



THE
JERE BEASLEY REPORT JANUARY 2010

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I. CAPITOL OBSERVATIONS

CLIMATE CHANGE AND THE SPECIAL INTERESTS

It is simply amazing that the leadership of the National Republican Party and a number of special interests refuse to acknowledge climate change as being a most serious threat for all nations. It is especially troubling to hear persons who aspire to hold high office on the national level in this country, and who don't have a clue, join the naysayers. We cannot afford to ignore this mounting problem any longer and must take all steps necessary to reverse the effects of climate change that have already occurred and then work toward solving the problem for future generations.

INSURANCE COMPANIES AND BIG PHARMA

As the debate in Congress gets down to the lick-log it is quite evident that the insurance and pharmaceutical industries have worked hard to protect their turf and have shown no real concern for the millions of American citizens who have no health insurance. Neither do these powerful industries care about the unreasonably high costs of health care in this country. At the outset of this debate, I felt that the two objectives for real reform had to be availability of health insurance and reducing health care costs for all Americans. But those priorities haven't registered with the lobbyists for these two powerful special interests. The Senate and House have passed separate bills that will be worked out in a conference committee. Hopefully, the final health care bill that goes to the President for his signature will be real health care reform, and not just a bill that benefits the insurance industry and big Pharma. If that happens it will be a tremendous accomplishment for the President and Congress.

PUBLIC CITIZEN WORKS HARD FOR CONSUMERS

Public Citizen has been working hard for consumers on many fronts, including health care and related issues. It's critically important to have reliable information about the prescription drugs you and your loved ones take. When it comes to your health, it's what you don't know that can hurt you. Public Citizen has fought over the years to help consumers. When you consider the following, it's obvious folks need help in the ongoing battle to make the pharmaceutical industry do right.

- 100,000 people die each year from adverse drug reactions from marketed drugs and another 2 million people are seriously injured, with 1.5 million of those requiring hospitalization.
- Last year the drug industry gave over \$500 million to the drug division of the Food and Drug Administration as "user fees," most of which paid for the cost of reviewing new drugs. This is an obvious conflict of interest and shouldn't be tolerated.
- Since the Congressionally-mandated "user fees" were put into place in 1992, the FDA has approved a record number of unsafe drugs that it later had to pull from the market. In fact, Public Citizen research published in the *Journal of the American Medical Association* has shown that one in five new drugs is found to have a significant safety problem after it has been approved.

For almost forty years, Public Citizen has been actively using the courts, government agencies and Congress to protect you from greedy drug companies that are exploiting consumers in order to maximize their profits. The consumer advocacy group has been:

- Fighting for consumers at the FDA to keep dangerous drugs off the market. For example, Muraglitazar—a new diabetes drug—was being pushed hard by two drug companies for FDA approval. Public Citizen argued in front of an FDA advisory committee

that the drug had modest effects and was associated with an increase in heart-related deaths. Although the FDA initially approved the drug, it was later rejected after a leading cardiologist made arguments similar to those of Public Citizen.

- Testifying at FDA advisory committee meetings to urge warnings or bans for dangerous drugs. Representatives of Public Citizen have testified before two FDA committees reviewing the effectiveness of cough and cold medications for children. To date, no manufacturer will advise against the use

IN THIS ISSUE

I.	Capitol Observations	2
II.	Drug Manufacturers Fraud	4
	Litigation	
III.	Purely Political News & Views	5
IV.	Legislative Happenings	5
V.	Court Watch	7
VI.	The National Scene	8
VII.	The Corporate World	8
VIII.	Congressional Update	10
IX.	Product Liability	11
X.	Mass Torts Update	14
XI.	Business Litigation	16
XII.	An Update on Securities Litigation	17
XIII.	Insurance and Finance Update . . .	17
XIV.	Employment and FLSA Litigation . .	19
XV.	Premises Liability Update	20
XVI.	Workplace Hazards	22
XVII.	Transportation	23
XVIII.	Healthcare Issues	25
XIX.	Environmental Concerns	25
XX.	The Consumer Corner	28
XXI.	Recalls Update	30
XXII.	Firm Activities	36
XXIII.	Special Recognitions	37
XXIV.	Favorite Bible Verse	38
XXV.	Closing Observations	38
XXVI.	Parting Words	39

of these medications for children under the age of four. Public Citizen contends the drugs have no proven effectiveness for children under 12. A formal government ban is needed and Public Citizen is fighting to get that done.

- Formally petitioning the FDA to ban dangerous drugs, and warning consumers not to use them well before the FDA finally takes action. Below are some of the drugs Public Citizen has warned readers about in *Worst Pills, Best Pills*:
- VIOXX (rofecoxib). In April 2001, Public Citizen issued a DO NOT USE warning. VIOXX was finally removed from the market in September 2004—more than three years later.
- BEXTRA (valdecoxib). When VIOXX was removed from the market, Public Citizen issued a DO NOT USE warning for another NSAID, BEXTRA, because of serious safety problems. In April 2005, Public Citizen petitioned the FDA to ban the drug and then the manufacturer agreed to stop marketing the product and recommended that patients stop taking it.
- Using the court system and the Freedom of Information Act to force the FDA to make important drug safety and effectiveness information more available to the public, and filing suit to force the FDA to take dangerous drugs off the market.
- Pushing the Senate Health, Education, Labor and Pension (HELP) Committee to increase oversight of the FDA, including hearings on the safety of the FDA's drug approval process. Public Citizen is also helping other Congressional committees, such as the Committee on Oversight and Government Reform and the Committee on Energy and Commerce, to do more oversight of the FDA.

I encourage our readers to support the work of Public Citizen—the research that allows the group to produce *Worst Pills, Best Pills* and other vital reports—and their watchdog activities that continue to expose

the influence of special interests in Washington. You can help Public Citizen by sending a generous contribution and help them in their fight for safer drugs at the FDA, in the courts and in Congress. Your financial support will help this group fight important issues that affect your daily life, like drug safety, a disastrous energy policy that protects the interests of the energy industry over consumers, and the corporate crime wave sweeping Wall Street that affects America's financial stability and much more. Please help Public Citizen fight for corporate and governmental accountability. It's good to know that Public Citizen does not accept donations from corporations or the government which keeps them independent and free to do the right thing for the American people.

Source: Public Citizen

A MOST INTERESTING ALLIANCE

A fascinating story on the 40-year alliance between Paul Hubbert and Joe Reed appeared in *The Montgomery Advertiser* last month. Having known Paul and Joe for a long time, I can say based on first-hand experience that they have made a very good team. I believe that AEA has been good for Alabama teachers and also good for education in our state. I consider both of these men to be my very good friends and I appreciate what they have done over the years. It's sorta interesting to see politicians taking shots at these two men, especially at Paul.

Even Paul's public detractors, on occasion, privately have asked for his political help. I never have understood that sort of thing, but maybe it's the way politics works these days. Personally, I would rather have the AEA membership in my corner than against me if I became interested in seeking a statewide political office. I also believe that if our elected officials over the years had worked as hard and been as successful in their jobs as Paul has been in his vocation, our state would be much better off today than it is.

ARTUR DAVIS FILES THE MAIN STREET SURVIVAL ACT

Artur Davis has introduced a bill in Congress that would use leftover TARP money to help Alabama businesses survive. The bill—H.R. 4340, the “Main Street Survival Act”—would establish a \$1 billion revolving loan fund for small and mid-sized businesses that are struggling to obtain credit in the aftermath of the recession. The bill would seed the fund with left over dividends from the TARP program. The fund would be administered by the Department of the Treasury. The Congressman issued the following statement:

As the House adjourns for the year, not nearly enough has been done to protect jobs in the midst of the highest unemployment in 26 years. While I voted today for a bill that will extend unemployment benefits and health insurance for laid off workers, it is not sufficient to expand the safety net—we need to save jobs and we need to acknowledge that the same banks who received vast government assistance are still not lending to small and mid-sized businesses. If this revolving loan fund had been in place last summer, Meadowcraft in Selma might have survived and New Era Cap Co. in Demopolis might have a lifeline.

I recognize that some of my colleagues prefer to use leftover TARP money as a rainy day fund for big banks. In my opinion, that would only spur banks to resume the careless lending and investment practices that almost wrecked our economy. Some argue that the funds should be used for deficit reduction, a much more worthy idea. But the reality is that a significant chunk of the TARP dividends should be devoted to the purpose that TARP was meant to serve—the survival of deserving businesses who are in danger of shutting their doors and the protection of jobs.

H.R. 4340 will limit eligibility to businesses that employ fewer than 1000 workers and whose current financial condition makes it likely that they will have to make layoffs. Eligible businesses will also have to demonstrate an ability to repay the loan. A business may use the funds to finance the cost of operations, but may not use the funds to expand operations. The maximum loan amount would be \$1 million, in aggregate, in any fiscal year and the duration of the revolving loan program would be three years from the enactment of the Act. The bill should be passed without delay so that small businesses can get some badly-needed help. If you agree, contact other members of the House as well as your U.S. Senators and ask them to support the bill.

II. DRUG MANUFACTURERS FRAUD LITIGATION

AN UPDATE ON THE MEDICAID FRAUD LITIGATION

As we have previously reported, our firm currently represents seven states where we have pending Medicaid fraud lawsuits. Additionally, there are several other states with whom we are consulting on issues relating to this ongoing litigation. Interestingly—and contrary to the drug manufacturer's expectations—the much-criticized Alabama Supreme Court opinion on the Medicaid fraud issues (currently on rehearing) has fallen on deaf ears in other state and federal courts. Thus far no state or federal court has given any deference at all to the Alabama opinion. In fact, one state court judge commented:

Does it appear that the Alabama Supreme Court basically substituted its judgment for that of the jury on the factual issues?

Comments by Judge Roger L. Crittenden, Franklin Circuit Court in Kentucky as he disregarded the

Alabama opinion and affirmed a verdict against Sandoz, Inc., for \$27.7 million for the State of Kentucky. (October 2009)

In the State of Hawaii, Defendants Sandoz, Inc. and Watson both argued that the Alabama Supreme Court decision should be considered and asked the trial judge to dismiss the State of Hawaii's claims based on the Alabama Supreme Court's decision. But the judge disregarded its opinion in its entirety and denied both the Defendants' motions for summary judgment, giving no deference at all to the Alabama Supreme Court opinion. The story is much the same in the federal court cases. No trial court, no appellate court, and no judge in this country has found any redeeming quality about the Alabama Court's opinion. In fact, all have criticized it and disregarded it for good reason. Perhaps on rehearing the Justices on the Alabama Supreme Court will correct the actions they have taken.

So, the Medicaid fraud march continues. We have trials set in the State of Hawaii in January with GlaxoSmithKline and Novartis. We have a trial in the State of Kansas against AstraZeneca, Aventis and the Boehringer Ingelheim Companies in May 2010. We have another trial in the State of Hawaii against Mylan Pharmaceuticals in June of 2010 and in the State of Mississippi we have Watson, Sandoz, Abbott, Mylan and Forest set for trial in December 2010. Other trial dates will be set in the States of Alabama, Alaska, South Carolina, and Utah.

On the settlement front, we have recently aided Mississippi Attorney General Jim Hood in settling with drug manufactures Baxter, Boehringer Ingelheim and Amgen/ImmuneX for over \$13.4 million dollars. This brings Mississippi's total settlement amount to date up to \$28.4 million dollars. We are continuing to pursue other settlements with drug companies in the State of Mississippi.

There are other settlement discussions pending in other states that are not yet ripe for public announcement.

We will keep our readers posted on any settlement news as it takes place.

It is most unfortunate that the people of the State of Alabama have to witness other states refill their coffers with settlement funds as a result of fraudulent conduct by the pharmaceutical industry and realize that our Supreme Court has sided with the drug companies. That meant Alabama didn't receive some \$274 million for its starving state budgets. This missed opportunity will only worsen in our state unless the Justices withdraw the current opinion and issue an opinion affirming what three juries have already decided—that Alabama is owed \$274 million dollars by pharmaceutical companies AstraZeneca, GlaxoSmithKline, and Novartis. I ask this question: how can the conduct of a drug company like AstraZeneca be considered fraud in the criminal courts and it not be civil fraud in Alabama? Do you believe a company that was not guilty of Medicaid fraud would plead guilty and pay a fine to the federal government of \$570 million?

CALIFORNIA SETTLES \$21.3 MILLION MEDICAID FRAUD SUIT WITH SCHERING- PLOUGH

California Attorney General Edmund G. Brown Jr. announced a \$21.3 million settlement last month with Schering-Plough Corporation, resolving allegations the giant drug manufacturer "deliberately inflated" the price of Albuterol and other drugs, causing California's Medicaid (Medi-Cal) program to overpay millions of dollars in pharmacy reimbursements. Albuterol is a widely-prescribed generic drug, delivered through inhalers, nebulizers and masks, and is used to treat asthma and other breathing problems. Attorney General Brown had this to say:

With healthcare costs spiraling out of control, it's unconscionable that a Fortune 500 pharmaceutical company deliberately inflated its drug prices to cheat California's public healthcare system out of millions of dollars. This is a company that made more than \$12 billion in profits last year; yet

still raided the pockets of California taxpayers.

The settlement stems from a lawsuit filed in California against several pharmaceutical companies accused of Medicaid fraud. California's case is still pending against Dey, Inc., Mylan Pharmaceuticals, Inc., Sandoz, Inc. and their parent companies. Schering-Plough recently merged with Merck, and is now known as Merck & Co. California's \$21.3 million agreement is one of three settlements negotiated with Schering-Plough, collectively totaling \$69 million, over falsely-inflated drug prices. Schering-Plough also reached settlements with Florida and the federal government, the latter for approximately \$44.5 million.

The California settlement resolves allegations that Warrick Pharmaceuticals, a subsidiary of Schering-Plough, deliberately inflated the Average Wholesale Prices it reported to the state for Albuterol. Medi-Cal sets the reimbursement rates for pharmacies for many of the drugs dispensed to Medi-Cal patients based on the AWP's reported by drug manufacturers. California pharmacies dispensed Albuterol to patients and were then reimbursed by Medi-Cal. By reporting falsely inflated AWP's, a number of drug manufacturers caused Medi-Cal to overpay millions of dollars in pharmacy reimbursements.

If this story sounds familiar, it should because the fraud in California is identical to the fraud committed by the drug companies in Alabama. The citizens of our state and maybe even Justices on our state's Supreme Court must be wondering why a drug manufacturer would be paying \$21.3 million for fraudulent conduct if they weren't guilty of fraud. They might also be asking how can conduct by a drug manufacturer constitute fraud in California, but not in Alabama?

Source: California Attorney General's Office Press Release

III. PURELY POLITICAL NEWS & VIEWS

LOOKING AHEAD TO THIS YEAR'S POLITICAL CAMPAIGNS

I hope all of the early campaigning last year by the candidates who will be running this year hasn't worn out the public. I have never seen campaigns get kicked off so early, but that seems to be the way things are done these days. Most folks are probably like me and would like to see the length of campaigns reduced sharply. In any event, you can rest assured that things will really start to get hot this month. I hope and pray that the candidates and their advisors will keep things civil and on a high plane.

MITT ROMNEY ENDORSES KAY IVEY FOR ALABAMA GOVERNOR

This may be old news, but former Massachusetts governor and Republican presidential candidate Mitt Romney endorsed State Treasurer Kay Ivey in her race for Governor. Romney believes Kay has the experience and vision to do a good job as Governor. He also believes she has stayed true to her conservative principles as state treasurer. As you may recall, Kay served as Romney's Alabama campaign chairwoman during the 2008 Presidential race. I am not sure how much weight this endorsement will have in the race, but coming from a national political figure, it is significant.

GEORGE WALLACE JR. IS RUNNING FOR STATE TREASURER

Most Capitol Hill insiders were surprised that George Wallace Jr. has decided to get back into the political arena. But politics is in his blood, and for that reason, I wasn't too surprised when George announced his decision to run for State Treasurer. George served two terms as Treasurer and also served on the Public Service Commis-

sion and he did a very good job in both offices. He is concerned about the fate of the state's Prepaid Affordable College Tuition (PACT) program and says he "doesn't want to be a spectator in ensuring the future of the program." I suspect that was a strong motivation for George to get in the race. As State Treasurer, he helped create the program, and he believes the state should honor the PACT contracts with Alabama families and so do I.

SUSAN PARKER DESERVES A SECOND TERM ON ALABAMA'S PUBLIC SERVICE COMMISSION

Public Service Commission member Susan Parker is seeking re-election to a second term. The Democratic commissioner launched her campaign on December 17th. Susan has worked to educate consumers about energy efficiency and lowering utility bills, but there is more she wants to do in a second term. Susan has developed a good name outside Alabama during her first term. She is president of the Southeastern Association of Regulatory Utility Commissioners, and she was recently elected second vice president of the National Association of Regulatory Utility Commissioners. Susan is in line to be president in 2012. In my opinion, Susan Parker has done an outstanding job for the people of Alabama during her first term on the PSC and deserves a second. She is a good commissioner and an even better person.

Source: Associated Press

IV. LEGISLATIVE HAPPENINGS

THE 2010 REGULAR SESSION WILL BE A ROUGH ONE

Joyce Bigbee, Alabama's Legislative Fiscal Office director, has warned lawmakers that the state's General Fund for fiscal 2011 could be down 31%. The director predicted spending by the state's Education Trust Fund, including

federal stimulus money, in fiscal year 2011 should be about even with spending this year, but her prediction for the state General Fund, a major source of money for Medicaid, prisons and other non-education state spending, was much worse. As you probably know, fiscal 2011 year for state government starts October 1, 2010.

Director Bigbee predicted that spending in fiscal 2011 for the General Fund would total \$1.45 billion. This would include federal stimulus money. The General Fund budget would have a reduction of \$642 million, or 31% from this year's combined spending. A big reason for the drop is that the state will already have spent most of its federal stimulus money available for non-education operating expenses.

Education Trust Fund spending, with federal stimulus money, should be \$5.59 billion in fiscal 2011, a decline of about \$33 million or less than 1% from this year's combined spending. The Education Trust Fund is the main source of state money for public schools, colleges and universities.

State School Superintendent Joe Morton has told lawmakers in the budget hearings that as many as 3,543 teaching positions could be eliminated in the next school year unless K-12 public schools get an extra \$235 million over the past year's budgeted spending. There are currently about 48,500 state-funded teachers in Alabama public schools. This is just one of the many fiscal problems facing Governor Riley and the Legislature.

It is being predicted by some that the General Fund could see a 30% cut in many of the agencies funded from that source. It's likely Governor Riley will declare proration in the General Fund budgets, which is something that hasn't happened in years. The members of the House and Senate had better fasten their seatbelts—they are in for a very rough ride!

Source: Birmingham News

ROADS PROGRAM PROPOSED FOR STATE

Democrats in the Alabama Senate want to take \$1 billion from a state

savings account and spend it on road and bridge construction. Members of the Senate Democratic Caucus will make the proposed constitutional amendment a priority in the legislative session which begins this month. In my opinion, this proposal has merit. Hopefully, bi-partisan support will develop and make it possible so that the proposal will become a reality for Alabama citizens. Spending \$100 million per year from the Alabama Trust Fund for ten years will not only create jobs, it will also make our highways safer.

Source: Associated Press

A LOOK AT THE EDUCATION FUNDING PROBLEM

I have tremendous respect for my good friend Dr. Gerald Johnson. Recently Gerald wrote an op-ed piece that appeared in the *Birmingham News*. He really hits the nail on the head in his analysis of our education funding woes. I am including what he wrote in its entirety.

No Easy Fix For Education Funding Holes

After some 40 years of observing Alabama public education policy and budgetary processes and outcomes, I continue to be perplexed by the simplistic editorial prescriptions offered to solve the state's continuing education budget problems. The latest version is the December 7th Birmingham News editorial on "wobbly" education budgeting. The News' editorial authoritatively stated that, "There's no excuse for not finding a better way, particularly when the better way already exists: building budgets based on trends that already happened, rather than trends that may not." According to The News, the better way is to base the education budget on Republican Rep. Greg Canfield's model of average expenditures over the past 15 years and place the "extra" money in good years

in a savings account for lean years.

The Canfield model is based on the premise that, if the education budgetary process could be made more predictable, the state's education budget problems would be solved. I suggest just the opposite. Not only would the budget problems not be solved, they would be worse. The proposal is a prescription for mediocrity. Let's quickly dismiss the part of the proposal that calls for saving "surplus" money in good years to help in lean years. The state already does this in the form of several "rainy-day" funds. These funds have provided hundreds of millions of dollars over the past two years to reduce the impact of the current hard times. But, they didn't solve the problems.

The budgetary process is not the problem. If so, the lengthy list of budgetary process reforms which I taught over the years, including zero-based, program, incremental, line-item, program planning budgeting systems and "voodoo" budgeting, would have long since solved the problems. Changes in the budgetary process will not address the real budgetary problems—inadequate funding and an unfair and unproductive tax structure. Any reform proposal should, first of all, do no harm. This proposal will do harm. Assuredly, had average expenditures been applied over the past 10 years, there would be no Alabama Reading Initiative, Math Initiative, lower class size, significant salary increases, cost-of-living adjustments, classroom supply funds or any other initiative that could only be funded in the good years. Take the good-year funding away and you have a formula for mediocrity.

If you just run the expenditure and revenue numbers for the period from fiscal year 1994 to fiscal year 2008, the proposed

average expenditure model beats inflation by \$10.52 billion while the current revenue model beats inflation by \$13.22 billion, a loss of \$2.7 billion. In just the previous four years, education would have received \$2.4 billion less. That is five times the amount spent on the reading and math and science initiatives, and more than the federal stimulus stability dollars. Even worse, under the expenditure proposal, there is the possibility federal stimulus dollars would not be available to help distressed schools, because the funding caps would require the dollars to be set aside and the federal dollars would be lost, costing the Education Trust Fund an additional \$1 billion.

Yes, as The News' editorial said, "There's no excuse for not finding a better way, particularly when the better way already exists." A better way does exist, but it is certainly not the average expenditure model. We all know the better way. But the better way is the road less traveled and the more difficult. Thus, editorial boards muse in the abstract about changes in process, not substance, and endorse simplistic proposals, not solutions. Until the better way is achieved, the bailing wire, gum and glue, patchwork, feast-and-famine approach does the least harm and provides for some real progress.

Source: Dr. Gerald Johnson, *The Birmingham News* December 20, 2009

V. COURT WATCH

COURT WON'T DISTURB \$82.6 MILLION AWARD IN SUV ROLLOVER

The U.S. Supreme Court has left in place an \$82.6 million award to a woman who was paralyzed after her Ford Explorer rolled over. The Justices rejected Ford Motor Co.'s challenge to

the punitive portion of the damages award, which was \$55 million. Ford argued that it should not be punished because its design of the vehicle met federal safety standards. A California state appeals court earlier rejected Ford's contention and upheld the award to Ms. Benetta Buell-Wilson.

Ms. Buell-Wilson was driving on an interstate near San Diego in January 2002 when she swerved to avoid a metal object and lost control of her 1997 Explorer, which rolled four and a half times. The mother of two was paralyzed from the waist down when the roof collapsed on her neck, severing her spine. A jury initially awarded Ms. Buell-Wilson \$369 million, including \$246 million in punitive damages, but courts twice cut the size of the award. The jury concluded that Ford knew the Explorer had design defects that made it prone to rollovers in emergency maneuvers and that the vehicle's roof would collapse.

Source: Associated Press

ALABAMA CITIES SUING INTERNET TRAVEL FIRMS

Nine Alabama cities, including the state's largest city, Birmingham, have filed a lawsuit saying Internet travel companies have underpaid lodging taxes by millions of dollars. The lawsuit filed in Jefferson County Circuit Court, alleges that Orbitz, Expedia, Travelocity and Priceline have been paying tax on rooms based on the wholesale rate they pay hotels and should be paying the retail rates they charge customers. In addition to Birmingham, the other cities are Huntsville, Decatur, Auburn, Madison, Anniston, Opelika, Fairhope and Gulf Shores. The Birmingham-Jefferson Civic Center Authority is also among those who brought the suit.

Source: *Montgomery Advertiser*

COURT REFUSES TO REVIVE GUN LAWSUIT

The U.S. Supreme Court has turned away a new challenge to a 2005 law that gives gun manufacturers immunity from lawsuits by shooting victims. The Justices refused to hear an appeal from

Hector Adames Jr. to revive his lawsuit against the Beretta U.S.A. Corp. over the accidental shooting death of his 13-year-old son. The Illinois Supreme Court threw out the lawsuit, citing the federal 2005 Protection of Lawful Commerce in Arms Act.

Adames' son, Josh, was shot and killed by a 13-year-old boy, who found his father's Beretta and removed the magazine containing the ammunition. He pointed the gun at Josh and pulled the trigger, not knowing that a bullet remained in the chamber. Adames sued Beretta, alleging that the gun did not have the proper warnings or a safety mechanism that stops the gun from being fired without the magazine in place.

Source: Associated Press

PUBLIC JUSTICE JOINS IMPORTANT LAWSUIT

Public Justice has joined a critically important New York case that could have a dramatic impact on consumer safety. The issue in the case (*Wallace v. York International*) is whether a product manufacturer or seller has a duty to warn about all of the dangers of its product, including the dangers of component parts that it knows will be installed on its product by others. The Defendant claims it has no duty to warn about dangerous component parts that it knows will be installed on its products. Public Justice in an amici brief says that such a duty does—and must—exist.

The lawsuit was filed on behalf of a man who died from exposure to asbestos that was installed in an air conditioning unit manufactured by York International. A \$5 million verdict was returned in his case on the ground that York should have foreseen that its air conditioning units were being used, or would be used, with the ultra hazardous, asbestos-containing insulation pervasively used at the time. On appeal, York is contending that it had no duty to warn about any dangerous components installed on its product by third parties, regardless of whether the use of the hazardous component was foreseeable.

Under existing law in most states, manufacturers have a duty to warn about dangerous components that it knows could be installed on its products by third parties. If York has its way, product manufacturers would be able to avoid liability for failing to warn of the full dangers of their products—the dangers posed by components it knows will be installed by others. Not only would such a ruling have a terrible effect on victims' rights in New York State, but it could potentially spread to other states that recognize a duty to warn under such circumstances.

The amici brief, which was filed on December 2, 2009, on behalf of Public Justice, the American Association for Justice, and the New York State Trial Lawyers Association, was principally authored by Jeffrey R. White of the Center for Constitutional Litigation, with input from Public Justice Staff Attorney Leslie Brueckner.

Source: Public Justice Foundation

MIAMI WOMAN WHO SUED EMPLOYER OVER JURY DUTY IS AWARDED \$150,000

A Miami-Dade jury awarded security guard Jackalyn P. Strachan \$150,000 in damages recently in a lawsuit against her employer. The jury found that a Miami security firm, Hall Investigation Service, wrongfully denied wages and fired Ms. Strachan for serving as a juror in a murder trial in April 2007. The jury is a fundamental part of what makes the U.S. judicial system work. No employer should keep an employee from serving on a jury. Serving on a jury is an important duty of citizenship and one that all of us should take seriously.

Mrs. Strachan, 57, was a longtime Hall security supervisor. In April 2007, she was stationed at the Dr. Martin Luther King Jr. Plaza office building when she told company owner Arthur Hall about the jury summons. Hall became angry and told his employee she should skip court for work. Ms. Strachan served three days on the jury that convicted a man of murder for fatally beating a homeless man with a tree branch.

The trial judge gave Ms. Strachan a letter vouching for her service, and also a copy of the county law protecting citizens who serve on juries. Hall still refused to pay the employee the \$400 in wages she should have earned during the three days of jury service. He later accused Ms. Strachan of fraud and threatened to report her to the Miami-Dade state attorney's office. The jurors in the case awarded the employee \$30,000 for lost wages and emotional distress, and \$120,000 in punitive damages. Michael Feiler, a lawyer located in Coral Gables, Fla., represented the Plaintiff and did a good job.

Source: *Miami Herald*

VI. THE NATIONAL SCENE

GOVERNMENT TO PAY \$3.4 BILLION TO SETTLE INDIAN TRUST LAWSUIT

The U.S. government will pay \$3.4 billion to settle a long-running lawsuit against the Interior Department for mismanaging the revenue in Native American trust funds. As part of the settlement, the government will pay \$1.4 billion directly to members of Indian tribes and establish a \$2 billion fund to buy land from Native Americans. The settlement also creates a \$60 million federal scholarship to improve access to higher education for Indian youth. U.S. Interior Secretary Ken Salazar, in announcing the settlement, said "We are here to right a past wrong." The settlement must still be approved by the U.S. Congress and the court.

Under the settlement, most of the 300,000 individual Indians who were part of the class action lawsuit would receive at least \$1,500 each. The Interior Department was sued 13 years ago for mishandling the revenue in Indian trust funds going back to 1887. The fund includes 10 million acres of land owned by individual Indians and 46 million acres belonging to Indian tribes.

Source: Reuters

VII. THE CORPORATE WORLD

IT PAYS TO BE A CORPORATE MONITOR

I have learned that some folks are doing very well serving as corporate monitors. I doubt that many of our readers even know what a "corporate monitor" is. I must confess that I didn't until just a few weeks ago. A corporate monitor is a person appointed by the Justice Department to oversee and enforce various deferred and non-prosecution agreements.

A number of persons have served as corporate monitors. A list of corporate monitors was recently published on the House Judiciary Committee's web site. Interestingly, that list didn't include the names of four persons who have been appointed since March of 2008. I understand at least two additional monitors will be appointed soon. The Government Accountability Office recently released a report on corporate monitors. The title of the report is "Corporate Crime: Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts."

The GAO found that there have been 45 monitors appointed. There has been some concern about the monitors' cost, scope and amount of work completed. The pay scale for this work is pretty good, even by corporate standards. Some companies paid \$8,000 a month for their monitors and others paid \$2.1 million per month. The GAO surveyed eight companies on the cost of their monitorships. These reported costs were: \$38.7 million; \$12 million; \$9.2 million; \$5.7 million; \$3.9 million; \$3 million; \$2.7 million; and \$200,000. That's a great deal of money. The Fraud Section at the Department of Justice "expects a work plan," when a monitor is appointed. According to a report in *Corporate Crime Reporter* the amount of fees disclosed may only be the tip of

the iceberg when it comes to the total costs of monitors.

Source: *Corporate Crime Reporter*

BAILOUT LOANS TO THE HARTFORD AND LINCOLN NATIONAL

A bailout watchdog says the participation of two big insurers in the \$700 billion financial rescue contradicted the goals of the government program. The inclusion of Hartford Financial Services Group Inc. and Lincoln National Corp. “was incongruous with the spirit and intent” of the bailout program, according to the report by Special Inspector General Neil Barofsky. The taxpayer investments in the two companies were supposed to be for “banking business.” Instead the money went to support their insurance businesses, not the small thrift institutions they acquired in order to qualify for the bailout.

The report illustrates that the amount of money they received from the government—\$3.4 billion for Hartford, which is based in Hartford, Connecticut, and \$950 million for Philadelphia-based Lincoln—was based on the assets of their parent insurance companies and “dwarfed” the size of the thrifts they acquired. It was stated further in the report that “treasury fit the enormous investments in these insurance companies, huge proverbial pegs, into the small round holes’ of eligibility for the bailout program.” It’s detailed in the report how six companies used \$81 billion in taxpayer money they received and whether they kept it separate from other company funds.

General Motors and Chrysler, for example, used large portions of the money to cover daily operating expenses like paying suppliers and meeting payroll. Only time will tell how ineffective the federal bailouts actually have been. I suspect that will take some time. I have to believe that our nation’s economy was saved.

Source: *Insurance Journal*

IT APPEARS GOLDMAN PLAYED MUCH LARGER ROLE IN AIG TRADES

The *Wall Street Journal* has reported that Goldman Sachs Group Inc. played a bigger role in fueling the mortgage bets that crippled American Insurance Group Inc. than has been publicly disclosed. An analysis by the paper of AIG’s trades on pools of mortgage debt reveals that Goldman was a key player in many of them, including those involving other banks. As you will recall, Goldman was one of 16 banks the U.S. government rescued last year after closing out losing trades that AIG had made with the financial firms.

The bank originated or bought protection from AIG on roughly \$33 billion of the \$80 billion of U.S. mortgage assets that AIG insured during the housing boom. That was about twice as much as Societe Generale and Merrill Lynch, the firms with the largest exposure to AIG after Goldman, according to an analysis of ratings-firm reports and an internal AIG document, as reported by the *Journal*. Goldman would act as the middleman between AIG and banks, taking billions in risk of the mortgage-related investments. It was reported that Goldman then insured the risks with a single trading partner, AIG.

The *Journal* reports that trades, mostly booked from 2004 to 2006, yielded less than \$50 million in profits for Goldman. But the trades added risks onto AIG’s books and later came to haunt the insurer and Goldman. The trades also gave Goldman a unique window into AIG’s exposure to losses on securities linked to mortgages. When the federal government bailed out the insurer, Goldman avoided losses on its trades with AIG covering a total of \$22 billion in assets.

A government audit in November on part of the AIG bailout described Goldman’s middleman role. The size of the government’s bailout of Goldman and the other AIG counter-parties has been very unpopular. It should be noted that Henry Paulson, the U.S. Treasury secretary, was a former Goldman chief executive.

Source: *Wall Street Journal*

CONGRESS SHOULD RESTORE THE WALL BETWEEN BANKING AND INSURANCE

Financial giants could be broken up under two bills introduced in the U.S. Congress last month. One of the bills has the backing of Senator John McCain. Both bills would reinstate the 1930s-era Glass-Steagall laws that barred large banks from affiliating with securities firms and engaging in the insurance business. Those limits were largely repealed in 1999, a high-water mark for deregulation. Senator McCain, who sponsored the bill with Democratic Senator Maria Cantwell, said in a statement:

It is time to put a stop to the taxpayer financed excesses of Wall Street. This country would be better served if we limit the activities of these financial institutions.

Passage of the Cantwell-McCain bill would force firms at the center of last year’s financial crisis—such as Goldman, Morgan Stanley, Citigroup, JPMorgan Chase and Wells Fargo—to spin off investment and insurance operations. A similar measure was offered by six House Democrats, including Representatives Maurice Hinchey, Peter DeFazio, Jay Inslee and John Tierney. The bills come as Congress debates a sweeping overhaul of financial regulation more than a year after the severe banking and capital markets crisis rocked economies worldwide.

Restoring Glass-Steagall should have broad appeal, but it may be difficult to win passage in the Senate. I have believed for a long time that it was a mistake to repeal Glass-Steagall. The Act was largely repealed in 1999 under the Gramm-Leach-Bliley Act as the result of intense lobbying pressure from bankers, including those wanting to merge the financial firms that later came to comprise Citigroup.

Today, supporters of stronger regulation of Wall Street and the banks say it is no coincidence that America has suffered a series of financial crises since deregulators gained the upper hand politically in Washington in the 1980s. Rep. Hinchey had this to say:

The repeal of Glass-Steagall has exposed the U.S. economy to a level of risk that is simply unacceptable. Congress ignored history in 1999 when it repealed the Glass-Steagall Act and the American people have been forced to pay the price while bailing out these mega-banks, which should have never existed in the first place.

The American people will benefit if Congress can withstand pressure from the lobbyists and pass this legislation.

Source: *Insurance Journal*

MERCER FACING \$2.8 BILLION LAWSUIT IN ALASKA

The Alaska Retirement Management Board has filed suit against Mercer, alleging that the human resources consulting firm made a number of errors in its work as the state's actuarial consultant. The Alaskan state agency, which is seeking \$2.8 billion in damages, has accused Mercer of making "multiple errors" when it came to figuring the amount that should be set aside for health care and pension benefits. The agency has also alleged that company executives knew of the errors and covered them up.

Mercer, a division of Marsh & McLennan Companies Inc., could be hit with punitive damages as well as treble damages if Alaska wins the case. According to Marsh's most recent quarterly filing, it has not "recorded a liability related to the Alaska case because it cannot determine 'that a loss is both probable and reasonably estimable.'" According to the media reports, Mercer said in a statement that its error and its failure to disclose it was "a mistake in judgment that Mercer regrets and it is not consistent with the company's corporate culture." Mercer's lawyers have argued that it did no "compensable harm" or damage to Alaska's retirement systems. The judge overseeing the case has ordered a trial to be held in Juneau next July. It will be interesting to see how this lawsuit winds up.

Source: *New York Times* and Reuters

VIII. CONGRESSIONAL UPDATE

THE HEALTHCARE REFORM DEBATE

The U.S. Senate passed its healthcare reform bill on Christmas Eve. By the time this issue is received, I am hopeful that a healthcare reform bill will have passed both Houses and been signed into law. I just hope and pray that the reform measure will be a good one.

HOUSE PASSES IMPORTANT BILL TIGHTENING FINANCIAL RULES

The House of Representatives has approved a Democratic plan that would significantly tighten federal regulation of Wall Street and the financial sector. This advances a far-reaching Congressional response to the financial crisis that almost destroyed our nation's economy. The House voted 223 to 202 to approve the measure. The bill creates a new agency to oversee consumer lending, establishes new rules for transactions that contributed to the meltdown, and seeks to reduce the threat that one or two huge companies on the verge of collapse could bring down the economy. The Senate has made less headway in drafting a companion bill.

Most observers believe this vote to be the most significant legislative act to confront the financial crisis that exploded last year since the vast and costly bailout that was pushed through Congress at the peak of the emergency. It was an effort to address comprehensively the underlying causes of the collapse, which was reckless risk-taking unrestrained by regulation. The lack of regulation made it very easy for smart folks to do dumb things with little if any fear of having to pay for their actions. The bill's principal provisions establish a process that will:

- dismantle large, failing financial institutions;
- set up a council to identify and regulate firms that are so big, intercon-

nected or risky that they need heightened supervision to keep them from bringing down the whole financial system;

- create a new consumer financial protection agency to squelch unfair and abusive practices; and
- for the first time, regulate over-the-counter derivatives markets; and deal with executive pay, investor protection, credit ratings, hedge funds and insurance.

Despite the House action, final passage won't come soon. The Senate is still developing its own measure for debate early next year and any Senate bill is likely to have substantial differences from the House measure, necessitating further negotiations.

The overhaul of Wall Street regulation is a top domestic priority of the Obama administration, which supported the House bill. Most Democrats agreed that heightened regulation of the financial services industry was warranted by the events leading up to the financial crisis. A lack of adequate regulation during the Bush Administration was a central reason for the economic collapse in the first place. Republicans have largely ignored the need to more strongly police Wall Street in the aftermath of the events of recent years. It's time for them to join with Democrats in Congress and help bring about the needed changes.

Source: *New York Times*

THERE IS STILL LOTS OF WORK TO BE DONE

Congress will have lots to do once the healthcare debate is concluded. There are lots of important issues that must be dealt with. Some of the issues facing the lawmakers will be discussed below.

Economic Issues

The American people are still struggling as a result of the deep recession that the Bush Administration left us with. Hopefully, Presi-

dent Obama and Congress will pass the necessary legislation needed to make sure that we don't again fall into the same fiscal mess.

Campaign Finance Reform

It's probably too much to expect for Congress to pass any meaningful campaign finance reform legislation this year. Although it is badly needed. Special interests will continue to have far too much power and influence until such time as major changes are made in how political campaigns are financed.

Arbitration Reform

Prompted by the rape of former KBR employee Jamie Leigh Jones, Congress will soon pass a measure banning defense contractors from forcing employees to use arbitration to resolve claims of discrimination and sexual assault. House and Senate negotiators agreed to include the no-arbitration provision in a \$636 billion defense spending bill that passed the House by a vote of 395-34. The measure is now in the Senate, which was expected to pass it before Christmas. Employers and other potential lawsuit targets generally use binding arbitration to keep disputes out of the court system, which is very much anti-consumer and just plain wrong.

The no-arbitration provision would ban defense contracts worth more than \$1 million with companies that seek to enforce or establish binding requirements in employee contracts in certain circumstances. The provision covers any requirements that force workers to use arbitration to resolve claims of sexual assault, sexual harassment, assault, battery, infliction of emotional distress, false imprisonment and negligent hiring. Sen. Al Franken, D-Minn., who pushed the initiative, says it "allows victims of assault and discrimination their rightful day in court."

Senator Franken said the arbitration proposal was a direct response to Jones' allegations that she was raped by co-workers while in Iraq in 2005. A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit ruled in September that Jones' lawsuit against Houston-based engineering firm KBR and its former parent company, Halliburton, can go to trial, despite language in her 18-page employment contract requiring that such claims be resolved through arbitration. However a Houston-based federal judge in 2008 dismissed a similar claim by another woman who claimed she was raped while working for KBR, citing the binding arbitration language in her employment contract. Ms. Jones has told her story in testimony to Congress and via a Web site for the Jamie Leigh Foundation. She says fellow military contractors drugged and raped her and then held her in a shipping container. This woman clearly deserves to have her case heard in a court of law.

Source: *Houston Chronicle*

IX. PRODUCT LIABILITY UPDATE

YAMAHA GRIZZLY CASE SETTLED

Cole Portis and Chris Glover, who are in our firm's Product Liability Section, have reached a confidential settlement in an Arkansas product liability case against Yamaha for defects in the Yamaha Grizzly. Our client was unloading his 2002 Yamaha Grizzly ATV from a trailer when the throttle stuck in the wide open position. The four-wheeler shot off the back of the trailer throwing our client to the ground. The incident left him in a coma for some time with numerous permanent and severe injuries.

Our investigation revealed that Yamaha has a serious problem with throttle cables on these ATVs. We are

pleased with the outcome of this case and that we were able to help our client through this most difficult experience. We worked on this case with Randy Hall and Gary Green, two very good lawyers from Little Rock, Ark. If you would like more information concerning the Yamaha Grizzly, please contact Chris Glover at 800-898-2034 or by email at chris.glover@beasleyallen.com.

VERDICT AGAINST FORD IN CLAYTON COUNTY, GEORGIA

A Georgia jury returned a verdict for compensatory and punitive damages last month against Ford Motor Company. The case involved a 2002 Explorer. Lynn Wheeler, a 58-year-old woman, was sitting in the rear center seat, wearing the lap-only seat belt Ford installed for that seating position in the vehicle.

Ms. Wheeler was headed to church on Christmas morning in 2005 with four other family members in the vehicle. En route, they were hit head-on by an Eagle Talon. In the crash, the two-person bench seat in which Lynn Wheeler was sitting broke and began to fold down and forward. The lap belt allowed her head to strike the front seat back. She suffered a C1-C2 subluxation and is now a quadriplegic who is dependent on a ventilator. None of the other four occupants of the Explorer received any serious injury.

It was alleged in the lawsuit that the "occupant restraint system" for the rear center was defective. The seat breaking and also the way the seat and structures and lap belt all interacted to create a danger and defect in this particular vehicle. That was the focus at trial. The trial judge denied Ford's Geier-preemption motions because the claims were not pled as a simple failure to have a shoulder belt. The jury returned a verdict for \$17 million in compensatory damages, and checked "Yes" on punitive damages. A confidential settlement was reached just before the jury "knocked on the door" with its Phase Two verdict which would have had the amount of punitive damages.

The Atlanta firm of Butler, Wooten & Fryhofer, LLP, represented the Plaintiffs and did an outstanding job.

Source: AIEG

NHTSA PROBES TOYOTA COROLLA AND MATRIX SUDDEN STALLS

As if Toyota didn't have enough problems with the sudden, unexplained acceleration of its vehicles, the company is now involved in another federal safety probe. This time regulators are looking at numerous complaints of engine stalling problems in Corolla and Matrix cars from model year 2006 equipped with 1ZZ-FE engines. The vehicles will even stall at highway speeds. The National Highway Traffic Safety Administration launched the investigation on November 30th, citing 26 complaints from drivers. The stalls happened randomly on highways and intersections. The Corolla and Matrix investigation by NHTSA covers 397,000 vehicles.

NHTSA is looking at a problem with the electronic control module or onboard computer which was the subject of a service bulletin two years ago. Neither the Corolla nor Matrix is involved in the massive recall of 4.2 million Toyotas because of a sudden acceleration problem. Consumer Reports finds Toyota leads NHTSA adverse event reports for all 2008 models. And the company has also announced it's recalling its Tundra pickup truck because a rust problem, caused by salt used on roads in the winter in certain states, can cause the spare tire to fall out.

Source: USA Today and Los Angeles Times

NHTSA IGNORED TOYOTA SUDDEN ACCELERATION REPORTS

Since 2001, safety investigators have ignored hundreds of reports of Toyota sudden acceleration problems, according to the *Los Angeles Times*. In fact, the *Times* review of federal records shows that more than 1,000 Toyota and Lexus owners have reported that their vehicles accelerated suddenly and on their own since 2001. Many times the

sudden acceleration caused crashes with trees, parked cars, brick walls, or other obstacles, resulting in injuries and at least 19 deaths. This is much more than the 11 fatalities per year for all other automakers combined in sudden acceleration related accidents.

In the past seven years, owner complaints triggered at least eight National Highway Traffic Safety Administration investigations into sudden acceleration in Toyota and Lexus vehicles. However, Toyota recalled less than 85,000 vehicles as a result of those probes and NHTSA closed six other cases without a finding of defect. The *Times* investigation revealed that those investigations systematically excluded or dismissed the majority of complaints by owners that their Toyota and Lexus vehicles had suddenly accelerated, which sharply narrowed the scope of the probes. Broad categories of sudden acceleration complaints were eliminated, such as:

- instances in which drivers said they could not stop the vehicle using the brakes;
- sudden acceleration incidents lasting more than a few seconds; or
- reports in which the driver could not or did not identify the possible causes of the problem.

Using these exclusions as part of their rationale, NHTSA officials closed at least five of their investigations. Because of the excluded incidents, there were fewer incidents to consider, so NHTSA concluded that there were too few reported problems to warrant further inquiry. Unfortunately, that is what happens when a government safety agency is run by people who work for the companies the agency is supposed to regulate. The people who were supposed to be looking out for the public were ignoring defect claims while people were dying.

An independent safety expert, Sean Kane of Safety Research and Strategies, SafetyResearch.net, has identified nearly 2,000 sudden-acceleration cases for Toyota vehicles built since 2001. The *Times* also located more

than 1,000 reports by owners that their vehicles had suddenly accelerated, as well as records of 19 fatalities involving Toyota and Lexus vehicles from the same model years in which sudden or unintended acceleration may have been a factor. A 2007 survey by NHTSA of Lexus owners shows that 10% complained of sudden acceleration problems. NHTSA, Toyota and Lexus owe it to the consumers to get this sudden acceleration defect issue resolved. There have been far too many deaths and injuries for any further delay. As long as these defective vehicles are on the highway, the motoring public is at risk.

If you would like more information or have any questions about Toyota sudden acceleration, you can contact Graham Esdale (Graham.Esdale@beasleyallen.com) at 800-898-2034.

Source: Los Angeles Times

\$10.2 MILLION AWARD IN MESOTHELIOMA LAWSUIT

A jury has awarded Henry and Geraldine Barabin \$10.2 million in their lawsuit against Scapa Dryer Fabrics, Inc. and AstenJohnson. The lawsuit involved asbestos exposure and the development of mesothelioma. The two companies heavily incorporated asbestos into their products and workers nearby the manufacturing process were at a very high risk of being exposed to the toxic mineral. Henry Barabin worked for the two companies as a laborer between 1964 and 2001. His first work was at the Texaco Refinery in Port Arthur, Texas from 1964 to 1968. He then worked at the Crown Zellerbach paper mill in Camas, Wash. from 1968 to 2001.

Mr. Barabin was exposed to asbestos dust that was released from asbestos-containing dryer fabrics during normal handling, replacement disposal and cleanup operations. One of his jobs included cleaning out the paper machine's dryer fabrics during maintenance and shutdown periods. It was alleged that the asbestos dryer fabrics were defectively designed and did not include warnings about the possible dangers of asbestos exposure.

Because of his exposure, Mr. Barabin was diagnosed with malignant mesothelioma in 2006. As we have reported, illnesses related to asbestos exposure are extremely life-threatening due to the severe latency period of symptoms. In many cases, victims of asbestos exposure unknowingly develop a disease before feeling any signs of occurrence. Depending on the disease, symptoms may take as long as ten to 50 years to arise.

As you may now know, Mesothelioma is particularly harmful as there is no cure for the disease. After diagnosis, most patients receive palliative care or enter clinical trials to help combat their condition. Average prognosis for mesothelioma is between four and 18 months. In addition to paper mill workers, other jobs that have had a history of asbestos exposure include those in the construction, shipyard, power and chemical plant, electrical and automotive industries. If you would like more information or have any questions about asbestos exposure, you can contact Mike Andrews (Mike.Andrews@beasleyallen.com) or Ben Locklar (Ben.Locklar@beasleyallen.com) in our office at 800-898-2034.

DANGEROUS AFTERMARKET WHEELS ON CARS

A common practice among many young people today is to purchase new rims or “wheels” for their vehicles. These wheels have spawned a cultural revolution, of sorts. In fact, they have even become the subject of rap songs. The larger rims or wheels being placed on some vehicles are referred to as “dubs,” “blades,” “speeds,” “spinners,” and “twenties,” among other names. Many of the rims that are being installed on automobiles are aftermarket products, meaning that they were not manufactured by the automobile manufacturer or were not manufactured specifically for that vehicle by another company for the vehicle manufacturer.

The rims are typically made of aluminum, either forged or cast. The aluminum is often made as an alloy, blended with other materials like magnesium or

other non-ferrous metals in order to strengthen the aluminum. The integrity of the aluminum or aluminum compounds used and the manufacturing process employed by the manufacturer could mean the difference between life and death. There have been many reported incidents of the aftermarket wheels collapsing or breaking. Because of the boom in the market, it is expected that many more accidents will occur because of faulty and defective rims. The method used to make the tire and the quality of the manufacturing process can greatly affect the cost of the rims and their safety risks.

While most automobiles are equipped at the factory with 13” to 15” tires and rims, aftermarket rims can be 20” or more. In most instances the wheels that come on a vehicle are wheels that are designed for that vehicle. The aftermarket wheels, on the other hand, are not designed for the vehicle. The larger wheels affect stability and handling of the vehicle. Also, depending on the integrity of the rims, the weight and stress applied from normal operation of a vehicle can cause the wheels to fail in a variety of manners.

Virtually every vehicle manufactured today has computer and electronic systems that are designed to adjust handling and suspension, based upon events that occur with the wheels that come standard on the vehicle. When larger wheels are added to a vehicle, the computer system cannot interpret the data correctly, meaning that the braking action and stability of the vehicle could be impaired. The larger wheels are also shown to increase wear and tear on suspension. All of these factors, from the integrity of the metal to the interface of the tire system with the vehicle’s electronic stability system, can greatly increase the risk of serious bodily harm or injury.

A quick Google® search reveals that there are literally hundreds of options for aftermarket rims and wheels. Some of the manufacturers of these aftermarket rims are from countries like China, where it is unlikely that the manufacturing processes are monitored as

closely as they are, or should be, in the United States.

For those who wish to add a set of “blades” or “dubs” to their vehicle, it is recommended that they seek out a reputable tire shop. Modifications may have to be made to the suspension and braking system to minimize the risks associated with the addition of the larger rims. Forged aluminum may also offer better integrity. Our firm will review cases involving wheel or rim failures that result in serious injury or death. If you need additional information on this subject, contact Ben Locklar or Cole Portis in our firm at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com or Cole.Portis@beasleyallen.com.

Sources: Pat Ardis, a lawyer from Memphis, Tenn.; <http://www.insideline.com/features/the-danger-of-dubs.html>; <http://www.ripoffreport.com/Car-Parts-Accessories/Wheelmax/wheelmax-danger-unsafe-product-f4a4m.htm>

FEDERAL STUDY SAYS FAULTY CHINESE DRYWALL CAUSES CORROSION

The Consumer Product Safety Commission has found a link between the imported material Chinese drywall and the corrosion problem in homes that have it. But the agency also said they don’t believe the problems are as widespread as early estimates predicted. The conclusion followed testing at 51 homes in Florida, Alabama, Louisiana, Mississippi and Virginia that found “a strong association between the problem drywall, the hydrogen sulfide levels in homes with that drywall and corrosion in those homes.”

Over the past year, homeowners have been complaining to federal and state government agencies that their homes smell of sulfur or rotten eggs, the copper in their air-conditioning units and electrical wires in their homes are corroding and that other metals are turning black. They have also reported problems breathing, headaches and nosebleeds. But until this report, no agency had officially linked corrosion problems with drywall. The CPSC is still investigating the link between wallboard and health concerns. The report said chemicals found

in the homes tested were at levels lower than what might be expected to cause irritation, but the combination of those compounds with other substances could lead to the symptoms families are experiencing.

To date, the CPSC has received 2,091 reports from residents in 32 states, the District of Columbia and Puerto Rico who believe their health symptoms or the corrosion of certain metal components are related to Chinese drywall. The majority of those—more than 1,400—are from Florida residents. While the problem is widespread, Wolfson said previous estimates that as many as 100,000 homes nationwide may be affected are likely incorrect. Complaints reported to state and federal agencies don't foreshadow that large of a number.

So far the CPSC has spent about \$3.5 million on its investigation, which is the largest in the history of the agency. The next phase of its work will deal with finding ways to identify problem drywall and come up with ways to treat homes. Many homeowners are pursuing lawsuits against foreign manufacturers that may well take years to resolve. You shouldn't be surprised to learn that the foreign companies are making it difficult for the victims. Only one company, Knauf Plasterboard Tianjian, has agreed to be served with a federal class-action lawsuit and not force Plaintiffs to go through international legal channels. Eventually the federal government may have to get involved. But I am not sure what will be available to homeowners from that source. The IRS could decide to allow homeowners to declare a casualty loss on returns. Some states, including Louisiana, are using federal Community Development Block Grant money to help homeowners. In any event there is a most serious problem that must be dealt with.

Source: *The Miami Herald*

NEW ORLEANS SAINTS COACH LEADS CHINESE DRYWALL LAWSUIT

New Orleans Saints head coach Sean Payton is one of about 2,100 Plaintiffs

named in a class-action lawsuit against a Chinese manufacturer of drywall that has allegedly damaged homes and sickened residents. Coach Payton is the lead Plaintiff for the suit filed last month against Knauf Plasterboard Tianjin Co. The coach moved his family out of their suburban New Orleans house and is suing the Chinese maker of drywall used in his home. The Plaintiffs in the newly-filed suit include residents of Alabama, Florida, Louisiana and Mississippi. Dozens of homebuilders, remodelers, building suppliers and drywall distributors also are named as Defendants in the suit.

Source: Associated Press

X. MASS TORTS UPDATE

GLAXO HAS PAID \$1 BILLION IN THE SETTLEMENT OF PAXIL SUITS

It was reported recently in *Bloomberg News* that GlaxoSmithKline Plc (GSK) has paid almost \$1 billion to resolve lawsuits over Paxil since it introduced the antidepressant in 1993. Included in the total are about \$390 million for suicides or attempted suicides linked to the drug. As part of the total, GSK, the United Kingdom's largest drugmaker, so far has paid \$200 million to settle Paxil addiction and birth-defect cases and \$400 million to resolve antitrust, fraud and design claims.

Frankly, I seriously doubt that the total payout by GSK is really known at this juncture. The London-based company hasn't disclosed the settlement total in company filings. It has made public some accords. The drug manufacturer's provision for legal and other non-tax disputes as of the end of 2008 was 1.9 billion pounds (\$3.09 billion), according to its latest annual report. But that total included all legal matters, not just Paxil litigation.

Paxil has been on the market in the United States since 1993. About 450 suicide-related Paxil cases have been

settled. Reportedly, only about a dozen of the cases filed haven't been settled. The \$1 billion total doesn't include more than 600 claims that Paxil caused birth defects. The Paxil litigation had three major personal injury litigations over one drug—the suicide, the birth defect and the withdrawal cases. Since at least 2003, GlaxoSmithKline has faced claims in courts in this country that some Paxil users were subjected to an undisclosed, higher risk for suicide and birth defects.

Source: *Bloomberg*

Pfizer Seeks To Curtail Publicity

Last month, we reported on two recent hormone therapy verdicts that were returned by Philadelphia juries against Wyeth (a division of Pfizer). Those verdicts totaled in excess of \$103 million and received a lot of attention from the press around the country. Since then, the *New York Times* ran an extensive piece with electronic links to many of the documents that were considered by the jurors in rendering their decisions. The article is entitled "Menopause, as Brought to You by Big Pharma" and can be found at <http://www.hrt-legal.com/>.

The *Times* reports that "the documents offer a snapshot of Wyeth's efforts. Taken together, they depict a company that over several decades spent tens of millions of dollars on influential physicians, professional medical societies, scientific publications, courses and celebrity ads, inundating doctors and patients with a sea of positive preventive health messages that Plaintiffs' lawyers say deflected users' attention from cancer concerns." Dr. Jerome L. Avorn, a professor of medicine at Harvard Medical School, says the cases demonstrate the importance of litigation in detailing exactly how drug makers operate their businesses as they yield documents that provide a rare glimpse inside the file cabinets and hard drives of a major drug company.

In response to the *New York Times* article, Pfizer issued a news release affirming confidence in its hormone therapy drugs. Ironically, Pfizer then

filed a motion with the Philadelphia court seeking to curtail publicity surrounding these cases. As we go to press, the court has not yet ruled on that motion.

Source: *New York Times*

ORTHOPEDIC SURGEON HAS ETHICAL DUTY TO WARN A PATIENT OF POTENTIAL SHOULDER PAIN PUMP INJURY

We have written in previous issues about the widespread problem relating to pain pumps. Dr. Joseph A. Carrese is the director of the program on ethics and clinical practice at John Hopkins Berman Institute of Bio-Ethics. Dr. Carrese, who is an expert in the field of Bio-Ethics, has recently reviewed medical literature, expert reports and depositions from the shoulder pain pump litigation. He was asked to form an opinion about an orthopedic surgeon's ethical responsibility to a patient after performing arthroscopic shoulder surgery with the use of a pain pump device that infuses medication continuously via a catheter directly into the shoulder joint. Based upon his education, training and expertise and the review of all of the documents provided to him, Dr. Carrese believes that the surgeon should inform all of his patients who have had this surgery and subsequent use of the pain pump of the following:

- The potential risk and adverse outcomes associated with the use of a pain pump catheter device that infuses pain medication directly into the joint space;
- For patients who in fact develop chondrolysis, inform the patients what is generally known about this post-operative complication;
- The likely association of their current condition (chondrolysis) to the pain pump catheter device;
- What steps patients might take to get a proper diagnosis and proper management of their condition; and
- Their right to pursue litigation related to their condition.

We believe there are many patients in this country suffering from chondrolysis as a result of infusion of an anesthetic into their joint space with the use of a pain pump who have no idea they have suffered an injury in this manner. Orthopedic surgeons who have performed this type of surgery have an ethical responsibility to inform those patients of the above risk and rights. We hope that they will do so.

Source: Dr. Joseph A. Carrese

LAWSUITS FILED OVER BENZENE EXPOSURE

Earlier this year, a Texas couple, Charles and Bessie Mae Stewart, sued BP and several other companies after the husband reportedly contracted a potentially fatal form of cancer allegedly due to benzene exposure. Mr. Stewart was diagnosed with chronic lymphocytic leukemia, a type of cancer involving the white blood cells which is generally considered incurable. The lawsuit filed in Galveston County District Court, alleges that 30 years of working around benzene gave Charles Stewart chronic lymphocytic leukemia. In addition to BP, Chevron, ConocoPhillips, Shell, Texaco, and Marathon are named as Defendants in the lawsuit. It's alleged in the lawsuit that the Defendants knew about the dangers associated with exposure to benzene and failed to warn him that he was working in close proximity to the hazardous solvents and chemicals without any precautions to reduce the risk of exposure.

Also, in August of this year, another lawsuit was filed by a retired railroad worker, Richard Czuprynski, who developed a deadly form of cancer after 30 years of alleged exposure to Benzene and other cancer-causing chemicals. The lawsuit, filed in Jefferson County (Texas) District Court, accuses Kansas City Southern Railway Co. of negligently exposing Czuprynski to toxic materials during his time as an engineer, conductor, and brakeman with the company from 1976 until March 2009.

Benzene is a chemical which has been used as a gasoline additive, an industrial solvent and during the pro-

duction of various drugs, plastics, synthetic rubber and dyes. Benzene is a toxic substance. In 1996 it was classified as a Class A carcinogen by the Environmental Protection Agency, and has been linked to cancer and other serious health problems. The International Agency for Research on Cancer and the Occupational Safety and Health Administration have also determined that benzene has been linked to the development of blood cancers and blood disorders several years after exposure. There is a latency period associated with the effects of benzene that can take anywhere from seven-15 years.

On occasion benzene-related diseases can develop as late as 40 years after exposure. People typically diagnosed with benzene-related cancers were exposed to benzene through occupational use, in work environments such as chemical plants, refineries, steel mills, mechanic shops, and other industrial settings. Workers exposed to high levels of benzene are at the greatest risk of suffering its long-term harmful effects including acute myelogenous leukemia, acute lymphocytic leukemia, anemia and other forms of cancer and leukemia. Acute myelogenous leukemia, also known as acute myeloid leukemia, is the most serious of the benzene related leukemias.

Source: *Southeast Texas Record*

AN UPDATE ON BOTOX LITIGATION

As you probably know, while Botox is the most popular cosmetic procedure in the United States, its use is said to have caused serious injuries, ranging from muscle weakness to difficulty swallowing or breathing to death. Botox—and a similar drug, Myobloc—are made of botulinum toxin. The Food and Drug Administration has approved Botox for “therapeutic” conditions, such as involuntary eye blinking, involuntary contractions of the neck muscles, excessive sweating and crossed eyes.

Botox Cosmetic is approved for the temporary smoothing of wrinkles between the eyebrows, and Myobloc is approved for adults who suffer from

severe neck muscle spasms. But neither product has been approved for children under 12 years of age for any purpose. Nevertheless, some patients, including children, are receiving the drugs for off-label uses, such as combating limb spasticity in cerebral palsy patients, migraines or excessive salivation. In August, after evaluating reports of numerous adverse reactions from both approved and unapproved uses of Myobloc and Botox, the FDA announced that both products would be required to carry a black box warning.

The warning highlights “the possibility of experiencing [a] potentially life-threatening distant spread of toxin—from the injection site after local injection.” Obviously, the previous label was inadequate. By the time the FDA required the company to update the Botox label, the agency had quite a bit of information about the possible spread of the toxin from injection sites. There are a number of Botox-related lawsuits that have been filed in a number of courts around the country.

Because of the drug’s popularity and wide-spread use, as well as the delay that can occur between an injection and the onset of symptoms, there will likely be more cases filed. The onset of symptoms following Botox injections can take anywhere from a few hours to several days. Often persons will have a generalized weakness, or flu-like symptoms. In more severe cases, they have trouble breathing and swallowing and may have to be put on a mechanical ventilator and have a feeding tube put in. An anti-toxin can combat the botulism, but it is only effective during the first 48 hours.

Source: *Lawyers USA Online*

PERMAX AND DOSTINEX LITIGATION HEATS UP

Permax (Pergolide Mesylate) and Dostinex (Cabergoline) were medications used to treat mainly patients with Parkinson’s Disease and Restless Leg Syndrome. Unfortunately, like many other recent medications, these drugs and their generic equivalents were

withdrawn from the market for causing damage to patients’ heart valves. Specifically, studies have shown that Permax and Dostinex affect the mitral, aortic, and tricuspid heart valves by causing varying degrees of heart valve regurgitation (the backward flow of blood across the heart valves), otherwise known as valvular heart disease. This occurrence causes the heart to work harder to pump blood through the heart valves, which results in users becoming short of breath and more easily fatigued when participating in physical activity. This damage to the heart valves can also lead to congestive heart failure, heart valve replacement, or death.

An ultrasound of the chest, called an echocardiogram, is the best way to determine if heart valve damage or regurgitation exists. Unless a patient exhibits signs and symptoms of valvular heart disease or has had previous heart valve issues, echocardiograms are rarely ordered by treating physicians. Due to the relative scarcity of echocardiograms being used, there are many patients that have used Permax or Dostinex, but are unaware of the damage that their heart valves may have.

Fortunately, for many of our Permax and Dostinex clients, they were able to have echocardiograms performed identifying varying degrees of damage to their heart valve, which resulted in immediate treatment. It has also led to several lawsuits being filed around the country involving the damage that these drugs have caused. Currently, the first Permax case in the country is set for trial in Miami in March, 2010. The second Permax case in the country is set for trial in November, 2010. Trial dates for a handful of other Permax and Dostinex cases are currently pending. We continue to gather evidence regarding the dangers of these drugs. We expect these trials will hold these companies responsible for the injuries they have caused these clients.

If you need additional information on this subject, contact Navan Ward in our firm at 800-898-2034 or by email at Navan.Ward@beasleyallen.com.

XI. BUSINESS LITIGATION

FORD ORDERED TO PAY MAN \$55.6 MILLION IN PATENT DISPUTE

Jacob Krippelz has waged an 11-year battle in the courts against Ford Motor Co. over a lighting system he patented in 1991. But his lengthy legal battle is finally nearing an end. Last December, a federal jury in Chicago awarded him \$23 million in royalties for Ford’s patent infringement. But the case was not over. In late November of this year, U.S. District Judge James Zagel increased the award to \$55.6 million. The judge found that Ford had acted recklessly by selling vehicles with similar lamps even though the company knew of the potential infringement. That’s called “willful” infringement. U.S. patent laws allow courts in such cases to increase the damages for willful action by up to three times the amount assessed. Ford was said to have had a cavalier attitude about this situation, and it apparently continued after the suit was filed. It appears that the lamps which were the subject of the litigation were used on millions of vehicles.

The case is significant, not only for the size of the damages to an individual inventor, but also for its uncanny resemblance to Robert W. Kearns’ patent-infringement story from the 1960s. Kearns came up with his idea—intermittent windshield wipers—while driving home one night in a light rain. He later demonstrated his invention to Ford engineers and received a positive response. After a lapse in time, in 1969 Ford came out with its own intermittent wiper. In 1978, Kearns filed his lawsuit against Ford. The case did not go to trial until 1990, and a jury found that Ford had infringed his patents. The automaker settled with the inventor for \$10.2 million after Kearns had rejected an earlier \$30 million settlement offer.

The Plaintiff in the latest case, Krippelz, emigrated from the former Yugoslavia in the 1950s and went to work

for Caterpillar. He later opened a machining business that supplies components to Caterpillar and other heavy-equipment manufacturers. In 1991, Krippelz patented his design for a small lamp mounted to sideview mirrors, now known as a “puddle lamp.” He sent a copy of his patent to Ford soon after it was issued. The automaker told him they were not interested in the invention. Six years later, Krippelz walked into his local Ford dealer and saw the lamp on a vehicle. Ford’s puddle lamp supplier had its own patent, which refers to Krippelz’s patent.

Krippelz sued Ford in 1998. The suit was delayed for several reasons, including Ford’s effort to test the device, which Judge Zagel found “created a needless controversy.” A movie dealing with patent infringement, entitled “Flash of Genius,” came out just before Krippelz’s case went to trial in December.

Source: *Chicago Tribune*

MISSOURI FARMERS AWARDED \$2 MILLION FOR BIOTECH RICE ACCIDENT

Bayer CropScience will have to pay two Missouri farmers more than \$2 million in damages resulting from the company’s accidental release of experimental biotech rice into the food supply. A federal jury in St. Louis returned the first verdict in several lawsuits filed in response to Bayer’s accidental release of Liberty Link in 2006. The rice wasn’t approved for human consumption, and export prices dropped sharply after traces of it were discovered in U.S. grain bins. One Missouri farmer was awarded nearly \$2 million while the other received \$53,000. The farmers contended that they lost the income when the release caused prices to crash and drained value from the 2006 crop they hoped to sell overseas.

Source: Associated Press

XII. AN UPDATE ON SECURITIES LITIGATION

MORGAN STANLEY WILL PAY BACK \$42 MILLION IN MONTANA

A settlement has been reached between the State of Montana and Morgan Stanley & Co., Inc. regarding allegations that the company misled investors. In the settlement, Morgan Stanley has agreed to provide liquidity to Montana investors who invested in auction-rate securities before the market for those securities was frozen in February 2008. The settlement includes rescission to Montana victims totaling more than \$43 million and a \$120,000 fine to be deposited in the state’s general fund. Montana Commissioner of Securities and Insurance, Monica Lindeen announced the settlement on December 16th.

According to complaints received from investors throughout the country, Morgan Stanley misrepresented auction-rate securities (ARS) by telling customers they were safe, highly liquid investments comparable to money markets. A multi-state investigation was conducted responding to allegations regarding the liquidity of auction-rate securities that Morgan Stanley underwrote, marketed and sold. Investors further alleged Morgan Stanley knew that in 2007 and 2008 the ARS market was deteriorating and began purchasing additional inventory to prevent failed auctions.

As you may know, auction-rate securities are preferred shares or debt instruments such as corporate or municipal bonds. They have a long-term maturity and are sold at monthly or weekly auctions. Until recently the ARSs were treated by many investors as cash investments. But when the auction-rate security market collapsed, auctions came to a halt, leaving investors with investments that could not easily be converted to cash. The settlement agreement finalizes the actions taken

against Morgan Stanley as a result of the investigation.

Source: *Insurance Journal*

XIII. INSURANCE AND FINANCE UPDATE

ALLSTATE AND ALFA DROP WIND COVERAGE IN COASTAL ALABAMA

It was reported last month that Allstate Corp. and Alfa Mutual group will cumulatively drop wind coverage on 14,000 homeowner policies in Mobile and Baldwin counties over the next 18 months. The cuts will affect as many as 7% of all homeowners in the two counties. The moves are another blow to Alabama’s coastal insurance market. Since Hurricane Ivan, which hit in 2004, Allstate, Alfa and State Farm Fire and Casualty have either dropped or planned to drop wind coverage, or all coverage, on nearly 41,000 policies.

Allstate will essentially stop insuring against wind damage in Mobile and Baldwin counties if it drops coverage on 9,000 existing policies. Since Hurricane Ivan, Allstate has announced four waves of cuts, totaling 30,000 homeowners. State officials said Allstate will have fewer than 500 wind policyholders in the two counties. Alfa, Alabama’s No. 2 property insurer, will retain some of its wind policyholders in Mobile and Baldwin counties. It was reported that Alfa will still cover more than \$7 billion in all kinds of property.

Cuts to Alabama policyholders will apparently take effect as policies come up for renewal. It’s estimated this will take a year to cycle through. By rule, policyholders who are losing coverage must be notified 120 days before renewal dates. Customers being dropped were said to have been chosen based on location, type of construction, amount of coverage and other factors.

State Farm, based in Bloomington, Ill., is the only traditional state-regulated insurer that has been accepting new business in Mobile and Baldwin

counties in recent months. However, the state's largest property insurer limits how many new customers it will take. Displaced policyholders may have to look to surplus lines insurers, which are lightly regulated, or to the Alabama Insurance Underwriting Association, the insurer of last resort known as the "Beach Pool." Both those options are typically more expensive than traditional markets. There has been a significant increase in Beach Pool policyholders. The pool added almost 8,000 new residential policyholders in the 18 months ended in October, more than doubling in size to 14,406 policies.

Source: AL.com

TEXAS JURY AWARDS \$70 MILLION TO INJURED WORKER

Some insurance companies treat their policyholders much worse than second-class citizens. A case in Texas is an example of how some companies operate. A maintenance supervisor who fell with a chain saw while trimming trees at a San Antonio apartment complex six years ago has been awarded \$70 million in his lawsuit against the complex's insurance company. A Texas jury found that Charles Tate suffered mental anguish when Discover Property & Casualty Insurance Company delayed paying him for his rehabilitative job training. The jury also found that the Connecticut-based company, along with JI Specialty Services, which administered claims for Discover, knowingly engaged in an unfair and deceptive act.

On six separate occasions, the Texas Department of Insurance's workers' compensation division sided with Tate, who suffered severe neck and shoulder injuries that made manual labor impossible. The agency ruled that he had a right under the law to have the insurance company pay for him to be retrained as a real estate agent, a career he wanted to pursue. Of the verdict, \$30 million was for punitive damages. Insurance companies on all too many occasions treat their policyholders badly. They must be made to be fair in

their dealings with persons who have valid claims. Thomas Rhodes, a lawyer from San Antonio, represented Mr. Tate and did a very good job.

Source: mysanantonio.com

DROWNING LAWSUITS FINALLY SETTLED

In a lengthy legal battle, the family of a New York jazz musician who drowned trying to save a rabbi's wife in dangerous riptides off Miami Beach will receive \$5 million in damages. The decade-old case raised serious liability issues for seaside communities that don't provide lifeguards at public beaches. Last month U.S. District Judge Alan Gold ordered Delaware-based Monticello Insurance Co. to pay damages to the wife of Zachary Breaux. The insurance carrier had refused to pay, even though the family's lawyer and the City of Miami Beach had negotiated a settlement.

Judge Gold also ordered the insurance company to pay \$750,000 in damages to the husband of Eugenie Poleyeff, a New York school secretary. She was the person Breaux tried to save during a midwinter vacation in 1997. The city also negotiated a settlement in that case, but the insurer also refused to pay in the case.

Both cases went up to the Florida Supreme Court at mid-decade and wound up in federal court in Miami. During the interim, the state Legislature passed a law removing liability for seaside municipalities if they posted warning flags about dangerous swimming conditions or if someone drowned because of natural causes. But the new law didn't affect the two cases referred to above. Eugenie Poleyeff and her husband were on vacation in 1997 and Mrs. Poleyeff went for a swim on Miami Beach. She got in trouble and Zachary Breaux went into the water while his wife and daughter searched desperately for a lifeguard. Both Breaux and the woman drowned, pulled into deep waters by rugged riptides.

Frederica Breaux and Israel Poleyeff, a rabbi, sued Miami Beach, asserting that the city should have had lifeguards and riptide warnings at the public

beach. Miami Beach provided parking, showers and concessions near the 29th Street beach to cater to the public, but didn't station lifeguards, supply lifesaving equipment or put up riptide warnings.

The two cases had been in both the state and federal courts. State circuit and appellate courts didn't allow the cases to go to trial, saying the city couldn't be held responsible for ocean conditions. In 2002, the Third District Court of Appeals panel ruled that a city which does not regulate a particular beach area has "no common-law duty" to safeguard the public from ocean dangers. The state Supreme Court agreed to review that opinion because it ran contrary to decades of High Court rulings that Florida communities can be held liable. In a landmark ruling in 2005, the state Supreme Court found that cities, like private landowners, have a responsibility to warn beachgoers of dangerous conditions that are known or should be known.

Soon after the drownings, the city erected a lifeguard stand at that beach. The lawyer for the Breaux family contended that the city should have posted signs that this was not a protected beach. After the Supreme Court's ruling, Monticello, the city's insurer, refused to defend Miami Beach. So city officials decided to negotiate a settlement with Breaux's estate and the estate of Poleyeff.

After the 2007 settlements, the city and the families ended up on one side of the legal fight and the city's insurer, Monticello, on the other. The city wanted to do the right thing and settle with the victims, but it also became a victim when Monticello abandoned them by denying both coverage and defense. Judge Gold ordered Monticello to pay not only the damages to the Breaux and Poleyeff families, but also to reimburse the city for its \$200,000 obligation under the settlements. The judge also ordered the insurer to pay interest on the damages as well as attorneys' fees and costs for the decade-long case. Monticello could still appeal Judge Gold's ruling.

Miami Beach City lawyer Jose Smith and Howard Pomerantz represented

the Breaux family. The Poleyeff family was represented by Andrew Yaffa, a lawyer with Grossman Roth, a Florida firm. Both did very good jobs for their respective clients.

Source: *Miami Herald*

XIV. EMPLOYMENT AND FLSA LITIGATION

CLASS CONDITIONALLY CERTIFIED IN FLSA CASE AGAINST RITE AID CORPORATION

A lawsuit against Rite Aid Corporation was filed on behalf of current and former assistant store managers who are paid a salary and do not receive overtime compensation of time and a half for hours worked over 40 hours each week. The suit alleges that the salaried assistant store managers were improperly classified as exempt from the overtime pay requirement of the Fair Labor Standards Act. Instead, they are non-exempt employees under the FLSA and are entitled to overtime compensation.

On December 9, 2009, the United States District Court for the Middle District of Pennsylvania conditionally certified a nationwide class, which encompasses all assistant store managers who worked in any of the 4,901 Rite Aid stores across the country within the last three years. These current and former employees will receive notice of the action. Pursuant to the FLSA, they will have to opt-in if they wish to assert claims under the act. The notice describing the action and informing the employees of their right to opt-in is expected to be mailed very soon.

Source: *Streetinsider.com*

WAL-MART WILL PAY \$40 MILLION TO WORKERS

Wal-Mart Stores Inc., the world's largest retailer, has agreed to pay \$40 million to as many as 87,500 current and former employees in Massachusetts, the largest wage-and-hour class-

action settlement in the state's history. The class-action lawsuit, filed in 2001, accused the retailer of denying workers rest and meal breaks, refusing to pay overtime, and manipulating time cards to lower employees' pay. Under terms of the settlement any person who worked for Wal-Mart between August 1995 and the settlement date will receive a payment of between \$400 and \$2,500, depending on the number of years worked. The average worker will receive \$734.

The Massachusetts case is similar to many others that have been brought against Wal-Mart by employees across the country, most alleging that the Bentonville, Ark.-based company violated laws by requiring employees to work through breaks, to work beyond their regular shifts, and similar practices. While Wal-Mart has denied the allegations, the company agreed in December to pay up to \$640 million to settle 63 federal and state class-action wage-and-hour lawsuits. The Massachusetts case, which was not part of that settlement, was initially filed eight years ago on behalf of 67,000 people who worked for Wal-Mart in Massachusetts between 1995 and 2005.

The two Plaintiffs, Elaine Polion and Crystal Salvas, left their employment at Wal-Mart years ago. The case has been moving back and forth for years, first being certified as a class action, being almost thrown out as a trial date approached in 2006, and then being revived on appeal and sent back to trial as a class action by the state Supreme Judicial Court two years ago. Philip Gordon of Boston's Gordon Law Group handled this case and did a very good job.

Source: *Boston Globe*

UPS OVERTIME SUIT SETTLED FOR \$12.8 MILLION

A federal judge has approved a mediated settlement for delivery drivers who were denied benefits and overtime by UPS Supply Chain Solutions. The drivers had been misclassified by the employer as independent contractors. U.S. District Judge Phyllis Hamilton

of the Northern District of California preliminarily approved the \$12.8 million settlement in the class action involving about 660 potential class members. At least 83% of the settlement funds will go to members of two proposed classes representing workers in California and nationwide.

Companies considering whether to classify people as independent contractors should take this settlement as further indication that it's a risky business choice to take that route. UPS has changed the way it uses independent contractors based on some of the allegations raised in this case, according to a corporate spokeswoman. Judge Hamilton has set a fairness hearing for March 15th. Lead Plaintiff's counsel is Lynn Faris, who is with the firm of Leonard Carder, located in Oakland, Calif.

Source: *Law.com*

WAGE-AND-HOUR CLASS ACTIONS FILED AGAINST AT&T

Two lawsuits have been filed against the subsidiaries of AT&T. One was filed in an Atlanta federal court and the other in a San Francisco federal court. The actions seek a combined \$1 billion in damages and back pay for roughly 5,000 current and former AT&T workers who were allegedly improperly classified by the company as exempt from overtime pay in violation of the Federal Fair Labor Standards Act.

In the recently-filed AT&T lawsuits, the Plaintiffs are called "first level" managers within AT&T, but they allege that they are managers in name only. They don't have managerial duties or authority. It's alleged that many of the employees perform clerical tasks and relay information between the company managers and technicians.

DOCTOR WINS SUIT AGAINST CANCER INSTITUTE

A radiation oncologist, who formerly worked for the University of Pittsburgh Cancer Institute, won a potential \$3 million verdict in federal court on charges that her employer retaliated

against her for raising concerns about discrimination. The jury recommended that Dr. Kristina Gerszten be awarded \$1.5 million in back pay from the University of Pittsburgh Cancer Institute, which works in tandem with the UPMC Cancer Centers, as well as \$827,292 in front pay. But since those amounts are only advisory, it will be up to U.S. District Judge Arthur J. Schwab to determine what amount the Defendant will actually have to pay.

Dr. Gerszten filed a federal lawsuit in September 2008, alleging that she had been discriminated against because of her gender and retaliated against for making the original complaint to hospital officials. The jury found no evidence of sex discrimination, but it did find that she was retaliated against when the University of Pittsburgh Cancer Institute failed to hire her as medical director at both UPMC St. Margaret and at its facility in Natrona Heights.

In addition to back and front pay, the verdict includes \$200,000 in compensatory damages, as well as \$300,000 in punitive damages. The jury found that punitive damages should be \$500,000, but under law, the cap is \$300,000. The award of punitive damages, which is not typical in these cases, says that UPMC Cancer Centers violated the law in a malicious way.

Dr. Gerszten, 46, was employed as a radiation oncologist with UPMC from 1992 to 2007. After leaving her position as medical director for radiation oncology at Magee-Womens Hospital in February 2004, Dr. Gerszten signed a two-year contract in which she traveled to various UPMC cancer centers and provided coverage. According to a court filing, UPMC said Dr. Gerszten negotiated her schedule so that she would only work 180 to 200 days each year, though she would be considered a full-time employee.

In 2006, Dr. Gerszten was given a new, one-year contract at the University of Pittsburgh Cancer Institute. In January 2007, the Institute chose not to renew. As part of that contract, Dr. Gerszten said, she had an 18-month non-compete clause and was left without work until January 2009. She now works part time at the Depart-

ment of Veterans Affairs as a staff radiation oncologist. Dr. Gerszten said at UPMC, “the emphasis was on the money” and not the patients. Colleen Ramage Johnston represented Gerszten.

Source: Pittsburgh Post-Gazette

XV. PREMISES LIABILITY UPDATE

SETTLEMENT IN RHODE ISLAND CLUB FIRE CASE

Children under 18 who lost a parent in a deadly 2003 Rhode Island nightclub fire should receive an average gross award of \$202,000 as their shares of a \$176 million settlement. A report relating to the settlement has been submitted in federal court. The report reviews death and personal injury claims from the dozens of children affected by the 2003 fire at The Station nightclub in West Warwick, which killed 100 people and injured more than 200 others. The report was prepared by William Poore, a Providence lawyer appointed to conduct the review, and the report’s recommendations must have court approval.

More than 300 survivors and victims’ relatives sued after the fire, which began when pyrotechnics used as a stage prop by the 1980s rock band Great White set ablaze cheap sound-proofing foam on the walls and ceiling. The lawsuits resolved in piecemeal fashion in 2007 and last year, with several dozen Defendants including foam manufacturers, brewer Anheuser Busch, Clear Channel Broadcasting, the town of West Warwick and the state itself each agreeing to settle. Though the last Defendant settled more than a year ago, it’s not clear when the money will be distributed.

Forty-one children under 18, including a six-year-old who was in utero at the time of the fire, will receive shares ranging from \$171,685.44 to \$241,631.36, if the court approves the settlement. The average gross award for

children in that category would be \$202,000. The age of the child at the time of the fire accounts for the wide range.

According to the report, victims’ children who were minors at the time of the fire but are now adults would receive an average gross award of \$155,700. The settlement money will be allocated according to a point system that awards the largest shares to the people most seriously injured, with some badly-burned survivors expected to receive multi-million dollar awards. Children who lost one or more parents are given a base of 20 points, plus one point for each year they were under the age of 18 at the time of the fire. Children whose parents were injured but survived are also entitled to money under a separate formula that awards points based on total medical costs.

Source: Insurance Journal

COURT RULING CLEARS WAY FOR BONFIRE LAWSUITS

The last remaining lawsuits from the fatal 1999 collapse of the Texas A&M University bonfire—filed more than eight years ago—have moved closer to resolution. The Texas Supreme Court has now dismissed a related appeal. Zachry Construction Corp., involved in the building of the bonfire stack, was seeking an order to include the university on the jury verdict form that will be used to apportion legal blame for the collapse. If the victims and their families prevail at trial, the jury’s calculation would determine how much money Zachry and another sued firm, Scott-Macon, owe in damages. Including Texas A&M in the calculations could lower the companies’ financial liability.

The Supreme Court noted that Texas A&M had reached a \$2.1 million settlement with family members since the Zachry case was accepted by the court in May. By settling, the university will appear on the jury verdict form, making the Zachry appeal moot. Because it already had settled, the school would not be liable for more damages. Twelve persons were killed in the early morning collapse of the massive wooden stack that was to be

ignited the night before A&M's annual football game with its archrival, the University of Texas.

Much of the delay was over Texas A&M's claim that it is immune from lawsuits because it is a state entity. The victims dropped A&M from the lawsuit to speed matters, but two people filed suit to bring the school back into the case. Their claims had been before the Supreme Court since 2007. Lawsuits from seven families are now pending. The lawsuits, four from families of the dead and three from families of injured survivors, were consolidated into one case in a state court.

Source: *American-Statesman*

\$54 MILLION AWARDED IN GROUP HOME RAPE

An Albuquerque jury returned a \$54.5 million damage award recently against a health services company arising out of the 2004 rape of a profoundly retarded man. The award included more than \$49 million in punitive damages. The jurors were very upset that these corporations would not accept responsibility for their actions. The verdict was against ResCare New Mexico and its parent ResCare Inc., the Louisville-based international health services company.

The victim, who cannot speak or perform daily functions on his own, was raped while living in College House, a group home operated by one of ResCare's New Mexico subsidiaries. The lawsuit was brought on the victim's behalf by his sister. Jurors heard three weeks of testimony about what happened to the victim, the aftermath, and the relationship between the health care company's New Mexico operations and Kentucky headquarters. The verdict consisted of \$4.95 million in compensatory damages and \$1.2 million in punitive damages against the all-but-defunct ResCare New Mexico and \$48 million in punitive damages against ResCare Inc.

One juror said in a post-verdict interview: "the further you went up the corporate ladder, the less accountability there was." Another juror observed that

the "silver lining" for ResCare was that the company can take note and make sure this sort of thing "doesn't happen again." A number of jurors said as a group that "the most honesty was from the front-line people who were paid \$7 an hour."

The New Mexico Department of Health canceled ResCare's contract in 2006 without citing a reason, and it no longer operates any facilities in the state. Carl Bettinger, Greg Chase, lawyers from Albuquerque, N.M., and Tom Lilly, from Roswell, N.M., represented the Plaintiff and did a very good job.

Source: *ABQ Journal*

JURY AWARDS \$7.75 MILLION IN ABUSE CASE

A jury in Ventura County awarded \$7.75 million last month to the family of a 71-year-old stroke victim who filed an elder abuse lawsuit against the Fillmore Convalescent Center. Ms. Maria Arellano was a stroke victim who was non-verbal. During the trial a secret videotape of the woman being abused was viewed by the jurors. The jury awarded \$2.75 million in compensatory damages and \$5 million in punitives.

In 2006, Maria Arellano, 71, was a resident at the center and family members noticed during a visit that she was bruised. They complained to management, but the center failed to investigate. So the family set up a hidden video camera on a side table in her room. The camera caught an employee, Monica Garcia, slapping Ms. Arellano, pulling her around by the hair, bending her neck, fingers and wrists, and treating her violently in a shower chair.

The verdict splits liability among three Defendants: the center, 40%; owner Eduardo Gonzalez, 40%; and the employee, 20%. Greg Johnson, a Oxnard, Calif. lawyer, represented the Plaintiff and did a good job. Incidentally, last month Fillmore Convalescent received a five-star rating, the highest, from the Nursing Home Compare system, run by the Centers for Medicare and Medicaid Services.

Source: *VCStar.com*

SAN FRANCISCO TO PAY \$7 MILLION FOR STANISLAUS FOREST FIRES

The city of San Francisco has paid \$7 million to settle federal claims for wild-fire damage to a national forest caused by negligent maintenance of power line rights of way. The 1999 Pilot fire and the 2004 Early fire burned 5,698 acres in the Stanislaus National Forest in Tuolumne County, Calif. The fires resulted from trees growing too close to the high-voltage power transmission lines of Hetch Hetchy Water and Power, which is owned by San Francisco. There were two civil lawsuits filed by the federal government against the city and its utilities agency.

Legislation passed in 1913 granted the city rights of way on federal lands, including the Hetch Hetchy Valley in Yosemite National Park, for a hydroelectric system that delivers year-round, potable water and power to San Francisco and neighboring communities. Hetch Hetchy is charged with clearing the rights of way. California law requires the agency to maintain a ten-foot clearance in all directions between its power lines and vegetation.

The Pilot fire ignited on August 23, 1999, about ten miles east of Groveland. U.S. Forest Service investigators determined that the fire was sparked by an electrical discharge from a power line to a cedar tree that had grown to within a few feet of the line. On August 9, 2004, the early fire ignited about six miles northeast of the Pilot fire location. Forest Service investigators again established that the blaze was sparked by an electrical discharge from a power line to an oak tree. Some of the settlement funds will finance restoration efforts.

Source: *Fresnobee.com*

INJURIES AND DEATHS FROM FALLING FURNITURE ARE STILL A CONCERN

There have been major problems over the years involving furniture falling on folks and especially on children. Large television sets have been a source of concern. A recent study shows that the number of children killed or injured by falling television

sets appears to have risen. A team from the Center for Injury Research and Policy at Nationwide Children's Hospital in Ohio reviewed data from 100 emergency rooms and estimated that about 14,700 furniture-related injuries occurred each year between 1990 and 2007—almost half due to television sets, the most common article involved in the accidents—and resulted in about 300 deaths.

The research, published in October in the journal *Clinical Pediatrics*, showed that the number and rate of injuries to youngsters from falling furniture increased significantly over the period. The rate generally rose from 18.8 per 100,000 people in 1990 to 22.9 in 2007, peaking at 25.7 in 2004. A similar report from the U.S. Consumer Product Safety Commission last year estimated 42,700 injuries and 180 deaths associated with appliance, furniture and television instability and tip-overs from 2000 to 2006; 87 of the deaths involved televisions. The number rose from seven in 2000 to 23 in 2006.

Parents should anchor heavy televisions to the wall. Anchoring devices should be sold along with the sets. The same is true with other pieces of furniture that pose a tip-over risk. The study indicates there is no totally safe way to put a large piece of furniture that is a tip-over risk in a home where children live and play. Parents should also never put a remote control, toy or other enticing object on a television set, dresser or shelf that a child might try to reach.

Source: Associated Press

THERE ARE SEVERAL CODES THAT APPLY TO PREMISES LIABILITY LITIGATION

Our firm handles cases that involve injuries and deaths in the category of premises liability litigation. Quite often a code that was in effect at the time of the incident giving rise to a lawsuit will be very important to the outcome of the case. The applicable code could have been the one in effect at the time a structure was approved initially or at the time of any modifications. Design

requirements are very important in such cases. The following are some of the codes that lawyers must be familiar with if they handle premises liability litigation:

- **Building codes**—These can be either International or Building Officials Code Administration (BOCA) codes that set requirements on items such as handrails, treads, risers and other construction details to help engineers determine if the structure or location was constructed in accordance with applicable codes.
- **American Disability Act (ADA) Related Codes**—Codes such as American National Standards Institute (ANSI) that sets requirements for walking surface levelness in public and commercial spaces.
- **National Fire Protection Association (NFPA)**—Codes such as the Life Safety Code (NFPA 101) which discusses designs for exits and discharging of people from spaces.
- **American Society for Testing and Materials (ASTM)**—Standards for the practice of safe walking surfaces such as wet surfaces, tile, wood and other surface materials.
- **Occupational Safety and Health Administration (OSHA)**—Laws that discuss walking surface requirements and hazards.

\$4.7 MILLION SETTLEMENT IN CONVENTION CENTER COLLAPSE

The authority that operates the David L. Lawrence Convention Center in Pittsburgh will receive \$4.78 million from firms to settle claims over a floor collapse. In February 2007, a concrete slab crashed to a walkway about 30 feet below when a tractor-trailer drove through a loading area. Fortunately, no one was injured, but there was tremendous property damage. The city-county Sports & Exhibition Authority approved the settlement on December 18th. It filed a notice of intent to sue last summer.

The firms settling the claims include steel fabricator ADF Group, Rafael Vinoly Architects and contractor Dick Corp. The authority's insurer, The Travelers Indemnity Co., will receive \$1.125 million from contractors. The settlement represents about 90% of the loss attributed to the collapse.

Source: *Insurance Journal*

XVI. WORKPLACE HAZARDS

TEXAS JURY AWARDS BP WORKERS \$100 MILLION IN LAWSUIT

A federal jury has awarded more than \$100 million to ten workers who were injured in 2007 when a toxic substance was released at BP PLC's Texas City plant. The jurors awarded each contract worker \$10 million in punitive damages. Nine of the workers were also awarded between \$5,000 and \$10,000 for pain and suffering and medical expenses, while the tenth got more than \$240,000.

As we have reported previously, the refinery, located about 30 miles southeast of Houston, was the site of a 2005 explosion that killed 15 people and injured 170. It was the worst U.S. industrial accident since 1990. The refinery has had a history of fires, chemical releases and worker deaths. The U.S. Chemical Safety and Hazard Investigation Board, which investigated the 2005 blast, found BP fostered bad management at the plant and that cost-cutting moves by BP were factors in the explosion. The jury's award also comes after the Occupational Safety and Health Administration in October imposed a record \$87 million fine against BP for failing to correct safety hazards following the 2005 blast.

The workers' lawsuit alleged that in April 2007, more than 100 contract employees at the plant were sent to hospitals after claiming they were exposed to a toxic substance released at the refinery. The workers said their injuries included dizziness and sore

throats, with one employee passing out, after inhaling the substance. The workers did not have any long-term damage to their lungs. During the trial, BP claimed no toxic substance was released at the refinery on the date in question.

One of the worker's gas masks was tested. The test revealed it had been exposed to carbon disulfide, a toxic colorless liquid. BP had a bad safety record. The company has a long history of leaks and releases. Tony Buzbee, a Houston lawyer, represented the ten workers and did a very good job.

Source: *Insurance Journal*

XVII. TRANSPORTATION

\$7.1 MILLION VERDICT RETURNED IN COMAIR CASE

A U.S. District Court jury in Kentucky has returned a \$7.1 million verdict for the family of Bryan Keith Woodward, a Comair Flight 5191 victim. The family sued Comair in the crash that killed 49 people near Blue Grass Airport in August 2006. Woodward was 39 when he died in the crash. His widow was the only family member of the 47 passengers killed in the crash who did not settle with the airline company.

The suit came after the Kentucky Supreme Court ruled in October that a spouse may sue for loss of physical and emotional companionship, called loss of consortium, after the spouse's death. Previously under Kentucky law, a spouse could sue for loss of consortium if his or her spouse was incapacitated, but not if he or she died. The victim's widow wanted to go to trial against Comair because she wanted the airline to publicly take the blame for the crash.

Source: *Kentucky Herald Leader*

JURY AWARDS \$89 MILLION AGAINST DRUNKEN DRIVER

A jury in Missouri has awarded \$89 million in damages to the family of a

man killed in a 2008 crash with a drunken driver, and to the man's fiancée and daughter. The jury clearly sent a message on drinking and driving. Based on reports the jury was very unhappy with drunken driving.

Troy Zerna, who was 20 years old at the time of the crash, was already driving on a hardship license after a previous DWI. Zerna's blood-alcohol level was 0.20%—well over twice the legal limit to drive. Dennis Riegel Jr., 28, was killed in the crash and his fiancée, Christine Hodge, was seriously hurt. The couple was returning from a shopping mall where they had registered for gifts for their upcoming wedding.

Five months before the crash, Zerna had been arrested and his license suspended for his involvement in another DWI-related wreck. Zerna has been sentenced to a total of ten years in prison on DWI-related convictions involving both crashes. Mark Bronson, a lawyer from St. Louis, represented the Plaintiffs and did a very good job.

Source: *St. Louis Post Dispatch*

SANTA ROSA WINERY TO PAY \$3 MILLION TO TEEN INJURED IN DUI

A Santa Rosa winery has agreed to pay \$3 million to settle a lawsuit brought by a man who was permanently disabled in an alcohol-related car crash in 2006. Paradise Ridge Winery was sued by Joshua Apodaca, the passenger in a car driven by a 19-year-old classmate, Sean Bradley, who was served beer at a wedding reception hosted by the winery. A crash early the next morning left Apodaca with a serious brain injury. His family filed suit seeking damages from Paradise Ridge, Bradley, and the owners of a 7-Eleven store where Bradley bought additional alcohol.

Under the terms of a court-appointed settlement, the winery will pay \$3 million, 7-Eleven will pay \$500,000 and Bradley will pay about \$105,000. The money from the settlement will cover the cost of life-time care for Apodaca, and buy him a house with disability accommodations. The service of

alcohol to minors at wedding-related functions is an important issue.

The suit arose from the events of July 14, 2006, when Apodaca and Bradley attended a wedding at the winery. Bradley said he was served six to eight beers by the winery despite telling an employee he left his identification in his car. When the reception ended, Bradley and Apodaca got a ride to Bradley's parents' home. Once there, the two drove off together in a Subaru sedan, stopping at a 7-Eleven, where Bradley was said to have bought two bottles of Mike's Hard Lemonade.

The crash occurred early the next morning, a few blocks from Bradley's house. According to police, the car was speeding when it crashed into trees and a redwood fence. Both men had to be cut from the wreckage. Tests taken at a hospital revealed Bradley had a blood-alcohol level of .14%, almost twice the legal limit. He was convicted of driving under the influence and causing bodily injury and sentenced to nine months in jail and three years' formal probation.

Apodaca, now 23, suffered brain and orthopedic injuries. His mother and grandfather were named by the court as conservators of his estate because of his disabilities. The suit was originally filed against Bradley and his parents for damages related to the crash. Paradise Ridge and the 7-Eleven were added later as Defendants. An annuity yielding monthly payments was purchased for Apodaca. Over the course of his lifetime, it is expected to pay out \$4.9 million.

Fireman's Fund Insurance Company and Mitsui Sumitomo Insurance Group will pay the jury award for the winery. The Bradleys were covered for \$100,000 by an automobile insurance policy and the 7-Eleven owners were covered under a corporate indemnity policy. California law states that bars, wineries and other licensed alcohol purveyors are not responsible for what intoxicated patrons do once they walk out the door. But Apodaca's lawsuit was based on the exception to this rule, which is a prohibition on serving alcohol to obviously intoxicated minors. Patrick Emery, a Santa Rosa,

Calif., lawyer, represented the Plaintiffs and did a very good job.

Source: *The Press Democrat*

MAN PARALYZED IN MOTOR VEHICLE ACCIDENT AWARDED \$44.9 MILLION

A jury in Lee County, Fla., awarded \$44.9 million recently to Gerald Aloia, who was paralyzed in a 2006 motor vehicle accident. The verdict is one of the largest in the county's history. Mr. Aloia was riding on his motorcycle in 2006 when he was struck by a car.

Source: *Ft. Myers News-Press*

CAR CRASH VICTIM AWARDED \$4 MILLION IN SUIT

A jury in Jackson County, Fla., recently awarded a car crash victim more than \$4 million. Mrs. Julie Keyes was involved in a single-car accident in December of 2006. She was run off the road by another driver and her vehicle over corrected and flipped upside down. Mrs. Keyes was air-lifted to Flowers Hospital in Dothan, Ala., suffering from a bruised spinal cord and a hangman's fracture. After spending time at Flowers, she was sent to a rehabilitation facility. Following her stay there she was sent to another hospital in Alabama for surgery.

Mrs. Keyes now has difficulty controlling her arms and legs. She is also unable to walk without a wheelchair or assistance from someone else. The driver of the other vehicle was never found, and because of that Mrs. Keyes' should have been covered under the uninsured motorists coverage of her insurance policy. Her insurance carrier was American International Insurance. A representative of American International told Mrs. Keyes right after the accident that they would provide coverage.

After a week-long trial, the jury ruled for Mrs. Keyes and her husband. Out of the more than \$4 million award, \$3.4 million was for past economic losses and past and future medical bills. The remainder was for physical pain, suffering and disfigurement. Until the accident, Mrs. Keyes was the caregiver for

her husband who lost his leg after a car accident back in 1974. She also worked full-time at the Florida State Welcome Center at the Florida-Alabama line in Jackson County. Larry Perry, with the Perry & Young Law Firm of Panama City Fla., represented the Plaintiffs and did a good job.

TEXTING AND DRIVING SIMPLY ARE A BAD MIX

United States Secretary of Transportation Ray LaHood was the keynote speaker at the Alabama Distracted Driving Summit, sponsored by the University of Alabama at Birmingham's University Transportation Center (part of the Injury Control Research Center) and the University Transportation Center of Alabama at Tuscaloosa. The summit, the first such event in Alabama, brought together leaders in transportation, public policy, law enforcement and science to discuss how to reduce motor-vehicle crashes resulting from distracted driving through legislation, enforcement, public awareness and education. One of our lawyers, Mike Andrews, is a member of the UAB-UTC Advisory Board and attended the meeting.

Without any doubt, distracted driving is an epidemic in this country. The U.S. Department of Transportation estimates that 800,000 vehicles were driven by someone using a cell phone in 2008, that 6,000 people died in distracted-driving-related vehicle crashes, and that 500,000 were injured. Last September, Dr. Despina Stavrinou, a researcher at UAB, and Russ Fine, Ph.D., director of the UAB University Transportation Center, organized the summit and did a great job. Alabama was the first state to respond to the Secretary's challenge to begin a national debate on the practice of driving while distracted by the ubiquitous technology of today.

Distracted driving is often equated with drunk driving. It will take a consistent combination of education, effective enforcement, a committed judiciary and collective efforts by local, state, and national advocates to put a dent in the problem. The danger is most

acute among young drivers who have grown up surrounded by hand-held electronic technology. The Pew Research Center says that 70% of 16 and 17 year olds admit they've been in a car while the driver was texting.

Most teens have been texting or using hand-held electronics since they were nine or ten years old. They are now getting behind the wheel of a car. Secretary LaHood outlined steps that he hopes will become part of the nation's collective driving routine: Parents need to set clear ground rules for teenage drivers, and then enforce them. Teens need to exert peer pressure and tell friends they won't ride with them if they text. Employers need to let employees travel to destinations without interruption. And all of us need to use some common sense every time we get behind the wheel of a vehicle.

A growing number of states have legislation pending banning distracted driving in one form or another. The insurance and telecommunications industries are engaged in a search for solutions. The Alabama summit identified a number of promising avenues to minimize the risks of distracted driving, some of which are already in the planning stages in Alabama. The state has assigned responsibility for addressing the issue of distracted driving to the Alabama Department of Economic and Community Affairs and the State Safety Coordinating Committee which has developed an Alabama Strategic Highway Safety Plan. Dr. Fine had this to say:

Because of the summit, many more people in the private sector and in government have become better informed about the distracted driving problem. Our goal now is to continue to increase awareness among policy and decision makers as well as the general public. We intend to keep the anti-distracted driving campaign going throughout the entire regular 2010 session of the Alabama Legislature, or until an anti-distracted driving bill is signed into law by the Governor, whichever occurs first.

The UAB-UTC will provide each member of the Alabama Legislature with individual DVD copies of the presentations made at the summit. They also intend to set up a Distracted Driving Theater near the capitol in Montgomery, where legislators, their staffs, elected, appointed and regular civil service employees, as well as members of the general public, can visit and view DVD copies of all presentations and panel discussions made during the summit. Other anti-distracted driving information will be available and distributed through the theater.

KENTUCKY BANS STATE WORKERS FROM TEXTING WHILE DRIVING

Kentucky Gov. Steve Beshear has banned state employees in his state from sending text messages while driving government-owned vehicles. Gov. Beshear issued an executive order that says he took the step in an effort to reduce the number of traffic accidents caused by driver distraction. He said the state and its 34,000 employees need to set an example for other drivers.

The Governor's order defines texting as any form of electronic data communication, including reading or entering data into handheld or other electronic devices. The order says that includes SMS texting, e-mailing, instant messaging, and obtaining navigational information. Employees involved in public safety are exempted from the ban. Governor Beshear is calling the ban his "Eyes on the Road" effort.

Source: *Insurance Journal*

XVIII. HEALTHCARE ISSUES

FDA STILL HASN'T IMPROVED SAFETY AFTER VIOXX SCANDAL

More than three years have passed and the Food and Drug Administration still hasn't restructured its staff to

better monitor drug safety as recommended by experts after the Vioxx scandal. Congressional investigators say the FDA has yet to follow through on changes suggested in 2006 to help the agency detect problems with drugs taken by millions of Americans. Those recommendations came after the dangerous episode involving Vioxx. As all America now knows, the FDA approved Vioxx in 1999, only to pull it from the market in 2004 after linking it to heart attack and stroke.

Agency officials have made some changes to drug oversight, according to a Government Accountability Office report, but the FDA continues to give the bulk of its decision-making power to scientists who approve new drugs, rather than those who monitor the side effects of drugs on the market. "It is not yet clear if or when FDA's decision-making process will be substantially improved as a result of its efforts," said the GAO report.

Within the FDA bureaucracy, scientists tasked with reviewing new drug applications have traditionally had the most say over questions of safety, even after drugs are approved. But outside experts say leaving such key decisions to the scientists who first cleared the drugs could lead to inadequate safety actions, putting prescription drug users at risk. Dr. Diana Zuckerman of the National Research Center for Women and Families in Washington says: "There's this desire on the part of the people who first approved the drug to say, 'We predicted everything and it's fine.'" Dr. Zuckerman and others say such decisions should be made with equal input from the FDA's office for monitoring reports of side effects collected from across the country.

The GAO, the Institute of Medicine and other experts have long recommended that the so-called Office of Surveillance and Epidemiology be given equal authority on drug safety with the agency's Office of New Drugs. But GAO investigators report that FDA leaders still have not transferred key responsibilities to surveillance officials. It's time for the FDA to establish independence for its post-market surveillance. In 2006,

the GAO made some specific recommendations to the FDA.

The GAO report requires the FDA to set a timetable for transferring new responsibilities to the surveillance office. Despite a formal memo between the offices designed to put them on equal footing, the new drug office still retains nearly all the power over regulatory decisions, according to the report. In its response to the report, the FDA says major decisions about drug safety are delegated to the new drugs division because that is "where staff with the broadest expertise and experience" on product safety issues reside.

The FDA claims that it intends to give the surveillance office more responsibilities, but only after its nearly 200 employees gain the experience and resources needed to take on those tasks. The Office of New Drugs has more than 900 employees. According to the GAO, the number of surveillance staffers would have to double in coming years to accommodate the additional work being assigned to the unit.

Source: Associated Press

XIX. ENVIRONMENTAL CONCERNS

FEW WATER SYSTEMS ARE PUNISHED FOR VIOLATING SAFE DRINKING WATER ACT

More than 20% of the nation's water treatment systems have violated key provisions of the Safe Drinking Water Act over the last five years, according to a *New York Times* analysis of federal data. The Safe Drinking Water Act requires communities to deliver safe tap water to local residents. But since 2004, the water provided to more than 49 million people has contained illegal concentrations of chemicals like arsenic, or radioactive substances like uranium, as well as dangerous bacteria often found in sewage.

Regulators are informed of these violations as they are discovered. But regulatory records show that fewer than 6%

of the water systems that broke the law were ever fined or punished by state or federal officials, including those at the Environmental Protection Agency, which has ultimate responsibility for enforcing standards.

Studies indicate that drinking water contaminants are linked to millions of instances of illness in the United States each year. What's more, water pollution has become a growing concern for lawmakers because government oversight of polluters has waned. In some instances, drinking water violations were one-time events, and probably posed little risk. But for hundreds of other systems, illegal contamination persisted for years, records show. An analysis of EPA data by the *New York Times* shows that Safe Drinking Water Act violations have occurred in every state. But, almost none of those systems were ever punished. The problem, according to current and former government officials, is that enforcing the Safe Drinking Water Act has not been a federal priority over the past eight years.

Recently, the Senate Environment and Public Works committee questioned a high-ranking EPA official about the agency's enforcement of drinking-water safety laws. The EPA is expected to announce a new policy for how it polices the nation's 54,700 water systems. In fact, EPA administrator Lisa P. Jackson has already announced that she plans to institute a wide-ranging overhaul of the agency's Clean Water Act enforcement program. Hopefully, the new administrator's reforms will drastically change the way the EPA investigates and prosecutes drinking water violations in our country. Without question, the last administration provided a perfect example of what happens when political leadership fails to protect our health and the environment.

Source: *New York Times*

A LOOK AT THE TVA COAL ASH SPILL— ONE YEAR LATER

December 22, 2009 marked the one-year anniversary of the largest indus-

trial accident in U.S. history. As we have reported, the Tennessee Valley Authority spilled over 1 billion gallons of coal combustion waste onto over 300 acres of land and into the Emory, Clinch and Tennessee Rivers. This disaster brought to the forefront the need for stricter oversight on how the coal-fired power industry handles its waste. Evidence has continued to mount since the spill in favor of regulating coal ash waste and coal combustion wastewater.

In fall of 2009, the U.S. Environmental Protection Agency issued a report that analyzed the health and environmental impacts of wastewater from coal-fired power plants. The reports states that: an increasing amount of evidence indicates that the characteristics of coal combustion wastewater have the potential to impact human health and the environment. Many of the common pollutants found in coal combustion wastewater such as selenium, mercury, and arsenic are known to cause environmental harm and can potentially represent a human health risk. Pollutants in coal combustion wastewater are of particular concern because they can occur in large quantities and at high concentrations in discharges and leaching to both surface and groundwater.

A report issued in December by the Environmental Integrity Project (EIP) confirms that the TVA ash spill contained large quantities of pollutants. The EIP report analyzed TVA's own data submitted to EPA's Toxic Release Inventory (TRI) and found that the spill released 2.66 million pounds of ten toxic pollutants, including arsenic, barium, chromium, copper, lead, manganese, mercury, nickel, vanadium and zinc. Through its TRI reporting, TVA admitted to releasing over four times more lead and over twice the amount of arsenic than the entire power industry released in 2007. During that year the U.S. power industry reported releases of over 2 million pounds of toxic pollutants into our nation's waterways. These numbers are astounding and illustrate the strong need for regulations of coal combustion waste and wastewater discharges.

The call to hold TVA accountable for its pollution continues to grow. EIP issued a second report in December entitled, "Outside the Law: Restoring Accountability to the Tennessee Valley Authority." The report calls on the Obama administration to prosecute TVA for its environmental violations. In addition to the calls from environmental organizations, Congress held another hearing in November to learn more about TVA's cleanup activities, EPA's regulatory plans, and the disposal of coal ash in Perry County, Ala. During his testimony before the House Transportation and Infrastructure Sub-Committee on Water Resources and Environment, Acting EPA Region IV Administrator Stanley Meiburg acknowledged that "the longer [the ash] sits there the more opportunity you have for something to happen." In fact, he cited recent samples taken in the Clinch River that showed elevated arsenic levels.

During the same hearing, Tom Kilgore, who is CEO of TVA, reported that about two-thirds of the ash that spilled has been removed from the Emory River and that TVA is on schedule to complete the river clean-up by spring of 2010 with the remaining cleanup projected to last until 2013, a full five years from the date of the spill.

The Kingston community will continue to be affected by the aftermath of the spill. The class litigation, in which our firm is involved, seeks to hold TVA to its promise of cleaning up the Kingston community completely and making those affected whole again. If you need additional information on this litigation, contact Rhon Jones or David Byrne in our firm at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or David.Byrne@beasleyallen.com.

Sources: *Knoxville News Sentinel*, *Chattanooga Times Free Press*, Environmental Integrity Project

UPDATE ON PFC CONTAMINATION ON NORTH ALABAMA FARMS

Our firm continues to investigate claims on behalf of Alabama farmers and other property owners affected by contaminated sewage sludge in fertil-

izer in Franklin, Lawrence, and Morgan counties. As we have reported, sewage sludge used as fertilizer was spread over approximately 5000 acres of farmland and contained elevated levels of perfluorochemicals (PFCs)—specifically perfluorooctanoic acid (PFOA) and perfluorooctyl sulfonate (PFOS). The contamination stems from industrial operations in the Decatur area, particularly 3M, Dyneon, Daiken and Toray Fluorofibers. Each of these companies reportedly discharged waste and water into the Decatur Utilities wastewater treatment plant. Decatur Utilities contracted with Synagro to spread the sludge on area farms.

The contamination sparked a multi-agency investigation to determine the extent of PFC contamination, including potential routes of exposure and any potential health effects to area residents. On December 1, 2009, multiple agencies held a meeting to update the public on the PFC contamination in north Alabama. The agencies participating included EPA, ADEM, Agency for Toxic Substances and Disease Registry (ATSDR), USDA Food Safety and Inspection Services, Alabama Department of Public Health, Alabama Department of Agriculture and Industry, and Decatur Utilities.

The EPA announced that Region IV has developed soil screening guidance limits for PFOA (16,000 ppb or micrograms/kilogram) and PFOS (6,000 ppb or micrograms/kilogram). They found PFCs in 25/26 soil samples in the Decatur area ranging from .17-317 ppb for PFOA and 4.5-408 ppb for PFOS. The samples also revealed elevated levels of other PFCs, but those levels were not discussed.

The EPA admitted that there is some uncertainty to the soil screening guidance limits because they are not based on lifetime exposure and do not account for the presence of other PFCs. They advised that children should be kept away from soil contaminated with PFCs. The EPA is working on lifetime exposure limits for PFOA and PFOS that will be completed by the end of 2010.

After the contamination was discovered on the properties receiving

sludge, 3M, Dyneon, Daiken and Toray Fluorofibers agreed to sample all private wells within one mile of land with heavy application, within a half mile of land with moderate application, and within a quarter mile of land with low application. These wells will be sampled quarterly for one year. The EPA also took additional samples from the municipal water supplies in the area in September 2009. None of these samples exceeded the limits proscribed by the Provisional Health Advisory, and only one—West Morgan East Lawrence Water Authority (WMELWA)—had levels above the non-detect level. WMELWA showed .3 ppb PFOA and .2 ppb PFOS.

USDA FSIS reported that they completed the assessment of the tissue samples taken from local cattle. The samples revealed that any PFC contamination was below detectable limits. The north Alabama samples compared similarly to the ten random samples taken from cattle elsewhere in the U.S. ATSDR presented information about a new study the agency will undertake beginning in the spring of 2010 with results available approximately six months thereafter. The ATSDR plans to evaluate blood samples of area residents to determine whether PFCs are present in local residents' blood at levels higher than the national average. The study will be voluntary and seeks 200 individuals over age 12 who live on or near land where PFC-laden sludge was heavily applied.

Study participants must have lived on or near the contaminated land for at least one year. Persons ingesting contaminated well water for one year or more also are eligible to participate. Persons working in PFC related industries and persons who suffer from blood disorders or anemia are ineligible for the study. The ATSDR study is free and no individual health information will be shared. The study is limited to blood screening, and no other health assessments will be conducted at this time. If the results show high levels of PFCs in residents' blood, additional assessments may be conducted to determine health impacts caused by the elevated levels. The ADPH stated

that they are finding PFCs in fish in the Tennessee River, and the fish with highest levels are found in Baker's Creek. This creek is where the location of the 3M, Daiken and Toray Fluorofibers outfalls.

Lawyers in our firm have successfully represented clients in PFC cases nationwide. We continue to examine the situation in Decatur on behalf of those affected by the contamination. If you need additional information on this subject, contact Rhon Jones or David Byrne in our firm at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or David.Byrne@beasleyallen.com.

Sources: Associated Press, *Decatur Daily*

ASARCO PAYS \$1.79 BILLION TO FIX SITES

The American Smelting and Refining Company (Asarco), a mining company, has paid the federal government a record \$1.79 billion to settle claims for hazardous waste pollution across 19 states. This is the nation's largest environmental bankruptcy settlement. The money came from a subsidiary of the mining conglomerate Grupo Mexico, Asarco's parent, and will be used to repair extensive damage from the mining operations.

Asarco, a 110-year-old copper company based in Tucson, was accused of gross environmental misconduct at numerous sites, including illegally burning hazardous waste instead of disposing of it properly. As a result of the company's actions, lead and other toxic metals traveled downstream, polluting water and soil in many places. The Justice Department, along with the Interior and Agriculture Departments, and the Environmental Protection Agency worked on this litigation. The settlement provides full payment plus interest for allowed claims to the government.

The settlement money is already being distributed to pay off cleanup and restoration at more than 80 contaminated sites. The largest single payment, \$436 million, went to clean up a toxic mine site in the Coeur d'Alene Basin in Idaho. A trust for overseeing the cleanup of a smelter site in

Omaha that spewed lead over 27 square miles of surrounding water and soil received \$219 million. According to Mathew V. Stanislaus, Assistant Administrator for Solid Waste and Emergency Response at the EPA, the money will cover the cleanup of 10.5 million cubic feet of soil and 5 million cubic yards of water.

Source: *New York Times*

McWANE INC. TO PAY \$4 MILLION FINE IN POLLUTION CASE

McWane Inc. has agreed to plead guilty to felony charges that will settle its criminal case in federal court. The Birmingham-based company, which operates pipe and water-fittings foundries, has pleaded guilty to nine felony violations of the Clean Water Act stemming from effusions at the McWane Cast Iron Pipe plant into Avondale Creek. McWane will also pay a \$4 million fine and pay for the construction of a city park.

The original case filed in the matter went to trial in 2005 in U.S. District Court in Birmingham. The company was convicted of 20 felonies and fined \$8 million. The conviction was later overturned and a new trial scheduled. No trial will now be required because of the settlement. McWane operates 25 plants and employs 6,000 people in North America, Australia and Canada. It's one of the four largest North American makers of ductile-iron pipe used to carry water into homes and business.

Source: *Birmingham News*

XX. THE CONSUMER CORNER

IIHS RELEASES NEW BOOSTER RATINGS

The Insurance Institute for Highway Safety released a report of 60 booster seats on December 22nd, rating nine seats at "best bets" and six as "good bets." The study aimed at taking the guesswork out of selecting boosters most likely to provide good lap and

shoulder belt fit in a range of vehicles. Eleven of the 60 seats tested are not recommended by the IIHS "because they do such a poor job of fitting the belt." The Institute notes that fit is important because safety belts are designed with adults in mind, not children. According to the organization, the belt should lay flat across a child's upper thighs and position the shoulder belt at mid-shoulder. The Institute released its first booster ratings in 2008, evaluating 41 seats. Anne McCartt, Institute senior vice president for research, observed:

Parents can't tell a good booster from a bad one just by comparing design features and price. What really matters is if the booster you're considering correctly positions the safety belt on your four- to eight-year-old in your vehicle. Our ratings make it easier to pick a safer booster for kids who have outgrown child restraints.

The new ratings cover almost all models sold in the United States right now. Manufacturers provided seat model numbers, and the Institute conducted its own check of retail inventories before purchasing seats. The IIHS' best and good bets include several choices starting at about \$20 and ranging up to \$250 or more. Big box retailers stock most of them in stores and online, and the rest can be found at specialty baby-gear sellers.

The IIHS' best-rated boosters are:

- Combi Dakota backless with clip
- Recaro Young Sport highback (combination seat)
- Recaro Vivo highback
- Maxi-Cosi Rodi XR dual-use highback
- Evenflo Big Kid Amp backless with clip
- Eddie Bauer Auto Booster dual-use highback
- Cosco Juvenile Pronto dual-use highback

- Britax Frontier highback (combination seat)

- Clek Oobr dual-use highback

"The nine best bets should provide good lap and shoulder belt fit for typical four- to eight-year-olds in almost any car, minivan, or SUV," according to Ms. McCartt. She explained that "a best bet that provides good belt fit in Mom's minivan should work equally well in Dad's sedan."

The IIHS' good bets include:

- Combi Kobuk dual-use backless with shoulder belt clip
- Maxi-Cosi Rodi dual-use highback
- Evenflo Symphony 65 3-in-1
- Britax Parkway SG dual-use highback
- Graco TurboBooster SafeSeat Wander dual-use highback
- Graco TurboBooster SafeSeat Sachi dual-use highback

The following were not recommended boosters by the Institute:

- Harmony Secure Comfort Deluxe backless with clip
- Combi Kobuk dual-use highback
- Evenflo Express highback (combination)
- Eddie Bauer Deluxe highback (combination)
- Evenflo Sightseer highback
- Safety 1st Alpha Omega Elite 3-in-1
- Alpha Omega Elite 3-in-1
- Eddie Bauer Deluxe 3-in-1
- Safety 1st All-in-One 3-in-1
- Alpha Omega Luxe Echelon 3-in-1
- Alpha Omega 3-in-1

The IIHS noted that more than half of the not-recommended boosters are 3-in-1s that leave the lap belt too high on the abdomen and the shoulder belt too far out on the shoulder. Another seat, the Harmony Secure, has armrests that push the lap belt away from the

hips, way out on a child's thighs. Shoulder belt fit is the main problem for the rest of the seats. According to the new report, Dorel Juvenile Group makes seven of the boosters that aren't recommended, selling under the names Cosco, Dorel, Eddie Bauer, Maxi-Cosi, and Safety 1st.

Source: Insurance Institute for Highway Safety

\$25 MILLION VITAMIN PRICE FIXING AGREEMENT

A \$25 million multistate settlement has been reached in a lawsuit brought by 23 states. The litigation involved a vitamin price-fixing scheme that violated federal and state antitrust laws. It's not clear exactly how much each state will receive from the settlement. That will be determined once court approval is obtained. The class action lawsuit was pending in the U.S. District Court for the District of Columbia. The settlement is the second to be reached on behalf of consumers and businesses that purchased certain vitamins between 1988 and 2000 and reside in the 23 settling states.

In 2000 several states reached a \$225 million agreement involving the same vitamins but different manufacturers. The vitamins affected by this price fixing conspiracy are: vitamin A, astaxanthin, vitamin B1 (thiamin), vitamin B2 (riboflavin), vitamin B3 (niacin), vitamin B4 (choline chloride), vitamin B5 (calpan), vitamin B6, vitamin B9 (folic acid), vitamin B12 (cyanocobalamin pharma), beta-carotene, vitamin C, canthaxanthin, vitamin E, and vitamin H (biotin) as well as all blends and forms of these vitamins. Also included is Premix, a product that contains one or more these vitamins in combination with other substances.

The Defendants named in the settlement agreement include: Akzo Nobel Inc.; Bioproducts Incorporated, Mitsui & Co., Ltd. and Mitsui & Co. (U.S.A.), Inc.; Chinook Global Limited and Chinook Group, Inc.; Evonik Degussa GmbH, successor to Degussa AG, and Evonik Degussa Corporation; Lonza AG; Merck KGaA, E. Merck and EM Industries, Inc.; Nepera, Inc.; Sumitomo Chemical

America, Inc. and Sumitomo Chemical Co., Ltd.; Mitsubishi Tanabe Pharma Corporation and Tanabe U.S.A., Inc.; UCB Pharma, Inc.; and Vertellus Specialties Inc. and Vertellus Chemicals SA.

The following states and other entities participated in the settlement: Arizona, District of Columbia, Florida, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, North Dakota, Puerto Rico, Rhode Island, South Dakota, Vermont, Washington, West Virginia and Wisconsin.

Source: Associated Press

SOME CHICKENS MAY NOT BE SAFE TO EAT

A new study by *Consumer Reports* takes an in-depth look at the safety of the chickens that American families eat. *Consumer Reports* tested whole chickens for two types of bacteria that can make a person very sick. According to Urvashi Rangan, director of Technical Policy at Consumers Union, chickens are not safe enough. Rangan told *CBS News* that "It's a dirty industry and it needs to be cleaned up."

Consumer Reports purchased 382 raw whole broiler chickens from more than 100 stores in 22 states and tested for salmonella and a dangerous bacteria called campylobacter. And in *Consumer Reports'* findings, nearly two-thirds of the chickens tested had either one or both pathogens.

Koeppen said 62% of the birds had some level of campylobacter, 14% had salmonella, and 9% had both. Only 34% of the chickens were completely clean of both pathogens. The Centers for Disease Control and Prevention estimates salmonella and campylobacter from chicken and other foods infect 3.3 million Americans, hospitalize over 26,000, and kill more than 650 every year.

The most recent USDA tests showed lower percentages than the *Consumer Reports* test for both salmonella and campylobacter. It's important to note that while chicken processors must obey specific rules on salmonella, no federal standards for campylobacter currently exist.

Source: *CBS News*

\$50 MILLION VERDICT OVER HAIR-LOSS FIX

An Alameda County, Calif., jury has returned a \$50 million verdict in a class action lawsuit that sought relief for Californians who bought Avacor, a hair-loss remedy that was marketed as an all-natural, clinically-tested product. There were about 150,000 purchases of Avacor in California during the class period, but since some were reorders, the exact size of the class is unclear.

The outcome against two Defendants marked the second trial victory in the same class action. The earlier trial ended in a \$40 million verdict against different Defendants. The awards from the trials will not be added together. The court is expected to order that \$50 million in all be returned to the class. Both trials took place before the same state court judge. The Defendants in the latest trial were two officers of Global Vision Products Inc., Robert DeBenedictis and Henry Edelson. A court-ordered stay after the company's 2007 bankruptcy filing kept them out of the earlier verdict.

Name Plaintiffs Garrett Boyd and James Thomas claimed Avacor's three-part "hair re-growth program" was misleading in selling itself as an all-natural, clinically-tested product with no side effects. It was contended that Global Vision Products' advertising referred to a clinic that didn't exist, a study that was never done and success rates that had no backing. The company, having filed for bankruptcy, was not included in either trial. Testimony indicated that DeBenedictis continues to sell Avacor.

The three principal Defendants involved in the 2007 trial were Avacor's creator, a Nascar driver hired as its celebrity spokesman, and a former doctor who appeared in ads for the product. The jury returned a verdict of just under \$37 million. In May 2008 the trial judge increased the award to \$40 million and wrote:

The court can and does take judicial notice of the fact that enormous sums of money are spent on personal care and grooming products. Into this lucrative market stepped a band of hucksters, defendants, to prey on the

vulnerabilities of human nature and employing a colossal array of false, deceptive and fraudulent techniques cynically collected millions of dollars from deceived California consumers.

Timothy Fisher, who is with the firm of Bramson, Plutzik, Mahler & Birkhaeuser located in Walnut Creek, Calif., and Scott Bursor from the New York firm of Faruqi & Faruqi, represented the Plaintiffs and did good work.

Source: Law.com

APOLLO SETTLES UNIVERSITY OF PHOENIX RECRUITING SUIT

Apollo Group Inc. has agreed to pay \$78.5 million to settle a whistleblower lawsuit over the way it paid recruiters for its University of Phoenix subsidiary. The federal lawsuit was brought in 2003 by two former employees who alleged the company violated a federal ban on paying recruiters on the basis of the number of students enrolled. Apollo paid \$9.8 million in 2004 to the Department of Education to settle similar allegations. The settlement comes as the Obama administration reviews regulations on incentive compensation. The administration is expected to tighten a 2002 rule that gave colleges some leeway to pay recruiters based on enrollment numbers.

Phoenix is the nation's largest for-profit college, with 443,000 students. Apollo said it is "confident" it will not face any further civil or administrative exposure relating to its compliance with the Higher Education Act provision relating to incentive compensation from March 1997 through the present. As you probably know, under the False Claims Act, Plaintiffs—known as relators—sue on behalf of the government. The Justice Department then reviews the claims before deciding whether to join the suit, which it declined to do in this case. When the government doesn't get in, the whistleblower can proceed with the lawsuit.

Source: Bloomberg

MORE BABY DEATHS LINKED TO SIMPLICITY CRIBS

Despite several recalls and warnings, the number of reported baby deaths linked to defective Simplicity cribs is now up to 11. The most recent death occurred in September when a seven-month-old child from Princeton, Ky., became entrapped in the crib when a part of it broke, according to the Consumer Product Safety Commission. The agency also said it's aware of another 25 incidents involving drop-side parts detaching from Simplicity cribs.

The recall of Simplicity-manufactured cribs began in December 2005. More than 2 million Simplicity drop-side cribs have been recalled so far because of problems with their plastic hardware. Some of the recalled cribs have the Graco logo and Winnie the Pooh motif. The crib's hardware can break or deform, causing the drop side to detach. This detachment creates a space between the drop side and crib mattress that babies can roll into and become entrapped, leading to suffocation risk. The agency's announcement on Thursday that 11 babies have died was a big jump from earlier recall announcements that reported only three baby deaths.

The CPSC previously announced that a nine-month-old child and a six-month-old child died when the drop side was installed upside down. The agency also announced the death of an eight-month-old child from Houston who became entrapped and suffocated between the drop side and the crib mattress when a plastic connector on the drop side broke. The agency announced the new death tally with another reminder to parents about the dangers of Simplicity cribs. Simplicity's assets were bought by SFCA Inc. last year but neither company appears to be conducting day-to-day operations. The agency says caregivers should check their cribs to see whether they have a recalled Simplicity crib. If they do, consumers should stop using them immediately and should not attempt to fix the cribs.

Source: Associated Press

A CREDIT CARD HAS A 79.9% INTEREST RATE

First Premier Bank, a subprime credit card issuer, has a credit card with an interest rate of 79.9%. The bloated APR is how the bank is skirting new regulations intended to curb abusive practices in the industry. It's a strategy other subprime card issuers could start adopting to get around the new rules. Typically, the First Premier card comes with a minimum of \$256 in fees in the first year for a credit line of \$250. But starting in February, a new law will cap such fees at 25% of a card's credit line.

In a recent mailing for a preapproved card, First Premier lowers fees to just that limit—\$75 in the first year for a credit line of \$300. But the new law doesn't set a cap on interest rates. Therefore we see the 79.9% APR, up from the previous 9.9%. First Premier targets folks with bad credit who likely can't get approved for cards elsewhere.

Source: MSNBC

XXI. RECALLS UPDATE

We are still seeing a good number of product recalls each month. The following are some significant recalls that have occurred since our last issue.

NISSAN RECALLS OVER 345,000 VEHICLES

Nissan Motor Co. is recalling over 345,000 vehicles in Japan and abroad due to faulty brakes and fuel gauges. The recall affected a total of 345,306 vehicles. Nearly 92% of the recalled vehicles were sold in Japan, with the rest mainly in Asia. The transport ministry says there are no reports of accidents due to faulty brakes and fuel gauges. The ministry said corrosion could cause malfunction for parking brakes. The recalled vehicles were the Elgrand minivan, the Serena minivan and the Cefiro

sedan. The Cefiro is marketed overseas as the Maxima.

800,000 DOSES OF SWINE FLU VACCINE RECALLED

Health officials have recalled hundreds of thousands of doses of swine flu vaccine after tests indicated they may not be potent enough to protect against the virus. The Centers for Disease Control and Prevention has notified doctors about the recall. The recall involves about 800,000 doses made by Sanofi Pasteur. The doses are pre-filled syringes intended for young children, ages six months to almost three years.

Health officials recommend children those ages get two doses, spaced about a month apart. Health officials say it's not clear how many doses have already been given, but they don't believe children need to be re-vaccinated. The lots passed potency tests when they were first shipped, but tests indicate the potency waned afterwards.

MEDICINE COMPANY RECALL

Federal health regulators are warning doctors about 11 recalled lots of an intravenous hypertension drug made by the Medicines Co. that are contaminated with bits of steel. The company, based in Parsippany, N.J., recalled the affected lots of Cleviprex after detecting tiny particles of stainless steel during a routine inspection. The Food and Drug Administration says the particles could potentially disrupt blood flow to the brain, kidney, liver heart and lungs. Cleviprex is used to lower high blood pressure in patients who cannot take pills. It is distributed to doctors for injection into patients at the hospital or medical offices. The company says it has not received any reports of

health problems connected with the issue.

MORE THAN 440,000 BABY CAR SEAT CARRIERS RECALLED

A baby product manufacturer has recalled about 447,000 of its infant car seat carriers, including some branded with Eddie Bauer and Disney logos. This came after dozens of reports of the carrier's handle coming loose. There have been at least three injuries to babies, including bumps, bruises and a head injury. Dorel Juvenile Group Inc., of Columbus, Ind., received 77 reports of the child restraint handle fully or partially coming off the products. The government says consumers should immediately stop using the seat's carrying handle. The bolts that attach the handle to the seat can loosen, causing the handle to possibly separate, thus creating a fall hazard for babies.

The recall involves Safety 1st, Cosco, Eddie Bauer and Disney branded infant car seat carriers with certain model numbers. They were sold at department and children's product stores nationwide from January 2008 through this month. The recall was announced by the Consumer Product Safety Commission, National Highway Traffic Safety Administration and Dorel Juvenile Group. NHTSA says consumers should not use the handle until a repair kit has been installed. The repair kit includes new bolts that consumers can attach to the handle and seat carrier. They can order these free repair kits by contacting Dorel at 866-762-3316.

ELECTROLUX ICON® AND KENMORE PRO® GAS RANGES RECALLED

Electrolux Home Products Inc., of Augusta, Ga., has recalled Electrolux ICON and Kenmore Pro 30"

Gas Ranges. An incorrect part allows more fuel to pass to the range's oven than can be burned efficiently, causing incomplete combustion and the release of carbon monoxide. This poses a risk of carbon monoxide poisoning to consumers. Electrolux has received four reports of incidents involving carbon monoxide being released from the recalled gas range. No injuries have been reported. The ranges were sold at appliance retailers nationwide from August 2008 through October 2009 for between \$2,500 and \$3,500.

Consumers should immediately stop using the range's oven and contact Electrolux for the Electrolux ICON, or Sears for the Kenmore PRO, to schedule a free repair. Consumers can continue to use the cooktop (top burners) and the broiler as well as any clock and/or timer functions.

For additional information, contact Electrolux toll-free at (888) 360-8557 or visit the firm's Web site at www.gasrangeorifice.com. Consumers with Kenmore PRO brand ranges should call Sears toll-free at (800) 733-2299.

50 MILLION SHADES RECALLED FOR STRANGULATION RISK

Government safety regulators and the window-covering industry have recalled all Roman shades and roll-up blinds in homes with small children. The concern is that a child can easily become entangled in the cords and strangle to death. The U.S. Consumer Product Safety Commission says that about 50 million window coverings need to be repaired to make them safe for children. About 5 million Roman shades and 3 million roll-up blinds are sold each year. A reported eight children have died and 16 were nearly strangled in window-covering cords since 2001.

Strangulations in Roman shades can occur when a child places his neck between the exposed inner cord and the fabric on the backside of the blind or when a child wraps the cord around his neck. With roll-up blinds, the hazard occurs when a child's neck becomes entangled in the lifting loop. These are hidden dangers. A child can get entangled or strangled on these cords very quickly, according to Inez Tenenbaum, CPSC Chairman.

Some of country's biggest retailers are impacted by this recall, as these blinds and shades are commonly sold at Wal-Mart, Pottery Barn, IKEA and Target. Customers that have Roman or roll-up shades in their homes should contact the Window Covering Safety Council immediately at www.windowcoverings.org or by calling (800) 506-4636 anytime to receive a free repair kit to make the window coverings safe.

The CPSC says anyone with young children should remove any blinds or shades that have cords attached. They also advised parents not to place cribs, beds or other furniture close to windows because children can climb on the furniture and reach the cords. Cordless window coverings are recommended for all homes where children live or visit.

CPSC AND LAJOBI REANNOUNCE 2001 RECALL OF CRIBS

LaJobi Inc., of Cranbury, N.J., has recalled about 400 "Molly" and "Betsy" Cribs. This recall was first announced in December 2001. The cribs have cut-outs in the end panels that can allow young children to get their heads entrapped, which can pose a strangulation hazard to infants and toddlers. CPSC is aware of the death of a one-year old girl whose head and neck became entrapped in the headboard cut-out of the "Betsy"

style crib in 2003 in Mississippi, following the 2001 recall. No additional incidents or injuries have been reported. This recall involves both "Molly" and "Betsy" style wooden cribs. The end panels on the "Molly" style cribs are made of solid wood with openings on both sides. The end panels on the "Betsy" style cribs are constructed with wood slats.

The cribs were sold at juvenile specialty stores nationwide from May 2000 through September 2001 for about \$700 for the Molly model and \$650 for the Betsy model. The cribs have not been available at retail since 2001. This re-issuance is voluntarily being undertaken to both alert consumers who may still have these cribs in their possession and to especially alert thrift stores and other similar second hand stores that these cribs should not be given away, sold or continued to be used. Consumers should stop using these cribs immediately and contact LaJobi to receive replacement end panels which eliminates the hazard. For additional information, contact LaJobi at (800) 266-2848 or visit the firm's Web site at www.Lajobi.com.

IKEA RECALLS HIGH CHAIRS POSING CHOKING HAZARDS

IKEA is announcing a voluntary recall of its LEOPARD high chairs due to fall and choking hazards. The company said the snap locks used to secure the seat to the frame can break and allow the seat and child to drop through the frame, posing a fall hazard to young children. In addition, detached snap locks can pose a choking hazard to young children.

This recall involves all colors of the LEOPARD highchairs sold as a seat and a frame individually. The seat and tray has an adhesive label affixed to the underside with the words LEOPARD and "Made in

Italy," an eight-digit article number and a five-digit supplier number (19589). IKEA has received 11 reports worldwide of failing snap locks, including one report of a child falling through the frame and suffering bruised legs. In addition, the company has one report of a child mouthing a detached snap lock. No incidents have been reported in the United States. Consumers should immediately stop using the high chairs and return them to any IKEA store for a full refund.

BOY'S WARM-UP SETS RECALLED DUE TO STRANGULATION HAZARD

About 5,400 boy's velour warm-up sets have been recalled by their manufacturer KT Group Inc., of New York. The sweatshirts have drawstrings through the hoods, posing a strangulation hazard to children.

This recall involves boy's hooded sweatshirts style B639BC in colors black, chocolate and charcoal. The velour sweatshirts were sold in sizes S, M, L, or XL and have the name "Beverly Hills Polo Club" on the hangtag and on the center back neck. The coats were sold at Burlington Coat Factory nationwide from September 2007 through October 2009.

Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard, or return the garment to any Burlington Coat Factory store for a full refund. For additional information, all Fashion Options collect at (212) 947-2223 or visit their Web site at www.fashionoptions.com.

CHILDREN'S HOODED SWEATSHIRTS WITH DRAWSTRINGS RECALLED

About 3,700 girls' hooded sweatshirts have been recalled by the manufacturer Allura Imports Inc.,

of New York. The sweatshirts have a drawstring through the hood, which can pose a strangulation hazard to young children. No injuries have been reported. This recall involves girl's velour hooded sweatshirts with a zip front. The sweatshirts were sold as a part of a two-piece set exclusively at Burlington Coat Factory stores nationwide from October 2008 through July 2009 for about \$11.

Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard, or return the garments to either the place of purchase or to Allura Imports for a full refund. For additional information, contact Allura Imports at (800) 695-4510. Consumers can also visit their Web site at www.burlingtoncoatfactory.com.

**CHILDREN'S HOODED SWEATSHIRTS
WITH DRAWSTRINGS RECALLED BY
NTD APPAREL**

NTD Apparel, of Los Angeles, Calif., has recalled about 1,200 "Hello Kitty" Zip Up Hoodie Sweatshirts. The sweatshirts have a drawstring through the hood which can pose a strangulation hazard to children.

The hoodies were sold at Macy's and Dillard's department stores nationwide from November 2008 through December 2008 for \$36. Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard, or return the garment to either the place of purchase or to NTD Apparel for a full refund. For additional information, contact NTD Apparel toll-free at (866) 317-3974.

**SNAP BEADS RECALLED BY EDUSHAPE
DUE TO CHOKING HAZARD**

About 40 units of Snap Beads have been recalled by the Chinese manufacturer, Xiamen Xinlu Machinery

Co., Ltd. The beads were distributed by Edushape Ltd., of Deer Park, N.Y. The tip of the snap bead peg may break off under repetitive pressure, posing a choking hazard to small children. The recalled product is multicolored and has textured soft plastic beads that are designed to connect to one another. The beads are packaged in a 6" x 6" x 8" clear plastic jar with a photo of a child playing with the beads on the label. The word "Edushape" is written on the label in green and red. The beads were sold at various retail stores and online from July 2009 to September 2009 for about \$20. Consumers should immediately stop using the snap beads and contact Edushape for a replacement set. For additional information, please contact Edushape's customer service department at (800) 404-4744, or visit their Web site at www.Edushape.com, or e-mail the firm at edu-usa@edushape.com.

**EVENFLO RECALLS CAKE TOYS ON
CHILDREN'S ACTIVITY CENTERS**

Evenflo Co. Inc., has recalled about 66,000 Evenflo ExerSaucer® 1-2-3 Tea for Me™ Activity Learning Centers in the United States and 13,660 in Canada. The candle flame attached to the top of the cake toy can detach, posing a choking hazard to young children. Evenflo has received 11 reports of the toy flames detaching. Five of the incidents occurred in the United States and six in Canada. No injuries have been reported. This recall involves Evenflo ExerSaucer® 1-2-3 Tea for Me™ activity learning centers. The recommended age for use of this product is four months to walking.

The recalled items were sold at Toys "R" Us and juvenile product stores nationwide from December 2007 through March 2009 for about \$70. Consumers should immediately remove the cake toy from the product and contact

Evenflo to receive a free replacement toy. The ExerSaucer® may continue to be used without the cake toy. For additional information, contact Evenflo at (800) 233-5921, or visit their Web site at safety.evenflo.com.

**AMBY BABY MOTION BEDS AND
HAMMOCKS RECALLED**

Amby Baby USA, of Minneapolis, Minn., has issued a recall Amby Baby Motion Beds. The side-to-side shifting or tilting of the hammock can cause the infant to roll and become entrapped or wedged against the hammock's fabric and/or mattress pad, resulting in a suffocation hazard. Amby Baby is aware of two infant suffocation deaths in the Amby Baby hammock. The Amby Baby Motion Bed consists of a steel frame and a fabric hammock which are connected by a large spring and metal crossbar. There is only one model of the hammock available which can be identified by a label sewn onto the hammock stating: "Amby—Babies Love It, Naturally."

The beds were sold online at Ambybaby.com and other Internet retailers from January 2003 through October 2009 for about \$250. Consumers should immediately stop using the Amby Baby motion beds/hammocks and contact Amby Baby USA for a free repair kit. Parents and caregivers are urged to find an alternative, safe sleeping environment for their baby. For additional information, contact Amby Baby USA toll-free at (866) 544-9721 or visit their Web site at www.ambybaby.com.

**BLENDERS RECALLED BY HAIER
AMERICA DUE TO LACERATION HAZARD**

About 53,800 Haier America blenders have been recalled. The blade assemblies of the blenders may come apart or break, posing a lac-

eration risk. The blenders were manufactured by Ka Po International Industrial Co., of Hong Kong. Haier America has received approximately 60 reports of blade assemblies coming apart or breaking. This recall involves commercial-style 500-watt blenders with model number HB500BSS. The blenders were sold at mass merchandisers and specialty retailers nationwide from November 2006 through October 2009 for between \$26 and \$60. Consumers should immediately stop using the recalled blenders and contact Haier America to receive a free replacement blade assembly. For additional information, contact Haier America toll-free at (866) 327-6147, or visit their Web site at www.haieramerica.com.

JCPENNEY RECALLS COOKS® OUTDOOR BBQ GRILLS DUE TO FIRE HAZARD

About 5,600 Cooks Outdoor® BBQ Grills have been recalled by the importer JCPenney Purchasing Corp., of Plano, Texas. The drip pan on the grill does not allow for adequate drainage, posing fire and burn hazards to consumers. The firm has received 11 reports of fires resulting from inadequate drainage. This recall involves Cooks® brand outdoor BBQ grills. The grill has a digital thermometer on the hood, stainless steel top and a global LP regulator. Lot number 780-2176 is printed on the underside of the grill's stand. They were sold by JCPenney stores nationwide and online at www.jcp.com from February 2009 through September 2009 for between \$190 and \$600.

Consumers should immediately stop using the recalled grills. To ensure the grills are not useable, consumers should remove the gas regulator and hose assembly. All consumers (whether they purchased the item online or at a JCPenney retail stores) should

return the regulator and hose to the Catalog/Customer Service Desk at any JCPenney store for a full refund. Consumers should contact JCPenney for instructions on how to disconnect the gas regulator and hose. For additional information, contact JCPenney toll-free at (888) 333-6063 anytime of visit their Web site at www.jcp.com.

TOY TRUCKS RECALLED BY VARIETY WHOLESALERS

About 700 Super Rigs Play Sets have been recalled by Variety Wholesalers Inc., of Henderson, N.C. The toy truck's surface coating contains high levels of lead, violating the federal lead paint standard. This recall involves "Super Rig Transport" toy truck with trailer and vehicles. The truck and trailer are multi-colored, holding two vehicles and two action figures. "Super Rigs Play Set" is labeled on the outside of the packaging. The trucks were sold at discount stores in the Southeast from September 2009 through November 2009 for about \$20. Consumers should immediately take the recalled toy away from children and return it to the place of purchase for a full refund or replacement product. For additional information, contact Variety Wholesalers at (800) 678-7776 or visit their Web site at <http://www.vwstores.com>.

MTD RECALLS LOG SPLITTERS DUE TO AMPUTATION HAZARD

About 26,000 MTD log splitters have been recalled in the United States. Also, 2,100 in Canada have been recalled. The control handle of the log splitter could fail to automatically return to the neutral position as it should and could fail to stop the splitting wedge from moving forward, posing a risk of amputation to consumers' hands and fingers. Log splitters manufactured from November 2008

through October 2009 are included in this recall. Additional recalled log splitter models were sold in Canada.

The splitters were sold by Home Depot, Lowe's, Menards, Sears, Wal-Mart, hardware stores and by independent dealers from November 2008 through October 2009 for between \$1,000 and \$2,300. Consumers should immediately stop using the recalled log splitters and contact MTD Products Inc. to determine if their log splitter is included in the recall, to receive inspection instructions and to receive a free repair if needed. For additional information, contact MTD toll free at (888) 848-6038, or visit their Web site at www.mtd-products.com.

TIMBERLAND CHILDREN'S BOOTS RECALLED

About 21,000 children's Timberland Classic Scuffproof boots, made in Thailand and imported by The Timberland Co., of Stratham, N.H have been recalled. The logo stamped on the boot's insoles has high levels of lead, which is toxic if young children ingest it. No incidents or injuries have been reported. The boots were sold at shoe stores and specialty retailers nationwide from June through October. Details: by phone at 800-445-5545; on the Web at <http://www.timberland.com> or <http://www.cpsc.gov>.

FARIBAULT FOODS RECALLS SOUP PRODUCT

Faribault Foods is recalling 15-ounce cans of Health Valley Organic No Salt Added Split Pea Soup with certain lot codes because the soup contains butter and potatoes, which are not declared on the ingredients label. Those who have an allergy or severe sensitivity to milk protein or

potatoes run the risk of a health problem or illness if they eat the recalled soup. No confirmed illnesses have been reported, according to the Faribault, Minn., company. The recalled split pea soup was distributed to food stores nationwide. For more information, consumers can call 800-423-4846.

HOME DEPOT RECALLS DEHUMIDIFIERS

The Home Depot, of Atlanta, Ga., has recalled about 2,000 Hampton Bay Dehumidifiers. An internal component can fail causing the dehumidifier to overheat, posing fire and burn hazards to consumers. Home Depot has received 18 reports of the dehumidifiers catching fire. One consumer reported a burn injury to his forearm. The dehumidifiers are beige, have four wheels, and measure 21 inches high, 13 ½ inches wide and 17 ½ inches long. “Hampton Bay” is printed on the front panel. Model HB-50 is being recalled. The model number is printed on the back interior panel. They were sold at The Home Depot from November 2000 through May 2007 for between \$120 and \$150. Consumers should immediately stop using the recalled dehumidifiers and contact Home Depot to receive a gift card for the full amount of the purchase price. For additional information, contact The Home Depot at (800) 553-3199, or visit the firm’s Web site at www.homedepot.com.

CO2 BICYCLE TIRE INFLATORS SOLD AT WAL-MART RECALLED

About 24,000 CO2 bicycle tire inflators have been recalled by Todson Inc., of North Attleboro, Mass. The pressurized cartridge containing carbon dioxide (CO2) can forcefully separate from the pump head, posing a risk of injury to the consumer. This recall

involves Zefal CO2 bicycle tire inflators with a small pressurized carbon dioxide cartridge. The metal cartridge is threaded into the inflator head, which allows for the controlled release of carbon dioxide into the bicycle inner tube. The recalled inflators have “Zefal EZ+ CO2 inflator” printed on the front of the package. Model number 5602 and UPC number 798661556020 is printed on the back. They were sold exclusively at Wal-Mart stores nationwide from August 2009 through November 2009 for about \$15. Consumers should immediately stop using the inflators and return them to Wal-Mart for a full refund. For additional information, contact Todson Inc. at (800) 213-4561, or visit their Web site at www.todson.com.

CHILDREN’S HOODED SWEATSHIRTS WITH DRAWSTRINGS RECALLED BY JASON EVANS ASSOCIATES

Jason Evans Associates, LLC, of Hewlett, N.Y., has recalled about 18,300 boys fleece & flannel zip hooded sweatshirts with drawstrings. The hooded zip sweatshirts have a drawstring through the hood which can pose a strangulation hazard to children. The recall covers Boys Fleece, Printed Fleece and Flannel Zip Hooded Sweatshirts with labels in the neck seam with the brand name Bay Trading and RN# 30842, in sizes 4–18. They were sold at Burlington Coat Factory from September 2006 through October 2009 for about \$12 to \$20. Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard or return the garment to either the place of purchase or to Jason Evans for a full refund. For additional information contact: Jason Evans toll free at (888) 683-0063 or visit their Web site at www.burlingtoncoatfactory.com.

TOY DART GUN PLAY SET RECALLED BY OKK TRADING

“Action Team” Toy Dart Gun Sets have been recalled by OKK Trading Inc., of Los Angeles, Calif. If a child places the soft, pliable plastic dart in his/her mouth, he/she is likely to choke/aspirate the dart into her/his throat impairing the child’s ability to breathe. If the dart is not immediately removed, brain damage or death can occur. There has been one report of the November 2007 death of an eight-year-old boy in Port Arthur, Texas. The child reportedly was chewing on the toy dart when he inadvertently swallowed it and it became lodged in his throat blocking his ability to breathe.

The “Action Team” play set has a toy gun with three soft rubber darts, a S.W.A.T. watch, a baton, walkie-talkie, a whistle, and a badge with a clip and an identification card. The toy guns, which were made in China, were sold at discount department stores nationwide from December 2006 through March 2008 for about \$1. Consumers should immediately take the recalled dart gun sets away from children and contact OKK Trading to return the toy for a \$3 bounty. OKK Trading will provide a free postage paid envelope for consumers to return the toy. For additional information, contact OKK Trading toll-free at (877) 655-8697 or visit their Web site at www.okktrading.com.

VICKS DAYQUIL RECALLED BECAUSE PACKAGING ISN’T CHILD-PROOF

About 700,000 units of Vicks Dayquil cold medicine have been recalled after finding that the packaging was not child-proof. The recall affects Vicks Dayquil Cold & Flu 24-Count Bonus Pack Liquicaps with the UPC no. 3 23900 01087 1, according to the product safety group. The medicine was sold

between September 2008 and December 2009.

The packaging—which is not child-resistant and lacks the statement, “This package for households without young children”—should be kept out of the reach of young children. If a child swallows several of the pills, the child could suffer “serious health problems or death,” according to the CPSC. No injuries have been reported in relation to the recall. People who bought the product can request a refund or coupon from manufacturer Procter and Gamble Co. by calling them at 800-251-3374.

P&G RECALLS VICKS NASAL SPRAY AFTER BACTERIA FOUND

The Procter & Gamble Co. has recalled some 120,000 bottles of Vicks Sinex nasal spray after the company found bacteria in samples during routine testing. The voluntary recall took place after small amounts of the *B. cepacia* bacteria were found in the over-the-counter product at the German plant where it's made. Millikin says no illnesses have been reported. The bacteria could harm people with chronic lung problems or weakened immune systems according to the company.

Three lots of the spray sent to stores in the United States, Germany and the United Kingdom are being recalled. The company, which is based in Cincinnati, says it has informed regulatory authorities in the affected countries. The bacteria were found in a small amount of the U.S. lot after it shipped, and the company is testing samples from the U.K. and German lots produced from the same raw material mixture in Gross Gerau, Germany. P&G says consumers should not use the medication.

CAT FOOD RECALLED OVER THIAMINE DEFICIENCY

Diamond Pet Foods has recalled select bags of dry cat food after 21 reports of health problems in cats. Select bags of Premium Edge Finicky Adult Cat and Premium Edge Hairball could lead to gastrointestinal or neurological problems for cats, because they do not contain enough thiamine, an essential nutrient for cats. If cats fed these foods have no other source of nutrition, they could develop thiamine deficiency. If untreated, this disorder could result in death.

Initial symptoms of thiamine deficiency include decreased appetite, salivation, vomiting and weight loss. Later, neurological problems could develop including bending the neck toward the floor, wobbly walking, circling, falling and seizures. The company has confirmed 21 cases of thiamine deficiency in New York and Pennsylvania. The recalled bags of food were distributed in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey, Maryland, Delaware, New York, Pennsylvania, Virginia, Alabama, Tennessee, North Carolina, South Carolina, Georgia and Florida. For a full refund, consumers can return the recalled cat food to the place it was purchased. For more information call 800-977-8797.

If you need more information on any of the recalls listed above, or would like information on a recall not listed, you can go to our firm Web site at www.BeasleyAllen.com/recalls. You may also contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information.

XXII. FIRM ACTIVITIES

BUILDING OAKS OF RIGHTEOUSNESS

Our firm is sponsoring a very special event to be held at St. James United Methodist Church in Montgomery on the 15th of this month. John Croyle, who played football at the University of Alabama under Coach Paul Bryant, and who now runs the Big Oak Ranch, will be the featured speaker. Kim Hill, the noted Christian singer, will be the worship leader and will sing some of her big hits. This event is designed to help men understand their responsibilities as husbands and fathers. It should be attended by men, women and young people. St. James is located at the intersection of Vaughn and Ryan roads. For all who attend, I guarantee that it will be a highlight of their year!

EMPLOYEE SPOTLIGHTS

HELEN TAYLOR

Helen Taylor, who joined us in December of 2008, serves as the Public Relations Coordinator for the firm. In this position, Helen works closely with news media outlets to help promote firm events, charitable giving, community service and reporting on ongoing or new cases. She also assists with special events and advertising projects. Helen is married to Jason Taylor and she has a ten-year-old step-daughter, Catie, and a two-and-a-half-year-old son, Sam. The Taylors also have a 12-year-old dog, Hannah. Helen graduated from Auburn University Montgomery. She enjoys keeping up with Sam, gardening, and spending time with her family. Helen is a most valuable employee who does outstanding work. We are most fortunate to have her with us.

DARNESHIA WHITFIELD

Darneshia Whitfield, who joined the firm in February 2007, is a Staff Assistant in the Mass Torts Section. Recently, she has been working with the Hormone Replacement Therapy Team. Her duties on the team consist of assist-

ing with preparing clients' cases for their upcoming trials. Darneshia has also previously worked with the Vioxx team on file management for our Vioxx clients. When the Vioxx settlement was reached the focus then switched to preparing each client file for presentation to the claims administrator for a settlement award.

Darneshia says she really enjoys her job at Beasley Allen and being able to know that her hard work is helping others is a great reward. She and her husband Tommy have two children, Carly, who is 16 years old, and T.J., who is eight. Darneshia has a Bachelor's Degree in Business Administration from Faulkner University. Darneshia says the majority of her time is dedicated to her children and their activities but she also enjoys reading, sports, movies, and music. Darneshia, a dedicated worker, does a very good job. We are fortunate to have her with us.

TOP LAWYERS AT FIRM HONORED

Managing Shareholder Tom Methvin was selected as the firm's "Top Attorney" of the Year. The annual recognition is presented to the lawyer who demonstrates exceptional professional skill throughout the course of the year and best represents the firm's ideal of "helping those who need it most." Tom does a tremendous job of managing the firm and keeping things on the right track.

The firm also recognized excellence in each of its sections, naming a Lawyer of the Year in each Section. Honorees for 2009 are:

- Julia Beasley, Personal Injury Section Lawyer of the Year;
- Lance Gould, Fraud Section Lawyer of the Year;
- Ted Meadows, Mass Torts Section Lawyer of the Year;
- Kendall Dunson, Product Liability Section Lawyer of the Year; and
- Rhon Jones, Toxic Torts Section Lawyer of the Year.

Each of these lawyers did extremely good work during 2009 and were selected to receive the awards at the firm's Christmas party on December 15th.

XXIII. SPECIAL RECOGNITIONS

END OF YEAR MESSAGE FROM STATE BAR PRESIDENT TOM METHVIN

To many people, the start of the New Year signals a clean slate. The days ahead feel full of potential. This is why it is traditional to make a New Year's Resolution or two. As you consider your resolutions, I'd like to urge you to make Access to Justice a priority.

Since deciding to emphasize this important service during my term as Bar President, I have been encouraged by the response from lawyers throughout the state. During Pro Bono Week in October, lawyers in every judicial circuit participated in activities to provide free legal services to the poor, or to raise awareness about pro bono programs available in their community. More than 3,200 hours of service were contributed during Pro Bono Week alone, totaling more than \$400,000.

Building on this momentum, the Montgomery County Bar Association (MCBA) Pro Bono Committee, with the Alabama State Bar Volunteer Lawyer Program (VLP), has implemented a pilot program in Montgomery County to provide a monthly free legal services clinic. The clinic will operate on the first Tuesday of each month and began in November 2009. Volunteer lawyers were able to help 36 people at the first two clinics. Each life we touch will have such an impact on others, and on the community. Our work helps make

Alabama a better place for all of us to live.

The VLP is an important tool to provide free legal services to poor and disadvantaged Alabamians. It refers cases to volunteer private attorneys who agree to provide free legal assistance to low-income clients. Each of the four VLPs affiliated with the Alabama State Bar—the Birmingham, Mobile and Madison County Bar Associations, and the ASB VLP—has increased its focus on VLP participation and activity.

Three thousand attorneys are currently participating in the VLP. I was particularly encouraged to learn that at Beasley Allen's recent Legal Strategies Conference, we had almost 80 new attorneys join the VLP. That is outstanding! If you have not already joined, won't you consider putting this at the top of your New Year's Resolution list?

Many people say that a society should be judged on how it treats the least among them. As lawyers we are leaders of society and have a duty to try to help the less fortunate. Through your continued service, we will continue to be able to provide true access to justice for "the least of these" in our community.

LABARRON BOONE HOSTS THE LAW & YOU

LaBarron Boone hosts the live radio call-in program "The Law & You" each Tuesday from 6-6:30 p.m. on WVAS-FM, 90.7. The show addresses a variety of legal issues and fields calls from listeners each week. LaBarron also welcomes special guests including lawyers and other government, industry, civic and political leaders. Past guests have included State Senator Hank Sanders, Montgomery Mayor Todd Strange, Senator Quinton Ross, Jr., Montgomery Police Chief Art Baylor, and Civil Rights lawyer Solomon Seay.

The Law & You touches on a wide spectrum of topics, with the goal of helping people find answers to their legal questions and learn more about the law, and also putting them in touch with the resources they need to find a solution. Each 30-minute show is magazine-formatted, highlighting one call-in topic. Live calls are taken from listeners. LaBarron says:

At Beasley Allen, we will continue serving our community and this country by keeping it legal. Our radio program "The Law & Yo" reaches people all over the world not only over the airwaves, but also on the Internet.

Folks can call the program at 334-269-6785 or toll-free at 800-631-2893. Listeners also may submit questions via Twitter at twitter.com/thelawandyou or online at www.beasleyallen.com.

LEDBETTER HONORED WITH INSPIRE AWARD

I hope none of our readers have forgotten who Lily Ledbetter is or what she has done. The equal pay advocate, a former Goodyear Tire & Rubber Co. employee whose name is on federal equal pay legislation passed last year, joined celebrities Clint Eastwood, Raquel Welch, Leeza Gibbons and six other advocates in being recipients of the eighth annual Inspire Awards given by AARP. The Inspire Awards salute ten outstanding individuals "who are using their energy, creativity and passion to make the world a better place."

The 2010 honorees include Lonnie Ali (voice for Parkinson's), Aida Giachello, (Latino health activist), Scott Hamilton (cancer crusader), Tom Joyner (education advocate), Brenda Krause Eheart (Bridge for Generations) and Capt. Richard Phillips (reluctant hero). Nancy Graham, editor of *AARP The Magazine* observed:

These ten compassionate, forward-thinking and daring individuals stand up for causes they believe in and they've found unique ways to inspire others to action. Through their extraordi-

nary contributions to society, this year's Inspire Award honorees motivate our readers to get involved, give back, and make a difference in their own communities.

Lily Ledbetter, who lives in Jacksonville, Ala., spoke at the Democratic National Convention in Denver about her battle for pay equity that went all the way to the U.S. Supreme Court before losing. Ms. Ledbetter's convention speech about her legal battle with Goodyear over being paid less than male supervisors doing the same work got the attention of Barack Obama's presidential campaign. After helping the Obama campaign in several states and cutting a campaign spot for the Democratic presidential nominee, Ms. Ledbetter campaigned for other Democratic candidates.

The Lilly Ledbetter Fair Pay Restoration Act was the first legislation signed by President Obama. The law gives people 180 days from when they learn of pay discrimination to file suit. Ms. Ledbetter worked at Goodyear for almost 20 years and filed suit in 1998 shortly before retiring. She lost her legal battle in 2007 when the Supreme Court ruled she had waited too long to file suit over her pay, even though she didn't know she was being paid less.

The company argued the difference in pay was based on job performance, not discrimination, and that the Complaint had been filed late. Ms. Ledbetter said she had wanted the significance of the first bill signed by President Obama to tell the Supreme Court "you got it wrong." She found out through an anonymous note about the difference in pay and still doesn't know who gave her the information. This courageous woman says, "It was never about the money, it was about what was right." Ms. Ledbetter lost an estimated \$225,000 in wages during the time she worked at Goodyear. She initially was awarded \$3.8 million, but that ruling was overturned by the Court of Appeals for the Eleventh Circuit and the decision was upheld by the Supreme Court. I am very proud of Lily Ledbetter. Lots of

women in this country owe a great deal to her.

Source: *The Gadsden Times*

XXIV. FAVORITE BIBLE VERSE

Dr. Lester Spencer, Pastor at St. James United Methodist Church, sent in the following verse:

I am your Creator. You were in my care even before you were born.

Isaiah 44:2a (CEU)

Patrick McWhorter sent in the following verse.

The Lord himself will fight for you. Just stay calm.

Exodus 14:14 (NLT)

Fred L. Potter, who serves as Executive Director of the Christian Legal Society, sent in the following verse.

He who oppresses the poor shows contempt for their Maker, but whoever is kind to the needy honors God.

Proverbs 14:31

Joshua P. Hayes, a very good lawyer with the Prince Glover Law Firm in Tuscaloosa, sent in his favorite verse.

Delight yourself in the Lord and he will give you the desires of your heart.

Psalms 37:4

XXV. CLOSING OBSERVATIONS

Dempsey and Frances Boyd, who are from my hometown of Clayton, have been friends of our family for years. One of their grandchildren, Chris Cooper, sent in the following message. Chris runs the Boyd Brothers Transport-

tation Co. operations in Birmingham and does an outstanding job.

Our Sunday school class has recently spent a bit of time in the Book of James. James was written by Jesus' brother, not James the apostle, and it has great messages of how truly genuine faith will inevitably produce good deeds. This is the basic central theme of James' letter, but James also provides great practical advice on living a Christian life.

Chapter 3 has a great applicable message about how our speech affects others. Specifically, James teaches how our "tongues" are instruments of great influence on other people around us. James goes further into detail about our tongues and makes the statement in verse 6 that "It corrupts the whole person, sets the whole course of his life on fire and is itself set on fire by hell." This is a theme that is repeated throughout Scripture. For Example, in Psalms 39:1, David prayed, "I will guard my ways so that I may not sin with my tongue." Solomon warned, "Life and death are in the power of the tongue" (Proverbs 18:21). Jesus also reminded us of the significance of our words when He said, "For by your words you will be acquitted, and by your words you will be condemned" (Matthew 12:37). Likewise, we have probably all heard of some variation of what James says in James 1:19 when he wrote, "Be quick to hear, slow to speak, and slow to anger."

Some people interpret the verses written in James to be intended for the use of teachers only; however, because this theme is reverberated multiple times throughout Scripture I believe ALL of us, as Christians, have a duty to be "better" examples to those we influence. We need to have positive contact with individuals rather than untamed, hypocritical conversations. So what are some examples of an "untamed" tongue? Some examples would be gossiping, putting others down, bragging, manipulating, false teaching, exaggerating, complaining, flattering and lying to name just a few.

How do we do this? How do we fight this "fire" of the tongue and avoid the double talk of praising our Lord and Father on Sunday and going the rest of the week without a thought to our speech? How do we "tame" our tongues? We must saturate our minds with Godly wisdom from the Bible and immerse ourselves in a healthy prayer life. Families and churches (and our country) today need believers whose speech is informed and influenced by God's word and wisdom. We must use our words to heal instead of harm, to encourage rather than tear down, and to unite instead of divide. Ultimately this will promote the peace James desires for us.

Chris Cooper
Birmingham, Ala.
December 10, 2009

OUR NATION CAN BE HEALED

The American people have an opportunity to heal our nation and the way it can be done is set out in the Bible. This instruction is one that we can no longer afford to ignore or put off.

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

2 Chronicles 7:14

XXVI. PARTING WORDS

The year 2010 will present many serious problems for the American people. But we can handle whatever comes our way much easier if we will learn to depend on God as our source of wisdom, courage and strength as we are confronted with these problems. Our Lord is faithful and true and always available to us. That assurance will allow us to deal with even the most difficult issues.

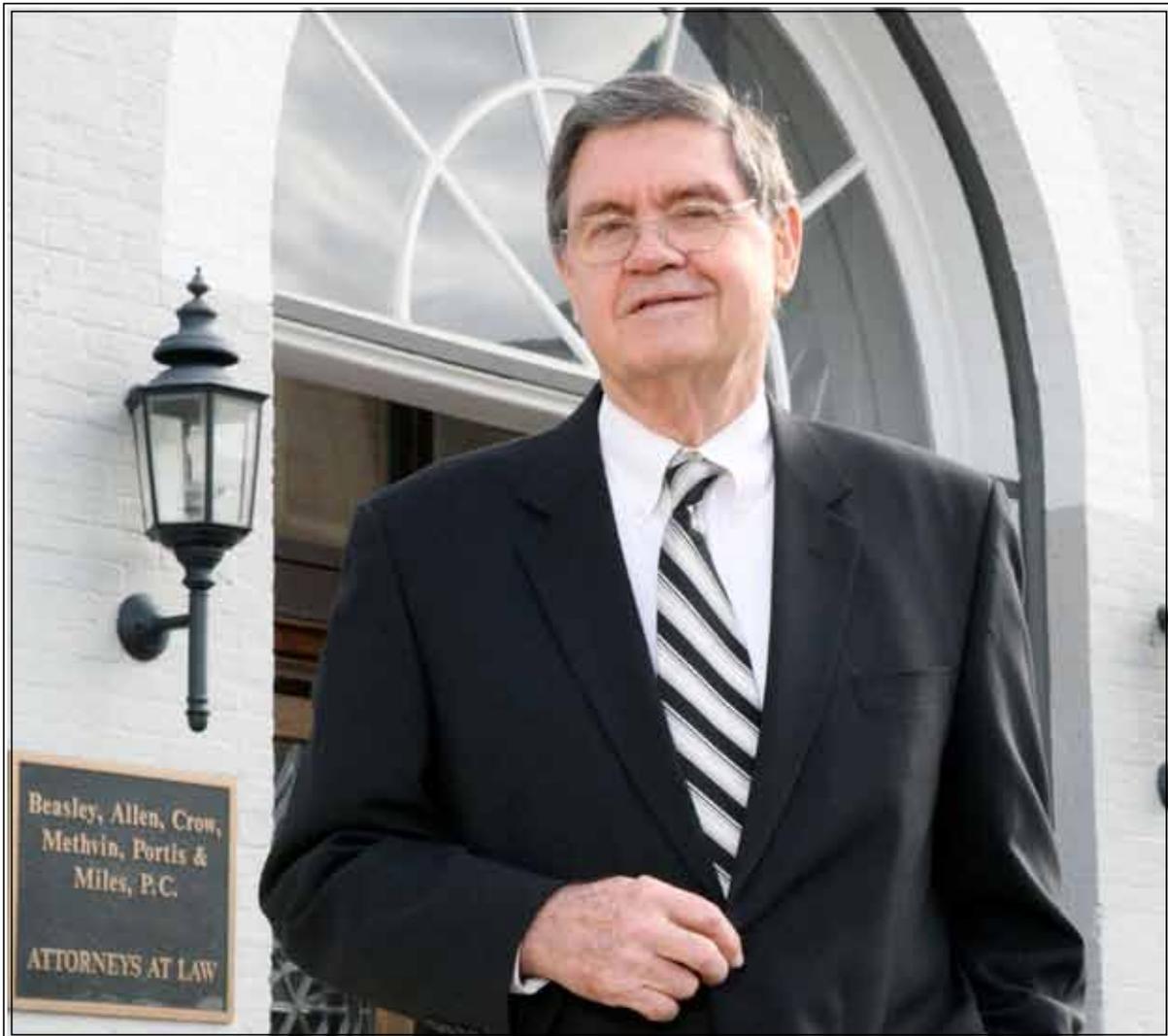
May God continue to bless and protect all of you during this New Year! It's my prayer that 2010 will be the best ever for you. This year can be one of spiritual change and growth for our nation and you can help bring that about. Happy New Year!

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