



THE  
**JERE BEASLEY REPORT** OCTOBER 2009

**Beasley Allen**

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# I. CAPITOL OBSERVATIONS

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## **TED KENNEDY LEFT A TREMENDOUS LEGACY**

The death of Senator Ted Kennedy has left a tremendous void in the U.S. Senate. The Massachusetts Senator also leaves a tremendous legacy that spans decades of public service. In my opinion, his record is one that may never again be equaled. His legacy covers lots of ground in many areas over his years in public life. Ted Kennedy's work as a member of the Senate touched nearly every major area of the law. Long a champion of ordinary folks, the youngest of the Kennedy brothers accomplished much good during his 47 years in the Senate. He left his imprint, either as original sponsor or a leading proponent, on the nation's landmark voting rights laws, its workplace discrimination laws, immigration reform, judicial nominations and other major issues. It's most unfortunate that the man who fought so hard for healthcare reform won't be around to see it become a reality.

Ted Kennedy was a liberal by belief and certainly by choice and he never made any apology for either. He took stands on important issues and, regardless of how tough the opposition became, he never wavered in his positions. Many of the issues he fought for were controversial and some were highly unpopular. But no American citizen, regardless of political party or affiliation, can say the man called the Lion of the Senate was anything but sincere. He will be missed by friend and foe alike!

## **TIME FOR COOPERATION IN OUR NATION'S CAPITOL**

It's way past time for Democrats and Republicans in Congress to put aside their political differences and start putting the people's interests first for a

change. Folks are fed up with the partisan approach to problem solving that has become worse today than ever. There are too many critical issues that affect the American people for Congress to conduct the people's business in such a manner. The divisions that have grown wider and more caustic in Congress are not good for the country and could wind up costing members of both parties their seats in upcoming elections unless they straighten up and fly right!

## **PFIZER TO PAY \$2.3 BILLION AND TO PLEAD GUILTY TO A CRIMINAL CHARGE**

Pfizer Inc. has agreed to plead guilty to a criminal charge brought by the federal government relating to an illegal and fraudulent promotion of its now-withdrawn Bextra pain medicine. The giant drug company will pay a record \$2.3 billion to settle allegations it improperly marketed 13 different medicines. The world's biggest drug maker was called a repeat offender by the U.S. government, a label that was well-deserved. Pfizer, with no apparent fear of being caught, was marketing drugs to patients and doctors for unapproved uses. You may recall that Pfizer pleaded guilty in 2004 to an earlier criminal charge of improper sales tactics. The company's practices have been under U.S. supervision since that time.

Pfizer took a \$2.3 billion charge late last year to settle allegations involving Bextra and other drugs, but they company didn't provide any details at the time. Mike Loucks, acting U.S. Attorney for the District of Massachusetts, had this to say about Pfizer and its conduct:

*The size and seriousness of this resolution, including the huge criminal fine of \$1.3 billion, reflects the seriousness and scope of Pfizer's crimes.*

Frankly, after having dealt with the drug industry in litigation over the years, I wasn't a bit surprised at Pfizer's

conduct that led to the criminal charges. Unfortunately, Pfizer isn't the only bad apple in the drug industry barrel. While this settlement is the largest to date for improper marketing of prescription drugs, Eli Lilly and Co. agreed to pay \$1.42 billion earlier this year for off-label sales of Zyprexa, its schizophrenia drug. Pfizer will pay \$503 million to resolve marketing practices involving Bextra, \$301 million related to its schizophrenia drug Geodon, \$98 million for Zyvox and about \$50 million for its blockbuster drug, Lyrica, used to treat nerve pain

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and seizures.

In addition to the \$2.3 billion fine, Pfizer will take new charges of up to \$33 million to resolve state civil consumer fraud allegations related to promotions of Geodon. Associate Attorney General Thomas Perrelli said the settlement illustrates ways the Justice Department “can help the American public at a time when budgets are tight and health care costs are rising.”

According to federal officials, the U.S. drug industry has paid out more than \$11 billion in similar settlements over the past decade. But one consumer advocate voiced hope that the latest penalty was so big it would curb the abuses. Bill Vaughan, an analyst at Consumers Union, the nonprofit publisher of Consumer Reports observed:

*There's so much money in selling pills, that there's a tremendous temptation to cheat. There's a kind of mentality in this sector that (settlements) are the cost of doing business and we can cheat. This penalty is so huge I think consumers can have some hope that maybe these guys will tighten up and run a better ship.*

You have to wonder how Pfizer can keep operating like it has over the past several years considering that the FDA is supposed to be regulating the drug industry. But this company, like a vast number of drug manufacturers, really believes it is above the law. Criminal charges are now being brought. But to really get their attention individuals—and not just as companies—will have to face criminal prosecution.

Source: Reuters

### **MORE NEWS ON THE ZYPREXA LITIGATION**

There has been a great deal of activity recently in the Zyprexa litigation and none of it is good news for Eli Lilly & Co. The drug manufacturer will pay \$22.5 million to settle a lawsuit involving the antipsychotic drug Zyprexa brought by the state of West Virginia. In

that suit, the state alleged that the company improperly marketed Zyprexa. As we have previously reported, this drug has been the subject of federal and state investigations into whether the company marketed the drug, approved for schizophrenia and bipolar disorder, for unapproved, or what is referred to as off-label, uses.

Lilly had already settled a marketing investigation in January with the U.S. Justice Department. The company was required to pay \$1.42 billion, which includes about \$362 million to more than 30 states. As we have reported, there have been a number of individual lawsuits filed by states against Lilly over Zyprexa. The West Virginia suit was only one of a dozen individual state claims that were pending against Lilly seeking reimbursement for funds spent on Medicaid, the government's health program for the poor. Lilly announced in July that it would take a pretax charge of \$102 million during this quarter to settle a number of the state lawsuits over Zyprexa.

It was significant that West Virginia elected to file its own lawsuit instead of participating in the consolidated settlement. A state the size of West Virginia would have received only about \$1.5 million in that settlement. So its obvious filing its own suit was the proper course of action. U.S. District Judge Jack Weinstein is now urging all states to settle their marketing claims against Lilly over Zyprexa. Judge Weinstein, who sits in Brooklyn and is overseeing all federal-court lawsuits over the drug, wrote in an order dated August 17, 2009 that “a global settlement of all cases, including those pending in state courts is desirable.”

After the West Virginia settlement, there were 11 state lawsuits pending against Lilly. All of these suits allege that the company withheld information about the side effects of Zyprexa, such as diabetes, and encouraged sales of the drug for unapproved purposes, including dementia and depression. While doctors can prescribe medicines for

any use, drug makers can't promote those medicines for any use not approved by the FDA. The states are seeking damages and fines for violation of laws against deceptive practices and false claims.

Shortly after the West Virginia settlement, Lilly agreed to settle, on confidential terms, lawsuits filed by seven of the 11 states that had sued over Zyprexa. A special master was appointed by Judge Weinstein to help push settlement negotiations. Competing the settlements will be delayed while the parties determine how much money the U.S. government will claim in compensation for federal dollars spent on Zyprexa through state Medicaid programs. If all of that is worked out, and the settlements are approved by the court, that would leave the remaining four state suits pending against Lilly. Settlement requirements were ongoing at press time in these cases.

A trial against Lilly, which was expected to last 3 to 4 weeks, started last month in South Carolina in that state's Zyprexa lawsuit. You may recall that the only actual trial of a state's Zyprexa lawsuit ended in March 2008 with an out-of-court settlement in which Lilly agreed to pay Alaska \$15 million. Lilly also agreed in October to pay a total of \$62 million to 32 states and the District of Columbia to settle consumer protection claims over improper marketing. So, as you can see, things have been very busy on the Zyprexa front.

Source: Bloomberg

### **CHRYSLER SHOULD ACCEPT LIABILITY FOR ALL PRIOR WRONGDOING**

Chrysler Group LLC will accept liability for injuries or deaths occurring after its June 10<sup>th</sup> exit from bankruptcy that were caused by faulty vehicles produced before that date. But all of those who filed personal injury or wrongful death suits arising from accidents occurring before Chrysler's bankruptcy can only pursue those claims against

the assets of Old Chrysler, which remain in bankruptcy court, and those assets will have little value. That makes the effect of the announcement by New Chrysler—while welcome—rather limited.

The federal government must correct this situation for the pre-bankruptcy victims of Old Chrysler, and there are lots of them. The American people will not tolerate Congress allowing hundreds of millions of dollars to be paid to officials of big banks as bonuses using taxpayers' dollars while ignoring the sad plight of Chrysler's long list of victims.

### **MY THOUGHTS ON HEALTH CARE REFORM**

I sincerely believe there is a real need for Health Care Reform in this country and in my opinion Congress should pass a plan. Hopefully, a compromise bill will eventually pass and be signed into law. The insurance and drug industries have financed the opposition to any meaningful reform and they have been effective. There have been all sorts of false accusations made that have delayed all attempts to work out a compromise that is real reform.

I am certainly no expert in this field, but have some idea of what shape reform should take. The primary objective should be accessibility and reducing costs. I believe the reform goals should include: guaranteed coverage; lower costs; greater choice; continued right to keep a favored doctor, hospital or insurance plan; higher quality of care, which would require medical professionals, and not insurance clerks, to make medical decisions; and prevention of disease becoming a major objective in the health care system.

Finally, I wonder if any of our readers have wondered who is actually paying for all of the expensive television and newspaper ads that have been run by groups like the U.S. Chamber of Commerce. I suspect that when you trace that money you will find none other than the insurance and drug manufac-

turers. Hopefully, the will of the people will prevail in the end!

## **II. PURELY POLITICAL NEWS & VIEWS**

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### **LABOR DAY USED TO HAVE GREATER POLITICAL SIGNIFICANCE**

Over the years Labor Day had become the time of year when political candidates kicked off their campaigns, or at least let folks know for sure of their intention to run for public office. No serious candidate for Governor in Alabama would dare have missed the events held each year in the Tennessee Valley or in Mobile County. The crowds were always very good and lively and folks had a great time. But in recent years, potential candidates have already had their campaigns in high gear long before Labor Day rolls around.

The early start by present-day candidates with their campaigns has taken some of the luster off of what had been a very active and most entertaining political day. I really believe that the campaigns start much too early these days and by the time Election Day comes the public has been pretty well worn out with politics and with some politicians. The early starts also unduly increase the cost of campaigns. Clearly, times have changed and so have our politics.

### **LILLY LEDBETTER ENDORSES ARTUR DAVIS FOR GOVERNOR**

Lilly Ledbetter, the Alabama worker for whom the Lilly Ledbetter Fair Pay Act is named, has endorsed Artur Davis for Governor of Alabama. This legislation affected every female in the U.S. work force and was badly needed. Ms. Ledbetter had this to say in her endorsement:

*I'm Lilly Ledbetter, and I'm proudly supporting Artur Davis*

*for governor. Artur has the vision, the grit, and the determination to transform Alabama's economy. He believes in this state, and he knows that with the right leadership, Alabama can lead the country. I just recorded a short video from home explaining why I support Artur. Watch my endorsement video today—and then if you haven't already, sign on to pledge your support for Artur too.*

*Until about eleven years ago, I was just another working grandmother. But after years of fighting for what I was rightfully owed, my employment discrimination suit came before the Supreme Court, and eventually Barack Obama signed a bill with my name on it. I never expected to be in the political spotlight, but I've learned that sometimes you have to stand up and speak out for what you believe in. Alabama is facing some tough challenges. A lot of families are struggling just to make ends meet and put food on the table. It's going to take a strong leader to rebuild our economy, improve our public schools, and restore the trust in state government.*

*That's why we need Artur Davis in the Governor's office. Watch my endorsement of Artur Davis now—then stand up and join me as we roll up our sleeves to elect Artur Davis the next Governor of Alabama. When Artur Davis says that he will fight for working women and working families, believe me, I know he'll keep his word. Artur has what it takes to lead us to victory next fall. But he can't do it alone. He needs our help and our support.*

In my opinion, this was a most significant endorsement. Coming just after the Labor Day holiday made it even more important. Working men and women, and especially women, all

understand and appreciate what this endorsement means in the Governor's race from their perspective.

#### **CHUCK NORRIS WADES IN AGAIN**

Chuck Norris has once again made an endorsement in a political race in Alabama and this time it was for a Republican gubernatorial candidate. Norris endorsed Roy Moore, who was already leading the GOP side of this race according to the polls, and the endorsement made a splash in the media. Although an endorsement by Norris seemed to help a Republican candidate in the presidential primary last year, it may not have the same effect in a Governor's race. Time will tell how voters will react to Norris getting involved in an Alabama race for the state's top job. I believe to have any real effect on the race's outcome Norris will have to spend considerable time in Alabama or be seen lots of times in television ads.

#### **JIMMY RANE TO HEAD UP BYRNE CAMPAIGN**

Rumors had been floating around the State Capitol for weeks that Jimmy Rane would likely run for Governor on the Republican ticket. But as it turns out, Jimmy won't be on the ballot as a candidate. Instead, the Henry County native will serve as general chairman of the Bradley Byrne campaign for Governor. In my opinion, Jimmy's involvement will definitely be a plus for his candidate.

Jimmy, who is president and CEO of Great Southern Wood Preserving Inc., says he will be actively involved in the campaign and will assist with fundraising and strategy for Bradley, who is one of six Republicans seeking the GOP nomination for Governor in 2010.

#### **THE ATTORNEY GENERAL'S RACE IN ALABAMA**

The Attorney General's race in Alabama has started to get pretty

heated and already has gotten sort of nasty. All of this started when certain powerful groups found an attack dog to put in the race against the incumbent Troy King. Since his entry, Luther Strange—the lawyer lobbyist—has constantly been on the attack. But from all accounts Luther's efforts haven't gained him any real support around the state. In fact, this type campaign, and especially this early, may wind up hurting Luther beyond repair. At some point, he might even have to discuss who some of his financial backers are and that may happen sooner than he will want to talk about it.

According to a number of polls, most folks believe Troy has done an outstanding job as Attorney General and deserves to be reelected. He has taken on some powerful groups by simply doing his job as the State of Alabama's chief law enforcement officer. But he has learned that when you take on powerful groups such as the drug manufacturers, you can expect them to retaliate and that's obviously what we are seeing in this race. It started with a number of rumors, followed by a grand jury investigation, and then an announced opponent comes along with strong backing from some of Troy's biggest enemies. I don't believe Troy should sit back and run a defensive campaign this time. He has a good record and it's one that folks around the state seem to like. Most polls indicate that the voters will respond favorably on Election Day.

### **III. LEGISLATIVE HAPPENINGS**

#### **LEGISLATIVE PRIORITIES SHOULD BE SET**

Governor Riley and the leaders in the House and Senate need to get together and set their legislative priorities for the 2010 Regular Session. If that happens, and a set of real goals for the session can be agreed on in a bi-parti-

san manner, it would pay great dividends for our state. These political leaders might even want to get some help from real people in setting their priorities for the session. That would certainly be an interesting and perhaps even novel approach to getting ready for a legislative session. Personally, I believe it is a good idea to listen to folks who aren't politicians and it might even work.

I have some thoughts on the priorities that should be set for the legislature and I suspect some of our readers do, too. The following would be my top priorities for the election year session: funding public education adequately at every level; funding general fund agencies adequately; passage of strong campaign finance reform laws; passage of a stronger ethics law; making Alabama's consumer protection laws stronger; stronger regulation of payday lenders; tax reform; and constitutional reform. Clearly, the items on my list would be hard to achieve in any session, and most likely impossible during an election year. But that doesn't mean that any of them should be ignored. If you could set the priorities in order of importance for Alabama for 2010—what would they be?

## **IV. COURT WATCH**

#### **THE AMERICAN PEOPLE MUST BE PROTECTED**

The U. S. Supreme Court will soon decide whether or not to turn Corporate America loose in political campaigns with no limits on their political spending. It's recognized that the Justices will have to reconcile two fundamentally irreconcilable goals. The central issue before the Court is how do the Justices protect the First Amendment's guarantee of free speech—and in the case before the Court political speech—and still put reasonable and badly-needed limits on election spend-

ing by corporations. With no limitations on political spending by corporations, it is quite apparent that their tremendous wealth will corrupt the system. For the good of our Republic the High Court must reach the proper decision and not just a political one.

#### **GROUP BACKS GOP CANDIDATES FOR ALABAMA SUPREME COURT**

In an interesting development, the Alabama Civil Justice Reform Committee, which has been on the wrong side of almost all consumer issues, made two very early endorsements in Supreme Court races that won't take place until next year. I assume that the leaders of the group were either trying to scare off Republican opposition for the individuals endorsed or were simply flexing their political muscles for all to see. The committee endorsed two Republicans on August 27<sup>th</sup> in races for the Alabama Supreme Court seats that will be on the ballot next year. Justice Mike Bolin was endorsed for re-election and the committee also endorsed Criminal Appeals Court Judge Kelli Wise for the seat on the High Court being vacated by Justice Patti Smith.

Source: Associated Press

#### **JEFFERSON COUNTY CIRCUIT JUDGE TO RUN FOR ALABAMA SUPREME COURT**

Jefferson County Circuit Judge Mac Parsons says he's going to run for the Alabama Supreme Court next year as a Democrat. But it appears he hasn't decided which of the three races he will enter. As mentioned above, three seats on the Court are up for election next year. In addition to Justice Mike Bolin, Justice Tom Parker is seeking re-election. Justice Patti Smith has apparently decided not to run again. Judge Parsons, who is in his second six-year term as a circuit judge, is the first Democrat to announce. Based in Bessemer, Judge Parsons has handled a number of high-profile cases. Before becoming a judge, he served 16 years

in the State Senate.

According to State Democratic Party Chairman Joe Turnham, at least two other circuit judges and a prominent Birmingham lawyer are considering running for the Court as Democrats. I believe there will be several other candidates in all three of these races—both Republicans and Democrats— before qualifying time. Based on what court-watchers are saying, there will be some very strong candidates in each race.

## V. THE NATIONAL SCENE

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### **COAL ASH DUMP SITES FOUND IN 35 STATES**

The toxic leftovers from burning coal for power are sitting in nearly 600 sites in 35 states, according to a federal survey released last month. Over the last decade spills have occurred at 34 of those sites. Many of the spills were minor compared with the disaster that occurred at the Tennessee Valley Authority's power plant in Kingston, Tennessee, that we have written about. The TVA spill, which flooded hundreds of acres of land, damaged homes and killed fish in nearby rivers, is not included in the data. But the spill resulted in the EPA's March request of 61 power companies for information on how they manage coal combustion waste.

The federal survey is the most comprehensive list to date of coal ash storage sites and includes information submitted by 219 facilities. The EPA says that to date it had not received any information or detected any issues at the 584 coal ash storage sites identified that required immediate action. But environmental groups believe that the number of sites and the danger they pose to surrounding communities clearly reveals that coal ash ponds need federal regulation.

Coal ash is a byproduct of burning coal that can include heavy metals and other toxic contaminants. Although the

EPA has long recognized coal ash as a risk to human health and the environment, no federal regulations or standards govern its storage or disposal. I believe strong regulation is badly needed as well as inspections of all of the existing sites. The EPA is aware of 67 cases where coal ash has polluted or is suspected of polluting water. EPA Administrator Lisa Jackson has said that the agency would consider federal rules. It will be interesting to see what happens on that front.

Source: Associated Press

### **FEDERAL JUDGE AWARDS MOTHER OF JAILED JOURNALIST \$27.5 MILLION**

A federal judge in Miami has ordered the Cuban government and its Communist Party to pay \$27.5 million to the ailing mother of a political prisoner in Cuba. This is believed to be the first time a U.S. court has awarded damages to a family member of a living political prisoner. Omar Rodríguez Saludes, former director of Cuba's Nueva Prensa news agency, is serving a 27-year sentence. It was reported that the 42-year-old journalist's crime was riding around Havana on a bicycle with a camera around his neck, taking photos of things the Cuban government preferred to keep in the dark.

This man was one of 75 dissidents rounded up in 2003 and he was sentenced to the longest term. His mother, Olivia Saludes, who now lives in Kentucky, sued the Cuban government for pain and suffering under the Alien Tort Claims Act. She says her son was subjected to inhumane treatment, including substandard food that still had animal hair and skin on it. It was alleged that her grief left her ill and unable to work. U.S. District Court Judge Alan Gold wrote:

*I have no doubt that the acts of the Cuban government are intended to oppress those in Cuba who seek to freely voice their opinions and ensure the suffering of their families, and that a puni-*

*tive damage award of sufficient magnitude is needed to serve as a deterrent against similar acts in the future.*

The judge ordered the government to pay \$2.5 million in compensatory damages and the Communist Party to pay \$25 million in punitive damages, which was more than double what lawyers trying the case had requested. It will be interesting to see how this matter winds up.

Source: *Miami Herald*

### **PITTSBURGH SOLDIER FILES SUIT AGAINST KBR OVER IRAQ TOXIN**

We have written previously on the shocking conduct of KBR in Iraq. Now a retired Pittsburgh soldier, Glen Bootay, has joined dozens of others nationwide in suing the well-connected governmental contractor for exposure to a dangerous chemical while he guarded a water treatment plant in Iraq. As you will recall, KBR is the same firm that has also been sued for faulty systems that led 18 soldiers to be electrocuted in barracks during the Iraq war.

The Bootay lawsuit, filed in federal court, concerns exposure to sodium dichromate while the soldier was deployed in 2003 at the water plant which KBR was hired to rebuild. Bootay, a 30-year-old, is disabled and takes up to 35 medicines because of the chemical exposure. KBR should settle his claim, all of the other claims that have been filed, and any others that are still out there.

Source: Associated Press

## **VI. THE CORPORATE WORLD**

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### **CONGRESS SHOULD ACT RESPONSIBLY**

September 15<sup>th</sup> marked the one year anniversary of the collapse of Lehman

Brothers. Since that failure, Congress has done virtually nothing to address the problems that led to the demise of this Wall Street giant and the bailing out of others that followed. That must change without further delay. Congress should act and do so promptly to straighten out the regulation of the financial institutions in this country.

Under the current regulatory structure, the job of ensuring that credit card companies and other lenders are playing fairly with consumers is spread out over more than ten different agencies. This fractured system also leads to regulator-shopping. Funding for the regulating agencies comes from fees paid by the regulated entities. This has led to a regulatory race to the bottom with various agencies rushing to prove that they are the most lenient and therefore most desirable.

The fix for all of this is the creation of a Consumer Financial Protection Agency. We wrote about this need in a recent issue. This agency will neither create financial products nor ban them. Instead, it would ensure that consumers have all the information they need to make responsible decisions. Such information is not always available today. For example, studies show that nearly half of subprime mortgages—the kind that almost destroyed our nation's economy—were made to people who actually qualified for regular loans.

The creation of the agency will be good news—not just for consumers but for business—especially small community banks that will no longer have to compete with unregulated fly-by-night mortgage companies and the like. I encourage you to contact your House members and U.S. Senators about this matter. Since Rep. Spencer Baucus and Senator Richard Shelby are the ranking Republican members on the House and Senate committees responsible for handling this legislation, they should definitely be contacted. If you agree that something must be done, let your elected officials in Washington know that creating this

agency will be good for America.

### **ORDINARY FOLKS NEED A CHAMPION**

When you consider all of the corruption and fraud that have been uncovered in Corporate America—combined with the power and political influence of those industries that have been committing the wrongdoing—it's quite apparent that ordinary Americans badly need all the help they can get in our Nation's Capitol. They need members of Congress who will stand up for them and be willing to champion their causes. There have been so many scandals in so many areas that when an announcement of another scandal is made today, it doesn't get the attention it deserves. Fraud and corruption in Corporate America have become commonplace and that's a sad commentary on the times.

The federal government, over the past several years, has done a pretty sorry job of regulating the industries that must be regulated by law. Weak regulation allowed industries such as the drug companies, and the huge financial institutions, to literally run wild. Fortunately, the regulatory climate is changing for the better, though much too slowly, in the Obama Administration. Clearly there is much more that must be done in our nation if ordinary folks are to have a chance when it comes to protecting and preserving their rights and freedoms.

## **VII. PRODUCT LIABILITY UPDATE**

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### **TOYOTA DESTROYED EVIDENCE IN ROLLOVER LAWSUITS**

It appears that the Japanese automaker Toyota may have done some very bad things in litigation against the company. If the allegations in a recently-filed lawsuit are true, the automaker has

some potentially big trouble on its hands. It's being alleged in this lawsuit by one of its former lawyers that Toyota concealed evidence, destroyed data and conspired to obstruct justice in defending itself against lawsuits involving vehicle rollover. This lawsuit has the potential of affecting lots of rollover lawsuits that Toyota has either settled or tried to a verdict.

Dimitrios Biller, the lawyer who managed Toyota's defense of rollover cases in the U.S., alleges in the suit that "there are vehicles on the road today" that don't meet a "required" safety margin when it comes to roof crush issues. The lawyer says in the lawsuit his Toyota bosses "made every effort" to stop, prevent and delay the completion of investigations involving rollover cases between 2004 until he resigned in 2007. In one probe, Biller says he was ordered to destroy electronic documents related to the design, engineering, testing and evaluation of vehicles in the U.S. He also says he wasn't allowed to complete another investigation, which allowed Toyota's engineering and manufacturing arm to go ahead and destroy relevant information and documents that should have been turned over in discovery to Plaintiffs' lawyers in 300 lawsuits.

Source: *USA Today*

#### **VERDICT AGAINST MICHELIN IN DEFECTIVE TIRE CASE**

On September 10, 2009, a jury in Willacy County, Texas, returned a verdict against Michelin and awarded \$11,964,000 in damages. The case arose out of an incident when a Ford F-250 pickup suffered a partial left front tread belt detachment of a BF Goodrich All-Terrain TA Tire. The tire had been built in Tuscaloosa, Alabama. The tread belt detachment caused the F-250 to travel into oncoming traffic causing a head-on collision with a Chevrolet Suburban. All six people in the Suburban were killed and a young passenger in the F-250 was left a paraplegic.

Several manufacturing defects, which

allowed moisture and other contaminants into the tire components prior to manufacture, were alleged by the Plaintiffs. It appears the moisture came from a leaky roof in the Tuscaloosa plant. Testimony revealed that moisture created a blister of trapped air or steam that caused a defect in the finished tire and caused the tread to separate. Evidence at trial also showed that misplaced or poorly spliced belts affected the real world performance of the tire and in this case caused the tread to separate. The evidence also established very poor adhesion of the tire components demonstrated by bare fretted belt cords and degradation of the tire.

The evidence also showed that there was another design defect in the tire. There was an absence of a nylon cap ply, which helps reduce tread separation, in tires sold in the United States. Michelin provided this important component in its tires sold in the Europe. Although this evidence was very strong, the jury was not allowed to hear it for consideration. The jury only considered the manufacturing defects of this tire that was produced by Michelin at its Tuscaloosa plant. In other words, the design aspect wasn't allowed in the case.

Michelin was also censured by the trial court for tampering with potential witnesses. Michelin sent letters to former employees of the plant instructing them not to talk to the lawyers representing the Plaintiffs. The lawyers representing the Plaintiffs in the case included Joseph Barrientos, John Sanger, Carlos Guerra, Michael Moore and Mikal Watts of the Watts Law Firm. They did an outstanding job for their clients.

#### **MORE ON THE COOPER TIRE BAD CONDUCT**

Our firm has known of the safety problems Cooper Tire has had with its tires for a long time. Recently we became aware of a Georgia Federal Court order which dealt with the bad conduct. The Georgia case involves an accident which occurred on I-95 in

Camden County, Georgia. The Plaintiff was driving a Mercury Mountaineer when the left rear tire on the vehicle detreaded, resulting in the vehicle leaving the roadway and rolling over. One individual was killed and another was severely injured in the rollover accident.

The Federal Court judge entered an order denying Cooper Tire's Motion for Summary Judgment on the Plaintiffs' design defect and punitive damage claims. The Court stated that the Plaintiffs' expert had identified three design defects in the subject tire: the lack of a full nylon cap ply; the lack of a belt edge gum strip or wedge; and inadequate aging resistance.

All of these designs are known countermeasures for the prevention of tire tread separation. The Plaintiffs alleged that Cooper's competitors employed these reasonable alternative designs, and that Cooper's internal documents showed that Cooper explored these alternatives, but rejected them so the company could make bigger profits.

In his order, the Federal Judge found that the Plaintiffs submitted evidence showing that "Cooper knew that the lack of a proper antioxidant package caused tread separation, and that this fact was publicized broadly." The antioxidant package is the chemical mixture added to the rubber compound to prevent the tire from aging prematurely. The Court's order also states that the Plaintiffs' evidence "bolsters their theory that Cooper delayed implementing this design improvement because of cost considerations." The Plaintiffs' expert outlined several defects in the inner liner of the tire and offered various alternative designs which would have prevented the tread separation.

Ultimately, the Judge found that Plaintiffs "presented evidence upon which a reasonable jury could find that these design defects caused the tread belt separation and the accident and that there were feasible, safer alternatives that would have corrected the identified product deficiencies." Interestingly,

the Judge noted that “Cooper’s Australian website provides some evidence that the manufacturer was aware of the feasibility and importance of this alternative design.”

The Judge also denied Cooper’s Motion for Summary Judgment as to the Plaintiffs’ claim for punitive damages. The Plaintiffs contended that Cooper knew the defects caused tread belt separations, and refused to implement simple, relatively inexpensive solutions. The Judge found that the Plaintiffs “presented some evidence that Cooper knew of the four design defects in 1996.” The Judge went on to state that “there is some evidence that other tire manufacturers adopted these safety measures starting in the 1960s, that they were widely used in the 1980s, and that Cooper rejected the safer design alternatives.” Most importantly, the Court noted that the Plaintiffs presented evidence that “Cooper knew that each of these design features prevented tread separations, but that Cooper decided against such changes because they cut into Cooper’s profit margin.”

It’s significant that this Court order confirms what our tire experts have been saying for years about Cooper tires—that they are cheap and poorly made. Our firm currently has several cases involving death and serious injury due to tread separations of tires manufactured by Cooper Tire. We expect to prove the same type of conduct as that set out in the federal court order. A recent list we have seen indicates that Cooper Tire tread separations over the last decade have resulted in over 218 deaths. Hopefully orders such as the one entered by this Federal Court Judge will shed some light on Cooper’s bad conduct and force it to reassess its decisions in regard to the safety of its tires. If you need more information on the Cooper Tire problems, contact either JP Sawyer or Rick Morrison, lawyers in our firm, at 800-898-2034 or by email at [JP.Sawyer@beasleyallen.com](mailto:JP.Sawyer@beasleyallen.com) or [Rick.Morrison@beasleyallen.com](mailto:Rick.Morrison@beasleyallen.com).

### **TOYOTA STEERING RECALL LAWSUITS CONSOLIDATED**

A Los Angeles Superior Court judge recently ordered four wrongful death lawsuits from California, Idaho, Kentucky, and Georgia, involving Toyota vehicles consolidated. Plaintiffs allege in the cases that Toyota failed to properly recall the steering relay rods in the Toyota pickups and SUVs. To date, four lawsuits arising out of accidents have been filed where Plaintiffs allege the steering relay rod snapped, causing fatalities. The one in California caused the death of an infant. All four of the lawsuits involve a safety recall Toyota issued in Japan in 2004, but which had not been issued in the United States.

Source: *The Times-Standard*

## **VIII. MASS TORTS UPDATE**

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### **VIOXX SETTLEMENT PROGRAM—HEART ATTACK FINAL PAYMENTS TO BE MADE ON SCHEDULE**

The Vioxx Settlement Program has reached an important milestone. More than eighteen months ago when the Resolution Program was announced, the parties indicated that they expected that final payments to qualifying heart attack Claimants would take place at the end of September 2009. Brown Greer, the Vioxx Claims Administrator, announced on Thursday, September 17<sup>th</sup>, that the heart attack final payments would be issued at the end of September as scheduled. Final payments in heart attack cases will total approximately \$2.4 billion dollars.

The Vioxx Resolution Program is not only the largest pharmaceutical resolution program in history, but has set a new benchmark as the most efficient resolution program in the history of mass torts. More than 30,000 heart attack claims have been reviewed in full at this time and more than 20,400 are scheduled to be paid at the end of

September. This monumental accomplishment is the result of the terrific work of Brown Greer and numerous lawyers, including Andy Birchfield, Leigh O’Dell and Roger Smith of Beasley Allen.

In addition, Brown Greer announced at a September 17<sup>th</sup> hearing that the point value for heart attack claims will range between \$1860 and \$1870 per point. These amounts are within 2-3% of the dollar value projected in August 2008 when interim payments for heart attack claims were begun. Interim payments have continued since that time. The heart attack final payments will result in the depletion of the \$4 billion heart attack fund that was established by the program.

More than 18,000 Claimants who suffered strokes as a result of taking Vioxx have enrolled in the program. Interim payments in stroke cases began in February 2009 in accordance with the terms of the settlement agreement. To date, interim payments have been issued to over 2,800 Claimants with almost \$80 million dollars being distributed to Claimants and their families. Interim payments in stroke cases will continue until final payments are made in early 2010. Stroke claims are being paid from a fund established by the settlement in the amount of \$850,000,000.

Lastly, the Vioxx Settlement Agreement dictated that certain claims would be given extraordinary injury consideration under the Settlement Program. Only those claims that qualify for compensation of the underlying heart attack or stroke claim will be considered for extraordinary treatment. By the September 1, 2009 deadline, approximately 3,600 Claimants had applied for extraordinary injury treatment. Reviews of those applications are ongoing and awards are expected in both heart attack and stroke cases in early 2010.

## **JUDGE DECLARES MISTRIAL IN FIRST FOSAMAX TRIAL**

A federal judge has declared a mistrial in the first trial to be held over whether Fosamax, Merck & Co.'s osteoporosis drug, causes painful jaw bone destruction after it became evident that jurors in the month-long trial in New York were deadlocked. Judge John F. Keenan declared a mistrial in the case brought by Plaintiff Shirley Boles. The Plaintiff, a 71-year-old Florida woman, developed severe dental and jaw-related problems several years after she began taking Fosamax in 1997.

Source: *Forbes*

## **24 FOSAMAX LAWSUITS WILL GO FORWARD**

There was another significant happening in a related matter in the Fosamax litigation. Judge John F. Keenan denied the motion filed by Merck & Co. to dismiss 24 lawsuits claiming Fosamax causes "jaw death" in patients who took the medicine for fewer than three years. In the ruling, Judge Keenan refused to dismiss the lawsuits, saying that whether there is a three-year threshold is a "genuine issue of fact for trial." The Plaintiffs contend that Fosamax causes osteonecrosis of the jaw, or ONJ. Tim O'Brien, one of the Plaintiffs' lawyers, discussed Judge Keenan's ruling in an interview with Bloomberg. Tim had this to say:

*This simply reflects what's been known in the science for a while now, that there is no magic window where a patient can be automatically said to be safe from developing ONJ after beginning Fosamax.*

The ruling comes in cases separate from the one on trial before Judge Keenan in a Manhattan federal court referred to above. Merck says as of June 30<sup>th</sup> it was defending about 900 Fosamax cases including lawsuits with multiple Plaintiffs. There are as many as 1,200 Plaintiffs in the cases which are

in state and federal courts, according to Merck. Plaintiffs in the 24 cases covered by the latest ruling submitted a profile form disclosing Fosamax use for fewer than three years. The court's ruling has to be considered good for future cases involving Fosamax use for less than three years. Our firm is handling a number of Fosamax cases. If you need more information contact Chad Cook at 800-898-2034 or by email at Chad.Cook@beasleyallen.com.

Source: *Bloomberg*

## **DANGEROUS CONTRACEPTIVE PILLS SHOULD BE REMOVED FROM THE MARKET**

The Coalition against Bayer Dangers, a consumer watchdog group, has demanded a ban of "third generation" contraceptive pills with increased rates of side effects. Studies recently published in the *British Medical Journal* found that pills which contain the hormones drospirenone or desogestrel carry twice the risk of potentially fatal injuries than the second generation medication first used in the 1970s. The studies showed that contraceptive pills such as Yaz and Yasmin, manufactured by Bayer, caused a six-fold increase in the risk of blood clots, which cause serious injuries such as Deep Vein Thrombosis (DVT) and Pulmonary Embolism (PE). These pills may also cause gallbladder disease requiring surgical removal.

Bayer is the world market leader in hormonal contraceptives. Sales of Yaz and Yasmin were more than \$1 billion last year. Jan Pehrke, who is from the Coalition against Bayer Dangers, says:

*The side effects of Yaz and Yasmin are more dangerous than those of older oral contraceptives. Bayer concealed the risk of injury, failed to warn doctors or their patients and downplayed the risks of Yasmin and Yaz in comparison to other available birth control pills.*

Both Yaz and Yasmin contain 3mg drospirenone, a hormone which pro-

motes dehydration and leads to a slight weight loss. However, the loss of fluid also increases the risk of blood clots. German authorities reported seven deaths related to Yasmin. German and Swiss authorities recently started investigations into the risks of Yasmin.

In the United States at least 48 lawsuits have been filed against Bayer. It's alleged in the suits that from 2004 through 2008 Yaz/Yasmin has caused more than 50 deaths. Some of the deaths occurred in women as young as 17. Deaths associated with cardiac arrhythmia, cardiac arrest, intracardiac thrombus, pulmonary embolism, and stroke have been reported. Bayer has refused to release any figures on side effects linked to contraceptives. Apparently, its reluctance is so as "not to make its customers uneasy." Hubert Ostendorf from the Coalition against Bayer Dangers, had this to say:

*Bayer is trying to establish hormone products as a standard contraceptive throughout the world, because their profits are enormous. That's why the severe side effects are pushed into the background.*

The Coalition has demanded that all studies and all reported side effects be published. Yaz/Yasmin is heavily advertised by Bayer, especially towards girls and young women, by promising reduction of weight and acne relief. In a television ad, for instance, Bayer claimed that Yaz "can help keep your skin clear," despite the fact that clinical studies have not concluded that taking Yaz results in acne-free skin.

Yaz advertisements in the United States also claimed that it would treat the symptoms of premenstrual dysphoric disorder. In October of 2008, Bayer was cited by the FDA for deceptive claims. The ads, according to the FDA, were overstating the benefits of Yaz while distracting viewers from the risks. Bayer had to conduct a \$20 million corrective advertising campaign. California Attorney General Edmund Brown stated:

*Bayer's deceptive ad campaign led young women to believe that its oral contraceptive would cure symptoms for which it was not approved for use.*

Our firm has been investigating claims involving Yaz and Yasmin and will continue to do so. If you have questions about this matter, contact Frank Woodson in our firm at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com.

Source: Coalition against Bayer Dangers

#### **MORE ON THE REGLAN LITIGATION**

There are approximately eleven active Reglan lawsuits filed and pending throughout the country. These lawsuits all allege that the manufacturers of Reglan failed to adequately investigate and study the drug, or warn about the potential side effects associated with its use. Plaintiffs in these cases sought to consolidate their claims through Multidistrict Litigation in order to coordinate pre-trial proceedings, eliminate duplicative discovery, and avoid conflicting rulings, but following a hearing held in May 2009, the MDL panel issued an order denying their request. The panel stated in its ruling:

*Metoclopramide litigation has a lengthy history, and record indicates that a significant amount of the common discovery has already taken place.*

This denial by the MDL panel means that any future Reglan/Metoclopramide lawsuits will proceed as individual suits and will not be formally coordinated. Reglan, or its generic version, Metoclopramide, is a drug approved for the short-term treatment of gastrointestinal disorders like gastroparesis, gastroesophageal reflux, and delayed gastric emptying. Use of this drug for longer than three months has been linked to Tardive Dyskinesia, a neurological disorder that causes repetitive and involuntary movements of the face, torso and limbs. Currently, there is no effective

treatment for Tardive Dyskinesia. For more information, please contact Danielle Mason or Chad Cook, who are lawyers in our firm working on Reglan cases, at 800-898-2034 or by email at Danielle.Mason@beasleyallen.com or Chad.Cook@beasleyallen.com.

#### **MINNESOTA SUPREME COURT DENIES WYETH LOOPHOLE DEFENSE**

Recently, the Minnesota Supreme Court confirmed that its six-year statute of limitations governs all personal injury claims properly brought in Minnesota courts, even when neither party is from there and the cause of action accrued completely in another state. Had it ruled otherwise, Minnesota's highest court would have reversed long standing state precedent that statutes of limitations are procedural in nature. Moreover, it would have effectively granted Wyeth's desire to dismiss approximately 4000 hormone therapy cases filed against it (as well as numerous other cases pending there).

Last month, we reported that newly unsealed court documents prove that Wyeth paid ghostwriters to produce forty scientific papers to promote the benefits and downplay the risks of its \$2 billion dollar a year hormone therapy drugs. The articles, published in medical journals between 1998 and 2005, failed to disclose Wyeth's role in initiating and paying for the work. This type of subterfuge, coupled with Wyeth's continuing denial that its drugs cause breast cancer, certainly played a major role in lulling many women (and their doctors) into thinking they did not have a case. Consequently, they did not consult with a lawyer until after their shorter home state statutes of limitations had expired. This ruling by the Minnesota Supreme Court, coupled with its six-year statute of limitations, will allow thousand of breast cancer victims to present their case against Wyeth to a jury.

Approximately 12,000 women have sued Pfizer and/or Wyeth claiming that their hormone therapy drugs caused

serious medical conditions, including breast cancer. So far, eight of ten juries have agreed and returned large verdicts. The companies have also settled at least eight other cases on the eve of trial. Our firm represents a number of women who have filed suit against Wyeth and/or Pfizer. We are currently set for trial in Philadelphia, Pa., where Judge Moss ordered 16 cases be tried starting in September 2009 and ending in the first half of 2010. We are also hopeful that several other hormone therapy cases will soon be set for trial in other parts of the country in 2010. If you would like more information please contact Ted Meadows, Melissa Prickett or Russ Abney in our office at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com, Melissa.Prickett@beasleyallen.com, or Russ.Abney@beasleyallen.com.

#### **GLAXOSMITHKLINE TO DEFEND PAXIL IN BIRTH-DEFECT CASE**

GlaxoSmithKline Plc, the world's second-biggest drug maker, started a Paxil trial in Philadelphia last month. Some call it a test case for more than 600 lawsuits over claims that GSK's antidepressant drug causes birth defects. Patients and their parents claim internal company documents produced for trial show that GSK failed to warn about the risks of Paxil until forced to do so in 2005 by the Food and Drug Administration. The Plaintiff in the case, Michelle David, blames the drug for causing life-threatening heart defects in her three-year-old son Lyam.

Paxil, approved by the FDA in 1992, generated about \$942 million in sales last year. GSK has settled other Paxil-related cases, including a suit brought by the New York Attorney General's office accusing the company of withholding safety data about the antidepressant. In addition to the David case, GSK will face two more Paxil trials later this fall and early next year in state court in Philadelphia.

Source: Bloomberg

## **BREAST CANCER DRUGS HAVE HEALTH RISKS**

Women who take drugs like raloxifene or tamoxifen can reduce their risk of developing invasive breast cancer by up to half, but they may be at greater risk for potentially serious blood clots, according to a recently-released study that reviews the risks and benefits of the drugs. The researchers said in a paper that for every 1,000 women who take the medications each year, seven to ten fewer cases of breast cancer will develop. While both medications increase the risk of blood clots, tamoxifen appears to have the highest risk. It was said in the study that for every 1,000 women who take tamoxifen each year, four to seven additional cases of blood clots occur. Tamoxifen also increases the risk of endometrial cancer and cataracts. The study appears in *Annals of Internal Medicine*.

A third drug, tibolone, which is not approved in the United States, but is sold elsewhere, was also included in the study. Tibolone significantly reduces breast cancer risk, but increases the risk of strokes in older women, according to the study. All three drugs were said to reduce the risk of fractures. The paper assessed the risks and benefits of the drugs when used by healthy women, who have never had breast cancer, but are considered at greater risk for the disease. Most of the data analyzed by the study was drawn from eight large clinical trials.

Source: *New York Times*

## **FDA ORDERS WARNING ON PHENERGAN**

A great deal has been written about the courageous fight by Diana Levine, a Vermont musician, who lost her arm because of the drug Phenergan. The Food and Drug Administration has now ordered the makers of that drug to include a black box warning on the drug's label. While Wyeth no longer sells Phenergan, many makers of generic drugs do.

The FDA ordered the companies to

put the strongest warning possible about the risks of IV push and Phenergan, also known as promethazine, on the drug label. The stronger warning, referred to as a "black box," will tell medical professionals that the preferred way to administer promethazine is through intramuscular injection. While the FDA's action is good, I believe the warning—even though it is a black box warning—should have been even stronger.

Source: *Philadelphia Inquirer*

## **GARDASIL MAY PROVE TO BE MORE RISKY THAN BENEFICIAL**

Merck & Co.'s HPV (human papillomaviruses) vaccine, Gardasil, may prove to be more risky than beneficial. Merck touts the vaccine as an effective preventative of cervical cancer. According to clinical studies, Gardasil has not been proven to reduce the incidences of cervical cancer. It has been shown, however, to be associated with numerous adverse reactions including: fainting, dizziness, nausea, blood clots, severe allergic reactions, Guillan-Barré Syndrome (paralysis), autoimmune disorders including rheumatoid arthritis, and death.

Since the vaccine's approval by the FDA in June of 2006, more than 16,000 adverse event reports have been filed with the Vaccine Adverse Event Reporting System, operated jointly by the Food and Drug Administration (FDA) and Centers for Disease Control (CDC). More than 6% of these reports were considered serious, including 43 deaths. In fact, one of the leading researchers on the vaccine warned that the rate of serious adverse events associated with Gardasil is greater than the incidence rate of cervical cancer.

Gardasil has been shown effective against four strands of HPV but offers no protection against the remainder of the more than 40 strands of HPV that are linked to cervical cancer and genital warts. Furthermore, for these four strands, the vaccine has only been

proven effective for five to seven years. This means that if a young girl is vaccinated at age 11 or 12—the age recommended by the CDC—by the time she is 17 or 18 years old, she may no longer be protected. The vaccine contains no warning about this potential "wearing off" so girls may enter their college years with a false sense of security that they are protected from HPV in general and cervical cancer specifically when in fact they may not be.

Two lawsuits have been filed on behalf of two girls who were injured after being vaccinated with Gardasil. In one case, a 15-year-old girl began vomiting on the day she received the shot and then developed pancreatitis. In the other, a 14-year-old girl contracted Guillan-Barré Syndrome one week after receiving her second dose of Gardasil. She became paralyzed in her lower arms and legs and had to learn to walk all over again. Attorneys anticipate that more lawsuits will be filed on behalf of the other girls who have suffered similar injuries. For all those considering encouraging their daughters or granddaughters to be vaccinated with Gardasil, extreme caution should be used. If you need more information on Gardasil, contact Leigh O'Dell in our firm at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com.

## **IX. BUSINESS LITIGATION**

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### **BROADCOM BACKDATING SUIT IS SETTLED FOR \$118 MILLION**

Broadcom Corp.'s liability insurance carrier has agreed to pay \$118 million to settle allegations of stock-options backdating in one of the largest such settlements in a derivative action to date. The settlement, subject to approval by federal court, would be the second-largest in a derivative action involving stock-options backdating.

Shareholders contended that the

Defendants manipulated Broadcom's stock options from 1997 to 2007 to enrich themselves and that Broadcom issued false and misleading statements to regulators. Broadcom restated earnings downward by \$2.2 billion. Richard Heimann, a partner at San Francisco's Lief Cabraser Heimann & Bernstein is the lead Plaintiffs' lawyer in the case.

#### **CHRYSLER SUES DAIMLER OVER KEY VEHICLE PARTS**

Chrysler Group LLC has sued Daimler AG, accusing the German automaker of breaching its contracts which required Daimler to supply crucial parts. It was alleged that the production of key 2010 Chrysler vehicles was put in jeopardy. Chrysler said without the Daimler-supplied steering columns and torque converters it will be unable to produce several 2010 model-year vehicles, including the Chrysler 300 and the Jeep Grand Cherokee SUV. Chrysler filed the lawsuit in bankruptcy court in New York and is seeking damages from Daimler.

Chrysler emerged from Chapter 11 bankruptcy protection in June after the bulk of its assets were purchased by Italian automaker Fiat Group SpA. Most all of Chrysler's liabilities were left behind and are being liquidated under court supervision. This lawsuit revolves around a dispute over payments for diesel engines supplied by Daimler. Chrysler accused Daimler of using the dispute as a basis for refusing to sign deliveries of steering columns and torque converters.

It was alleged that the "Chrysler Group believes Daimler's effort to extort Chrysler Group into paying for costs for a diesel engine that Daimler agreed to forego a few months ago is a breach of its obligation to negotiate in good faith." If deliveries of the parts stop, according to a Chrysler spokesman, it would affect production at its assembly plant in Brampton, Ontario, and its Jefferson North plant in Detroit.

Daimler Chrysler's lawsuit is "without merit," Daimler said in a statement:

*This is not a dispute about Chrysler's rights to existing contracts ... Rather Chrysler has been asking Daimler to change existing agreements and enter into completely new agreements.*

As you most likely know, Daimler owned Chrysler for several years until it sold its stake to private-equity firm Cerberus Capital Management LP in 2007. It's sort of ironic and a little sad to see Chrysler using the courts to its own advantage, but denying the same access to its customers who were sold vehicles with defects.

Source: Associated Press

## **X. AN UPDATE ON SECURITIES LITIGATION**

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#### **BANK OF AMERICA TO SETTLE MERRILL LAWSUIT FOR \$150 MILLION**

Bank of America Corp has agreed to pay \$150 million to settle a class-action lawsuit accusing the former Merrill Lynch & Co of misleading investors in connection with the sale of bonds and preferred stock. U.S. District Judge Jed Rakoff has granted preliminary approval to the settlement. A hearing will be held on November 23<sup>rd</sup> to decide if final approval should be ordered by the court. The Plaintiffs accused Merrill of issuing false and misleading prospectuses and registration statements in connection with the offerings, which were made between 2006 and 2008. The case was filed in the U.S. District Court, Southern District of New York (Manhattan).

Two Louisiana pension funds, the Louisiana Sheriffs' Pension and Relief Fund and the Louisiana Municipal Police Employees' Retirement System, were the lead Plaintiffs in the case.

About 20 former Merrill executives and directors were named as Defendants, including former chief executives Stanley O'Neal and John Thain. As you may recall, Bank of America acquired Merrill Lynch & Co in January, creating the largest U.S. bank by assets.

Source: Reuters

#### **CLASS ACTION LAWSUIT AGAINST TYCO SETTLED**

A federal judge has granted preliminary approval to Tyco International Inc.'s proposed settlement agreements to pay about \$70.5 million to a class of Tyco employees who alleged in a class action lawsuit that the company breached its fiduciary duties by stacking retirement plans with company stock even as a massive accounting fraud was taking place. U.S. District Judge Paul J. Barbadoro of the District of New Hampshire ruled that the three settlements were sufficiently fair, reasonable and adequate to warrant sending notice to members.

Source: Law360

#### **MORGAN KEEGAN ORDERED TO PAY HORACE GRANT \$1.4 MILLION**

Morgan Keegan & Co., the brokerage unit of Regions Financial Corp., has been ordered to pay former professional basketball star Horace Grant \$1.4 million in compensation for losses he suffered from investing in bond funds. The award was made by the Financial Industry Regulatory Authority, the money management industry's self-policing organization. The bond funds in question operated under a variation of the name "Regions Select" and lost much of their value when the sub-prime mortgage crisis hit. The funds have attracted hundreds of arbitration Complaints from aggrieved investors, such as Grant, who as you may know starred alongside Michael Jordan with the NBA's Chicago Bulls.

Source: Birmingham News

## JUDGE REJECTS SETTLEMENT BY BANK OF AMERICA WITH SEC

A New York federal judge has rejected a proposed settlement between Bank of America and the Securities and Exchange Commission regarding \$5.8 billion in bonuses to Merrill Lynch executives. In August, the SEC charged that Bank of America lied to its shareholders in November when it sought their approval to complete its \$50 billion purchase of Merrill. The SEC said Bank of America told shareholders that Merrill employees wouldn't get bonuses without its consent. However, the huge bank had already authorized payments of up to \$5.8 billion despite mounting losses of \$15 billion at Merrill in the fourth quarter. Bank of America had agreed to settle the case for \$33 million.

U.S. District Judge Jed Rakoff, in his decision, said the proposed settlement was "neither fair, nor reasonable, nor adequate." Judge Rakoff also said that if Bank of America "is innocent of lying to its shareholders, why is it prepared to pay \$33 million of its shareholders' money as a penalty for lying to them?" Judge Rakoff also came down hard on the SEC, stating: "The proposed consent judgment was a contrivance designed to provide the SEC with the facade of enforcement." Judge Rakoff also said that the settlement would effectively punish shareholders twice, stating:

*The notion that Bank of America shareholders, having been lied to blatantly in connection with the multibillion-dollar purchase of a huge, nearly bankrupt company, need to lose another \$33 million of their money in order to better assess the quality and performance of management is absurd.*

I totally agree with Judge Rakoff's decision to reject this settlement. The judge directed Bank of America and the SEC to prepare for a trial by February 1<sup>st</sup>.

Source: USA Today

## SEC REALLY DROPPED THE BALL IN THE MADOFF CASE

It has become quite apparent that the U.S. Securities and Exchange Commission missed "numerous" red flags that should have led it to discover Bernard Madoff's \$65 billion Ponzi scheme long before it did. It now appears that the SEC never did a "thorough and competent" probe despite complaints dating all the way back to 1992, a federal watchdog has concluded. The Inspector General for the SEC said in a blistering report that, despite five probes and having caught Madoff in "lies and misrepresentations," the Commission failed to follow up on inconsistencies. In this regard, Inspector General David Kotz wrote:

*Despite numerous credible and detailed complaints, the SEC never properly examined or investigated Madoff's trading and never took the necessary, but basic, steps to determine if Madoff was operating a Ponzi scheme.*

The Inspector General said the SEC's "most egregious" lapse was its failure to verify Madoff's purported trading with any independent third parties, even after it took testimony from Madoff in May 2006. Even Madoff believed he was caught at that time. Madoff thought the "game was over" and said he was "astonished" that the SEC did not follow up. It certainly appears that the SEC dropped the ball. It knew Madoff was clearing his trades through the Depository Trust Co., part of the U.S. Federal Reserve, and the SEC even had his account number.

A 22-page summary of the report has been released, and it's posted on the SEC's website at <http://www.sec.gov/spotlight/secpostmadoffreforms/oig-509-exec-summary.pdf>. The full report contains 450 pages. Senator Charles Grassley, an Iowa Republican, who called the report evidence of the SEC's "culture of deference toward the Wall Street elite," said the SEC must be transformed so it can be "the tough cop-on-

the-beat that the public needs." I totally agree with the Senator. Hopefully, the SEC and Congress have learned a great deal from the Madoff scandal which hurt lots of folks—some beyond financial repair—and that's something that the SEC will have to live with. I hope and pray it has learned its lesson!

Source: Insurance Journal

## XI. EMPLOYMENT AND FLSA LITIGATION

### LOW-WAGE WORKERS ARE OFTEN CHEATED

Low-wage workers are routinely denied proper overtime pay and are often paid less than the minimum wage, according to a new study based on a survey of workers in New York, Los Angeles and Chicago. The study, the most comprehensive examination of wage-law violations in a decade, also found that 68% of the workers interviewed had experienced at least one pay-related violation in the previous work week. The new study, "Broken Laws, Unprotected Workers," was conducted in the first half of 2008. The study was financed by the Ford, Joyce, Haynes and Russell Sage Foundations.

Source: New York Times

### LOWE'S SETTLES HARASSMENT CASE

Lowe's Home Improvement Warehouse Inc. has agreed to pay \$1.7 million to settle a sexual harassment case brought by three employees in Longview, including one who said she was sexually assaulted in 2006. Under a three-year consent decree. Lowe's also must:

- revise policies on discrimination, harassment and retaliation;
- provide training on those concerns to all employees at the company's 37 stores in Washington state and 13 stores in Oregon; and

- report regularly to the Equal Opportunity Employment Commission, which filed the lawsuit.

Acting EEOC Chairman Stuart J. Ishimaru, in a prepared statement, made it very clear that Lowe's conduct was very bad:

*Severe sex-based harassment of young workers was permitted to run rampant at one of the nation's largest retailers. It is shocking that Lowe's store managers actively engaged in and even encouraged such blatant unlawful conduct and then retaliated against the victims for objecting to it.*

As you may know, Lowe's is the nation's second-largest home improvement retailer, trailing only Home Depot, with more than 1,675 stores in the U.S. and Canada. According to the three workers, their problems began within months after they started work when the store opened in November 2005. One, a 21-year-old woman, said she repeatedly was implicitly propositioned by the 44-year-old store manager and that he sexually assaulted her in his office after she was given a promotion. Two other male employees, both in their 20s at the time, said department heads called them gay although they are heterosexual and subjected them to graphic sexual references. All three said they were subjected to months of verbal abuse and a sexually hostile work environment before two of them were fired and the third resigned under pressure, all by September 2006.

Source: Associated Press

#### **CINTAS TO PAY \$22.8 MILLION TO SETTLE OVERTIME PAY LAWSUIT WITH DRIVERS**

Work uniform supplier Cintas will pay \$22.8 million to a group of drivers to settle a class action lawsuit over overtime pay. Cintas was accused of misclassifying thousands of drivers as salaried employees instead of hourly workers to avoid paying them for over-

time worked. The settlement, which requires court approval, was reached with an arbitrator. The lawsuit was filed in U.S. District Court for the Northern District of California.

Source: Associated Press

#### **MARYLAND GROCER TO PAY \$275,000 TO SETTLE GENDER SUIT**

A Maryland grocery chain, Mars Super Markets, will pay \$275,000 to settle a gender discrimination lawsuit. The settlement was announced by the federal Equal Employment Opportunity Commission. A part-time deli clerk alleged that Mars wouldn't hire her as an apprentice meat cutter in a Dundalk store because she's a woman.

In the settlement in a U.S. District Court, Mars agreed to pay to the Plaintiff \$118,000 as back pay, damages and her attorney's fees. Other female applicants denied a meat cutter's job at Mars will also receive back pay. The EEOC says that Mars has been ordered to train managers and offer jobs to any woman denied a meat cutter's position.

Source: Insurance Journal

#### **JURY FINDS FOR WORKER IN AGE-DISCRIMINATION CASE**

A federal court jury in Texas awarded \$992,500 to a former airport restaurant manager who said he was fired because of his age. The jurors unanimously found that Host International Inc. discriminated against Fred Jackson, who was 57 when the company fired him in 2007. Jackson was older than any of Host International's other management employees in El Paso. Host International holds the city contract to provide food and beverage services at El Paso International Airport. The jury found for Jackson on his claims of discrimination and retaliation.

Jackson began working as general manager of food and beverage services in 1990, when Delaware North held the airport contract. Host International received the contract in January 2007,

hired Jackson as general manager, but then fired him nine weeks later. Jackson alleged that his problems began immediately with Host International, which cut his pay. He said that the Host International district manager told him that his \$70,000-a-year salary was good "for a person your age."

In February 2007, Jackson said the desk manager told him that the disparity in salaries was intended to attract "younger, talented people." Host International said it fired Jackson not because of his age but because he performed poorly. But the quality of Jackson's work was never criticized in writing by the company. His last performance review actually commended him.

Source: El Paso Times

#### **ALLSTATE SETTLES AGE DISCRIMINATION CLASS ACTION LAWSUIT**

Allstate Insurance Co. has agreed to pay \$4.5 million to about 90 former employees to settle an age discrimination class action lawsuit. The litigation with the U.S. Equal Employment Opportunity Commission was filed in 2004 and stems from the Northbrook, Ill.-based insurer's efforts in 2000 to convert its 15,000-member agent workforce to independent contractors from regular employees.

According to the EEOC Allstate had adopted a hiring moratorium for a period of one year, or while severance benefits were being received, that had a disproportionate impact on workers over age 40 because more than 90% of the agents subjected to it were in that age group. Allstate denied that its hiring moratorium violated the Age Discrimination in Employment Act of 1967.

Source: Business Insurance

## XII. INSURANCE AND FINANCE UPDATE

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### **HEALTH INSURER TO PAY \$17 MILLION TO MASSACHUSETTS**

A Texas health insurer has agreed to pay \$17 million in fines and other costs and will be barred from signing up new Massachusetts customers after it was accused of not delivering on promises to self-employed workers and other policyholders. The settlement between HealthMarkets Inc. and the Commonwealth is believed to be the largest consumer protection agreement by a health plan in Massachusetts history.

HealthMarkets Inc., mostly through its Mega Life and Health and Mid-west National Life subsidiaries, has about 27,000 customers in Massachusetts. HealthMarkets has been battling for years with regulators over accusations it hasn't properly overseen its agents. In 2006, it agreed to pay \$850,000 to settle disputes with the State. Attorney General Martha Coakley and Insurance Commissioner Nonnie Burnes came down hard on HealthMarkets. Attorney General Coakley said in a statement: "With health reform in Massachusetts and the requirement that individuals in Massachusetts have health insurance, it has been even more important to stop predatory practices in the health insurance market."

Commissioner Burnes says HealthMarkets just wouldn't or couldn't control the inaccurate coverage promises made by representatives to potential customers, adding "they weren't controlling their agents." Under the settlement, Health Markets will pay \$17 million, much of it going to compensate people for coverage-related disputes. The firm is banned from signing up new customers for five years. Under a separate agreement with Commissioner Burnes, HealthMarkets will pay an additional \$2 million—and possibly \$3 million more if it doesn't abide by

agreements—which is good for the people of Massachusetts.

Source: *Boston Herald*

### **PRISCO CONSULTING OWNER APPEALS \$1.76 MILLION JUDGMENT**

The owner of an Atlanta insurance consulting firm is appealing a recent \$1.76 million court award against him in a suit filed by his former employer, Merger & Acquisition Services, Inc. (M&A). The award was against Aaron N. Prisco, owner of Prisco Consulting, who was an employee of M&A until November, 2003. Prisco was accused of keeping M&A customer information and other property after he left M&A, and using it to compete unfairly against his former employer.

The judge also awarded, as part of the judgment, M&A and its founder, David Schofield, \$500,000 in punitive damages. It was stated in the court's order that Prisco "showed willful misconduct and specific intent to harm" Merger & Acquisition Services. The award of damages followed a court finding that Prisco "concealed evidence, destroyed evidence and made false statements about such evidence" showing "a blatant contempt for this court and a fundamental disregard for the judicial process."

After Prisco left M&A in 2003, he brought contract claims against the company for unpaid compensation and for retirement benefits. M&A subsequently filed counterclaims, alleging that Prisco improperly competed after his departure. The case will now go up on appeal.

Source: *Insurance Journal*

### **INSURANCE COMPANIES FIND WAYS TO DROP COVERAGE**

"Rescission" is the technical term for canceling coverage by an insurer on grounds that the company was misled by its policyholder. Many insurance experts believe this is among the most offensive practices in an insurance industry that already suffers from dis-

trust and a distinct lack of popularity among the American public. Stories of cancellations that have become public have caused outrage among regulators, analysts, and doctors, and certainly among lawyers who practice insurance law on the victims' side. It appears that insurers are much too eager to get rid of policyholders who have medical problems so the companies can make more profits.

No one claims to know how often policies are canceled—in large part, Congressional investigators say, because insurance companies are regulated by a patchwork of state laws and policies. But the practice is common enough to have resulted in lots of lawsuits and some state regulatory action. Health insurers use their power and their resources to deny benefits to folks who are most in need of care. But insurance company officials say they need to be able to cancel policies to control fraud, which they claim by some estimates, to be as much as \$100 billion annually.

Insurance regulators have said that many omissions by policyholders on their applications appear to be honest mistakes on forms that are needlessly complex and hard for a lay person to understand. Others result from a lack of information given to patients by their doctors. In many cases it's been revealed that insurers pay bonuses to personnel who find ways to cancel policies.

### **SOUTH CAROLINA AWARDS \$10 MILLION IN HEALTH INSURANCE REJECTION CASE**

The South Carolina Supreme Court upheld a multimillion verdict last month against an insurer which the Justices said revoked a man's health policy after he tested positive for HIV based solely on a nurse writing down the wrong year for the test. The Court called Fortis Insurance Company's actions "highly reprehensible" but reduced punitive damages awarded from \$15 million to \$10 million. The policyholder first found out he might have HIV when he tried to donate

blood in April 2002. The Red Cross let him know his sample tested positive, and a trip to his personal physician confirmed the diagnosis.

Fortis said it revoked the policy because the policyholder didn't reveal his diagnosis when he applied for insurance in May 2001 as the then 17-year-old prepared to head to college and could no longer be covered under his mother's policy. The company cited a note made by a nurse on a medical chart that incorrectly gave the wrong year for the test confirming the HIV diagnosis, placing it one day before the policyholder's application for insurance.

The committee for the insurance company that decides whether to revoke policies heard the policyholder's case along with 45 others in a two-hour session. The members were given a report from an underwriter that included the note: "Technically, we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is it sufficient?" The policyholder hired a lawyer who sent the company the original test results with the correct date. But a second committee also upheld revoking the insurance and the policyholder didn't have coverage for 20 months before Fortis reversed its decision, according to trial testimony. Fortis, which now does business as Assurant Health, appealed the case. The company's "conduct involved repeated acts of deliberate indifference for more than two years," the Justices wrote in their decision.

Source: Associated Press

### XIII. PREDATORY LENDING UPDATE

#### **MORTGAGE-RELATED LITIGATION IS ON THE RISE**

Mortgage-related lawsuits are on the rise, with both homeowners and investors suing over allegedly being

cheated by the mortgage industry. According to a litigation report from MortgageDaily.com, an online mortgage news analyst, the number of mortgage-related lawsuits filed in the first quarter of this year jumped to 81, a more than 50% increase from the 50 cases tracked during the same quarter in 2008.

Cases tied to foreclosures, including actions against foreclosures-rescue firms, jumped to 12, triple from the four cases in the prior period. Lawsuits filed by mortgage-backed securities investors also increased, from four to 13, which pushed investor class actions to 21 cases—the most of any type. These increases come as no surprise to the lawyers in our firm involved in mortgage-related litigation. If you want more information on mortgage-related litigation contact Bill Robertson at 800-898-2034 or by email at Bill.Robertson@beasleyallen.com.

Source: Law.com

### XIV. PREMISES LIABILITY UPDATE

#### **LAWSUITS FILED OVER FOOTBALL PRACTICE FACILITY COLLAPSE**

There have been two lawsuits filed arising out of the collapse on May 2<sup>nd</sup> of the Dallas Cowboys' practice facility in Irving. A Dallas Cowboys scouting assistant who was left paralyzed, and a special-teams coach whose neck was broken in the incident, have filed separate lawsuits against the Pennsylvania-based company that built the structure. The lawsuits, which also name an engineer and five other companies involved in construction and maintenance of the facility, allege that structural problems and code violations were kept from the team for years before the tent-like structure collapsed in gusting winds.

Rich Behm, who was paralyzed from the waist down, and coach Joe DeCamillis, are seeking both compensatory damages and punitive damages.

Summit Structures is the company that built the practice facility. It should be noted that the Cowboys are not named in the lawsuits.

Summit entered into a contract in 2003 to build the facility. Two other companies—Canada-based Cover-All and Minnesota-based Midwest Building and Fencing—were involved in the construction, and Burleson-based Wrangler Concrete Construction poured the foundation. Hilti, a Tulsa company, provided an adhesive material; JCI Holding and Scott Jacobs were involved in the engineering. The building reportedly was designed to sustain winds of up to 90 mph for up to three seconds. The highest winds that day were around 58 mph.

The lawsuits, filed in a Dallas state court, contend that the structure's concrete foundation was improperly constructed and that the facility should have been repaired or rebuilt after design problems were discovered in 2007. The lawsuits say that while the Cowboys were informed, the problems were never addressed.

Source: Star-Telegram

#### **CPSC ISSUES ALERT ABOUT LIGHT POLES**

The U.S. Consumer Product Safety Commission has issued a nationwide alert warning owners and operators of lighted outdoor athletic facilities to immediately inspect their poles for cracks and other signs of instability. A great deal of credit for this should go to a Texas newspaper. The warning came during an investigation initiated by the agency after the *Austin American-Statesman's* reports on the failure of more than a dozen stadium light poles designed by a Fort Worth company. The continuing danger presented by the giant poles designed and sold by Whitco Co. LP prompted the CPSC to issue the alert at this stage of its investigation. Because of the hazard and safety risks, the agency apparently felt it was necessary to go ahead with the alert even though the investigation hasn't

been completed.

Because there was no comprehensive list of Whitco's customers, the alert was sent to public agencies and others who might own or be responsible for large lighted areas. The warning does not speculate on what caused the company's poles to fail. The alert warned that the galvanized steel poles, weighing up to four tons each, "can fracture or crack and fall over, posing a risk of serious injury and death to patrons and bystanders from being hit or crushed." It stated further that "to reduce the risk of injury, Whitco Co. LP outdoor steel stadium light poles should be inspected immediately."

In March, a 125-foot pole at Bob Shelton Stadium in Hays County, Texas, fell onto the roof of a gymnasium during a girls junior varsity soccer game. Over the next several months, the *Statesman* documented more than a dozen Whitco poles falling in recent years. Thus far the commission says it has confirmed nine incidents of falling Whitco poles between 2000 and 2006. Most of the incidents occurred at public school athletic facilities.

Whitco declared bankruptcy in 2006, so most of the school districts bore the cost of replacing the lights themselves. The company also did not leave behind a customer list, which has made it difficult to alert other stadium owners of the potential danger. Even though no one has been injured so far, there have been near misses that caused significant property damage and left spectators shaken. While most of the incidents have taken place in Texas, others have been reported in Kansas, South Dakota, Mississippi, Massachusetts and other locations.

The CPSC said it also has tabulated "nearly 50" Whitco poles that had not fallen, but had developed worrisome cracks and were removed. *The Statesman* has counted about 100 Whitco poles that school districts and other athletic facility owners removed for safety reasons in recent years. Though some of those did not have visible cracks, they were taken down as a pre-

caution because other poles at the same location were cracked.

While experts said the poles should last decades, all of the cracked or fallen Whitco poles were less than ten years old. Some engineers who examined the broken poles blamed rapid vibrations caused by light winds for cracks that have appeared at the poles' bases. But others have concluded that Whitco's poles were poorly designed, with the base plates and the metal used in the tubes too thin to support the towers. Although Whitco didn't fabricate the poles, they were made to the company's specifications. It's not known when the CPSC's final report on Whitco and its poles will be completed.

Source: *Austin American-Statesman*

#### **JURY AWARDS \$10 MILLION IN ASSAULT CASE**

A jury in Rutherford County, Tennessee, has awarded more than \$10 million in damages to a man who was assaulted at a Ruby Tuesday restaurant in Smyrna, Tennessee. Ruby Tuesday Inc. was ordered to pay damages to Dan Maddy, who said the restaurant served too much liquor to the man who attacked him in 2005. George Nolan, the lawyer who represented Maddy, observed:

*We think the jury did a tremendous service for the community by sending a clear message to businesses that sell alcohol that this type of reckless over-serving will not be tolerated.*

A Ruby Tuesday bartender served the patron the equivalent of 19 beers over a 22-hour period. The patron later attacked Maddy causing severe injuries. Interestingly, Ruby Tuesday never reprimanded, suspended or otherwise disciplined the bartender. This case was tried under Tennessee law.

Source: *Tennessean.com*

#### **BONFIRE CASE IS BEFORE TEXAS SUPREME COURT**

You may recall the 1999 Texas A&M University bonfire collapse that resulted in lawsuits being filed. The Texas Supreme Court has heard oral arguments in a case involving that incident. Zachry Construction Corp. is attempting to make the university at least partly responsible in the remaining lawsuits arising from the collapse that killed 12 people and injured 27 others. The court heard arguments on September 8<sup>th</sup>.

Zachry says that Texas A&M was a "responsible third party" and should have liability to the victims. Texas A&M, which had reached a \$2.1 million settlement with several Plaintiffs last October, told the court that Zachry's argument is moot. Families of some of the students killed and injured sued university administrators and construction contractors hired to help build the 59-foot-tall tower of logs that collapsed.

Source: *Houston Chronicle*

## **XV. WORKPLACE HAZARDS**

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#### **PLANTS IN ALABAMA & GEORGIA HIT WITH OSHA PENALTIES**

The Occupational Safety and Health Administration has proposed \$576,750 in penalties against Sims Bark Co. and Sims Stone Co. for 142 workplace safety and health violations. The agency is proposing 14 violations and \$79,100 in penalties for the Olive Branch bark plant; 20 violations and \$94,400 in penalties for the company's bark plant in Brent, Alabama; 59 violations and \$260,900 in penalties for the bark and stone plants in Tuscumbia, Alabama; and 49 violations and \$142,350 in penalties for the bark and stone plants in Woodbury, Georgia. Inspections began after OSHA received a complaint and determined that similar hazards might exist at other

locations of the two companies.

Willful citations are being issued against the Brent, Tuscumbia and Olive Branch bark plants and the Tuscumbia stone plant for allowing workers to service, unjam and clean machinery without procedures in place to ensure that workers won't be caught in or struck by equipment or burned by machines' heat strips. Identified hazards involve lack of employee training, exposure to electric shocks, lack of fall protection, lack of machine guards, exposure to noise hazards, struck-by dangers and accumulations of combustible dust. The agency is issuing other-than-serious violations against all of the locations for failing to keep workplace injury logs according to OSHA rules. Cindy Coe, OSHA's regional administrator in Atlanta, stated:

*Sims Bark and Sims Stone management have displayed a systemic indifference to the safety and health of their own employees, resulting in a dangerous work environment.*

With two plants in Alabama and one in Mississippi, Sims Bark is one of the largest manufacturers in the nation for mulch, soil and landscape rocks. It appears they need to get their safety house in order.

Source: *DeSotoTimesTribune.com*

#### **MISSOURI FIRM IS FINED FOR SAFETY VIOLATIONS**

OSHA has cited Americold Logistics LLC, located in Carthage, Missouri, for safety and health violations and proposed \$117,000 in penalties. The company was cited by OSHA following a targeted inspection conducted under its site-specific targeting program. OSHA found 19 alleged serious violations and one other-than-serious violation of the Occupational Safety and Health Act. Charles Adkins, OSHA's regional administrator in Kansas City, observed:

*The workers at the company's underground, refrigerated warehouse and distribution facility were needlessly exposed to multiple episodes of life-threatening injury and chemical exposure due to improper procedures and malfunctioning equipment.*

The serious violations relate to inadequate process safety management of highly hazardous chemicals, lack of emergency preparedness and response procedures, and poor respiratory protection for workers. Violations also were identified relating to permit-required confined spaces, lockout/tagout procedures to prevent accidental energy start-up, electrical equipment and safe work practices, and powered industrial truck operations. The other-than-serious violation relates to inadequate employee access to personal sampling results.

Source: OSHA, <http://www.osha.gov>

#### **JURY AWARDS \$6.7 MILLION IN FATAL ADM ACCIDENT**

An Illinois jury has awarded the family of a 26-year-old man \$6.74 million in a lawsuit against Archer Daniels Midland Co. Francisco Moreno Garcia died at one of the agribusiness company's plants in 2007. He worked for ECF Inc. of St. Louis and was insulating pipes at one of Decatur-based ADM's facilities when a nearby machine malfunctioned and sprayed him with steam and hot liquid. The man had burns over almost 90% of his body. He was so badly burned that his skin was peeling off in strips at the scene. Donald Shapiro, a Chicago lawyer, represented the family and did a very good job in the case.

Source: *Quad-City Times*

## **XVI. TRANSPORTATION**

### **MEXICAN BUSES AVOID SAFETY CHECKS WHEN ENTERING THE UNITED STATES**

A recently-released audit by the federal government revealed that some Mexican passenger buses are not being inspected when they enter the U.S. This was said to be because they cross the border on evenings and weekends. During those times there are no inspectors on duty or the crossings lack safe places for inspections. Daily bus inspections were not being conducted at border crossings at Calexico and San Ysidro in California and Laredo and McAllen-Hidalgo Bridge in Texas, the Transportation Department's Inspector General's office said in its report.

At the San Ysidro and Laredo crossings, bus inspections were being carried out on the road's shoulder within inches of moving passenger buses, according to the report. It was stated in the report: "These constraints lessen the impact border inspections have as a deterrent to unsafe buses entering the United States."

As we have written previously, the North American Free Trade Agreement (NAFTA) granted U.S. road access to Mexican trucks and buses. But Congress delayed their travel further into this country by first requiring that certain safety measures be in place. The Federal Motor Carrier Safety Association, which oversees safety monitoring for Mexican trucks and buses, agreed with all recommendations made by the Inspector General's office. The association said in a written response to the audit that it was working with Customs and Border Protection to improve space for bus inspections.

The report also said some states are not consistently reporting traffic convictions of people driving in the U.S. with Mexican driver's licenses. This appears to be a widespread problem. The report said that delayed reporting or non-reporting of convictions could

lead to Mexican federal commercial driver's license holders continuing to drive in the U.S. despite the traffic conviction. According to the Federal Motor Carrier Safety Association "the lower conviction reporting could be attributed to law enforcement budget cuts, court noncompliance and drops in commercial driving because of the economic slump." Regardless, both the federal and state governments must make sure that the problems reported as a result of the audit are corrected.

Source: *Claims Journal*

### **MOTOR CARRIER COMPANIES KEEP UNSAFE TRUCKS ON ROADWAYS**

Nearly 30 million Americans traveled the highways in this country during the Labor Day holiday. Just prior to that holiday, a new analysis of government data was released that revealed that more than 28,000 motor carrier companies, representing more than 200,000 trucks, are currently operating in violation of federal safety laws. In an original analysis of data, not previously available to the public, it was found that persons on our nation's highways are sharing roads with trucks that have incurred thousands of safety violations. The violations include defective brakes, bad tires, loads that dangerously exceeded weight limits and drivers with little or no training or drug and alcohol dependencies.

Data was obtained on the safety performance of U.S. trucking companies through the Motor Carrier Management Information System, which is maintained by the Federal Motor Carrier Safety Administration (FMCSA). Over a million lines of data were analyzed in an effort to pinpoint just how many unsafe trucks might be on the road. West Virginia, North Dakota, Nebraska, Vermont and Iowa had the highest rate of companies in violation of federal safety requirements. The effects of these violations are deadly. While truck accidents occur for a variety of reasons, many are preventable, and often a direct result of trucking

companies violating safety standards to cut corners and maximize profits.

Source: American Association For Justice

### **LIABILITY INSURANCE LIMITS FOR TRUCKING FIRMS ARE TOO LOW**

There was another significant finding in the analysis of government data referred to above. Current minimum insurance requirements for truckers were found to be inadequate. According to the FMCSA, more than 4,000 people die every year in collisions with trucks and 80,000 more are seriously injured. Even though trucks make up less than 4% of all passenger vehicles on U.S. roads, they are involved in 12% of all motor vehicles fatalities.

The report concludes that the minimum insurance requirements for commercial trucks are "completely inadequate to compensate those who have been seriously injured in a collision involving multiple vehicles or multiple injured individuals." It should be noted that Congress set the minimum level of insurance to \$750,000 in 1980. When adjusted for inflation, \$750,000 is only \$292,000 in 1980 dollars. While large trucking companies may carry more than the required level of coverage, quite often smaller companies carry just the bare minimum. The analysis of the U.S. trucking industry found that 87% of the companies in violation of safety standards are small companies that have fleets of ten trucks or less.

Many folks don't realize that lots of deadly accidents involving unsafe trucks are never recorded as safety violations. A 2005 Government Accountability Office (GAO) study found that nearly one-third of commercial motor vehicle crashes that states are required to report to the federal government were never recorded. Additionally, state crash reports were not always accurate. The analysis by the American Association For Justice follows a GAO study in July 2009 which found that more than 1,000 commercial trucking firms that were ordered out of service because of federal safety violations

evaded compliance by operating under a different name, but often using the same owner, address and employees. Congress should increase the minimum insurance limits for commercial trucking companies to at least \$5 million per incident.

Source: American Association For Justice

### **JURY AWARDS \$30 MILLION TO TEENAGER IN TRUCK CRASH**

A Mississippi jury has awarded \$30 million to teenager Ethan Bryant and his parents in a lawsuit arising out of a highway crash. The teenager was severely injured following a deadly truck accident in August 2006. Ethan was 16 years old when he and a friend, Patrick Taylor, drove through an intersection in Southaven, Mississippi, near the Tennessee border. A gravel truck driven by Chad McCarty was unable to stop at the intersection's traffic signal, which was red for him, and crashed into Ethan's Dodge Dakota. The force of the impact caused the boy's vehicle to careen about 100 feet away from the intersection. His friend, Patrick, was killed in the crash at the scene. Ethan lapsed into an eight-month coma. After awakening from the coma, he developed a severe disorder limiting oxygen to the brain. Ethan now suffers from quadriplegia and episodic seizures.

The gravel truck was overloaded past the level allowed under state vehicle regulations by nearly 20,000 pounds. As a result, the truck, which was only going about 50 miles per hour when the driver attempted to brake, was unable to come to a stop at the intersection. That resulted in an accident with a terrible result. The lawsuit named as defendants McCarty; APAC-Tennessee, the asphalt paving company that commissioned McCarty; and Memphis Stone & Gravel, the company that loaded the truck.

Documents obtained during discovery revealed that McCarty had made at least 15 trips with a haul that exceeded the state limit. He had also not received his trucking license until

July 31<sup>st</sup> of that year, but had driven loads for APAC-Tennessee for about three weeks prior to that time. APAC-Tennessee claimed that this man was an “independent contractor,” and not an agent or employee. So a key issue was whether APAC-Tennessee was an employer of McCarty, and whether the company was at fault for failing to supervise the loads he was carrying.

The jury awarded \$30 million to Ethan and his parents for past and future medical expenses and loss of income. The jury found APAC-Tennessee 70% responsible for the accident; Memphis Stone & Gravel 20% responsible, and the driver, McCarty 10% responsible. McCarty had previously pleaded guilty to manslaughter and aggravated assault and was put on 15 years probation. Robert R. Morris III and Paul R. Scott of Smith Phillips Mitchell, Scott & Nowak, in Batesville, Miss., represented the Plaintiffs and did a very good job in the case.

Source: Lawyers USA Online

#### **JUDGE AWARDS \$18 MILLION TO VICTIM IN HIGHWAY CRASH CASE**

A federal magistrate judge has ruled in a non-jury bench trial that a man severely injured in a highway crash that killed three people is entitled to more than \$13.8 million from a truck driver and his company. In addition, the man's wife has been awarded \$4.2 million. The crash left Mark Tiburzi, who was 53 years old at the time, under constant care in a nursing home, unable to walk or talk.

The truck driver, Jeffrey D. Knight, was blamed for the wreck. The truck driver was reaching for a cell phone and distracted when his tractor-trailer rig crashed into vehicles on an interstate highway on July 15, 2008, causing the three fatalities and 14 injuries. The driver and the trucking company, Holmes Transport Inc. located in Muscle Shoals, Alabama, were ordered by U.S. Magistrate Judge David D. Noce to pay damages for Mr. Tiburzi's injuries.

In addition, the Judge ordered that

Mr. Tiburzi's wife, Cheryl, will receive more than \$4.2 million from Holmes Transport Inc. The couple has two children and a grandchild. Tiburzi, a district sales manager for Famous Footwear, was on a business trip when the crash happened. The truck driver violated regulations by driving beyond the maximum hours allowed over an eight-day period.

There are other lawsuits pending arising out of this incident. Two of the persons killed were Amish from northeastern Missouri who were heading to a funeral in Tennessee with a hired driver. Another man, a copier salesman, also was killed. At least two other families have civil suits pending against the driver and the company.

Source: St. Louis Post Dispatch

#### **FAMILY AWARDED \$4.4 MILLION IN WRONGFUL DEATH CASE**

A jury in Utah has awarded nearly \$4.4 million to the widow and children of a man who suffered fatal injuries in 2006 when he tried to swerve around backed-up traffic on an Interstate highway and hit other vehicles. The amount of the verdict will be reduced by almost \$2 million because of a state law that caps damages against the state and because of the victim's share of responsibility for the accident. The family of Richard Kunzler alleged in its lawsuit that the State Department of Transportation and a subcontractor working on a bridge reconstruction project near Spanish Fork, Utah failed to post appropriate signs warning motorists about traffic delays. It was alleged that vehicles were backing up a long distance and approaching drivers were given insufficient warning about the construction.

It was proved at trial that Mr. Kunzler knew about the construction, but didn't know where traffic was backing up. As he came over the crest of a hill on July 18, 2006, the driver ahead of him saw stopped cars and slammed on his brakes. Mr. Kunzler tried to swerve around the vehicle and crashed into

another vehicle. He died 13 days later.

The jurors awarded damages totaling \$4,396,268, awarding \$2,896,268 for economic damages and \$375,000 each for the decedent's wife and three children for loss of care, comfort and companionship. They also found that Mr. Kunzler was responsible for 20% of the fault, meaning about \$879,254 will be deducted from the total award. The jurors found UDOT to be 35% responsible, and Staker & Parson Cos. 45% responsible. UDOT's share will be reduced to about \$500,000 under a law that caps damages that can be assessed against state agencies. Tyler Young, a Provo lawyer, represented the family and did a very good job.

Source: The Salt Lake Tribune

#### **ALABAMA JURY AWARDS FAMILY MORE THAN \$3 MILLION IN DRUNK DRIVING CRASH**

A jury in Jefferson County, Alabama, has awarded a family more than \$3 million in a lawsuit arising out of a 2006 accident in which their car was rear-ended by a man found to be driving under the influence of alcohol. The jury ordered Rayburn H. Moore, Jr. and Moore Asphalt Paving Co. to pay Chris and Kristy Murray and their two children \$1.05 million in compensatory damages and \$2 million in punitive damages for the 2006 accident that occurred on Highway 31 in Warrior, Alabama. A Cadillac Escalade driven by Moore struck the Ford Mustang in which the Murrays were riding. Chris Murray, a crane operator at U.S. Steel, was stopped to wait for oncoming traffic to clear so he could make a left turn when his vehicle was struck from the rear by the drunk driver.

Cody Murray, who was six years old at the time of the accident, spent weeks in a coma and still can't walk or talk normally. His sister Shay, 11 at the time, had a broken leg, a lacerated liver and cuts to her head requiring more than 200 stitches. Both of the children were in the back seat of the Mustang. Three hours after the accident, Moore was found to have a blood-alcohol level

of .085%, according to court documents. A person with a blood alcohol level of .08% or higher is considered to be driving under the influence in Alabama.

There were 11,773 deaths in the U.S. last year caused by drunk drivers. It is already a national problem. The jury in this case was asked to send a message about driving under the influence and it responded. The jurors obviously made a statement about how dangerous drunk driving is. The jury awards, returned in Circuit Judge Tom King Jr.'s court, were broken down as follows: Moore Asphalt Paving Co., for whom Moore was running an errand at the time of the accident, was ordered to pay \$250,000 in compensatory damages and \$500,000 in punitive damages; and Moore was ordered to pay \$800,000 in compensatory damages and \$1.5 million in punitive damages.

Adam Gober, who is with the Gardendale firm of Townes, Woods & Roberts, and Jim Roberts, Jr. of Turner, Webb & Roberts in Tuscaloosa, represented the Murrays and did a tremendous job.

Source: Birmingham News

#### **DRUNKEN DRIVING CRASH VICTIM AWARDED \$3.14 MILLION**

A jury in Chippewa County, Wisconsin, awarded a 51-year-old woman more than \$3.1 million for her injuries and suffering after being struck by a drunken driver in December 2005. Debra Mayer was badly injured in the crash. She had a punctured lung, fractured rib, two broken teeth, broken left arm, broken left leg and broken left foot after a head-on crash with David M. Bowe in 2005. Ironically, Bowe, was uninjured in the crash. But he was sentenced to 18 months in jail for causing the crash. It was his second drunken driving offense.

The jury awarded Ms. Mayer \$750,000 for future medical expenses; \$250,000 for past and future loss of earnings; \$1.75 million for past and

future pain, suffering, disability and disfigurement; \$375,000 in punitive damages; and \$17,588 for out-of-pocket expenses for a total of \$3.14 million.

Obviously, this jury wanted to send a message to the community that drinking and driving will not be tolerated, and it has significant consequences. Bowe crashed his car nearly head-on into Mayer's vehicle. Bowe admitted he had left a bar in Chippewa Falls and lost control of his car, causing it to collide with Mayer's vehicle. He had a blood alcohol level of 0.16, which is twice the legal limit. A videotape showed that Mr. Bowe could hardly stand up.

In the criminal case, Bowe pleaded no contest to injury by intoxicated use of a vehicle, operating while under the influence, causing injury while operating a vehicle under the influence, reckless driving, negligent operation and disorderly conduct. Scott McCarty, a lawyer from Madison, represented the Plaintiff and did a very good job.

#### **ILLINOIS JURY AWARDS \$24 MILLION TO MAN INJURED IN CRASH**

A Cook County, Illinois jury awarded \$24 million last month to a man badly injured in a 2004 crash. On April 19, 2004, an SUV driven by Andrzej Chraca's SUV and an Illinois Department of Transportation truck collided in Schaumburg, Illinois. Chraca, 38, suffered a fractured vertebra in his spine, leaving him unable to walk without leg braces, canes or a walker. Chraca, a project manager for a furniture-building company, was left a paraplegic and he hasn't returned to work since the crash. The IDOT driver, Steve Miles, was also severely injured in the crash.

Both drivers in the accident sued each other and the jury award, in favor of Chraca, came after a two-week trial in Cook County Circuit Court. Both Miles, an IDOT employee using IDOT equipment at the time of the crash, and the state, are responsible for the jury award. Martin Healy, Jr., a Chicago, Illi-

nois, lawyer, represented the Plaintiff and did a very good job.

Source: Chicago Sun Times

#### **\$15 MILLION SETTLEMENT IN PLANE CRASH DEATH**

A judge has approved a \$15 million settlement in a wrongful death lawsuit filed in Cook County, Illinois, by the family of a Chicago restaurant executive killed in a private plane crash in 2006. Michael Waugh, who was general manager of Joe's Seafood, Prime Steak and Stone Crab Restaurant, was returning from Olathe, Kansas, on January 30, 2006, when the Cessna 421B piloted by a Morgan Stanley senior financial advisor, who was not a professional pilot, crashed just before landing at a Chicago-area airport. Mr. Waugh, the pilot, and two other passengers were killed. The lawsuit against the pilot's estate and Morgan Stanley alleged that the giant financial company used aircraft flown by nonprofessional pilots. The judge approved the settlement to the family of Mr. Waugh.

Source: Chicago Tribune

## **XVII. ARBITRATION UPDATE**

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#### **CONGRESS SHOULD ACT ON ARBITRATION LEGISLATION**

Mandatory binding arbitration, or what some call "forced arbitration," is ubiquitous in many industries, according to a study released by Public Citizen. The organization found in the study that 75% of companies in eight industries use forced arbitration. Congress is presently trying to determine whether mandatory binding arbitration is fair or voluntary. That shouldn't be too hard to figure out and I have to wonder why it's taking Congress so long.

As we have reported on many occasions, consumers are stripped of their

right to go to court over disputes when they open a bank or credit card account, obtain cell phone service, hire a stockbroker or buy a house. The same is true about half of the time when consumers buy computers or obtain cable or Internet service. Arbitration is commonplace in the purchase of automobiles and trucks.

The study, *Forced Arbitration: Unfair and Everywhere*, is based on inquiries of major credit card providers, banks, cell phone providers, computer manufacturers, cable/Internet providers, auto dealers, brokerages and home builders. The majority of data in the report was obtained by Public Citizen researchers inquiring as consumers about businesses' arbitration policies. David Arkush, director of Public Citizen's Congress Watch division, observed:

*Even though forced arbitration has been exposed as grossly unfair to consumers, the practice remains ubiquitous in many industries. This means that millions of Americans have been stripped of their right to hold corporations accountable in court.*

Forced arbitration requires consumers to settle disputes before secretive, private tribunals instead of courts. Consumer advocates have long said that forced arbitration is unfair because it undermines corporate accountability and deprives people of core protections against corporate wrongdoing. Americans believe they should have the right to legal recourse—including a judge, jury and the ability to appeal—and demand that decisions be based on law, according to recent polling conducted by Lake Research Group. The same poll also found that a majority of Americans—six in ten—oppose forced arbitration.

The continued use of forced arbitration coupled with overwhelming evidence of the processes' unfairness points to the need for Congress to pass the Arbitration Fairness Act, which would prohibit businesses from forcing

arbitration on consumers and employees. The LakeResearch public opinion polling showed that Americans support the Arbitration Fairness Act by a margin of more than two-to-one, including majorities of men and women, as well as Democrats, independents and Republicans. If you agree that forced arbitration that is binding on consumers is unfair, let the members of Congress know how you feel and ask them to support the Arbitration Fairness Act.

Source: Public Citizen

### **APPEALS COURT SENDS CONTRACTOR'S CASE TO COURT**

A federal appeals court ruled that the case of a Texas woman who alleges she was gang-raped by co-workers while working for a military contractor in Iraq will go to court instead of arbitration. Jamie Leigh Jones' federal lawsuit against Halliburton Co., former subsidiary KBR and several affiliates will now be tried in open court. The companies contended Jones signed an agreement that required claims against the companies to be resolved privately through arbitration. This is very good news!

KBR and Halliburton, which split in 2007, have disputed Jones' account of how the companies responded to her allegations. A lower court found Jones' allegations of assault and battery, intentional infliction of emotional distress, negligent hiring and supervision of employees and false imprisonment did not fall within the scope of the arbitration clause of the contract she signed.

Source: *Houston Chronicle*

## **XVIII. NURSING HOME LITIGATION**

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### **ARBITRATION PANEL FINDS IN FAVOR OF VICTIM OF NURSING HOME WRONGDOING**

An arbitration panel found in favor of the estate of Mrs. Voncil Sherrod, who died in 2005 from gangrene, which developed during her residency at High Pointe Health and Rehabilitation, a Mariner Health Care nursing home in Tennessee. The causes of action included claims for negligence, violation of the Tennessee Adult Protection Act (TAPA), and medical malpractice. Compensatory and punitive damages, along with lawyers' fees for violation of TAPA, were sought. Claims were asserted against Mariner Health Care, Inc. (the parent corporation), Mariner Health Care Management (the management company), and National Heritage Realty, Inc. (the licensee). Plaintiffs alleged that the three companies operated the facility as a joint venture and that they served as the alter egos of one another. Kenneth Connor, one of the lawyers for the families, stated:

*It is outrageous that Mrs. Sherrod was treated so horrifically. She wasn't turned and repositioned and developed terrible pressure ulcers. She wasn't kept clean and developed infections. In addition, she suffered the indignity of languishing in her own waste for long periods of time. We can only hope that other nursing homes take heed and reconsider the way in which they operate their facilities. It is particularly satisfying to have unanimous decisions when you seek justice for a negligence victim's family.*

The arbitration panel was comprised of two former trial and appellate judges and a lawyer who had represented Mariner. The parties each selected an arbitrator and those two arbitrators picked a third arbitrator who presided

over the proceeding. The panel rendered its award, finding unanimously for the Plaintiff on the negligence, medical malpractice and TAPA survival claims. The damage awards were determined by a majority of the panel. The amounts awarded, totaling \$2,773,396.32 were as follows: TAPA violations—\$250,000; Medical malpractice—\$626,396.32; Punitive damages—\$1,500,000; Attorneys fees for intentional, malicious or fraudulent misconduct resulting in a TAPA violation—\$400,000.

Lawyers for the Plaintiff at the arbitration hearing, Kenneth Connor and Henry Giessel of the firm Marks, Balette & Giessel, in Houston, Texas, and Matthew Mussalli, a lawyer in Woodland, Texas, represented the Plaintiff in this arbitration proceeding and did an outstanding job.

Source: *Memphis Business Journal*

### **BETTER REGULATION OF NURSING HOMES NEEDED**

A recent incident involving a nursing home in Illinois is clear evidence of why nursing homes must be effectively regulated. A 24-year-old nursing assistant who was on duty when an 89-year-old Alzheimer's disease patient wandered out of an Itasca nursing home and froze to death in February has pleaded guilty to criminal neglect. The aide was charged in connection with the death of the nursing home resident, who was found about 5 a.m. on February 5<sup>th</sup> outside the nursing home, The Arbor of Itasca. About 2 a.m., with the temperature around zero, the resident had left the facility through a door, triggering an alarm when she opened it. The aide, the on-duty nursing assistant, responded by turning the alarm off and returning to a lounge to watch a television show without checking on any residents.

An investigation revealed that the barefoot resident fell down about 85 feet from the door and then tried to crawl back. She made it about 14 feet

before her body gave out. The coroner's report said the poor lady died of hypothermia. The family told the judge:

*We entrusted our mother to the Arbor staff, but she was left alone to die alone in the cold. Her will to survive was overcome by the bitter cold, and she suffered a lonely and painful death.*

While the incident described above may seem extreme, we have seen similar conduct in many instances where our firm was hired by the family of a nursing home resident who had been injured or died. Nursing home owners and operators owe a high duty, in my opinion, to provide good treatment and supervision for the residents in their facilities. Governments at the federal and state level must do their jobs of regulating these facilities and monitor the level of care and treatment provided to residents.

Source: *Chicago Tribune*

## **XIX. HEALTH CARE ISSUES**

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### **STUDY FINDS RADIATION RISK FOR PATIENTS**

A new study in *The New England Journal of Medicine* has found that at least four million Americans under age 65 are exposed to high doses of radiation each year from medical imaging tests. It was reported that about 400,000 of those patients receive very high doses, more than the maximum annual exposure allowed for nuclear power plant employees or anyone else who works with radioactive material. The results from the study were published by the *Journal* in late August. The survey, which covered patients from 2005 to 2007, included almost one million patients insured by United-Healthcare.

The number of cancer cases that the radiation might cause over the next

several decades was not mentioned in the study. It has been estimated, however, that the number could be in the tens of thousands of additional cancers. Each individual patient is a relatively minor additional risk from the tests, but because they are given to so many people, it is felt that the cumulative risk is significant.

The use of the tests has risen sharply in the last two decades, as more and more physicians have bought CT and PET scanners and installed them in or near their offices. In 2007, the Department of Health and Human Services estimated that the number of CT scans given to Medicare patients had almost quadrupled from 1995 to 2005, while the number of PET scans had risen even faster. The new study's lead author, Dr. Reza Fazel, a cardiologist at Emory University, said the use of scans appeared to have increased even more from 2005 to 2007, the period covered by the survey.

Source: *New York Times*

### **HORMONE-DISRUPTING HERBICIDE WIDESPREAD IN U.S. DRINKING WATER**

The common herbicide atrazine, known to impact wildlife reproductive health, has contaminated watersheds and drinking water throughout much of the United States, according to a new report released recently by the Natural Resources Defense Council (NRDC). There are concerns about the chemical's effects on human reproduction. The environmental nonprofit organization believes that the EPA is ignoring its own data showing broad contamination of U.S. waters by atrazine, a known endocrine disruptor that affects human and animal hormones. Andrew Wetzler, director of NRDC's Wildlife Conservation Program and deputy director of NRDC's Midwest Program, as well as one of the report's authors, stated:

*The extent of contamination we found in the data was breathtaking and alarming. The EPA found*

*atrazine almost everywhere they looked. I think that the public will find this hard to swallow and I hope it will help force the EPA to address the situation more aggressively.*

The report finds that all of the watersheds monitored by EPA and 90% of the drinking water sampled tested positive for atrazine, which is sold under dozens of brand names. It is now found in more than 45 pre-mixes in the U.S. and is the active ingredient most frequently used by manufacturers in combination herbicide products.

It should be noted that while atrazine is banned by the European Union, it's regulated in the United States by the EPA. Under the Safe Drinking Water Act, the EPA has determined that an annual average of no more than three parts per billion (ppb) of atrazine may be present in drinking water. One of the chief findings of the NRDC report is that this reliance on a "running annual average" allows levels of atrazine in drinking water to peak at extremely high concentrations. The effects associated with atrazine, even at low levels of exposure, are said to be well documented.

Some scientists are concerned about exposure for children and pregnant women, as small doses could impact development of the brain and reproductive organs. Atrazine also acts as a multiplier to increase the toxic effects of other chemicals in the environment. The federal Agency for Toxic Substances warns:

*Atrazine may affect pregnant women by causing their babies to grow more slowly than normal. Birth defects and liver, kidney, and heart damage has been seen in animals exposed to high levels of atrazine.*

The NRDC says the herbicide has "limited economic value" and "safer agricultural methods can be substituted to achieve similar results." The environmental group would like to see atrazine

phased out, more effective atrazine monitoring, and the adoption of farming techniques that can help minimize the use of atrazine to keep it from running into waterways.

The NRDC recommends that consumers concerned about atrazine contamination in their drinking water use a simple and economical household water filter, such as one that fits on the tap. They say that consumers should make sure that the filter they choose is certified by NSF International to meet American National Standards Institute Standard 53 for the reduction of volatile organic compounds. That would make reasonably sure the filter was capable of reducing many contaminants, including atrazine and other herbicides and pesticides. NRDC's SimpleSteps website includes an online form to allow people to take on a watchdog role by collecting information on how their public water systems are treating these issues. Visit [www.simplesteps.org/atrazine](http://www.simplesteps.org/atrazine) for more information.

Source: NRDC

### **ALCOHOLIC ENERGY DRINKS ARE A BIG PROBLEM**

Most folks don't realize how dangerous Alcoholic Energy Drinks (AEDs) are for young people and adults. When a person mixes the depressant in alcohol and the stimulant in energy drinks they get what is referred to as a "wide-awake drunk." AEDs are a very big problem for young people. Energy drinks were once just a fad among our youth, but they have now become a staple in their lives. Energy drinks, which contain large doses of caffeine, ephedrine, guarana, taurine ginseng, and now alcohol, became a \$4.8 billion industry in the United States last year. The newest trend of energy drinks has been referred to as "speedball in a can." AEDs are prepackaged beverages that contain alcohol, caffeine and other stimulants.

You will probably be shocked to learn that teens—and even pre-teens—

can legally purchase energy drinks containing alcohol. Rock Star 21 has 6% alcohol and Sparks contains 7% alcohol. There are eight products on the market that contain 200% more alcohol than that found in a typical can of beer. Currently, Alabama has no law regarding placement of alcoholic drinks in a store separate from non-alcoholic. These AEDs are often stocked with the non-alcoholic brands. Because these cans have similar graphics, consumers and even store clerks are mistaking the alcoholic brands for regular energy drinks.

It has been reported that 31% of 12-17 year olds and 34% of 18-24 year olds regularly consume energy drinks. Producers are now focusing, not on television and radio, but on sporting events, text messaging and internet forums such as Facebook and MySpace to market their products. Alcohol producers, which spend \$4.5 billion marketing their products, have built on the popularity of these drinks by blurring the line between alcoholic and non-alcoholic beverages.

A web-based survey of more than 4,000 students revealed that, of the students who drank alcoholic beverages in the last 30 days, 24% mixed energy drinks with alcohol in order to "drink more and drink longer." A separate survey showed that 54% of those drinking an energy drink do so to improve the taste of alcohol. We all know that alcohol and young people do not mix. It's illegal for many reasons, one of them being that alcohol is the leading cause of death among youth. Also, research has shown that alcohol consumption, even in modest amounts, can result in permanent brain damage because the brain continues to develop into a person's mid-twenties. In addition, about 70,000 teens are sexually assaulted and more than 600,000 are physically assaulted each year as a result of drinking or being with someone who is drinking.

Marin Institute performed an in-depth study on the effects of mixing energy drinks with alcohol. Public

Health and Safety Officials have become alarmed by their findings. Researchers found in this study that: “The subjects’ performance was significantly worse after ingesting the AED despite their perception of increased alertness and reduced intoxication.”

Alcohol and energy drinks create a dangerous mix. The caffeine, a stimulant in these drinks, disguises the intoxicating effects of alcohol. Fatigue is the body’s way of saying it’s had enough to drink. High doses of caffeine mask the body’s natural way of alerting a person to stop drinking. The alcoholic beverages industry, as a whole, refuses to alert users to the potential for misjudging one’s intoxication. Instead, the industry suggests that the beverages will enhance alertness and energy. It’s predicted that companies in this industry will gross \$10 billion yearly by 2010.

Source: ParentTalk Alert

#### **A STUDY OF BINGE DRINKERS REVEALS SOME DISTURBING RESULTS**

A recent study from the Centers for Disease Control and Prevention indicates that binge drinking has become a major problem in this country. The study found that one in ten binge drinkers got behind the wheel the last time they drank heavily, and half of those drivers left a bar, restaurant or nightclub after downing five or more drinks. The study is being called the first to try to measure the likelihood someone will drive after binge drinking. It suggests a need for stepped-up efforts to prevent bars and restaurants from serving people after they’re intoxicated, according to its authors at the Centers for Disease Control and Prevention.

The researchers focused on 14,000 “binge drinkers”—people who said that at least once a month they had five or more drinks on a single occasion. About 12% said they had gone driving within two hours of their last bout of heavy drinking. Of those drivers, more than half took the wheel after drinking

in a bar, restaurant or other licensed establishment. Half of the drivers who left an establishment said they had seven or more drinks, and a quarter said they’d had at least ten. Some people can handle alcohol better than others, and eating food or drinking over several hours can soften alcohol’s impact. By any standard, however, ten drinks is a lot.

Dr. Timothy Naimi, an epidemiologist with the CDC’s alcohol program, who led the study, says that binge drinking is a main factor behind the more than 11,000 deaths annually from alcohol-related motor vehicle crashes. The study will be in the October issue of the *American Journal of Preventive Medicine*. Nearly every state has a law that in theory prohibits licensed establishments from selling alcohol to drunk patrons. But most states don’t have enough enforcement personnel to stop in on bars and watch for over-serving of customers. “These are among the most disregarded laws in the country,” Dr. Naimi said. Without policing, there’s little incentive for bars, clubs and restaurants to discourage drinking. Tips depend on keeping patrons happy and buying, noted Jim Mosher, a Washington, D.C.-based legal researcher and consultant on alcohol issues.

The CDC study was based on a telephone survey done in 2003 and 2004, and some things have changed since then. Drunk driving fatalities have decreased, dropping nearly 10% from 2007 to 2008, according to the National Highway Traffic Safety Administration. Also, there have been a variety of efforts to reduce drunk driving, including court-mandated devices that prevent a car from starting if a driver is drunk. I give the organization MADD a great deal of credit for any advancement in the battle to curtail drinking and driving. Most efforts focus on punishing the driver and not preventing drunk driving by focusing on those who enable it. Dr. Naimi observed:

*The drinking location is really important. We’re trusting these*

*licensed establishments to serve responsibly, and more than half of the intoxicated people who drive have been drinking in these places.*

A follow-up survey in 2008 found the situation hadn’t changed, but those results haven’t yet been released. Binge drinking is a serious problem and we had better get a handle on how to combat it.

Source: Associated Press

#### **JURY RETURNS A VERDICT IN A MOLESTATION CASE**

A jury in Multnomah County, Oregon, has ruled in favor of a woman who was molested by a paramedic while riding to the hospital in an ambulance. The ambulance company, American Medical Response, was accused of having a serial sex offender, Lannie Haszard, on its payroll and for failing to get rid of him. Jurors awarded the Plaintiff \$2.25 million in damages for pain and suffering after a month-long trial. Interestingly, the jury did not award punitive damages. But under Oregon law, the award will increase to \$3.25 million because the jury decided the Plaintiff was a “vulnerable person” as she lay semi-conscious and, at times, unable to move or speak as the paramedic molested her in December, 2007 while in the ambulance.

In the two years before this paramedic touched this woman inappropriately, three women reported similar behavior by him. The Plaintiff testified that she is afraid to leave home and has had frequent panic attacks. A psychologist testified that the Plaintiff suffers from post traumatic stress disorder. AMR Northwest is owned by a parent company, AMR. Companies that hire medical personnel have a strong duty to do adequate background checks. Individuals must be screened carefully before they are hired. Once hired, a person doing this sort of work must be carefully supervised.

Source: *The Oregonian*

## XX. ENVIRONMENTAL CONCERNS

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### **NEW UST LEAKS IN ALABAMA OCCUR FREQUENTLY**

We have written in prior issues about the dangers to people and property caused by harmful, toxic contaminants leaking from underground storage tanks (USTs). Unfortunately for the people of Alabama, leaks of toxic substances from USTs continue to occur with alarming frequency.

According to the United States Environmental Protection Agency there are more than 18,000 USTs in active use in Alabama. Leaks from these USTs have been reported in every county in Alabama. According to data released by the Alabama Department of Environmental Management (ADEM) in 2006, 147 new UST leaks were reported. In 2007, 101 new leaks were reported, and 81 were reported in 2008. Already in 2009, at least 82 new leaks have been reported to ADEM. Currently, ADEM has more than 1,000 active UST leak sites under investigation throughout the state.

USTs are used by gas stations and oil distributors to store gasoline, oil and other toxic petroleum products. Many of the USTs in use today were installed decades ago and were constructed of materials that are susceptible to corrosion. If they are not properly maintained, monitored and replaced periodically, these USTs can develop leaks which allow toxic petroleum contaminants to migrate through the soil and groundwater to neighboring properties. Some of these contaminants have been found to cause cancer, respiratory illness, kidney and liver disease, as well as other serious illnesses.

We are fighting to protect the rights of clients whose health and property have been damaged by contamination from a leaking UST. If you would like more information, believe that your health or property may have been

harmed by a leaking UST, or have questions, you can contact Alyce Robertson Addison or Chris Boutwell in our office at 800-898-2034 or by email at [Alyce.Addison@beasleyallen.com](mailto:Alyce.Addison@beasleyallen.com) or [Chris.Boutwell@beasleyallen.com](mailto:Chris.Boutwell@beasleyallen.com).

### **\$150 MILLION GAS-SPILL AWARD UPHELD**

A Circuit Court judge has affirmed the decision of a Baltimore County jury to award \$150 million to neighbors of a Jacksonville service station to compensate for damages arising from a leaking underground pipe. But the judge, Maurice W. Baldwin Jr., who presided over the five-month trial in the residents' lawsuit against the station's owner, ExxonMobil Corp., reduced the damages by between \$3 million and \$4 million. The Court took into account the money received by four families who were able to sell their properties. Also, the court adhered to a cap set by state law for this type of compensatory damages.

Source: *Baltimore Sun*

### **ENVIRONMENTAL GROUPS GIVE ALABAMA A LOW GRADE ON WATER QUALITY**

Environmental groups say that Alabama has failed to implement portions of the federal Clean Water Act, and gave my state a D+ on a water quality report card. The report, issued by the Gulf Restoration Network and the Alabama Rivers Alliance, did not examine whether Alabama is properly enforcing federal environmental policy. The groups are questioning instead whether Alabama has even implemented these policies.

Other Gulf states didn't fare any better on the "Clean Up Your Act!" Report Card released last month. The best grade went to Texas, but that state only got a "C." Alabama's grade was low because ADEM failed to set limits on the amount of nitrogen and phosphorus that can be dumped into rivers and Mobile Bay by industry and municipal sewer systems, according to the

groups. Such limits are called for under the Clean Water Act.

As you may know, nitrogen and phosphorus are key ingredients in fertilizers and organic waste. Together, they represent the main culprits in the formation of both the Gulf of Mexico's low-oxygen area, known as the dead zone, and the smaller dead zone that develops in Mobile Bay each summer. This year, the *Mobile Press Register* reported that Mobile Bay's dead zone developed earlier than normal and appeared to be more widespread than in previous years.

Under the Clean Water Act, Alabama was supposed to have adopted statewide limits for nitrogen and phosphorus by 2004. Those standards, according to the environmental groups, have still not been adopted in 2009 regardless of whether ADEM has enforced limits on some facilities.

Source: *Mobile Press Register*

### **PUBLIC CITIZEN EXPOSES A FRAUD IN TEXAS**

A recent rally in Houston, Texas, which was held to oppose federal climate change legislation, appeared to be on the level. Now it's being reported that it was just an industry-organized ploy designed to scuttle lawmakers' attempts to curb greenhouse gas emissions. The rally, attended by approximately 2,500 people, was organized by Energy Citizens, an astroturf alliance, which is funded primarily by the American Petroleum Institute (API). Public Citizen calls it "a fake grassroots group." Greenpeace uncovered an internal memo in which API asked member companies and groups to help recruit employees, retirees, vendors and contractors to attend the Houston rally and 21 other rallies in key Congressional districts.

The Houston "rally" was the first of these orchestrated events. Public Citizen says it was more like a company picnic than a real rally. In fact, ordinary citizens were barred from entering the rally. The only people allowed in were

energy company employees, who were bused in and who had to show a company ID in order to get in. This sort of thing should be made known to the news media and more importantly to the American people. It's no more than a well-financed effort to control Congress by those big companies opposing climate change legislation.

Source: Public Citizen

### **VIRGINIA COURT RULES IN FAVOR OF ENVIRONMENTAL GROUPS**

In a momentous victory for clean energy advocates in Virginia, a Circuit Court in Richmond ruled that the State Air Pollution Control Board violated federal environmental law in issuing a permit for Dominion Power's coal-fired power plant in the southwest corner of the state. Judge Margaret Spencer agreed with a coalition of environmental groups that the "escape hatch" in Dominion's Maximum Achievable Control Technology (MACT) permit rendered that permit unlawful.

The Clean Air Act's MACT program regulates emissions of hazardous air toxins, such as mercury, which can cause severe neurological deficits in infants, fetuses, and young children. Judge Spencer ruled that the "mercury emission limit...must be set 'irrespective of cost or achievability,'" and that the "escape hatch" was "violative of the laws addressing pre-construction mandates."

When Congress passed the Clean Air Act, it required companies to obtain such permits before construction began on a power plant. The goal was to ensure that the plant was designed and built in a way to protect the public health and welfare. Dominion, which started construction a week after the Virginia air board approved the permits in June 2008, has said the plant is about 20% complete. The judge's ruling invalidated the MACT permit.

The Wise Energy for Virginia Coalition has raised a host of concerns regarding Dominion over the past

several years including air pollution and the health of the local community, water quality, mountaintop removal coal mining, and the impacts of the plant's carbon emissions on global warming. Over 42,000 Virginians signed petitions and sent letters to state and company officials opposing the project.

Source: Southern Environment

### **CALIFORNIA IS FIRST STATE TO LIMIT ERIN BROCKOVICH CHEMICAL**

In the blockbuster movie *Erin Brockovich*, residents in the town of Hinkley, California, successfully sued Pacific Gas and Electric Company for discharging a cancer-causing chemical into their drinking water supply. This chemical, hexavalent chromium (also known as chromium 6 and chrome-6) has long been known to cause cancer. In August 2009, the State of California proposed limits on the amount of hexavalent chromium in drinking water. This is significant not only because the Erin Brockovich case took place in California, but also because California is the first state to propose a drinking water limit on this chemical.

Currently, drinking water standards in California, and many other places, limit only the amount of total chromium, without requiring a limit on each specific type of chromium. The new regulatory limit on hexavalent chromium proposed in California, which is .06 parts per billion, was the result of a long battle led by health and environmental activists. Big industry fought against placing a limitation on this chemical.

The sad reality is that most people assume that their drinking water is safe, simply because it is regulated and tested. Before making this assumption, it would be wise to find out what is regulated and what is not. You may be shocked at what you find out.

Source: Environmental Working Group

## **XXI. THE CONSUMER CORNER**

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### **CVS TO PAY \$2.8 MILLION IN REFUNDS FOR IMMUNE-SUPPORT ADS**

CVS Caremark Corp will pay nearly \$2.8 million in refunds to customers who bought its AirShield supplements to prevent illness. The Federal Trade Commission accused CVS of making unsubstantiated claims that AirShield could prevent colds and fight germs. As you may recall, the FTC previously reached a similar settlement with Rite Aid Corp., which will pay \$500,000 to settle charges of deceptive advertising involving its Germ Defense medicines.

In August 2008, Airborne Inc. agreed to pull misleading ads as part of an FTC probe. As part of that settlement, Airborne agreed to add up to \$6.5 million to a \$23.5 million fund created by a separate class action lawsuit filed against Airborne in California. According to CVS, the packaging for Airshield, the store brand equivalent to Airborne, was changed in 2008. CVS has also agreed to pay \$2.78 million to the FTC to cover the costs of a refund program for customers who purchased CVS Airshield from July 2005 through November 2008.

FTC will administer the refund program based on purchase information provided by CVS. The commission warned consumers to be aware of claims made about dietary supplements. David Vladeck, director of the FTC's Bureau of Consumer Protection, had this to say:

*With orders against Airborne, Rite Aid, and now CVS, manufacturers and retailers are on notice that they have to tell the truth about what dietary supplements can and cannot do.*

There is no telling how much money is paid out annually by the American people for drugs and supplements—with lots of them being virtually worth-

less and others not as advertised—and that’s a shame.

Source: Reuters

### **FDA PROBES LIVER DAMAGE CAUSED BY WEIGHT LOSS PILL ALLI**

The Food and Drug Administration is investigating reports of liver damage in patients taking alli, a nonprescription weight loss drug, which has been approved by the agency. The FDA has received more than 30 reports of serious liver damage in patients taking alli and Xenical, the prescription version of the drug. All but two of the cases involved prescription Xenical and occurred outside the United States. Twenty-seven patients were hospitalized, and six cases resulted in liver failure, according to the FDA. The reports, submitted between 1999 and October 2008, included 27 hospitalized patients, and six who suffered liver failure. The drug is known generically as Orlistat.

Both Alli and Xenical are marketed by British drug maker GlaxoSmithKline PLC, (GSK) but Xenical is manufactured by Swiss firm Roche. The FDA says it has not established a direct relationship between the weight loss treatments and liver injury, and advised patients to continue using the drugs as directed. The agency says: “Consumers should consult their health care professional if they are experiencing symptoms.”

The FDA said 30 of the liver injury cases occurred outside the United States and involved 120 milligram doses of prescription Xenical. The two U.S. cases were associated with GSK’s nonprescription version of the drug, which is sold under the name Alli, according to the FDA. The nonprescription dose is half of the prescription dose. Roche reported first-half 2009 sales for Xenical of 209 million Swiss francs (\$197 million). GSK reported Alli sales of \$125 million for the second quarter.

The FDA first approved Xenical in 1999 and alli in 2007. The prescription pill is twice as potent as alli, which can

be bought over the counter. GSK reported \$123 million in sales for alli last year, while Roche posted \$472 million in revenue for Xenical. Signs of liver damage include fatigue, fever, nausea and vomiting. The FDA said it’s reviewing additional details about the suspected cases of liver injury submitted by manufacturers. In general, the FDA has started notifying the public earlier about possible safety issues with drugs, after coming under fire for acting too slowly on problems with blockbuster treatments like Merck’s painkiller Vioxx.

Source: Yahoo News

### **LAWSUIT FILED IN THE DEATH OF 21 POLO HORSES**

A Florida pharmacy that mixed a deadly concoction of vitamin supplements that killed 21 elite polo horses fired a lab technician who prepared the mix after she spoke with federal investigators, according to a whistleblower complaint filed against the business. Sheila Harris, of Ocala, Florida, claims she cooperated with Food and Drug Administration investigators in the weeks following the deaths, and her employer, Franck’s Pharmacy, then fired her for talking about the case.

The lawsuit seeks reinstatement, unspecified compensatory damages and reimbursement for lost wages. The FDA and Florida authorities are still investigating while Franck’s Pharmacy continues to do business. Franck’s denies that it caused the horses’ deaths and says it didn’t fire the employee because she cooperated with investigators.

Florida’s state veterinarian, Dr. Thomas J. Holt, has blamed the horses’ deaths on an overdose of a common mineral that helps muscles recover from fatigue. Holt said in April that toxicology tests showed significantly increased selenium levels. The horses from the Venezuelan-owned Lechuza Caracas team began collapsing in April as they were unloaded from trailers at the International Polo Club Palm Beach before a championship match. Some

died at the scene and others died hours later. The horses had been given the supplement that day.

Franck’s Pharmacy has acknowledged the concoction contained too much selenium. The Lechuza team had ordered a compound similar to a name-brand supplement known as Biodyl, which includes vitamin B, potassium, magnesium and selenium. The supplement is used around the world but hasn’t been approved by the FDA for use in the U.S. Ms. Harris, the whistleblower, says she worked at Franck’s for more than 13 years. She said she mixed the compound as ordered, but later noticed “its consistency had changed, and the liquid had become cloudy.”

The Complaint alleges Ms. Harris was told by a pharmacy manager to simply “adjust the Ph balance and to filter the drug again.” It was then labeled and delivered, according to the suit. Harris claimed she spoke with FDA investigators twice after the horses died. She was fired on May 14<sup>th</sup>, the day before an FDA investigator was set to return for a third interview. Franck’s Pharmacy contended in a termination letter to Harris, included in the Complaint, that she was fired “as part of a company-wide effort to improve performance and increase efficiencies,” not for misconduct.

Source: Associated Press

### **VISA TO PAY OFF SETTLEMENT EARLY**

Visa Inc., the world’s largest payment network, will pay \$682 million to merchants in the U.S. to complete a settlement reached a few years back. Visa is paying early to get a discount from the \$800 million it had owed through 2012. The Plaintiff merchants filed an antitrust class-action suit in 2003 over excessive fees. Visa was to make the payment either on September 30<sup>th</sup> or the business day after the court order, whichever is later. The agreement to pay early is subject to court approval.

In the 2003 settlement over very large fees paid to Visa and MasterCard, which dominated the payments market, Visa agreed to pay \$2 billion

over a period of ten years, in equal annual installments of \$200 million. MasterCard Inc, the world's second-largest credit card company, had previously agreed to prepay its obligations at a discount.

As you may recall, a few years back, Visa and MasterCard also agreed to pay almost \$4 billion to American Express Co. and \$2.75 billion to Discover Financial Services after the credit card networks accused their bigger rivals of harming their business by preventing banks that issued MasterCard and Visa cards from also offering their cards.

Source: Reuters

### **NELNET AND OTHERS SUED OVER MISUSE OF SUBSIDY**

A whistleblower lawsuit over the alleged misuse of subsidy funds has been filed by a former Department of Education researcher. The researcher had reported the loophole that allowed student loan companies, including Nelnet, a student loan company located in Lincoln, Nebraska, to reap hundreds of millions in profits at taxpayers' expense. Jon Oberg, a University of Nebraska-Lincoln graduate and former aide to a former U.S. Senator, filed the suit in U.S. District Court for the Eastern District of Virginia, against Nelnet and several other Defendants. Nelnet, the lead Defendant, settled its differences with the federal government more than two years ago.

The suit seeks the return of about \$1 billion in "special allowance" payments wrongfully obtained under a federal subsidy program. The subsidy guaranteed a 9.5% return on a limited class of student loans. It was created in the 1980s to ensure low-cost student loans at a time when the economy was souring and interest rates were high. The civil suit seeks triple damages—\$3 billion—plus civil penalties of \$11,000 for each violation.

It was largely phased out in 1993, but companies found a loophole that allowed them to actually expand the

number of loans receiving the subsidy by recycling older loans and packaging them with newer ones. It was reported that Nelnet has acknowledged using the loophole. The Department's Inspector General recommended the company repay the federal government \$278 million. Instead, in a rather interesting development, Nelnet and the Department of Education reached a settlement in January 2007 that allowed the lender to actually keep the \$278 million. Under the settlement Nelnet agreed to stop using the subsidy, giving up as much as \$882 million in future profits.

Also named as Defendants in the civil suit are: Sallie Mae; Southwest Student Services Corp., a Sallie Mae subsidiary; the Kentucky Higher Education Student Loan Corp.; the Pennsylvania Higher Education Assistance Agency; the Vermont Student Assistance Corp.; the Panhandle Plains Higher Education Authority; Brazos Higher Education Services Corp.; the Arkansas Student Loan Authority; and Education Loans Inc. of South Dakota. The case is expected to go to trial early next year. Interestingly, earlier this summer, Nelnet was chosen by the U.S. Department of Education to be one of four student loan companies that will service federal student loans. Bert Rein represents the whistleblower in this case.

Source: Lincoln Journal Star

### **JURY AWARDS WHISTLE-BLOWER STUDENT \$450,000**

A jury in Georgia has awarded Sara Castle, a former nursing student, \$450,000 in damages in a whistleblower lawsuit. When Mrs. Castle was thrown out of nursing school just 13 weeks before graduating, she felt humiliated. She believed that the students in the nursing school weren't getting the clinical training they needed. This was because an instructor repeatedly dismissed students early—a practice Mrs. Castle exposed—and the teacher was subsequently fired. But Mrs. Castle was

then dismissed as a student by Appalachian Technical College and she contended was expelled because she had blown the whistle.

The jury found for Mrs. Castle and awarded \$450,000 in damages with \$50,000 of the amount being punitive. While the 55-year-old never finished her degree, she says telling the college administration what was happening was the right thing to do. Mrs. Castle said she and other students would arrive for clinical training early in the morning, but by 8 a.m., the instructor would dismiss the students. A total of 740 hours of hands-on training is required for a degree. According to Mrs. Castle, meeting that requirement would have been impossible based on the instructor's actions.

Mrs. Castle said she and her husband had moved to Jasper so she could attend the college and "pursue her dream of being a nurse." With their children grown, she felt the time was right for her to go back to school. This was a situation when a person saw a wrong and reported it—was punished for reporting—and was ultimately compensated for doing the right thing. Unfortunately, her dream of becoming a nurse was derailed.

Source: Atlanta-Journal Constitution

### **FDA REQUIRES FASTER FOOD SAFETY REPORTING**

A new rule promulgated by the Food and Drug Administration will require food makers to alert government officials of potentially contaminated products within 24 hours. The new rule is designed to help federal regulators spot food safety issues sooner. The FDA announced a new electronic database last month where manufacturers must notify the government if they believe one of their products is likely to cause sickness or death in people or animals. Regulators said the database will help the FDA prevent widespread illness from contaminated products and direct inspectors to plants that pose a high

safety concern.

The law creating the database was passed in 2007, after Congress criticized the FDA for its handling of safety problems with a range of foods and drugs. The FDA has had all sorts of problems since then trying to manage a number of food-safety recalls, including national outbreaks of salmonella. President Barack Obama has pledged to improve the safety of the nation's food supply and that's good news. Hopefully, this new rule will benefit regulators in their efforts to improve our food safety system.

Source: Associated Press

### **RECORDED TELEMARKETING CALLS ARE NOW ILLEGAL**

Hopefully, all of us will be getting a lot fewer of those pre-recorded telephone marketing calls in the future. These calls pitching everything from car insurance to debt consolidation services have become a real nuisance. Starting on September 1, 2009, telemarketers will need advance written permission from consumers in order to solicit them through automated pre-recorded telemarketing messages, sometimes called robo-calls, the Federal Trade Commission said. Even people who have not signed up for the federal Do Not Call registry, as well as those who have done business in the past with the solicitors, are now protected from unwanted automatic calls. It should be noted, however, you still may get calls from traditional live telemarketers, unless you put your name on state or federal Do Not Call lists. After September 2<sup>nd</sup> if you get an illegal telemarketing call, contact the FTC at 877-382-4357 or go to [www.ftc.gov](http://www.ftc.gov).

## **XXII. RECALLS UPDATE**

Because of the large number of recalls that we are seeing, we are changing the format of the recalls

section of the *Report*. We will list recalls by subject and you can go to our Web site for more information. We will only list some of the major recalls issued in recent months. For more information on these recalls, please visit the new Recalls section of our website: [www.beasleyallen.com/recalls/](http://www.beasleyallen.com/recalls/). The list of recalls is set out below:

- Toyota Recalls Nearly 100,000 Vehicles
- Baby Jogger Recalls Strollers Due To Fall Hazard
- Window Shades And Blinds Are Recalled After 3 Strangulation Deaths
- Frigidaire And Kenmore Smoothtop Electric Ranges Recalled Due To Fire Hazard
- Maytag Recalls More Refrigerators
- Simplicity Bassinet Recall Re-Announced After Two More Infant Deaths
- Recall Durabrand DVD Players Recall Is Expanded
- OfficeMax Recalls Office Chairs Due To Fall Hazard
- Kellogg's Recalling Two Types Of Eggo Waffles
- California Firm Recalls Spinach After Salmonella Found

Please let us know how this approach works. We need your input.

## **XXIII. FIRM ACTIVITIES**

### ***NO AUBURN RECEPTION THIS YEAR***

For a number of years our firm has sponsored a pregame reception at Auburn University during the football season. The reception would alternate between the Georgia and Alabama games and was held each year at the Convention Center. We have really enjoyed putting these receptions on

and they were lots of fun. But we have reluctantly decided not to have the reception this year for a number of reasons. The game will be played on the Friday after Thanksgiving and we felt that isn't a good time for the reception since many fans will be spending the holidays with their families. The game will be on CBS with a 1:30 p.m. starting time. So there will be no reception this year prior to the Auburn-Alabama game.

### **SENATOR SHELBY WILL BE A FEATURED SPEAKER AT ANNUAL RETREAT**

Senator Richard Shelby has agreed to be a featured speaker at our firm's annual retreat for Alabama lawyers which will be held in Montgomery on November 20<sup>th</sup> and 21<sup>st</sup>. The Alabama Senator will speak on Saturday morning. Last year over 1,000 Alabama lawyers attended the two-day retreat.

### **EMPLOYEE SPOTLIGHTS**

#### **STEPHANIE WALL**

Stephanie Wall, who will soon have been with the firm for two years, is a Clerk in the Personal Injury Section. In this position, she assists the Legal Assistants and Legal Secretaries in this section with trial prep and file management. She also orders and tracks medical records for Mesothelioma cases. Stephanie previously worked for the State of Alabama in the Unemployment Unit where she had a wide range of job duties. She has been married to Todd Wall, who works as a Database Administrator in our Information Technologies Department, for 2½ years. They have three children: Christopher, 21 years old; Alex, 17 years old; and Casey, 13 years old. They also have one granddaughter, Shelby, who is three years old.

Stephanie graduated Magna Cum Laude from South University with an associate of science degree in Paralegal Studies. She is currently studying so she

can obtain a Legal Assistant Certification. Stephanie is a member of the National Association of Legal Assistants and the Spina Bifida Association of Alabama. She enjoys spending time with her family, teaching her boys how to cook, riding four-wheelers, watching movies and playing board games. Stephanie works hard and is a very good employee. We are fortunate to have her with us.

## XXIV. SPECIAL RECOGNITIONS

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### **MAYOR TODD STRANGE DESIGNATES CHILD PASSENGER SAFETY WEEK**

Montgomery Mayor Todd Strange proclaimed September 12<sup>th</sup>—18<sup>th</sup> as Child Passenger Safety Week. This was in conjunction with a national campaign. In his work as a product liability lawyer for our firm, JP Sawyer has seen far too many instances of children injured or killed in vehicle accidents because they were not properly secured. Even if child safety seats were present, many times even the best-intentioned parents do not properly install them, rendering them ineffective, with tragic results. JP's goal was to raise awareness of this important issue by partnering with the City of Montgomery to recognize Child Passenger Safety Week. Mayor Strange presented JP with a proclamation to this effect. JP had this to say:

*It is tragic to talk to people who thought they were doing a good thing, that they were doing the right thing, by buckling up their children in safety seats. Then they find out that the seats weren't installed properly, and they blame themselves if their child is injured.*

All 50 states, the District of Columbia and our territories have laws requiring the use of child safety seats, booster

seats and seat belts for children traveling in motor vehicles. These laws were enacted because of the tremendous safety benefits they provide, helping to save lives and prevent serious injuries in the event of a crash. However, three out of every four child restraints are not properly used.

During National Child Passenger Safety Week, there were hundreds of free child seat inspection stations set up throughout the country. Hopefully, parents and caregivers took advantage of this service so their children can get the very best protection. For more information, visit [http://www.cdc.gov/motorvehiclesafety/child\\_passenger\\_safety/childseat-spot.html](http://www.cdc.gov/motorvehiclesafety/child_passenger_safety/childseat-spot.html).

### **SOUTHERN GOVERNORS TO WORK FOR ECONOMIC SUCCESS**

Governor Bob Riley has been elected as chairman of the Southern Governors' Association, which is made up of the Governors of 16 Southern states, and that's good news. These states—in combination—represent the world's third largest economy. Governor Riley plans to work together with other Southern Governors to use the Association's influence to promote and protect our mutual economic interests. I agree with Governor Riley that Southern Governors should use their collective influence to benefit our region, collaborate on economic development, and take part in ongoing discussions about federal policies. To learn more about the Southern Governors' Association and to watch Governor Riley's video statement, you can visit [www.southerngovernors.org](http://www.southerngovernors.org).

### **NATIONAL GUARD HEROES ARE HONORED**

Governor Bob Riley has presented the Alabama Commendation Medal to 47 Alabama National Guard soldiers whose quick, selfless actions saved a number of lives in July. The soldiers were on a bus returning to Alabama from drill at Camp Shelby, Mississippi

on July 12<sup>th</sup> when a bus in front of them carrying members of the First Baptist Church of Shreveport suffered a tire blowout and rolled over three times. As soon as they could, after stopping, the Alabama Guard members lifted the 30-passenger bus so trapped victims could be freed. The Guard members also directed traffic and provided medical assistance to the injured until local emergency personnel could arrive on the scene.

Part of the military training they had recently undergone included how to upright an overturned vehicle and provide emergency medical assistance. These soldiers from Detachment 1, 2101<sup>st</sup> Transportation Company are heroes and all Alabamians should be proud of them. Governor Riley had this to say:

*The terrorists we fight kill innocents. They don't save them. The terrorists have been taught there is a "right" way to die. We're taught that there is a right way to live.*

These Alabama National Guard troops will be deployed to Iraq early in 2010. Our prayers and support will go with them.

### **THE MONTHLY MESSAGE FROM STATE BAR PRESIDENT TOM METHVIN**

The following is the monthly message from Tom Methvin, who is serving as President of the Alabama State Bar Association.

### **Alabama Celebrates National Pro Bono Week**

*The Alabama State Bar will celebrate National Pro Bono Week, Oct. 25-31, 2009. This celebration recognizes the valuable work lawyers do throughout the year to represent those who cannot afford civil legal assistance. The event provides a time to reflect on this core value of our profession, celebrate the achievements of pro*

bono activities, and elevate them to even higher levels of service. This is a time to both educate the public about the pro bono services attorneys provide, and to celebrate those providing those services—Alabama lawyers.

Alabama was the first state in the nation to officially designate October 25-31, 2009 as Pro Bono Week, with a proclamation signed by Gov. Bob Riley.

Pro Bono work is a priority for the Alabama State Bar, and is accomplished through the Volunteer Lawyers Program (VLP). The VLP works to meet the needs of low-income Alabamians with the active participation of our members, who donate their time to ensure the underserved have equal access to justice. Our clients are low-income persons who cannot afford an attorney and who have a wide range of legal problems including consumer, domestic, housing, and probate matters.

As part of Pro Bono Week, the Bar set a number of goals designed to help those in need, to promote Volunteer Lawyer service to our colleagues in the legal community, to help increase funding for these services, and to raise public awareness of pro bono work.

Outreach activities will include a partnership with every circuit in the State, and all five law schools to provide pro bono services in their communities. VLP clinics will provide free legal services all over the state within the 60-day time-frame surrounding Pro Bono Week.

In addition to participating in hands-on service events, Bar members also will speak to members of the media, as well as to civic clubs and organizations, and Public Service Announce-

ments about Pro Bono Week will be broadcast throughout the state on television and radio. These efforts will help raise the profile of the legal profession by illustrating the good work attorneys do within the community, while helping to educate the public about the varied nature of pro bono work and the many people it serves.

The Alabama State Bar has set up a special web site with more information about plans for the National Pro Bono Celebration, including a calendar of events that will be taking place throughout the state. Visit us at <http://www.alabar.org/ProBonoWeek/index.cfm>.

Tom Methvin  
October 1, 2009

## XXV. FAVORITE BIBLE VERSES

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We didn't get many Bible verses for this month, but the two we did get are both good and most timely. My long-time friend Corky Hawthorne, a lawyer from Montgomery, sent in this verse:

*Do not let this Book of the Law depart from your mouth; meditate on it day and night, so that you may be careful to do everything written in it. Then you will be prosperous and successful. Have I not commanded you? Be strong and courageous. Do not be terrified; do not be discouraged, for the LORD your God will be with you wherever you go.*

Joshua 1:8-9

Mrs. Tara Davis, the wife of Artur Davis, sent a verse in this month. Tara says she relies on this verse to keep her grounded and motivated in her daily work.

*The King will reply, I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me.*

Matthew 25:40

## XXVI. CLOSING OBSERVATIONS

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### LAWYERS NEED ROLE MODELS, TOO

I am sure that most all of our readers have read Alabama native Harper Lee's classic novel *To Kill a Mockingbird* or perhaps some may have seen the play at the Alabama Shakespeare Festival based on her best-selling book. There were several fascinating characters in this book and one would be described as a role model. I read an interesting column recently by Rhea Grimsley Johnson in the *Montgomery Advertiser* which discussed one of these characters. This article made me realize that even lawyers need role models. The courage shown by Atticus Fitch, the fictional lawyer hero in the book, was exceptional to say the least.

I only wish that I had always had the sort of courage exhibited by Lawyer Finch in my life to stand up for right and justice regardless of the odds against me. Having grown up in rural Alabama at a time when few lawyers would have had the courage to take on a case such as the one Harper Lee wrote about, I can fully understand the extreme challenges Atticus Finch faced. Each of us who has chosen the Law as our field of work should reflect on how we would have reacted had such a case been put in our hands for a defense. Here is how Rheta wound up her excellent column:

*Atticus Finch has been a role model for a lot of us. ...He saw racism as a "sickness," which it is. And, by the way, it's still a sin to kill a mockingbird.*

Atticus Finch should serve as a role model for all lawyers in the United States—both young and old—as they take on just causes at times when the popular route would be to avoid taking a stand.

#### **MORE FROM DR. JOHN ED MATHISON**

The following is the third in the series by Dr. John Ed Mathison. Not surprisingly, we have received lots of good comments about the first two messages. I really appreciate John Ed taking time to do this for our readers.

#### **Catch It—Spread It**

*With the recent outbreak of Swine Flu, people are taking a lot of measures to keep from spreading that particular deadly disease. Here in the Montgomery area we saw high school athletic events cancelled, multiple instruction sheets from businesses and churches about how to avoid catching and passing on the flu, etc. Hopefully, it has been contained. It really got a lot of publicity and people expended a lot of energy to keep from catching it and spreading it.*

*There are also things for which we need to encourage an epidemic. We need to see that it could spread rapidly. This list could be almost endless. I would like to see a contagious outbreak of Christian commitment, Christian witness, church attendance, prayer, Bible study, etc. These would be excellent subjects for an epidemic. The big question is—Is there something about me that people ought to catch? What would happen to the gross national product in America if everybody caught my work ethic? What would be the trust level of people if everybody caught my core ethical values? What kind of atmosphere would pervade our country if everybody caught my*

*attitude? You can go on with the list.*

*There is one thing that I hope we can all catch. I learned it from a man whom I admire and serve with on the Board of the United Methodist Publishing House. His name is Dr. Robert Spain. He is a retired United Methodist Bishop and serves as chaplain to the Publishing House. He tells about his first pastorate in Shawnaatee, Tennessee. It was a small church in a rural area of Tennessee.*

*The real leader of the church was Mr. William Dixon—known affectionately as “Uncle Billy.” He was the patriarch of the community. Everybody loved him. Even though the church had elected officials, Uncle Billy really made the decisions. He made the announcements on Sunday mornings. He was quite elderly. He had one eye. He had lost one arm. When he prepared to make the announcements in church he would simply tuck the paperback hymnal under his arm, walk up, and start talking. Bob Spain said, “I learned to just sit down and let him say what he had to say.”*

*A mysterious illness began to spread among the people in Shawnaatee. People became seriously ill. A public health nurse came in from Knoxville to investigate. The nurse determined that the illness was due to the fact that people were all drinking from the same dipper on a well which was located between the school and town. Anyone who was thirsty would simply drop the bucket in the well, pull it up, use the dipper that was always there, and get a refreshing drink of water.*

*The nurse explained to Bob Spain that the illness was being passed on by people drinking from the common dipper. She asked for his help to inform the people and*

*stop this practice. In small rural towns in Tennessee, people don't take well to people from the “big city” like public health nurses, etc. Rev. Spain decided to ask Uncle Billy to help him tell the church. Uncle Billy agreed on Sunday morning to help spread the word. He encouraged people to quit drinking from the dipper at the well. He said this is where we are catching and spreading the illness. He pleaded with them to quit drinking from that dipper. They listened and obeyed.*

*Uncle Billy then tucked his paperback hymnal under his arm, knelt at the communion table, removed a white cloth from the communion elements, took the cover to one of the communion trays off, and took one of the little glasses out. He walked back and forth in front of the first row holding the cup, spilling some of the communion grape juice. He walked back and forth. He said to the people with intense emotion, “I plead with you that we all drink from this cup and catch what Jesus had.” Please drink from the cup and catch what Jesus had! This is what we need to catch—what Jesus had. We need to spread it. Let's start an epidemic!*

*John Ed Mathison  
October 1, 2009*

## **XXVII. PARTING WORDS**

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My good friend Chette Williams, who serves as the Chaplain for the Auburn University football team, sent in some good news recently. On the second Wednesday of this month, students around the country will get together on their school's athletic field to hear fellow students share their testimonies and challenge each other to read the Bible and to come to faith in Jesus

Christ. The Josiah challenge is based on the following:

*The king stood by his pillar and renewed the covenant in the presence of the LORD—to follow the LORD and keep his commands, regulations and decrees with all his heart and all his soul, and to obey the words of the covenant written in this book.*

*2 Chron 34:31*

I find that most folks who don't have a connection to the FCA have never heard of the Josiah Challenge and that's certainly understandable. According to Chette, this challenge is for students to: read the Bible; share the personal impact of the Bible; challenge each other to read the Bible; and challenge each other to commit to Jesus Christ.

Since 2004, more than 200,000 students have gathered to hear Josiah's challenge and take a stand. You can go to [www.FieldsofFaith.com](http://www.FieldsofFaith.com) to learn

more about Josiah's challenge and how you can help. You might also want to support the FCA in its overall mission. I can think of no better group to support than the FCA. It is taking the Gospel message to our young people and that's good news! To learn more about the FCA, go to [www.FCA.com](http://www.FCA.com).

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