THE JERE BEASLEY REPORT

JANUARY 2009

Beasley Allen

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.

Attorneys at law

Helping those who need it most since 1979

Distributed to over 45,000 subscribers each month

www.BeasleyAllen.com

I. CAPITOL OBSERVATIONS

Judge Orders Mediation In Drug Pricing Lawsuits

Montgomery County Circuit Judge Charles Price, who is presiding over the state of Alabama's Medicaid fraud litigation, has ordered the State of Alabama and two drug manufacturers, Roxane Laboratories and Sandoz, into mediation in an effort to reach a settlement in the drug pricing lawsuits against those companies. Judge Price appointed retired Circuit Judge Claud Neilson to mediate the State's lawsuits against the two drug manufacturers. The lawsuits are scheduled to go to trial on February 9th in Judge Price's courtroom. The court's order says all sides should make a good faith effort to reach an agreement.

Roxane and Sandoz are among the more than 70 companies the State has sued for overcharging the State's Medicaid program. Thus far we have has won jury verdicts on behalf of the State against three of the companies and have reached settlements with seven other manufacturers. Hopefully, the mediation will be successful. If not, we will be ready for trial in February.

Second Annual Beasley Allen Retreat Was A Great Success

About 1,000 lawyers attended the second annual Beasley Allen Retreat in November at the Renaissance Montgomery Hotel and Spa. The two-day retreat, which was open to all Alabama lawyers in private practice, provided continuing education credits and a great deal of useful information to those in attendance. We were fortunate to have Rep. Artur Davis and Dr. David Bronner as our featured speakers for the event. I gave the meeting's keynote opening address and explained "Why I am a Trial Lawyer." One of the highlights of the weekend event included special guest luncheon speaker Paul Finebaum, a popular sports commentator and columnist, who was very entertaining. Dr. Bronner's most informative talk was great and was well received. His topic, "The Future of Alabama and the Laws that Apply," was timely. Congressman Davis, who spoke on "National Politics and the Law," received a tremendous response from the lawyers. Most came away believing that Artur is running for Governor of Alabama in 2010.

Other featured speakers included the Honorable Charles Price, presiding judge for the 15th Judicial Circuit; Mark White, President of the Alabama Bar Association; veteran State Senator Roger Bedford; Ted Hosp of Maynard Cooper; and Jeremy McIntire from the Alabama State Bar. Firm lawyers Greg Allen, Dee Miles, Cole Portis, Rhon Jones, Julia Beasley, Kendall Dunson, Andy Birchfield, LaBarron Boone, and Dana Taunton gave excellent presentations on their specialties during the retreat. Tom Methvin, the firm's Managing Shareholder, who gave the welcoming remarks, had this to say about the retreat:

> *We were extremely pleased to be able to offer this program as a service for lawyers from throughout the State of Alabama. It was a valuable opportunity for continuing education, as well as providing the chance for networking and building business relationships with other lawyers. We felt the entire retreat was a complete success.*

Not only was the retreat good for the firm and I believe for all the lawyers who attended, it was good for Montgomery. According to Dawn Hathcock, Vice President for the Montgomery Area Chamber of Commerce Convention & Visitor Bureau, the direct economic impact of the conference was well over a quarter million dollars. Every available hotel room in the downtown area was occupied, as well as a number of rooms at several other hotel properties throughout the city. Dawn observed:

> *A revitalized downtown with an expanded Convention Center allows Montgomery to host larger groups than ever before, and the economic impact is significant. This includes hotel room nights, as well as revenue generated from people dining, shopping and visiting attractions during their stay. That's all money that goes back into the community and supports the infrastructure and quality of life for our residents.*

Spouses of the lawyers attended a special showing for them at Pickwick

IN THIS ISSUE

I. Capitol Observations 2
II. Recent Settlements in the Firm 6
III. Legislative Happenings 9
IV. Court Watch 9
V. The National Scene 11
VI. The Corporate World 13
VII. Congressional Update 16
VIII. Product Liability Update 17
IX. Mass Torts Update. 18
X. Business Litigation 22
XI. Insurance and Finance Update . . . 23
XII. Predatory Lending. 25
XIII. Premises Liability Update 26
XIV. Workplace Hazards. 28
XV. Transportation 29
XVI. Arbitration Update 32
XVII. Healthcare Issues 32
XVIII. Environmental Concerns. 35
XIX. The Consumer Corner. 39
XX. Recalls Update 44
XXI. Firm Activities 46
XXII. Special Recognitions. 48
XXIII. Some Closing Observations. 50
XXIV. Some Parting Words 51

Antiques. Many said this was a highlight of the weekend for them. Next year we hope to do a better job of providing events for the families of lawyers who come to the retreat.

A Very Good Economic Package Will Be Presented By President Elect Obama And Democrats

President-elect Barack Obama and Congressional Democrats will present Congress with a two-year economic rescue package that will total about a half-trillion dollars. The President-elect has an outstanding economic team already in place and has given them the job of assembling a measure to not only quickly pump money into the battered economy, but also to create at least 2.5 million new jobs. The plan will send a tax cut to the poor and middle class and make massive government investments in energy-saving and other technologies designed to pay for themselves over time.

Hopefully, this plan which certainly makes sense will pass quickly. Most agree the stimulus package must be significant enough to jolt the economy in a positive manner. Obviously, putting people back to work at this stage is a critical need. It's important that this plan restores confidence in the business community. The Bush Administration is not only leaving our economy in a mess, but it refused to admit the country was in a recession. I guess the good news is that most recessions run a course in about 16-18 months, which means this one should end in mid-year.

The Obama Administration will work to establish a "green jobs" program that will invest as much as $100 billion in projects to slash harmful emissions. This could include projects such as retrofitting buildings to make them more energy-efficient, upgrading the electrical grid and improving mass transit. Putting money into green technologies will have a very large positive employment effect. Not only will good jobs be created, but the short-term effects are compatible with long-term needs in the economy and that's very important.

Tax cuts for low- and middle-class workers will likely be a part of the new President's overall plan to end the recession and help save our nation's economy. I understand one component of this plan will be a proposal to send tax credits of $500 to individuals and $1,000 to couples, including payments for people who make too little to owe any taxes. Those credits are estimated to cost about $115 billion in their first two years, according to the nonpartisan Tax Policy Center. Contrary to what some GOP extreme right-wingers are saying, the recovery plan is not expected to include a tax increase for those earning $250,000 or more annually.

In addition, President-elect Obama unveiled a program on December 7th that featured the largest investment in U.S. infrastructure since the Interstate Highway System was conceived during the administration of President Dwight D. Eisenhower. The Obama plan, which could cost at least $500 billion, will breathe badly-needed life into the U.S. economy by creating 2.5 million jobs for traditional projects such as repairing roads and bridges, as well as 21st-century jobs in technology and alternative energy. This appears to be a well thought-out approach to creating jobs. At the same time it will take care of some badly-neglected infrastructure needs. Companies that provide services or materials in connection with such projects will do well and folks will get good jobs.

Regardless of whether you voted Democrat or Republican in the Presidential election, we all have an obligation to support the new President. He must be given a chance to put his plans for America in place and get things moving in the right direction again for all citizens. Thus far, his appointments and plans for America are very good.

Source: *Associated Press*

Bush White House Approves Regulations On Environmental Matters

The Bush White House has approved 61 new regulations in a last minute attempt to pay political debts and help out political buddies. Some of the rules benefit key industries that have long supported the administration, such as oil and gas companies and banks. One thing is certain: the regulations approved in November will do little to benefit ordinary citizens. In fact, many of them are designed to hurt consumers and damage the environment.

The Bush Administration's rush to approve and publish so many of these regulations in the *Federal Register* will make it difficult for the new Administration to undo the damage done. November 21st was an important political deadline for the Bush White House to ensure the new regulations become effective before the inauguration on January 20th. Once the new rules take the form of law, Democrats can undo them only by utilizing three complicated means:

- through new regulatory rulemaking that would probably take years;
- through Congressional amendments to underlying laws; or
- through special, fast-track resolutions of disapproval approved by the House and Senate within a few months after the start of the new Congressional session on January 6th.

Hopefully, Democrats in Congress will use the regulatory reversal power in consultation with the new President in order to protect the American people. The leadership must review oversight tools regarding the last-minute attempts to inflict severe damage to the law in the waning moments of the Bush Administration. This sort of thing can't be tolerated.

Source: *Washington Post*

National Consumer Groups Release Six Priority Platform

Seven leading consumer groups released their shared priority platform for 2009 last month. They sent letters to President-elect Obama, Speaker Nancy Pelosi and Senate Majority Leader Harry Reid, asking them to take

action on financial meltdown, health care, energy, food safety and restoring legal rights. Quick and comprehensive action was urged by the groups. In addition, they are asking that the President and Congress elevate consumer protection as a priority by reinstating the long-dormant Office of Consumer Affairs, this time to be headed by a special advisor to the President in the White House. That person would in effect be a consumer czar. The list of priorities will be pushed as a united consumer front and that's very good news.

The leaders of the public-interest groups want the adoption of six major pro-consumer priorities. Reinstatement of the White House Special Advisor on Consumer Affairs is a top priority. Leaders of the seven groups—Public Citizen, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, Public Citizen, and the U.S. Public Interest Research Group, representing millions of American consumers—have united behind this agenda in response to increasing risks to consumer rights and protections.

During the Bush years we have seen consumer rights threatened and taken away. The severe financial crisis and mortgage meltdown, high and volatile oil prices, growing concerns over the safety of imports and food, and the rising cost of health care have all resulted from the Bush Administration's total disregard for the plight of ordinary citizens in this country. I have never seen a worse Administration when it comes to consumer rights and protection than the Bush gang.

As a result of anti-consumer policies by the Bush Administration in these areas, the coalition of consumer advocates have developed an agenda to highlight some of the most critical issues facing the American public today. The leaders noted that Congressional passage of comprehensive Consumer Product Safety Commission reform this summer was a positive step, suggesting that Congress may be ready to consider other important consumer reforms.

As the events of recent months have shown, weak consumer protections don't just harm individual Americans, but the economy overall. Inadequate laws and poor oversight of credit and financial services have led to a huge loss of wealth for many American families and were a major factor in causing the severe economic recession. This agenda is not simply a way to protect consumers, but to increase the economic and health security of the country. The six-point agenda includes:

- Restoring the United States Office of Consumer Affairs. This would include putting a consumer "czar" In the White House.
- Reining in Wall Street Excesses, Protecting Consumers from Abusive and Predatory Lending.
- Protecting Consumers from Price-Gouging in Oil, Gas and Electricity Markets, and Taking Steps To Provide Households With Access to Alternative Energy and Efficiency.
- Improving Consumer Access to Justice by Reinstating Legal Rights.
- Ensuring Safe, High Quality, Affordable Healthcare for Everyone.
- Making Sure Food Products are Safe, including imported products.

Hopefully, President-elect Obama and the new Congress will adopt these priorities and push them very hard. If so, the American people will see *real* change!

Source: Public Citizen

Poll Results Are Most Revealing

Periodically, especially after major elections, the Capital Survey Research Center (CSRC) conducts statewide surveys in Alabama to measure public confidence in national and state institutions. The most recent survey, the Confidence in National Institutions Survey, was completed by CSRC on December 1st. The following findings came from the survey:

- 82% of Alabamians are dissatisfied with the way things are currently going in the country.
- In a ranking of confidence in national institutions, organizations and leaders, the U. S. Military, volunteer organizations such as the Red Cross, and President-elect Obama have the highest "Great Deal of Confidence" percentages. National polls, newspapers, unions, the Stock Market and business corporations have the lowest "Great Deal of Confidence" ratings.
- The highest "No Confidence" ratings include national radio talk shows (Limbaugh and Hannity) and the Stock Market.
- President-elect Obama, Senator McCain and Governor Palin, in that order, all have majority favorable ratings.
- 61% of Alabamians are either "Very" or "Somewhat" optimistic about the new national Administration.
- 53% of Alabamians feel "Very Good" or "Good" about their current household financial condition. Only 10% feel "Not Good."

I'm not surprised by the findings of the CSRC survey. In fact, the only one that may have changed over the past month would be the feelings in our State about household finances. I suspect if polled today the 43% in December would be much less now.

Source: Capital Survey Research Center

Louisiana Bridge Wrongful Death Lawsuit Filed

Our firm has filed suit on behalf of the family of the deceased bridge worker who was killed in the bridge collapse that we wrote about in the December issue of the *Report*. The death occurred on October 30, 2008, in Louisiana. Eric Troy Blackmon, a longtime employee of Boh Bros. Construction, was a foreman on the twin span bridge being built between Slidell and New Orleans, Louisiana. Mr. Blackmon was attached with a safety harness to a

70-ton concrete girder that collapsed into Lake Pontchartrain. The structural failure caused Mr. Blackmon to fall 30 feet to the lake surface and be pulled to the bottom of the lake.

J. Greg Allen, Chris D. Glover, and I will handle the case for the family. A complaint was filed on December 12, 2008 in the Civil District for the Parish of New Orleans, Louisiana, against Gulf Coast Pre-Stress, Inc., the Louisiana Department of Transportation and Development, and Volkert & Associates, Inc. These Defendants knew of problems in the design of the girders that prevented them from being properly secured to the bridge. The defendants were negligent in their remedial measures taken to repair the design issues in the girders.

This was a terrible incident that resulted in the loss of a husband and father. On the day of his death Mr. Blackmon and his co-workers were doing exactly what they should have been doing. These concrete girders are not supposed to fall and it's something that should never have happened. We will do everything possible to get a good result for the family.

City Of Birmingham Files Suit Against Predatory Lenders

Our firm has filed suit on behalf of the City of Birmingham against various sub-prime lenders including Countrywide. The companies violated the Fair Housing Act by participating in illegal predatory lending practices in the City of Birmingham. The lenders also violated state laws and have profited greatly by their wrongdoing.

The Birmingham City Council unanimously passed a resolution earlier this year authorizing the suit to be filed against the sub-prime mortgage lenders. The complaint filed alleges that as a result of the predatory practices of these lenders against many Birmingham residents, the City of Birmingham has lost tax revenue due to the high rate of foreclosures in the City. The excessive foreclosures have also caused the City to spend additional taxpayer funds maintaining abandoned properties, demolishing abandoned buildings, on increased abatement costs and on increased police and fire protection expenses due to increased crime rates in areas hardest hit by sub-prime foreclosures.

The lawsuit was filed in the Circuit Court of Jefferson County, Alabama and seeks compensatory, statutory, and punitive damages, as well as injunctive relief against the lenders to stop their predatory lending practices. The City of Birmingham and its citizens have been hurt because of the wrongful conduct of these predatory lenders. The goal of this lawsuit is to make the Defendants pay for their wrongdoing. Their conduct is not only unlawful, it's immoral. The case was removed to federal court by the Defendants, but it was promptly remanded to state court. Jay Aughtman, Dee Miles and I will try the case for the City.

Montgomery Police Department Will File Suit To Recover Damages For Faulty Surveillance Equipment

Our firm is representing the City of Montgomery and its Police Department in a lawsuit to recover damages caused by faulty video surveillance equipment that failed to function properly. The equipment, which included surveillance cameras mounted in police patrol cars and related support software, was purchased from North Carolina-based Integrian. The equipment, purchased at a cost in excess of $500,000, has failed to work and has caused the Montgomery Police Department a great deal of difficulty. Under the contract, mediation is required before the lawsuit can be filed. We have made a request for mediation and hope that Integrian will settle the case in a manner satisfactory to the City.

The Time Has Come For Constitutional Reform In Alabama

The time has come for a new constitution for the people of Alabama. There is no larger impediment in Alabama to economic prosperity, local governance and healing the wounds of our State's racist past than the 1901 Alabama Constitution. This outdated framework erodes education systems, discourages citizen involvement and creates an extraordinarily inefficient government. It's past time for change in this important area of concern. The mission of the Alabama Citizens for Constitutional Reform (ACCR) Foundation, an organization committed to democracy, is to organize and fund a grassroots citizens' movement to enact a new Alabama constitution that will ensure opportunity, self-determination, and justice for all Alabamians.

In my opinion, the best way to come up with a new constitution is by taking the convention route. Of course, there are some very strong special interests that oppose a convention. To address some of the fears that are being spread about holding a convention to write our State's seventh constitution, it was decided that a mock convention should be held. That will help educate people in the State about the convention process as well as engaging more folks in the Constitutional Reform Movement.

I understand that a mock convention will convene on the morning of Saturday, February 14th and will go through the afternoon of Monday, February 16th. It will convene again during the April 24–26 weekend before the document is unveiled at the Constitutional Village in Huntsville in conjunction with the third annual Bailey Thomson Awards Luncheon. If you want more information on the need for constitutional reform or the mock convention, you can contact Mark Berte, who is working hard on this project, at (205) 266-3371 or write to him at P.O. Box 10746, Birmingham, AL 35202.

II. RECENT SETTLEMENTS BY THE FIRM

Electrocution Case Settled In Alabama

Our firm has settled a wrongful death case that had been set for trial in an Alabama state court for January 5th. The case arose out of the electrocution of a wife and mother at a family-run business. The victim was electrocuted when she touched part of a feed line which consisted of a feed hopper and auger enclosed in a long metal tube. She had no way of knowing that the feed line had been energized because of a short in an electrical switch at the feed hopper which was located on the line. The Defendants in the case were: Chore-Time Brock (CTB), which designed, manufactured and sold the chicken feeder system; Farm Systems, Inc., which is the dealer for CTB; Latco, which sub-contracted with CTB for the construction of the chicken houses and the feeder installation; and Phillips Electric, which sub-contracted with Latco and wired the feeder system. CTB was the general contractor for the construction of the chicken houses including the installation of the feeder system.

There was a switch known as a 2912 manufactured by CTB on the hopper that was involved in this incident. The 2912 shorted out, thereby energizing the system. Unfortunately for the victim this switch was not grounded. When the victim touched the hopper line she became the ground and a sufficient amount of electricity passed through her body to kill her. The incident occurred early in the morning and the victim wasn't found until her two children came home from school and found her lying across the line. Both children had "zone of danger" claims against the Defendants.

Our experts found the feeder system to be defective and unreasonably dangerous, both in the form of design as well as installation. There were numerous violations of the National Electrical Code in the installation. The system should never have been designed to allow 220 volts to travel through the type of switch chosen by CTB. Our design expert found there were relay type switches used by other manufacturers which would have minimized the potential for the switch to burn out in the first place. With that alternative design, if a switch were to fail, the voltage would be very low and thus not dangerous. In addition, the system should have been designed to be grounded. Selling a 14550 switch with a clipped ground wire and an interchangeable switch that requires a ground without adequate warnings was also a factor in the claim against CTB.

The trial judge ordered the case to mediation before Phil Adams, a lawyer from Opelika. All claims were settled a few days after a full day of mediation was completed. Greg Allen and I from our firm and Shane Seaborn from the firm of Penn & Seaborn located in Clayton represented the family. The amount of the settlement is confidential at the request of the Defendants.

Huntsville Bus Crash Cases Settled

Our firm reached a settlement on behalf of the family of Nicole Ford, a Lee High School student, who was killed when her school bus crashed on November 20, 2006, in Huntsville and plunged 30 feet from a highway overpass to the ground below. Ms. Ford was among 40 students traveling to the Huntsville Technology Center who were involved in the tragic crash. None of the students was wearing a seatbelt because school buses in Alabama are not equipped with seatbelts.

Four students including Miss Ford were killed in the crash, and many others were injured. The bus was not equipped with seat belts for student passengers. Although seat belts are required by statute for the drivers of school buses in Alabama, the statute is silent on any mandate for seat belts for passengers. The Alabama Supreme Court has ruled this silence indicates the Legislature only intended for bus drivers to be belted.

The suit was filed in the Circuit Court for Madison County by our firm. Ours was the first case filed as a result of the incident. Other cases were filed later, including three more death cases and several personal injury claims. Defendants in our case were Laidlaw Transit, the school bus driver, and the driver of a passenger car that was involved in the crash.

The safety of children riding as passengers on school buses must be a top priority for those who are in charge of our schools and for those who own and operate school buses. This tragic incident resulted in the loss of innocent lives. Hopefully, the Alabama Legislature will take the necessary action to require all bus manufacturers to equip school buses with seat belts for passengers.

All of the pending cases went to mediation and, after a full day which lasted into the night, all four death cases were settled. The amounts of the settlement were confidential at the request of the Defendants and their liability insurance carrier. Kendall Dunson and Cole Portis from our firm, along with Wayne Wolfe of the Huntsville firm Wolfe, Jones, Boswell, Wolfe, Hancock & Daniel, LLC., represented the Ford family. We were pleased to have been able to settle their case.

Lawsuit Involving 18 Wheeler Crash Settled

Our firm settled a lawsuit last month that arose out of a motor vehicle crash that occurred in Montgomery. Our client, a 23-year-old female, was on her way home from work at a Hyundai supplier when her small automobile was struck from the rear by an 18 wheeler. The crash occurred on the Selma Highway near the airport at about six a.m. The 18 wheeler was traveling at about 60-65 miles per hour when the truck driver saw our client, who was stopped at a traffic light which was red for her at the time. The driver of the 18 wheeler told a witness at the scene

that he didn't see our client's automobile until it was too late to stop. His truck left skid marks before colliding with our client's automobile, knocking it into the air. Her automobile traveled 180 feet before striking a tree off the right side of the highway. Our client was knocked unconscious, suffered a closed head injury, three fractured vertebrae, a mediastinal hematoma, and some cuts and bruises in the crash. The compression fractures were at T3, T4 and T5. She was required to be hospitalized for five days in ICU. It was a miracle that she survived the crash.

Fortunately, there were two eyewitnesses to the collision since the driver of the 18 wheeler claimed in his deposition that our client cut in front of him without warning, thus causing the collision. Both witnesses at the scene said this wasn't true. One of them said the driver admitted that he was at fault. The driver had a bad driving history and had no business operating a tractor-trailer rig on a public highway. Our client lost her job with her employer and she lost her health insurance because she couldn't return to work because of her injuries and impairment. The case was settled for a confidential amount the week before it was scheduled for trial. Attempts at settlement in mediation had failed. Julia Beasley handled the case for our firm and did a very good job.

Settlement Of A Construction Site Case

Our firm recently settled a lawsuit that arose out of a workplace injury. Our client was employed by American Industrial Contractors (AIC) and working construction at an Alabama industrial plant in 2004. AIC was hired by Eisenmann Corporation, a Canadian company, to perform certain millwork labor at the plant. Our client was instructed to help Eisenmann change out the belts on the cockpit lift station on site on September 24, 2004. While our client was working to change out the belts, the 5,400 pound cockpit lift station fell on him and he suffered very serious injuries. He sustained a closed head injury, a concussion, scalp lacerations, blunt chest injuries, multiple rib fractures, pulmonary contusions, a left tibia/fibula fracture, and serious spinal burst fractures which resulted in a four-level fusion surgery. He had permanent rods inserted in his left leg. He also developed pneumonia and was hospitalized for 15 days. We filed suit on his behalf in an Alabama state court. The case was removed by Defendants to federal court.

At the time of settlement, our client's medical bills were substantial. His workers' compensation carrier, Travelers Insurance, asserted a subrogation claim of $117,623.53 for medical benefits and $69,680.63 for indemnity benefits paid. According to our economist, our client's lost earnings at present value were $779,444. His special damages amounted to over one million dollars, again at present value, at the time of the settlement. He also suffered severe physical pain and emotional distress because of his injuries.

Plaintiff retained the following experts in the case: Joseph Stabler, an elevator and escalator consultant; and Dr. William Hardy, Jr., an economist. Eisenmann was in charge of this work project and was responsible for ensuring that all equipment was locked out in the proper position. That company was also responsible for supervising all of the employees on site, including our client, at the time this incident occurred. The Eisenmann foreman told our client and his co-worker that the locking devices were engaged. This was confirmed by our client's co-workers on the project.

Both Defendants failed to identify and guard against the dangerous hazards that were present on the day when the Plaintiff was injured. The Defendants knew that if the equipment or safety locking devices were not functioning properly or were not in the proper position that an employee could be seriously injured when replacing the belts on this lift. The case was mediated and settled without the necessity of a trial. The case was handled by Julia Beasley for our firm and she did a very good job for our client. The amount of the settlement is confidential.

Roof Collapse Settlement

Our firm represented Jennifer Piggott, an employee of Hyundai supplier Hwashin America Corporation, in a claim against Gray Construction, Inc., and other Defendants arising out of a roof collapse at the Hwashin facility in Greenville, Alabama. We alleged that Gray Construction, the general contractor, negligently designed and constructed the facility in such a manner as to have a defective roof structure. The roof of the building did not have a proper drain system. Gray Construction filed a third party complaint in the lawsuit and named several subcontractors as Third Party Defendants based on their negligence and indemnity agreements.

In its third party complaint, Defendant Gray alleged that certain subcontractors failed to design and install a primary and secondary drainage system capable of draining the office roof. Gray made other claims regarding the design, specifications and inspections of the structural roof, joists, structural steel support and framing of the Hwashin facility.

The roof of a building collapsing like it did in this case is almost incomprehensible. Mrs. Piggott was working at her desk, doing her job, when the roof collapsed during a heavy rain. She was struck by the falling materials. It was a miracle that she was not electrocuted by all the electrical wiring located near her along with the rain water that came in after the roof collapsed on her.

The roof collapse severely injured Mrs. Piggott. She was required to have emergency back surgery due to a burst fracture of the L5 vertebral body, which caused significant bone injury in the spinal canal. An emergency decompressive laminectomy of L5 was performed with fusion of L4-5 and L5-S1. She was required to wear a back brace for several months. She incurred significant medical expenses and lost time

from work. Mrs. Piggott was required to see a pain management specialist because of the severe pain she was having as a result of her injuries.

The case was filed in Butler County, Alabama, and removed to federal court by Defendant Gray. The case was settled after being remanded from federal court to the Circuit Court of Butler County, Alabama. Julia Beasley handled this case for the firm and did a very good job for her clients, Mr. and Mrs. Piggott. The amount of the settlement is confidential.

Settlement In Motor Vehicle Case

Our firm represented Debbie Parrish who was involved in a motor vehicle accident on April 26, 2007. She was traveling on Montgomery's Atlanta Highway when the Defendant ran a stop sign, causing a t-bone accident. As a result of the impact, Ms. Parrish's prior neck fusion became unstable. She was required to undergo neck surgery. Ms. Parrish incurred medical expenses and lost several months of work. She is still unable to return to her previous activities such as horseback riding and performing other daily activities due to pain. The case settled at mediation for a confidential amount. Julia Beasley handled the case for Ms. Parrish and did a very good job for her.

Settlement Of A Playground Injury Case

On January 2, 2007, ten-year-old Joel Charles was playing with his brother and best friend on a playground provided for the residents of Vista Hills Apartments in Hoover, Alabama. The boys were playing tag when Joel tripped and fell on a metal stake protruding from the ground inside the playground area. The fall caused severe lacerations to the child and caused severe injuries to his internal organs.

When Joel's parents told the apartment complex about the injury, its management immediately reminded them that they had signed an exculpatory clause insulating the apartment complex from liability in this case. The complex did nothing to repair the dangerous condition existing on the playground. Fortunately for Joel, this incident occurred when it did. The day before, on January 1, 2007, Alabama's Governor signed into law the current version of the Alabama Landlord and Tenant Act, which had recently been passed by the Legislature. Prior to this Act, exculpatory clauses would have prevented Joel from recovering for the injuries and holding the apartment complex responsible for maintaining a dangerous playground for the children. The Act now prohibits these exculpatory clauses and we applaud the Governor and the Legislature for taking these steps to protect Alabama's citizens.

During discovery the apartment complex acknowledged a responsibility to keep the playground safe, yet virtually all the inspections done at the complex were limited to keeping paper and trash picked up. Several employees of the complex admitted that this stake was a very dangerous condition.

Playground injuries are a very serious concern for parents and children. Many playgrounds are not maintained to allow children to play safely. The problem existing at Vista Hills was recognized by the Consumer Product Safety Commission as a primary concern in the group's Handbook for Public Playground Safety. The very first page of the CPSC guidelines discusses falls on playgrounds, "[t]o address the issue of falls, these guidelines emphasize the importance of protective surfacing around playground equipment." The CPSC recommends a comprehensive maintenance program to address various concerns, including "hazardous protrusions and projections."

The apartment complex had no real maintenance program in place to check for and repair dangerous conditions on the playground. Chris Glover from our firm handled the case, which was filed in the Bessemer Division of the Jefferson County Circuit Court. The case settled prior to trial for a confidential amount. Chris did a very good job for our clients.

Roof Crush Case Settled

Our firm recently reached a settlement with Ford Motor Company involving the rollover of a Ford F450 Super Duty truck in Clarke County, Alabama. We represented the family of a young man who was riding as a front seat passenger in the truck while on his way to work in the timber business. Due to foggy conditions that morning, the driver of the truck allowed one of the tires of the vehicle to drop off the shoulder of the roadway. When he brought the truck back on the roadway it overturned two times. Although the truck was only travelling 40 miles per hour at the time it rolled over, there was substantial intrusion of the roof structure into the occupant compartment of the truck. The roof structure caved in on our clients' son causing him to suffer a burst fracture of his cervical spine. Unfortunately, the young man was paralyzed and died about ten days following the accident.

The Ford Super Duty truck series consists of the F250, F350, and F450 trucks. We actually cut the roof off of one of these trucks and found that the roof is not so "super." Most of the support structures of the roof on the Super Duty consist of open sections made of low-strength steel. We also cut the roof off of a Ford F150 truck to compare the two roof structures. Surprisingly, we found that the F150 roof structures included closed, box sections. Some of these were made of high-strength steel. The only explanation we could find for the differences in these two vehicles (which to the naked eye appear identical) is that the F150 has to meet the NHTSA federal safety standard for roof crush whereas the F250/F350/F450 trucks don't have to meet the standard. This is primarily due to the weight difference in the trucks. But, there is nothing preventing Ford or any other manufacturer from voluntarily subjecting these trucks to the federal standard. Good safety practices certainly require it.

This was a highly-contested case and a lot of work and preparation were put into it on behalf of our clients. J.P.

Sawyer from our firm, along with Gaines McCorquodale, a very good lawyer from Jackson, Alabama, handled the case. They did a very good job and got a good result for the family. The amount of the settlement is confidential.

Class Action Settlement Involving Unearned Premiums For Credit Insurance

Our firm recently settled a class action lawsuit involving refunds of unearned premiums for persons who purchased credit insurance using a single premium but who paid off the insured loan early. Credit insurance is purchased by consumers when they enter into contracts to finance automobiles, tractors, all-terrain vehicles, motorcycles, boats and watercrafts. Credit insurance comes in two forms—credit life pays off the entire loan if the consumer dies, while credit disability makes the monthly payments if the consumer becomes disabled. The large single premium is included in the original amount of the loan. That premium is earned over time so that the entire premium will be earned only if the loan is not paid off before the expiration date of coverage. In this class action settlement the return of unearned premiums for MS Life Insurance Company ("MS Life") policyholders allowed aggrieved class members to receive more than what they are entitled to receive under their contracts.

In this case, the Plaintiff who was the Class Representative purchased a vehicle from a dealership and financed the vehicle on June 22, 2001. In connection with that financing, the Plaintiff executed an installment loan contract which included the purchase of a credit insurance policy from MS Life. The Plaintiff paid a single, one-time premium for the credit insurance. The scheduled expiration date for the insurance coverage was December 22, 2006. The insurance policy provided credit life insurance to the Plaintiff, which was designed to pay the loan if she passed away while the loan was still unpaid.

The insurance coverage would stop if the loan was paid off, so MS Life could only earn the entire premium if the insured did not pay the loan off before the coverage was scheduled to expire. If the loan was paid off early—before coverage expired—then the Plaintiff would be entitled to a refund of unearned premium. The premiums due to be returned to a borrower who pays off early are called "unearned premiums" because once the loan is paid off, the insurance company no longer bears any risk of loss. On or about April 12, 2004, the Plaintiff paid off the loan. She was entitled to the unearned premium from the date of early payoff, April 12, 2004, through the date the insurance was scheduled to expire, December 22, 2006.

MS Life sold credit insurance to auto borrowers and lessees to protect them against the risk of default in the event they died or became disabled and unable to keep up with their loan or lease payments. The Plaintiff alleged that Defendant breached its credit life and disability insurance contracts with some insureds because some paid off their loans or leases prior to the scheduled payoff or lease termination date, and Defendant did not refund their unearned premiums. The settlement provided notice to potential class members and created a simple, streamlined settlement procedure for any former MS Life insured who may have paid off his insured loan early without receiving a refund of unearned premium. If you have any questions regarding this case or similar claims, please contact Lance Gould with our firm at 800-898-2034.

III. LEGISLATIVE HAPPENINGS

The Regular Session Of The Alabama Legislature

The Alabama Legislature will face a most difficult session when the regular session starts on February 3, 2009. The serious lack of money required to operate State government and public education will have to be dealt with. Frankly, the available revenues won't be adequate to meet even scaled-down budgets. I don't believe we can afford to allow the funding of education to suffer severe cuts. Neither can essential State services such as Medicaid be cut without causing great difficulty. It will be most interesting to see how Governor Riley and the legislative leadership respond to this crisis.

Budget Proration Hits Alabama Hard

As expected, Governor Bob Riley has declared proration in State education spending. He also announced a hiring freeze in non-education State agencies. The Governor said the revenue shortfall would have caused across-the-board cuts of 12.5%, but by taking $218 million, or half of the $437 million available in the State's rainy day fund, he was able to reduce the cuts to 9%. Apparently, the second half of the rainy day fund will be distributed during the fiscal year.

The Governor also is using his authority under the State Budget Management Act to reduce spending by 10% in State agencies funded out of the general fund. This will reduce spending for these agencies by about $200 million in the current year. It means non-education agencies face a hiring freeze, a freeze on State merit pay raises, a halt to the purchase of new State vehicles and other cost-saving measures. None of this is good news for the people of Alabama.

Source: *Birmingham News*

IV. COURT WATCH

U.S. Supreme Court Allows Lawsuits Over Light Cigarettes

In a most significant decision, the U.S. Supreme Court ruled last month

that lawsuits may proceed against tobacco companies for allegedly deceptive marketing of so-called "light" cigarettes. In a 5-4 decision, the Court—rejecting federal preemption—said that smokers may use state consumer protection laws to sue cigarette makers for the way they promote "light" and "low tar" brands.

The tobacco companies argued that the lawsuits are barred by the federal cigarette labeling law, which forbids states from regulating any aspect of cigarette advertising that involves smoking and health. But Justice John Paul Stevens said in his majority opinion that the labeling law does not shield the companies from state laws against deceptive practices. The Justice wrote that people suing the cigarette makers still must prove that the use of "light" and "lowered tar" actually violate the state anti-fraud laws. However, under the Court's ruling, those lawsuits may go forward.

Three Maine residents sued Altria Group Inc. and its Philip Morris USA Inc. subsidiary under the state's law against unfair marketing practices. The class action claim represents all smokers of Marlboro Lights or Cambridge Lights cigarettes, both made by Philip Morris. The lawsuit alleges that the company knew for decades that smokers of light cigarettes compensate for the lower levels of tar and nicotine by taking longer puffs and compensating in other ways. A Federal District Court dismissed the lawsuit, but the U.S. Court of Appeals for the First Circuit disagreed. Now that the highest Court in the land has ruled, the case will go forward. The rejection of preemption by the Court in this case is very important.

Source: *Associated Press*

Exxon Mobil Wins Again In Alabama Supreme Court

The Alabama Supreme Court has again ruled in favor of Exxon Mobil Corp. in the latest appeal in the state's ongoing dispute with the oil giant. The latest dispute involved $23 million which the state considered a **penalty** on the failure by Exxon to pay royalties to the state. We have been battling on behalf of the state against the oil company since 1999 over how much Exxon Mobil should pay Alabama in royalties from wells the company drilled in state-owned waters. I won't rehash the facts of the actual case against the company except to say it was one of the strongest cases of liability—documented by internal company documents—that I have ever seen.

In 2003, the state won a jury verdict, reduced by the trial judge to $3.6 billion. But the Alabama Supreme Court threw out most of that award in 2007. In January, Exxon Mobil had to pay Alabama more than $121 million in royalties plus the statutory interest on the judgment. We believed that Exxon Mobil should have paid the state an additional $23 million in what even Exxon had once described as a **penalty** and not interest. Exxon had taken the position before the jury verdict that it would be adequately punished by the "penalty" that the law imposed for its failure to pay royalties to the state. On appeal, however, the oil giant took the position the $23 million was actually "interest," and not a "penalty." In any event, the latest Supreme Court ruling should bring this litigation to a close.

Exxon Pays First Valdez Oil Spill Payments

Thousands of Alaska fishermen and other Plaintiffs have received their share of punitive damages in the *Exxon Valdez* oil spill lawsuit. Judge H. Russel Holland ordered the release of $151 million of the negotiated $383 million settlement in the lawsuit filed in the nation's worst oil spill nearly two decades ago. The residents of Prince William Sound and those adversely affected by the devastating effects of the *Exxon Valdez* oil spill have been treated like most folks who deal with the powerful oil giant in our court system and that's generally bad. In any event, the payments of the punitive damages will bring a sense of closure to the *Valdez* victims.

The remaining $232 million of the settlement negotiated with Exxon will be paid out later. Under that agreement, the money will be distributed to nearly 33,000 commercial fishermen and others who sued Exxon after the 1989 spill of crude in Prince William Sound. As everybody who has followed the *Valdez* saga knows, the tanker *Exxon Valdez* on March 23, 1989, hit Bligh Reef and spilled nearly 11 million gallons of oil into Prince William Sound. A jury in 1994 awarded Plaintiffs $5 billion. That was cut in half by the 9th Circuit Court of Appeals. The Supreme Court in late June, by a 5-3 vote, reduced the total to $507 million. The High Court didn't rule on whether Exxon should pay interest and sent that issue back to the Ninth Circuit Court for a decision. Oral arguments took place in December on that issue. Interest calculated since 1994 would add an estimated $488 million, boosting awards to individuals from roughly $15,000 to about $29,400. Exxon contends it does not have to pay interest. Dan Lawn, president of the Alaska Forum for Environmental Responsibility, made this observation:

> *Exxon has done everything it can to twist the legal system into trying to get out of shouldering its financial responsibility.*

Many believe Exxon came out smelling like a rose in this lawsuit. For example, Stan Stephens with the Prince William Sound Regional Citizens Advisory Committee said the small checks were a "slap in the face" to the people of Prince William Sound and all coastal areas of south central Alaska. "It's good they got something but it's far too little," he said, adding he's never been able to forgive Exxon for the spill. Stephens made this observation: "The least they could have done was make some people whole." I don't believe the bosses at Exxon understand that principle, nor do they care about the folks they hurt.

Source: *Associated Press*

A Look At The Bush Judges

President Bush has had eight years during which to appoint federal judges and he has taken full advantage of his opportunity. When criticized over his appointments, the President always used the standard GOP line, saying he appointed judges using one criteria: "the role of a judge is to interpret the law, not to legislate from the bench." But many legal scholars say that he has only appointed judges who subscribed to the right wing doctrine of the GOP and on many occasions the appointees did in fact create new law by way of their rulings. I hope that wasn't always the case and don't believe it has been in my area of the country. All of the judges appointed in Alabama, for example, have been fair and just in their rulings.

A look at the judges who were appointed by the President is most revealing. As a result of the 311 Bush appointments to Federal District Courts and the Appellate bench, judges across the country are now more male and more white than they were at the end of the Clinton presidency. A third of the nominees during Bush's first term had "a history of working as lawyers and lobbyists on behalf of the oil, gas and energy industries," according to a study by the Center for Investigative Reporting. Another study by the University of Houston of rulings by President Bush's district court appointees shows a pattern of disdain for the Bill of Rights, civil rights and privacy rights.

While President Bush will go down in history as one of the worst presidents ever, hopefully, the federal judges this man appointed will turn out much better than expected on issues that affect ordinary folks.

Source: *Washington Post*

The High Court Will Consider Asbestos-Related Lawsuits

The U.S. Supreme Court has agreed to consider reinstating the $500 million settlement of asbestos-related lawsuits against the Travelers Companies Inc. The settlement would also block any new lawsuits against Travelers arising out of the insurance company's long relationship with Johns Manville Corp., once the world's largest producer of asbestos.

Travelers was named in a number of lawsuits claiming that it tried to hide the dangerous health effects of asbestos. Exposure can increase the risk of lung cancer, mesothelioma and other ailments, according to federal health agencies. Travelers argued that asbestos-related claims should be paid out of a trust created by Johns Manville in the 1980s and approved by a federal bankruptcy judge. Money for that fund came primarily from insurers.

Travelers agreed to settle with several groups of Plaintiffs provided that federal courts make clear that it would not have to face any new similar lawsuits. But the 2nd U.S Circuit Court of Appeals in New York overturned the lower-court approval of the settlement. The appeals court said a bankruptcy judge lacks the authority to act so broadly. The Supreme Court justices will now consider the question of the bankruptcy court's power.

Source: *Associated Press*

The So-Called Lawsuit Abuse Campaign Was Bankrolled By Corporate Wrongdoers

The U.S. Chamber of Commerce is constantly speaking of "faceless corporations" that it claims have been victimized by so-called "abusive lawsuits." In reality, these companies aren't so faceless. The Chamber's own financial disclosures reveal that its Institute for Legal Reform (ILR) is funded by corporations notorious for their wrongdoing and misconduct. Examples of major corporations that sit on the front group's board include Wal-Mart, Citigroup, AIG, Bank of America, and a number of insurance and drug companies. ILR's board of directors includes corporations that earned a combined $1.4 trillion in 2007.

The Chamber claims it protects the interests of small businesses when in reality it's bankrolled by giant multi-billion dollar corporations. The latest campaign by the Chamber and ILR is just a new phase of its longstanding fight to shield corporate wrongdoers from being held accountable. The National Federation of Independent Business released a survey just this summer that showed "costs and frequency of lawsuits" ranked at the bottom of small businesses' list of concerns. Prior surveys of small businesses from *BusinessWeek* and the National Association of Manufacturers also showed litigation was not a concern. I would be shocked if anybody in America can say that all of the corporate bosses who have been caught literally stealing from investors, shareholders, and the public generally should have immunity from accountability. The Chamber and ILR have to create a firestorm of activity so they can keep the millions of dollars flowing into their coffers.

Source: American Association of Justice

V. THE NATIONAL SCENE

Risks Taken On Wall Street Led To The Financial Meltdown

The economic turmoil that our country is going through is partly the result of the arcane field of financial engineering—a blend of mathematics, statistics and computing. These financial engineers, as they are known, are the creators of mortgage-backed securities and the mathematical models of risk that so wrongly suggested these securities were safe.

Though the models failed to keep pace with the explosive growth in complex mortgage-backed securities, the larger failure was human. These financial engineers originally intended to spread risk through the use of financial instruments called derivatives or credit-default swaps. These instruments were originally created to insure blue-

chip bond investors against the risk of default. However, financial engineers shifted their focus and used these instruments as a means to bundle and sell mortgages, a practice that is largely to blame for the crisis that Wall Street is facing today.

Bundling mortgages and marketing them as safe investments seemed safe in principle, but the math, statistics, and computer modeling fell short in calibrating the lending risk on individual mortgage loans. This was exaggerated by the fact that the securitization of the mortgage market prompted lenders to move increasingly to automated underwriting systems, relying mainly on computerized credit-scoring models instead of human judgment. Essentially, the creation of this new "safe" investment vehicle created a demand for more mortgages, which in turn caused lenders to write more and more risky loans.

It has also become apparent that Wall Street analysts figured that since housing prices in the United States had not declined in decades, they'd continue to hold steady going forward. Obviously, the Wall Street models included a lot of wishful thinking about house prices. We now know that wishful thinking can do little to stop a housing bubble from bursting. And that's what happened in the mortgage-backed securities and credit derivatives markets.

Better computer modeling would have helped but so would have common sense among Wall Street investors. It was no secret that lenders were furiously writing loans while spending little time scrutinizing the creditworthiness of individual borrowers. But even with lenders exercising sensible restraint, and Wall Street using better risk models, much needed federal regulation was missing. Over the last several years regulation has been stripped from our financial markets and it must be reinstated.

Financial regulation should be seen as being similar to fire safety rules in building codes. The chances of any building burning down are slight, but ceiling sprinklers, fire extinguishers and fire escapes are mandated by law. If you need additional information on any of the above, contact Clay Barnett with our firm at 800-898-2034.

National Institutes Of Health Says Television Harmful To Children

Heavy exposure to television, movies and video games increases the risk of sex, drug and alcohol use, smoking, obesity and poor grades in children and teenagers, according to a new report by the National Institutes of Health. The NIH report reviewed 173 previous studies and 30 years of research about the effects of media consumption on children and found that links between media consumption and early sexual activity are particularly strong. For example 93% of the studies found that children with greater media exposure have sex earlier.

The NIH study's co-author Ezekiel Emanuel says with the average child spending nearly 45 hours a week immersed in media—almost three times the amount of time they spend with their parents—it's important to limit children's use of media. The report urges Hollywood and technology makers to create entertainment that is more family-friendly and less dangerous to children. It was recommended that policymakers should work to protect children from the harmful influences on television.

Source: Parent's Television Council

GM And Nissan Are Said To Be The Worst Television Advertisers

General Motors is number one on the Parents Television Council's list of worst advertisers. The group cited GM and Nissan together as advertising nearly 1,000 times on shows PTC has red-lighted as objectionable. In the group's annual ranking based on companies' sponsorship of shows that are family-friendly versus shows with sexual content, violence or profanity, rounding out the top ten worst were: L'Oreal, Pepsi-Cola, GlaxoSmithKline, Reckitt Benckiser, Target, Kohl's, Verizon Communications and Toyota. Those cited for sponsoring the best shows were Coca-Cola, Clorox, Century 21 Real Estate, H&R Block, Ferrero, CVS Caremark, Whirlpool Corp., Hershey, State Farm and Hewlett-Packard. PTC President Tim Winter had this to say:

> *The role that television advertisers play in determining what type of content comes into every home in America cannot be overstated. We commend the advertisers on our best list that have chosen to associate their hard-earned corporate brands with positive programming that the entire family can watch together.*

Parents can thank many of the advertisers on the worst list for allowing the networks to pump some of the most shocking and outrageous content on the air today directly into their living rooms. The top offenders include General Motors, which advertised on one of the most shocking episodes of Fox's Family Guy, and Nissan, which helped pay for the bloodiest episode in the Dexter series. During the 2007-2008 TV season alone, these two advertisers showed up nearly 1,000 times on "red light" shows that are unsuitable for children according to PTC's traffic light ratings system. I have to wonder when the federal government is going to realize it has an obligation to protect children in this country.

Source: Parent's Television Council

Leadership Breakdown At FCC Reported

In a scathing report released last month, Congressional investigators outlined a pattern of mismanagement, dysfunction and abuse of power at the Federal Communications Commission under the tenure of the agency's Republican chairman, Kevin Martin. The report—the result of a nearly year-long, bipartisan investigation by the House Energy and Commerce Committee—accuses Chairman Martin of manipulating data and suppressing information to influence telecommunications policy debates at the agency

and on Capitol Hill. The report also charges that the commission has become "politicized, failed to carry out some important responsibilities under Martin's leadership, and blames him for undermining an open and transparent regulatory process."

Based on the report, Chairman Martin was guilty of demoting agency staffers who did not agree with him and withholding information from his fellow commissioners. His style was described in the report as "heavy-handed, opaque, and non-collegial," and it was said he "created distrust, suspicion and turmoil among the five current commissioners." Bart Stupak (D-MI), who chairs the House Commerce Committee's Subcommittee on Oversight and Investigations, says Chairman Martin's legacy at the FCC will be "a blueprint of what not to do."

"The findings suggest that, in recent years, the FCC has operated in a dysfunctional manner and commission business has suffered as a result," according to Commerce Committee Chairman John Dingell (D-MI) who will be relinquishing the reins of the panel to California Democrat Henry Waxman next year. Hopefully, Martin will leave the commission after the White House changes hands. The following are among the findings of the 110-page report:

- Martin manipulated the findings of an FCC inquiry into the potential consumer benefits of requiring cable companies to sell channels on an individual—or "a la carte"—basis. The House investigation concludes that Martin undermined the integrity of the FCC staff and may have improperly influenced the Congressional debate on the matter by ordering agency employees to rewrite a report concluding that a la carte mandates would not benefit consumers.
- Martin tried to manipulate the findings of an annual FCC report on the state of competition in the market for cable and other video services to show that the industry had a big enough market share to permit additional government regulation. When the full commission voted to reject that conclusion, Martin suppressed the report by withholding its release.
- Under Martin's leadership, the FCC's oversight of the Telecommunications Relay Service Fund, which pays for special telecommunications services for people with hearing or speech disabilities, was overly lax. This resulted in overcompensation of the companies that provide these services by as much as $100 million a year—costs that were ultimately passed along to phone company customers.

Source: *Associated Press*

There Will Be A Change In Leadership At The FDA

Food and Drug Administration Commissioner Andrew von Eschenbach will resign effective the 20th of this month. In an internal message sent last month to FDA officials, Dr. von Eschenbach said he would cooperate with President-elect Barack Obama's transition team. While that's good news, the best news is that the chairman is leaving. I must confess that nothing about Dr. von Eschenbach's tenure at the FDA has been very impressive. In fact, the agency has been virtually an extension of the drug industry and that must be changed.

The FDA has been rocked with problems over the past few years involving the safety of popular prescription drugs, heart devices, and contaminated food and blood thinner from China. I believe President-elect Obama will select a new FDA leader who will put the health and safety of the American people at the very top of a list of priorities of the agency. For all too long the leadership of the FDA has been much too friendly to the powerful drug industry. Current senior FDA employees are much too close with the industries they regulate, creating a question of who they are working for. We need a complete change in the FDA's leadership.

Source: *Wall Street Journal*

VI. THE CORPORATE WORLD

The Bush Attacks On The Civil Court System Were Constant

For years George Bush has been used by the big bosses in Corporate America in their relentless and never-ending attacks on the civil court system. Also under attack has been the right to trial by jury, a right that is guaranteed to every American citizen by the U.S. Constitution. All of this started when Bush became governor of Texas in 1995. At that time, Karl Rove contrived a so-called legislative emergency in Texas dealing with what he labeled "frivolous lawsuits." That's when the term "tort reform" first came on the scene in a big way. Governor Bush then pushed a series of bills through the Texas Legislature that made it virtually impossible for Texas victims to hold wrongdoers accountable in the civil courts of that state.

When Rove and his gang got through with their dirty work in Texas they took their campaign to Washington. They realized that if a man like George Bush could be elected governor of a state like Texas, he also could be sold on the national stage. After electing their man President of the United States, the tort reform campaign moved in a big way to the national stage.

Once in office, President Bush continued his assault on the court system using the full power of his office. He pushed the Rove version of tort reform continuously for eight long and painful years. During his two terms, President Bush never let up in his efforts to protect corporate wrongdoers and bash their victims. The Bush Administration successfully pushed the federal version of Tort Reform. As a result, we have seen more unsafe products being put on the market than ever before and consumer protections drastically reduced.

There have been a series of new laws enacted by Congress at the request of the Bush gang that have badly hurt

folks in this country. The following are just a few of them and unfortunately most folks don't even know some are on the books.

- FISA Amendment Act (2008). This gives retroactive lawsuit immunity to telecom companies.
- Public Readiness and Emergency Preparedness Act (2005). This law affords drug makers total immunity for death or injury caused by administration or use of vaccines when a public health emergency has been declared.
- Protection of Lawful Commence In Arms Act (2005). This law strips away the legal right of gun violence victims and their families, as well as cities and counties, to seek redress against reckless and negligent gun dealers, manufacturers, distributors and trade associations.
- Class Action Fairness Act (2005). This law forces most state law-based class action cases, including product liability, worker protection, consumer fraud and civil rights suits, into federal court.
- Support Anti-Terrorism by Fostering Effective Technologies Act (2002). This law shields manufacturers, distributors and providers of "qualified anti-terrorism technology" from most lawsuits. They can't be held liable for punitive damages, can't face any additional damages beyond their insurance coverage and can't be sued in state courts.
- Air Transportation Safety and System Stabilization Act Amendments (2001). These amendments restrict liability for claims arising from the September 11th terrorist-related plane crashes against an air carrier, air craft manufacturer, airport sponsor or person with a property interest in the World Trade Center to the limits of their liability insurance coverage.

In addition to the laws that were passed by Congress, the Bush gang quietly put administrative agencies into positions of power never before imagined. This allowed the agencies to wipe out or render meaningless the individual legal rights of individuals. The full-scale attempt to use rulemaking by these agencies to preempt state tort law, if successful, would ban state lawsuits regardless of how bad the conduct of a wrongdoer might be. We have written on the federal preemption issue on numerous occasions in prior issues of the *Report*. The Bush gang has changed at least 50 federal agency rules for the sole purpose of blocking lawsuits by ordinary citizens who are injured and damaged by defective products. The following are a few examples of what the Bush gang has done:

- **Drug Labeling.** Consumers injured or killed by a defective or dangerous drug can't sue the manufacturer if the medication label has been approved by the Food and Drug Administration.
- **Mattress Flammability.** Consumers injured or killed in a mattress-related fire can't sue the manufacturer if it complied with the Consumer Product Safety Commission's mattress-flammability standard.
- **Railroad Safety.** Anyone injured or killed by a rail car carrying hazardous materials catching fire can't sue the manufacturer if the rail car met the federal construction standard.
- **Seatbelts.** Passengers injured or killed because they had no seatbelt can't sue the carmaker if it installed the number of seatbelts mandated by the National Highway Traffic Safety Administration.

The Bush presidency has left Americans in a country with more risks and fewer protections. Many are asking if President-elect Obama can undo the damage that the Bush gang has done and will he really work to protect victims' rights? I am convinced that he can and will! But it's very clear that the Obama Administration and the new Congress will have to clean up a lot of messes left by President Bush and his gang.

Bayer To Pay $97.5 Million To Settle Kickback Probe

Bayer, the German medical conglomerate, will pay $97.5 million to settle federal government claims that it paid kickbacks to medical suppliers to boost sales of its diabetes products. The Justice Department says that the settlement resolves an investigation into whether Bayer bribed 11 diabetic suppliers into switching patients to its products from competitors. Bayer Healthcare makes electronic monitors and testing strips used to measure blood sugar levels in Tarrytown, New York. According to the Justice Department, Bayer paid Liberty Medical Supply Inc., one of the largest diabetic suppliers, about $2.5 million to convert patients to Bayer supplies between 1998 and 2002. Based in St. Lucie, Florida, Liberty Medical is known for its heavy-rotation television advertising.

The Justice Department also alleged Bayer paid $375,000 in kickbacks to ten other diabetes equipment companies. Each of the 11 companies involved supplied equipment to patients enrolled in Medicare, the government's health care plan for seniors. The settlement also resolves false claims filed by those companies between 1998 through 2007. Gregory Katsas, an assistant Attorney General with the Justice Department, stated:

> *If medical device manufacturers want to serve Medicare beneficiaries they must follow the law.*

Corporations have been able to cheat the federal and state governments with almost complete immunity over the years and with no fear of being caught. Even when they were caught, the offending corporation know they could simply pay a fine and "keep on trucking." It's past time for the government to bring these corporate wrongdoers to justice and put a stop to the "lying, cheating and stealing" that has become a way of life for many in Corporate America in their dealings with federal programs.

Source: *Associated Press*

Saint Vincent To Pay $1.9 Million In Whistleblower Lawsuit

An example of how the taxpayers are being cheated relating to government programs involves a scheme by a number of hospitals to cheat the government in the Medicaid program. The federal government paid one of the hospitals, Saint Vincent Health Center, $6.15 million in the 2003 fiscal year to treat some of the Erie, Pennsylvania, hospital's oldest, sickest patients. Now as a result of a recent settlement, Saint Vincent will have to pay $1.9 million to settle a whistle-blower lawsuit that claimed the hospital submitted Medicare claims that exceeded its actual costs.

A total of seven hospitals have reached settlements in connection with a lawsuit, which was filed in 2005, by Anthony Kite, an independent hospital consultant from New Jersey. Saint Vincent was inflating its Medicare reimbursement claims from 2001 to 2003 to receive supplemental, or outlier, payments. Outlier payments reimburse hospitals for treating patients who require more care than usual for a particular illness or procedure. In late 2002, Saint Vincent raised the average charge for many of its most common treatments and procedures between 40% and 120%, according to information provided by the Pennsylvania Health Care Cost Containment Council. Larry Zoglin, the lawyer who represented the whistleblower, had this to say:

> *Saint Vincent dramatically hiked its charges across the board in 2002. It allowed the hospital to send a higher percentage of claims to Medicare for outlier payments. These were normal-cost patients made to look like outlier patients.*

Kite never worked as a consultant for Saint Vincent, but learned what the Erie hospital was doing while working with other hospitals named in the lawsuit. Saint Vincent received $6.15 million in outlier payments from Medicare in fiscal 2003, more than four times the $1.42 million it collected in fiscal 2002. This is an example of how some in Corporate America cheat the government when participating in good federal programs. The taxpayers foot the bill and program recipients are hurt because cheating the government takes money away from them.

Source: Erie Times News

AIG Owes $10 Billion For Bad Trades

It's been reported that American International Group, once the world's largest insurer, owes around $10 billion to other financial services firms for trades that have gone bad. Apparently, these trades haven't been explicitly disclosed before and aren't covered by terms of a current $150 billion federal government rescue package. The government's rescue package was meant to save AIG from collapse, but according to a report in the *Wall Street Journal*, the newly-discovered trades raise further questions about how the insurer will raise money to pay the debts. I suspect there is much more to come on how truly bad AIG has been.

Source: *Insurance Journal*

New York Lawyer Said To Have Stolen $380 Million

Federal prosecutors say that Marc Dreier, a New York lawyer, has stolen $380 million from hedge funds and investors. According to Assistant U.S. Attorney Jonathan Streeter, the alleged fraud has been going on since 2006. He described the victims of fraud as "very sophisticated investors." Dreier, a 58-year-old Harvard Law School graduate, was accused of stealing $113 million from two hedge funds since October by persuading them to "invest" in fake paper supported by forged financial documents.

Dreier is also accused of removing client funds amounting to tens of millions of dollars from law firm escrow accounts and putting it into his own personal accounts. Marc Dreier is the founder and sole equity partner of the Dreier law firm. At one time his firm had nearly 250 lawyers. The law firm has now filed for bankruptcy protection. If the charges against this man are true, he should be jailed, and banned from practicing law for life. Clearly, this sort of thing can't be tolerated.

Source: *Bloomberg*

HHS Releases Health Care Fraud And Abuse Control Program Report

The Department of Health and Human Services (HHS) and Department of Justice (DOJ) recently released the *Health Care Fraud and Abuse Control Program Annual Report* for FY 2007. According to the Annual Report, the federal government won or negotiated approximately $1.8 billion in judgments and settlements, and attained additional administrative impositions, in health care fraud cases and proceedings during fiscal year 2007. During fiscal year 2007, the Medicare Trust Fund also received transfers of approximately $797 million as a result of these efforts including those of preceding years. Further, the Annual Report indicates that during 2007 the following activity occurred:

- U.S. Attorneys' Offices opened 878 new criminal health care fraud investigations involving 1,548 potential Defendants.
- Federal prosecutors had 1,612 health care fraud criminal investigations pending, involving 2,603 potential defendants, and filed criminal charges in 434 cases involving 786 Defendants.
- A total of 560 Defendants were convicted for health care fraud related crimes.
- The Justice Department opened 776 new civil health care fraud investigations, had 743 civil health care fraud investigations pending, and opened 218 new civil health care fraud cases.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) established the Health Care Fraud and Abuse Control Program (HCFAC). Under the joint direction of

the Attorney General and HHS acting through HHS' Office of Inspector General, the HCFAC program is designed to coordinate Federal, State and local law enforcement activities concerning health care fraud and abuse. HIPAA requires that HHS and DOJ detail the amounts deposited and appropriated to the Medicare Trust Fund and the source of such deposits in the Annual Report.

Source: Medicare Update

Judge Approves Settlement In AIG Shareholder Suit

Last month a judge approved a $115 million settlement in a shareholder lawsuit against former executives of insurance company American International Group Inc. The settlement was reached in September, just days before trial was to begin in a 2002 lawsuit challenging hundreds of millions of dollars in commissions paid by AIG to C.V. Starr & Co., a privately-held affiliate controlled by former AIG Chairman Hank Greenberg and other AIG directors. It was alleged that the Teachers Retirement System of Louisiana alleged that New York-based AIG could have done the work for which it paid Starr, and that the commissions were simply a mechanism for Greenberg and other Starr directors to line their pockets.

The settlement calls for $85.5 million to be paid by insurance carriers, with Starr responsible for $28.25 million. The remaining $1.25 million will be paid by former AIG Vice Chairman of Insurance Thomas Tizzio. The judge in his order described the settlement as fair and reasonable, noting that there was no assurance that the Plaintiffs could have recovered the amount they were seeking, which was up to $2 billion, if the case had gone to trial.

Source: *Forbes*

VII. CONGRESSIONAL UPDATE

Hopefully The Bailout Of The Banks Will Help

I am still greatly concerned as to how the federal bailout of financial institutions has been carried out. It now appears there was too little planning done before Congress approved the original Bush Administration $700 billion bailout package. The changes in the original plan that have been made by Treasury Secretary Paulson may have been necessary, but nobody seems to really know why they were done. In any event, Congress must now make sure the controls that were put in place must be enforced. If necessary, new controls must be enacted by Congress and put into effect immediately and enforced. Hopefully, the bailout will be successful and our economy will rebound as a result.

The Domestic Automobile Industry

In my opinion, we can't allow the U.S. automobile manufacturers to fail and go out of business. I am firmly convinced that they should not have to go into bankruptcy. If that occurred, the fallout around the world would be an international disaster for the United States. While I believe the federal government must save this industry, it must be done in such a way that there are extremely strong controls imposed on each company. A major change in management with a cap on executive salaries is a necessity. The ripple effect on our nation's economy if this industry is allowed to collapse, with a massive loss of jobs, would be an economic and social disaster that would be impossible to overcome. Hopefully, the Bush Administration and Congress will have taken strong corrective action by the time this issue is received. Once the new President is in office, his Administration and Congress will have to follow up to make sure the automobile industry is saved.

Drug Makers' Trade Group Spent $5.4 Million Lobbying In Third Quarter

The pharmaceutical industry's main trade group spent more than $5.4 million lobbying Congress in the third quarter of 2008, according to a recent disclosure report. The Pharmaceutical Research and Manufacturers of America (PhRMA) lobbied the federal government on legislation involving allowing generic versions of biologic drugs, reimportation of prescription drugs, and the budgets for the Food and Drug Administration and the Department of Health and Human Services. Hopefully, some of this lobbying helped consumers.

The trade group has more than 30 members, including Bristol-Myers Squibb Co., GlaxoSmithKline PLC, Johnson & Johnson, Merck & Co., Novartis Corp., Pfizer Inc., Sanofi-Aventis SA, other drug makers and several biotech companies. In the July-September period, in addition to PhRMA lobbying Congress, it also lobbied the Departments of Commerce and Health and Human Services, the FDA, National Security Council, Congressional Budget Office, Patent and Trademark Office, U.S. Trade Representative and National Economic Council. The report was filed in October with the House clerk's office.

Former Louisiana Rep. Billy Tauzin, PhRMA's president and chief executive, is one of the group's registered lobbyists. You will remember that this fella, while in Congress, pushed legislation through that greatly benefited the drug companies and hurt consumers and taxpayers. His last bit of carrying water for the drug industry while in Congress was securing the passage of the Medicare bill in 2003. Afterwards, Tauzin resigned his seat in Congress and went to work full time with PhRMA as its executive director. Other PhRMA lobbyists have also worked in Congress in some capacity before becoming lobbyists. Some of the lobbying activities involved product liability

issues and matters relating to Medicare and Medicaid.

Source: *Associated Press*

VIII. PRODUCT LIABILITY UPDATE

New Video Shows Inadequacy of New Vehicle Roof Strength Standards

The issue of roof safety in American automobiles has been largely ignored by the federal government for years. As a result, we have seen unacceptably low roof crush standards, continual delays and inaction by the National Highway Traffic Safety Administration to increase those low standards, out-of-date and unrealistic roof crush tests, and even the suppression of rollover test videos. In 2006, the U.S. Consumer watchdog group Public Citizen published results of dynamic roof crush tests comparing the performance of a Volvo XC90 and a Ford Explorer in realistic rollovers.

American roof crush standards have not changed since that time and unfortunately those results are as valid today as they were in 2006. The tests were performed on the Jordan Rollover System (JRS) and were sponsored by the Santo Family Foundation. The test was not conducted by NHTSA because the government measures roof strength with a "static crush" test, in which a slow moving metal plate bears down on the automobile. An automobile's roof passes if the roof can withstand one times the vehicle's weight worth of pressure. The more realistic JRS test simulated a multiple rollover. The maximum intrusion on the Volvo's roof was 2.6 inches and peak roof intrusion velocity was less than four miles per hour. Its dummy occupants escaped serious injury in multiple rollovers.

But, the Ford and its occupants didn't fare so well. Maximum roof intrusion on the Explorer was 11.5 inches and peak roof intrusion velocity was 12 mph, exceeding the known thresholds for **death and serious injury**. Its occupants were severely injured. Because of the Explorer's poor performance, Ford sought and received protective orders in 24 courts. The protective orders effectively concealed the test video from the public. Now, however, the results of these tests are available to the public.

Thus far, the JRS test results mirror actual known rollover crashes of various vehicles. Vehicles that perform poorly in the JRS have been shown to perform poorly in real life. Recently, the NHTSA announced its latest delay in issuing new and improved roof crush safety standards, saying that the time isn't right for the automobile manufacturing industry to have to raise its standards. This is the latest in a long series of delays, and will effectively toss the responsibility to the next Administration. After more than three decades of playing games with safety, it's a perfect time for better, safer American cars. The domestic car companies are asking the federal government to bail them out and that should happen. It's only right that these companies start making cars that the public wants, but they should also be made for safety as well as performance.

Source: Public Citizen

Workplace Product Liability

In this country, if you kill, cripple or dismember someone you should expect to go to jail, unless that person works for you. Unlike the laws that govern ordinary people, the laws regarding workplace safety offer unfair protections to businesses that expose employees to unnecessary and preventable dangers. In fact, workers compensation laws (originally enacted to provide financial protection for injured workers) often act to restrict the types of lawsuits that can be brought for workplace injury and in many cases prevent the injured employee or his family from being able to sue at all. In addition to the risks associated with mismanaged and poorly-supervised worksites, all too often a defective product also plays a role in a workplace injury or death.

Over the years, we have represented scores of individuals who have been severely injured by a defective product used in a workplace. If a supervisor removes a guard from a saw and an employee is later injured, the supervisor and the company may be liable for that removal. Additionally, if the removal of the guard was foreseeable to the manufacturer, the product may be defective under Alabama law. Examples of cases we have handled involving defective products that caused workplace injuries include: woodworking machinery that lacked anti-kickback teeth to prevent violent ejection of wood pieces into a nearby worker, a tractor mounted posthole digger that lacked a guard to prevent a worker from being entangled in an exposed rotating bolt, an excavator quick coupler that failed and allowed the excavator bucket to fall onto a worker, a horizontal boring machine that lacked proper torque control and operator presence technology to prevent the machine from overturning and crushing a worker, ungrounded electrical equipment, and many more instances of workplace injury and death caused by defective products.

We currently represent the family of a young man who was killed while operating a large excavator or track hoe. While driving the excavator from one location to another, the operator had to maneuver among trees on a jobsite. When he stood up from the seat to look out the side door, the excavator violently swiveled and crushed his head against a tree. The allegations are that this excavator should have been equipped with operator presence sensing technology that would have prevented operation of the machine if the operator is out of the seat. Because such technology has been used on various machinery for years, we look forward to presenting this case to a jury.

If you need more information on any of the matters discussed above, contact Mike Andrews at 800-898-2034.

Jury Awards Quadriplegic $11.3 Million In Lawsuit

Harold Leon Bostick, a former law student who was left quadriplegic when weightlifting equipment at his gym crashed onto his neck, has won his lawsuit. A federal court jury awarded $11 million in damages. Bostick has now won a total of $18.6 million following seven long years of litigation. The 39-year-old former Marine, who holds degrees in chemical engineering, business and law, was doing squats on a machine at Gold's Gym in Venice, California, when the horizontal bar of weights bearing a couple hundred pounds of weight fell on his neck. The machine did not have adjustable safety stops installed. The gym had settled with Bostick for $7.3 million. The jury ruled against Atlantic Mutual, the insurer for machine manufacturer Flex Equipment Co., and awarded the additional $11.3 million. This man's medical bills were about $700,000 for the first year after his injury.

The reason that Atlantic Mutual was the sole Defendant in the case that went to trial is another story and a most interesting one. Bostick had sued Flex and Gold's Gym originally. After filing suit, he offered to settle with Flex and its insurer, Atlantic Mutual, for Flex's policy limit of $1 million. Estimating that a loss at trial could easily exceed $1 million, a lawyer for Atlantic Mutual told his client "it may be dangerous to reject the Plaintiff's current offer" and recommended settlement. But Atlantic Mutual never responded to Bostick's offer and the case went to trial. A Superior Court jury found Flex liable and awarded Bostick more than $14.6 million. Frustrated that its insurer did not settle and being unable to pay the jury award, Flex gave Bostick the right to sue Atlantic Mutual for bad faith for refusing to settle earlier in the case. Gold's Gym settled with Bostick for $7.3 million. When the case went to trial, the jury ruled against the insurance company and awarded Bostick the additional $11.3 million.

While Bostick will be in a wheelchair for the rest of his life, he still sees one real benefit. This man says that he will now have more money "to help other people who are handicapped." In July, he and some friends founded the Disabled Sports and Fitness Foundation, a nonprofit group intended to help people afford and gain access to sports equipment for physical therapy. In some ways, Bostick's goals today are not so different than they were when he enrolled as a law student at Pepperdine University a few months before his injury. While Bostick has a physical disability, he hasn't lost his spirit and that's good. The California lawyer who represented Bostick in this case did an outstanding job. However, Bostick says no amount of money can give him the life he had before the evening of January 4, 2001.

Source: *Associated Press*

W.R. Grace To Pay Up To $140 Million In Asbestos Case

W.R. Grace & Co. has agreed to pay up to $140 million to settle a class action lawsuit arising out of its use of an attic-insulating product that contained asbestos. The specialty chemicals maker will pay $30 million cash into a trust fund, an additional $30 million cash after three years, and make up to ten additional annual payments of $8 million if certain conditions are met. This information comes from a filing with the Securities and Exchange Commission. The company sold Zonolite attic insulation, a loose-fill vermiculite product that contains naturally occurring asbestos. Zonolite was installed in millions of homes throughout the U.S. and Canada. As you may recall, the hundreds of thousands of lawsuits involving this product forced W.R. Grace into bankruptcy protection in 2001. Much of the Zonolite manufactured in the U.S. came from a vermiculite mine in Libby, Mont. The Libby, Montana mine, which was open for more than 70 years and closed in 1990, has been linked to asbestos exposure that has sickened thousands and killed more than 200 people in the Libby area.

The U.S. Environmental Protection Agency has been overseeing cleanup under the Superfund program since 1999. You may have seen the PBS documentary based on the town's experience which again put W.R. Grace and the small community in the spotlight. Grace reached an agreement this past August to resolve all asbestos claims against the company, allowing it to emerge from bankruptcy without further obligations for asbestos injury. The payments will be backed by 50.1% of W.R. Grace's stock. While W.R. Grace stock had traded as high as $30, it was trading at $3.50 just before we sent this issue to the printer.

Source: *Associated Press*

IX. MASS TORTS UPDATE

Vioxx Settlement Program Update

The massive Vioxx settlement that our firm has been spearheading has been going extremely well. It has required a tremendous amount of time and effort to process all of the matters related to the settlement. As of November 2008, the Vioxx Claims Administrator has issued interim settlement payments to 3,055 Vioxx claimants who suffered a heart attack or sudden cardiac death. These claimants are represented by 167 different law firms. The total of the interim settlement funds paid equals $247,819,343. It is estimated that all heart attack/sudden cardiac death cases will receive interim and final payments by summer 2009. Interim settlement payments for stroke cases will commence in February 2009 in accordance with the terms of the settlement agreement.

As of October 2008, 48,419 claimants had enrolled in the Vioxx Settlement Program. The enrollment deadline had been extended until October 30, 2008, when Merck waived its Walk Away Right under Section 11.1.1 of the Settlement Agreement. As of November 20, 2008, 41,273 of those claimants had

submitted claims materials sufficient for the Claims Administrator to review. The deadline for submitting Claims Packages was July 1, 2008. With the built-in extensions outlined in Exhibit 1.5 of the Settlement Agreement, claimants had until November 30, 2008, at the latest, to cure any deficiencies in their claims packages. Additional time, through December 30, 2008, has been extended for good cause shown.

The Claims Administrator continues to review claims packages to determine what claims qualify for compensation through the program. As an overview of the Vioxx Settlement Program, claims that qualify for compensation through the Settlement Program are being issued a Notice of Eligibility. Under the Settlement Agreement, a claim qualifies for compensation if:

- it meets certain criteria for a heart attack or ischemic stroke as established by a claimant's medical records;
- if medical or pharmacy records document that at least 30 Vioxx pills were dispensed to a Vioxx claimant within any 60-day period prior to the injury; and
- if medical or pharmacy records establish that Vioxx was being used within 14 days of the injury.

Claims that are deemed ineligible by the Claims Administrator are issued a Notice of Ineligibility. If no additional medical records are submitted to the Claims Administrator for review in response to a Notice of Ineligibility, the claim will be reviewed by the Gates Committee for a final determination of eligibility. If found ineligible by the Gates Committee, a claimant can allow their claim to be extinguished, appeal the finding of ineligibility to a Special Master, or elect to return to the court system by filing a Stipulation of Future Evidence pursuant to § 2.7.3 of the Settlement Agreement.

Following the receipt of a Notice of Eligibility, eligible claimants will receive a Notice of Points Award, which contains the number of points awarded by the Claims Administrator based upon the Administrator's objective review of the claimant's medical and pharmacy records. The amount of money each claimant will receive in association with a claim is determined by multiplying the number of points awarded by the value of each point. The final point value will be determined after all Vioxx claims are evaluated. The current estimated value of a point in regard to heart attack claims is $1915.

McKesson Settles Class Action Suit For $350 Million

McKesson Corp., the nation's largest drug distributor, has agreed to pay $350 million to settle a class action suit alleging it fraudulently hiked up the price of more than 400 medications. A class of consumers and health and welfare funds had filed suit in 2005 against the company alleging violations of the Racketeer Influenced and Corrupt Organizations Act for allegedly falsely inflating the average wholesale price (AWP) of a number of America's most popular prescription medications.

Those medications included allergy drug Allegra, arthritis/pain medication Celebrex, asthma drug Flonase and cholesterol medication Lipitor, which, according to Intercontinental Marketing Services, was the world's top-selling drug as of September. The Plaintiffs alleged in their second amended complaint that McKesson conspired with First DataBank, an electronic drug data publisher, to deceitfully increase the AWP, which is widely relied upon by "consumers, health and welfare plans, health insurers and other end payors for prescription drugs" as a pricing standard.

According to the complaint, McKesson and First DataBank devised a scheme to increase "the spread" between medications' wholesale acquisition cost (WAC) which is the price retailers pay for drugs, and the AWP, the price at which retailers sell drugs to consumers. The complaint alleged that in late 2001 or early 2002 First DataBank, which gets the WAC and AWP information from drug manufacturers, reached an agreement with McKesson in which First DataBank would rely solely on McKesson's WAC-to-AWP spread.

Source: *The Legal Intelligencer*

Children's Motrin, Antibiotics And Other Drugs Are Linked To SJS

We have written extensively on Stevens-Johnson Syndrome (SJS) in previous issues. As you may recall, SJS is usually caused by a drug. It can be all the way from a supposedly harmless painkiller such as over-the-counter Children's Motrin to an anti-epileptic drug or antibiotic prescribed by a doctor. There are a lot of drugs on the market that can cause SJS. When a person has taken some drug, such as a painkiller or an antibiotic, and comes down with SJS, the consequences aren't very good. For example, their skin dies and falls off.

One particular over-the-counter medicine, Children's Motrin, has been linked to SJS and several lawsuits have been filed against the maker, Johnson & Johnson. It's alleged in one of the suits that the company knew for nearly 20 years that Children's Motrin can cause SJS but failed to warn consumers about the danger regarding the drug's over-the-counter labeling. Most folks who come down with SJS will have never even heard of SJS and have no idea what it is. If you want more information on SJS, you can contact Frank Woodson in our firm at 800-898-2034.

Source: *Associated Press*

Medtronic Is Sued Over Bone Product

The family of Shirley Nisbet, a California woman who went into respiratory arrest and died after neck surgery, has filed a lawsuit blaming her death on the use of a bone-growth protein made by Medtronic Inc. As you may recall, the Justice Department has been investigating Medtronic. Also, a separate U.S. Senate inquiry into use of the bone-growth product called Infuse Bone

Graft—for purposes not approved by the Food and Drug Administration—was being conducted at the time the suit was filed. Government investigators are probing the off-label use of Infuse. Use of Infuse in the neck is one of these so-called off-label uses. The only type of spine surgery for which Infuse has been approved is a frontal approach to the lower backbone, known as the lumbar spine. Even though doctors are allowed to use FDA-approved products any way they see fit, companies aren't allowed to promote off-label uses. The suit, filed in federal court in Los Angeles, is the first to allege that Infuse was responsible for a death. It contains similar allegations to those made in lawsuits filed in 2002 and 2003 by former employees of Medtronic's spinal division.

The Nisbet family alleges in their suit that a Medtronic salesman urged Ms. Nisbet's surgeon to use Infuse in her neck surgery even though such use wasn't FDA-approved. The product is placed in the patient during surgery. The lawsuit alleges Ms. Nisbet underwent the surgery on August 21st, about seven weeks after the FDA had warned that Infuse in neck surgery had caused life-threatening complications. That July 1st advisory also linked Infuse to "compression of the airway," difficulty swallowing or breathing and the need for breathing tubes.

The suit alleges that Ms. Nisbet went in for surgery to treat neck pain, but that afterward she developed swelling in the neck, then had difficulty swallowing and breathing. Early in the morning of August 23rd, according to the lawsuit, the woman went into respiratory arrest, degenerating into a vegetative state, and then was "kept alive by artificial means" until she died on August 30th. The lawsuit alleges that a Medtronic sales representative was in the operating room and that "prior to and during the surgery, the Medtronic sales representative encouraged and recommended" the use of Infuse to the doctor. This doctor is identified in the lawsuit, but isn't named as a Defendant.

It appears that Medtronic may have made an "adverse event" report on the Nisbet case to the FDA. While a report filed by the company more than three weeks after Ms. Nisbet's death doesn't identify the patient by name or the location of the incident, it may well be the Nisbet case. According to a review by *The Wall Street Journal*, the report contains details that appear to match the allegations in her case, such as the patient developing swelling and complaining of increasing difficulty swallowing. The company's report quotes the surgeon as saying he "does not believe that Infuse played a direct role" in the patient's outcome. The report also said the patient was in a coma. This surely sounds like the Nisbet case.

Apart from the Justice Department and Senate inquiries, Medtronic has been accused by former employees of paying kickbacks to doctors—in the form of phony consulting arrangements, free travel to resorts and sham royalty deals—to get them to use the company's spine products. Medtronic, which has denied the allegations, has agreed to pay $40 million to settle claims made in two lawsuits filed by former employees in 2002 and 2003. Those lawsuits were handled by the law firm of Lieff, Cabraser, Heimann & Bernstein, which has offices in California, New York and Tennessee. That firm did a very good job.

Source: *Wall Street Journal*

Various Injuries Justify A Number Of Recalls On Medtronic Pain Pumps

Within the past few years, there has been a steady increase in the number of recalled medical devices called pain pumps. Pain pumps typically are portable and often disposable pain management devices which continuously administer local anesthetic through a catheter to a surgical site for a certain time period following surgery to decrease post-operative pain and assist in earlier rehabilitation. One of the recent notable injuries due to defective pain pumps has been the destruction of shoulder cartilage attributed to the application of anesthetic medication directly into the joint space via the pain pump catheter. However, pain pumps have caused various other injuries, resulting in their withdrawal from the market.

One type of injury resulting in recalled pain pumps is neurologic injuries caused by the development of catheter-associated intra-spinal masses or lesions associated with the tips of spinal infusion catheters. These masses can either be cancerous or cause paralysis. Some of the studies looking at these injuries indicate that patients received a form of morphine or morphine combined with other analgesics and local anesthetics. The exact rate of these complications is unknown at this point, but range from one intrathecal mass per 1000 patients to three intrathecal masses per 60 patients.

These masses or lesions may cause acute spinal cord compression and be associated with a permanent neurologic injury or occur without any symptoms. The scientific literature suggests that these masses or lesions develop in patients receiving long-term analgesic drug therapy. Computed tomography (CT) scanning is a cost-effective tool for the early detection of catheter-associated masses to allow time for the protective treatment prior to the development of serious neurologic injury. Patients who have used recalled pain pumps with catheters are strongly encouraged to speak to their doctors about catheter-associated masses in order to prevent any potential future neurologic complications. If you want more information on the pain pump litigation you can contact either Navan Ward or Ted Meadows at 800-898-2034.

Woman Sues Novartis Over Zelnorm

An Iowa woman who took Zelnorm, a medication that has since been removed from the market, has filed suit against Novartis, the company that made the drug, saying she suffered serious, adverse side effects. The 35-year-old Plaintiff, who took Zelnorm from 2002 through 2007, when it was discontinued for general use, filed the lawsuit on behalf of herself and her son

in federal court. Zelnorm was used to treat irritable bowel syndrome. It's alleged in the complaint that Novartis "knew or should have known" of an increased risk of heart problems because of information from studies that began in 2004.The lawsuit alleges:

> *Even though Novartis became aware of information concerning increased cardiovascular risk from Zelnorm use following the initial approval of Zelnorm in 2002, Novartis concealed this information from consumers, including Plaintiff, and from their physicians and the FDA until Zelnorm was withdrawn from the market in 2007.*

The FDA approved Zelnorm for use in July 2002.The FDA requested Novartis take the drug off the shelf in March 2007.The FDA says on its website that an analysis found a higher chance of heart attack, stroke and chest pain in patients treated with Zelnorm compared with people treated with a placebo. But, FDA officials said there may be women for whom the benefits of Zelnorm outweighed the risks. In July 2007, the FDA allowed for a limited use of the drug in specific women younger than age 55. However, that changed again in April. Now, the drug will be prescribed only when a person's life is in danger.

The Plaintiff in the recently-filed lawsuit, who had no history of heart disease, developed problems that have required angioplasty and the placement of stints. It's alleged in her lawsuit that her condition "will continue to profoundly and adversely impact her and her son for the rest of their lives." This case will be watched with interest. If you need additional information on Zelnorm contact Frank Woodson with our firm at 800-898-2034.

Source: *Quad City Times*

AstraZeneca Was Aware Of Seroquel Risks In 2000

Company internal documents show that AstraZeneca Plc., knew about the risk of the antipsychotic drug Seroquel causing diabetes as far back as 2000. It has been revealed in a Florida case that the company was well aware of the risk. AstraZeneca Global Safety Officer Wayne Geller concluded there was "reasonable evidence to suggest Seroquel therapy can cause" diabetes and related conditions, according to documents produced for a hearing in federal court in Tampa, Florida last month. Geller drew his conclusions following a review of available studies and internal trials, according to the documents.

AstraZeneca is facing a tremendous number of claims over Seroquel in state and federal courts in the United States. The first trial, set to begin on February 2nd, involves a complaint filed by Linda Guinn, a Florida woman. Ms. Guinn says she developed diabetes after taking Seroquel. The drug is part a class of newer antipsychotic drugs including Eli Lilly & Co.'s Zyprexa and Johnson & Johnson's Risperdal. Thousands of consumers have sued the companies claiming they hid the risks of the drugs and marketed them for unapproved purposes. Thus far, Lilly has paid $1.2 billion to settle 31,000 claims by individuals. It will be most interesting to see if AstraZeneca will allow the Florida case to go to trial.

Source: *Bloomberg*

Trasylol Class Action Filed In Canada

A class action lawsuit was filed last month in Canada alleging that Bayer, the maker of Trasylol, failed to warn about the increased risks of the drug, which is used during open heart surgery to reduce blood loss. As you will recall, a new study found the increased risks. Trasylol, or aprotinin, is injected during open heart surgery to reduce blood loss but has been linked to renal failure, heart attacks, strokes and other risks.

Over 4.5 million patients worldwide are estimated to have been given Trasylol before sales were suspended by the FDA in November 2007. We reported recently that about 150 Trasylol suits have been filed in the U.S., and there likely will be many more in the coming months. If you need additional information on the Trasylol litigation, contact Frank Woodson with our firm at 800-898-2034.

Source: *Lawyers USA*

Wyeth Paid Ghostwriters For Medical Journal Articles

I wasn't surprised a bit to learn that pharmaceutical giant Wyeth has paid ghostwriters to produce medical journal articles favorable to its hormone therapy drug, Prempro. According to Congressional letters seeking more information about the company's involvement in medical ghostwriting, this appears to have been the case. At least one article was published even after a federal study found the drug raised the risk of breast cancer.

Senator Charles Grassley, a member of the Senate Finance Committee, asked Wyeth and DesignWrite, a medical writing firm, to disclose payments related to the preparation of journal articles and the activities of doctors who were recruited to put their names on them for publication. This is part of a continuing investigation by the Republican Senator from Iowa into drug industry influence on doctors. In his letter to Wyeth's chairman and chief executive, Bernard J. Poussot, Senator Grassley wrote:

> *Any attempt to manipulate the scientific literature, that can in turn mislead doctors to prescribe drugs that may not work and/or cause harm to their patients, is very troubling.*

Dozens of internal corporate documents gathered from lawsuits have been released by Grassley's staff. These documents show the role of Wyeth and DesignWrite in creating articles promoting hormone therapy for menopausal women as far back as 1997. The documents show company executives came up with ideas for medical journal articles, titled them, drafted outlines, paid writers to draft the manuscripts, recruited academic

authors and identified publications to run the articles. They did this without telling journal editors or readers of their roles.

Senator Grassley contends that with the Wyeth commissioned articles, the expert authors whose names appear on the articles only became involved after the outlines or drafts of the articles were already written. To date, Wyeth executives have insisted that their publication practices were legitimate and that the listed authors played significant roles in developing journal articles.

These activities are in violation of medical journal guidelines. The International Committee of Medical Journal Editors says authorship means "substantive intellectual contributions" including conception or analysis of the subject and drafting or critical revision of the document. The World Association of Medical Editors says ghost authorship—which it defines as a substantial contribution not mentioned in the manuscript—is "dishonest and unacceptable."

Ted Meadows, Melissa Prickett, and Russ Abney, the lawyers working on hormone therapy at our firm, continue to investigate potential cases as they are filing and litigating others. If you need more information on this subject contact any of them at 800-898-2034.

Source: *New York Times* & *Wall Street Journal*

New Study Connects Hormone Use To Breast Cancer

A new analysis of a big federal study confirms the risk associated with hormone replacement therapy. It reveals the most dramatic evidence yet of the dangers of this still-popular therapy. Taking menopause hormones for five years doubles the risk for breast cancer. The study indicates that even women who took estrogen and progestin pills for as little as a couple of years had a greater chance of getting cancer. And when they stopped taking them, their odds quickly improved, returning to a normal risk level roughly two years after quitting. These new findings confirm that the risks of hormone use outweigh the benefits for most women.

Breast cancer rates fell sharply in recent years, mainly because millions of women quit hormone therapy. Another factor in the decrease was that fewer newly menopausal women started on the therapy. The study's leader, Dr. Rowan Chlebowski of Harbor-UCLA Medical Center in Los Angeles, observed:

> *It's an excellent message for women: You can still diminish risk (by quitting), even if you've been on hormones for a long time. It's not like smoking where you have to wait ten or 15 years for the risk to come down.*

Study results were made available on December 13th at the San Antonio Breast Cancer Symposium. The results are from the Women's Health Initiative, which tested estrogen and progestin pills that doctors long believed would prevent heart disease, bone loss and many other problems in women after menopause. The main part of the study was stopped in 2002 when researchers saw surprisingly higher risks of heart problems and breast cancer in hormone users. Most of the women in the federal study were in their 60s and well past menopause.

Source: *Associated Press*

X. BUSINESS LITIGATION

$3 Million Verdict Against ExxonMobil

A $3 million verdict was returned by a jury against ExxonMobil Corp. on behalf of a Darlington company that claimed the global oil giant illegally conspired to drive it out of the Mobil lubricants business and wrongfully terminated its distributorship. At the conclusion of the trial, the jury took less than two hours to reach its decision and awarded $2 million in actual damages and $1 million in punitive damages in favor of Bristow Oil Co. The origin of this lawsuit went back to 1984 when Damon Flowers first joined Bristow at the request of his father-in-law, William Bristow. Shortly thereafter, Mobil Oil Corp., now called ExxonMobil, requested that Bristow distribute its lubricants. In response, Flowers agreed to lead that part of the business.

In spring 2001, ExxonMobil employees came to Darlington to meet with Flowers, who believed they were coming to present him with a newly-drafted agreement. Instead, ExxonMobil said it was terminating Bristow's distributorship. The jury agreed that had Bristow known ExxonMobil intended to end its 17-year relationship, the business could have been saved by Flowers. The Plaintiff was represented by State Senator Gerald Malloy and John Nichols of Bluestein, Nichols, Thompson & Delgado LLC. The case was in court for four years. Senator Malloy had this to say about the verdict:

> *The verdict sends a message to those companies that deal with the public. They should conduct business with fairness and honesty.*

It will be interesting to see if ExxonMobil changes the way it does business because of this verdict. When you consider the giant oil company makes about $40 billion every three months in profits, I seriously doubt it.

Class Action Lawsuit Filed Against The Reserve

Investors in a second mutual fund managed by The Reserve have filed a lawsuit in federal court and will seek to have it certified as a class action. This is said to have opened a new front in the expanding legal battle against the company. The lawsuit accuses The Reserve of misleading the thousands of investors in the firm's Yield Plus fund by pursuing risky investments, rather than preserving capital. Those investments included commercial debt of Lehman Bros., which as you know

sought bankruptcy court protection in September, triggering a freeze on the $1.1 billion Yield Plus fund.

The lawsuit also charges that TD Ameritrade misled hundreds of its clients who placed their assets in the fund by describing it as "just like a money market." In fact, Yield Plus is a diversified mutual fund that made "significantly riskier" investments than a money market fund. The Yield Plus investors "could face double-digit percentage losses."

The Reserve already faces at least 16 other federal lawsuits involving its flagship Primary fund, a $64 billion money market mutual fund similarly frozen after Lehman's bankruptcy. The Primary fund dropped below the $1-per-share standard—referred to as "breaking the buck"—the day after Lehman's bankruptcy filing. This prompted a wave of investor withdrawals that rocked the mutual fund industry and caused the federal government to step in with a temporary insurance plan. But Yield Plus, which also "broke the buck," is not covered by the controversial Washington rescue effort. Many Yield Plus investors are complaining to the Securities and Exchange Commission and state regulators that Reserve and TD Ameritrade gave them false or misleading information. Darren Robbins, a lawyer with Coughlin Stoia Geller Rudman & Robbins, located in San Diego, California, filed this lawsuit on behalf of investors.

Source: *USA Today*

Giant Accounting Firm Settles Case With Pennsylvania

The Pennsylvania Department of Insurance has completed a $40 million settlement with Deloitte & Touche USA LLP in connection with the accounting firm's auditing services for Reliance Insurance Co. The Insurance Department had charged that the firm was guilty of accounting malpractice arising out of its auditing of the bankrupt insurance company. Reliance was licensed to write insurance in all 50 states. The states with the largest number of policyholders included California, Florida, Illinois, New York, Pennsylvania and Texas.

Source: *National Law Journal*

Ford Must Pay $23 Million In Suit Over Mirrors

Ford Motor Co. will have to pay $23 million to an Illinois man who said the company used his patented invention for a lighting system used in mirrors located outside vehicles. The verdict, reached last month in a Chicago federal court, came in a ten-year-old patent suit against Ford by Jacob Krippelz. He was chief executive officer of Jake's Inc., a small machining and heavy-equipment component company based in Aurora, Illinois. The jury rejected arguments by Ford that the patent was invalid because it didn't cover a new invention. The patent at issue was issued in 1991.

Source: *Bloomberg News*

The Tort Of Intentional Interference With Business Relations

Over the years, our firm has handled a number of cases where one business had been caught trying to do damage to a competitor, resulting in losses and damages to the victimized company. Fortunately, there is a cause of action in Alabama for the intentional interference with business relations. However, we have found that this type case is not always easy to win. But, with the right set of facts, these cases can be won. To prove such a case, the following criteria must exist:

- a contract or business relation;
- the Defendant's knowledge of the contract or business relation;
- intentional interference by the Defendant with the contract or business relation;
- the absence of justification for the Defendant's interference; and
- damages as a direct consequence of the interference.

To prove a case under Alabama law on the subject doesn't require fraud, force or coercion. If you need additional information on this subject, contact Dana Taunton at 800-898-2034.

UnitedHealth Options Settlement Approved

A federal judge has given preliminary approval to a $900 million-plus settlement resolving a lawsuit pitting UnitedHealth Group shareholders against the insurer over its stock options. Minnetonka, Minnesota-based UnitedHealth will pay $895 million to settle the class-action case. The lead Plaintiffs in the suit are the California Public Employees Retirement System and Alaska Plumbing and Pipefitting Industry Pension Trust. Former UnitedHealth Chief Executive William McGuire also has agreed to pay $30 million toward the settlement and to return stock options representing more than 3 million shares. The case arose out of a scandal involving the backdating of UnitedHealth stock options that forced McGuire to step down in 2006.

Source: *Associated Press*

XI. INSURANCE AND FINANCE UPDATE

New Report Highlights Mismanagement Of Regions Morgan Keegan Bond Funds

A recent report highlights the magnitude of the Regions Morgan Keegan bond funds disaster. The report by the Securities Litigation and Consulting Group found that investors in the RMK bond funds lost $2 billion dollars. Some of the funds have lost 90% of their value since the beginning of 2007. The report states:

> *The RMK funds suffered massive losses because they held concentrated holdings of low-priority tranches in structured finance deals backed by risky assets. RMK*

did not disclose the risks it was taking until after the losses had occurred. In fact, it misrepresented hundreds of millions of dollars of leveraged asset-backed securities as corporate bonds and preferred stocks thereby making the funds seem more diversified and less risky than they were.

The report notes that RMK invested a "substantial majority" of the portfolios in low-priority tranches. The concentration dramatically increased credit risk, but this risk was not disclosed to investors even though portfolio managers in charge of the funds knew about the risks. According to the report, had RMK performed a rudimentary analysis of its holdings the company would have found that investors were exposed to up to ten times the credit risk in exchange for only up to 2% higher returns. Based on this report, Morgan Keegan investors had no way of knowing that they could lose all their money. If you need additional information on this subject, contact Scarlette Tuley at 800-898-2034.

Justice Department Joins Lawsuit Against McKesson

The U.S. Justice Department has joined a whistleblower lawsuit involving several companies, including McKesson Corp., alleging that they submitted false claims to Medicare, paid illegal kickbacks and established sham medical-equipment suppliers. This case originally was filed by a private citizen under the *qui tam* provisions of the False Claims Act in federal court in Mississippi. These provisions allow private citizens to sue on behalf of the U.S. government for alleged fraud by government contractors and to share in any money recovered.

The government alleges that McKesson, through its McKesson Medical-Surgical MediNet Inc. subsidiary, made arrangements for its supplies to be used in nursing facilities owned by Beverly Enterprises Inc., now known as Golden Living. The suit alleges that McKesson promised Beverly facilities that significant profits could be gained from making it appear to Medicare that it was Beverly, not McKesson or MediNet, that was supplying the equipment and supplies. The suit accuses MediNet of setting up and managing a purported medical equipment supplier, called CSMS, affiliated with Beverly and using that supplier to bill Medicare. According to the suit, Beverly allegedly kept millions of dollars in Medicare payments for services and supplies that were supplied by MediNet in exchange for referring sales to McKesson.

Drug wholesaler McKesson is one of the nation's largest suppliers of medical equipment, which includes feeding devices and oxygen supplies. The company says it has been cooperating with the government's investigation for several years. Golden Living also says it has been cooperating with the government's probe for nearly three years.

Source: *Wall Street Journal*

Settlement With Hank Greenberg Breaks Down

It appears that efforts to settle the long-running fraud lawsuit against American International Group Inc.'s former chief, Maurice "Hank" Greenberg, are totally off track. Before AIG's near collapse in mid-September, which led to a federal bailout, the parties had reached a tentative settlement. When AIG dropped from $30 per share to as low as $1 per share, the settlement fell apart.

The lawsuit was brought by former New York Attorney General Eliot Spitzer as part of an accounting probe of AIG that led to Greenberg leaving the company in 2005. AIG reached a $1.64 billion settlement with authorities in 2006. Much of Greenberg's wealth is tied up in AIG stock through personal holdings, a family trust and companies he controls. The U.S. government now owns nearly 80% of AIG as the result of its $85 billion "bailout" of the insurance holding company in September. A revised plan boosted the amount of aid to AIG to as much as $150 billion. Greenberg, now chairman and CEO of C.V. Starr & Co Inc., has publicly criticized the AIG management and board of directors that followed him for the insurance giant's problems. It now appears the case will proceed toward a trial in New York Supreme Court.

Source: *Insurance Journal*

Duke University Sues Insurer Over Lacrosse Controversy Claims

Duke University has filed a lawsuit against National Union Fire Insurance Co., its insurer, demanding that the company cover the costs of its settlement with three former lacrosse players who were falsely accused of rape. The North Carolina school filed a lawsuit against the company seeking compensation for the undisclosed settlement and other costs incurred in the fallout of the case. The lawsuit said the insurer has paid nothing toward the case. It's alleged:

Because National Union has not paid, Duke has been forced to bear the full financial impact of its own defense.

Along with the settlement provided to the three players—Reade Seligmann, Collin Finnerty and Dave Evans—more than 40 unindicted players from the 2006 lacrosse team have since sued the university. Also, the former lacrosse coach, Mike Pressler, has sued the school. In a release Duke spokesman Michael Schoenfeld stated:

Duke believes that our insurance companies should meet their obligations and we will pursue all options available to us. While Duke sought to address this without resorting to a lawsuit, we were not able to reach a satisfactory outcome and thus turn to the courts.

In the Duke lawsuit, it's alleged that National Union breached its contract. It's contended that the insurance policies protect the school from any losses

arising from legal claims. The school said it repeatedly notified the insurance company about the details of the investigation and that National Union, an affiliate of AIG, repeatedly acknowledged that its policies potentially covered the claims.

Source: *Insurance Journal*

XII. PREDATORY LENDING

Fund Investors Sue Countrywide Over Loan Modifications

A hedge fund has filed a most interesting suit against the Countrywide Financial Corporation, the giant mortgage lender, demanding that Countrywide compensate holders of some securities backed by mortgages if the lender changes the terms of the loans. According to the lawsuit, the fund, Greenwich Financial Services, and other investors stood to lose money if Countrywide, now part of Bank of America, modified loans under a settlement that it reached with 11 state Attorneys General in October. This came as the government was pushing banks to help struggling homeowners. It's good to see some folks fighting back.

In recent months, some investors who own mortgage securities have begun voicing concern about how loans are modified, but few have filed suit. The Greenwich Financial case, filed in state court in New York, highlights the complexity associated with modifying loans that have been bundled into securities. It also signals that more aggressive government and private efforts to help borrowers could face stiff resistance from investors. The lawsuit claims that under contracts governing 374 Countrywide mortgage trusts, the company must purchase at face value any mortgage that it modifies.

According to William Frey, president of Greenwich Financial, an estimated $150 billion in mortgages could be covered by the requirement. His position is that Countrywide doesn't have the right to modify the terms. Though his firm is the only named Plaintiff in the case, many other investors are said to be supporting this lawsuit. They would benefit if the court granted the case class action status. Under the settlement with the states, Countrywide agreed to modify up to 400,000 loans and to provide $8.4 billion in relief to borrowers to settle predatory lending accusations. It's contended in the suit:

> *Countrywide plans not to absorb the $8.4 billion itself, even though it was Countrywide's own conduct of which the Attorneys General complained in the proceedings, but rather to pass most or all of that reduction on to the trusts that purchased mortgage loans from Countrywide.*

I must confess that this lawsuit really takes a turn that I never anticipated. In effect, as I understand it, the litigation pits a rather elite group against the actual victims of a predatory lender. While I concede that both groups are victims, my feelings go out more to the homeowners. In any event, it will be interesting to see how this lawsuit works out.

Source: *New York Times*

Countrywide To Make $11.5 Million In North Carolina Refunds

Countrywide has agreed to refund $11.5 million to about 4,800 borrowers in North Carolina under a settlement with the state's Banking Commissioner. Countrywide also has agreed to make $2 million in grants to 26 nonprofit organizations in the state that provide foreclosure prevention counseling. Deputy Banking Commissioner Mark Pearce said in a prepared statement:

> *We found evidence that Countrywide overcharged thousands of North Carolina homeowners. This settlement provides for a full refund of any illegal charges identified in the course of our examination.*

The banking commissioner's office found that about 3,800 borrowers were overcharged on first mortgages, and another 1,000 were overcharged on second mortgages. Homeowners entitled to refunds should receive their checks within 60 days. Borrowers who want to find out if they will receive a refund can call the North Carolina Office of the Commissioner of Banks at 1-888-384-3811. The settlement supplements the multi-state agreement, announced in October, under which Countrywide Financial Corp. agreed to modify unaffordable mortgages. The latest settlement involves Countrywide units Countrywide Home Loans and Countrywide Mortgage Ventures.

Source: *News & Observer*

$141 Million Fraud Verdict Against Bank Of America

A verdict of $141 million was returned last month against Bank of America Corp., the largest U.S. consumer bank, in a lawsuit over claims that one of its units defrauded investors who bought securities backed by a furniture retailer. Federal court jurors in New York decided in favor of the investors, including American International Group Inc., Bank Leumi Le-Israel Ltd., Allstate Corp. and Societe Generale SA, in a trial that started in October. The jury awarded $85 million, which with interest, totals $141 million. The Plaintiffs showed the jury that Bank of America Securities knew the securities it was selling were much worse than they were holding them out to be to the marketplace.

The Bank of America unit, Nationsbanc, underwrote securities issued by a trust created by Heilig-Meyers, once the largest U.S. furniture retailer. The securities were backed by money owed to Heilig-Meyers from installment contracts. According to the Plaintiffs, Nationsbanc deceived investors when it claimed in offering materials that Heilig-Meyers's collection practices were effective and its receivables sound. Richmond, Virginia-based Heilig-Meyers, which catered to low- and

middle-income consumers, filed for bankruptcy in 2000 and wasn't a Defendant in the case.

Source: *Bloomberg*

XIII. PREMISES LIABILITY UPDATE

Six Flags Amusement Park Settles Kentucky Teenager's Accident Case

Six Flags Kentucky Kingdom, an amusement park, has reached a settlement with the family of a Louisville teenager whose feet were severed when a thrill ride malfunctioned last year. The settlement will provide "lifetime care" for Kaitlyn Lasitter, who was 13 when a cable on the ride snapped in June 2007, cutting off her feet. Doctors were able to reattach her right foot but not her left one, and some of her left leg was amputated. Terms of the settlement are confidential. Kaitlyn's family sued the amusement park, claiming the park failed to maintain the Superman Tower of Power ride and equipment and to ensure riders' safety. The ride, which ascended several stories before dropping riders at speeds of more than 50 mph, has since been dismantled. A trial in the case had been set for early 2010.

A Kentucky Department of Agriculture report placed blame for the accident on a faulty cable and slow response by an operator. The report said Kaitlyn would likely have suffered only cuts and scrapes with swifter action from the ride's operators. Kaitlyn has undergone several surgeries since the accident. The teenager was suffering "excruciating pain" as she faced more surgery. Kaitlyn, a former softball and soccer player, described putting on weight from inactivity, being made fun of, having friends and boys treat her differently and missing out on being a teenager. Kentucky Kingdom had filed suit a separate against Intamin Ltd., the manufacturer of the ride, and that claim was also settled.

Source: *Insurance Journal*

Victim's Family Awarded $36 Million In Wal-Mart Shooting

A state court jury in Arizona has awarded $36 million in damages to the family of a man shot to death by a mental patient in 2005 in a Wal-Mart parking lot. ValueOptions Inc., the company that held the state contract for providing behavioral health care until last year, was found 90% at fault in the death of 35-year-old Patrick Graham. Mr. Graham was one of two men shot by Ed Liu, a ValueOptions patient who has suffered from paranoid schizophrenia for more than 20 years.

In criminal court, Liu was found mentally incompetent to stand trial for the death of Mr. Graham and Anthony Spangler. The two men were employed by a Wal-Mart Supercenter in Peoria. The men were collecting shopping carts in the parking lot when Liu, who had been off his medications for nearly eight months, drove up and shot them without provocation. ValueOptions was accused of negligence for not following its own guidelines in caring for Liu.

ValueOptions held a contract with the State of Arizona to handle behavioral health care between 1999 and 2007. Diagnosed as paranoid schizophrenic, Liu spent 20 years in the State's mental-health system. Still, he functioned adequately while on medication. Based on trial testimony, he was conscientious in managing those medications. In December 2004, it was reported that Liu's care provider at ValueOptions noted that his condition was worsening. Nonetheless, his appointment for that month was canceled, though he was running low on the multiple medications he took. No one from ValueOptions checked on him until May 2005, when a case worker knocked on his door and he did not answer. In a phone call the next day, Liu complained that he wanted to get back on his medications, but he failed to show up for a June appointment.

In August 2005, Liu bought a Glock semiautomatic pistol. According to trial testimony, he was apparently hearing voices and receiving messages from car license plates and CNN newscasts. On August 23, 2005, Liu drove to the Wal-Mart parking lot and shot Graham and Spangler. A witness took down his license plate as he drove away. When police arrested him, he had no memory of the incident. The State of Arizona and Liu also were named in the lawsuit. The State settled for $250,000. Liu's own liability insurance policy paid an undisclosed amount. A separate lawsuit by Spangler's family is still pending.

The jury in the Graham trial awarded damages and punitive damages of $10 million to the widow; $10.5 million each to Graham's two children; and $2.5 million each to his parents. ValueOptions must pay 90% of the damages, to be divided between the Virginia-based corporation and its Arizona subsidiary. ValueOptions says it will appeal. Richard M. Gerry, a lawyer from Phoenix, Arizona, represented the Graham family and did a very good job.

Source: *Arizona Republic*

Jury Awards Injured Maine Man $5 Million In Electrical Accident Lawsuit

A Maine man has been awarded nearly $5 million in damages for injuries he sustained six years ago in an electrical accident at a Penobscot boatyard. Bryan Smith, who is now 24 years old, was operating a crane to move a sailboat when the mast hit a high-voltage power line. Superior Court Justice Michaela Murphy found that Central Maine Power caused the accident because the power line was more than 15 feet closer to the ground than it should have been. The judge awarded Smith $3 million in damages for loss of enjoyment of life, pain and suffering, more than $1 million in lost earnings, and $783,000 for past and future medical and rehabilitation expenses.

Source: *Insurance Journal*

Indiana Soldiers File Suit Over Chemical Exposure In Iraq

Sixteen Indiana National Guard soldiers have filed suit against KBR Inc., a big defense contractor with very strong

political connections, saying its employees knowingly allowed them to be exposed to a toxic chemical in Iraq five years ago. The federal suit, filed in U.S. District Court, alleges the soldiers were exposed to a carcinogen while protecting an Iraqi water pumping plant shortly after the U.S. invasion in 2003. The complaint alleges that Houston-based KBR knew at least as early as May 2003 that the plant was contaminated with sodium dichromate, a known carcinogen, but concealed the danger from civilian workers and 139 soldiers from the Indiana Guard's 1st Battalion, 152nd Infantry.

The chemical, used to remove pipe corrosion, is especially dangerous because it contains hexavalent chromium, which is known to cause birth defects and cancer, particularly lung cancer. The cancer can take years to develop. Some of the soldiers who served at the site now have respiratory system tumors associated with hexavalent chromium exposure. The lawsuit seeks reimbursement for medical costs, monitoring for cancer and other health problems and unspecified monetary damages.

The lawsuit alleges that KBR knew of the contamination and played down the danger. When Guard members and American civilians working at the plant began to have nosebleeds, KBR managers told them they were simply caused by the dry desert air, according to allegations in the lawsuit. Nosebleeds are a symptom of acute hexavalent chromium poisoning. The work wasn't shut down until September 2003, after KBR managers in full environmental protective gear inspected the plant while workers and Guard members remained unprotected. The plant has since reopened, but workers now wear protective gear. The extent of the company's knowledge of the hazard didn't become clear to the Plaintiffs in this case until Congressional hearings this June.

KBR used to be a subsidiary of Halliburton Co., the oilfield services conglomerate whose chief executive from 1995 to 2000 was Vice President Dick Cheney. KBR became a separate public company last year, but it still has strong political connections and has done very well financially in Iraq. Hopefully, Michael P. Doyle of Houston, Texas, the lead lawyer in this case, will be successful in this case for his clients.

Source: *Associated Press*

Tennessee Motel Sued For $100 Million In Death Of Alabama Woman

The parents of a young Alabama woman have filed a lawsuit against the motel in Knoxville where she was killed, allegedly by a motel employee. The parents, who are from Florence, Alabama, filed the lawsuit in Knox County Circuit Court in December against the Days Inn Corp. and its parent companies over the death of 21-year-old Jennifer Lee Hampton. The former Waterloo High homecoming queen was allegedly strangled by the employee while she was on a business trip to Knoxville on September 21st.

According to authorities, the employee, a housekeeper at the motel, used a master key to enter Hampton's room, then sexually assaulted and killed her. Hampton's body was found a week later in a nearby lake. The Defendants are accused of being negligent for hiring illegal immigrants without performing background investigations. It also accuses the Defendants of negligence for allowing employees to have master keys to guests' rooms. The motel has since changed its franchise from Days Inn to AmeriStay Hotel and Suites. The employee was charged with murder and at press time was being held in jail without bond.

Source: *Associated Press*

Texas Hazing Lawsuit Judgment Overturned

We wrote on the Texas hazing case last month that resulted in a default judgment. Since then the judge has overturned his previous $16.2 million award against the Sigma Alpha Epsilon fraternity. You will recall the fraternity had been sued by the parents of a pledge who died after a hazing event at the University of Texas. The national organization and the local chapter failed to respond to the lawsuit and a default judgment was entered. Now the judge has accepted the fraternity's explanation that the failure to respond was an accident and has set aside his prior order.

The lawsuit will now proceed to trial. Freshman Tyler Cross died in November 2006 after falling from the fifth floor of his off-campus apartment building. Investigators said pledges were given half-gallon bottles of liquor, and the student's blood alcohol level was more than twice the legal limit of .08. Two pledge trainers pleaded no contest to hazing and furnishing to minors and were sentenced to four days in jail and given two years' deferred adjudication. While this is a set back in the case for the family, the fraternity and its insurance carrier may eventually wish the $16.2 million judgment was back in place. A jury may return a much larger verdict when the case is tried based on the facts. This fraternity needs to be taught a lesson!

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

Fraternity At Alabama Disbanded Over Hazing Violations

We wrote last month on hazing problems at schools and universities around the country and specifically mentioned the Texas case referred to above. Now, a leading fraternity at the University of Alabama has been disbanded for repeated rules violations, including hazing new members. The national board of Sigma Phi Epsilon revoked the charter of its Alabama chapter in late November. According to a university spokeswoman, there were violations of student conduct standards and rules against mistreating new members, the practice commonly referred to as hazing. Apparently, the fraternity is cooperating with university and local law enforcement investigating the allegations. Sigma Phi Epsilon is a large, prominent fraternity at Alabama, where it has had a chapter since 1927. The fraternity had 113 members on campus

this fall. In my opinion, hazing is not only stupid, it's dangerous and the sort of thing that has no place on any college campus.

Source: *Associated Press*

Milwaukee Loses Appeal In Lead Paint Lawsuit

An appeals court has rejected the City of Milwaukee's bid to force a former lead paint manufacturer to pay for the cleanup of 11,000 contaminated properties. The Court of Appeals ruled by a 2-1 vote that the evidence was sufficient to uphold a jury's ruling that NL Industries Inc. won't have to pay the City's costs of cleaning up the inner-city homes. The City sought $52.6 million for the program, which spanned 1992 to 2006 and involved replacing old windows. The Milwaukee County jury ruled last year the widespread presence of lead paint in Milwaukee homes was a public nuisance, but NL Industries did not "intentionally and unreasonably engage in conduct" that caused it and was not "negligent." The City appealed, raising numerous claims of error in the jury instructions, admission of evidence and court procedures. It asked the appeals court to overturn the jury's verdict, saying the company knew for decades that childhood lead paint poisoning was a serious public health problem but continued to sell and promote the product.

Source: *Associated Press*

XIV. WORKPLACE HAZARDS

Appeals Court Upholds $35.6 Million Judgment Against Family Dollar

A federal appeals court has upheld a $35.6 million judgment against Family Dollar Stores Inc., which was sued by employees denied overtime pay because they were classified as store managers. A federal jury in Tuscaloosa, Alabama, ruled in 2006 that Family Dollar violated the Fair Labor Standards Act and awarded back pay to 1,424 employees who routinely worked 60 to 70 hours a week with duties that included mopping floors, unloading trucks, stocking shelves and running cash registers. The North Carolina-based company appealed U.S. District Judge U.W. Clemon's final award, which included more than $17.8 million in back overtime and an equal amount in damages. A U.S. Court of Appeals for the Eleventh Circuit panel upheld Judge Clemon's ruling.

The three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit in Atlanta agreed with the judge and jury. The jury "reasonably determined that Family Dollar failed to meet its burden of proving that Plaintiff store managers' primary duty was management," said the opinion written by Judge Frank M. Hull and joined by Judges Joel F. Dubina and Peter T. Fay. Family Dollar operates 6,600 stores in 44 states, from Maine to Arizona, offering low-cost general merchandise largely to rural and small-town customers.

The Plaintiffs were represented by Allen Schreiber of the Schreiber & Petro firm and Greg Wiggins, Mike Quinn and Rosco Calamusa of the Wiggins, Childs, Quinn & Pantazis firm, all from Birmingham. These lawyers did an outstanding job in the eight-year-old case. The Appeals Court decision will have an effect on a number of cases that were being held up waiting for the court to rule.

Source: *Associated Press*

Wal-Mart To Pay $54.25 Million To Settle Employees' Lawsuit

Wal-Mart Stores Inc. will pay up to $54.25 million to settle a class action lawsuit that alleged the discount giant cut workers' break time and allowed employees to work off the clock in Minnesota. The class includes about 100,000 current and former hourly workers who were employed at Wal-Mart Stores and Sam's Clubs in Minnesota from September 11, 1998, through November 14, 2008. In the settlement, Wal-Mart has also agreed to maintain electronic systems, surveys and notices to stay compliant with wage and hour policies and Minnesota laws. In July, a Dakota County judge ruled against Wal-Mart in the lawsuit, saying the giant retailer violated state labor laws 2 million times by cutting worker break time and "willfully" allowing employees to work off the clock.

Source: *Associated Press*

$48 Million Jury Award To Injured Railroad Worker Is Approved

A California judge has approved a $48-million jury award to a former Union Pacific Railroad employee who was left a quadriplegic after a work-related motor vehicle accident last year. The jury award in Los Angeles to Eric Doi was the largest verdict ever to a Plaintiff under the federal law that covers railroad workers injured on the job. It should be noted that railroads and their employees are not covered by state workers' compensation laws. The railroad company says it will "pursue further judicial review," which is a fancy way of saying the case isn't over.

The 30-year-old employee, a railroad signalman, was the passenger in a company truck last year when a co-worker behind the wheel became distracted and lost control of the vehicle. The truck rolled over down an embankment, crashed through a fence and into oncoming traffic on a highway. The employee, who now needs round-the-clock care and physical rehabilitation, relies on other people for everyday activities. These are the little things we all take for granted, such as using the bathroom or eating a meal. Donald S. Britt, a lawyer from Sacramento, California, represented the employee and did an outstanding job in this case.

Source: *Los Angeles Times*

Orange County Register's Parent Settles Dispute With Newspaper Carriers

Freedom Communications Inc., the company that operates the *Orange County Register,* reached a multimillion-dollar settlement with the newspaper's carriers after a long dispute over their employment status. The Irvine, Calif.-based newspaper will pay about $22 million to settle the class action lawsuit filed on behalf of more than 5,000 newspaper carriers, who are classified as independent contractors by the company. The lawsuit, filed in 2003, alleged that the classification was unfair because it denied them overtime pay and mileage and required them to pay fines out of pocket for late papers and other delivery problems. The settlement, which came in the middle of the trial, will not require the firm to reclassify its carriers as employees. Freedom Communication says it will pay any class members who filed claims.

Source: *Los Angeles Times*

Circuit City To Pay $15 Million In Discrimination Lawsuit

Circuit City has agreed to pay $15 million to settle a Los Angeles lawsuit that claimed more than 200 workers were laid off because of age discrimination. Last month a Los Angeles judge approved an agreement that allows the workers to become creditors of the electronics chain, which filed for bankruptcy protection in November. The store chain laid off 3,400 employees last year who were making more than market-rate pay. Those who lost their jobs generally had more seniority and thus tended to be older. The company has said the layoffs were based on salaries and had nothing to do with age. Gloria Allred, a lawyer with Alfred, Maroko & Golberg, located in Los Angeles, represented the workers and did a very good job.

Source: *Associated Press*

XV. TRANSPORTATION

Jury Awards $23.5 Million For Injuries From 18 Wheeler Collision

A Kansas jury recently awarded $23.5 million to Terry and Donna Frederick in a lawsuit stemming from injuries in a semi-trailer accident in New Mexico. The actual award was reduced by the trial judge to nearly $15.3 million. The jury decided the driver of the other truck was only 65% at fault. That driver, Robyn Getchel, tested positive for methamphetamine while driving a truck for Swift Transportation. Getchel claimed she was rear-ended, but subsequent tests revealed that she was backing up from a rest stop onto the highway when she hit the truck Terry Frederick was riding in for Yellow Freight. The driver of the Yellow Freight truck, Dennis Bottorff, was killed.

The accident occurred just after 1:30 a.m. on March 16, 2006, on U.S. 54 near Tucumcari, New Mexico. This was about two hours west of Amarillo, Texas. Terry Frederick, 56, suffered a severe spinal cord injury and had about $5 million in medical bills. The rest of the verdict covered future medical expenses, lost wages and pain and suffering.

While this verdict may have been a record in Kansas, it's not the biggest verdict against Swift. Last December, an Arizona jury awarded $36.5 million to the family of a man killed in a collision with another one of the Swift trucks. A lawsuit on behalf of the Bottorff family has been filed in federal court in Kansas City, Missouri, and should be tried next spring. Scott Nutter, a lawyer with the firm of Shamberg, Johnson and Bergman, located in Kansas City, Missouri, represents the Plaintiffs in both cases, and did an excellent job.

Metrolink Denies Liability For Fatal Crash

Metrolink, the regional rail agency for Southern California, has denied liability for the September crash that left 25 people dead and dozens more injured. The crash was one of the worst in American rail history. In its first court filing since the crash, Metrolink asserts an immunity defense based on federal preemption grounds. Metrolink also argues that damages are restricted to $200 million per accident under the federal Amtrak Reform and Accountability Act. At the time of the crash, lawyers estimated that damages could be as much as $500 million.

Metrolink also says in its answer that the "injuries were caused in whole or in part by the wrongful, negligent, criminal conduct, tortuous conduct, and/or carelessness and lack of due care on the part of third parties for which this answering Defendant is not liable." Metrolink has also filed a lawsuit against Connex Railroad LLC, the employer of the engineer of Metrolink 111, which crashed into an oncoming freight train operated by Union Pacific Corp.

The National Transportation Safety Board concluded that the engineer, who died in the crash, had been sending e-mails moments before both trains collided. Thus far, only two lawsuits have been filed against Metrolink, also known as the Southern California Regional Rail Authority. Both of the suits were filed in Los Angeles County Superior Court. There have been 25 government claims filed against Metrolink and more lawsuits are expected to be filed once the authority rejects those claims.

Source: *National Law Journal*

Family Of Officer Killed In Crash Awarded $8 Million

Four years after a highly decorated Florida police officer was killed in a car crash, a Broward County jury awarded $8.07 million to the widow and her three daughters. The case arose out of a two-vehicle collision. In the incident, the officer swerved to avoid hitting a car that ran a stop sign and his car went into a drainage curb, flipping his vehicle and smashing it against a large tree. The father of three was ejected

from the car and died seven days later in the hospital.

The jury awarded the compensatory damages against the Florida Department of Transportation (FDOT) and the teenage driver and her father. It was contended in the lawsuit that the 18-year-old driver's negligence led to the officer's death. It also was alleged that the FDOT was responsible for the crash as well for violating its own rules by allowing a drainage curb and large trees to be placed on a road where the speed limit was 50 mph.

The jury calculated the damages to the family caused by the crash to be $11.5 million. But after distributing the blame placed on the teenage driver, the FDOT, and the officer himself, the family was awarded 70% of the total monetary damages. The jury concluded that the officer was 30% responsible for his own death. More than half of the blame, 55%, was placed on the young driver, with 15% of the liability of the crash attributed to the FDOT.

Source: *Miami Herald*

Girl Paralyzed In Crash Caused By Drunk Driver To Receive $26 Million

The family of a girl left paralyzed after a car accident caused by a drunken driver leaving a New York Giants football game has settled its case. The family will receive $26 million under the terms of the settlement. The amount of the settlement had been sealed until a state appellate court overturned a lower court's decision and allowed it to be made public. The appellate court's decision brings an end to the lawsuit filed by the family of the little girl, who was paralyzed from the neck down as a two year old in 1999. The family sued Aramark, the stadium's concessionaire, contending that employees continued to serve beer to a man at the game after he was visibly intoxicated and slurring his speech. The man, who subsequently drove the car that was involved in the accident, was found after the accident to have a blood alcohol level of 0.226, more than twice the legal limit at the time.

The jury awarded the family $105 million in 2005, but that ruling was reversed on appeal the following year. The parties had actually reached a settlement last year before the case went back to court, but the agreement was sealed. Prior to this settlement, the family had reached separate settlements with the Giants, the NFL and the drunk driver for a total of about $1.2 million. The $25 million settlement with Aramark represents about 90% of the compensatory damages awarded in the initial $105 million jury verdict. The remainder of the original award was for punitive damages. The victim will be able to get the appropriate care as a result of the settlements, which will take care of her for the rest of her life. David Mazie, a New Jersey lawyer, represented the family and did a great job for them.

Source: *Associated Press*

Livery Firm May Be Liable In Fatal Crash

The highest appeals court in Massachusetts has ruled that a livery company and its driver in Boston could be held liable in a fatal car accident caused by a drunken passenger after he left the livery van. The Supreme Judicial Court found that Ultimate Livery Service Inc., located in Boston, and its driver, Richard Broderick, could be found to be at fault in a 2001 accident that killed an off-duty Boston police officer and left several other people with serious injuries. The court said Broderick should not have dropped off a drunken passenger at a location where he would likely get into a car and drive.

William Powers, along with five other men, had hired Ultimate to take them to a bachelor party on the night of August 11, 2001. The driver picked them up in a 15-passenger van at a South Boston sports bar, took them to a strip club in Rhode Island, and then drove them back to the sports bar. The men drank in both bars and during the ride to and from Rhode Island. Powers, joined by two of the men, drove away after being dropped off and collided with another car at an intersection. The crash killed Sean Waters, an off-duty police officer who was a passenger in the other car. Passengers in both cars were injured.

Lawsuits were filed by the officer's estate and the injured passengers, claiming that Ultimate and its driver were at fault for allowing Powers to leave the van at the Boston bar when they knew, or should have known, that he was likely to drive a car while intoxicated. A Superior Court judge dismissed the lawsuits, finding that Ultimate and the driver were not responsible for the conduct of the passenger once he left the van. But the appeals court, in reversing that ruling, found that Ultimate and its driver, "owed a duty" to the occupants of both cars. The ruling will permit the negligence claims to go to trial in a lower court to determine if damages should be paid. The court's opinion stated:

> *Broderick knew, or should have known, that Powers was intoxicated, yet he allowed Powers to make his own judgment about driving, failing to take any reasonable precautions to prevent him from doing so. A jury could conclude that Ultimate and Broderick were negligent when they left Powers at a location where he would likely drive and pose an extreme danger to the public.*

The court also found that Ultimate's insurer, Commerce Insurance Co., is required to cover the claims made by the passengers. A national trade association said it was concerned that the ruling appears to require livery companies to substitute their judgment for the judgment of its passengers. Michael B. Bogdanow, the Boston lawyer who represented the mother of the police officer who was killed in the accident, says many livery companies market their services to people who plan to drink heavily. In this regard, he added:

> *They know that their passengers are drinking to the point of intoxication where they cannot safely drive and they cannot even safely make the decision about whether*

to drive. Given that, the transportation service should know better than to simply leave someone at their car.

This decision will certainly get the attention of companies that sell their services, including the use of vehicles, to groups. It most likely will have a limited application to situations where the use of alcohol is involved and passengers are transported. In fact, it may well be limited in application to cases with almost identical facts.

Source: *Insurance Journal*

Drunk Drivers Are A Threat To All Citizens

There were 41,059 deaths in 2007 on our nation's highways and 12,998 of the deaths were caused by drunk drivers. Of the 1,100 traffic-related deaths in Alabama, 389 were related to drunk driving. I don't have the totals so far for 2008, but expect the numbers to be pretty much in line with those for 2007. MADD, the organization that is dedicated to making our highways safer, reports that the annual cost of alcohol-related highway crashes was $114.3 billion nationwide in 2007. MADD also says that according to data from the U.S. Department of Transportation, families across the country are sharing the highways with 2 million drunk drivers with three or more DUI convictions, and of those, 400,000 have five or more convictions. That is not good and it obviously puts innocent folks at great risk of injury or death when they use our highways.

A recent survey ranks states based on their percent of total traffic deaths that involve a drunk driver. The rankings come from objective federal data. Alabama was number 40 on the list with 35% of deaths involving drunk drivers. While there was a 3.2% improvement in drunk driving deaths over 2006, however, this is not a good report for my state. Alabama is currently one of three states not to have an interlock law on the books. North Dakota was the worst state in the ranking, edging out South Carolina. Utah was the best of the states followed by Iowa and Kentucky.

I urge all of our readers to support MADD with a financial gift before year's end and to contact Legislators asking them to pass the necessary laws which will help make our highways safer. If you want more information on MADD's campaign to eliminate drunk drivers, go to WWW.MADD.ORG.

Cities With The Most Deadly Teen Crashes

While the holidays are often a dangerous time on the roads, they are especially dangerous for teenagers. Recently, Allstate Insurance Company released a new teen driving hotspots study which lists the top cities for fatal teen crashes from Thanksgiving through New Years Day. The study looks at recent federal crash statistics, Allstate claims data on teen collisions and U.S. Census Bureau Statistics to score metro areas across the nation on rates of fatal crashes involving teens during the holidays. It identifies hotspots where deadly teen driving crashes are highest among the nation's 50 largest metro areas. The following is a list of the ten deadliest hotspots:

- Tampa – St. Petersburg
- Jacksonville
- Orlando – Kissimmee
- Kansas City, MO
- Birmingham – Hoover
- Phoenix – Mesa – Scottsdale
- Las Vegas – Paradise
- Oklahoma City
- Louisville
- Richmond

The release of this study kicked off a campaign to promote safe teen driving during the holidays. Parents should talk with their teen drivers about being safe on the road at all times and not just during the holidays. They may want to emphasize concentrating on the roadways and limiting cell phone use by teenagers. In fact, that would be good safety advice for anybody, not just teenagers!

Source: *First Coast News*

Settlement Reached In Fatal Balloon Crash

The family of a California woman who fell 70 feet to her death in October of 2007 when the hot air balloon she was riding in was caught in power lines has reached a $1.4 million settlement. A wrongful death lawsuit was filed against Albuquerque International Balloon Fiesta, Star Trail Inc., Rainbow Ryders and the pilot of the balloon. It appears the $1.4 million payment under the settlement agreement was the extent of the policy limit of the liability insurance covering the death.

Source: *Associated Press*

AAJ Challenges NHTSA's School Bus Safety Rule

A final rule promulgated by the National Highway Traffic Safety Administration doesn't go far enough to curb injuries associated with the nearly 2,000 school bus accidents each year. A petition for reconsideration of the rule was filed with NHTSA by the American Association for Justice (AAJ) last month. AAJ is doing a good thing in challenging the agency's final rule on school bus safety.

The final by rule by NHTSA requires seatbelts for small school buses, but only recommends seatbelts for larger school buses. The agency says adding seatbelts on the larger vehicles would limit capacity and be cost prohibitive. Larger buses will be required to increase the seat back height four inches, just a fraction of the cost estimated for adding seat belts. The rule also includes preemption language that attempts to grant blanket immunity to the manufacturing industry that makes buses and their parts.

The language would make it virtually impossible to seek restitution through

the civil justice system for injuries and fatalities associated with school bus accidents. AAJ President Les Weisbrod had this to say:

NHTSA continues to allow corporate responsibility to take a back seat to children's safety. There is no reason to include preemption language that attempts to limit consumers' civil justice rights in a rule about school bus safety except to give corporations yet another handout. Our children's safety should be a first priority in school bus standards, instead NHTSA included an escape clause for corporate responsibility.

Hopefully, NHTSA will become an agency during the Obama Administration that will make motor vehicle safety its top priority. I firmly believe that will happen.

Source: American Association for Justice

XVI. ARBITRATION UPDATE

Mandatory Binding Arbitration In Nursing Homes Must Be Banned

For years I have been opposed to mandatory, binding arbitration in all consumer agreements and transactions and have been actively involved in the fight to ban them. While mandatory arbitration over a consumer's credit card dispute is bad, putting arbitration clauses in nursing home admission forms is about as low as it gets. The following sad story illustrates why this sort of thing is so bad.

Mack Mitchell had suffered several mini strokes and was diagnosed with Alzheimer's in 2004. After another stroke in March 2005, he was treated at Baptist Hospital in Collierville, TN and then transferred to Cordova Rehabilitation and Nursing Center. On April 8, 2005, Lovie Mitchell went to visit her husband Mack. When she arrived at Cordova, Mrs. Mitchell was directed to Cordova's admissions counselor, Ron Lee. Mr. Mitchell was not competent to sign his own admissions papers, and Cordova needed Mrs. Mitchell to sign them for him.

Because of her condition, Mrs. Mitchell was not able to read the agreement herself. Instead, Mr. Lee summarized its terms, and Mrs. Mitchell signed it. During the three months that Mr. Mitchell was a patient at Cordova he suffered from multiple falls, a laceration from a fall, unnecessary physical pain and severe neglect which led to his eventual death.

At the time of the meeting, Mrs. Mitchell was experiencing severe health problems. Since January 2004, she had been undergoing chemotherapy treatment for Stage 3 cancer. She was also taking medication to treat depression, anxiety, fatigue, and chronic anemia. Side effects of her treatment included blurry vision and difficulty concentrating. Clearly, she had no business signing an agreement for arbitration hidden in nursing home admission forms.

Mrs. Mitchell later filed a lawsuit against Cordova/Kindred. In response, Kindred attempted to force Mrs. Mitchell to go to arbitration instead of court. The trial court ruled in January that Kindred could not force Mrs. Mitchell into arbitration because she was incompetent when she signed the contract. In mid-November, however, the Tennessee Court of Appeals reversed that decision and ruled that Mrs. Mitchell must enter into binding mandatory arbitration. That was a very bad decision, but is one that the Mitchell family will have to live with.

As we have reported previously, legislation has been introduced in Congress called the Fairness in Nursing Home Arbitration Act. If passed, the new law would put an end to practices such as the one described above which prey on families. Before recessing, the House and Senate Judiciary committees passed the bill. It's now awaiting action by the full Senate.

The Mitchell case is just one of many examples across the country of elder Americans who are forced into signing arbitration clauses in nursing home admission forms in order to receive long term care. Often these patients and their family members are suffering from medical problems such as dementia or the side effects from prescription drugs. In such cases, they are not competent to sign any legal agreement and certainly not an arbitration agreement hidden in a series of forms. Even a person with no impairments of any kind should be forced to sign for arbitration in a nursing home admission form. Hopefully, the new Congress will pass the pending bill and it will become law.

Source: American Association for Justice

XVII. HEALTHCARE ISSUES

Avandia—The Diabetes Drug—Is Linked To Higher Risk Of Death

Elderly people with diabetes who took the controversial drug rosiglitazone, sold under the brand name Avandia, were more likely to develop congestive heart failure and more likely to die than those receiving a similar drug called pioglitazone, sold as Actos, according to a recent report. In a surprise finding, however, the researchers found that patients taking rosiglitazone did not suffer more heart attacks or strokes than those taking pioglitazone. Rosiglitazone has been the subject of considerable controversy since 2007, when an analysis of 42 published studies concluded that the drug may dramatically increase the risk of heart attacks and other cardiovascular events, compared to various other treatments.

Researchers at Harvard Medical School used a database of Medicare beneficiaries to track 28,361 patients for up to five years. About half were treated with rosiglitazone and half were taking pioglitazone. Death rates were 15% higher among patients treated with rosiglitazone, compared to

those taking pioglitazone. The researchers found that the incidence of congestive heart failure was 13% higher. "Rosiglitazone was associated with greater mortality," according to Dr. Wolfgang C. Winkelmayer, assistant professor of medicine at the Harvard Medical School and first author of the study, published in The Archives of Internal Medicine. It should be noted the study is an observational study.

Officials at GlaxoSmithKline, which manufactures rosiglitazone, dismissed the findings, saying they are inconsistent with evidence from more rigorous randomized clinical trials. Company officials pointed out that these include interim results reported from a six-year trial involving 4,447 patients. They say that the trial found no significant increases in deaths from cardiovascular disease or other causes in patients taking rosiglitazone.

Although the current study also found no differences in heart attack and stroke rates, Dr. Winkelmayer suggested the higher death rates among patients taking rosiglitazone may be due to underlying cardiovascular disease that was never diagnosed in the elderly patients, whose average age was 78. Dr. Winkelmayer had this explanation:

In much older adults, it is possible if they do have a stroke or myocardial infarction, they might actually die immediately and never make it to the hospital for a diagnosis, so the excess cardiac events might show up as deaths.

Dr. John Buse, chief of endocrinology at the University of North Carolina School of Medicine and president of the American Diabetes Association, said that while the new study is important, it's limited. In this regard, he observed:

This is about the tenth report suggesting that rosiglitazone is associated with excess cardiovascular problems. We don't have proof yet.

Both the American Diabetes Association and the European Association for the Study of Diabetes have removed rosiglitazone from lists of recommended treatments for type 2 diabetes. The consumer watchdog group Public Citizen went further and called on the Food and Drug Administration to ban the drug. Public Citizen says that rosiglitazone causes liver failure, vision impairment and other serious side effects, in addition to heart problems. Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, wants this study to be "the last nail in the coffin" that results in this drug being pulled off the market. Dr. Wolfe had this to say:

The big attraction of these drugs is that they are insulin-sensitizing drugs and forestall the time when someone would have to go on to insulin. But with a 15% excess mortality over even pioglitazone, which itself is dangerous, that doesn't seem like a very good tradeoff.

A federal scientific advisory panel that reviewed rosiglitazone's safety profile last year recommended that it remain on the market. Sales of the drug have fallen sharply. About one million Americans still take the drug, which helps control blood sugar by increasing the body's sensitivity to insulin, often as part of a regimen that includes other diabetes medications. If you need additional information on Avandia feel free to contact Frank Woodson in our Mass Torts Section at 800-898-2034.

Source: *New York Times*

FDA Puts Black Box Warning On Bowel-Clearing Drugs

The Food and Drug Administration is adding the sternest safety warnings available to prescription drugs used to cleanse the bowel before colonoscopies. The agency says it has received more than 20 reports of a rare but serious form of kidney failure among patients taking the drugs, known as oral phosphate products. The new boxed warning label will apply to Visicol and OsmoPrep—both prescription tablets made by Salix Pharmaceuticals—and used for the purposes described above. The label warns that the drugs should be used with caution in older patients, those that suffer from dehydration and kidney disease or those that take medications that affect the kidneys.

The FDA is also concerned about the kidney risks from over-the-counter bowel cleansers, such as Fleet Phospho-soda, made by C.B. Fleet Company Inc. While many phosphate products sold without a prescription are only labeled to treat constipation, regulators said they are often used at higher doses to clear the colon. The FDA said in a statement:

The available data do not show a risk of acute kidney injury when these 'over-the-counter' products are used at the lower doses for laxative use. However, when used for bowel cleansing, these products have the same risks as prescription drugs.

The agency advised consumers not to use any of the over-the-counter products for bowel cleansing. While nonprescription products cannot receive boxed warnings, FDA officials plan to require stricter labeling on the dozens of over-the-counter phosphate drugs. The FDA first warned doctors and patients about potential kidney risks with the medications in 2006.

Source: *Associated Press*

FDA Finally Sets Melamine Standard For Baby Formula

We have written about the industrial chemical melamine in previous issues. You will recall federal food regulators announced that they were unable to set a safety threshold for the melamine in baby formula. But now the FDA has set a standard that allows for higher levels than those found in U.S.-made batches of the product. FDA officials have set a threshold of 1 part per million of melamine in formula, provided a related chemical isn't present. They still insist, however, that the formulas are safe.

The setting of the standard came days after *The Associated Press*

reported that FDA tests found traces of melamine in the infant formula of one major U.S. manufacturer and cyanuric acid, a chemical relative, in the formula of a second major manufacturer. The contaminated samples measured at levels below the new standard. Interestingly, there have been no new scientific studies since October that would give regulators more safety data. I have to wonder what has happened in the interim and why the level wasn't set earlier.

It is the standard as the one public health officials have set in Canada and China where in September the problem of melamine in infant formula first surfaced. But it is 20 times higher than the most stringent level in Taiwan. The FDA now says the lack of dual contamination was key in its decision because "studies so far show dangerous health effects only when both chemicals are present." Apparently, neither of the two tainted samples had both contaminants. The agency still has not set a safety level for melamine if cyanuric acid is also present.

Reacting to news of the contaminated formulas, members of Congress, a national consumer group and the Illinois Attorney General have demanded a national recall. But the FDA says that made no sense because it had no evidence suggesting that the formula would be dangerous for babies at the levels of contamination found. Consumers Union believes that the FDA advice is of small comfort to parents and caregivers. Jean Halloran, the group's director of Food Policy Initiatives, observed:

> *It is very disturbing to us that no recall has been requested. The FDA originally said there was no safe level for these contaminants in infant formula. So this formula is contaminated.*

Ms. Halloran has urged the FDA "to immediately make public all of the results of its tests for melamine contamination in food," even those with levels below what would trigger agency action. As you know, Melamine is the chemical found in Chinese infant formula—in far larger concentrations—that has been blamed for killing at least four babies and making at least 50,000 others ill. The FDA said in October that the toxicity of cyanuric acid was under study, but that it was "prudent" to assume that the potency of cyanuric acid is equal to that of melamine. Rep. Rosa DeLauro, who heads a panel that oversees the FDA budget, said the agency was taking a "marketplace first, science last" approach. The Connecticut lawmaker had this to say:

> *The FDA should be insisting on a zero-tolerance policy for melamine in domestic infant formula until it is able to determine conclusively based on sound independent science that the trace levels would not pose a health risk to infants.*

Hopefully, the Obama Administration and the new Congress will revamp the FDA, give the agency the tools and authority necessary to do its job and then make sure that the job is being done.

Source: *Associated Press*

Over 1,000 Melamine Babies Still In Hospitals In China

As this issue was sent to the printer, over a thousand Chinese infants were still in hospitals receiving treatment for kidney damage caused by tainted milk. This is months after the Melamine scandal broke. It's now common knowledge that many dairy products in China were contaminated with Melamine. A total of 50,741 children in that country have recovered and been discharged. But four children died in China from problems caused by melamine. A global panic resulted as products including sweets, biscuits and ice-cream were found to be contaminated. The scandal fueled domestic fears about the food safety and caused the "made in China" brand to be a problem at a time of global slowdown and sluggish exports.

The United States has since banned all imports of Chinese food products unless they are certified either free of dairy or free of melamine. The white powder was added to watered down milk because it mimics protein in some quality tests, and has since shown up in eggs because it was added to animal feed for the same reason. It's normally used in making plastics including floor tiles, whiteboards and kitchenware. Door-to-door screening of more than 307,000 Beijing families with children under the age of three found that over 75,000 babies had been fed contaminated milk formula, according to the official Xinhua news agency.

Source: *Reuters*

Children From FEMA Trailer Park Battle Serious Health Problems

A new study has revealed that children of displaced families from Hurricanes Katrina and Rita have serious health and mental ailments. The report, released by the New York-based Children's Health Fund, reviewed medical records of 261 children who lived in a federally-funded Baton Rouge trailer park until early summer. This is the first in-depth review of children's medical and mental health after the catastrophic storms in 2005 that displaced thousands of families throughout the Gulf Coast.

After Katrina, the Children's Health Fund, a non-profit group that provides health care to children, dispatched mobile clinics across the Gulf Coast, including one outside Renaissance Village in Baton Rouge, then the largest Federal Emergency Management Agency trailer park in the region. The Children's Health Fund used medical data gathered from that clinic to conduct the survey, according to Irwin Redlener, president of the group and the study's author. One of the most alarming findings: 41% of children younger than four were diagnosed with iron-deficiency anemia, more than double the rate of children living in New York City homeless shelters. This appears to be a very big problem that has not been focused on at all in the Gulf Coast.

Dr. Heidi Sinclair, a Baton Rouge pediatrician who helped run the Children's Health Fund clinic there, says she saw

disturbingly high rates of respiratory problems and skin rashes among children. Dr. Sinclair said that when she began testing for iron-deficiency—a condition that can lead to fatigue, attention-deficit disorder and skin ailments—she thought the machines used to test were malfunctioning because the rates were so consistently high. She says, "the main problem is there's been such a lack of stability." This year, the Centers for Disease Control and Prevention said it would launch a long-term study of children who resided in federally-issued trailers and mobile homes in Louisiana and Mississippi, hundreds of which were found to have high levels of toxins, such as formaldehyde.

After Renaissance Village was emptied this summer, the children and their families relocated to permanent or other temporary housing. There are still at least 9,300 families in trailers and 1,600 in hotel rooms across the Gulf Coast, according to FEMA. It's said that the children in the Children's Health Fund study are probably some of the sickest of the estimated 30,000 children living in trailers and temporary housing in the region. Many other displaced children could experience similar symptoms. There is no telling how many children have been affected. Many of the children have not been seen by a doctor or been tested.

Source: *USA Today*

Tampa Baby Almost Dies From Watered-Down Formula

It was reported recently by the *Miami Herald* that a Florida mother, who watered down her infant's formula to save money, almost watched the five-month-old die. As a result, hospital officials are now cautioning cash-strapped parents from trying something similar. La'Damian Barton was hospitalized at University Community Hospital in Tampa after he had a seizure and stopped breathing. Doctors diagnosed water intoxication and malnourishment in the infant. It was reported that the baby had low blood sodium, which is why he had a seizure. At 8 pounds, 6 ounces, the baby was severely underweight. The infant's 23-year-old mother said she had no idea adding the extra water was dangerous. She was trying to stretch the allotment of baby formula cans she receives each month from the federal WIC program for low-income families. The mother, a technical college student, says she couldn't afford to buy more formula. The baby will have to be monitored over the next few years. The child could suffer cerebral palsy, seizure disorder or mental retardation.

Source: *Associated Press*

Some Disturbing News Concerning Teenage Drinking

We should all be concerned about the large number of teenagers who are regularly drinking alcoholic beverages. I was shocked to learn that two-thirds of teenagers who drink report that they can buy their own alcoholic beverages with no difficulty. That is most disturbing. Even more disturbing is a report by MADD that 35% of children in the fourth grade are pressured by their peers to drink. By the time they reach the sixth grade, 49% have been pressured and many have yielded to the pressure. The report indicates that the average age at which people start drinking alcoholic beverages is 16.6 years of age. Of the nearly 200,000 students surveyed, 33% said that their parents often don't set clear rules about drinking. Half of them said that they are not disciplined when they break rules that were set by their parents.

We should all get involved in efforts to curtail drinking by young people at any age. Parents should teach their children at an early age that actions have consequences at any age. MADD recommends explaining the facts about underage drinking early with children. Parents must talk to their children and must also listen. We can't assume that youngsters understand the evils of alcohol and how it can hurt them in so many ways. Don't wait until it's too late to get involved with your children. I am also firmly convinced that faith and prayer must play a major role in dealing with the problems that our children and grandchildren face in today's world and that includes the use of alcohol and drugs.

Source: MADD

XVIII. ENVIRONMENTAL CONCERNS

Mercury Contamination Case Progressing

We are continuing to make progress in our mercury contamination case against Occidental Chemical Corporation which is in Muscle Shoals, Alabama. We are contending on behalf of our clients that Occidental contaminated their property with mercury released from Occidental's Muscle Shoals plant. In response to Occidental's motion for a summary judgment, the trial judge ruled that the plaintiffs owning property within 11,200 feet have produced sufficient evidence to go to the jury on their claims. This case is set for trial in June in Federal District Court for the Northern District of Alabama, in Florence, Alabama. We will keep you posted on future developments in this litigation.

Leaking Underground Storage Tanks Are A Major Problem

Our firm has reviewed and filed a number of cases involving leaking underground storage tank systems. Thousands of underground tanks containing gasoline, oil and other potentially toxic petroleum products are located at service stations throughout the state of Alabama. Over time, these underground storage tank systems can erode and develop leaks if they are not properly maintained, monitored, and replaced periodically. When these systems leak, petroleum contaminants can migrate through the soil and groundwater and damage private prop-

erty or even harm nearby residents.

Our firm is currently working on a case in Tallapoosa County, Alabama, that provides an excellent example of just how devastating an underground storage tank leak can be. In January of last year, Allen Oil Company notified the Alabama Department of Environmental Management (ADEM) that its Allen's Food Mart store in Alexander City had suffered a significant gasoline leak. When ADEM and emergency response officials arrived at the scene, they learned that over 54,000 gallons of gasoline had been released into the environment. Not only did the gasoline saturate our clients' property, located downhill from Allen's Food Mart but it also impacted Sugar Creek, which flows directly into Lake Martin.

In order to try to curb the flow of gasoline into Sugar Creek and Lake Martin, ADEM directed emergency responders to dig an extensive network of trenches and erect other artificial barriers on our clients' property. While these activities reduced the level of gasoline contaminants entering the creek, our clients' property was completely devastated in the process. As a result, land that our clients and their families had owned for years was rendered completely worthless.

Unfortunately, underground storage tank leaks are not an isolated occurrence in Alabama. In fact, ADEM has over one thousand active underground storage tank leak sites currently under investigation throughout the state. In nearly every instance, those leaks could have been avoided with just a little bit of effort and preventive maintenance on the part of tank owners. Hopefully though, cases like this one will remind gas station tank owners that their right to sell gasoline in Alabama comes with a responsibility to protect the property and health of their neighbors. If you need additional information on anything mentioned above, contact Alyce Roberston or Chris Boutwell with our firm at 800-898-2034.

EPA Eases Rule On Lead Emissions

The Environmental Protection Agency has approved a tough new rule aimed at clearing the nation's air of lead—but federal documents have revealed that the Bush Administration quietly weakened a key provision. As a result, dozens of polluters were exempted from scrutiny. It appears that a new network of monitors designed to track lead emissions from factories has been scaled back. The change undermines a rule that otherwise has been widely hailed as a powerful step in protecting children's health. The fight against childhood lead poisoning is too important to allow the Bush gang to get away with this sort of thing.

The federal rule was prompted by compelling research showing lead is more dangerous than had been thought. Even low levels of the toxic metal in young children have been linked to learning disabilities, aggression and criminal behavior later in life. It's significant that many scientists believe there is no safe level of exposure. The EPA last month, when it was facing a court order to act more aggressively, lowered the maximum amount of lead allowed in the air. The new standard, 0.15 micrograms per cubic meter, is ten times more stringent than the standard set in 1978. To help meet the new limit, the EPA planned to require lead monitors next to any factory emitting at least half a ton of lead a year. But after the White House intervened, the agency raised the threshold to a ton or more of lead, according to e-mails and other documents exchanged between the EPA and the Office of Management and Budget.

As a result of the White House's actions, dozens of factories won't be checked regularly. While federal and state officials debate the exact number, a review of EPA records by the *New York Times* found the number of U.S. plants monitored could drop by nearly 60%, from 203 to 87. S. William Becker, executive director of the National Assn. of Clean Air Agencies, observed: "This sleight of hand by the administration ignores major sources of a dangerous neurotoxin." While the Obama administration could try to amend the lead rule, that process would take months.

National lead emissions have dropped 97% under the old standard, largely because lead was removed from gasoline. But cement plants, smelters, steel mills and other factories still emit about 1,300 tons of lead into the air each year, according to the EPA. After tiny lead particles settle to the ground, they can stay there for years. Exposure can occur when people, especially children, handle or play with contaminated soil and then put dirty hands into their mouths. The EPA was urged to set tougher lead standards. Dozens of monitors scattered across the country already check lead levels in the air, but the EPA estimated that it would take dozens more to track emissions from polluters releasing at least a half-ton of lead.

As previously reported, industry lobbyists fought hard against the new standard and the additional monitoring. They argued that lingering dust from leaded gasoline and lead paint are a much bigger threat to children than ongoing industrial emissions. In written comments filed with the EPA and the Office of Management and Budget, lead battery manufacturers and recyclers said many of their facilities would fail to comply with the tougher standard. They claimed that if factories had to reduce lead emissions, companies would be forced to move operations to countries with lax environmental policies. The Assn. of Battery Recyclers wrote in comments to the Office of Management and Budget that a tougher lead rule would lead to "environmental and human health risks attributable to mishandling, improper disposal and illegal export of millions of spent lead acid batteries." A related organization, the Battery Council International, told the EPA that the more stringent monitoring standards would be "unjustifiably low." It would appear that protecting the health and safety of children would be the top priority for the EPA and at last a priority for industry.

After lobbyists from the industry met with Bush Administration officials, the White House ordered the EPA to raise

the monitoring threshold to a ton or more. Federal records document this highly questionable action by the Bush gang. According to EPA officials, states could add lead monitors if they thought it was necessary. The EPA said in a prepared statement:

> *We selected an approach that would still ensure monitoring around those sources that have the potential to contribute to a violation of the standards.*

Hopefully, the Obama Administration will get involved and make the EPA change the rule. Unfortunately, this is just one of many problems that the new Administration will have to correct.

Source: *New York Times*

Bush Administration Quietly Working To Weaken Clean Air Act

Another example of how truly bad the Bush Administration has been on environment issues involves the Environmental Protection Agency. The EPA has been working to relax air quality rules and make it easier to build coal-fired power plants, oil refineries and other pollution-emitting enterprises near national parks and wilderness areas. The agency is taking this action even though half of the EPA's ten regional administrators have formally opposed the plan. The push by the Bush Administration to weaken the Clean Air Act involves changing the method used to measure air pollution near national parks so that pollution is averaged over much longer periods, effectively diluting large spikes. Polluters are thereby protected from violating the law. Jeffrey R. Holmstead, who served as chief of EPA's air and radiation office, helped initiate the change. Holmstead has since left the EPA and you won't be surprised to learn that he now works at the power industry legal and lobbying firm Bracewell & Giuliani.

Source: *Washington Post*

Greenhouse Gas Emissions Increase

The Energy Department has reported that U.S. greenhouse gases emissions increased last year by 1.4% after a decline in 2006. The report released last month said carbon dioxide pollution from burning of fossil fuels rose by 1.3% in 2007. The report attributed the increase to colder winter weather and a warmer summer that required more fuel burning for heating and electricity to run air conditioners. Greenhouse gas emissions have increased an average of just under 1% a year since 1990. A decline in emissions in 2006 also was attributed to weather that reduced the demand for heating and cooling that year.

Source: *Associated Press*

McWane's Appeal In Pollution Conviction Upheld By U.S. Supreme Court

The U.S. Supreme Court recently declined to address an appeals court ruling in a case against McWane, Inc. and two executives. As a result, the Defendants' convictions remain overturned and a new trial will be set in the near future. In June 2005, the Birmingham-based pipemaker, and two executives were convicted of conspiring to violate the federal Clean Water Act by emitting pollutants into Avondale Creek. During the five-week trial, former McWane employees testified that they were instructed to pump tainted water into the creek in order to speed production.

In October 2007, the 11th Circuit Court of Appeals overturned the convictions against the Defendants and granted a new trial. The Appeals Court determined that the trial judge did not correctly define "navigable water" during his charge to the jury. In order for a waterway to be governed by the Clean Water Act it must first be defined as "navigable water." The prosecution claimed that Avondale's connection to the Black Warrior River makes it a navigable waterway. Conversely, the Defense argued that the creek did not meet the definition of navigable water.

Ultimately, the Appeals Court found that the prosecution offered no evidence to suggest that Avondale Creek's water had any chemical, physical or biological effect on the Black Warrior River. As a result, the Clean Water Act could not be applied and the convictions were overturned. The new trial could be set as early as later this month, but prosecutors are currently requesting a delay due to the complexity of the case.

Source: *The Birmingham News*

Splenda Plant And Residents Settle Complaint

A lawsuit accusing the company that makes Splenda of noise pollution from a factory in McIntosh, Alabama, has been settled before going to trial. More than two dozen Washington County residents sued Tate & Lyle in 2006, accusing the company's nearby factory of disrupting their lives with noxious odors and excessive noise. A federal judge dismissed odor allegations and urged all of the lawyers to resolve the remaining differences over the noise. The case was settled prior to the day when the trial was to start in federal court. Terms of the agreement hadn't been released at press time for this issue.

Source: *Associated Press*

An Update On The Hot Fuel Litigation

As we reported in September of last year, our firm, along with several firms across the United States, is seeking billions in lost revenues improperly pocketed by the oil industry in the "Hot Fuel" case in Kansas Federal Court. The case is ongoing in nature, and currently involves claims brought by 46 Plaintiffs against more than 130 oil industry Defendants in 26 states.

Motor fuel, like most liquids, expands in volume as its temperature rises. However, motor fuel's mass (commonly referred to as the energy within matter) remains constant as its volume increases due to rising temperatures. Energy regulators and oil entities have

been aware of this well-known phenomenon since the turn of the century. As a result, these regulators created a standard measurement for the sale of motor fuel where at 60 degrees a gallon is 231 cubic inches. This measurement was designed to ensure fairness and consistency.

Unfortunately, fairness only applies to the billion dollar oil tycoons and not the average consumer at retail. We have discovered that the oil entities, like the regulators, have been well aware of thermal expansion in gasoline for quite some time. In fact, U.S. oil companies and distributors track and adjust prices to conform to the 60 degree temperature designation at every level of the supply chain process; every stage that is, except the consumer's purchase. Because U.S. temperatures exceed 60 degrees for the majority of the year, consumers are purchasing "expanded" gallons of motor fuel at a set price per gallon. As a result, consumers are not getting what they pay for at the pump, and oil companies are pocketing billions to go along with their world-record profits.

Currently, we are diligently working through discovery to uncover the Defendant's concerted effort to sell consumers less fuel than they pay for. The Defendants claim the technology to regulate the temperature of motor fuel does not exist. At the same time, they have installed devices in Canada, where the temperature is much cooler and consumers subsequently get more fuel than they pay for. They additionally argue that the process would be too expensive, all while they are making world-record profits.

Consumers from across this country have witnessed firsthand the mortgage industry's crash, stock market woes, unprecedented job cuts, rising food costs and roller coaster fuel prices. The "Hot Fuel" problem, like many of our country's problems, centers on one thing: corporate greed. We are pleased to be working with a number of law firms around the country to ensure fairness to the average consumer and hold the oil companies accountable for their actions. Rhon Jones, our Toxic Torts Section Head, along with Parker Miller, have taken leadership roles in the case. If you want additional information on this subject you can contact either of these lawyers at 800-898-2034.

Offensive And Noxious Odors In Carthage, Missouri

Renewable Environmental Solutions is a rendering plant located in Carthage, Missouri, that uses the Thermal Conversion Process to convert agricultural waste products into fuel. Since the plant began operation in 2003, it has been the target of hundreds of complaints by Carthage residents for emitting offensive and noxious odors. At times the odor discharge is so severe that area residents are nauseated.

The Missouri Air Conservation Commission and the Missouri Department of Natural Resources have cited RES for multiple violations of the State's air emission standards. Despite the numerous complaints and air emission standards violations, RES has failed to take adequate protective measures to prevent the emission and release of offensive and noxious odors from its facility. The resulting odor has injured area residents and property owners by diminishing their right to enjoy their property and decreasing their property values. This case is brought on behalf of a class of individuals who have suffered damages as a result of the odor discharge originating from the RES facility. Following the class-related briefing, the Court will schedule a hearing in 2009 on the Plaintiff's Motion for Class Certification.

Lesaffre Yeast Emits Odors In Alabama Town

Lesaffre operates a yeast manufacturing facility in Headland, Alabama. The yeast manufacturing process can cause the release of odorous compounds. As a result of this release, offensive odors envelop the surrounding community. Regularly, the odor reaches such a degree that neighboring landowners must shut their windows and remain inside to obtain relief. In addition to the emission of malodorous compounds such as yeast and molasses, Lesaffre's manufacturing process also emits acetaldehyde. Not only does acetaldehyde impart a pungent, suffocating odor at high concentrations, it is also a hazardous air pollutant.

The yeast manufacturing process also results in the production of wastewater. In order to dispose of the wastewater, Lesaffre engages in a land application process. The application process involves the use of pivots to liberally distribute the wastewater onto many acres of land surrounding the facility. The odor emitted from the application practice is highly offensive to adjacent landowners. Lesaffre has emitted an odor into the surrounding community which is so offensive that it interferes with the ordinary comfort of the Plaintiffs and it has also caused the value of their property to be adversely affected.

ExxonMobil Hit With $6.1 Million Pollution Fine

The ExxonMobil Corp. has agreed to pay a $6.1 million penalty for failing to comply with an agreement to cut pollution from four refineries in California, Louisiana and Texas. The Justice Department demanded the fine because ExxonMobil had violated a 2005 consent agreement by not adequately controlling smokestack sulfur emissions at the refineries as it had promised to do. Assistant Attorney General Ronald Tenpas said "the Department will not tolerate violation of our consent decrees." Under that settlement, ExxonMobil in 2005 paid $7.7 million in civil penalties, and performed $6.7 million worth of environment-related community projects. The refineries are in Beaumont and Baytown, Texas; Torrance, California, and Baton Rouge, Louisiana. ExxonMobil treats fines and penalties as just a cost of doing business. Considering that the giant oil company makes over $40 billion in profits each year, a few million dollars in fines won't slow

them down very much. To this politically powerful company, it's just a cost of doing business—their way—and that's not good for the American people as a rule.

Source: *Associated Press*

An Update On 3M Litigation

As you have read in previous months, our firm is handling a water and soil contamination case just outside of Minneapolis, Minnesota for residents whose property and rights to enjoy their property have been harmed by perfluorochemical (PFC) contamination caused by the 3M Company. As you may remember, these chemicals are toxic, break down only very slowly (for certain PFCs, over a period of years) in the environment, and build up in the environment and in living organisms. Trial is scheduled to start on the claims of the first of these clients in May of 2009. We are convinced that we are in the right and that 3M has contaminated the soil and water of thousands of residents in the area.

Indeed, since we filed suit over four years ago, and spurred by the suit, 3M has spent many millions of dollars installing filtration systems to filter out their PFCs from a few large contaminated municipal supply wells, and to extend water lines from "clean" water supplies to certain other areas whose previous water supplies 3M's chemicals had contaminated. In addition, the Minnesota state environmental agency is about to require 3M to spend many millions more to remediate landfill areas where 3M disposed of these chemicals (without advising the agency) years ago. At the same time, however, 3M has denied any harm has occurred from PFC contamination, and denied that it is responsible for any such harm that may have occurred (and, in fact, did occur). Although our lawsuit is in the home state of 3M—a large corporation ranked 100th on the 2008 Fortune 500, with over $24 billion in sales and $4 billion in net income in 2007, and higher totals for both expected in 2008—and in a county that is home to many 3M employees, where the Company's presence is strong indeed, we will continue to pursue these claims so that impacted residents can obtain some form of relief. Rhon Jones, Alyce Roberston and Chris Boutwell from our firm are handling this case.

XIX. THE CONSUMER CORNER

Ford And Volvo Lead Annual List Of Safest Vehicles

The insurance industry named dozens of new cars and trucks, led by Ford Motor Co. and its Volvo subsidiary, to its annual list of the safest vehicles, helped by the increased use of anti-rollover technology. Ford and Volvo had 16 vehicles in the 2009 model year on the Insurance Institute for Highway Safety's list of the safest new cars, followed by Honda Motor Co. with 13 vehicles. Seventy-two cars, trucks and SUVs received the top safety pick designation for 2009, more than double the number of vehicles in the 2008 model year and three times the number in 2007. "The sheer number of this year's winners indicates that automakers have made huge strides to improve crash protection," said Institute president Adrian Lund. The selected vehicles are the best in protecting people in front, side and rear crash tests based on institute evaluations during the year. The vehicles are required to have electronic stability control, or ESC, to qualify for the award.

IIHS said electronic stability control is now standard equipment on virtually all new SUVs and three-quarters of passenger cars for the 2009 model year. ESC is standard on more than one-third of 2009 pickups. Ford was led by the Ford Fusion and Mercury Milan midsize cars with optional ESC; the Ford F-150 pickup, Ford Edge and Ford Flex midsize sport utility vehicles; and the Ford Escape and Mercury Mariner small SUVs. The list also included the Mazda Tribute, which has the same underpinnings as the Escape and Mariner.

Honda and its Acura unit had vehicles in nearly every category, including top-sellers such as the Honda Accord; the Honda Civic 4-door with optional ESC; and the Acura MDX and RDX midsize SUVs; and the Honda Fit with optional ESC. The Fit is the first mini-car to earn the safety award. Volkswagen AG and its Audi brand had nine vehicles on the list, including the Volkswagen Jetta and Passat and the Audi A3, A4 and A6. General Motors Corp. and Toyota Motor Corp. both had eight vehicles on the list. GM's included the Cadillac CTS and the Buick Enclave, Chevrolet Traverse, GMC Acadia and Saturn Outlook.

Toyota's top performers were the Toyota Corolla with optional ESC, Toyota RAV4, Toyota Tacoma, Toyota Tundra and Scion xB. Using the awards, consumers can compare vehicles without having to review results from multiple tests. Automakers pay close attention to the Institute's findings and frequently note positive ratings in television commercials. The Institute has advocated for an early adoption of anti-rollover technology such as ESC ahead of a government requirement for the systems by the 2012 model year. Electronic stability control senses when a driver may lose control and automatically applies brakes to individual wheels to keep the vehicle stable and avoid a rollover. It helps motorists avoid skidding across icy or slick roads or keep control when swerving to avoid an unexpected object in the road. Chrysler LLC was the only major automaker that did not receive a single award.

Source: *Associated Press*

Expired Products On Store Shelves Are A Problem

The State of New York has sued CVS Caremark Corp. for selling expired products. The filing of this suit came on the same day the state announced the settlement of similar claims against Rite

Aid Corp. for as much as $1.3 million. In the CVS lawsuit, New York officials accused the chain store of selling items that had expired as far back as 2006. Last spring, state investigators said they found old products at 60% of the CVS stores visited in New York and 43% of Rite Aid stores visited.

As part of its settlement, Rite Aid agreed to conduct weekly inspections of its New York stores to ensure expired over-the-counter drugs, infant formula, milk and eggs aren't offered for sale. According to a statement by New York Attorney General Andrew Cuomo, Rite Aid will immediately pay a $1 million civil penalty and as much as $300,000 more if it fails to comply with the agreement during the next three years. The Attorney General had this to say:

> *In today's difficult economic times, consumers should not be spending their hard-earned money on expired products that may be harmful to themselves or their children.*

In the suit against CVS, the Attorney General claims that, by selling expired products, the company violated New York's Executive Law and General Business Law, as well as federal and local laws. CVS is the nation's second-largest drug store chain by number of stores, behind Walgreen Co. Rite Aid ranks third. The relief sought by New York is for CVS to be ordered to retain an independent monitor for monthly checks, post signs for consumers that they are entitled to refunds for expired products and their health risks and pay a civil penalty of $500 for every violation of general business law. CVS says it has been cooperating with Attorney General Cuomo's office and says it was disappointed the suit was filed.

In 2003, CVS resolved an earlier investigation by New York that revealed the chain sold over-the-counter drugs after their expiration dates. The company then agreed to stop selling expired drugs and implement safeguards for the future. In June, Cuomo announced the results of a probe that included about 1,000 locations of several drugstore chains. Investigators turned up more than 600 expired products, including baby formula. Expired products were sold at more than 122 Rite Aid stores and 148 CVS stores in New York, according to the Attorney General's office.

California Attorney General Jerry Brown also accused CVS in June of last year of selling expired baby food and over-the-counter drugs. In March, the Fairfield Department of Health in Pennsylvania found 100 expired baby food items at six CVS stores, according to Attorney General Cuomo's suit. The complaint filed against CVS said:

> *The widespread nature of these violations indicates that CVS has not taken seriously its legal obligations or its responsibilities to its consumers vis-à-vis the sale of expired products.*

There can be no excuse for any store to have products for sale on their shelves that are old. It's especially bad when the date-expired products are drug and food items. The Attorneys General of New York and California should be commended for their dedication and their actions to protect consumers in those states.

Source: *Bloomberg*

EWG Works To Save Our Planet

The Environmental Working Group (EWG), a nonprofit environmental research organization, is doing extremely good work. The team of scientists, engineers, policy experts, lawyers and computer programmers at EWG pores over government data, legal documents, scientific studies and their own laboratory tests to expose threats to public health and the environment. In their efforts to save our plant, they are working to find solutions. Their research brings to light unsettling facts that people have a right to know. EWG is to be commended for its role in fighting to save our environment and to protect people everywhere on health and safety issues.

BPA Research Is Noteworthy

Bisphenol A (BPA) is a plastics chemical invented nearly 120 years ago and currently used in enormous amounts to manufacture hard plastic water bottles and to make epoxy linings of metal food cans, like those for canned infant formula. Although its long-time use in consumer products has come with assurances of its safety from industry, studies conducted over the past 20 years now show it to be not only a ubiquitous pollutant in the human body—it contaminates nearly 93% of the population—but also a potent developmental toxin at very low doses.

In September 2008 the National Toxicology Program of NIH determined that BPA may pose risks to human development, raising concerns for early puberty, prostate effects, breast cancer, and behavioral impacts from early-life exposures. Pregnant women, infants and young children are most vulnerable to the harmful effects of BPA. A recent study linked BPA exposures to risk of heart disease, diabetes, and liver toxicity.

Although, the FDA has yet to act to tighten safety standards, two Congressional investigations have been launched to shed light on industry influence of government science evaluations. It's significant that Wal-Mart and other retailers are pulling BPA-containing products off of store shelves. A series of major events have transformed our understanding of BPA, shown its potential role in human health problems, and revealed industry's inside fight to keep it on the market despite the significant health risks.

Jury Awards $17 Million Against AT&T

A federal jury in Kansas City, Kansas, has ordered AT&T Inc. to pay almost $17 million for overcharging customers in California when passing along a federally-mandated phone fee. But, the jurors determined there wasn't enough evidence showing the telecommunications giant conspired with Sprint Nextel Corp. or then-competitor MCI

to overcharge customers nationwide for the Universal Service Fund.

The antitrust case consolidated dozens of class action lawsuits filed across the country and covered customers who paid into the Universal Service Fund between August 1, 2001, and March 31, 2003. The fund subsidizes the cost of running phone service to rural areas, low-income customers and public facilities, such as schools, libraries and rural hospitals. Carriers are required to contribute to the fund a percentage of their gross revenue from interstate and international calls. The Federal Communications Commission sets the contribution rate. AT&T described the fee on its bills as a "Universal Connectivity Charge."

After a five-week trial, jurors agreed AT&T had violated its contract with its California residential customers, a subset of the class action members, and awarded $16.9 million. Sprint had been a co-defendant in the case. But the Overland Park, Kansas-based company agreed in September to settle its involvement for $30 million.

Source: *Associated Press*

Toy Buyers Must Still Be On Guard For Hazards To Children

Toxic chemicals are still being found in children's products despite new laws against them, according to a U.S. consumer watchdog. As a result, it was still toy "buyers beware" during the Christmas season. Just before the holiday shopping season began, the U.S. Public Interest Research Group (PIRG) warned consumers to avoid soft plastic toys and heavy children's jewelry. PIRG health advocate Liz Hitchcock said at a news conference held before Christmas: "It's still 'buyer beware' for this shopping season." Soft plastic toys may contain phthalates, chemicals linked by some medical research to a range of health problems. Lots of toys containing phtholates were sold during pre-Christmas shopping. PIRG's advice to consumers was to avoid soft plastic products. PIRG's 23rd toy safety survey—an annual event for the world toy industry—was released in late November. Parents—if they haven't already done so—should check this survey to see if their children now have any of the listed toys.

Any products likely to contain lead are suspect. Eighteen U.S. children died from toy-related injuries last year. Another 80,000 children under the age of five ended up in hospital emergency rooms due to toy-related injuries. Even after stronger consumer safety laws were passed by Congress, the Consumer Product Safety Commission, at the urging of the Bush Administration, told toy companies they could keep selling phthalate-laden toys until they run out of them. This was done in spite of a clear prohibition against selling these toys after February 10th. That's very hard to understand, but typical of the Bush Administration, when you consider that it's dealing with a health and safety issue.

Source: *Reuters*

Mattel Settles With 39 States Over Tainted Toys

Toy maker Mattel Inc. will pay $12 million to 39 states to settle an investigation over Chinese-made lead-tainted toys shipped to the United States in 2007. Mattel and its Fisher Price unit recalled more than 21 million Chinese-made toys last year, beginning in August, fearing the items were tainted with lead paint and tiny magnets that children could accidentally swallow. All the affected toys were pulled off store shelves by December 2007. Also, as part of the settlement agreement, Mattel agreed to lower the acceptable level of lead in toys shipped to the states to 90 parts per million, down from 600 parts per million, which is currently the federal standard. When new regulations go into place next year, however, the federal standard will also fall to 90 parts per million.

States taking part in the settlement are: Alabama, Alaska, Arkansas, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming. It should be noted that there are still class action suits filed by consumers that are pending and aren't affected by this settlement.

California also took part in negotiations, but reached a separate agreement under its Safe Drinking Water and Toxic Enforcement Act, and as a result fared better than the other states. As part of that agreement, nine toy companies, including Mattel, will pay California $1.8 million over lead-tainted toys. In addition to paying the $1.8 million, the toy makers will accelerate reductions in the levels of toxic lead in consumer products to settle California's case. The California case was pursued under that state's Proposition 65, an initiative approved by voters in 1986. The agreement concluded a lengthy investigation and legal battle that followed a series of recalls of toys, lunchboxes and novelty items imported from China and other developing nations that contained unsafe levels of lead.

Source: *Associated Press*

Groups Sue Over Toxic Toys

While plastic toys containing phthalates are supposed to be banned starting on February 10th, it appears that toys already on the shelves will not be pulled. Consumer groups are not happy over what they say is an attempt by the Consumer Product Safety Commission to get around a Congressional ban on toys containing amounts of phthalates that are considered dangerous. These are chemicals that soften plastic and make it more flexible. The Natural Resources Defense Council and Public Citizen filed a lawsuit in a New York federal court seeking to force the CPSC to enforce the ban and get all such toxic toys off store shelves.

Phthalates can cause a number of adverse health affects, particularly when young children are exposed to

amounts over recommended limits. But, the CPSC is interpreting the ban in a way that creates a loophole to keep from applying it to all toys that might have been involved. The CPSC says the ban means manufacturers have to stop making such toys by the February deadline, but the agency says toys that have already been produced by then can be sold as long as supplies last. That apparently could take years. It appears Congress intended to make such toys unavailable on the deadline date. Parents should avoid products with phthalates and hope the CPSC will change its position and ban the products on February 10th.

Source: *CBS News*

Survey Finds One In Three Toys Contain Toxic Chemicals

A new survey finds that about a third of popular toys that were sold during the holiday season contain significant levels of toxic chemicals. Researchers for the JustGreen Partnership, a coalition of children's safety, public health and environmental groups, tested more than 1,500 toys and found that one in three contained medium or high levels of chemicals such as lead, cadmium and arsenic. Lead was detected in 20% of the toys, and the group says levels in some far exceed the 600 parts-per-million standard set by the federal government for a recall. Children's jewelry was the most contaminated product category, with items marketed by Disney and Christmas Tree Shops topping the group's "worst toys" list. Parents and care givers must be especially vigilant in their efforts to make sure children's toys received during Christmas are safe. You can go to www.healthytoys.org for more information.

Source: *Associated Press*

Wal-Mart Reaches A Settlement In Price-Scanning Suit

California and Wal-Mart Stores Inc. have reached a settlement that will benefit consumers who experience price-scanning errors at Wal-Mart stores. Under the settlement terms, Wal-Mart will give customers $3 back when pricing mistakes are found at the cash register. In late 2005, the California Attorney General's office began investigating allegations that Wal-Mart stores in California were scanning items at higher prices than those advertised on store shelves and signs.

Investigators said random price-checking statewide found that 164 Wal-Mart Stores in 30 counties had made scanning errors. On average, customers who were overcharged paid an extra $8.40 at checkout. In the settlement agreement, the state said Wal-Mart agreed to implement a pricing accuracy program in California for at least four years. The program includes an "automatic refund" of $3 for confirmed overcharges. But if the overcharged item costs less than $3, it will be free. The state said Wal-Mart also agreed to pay $1.4 million in restitution, civil penalties and reimbursement for investigative costs, and $50,000 to the State Consumer Protection Prosecution Trust Fund.

Source: *Sacramento Bee*

Settlement Approved In Lawsuit Over Auto Service Contracts

A Missouri state court judge and the U.S. Bankruptcy Court have approved a settlement agreement that could result in as much as $6,000 each being paid to former customers of John Chezik Honda. With the approval of these courts, Chezik will pay about $2.9 million under the settlement. This ends protracted litigation over vehicle service contracts that Chezik sold to customers between January 1, 1997 and December 22, 2003. Each customer paid more than $1,000 for the contracts, which were supposed to cover the costs of various parts and repairs for three years or 36,000 miles, whichever came first. The customers were told that if they didn't use the contract during the contract period, the price of the contract would be refunded. Instead, customers who sought the refund found out the money-back guarantee applied only if they bought another vehicle from the dealership. In 2002, several customers filed a class action lawsuit against the dealership. In May 2007, a jury awarded damages against Chezik and the dealership subsequently sought bankruptcy protection.

Source: *Kansas City Star*

Judge Certifies Class In Suit Against Sprint

A federal judge in Kansas has certified a class of more than 19,000 current and former Sprint Nextel Corp. retail employees who are suing the telecommunications company for allegedly shorting them on commissions. The certification order is in a lawsuit filed in February in which retail employees for Sprint Nextel in Texas and Louisiana contended that because of computer problems in the aftermath of the Sprint merger with Nextel, the employees didn't receive hundreds of dollars each month in commissions they were entitled to in the course of their work. In subsequent court filings, lawyers for Sprint have denied the material allegations in the lawsuit by the Plaintiffs. Interestingly, the Overland Park-based company ranks number one on the *Kansas City Business Journal's* list of area public companies.

Source: *Kansas City Business Journal*

Bank Overdraft Fees Hit Young And Low-Income Customers

Overdraft fees are boosting banks' profits at the expense of consumers, especially young and low-income people, according to findings in a new Federal Deposit Insurance Corp. study. This shouldn't come as a big surprise. The 18-month survey found that most banks automatically enroll consumers in overdraft programs—some don't allow them to opt out—and then cover overdrawn transactions for a per-item fee of up to $38. The survey excludes many of the largest banks in the nation, because it covers only FDIC-regulated banks. Nevertheless, it's still the largest

study of overdraft programs by a bank regulator. According to an article in *USA Today*, it will "fill an important universe of information that has not been available to policymakers."

In recent years, consumer groups have received an increasing amount of complaints about overdraft fees. The Federal Reserve has proposed a rule, which it expects to finalize by year's end, that requires banks to give customers the ability to "opt out" of overdraft programs. But advocates say the rule doesn't go far enough because banks don't have to obtain explicit permission from customers to pay their checks and debit card transactions. A bill introduced in Congress by Rep. Carolyn Maloney (D-NY), would require banks to sign up consumers for this service. The FDIC's survey found:

- Most banks that automatically enroll consumers allow them to overdraw by check, ATM or debit card purchases. About half of all overdrafts occur at ATMs or via debit card transactions, which tend to be for smaller dollar amounts.
- Banks surveyed earned $1.97 billion in overdraft-related fees in 2006, representing 74% of their overall $2.66 billion in service charges on deposit accounts. The advocacy group Center for Responsible Lending estimates that overdraft-related fees bring in a total of $17.5 billion each year to banks and credit unions.
- Large banks are more likely to process transactions from largest to smallest dollar amount, often triggering more fees.
- Young and low-income consumers are disproportionately affected by overdraft fees. "The most vulnerable consumers are getting hit with these fees," says Chi Chi Wu of the National Consumer Law Center.

Hopefully, the Maloney bill will pass and become law. It is needed to give consumers the protection they deserve.

Source: *USA Today*

Crib Warnings Missed Before Recall

Cribs made and sold by Delta Enterprises are extremely dangerous. Even though the cribs, 1.6 million in number, have been recalled, federal regulators have given an incomplete picture of the cribs' dangerous record. Delta and the CPSC had to have known how dangerous these cribs were for a long time. A long trail of warning signs began at least a decade before this fall's massive recall. For years, parents were telling Delta and the U.S. Consumer Product Safety Commission that the side rails on certain Delta cribs were breaking in ways that could trap and kill babies. This is quite evident according to government documents. The CPSC says it finally discovered the pattern last summer with the help of a newly created database designed to better spot crib hazards.

Delta and the agency both claim the recent recall included only two deaths they could connect directly to the mechanism that allows the sides of the cribs to be raised or lowered. However, there have been other deaths. Agency officials say they did not include all of them in the recall alert because, with some of the deaths, the baby bed didn't fit the recall's pattern. In one case the crib railing separated at the bottom while in others, it came loose at the top. It's difficult to understand how the CPSC could have failed to take action against Delta much sooner than it did. There were plenty of warnings.

Source: *Chicago Tribune*

New Electronic Key Device Prevents Driving While Using Cell Phone

A new automobile ignition key can prevent teenagers from talking on cell phones or sending text messages while driving. The invention, by researchers at the University of Utah, is called Key2SafeDriving and is aimed at cutting down on road deaths. It relies on Bluetooth technology to wirelessly connect keys to phones. Since a major factor in safe driving is to avoid distraction, this device has great promise. If it works, it will provide a simple, cost-effective solution to improve driving safety. Since motor vehicle accidents are the fifth leading cause of all deaths in the country, inventions like this one are most welcome. Among teens, motor vehicle accidents are the leading cause of death.

Studies have shown that driving while talking on cell phones is as dangerous as driving drunk. Several states have banned phoning and texting while driving, particularly for novice drivers. It's been said that cell phone distraction causes 2,600 deaths and 330,000 injuries in the United States every year. Provisional patents have been obtained by the university and it has licensed the invention to a private company that hopes to see it on the market within six months at a cost of less than $50 per key plus a yet-undetermined monthly service fee.

Source: *LifeScience.com*

The New Law Relating To Pools And Spas Should Be Enforced To Protect Children

A new law requiring anti-drowning drain covers to be installed at public swimming pools and hot tubs should be enforced. The sweeping law designed to prevent drain suction from trapping children under water was passed by Congress after a long, tough fight. The rules apply to pools and spas used by the public, including municipal pools and those at hotels, private clubs, apartment buildings and community centers. The improved drain systems were outlined in legislation passed by Congress a year ago. Pool and spa operators had a year to comply. The deadline for installing the new equipment has now come and the law must be enforced.

Nancy Nord, acting chairman of the Consumer Product Safety Commission, says the agency will focus initially on public baby pools and wading pools, as well as in-ground spas that have flat drain grates on the bottom and just one drain system. Unfortunately, Congress did not give the CPSC the $7 million needed to enforce the law. As a result,

the federal government expects states to take on much of the enforcement responsibility.

As you will recall from prior issues, the safety issue received heightened attention after the seven-year-old granddaughter of former Secretary of State James A. Baker was sucked onto a spa drain in 2002. She drowned despite efforts to pry her off. The legislation bans the manufacture, sale or distribution of drain covers that don't meet anti-entrapment safety standards. New models use a hump-shaped drain cover rather than the flat style that more easily attains suction with a child's body. Pools with just one drain also are required to install a second drain system, or external shut-off.

Alan Korn, public policy director of the Washington-based nonprofit group Safe Kids Worldwide, said the vast majority of American swimmers don't realize that the bottom of pools and spas and wading pools are a hidden hazard, especially to children. He said one person dies because of pool or spa drain suction in a typical year. His agency cited 33 deaths of children under age 14 between 1985 and 2004. The new drain-cover rule also applies to new portable hot tubs sold for backyard use by consumers. The rules to do not apply to existing hot tubs. In my opinion this new law must be enforced.

Source: *Associated Press*

Airborne Pays $7 Million In Settlement With 32 States

Airborne Health Inc. has agreed to pay $7 million to settle investigations by 32 state Attorneys General and the District of Columbia over the past marketing and labeling of its products. Previously Airborne settled two matters involving similar claims. The privately-held company makes popular dietary supplements with vitamins, minerals and herbs that it says help support the immune system. Connecticut Attorney General Richard Blumenthal had this to say:

We're putting the dietary supplement industry on notice—snake oil sales pitches will no longer be given free reign. Our strong coalition of states will continue to investigate and pursue companies that make false claims about dietary supplements and other products.

The agreement will not impact Airborne's products. According to Attorney General Blumenthal, Airborne agreed to certain prohibitions against making claims over the benefits of its products. The company also may not control where a retailer puts its products in stores. Airborne also agreed not to market a product with directions that would result in a person ingesting 15,000 International Units of Vitamin A or more per day. Airborne had previously reached a $23.5 million settlement of a class action lawsuit and a $6.5 million settlement with the Federal Trade Commission. The company said the FTC settlement funds would be paid only if the class action settlement does not cover all consumer claims that were submitted by September 18, 2008

Source: *Reuters*

XX. RECALLS UPDATE

Graco Car Seats Recalled

Nearly 44,000 Graco car seats have been recalled. The recalled seats are the Graco ComfortSport Convertible Car Seat models in the Frazier pattern. The affected seats were manufactured between November 1, 2006 and October 8, 2007. The seats have a large sized body pillow that partially hides the child airbag warning label. That violates the requirements of the Federal Motor Vehicle Safety Standard. If the seat is improperly placed in the vehicle, it could cause serious injury. Graco is notifying owners and instructing them to discard the supplemental pillows, which are provided for comfort only. Owners may contact Graco at 1-800-345-4109.

GE Recalls Wall Ovens Due To Fire And Burn Hazards

GE Consumer & Industrial has recalled about 244,000 GE®, GE Profile™, Monogram® and Kenmore® Wall Ovens. If the wall oven door is removed and incorrectly re-attached by the installer or the consumer the extreme heat used in the self-clean cycle can escape. This can pose a fire and burn hazard to consumers. GE is aware of 28 incidents of minor property damage in which adjacent kitchen cabinets have been damaged. No injuries have been reported.

This recall involves GE wall ovens sold from October 2002 through December 2004 under the following brand names: GE®, GE Profile™, Monogram® and Kenmore®. The wall ovens were sold in white, black, bisque and stainless steel for between $900 and $3,600. The following model and serial numbers can be found inside the oven on the left interior wall. For microwave combination ovens, the serial number can be found on the left interior wall of the microwave.

Consumers should immediately inspect their ovens to make sure they do not have an incorrectly re-attached wall oven door, which will not open into the flat position. If the wall oven door is incorrectly re-attached, consumers should not use the self-clean cycle and should call GE for a free repair. Consumers can continue to use the normal baking or broiling function in the oven until the oven is repaired. For additional information, contact GE toll-free at (888) 569-1588 or visit the firm's Web site at www.GEAppliances.com.

Window Blinds And Shades Recalled After Child Strangled

Federal safety officials have announced a recall of window blinds and shades after the strangling death of one young child and a close call for a second. The recall involves nearly

700,000 IKEA and Green Mountain Vista blinds and shades. According to the Consumer Product Safety Commission, a one-year-old girl from Greenwich, Connecticut, was strangled when she got caught in the inner cord of an IKEA Roman blinds set that was hanging over her playpen. The CPSC also received a report of a two-year-old girl from Bristol, Connecticut, who nearly strangled on the beaded-chain loop hanging from a set of Green Mountain Vista shades. Fortunately, the girl's older brother saved her.

IKEA sold the blinds at stores nationwide between July 2005 and June 2008. The blinds may be returned to any IKEA store for a refund. The shades are insulated blackout roller shades and insulated Roman shades sold by a number of stores and catalogs. Green Mountain Vista says owners should check to see if a tension device is attached to the chain loop. If not, the company is offering a free repair kit and installation instructions.

Stainless Steel Pots Recalled

Ocean State Jobbers Inc., of North Kingstown, Rhode Island, has recalled its Century Cookware Stainless Steel Stockpots. The stainless steel pots have metal handles that can detach during use, posing a serious burn hazard to consumers. Ocean State Jobbers has received one report of the handles breaking off a pot and causing a burn injury. This recall involves the 8-quart, 12-quart, 16-quart, and 20-quart Century Cookware Stainless Steel Stockpots with glass lids. "Century Cookware" is marked on the front and on the bottom of each pot. The pots were sold at all Ocean State Job Lot stores throughout New England from July 2008 through October 2008 for between $12 and $25. Consumers should immediately stop using the stockpots and return them to the place of purchase for a full refund. For additional information, contact Ocean State Jobbers at (800) 603-9601 or visit the firm's Web site at www.oceanstatejoblot.com.

Walgreens Teddy Bears With Chocolate Bars Recalled

Last month, Georgia Agriculture Commissioner Tommy Irvin alerted consumers to the recall of teddy bears with chocolate bars sold at Walgreens. The product was recalled because the chocolate bars may contain melamine, which is a definite health risk. The recall involves 173 teddy bears with chocolate bars. Walgreens described the product as an approximately nine-inch high Dressy Teddy Bear with a four-ounce chocolate bar. The product's UPC number is 047475864485, and the product tag also includes the item number 291332. The bears have been sold in Walgreens stores since late September 2008. Analysis by the U.S. Food and Drug Administration found that certain samples of the chocolate bars provided with the teddy bears were contaminated with melamine. Customers who purchased the product should return it to the Walgreens for a full refund. But more importantly the chocolate bars should be kept away from children.

The Toro Company Reannounces Recall Of Electric Blowers

About 900,000 Toro Power Sweep Electric Blowers have been recalled by the manufacturer, The Toro Company, of Bloomington, Minnesota. The blower's impeller, which is a rotating component on the blower, can break, resulting in pieces of plastic flying out of the blower. This poses a risk of serious injury to the user or a bystander. Toro has received 162 reports of broken impellers, including 28 reports of minor cuts and bruises resulting from projected impeller pieces.

The recall involves Toro Power Sweep electric blower model 51586 that was manufactured between 2000 and 2002. The recalled units have serial numbers that range between 0000 55100 and 220255609. There are two decals on the main housing of the blower. One decal reads, "TORO Power Sweep" and the decal on the opposite side of the blower contains the model number and serial number. The recalled units can be identified by a black impeller fan that can be seen through the air inlet screen on the bottom of the unit. Toro dealers and various mass retailers nationwide including The Home Depot, Lowes, Target and K-Mart stores sold the blowers from January 2000 through late December 2002 for about $32. Consumers should stop using the recalled blowers immediately and contact Toro to receive a replacement blower. For more information, contact Toro at (888) 279-3191. Consumers can also visit the Toro web site at www.toro.com. The Toro Company has notified registered owners directly.

95,000 High Chairs Recalled After Reports Of Injuries

About 95,000 **Majestic High Chairs** made by Evenflo Co. Inc, of Miamisburg, Ohio, have been voluntarily recalled because the company says they pose a hazard for children when parts come loose and the seat backs fall off. There have been dozens of reported injuries to children, from broken bones to head bruises. The company received more than 1,000 reports of parts falling out. The high chairs, made in China, were sold nationwide at juvenile product and mass merchandise stores, including Toys "R" Us, Babies "R" Us, Burlington Coat Factory and Shopko, and online at walmart.com from January 2006 through May 2007. For more information, consumers can call Evenflo at 800-233-5921 or visit www.majestichighchair.com.

Strollers Recalled

Some 1,600 **Phil & Teds Dash Buggy Strollers**, made in China and imported by Regal Lager Inc., of Kennesaw, Ga., have been recalled because the frame handle could fail to latch properly and break, posing a fall hazard to small children. No injuries or incidents have been reported. The recalled stroller has a metal frame with three wheels, a cloth seat and a canopy. The product was sold at independent juve-

nile specialty stores and online from July through September last year. For details, call 800-593-5522, or visit www.regallager.com.

Toy Dinosaur Recalled

About 480 **Dinosaur Epoch Toy Dinosaurs**, manufactured in China and imported by Xtreme Toy Zone of Los Angeles, have been recalled because surface paints can contain high levels of lead, which is toxic if ingested by young children. No incidents have been reported. The dinosaurs were sold on Xtreme Toy Zone's web site between May and October 2008.

XXI. FIRM ACTIVITIES

Firm Makes Lawyer Awards At Year's End

Each year our firm selects a "Litigator of the Year" for the entire firm and a "Lawyer of the Year" for each section. The votes in each category this year were extremely close as there was stiff competition for each award. At our firm's Christmas party, Dee Miles was announced as the "Litigator of the Year." This 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."

Our firm also recognized excellence in each of its sections, naming the Lawyer of the Year for each. Honorees for 2008 are Roger Smith in the Mass Torts Section; Clint Carter in the Consumer Fraud Section; Ben Baker in the Personal Injury Section; and David Byrne in the Toxic Torts Section. Each of these lawyers did outstanding work for their clients during the year.

While selected as Litigator of the Year for his overall excellence in practice, Dee was recognized in particular for his work as co-lead counsel in the Average Wholesale Price (AWP) litigation, in which our firm represented the State of Alabama against 73 pharmaceutical companies accused of defrauding the Medicaid system by inflating drug prices. AWP litigation is being pursued in 22 other states, as well as in a nationwide class action lawsuit. Our firm is representing seven states in these cases. Alabama was the first state to go to trial in this litigation, winning Plaintiff verdicts against three drug companies in the first two trials. The state has settled with seven of the drug companies to date.

Employee Spotlights

DAVID BYRNE

David joined the firm in 2001 and he now focuses primarily on commercial and environmental litigation. Before joining Beasley Allen, David practiced with the firm of Beck & Byrne, P.C., where he was involved in consumer fraud litigation, business litigation, personal injury litigation, and state and federal criminal litigation. David also served as a Deputy Attorney General for the State of Alabama and as a law clerk to U.S. District Judge Robert Varner and Alabama Court of Criminal Appeals Judge John M. Patterson.

David has assisted clients in obtaining multi-million dollar settlements and verdicts in a wide variety of cases including: Federal Tort Claims Act (FTCA) cases, food-product franchise cases, accounting malpractice cases, motor vehicle franchise act cases, consumer fraud class actions, funeral services cases, premises liability cases, insurance agent contract cases, defective product cases, and numerous environmental liability cases. In 2003, he was involved in the record-breaking $700 million dollar settlement for PCB contamination claims against Solutia, Monsanto and Pharmacia in Anniston, Alabama. David was the lead lawyer in a recent environmental case that went all the way to the U.S. Supreme Court. In that case a $21.9 million verdict for the City of Columbus, Georgia, a local business owner and a homeowner was affirmed.

David and his wife, Betty Bobbitt, have been married since 1993 and have two children. They attend Young Meadows Presbyterian Church, where David serves as a deacon. David is also the president of the Montgomery County Trial Lawyers Association and is a member of the Board of Governors for the Alabama Trial Lawyers Association. David is an outstanding lawyer who works very hard and gets very good results for his clients. We are most fortunate to have David as a lawyer in the firm.

J.P. SAWYER

J.P. Sawyer has been with the firm for eight years. His litigation focus is currently in the area of product liability actions. J.P. has become primarily involved in cases involving defective roof structures in automobiles. Most recently, he has done a good deal of work relating to side impact and rollover airbags. J.P. has cases pending throughout the entire Southeast. The Coffee County native is a frequent speaker at litigation seminars. He has been invited to speak at national seminars. He has authored several papers relating to litigation. J.P. is actively involved in both the Alabama Association for Justice and the Mississippi Association for Justice. In fact, he is a "lifetime member" of the Mississippi Association for Justice.

J.P. is married to Keely Warren Sawyer of Enterprise, Alabama. They have two daughters, Kalyn and Ella, and twin sons, Brack and Lint. J.P. and his wife Keely are active members of St. James United Methodist Church. J.P. enjoys foreign mission work. Most recently he traveled to Ecuador and Cuba to participate in missionary work through the United Methodist Volunteers in Mission program. J.P. is a real asset to the firm. He works hard for his clients and cares deeply for their well-being. We are blessed to have J.P. with us.

NAVAN WARD

Navan Ward, who has been with the firm since 2002, is in the Mass Torts Section. He was originally responsible for overseeing the Meridia pharmaceutical drug litigation. This drug was

used as a weight loss treatment, but caused users to suffer heart attacks and strokes. Navan has worked on a number of nursing home neglect and abuse cases in Alabama, Mississippi, Tennessee, and Georgia. He has litigated cases where nursing home residents suffered from injuries such as multiple falls, bedsores, malnutrition, dehydration, aspiration pneumonia and sepsis/infections. Navan has been successful in obtaining verdicts and settlements in excess of $2.85 million for the nursing home residents he has represented.

Currently, Navan is heavily involved with the Cox-2 (Vioxx, Celebrex, Bextra) pharmaceutical drug litigation. These drugs were used for the treatment of arthritis, but caused heart attacks, strokes, and serious skin reactions. He has been responsible for overseeing the Celebrex and Bextra pharmaceutical litigation. Navan is one of the leaders in the Bextra/Celebrex Multi-district Litigation (MDL), serving on both the Science and Discovery committees. Also, Navan is responsible for overseeing the Permax and Dostinex pharmaceutical drug litigation. These drugs were used for the treatment of Parkinson's Disease, but caused damage to the users' heart valves.

Recently, Navan has begun representing victims who have been injured by the use of pain pumps. He has been instrumental in obtaining settlements totaling more than $73 million for some of the clients that he represents who have taken these dangerous drugs. Navan has given several presentations concerning Cox-2 drug issues, Permax/Dostinex litigation, Hormone Replacement Therapy litigation, and nursing home litigation issues throughout the country.

Navan is married to the former Bridget L. Maynor, of Irondale, Alabama. Navan's childhood church was Bethany Seventh Day Adventist Church, but he now attends Northview Christian Church - Safe Harbor. Navan is the Co-chair of the Annual Father Walter's Charity Golf Tournament and a member of the Alabama Law Foundation's Grants Committee. Additionally he is a member of Leadership Montgomery's Class XXI.

Navan serves in leadership positions for various legal organizations. Currently, he serves as the treasurer for the Young Lawyers Section of the Alabama State Bar; treasurer for the Montgomery Trial Lawyer's Association; treasurer for the Capital City Bar Association; Law School Summer Internship Chairperson and secretary for the Alabama Lawyer's Association. In addition, he is a member of the Montgomery County Bar Association and the Mississippi Bar Association, and is an American Bar Association State Delegate for Alabama. Navan is an excellent lawyer who works extremely hard for his clients. He believes in his work and in his clients and that's very important. We are blessed to have Navan in our firm.

LISA HARRIS

Lisa Harris serves as Executive Director for our firm, which simply means she literally "runs the place." Lisa, who has been with the firm for 18 years, took over her current duties in 1998. Since then she has been in charge of managing all daily activities of the firm. Lisa graduated from Auburn University Montgomery with a Business Administration degree. When she is not at work Lisa keeps busy with her 18 year-old daughter, Haley, who is a freshman at Faulkner University in Montgomery. She also enjoys traveling, water sports, and, most of all, the beach. We are most fortunate to have Lisa, a dedicated and extremely competent person, heading up the firm. She is a real blessing to all of us and a most valuable employee.

MIRIAM GRIFFIN

Miriam Griffin has been with the firm since July of 2007 as a Legal Assistant to Leigh O'Dell in our Mass Torts Section. She commutes everyday from Evergreen, Alabama. She obtained her Paralegal Certificate from Auburn University and has 11 years of experience in various areas of law including Criminal Law and Real Estate Law. Miriam enjoys hiking, reading, sewing, going to the beach in her free time and spending time with her two grandchildren. She is a very good employee who works extremely hard. Miriam is a blessing and we are fortunate to have her with us.

LISA SMITH

Lisa Smith has been with the firm for eight years as Jay Aughtman's legal assistant in our Consumer Fraud Section. Her main job is handling discovery matters. Lisa works on the class action opt-out cases and spends a good bit of time communicating with clients, updating them on their cases or obtaining new information from them. All of our legal assistants are valuable members of the litigation team in a case. Lisa has been married to David Smith of Prattville for 22 years and they have two boys, Dustin (age 21) and Donnie (age 15). Lisa also has two grandchildren Raygan (age two) and Colt (age one), whom she adores. She enjoys spending time with her grandchildren and watching her son Donnie play for the Billingsley Bears. Lisa is an outstanding employee, who enjoys her work and does it well. We are fortunate to have Lisa with the firm.

CAROL THOMPSON

Carol Thompson, one of our most experienced legal assistants, works for Greg Allen in our Product Liability Section. Carol, who has been with the firm since 1990, has been involved in some of our most important product liability cases. The work in product liability cases is extremely difficult, demanding, and intense for a number of reasons. These cases will always involve either a death or serious injury that permanently disables the victim. As a result, folks who work on these cases must have a great deal of medical knowledge and expertise. Discovery in these cases is always difficult and requires a good deal of plain old hard work. The only way to obtain documents and information from corporate Defendants is to work hard, be persistent and never give up. Carol is a real pro when it comes to discovery issues and it has paid off for the clients in some very important cases.

Carol is married to Mark Thompson, a veteran with the Montgomery County

Sheriff's Department, and they have three sons and one grandson. Most of Carol's free time is spent entertaining her five-year-old grandson, Gavin. Carol's life has been dedicated to her family and her job. She says between the two, there is not much time for anything else. Carol is a tremendous asset to the firm and is the best example of what a legal assistant should be that I have had the privilege of working with. We are truly blessed to have her with us.

AMY YEARGAN

Amy Yeargan came to the firm in August of 2007 as a Legal Assistant for Alyce Robertson and Chris Boutwell in the Toxic Torts section. Currently, she is working on the Occidental Chemical Corporation lawsuit. Amy has also worked with Scott Thomas, in Internet Services, on numerous internet commercials/video clips for the firm. Amy is engaged to Caleb Ross, a history teacher and a football coach at Prattville High School. They have plans to marry on April 18, 2009. She graduated from Auburn University Montgomery in May of 2007 with a Bachelor of Science degree in Justice and Public Safety and obtained a paralegal certification from the American Bar Association.

While at AUM, Amy was a member of Alpha Gamma Delta sorority where she held several offices such as Scholarship Coordinator and Vice President of Operations. While Amy is busy working at the firm and also planning her wedding, she also enjoys shopping, working out, and reading. She is a very good employee and we are fortunate to have her with us.

XXII. SPECIAL RECOGNITIONS

Joan Claybrook Is A Very Special Person

Joan Claybrook has served as Executive Director of Public Citizen, a great institution, for over 27 years. Her work, advocating for democratic principles on behalf of all public citizens and advancing democracy in the face of adversity, has been truly outstanding. Joan announced last month that she was stepping down as President of Public Citizen, effective January 31, 2009. Fortunately, she will continue to be part of Public Citizen's future and will remain on the Board of Directors. While Public Citizen's noble mission, which is to protect the health, safety and democracy of all Americans, will continue, Joan's leadership will be sorely missed. She has labored diligently in support of Public Citizen's work. During her tenure, Joan's leadership has been tremendous and she will be very difficult to replace. When the descriptive term, "consumer advocate" was coined, the persons responsible had to have had Joan Claybrook as their role model.

In announcing her decision to step down as President, Joan quoted Louis Brandeis, who said years ago, "The only title in our democracy superior to that of President is the title of Citizen." That was quite appropriate. While the work of Public Citizen must continue and, if anything, intensify, Public Citizen has accomplished great things during Joan's tenure. Every consumer in America has benefited from the advocacy work of Public Citizen. Public Citizen, under Joan's leadership, has played a significant role in Congress, in government agencies and in the courts to protect health, safety and democracy for everyone in the U.S. Over the past 27 years, Public Citizen helped pass significant laws benefiting consumers, opened access to government information, enhanced Congressional ethics and campaign reform, and has stopped some of industry's most egregious efforts to rollback public protections. Some of the accomplishments of Public Citizen while Joan was President include:

- Airbags are now standard equipment in all motor vehicles sold in the U.S., as well as in countries all over the world. Just in the U.S., they save almost 3,000 lives a year. Additionally, the federal government is being forced by our work to issue critically important vehicle safety standards to prevent rollover, upgrade roof strength and mitigate ejection (rollover crashes kill 10,800 people a year), improve tire safety and require transparency in auto industry dealings with the regulatory agency to protect the public against safety defects.
- The expansion of dangerous triple-trailer trucks was stopped, limiting their operation to about a dozen, mostly western, states.
- Major changes in Congressional ethics and lobbying requirements were adopted in 1995 and 2007 because of Public Citizen's intense efforts, including a gift ban, limits on use of corporate aircraft and expansive reporting requirements.
- Public Citizen helped to secure enactment of a major campaign finance reform bill that bans soft (unregulated) money that was often doled out in huge amounts to the political parties, as well as regulation of phony "issue ads" in political campaigns, and worked to assure it was found to be constitutional by the U.S. Supreme Court.
- Legislation to tie the hands of government regulators was blocked. Public Citizen played a pivotal role in 1995 in stopping—by one vote—the Gingrich/
  Dole bill that would have rolled back the ability of regulators to issue health, safety and environmental standards.
- Public Citizen was instrumental in defeating efforts by the super-rich to eliminate the estate tax, which would have cost the U.S. Treasury a trillion dollars.
- Public Citizen fought for years to keep access to the courthouse door open for victims of product defects and medical malpractice by defeating, again and again, legislation to restrict damage awards.
- Public Citizen's litigation group has brought hundreds of public interest lawsuits in federal district and courts of appeal and in the U.S. Supreme

Court, including achieving a landmark victory that preserves White House electronic records and assures electronic records (not just paper records) are available under the Freedom of Information Act.

Joan Claybrook is a great person—a great American—and a great consumer advocate. She will be sorely missed at Public Citizen. I have been blessed to know Joan and to have her as my very good friend. If we all had the same dedication to our work as does Joan, and the same character that she possesses, we would have a better world.

A Very Special Quarterback

If you don't recognize the name Sam Bradford, college football isn't your thing. For the uninformed Sam is the starting quarterback at the University of Oklahoma and a great one. He led the Sooners to the Big 12 championship in 2007 and 2008. In his first game as a Sooner, Sam completed 21 0f 23 passing attempts for 363 yards and three touchdowns. He broke the school record for passing yards in a half. In his second game Sam broke the school record for most consecutive pass completions with 22. He also holds the NCAA freshman touchdown passing record with a total of 36.

The redshirt sophomore hasn't slowed down a bit in his second season. Sam won the Heisman Trophy edging out two worthy competitors—Texas QB Colt McCoy and Florida QB Tim Tebow. Sam passed for 4,468 yards and 48 touchdowns this season and will lead the Sooners against Tebow and the Florida Gators for the National Championship this month. It's noteworthy that the two quarterbacks who led their respective teams in the championship game are both on Jesus' team.

With all of his accomplishments on the football field, there is something even more important, and that is Sam is a dedicated Christian who lives his faith daily. He is on the FCA leadership team at Oklahoma. Sam is a Cherokee Indian which also makes him very special in my book. Sam acknowledges that his relationship with Jesus Christ is the most important thing in his life and that's good to know. He says the verse below is one of his favorite scriptures:

Keep your eyes open, hold tight to your convictions, give it all you've got.

1 Corinthians 16:13a (MSG)

With all of the bad stuff going on in the world of athletics, it's good to know that players like Sam are willing to give God all of the glory for their accomplishments on and off the playing field. Fortunately, Sam is not alone and there are many more just like him in the sports world.

Sam Bradford Isn't Alone In His Stand

It's great to know that there are other prominent and highly-successful athletes at other schools who stand up for Jesus Christ and are real role models for young folks around the country. Tim Tebow, the well-known and highly-effective quarterback from the University of Florida, is a dedicated Christian who not only talks the talk—but walks the walk for Jesus.

In my state of Alabama, two student athletes, Glen Coffee, a great running back at the University of Alabama, and Jason Bosley, the starting center at Auburn University, are also prime examples of dedicated Christian athletes. These young men are outstanding football players who have lived their faith on and off the field. They too are the kind of role models that young folks need these days.

Conecuh Couple Receive Farm Award

Coming from several generations of farmers myself, I am always glad to see farm families recognized and honored. I was pleased to learn that a Conecuh County, Alabama couple has been recognized as the 2008 Outstanding Young Farm Family of Alabama. The Alabama Farmers Federation announced the honor last month at its 87th annual meeting in Mobile. The couple, Chip and Lisa Stacey, who live near Evergreen, have a diversified farm that includes wheat, soybeans, corn, beef cattle, timber and wildlife. Chip is a fourth-generation farmer and Lisa is a veterinarian. The Staceys will compete in February for the American Farm Bureau Federation's Young Farmers and Ranchers Achievement Award in San Antonio, Texas. While farm living is tough and challenging, it's also a great life. It's good to see young folks staying on the farm.

Prominent Speakers Scheduled For AAJ Class Action Litigation Group Meeting

The newly formed AAJ Class Action Litigation Group will meet for the first time on February 8, 2009 at the AAJ Winter Conference in New Orleans, Louisiana. Our firm is co-chair of this group. It is the first time that AAJ has established a specific class action litigation group nationally. There will be a number of very good speakers at this meeting.

Ken Moscaret is a nationally recognized expert on the reasonableness of awards in class action lawsuits. He is very well known for his work in the *Enron* litigation. Mr. Moscaret is widely regarded as one of the nations leading authorities on attorney's fees in class actions. Arthur Bryant, Executive Director of Public Justice, will also speak to the group. Arthur will speak on *cy pres* awards in class actions, which are awards given to third parties usually in some type of charitable or public policy fashion. He is widely regarded as one of the best public interest and class action lawyers in the United States. Ken has received numerous awards for his accomplishments in this field.

AAJ is very pleased to have lined up such a distinguished panel of nationally recognized speakers. We urge all lawyers who do this sort of work to join the Class Action Litigation Group and attend the meeting in February. For more information contact Jay Aughtman with our firm at 800-898-2034.

Fighting For A Just Cause

Patrick James, whose ten-year old daughter was tragically killed in a 15-passenger single vehicle rollover in South Carolina, contacted me after reading the December issue of the *Report*. Patrick and his father-in-law, Rick Koehler, who also contacted me, have been working to either improve the safety of these 15-passenger vans or get the death traps off the road. They have organized the American Center for Van and Tire Safety which is dedicated to Alex "Lexie" James and to all of those who have lost their lives in vehicle accidents and especially those who have died in 15-passenger vans. These two men are to be commended for their mission and dedication to a just cause. If you want more information go to this web site: www.acfvats.org.

XXIII. SOME CLOSING OBSERVATIONS

Evil with its resulting wrongdoing and abuse of all sorts is so rampant in the world we live in that it's very easy for us to become discouraged and overly concerned about the state of affairs around us. In fact, we may even be tempted to quit trying to make things better for our fellow citizens. When things seem to be overwhelming, it's good to recall what outstanding men and women over the years have said and done when things got tough in their time. I find it reassuring to know that others have faced similar trials and tribulations and may even have had the same feelings and doubts that I have had on occasion. One such man had this to say in the 18th Century:

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

Edmund Burke, Irish orator, philosopher, & politician (1729 - 1797)

Each of us has an obligation to do all within our power and ability to help stamp out the evils that exist today in the United States. The forces of evil will continue to do well and have a vast negative effect on our government and our people unless good folks work hard to slow them down and eventually stop their movements. We can't afford to sit back and hope others will get the job done. It will take all of us—working together—to put our country back on its proper course and restore it to its former place as a nation. This is an effort that's far too important for any of us to sit on the sidelines and watch while others are in the arena fighting the good fight.

Recently, Kendall Few, a very good South Carolina lawyer, sent Greg Allen in our firm a rather interesting message. While this was sort of a "tongue in cheek" prayer, it has real meaning if you have kept up with current events of late and it's certainly worth reading.

Dear Lord And Father Of Mankind, Forgive Our Foolish Ways

I'm sure that everyone has heard that "Citi never sleeps!"

But when they lay off thousands, it may give the world the creeps!

Way back when Ronald Reagan said that it would "Trickle Down!"

Even before we got ourselves our present "Circus Clown!"

Before the trillions bail out, back when pennies were in vogue,

And even back before Karl Rove, that supercilious rogue,

Back then when people counted, when our nation was at peace,

When our budget bore a surplus, when Thanksgiving was a feast,

Back when the times were good, my friends, before "Old Joe the Plumber,"

When global warming didn't come till way late in the summer,

When "liberal" wasn't an odious word akin to "leprosy,"

When a man could get a decent job from sea to shining sea!

Oh will it ever come again, oh let us pray some day it will,

When America will truly be "that shining city on a Hill."

J. Kendall Few 11/19/08

• John Greenlief Whittier (1872)

My friend Sandra Nickel, a Montgomery realtor, says thanks to Shanna Malone, who works very hard in our firm to put out this *Report* each month, she now has a new mantra: "Trust God like everything depends on Him and work like everything depends on me!" That's a pretty good combination so long as the trust factor controls the dependency aspect. Fortunately Sandra, who has been highly successful in real estate sales in the Capital City, knows and understands exactly how that has to work.

Len Shannon, who attended Ensley High School in Birmingham a few years ago with my wife, Sara, told me recently about some good advice his mother gave him when he was a child. I decided to pass this advice on to our readers because his mother's words still ring true in today's world. The following is the advice Len's mother gave him:

Always do right and associate with the best and leave the rest to others. You can accomplish more in one hour with God than one lifetime without Him.

Mary Shannon

What Mrs. Shannon said is so true and it sounds sort of like what my own mother told me when I was about six years old and just starting to school in Clayton. In fact, she always said that a person who lies down with dogs that have fleas will always get up scratching. Len also took the time to send in his favorite Bible verse, which tells us the source of all good things:

With God all things are possible.

Matthew 19:26

One of our readers, who remains anonymous, send in this verse.

Now may the God of peace—who brought up from the dead our Lord Jesus, the great Shepherd of the sheep, and ratified an eternal covenant with his blood—may he equip you with all you need for doing his will. May he produce in you, through the power of Jesus Christ, every good thing that is pleasing to him. All glory to him forever and ever! Amen.

Hebrews 13:20-21 (New Living Translation)

The Holy Bible Is A Guide For Us

Many Americans spend lots of time and money buying all sorts of guides and self-help books in their efforts to get ahead in their attempts to avoid pitfalls in life. When you get down to it, however, I can think of no better guide for life than the Bible. The divinely-inspired principles in the Bible are better than any self-help course or motivation talks that are available today. In fact, you don't have to look any further than the Bible when trying to figure out what works and what won't in dealing with life's ups and downs. Let's see what Daniel Webster had to say on the subject:

If we abide by the principles taught in the Bible, our country will go on prospering. But if we and our posterity neglect its instructions and authority, no man can tell how sudden a catastrophe may overwhelm us and bury all our glory in profound obscurity.

Daniel Webster

It would be good if we would make Bible-reading a part of our daily schedule of events. I must confess I need to do a better job in that area and not just go to the Bible for guidance and help when "my tail gets in a crack!"

XXIV. SOME PARTING WORDS

As we enter the New Year, we face tremendous changes and uncertainty—the hopeful beginning of a new Presidency and yet the daunting prospect of a serious economic downturn. These are challenging and concerning times. It is also a time when we need to stop and evaluate our lives to determine what is most important and what our priorities should be. I suggest the following priorities. Though times may continue to be challenging, you can be assured that if you make these priorities your own that your life will be abundantly blessed.

- We must make our first priority trusting God and living a life that is obedient to Him and His Word;
- After God, our second priority should be the well-being, love, and care of our families;
- We should "love our neighbor as ourselves," helping those who are less fortunate than we are whenever the opportunity presents itself; and
- Lastly, we should work diligently, faithfully in our place of employment—regardless of what we do for a living—doing our work "as unto the Lord."

I am confident that the new President will set an example for all of us as he leads our nation during these trying times. My prayer is that President Obama will seek and depend on God to guide and direct him during his presidency.

In closing, my desire for each of you and your families is that you have a healthy, safe and prosperous new year and that God will bless you richly during the coming year.

To view this publication on-line,
add or change an address,
or contact us about this publication,
please visit our Website: BeasleyAllen.com

218 COMMERCE STREET (36104)
POST OFFICE BOX 4160
MONTGOMERY, ALABAMA 36103-4160
(334) 269-2343
TOLL FREE
(800) 898-2034
TELECOPIER
(334) 954-7555
WEB PAGE
www.BeasleyAllen.com

RETURN SERVICE REQUESTED

Jere Locke Beasley, founding shareholder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs 44 lawyers and more than 200 support staff. **Jere Beasley** has always been an advocate for victims of wrongdoing and has been **helping those who need it most since 1979.**

Beasley Allen
BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
Attorneys at law