolair revealed that users of the drug may experience a disproportionate increase in heart disease, arrhythmias, heart failure and stroke. The study was conducted by the manufacturer of the drug, Genentech, and consisted of 5,000 participants who were taking the drug and 2,500 participants who were not. No statistical information has yet been released, but the Food and Drug Administration has indicated that they are conducting an independent evaluation of Xolair to determine its safety.

In 2007, the FDA required the manufacturer of Xolair to issue a black box warning on its label which outlined the risk of severe or even fatal anaphylactic reaction to the medication. The label also warned of increased risk of malignancy. However, the label made no mention of any risks associated with Xolair and heart attack or stroke.

Although the study seems to indicate a real risk of heart attack or stroke, the FDA is not recommending that patients stop taking the drug or that the drug be withdrawn from the market at this time. Health care providers and users should be aware of these risks and use this information to determine the risks and benefits to individual patients. If you want more information on this subject, contact Danielle Mason or

Leigh Odell in our firm at 800-898-2034 or Danielle.Mason@beasleyallen.com or Leigh.Odell@beasleyallen.com.

Source: FDA

BOSTON SCIENTIFIC AND SIX OTHERS SUED OVER SURGERY DEVICES

Lawsuits have been filed in Houston, Texas, alleging that Boston Scientific Corp., Medtronic Inc. and five other companies promoted surgical devices for unapproved uses and thereby cheated the federal Medicare program. The lawsuits filed by a whistleblower were unsealed in a Houston court. Boston Scientific and its Guidant Corp. unit “initiated a coordinated nationwide sales campaign, including the use of illegal kickbacks and other improper means, to entice physicians and hospitals to use their products for off-label purposes,” according to a former saleswoman (identified as Jane Doe) in the complaint.

The Plaintiff filed similar actions accusing companies including Medtronic, St. Jude Medical Inc. and Endoscopic Technologies Inc. of improperly marketing surgical ablation devices, used for lesions or scar tissue, for treatment of a trial fibrillation to increase sales. The suits were filed under the federal False Claims Act on behalf of the government, alleging the off-label marketing caused excessive Medicare reimbursements. The Justice Department says that Endoscopic Technologies, based in Danville, California, agreed to pay the U.S. \$1.4 million to settle the lawsuit filed against it. The federal government had joined the case against the company.

Thus far, the government hasn’t determined whether to join the whistleblower suits against the other device makers. It must decide by August 21st whether to intervene. Minneapolis-based Medtronic first disclosed the investigation in its March 4, 2009, quarterly filing with the U.S. Securities and Exchange Commission.

The lawsuits claim the companies encouraged doctors and hospitals to use cardiac ablation as inpatient procedures, greatly increasing the cost. Surgical ablation devices create controlled

lesions or scar tissue on the heart muscle to block irregular signals of the heart, potentially re-establishing normal heart rhythm. It is alleged in the complaint against Natick, Massachusetts-based Boston Scientific and Guidant that:

For the majority of patients, cardiac ablation can be more safely performed, at a lower cost, as an outpatient catheter procedure. Inpatient admission is not medically necessary.

The lawsuits claim the companies promoted expensive heart surgeries using the devices when less invasive alternatives were appropriate, advised hospitals how to inflate Medicare reimbursements and paid kickbacks to doctors and hospitals. The Defendants also include Atricure Inc., based in West Chester, Ohio. The Justice Department in its announcement of the \$1.4 million settlement that such promotion by Endoscopic Technologies, or Estech, violated the federal Food, Drug and Cosmetic Act and caused the submission of false claims. Tony West, Assistant Attorney General for the Department’s civil division, observed:

The Department of Justice is committed to protecting Medicare from the unlawful marketing practices of Estech and other medical device manufacturers.

If you need additional information on litigation of the nature discussed above, contact Ted Meadows at 800-898-2034 or Ted.Meadows@beasleyallen.com.

Source: Bloomberg News

XIII. BUSINESS LITIGATION

JURY RULES FOR HANK GREENBERG IN STARR CASE

A jury has ruled in favor of a company run by former AIG CEO Hank Greenberg, finding that Starr Interna-

tional Co. did not plunder billions from a retirement fund. This killed the bailed-out insurer’s chances of collecting \$4.3 billion in damages. American International Group Inc. sued Starr, a private company run by Greenberg, in an effort to recover millions of shares held by Starr and to get compensation for stock sold. This verdict is the latest blow for AIG as it struggles to repay \$83 billion in loans from the federal government.

AIG had sought to establish that there had been an oral trust created in 1970, entrusting Starr International to use a block of AIG shares acquired in a company restructuring to fund an executive retirement scheme for generations of AIG employees. The suit charged Starr with breach of that trust, and with a second claim of conversion related to sales of the stock for the company’s own use. The jury returned their verdict after about only five hours of deliberation, ruling that Starr was not liable on the two claims. But a final decision on the breach of trust claim will be made by the trial judge at a later date.

David Boies was the lawyer who represented Greenberg and Starr International. After the verdict, David said:

The quickness of the jury’s decision reflects the simplicity of the case. The trust AIG is alleging, no one had ever heard of or seen. No document mentioned it and I think the jury recognized that. I am hopeful the judge would see it the same way as the jury does.

Hank Greenberg, who is now 84, was forced out of AIG in 2005 after 38 years as CEO for failure to cooperate with an internal investigation into accounting practices at the insurer that once claimed global dominance. There are a number of lawsuits still pending between Greenberg, or companies he controls, and AIG, stemming from the parties’ 2005 break-up. Greenberg also continues to face civil charges of fraud brought by then New York Attorney General Eliot Spitzer in 2005 related to complex reinsurance transactions at the insurer.

Source: Insurance Journal

MERCK AND SCHERING WORKING TO SETTLE SHAREHOLDER LAWSUIT

Merck & Co. and Schering-Plough Corp. are trying to settle a shareholder lawsuit that arose out of the planned merger of the two companies. The drug giants are offering to disclose new information about the merger to settle the class action lawsuit. The New Jersey-based companies have proposed a settlement in which they would disclose more information about the proposed \$41.1 billion combination, the opinions of financial adviser JPMorgan on the fairness of the deal, and other details.

Under the proposal no damages would be paid. Merck wants the settlement not to be an admission of wrongdoing or liability. If agreed to, it also says the Plaintiffs will be able to request that Merck pay their fees and costs. Schering-Plough says if the court approves the settlement, it will resolve all claims that were brought or could be brought by shareholders. It will be interesting to see if this proposed settlement is acceptable to the shareholders of the two companies.

Source: *Forbes*

XIV. AN UPDATE ON SECURITIES LITIGATION

MORE PROBLEMS FOR REGIONS FINANCIAL CORPORATION AND MORGAN KEEGAN AND COMPANY

Regions Financial Corporation and its Morgan Keegan investment operation are facing federal and state charges related to certain mutual funds. A number of their mutual funds took tremendous hits in the market due to over exposure to collateralized debt obligations and other risky mortgage-related investment holdings. Several Morgan Keegan mutual funds lost in excess of 70% of their value in a short period of time.

Regions and Morgan Keegan were formally served on July 9th with a "Wells

Notice" by the SEC. The notice informed Regions and Morgan Keegan that the SEC intends to recommend enforcement actions against them for possible violations of Federal Securities Laws. The mutual funds at issue were managed by Morgan Asset Management, Inc., a part of Morgan Keegan, and James Kelsoe, a senior portfolio manager. The management of the mutual funds at issue has now been transferred to Hyperion Brookfield Asset Management, Inc. of New York.

Through the end of 2005, the mutual funds at issue beat all U.S. high yield bond funds and the Dow Jones industrial average. In the wake of the mortgage crisis and housing meltdown, three popular Morgan Keegan bond funds plummeted by 60% or more, creating among the worst returns of any bond mutual funds in the country.

As you may know, a Wells notice is not a formal allegation nor is it a finding of wrongdoing. The notice provides the recipients the opportunity to provide their perspective and to address issues raised prior to any formal action being taken by the Commission. But it's not a notice that anybody in the securities business ever wants to get.

Separately, Morgan Keegan is facing hundreds of lawsuits and arbitration complaints from institutional and individual investors who put their money in the poor performing bond funds. Numerous arbitration proceedings have already occurred against Morgan Keegan with the majority of decisions being in favor of Plaintiffs seeking restitution.

The Alabama Securities Commission, which has been heavily involved, says that Morgan Keegan "engaged in fraud, used unethical sales practices, failed to supervise agents, and withheld material facts from customers." The SEC also has filed suit over the matter in U.S. District Court in Atlanta, saying the firm stranded investors with \$1.2 billion of securities in transactions that earned it \$4.3 million in fees from June 2007 through February 2008.

The Alabama Securities Commission gave Morgan Keegan 28 days to dispute the allegations in its "show cause"

order, which demands the firm demonstrate why its registration to do business in Alabama shouldn't be suspended or revoked. Alabama regulators also are seeking to force the firm to buy back all auction-rate securities it sold to customers and pay back any profits it earned from selling them.

If you need more information on this subject, contact Scarlett Tuley, Jay Aughtman, or Dee Miles, lawyers in our firm who are handling Morgan Keegan litigation, at 800-898-2034 or by email at Scarlett.Tuley@beasleyallen.com, Jay.Aughtman@beasleyallen.com or Dee.Miles@beasleyallen.com.

Source: Associated Press

MORGAN STANLEY SETTLES SEC CHARGES

On July 20th Morgan Stanley agreed to pay a \$500,000 penalty to settle federal regulators' charges that it misled customers in its Nashville office about the money management firms it recommended and from which it received commissions. Morgan Stanley—under the agreement with the SEC—agreed to refrain from future violations of the securities laws. The SEC alleged in an administrative proceeding that Morgan Stanley breached its fiduciary duty to clients in Nashville by making "material misstatements" about a program to help clients develop investment objectives.

The SEC also charged William Keith Phillips, a former investment adviser in Morgan Stanley's Nashville branch office, and that case is pending. Interestingly, Phillips says that he depended on Morgan Stanley's legal and compliance personnel to ensure that proper disclosures were made and as a result doesn't believe his actions violated SEC rules.

According to the SEC, the alleged misconduct occurred from 2000 to early 2006 and that, contrary to disclosures to clients, Phillips recommended some money management firms that had not been approved to participate in Morgan Stanley's advisory program. Scott Friestad, the associate director of the SEC's enforcement division, said in a statement:

Morgan Stanley said one thing

and did another when recommending money managers who had not been properly vetted by the firm, and Phillips repeatedly disregarded Morgan Stanley's policies and procedures and reaped undisclosed financial benefits from these unapproved managers.

It was reported that Mr. Phillips, who was a top revenue producer, steered clients to three unapproved management firms that paid at least \$3.3 million in commissions and fees to both Morgan Stanley and to him. The company and Phillips failed to disclose to clients the potential conflict of interest. Morgan Stanley says that Phillips "is no longer employed and that they have since strengthened their "policies and procedures around the marketing of investment advisory services."

Source: *USA Today*

XV. EMPLOYMENT AND FLSA LITIGATION

AN UPDATE ON ONGOING FLSA LITIGATION

Our firm has recently settled three significant FLSA cases on a class wide (collective action) basis, providing employees of those companies with back wages that they were wrongfully denied as a result of labor abuses. While each company's labor violations differed slightly, each involved a common theme we continue to see in these labor abuse cases. That common theme is where employers intentionally misclassify employees as managers and independent contractors in order to escape paying overtime pay.

One of the main reasons Congress passed the FLSA law in 1938 was to prohibit employers from unfair labor practices, one of which was overworking company employees. The law is clear that if an employer works an employee more than 40 hours a week, that employer must pay a penalty, overtime pay (one and a half times the employee's hourly rate) for that viola-

tion. Some companies try to place false titles on their employees, such as "managers," "assistant managers" or "independent contractors" to avoid the overtime penalty. The employers force these employees to work 50 to 100 hours per week, doing pure labor, not managerial work. There are companies all over this country violating these fair labor standards and the FLSA law provides a cause of action and a remedy in a court of law.

Our law firm remains committed to protecting the labor force in this country by filing these FLSA cases where labor abuses are occurring. We are currently pushing the Dollar General litigation toward a conclusion. The United States District Court for the Northern District of Alabama, Western Division, located in Tuscaloosa, Alabama, recently certified a "collective action" against Dollar General, a case currently being handled by our firm. The Court has ordered a notice to be sent to all store managers of that company notifying them of the class. That notice should be issued within the next 30 days to the employees of Dollar General.

We will continue to update our readers on the 1200 individual cases filed throughout this country against Dollar General, as well as the recently certified collective action mentioned above, which is currently before U.S. District Judge Scott Coogler. If you need any additional information relating to any of the above, contact Roman Shaul, Larry Golston, Lance Gould or Dee Miles at 800-898-2034 or Roman.Shaul@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Dee.Miles@beasleyallen.com.

WAL-MART SETTLEMENT OF MASSACHUSETTS PAY SUIT IS REJECTED

A state court judge in Massachusetts has rejected an attempt by Wal-Mart Stores Inc. to settle a class-action lawsuit in a Massachusetts workers' pay dispute. Plaintiffs' lawyers claimed that Wal-Mart reached a secret deal with a group of lawyers who were no longer active in the case. The lawsuit, filed by hourly workers, claimed Wal-Mart's

managers required them to work off-the-clock and denied or cut short rest and meal breaks. Wal-Mart, the world's largest retailer, agreed to settle the lawsuit for as much as \$40 million and sought preliminary court approval.

Named Plaintiffs, Elaine Polion and Crystal Salvas, objected to the settlement agreement, claiming Wal-Mart sought out other lawyers after refusing a \$50 million settlement demand in May. Massachusetts Superior Court Judge Thomas Murtagh refused to grant the requested preliminary approval on July 15th and appointed Carolyn Burton, who objected to the settlement, as the lead attorney for the Plaintiffs in the lawsuit. Judge Murtagh called the settlement process "tainted." A trial is now scheduled for October 5th. I'm not sure which set of lawyers involved in this matter is correct as to what happened to the settlement or whether it was a good one, but I do know that a judge has control over those issues.

Wal-Mart agreed in December to pay as much as \$640 million to settle more than 60 wage and hour class actions filed in state and federal courts. The giant retailer also agreed in December to pay \$54.3 million to settle a class-action suit by Minnesota hourly workers claiming violations of wage and hour laws. Obviously, the Massachusetts case referred to above wasn't among those settled. Nor did Wal-Mart settle lawsuits in Pennsylvania and California, where juries returned verdicts for the workers. The company appealed a \$78 million jury verdict in Pennsylvania in 2006 over rest breaks and unpaid work and a \$172 million verdict in California in 2005 over meal breaks.

Source: *Bloomberg*

WAL-MART SETTLES LAWSUIT BY WORKERS IN WASHINGTON FOR \$35 MILLION

Wal-Mart Stores Inc. has agreed to pay up to \$35 million to settle a class-action lawsuit brought on behalf of 88,000 workers in Washington State who were forced to skip meal and rest breaks or work off the clock. A King County Superior Court judge gave final approval to the settlement. The class members must file their claims by

August 19th. The settlement also requires Wal-Mart to continue steps it has taken to prevent wage and hour violations at its 50 stores and Sam's Clubs in Washington.

Source: *Seattle Times*

SETTLEMENT OF \$17.5 MILLION LAWSUIT AGAINST WAL-MART IS APPROVED

In another lawsuit involving Wal-Mart Stores, Inc., a federal judge gave final approval last month to the \$17.5 million settlement reached after black truck drivers sued the retail giant. U.S. District Judge Bill Wilson, Jr. signed an order approving the settlement in the class-action lawsuit. Folks in the class applied to drive for Wal-Mart between 2001 and 2008 and were turned away.

Source: Associated Press

TEXAS COMPANY ORDERED TO PAY \$3 MILLION TO BLACK WORKERS

Lufkin Industries Inc., an East Texas company, must pay black workers more than \$3 million in back pay as damages in a class action lawsuit charging racial discrimination. A federal judge ruled that the company must pay the workers \$3.1 million as well as 5% interest to compensate them for acts of discrimination dating from 1994. A bench trial in 2005 found that the company unlawfully made initial assignment and promotion decisions that discriminated against black workers. That ruling was made by another federal judge who died later that year. In the recent ruling, Judge Ron Clark wrote:

Lufkin Industries has been profiting for years from its policy of unlawful discrimination. At the same time, as Judge Cobb found, Lufkin's CEO was indulged with a corporate jet and pilot and in 2002 a paycheck three times that of the president of the United States.

Lufkin, a publicly traded company, sells and services oil field pumping units, foundry castings and power transmission products. The class action

suit, which lists 13 named Plaintiffs, was filed in 1997. Judge Clark's order followed a directive from the Fifth Circuit Court of Appeals asking that the district court craft a more specific remedial order.

The amount of pay due the workers, with interest, will be about \$5 million. But because the suit only addressed the pay differentials in certain documented cases, the problem appears to be much bigger. The final judgment in 2005 noted that the company's managers and supervisors gave whites preferential treatment and that "the pattern of African American shortfalls in promotions is consistent across the years." The company was ordered to stop channeling black applicants to divisions where working conditions are poor. Tim Gerigan, a lawyer from Nacogdoches, Texas, represented the workers and did an outstanding job.

Source: Associated Press

BANK OF AMERICA SUED FOR GENDER BIAS OVER BONUSES

Bank of America Corp. has been accused in a federal lawsuit of discriminating against female brokers at the former Merrill Lynch & Co. by offering them lower retention bonuses than male counterparts. The lawsuit, filed in New York, seeks class-action status. Female brokers allege that they were, typically, eligible for lower bonuses because of gender bias at Merrill, and that wealthier clients were steered to male brokers. It is alleged further that, because bonuses were based on "production," or fees earned on client assets, the bonus distribution authorized by Bank of America "disproportionately disadvantages women and advantages white men as favored employees."

It's not common for a company in the brokerage business to use retention bonuses. These bonuses are often awarded to brokers who work at companies being acquired to keep them from defecting to competitors. It's reported that for top producers bonuses can reach seven figures. Bank of America has said it has about 15,800 brokers, according to reports, most of which

came from Merrill. Chief Executive Kenneth Lewis has referred to the brokerage business as the "crown jewel" of Merrill. Bank of America bought Merrill on January 1st of this year.

The case was brought by Jaime Goodman, who has worked at Merrill since 1992. In the Complaint, she alleges that she has been a "top-quintile performer" and "a \$1 million producer for nearly a decade," but would have performed even better and gotten a higher retention bonus absent discrimination. The Plaintiff is seeking compensatory damages, including the value of all compensation and benefits lost because of the alleged bias, as well as punitive damages and other remedies. Linda Friedman, a partner at Stowell & Friedman Ltd in Chicago, who is representing the Plaintiff, said:

The idea of a retention bonus is to retain the best and the brightest. Bank of America acquired a company that had a history of mistreatment. Rather than acknowledge that, and be part of the solution to level the playing field, Bank of America picked up where Merrill Lynch left off.

This lawsuit is very important for obvious reasons and will be watched closely by female workers nationwide.

Source: *Reuters*

XVI. PREMISES LIABILITY UPDATE

HOME DEPOT CUSTOMER INJURED BY FORKLIFT AWARDED \$1.5 MILLION

A Georgia jury awarded a customer and his wife \$1.5 million last month in a lawsuit arising out of a forklift accident at a Home Depot store. The complaint filed by 58-year-old Larry Reece alleged that a pallet of plywood fell on him from a forklift at the Marietta, Georgia, store in 2005, knocking him down and causing neck and spine injuries. It was proven that the pallet fell 24 feet from the fork lift. The wood

hit a barricade that knocked Mr. Reece down, causing him to be trapped under the plywood.

In a most interesting and highly-unusual development, Home Depot made a settlement offer for punitive damages and Mr. Reece accepted the offer. The case then went to a jury only on the issue of personal injury damages. Mr. Reece was unable to resume his work in residential construction after the accident. A Home Depot spokesman said the chain has tried to do the right thing by accepting responsibility and by making fair offers to compensate Mr. Reece for his injuries.

As part of the verdict, Mrs. Reece was awarded \$30,000 for loss of marital relations. Medical expenses for Mr. Reece's neck injuries were about \$120,000, which included surgery to repair herniated discs. Mr. Reece had a permanent injury and permanent hardware implanted in his neck. All he had ever done was construction work.

As you may know, this was not the first rodeo for Home Depot. Over the years their stores—with their “sky shelving” packed with stock—have been the subject of other lawsuits arising out of injuries occurring in the stores. Jeff Shiver, a very good lawyer from Atlanta, represented Mr. Reece in his case, and did an outstanding job.

Source: Associated Press

COMPANIES ARE AT FAULT IN PARKING LOT DEATH

A jury has awarded \$750,000 each to the parents of a 21-year-old who was strangled to death in a Florida restaurant's parking lot. Jurors found that Brickman Management Company and B&B Cash Grocery Stores were negligent for not providing security on the morning of Anthony Makowski's death. Brickman owns the McDonald's in Land O' Lakes, Florida, where Makowski was strangled to death by another male during a fight back in 2005.

The case was based on 750 calls for service from the McDonald's and the surrounding parking lot between 2001 and 2005. The incidents included juvenile disturbances, loitering and reported assaults. About 200 of the calls

mentioned some form of alcohol use and most were made between midnight and 5 a.m. on Friday nights into Saturday mornings and Saturday nights into Sunday mornings. The McDonald's drive-through is open 24 hours.

Source: Tampa Tribune

SOME PUBLIC-POOL DRAINS ARE NOT MEETING THE NEW STANDARD

It's being reported that in some parts of the country municipal swimming pools are not complying with the new federal law designed to keep children from becoming trapped in drains. Unfortunately, in many instances, there is virtually no one to enforce the law, and that's inexcusable. Pools in some cities have opened without the required improvements, while others say their drains are safe even though they don't comply.

The Virginia Graeme Baker Pool and Spa Safety Act requires public pools to have a certified drain cover for their filtration systems. Enacted in December of 2007, the act was created after the seven-year-old granddaughter of former U.S. Secretary of State James Baker was trapped by the suction from a hot tub drain and died in 2002. The law became effective on Dec. 19, 2008.

As we have reported previously, those entrapped by pool drains sometimes are eviscerated. The Consumer Product Safety Commission, along with state Attorneys General, are authorized to enforce the law. But commission spokeswoman Kathleen Reilly said officials cannot realistically verify that every pool complies. With as many as 900,000 public pools and spas in the U.S. and only 100 field representatives, Ms. Reilly said that task would be “all but impossible.” She conceded that states have shown varying degrees of enforcement.

For example, in Maryland, pools were not allowed to open this summer unless they were in compliance, but Virginia has not aggressively enforced the law. I must admit that I don't know exactly what's being done in Alabama. I do know, however, that the new law must be followed and also enforced.

PAINT MAKER LOSES IN LEAD CONTAMINATION SUIT

A Mississippi jury has found paint manufacturer Sherwin-Williams Co. liable for the illnesses of a Mississippi boy who ate lead-contaminated paint chips. The Jefferson County Circuit Court jury awarded \$7 million in damages in the lawsuit filed on behalf of Trelvion Gaines and his mother, Shermeker Pollard, of Fayette. The ruling is significant because few lead paint lawsuits filed against manufacturers have been successful nationwide.

Sherwin-Williams will appeal the jury's decision. The suit was filed in 2000 in Jefferson County Circuit Court when Gaines was nine years of age. A trial judge ruled in favor of the Cleveland, Ohio-based paint manufacturer in 2003. The Mississippi Supreme Court overturned the decision in 2007 and ordered a new trial. In the lawsuit, the family claims Trelvion Gaines ingested lead paint chips while staying in the house where his grandmother had lived since the 1970s.

Lead paint was banned in the United States in 1978, but can be found in some older homes. The house was painted four times between 1974 and 1994. The lawsuit alleges that the boy was exposed to lead dust and chips from sanding, scraping and other steps recommended by Sherwin-Williams to remove the lead paint from the house before paint that's not lead-based could be applied. The brain damage became evident in the first grade, consistent with the CDC statements that lead-induced brain damage may take years to manifest in the harmed children. The teenager still reads only at a second- or third-grade level and shows other signs of cognitive delays. Tim Porter, a Jackson, Mississippi lawyer, represented the family and did a very good job.

CORPORATE HOG FARM LAWSUIT SETTLED FOR \$1.1 MILLION

A couple who lives near Stockton Lake, Missouri, has settled its lawsuit for \$1.1 million. The lawsuit arose out of the stench from a nearby factory hog farm. The nuisance lawsuit was filed by

Ed and Ruth McEowen against the hog operators after barns were built less than 1,000 feet from their home several years ago. What was described during the trial as a sickening stench was said to settle down in the valley near their home once the sun goes down.

The lawsuit was filed against a number of Defendants: the owner of the barns; the Missouri Farmers Association, which supplied the hogs; North View Swine Co.; Tri-County Swine; and an insurer, the Missouri Farm Bureau. The owner does not live with 7,500 hogs at the farm that is located across the road from the Plaintiffs. One of six barns was built without a construction permit, a violation of Missouri Department of Natural Resources regulations, according to allegations in the lawsuit. The farm was said to have operated six years without an operating permit from DNR.

Hog waste also fouled a creek that runs through the Plaintiffs' property. The Plaintiffs had lived on their 40-acre farm for 30 years and they actually built their home and a workshop by themselves. The settlement involves only odors up to the date of the settlement. But the Plaintiffs say they will file another nuisance action if the hog operation continues to harm their quality of life.

The Plaintiffs were represented by Mike Holzknecht, a lawyer from Stockton, Missouri, and Charlie Speer, a Kansas City lawyer. They did a very good job for their clients.

Source: *Kansas City Star*

XVII. WORKPLACE HAZARDS

HISPANIC WORKER DEATHS UP 76% SINCE 1992

The number of Hispanic workers who die on the job has risen, even as the overall number of workplace deaths has declined, according to federal statistics. Hispanic worker deaths increased from 533 in 1992 to 937 in 2007 — a 76% jump. In the same

period, total fatalities in all jobs nationwide fell from 6,217 to 5,657, according to the data. The 2007 tally, the latest available from the U.S. Bureau of Labor Statistics, followed a record 990 Hispanic deaths in 2006.

More Hispanics in the workforce can account for some of the increase in deaths, according to Peg Seminario, safety and health director of the AFL-CIO. In 1998, Hispanics represented 10.4% of the U.S. labor force, according to the U.S. Bureau of Labor Statistics. In 2007 they accounted for 14%. Lack of training, poor communication skills and exploitation of workers also lead to accidents and deaths on the job.

The Obama Administration says that reducing injuries and fatalities at construction sites nationwide shall be the immediate goal of the federal government. Secretary of Labor Hilda Solis, in a speech to the American Society of Safety Professionals, said clearly that the "The U.S. Department of Labor is now back in the enforcement business." That's good news for American workers.

Source: *USA Today*

JURY AWARDS \$9.6 MILLION TO WORKER INJURED IN INDUSTRIAL ACCIDENT

An industrial worker who suffered severe eye damage after he was doused in acid in an April 2006 workplace accident has been awarded \$9.6 million by a Texas jury. The jury found that Dallas-based Occidental Chemical Corp., a unit of Occidental Petroleum Corp., negligently designed the acid addition system to which Equistar Chemicals worker Jason Jenkins was adding acid at the Lyondell Bayport facility when the accident in question occurred.

Jenkins, who lost most of his vision in one eye, alleged that Occidental's system lacked a pressure indicator and it failed to properly vent pressure to prevent worker injury. The faulty design vented pressure near the worker's face, according to trial evidence. The jury found Occidental 75% responsible, Equistar 20% responsible and Jenkins 5% responsible for the incident. A safer alternative design was available, according to trial testimony, when the system was designed.

Kurt Arnold, Jason Itkin and Michael Pierce, lawyers with Arnold & Itkin, a Houston law firm, represented Mr. Jenkins and did an outstanding job.

Source: *Sun Herald*

XVIII. TRANSPORTATION

FEWER DRUNK DRIVERS ON THE HIGHWAYS

There was some good news released recently concerning our nation's highways. A new roadside survey by the National Highway Traffic Safety Administration confirms a continuing decline in the percentage of legally intoxicated drivers. In 1973, 7.5% of drivers had a blood alcohol concentration (BAC) of .08 or higher. In the latest survey, that figure had fallen to 2.2%. A BAC of .08 or higher is now above the legal limit in all 50 states and the District of Columbia.

Previous roadside surveys conducted by NHTSA have measured only alcohol. But the 2007 survey used new screening techniques that detected other substances as well and in the future may help show the extent of drug impairment among drivers.

The survey found 16.3% of nighttime weekend drivers were drug positive. The survey focused on weekend nighttime drivers and found that the drugs used most commonly by drivers were: marijuana (8.6%); cocaine (3.9%); and over-the-counter and prescription drugs (3.9%).

Transportation Secretary Ray LaHood is concerned about the prevalence of drivers who use drugs, and officials should continue to fight against all impaired drivers. He had this to say about the good news on drunk drivers:

I'm pleased to see that our battle against drunk driving is succeeding. However, alcohol still kills 13,000 people a year on our roads and we must continue to be vigilant in our efforts to prevent drunk driving.

While the data relating to drunk driving is better, there is still much

room for improvement. But the data relating to drivers under the influence of drugs is a very big problem. Gil Kerlikowske, director of the Office of National Drug Control Policy, observed:

This troubling data shows us, for the first time, the scope of drugged driving in America, and reinforces the need to reduce drug abuse. Drugged driving, like drunk driving, is a matter of public safety and health. It puts us all at risk and must be prevented.

NHTSA is conducting further research to assess how drug traces correspond to driver impairment since some drugs can remain in the body for days or even weeks. Among the findings of the latest roadside survey are these:

- The percentage of male drivers with illegal BAC levels was 42% higher than the percentage of alcohol-impaired female drivers.
- Drivers were more likely to be illegally drunk during late nighttime hours (1 a.m. to 3 a.m.) than during daytime or early evening hours.
- Motorcycle riders were more than twice as likely as passenger vehicle drivers to be drunk (5.6% compared with 2.3%). Pickup truck drivers were the next most likely to have illegal BACs (3.3%).

The 2007 survey involved more than 300 roadside locations throughout the United States. Government at every level must continue their efforts to curtail drunk driving and also to do the same for “drugged driving.”

Source: *Insurance Journal*

ALABAMA CORRECTIONS DEPARTMENT CHANGES TRANSPORTING POLICY

The Alabama Department of Corrections has finally changed the way it transports job applicants to sites around the state. But it took a terrible tragedy to bring the change about. Without question it comes about as the direct result of the horrific crash of a prison van that left seven people dead last fall. Correctional officer

Rodney Kelley was driving a Department security van with six job applicants on board when the crash occurred in the early morning hours of October 3, 2008. All of the passengers in the van and Mr. Kelley were killed. Our firm is representing two of the victims’ families and knows firsthand how devastating this ordeal has been for all of the families.

The previous policy was one that in my opinion should never have been in place. Now the Department no longer uses vans that lock passengers in the back for the courtesy rides to application sessions. Passengers could not get out of the vans—without being let out—in the event of a crash. That was the old system. The vans the victims were in when the crash occurred were actually caged vans that were used to haul prison inmates around. I understand that regular vans will now be used when private citizens or employees are being transported.

In the crash that brought about the change, an 18-wheeler traveling at a high rate of speed was attempting to pass in a no-passing zone when it collided with the prison van. The victims in the van died trapped inside after the van caught fire and burned. A tractor-trailer was traveling in an easterly direction and was trying to pass another truck also heading east on U.S. Highway 82. The prison van was headed west and coming around a curve when two the vehicles collided and burst into flames.

Our investigation has revealed that the passing truck had been signaled to pass in a no-pass zone by the slower moving truck headed in the same direction. As a result, both drivers were at fault and there was an awful tragedy resulting in the loss of seven innocent lives. The civil lawsuits filed by the victims’ families over the crash are all pending in Montgomery County Circuit Court. Judge Charles Price consolidated all of the cases for discovery purposes only. The cases will be tried separately and hopefully in the near future.

Source: *Blog.AL.com*

COURT AWARDS \$14.6 MILLION TO PARALYZED TRUCKER

In a lawsuit arising out of a 2007 accident on a state road in Palm Beach County, Florida, a Broward Circuit Court judge has ordered an insurance company to pay a paralyzed truck driver \$14.6 million. Derry Brown Jr. of Pahokee, Florida, was hauling a load of sugar in an 18-wheeler when a driver ran a stop sign, cutting him off on May 31, 2007. In an attempt to avoid a crash, Brown swerved out of the way. His truck then overturned.

The accident cost Brown the use of his arms and legs and left him with large and mounting medical bills. When National Casualty Co., Brown’s insurance carrier, denied coverage, he sued for uninsured-motorist benefits. Brown is undergoing rehabilitation at the Florida Institute for Neurological Rehabilitation in Wachula, because of his condition. Robert Keeley represented the Plaintiff.

Source: *Miami Herald*

LAWSUITS FILED OVER DEADLY METRO CRASH

There have been six lawsuits filed in federal court arising out of the deadly crash of a metro train in Washington D.C. Nine persons were killed in the crash and 80 were injured. Metro is the subway system for Washington, D.C. Metro is responsible for the first \$5 million under its liability insurance policy for such accidents. After that, coverage from a number of carriers kicks in and will be needed to cover all of the claims. Metro also has property insurance with a \$1 million deductible. Metro has not disclosed the full extent of its liability insurance coverage. If liability exceeds the total limits, Metro will have to cover the remainder.

Those injured in last month’s crash, and relatives of the nine people killed, have up to three years to file a claim. But most believe there won’t be a great deal of progress in these cases until the federal investigation into the cause of the crash is concluded. The lawsuits filed thus far make a number of allegations, including:

- That a novice train operator, Jeanice McMillan, who was killed in the crash, failed to keep proper watch and failed to brake early enough;
- That Ms. McMillan was not properly trained and supervised;
- That the train was traveling too fast; and
- That Metro failed to properly maintain the braking and computer systems designed to prevent crashes.

At least one of the lawsuits names Alstom Signaling as a defendant, saying that company was responsible for a malfunctioning circuit that failed to detect that Ms. McMillan's train was speeding toward a stopped train. Federal investigators say the emergency brakes on Ms. McMillan's train were engaged about 425 feet before impact. Investigators will conduct tests to establish when she would have been able to see the stopped train ahead of her and to measure that against the point where the brakes were deployed.

Source: *Washington Post*

JURY BLAMES PILOT ERROR IN MOVIE HELICOPTER CRASH

An Iowa jury, at the conclusion of a high profile lawsuit, found in favor of a film producer and a cameraman's widow last month. Both won multimillion-dollar lawsuits against a pilot who crashed a helicopter into power lines during production of an eastern Iowa baseball movie. The jury in Polk County, Iowa, awarded \$7.2 million to the widow of Roland Schlotzhauer, the cameraman who died in the June 2006 crash while filming *The Final Season*. Jurors also ordered the pilot to pay \$4.2 million to Tony Wilson, the Dallas Center movie producer, who suffered near-fatal injuries.

The verdict was in a case which consolidated four lawsuits—with conflicting versions of how the low-flying chopper crashed—for trial. The case revolved around an aerial shot for *The Final Season*, a film about the Norway High School baseball team's 1991 championship run. The pilot was flying

between 30 and 50 feet off the ground and traveling about 55 mph for a shot along a highway near Walford, Iowa when the chopper snagged on power lines. Both the pilot and Wilson suffered permanent injuries and have incurred hundreds of thousands of dollar in medical bills. Schlotzhauer was killed in the crash.

Jurors placed 75% of the blame on the pilot in the Schlotzhauer's lawsuit, which means he will have to pay three-fourths of the \$7.2 million award. The corporate owners of *The Final Season* must pay the remaining 25%. In the Wilson lawsuit, jurors found that the pilot was completely at fault and ordered him to pay the film producer \$4.2 million for medical expenses, pain and suffering, lost earnings and other legal damages. The pilot's company, Ritel Copter Service, also was named in the lawsuit.

Bristol Aerospace, a Canadian aviation company, was a Defendant in three of the lawsuits. Lawyers for Wilson, Schlotzhauer and the pilot all blamed the crash on a windshield-mounted blade manufactured by the company to slice through power lines. It was contended that Bristol Aerospace executives, concerned that their patent was about to expire, shortened the blade and removed a serrated edge. It was further contended during the trial that the cost-cutting move ultimately stopped the blade from working properly in the crash.

But lawyers for Bristol contended that the redesign did not compromise the safety device. They said engineers did shorten the blade, but also increased the angle so it would stand at the same height. Tests conducted by the U.S. Army found that the serrated edge slowed the momentum of the power lines as they slid into the main cutter. As a result, the device was said to be more effective without the serrated edge.

The jurors found that Bristol wasn't at fault. Six of the seven jurors ruled against the pilot. Kevin Driscoll, a lawyer from Des Moines, Iowa, represented Tony Wilson & his wife. Gary Robb, a Kansas City lawyer, represented the widow of Mr. Schlotzhauer. This was an extremely complicated matter and had to be most difficult to try

because of the consolidated cases.

Source: *Des Moines Register*

CONFLICTING TESTIMONY LEADS TO \$16 MILLION SETTLEMENT

An interesting development occurred during the trial of a lawsuit in a Texas court. Conflicting statements offered by a witness on the stand during a trial resulted in a settlement of the case. Pioneer Drilling Company, in the wrongful death case, agreed to settle for \$16 million. The settlement came after three days of testimony in the case which involved the death of Rhonda Kay Henson. The woman's family sued Pioneer and the driver, Daniel Armstrong, asserting negligence and a wrongful death claim. On September 11, 2008, two large pieces of gas well equipment fell from a Pioneer tractor-trailer driven by Armstrong. One piece, known as a spreader bar, struck Ms. Henson's truck and killed her.

During testimony, Armstrong admitted to numerous driving infractions and said he was not aware of safety laws and regulations about securing and transporting large loads. Armstrong discussed earlier driving infractions including tickets, accidents, license suspensions and a driving under the influence by a minor citation. Armstrong said he, and other Pioneer officials, falsified and back dated documents in his employee file after the accident that killed Ms. Henson. Company officials also allowed Armstrong to drive a tractor-trailer once after the accident.

Evidence offered during the trial about the handwritten description on a Pioneer company accident report proved contradictory. In a previously-taken videotaped deposition played for jurors, Armstrong said the handwriting, but not the signature, was his. Previously, Armstrong had said neither the accident description nor signature were his handwriting. Over time Armstrong had given different versions of the circumstances of the accident. He had said first that he believed the initial account given by him to the investigating officers was correct at the time. During the trial, however, he admitted that he knew that version was false.

Armstrong admitted to having given conflicting testimony in other matters.

Because of his inconsistent statements, the trial judge stopped testimony to give Armstrong a chance to consult with a criminal lawyer. Armstrong never retook the stand and no more testimony was heard by the jury. A settlement was soon reached by the parties. Pioneer's insurance company will pay \$15 million of the settlement, and the company will pay the other \$1 million. A Fort Worth lawyer, John David Hart, represented the woman's family and did a very good job.

Source: *Cleburne Times Review*

\$14 MILLION DRAM SHOP ACT AWARD RESTORED IN WASHINGTON STATE

The Washington Supreme Court has unanimously reinstated a \$14 million award to a family who sued a tavern and a bartender after one of the bar's customers drove away from the establishment and collided with their car, leaving a seven-year-old boy a paraplegic. Under Washington state law, bartenders who serve visibly intoxicated customers are liable for damages to potential victims. At issue was the type of evidence needed to prove "negligent overservice." Most states, including Alabama, have "dram shop" laws that can make taverns or bartenders—and in some states, even social hosts—liable for damages if they serve intoxicated customers who leave the premises and harm themselves or others.

The Justices on the Supreme Court noted that a forensic consultant found that the bar patron—Hawkeye Kinkaid—likely drank the equivalent of either 21 12-ounce beers or 30 ounces of 80-proof alcohol, and probably had a blood alcohol content of 0.32 at the time of the collision. The legal threshold in Washington State is 0.08. Kinkaid was drinking at Moose Lodge, about 90 miles north of Seattle, just before the April 2000 accident. Kinkaid's girlfriend was a bartender at the lodge and served him the night of the accident.

After Kinkaid left the lodge, he drove his car across the center line of a road in nearby Ferndale, striking the car of Bianca Faust of New York City, who was

driving with her two children and infant grandchild. Mrs. Kinkaid was killed and everyone in the Faust car was injured, including seven-year-old Christopher. Mrs. Faust and her family members sued both the lodge and the bartender, and received a verdict in the trial court. The award was later overturned by the state Court of Appeals, which said Mrs. Faust had to present "specific point-in-time evidence" that Kinkaid seemed drunk when the bartender served him alcohol.

But the Supreme Court disagreed, noting that in statements to others, the bartender said Kinkaid was too "tipsy" to be driving and that he was so drunk that night that she eventually refused to serve him. Christopher, now 15, will benefit the most from the ruling. Steve Chance represented the Faust family, and did a very good job. He had this to say about the outcome:

His life is now going to make a significant change for the better. This family now can take care of their boy the way he's entitled to be taken care of.

Dram shop acts are on the books for the dual purposes of compensating victims and to reduce drunk driving on our nation's highways. All lawyers should become familiar with the specific laws in their state so that cases can be brought for victims in drunk driving accidents that result in deaths or serious injury. If you want additional information on dram shop act litigation, contact Dana Taunton or Leslie Ellis at 800-898-2034 or Dana.Taunton@beasleyallen.com or Leslie.Ellis@beasleyallen.com.

Source: Associated Press

XIX. ARBITRATION UPDATE

ATTORNEY GENERAL SWANSON SHOULD GET A MEDAL IN THE NATIONAL ARBITRATION WARS

Minnesota Attorney General Lori Swanson filed suit against the National

Arbitration Forum of Minnesota, the nation's largest arbitration company for consumer credit disputes. The suit, filed on July 14th, accused NAF of consumer fraud, false advertising and deceptive trade practices by "misrepresenting its independence" and hiding its "extensive ties" to the collection industry. Attorney General Swanson, when filing the suit, said in a press release:

This is a classic case of the little guy being stepped on by fine-print contracts. Credit card companies are among the most prolific users of mandatory arbitration clauses. Just by keeping a credit card, the consumer agrees to the terms and conditions of the card, even if the arbitration provision was sent to the consumer after the card was issued. As a result of mandatory arbitration clauses, which appear in millions of consumer agreements, hundreds of thousands of consumer disputes are resolved each year not by a judge or jury, but by a private arbitration system.

As we have repeatedly reported, credit card companies, banks, retail lenders and cell phone service providers have been inserting "mandatory pre-dispute arbitration clauses" in the fine print of consumer agreements. The clauses require consumers to waive their right to seek legal action in the event of a dispute with the company. Disputes are to be resolved by an arbitrator selected by the credit card company or other creditor. In most every case, the consumer doesn't realize that he or she is waiving an important right. Most don't even know about the arbitration clause that affects them.

The lawsuit, filed in Hennepin County District Court, charged that the National Arbitration Forum works behind the scenes, "alongside creditors and against the interests of ordinary consumers," to convince credit card companies and other creditors to insert arbitration provisions in their customer agreements and then appointing itself to resolve the disputes. The lawsuit alleged that the National Arbitration Forum pays commissions to executives to convince creditors to insert manda-

tory arbitration clauses in customer agreements, thus generating arbitration filings and revenue for itself.

I am pleased to report that within days after being sued, the National Arbitration Forum agreed to stop handling cases involving banks and credit card issuers over unpaid bills. Under the agreement with the Attorney General, no longer will NAF be allowed to settle disputes between consumers and credit card companies. This is a significant victory for American consumers.

The settlement also provides more evidence to consumer advocates who have been challenging mandatory arbitration clauses written into consumer contracts. In addition to credit cards, contracts involving autos, cell phones and health care require consumers to resolve disputes through binding arbitration rather than going to court.

The debate over the fairness of mandatory arbitration is still awaiting action in Congress. Lawmakers are considering whether to ban such clauses in all consumer contracts. Attorney General Swanson, in a statement about the NAF settlement, said:

To consumers, the company said it was impartial, but behind the scenes, it worked alongside credit card companies to get them to put unfair arbitration clauses in the fine print of their contracts and to appoint the Forum as the arbitrator. Now the company is out of this business.

The allegations in the Attorney General's suit cast doubt on the fairness of the proceedings by revealing a financial connection between the NAF and a New York hedge fund that also controlled a debt collection agency. The Attorney General said that the NAF handled more than 214,000 collection claims in 2006, 60% of which were filed by three law firms with ties to the hedge fund.

Source: Saint Paul Legal Ledger

THE AMERICAN ARBITRATION ASSOCIATION FOLLOWS SUIT

After the settlement of the lawsuit

mentioned above, another major arbitration firm has backed away from the business of resolving disputes between customers and their credit-card and cellphone companies. The American Arbitration Association will stop participating in consumer-debt-collection disputes until new guidelines are established. That, too, was a major victory for consumers in this country.

Source: Wall Street Journal

XX. HEALTH CARE ISSUES

FDA ISSUES STRONGER WARNINGS FOR CHANTIX AND WELLBUTRIN

The FDA wants Pfizer, the manufacturer of Chantix, and GlaxoSmithKline, the maker of Zyban, another commonly-prescribed smoking cessation drug, to amplify warnings about the serious reactions users of the drugs may experience. The agency says it will require the drug companies to put black boxed warnings—the most serious caution—on product labeling for both Chantix and Zyban. Chantix, also known as varenicline and marketed outside the United States as Champix, has been linked to behavioral changes and other symptoms.

The FDA warns that agitation, hostility, depression, and suicidal thoughts and actions are possible side effects that users should be keenly aware of. The FDA will require the same strong warnings on labeling for Zyban (bupropion hydrochloride, otherwise called Wellbutrin when prescribed as an antidepressant). The Pfizer drug, introduced in 2006, has about 90% of the market for prescription smoking-cessation drugs, according to IMS Health, a health care information company. The FDA stated in its latest warning:

People who are taking Chantix or Zyban and experience any serious and unusual changes in mood or behavior or who feel like hurting themselves or someone else should stop taking the medi-

cine and call their health care professional right away.

The FDA also urges friends and family members to be observant of those using the medications, remaining vigilant for behavioral changes in particular. According to the FDA, observers who sense behavioral changes should “tell the person their concerns and recommend that he or she stop taking the drug and call a health care professional right away.” Health officials, reluctant to withdraw smoking cessation drugs from the market even if the drugs prove to be dangerous, advise using Chantix and Zyban with extreme caution.

Smoking is the leading cause of preventable death in this country and that helps keep these drugs on the pharmacy shelves despite their risks. In addition to boxed warnings on product labeling, the FDA will also require all adverse risks to be described in the drugs' Medication Guides. The same regulations will also apply to all generic versions of Zyban.

Analyses of both Chantix and Zyban users reveal disturbing patterns. The FDA notes that while many people stopped experiencing adverse affects once they discontinued the medication, others “continued to have symptoms after stopping the medication. Also, in a few cases, the problems began after the medication was stopped.”

The FDA has also ordered the drug manufacturers to conduct new clinical trials to determine how frequently serious neuropsychiatric symptoms occur in patients undergoing various smoking cessation therapies. To help discern whether the drugs cause the symptoms or merely exacerbate them, the trials will include patients with and without psychiatric disorders. For more information, visit www.chantix-legal.com.

DARVON AND SIMILAR DRUGS TO CARRY STRONGER WARNINGS

The Food and Drug Administration will require stricter labeling of drugs containing propoxyphene, a mild opioid painkiller, and one that the European Union's FDA-equivalent decided in June to phase out of use. The trade name of the drug is Darvon. Combined with acetaminophen—a non-addictive painkiller that FDA issued a warning about in early July—it's sold as Darvocet. As we have reported previously, Public Citizen petitioned the FDA in 2006 to ban propoxyphene. In January, a committee of experts advising the agency voted 14 to 12 that the drug should be withdrawn. On June 25th, the European Medicines Agency announced the drug would be phased out of use.

But in its decision last month the FDA concluded that propoxyphene is useful enough to remain on the market, at least for now. Propoxyphene has been on the market since 1957. From 1969 through 2005, 91 deaths attributed to the drug were reported to the FDA. Actually, that is assumed to be only a small fraction of the total fatalities. Some of the deaths may have occurred because of an effect on the heart called "QT prolongation," which can lead to a deadly arrhythmia.

The drug will now carry a "boxed warning," commonly referred to as a black-box warning, and pharmacists will be required to give patients information stressing the hazards of taking higher-than-prescribed doses. The FDA will also ask the Medicare program and the Veterans Health Administration for their records on the safety of propoxyphene in the elderly. About 22 million prescriptions for propoxyphene-containing painkillers are written each year. In comparison, the most popular prescription painkiller, a hydrocodone and acetaminophen combination sold as Vicodin, sells 120 million prescriptions. Nearly 40% of Darvon and Darvon-like drugs are used by folks who are 65 and older.

Source: *Washington Post*

DANISH STUDY LOOKS AT LINK BETWEEN HRT AND CANCER

In a study by Danish researchers, it was found that menopausal women who took hormone replacement therapy increased their risk of ovarian cancer by 38%. The study of more than 900,000 Danish women, aged 50 to 79, found about one extra ovarian cancer for roughly 8,300 women taking hormone therapy each year. At the time the women got sick, 9% of them were taking hormone therapy, 22% were previous users and 63% did not take it. The researchers calculated that current hormone use conferred a 38% higher risk of contracting the disease compared to non-users over the eight-year study.

Hormone therapy was linked to 140 extra cases of ovarian cancer in Denmark during the eight-year study, accounting for 5% of all cases in that period, the researchers reported in the *Journal of the American Medical Association*. Dr. Lina Steinrud Morch and colleagues at Copenhagen University wrote in the report:

Even though this share seems low, ovarian cancer remains highly fatal, so accordingly this risk warrants consideration when deciding whether to use (hormone therapy).

The findings were similar to those in the 2002 Women's Health Initiative study, which was stopped early because it found an increased risk of ovarian cancer, breast cancer, strokes and other health problems from hormone therapy or HRT. After the WHI study HRT use plunged. Sales of U.S. market leader Wyeth's combined estrogen-progestin therapy Prempro have fallen by 50% since 2001 to around \$1 billion a year.

The risks of ovarian cancer were about the same from hormone therapy regardless of the duration of use, the formulation of the hormones, the estrogen dose, or how it was administered, according to the study. As in earlier studies, it found the cancer risk diminished about two years after therapy was stopped. Since ovarian cancer is diffi-

cult to detect before it spreads, it's often fatal. Roughly 18 out of 100,000 U.S. women are diagnosed yearly with the disease, which killed 15,000 Americans in 2007, according to government statistics. Medical research has not found what causes cancer cells to appear in the ovaries in the first place, but estrogen is believed to spur tumor growth and it certainly may be a trigger.

Source: *Reuters*

XXI. ENVIRONMENTAL CONCERNS

EPA TARGETS 44 COAL ASH SITES IN TEN STATES

The EPA has targeted 44 coal ash storage sites in ten states that are similar to the one that flooded a community in Tennessee last year. There are over 400 coal ash storage sites in the U.S. However, federal officials targeted these sites for inspection after they were identified as potential threats to nearby communities. These particular sites were selected because of their close proximity to where people live, not because of any discovered defect. According to Matt Hale, director of the EPA's office of research, conservation and recovery, the "high hazard potential means there will be probable loss of human life if there is a significant dam failure." Therefore, the agency wants to make sure that the sites are structurally sound.

Burning coal produces ash which is stored as liquid slurry in containment ponds or dams. These ponds hold fly ash, bottom ash, coal slag and flue gas residues that contain toxic metals such as arsenic, selenium, cadmium, lead and mercury. Last year, one such dam broke near Kingston, Tennessee flooding 300 acres of a nearby community with 5 million cubic yards of ash and sludge and damaging 40 homes. That incident prompted a safety review of storage ponds that hold the waste byproduct near large coal burning power plants.

Until recently, the public has not been privy to the locations of coal ash

sites across the country. The Army Corps of Engineers did not want the locations disclosed because of the possibility that terrorists may target such a facility. Senator Barbara Boxer, D-California, called on the EPA to disclose high-risk coal ash locations after the incident in Tennessee. Boxer said that it is essential that the public knows where these sites are “so that people have the information they need to quickly press for action to make these sites safer.”

The sites identified were in the following states: North Carolina, Arizona, Kentucky, Ohio, West Virginia, Illinois, Indiana, Pennsylvania, Georgia, and Montana. The largest concentration of potentially hazardous sites is near Cochise, Arizona where there are seven ponds. North Carolina has a dozen targeted sites, more than any other state on the list.

Source: Associated Press

UPDATE ON THE TVA COAL ASH SPILL LITIGATION

As previously reported, our firm filed a class action lawsuit on behalf of property owners damaged by the Tennessee Valley Authority coal ash spill in Kingston, Tennessee. We are presently working with Gary Davis and Mary Parker, two very good lawyers in Tennessee, on this important litigation.

The December 2008 disaster, which spilled over a billion gallons of toxic coal ash sludge across more than 300 acres, is the largest industrial accident in U.S. history. To put the magnitude of the TVA disaster in perspective, the Exxon Valdez accident released just under 11 million gallons—a tiny fraction of the TVA spill. The health and environmental ramifications from the TVA spill are enormous and clean up is slated to cost almost \$1 billion and continue for years to come.

The disaster is a result of a dike failure and the cause of that failure is being thoroughly investigated. A TVA-funded study by AECOM found that the sludge ponds were on the verge of failing for some time before the disaster occurred, and while TVA accepts the AECOM findings, independent experts

have found faults in the AECOM study. A panel created by the Tennessee Department of Environment and Conservation (TDEC) will review the AECOM report and may consider other independent analyses to help determine the cause of the dike failure. The TDEC panel includes representatives from the Army Corps of Engineers and the U.S. Environmental Protection Agency. In addition, TVA's Inspector General's Office plans to release its own report on the cause in the near future.

In the meantime, the lengthy process of cleanup continues with disposal of the dredged ash now affecting more than the Kingston community and the surrounding area; other communities soon will bear the costs of TVA's mistakes. EPA approved TVA's plan to haul the ash dredged from the Emory River to one of the poorest communities in America. As soon as this month, TVA may begin transporting 3 million cubic yards of sludge by rail to a landfill in Perry County, Alabama. TVA also is reviewing the feasibility of ash disposal in a number of Tennessee landfills. Coal ash disposal is an issue that affects communities across the country.

In an effort to prevent similar catastrophes, the EPA has identified 44 high risk coal ash ponds throughout the U.S. The location of the 44 sites in relation to population density helped determine which sites pose a high risk to surrounding areas and current dike conditions were not a part of this initial report. The sites are spread across ten states, including North Carolina, Arizona, Kentucky, Ohio, West Virginia, Illinois, Indiana, Pennsylvania, Georgia, and Montana. To date, the EPA has visited about half of the 44 sites and plans to report on those sites soon. Meanwhile, EPA on-site inspections are continuing in addition to reviews of state inspection reports at some of the sites.

Other EPA efforts related to coal ash disposal include increased attention to how these sites are regulated. Even though it is well documented that coal ash contains hazardous constituents, coal ash currently is not classified as hazardous waste. Instead, it is regulated in the same way as household solid

waste. As a result of the spill EPA vowed to propose new regulations for coal ash storage by the end of 2009.

These new regulations aim to help prevent disasters like the one in Kingston, but the residents of Kingston are faced with the effects of that disaster now. Residents in the area report numerous health issues resulting from the spill, including respiratory and stress-related illnesses, and the hazardous components of coal ash pose risks for long-term health effects as well. It is well documented that coal ash contains such hazardous elements as lead, mercury, arsenic, barium, and chromium.

These elements contribute to increased risk of cancer, liver damage and neurological problems among a host of other issues. TVA recently contracted with Oak Ridge Associated Universities (ORAU) to conduct medical monitoring in the Kingston community. According to TVA's proposal, ORAU will establish criteria to allow qualifying residents access to medical monitoring. This lawsuit seeks to ensure that this monitoring is adequate and that the qualifying criteria allow all affected residents access to proper medical monitoring and treatment.

Our firm, along with lawyers from the other firms involved in this litigation, is working on behalf of individuals and a class of clients in this lawsuit to bring about a complete clean-up of the area; ensure that our clients are fully compensated for the damage to their property (including their property values); and obtain long-term medical monitoring relief for area residents who have been exposed to the toxic contaminants in TVA's coal ash sludge.

While still in its infancy, quite a bit of work has been accomplished in this litigation. Corporate Representative depositions have commenced, and lawyers from our firm are assisting in the various discovery issues that a case of this magnitude involves. If you need additional information on this subject, contact Rhon Jones or David Byrne in our firm at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or David.Byrne@beasleyallen.com.

Sources: Knoxville News Sentinel and Associated Press

REPORT BLASTS TVA ON COAL ASH STORAGE

In a related matter, consultants hired by the Tennessee Valley Authority have found widespread problems with how the nation's largest public utility runs and maintains its coal ash storage operations. The consultants, in a report issued on July 21st, were highly critical of TVA. Overall, the consultants said in their report to the TVA board of directors that "necessary systems, controls and culture were not in place" to properly manage the coal ash operation at TVA's 11 coal-fired power plants. Consultant William Idle of McKenna Long & Aldridge LLP of Atlanta, stated:

There was no comprehensive plan agreed to and executed by all the people that needed to make sure a Kingston spill would not occur. Over the years, the risks increased, but they were not addressed. By the time the Kingston spill occurred, there had been decades of neglect.

The TVA board of directors unanimously adopted a resolution on July 21st acknowledging "mistakes were made" and expressing a commitment to "assist, and as necessary, direct management in the clean up and to ensure a more robust risk management system." While engineers debate the spill's cause, TVA Chairman Mike Duncan said the bottom line is that "the organization allowed it to happen and we must fix the organization."

The McKenna Long report concluded the Kingston disaster was a symptom of a larger problem involving coal ash operations throughout TVA's 11 coal-fired power plants in Tennessee, Alabama and Kentucky. Standard systems and controls "for monitoring and evaluating risks that one would expect to see were never installed." The report also said communications between four separate TVA divisions with responsibilities for ash retention facilities was "strained and in some instances, nonexistent."

The consultants said TVA also failed to heed "red flags" from accidents at non-TVA sites, including a Pennsylvania spill in 2005 and a Kentucky mine spill

in 2000. They also said TVA did not have any standard procedures regarding operation and maintenance of wet-ash ponds and didn't put a priority on preventing spills or accidents. The report concludes that TVA also failed to ensure standard training for engineers who inspect such operations.

Source: Macon.com

UPDATE ON TOXIC SEWAGE SLUDGE USED AS FERTILIZER

Our firm continues to investigate claims on behalf of Alabama farmers and other property owners affected by contaminated sewage sludge in fertilizer in Franklin, Lawrence, and Morgan counties. The EPA found elevated levels of perfluorochemicals (PFCs)—specifically perfluorooctanoic acid (PFOA) and perfluorooctyl sulfonate (PFOS)—in treated sewage sludge from the Decatur Utilities (DU) Dry Creek Wastewater Treatment Plant and in soil and water on farms in the surrounding area. The sewage sludge (also known as "biosolids") had been applied as fertilizer to approximately 5000 acres of farmland for roughly the past twelve years.

As a result of these findings, a multi-agency investigation is underway to determine the source and extent of PFC contamination, including potential routes of exposure and any potential health effects to area residents. The EPA held a public meeting in Moulton on June 2, 2009, and plans to hold another such meeting in the fall of 2009 to explain the coordinated federal, state, and local activities and to respond to questions from residents in the community. The multi-agency investigation includes the U.S. Department of Agriculture, the U.S. Food and Drug Administration, the Alabama Departments of Environmental Management, Agriculture and Industries, and Public Health, and Decatur Utilities.

Although Decatur drinking water samples are below the EPA Provisional Health Advisory limits, high PFC levels have been discovered in two private wells and numerous grazing ponds thus far. Additionally, the USDA and the

FDA are conducting investigations on what the contamination means for livestock and food products in the Decatur area. The EPA continues to take samples and anticipates final results of the 2009 soil sampling to be available at the end of June 2009. The USDA took samples of meat, organ, and blood from nine cattle from the area farms and those sample results are expected to be available this summer. Additionally, the FDA anticipates that sample results from milk from a dairy cow at the only dairy farm in the area will be available this summer.

In response to the contamination findings in Decatur, the EPA issued a health advisory in January 2009 that limits the amount of PFOS and PFOA in drinking water. The EPA advises people who are concerned that their wells are contaminated to use bottled water or point-of-use filters, installed at the faucet, with granulated, activated carbon. PFOA's are considered toxicants, likely human carcinogens and are linked to birth defects, increased cancer rates, and changes to lipid levels and the immune system in high exposure cases. These chemicals are used as firefighting foams, grease and water repellants, and precursors to Teflon, Scotchguard, and other non-stick consumer goods.

The 3M company recently halted its production of PFOS due to concerns of the chemical's persistence in the environment and long-term health and environmental effects. The EPA has requested information from numerous Decatur-area industries that use PFC chemicals in their operations, including 3M, Dyneon, Daiken and Toray Fluorofibers. Each of these companies reportedly discharges waste and water into the Decatur Utilities wastewater treatment plant. According to the U.S. Environmental Protection Agency, one of the manufacturers notified the EPA in 2007 that it had unknowingly discharged PFCs into the DU wastewater treatment plant. This action prompted the EPA investigation.

Lawyers in our firm have successfully represented clients in PFC cases nationwide. We will continue to monitor the situation in Decatur on behalf of those

affected by the contamination. If you need additional information on this subject, contact Rhon Jones or David Byrne in our firm at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or David.Byrne@beasleyallen.com.

Sources: Associated Press and *Decatur Daily*

TEXAS FIRM AGREES TO CLEAN UP MERCURY SPILLS IN LOUISIANA

Two years after several environmental groups filed lawsuits, a Houston energy company has finally agreed to clean up mercury contamination around its natural gas wells in the Monroe, Louisiana area. EnerVest Operating LLC will decontaminate land in three parishes (Ouachita, Union and Morehouse) and replace about 400 leaky mercury meters the company uses to gauge well and pipeline pressure. The settlement was approved last month by the U.S. District Court for the Western District of Louisiana.

The settlement comes more than two years after EnerVest was sued for allowing mercury to seep into the land surrounding its wells in northeast Louisiana. The company failed to properly dispose of mercury and clean up spills from meters, according to the lawsuit filed by the Louisiana Audubon Council, the Sierra Club, the Gulf Restoration Network and the Louisiana Environmental Action Network. Nor did EnerVest upgrade its meters to more environmentally friendly models that have become "the industry standard," according to the groups.

The Monroe area has been plagued with toxic levels of mercury in recent years, sparking state regulators to issue health warnings for Bayou DeSiard, Black Bayou Lake and the Ouachita River, where contaminated fish have been found. As we have reported in previous issues, ingesting mercury can cause neurological and kidney disorders, especially among children. Pregnant women can pass the substance to fetuses, sometimes causing developmental problems for exposed infants. The environmental groups launched a shoe-leather investigation to see if they could link the high levels of mercury in Monroe to the prevalence of manome-

ters, or mercury meters, in the area's natural gas fields. A single manometer contains as much as seven pounds of liquid mercury, and the devices are prone to leaks.

The environmental groups reported EnerVest's mercury spills in late 2006 to the U.S. Environmental Protection Agency and the Louisiana Department of Environmental Quality, but the agencies failed to "redress these violations," requiring the groups to take legal action. Under the settlement, EnerVest must:

- replace all of its roughly 400 mercury meters with dryflow meters, which do not use mercury, by December 31, 2010;
- Remove mercury that has tainted residential and floodplain areas by the end of 2015;
- must have remediated 800 contaminated sites by 2019.
- use a higher standard than the state's rule requiring companies to leave behind no more than 2.3 parts per million of mercury; and
- for wetlands, leave just one part per million of mercury.

The settlement has been hailed as an important victory by the Audubon Council and one that hopefully will encourage the State of Louisiana to crack down on gas producers that continue to use mercury meters despite the availability of cleaner technology. Louisiana has a voluntary mercury clean-up program for gas producers, but does not fine polluters or require them to replace old manometers. Frankly, I have seen very few "voluntary compliance" programs that work well for people and the environment.

Source: NOLA.com

DUPONT LIABLE IN KENTUCKY CHEMICAL CASE

A federal jury in Kentucky has ordered DuPont to pay more than \$1.25 million to six people who were injured when fuming sulfuric acid spilled from an eastern Kentucky plant

five years ago. The jury found DuPont legally responsible for skin burns, eye irritation and respiratory and eye problems sustained by neighbors of the company's plant in Wurtland. The leak, which happened in 2004, stemmed from a cracked pipe at the plant. It resulted in sulfur trioxide, a chemical that formed white clouds composed of tiny droplets of sulfuric acid, being released into the air. The injured ranged in age from 18 months to 80 years old at the time of the spill. DuPont argued that it gave warnings to neighbors about the leak and was not responsible for any injuries.

The lawsuit is being tried in four phases. The decision in the first phase sets the stage for another 173 people who sued DuPont over the leak to collect damages. The trial in the first phase determined liability for the leak and whether DuPont should have to pay punitive damages for all the Plaintiffs. The remaining cases will focus on the amount of damages to be awarded. Jurors awarded just under \$130,000 in compensatory damages for past and future medical bills, then awarded ten-times the compensatory damages as a punitive award for the Plaintiffs. Under a ruling by the trial judge, DuPont cannot appeal the verdict until the claims by all 179 Plaintiffs' are resolved. No trial date for the other cases has been set, but the judge has indicated the second trial will take place in October.

DuPont also experienced a 1995 leak in which 23,800 gallons of sulfuric acid escaped into the air and more than 1,000 people were evacuated. For that accident, DuPont agreed, among other things, to pay the Department of Justice and the EPA \$1.5 million. The company also faces additional litigation from the 1995 spill case. Louise M. Roselle, a lawyer with the Cincinnati law firm of Waite, Schneida, Bayless & Chesley, represented the Plaintiffs in the recent litigation and did an outstanding job.

Source: Associated Press

XXII. THE CONSUMER CORNER

CONSUMERS MUST HAVE THE RIGHT TO BRING INDIVIDUAL ACTIONS

As mentioned in a prior section, Congress should pass legislation to create a Consumer Financial Protection Agency (CFPA). Recourse for individual consumers must be a key goal of any new consumer protection system. The Obama Administration's plan appropriately states that the private enforcement provisions of existing statutes will not be disturbed, and that H.R. 1705 will leave these protections intact and unchanged. But, the Administration's plan failed to address the enforceability of new CFPA rules. It's critical that consumers who are harmed by violations of these rules be able to take action to protect themselves. H.R. 1705 provides a right of action for consumers to enforce these rules.

Consumers must have the ability to hold those who harm them accountable for numerous reasons:

- No matter how vigorous and how fully funded a new CFPA is, it will not be able to directly redress the vast majority of violations against individuals. The CFPA will likely have thousands of institutions within its jurisdiction. It cannot possibly examine, supervise or enforce compliance by all of them.
- Individuals have much more complete information about the effect of products and practices. Quite often they are in the best position to identify violations of laws, take action, and redress the harm they suffer. An agency on the outside looking in often will not have sufficient details to detect abusive behavior or to bring an enforcement action.
- Individuals are an early warning system that can alert states and the CFPA of problems when they first arise. These alerts would come before they become a national problem

requiring the attention of a federal agency. The CFPA can monitor individual actions and determine when it is necessary to step in.

- Bolstering public enforcement with private enforcement conserves public resources. A federal agency cannot and should not go after every individual violation.
- Consumer enforcement is a safety net that ensures compliance and accountability after this crisis has passed, when good times return, and when it becomes more tempting for regulators to think that all is well and to take a lighter approach.
- The Administration's plan correctly identifies mandatory arbitration clauses as a barrier to fair adjudication and effective redress. It's also critically important to access to justice that consumers have the individual right to enforce a rule.

Private enforcement is the norm and has worked well as a complement to public enforcement in the vast majority of the consumer protection statutes that will be consolidated under the CFPA. Conversely, the statutes that lack private enforcement mechanisms are notable for the lack of compliance.

The ideal consumer protection would be a combination of strong federal, state, and individual laws with each having enforcement capabilities. In my opinion, individual enforcement is critical to making the consumer protection regime work.

SETTLEMENT PENDING IN CASE AGAINST CBS FOR ASBESTOS IN CSI TOY

Nearly two years ago independent research uncovered the presence of deadly asbestos in a child's toy. This toy was based on the popular CBS television program, *CSI: Crime Scene Investigation*. It was found that the CSI toy's fingerprinting powder contained asbestos. The fingerprinting powder is included in CSI-themed investigation toy kits including the CSI: Crime Scene Investigation™ Fingerprint Examination Kit (CSI Exam Kit) and the CSI: Crime

Scene Investigation™ Forensic Lab Kit (CSI Lab Kit). In July, a proposed settlement of a nationwide class action against CBS Broadcasting, Inc. and major toy retailers would, if approved, give cash refunds to consumers and effectively implement a nationwide recall of the toy kits.

The lawsuit was filed in early 2008 in federal and California state courts against CBS Broadcasting, Inc., Planet Toys, Inc., and several retail manufacturers in response to their production and marketing of CSI toy kits containing asbestos. As more folks are learning, asbestos is the only known cause of the deadly cancer mesothelioma, which affects the lining of the chest or, more rarely, the abdomen or the heart. There is no known cure for mesothelioma and there is no safe level of exposure to asbestos.

The suit came in response to the findings of an 18-month independent study conducted by the Asbestos Disease Awareness Organization, which is a nonprofit organization dedicated to the mission of "asbestos awareness, education, advocacy, prevention, support and a cure." In November 2007, ADAO publicly released its findings, which tested more than 250 commonly found consumer products for asbestos. Three independent, government-certified laboratories participating in the study confirmed the presence of asbestos in the white fingerprint powder of the CSI Exam Kit.

ADAO met with representatives from CBS and Planet Toys in December 2007 to discuss its findings about the fingerprint powder. As a result, Planet Toys asked retailers to stop sales of the CSI Exam Kit pending further investigation. But the company refused to stop sales of the CSI Lab Kit, which contained the same fingerprint powder, and refused to recall the products from consumers' homes voluntarily.

The settlement, which is subject to court approval, provides cash refunds to consumers throughout the U.S. who bought, or received as a gift, one or more CSI Exam Kits or Lab Kits sold by CBS, Toys "R" Us, Hammacher Schlemmer, Walgreens, Amazon.com, Buy.com, Sears, Kmart, and QVC. Consumers

seeking refunds must submit a claim form to a claims administrator by January 14, 2010, and have the option of sending the toy kits to the claims administrator at no cost. Planet Toys, the kits' manufacturer, is not part of the settlement because it filed for Chapter 7 bankruptcy protection in March 2009. You can visit the official settlement web site for information and claim forms.

Source: Wendi Lewis
July 7, 2009

COMPANIES FINED FOR LEAD PAINT IN CHILDREN'S TOYS AND OTHER ITEMS

According to the U.S. Consumer Product Safety Commission, nine children's product manufacturers, importers and sellers have agreed to pay more than \$500,000 in civil penalties. These penalties settle allegations that the firms "knowingly manufactured, imported, or sold toys and other children's articles with paint or other surface coatings that contained lead levels in violation of federal law."

The items were recalled in 2007 and 2008, and include toys, metal jewelry, pens, metal water bottles, pencil pouches, sunglasses and Halloween pails and baskets, the announcement said. The CPSC ordered the following firms to pay civil penalties to the federal government:

- Cardinal Distributing Co. Inc., of Baltimore, Md.—\$100,000.
- Dollar General Corp., of Goodlettsville, Tenn.—\$100,000.
- Family Dollar Stores Inc., of Matthews, N.C.—\$75,000.
- Hobby Lobby Stores Inc., of Oklahoma City, Okla.—\$50,000.
- First Learning Company Ltd., of Hong Kong—\$50,000.
- Michaels Stores Inc., of Irving, Texas—\$45,000.
- A&A Global Industries Inc., of Cockeysville, Md.—\$40,000.
- Raymond Geddes & Co., of Baltimore, Md.—\$40,000.

- Downeast Concepts Inc., of Yarmouth, Maine—\$30,000.

The problems relating to lead used in clear violation of federal law must be dealt with and this is a step in the right direction. Manufacturers, distributors and retail outlets must be made to understand that future violations will result in more than relatively small money fines.

Source: CPSC Release

TOY IMPORTER TO PAY \$665,000 PENALTY

OKK Trading, a toy importer, has agreed to pay a \$665,000 civil penalty after it imported and sold toys with high levels of lead and violated other child safety standards. The penalty is part of a settlement the company reached with the Consumer Product Safety Commission. The settlement resolves CPSC allegations that the Commerce, Calif., company knowingly imported and sold toys with excessive lead levels from November 2007 through August 2008, violating a 30-year-old federal ban on lead paint on toys.

The settlement also resolves several other allegations that the company knowingly imported and sold toys, games, rattles, pacifiers and art materials that violated federal safety standards. OKK Trading told the CPSC that it received no reports of incidents or injuries involving the products covered by the settlement.

Source: Associated Press

A LOOK AT THE 2009 SUNSCREEN GUIDE

Even though the summer months are almost gone, it's still a good time to take a look at some information concerning products used for protection from sun rays. According to a report by the Environmental Working Group (EWG) three of five brand-name sunscreens either don't protect skin from sun damage or contain hazardous chemicals—or both. An EWG investigation of 1,571 sunscreens rates the season's best—and worst. Some companies have responded to EWG's three-year campaign for safer, more effective

sunscreens. Seventy percent (70%) of sunscreen products now contain strong UVA filters, compared to 29% last year. The bad news is that much UVA protection is still too thin to save your skin. It makes no sense to waste money or risk your skin on sunscreens that don't deliver. It's advisable to use ENG's 2009 Sunscreen Guide to find better products.

More than a million cases of skin cancer are diagnosed in the U.S. every year. The incidence of malignant melanoma, the most dangerous form of the disease, is escalating. Effective sunscreens are crucial to public health. But EWG's investigation reveals that they may be hard to find: 57 sunscreens with SPFs from 55-100+ might tempt you to stay out longer in the sun, but they block just 1-2% more sunburn rays than an SPF 30 sunscreen. Hundreds of all-day moisturizers advertise SPF protection, but one in five offers little protection from harmful UVA rays. Some break down well before the day's end. A surprising new government report attributes an increasing incidence of malignant melanoma among people who work indoors to UVA rays shining through windows onto unprotected skin.

Lip cancer is most common on the bottom lip where sun exposure is most direct. Two of five lip balms offer poor UVA protection. One plus for 2009: 19% fewer sunscreens contain oxybenzone, a synthetic estrogen that disrupts the hormone system. Few sunscreens live up to their advertising claims, and the federal government is powerless to make them. The federal Food and Drug Administration has been promising to regulate sunscreens since 1978, but so far the FDA hasn't delivered on its promises.

It's time for the FDA to do its job and issue some meaningful sunscreen regulations. If you agree, email FDA Commissioner Dr. Margaret Hamburg. In the meantime, EWG's research team has created a comprehensive guide—listing 72 recommended products and other sun safety tips—to help you and your family have fun in the sun—safely.

Source: Environmental Working Group News Release

COMPUTERS CAN BE A SOURCE OF INJURIES

Computer users are afflicted with more than back pain and carpal tunnel syndrome. People are also winding up in emergency rooms with cuts, bruises, sprains and fractures caused by computers and computer accessories. It's reported that more than 90% of the injuries occur at home. Researchers, in a study in the July issue of *The American Journal of Preventive Medicine*, estimate that in 2006 there were 9,279 emergency room visits for computer-related injuries, up from 1,267 in 1994. The increase is more than double the increase in home computer ownership in those years. The data used in the study came from the National Electronic Injury Surveillance System, which is managed by the Consumer Product Safety Commission.

Over the 13-year study period, more than 78,000 people ages one month to 89 years, were treated in emergency rooms for acute computer-related injuries. More than half of the injuries happened when people were moving their computers. The monitor was the part of the computer most commonly involved. Injuries peaked in 2003, when sales of LCD monitors first exceeded those of monitors with cathode ray tubes. The authors suggest that the lighter monitors are causing fewer injuries. The study's senior author, Lara B. McKenzie, of the Nationwide Children's Hospital in Columbus, Ohio, observed:

Children under five had the highest overall injury rate as well as the greatest injury rate increase of any group. Computer cases have sharp edges, wires can be electrical or tripping hazards, and computer chairs are too big for young children, which provides opportunities for falls. We have to look at the computer work station as an area we can make safe for children.

I really had never considered computers to be a source of personal injuries to users. This report was most enlightening and made me realize there

are safety risks for computer users.

Source: *New York Times*

ANOTHER LOOK AT CRIB SAFETY

We have written in prior issues on safety concerns relating to baby cribs. However, we believe that this subject deserves another look. Most folks would agree that cribs are supposed to keep babies safe. But federal regulators have become alarmed by a rash of safety problems over the past two years that have required millions of cribs to be recalled by several companies. At least 13 children have died in cribs and bassinets recalled by just one manufacturer, Simplicity Inc. On July 2nd, the U.S. Consumer Product Safety Commission announced the recall of 400,000 Simplicity drop-side cribs because they pose a risk of suffocation. The plastic hardware can break or deform, creating a potentially deadly gap between the drop side and the crib mattress, federal officials said. Simplicity is out of business.

This is the latest in a series of Simplicity recalls, prompting CPSC officials to urge consumers, day care providers, thrift store operators and online sellers to make sure they don't have any of the dangerous products. Similar hazards have been found in cribs made by more than a dozen other companies, according to federal records. Since 2007, more than 4.6 million cribs have been recalled. It's likely many of them are still in homes without needed repairs simply because product recalls often have limited effectiveness.

Beyond deaths caused by Simplicity products, CPSC says there have been dozens of deaths associated with drop-side cribs in recent years. According to CPSC, modern crib hazards mainly fall into three categories:

- Drop sides on cribs that don't stay on their tracks, creating dangerous gaps because of failed or missing parts, improper assembly or wear and tear. Recalls include two in October involving drop-side cribs made by Delta Enterprise Corp. The potential for missing safety pegs in 985,000 of the cribs and spring-peg failure in 600,000 cribs create a risk for dan-

gerous gaps along the drop side. The recalls were announced after the death of an eight-month-old child who suffocated when the drop side detached in a crib reassembled without safety pegs.

- Mattress support failures, where one or multiple corner mattress supports break. This creates a dangerous gap where a child can become entrapped and suffocate. Recalls include one in January involving 535,000 Stork Craft cribs with metal mattress support brackets that can crack and break. The CPSC had received ten reports of the brackets breaking.
- Broken vertical side slats or spindles that create gaps where babies can get stuck. Recalls include three announced between June 2008 and April by Jardine Enterprises involving more than 470,000 cribs with slats that can break or fall out of their rails. As of April, the CPSC had received more than 90 reports of slats breaking, including six cases where children became entrapped in the gap created by the break. Three incidents resulted in minor injury, bumps and scrapes, the agency said.

Drop-side cribs, which allow caregivers to take children in and out without reaching over a high railing, have been very popular in recent years. But in the wake of safety concerns, Toys "R" Us has stopped placing orders for drop-side cribs and expects to no longer carry them by year's end.

Because of problems with durability and concern that current crib standards, which are largely voluntary ones developed by ASTM International, aren't enough to protect children, the CPSC is considering greater regulation. But any changes will likely be months away. Nancy Cowles, executive director of Kids in Danger, a leading national crib safety advocacy group had this to say:

Most parents assume if a store is selling it, that someone must have made sure that it was made to be safe. One of the things in this country that should be tested and safe ought to be a child's sleeping environment.

Parents and caregivers shouldn't assume that the cribs they're using are safe—even if they've been purchased recently. The CPSC's Web site details more than 20 recalls involving millions of cribs just in the past two years. Dozens of additional recalls have occurred. The CPSC is urging consumers to be especially on the lookout for numerous Simplicity nursery products, including cribs and bassinets, that have been involved in recalls since 2005. In most cases, the recalls involve specific models and dates of manufacture. For full details on all crib recalls, go to www.cpsc.gov or call 800-638-2772.

Source: CPSC

TJX AGREES TO PAY \$9.75 MILLION TO 41 STATES IN DATA BREACH CASE

Retail giant TJX Cos. has agreed to pay \$9.75 million to 41 states to settle an investigation of a massive data breach that jeopardized millions of payment card numbers. TJX, the parent company of the T.J. Maxx and Marshalls discount clothing chains, will pay \$7.25 million in settlement and investigation costs. In addition, \$2.5 million will go to create a data security fund for those states.

In January 2007, TJX disclosed that hackers had tapped into its computer systems, which stored about 50 million customers' credit and debit card numbers. The breach wasn't detected for more than a year. The company emphasized in a news release that it "firmly believes it did not violate any consumer protection or data security laws." California Attorney General Jerry Brown had a different take, citing TJX's 2004 internal audit, which found security vulnerabilities. The Attorney General had this to say:

TJX ignored flaws in its credit card database, until hackers broke into it, gaining access to the personal information of almost 50 million people. This agreement requires the company to carefully test its security systems and upgrade them to the highest contemporary standards.

TJX's chief financial officer, Jeffrey Naylor, said the settlement would allow TJX and the states' attorneys general to take "leadership roles in exploring new technologies and approaches to solving the systemic problems in the U.S. payment card industry." TJX had previously settled with consumers and banks.

The settlement involves claims brought against the company by 41 Attorneys General, led by the office of Massachusetts Attorney General Martha Coakley, that the company failed to protect its customers' financial information. Coakley filed the assurance of discontinuance in Suffolk Superior Court in Massachusetts on June 23rd. Last September, TJX settled a case brought by consumers against the company and its bank, Fifth Third Bancorp, over 2005 and 2006 data breaches caused by computer hackers that compromised the security of at least 45.7 million consumer credit and debit cards. TJX agreed to give consumers who used a credit card, debit card or check at the stores during specified time periods \$30 in cash or a \$60 voucher for three years of credit monitoring plus the cost of replacing a driver's license.

In December of 2007, TJX settled claims brought by three banks and three state bankers associations for undisclosed terms. TJX also agreed to implement its own stringent data security program. The settlement "ensures that companies cannot write-off the risk of a data breach as a cost of doing business," according to General Coakley, who added:

All retailers and companies that hold or use personally identifiable information must employ data security systems that guard against the improper disclosure or use of that information.

New technologies must be developed to combat cybercrime targeting the payment card industry. The large number of attacks by cyber-criminals pose a most serious threat. The U.S. payment card system must protect "sensitive" consumer data. Security measures that are already in use throughout much of the world must be

put in place in the U.S.

Source: *Los Angeles Times*

FEDERAL AND STATE PROSECUTORS ACT TO STOP SHAM LOAN CONSULTANTS

Prosecutors around the country filed 189 legal actions last month against loan modification consultants accused of cheating homeowners who are desperate to make their mortgage payments more affordable. The lawsuits and cease-and-desist orders were announced last month by Federal Trade Commission Chairman Jon Leibowitz and California Attorney General Jerry Brown. The actions are part of a nationwide sweep of alleged sham consultants by the federal agency and officials in 19 states. Commissioner Leibowitz used the announcement to put scam artists on notice and urged homeowners to protect themselves from being exploited. He said fraudulent loan modification consultants are "full of hollow promises designed to fatten the pockets of criminals and con men."

The lawsuits, filed by the Federal Trade Commission and state Attorneys General, seek millions of dollars in civil penalties, restitution for victims and a permanent injunction to keep the Defendants from offering mortgage-relief services. The FTC is working on rules that would prohibit a mortgage modification service from accepting upfront payments. The Commission hopes to have the regulations in place by the end of this year.

Source: *USA Today*

ORDINARY FOLKS CAN REPORT DEFECTIVE PRODUCTS

By completing a form and then submitting it to the U.S. Consumer Product Safety Commission, any person can report an injury or death involving consumer products. Unsafe products can also be reported to the CPSC. You can contact the Commission by mail, phone or Internet email for further details. An incident or unsafe product can be reported by calling toll-free at 1-800-638-2772 or by sending an e-mail to info@cpsc.gov.

The CPSC advises to keep the product involved in the incident for at least 30 days after you file this report for further evaluation by the CPSC. Also, remember the CPSC does not have jurisdiction over automobiles, trucks and motorcycles, car seats protecting children in on-road vehicles, foods, medicines, cosmetics, medical devices, or dissatisfaction with business practices. Links to the proper agencies can be found on the "Report Unsafe Products" page.

Source: CPSC

XXIII. RECALLS UPDATE

There seem to have been more recalls announced during the past month than I can remember in any comparable short period of time. I will discuss some of these recalls in grouping according to the product type and use:

MOTOR VEHICLE RECALLS

Volkswagen Recalls Routan Vehicles

Volkswagen is recalling 18,500 MY 2009 Routan vehicles for failing to comply with the requirements of federal motor vehicle safety standard NO. 208, "Occupant Crash Protection." The owner's manual was printed without the FMVSS NO. 208 required information explaining that no object should be placed over or near the air bag on the instrument panel. Any such objects could cause injury to the vehicle's occupants in the event of a crash severe enough to cause the air bag to inflate. Dealers will send an owner's manual insert containing the required air bag information for owner installation or dealers will install in the event the owner prefers assistance from the dealer. The recall was to begin on or before July 31, 2009. Owners may contact Volkswagen at 1-800-822-8987.

A NUMBER OF TIRE RECALLS

Firestone Tire Recall

Bridgestone/Firestone North America Tire has recalled Firestone / FR 380 / P235 / 75R15 tires that were made during the period from September 9, 2007 to July 2, 2008. There are 127,183 units affected. The National Highway Traffic Safety Administration has announced the major tire recall of over 127,000 Firestone FR380 tires, size P235/ 75R15. Consumers are urged to stop using the recalled tires immediately and contact Firestone for a free replacement.

Continued use of the recalled tires may lead to vibrations and groove cracking. Extended use could lead to tread distortion or tread separation and loss of vehicle control. The affected tires are to be replaced free of charge. The Firestone tire recall began on or about June 29, 2009. Owners may contact the company toll-free at 1-800-465-1904. Owners may also contact the National Highway Traffic Safety Administration's vehicle safety hotline at 1-888-327-4236, or go to www.safercar.gov.

Kumho Recalls Light Truck All-Terrain Tires

Kumho Tire USA has recalled about 36,000 Mohave light truck all-terrain tires. The recall is for sizes LT225/75R16, LT245/75R16, and LT265/75R16, produced between December 7, 2008 and June, 2009. The tires can cause the vehicle's handling to become difficult when operated under load or when changing lanes. This could cause the vehicle to sway and possibly cause a crash. The tire brand name, tire line, tire size and production dates are:

- KUMHO / MOHAVE A/T / LT225/75R16 DEC 07, 2008-JUN 13, 2009

- KUMHO / MOHAVE A/T / LT245/75R16 DEC 07, 2008-JUN 13, 2009
- KUMHO / MOHAVE A/T / LT265/75R16 DEC 07, 2008-JUN 13, 2009

Kumho was to notify tire owners and replace the tires free of charge when the recall began last month. Owners may contact Kumho at 1-800-445-8646. Consumers may contact the National Highway Traffic Safety Administration (NHTSA) at 1-888-327-4236 (TTY: 1-800-424-9153) or at www.safercar.gov.

Cooper Tires Recalled

Cooper Tire has recalled 1,692 Cooper CS Touring Tires, Size 215/55R17, produced between September 7th and October 11, 2008. These tires may have been cured for an inadequate amount of time. This condition can lead to tread separation, possibly resulting in loss of vehicle control and a crash. Cooper Tire will notify owners and replace, mount and balance any defective tires free of charge. Dealers will examine suspect tires to see if they fall in the recall population. The recall began on December 18, 2008. Owners may contact Cooper Tire Consumer Relations toll-free at 1-800-854-6288.

Bridgestone Tires Recalled

Bridgestone America's tire operation has recalled 1,018 Bridgestone Exedra G850 G Motorcycle tires, size 180/70R16 77H, sold as original equipment for model year 2008 and 2009 Triumph Rocket III touring motorcycles. The motorcycle to which these tires are applied develops very high torque and can cause torque-induced degradation in a body ply which may result in interlinear cracking that may lead to a slow leak in the rear tire. The condition is said not to affect the front tire. The affected

tires may begin to vibrate at moderate speeds.

Continued use of a tire with this condition could lead to a vehicle crash. Bridgestone is working with Triumph to notify owners and the defective tires will be replaced free of charge. In addition, the front tire will be replaced free of charge due to the matching requirements of the motorcycle. This safety recall began on April 21, 2009. Owners may contact Bridgestone toll-free at 1-800-465-1904.

Goodyear Tires Recalled

Goodyear Tire has recalled 18 Goodyear Eagle Rs-A, size P235/55R18 99V, manufactured during the week of January 7, 2008, which fail to conform to the labeling requirements of federal motor vehicle safety standard No. 139, "New Pneumatic Radial Tires For Light Vehicles." These tires have the correct full tin on one sidewall but do not contain the correct partial tin on the other sidewall. The purpose of the standard is to establish specific tire dimensions, test requirements, and labeling requirements, and to define tire load ratings. Goodyear was to notify owners and replace the noncompliant tires free of charge.

The recall began on February 10, 2009. Owners may contact Goodyear consumer relations toll-free at 1-800-321-2136. The manufacturer's petition which requested that NHTSA determine this FMVSS noncompliance does not create an unreasonable risk to motor vehicle safety was denied on January 13, 2009. Therefore, this manufacturer was obligated to conduct an owner notification and remedy campaign. Customers may also contact the National Highway Traffic Safety Administration's vehicle safety hotline at 1-888-327-4236 (TTY 1-800-424-9153), or go to <http://www.safercar.gov>.

RECALLS OF HOUSEHOLD PRODUCTS

Coffeemakers Recalled Due To Burn Hazard

Applica Consumer Products Inc., of Miramar, Florida, has recalled Black & Decker® brand Space-maker™ Coffeemakers. The brew basket can shift out of alignment allowing hot water to overflow. This poses a scalding and burn hazard to consumers. The firm has received 235 reports of hot water overflowing and coming into contact with consumers, including ten reports of second-degree burns. The product has an under-cabinet mount, programmable digital clock/timer, removable water reservoir, and either a 12-cup glass carafe or an 8-cup thermal carafe.

Only model numbers ODC440, ODC440B, ODC450 and ODC460 are included in the recall. The model number can be located on the back of the coffeemaker. The coffeemakers were sold at major retailers nationwide, including K-Mart, Kohl's, Target, Wal-Mart, Bed, Bath & Beyond, and Amazon.com, from March 2006 through March 2009 for between \$60 and \$70. Consumers should stop using the recalled coffeemaker immediately and contact Applica for a free replacement brew basket. For additional information, contact Applica toll-free at (866) 668-4442 or visit the company's Web site at www.acprecall.com.

Crane Plumbing Recalls Bath Tubs With A Whirlpool

Crane Plumbing LLC, of Dallas, Texas, has recalled 5,500 Crane Bath Tubs With A Whirlpool. The drain covers in the tubs can entangle a bather's hair in the openings, causing the bather's head to be held under water, which can result in drowning. No injuries have been reported. The bathtubs are acrylic with 6-12 jets. The Crane logo is printed on

the whirlpool and/or noted on the air control valve. The tubs were sold at home improvement, retail and wholesale stores nationwide from March 2007 through February 2009 for between \$700 and \$2,700. Consumers should immediately stop using the recalled tubs. Consumers can contact Crane for additional identification information on affected tubs. Consumers who have the recalled tub have two options:

- Contact Crane directly to arrange for a service agent to perform a free, in-person replacement in their home or facility; or
- Consumers can choose to replace the part themselves and Crane will provide them with a free repair kit and directions.

For additional information, contact Crane Plumbing toll-free at (866) 876-3632 or visit the company's Web site at www.craneplumbing.com.

Intermatic Recalls In-Wall Timers Due To Shock Hazard

About 240,000 Intermatic Model ST01 and EI600 In-wall Electronic Timers have been recalled by their manufacturer Intermatic Inc., of Spring Grove, Ill. When consumers trying to replace the timer's battery place a metal object through the battery tray slot, the object can reach internal metal contacts, posing a shock hazard to consumers. The manufacturer says it has received 12 reports of consumers receiving a minor shock while changing the timer's battery. This recall involves the Intermatic In-Wall Electronic Timers with model numbers ST01, ST01C, ST01AC, ST01AC70, ST01C70, ST01CL, EI600C, EI600LAC, EI600LAC8, EI600WC, and EI600WC8.

This product is a lamp and appliance timer and typically takes the place of a standard wall switch. The timer is white, off-white, or

almond and measures 2 1/2 inches high by 1 3/4 inches wide. Model numbers can be found on the packaging and on the instruction. In-Wall timers are included in this recall if:

- the brand name “Intermatic” is molded on the front of the timer cover door;
- the timer has only four keypad buttons, and
- there is no 3-digit date code (e.g. “04C”) stamped on the inside of the timer cover door.

Timers with a 3-digit date code (e.g. “04C”) stamped on the inside of the timer cover door are not included in this recall. The timers were sold at retailers and electrical distributors nationwide from March 2007 through June 2009 for between \$25 and \$45. Consumers should not attempt to change the in-wall timer’s battery until they receive the repair kit. Consumers should contact Intermatic to obtain a free repair kit with installation instructions. For additional information, call Intermatic toll-free at (877) 417-4316 or visit the firm’s Web site at www.intermatic.com.

Kidde Recalls Dual Sensor Smoke Alarms

About 94,000 Kidde Model PI2000 Dual Sensor Smoke Alarms have been recalled by their manufacturer: Walter Kidde Portable Equipment Inc., of Mebane, N.C. An electrostatic discharge can damage the unit, causing it not to warn consumers of a fire. According to the manufacturer, it has received two reports of smoke alarm malfunctions involving electrostatic discharge during installation. No injuries have been reported. This recall involves Kidde dual sensor smoke alarms model PI2000. The alarms can be identified by two buttons, “HUSH” and “PUSH AND HOLD TO TEST WEEKLY,” which are located on

the front/center of the alarm.

The model number and date code are on the back of the smoke alarm. Only date codes 2008 Aug 01 through 2009 May 04 are included in this recall. Consumers should contact Kidde immediately to receive a free replacement smoke alarm. For additional information, contact Kidde toll-free at (877) 524-2086 or visit the company’s Web site at www.kidde.com.

Gas Grills Recalled Due To Fire, Burn Hazards

Fiesta Gas Grills, of Dickson, Tennessee has recalled Blue Ember Gas Grills. The hose of the gas tank can get too close to the firebox and be exposed to heat, posing a fire hazard to consumers. Fiesta has received 161 reports of grill fires, resulting in nine injuries, including two incidents of major burns on different parts of the body, six incidents of minor burns, and an incident involving temporary hearing loss. This recall involves Blue Ember liquid propane (LP) outdoor grills with model and serial numbers listed below. The cabinet style grill has two doors and is silver and black or silver and gray. “Blue Ember” is printed on the grill’s hood.

The grills were sold at various home centers and retailers nationwide from November 2006 through June 2008 for between \$400 and \$500 in the United States and from November 2006 through May 2009 for between \$400 and \$600 in Canada. Consumers should immediately stop using the grill and call Fiesta Gas Grills to obtain a free replacement grease pan assembly and instructions for installing the part and the gas tank. The grill should not be used until the new grease pan assembly and the gas tank have been installed correctly. Consumers should also inspect the gas burner hose and regulator;

which will be replaced free of charge if there are signs of damage. For additional information, contact Fiesta Gas Grills toll-free at (866)740-7849, email mnorman@fiestagasgrills.com or visit the company’s Web site at www.blueembergrills.com.

Stamina Products Recalls Elliptical Machines

About 11,000 Elliptical Cross Trainers have been recalled by the manufacturer Stamina Products Inc. of Springfield, Mo. Stamina modified the warning/assembly instructions in the owner’s manuals to emphasize that the elliptical pedal shafts must be securely tightened to the cranks. If not securely tightened, the pedal shafts could become loose from the cranks, which could result in serious injury to the user and/or damage to the product. This recall includes the following elliptical machines:

- Magnetic 1772 Cross Trainer Elliptical; Model No. 55-1772
- Air 1725 Elliptical Cross Trainer; Model No. 55-1725
- Air Resistance 1723 Cross Trainer; Model No. 55-1723

Consumers should not assemble or use these elliptical machines until they have reviewed the modified warnings and assembly instructions. Consumers can obtain the new warning and assembly instructions by contacting Stamina toll free at (800) 375-7520, or visiting the firm’s web site at www.staminaproducts.com.

RECALLS OF PRODUCTS FOR CHILDREN

Inflatable Baby Floats Recalled Due To Drowning Hazard

Aqua-Leisure Industries, of Avon, Massachusetts, has recalled Inflatable Baby Floats. The leg straps in

the seat of the float can tear, causing children to unexpectedly fall into or under the water, posing a risk of drowning. There have been 31 reports of float seats tearing, causing children to fall into or under the water. Fortunately, according to the company, no injuries have been reported. The recalled inflatable baby floats were sold in a variety of styles and colors. The names and model numbers are located on the packaging. A date between 08/02 and 07/08 is molded on the valves of recalled products.

Products not included in the recall can be identified with the lettering "NP" molded on the valve. Juvenile product and mass merchandise retailers nationwide, including Target, Toys "R" Us, Wal-Mart, Dollar General, Kmart, Walgreens, Ace Hardware, and Bed, Bath & Beyond sold the baby floats from December 2002 through June 2009 for between \$8 and \$15. Consumers should immediately stop using these recalled inflatable baby floats and contact Aqua-Leisure for a full refund. For additional information, contact Aqua-Leisure toll-free at (866) 807-3998 or visit the firm's Web site at www.aqua-leisure.com.

Simplicity Drop Side Cribs Recalled By Retailers

About 400,000 Simplicity Drop Side Cribs have been recalled by manufacturer Simplicity Inc. and SFCA Inc. of Reading, Pennsylvania. It appears that the firms no longer conduct day-to-day operations. The crib's plastic hardware can break or deform, causing the drop side to detach. When the drop side detaches, it creates space between the drop side and the crib mattress. Infants and toddlers can roll into this space and become entrapped which can lead to suffocation. CPSC is aware of one death involving an eight-month-old child from Houston,

Texas who became entrapped and suffocated between the drop side and the crib mattress when a plastic connector on the drop side broke. The child's death was previously reported by CPSC.

The CPSC also is aware of an additional 25 incidents involving the drop side detaching from the crib. In six of these incidents, the drop side detached because the plastic flexible tab deformed or broke. In four of the drop side detachment incidents, other plastic parts, including connectors or tracks, deformed or broke. In two of the incidents, two children became entrapped between the drop side and the crib mattress. There were no reported injuries.

This recall involves all drop side cribs with a different or "newer" style of plastic hardware from those cribs recalled in September 2007. This newer style of Simplicity hardware can be identified by a flexible plastic tab at the top of the lower tracks. The recalled model numbers include but may not be limited to: 8050, 8325, 8620, 8745, 8748, 8755, 8756, 8765, 8778, 8810, 8994, 8995, and 8996. Consumers should immediately stop using the recalled cribs and find an alternative, safe sleeping environment for their babies. Consumers should immediately return the crib to the place of purchase for a refund, replacement or store credit.

Sit'N'Stroll Child Restraints Recalled

Triple Play Products, LLC has recalled certain Sit'N'Stroll Child Restraint Systems, Model 4002, manufactured on May 5, 2008. The webbing used in the center adjuster for the harness fails to comply with the initial breaking strength requirements of federal motor vehicle safety standard No. 213, "Child Restraint Systems." In the event of a crash, the child may not be properly restrained resulting in injury to the child. Triple

Play will notify owners and provide a free repair kit along with instructions to replace the center adjuster webbing. Owners may contact Triple Play consumer information line toll-free at 1-800-829-1625.

Sport Balls Recalled

American Greetings Corp., of Cleveland, Ohio, has recalled DesignWare Sport Balls. About 90,000 packages in the United States and 1,900 in Canada are included in the recall. The surface coating on the basketball contains excessive levels of lead, in violation of the federal lead paint standard. This recall involves DesignWare Sport Balls party favors. The package contains four mini sport balls: a basketball, a football, a baseball and a soccer ball. The model number is SPBL 1821 and is printed on the packaging. Consumers should take the recalled sport balls away from children immediately and contact American Greetings to receive a coupon for a replacement product. For additional information, contact American Greetings at (800) 777-4891 or visit the company's Web site at www.ag.com.

Kolcraft Recalls One Million Play Yards

Kolcraft play yards have been recalled due to a fall hazard. The play yards include a side rail that can fail to close properly. The latches on the side rails can open unexpectedly, causing a child to fall, according to an announcement by The U.S. Consumer Product Safety Commission. About one million of the play yards made in China, Spain and Italy, were imported by Kolcraft Enterprises of Chicago, Ill., and sold nationwide between January 2000 and January 2009 for between \$50 and \$160.

Kolcraft, has received 347 reports of sides of the play yard collapsing unexpectedly, resulting in 21 injuries to young children, includ-

ing bumps, scrapes, bruises and one concussion.

This recall involves the Kolcraft Travelin' Tot play yards, as well as other similar play yards manufactured for Carter's, Sesame Street, Jeep, Contours, Care Bare and Eric Carle, with model numbers listed below. Some of the units have a bassinet and/or changing table. Some models have a mobile, vibrating unit or a parent organizer. Model numbers are printed on a white sticker on one of the feet of the play yard.

Some of the models of the play yards involved in this recall were recalled in September 2007 due to a strangulation hazard posed by the changing table, which resulted in the death of a ten-month-old child. The play yards were sold at Babies R Us, Wal-Mart, Kmart, Sears, Target and other stores nationwide and Internet retailers from January 2000 through January 2009 for between \$50 and \$160. Consumers should immediately stop using the play yard and contact Kolcraft for a free repair kit. For additional information, contact Kolcraft toll-free at (866) 594-4208 anytime or visit the company's Web site at www.kolcraft.com.

Children's Hooded Sweatshirts Recalled

About 7,000 youth hooded sweatshirts have been recalled by distributor Propac Distributing Corp., of Gardena, California. The sweatshirts have a drawstring through the hood which can pose a strangulation hazard to children. In February 1996, CPSC issued guidelines to help prevent children from strangling or getting entangled on the neck and waist drawstrings in upper garments, such as jackets or sweatshirts. This recall involves youth zipper and pullover hooded sweatshirts with drawstrings. The

sweatshirts were sold in black, navy and grey. The Proclub brand sweatshirts have RN number 100418 printed on a tag inside the collar. The sweatshirts were sold at retail stores in Los Angeles, Calif and Las Vegas, Nevada from November 2008 through December 2008 for about \$19.

Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard, or return the garment with drawstring to the place of purchase for a full refund. Consumers also can return the sweatshirts to Propac Distributing for a full refund. For additional information, contact Propac Distributing at (888) 337-0011 or visit the firm's Web site at www.proclubinc.com.

Luv N' Care Issues A Nationwide Recall Of Teethers

Luv N' Care, LTD, of Monroe, LA, is recalling all Nuby Gel Filled Teethers. These products have been found to contain *Bacillus subtilis* and *Bacillus circulans* in the gel. It's said that these bacteria generally do not cause illness; however, the bacteria can affect children with weakened immune systems, causing stomach pain, vomiting, and diarrhea, if the teether is punctured and the liquid from the teether is ingested.

Consumers who have Nuby Gel Filled Teethers and Cottontails and Playschool Teethers with any of the UPC Codes listed below should immediately stop using them, discard them or return them to the place of purchase for a full refund. A list of the recalled products can be obtained from the CPSC or by contacting Shanna Malone at Shanna.Malone@beasleyallen.com.

Luv N' Care voluntarily recalled the products after learning that samples of two lots collected by the Food and Drug Administration were found to contain *Bacil-*

lus subtilis and *Bacillus circulans*, respectively in the gel. The FDA was apprised of this action. No illnesses have been reported to date. Product was distributed through retail outlets nationwide and has been found to be marketed on the internet. The products are packaged in a plastic bubble on a printed card and can be identified by UPC Codes.

The company has ceased production and distribution of the product and is notifying its distributors to return the product. Consumers are urged to return the product to the place of purchase for a full refund. Consumers with questions may contact the company at 1-800-256-2399 ext. 3106 between 8:00 AM and 5:00 PM Central time. Adverse reactions experienced with the use of this product may be reported to the FDA's MedWatch Adverse Event Reporting program either online (www.fda.gov/medwatch/report.htm), by regular mail (MedWatch 5600 Fishers Lane, Rockville, MD 20852-9787) or by fax (1-800-FDA-0178).

Evenflo Recalls Telephone Toys Due To Choking Hazard

Evenflo Switch-A-Roo Telephone Toys have been recalled by the manufacturer Evenflo Co. Inc., of Miamisburg, Ohio. A mirror decal attached to the toy can peel away, posing a potential choking hazard. The recall involves Evenflo Switch-A-Roo telephone toys made between October 2008 and June 2009. The model number is 6391911. Consumers should immediately remove the mirror decal from the toy and permanently dispose of it. For additional information, contact Evenflo at (800) 233-5921 or visit the company's Web site at safety.evenflo.com.

Buster Brown Clog Children's Shoes Recalled

About 1.4 million Buster Brown & Co.'s Clog Children's Shoes have been recalled by distributor: Brown Shoe Co. Inc., of St. Louis, Mo. and its affiliate Pagoda International Footwear Ltd., of Hong Kong. The shoe has decorative wheels that can detach, posing a choking hazard to young children. The companies have received two reports of a decorative wheel detaching from the shoe. No injuries have been reported. This recall involves the Buster Brown & Co. clog children's shoes with model or retail numbers listed below.

These shoes are a plastic molded EVA "water" clog and are designed to resemble a car. The shoes are red, brown, blue, yellow, and pink and most shoes bear the words "CARS," "Transformers Animated," or "Barbie." "Buster Brown & Co.™" is printed on the shoe inside at the heel, on a sewn-in tag inside the fleece-lined shoe, and on the original hang tag. The model or retail number can also be found on these tags. The shoes were sold in children's sizes 5 to 13 and youth sizes 1-3.

Customers should immediately take this product away from children and return it to the place of purchase for a full refund. For additional information, contact Buster Brown & Co. toll-free at (888) 869-1044, visit the company's website at www.busterbrownshoes.com, or send an email to Busterandtige@brownshoe.com.

RECALLS OF FOOD PRODUCTS

Warning On Two Pistachio Brands

The FDA has warned folks not to eat two brands of pistachios because they may be contaminated with Salmonella. California Prime Produce and Orange

County Orchards pistachios are both packaged by Orca Distribution West. The agency said people should throw away any recalled products and avoid contact of the product with their skin. Salmonella can cause serious and sometimes fatal infections in young children, frail or elderly people.

The recalled snacks are associated with an earlier recall by Setton Pistachio of Terra Bella Inc. Orca received and repacked some pistachios from Setton. The newly recalled nuts were sold at stores, airports and hotels nationwide. They come in six-ounce bags with zippers. They UPC number is 8 10826 01116 2, and they have sell-by dates of 7/30/09 and 8/30/09. Salmonella can cause fever, diarrhea, nausea, vomiting and abdominal pain. If it gets into the blood, it can cause arthritis and a heart infection. Orca has not made a public announcement regarding these products, according to the FDA. But the FDA has alerted consumers so that they can take appropriate action.

Malt-O-Meal Company Recalls Maple & Brown Sugar Instant Oatmeal

Malt-O-Meal Company has recalled "Maple & Brown Sugar Instant Oatmeal" and "Maple & Brown Sugar Instant Oatmeal" packets sold in "Variety" cartons, with carton date codes between June 30, 2009 and October 28, 2010, because the products contain instant non-fat dry milk manufactured by the Plainview Milk Products Cooperative. Plainview has recently commenced a recall of instant non-fat dry milk and other ingredients that have the potential to be contaminated with Salmonella bacteria.

The product was distributed nationally under a variety of brands in cartons of six to 15 packets. Brands include Cub Foods, Diamond Crystal, Fastco, Flavorite, Foodland, Good 'n

Hearty, Hearty Traditions, Hy-Top, IGA, Mom's Best Natural, Mega-roons, Millville, Our Family, Richfood, Shop 'n Save and Smart Menu.

Consumers should look on the product cartons for carton date codes that are between June 30, 2009 (which would be printed as "JUN3009") and October 28, 2010 (which would be printed as "OCT2810"). These dates are usually printed as the first seven characters of a 15-character string. If you want a list of the affected products, contact Shanna Malone by email at Shanna.Malone@beasleyallen.com. Consumers also can refer to the comprehensive list of affected products at www.momsbestnaturals.com/oatmeal-news/details.php.

Consumers who have purchased any of the affected products should not consume them and are urged to return them to their place of purchase for a full refund. Consumers with questions may contact the company at 1-877-665-9331. For more information on Salmonella, please visit the Centers for Disease Control and Prevention's website at <http://www.cdc.gov>.

XIV. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

BEN LOCKLAR Moves To Personal Injury/Product Liability Section

We are pleased to report that Ben Locklar, a shareholder with the firm, has moved over to the firm's Personal Injury section. Our firm is aggressively pursuing mesothelioma cases and the companies that supplied asbestos containing products which cause the deadly disease. Ben, who brings 20 years of experience as a lawyer to the section, will be focusing primarily on those cases. Prior to his move, Ben had

been working on pharmaceutical liability cases in our Mass Tort section, where he did an outstanding job.

Ben, who has been with the firm since 2005, previously practiced in Montgomery with Richard Jordan and Randy Myers, two very good lawyers. Ben—a team player—was needed to work primarily with Mike Andrews on the mesothelioma cases and—in a spirit of cooperation—made this move. If you have any questions about mesothelioma or asbestos exposure, feel free to contact Ben at 800-898-2034 or Ben.Locklar@beasleyallen.com.

PAUL LYNN

Paul Lynn, who has been with the firm since July of 2003, currently serves as a Staff Attorney in the Fraud Section. For a considerable period of time, Paul has been working on the Medicaid fraud involving the drug manufacturers. He has assisted in the ongoing litigation, writing of briefs and the preparation for depositions. While in law school, Paul was a law clerk for Clint Carter in the firm.

Paul, a native of Birmingham, graduated from John Carroll Catholic High School. He then attended the University of Alabama at Birmingham graduating in 2002 with a B.S. in Accounting. While at UAB, he was a member of Beta Alpha Psi. Paul graduated from Jones School of Law in 2007. While there he served as President of Delta Theta Phi and received two Scholastic Achievement Awards. Paul is a member of St. Peter's Catholic Church and he has one son, JP. Paul enjoys golf and hunting. Paul is a very good employee, a very hard and dedicated worker, and he is a definite asset to the firm. We are most fortunate to have him with us.

SCOTTIE HENSON

Scottie Henson, who has been with the firm for over four years, currently serves as a Vioxx Staff Assistant to Roger Smith in our Mass Torts Section. In this position, Scottie talks with clients about their current case status. Things like Notice of Eligibility, Notice of Ineligibility, Notice of Points Award, Extraordinary Injury Fund Program, and Private Lien Resolution Program are some of the matters involved in

dealing with clients. Also any other project that needs prompt attention will be handled.

Scottie is married to Jerry Henson and they have three daughters between them. Her daughter, Christian, is the oldest at age 15, Jerry's two, Carley age 11 and Kaylin age nine, make out the family. They live in what Scottie describes as "the sticks" on a quiet country road in Marbury, with dogs, horses and a hamster.

Scottie graduated in 2007 as a Certified Medical Assistant. She also attended AUM for Photography in the summer of 2008 and went to Cosmetology school way back in 1993. She works part-time with a local group here in Montgomery called Southern Paranormal Researchers as the Photographer/Videographer. Scottie also paints and is a big movie buff. She is a very good employee who is dedicated to her work and to the clients. We are fortunate to have her with the firm.

WENDI LEWIS

Wendi Lewis joined the firm in February of 2008. She currently serves as the firm's Communications Director. Wendi originally came to the firm as a "conversation architect," a full-time writer for an exciting new project, a web site dedicated to raising awareness about mesothelioma, a rare form of cancer caused by asbestos. In working with mesothelioma clients, we realized that many people are not familiar with meso or the dangers of asbestos. So, a decision was made to establish a web site that would help people find information about this deadly disease, connect with others who have been touched by mesothelioma, and find information about research and treatment. The web site, www.myMeso.org, operates as a blog, providing constantly changing and new information on this topic. The site is dedicated to outreach and awareness.

In addition to myMeso.org, Wendi now writes and manages content for more than 25 issue-specific web sites that provide information about products and cases that our lawyers are working on. These sites are geared to helping potential clients find us, and learn more about these issues. Topics

include Reglan, Chantix, pain pumps, investment and securities fraud, mesothelioma law, Yamaha Rhino rollovers / ATV-UTV safety, and a variety of topics in the area of Personal Injury, including product recalls, safety information, and single-vehicle accidents. We are constantly adding new issue-specific sites geared toward matters our attorneys are investigating. Additionally, the web services department maintains our main web site, www.beasleyallen.com, and we ensure that all information on that site is regularly updated and correct.

This department also oversees a lot of the public relations, marketing and other communications efforts of the firm. Wendi's tasks in this area include writing press releases and other marketing materials, as well as proof-reading and helping to ensure consistency in materials that represent the firm.

Wendi is married to Dr. Eric Lewis, a veterinarian, and they have one cat, Ico, and one dog, a border collie named Reef. In their spare time, they enjoy traveling, with New Orleans and the beach as their favorite destinations. Wendi graduated from Auburn Montgomery with a bachelor's degree in English. She authored a coffee-table book called entitled *Montgomery: At the Forefront of a New Century*, published in 1996. Wendi also serves on the Board of Directors for the Montgomery Zoo and Central Alabama CrimeStoppers, the Advisory Board for ClefWorks, and the Communications Committee for the River Region United Way. Wendi is a most valuable employee and provides services that we believe are extremely important for our clients and the public generally. We are most fortunate to have her with us.

LAWCALL STILL GETTING LOTS OF TRAFFIC

As we have reported, since January our firm has hosted *LawCall* a weekly, thirty-minute call-in show, and it continues to grow in popularity. The show airs live each Sunday night at 11:00 p.m. and is hosted by Gibson Vance from our firm. Each week a guest lawyer appears on the show with

Gibson. A specific topic is chosen to discuss each week. Callers are given the opportunity to call in and ask their questions. The show covers topics such as injuries sustained in the work place, injuries sustained from auto accidents, nursing home negligence and estate issues. According to the station, their switchboard is overwhelmed each Sunday night with calls. If callers are unable to get through they can also submit their questions via the web at free.consult@beasleyallen.com.

XXV. SPECIAL RECOGNITIONS

PUBLIC JUSTICE WORKS HARD FOR CONSUMERS

Our firm has handled so much litigation caused by corporate wrongdoing and abuse that we sometimes take for granted that everybody knows how some companies in Corporate America operate. But, I fully realize that most folks really have no way to know about the depth of corporate wrongdoing and abuse—that is, until it affects them or a member of their family. The following news release was received from Public Justice and its content is most timely.

Consumers throughout America are supposed to be treated fairly and honestly. Unfortunately, many companies seek to maximize their profits by cheating their customers. Others make unsafe products that injure or even kill consumers. Public Justice's litigation holds these companies accountable, wins compensation for their victims, and protects consumers rights nationwide.

Far too many corporations see their own customers as targets to be fleeced, and act on that urge. Litigating cases in state and federal courts throughout the country, Public Justice has won a broad range of individual cases

and class actions. We have won compensation for the injured and helped get defective products off of the market. We've recovered millions for consumers who were victimized by payday lenders charging over 1,000% interest, credit card companies, cell phone providers, car dealers, HMO's, and numerous other corporations using bait-and-switches and other illegal scams. We have forced cheating corporations to follow the law, and won landmark precedents that have changed the face of modern consumer law.

America was created by people who understood that power unchecked is power abused. That's why we have separation of powers, the Bill of Rights, and the right to a day in court. For the past several years, however, many of those with power—in both the public and private sectors—have had few restraints. They could only be held accountable in the courts. So they unleashed an unprecedented, calculated, and fundamentally un-American attack: step by step, in area after area, they started trying to eliminate access to the courts and, ultimately, justice itself. That has not stopped. Look around. Throughout America, corporate wrongdoers are amending their consumer, employment, and investors' contracts to explicitly ban individual and class action litigation. They're working daily to expand federal preemption, mandatory arbitration, and court secrecy to preclude many suits and bury the rest. Meanwhile, the federal government and state legislatures are increasingly considering regulations and legislation that would bar court access and eliminate Americans' rights. We cannot let that happen.

Source: Public Justice

PRESIDENT SUSAN PARKER IS A DEDICATED PUBLIC SERVANT

Susan Parker, who is in her first term as a member of the Alabama Public Service Commission, recently was elected president of the Southeastern Association of Regulatory Utility Commissioners (SEARUC) at the association's annual meeting. SEARUC members are utility regulators from Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Texas. Commissioner Parker had this to say about her election:

As the Southeastern region president, I will be working hard with my fellow commissioners and with Congress to find the proper balance on issues such as climate legislation. We must fight to protect the Southeastern economy and keep our utility rates down as we address environmental concerns.

The Alabama commissioner's one-year term as SEARUC president begins immediately. Elected to the state PSC in 2006, Susan also holds leadership positions in the National Association of Regulatory Utility Commissioners. Mirroring her efforts in Alabama, Susan says she will use her role as SEARUC president to focus greater attention on the importance of energy efficiency. Susan's Consumer Education Initiative in Alabama, launched in March 2008, provides information on efficiency and conservation to low-income utility customers and senior citizens throughout the state. Her Bill of Rights for consumers is available and can be obtained by contacting Susan at the PSC. Susan is a dedicated public servant and is doing an outstanding job for Alabama citizens on the PSC.

A SPECIAL EVENT THIS MONTH IN BIRMINGHAM

Returning to its roots and to the home of my friend David Shelby, a Birmingham lawyer, the *Magic in the Moonlight* Gala will take place on Sat-

urday, August 29th. This event will feature signature dishes from top restaurants in Birmingham including Gianmarco's, Homewood Gourmet, Brio, John's, Bongiorno, and Daniel George. Guests can mix and mingle while enjoying some good entertainment by Cleve Eaton and The Alabama All-Stars. Also, there will be a silent auction for items ranging from "Roger's Lighthouse" beach retreat in Seaside to commissioned art by Susan Oliver, as well as our "Diamond on Ice" courtesy of Barton-Clay Fine Jewelers.

During the evening, the Sheena Diane Ayers Humanitarian Award will go to Tom Methvin from our firm for his years of work with the Cystic Fibrosis Foundation. Tom is now President of the Alabama State Bar and is the Managing Shareholder in our firm. Co-chairs Roger and Diane Appell extend their gratitude to David Shelby for once again hosting the gala. Hopefully, our readers in the area will be able to make this event.

All proceeds benefit the Cystic Fibrosis Foundation, the leading organization in the fight to cure and care for people with cystic fibrosis. Birmingham boasts both research centers at UAB and CF clinics at Children's Hospital and UAB. The foundation's dramatic results in extending the life expectancy of CF patients has garnered numerous national awards. For tickets or additional information on *Magic in the Moonlight*, you can contact Jennifer McEuen, CFF Alabama Chapter, 205-870-8565 or jmceuen@cff.org.

THE NEW PRESIDENT OF THE ALABAMA STATE BAR

On July 18th, Tom Methvin, Managing Shareholder of our firm, assumed the role of President of the Alabama State Bar. This is quite an honor for any lawyer and one that is well-deserved by Tom. He has worked hard on Bar Association projects over the years. His election also brings with it tremendous responsibilities and great opportunities for service to our state. The following are remarks from the State Bar annual conference, made by Tom when he took office:

Madam Chief Justice, Colleagues, Friends and Family: It is quite an honor to serve as your Bar President. As you know, I've got very big shoes to fill as I follow two great presidents, Mark White and Sam Crosby. I do not take this job lightly.

As I look back in time, I wonder what were the major issues facing our first bar president in 1879 as he dealt with all the changes during Reconstruction. I wonder what issues faced our 41st bar president in 1920 when he dealt with the new laws regarding women's right to vote. I wonder what issues faced our 86th bar president in 1964 when he dealt with the changes of the Civil Rights Act becoming law.

And then I wondered what the major issues are facing us today in 2009, as I become your 133rd Bar President. The changes in our nation's economy and how it has thrust so many more Alabamians into poverty has to be a consideration. How our State Bar deals with this relative to other State Bars is likewise a consideration.

After thinking about all of this and after receiving a lot of input from Bar leaders, I concluded that one of the major issues we need to focus our time and effort on is access to justice for the poor. Why is this so important? Why now?

Alabama has a large number of people living in poverty. These numbers have increased substantially because of the economy and are likely to continue to increase. Our statistics show that over 80% of their legal needs are not being met.

As of last year, we spent less in this state for access to justice than any other state in the country. Even Puerto Rico spent more than us—yes even Puerto Rico. As a result, justice for the poor suffered greatly. In my opinion, this

is shameful and just plain wrong! The increase of those living in poverty and the way we fund legal services to them makes access to justice more important now than ever before.

Our nation's promise in the Pledge of Allegiance of "and justice for all" is among our proudest traditions. Yet for many living in poverty it is a hollow promise. In fact, in many cases they are not only seeking justice they are actually fighting injustice. You know, we can debate what justice is and it can be hard to tell sometimes. However, there can be no debate about injustice. Injustice is easy to spot.

A mother is trying to support her children by working two jobs. She is running from an abusive spouse who beats her over and over. He told her he would kill her if she ran. She needs a restraining order to stop the violence. She needs to change her legal identity to hide from the abuse, but she can't afford a lawyer. This is injustice.

The elderly couple who are living on Social Security and who rent a small apartment. He is a World War II veteran and she worked at a factory for 30 years. They always pay their rent on time but the landlord refuses to fix their leaking roof and sagging floors. The landlord kicks them out in the street because they can't afford a lawyer to protect their rights. This is an injustice.

These are typical fact situations of people who need a lawyer in Alabama who in many cases can't get one. They are left out of our justice system primarily because of the lack of funding. Let us remember them as we think of the plight of all those who cannot get a lawyer and must deal with injustice on a daily basis.

Thankfully, Chief Justice Sue Bell Cobb had the foresight to recog-

nize this problem. In April 2007, under her leadership the Alabama Supreme Court created the Access to Justice Commission and appointed its leader Ted Hosp, who has done an excellent job. The Commission and the Alabama Law Foundation have worked together to make great progress. But we have got so much more to do. We plan major new initiatives this year to address this.

- First, we will raise substantial funds to hire more Legal Services lawyers to handle these cases. Alan Rogers has agreed to chair this effort. Thank you Alan! As you know, Legal Services is the main way that those of limited means receive free legal help in this state. Legal Services does a great job and we appreciate them.
- Second, we will approach the Alabama legislature and ask them to fund access to justice at the same level other states do. We will particularly call on our lawyer legislators to help us with this. Jim Pratt has agreed to lead this effort. Thank you Jim.
- Third, we will ask every member of the bar to contribute some amount of time or money to help Access for Justice.
- Fourth, we will upgrade our volunteer lawyer program. This can give us immediate help while we work on the slower task of raising funds for other access to justice programs. Right now, we have a 23% attorney participation rate in our Volunteer Lawyer Programs. We need more lawyers to help and we plan to actively recruit them. You are bar leaders who set the tone for how other bar members act. If you are not a member of a volunteer lawyer program, please join. Please encourage everyone in your firm to join also. Our firm has 42 lawyers and has a 100% participation rate. We would like to have as many firms as possible at 100% participation. Will you

encourage all members of your firm to do this? This is very important.

We also have a pro bono celebration set this year during the week of October 25th. During this week, we will highlight our members' pro bono activities by having an outreach in every judicial circuit in this state. We will help a lot of people and we will get a lot of positive PR. Thank you President-Elect Alyce Spruell for taking charge of this.

I want to take a moment to commend the Mobile Bar Association volunteer lawyer program. Its program is the best in the state and one of the best in the nation. It has received state and national awards for its great work. Approximately 60% of its lawyers participate in the program and it has delivered over 25,000 hours of lawyer time for free to the Mobile public. To the members of the Mobile Bar, thank you for your example.

I would also like to thank Rich Raleigh, who has agreed to chair the volunteer lawyers program in Huntsville. Rich and his committee are completely re-designing this program and have already made great progress. We expect to say this time next year that this program is on track to be one of the best around.

Lastly, I want to thank the Alabama Civil Justice Foundation and the Access to Justice Commission for their grant that allowed us to hire a pro bono lawyer to work full time to protect the rights of those facing foreclosure.

In closing, Let me say this: Let's make Alabama a place to be proud of as it relates to access to justice. With your help, I am convinced we can do it!

We are proud of Tom and his work in the State Bar Association. As Managing Shareholder in our firm, Tom has the toughest job of any lawyer in our firm.

He has to run the entire operation, pay the bills and keep lawyers and employees reasonably happy. I am confident that Tom will be an outstanding Bar president.

GIBSON VANCE ELECTED PRESIDENT-ELECT OF THE ASSOCIATION FOR JUSTICE

On July 28th Gibson Vance, a shareholder in our firm, became president-elect of the Association for Justice, a national association of 60,000 lawyers located throughout the country, all of whom represent people. More will be said on Gibson's election next month. Needless to say, we are very proud of him.

FAVORITE BIBLE VERSES

Last month very few Bible verses were sent in, but we had a bunch sent in for this month's issue and that's good news. I am going to use more than usual in this issue and really wish I could include all of them. But unfortunately space won't allow it.

Several folks have said that the most needed verse in today's world and especially for the United States of America is found in 2 Chronicles 7:14. The message God gave to King Solomon is as needed today as it was in those days. I will mention more on that in my concluding remarks.

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

Lamar and Joy Brown were our neighbors when Sara and I lived in Clayton a "few years" back. At the time, Lamar was the Pastor at Clayton United Methodist Church. He later became Senior Pastor at Saint James United Methodist Church in Montgomery. Lamar and Joy were two of the finest folks I have ever known and were very good friends of ours. Lamar died in December of last year after a lengthy

bout with cancer and is now in Heaven. Recently, Joy sent in Lamar's favorite Bible verse.

Trust in the LORD with all thine heart; and lean not unto thine own understanding. In all thy ways acknowledge him, and he shall direct thy paths.

Proverbs 3:5-6

Joy says Lamar lived by the Bible and especially by this verse. Having known Lamar well for years, I know that to be true.

My good friend Sam Crosby, an outstanding and well-respected lawyer from Baldwin County, sent in a number of his favorite verses from the Bible for this issue. Sam did an outstanding job as president of the Alabama State Bar Association in 2008 and set the bar very high for those who follow him in that office.

The Lord is my light and my salvation; whom shall I fear? The Lord is the stronghold of my life; of whom shall I be afraid?

Psalms 27:1

For I am thy passing guest, a sojourner, like all my fathers.

Psalms 39:12

Fear not, for I have redeemed you; I have called you by name, you are mine. When you pass through the waters I will be with you; and through the rivers, they shall not overwhelm you; when you walk through the fire you shall not be burned, and the flame shall not consume you. For I am the Lord your God, the Holy One of Israel, your Savior.

Isaiah 43:1

In the world you have tribulation; but be of good cheer, I have overcome the world.

John 16:33

With the Lord one day is as a thousand years, and a thousand years as one day.

2 Peter 3:8

He who abides in love abides in God, and God abides in him.

1 John 4:16

Jesus Christ is the same yesterday and today and forever.

Hebrews 13:8

And what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?

Micah 6:8

Because of Sam's daily walk with His Lord and Savior Jesus Christ, he has inspired all with whom he comes in contact and in the right way.

My friend, David Winger, from The Winger Law Firm in Birmingham, sent in his wife's favorite Bible Verse. He says that Peggy uses this verse regularly in her daily life and ends almost all telephone conversations with, "Psalms 91 over you." Peggy asks the protection of God's angels over those upon whom she bestows her blessing.

He who dwells in the secret place of the Most High shall abide under the shadow of the Almighty. I will say of the LORD, "He is my refuge and my fortress; My God, in Him I will trust." Surely He shall deliver you from the snare of the fowler[a] And from the perilous pestilence. He shall cover you with His feathers, And under His wings you shall take refuge; His truth shall be your shield and buckler. You shall not be afraid of the terror by night, Nor of the arrow that flies by day, Nor of the pestilence that walks in darkness, Nor of the destruction that lays waste at noonday. A thousand may fall at your side, And ten thousand at your right hand; But it shall not come near you. Only with your eyes shall you look, And see the reward of the wicked. Because you have made the LORD, who is my refuge, Even the Most High, your dwelling place, No evil shall befall you, Nor shall any plague come near your dwelling; For He shall give His angels charge over

you, To keep you in all your ways. In their hands they shall bear you up, Lest you dash your foot against a stone. You shall tread upon the lion and the cobra, The young lion and the serpent you shall trample underfoot. "Because he has set his love upon Me, therefore I will deliver him; I will set him on high, because he has known My name. He shall call upon Me, and I will answer him; I will be with him in trouble; I will deliver him and honor him. With long life I will satisfy him, And show him My salvation.

Psalms 91

Oswald and Jeanie Knight, who are from Montgomery, sent in the following verses which they say give them much strength, peace, and comfort—especially at this difficult time in our nation. Oswald and Jeanie have been good friends of ours since Sara and I moved to Montgomery in 1971. Oswald, a retired lineman with the Alabama Power Company, is famous for being the maker of the best "pecan brittle" in the world. The following are verses from two good folks:

Give all your worries and cares to God for He cares about you.

1 Peter 5:7

Do not grieve, for the joy of the Lord is my strength.

Nehemiah 8:10

But my God shall supply all your needs according to His riches in glory by Christ Jesus.

Philippians 4:19

Lo I am with you always even to the end of the age!

Matthew 28:20

And Jesus said, the things which are impossible with man are possible with God.

Luke 18:27

Another good friend, Taylor Blackwell, wrote recently that he really enjoyed the article in the last issue entitled "Christians must stand firm." Taylor

pointed out that too often Christians fail to stand up when they should and are silent when they should speak out. He says we often “turn away” or “tolerate” things when we should act. Taylor is absolutely right. The following are the two verses that he keeps with him at all times:

Do not withhold your mercy from me O Lord. May your love and your truth always protect me. For troubles without number surround me. My sins have overtaken me and I cannot see. They are more than the hairs of my head and my heart fails within me.
Psalm 40:11

Do not be anxious about anything, but in everything by prayer and petition, with thanksgiving, present your requests to God.
Phil. 4:6

Taylor is a highly successful businessman in Montgomery. He is a very good role model for young men and women entering the work force in our city.

XXVI. CLOSING OBSERVATIONS

Dr. John Ed Mathison has volunteered to write a series of four articles for the Report, starting with this month's issue. We have been looking forward to John Ed doing this and it is greatly appreciated. The first of the series is set out below and it's on a subject that affects every single living person in this world.

HOW MUCH ARE YOU WORTH?

What is a person worth? That is a huge question going on right now in major league sports as professionals are negotiating contracts and free agents are looking for the best deals.

Albert Haynesworth went into the free agent market and the Washington Redskins think he is worth

a lot. He signed a \$100 million contract that includes a record \$41 million signing bonus. That is strong! Manny Ramirez signed a two-year, \$45 million contract with the Los Angeles Dodgers. Many other players are “testing the market” to see what they are worth. It doesn't appear that the economy is in a down turn when we see what so many of these players are getting.

At the other end of the spectrum is the story of John Odom. He was a former prospect in the San Francisco Giants' chain. Odom is from Roswell, Georgia. He had a bumpy four years in the Giants' farm system, never getting above Class A. The Giants released him last year and the Calgary Vipers picked him up. Because of a 1999 conviction for aggravated assault, Odom couldn't get into Canada. So Calgary made a trade. The initial trade called for a cash settlement of \$1,000 to the Vipers. The Vipers decided they didn't want to do a cash deal because it made them look financially unstable. So they made another proposal that has now become famous.

Odom was traded for some bats the Vipers could use. At \$665 for ten bats, made by Prairie Sticks, double-dipped black, 34 inches long, model C243, Laredo agreed to the deal. At first it was news novelty and Odom liked it. Evidently it got the best of him when he did not pitch well at Laredo. They called him “Bat Man” or “Bat Guy” or “Bat Boy.” He quit in humiliation. Six months later he was found dead from an overdose.

How much was he worth—ten bats? Is a football player or baseball player worth \$110 million? How much are you worth? Focus on how much God thinks you are worth. You are worth everything to Him. You are worth so much that He sent his only Son into the world so that whosoever believes

in Him should never perish but have everlasting life.

Peter reminds us in I Peter 1:7 that the faith we have through Jesus Christ is “more precious than gold which is perishable.” In I Peter 3:4 he reminds us that when our lives are truly lived according to His spirit that we become “a hidden person of heart, with the imperishable quality of a gentle and quiet spirit, which is precious in the sight of God.” Some scientists have estimated what the chemical components of our body might be worth. It is not very much. God calculates the worth of every person by the fact that He created us, loved us, and sent His Son to save us. Each of us is of inestimable worth in His sight!

Your worth to God is more than any contract that any athlete will ever sign. God will never trade you for anything—not even a few bats or multi millions of dollars. Ask God to help you today to know your worth, and to live it out accordingly!

*John Ed Mathison
August 2009*

IT WILL TAKE A REAL HEALING FOR AMERICA TO GET THINGS RIGHT

It is quite clear that the United States of America is in serious trouble on a number of fronts. Politically, our national government is virtually paralyzed with partisanship and with petty bickering, neither of which does anybody any good. Our economy—while showing signs of improvement—is still struggling. Last year was the greatest year of job loss in our country in about 70 years. Millions of Americans have no health insurance and receive sub-standard health care. Our nation's reputation on the international front was at an all time low when the current administration took over in January. While it has improved, there is much yet to accomplish in that area.

It's high time for our nation to be healed and its many problems resolved.

I for one believe that the promise made by God to King Solomon some 3,000 years ago is as good now as it was then. It's also as needed now if not more. We mentioned this promise in a prior section, but it's so critically important, I will set it out again here. Let's take a look at what the promise was:

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

We must pay special attention to whom God was speaking when this promise was made. God was calling on His people, the Nation of Israel, to take action to heal their land. His promise is just as needed and just as appropriate today. We in America should listen to this promise collectively and then act without hesitation. It's obvious that

we can't legislate the healing that our Nation needs and neither can we force it on folks by any means. I know firsthand that God is good and has a plan and a definite purpose for our lives and for the United States of America. The time has come for us to finally stop and listen and then to get busy doing our part to bring about the needed healing for America that God promises. The four requirements are very specific and very easily understood. A true healing for America is my prayer and hopefully it's also yours.

XXVII. PARTING WORDS

It's difficult to believe that we are already in the month of August. This year has flown by for me at a record pace. As I reflect back on the first seven months of 2009, I can say without reservation that this has been a most

trying year for all of us. When you consider that lots of folks have lost their jobs and many of them, as well as others, have lost their homes, it really puts life in perspective for the rest of us. I have always felt that we all have an obligation to help others who are having troubles and difficulties. We must reach out to those folks and assist them to the best of our ability to get things right.

God has blessed all of us at Beasley Allen and we realize fully that we have a moral and spiritual duty to help others when we can. My prayer is that our economy will soon rebound and that folks who are out of work or who are homeless will be able to return to their jobs and to their homes. In the meanwhile, we must all become more involved and help our friends and neighbors who have been hurt by circumstances beyond their control. God will bless those efforts!

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