



THE
JERE BEASLEY REPORT

APRIL 2009

Beasley Allen

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I. CAPITOL OBSERVATIONS

AARP SUPPORTS ALABAMA IN MEDICAID FRAUD LITIGATION

As you probably know, AARP is a non-partisan, nonprofit membership organization for folks 50 and over, with 40 million members nationwide. There are 513,000 AARP members in Alabama. This organization works to ensure that all Americans have access to affordable, quality health and long-term care, and to control health care costs without compromising quality. Without a doubt, AARP does a tremendous job of protecting their members and other consumers who haven't yet reached 50 years of age.

I am pleased to report that AARP fully supports Alabama's efforts to protect its Medicaid funds. Its support is extremely important and is greatly appreciated. The organization recognizes that strengthening Medicaid is a vital priority for seniors. Medicaid is an essential foundation of the nation's health care system, serving approximately 59 million vulnerable persons, or one in six of the nation's population. Medicaid is also the largest payer for long-term care and is critical in redirecting care to the often more cost-effective home and community-based settings that older Americans prefer. Thus, although older and disabled persons make up just one-quarter of Medicaid enrollees, they account for 70% of Medicaid spending. This is why AARP can't tolerate the drug manufacturers abusing the Medicaid program.

Having said all of this, it's very easy to see why AARP has filed briefs supporting the State of Alabama in the cases against three drug manufacturers that are on appeal before the Alabama Supreme Court. In filing its briefs, AARP said it has a strong interest in Alabama's cases because the practices challenged contribute to reducing access to affordable prescription drug treatments. AARP's legal staff told the court in its briefs that affordable prescription medication is particularly important to the

older people, who have the highest rate of prescription drug use because of their higher rate of chronic and serious health conditions. Because prescription drug spending has skyrocketed over the last fifteen years, thereby limiting access to medically necessary medicines for many people, AARP advocates for policies, laws, and other efforts that broaden access to prescription drugs. AARP's leadership and its legal staff are 100% on board in support of the State's cases against the drug companies. These companies have committed fraud against Alabama's Medicaid program.

It's most significant that AARP's lawyers, after studying the record of testimony from the actual trial of the case, recommended to the leadership of AARP that a brief supporting the State be filed. That has now happened and AARP, on behalf of its Alabama members, is asking the Supreme Court to affirm the full verdicts against AstraZeneca, GlaxoSmithKline and Novartis!

MORE SUPPORT FOR ALABAMA

In addition to the AARP, fourteen states have filed Amicus briefs in support of Alabama in the Medicaid fraud appeals. Each of the states took the position that AstraZeneca, GSK and Novartis committed fraud and that the Supreme Court should affirm the jury verdicts, without reduction in damages, in all cases. The states supporting Alabama in the Medicaid fraud litigation are: Alaska, California, Hawaii, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, New York, Texas, Utah, and Wisconsin.

MONTGOMERY FOSAMAX TRIAL WILL BE ONE OF THE FIRST IN THE NATION

In the past few editions of this *Report*, we have written about several of our clients who have been injured and damaged by the drug Fosamax. As you now know, Fosamax, used for the treatment of Osteoporosis, has been linked to Osteonecrosis of the Jaw (ONJ), which is a disfiguring and dis-

abling condition of the jaw bone that causes infection and rotting of the jaw bone. One of our cases will be the first state court case in the country to go to trial. The case of *Finley v. Merck* is scheduled for trial in October of 2009 in the Circuit Court of Montgomery before Judge Gene Reese.

This case involves our client, Martha Finley, who took Fosamax for several years and who was ultimately diagnosed with ONJ. Her devastating injury required hospitalization, implementation of procedures to drain infection, numerous additional tooth extractions, and multiple debridement treatments

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for her jaw bone. After the hospitalization, her doctors elected to stop the use of Fosamax. We look forward to presenting the evidence of Merck's misconduct to a jury and will seek justice for Ms. Finley. I, along with Andy Birchfield and Chad Cook from our firm, will try the case which should start on October 19th.

ASTRAZENECA HIDES DAMAGING DOCUMENTS

Recently, the *Wall Street Journal*, the *New York Times*, and newspapers across the country reported on internal AstraZeneca documents made public for the first time. The internal documents and e-mails written by company officials, which were uncovered in a federal court lawsuit, reveal that AstraZeneca knew a decade ago that its psychiatric drug Seroquel caused diabetes and major weight gain. The documents also show that, in spite of that knowledge, the company continued to market the drug as having no risk.

AstraZeneca produced an analysis of studies showing that its antipsychotic drug Seroquel was less effective than older-generation psychiatric drugs it was supposed to improve upon. As we have reported in previous issues, over the past dozen years AstraZeneca has marketed Seroquel as an effective treatment for schizophrenia and bipolar disorder. AstraZeneca's efforts resulted in the company selling more than \$20 billion of the drug. In 2008 alone, Seroquel sales totaled \$4.45 billion. The AstraZeneca documents prove without a doubt that the company put its profit over the safety of persons taking Seroquel. That is an indictment of the company's bosses who allowed this to happen.

Currently there are more than 9,000 lawsuits, filed by individuals, pending against AstraZeneca. These suits allege that the individuals developed diabetes after taking Seroquel. Many of the cases have been consolidated in the U.S. District Court for the Middle District of Florida. The key issue in all of the lawsuits is whether the company **knew** that some patients could develop diabetes from Seroquel and yet failed to

disclose that to the medical community and to the public.

The documents—which include internal emails involving key officers and employees—show how AstraZeneca tried to hide the diabetes link for nearly a decade. Clearly, the company knew about the risk of weight gain and the diabetes risk in 2000. Not only did AstraZeneca fail to warn doctors and patients, but it instead marketed the drug in a way that represented that there was no risk. I must confess that, after having been involved in litigation against the drug industry for a number of years, I'm not at all surprised at the content of these documents.

Source: AAJ

ALABAMA CITIZENS ARE UNHAPPY WITH ALABAMA'S TUITION PROGRAM

There has been a statewide firestorm over the virtual collapse of Alabama's prepaid college tuition plan. Participants are very upset with the board that manages the failing plan. Created in 1989, the Wallace-Folsom Prepaid Affordable College Tuition Plan (PACT) was designed to let people pay a fixed amount when a child is young in anticipation of getting tuition and fees paid at an in-state public university when that child finishes high school. Now it appears the plan, which has 49,000 participants, is in big trouble. Lots of public officials—even those who have no direct relationship to the plan—are catching a great deal of criticism and blame for what the public perceives to be a major problem in how the fund has been run.

It appears that the PACT program put far too high a percentage of its funds in the stock market, which has been hard hit by the economic downturn, and that turned out to be unsound money management. I am told that up until 1995, the program's literature repeatedly said the plan "will guarantee payment," but plan officials are now saying there was never a "guarantee" in state law. Interestingly, the language referred to was removed in 1995. The program's assets dropped from \$899 million in September 2007 to \$463

million at the end of January—a 48% decline—and that's unacceptable in a program of this sort.

State Treasurer Kay Ivey's office administers the program and has a ten-member board in place, which includes Lt. Governor Jim Folsom and Post Secondary Chancellor Bradley Bryne, a former state Senator. In addition to the Treasurer and the board, there is another key player involved in running the PACT program and that's a firm by the name of Callen & Associates. This is a national firm that most folks I have talked with didn't even know was involved in the Alabama program. It will be most interesting to learn the exact role played by Callen & Associates and the extent of that role in the decision-making process relating to the investment of PACT funds.

The board has agreed to keep paying tuition, but not allow new enrollees in the program. The board transferred \$1.3 million from a scholarship fund into the PACT program. The board also agreed to ask the state Legislature to put about \$45 million annually into the program. Fortunately, the board unanimously passed a resolution not to dissolve the program. Without a doubt, the PACT program is in deep trouble.

A lawsuit, filed last month by two participants in the program, named the state Treasurer and several corporations as Defendants. Interestingly, no members of the board were sued. It doesn't take a political scientist to figure out that this matter has created the first real issue of the upcoming governor's race. Observers believe it's one that will certainly carry over into 2010.

Source: *Associated Press*

ANOTHER ENTRY IN THE 2010 ALABAMA GOVERNOR'S RACE

You can't always believe all of the political rumors that make the rounds in Montgomery, but some actually prove to be true. If you can believe one of the stronger rumors floating around the State House, Roy Moore is now in the race for Governor. In fact, one early poll showed the former Alabama Chief Justice to be the leader among all likely Republican candidates. For some

reason the poll results haven't gotten any media attention. If in fact the Etowah County native gets in the race, it will make for a most interesting affair. Based on what I hear from around the state, Roy Moore still has a strong following and would be a strong candidate for Governor. But a Moore candidacy probably wouldn't make some of the GOP bosses very happy!

TROY CHANCELLOR SAYS HE WON'T RUN FOR GOVERNOR

Dr. Jack Hawkins, Chancellor of Troy University, has decided not to run for Governor in 2010. Dr. Hawkins made the announcement in Montgomery on March 24th. While I wasn't a bit surprised to learn that the former Marine had received lots of encouragement to run for Governor next year, I was surprised that he won't be a candidate. In my opinion—had he run—Dr. Hawkins would have been a very strong candidate and possibly would have been elected Governor.

I first met Jack Hawkins back in the 1970s when he was at UAB. The impression he made on my wife Sara and me was a lasting one. I predicted at the time that he would be a college president in the future and I had hoped that he would eventually be at Auburn. While he made me a good "predictor," unfortunately for Auburn folks, Dr. Hawkins landed at Troy University. Needless to say, he has done an outstanding job there as Chancellor. In my opinion, Jack Hawkins is the best "college boss" in the state. I also believe he would have been a very good Governor.

TROY KING WILL RUN FOR ELECTION IN 2010

Troy King announced last month that he will run for re-election in 2010. Troy says he has more to do to keep his promise of making Alabama a safer place in which to live. The Attorney General announced his plans in a speech to the Greater Birmingham Young Republicans Club. The announcement came two days after

news reports that what appears to be a politically-motivated federal grand jury was at work in Montgomery. I am not sure who is behind this investigation, but based on media reports it appears more political than criminal in nature. The strangest part of this news is that grand jury work is supposed to be confidential.

There is talk that there will be others—both Republicans and Democrats—getting into the Attorney General race. Birmingham lawyer Luther Strange, who was the Republican nominee for lieutenant governor in 2006, is said to be considering running for Attorney General next year. Media reports indicate that Troy made an early announcement because he wanted the people of Alabama to know his plans. Frankly, I believe he made the right decision in running for reelection instead of getting into the Governor's race.

Source: Associated Press

MACHINES CONFISCATED IN GAMBLING RAID

A raid by the Governor's Task Force on Illegal Gambling at the White Hall gaming center on March 19th caught lots of folks by surprise. In that raid, the Task Force, led by Director David Barber, a former Jefferson County District Attorney, seized 101 machines and \$560,000 in cash. The Task Force moved in before dawn in the Lowndes County community and started its work with guns drawn, according to media reports. The cash seized was said to be the "take" for three days at the center. This raid has gotten a great deal of attention and it has already landed in court. I am reasonably sure that before long there will be lots more litigation arising out of the raid and related issues.

Source: Associated Press

II. RECENT FILINGS AND SETTLEMENTS BY THE FIRM

RECENTLY FILED PRODUCTS CASES

Our firm filed two significant product liability cases recently. The first case was filed by Greg Allen and involves a single vehicle car accident. The second case, filed by J.P. Sawyer, arises in the context of a workplace injury. Both cases highlight two product liability areas that lawyers have often overlooked when evaluating potential claims. I will discuss each case below.

LAWSUIT FILED AGAINST FORD AND FIRESTONE

We represent the parents of a young girl who was tragically killed when the 1997 Mercury Mountaineer in which she was a passenger, rolled over as a result of the detreading of a recalled Firestone tire. The Mercury Mountaineer is the sister vehicle of the Ford Explorer. Unfortunately, it is a tragedy that we have seen repeated far too often. In this case, the tire that detreaded was a spare tire that had never been used. It looked practically brand new with very few miles on it. The spare tire was an OEM tire, that is, it came on the truck when it was first placed on the market by Ford back in 1997. The tire detreaded within a few weeks of being placed on the truck.

This was an avoidable tragedy. Ford and Firestone failed to notify the owner of the vehicle that the defective tire had been recalled. Further, there are defects in Ford's design of its Mountaineer/Explorer that makes the vehicle uncontrollable and unstable when a detread occurs. The problems with Ford's

design of this vehicle and the problem with the Firestone tires have been well documented for almost a decade. It is truly tragic that, even after Congressional hearings and legislation, almost ten years later we are still seeing deaths and severe injuries still occurring as a result of the Ford and Firestone's defective trucks and tires. Greg Allen will be the lead lawyer in this case.

LAWSUIT FILED IN DEATH CAUSED AT WORK

Our firm recently filed a product liability lawsuit against the manufacturer of a metal shredding machine. In this tragic case, we represent the family of a man who was killed while performing the job he had been contracted to do by a metal recycling business. This young man, who performed routine maintenance on the machine, was required to enter the metal grinding machine through an access door in order to perform service and cleaning of the machine. On this particular day, the man entered the machine to perform the maintenance. While in the machine, a co-worker turned on the metal shredder. As a result, the man was instantly killed.

After the accident, OSHA cited several of the Defendants with more than 20 different violations. His death could have been easily avoided by the manufacturer if the machine had been equipped with an interlock device. An interlock device would have prevented the metal grinder from being energized while the man was in the machine performing the maintenance. Interlock devices have been around since 1930s and are relatively inexpensive. They are commonly used by manufacturers as a safety device to prevent the exact type of accident that resulted in this young man's death. This appears to be another example of a manufacturer putting profits over

safety. J.P. Sawyer will be the lead lawyer in this case.

MORE ON THE BALLENGER CASE

Our firm is continuing to work on the case filed against Sikorsky Aircraft Corporation arising out of the death of Thomas Ballenger. We have learned from our investigation of the January 4th helicopter crash near Morgan City, Louisiana, involving a Sikorsky S-76C++ helicopter, that there are other parties that share responsibility for the fatal crash. During the first of two examinations of the wreckage layout in Louisiana, a bird specialist with the U.S. Department of Agriculture examined the helicopter for evidence of a bird strike. DNA testing done by the Smithsonian Institute Feather Identification Lab revealed that remains of a hawk were found on the windshield. Also, remnants of a bird strike were found in the windshield seal. The ongoing investigation has pointed to a failure of the helicopter's aftermarket windshield and composite center post. We believe that the windshield was not airworthy for use in this helicopter because it was not designed to withstand a foreseeable bird strike at the helicopter's cruising speed.

The original production laminated glass windshields from the helicopter had been removed and replaced with an aftermarket acrylic windshield. These aftermarket windshields were designed, manufactured, and sold by Tennessee-based Aeronautical Associates, Inc., a division of Edwards Aircraft Corporation, and a subsidiary of Bell Helicopter Textron, Inc. We have brought these additional parties into the case that was filed in the Federal District Court located in Montgomery, Alabama. It's significant that Sikorsky has issued a warning that these aftermarket acrylic windshields should not be used with the S-76C++. I, along with Greg Allen and Chris Glover from our firm, am handling this case. We are working closely with Jim Calton, Sr. and Jim Calton, Jr., lawyers from Eufaula, Ala., who are involved with us in this case.

LAWSUIT FILED FOR PROPERTY OWNER AFFECTED BY FUEL LEAK

On March 19, 2009, we filed suit in the Circuit Court of Tuscaloosa County, Ala., on behalf of Susan Turner for damages to her property, incurred as a result of a leaking underground storage tank. Defendants include Chatham Oil Company, Inc., and Alabama Underground and Aboveground Storage Tank Trust Fund. The lawsuit alleges an underground storage tank located at Speedmart Fuel Center in Tuscaloosa, owned by Chatham Oil Company, Inc., incurred a leak, releasing gasoline and related products, contaminating the soil and groundwater on the property. In August 2007, Mrs. Turner noticed a strong odor of gasoline on her property, and saw a gasoline sheen on surface water on her property.

After testing by the Alabama Department of Environmental Management (ADEM), it was determined that gasoline has contaminated the soil, surface water and groundwater. Soil samples also indicate the presence of hazardous materials such as Benzene, Ethyl Benzene, Xylene and MTBE, in quantities that exceed the allowable Maximum Contaminant Level (MCL).

The Defendants had a duty to make sure that petroleum products stored in the underground storage tanks were secure. They also had a duty to adequately install, monitor, inspect, test, evaluate, assess, repair and maintain the UST, which they failed to do. Defendants are responsible in damages under the theories of negligence, wantonness, trespass, nuisance and strict liability. Alyce Roberston, Rhon Jones and Chris Boutwell will handle this case for our client.

According to the U.S. Environmental Protection Agency, there are about 625,000 underground storage tanks nationwide that store petroleum or other hazardous substances. According to EPA regulations, it is the responsibility of an owner or operator of an underground storage tank system to take immediate action to stop the release of petroleum or other hazardous substances from the UST and to ensure there is no threat to the safety

of people located in the area of the release. Studies indicate that one gallon of petroleum can contaminate one million gallons of water, and that one pin-prick size hole in an UST can leak 400 gallons of fuel per year. Gasoline, leaking from service stations, is one of the most common sources of ground-water pollution. For more information, visit www.leaking-storage-tank.com.

LAWSUIT FILED AGAINST MAKERS OF PERMAX

Our firm represents a Florida woman who suffered congestive heart failure (CHF), resulting in a heart valve replacement. We filed suit on her behalf against the makers and distributors of the drug Permax (generically known as pergolide mesylate). Permax was used to manage tremors and slowness of movement associated with Parkinson's disease or Restless Leg Syndrome. During the entire time that Permax was on the market, various drug companies have been responsible for manufacturing or promoting the drug, including Eli Lilly & Company, Athena Neurosciences, Elan Pharmaceuticals, Amarin Pharmaceuticals, and Valeant Pharmaceuticals. The makers of the generic versions of the drug were Par, Teva, and Ivax Pharmaceuticals, respectively. On March 27, 2007, Permax was removed from the market because of the risk of serious damage to patients' mitral, aortic, and tricuspid heart valves.

The drug companies mentioned above defectively manufactured and sold Permax despite their knowledge of the risks associated with the drug. After taking Permax consistently for over four years, our client developed CHF, which led to a mitral valve replacement. She also developed severe tricuspid regurgitation due to her ingestion of the drug.

Early studies reviewing the side effects of Permax revealed that this drug was linked to an increased risk of valvular heart disease. Subsequent studies confirmed that patients taking Permax were 7.1 times more likely to develop heart damage, compared to patients taking other alternative drugs. The medical studies and scientific liter-

ature were consistent with the injuries that our client sustained and demonstrate that these drug companies knew or reasonably should have known of the increased risk of valvular heart disease associated with Permax. Consequently, proper and adequate warnings of that risk were not provided to our client, her doctors or the medical community by these drug companies.

The suit, filed in a Florida state court, is one of a number of cases that have been filed around the country alleging similar facts and injuries against the makers of Permax. The drug companies have taken the position in the lawsuit that they are not responsible for her injuries and have filed motions to dismiss her claims. This suit also is typical of other lawsuits where patients were injured by prescription drugs that had been approved by the Food and Drug Administration, but later had to be removed from the market because of the danger the drugs posed to the public. Navan Ward, a lawyer in our Mass Torts Section, is the lead lawyer in the Florida case. I, along with Andy Birchfield, will also be involved in the case.

SETTLEMENT OF AN INDUSTRIAL MACHINERY ACCIDENT

We have discussed the dangers associated with working with industrial machinery in past issues of the *Report*. It's well documented that machine-related accidents can lead to serious bodily injury and even death. We recently resolved a case for our clients, Mr. and Mrs. Dexter Wilson, involving industrial machinery. Mr. Wilson lost his left leg in an on-the-job accident. When Mr. Wilson originally sought assistance from a lawyer with his Workers' Compensation claim, the lawyer discovered that his client had been injured by a chain drag system. He then referred the case to our firm to determine whether Mr. Wilson had a viable product liability claim against the machine manufacturer. After determining the machine was responsible for the man's injury, we filed suit against three manufacturing Defendants and recently settled the case favorably for our clients.

Mr. Wilson was employed with Mead-

WestVaco in Russell County, Alabama. MeadWestVaco processes logs at its facility, using a combination of log decks, step feeders and conveyors to move the logs through the process. Logs are loaded onto the log decks which move the logs to the step feeder. The step feeder then separates and transfers the logs onto the conveyor for finishing down the line. The step feeder and log deck are connected as part of the process. The step feeder in question was installed in 2005. Immediately after installation, the MeadWestVaco employees noticed a buildup of bark and wood chips under the step feeder. The debris pile eventually affected the operation of the step feeder. The manufacturer of the step feeder knew about the problem of debris falling below its machine, yet it took no steps to eliminate or guard against the foreseeable hazard. Both the step feeder and the log deck have moving chains and other parts below the respective machines. The problem required MeadWestVaco to shut the process down, and an employee would have to go under the step feeder as many as four times daily to remove the debris.

MeadWestVaco hired another entity to build a chain drag system to assist in removing the debris from below the step feeder. The chain drag system would not remove all of the debris; however, it reduced the number of times employees were required to clean below the machine. The chain drag system was installed without guarding and without interlocks that would automatically turn the machine off when the area was accessed. On August 24, 2005, Mr. Wilson was cleaning below the step feeder using an air hose. The chain drag caught his pants leg and pulled him into the system. Mr. Wilson was trapped below the machine for as long as 45 minutes bleeding and helpless because no one could see him or hear him under the machine. His leg was severely injured requiring a below-the-knee amputation.

We filed suit under the Alabama Extended Manufacturer's Liability Doctrine alleging the machine was defective and unreasonably dangerous because a foreseeable hazard was not

eliminated or guarded against. Initially, the manufacturers of the step feeder and the chain drag system denied liability. In reality, both were responsible for Mr. Wilson's injury. Our client's life is forever changed as he will have to adjust to life without his leg. He can no longer perform his job and is forever disfigured physically and is emotionally scarred. After a year of litigation we were able to reach a confidential settlement with the Defendants. The lawsuit could not make Mr. Wilson whole, nor could it give Mrs. Wilson the husband she had before the injury. But the settlement will provide our client's with adequate compensation for their pain, suffering and inconvenience. Additionally, it will replace Mr. Wilson's income until he can learn and be trained for a new vocation. Kendall Dunson handled the case, along with Ben Finley, an Atlanta lawyer, and they did an outstanding job.

III. LEGISLATIVE HAPPENINGS

FOUR SPECIAL ELECTIONS FOR LEGISLATIVE SEATS

Special elections will result in there being four new faces in the Alabama Legislature. This is the result of vacancies having been created in Legislative seats in both the House and Senate. Until these races are over, the people in the affected districts won't have a representative filling those important seats in the Legislature. I will briefly mention each race below.

THE DISTRICT SEVEN SENATE RACE

A new member of the Senate will soon be elected in the 7th Senatorial District. The primaries held in both parties are now in progress. State Representative Laura Hall won an easy victory in the Democratic primary last month. She took about 80% of the vote against her

opponent. In the Republican primary, Sam Givhan, a Huntsville lawyer, led but will have to face a runoff. There were six Republican candidates in the contest to succeed Democrat Parker Griffith, who won a Congressional seat last November. Givhan, the biggest fundraiser in the field, received 30% of the vote in the GOP primary. Restaurateur Paul Sanford was second with 23%, and Mary Scott Hunter, another lawyer, was third at 22%. The runoff is scheduled for April 21st, with the general election set for June 9th. It's too bad the folks in District 7 won't have a Senator in the current session, but help is on the way for future sessions.

Source: Associated Press

THE OTHER RACES

There will be three other special elections to be held to fill vacant seats in the 22nd and 19th Senate Districts and in the House District 6 Seat. In Senate District 22, which was vacated by Pat Lindsey, special primary elections will be held on April 14th with a runoff in the Republican primary—if necessary—on June 2nd. The candidates are: on the Democratic side Rep. Marc Keahey; and on the Republican ticket Geg Albritton, Judy Belk and Danny Joyner. The party nominees will face off on July 21st which means the citizens in that district, as in the others, won't be represented in the Senate in the current session.

In Senate District 19, which was vacated when then-Senator E. B. McClain was convicted of a crime in a Birmingham court, the primary will be on May 12th with a runoff if necessary on June 30th. The Democratic candidates are Louise Alexander; Rep. Merika Coleman; Rep. Priscilla Dunn; Eric Major; Lawrence McAdory; Nathan Reed; Rep. Rod Scott; and Madilyn Southern. I suspect with all of these good candidates, a run-off is likely. There is no Republican candidate so

even though a general election date was announced, the survivor amongst the Democrats will be the new Senator.

A special election will be held in House District 6, which became vacant as the result of another criminal conviction. Qualifying for this seat ended on April 3rd but the names weren't available to us when we sent this issue to the printer. The primaries will be held on May 26th with the run offs, if necessary, on July 14th. The general election will be on September 1st.

Source: Associated Press

A GOOD BILL THAT WILL BENEFIT MEDICAID

Senator Roger Bedford has introduced a bill (SB 468) that if passed would help the Alabama Medicaid Agency put a stop to the fraudulent practices of the drug manufacturers relating to their reporting of false prices for drugs. The bill, which would provide penalties for cheating the Medicaid agency in Alabama, covers fraudulent practices of pharmaceutical providers of medicines and pharmaceuticals to the program.

The bill provides that, in addition to any other penalty, fine, or sanction that applies to pharmaceutical providers which defraud the agency by deliberately furnishing false prices for pharmaceuticals, the drug manufacturers would be liable for a per transaction penalty of not less than \$100 nor more than \$15,000 per transaction, which shall be paid to the State General Fund.

This is a good bill and it should be passed and signed into law. But I understand the drug manufacturers have hired every available lobbyist in an effort to defeat the bill. Even if Roger's bill doesn't pass, he has certainly helped the capital city's economy.

BOAT WRECKS SHOULD BE TREATED LIKE CAR WRECKS

A bill in the Alabama House of Representatives—if passed—would treat fatal boating accidents involving alcoholic beverages the same as fatal traffic accidents where the driver of one of the vehicles was driving under the influ-

ence. The House Judiciary Committee has approved the bill sponsored by Rep. Barry Mask of Wetumpka. Rep. Mask said the bill was inspired by fatal boating accidents in recent years on Lake Jordan and Lake Martin.

According to Elmore County District Attorney Randall Houston, the bill would set the same penalties for fatal boating accidents where drinking is a contributing factor as for traffic accidents. He says the bill is needed because of the large number of boaters on Alabama lakes and the speed of boats operating on waterways. Our firm has handled a number of cases on Lake Martin primarily where drunk boat operators were involved in incidents resulting in serious injuries and fatalities. We are currently handling one such case where deaths are involved in an accident caused by a drunk driver. Hopefully this bill will be passed and be signed into law by Governor Riley.

Source: Associated Press

STEEL COIL TRANSPORT BILL BECOMES LAW

The Alabama House gave final approval by a 94-0 vote last month to a bill that regulates the transport of steel coils on state roads. Governor Riley has signed the bill into law. Rep. Paul DeMarco, R-Homewood, the bill sponsor, said that coils will not fall off the trucks when trucking companies follow the regulations. It's obvious this legislation was badly needed and its passage will help save lives. The new law will boost the maximum fine from \$2,000 to \$10,000 and increase the maximum punishment from 30 days in jail to one year in jail. Drivers will be required to be certified by the state Department of Public Safety to haul the coils. This legislation, along with strong enforcement by the Department of Public Safety, should prevent any future loss of life or injuries on our highways caused by steel coils falling off of trucks.

Coils have broken free from tractor-trailers on Alabama highways with more than a dozen such occurrences happening in Jefferson County alone in the past five years. Fortunately, there have been no deaths from the rolling coils, which can weigh as much as

46,000 pounds, but there has been one recorded injury. Significantly, the cost to repair highways, according to media reports, has been at least \$7.5 million. DPS truck inspectors found numerous violations by steel haulers on Birmingham-area interstates over the last three months. Since the new law will impose tougher fines against truck drivers and companies if they fail to secure coils to trucks it should have a good effect. As mentioned above, the law also calls for extensive training to drivers and company officials on how to properly secure the coils. I commend Rep. DeMarco and his colleagues—along with Governor Riley—for getting this bill passed.

Source: Birmingham News and Associated Press

IV. COURT WATCH

ALABAMA HOUSE PANEL VOTES AGAINST TWO GOOD BILLS

A House committee in the Alabama Legislature has voted—mostly along party lines—to defeat two bills that would have taken partisan politics out of judicial elections. On March 25th the House Constitution and Elections Committee defeated a bill on a 6-5 vote that would have required candidates for judicial positions to run in nonpartisan elections. The committee also defeated, on a 5-5 vote, a bill to limit the amount of money candidates for appellate judge positions can receive in campaign contributions. Both bills were supported by Alabama Chief Justice Sue Bell Cobb, who has consistently said that Alabama residents want politics taken out of the process of selecting judges. I believe the Chief Justice is correct on that point.

The votes on the bills were along party lines, with Republicans voting against nonpartisan elections and against limiting campaign contributions. Democrats supported the bills but failed in their efforts. It will be difficult for those opposing these bills—especially the second one—to explain to folks back home why they voted against them. Alabama citizens want

judges who are independent and fair and with no financial ties directly or indirectly to any political party or to any politically motivated group. Hopefully, there will be an effort to bring these bills up again and pass them.

Source: Associated Press and Birmingham News

THE RIGHT TO TRIAL BY JURY MUST BE PRESERVED

The civil jury system in our country was under constant and intense attack during all of the years of the Bush Administration. Their blatant attempts to protect wrongdoers in Corporate America were beyond comprehension. It soon became apparent that the jury system was in danger of being destroyed and the right to trial by jury in America taken away. While there had been attacks before Karl Rove and his gang actually took over the federal government, the attacks greatly intensified under Rove's direction once he got to Washington. As a result, the protections intended to be afforded by the Seventh Amendment to the U.S. Constitution were being systematically dismantled. Without a doubt, the carefully-constructed plan was to protect and benefit the bad guys in corporate America and to penalize innocent victims.

The jury system has been recognized as essential to a free people and over the years has stood the test of time. The following are examples of what some historically significant figures have said on the importance of the right to trial by jury.

The jury system has come to stand for all we mean by English justice, for as long as every case must be scrutinized by twelve honest men and women, both the Plaintiff and the Defendant alike have a safeguard from arbitrary perversion of the law.

Winston Churchill (1956)

Freedom of religion; freedom of the press, and freedom of the person under the protection of habeas corpus, and trial by juries impartially selected. These principles form the bright constellation

which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages and the blood of our heroes have been devoted to their attainment. They should be the creed of our political faith.

Thomas Jefferson (1801)

Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.

James Madison (1789)

Trial by jury is the best appendage of freedom by which our ancestors have secured their lives and property. I hope we shall never be induced to part with that excellent mode of trial.

Patrick Henry of Virginia (1788)

Those words of wisdom, meant not only for their respective generations, but more importantly, for those to come, are right on target. Hopefully, at least most of our present day leaders share those convictions. I am convinced that the new administration in Washington believes that the jury system is important and is worthy of being saved and that should give all of us hope for the future.

Unfortunately, the judiciary, state lawmakers, and members of Congress have been parties—some willingly and some not—to the well-financed movement designed to destroy the jury system. It's not surprising that the public has been pretty much oblivious to what has been happening. Some of the very citizens for whose benefit those inalienable rights were provided have even bought into the myth of tort reform after hearing all of the stories about how "broken" the jury system had become and how it needed to be "reformed." Many have forgotten how vitally important trial by jury in this country has been for ordinary folks over the years.

Those who want to destroy the system have spent hundreds of millions of dollars financing political campaigns and have utilized slick public relations

efforts along the way. Many citizens haven't realized that their rights are being trampled or were actually in danger of being lost. As part of the Rove-devised plan, we have seen such things as mandatory, binding arbitration in every conceivable consumer transaction replace the courts as a place for a consumer to take a dispute for resolution and justice. We have also seen federal preemption—pushed by the Bush Administration—being effectively used. This is a concept that, unless checked, would allow the manufacturers of defective and dangerous products to get away with obvious wrongdoing, leaving no place for an injured person to go for relief.

We can't assume that all is well and become complacent just because a new Administration is in power in our Nation's Capitol. Many of us have been in the trenches and have fought a good fight. Those who haven't been involved, however, must now get involved in the fight to preserve the right to trial by jury. None of us can afford to sit this battle out and hope that others will do the job for us. It's not too late to reverse the trends that have developed during the Bush-Cheney-Rove years, but in order to make things right members of Congress must have the courage to say no to powerful corporate lobbyists. It will also require a judiciary free from special interest control. My prayer for America's well-being is that the right to trial by jury—the cornerstone of liberty and justice for all citizens—is now safe and secure.

A LOOK AT SOME IMPORTANT CASES FROM THE U.S. SUPREME COURT

There have been a number of extremely important cases coming down from the U.S. Supreme Court in recent weeks. The following are a few of them.

U.S. SUPREME COURT REJECTS LIMITS ON DRUG LAWSUITS

The U.S. Supreme Court has upheld a \$6.7 million jury award to Diana

Levine, a musician who lost her arm because of a botched injection of an anti-nausea medication. The court in its 6-3 decision rejected a plea by Wyeth Pharmaceuticals for limiting lawsuits against drug makers. The claim by Wyeth that federal approval of its Phenergan anti-nausea drug should have shielded the company from lawsuits like the one filed by Ms. Levine had no merit and in the high court was correct in its ruling.

The decision is the second during the high court's current term to reject business groups' arguments that federal regulation effectively pre-empts consumer complaints under state law. In the Levine case a Vermont jury agreed with her claim that Wyeth failed to provide a strong and clear warning about the risks of quickly injecting the drug into a vein, a method called IV push. Gangrene is almost a certainty if the injection accidentally hits an artery—and that's exactly what happened to Ms. Levine. This courageous woman, once a professional guitar and piano player, now plays with one hand and sings. She displayed tremendous courage and tenacity in taking on the powerful pharmaceutical industry.

Wyeth appealed the jury's verdict and, backed by the Bush Administration and powerful forces from Corporate America, argued that once a drug's warning label gets approval from the Food and Drug Administration, the label can't be changed without further FDA approval. Wyeth contended that consumers cannot pursue state law claims when they are harmed by the product. Justice John Paul Stevens, writing the majority opinion, said Wyeth could "unilaterally strengthen its warning." Justice Stevens was persuaded that until a recent change by the FDA, the agency "traditionally regarded state law as a complementary form of drug regulation" because it monitors 11,000 drugs. Justice Clarence Thomas agreed with the outcome

of the case and wrote a concurring opinion. Justice Samuel Alito wrote a dissent that was joined by Chief Justice John Roberts and Justice Antonin Scalia, which really came as no surprise.

The FDA has approved the use of Phenergan by injection, including the method at issue in the Levine case. The drug has been available for decades to treat nausea and when used properly, both sides agree it is safe and effective. The Bush administration and business groups aggressively pushed limits on lawsuits through the doctrine of preemption—asserting the primacy of federal regulation over rules that might differ from state to state. The Supreme Court agreed in an isolated and quite different case on its facts, ruling last term that FDA approval shields **medical devices** from most lawsuits. That case turned on a provision of federal law prohibiting states from imposing their own requirements on the devices.

The Levine case was important to consumers because the Bush Administration and Wyeth contended that, although the federal Food, Drug and Cosmetic Act lacks a similar provision, drug manufacturers also are protected from lawsuits involving federally approved drugs. Justice Stevens said there could be circumstances where consumer lawsuits would not be allowed, including if the FDA had considered and rejected a stronger warning label. But that was not the case with Phenergan the Justice wrote. He pointed out that the Justices had discussed that the FDA did not consider and reject a stronger warning against IV-push injection of Phenergan. Obviously, the result in the Levine case was important, not only to Ms. Levine, but to every single American citizen. It followed exactly how the FDA had interpreted the law for years prior to the Bush Administration forcing it to change its well-established position.

THE LEVINE RULING WILL HAVE AN IMPACT BEYOND DRUG FIRMS

The Supreme Court's ruling in the Wyeth case will affect a great number of pharmaceutical-industry cases, ranging from antidepressants to hormone-replacement therapy. Fortunately for the American people, the decision will have an effect outside the drug cases. It will help to undo the edifice of federal regulation built up during the eight years of the Bush Administration which were totally anti-consumer. The Bush gang worked very hard in its efforts to shield federally-regulated products from state court lawsuits. As stated above, Wyeth got strong backing from the Bush Administration in the Levine case. Fortunately for consumers the high court followed the law.

The White House strategy to preempt state laws, which got under way in 2001, used agency regulations as a way to sidestep Congress. The policy had strong backing from the U.S. Chamber of Commerce and its tort reform arm, the Institute for Legal Reform. Years of precedent relating to federal preemption were totally ignored by the Bush Administration and its allies. The Bush Administration inserted preemption language into 50 different regulations from agencies including the National Highway Traffic Safety Administration, the Federal Drug Administration, the Federal Railroad Administration, the Pipeline and Hazardous Materials Safety Administration, and the Product Safety Commission. Had the Supreme Court failed to put a stop to this madness, American consumers would have been without any real remedies for relief against those wrongdoers in Corporate America whose defective and unreasonably dangerous products hurt them.

Source: *Wall Street Journal*

SUPREME COURT REJECTS AGENT ORANGE CASES

The U.S. Supreme Court has turned down American and Vietnamese victims of Agent Orange who wanted to pursue lawsuits against companies that made the toxic chemical defoliant used in the Vietnam War. The justices, without an opinion, rejected appeals in three separate cases. The ruling was in favor of Dow Chemical, Monsanto and other companies that made Agent Orange and other herbicides used by the military in Vietnam. Agent Orange has been linked to cancer, diabetes and birth defects among Vietnamese soldiers and civilians and American veterans.

The American Plaintiffs blame their cancer on exposure to Agent Orange during their military service in Vietnam. The Vietnamese who filed suits said the sustained program by the United States to prevent the enemy from using vegetation for cover and sustenance caused miscarriages, birth defects, breast cancer, ovarian tumors, lung cancer, Hodgkin's disease and prostate tumors. All three cases had been dismissed by the 2nd U.S. Circuit Court of Appeals in New York.

The appeals court said that lawsuit brought by the Vietnamese Plaintiffs could not go forward because Agent Orange was used to protect U.S. troops against ambush and not as a weapon of war against human populations. The other two suits were filed by U.S. veterans who got sick too late to claim a portion of the \$180 million settlement with makers of the chemical in 1984. In 2006, the Supreme Court deadlocked 4-4 on whether those lawsuits could proceed. The 2nd Circuit judges ultimately said no in all cases. In one case, the court said companies are shielded from lawsuits brought by U.S. military veterans or their relatives because the law protects government contractors in certain circumstances who

provide defective products. In the third suit, the Appeals Court ruled that the companies could transfer claims from state to federal courts.

Source: *Associated Press*

THE NRA WINS AGAIN

The U.S. Supreme Court has turned away requests by New York City and gun violence victims to hold the firearms industry responsible for selling guns that could end up in illegal markets. The Justices' decision puts an end to lawsuits first filed in 2000. Federal appeals courts in New York and Washington threw out the complaints after Congress passed a law in 2005 giving the gun industry broad immunity against such lawsuits.

It should be noted that the city's lawsuit asked for no monetary damages. Instead, it had sought a court order for gun makers to more closely monitor those dealers who frequently sell guns later used to commit crimes. But the 2nd U.S. Circuit Court of Appeals ruled that federal law provides the gun industry with broad immunity from lawsuits brought by crime victims and violence-plagued cities. The Supreme Court refused to reconsider that decision.

The lawsuit was first brought by the city in June 2000 while Rudy Giuliani was mayor. It was delayed due to the September 11, 2001 terrorist attacks on the World Trade Center and because of similar litigation in the state courts. The city refiled the lawsuit in January 2004, saying manufacturers let handguns reach illegal markets at gun shows in which non-licensed people can sell to other private citizens; through private sales in which background checks are not required; by oversupplying markets where gun regulations are lax; and by having poor overall security.

The city took the position that a state nuisance law makes it a crime

to knowingly or recklessly create a condition endangering the safety or health of a considerable number of people. But the federal appeals court said New York's law does not qualify as an exception to federal law. It agreed with a U.S. District Judge who said that the Protection of Lawful Commerce in Arms Act, which became law in 2005, is constitutional. The U.S. Supreme Court simply refused to take the case when the city sought relief. While the NRA wasn't a party to this case, its power and influence played a definite role since the act in question was pushed through Congress by the gun lobby.

As a gun owner, who believes both in the Constitution and in the right of an individual to own a gun, I must confess that the easy availability of "assault rifles" for sale in this country bothers me. With all of the mass murders recently—where assault rifles were involved—perhaps Congress should take action to at least address that issue. Even though I have been a hunter for years, I have never seen anybody use an assault rifle on any type hunt that I was on.

Source: *Associated Press*

SUPREME COURT SIDES WITH CONSUMER IN DISPUTE WITH CREDIT CARD COMPANY

The U.S. Supreme Court has ruled that consumers can resist credit card companies' push to move their disputes over finance charges and late fees to arbitration. The justices voted 5-4 in favor of Betty Vaden in her dispute with Discover Bank. Discover sued Ms. Vaden in Maryland state court in 2003, claiming she hadn't paid more than \$10,000 that was owed on her account. The woman then filed a class-action counterclaim in the case, saying the company's finance charges and late fees violated state law. The bank then asked a federal court to force Ms. Vaden into arbitration over her claim.

But Justice Ruth Bader Ginsburg, writing for the majority, said state courts sometimes are the proper place for such lawsuits. She wrote: "Here, the controversy between Discover and Vaden was triggered by Discover's garden-variety, state-law debt-collection claim against Vaden." Most credit card customer service agreements require disputes over charges to be resolved by way of mandatory binding arbitration. They claim it's cheaper and faster than a lawsuit which is not true.

A study by the Public Citizen consumer advocacy group found that arbitrators often rule in favor of the credit card companies, which came as no surprise. In this case, the issue was whether a federal court could step into what had been a state court lawsuit to order the parties into arbitration. This is a good decision by the Supreme Court and hopefully is a sign that at least five justices recognize that arbitration is not such a good thing for consumers.

Source: *Associated Press*

HIGH COURT TO DECIDE WHEN JUDGES SHOULD STEP ASIDE

The case we have mentioned in a previous issue, relating to when elected judges must step aside from cases in which there would be at least an appearance of bias if they took part, has now been argued in the U.S. Supreme Court. The issue is whether judges in such cases should be allowed to hear these cases. During lively arguments in the closely-watched case from West Virginia, five justices expressed support for a ruling that the Constitution's guarantee of a fair trial could require judges not to participate in a case in which there was a likelihood of bias. Interestingly, the groups who are supporting a ruling in favor of the judge are those who also have supported tort reform.

Judges are elected in 39 states and candidates for the highest state courts have raised more than \$168 million

since 2000, according to Justice at Stake, which tracks campaign spending in judicial elections. The losing party in the West Virginia case, Harman Mining Corp., and its president, Hugh Caperton, asked the justices on the high court to rule that the judge in question's refusal to step aside from the case violated their constitutional right to due process. They argued that several factors combine to create an "overwhelming probability" that the judge in question would not be impartial, including the size of the campaign support and the fact that it represented more than half the money spent on his behalf. Interestingly, the money mostly went to an independent group that ran television ads against the judge's opponent. That sure does sound like a tactic used in Alabama by groups which have spent millions in our state's Supreme Court elections.

In addition, the judge in West Virginia made the decision to remain on the case by himself, not subject to review by his fellow justices. Other states, but not the U.S. Supreme Court, let the whole court review recusal decisions. This case is being closely watched by former judges and interest groups on both sides of the debate over campaign contributions. Hopefully, Congress will get the message—regardless of how the case turns out—that campaign finance reform for all judicial races is needed.

Source: *Associated Press*

V. THE NATIONAL SCENE

EPA SAYS GLOBAL WARMING IS A PUBLIC DANGER

The Obama White House is reviewing a finding by the Environmental Protection Agency that global warming is a threat to public health and welfare. The EPA action is the first step to regulating carbon dioxide and other greenhouse gases under the Clean Air Act, a move that would have broad economic and environmental impacts. I understand that the agency's finding was sent to

the White House office of Management and Budget for review last month.

Two years ago the Supreme Court said that once greenhouse gases are found to endanger public health or welfare, they must then be regulated. But, as predicted at the time, the Bush administration refused to make such a finding. I am confident that the Obama Administration recognizes that global warming is a critically important concern that must be dealt with promptly and effectively. I am also confident that the issue will in fact be dealt with. It's in our nation's best interest to do so, without any doubt, and future generations will reap the benefits.

Source: *Associated Press*

THE RIGHT WING TRIES TO WIN BACK THE NATION

It certainly appears that the National Republican Party has literally been taken over by a small segment of the party and that Rush Limbaugh has clearly emerged as the party's leader. The thought of a person like Limbaugh in charge of anything of substance is a scary thought to say the least! But for him to actually take over a major political party in our country is more than just scary. Many are asking, how could this have happened? In my opinion, it happened because the GOP leadership shut ordinary folks out of their party over the past several years. While the national Republican Party has always been a party run by the elite, now it's totally controlled by right wing extremists.

Big Rush is telling everybody who will listen that he wants President Obama to fail and as a result, many Republicans, who are good and honorable citizens, are taking a second look at their party. It's obvious that Limbaugh is very unpopular among the voters that the GOP needs to reach. According to recent polling data, the talk-show host has an unfavorable rating, with 41% of the American people actually saying they dislike him. For obvious reasons, that number is much larger with women.

I have never understood why anybody listens to Limbaugh's ranting on his radio show. Nevertheless, he

does have a very large group of dedicated listeners. But I wonder how many of his listeners have ever checked out his background. In any event, the GOP has to figure out a way to rid itself of Big Rush and yet keep him at the same time. Obviously, that will be difficult—if not impossible!

NEWT GINGRICH BADLY WANTS TO BE PRESIDENT

President Obama is not yet two months into his term and already there's talk about who might run for the job in 2012. It appears that Newt Gingrich, the former Republican House speaker, badly wants to be president. According to sources in Washington, Gingrich is busy making contacts lining up support. Observers say Newt has even lost a few pounds. He was asked recently on "Meet the Press" whether he wanted to run for president in 2012 and his response was: "Not particularly." That comment was not only unusual, but it appears to have been a planned response designed to make folks talk. Indeed, it has created lots of talk around the country. Most seem to believe Gingrich is available to be a candidate—"if asked." While Newt is smart and appears to have organizational talents, I'm not sure he is the sort of person who could be a President for all Americans!

PRESIDENT OBAMA CREATES WOMEN'S PANEL

President Barack Obama has created a White House council to advise him on issues facing women and girls. In making the announcement, the President said the nation must work to make sure its daughters and granddaughters have every opportunity to succeed. He appears to have been motivated by his single mother raising his family and by his grandmother being denied promotions at her job. The President says his administration should help women facing challenges like that and I totally agree with him.

The President named senior adviser Valerie Jarrett to head the group.

Members of his Cabinet will serve with the panel as well. Tina Tchen will run its day-to-day operations. The announcement came as part of the Administration's push with Women's History Month. Significantly, this will be the first time that women are to have one entity working on problems unique to females.

Source: Associated Press

LAWSUITS ARISING OUT OF SEPTEMBER 11TH ATTACKS ARE SETTLED

Families of September 11th victims have settled 92 lawsuits for \$500 million. The settlements came during the mediation of 95 lawsuits. The mediation gave the families an opportunity to let the airlines know what they had been through on and after September 11th. It appears from media reports that the families let the airline representative know how "extraordinary their loved ones were," and "how angry they were at what had happened." Sheila Birnbaum, the court-appointed mediator, says the face-to-face encounters between individual families and airline or airline safety representatives were crucial to resolving at least 30 of the lawsuits brought on behalf of the victims.

Ninety-seven percent of the families of those killed in planes at the World Trade Center or at the Pentagon on September 11th chose to receive payments from a special fund established by Congress. The fund distributed more than \$7 billion to over 5,000 survivors. But 95 lawsuits on behalf of 96 victims were filed by those who refused to accept payment from the fund. The suits were filed on behalf of families whose loved ones were killed on planes that were hijacked by the terrorists. These three cases that weren't settled at mediation remain pending and no trial date has been set. In a report filed in Manhattan federal court, the mediator said that by the spring of 2006 about 70 cases remained unsettled. She said:

It became apparent that an obstacle to settling many cases was a desire by families to tell the story

of their loss or express feelings to the court or to tell the same to a representative of the airlines and to receive expressions of condolences from the airlines.

During a period of months the mediation sessions, lasting from minutes to hours, were arranged between individual families and the airlines at law firms in Washington, New York City and Boston. The meetings were described as being "very emotional" involving "moving experiences." After the meetings, many of the families were able to begin discussing compensation for their losses and as a result these settlements eventually resulted.

Source: Associated Press

WHISTLE-BLOWER LAWSUIT CLAIMS STATE RIPPED OFF FOR MILLIONS

A lawsuit filed by Hunter Laboratories LLC, a small Bay Area lab, alleges that seven companies, including medical testing giant Quest Diagnostics, have overcharged the State of California by more than 500% for some procedures. It's said this overbilling has cost the state hundreds of millions dollars. State Attorney General Jerry Brown revealed the details of the civil lawsuit at a news conference last month. The state launched its investigation three years ago into the alleged overbilling. The suit alleges that the state Medi-Cal program has been overcharged by the seven labs by as much as \$500 million over the last 15 years. Hospitals and doctors are alleged to have entered into agreements with large lab companies and benefited greatly at the expense of taxpayers.

Source: KTVU.com

HEALTHWAYS SETTLES WHISTLEBLOWER LAWSUIT

Healthways Inc. has settled a whistleblower lawsuit against the company. The lawsuit, filed 15 years ago by a former employee, is related to the Nashville-based disease management company's former Diabetes Treatment Center of America business. The settle-

ment, filed on behalf of the federal government, must be approved by the U.S. Department of Justice. The government did not intervene in the lawsuit which alleged that Diabetes Treatment illegally paid doctors for referrals. Under the settlement, if approved, Healthways will pay a total of \$40 million with the government getting \$28 million and the remaining \$12 million covering costs and fees.

Source: The Tennessean

FEDERAL WHISTLEBLOWERS MUST HAVE PROTECTION

Public Citizen has issued a call to arms in an effort to protect federal whistleblowers. Most folks working for the federal government are ordinary people, go to work day in and day out, and do their job. But many of them—when confronted with waste, fraud, recklessness about safety, or other abuses—make the extraordinary decision to risk their livelihoods to protect the public. The government is supposed to serve the public's best interest, but this is not always the case. Too often, corners are cut or resources are wasted, or worse. When that happens, government agencies are co-opted for political fights or private interests.

When scientific research is altered or suppressed, when government contractors waste millions of taxpayer dollars, or when national security documents are falsified, the innocent government employees who witness these acts should be free to blow the whistle on the wrongdoing without fear of retribution. When an employee blows the whistle on wrongful conduct that hurts taxpayers they must be protected from retaliation.

Public Citizen has been fighting to end retaliation against those who speak up against abuses and the unmistakable, chilling message that reprisals against whistleblowers sends to all employees that they should keep quiet, or else. Citizens from across the country are demanding better protection for all of the brave individuals who risk so much in serving the public good. We should all show our support for honesty and accountabil-

ity in government and take action now! You can do your part by letting your Senators and members of Congress know that federal whistleblowers must be protected.

Source: *Public Citizen*

AN UPDATE ON KBR'S PERFORMANCE IN IRAQ

The military is having to inspect more than 90,000 U.S.-run facilities in Iraq to reduce a deadly threat that troops face, and it is far off the battlefield. We have written in previous issues on the problems caused by KBR and the threat to our troops. The threat is electrocution or shock while showering or using appliances. As reported, at least three soldiers have been killed while showering since the invasion of Iraq in 2003. Many more have suffered shocks between September 2006 and July 2008, but survived. A database maintained by KBR Inc., the Houston-based contractor which oversees maintenance at most U.S. facilities in Iraq, revealed this tragic story.

Fortunately, an Army task force says it's making progress in dealing with the problem. About one-third of the inspections so far have turned up major electrical problems. Half of the problems they found have since been fixed, but about 65,000 facilities still need to be inspected. This could take the rest of this year. Our military was put in a war in Iraq that never should have been fought and they have bravely done their duty as soldiers. While there, our government had the duty to give them total support, and that support wasn't always provided. I fear that too many politically-connected companies profited in this war at the expense of U.S. taxpayers and in many instances our troops were put at risk. Having soldiers electrocuted because of sub-standard and shoddy work done by a company with political ties such as KBR can't be tolerated.

Source: *Associated Press*

VI. THE CORPORATE WORLD

THE PROBLEMS AT AMERICAN INTERNATIONAL GROUP

Based on all that has happened over the past six months, one could write a book on American International Group and the many problems this "insurance company" has caused to our nation and its people. AIG, which has been run by a group of greedy and perhaps incompetent individuals, has constantly been in the news and on the minds of the American people over the past several weeks. Due to time and space constraints, I am going to just hit the main areas of concern in this issue.

AIG MELTDOWN HAD ITS ROOTS IN THE GREENBERG ERA

As we all know, American International Group was in the news because of the company's role in the economic downturn of our nation's economy. We are learning a great deal about how this giant insurance company operated and how it took advantage of the federal government's regulatory schemes. Maurice "Hank" Greenberg built AIG into the world's largest insurance company, but during his tenure the giant insurer became a financial monster that was totally out of control. Greenberg left AIG in 2005 amid allegations he used off-balance sheet transactions to improperly boost profits. AIG posted a \$61.7 billion quarterly loss last month, the biggest in corporate history. A third bailout by the U.S. government was necessary to save the company. It certainly appears that Greenberg planted the seeds of the financial disaster that will cost taxpayers over \$180 billion. Greenberg's creation more than two decades ago of a financial products unit appears to have caused the bulk of AIG's massive losses. Obviously, he had to

have help to make things work for his then-company.

It's been reported that credit default swaps (CDS) held by AIG Financial Products have been the biggest driver of AIG's losses, which have exceeded \$100 billion over the past five quarters. Christopher Whalen, co-founder of Institutional Risk Analytics, which provides analysis and ratings to banks, made this observation:

The bottom line is that Hank Greenberg wandered out of the very safe, well-capitalized world of insurance into the surreal world of credit default swaps where you can create endless amount of risk.

In a most interesting development, Greenberg has filed suit against his former company for misrepresenting the risk of losses from credit default swaps held by AIG Financial Products. The lawsuit also named several individuals as Defendants, including Greenberg's successor Martin Sullivan and Joseph Cassano, the former chief of AIG's financial products unit, which originated many of the credit default swaps. In the suit, it is alleged that Greenberg was misled into buying stock at inflated prices. Greenberg claims he paid more taxes than he should have because of the inflated prices resulting in his overstating his income. Greenberg oversaw AIG's growth into a company spanning 130 countries and serving more than 70 million customers. But in 2005, an investigation by then-New York Attorney General Eliot Spitzer forced Greenberg out.

Source: *Reuters and Insurance Journal*

THE FEDERAL GOVERNMENT MUST CONTROL AIG'S OPERATORS

There was more wrong with American International Group, however, than just Hank Greenberg's involvement. President Obama is

absolutely correct in saying that AIG is in financial straits because of “recklessness and greed.” Reports surfaced in Mid-March that financially strapped AIG was paying about \$165 million in bonuses to executives. He is also on the right track in his efforts to stop AIG from paying out \$165 million in executive bonuses. The President, in letting the public know his intent, said:

It's hard to understand how derivative traders at AIG warranted any bonuses, much less \$165 million in extra pay. How do they justify this outrage to the taxpayers who are keeping the company afloat.

AIG should never have paid any bonuses to a group of executives who ran the company into the ground and certainly not \$165 million. Anybody who had anything to do with causing the largest corporate loss in history should be fired—not rewarded for their incompetence. The bulk of the payments at issue cover AIG Financial Products, the unit of the company that sold credit default swaps, the risky contracts mentioned above that caused massive losses for the insurer. Rewarding incompetence and perhaps even wrongdoing makes no sense and can't be tolerated.

It also was revealed that American International Group Inc. used more than \$90 billion in federal aid to pay out foreign and domestic banks, some of whom had received their own multibillion-dollar federal government bailouts. Some of the biggest recipients of the AIG money were Goldman Sachs at \$12.9 billion, and three European banks—France's Societe Generale at \$11.9 billion, Germany's Deutsche Bank at \$11.8 billion, and Britain's Barclays PLC at \$8.5 billion. Merrill Lynch, which also is undergoing federal scrutiny of its bonus plans, received \$6.8 billion

as of December 31st. The money went to banks to cover their losses on complex mortgage investments, as well as for collateral needed for other transactions.

Source: Associated Press

NEW YORK ATTORNEY GENERAL GETS INVOLVED

Perhaps the best news that I have heard relating to AIG is that New York Attorney General Andrew Cuomo is now after them. The Attorney General has subpoenaed information relating to the payment of bonuses. He will investigate whether the employees were involved in the insurance giant's near-collapse and whether the \$165 million in bonus payments are fraudulent under state law. The Attorney General's office issued subpoenas for the names and information about their work and contracts. In addition to the list of people set to receive bonuses, Cuomo wants details about who developed the bonus plans and a status report on whether payments have been made.

Source: Associated Press

U.S. HOUSE PASSES MEASURE TO RECOUP AIG BONUSES

The U.S. House of Representatives passed a bill on March 19th to recoup the bonuses paid to AIG employees. The House voted 328-93 to approve a 90% tax on bonuses for certain executives at companies that are getting taxpayer-financed help. Republican Senator Jon Kyl of Arizona, blocked an initial bid to approve a Senate version of the legislation that would put a 70% excise tax on bonuses for employees at companies that have received at least \$100 million in bailout aid. Senator Kyl said more study was needed.

President Obama urged lawmakers

to press on with measures that he can sign into law, calling AIG bonuses a symptom of “a bubble and bust economy that valued reckless speculation over responsibility and hard work.” I have concerns that the House bill is unconstitutional, but it does send a message to Corporate America. The American people are fed up with the greed and arrogance that have been displayed by all too many corporate executives.

Source: Insurance Journal

CORPORATE DIRECTORS MAY BE TAKING A SECOND LOOK AT SERVING

Over the years men and women would agree to serve on the boards of public-traded corporations without giving it a second thought. But the job of a director in today's climate has become decidedly less appealing for a number of reasons. The activities of directors are now being carefully scrutinized. Both the federal government and investors are paying more attention to directors' involvement in corporate decision-making. Before the current economic crisis, investors weren't as concerned about directors' involvement in corporate wrongdoing. But, they are now looking inside corporate boardrooms. They are demanding answers on why certain decisions were made or why more scrutiny and monitoring of corporate activities surrounding those decisions and the aftermath didn't happen. Many times directors have routinely approved what high-ranking officers or an executive committee of board members recommended.

The Sarbanes-Oxley Act of 2002 raised the standards for corporate governance and financial accountability at domestic public companies. That, in combination with the economic crisis, has put even more pressure on board members to account for their performance. Director liability for corporate malfeasance has become a major concern and rightfully so. It's being predicted by a number of legal experts that an increase in class-action lawsuits against companies and, in some cases, individual directors, is very likely

because of the economic meltdown and terrific investor losses. As a result of the liability exposure for corporate directors, many persons will elect to get off the boards. Another factor will be the influence the government will have—if any—in choosing new directors at companies such as Citigroup that have received bailout funds. It's always been my belief that a person should not serve on the board of directors of a large corporation when he or she is not involved in the day-to-day operations of the company. That belief is much stronger today!

Source: *Insurance Journal* and *Reuters*

MERCK HAS BEEN THE TARGET OF A FEDERAL INVESTIGATION

It's being reported in the national media that Merck & Co. is now officially "a target" of a grand jury investigation involving Vioxx. According to the reports, the investigation started in 2004. The company admitted that a letter from the U.S. Attorney's Office in Massachusetts stating the company was a target was received last month. While the investigation is said to involve activities in connection with Vioxx, I am not sure what all is being looked at. But, I believe it deals with alleged fraudulent conduct concerning the marketing of the painkiller and the concealment of information.

Source: *Associated Press*

ERNST & YOUNG SETTLES HEALTHSOUTH FRAUD SUIT

Ernst & Young LLP has agreed to pay \$109 million to HealthSouth Corp. shareholders who sued the firm for failing to detect an accounting fraud involving more than a dozen HealthSouth executives. The settlement, once approved by the court, will create a fund for investors. Rob Riley, a very good Birmingham lawyer, represented the Plaintiffs, and did an outstanding job. Rob says the settlement is a good one for investors who thought they would never see any return of their investment. U.S. District Judge Karon Bowdre was to hear the matter one day

after this issue went to the printer. I believe the judge will give the settlement her preliminary approval.

The proposed settlement would pay certified investors during the fraud period, but HealthSouth would get no part of the fund. The company has a separate lawsuit against Ernst & Young that is set for mediation later this year. The \$2.7 billion fraudulent accounting scheme took place from 1996 to 2002. Fifteen former HealthSouth officials pleaded guilty in the case. I understand one more corporate Defendant and Richard Scrushy remain as Defendants in the case.

Source: *Associated Press*

VII. CAMPAIGN FINANCE REFORM

NOTHING TO REPORT THIS MONTH

Congress and most all state legislative bodies have been so caught up with fiscal problems, caused by a huge lack of money, that campaign finance reform has been put on the back burner. As a result, there is nothing of consequence to report this month. Hopefully, that won't be the case for too long and we will have some good news to report on this front in the not too distant future.

VII. CONGRESSIONAL UPDATE

REGULATION OF OUR NATION'S FINANCIAL SYSTEM MUST BE CHANGED

Legislation is badly needed to overhaul how the federal government regulates the nation's financial system. Based on my limited knowledge, it appears there are several options available to lawmakers. Regardless of which route is taken, however, Congress must act swiftly to make future financial meltdowns less likely. Many experts are

questioning whether the Federal Reserve is the best vehicle to oversee a consolidated regulatory system. Some are even saying more regulation isn't needed, which is sort of hard to understand, considering that poor regulation helped create our economic mess. I call that the "ostrich approach."

I believe the goal of regulatory reform should be to create a systemic risk regulator responsible for monitoring financial markets and institutions. This is critical in order to head off the kind of risky practices that contributed to the economy's current problems. Regardless of what is done, restructuring the regulatory system must be a top priority for the Obama Administration and any proposed legislation should cover all important financial institutions not already subject to federal regulation, including insurance companies and hedge funds. All of the institutions must be regulated in the future. The plight of AIG is the best evidence of why regulation is essential.

It may be that a new entity, independent of all other existing agencies and entities, including the Federal Reserve, is needed. To be effective, such a new entity would have to be given the authority and power to really regulate. In the scheme of things, however, consumer protection must not be forgotten. There must be adequate protection for investors and consumers if our nation's economic future is to be truly sound. It goes without saying that companies like Fannie Mae and Freddie Mac—which are backed by the government—must be regulated and can't be allowed to take risks that private companies couldn't take. Hopefully, our national leaders have learned a good lesson—as painful as that learning process has been—from the mistakes of the past and will now do the right thing for the American people. Our future—as a powerful and influential leader on the international stage—depends on it!

MEDICAL DEVICE LEGISLATION INTRODUCED IN CONGRESS

If a bill passes in Congress, patients suffering injuries caused by defective

medical devices will be able to hold manufacturers accountable in state courts. The new legislation was introduced last month. The Medical Device Safety Act, sponsored by Senator Ted Kennedy in the Senate and by New Jersey Representative Frank Pallone and House Energy and Commerce Committee Chairman Henry Waxman in the House, would restore the right to seek justice for victims of faulty medical devices. These devices would include heart defibrillators, artificial valves, and prosthetic knees and hips. This legislation followed the Supreme Court's decision in *Wyeth v. Levine* that held that federal law does not preempt state law claims with regard to drug warning labels. That important decision was discussed in great detail in this issue. The Medical Device Safety Act is needed to restore the right to file suit in state courts to medical device patients.

Prompted by the United States Supreme Court decision last year in *Riegel v. Medtronic*, the legislation would re-establish that federal law governing medical device approvals does not "modify or otherwise affect" lawsuits brought in state courts. The *Riegel* decision held that manufacturers of class III medical devices that have been approved by the Food and Drug Administration's pre-market approval process are essentially immune from liability. That immunity could apply even in instances when a company actually knew that a device was defective and dangerous, and even when the device had been recalled. Linda Lipsen, Senior Vice President of Public Affairs for the American Association for Justice, observed:

You only have to look at these 1,496 individuals to see the real life effects of allowing negligent manufacturers to receive complete immunity for their hazardous products. The Medical Device Safety Act is an important step in restoring accountability to device manufacturers and protecting patients from defective devices that can harm and even kill consumers.

The Government Accountability Office (GAO) reported in January that

the FDA has failed for decades to comply with a Congressional mandate and rigorously review class III devices, the riskiest class of medical devices, as covered in *Riegel*. For example, in a recent five-year period, the FDA required only minimal testing before approving 228 class III, high-risk medical devices, including metal hip joints, defibrillators, and electrodes for pacemakers. Based on findings from its report, the GAO recommended the FDA either issue regulations to reclassify some medical devices or require the more stringent premarket review process.

Source: AAJ Release

A NUMBER OF SAFETY ISSUES MUST RECEIVE CONGRESSIONAL ATTENTION

During the eight years of the Bush Administration—when it comes to the regulation of the automobile industry and consumer products of all kinds—safety was pretty much put on the shelf. As a result, the American people were put at tremendous risk. The Obama Administration and Congress now have a joint responsibility to undo all of the bad that was done over the past eight years. One area where much work is needed is in motor vehicle safety and Congress has a duty to get to work in that arena. It was reported by the Consumer Federation of America that priorities focusing on improving vehicle safety should include:

- **Creation of a dynamic rollover standard:** To improve rollover crash avoidance and crashworthiness protections, the National Highway Traffic Safety Administration needs to set a standard based on a test that duplicates real-world crash forces.
- **Revamping of crash test information:** Updating the five-star rating system is also needed in order to better show the differences in the safety of new vehicles.
- **Requiring improved tire labeling and identification:** Placing clear and understandable information on tire sidewalls is needed to enable consumers to respond adequately to tire recalls.

Hopefully, the economic crisis that has affected every citizen and which has caused the president and Congress to focus their undivided attention in that direction, will soon be under control. Then other priority items—such as vehicle safety—can be dealt with.

Source: Consumer Federation of America

LIMITS SOUGHT ON MANDATORY ARBITRATION

As we have written on numerous occasions, in practically every contract for goods and services that a consumer is a party to there is a federal mandatory pre-dispute binding arbitration clause. As a result, if a person wants to obtain a credit card, enter a nursing home, purchase a car, or receive cell phone services, that individual must forfeit his or her constitutional right to go to court as a condition of obtaining that product or service. When a dispute arises about the product or service subject to the contract, a consumer is forced to enter a private, secretive, expensive, one-sided resolution system. But most consumers are either unaware that these clauses are in the contracts that they sign or they have no concept of the consequences of these clauses.

Over the years, Congress really hasn't done its job when it comes to dealing with consumer-related arbitration. The federal arbitration was never intended by Congress—either when it was passed or later—to apply to consumer disputes. Finally, members of Congress are beginning to wake up to the overall problem. Legislation was considered in the last Congress to prohibit pre-dispute, binding arbitration agreements if the agreement requires arbitration of:

- an employment, consumer, or franchise dispute; or
- a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

Bills were also introduced to ban use of arbitration clauses in specific agreements, such as in nursing home

contracts and automobile sales contracts. Unfortunately, none of these bills passed and became law. Despite success in raising awareness of the issues none of the legislation made it through Congress. The certainty of a Presidential veto had lots to do with the lack of progress in either chamber. With a new administration and increased Democratic majorities in both the House and Senate offering new opportunities for passage, however, these issues will receive renewed attention. All of our readers are encouraged to contact President Obama and their Senators and House members and ask for their full support.

Source: CFA News

TWO IMPORTANT BILLS DEALING WITH ARBITRATION SHOULD BE PASSED

As mentioned in this section, there are lots of important and badly-needed bills in Congress that affect consumers and which need attention. I am going to mention just two more of them at this juncture. These bills, dealing with arbitration, have been introduced in Congress. The following is a brief summary of each bill:

- **The Nursing Home Arbitration Act** was introduced in the House of Representatives by Rep. Linda Sanchez (HR 1237) and in the Senate by Sen. Mel Martinez (S. 512). These bills would prohibit binding mandatory arbitration agreements in nursing home contracts, safeguarding the legal rights of an all too vulnerable population. Meanwhile, Senators Herb Kohl and Lindsey Graham introduced S. 537, the Sunshine in Litigation Act, a bill to restrict protective orders and secrecy agreements in Federal cases where the result of such agreements would be to withhold public health and safety information from the public.
- Rep. Hank Johnson introduced HR 1020, **The Arbitration Fairness Act of 2009**. This bill will eliminate unfair binding mandatory arbitration contracts in consumer agreements. Hopefully, this bill will be passed

since it's badly needed by consumers.

Hopefully, each of these bills will pass in the current session. Consumers have had the short end of the stick in Washington for years and it's time for the corporate-dominance of the White House and Congress to end.

Source: AAJ Release

VIII. PRODUCT LIABILITY UPDATE

A SERIES HIGHLIGHTING OFTEN OVERLOOKED PRODUCT CLAIMS

Over the next few months, we will include a series of articles in the *Report* discussing product liability claims arising out of single vehicle accidents. As our lawyers in the firm's Personal Injury Section know, a product liability claim focuses on whether or not a product is defective. The purpose of this series will be to inform our readers of the different kinds of product liability claims that are out there on a recurring basis. In automobile cases, the defective product could be the entire vehicle, or it could be a component part such as the seat belt or tires. Unfortunately, the average motorist has no idea how unprotected he or she will be in a crash as a driver or passenger in a defective vehicle. Our lawyers are trained to recognize defect claims in motor vehicle accident cases and that's essential to representing clients in that field. Any single vehicle accident involving serious injury or death, including paralysis, loss of limb or brain damage, should be carefully analyzed for potential product liability claims. This week we will take a look at "roof crush" defects.

ROOF CRUSH

To protect occupants in a rollover, maintaining survival space is very important. Survival space is the space around an occupant that

remains free of intrusion in an accident. It is the area in which an occupant is able to "survive" the crash. A roof is part of the structural support of a vehicle and is therefore a critical component in keeping the occupant safe. If a roof crushes substantially during an accident, from a failure of the side rails, headers or support pillars, catastrophic injuries can occur. Often, this decreased survival space results in some portion of the vehicle impacting the occupant's head causing death, paralysis or brain damage. Sometimes, the occupant can even be partially ejected through an opening created during roof crush. In a single vehicle accident, where the roof of a vehicle deforms, crushes, or opens over the occupant's head by deforming sideways, there may be a roof crush defect.

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 struc-

tures 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.

Our firm routinely reviews all automobile accidents involving serious injury or death, including paralysis, loss of limb or brain damage to determine if there is a defective roof. If you would like more information or have a question, you can contact Cole Portis or Greg Allen at 800-898-2034, or by email at Cole.Portis@beasleyallen.com or Greg.Allen@beasleyallen.com.

THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY RAISES ROOF STANDARD

The Insurance Institute for Highway Safety, a powerful automobile industry group, will require stronger vehicle roofs in awarding its top safety rating. The Institute will require automakers to dramatically increase the strength of vehicle roofs to receive its top safety pick ratings. Virginia-based IIHS conducts dozens of crash tests annually and pressures automakers into adding safety features to reduce car crash injuries and deaths. Its ratings are widely used by consumers and touted by companies that win them. It's reported that automakers often make design changes to boost their ratings.

The institute, financed by the insurance industry, already conducts front, side-impact and rear-impact crash tests. The roof was just about the only thing left. As we have reported, rollover crashes kill about 10,000 people each year. Adrian Lund, president of IIHS, said another study it commissioned had convinced the Institute that it was time to require automakers to do more to improve roof strength. A study released by IIHS last month, which is an industry-funded group, at the SAE Government/Industry meetings reveals that a 1.0 increase in roof strength reduces the risk of fatalities in a single-passenger car rollover by over 20%.

In January, the National Highway Traffic Safety Administration unveiled a proposal to require a vehicle roof to withstand a force equal to 2.5 times the vehicle weight while at the same time maintaining sufficient head room for a buckled-in, average-size adult male to avoid being struck. That's up from the current standard of withstanding a force equal to 1.5 times the vehicle weight. But NHTSA hasn't finalized its regulation. Starting in the fall, IIHS will require automakers to have a 4.0 rating to win a top safety pick. Concerning the need for stronger roofs, Lund observed:

We see significant safety benefits in stronger vehicle roofs. The government is moving slowly and they are going to continue to move slowly. NHTSA has clearly undercounted the number of injuries and deaths that can be prevented by stronger roofs.

From a legal perspective, there is no law or regulation that says automakers have to pass the new test. But failing to do so—or getting poor marks—has a downside and that's some real bad publicity. The institute's tests are widely reported. And that fact makes it likely automakers will make the needed changes that are necessary to do well on the test. The Alliance of Automobile Manufacturers, the trade group that represents Detroit's Big Three automakers, Toyota Motor Corp., Daimler AG and six others, supports increasing the standard to 2.5 times the vehicle's

weight, but says going beyond that is unwarranted.

Most reliable safety advocates see that as being such "a minor improvement" it would be "meaningless." At a news conference last fall my longtime friend Joan Claybrook, who at the time was the president of Public Citizen, said the "NHTSA is more concerned with protecting auto companies than the families who needlessly lose loved ones each day."

NHTSA's proposed update also would cover vehicles that weigh up to 10,000 pounds, versus the current 6,000-pound requirement. The proposal is aimed at helping people survive rollover crashes, which account for more than 10,000 deaths annually. Rollovers represent 3% of all crashes, but account for one-third of all vehicle deaths. General Motors Corp. and Ford Motor Co. essentially wrote the regulation that's been in effect since 1973 after their fleets failed NHTSA's first proposed roof standard in 1971. NHTSA studied the issue for more than a decade before proposing in August 2005 to increase the strength of vehicle roofs and broaden the number of the vehicles covered. NHTSA said then that upping the standard to 2.5 times the vehicle weight would save 13 to 44 lives and prevent up to 800 injuries annually. The agency said it would require that both sides of the vehicle roof be tested, and in January, NHTSA updated its proposal to include a double-sided test. Currently, only one side is tested.

Our firm currently pursues claims involving roof crush brought against auto manufacturers for failure to design and manufacture roofs that will provide adequate protection in foreseeable rollover crashes. If you have any questions please contact Graham Esdale by email at Graham.Esdale@beasleyallen.com or by phone at 800-898-2034.

Source: Portions of this article were taken from "Institute Raises Roof Standard" by David Shephardson/*Detroit News* and "Test Designed to Improve Rollover Safety" by Christopher Jensen/*New York Times*. February 6, 2009.

A LOOK AT HEAVY TRUCK CRASHWORTHINESS

I asked Ben Baker, a lawyer in our Personal Injury Section, to write a piece on crashworthiness as it relates to big trucks. Ben has a tremendous amount of experience in product liability litigation and has handled a number of crashworthiness cases. He agreed to write for this issue and the following is his article.

BIG TRUCK CRASHWORTHINESS

Statistical evidence shows that approximately 1,000 heavy truck occupants are killed in highway crashes every year. During the 1980s, the National Highway Traffic Safety Administration sponsored a number of research projects that evaluated statistical information related to heavy truck crashes in the United States. It was found consistently that the primary contributing factor to heavy truck occupant fatalities were injuries caused by ejection and rollover which involved severe deformation to the cab. The same reports also found that the best way to reduce heavy truck occupant fatalities was:

- *to enhance the structural integrity of the cabs, and*
- *improve methods to reduce occupant impacts with the interior surfaces of the vehicles.*

Despite this overwhelming evidence, heavy truck crashworthiness and cab roof strength is still not regulated by NHTSA. In contrast, passenger car manufacturers are required to pass minimum roof strength and crashworthiness standards found in the Federal Motor Vehicle Safety Standards. The United States has always lagged behind on safety regulation of car manufacturers. Although the crashworthiness of heavy truck cabs is not regulated in this country, there have been foreign standards in

place for years. Heavy trucks sold in foreign countries are required to meet a variety of crashworthiness and roof strength standards. These include the Swedish standard and the ECE Rule 29 standard, which require cab strength testing by static and dynamic loads. These particular tests require impacts to the roof, rear of the cab, front of the cab and the A pillars of the cab.

Apparently, in response to the overwhelming research data, American heavy truck manufacturers undertook the "Heavy Truck Crashworthiness Study" in conjunction with the Society of Automotive Engineers (SAE) during the 1990s. This study culminated in an SAE recommended practice for testing the strength of heavy trucks. Unfortunately, the test does not simulate actual forces that would be imparted into a heavy truck cab that rolled over while travelling down the highway. As a result, heavy trucks manufactured in the United States still provide unsafe cabs of thin aluminum with fiberglass roofs. Therefore, occupant fatalities continue to occur truck rollovers. It's extremely difficult for a heavy truck driver to survive a wreck when the roof and cab structure disintegrate around him during the event and fail to maintain reasonable occupant survival space.

Ben Baker
Personal Injury Section
April 2009

Our firm has handled a number of cases against heavy truck manufacturers for the failure to design and manufacture cabs that will provide adequate protection for truck occupants in foreseeable rollover crashes. We are currently looking at a number of these claims and have several cases filed in courts around the country. If you have any questions about claims of this sort, contact Ben Baker in our firm by email at ben.baker@beasleyallen.com or call him at 800-898-2034.

NHTSA TESTS OF INFANT CAR SEATS REVEAL SAFETY FAILURES IN CRASHES

In crash tests run by the federal government infant car seats didn't fare very well. Thirty-one seats tested either flew off their bases or exceeded injury limits in the series of frontal crashes. Federal researchers used 2008 model year vehicles in these tests. The results from the tests were never publicized, and according to the *Chicago Tribune*, even some infant-seat makers were unaware of their existence. The *Tribune* found the results buried in thousands of pages of test reports from the National Highway Traffic Safety Administration. It should be noted that these tests are used to rate the safety of cars, not the child restraints in them.

What the newspaper found calls into question the rigor of the current safety standards for such seats. The investigation also highlights how little information parents are armed with as they make one of the most important safety decisions for their babies. We can compare safety ratings for cars, but not for the safety of car seats. Parents often have no way of knowing which seat fits best in their car and whether conventional wisdom is accurate. Take for example that the *Tribune* found two of the most expensive seats tested had some of the poorest results. Also, it was found that some small cars protected car seats better than larger ones. My good friend Joan Claybrook, a former NHTSA administrator and now president emeritus of Public Citizen, had this to say: "What you've uncovered totally reveals the flaws in the current safety standard and also NHTSA's negligence in not reporting this to the public."

Transportation Secretary Ray LaHood, who is now on the job, said in a written statement given to the *Tribune* that he ordered a "complete top to bottom review of child safety seat regulations" and directed NHTSA to make the crash-test results "more available" to consumers. Of the 66 infant seats tested in frontal crashes, nearly half of the seats either separated from their bases or exceeded injury limits. Even though vehicles—and not seats—were being tested, the government describes the tests as research. But the results for two

seats were so troubling that NHTSA recalled those seat models. One manufacturer completely overhauled how it evaluated its seats. NHTSA says it's now analyzing all of the test results and doesn't yet know what they mean. If infant seats performed as poorly on American roads as they did in these crash tests, said Ron Medford, NHTSA's acting deputy administrator, "We would expect to see higher numbers of fatalities or serious injuries than we're aware of."

In 2007, 63 babies were killed and about 7,000 were injured in crashes where they were strapped into infant restraints. Before being sold, seats must pass a test that simulates a head-on crash at 30 mph on a sled bench. Remember, the tests analyzed by the Tribune were where regulators crashed actual vehicles into a wall at 35 mph. Joan says the crash tests suggest something that is common sense: the effectiveness of car seats can be more thoroughly judged when evaluated inside a real car as it is crashed.

When a person like Joan Claybrook, a former NHTSA administrator and a very good one, says automakers should crash test infant seats with their vehicles and then designate which seats fit particular models, NHTSA should listen. It's too important an issue to ignore her very sound and well-considered advice. Taking that approach would result in infant-seat makers competing to become the recommended seat. Joan says car companies could set specifications that ensure a perfect fit, the same way they set requirements for tire makers. Instead, families are left with ill-fitting baby seats and a safety standard that, according to Joan, is "totally inadequate." I totally agree!

Our firm has handled a number of cases where innocent infants were either killed or badly injured due to a defective car seat. If you have further questions on this subject or would like more information, you can contact Graham Esdale who is in our Product Liability Section at 800-898-2034, or by email at Graham.Esdale@beasleyallen.com.

Source: *Chicago Tribune* and Public Citizen

IMPORTANT SAFETY FEATURES TO LOOK FOR WHEN SHOPPING FOR AN AUTOMOBILE

We are constantly being asked by folks to tell them what is a safe vehicle to purchase. I asked Greg Allen, who is our most experienced lawyer in the section of the firm that deals with vehicle safety issues, to write a piece for this issue on that subject. He agreed to do so and it is set out below.

Because our firm has been involved in crashworthiness litigation for many years, we are often contacted by friends and clients for our recommendations for safety features for an automobile they are intending to purchase. This is especially true when parents are shopping for a first automobile for teenage sons and daughters. The statistics show that there is a strong likelihood that a new teenage driver will be involved in some form of accident. Those accidents often have serious consequences. The National Highway Traffic Safety Administration estimates that 35% of deaths to teenagers occur as a result of motor vehicle accidents. Their research shows that immaturity combined with drinking and driving, not wearing seat belts, distracted driving (such as cell phone use, loud music or other passengers), drowsy driving, night time driving and, drug use aggravate the problem (www.nhtsa.gov).

Generally, we do not recommend a particular brand of vehicle because there are trade-offs based on weight, size and type of vehicle. However, there are some basic safety features that everyone should be aware of when making a decision to invest in a new car or truck.

ELECTRONIC STABILITY CONTROL (ESC)

Electronic Stability Control (ESC) was introduced in the late 1990's. It is a computerized technology

that improves a vehicle's safety by preventing loss of control. When the ESC detects a loss of steering control, it automatically applies individual brakes that will help steer the vehicle in the direction that the driver is intending to go. The braking of the individual wheels prevents the car from both over steering and under steering. Some of the systems even change the engine power until the control is regained. Electronic Stability Control has been touted as one of the most significant safety innovations in decades. This is especially true if you are planning to buy an SUV, which tends to be top heavy and may roll over if you lose control. By maintaining directional stability in an emergency maneuver, the risk of rollover is significantly reduced. The National Highway Traffic Safety Administration has estimated that SUVs with Electronic Stability Control are involved in 67% fewer accidents than those without the system.

The system is very sensitive and can detect a loss of steering control. A vehicle can sometimes over steer in an emergency evasive maneuver or on slippery roads. The ESC can detect the skid and apply brakes to the individual wheels in a nonsymmetrical manner in order to bring the vehicle back in line with the driver's intentions. The ESC can work on any type of surface, including icy or wet conditions.

Many cars and trucks today still do not have ESC. Most U.S. manufacturers intend to make ESC standard equipment by the end of 2010. This is an important safety feature.

ANTI-LOCK BRAKING SYSTEMS (ABS)

In order to have Electronic Stability Control, your car must have an Anti-Lock Braking System. Even if you don't have Electronic

Stability Control, we strongly recommend buying vehicles that have an Anti-Lock Braking System. Many systems are still offered only as optional equipment. The Anti-Lock Braking System prevents wheel lock-up with heavy braking. Automotive engineers have known for years that effective braking requires that tires operate at their peak performance. When you slam on your brakes without an Anti-Lock Braking System, the tires will lock down completely. When the tires start sliding and leaving black skid marks, they are not braking effectively. Engineers call this tire saturation. Brakes work more effectively just at the point where the tires start to lock up, but not completely. It's very similar to the principle used by race car drivers. Racers go into a turn and allow the car to start slipping but not completely. When the car starts sliding, it may lose complete traction and slide into the wall. The intention of the driver is to keep the vehicle riding with all four tires at peak performance.

Many drivers who are unaware of Anti-Lock Braking Systems have a tendency to pump their brakes to prevent wheel lock-up. That is the same principal that ABS works on. The computer senses when the tires are locking up and will release the brakes just slightly. If you've ever slammed the brakes on with an ABS system, you may have heard a groaning or chirping sound. That was the ABS system working. If you have an ABS system, you no longer have to pump the brakes. Drivers, including your children, need to be trained to "stomp and steer" if the car has an ABS system. With a properly operating ABS system, the driver can maintain steering control under heavy braking because the skid is being prevented. There are a number of types of Anti-Lock Braking Systems. Some not only prevent wheel lock under braking, but

also electronically control the front to rear brake bias. Some of the systems are called Electronic Brake Force Distribution (EBD) or Traction Control System (TCS), or Emergency Brake Assist (BA, EBA, or HBA).

OCCUPANT PROTECTION

There are certain physical principles that can't be overridden by safety systems. Newton's laws of physics always apply. There is no doubt when a heavy vehicle strikes a lighter weight vehicle the heavy vehicle will win most of the time with all things being equal. That's why smaller cars need good crashworthiness features. The most important part in crash protection is that the vehicle rather than the occupant absorb the energy of the crash. The car needs to be designed with the strong box theory in mind. The passenger compartment needs to maintain its integrity while the rest of the vehicle, including the front end and rear end structures, are allowed to crush to absorb energy. That crush needs to stop when it reaches the passenger compartment. While no vehicle is completely crush resistant, there are major differences in various manufacturers and various designs. While you cannot generally tell by looking at a vehicle whether or not it has as good crash performance, there are resources available that can help you determine whether or not to buy a vehicle. You can look at the crash reports from the Insurance Institute for Highway Safety (www.iihs.gov). You can also go to the National Highway Traffic Safety Administration website (www.nhtsa.gov), or to Consumer's Union (www.consumerreports.org). Other websites to check are www.kbb.com, www.edmunds.com, www.nadaguides.com/car/video, and www.safercar.gov. You can learn about the crash rating of

your car by doing simple research.

OCCUPANT RESTRAINT SYSTEM

You only have to turn the television on and watch the NASCAR drivers on Sunday to understand the importance of occupant restraint. The reason the NASCAR drivers can survive horrific looking crashes is because they are completely coupled to the vehicle by five point racing harnesses that are firmly attached to the frame. The drivers sit in a very strong seat system and they are protected by a roll cage and safety nets. It has been known for years that in order to protect an occupant in a crash, the vehicle rather than the occupant needs to absorb the energy of the crash. The best way for that to occur is for the occupant to remain coupled to the vehicle within the zone of safety provided by the safety cage of the car. In order to stay coupled to the vehicle, the car needs a strong and effective restraint system. Seat belt pretensioners are a component of a seat belt system that locks the seat belt in place during a crash. The pretensioners can be mechanical, pyrotechnic, or even electrical. The systems are designed to tighten the belt as the crash forces develop. The tighter the belt, the safer the occupant.

Some vehicles still are equipped with center seat lap only seat belts. A three point belt is much more effective than a lap belt. However, it's better to wear a lap belt than no seat belt at all.

The seating system of a car is part of the restraint system. The seat back needs to be strong. While it's difficult for a consumer to determine the strength of a seat back, there are certain clues that are available. If the seat belt is incorporated into the seat back, also known as "all belts to seats," the

seat back necessarily has to be strong enough to support collision forces.

The head restraints are vital to guard against whiplash and neck injuries that may occur in a rear end collisions. The restraints need to be tall enough to cushion the head above the top of the spine. Many cars now have head restraints that are adjustable. Be sure that the head restraint will lock into position. Review the previously listed websites for head restraint and crash ratings.

AIRBAGS

According to current law, every passenger vehicle has to be equipped with dual front airbags. However, not all airbags are the same. There are some airbag systems that have created dangers. You need to research the car you are intending to buy for this issue. Many vehicles now have smart airbag systems that use electronic sensors to gauge variables, such as crash severity, and whether or not the seatbelt is being used. Some airbags can determine whether an occupant is out of position and will alter the force with which the airbag deploys. Smart airbags can inflate with less force in less severe crashes. They can inflate with more force more quickly in more severe crashes. You need to do individual research on the car that you are considering.

Side airbags are now common for front occupants. The side airbag deploys in a side impact and is designed to protect the occupant's torso. Head protection airbags, an important advancement, are becoming more available. This type of airbag is extremely important in side impacts. Without this type of safety, a strike by an oncoming vehicle on the near side often has very severe consequences because there is no struc-

ture in the vehicle to absorb the energy. There is no room to allow the seat belts to function and allow the occupant to "ride down" the collision force. The energy is therefore often transferred to the occupant in a side impact. Side airbags and head protection are probably the most important safety features for side impact protection. Consumer Reports highly recommends head protection side airbags when they are available.

If you are shopping for an SUV, inquire about side curtain bags that drop down and cover the windows in case of a rollover. In our experience, partial or complete ejection are the primary causes of occupant injury or death in rollovers. We have always advocated that manufacturers should use laminated glass in the side windows of SUV's similar to that mandated by law for the front windshield. In a rollover, windows made of tempered glass break out and the centrifugal forces allow the occupant's head, arms or torso to get outside the plane of the vehicle. (That's why NASCAR race cars have the nets in the windows.) Laminated glass will help retain the occupant. This is a very important safety feature. Side curtain air bags that are effective will drop down and prevent complete or partial ejection.

ROLLOVER RESISTANCE

Taller vehicles, such as SUVs and pickup trucks, are more likely to roll over than passenger cars. The rollover rates have been known to be two to three times those of passenger cars. While SUVs are becoming more stable by being designed lower and wider, there is still a significant chance of rollover in these vehicles. NHTSA has developed a five star rating system to notify the consumer of which vehicles have the higher

rollover resistance rating (RRR). This rating is based strictly on the static stability factor, which is a measure of the track width and the center of gravity. The stability factor is a good measure of stability, but it's not the only measure that is important. As mentioned previously in this article, it is very important to have the Electronic Stability Control System if you are going to buy an SUV.

There are many other safety features that automobiles have today. This is an attempt to give you an idea of some of the more important ones you should look for in shopping for a vehicle. It's important that you research the car or truck you are thinking of buying to make an educated judgment on the necessary safety features for you and your family. Don't simply trust the manufacturer's or government standards to protect your family. Your family is too important to entrust their safety to the manufacturer or a government regulator.

J. Greg Allen
Personal Injury Section
April, 2009

FORMER ATHLETE WINS LAWSUIT AGAINST FORD MOTOR CREDIT CO.

A former diving champion, Thomas Smolinski, who was paralyzed in a car crash ten years ago, was awarded \$40 million by a jury last month. The verdict, which came after a four-week trial, was against Ford Motor Credit Co. and Smolinski's older brother, Matthew. The jury held the Ford Motor subsidiary and the brother equally liable for the rollover of a Ford Explorer, owned by Ford Motor Credit and driven by the brother when the 1999 incident occurred.

Thomas Smolinski, now 33, suffered devastating spinal injuries from the accident. He was left paralyzed and confined to a wheelchair, having to rely on others for his daily care. At the time of the accident, the Plaintiff had just graduated from Cleveland State Univer-

sity with a degree in marketing and communication. He had achieved Academic All-American status in springboard diving in Division I athletics. Anne Beltz Rimmler, a lawyer from Buffalo, New York, represented the Plaintiff. While she did an outstanding job, I am not sure why Ford Motor Company wasn't a party Defendant in the case.

Source: *Buffalo News*

IX. MASS TORTS UPDATE

PAIN PUMP CLAIMS RESOLVED

Jeff Wihtol, a lawyer from Portland, Oregon, has a law practice that focuses on representing individuals who are injured or families of persons killed through no fault of their own. Jeff was the first lawyer in the country to investigate cases on behalf of victims who suffered injuries to their shoulders as a result of the use of a pain pump after surgery which made him a pioneer in that field. If the pain pump device is used in such a manner that the pain medication is released into the shoulder joint, it's toxic to the cartilage. This can cause a condition known as Postarthroscopic Glenohumeral Chondrolysis (PAGCL). This devastating condition causes severe pain and stiffness in the affected shoulder along with limitations on range of motion, reduced strength and the need for constant pain management. It's not at all uncommon for a victim of PAGCL to require repeated surgical procedures including a possible shoulder joint replacement.

Jeff recognized that the group of clients he represented were probably not the only ones in the country being injured in this manner. In 2007, he approached our firm and the law firm of Williams, Love, O'Leary & Powers, also of Portland, to see if we had an interest in working together on this litigation. We then started to investigate more claims in an effort to help folks and also to inform the public about these injuries. We soon began to file

these cases all over the country.

There was a recent development that is worthy of note relating to this area. A trial was started against Stryker Corporation on February 23rd, in Portland, Oregon. That case involved six Plaintiffs, all alleging injuries caused by the Stryker pain pump. Two of the claims were settled prior to opening statements in the case. The other four Plaintiffs settled their cases after five to six days of testimony in the case. But the trial continues because the surgeon who performed the surgeries on these individuals filed a claim against the manufacturer for his emotional distress for being a party to causing these injuries to his patients. Hopefully, we can report on a favorable verdict in next month's issue.

Our firm is proud to be a leader in this litigation along with the Wihtol and Williams firms. Jeff Wihtol is to be commended for his fine work on these cases and for his willingness to get involved initially in these cases. His helping educate the public about the serious consequences and injuries that these pain pumps have caused is most important. If you have questions about pain pump cases, you can contact Frank Woodson in our firm at Frank.Woodson@beasleyallen.com or call him at 800-898-2034.

PAXIL USE DURING PREGNANCY CAN CAUSE BIRTH DEFECTS

In September 2005, GlaxoSmithKline (GSK) sent a "Dear Doctor" letter to physicians notifying them of the results of a retrospective epidemiologic study suggesting an increased risk of congenital malformations in infants born to mothers who ingested Paxil in the first trimester of pregnancy as compared to other antidepressants. GSK changed the Pregnancy subsection of the Precautions section of the Paxil label to reflect the new information.

On December 8, 2005, after the results of a second study became available, the FDA issued a Public Health Advisory to health care professionals and patients advising them that Paxil should not be taken by women who were pregnant or planned on becoming

pregnant. In one study, women taking Paxil in the first trimester had a two-fold increased risk for having an infant with a cardiac defect.

In another study, infants of women who received Paxil in the first trimester had a 1.5-fold increased risk for cardiac malformations and a 1.8-fold increased risk for congenital malformations. As a result, the FDA requested GSK to change Paxil's pregnancy category from C to D and to add additional information to the Warning section of the Paxil label. The Category D warning, which is a stronger warning, means that studies in pregnant women have demonstrated a risk to the fetus.

On July 19, 2006, the FDA issued a Public Health Advisory for Paxil and several other antidepressants advising of the results of a study published in the *New England Journal of Medicine* showing a six-fold increased risk of persistent pulmonary hypertension (PPH) in infants born to mothers who took an antidepressant in the last trimester of pregnancy. Lawyers in our firm's Mass Torts Section continue to review Paxil-related birth defect cases. For more information on this subject contact Roger Smith at Roger.Smith@beasleyallen.com or 800-898-2034.

MEDTRONIC LINKS DEVICE FOR HEART TO 13 DEATHS

Medtronic has reported that at least 13 people have died in connection with a heart device that it recalled in 2007, but was still in widespread use. This includes four patients whose deaths were related to efforts by doctors to surgically remove the product. The new data reflect the first fatality update by Medtronic since October 2007, when it recalled the device—a thin electrical cable that connects an implanted defibrillator to a patient's heart. The company cited five deaths when it recalled the product, saying fractures in the cable could cause a defibrillator to fail to deliver a lifesaving shock to an erratically beating heart, or to fire for no reason.

Separately, a previously-undisclosed report from the Food and Drug Administration indicates that Medtronic

began receiving reports soon after the device reached the market in late 2004 that the cable, known as the Sprint Fidelis, was fracturing. The company also revised its manufacturing process in the months before withdrawing the Sprint Fidelis from the market, according to this report.

There are a number of lawsuits pending filed by patients. When Medtronic may have known the Sprint Fidelis posed safety problems, and how it responded to that information, will be significant factors in these cases. As previously reported, Congress is moving to nullify the U.S. Supreme Court decision last year regarding medical devices. About 150,000 people in this country still have the Sprint Fidelis leads in their bodies. In addition to the fatalities, the FDA has received about 2,200 reports of serious injuries related to the leads. Our firm has handled a number of these cases and have cases currently pending. If you need information on this subject, contact Leigh O'Dell who is in our Mass Torts Section, at Leigh.Odell@beasleyallen.com or at 800-898-2034.

Source: *New York Times*

FABRICATED STUDIES IN DRUG RESEARCH HAVE SHOCKED THE MEDICAL COMMUNITY

There has been a great deal of controversy relating to drug trials over the past several years. In our firm's involvement in litigation against drug companies we have seen a number of questionable studies and reports from studies. Perhaps a recent revelation that started in an article in the *Wall Street Journal* was the biggest shock of all. It was reported that a prominent Massachusetts anesthesiologist had fabricated 21 medical studies involving major drugs. Baystate Medical Center, located in Springfield, Mass., has requested several anesthesiology journals to retract the studies which appeared between 1996 and 2008. The hospital says its former chief of acute pain, Dr. Scott S. Reuben, faked data used in the studies. That is big news to say the least and it's an indictment of the pharmaceutical industry.

Some of the studies reported favor-

able results from use of Merck's Vioxx and Pfizer's Bextra, which as you will recall were subsequently pulled from the market. Other studies offered good news about Pfizer's pain drugs Lyrica and Celebrex and Wyeth's antidepressant Effexor XR. It appears that Dr. Reuben enjoyed a stellar reputation and the *Journal* reports that his work was particularly influential in pain treatment. Many doctors appear to have been shocked by the bad news now learned about the studies. *Anesthesiology News* first reported on the retractions. Obviously, the retractions will have a huge impact in the discipline of postoperative pain management. It will be interesting to find out what relationships—financial or otherwise—existed between Dr. Reuben and the drug manufacturers. Pfizer had funded some of Reuben's research and had also paid him to speak on behalf of its medicines.

According to the *Wall Street Journal*, these studies had a great deal of influence on the practice of medicine. Because of Dr. Reuben's "research," it had become routine for doctors to combine the use of painkillers like Celebrex and Lyrica for patients undergoing common procedures such as knee and hip replacements. Dr. Reuben even had a good relationship with the Food & Drug Administration and this agency apparently both respected his work and relied on him. This doctor had written the FDA asking it not to restrict the use of many of the painkillers he had studied. Quite often Dr. Reuben cited his fake data to make his case, according to reports in the *Journal*.

The *Wall Street Journal* says further that Dr. Reuben's fraud has caused *Anesthesia & Analgesia*, a respected journal, to retract ten studies. It also posted a list of 11 other studies that were published in other journals on its Web site. The journal *Anesthesiology* said it has retracted three of the doctor's articles. Not surprisingly, Dr. Reuben has strong ties with the pharmaceutical industry. Perhaps the most disturbing aspect of this scandal is that many of the drugs Dr. Reuben researched have been linked to serious side effects.

Like many antidepressants, the labeling of Effexor warns that it has been linked to suicides in young people and children. Both Vioxx and Celebrex have been linked to heart attacks and strokes. Vioxx was recalled in 2006 because of these specific problems. Had Dr. Reuben not been such a fraud, it's possible that Merck wouldn't have gotten away with putting Vioxx on the market or at least the company would have had to warn about the known risks associated with the use of the painkiller.

This is actually not the first time the integrity of studies involving Vioxx have come into question. During our firm's litigation involving the drug, we saw evidence where Merck employees worked alone or with publishing companies to write Vioxx study manuscripts and later recruited academic medical experts to put their names as first authors on the studies. Merck's involvement in producing the data wasn't disclosed. This revelation concerning Dr. Reuben—while a shock to the medical community—didn't come as such a shock to lawyers in our firm's Mass Torts Section. We have known for a good while—as a result of our involvement in drug-related litigation—that drug companies can't always be trusted when it comes to their studies and studies that they finance. The FDA relies on that sort of thing when it approves drugs for the market place.

Source: *Wall Street Journal*

JOHNSON & JOHNSON UNIT MISLED DOCTORS ON DRUG RISKS

A judge has ruled that Johnson & Johnson and its Janssen Pharmaceutica unit must pay West Virginia \$3.95 million for misleading doctors about the risks and benefits of the antipsychotic drug Risperdal. West Virginia Attorney General Darrell McGraw filed suit in 2004 against Johnson & Johnson and the Janssen unit, contending the companies violated the state's consumer protection act by claiming the drug was safer than similar medications. Risperdal is a member of a class of drugs called atypical antipsychotics that include Eli Lilly & Co.'s Zyprexa

and AstraZeneca's Seroquel. Janssen is a division of Johnson & Johnson's Ortho-McNeil-Janssen Pharmaceuticals unit.

In September 2003 the U.S. Food and Drug Administration required makers of atypicals to warn doctors that such drugs were associated with an increased risk of diabetes. A judge in West Virginia said that in November 2003 Janssen sent out "false and misleading" letters to doctors that downplayed the risks. The judge wrote in his order:

The court finds the Defendant's wording of its November 2003 Risperdal letter was deliberately constructed to circumvent the FDA's mandated warning for an increased risk of diabetes, and deliberately constructed to mislead health-care professionals.

The judge found that the FDA had already determined that the November 2003 letter was misleading under federal guidelines. He fined the companies \$1.95 million for these letters and an additional \$2 million for Risperdal sales calls made in West Virginia from November 2003 to July 2004. The court agreed with West Virginia's claim that J&J and Janssen misled doctors on the risks and benefits of the Duragesic pain patch and issued a \$525,000 fine.

Source: *Bloomberg*

RANBAXY PLANT FALSIFIED DATA AND RESULTS

According to the Food and Drug Administration, a manufacturing plant owned by Ranbaxy Laboratories Ltd. falsified data and test results in approved and pending drug applications. *The Wall Street Journal* reported that the agency halted the review of drug applications made at Ranbaxy's Paonta Sahib plant in India. Last September, the FDA banned Ranbaxy from importing more than 30 generic drugs into the country because of "manufacturing violations" it found at two company plants in India, including Paonta Sahib. Hopefully, this means most products made at that plant are no longer on shelves in this country. Such drugs include generic versions of

the cholesterol-lowering drug Zocor and the heartburn treatment Zantac.

Source: *Wall Street Journal*

CASES THAT MADE A DIFFERENCE IN PHARMACEUTICAL LITIGATION

From 1993 to 1998, pharmaceutical manufacturer Johnson & Johnson made over one billion dollars in sales from Propulsid, a prescription heart burn medication, even as the company knew that hundreds of patients were dying from side effects. The Federal Drug Administration and the company were receiving reports of people who developed heart problems after taking the medication. Children were at particular risk, and federal regulators advised that they would not approve the drug for pediatric sales.

While Johnson & Johnson agreed not to market Propulsid directly to children because of their increased risk of side effects, the company did use educational efforts advocating the drug's use in pediatric patients. The educational efforts have the effect of side stepping the agreement not to market to children. Evidence showed that Johnson & Johnson knew that 90% of the company's cherry-flavored liquid Propulsid went to children, even though the company claimed it was aimed at geriatric patients.

In all, at least three hundred people died and as many as thousands were injured by Propulsid. The Civil Justice system played a major role in bringing the facts of Johnson & Johnson's questionable marketing practices to light. In 2004, Johnson & Johnson agreed to pay approximately \$90 million in restitution to injured patients and the families of those who were killed. The sale of Propulsid has now been discontinued in the United States.

Source: American Association of Justice Website—www.justice.org

LOBBYING HAS HAD A DEFINITE EFFECT ON THE FDA PROCESS

A recent article in the *Wall Street Journal* lays out in detail how the healthcare industry and its political

friends influence what happens at the FDA. While the article dealt only with medical devices, the activities described also apply to drugs approved by the agency. The medical device is a \$200 billion-a-year industry. The *Journal* sets out how manufacturer ReGen sought full approval from the FDA of a new medical device intended to treat meniscus tears. The c-shaped pad made from cow collagen, named Menaflex, was designed to be inserted between the knee bones to serve as a shock absorber between the bones. To support its application for full approval with the FDA, ReGen initiated a \$35 million clinical trial to prove the safety and efficacy of Menaflex.

In December 2005, after receiving the first of two FDA warning letters regarding its clinical trial, ReGen decided to seek fast-track approval of Menaflex. It should be noted that fast-track [510(k)] approval does not require the completion of a clinical trial. Instead, all it requires is a showing that the product to be approved is substantially equivalent to a device previously approved by the FDA. That leaves a serious loophole in the law which those in the industry have used to their advantage.

The FDA scientists who were involved with reviewing Menaflex rejected ReGen's fast-track applications in August 2006 and September 2007, finding that Menaflex was a new kind of device that required a rigorous, full review. In December 2007, ReGen, a New Jersey company, called on New Jersey lawmakers to help. Senators Robert Menendez and Sen. Frank Lautenberg and Representatives Frank Pallone and Steve Rothman wrote the FDA Commissioner in December 2007 asking that he personally review the Menaflex issue.

In January 2008, as a result of Congressional intervention, ReGen met with the FDA Commissioner. Two days later, ReGen wrote the Commissioner and asked for the Menaflex application to be given to Dr. Dan Shultz, head of the FDA's device division. ReGen also asked for all FDA scientists, who previously opposed Menaflex, to be excluded from the decision-making

process. From that point forward, Dr. Shultz took personal charge of that critical process. In July 2008, ReGen announced what it described to be successful results with its clinical trial. FDA scientists disagreed with ReGen's categorization of the trial results. They noted that patients needed additional operations after receiving the Menaflex pad, and in some cases the device had to be removed.

Also in July 2008, ReGen filed its third application for fast-track approval. FDA scientists again found the device to not be substantially equivalent to previously-approved devices. Their rejection letter was never sent. Rather, in an unusual move, and at the request of ReGen, Dr. Shultz set up a panel of outside doctors to determine if Menaflex met the 510(k) standards for fast-track approval. It's reported that ReGen pushed the FDA on who should be on the panel. On October 28, 2008, a staffer to Rep. Pallone contacted the FDA integrity office director to discuss the Menaflex panel. ReGen specifically asked that FDA scientists, who previously objected to Menaflex, not be allowed to address the panel.

ReGen's requests caused considerable debate within the FDA. In response, agency officials drafted a letter to ReGen, the language of which was objected to by FDA lawyers who said it would cause significant problems for the agency with other companies because other companies did not have the same opportunities, and it would document favorable treatment for ReGen. Per ReGen's request, the Menaflex panel included eight sports-medicine experts. No FDA scientists who had objected to Menaflex spoke at the panel. Following the meeting, Dr. Shultz issued a letter stating that the panel "clearly and unanimously" found Menaflex to be as effective as other similar products. Interviews with the panel members reveal that their findings were not unanimous. One panel member, Dr. Mabry, said that it was important to note that the panel did not find that the Menaflex pad was substantially equivalent to other medical devices. He said further, that had they known that Dr. Shultz was going to

approve the Menaflex pad citing their panel, he would have been a more vocal opponent of it.

In December 2008, after reviewing the 510(k) application for Menaflex, Dr. Larry Kessler, director of the FDA's science and engineering laboratory, found that Menaflex was not similar enough to other devices to qualify for 510(k) approval. Dr. Kessler wrote, "There is no statistical basis demonstrating effectiveness for this product." By letter, he told Dr. Shultz that he was concerned that fast-track approval of Menaflex sets a precedent "that concerns us." On December 20, 2008, Dr. Shultz approved Menaflex, finding that it was similar enough to other devices to earn approval.

According to Dr. Kessler, who now heads the Health Services Department at the University of Washington, FDA's handling of Menaflex "shows the FDA at its worst." In January 2009, nine FDA scientists in the device division wrote Congress calling for the President to remove top FDA medical device regulators, stating that the device approval process was "corrupted and distorted by current FDA managers." The above is an example of how industry literally controls the FDA. That's wrong and it must be changed.

Source: *Wall Street Journal*

MRI'S MAY BURN PATIENTS WHO WEAR DRUG PATCHES

Federal health officials have warned that patients who wear nicotine or other drug patches during MRI scans run a risk of being burned. This is because some patches contain tiny metal elements that can be heated by the device's huge magnet. Dr. Sandra Kweder, deputy director of the Food and Drug Administration's new drug office, observed: "Some, but not all, of these patches contain a little bit of aluminum, just enough that the patch could overheat if worn during an MRI scan." Dr. Kweder says the FDA has received reports of as many as five patients wearing patches who experienced a skin burn similar to a bad sunburn during screening. It should be noted that federal health officials are

generally alerted to only a fraction of the injuries associated with drug and device use.

According to Dr. Kweder, there are about 60 kinds of drug patches sold in the United States. About 20 of the patches contain the tiny metal fragments. Patients are not always warned of the contents of these metal-containing products. Because few people consult the box for a warning before or after donning a patch, the FDA will soon require that all such products carry a warning on the patch itself. But the precise wording is still under discussion by the FDA. Patients should consult their doctors on whether to replace or reuse patches after removal for scans.

The patch alert is the latest in a series of safety warnings involving magnetic resonance imaging that have resulted from the unpredictable effects of the strong magnets used in MRI devices. It was reported in the *New York Times* that most of the nation's MRI centers have experienced injury to patients or damage to the devices because of accidents involving metal objects. Some of the injuries have been very serious and deaths have been reported. In one widely-reported accident, a six-year-old boy was fatally injured at Westchester Medical Center in 2001 when a metal oxygen tank flew into the MRI chamber in which he was lying and struck him in the head.

I doubt seriously if very many people even understand how the MRI machines really work. Few—if any—will realize that there are burn risks associated with undergoing an MRI. The medical community must do a better job of educating the public about the risks mentioned above.

Source: *New York Times*

FDA STAFF MEMBERS QUESTION RISKS WITH BAYER AND J&J DRUG

There is another drug being proposed to the U.S. Food and Drug Administration which is currently under review. Staff at the FDA have expressed concern over bleeding and other risks with Bayer AG's and Johnson & Johnson's blood-thinning

drug Xarelto. The documents were released ahead of an FDA advisory panel meeting last month where the once-a-day pill for short-term use to prevent blood clots after hip or knee replacement surgery was discussed. If approved, the drug would compete against enoxaparin, the widely-used blood thinner sold as an injectable drug by Sanofi-Aventis SA under the name Lovenox. The rate for bleeding with Xarelto, also known as rivaroxaban, was about twice that of enoxaparin, although the overall rate of bleeding risk was low, according to the FDA report. The staff wrote in one review:

The evidence that administration of rivaroxaban (Xarelto) could lead to bleeding events in significantly more patients relative to enoxaparin amplifies this safety concern for rivaroxaban.

FDA reviewers are saying that long-term safety data are needed to fully weigh the potential for liver damage with the drug. They noted that several company-funded studies were under way that should provide that information. Despite the risks, FDA staff said the company's data showed the drug was effective in preventing dangerous blood clots in patients undergoing such surgeries. Johnson & Johnson contends that the benefits of Xarelto outweighed its risks and says it would take steps to monitor potential problems after approval. A Bayer spokesman said the company was confident it could address the FDA's concerns. The FDA is seeking advice from its panel of outside experts before making its decision. The agency usually follows the panel's recommendations, but not always.

The initial market for Xarelto is somewhat small—the company estimates just 800,000 people receive replacement hips or knees each year in the United States. The greater potential of the drug is said to lie in a future use as a long-term therapy to prevent stroke, which according to the Centers for Disease Control and Prevention affects more than 5 million Americans and is the third-leading cause of death. Bayer and J&J have said they are studying that

use as well as the possible prevention of acute coronary syndrome.

Source: Reuters

X. BUSINESS LITIGATION

\$600 MILLION SETTLEMENT FOR TELEVISION LAWSUIT AGAINST UNIVISION

Grupo Televisa S.A.B. has reached a settlement valued at several hundred million dollars in litigation against Univision Communications Inc. The settlement was reached three weeks into trial in a Los Angeles federal court. Televisa, the leading Mexican producer of telenovelas, filed suit against Univision in 2005, alleging the U.S. broadcasting giant excluded certain programs from a 25-year Program License Agreement. That agreement required Univision to pay royalties to Televisa on its advertising revenues in exchange for Televisa programming. Under the settlement Univision agreed to pay Televisa \$25 million in cash. It also agreed to amend the parties' agreement to expand the base upon which the royalties are calculated, narrow the exclusions to the royalty base, and to provide Televisa with free advertising time worth \$65 million a year through 2017.

Source: Bingham.com

WHOLE FOODS SETTLES WITH THE FTC

Whole Foods Market has reached a settlement with the Federal Trade Commission resolving charges that its \$565 million acquisition of Wild Oats Markets had violated antitrust law. The FTC had opposed the deal between Whole Foods and Wild Oats on antitrust grounds. The government's lawyers argued that Whole Foods and Wild Oats compete in a specific market of natural and organic food and that the combined company would raise prices and stifle competition. The FTC said the settlement restores competition in the premium and organic foods market. Whole Foods must sell 32 of its

supermarkets and related assets, including 12 Wild Oats stores, one Whole Foods store, and the leases for 19 Wild Oats stores that have already been closed. It must also divest intellectual property relating to Wild Oats, including the branding rights.

Source: Forbes.com

HITACHI PLEADS GUILTY TO FIXING LCD PRICES

Hitachi Displays Ltd. Has agreed to plead guilty to conspiring to fix prices on the sale of LCD panels. The Japan-based electronics firm agreed to pay a \$31 million fine as part of its agreement with the U.S. Justice Department. Three other major producers of liquid crystal display panels have already admitted their involvement in price-fixing. Hitachi admitted to fixing prices of the screens sold to Dell, Inc. for use in desktop monitors and notebook computers from 2001 to 2004.

LG Display Co. Ltd., Sharp Corp., and Chunghwa Picture Tubes Ltd. Entered into similar plea agreements last year relating to their sales of glass display screens. LG Display, a South Korean company, and its LG Display America Inc. unit agreed to pay a \$400 million fine for its part in fixing prices of certain LCD panels from 2001 to 2006. Chunghwa, a Taiwanese company, agreed to pay \$65 million for its role in the scheme. And Sharp, a Japanese company, agreed to pay \$120 million for participating in separate conspiracies to fix the price of certain LCD panels sold to Dell, Motorola and Apple. Those panels were used in computer monitors, laptops, Motorola Razzr mobile phones and Apple's iPod portable music players.

With the Hitachi plea, the U.S. government will have brought in more than \$600 million in criminal fines stemming from LCD price-fixing. Acting Assistant Attorney General Scott Hammond had this to say in a statement concerning the settlement:

This case should send a strong message to multinational companies operating in the United States that when it comes to

enforcing the U.S. antitrust laws we mean business.

I hope that one of these days the mindset of those who run major corporations will be such that “doing the right thing” will be the accepted way to do business. Until then there will be more reporting of wrongdoing in the corporate world.

Source: *Associated Press*

XI. INSURANCE AND FINANCE UPDATE

JUDGMENT REVERSED IN VANISHING PREMIUM INSURANCE CASE

A California Appellate Court has ruled that disclaimers placed inconspicuously in an insurance policy sales brochure did not preclude an insured’s claim of justifiable reliance on the promises made on the face of the brochure. In 1993, an agent for the Guardian Life Insurance Company of America sold David Powell a \$500,000 whole life insurance policy. The agent allegedly told Mr. Powell that earnings from the policy would be sufficient to pay the premium costs by the 12th year of the policy’s life, thus eliminating any out-of-pocket premium costs after the 11th year. As we have reported, such a policy is referred to as a “vanishing premium” policy. As part of his effort to sell the policy, the agent provided Mr. Powell a three-page illustration that depicted the elimination of out-of-pocket premium in the 12th year of the policy’s life.

The third page of the document contained a single, lengthy endnote—39 single-spaced lines, all capitalized—with various conditions, qualifications and limitations about the life insurance product being offered. In the middle of the page—not set apart in any way from the surrounding text by contrasting type, font, color, border or spacing—the following disclaimer appeared:

Figures depending on dividends are neither estimated nor guaran-

teed, but are based on the 1993 dividend scale. Actual future dividends may be higher or lower than those illustrated depending on the company’s actual future experience.

Following another dozen lines of explanation in the document furnished to the prospective policyholder—all in the same type face—a further caution was provided:

The number of years of required cash outlays depends upon age at issue, policy class, face amount, and continuation of The Guardian’s current dividend scale, and assumes no policy loans.

Mr. Powell allegedly did not discover he had been deceived until 2004, when, after paying premiums for 11 years, he was billed for additional premium costs. The policyholder was told that lower-than-anticipated dividend earnings necessitated the additional payments. Mr. Powell sued Guardian and Davidson for fraud and negligent misrepresentation among legal theories.

A California state court dismissed the complaint, saying that Mr. Powell’s claims accrued when he purchased the policy in 1993 and thus were barred by the statute of limitations. The court also ruled that the policyholder would be unable to establish justifiable reliance on the alleged misrepresentations because of inconsistent language in the policy itself and in footnote disclosures to the marketing materials. Mr. Powell appealed the trial court’s decision to the California Court of Appeals.

The court first determined that the claims were not time-barred since the three-year limitations period for fraud and negligent misrepresentation claims begins to run only when the aggrieved party discovers the facts constituting the fraud. Thus, Mr. Powell’s right to sue depended on when he discovered the alleged misrepresentation. On the merits, the court rejected Guardian’s contention that the disclaimers, which were part of the agent’s three-page illustration, were so clear and obvious as to preclude, as a matter of law, the claims of delayed discovery and reason-

able reliance. The court found a question of fact as to the presence or absence of a manifest unreasonableness in Mr. Powell’s reliance on the allegedly deceptive policy illustration and the promises of Guardian’s agent.

The court felt that if the evidence ultimately established that the disclaimers were read and understood, they might be sufficient to defeat the claims. “But the placement of the disclaimers, buried in a sea of same-sized, capitalized print, coupled with the absence of any cautionary language on the first page of the policy illustration, precluded a determination that the disclaimers were adequate as a matter of law,” according to the court. Nor did reference in the policy itself to premiums payable “for life” also necessarily bar the claims. It wasn’t alleged that Mr. Powell was told “that premiums would stop, rather that premiums after the 11th year would be paid from earnings from the policy and that no further out-of-pocket payments would be required.” This was a well-reasoned opinion recognizing that in the real world matters hidden in an insurance policy or supporting documents aren’t always noticed by policyholders.

Source: *CAL law*

APPEALS COURT THROWS OUT PART OF \$356,000 KATRINA AWARD

A Federal Appeals Court has ruled that a jury shouldn’t have awarded money to a south Louisiana couple for their allegation that an insurance company acted in bad faith when it denied their homeowner claim after Hurricane Katrina. The ruling last month by the Fifth U.S. Circuit Court of Appeals vacates a portion of a November 2007 judgment against State Farm Fire and Casualty Co. The jury had awarded Michael and Judy Kodrin \$356,000 in damages, penalties, and attorney’s fees. Their trial was the first in Louisiana against State Farm over damage from the August 2005 hurricane.

A three-judge panel from the 5th Circuit said the Kodrins weren’t entitled to bad-faith penalties, damages or attorney’s fees because the couple failed to prove State Farm “had no justification for denying their claim.” The

panel instructed the trial court judge to recalculate the Plaintiffs' award based on its ruling.

State Farm claims its homeowner policies cover damage from a hurricane's wind, but not its rising water. The insurer contended that Katrina's flood waters demolished the couple's Port Sulphur home. The Appeals Court upheld a jury's decision that State Farm owed the couple about \$200,000 for Katrina's wind damage. But the Fifth Circuit said the only evidence of bad faith presented by the Kodrins was State Farm's denial and their expert's testimony that wind caused the damage. The Court, in its opinion, said:

This is evidence that State Farm was wrong about the cause of damage, but without more, it is not evidence of bad faith. The Plaintiffs essentially ask this court to find bad faith any time an insurer denies coverage and a jury disagrees. This would unduly pressure insurers to pay out claims that they have reason to believe lie outside the scope of coverage, solely to avoid penalties later.

John Redmann, a Louisiana lawyer who represented the Kodrins, says the ruling could cost his clients up to about \$250,000 that jurors and the trial judge had awarded for penalties, mental anguish and attorneys' fees. It's not known if State Farm presented evidence that the damages were caused by water and not by wind. Since the Plaintiffs had expert testimony by an expert engineer that wind caused the damage, it seems like State Farm would have needed a "reason" for its "denial." Redmann is weighing his clients' legal options, including asking the 5th Circuit to rehear the case.

Source: Associated Press

TOP FIVE REASONS CONSUMERS FILE COMPLAINTS AGAINST INSURERS

According to a report from the National Association of Insurance Commissioners, (NAIC) the top five reasons consumers filed formal complaints against their insurance companies in 2008 were delays, denials of claims,

unsatisfactory settlement offers, premiums and rating, and cancellations. The NAIC collected the data through its centralized electronic Complaint Database System, through which states voluntarily report "closed" complaints. A total of 195,669 confirmed consumer complaints on insurance companies were reported in the 2008 calendar year. Accident/health and auto insurance coverage were the target of the most complaints, followed by homeowners, life and annuity, and commercial multi-peril. Based on our litigation experience fraudulent conduct would be a factor in many of the categories of complaints referred to above.

Source: National Association of Insurance Commissioners

XII. SECURITIES CASES

CLAIMANTS AWARDED DAMAGES AGAINST REGIONS MORGAN KEEGAN

Arbitrators awarded over \$100,000 recently in two separate investment-related cases. In February, the well-known sportscaster Tim McCarver was awarded \$100,000 in compensatory damages as a result of losses from investments in Regions Morgan Keegan bond funds. In March, a retired cattle farmer was awarded \$187,000 for his losses in those same bond funds. The evidence developed through these cases and others highlights Morgan Keegan's scheme to defraud its bond fund investors. These investors believed they were in a bond fund, which is traditionally a low-risk investment. Instead the bond funds they were put in contained speculative and high-risk investments. These investments have left many investors without their life savings. A large segment of the bond fund investors were either retirees or those folks who were close to retirement. Morgan Keegan has now left them with a bleak future at a critical point in their lives.

Morgan Keegan being found liable in these arbitrations, however, is a positive

step. As more and more of these cases are tried hopefully arbitrators will recognize and be overwhelmed by Morgan Keegan's bad conduct and will restore the life savings of the investors. Our firm is actively pursuing bond fund claims against Morgan Keegan. If you have questions relating to this subject, contact Jay Aughtman (Jay.Aughtman@beasleyallen.com) or Scarlett Tuley (Scarlette.Tuley@beasleyallen.com) or 800-898-2034.

MORE POTENTIAL CLAIMS UNDER REVIEW BY THE FIRM

Our firm is currently investigating and evaluating a number of potential claims for investors who have suffered substantial losses. Many of them involve financial institutions and bond insurers as potential Defendants. It takes a great deal of work before these cases are ready to file. We want to be sure of the liability and damages before filing suits or going to arbitration on behalf of the persons who have contacted the firm. More will be said on these cases next month. Jay Aughtman, Scarlett Tuley, and I are working in this area at present.

PONZI SCHEMES RAMPANT

Ponzi schemes are being uncovered in record numbers. The SEC is investigating cases all over the country, that while not on the scale of Madoff, are just as devastating to investors. In an action filed this month entitled SEC v. Millennium Bank, the defendants were allegedly conducting a Ponzi scheme via an offshore bank that raised over \$68 million from investors. Investors were solicited to purchase CDs which defendants claimed paid extraordinary returns. What actually happened is the money was simply transferred offshore to the defendants' accounts. The SEC also obtained a preliminary injunction in March against an individual in Virginia who bilked \$11 million from about 31 investors through a fraudulent offering scheme in which he sold limited partnership interests in three entities. He claimed annual returns as

high as 22%. As with the Millennium case virtually none of the money raised was actually invested.

Now that the world is aware of the Bernie Madoff scheme, many other long running schemes, some as long as 13 years, are coming to light. This is sad news for many investors because it will be difficult to recover any money from these con men. However, there may well be others who assisted the con men who have liability. We are looking into several potential claims of this sort. Going forward investors should be very wary of any nontraditional investment opportunities and skeptical of anyone claiming extraordinary results on investments.

If you have question relating to this subject, contact Jay Aughtman (Jay.Aughtman@beasleyallen.com) or Scarlett Tuley (Scarlette.Tuley@beasleyallen.com) or 800-898-2034.

XIII. EMPLOYMENT LAW

COMPANIES MUST COMPLY WITH FLSA

The Fair Labor Standards Act (FLSA) was passed in the aftermath of the Great Depression and was supposed to guarantee “a fair day’s pay for a fair day’s work.” The FLSA was a response to all the deplorable working conditions American workers were being forced to endure just to be able to have a job. In the 1920s and 1930s Corporate America required employees to work extremely long hours for very little pay. If an individual complained about his or her pay, or the long hours they were required to work, they were simply fired and replaced by another individual. During the Depression era, with unemployment at all-time highs, many companies used the vast labor pool to their advantage. Many workers were forced to work until they literally could not continue then they were terminated and replaced by younger, and more physically capable individuals. This “heartless” approach to running a company and dealing with its employees was morally wrong.

Although American workers hopefully will never have to endure what the early 20th century workers experienced, we have seen many in Corporate America try and use the current economic crises to their advantage. The first way we have seen corporations abuse their workers is by requiring them to take on more responsibility or job duties than they otherwise are required to perform. Often times, employees are even being forced to work “off-the-clock.” The second manner we have seen abuse is by managers and supervisors openly intimidating employees by claiming that there are plenty of unemployed individuals out there who want their job. This creates a hostile work environment and makes employees reluctant to stand up in the face of abuse for fear of retaliation or losing their jobs.

When corporations require salaried employees to work longer hours or increase a person’s job duties or responsibilities, they may be violating the law. Under the FLSA, a “Bona Fide Executive” or managerial employee typically receives a salary for all hours worked and is not entitled to overtime pay. To qualify for this type of pay arrangement, however, the employee’s “primary duty” must be “management” of the store or department to which they are assigned. Under the Department of Labor regulations, “the amount of time” an employee spends on a particular task can be a good indicator of whether “management” is their primary duty. Therefore, if a company continues to add more job duties and responsibilities that really isn’t “management” work, they could be violating the law by changing the very nature of the job. In many instances, adding the additional work will create a situation where the employee should actually be receiving overtime pay, even though they still receive a salary.

Our firm is currently reviewing several cases where individuals have complained that they have had additional job responsibilities placed on them in the company’s effort to increase production or to help the company save on labor costs. Many times, companies will eliminate certain

jobs and expect the remaining employees to pick up the extra work. There is certainly nothing wrong with employees pitching in during tough economic times. But, a company cannot be allowed to violate the law and abuse its employees so its high level executives can continue to make their same salaries, receive big bonuses and not share in the increased work. If you want more information relating to this subject, contact Roman Shaul in our firm at Roman.Shaul@beasleyallen.com or 800-898-2034.

GOVERNMENT REVERSES STANCE ON WAL-MART CLASS IN GENDER BIAS CASE

The federal government is now involved in the huge gender class action against Wal-Mart. The move is a reversal by the U.S. Equal Employment and Opportunity Commission, which had previously decided to sit the case out. Instead, the EEOC now opposes Wal-Mart’s bid to try punitive damages on a case-by-case basis, according to an amicus curiae brief the commission filed with the Ninth U.S. Circuit Court of Appeals. Plaintiff’s lawyers first sought the government’s intervention in 2006 when the case was before a three-judge panel of the Ninth Circuit. But the EEOC declined to get involved at that time without stating a reason. The panel upheld class certification for 2 million potential Plaintiffs. But the Ninth Circuit decided to take the case en banc and will hear oral argument.

The Plaintiffs say in the lawsuit that Wal-Mart uniformly paid women less than men across the country. The EEOC said in its brief:

If Wal-Mart’s arguments were accepted, it could effectively preclude a claim for punitive damages in most if not all Title VII pattern-or-practice cases including those brought by the Commission.

It will be interesting to see how this case turns out. We will report all future developments as the case goes forward. It clearly is a most important case.

Source: Law.com

XIV. PREDATORY LENDING

SEVEN SIGNS OF PREDATORY LENDING

Over the last several years, our nation has made progress in expanding access to capital for previously under-served borrowers. But despite this progress, too many families are suffering today because the evidence of abusive practices in a segment of the mortgage lending market. Predatory mortgage lending practices strip borrowers of home equity and threaten families with foreclosure, destabilizing the very communities that were beginning to enjoy the fruits of our nation's economic success. Predatory mortgage lending involves a wide array of abusive practices. Here are brief descriptions of some of the most common predatory lending practices:

- **Loan Flipping:** A lender “flips” a borrower by refinancing a loan to generate fee income without providing any net tangible benefit to the borrower. Flipping can quickly drain borrower equity and increase monthly payments—sometimes on homes that had previously been owned free of debt.
- **Unnecessary Products:** Sometimes borrowers may pay more than necessary because lenders sell and finance unnecessary insurance or other products along with the loan.
- **Excessive Fees:** Points and fees are costs not directly reflected in interest rates. Because these costs can be financed, they are easy to disguise or downplay. On competitive loans, fees below 1% of the loan amount are typical. On predatory loans, fees totaling more than 5% of the loan amount are common.
- **Prepayment Penalties:** Borrowers with higher-interest subprime loans have a strong incentive to refinance as soon as their credit improves. However, up to 80% of all subprime mortgages carry a prepayment

penalty—a fee for paying off a loan early. An abusive prepayment penalty typically is effective more than three years and/or costs more than six months' interest. In the prime market, only about 2% of home loans carry prepayment penalties of any length.

- **Mandatory Arbitration:** Some loan contracts require “mandatory arbitration,” meaning that the borrowers are not allowed to seek legal remedies in a court if they find that their home is threatened by loans with illegal or abusive terms. Mandatory arbitration makes it much less likely that borrowers will receive fair and appropriate remedies in cases of wrongdoing.
- **Steering & Targeting:** Predatory lenders may steer borrowers into subprime mortgages, even when the borrowers could qualify for a mainstream loan. Vulnerable borrowers may be subjected to aggressive sales tactics and sometimes outright fraud. Fannie Mae has estimated that up to half of borrowers with subprime mortgages could have qualified for loans with better terms.
- **Kickbacks to Brokers:** When brokers deliver a loan with an inflated interest rate (i.e., higher than the rate acceptable to the lender), the lender often pays a “yield spread premium”—a kickback for making the loan more costly to the borrower.

Predatory lenders have caused a tremendous amount of misery and suffering to hundreds of thousands of people in this country. These practices had a direct effect on the meltdown of the nation's economy. Very poor and sometimes no regulation of the industry were contributing factors. It bothers me to hear some of the Republicans in Congress—who were in control when much of the regulation that was in effect was relaxed—trying to put the blame on others for what the predatory lenders have done. Had the government done its job, much of what our economy is going through may well have been avoided.

Source: Center for Responsible Lending & Predatory Lending

XV. PREMISES LIABILITY UPDATE

SUIT SETTLED OVER FRATERNITY HAZING DEATH

The mother of a University of Colorado student, Gordie Bailey, who died of acute alcohol poisoning in September 2004 after a fraternity-initiation ritual, has settled her lawsuit with the fraternity. The settlement, which was reached just before the trial was to start last month, was reached with both the Chi Psi fraternity and the Alpha Psi Delta Corporation of Chi Psi, which owned the fraternity house in Boulder. The amount of the settlement is confidential.

Gordie Bailey died on the morning of September 17, 2004, of acute alcohol poisoning. At the time, his blood-alcohol level was 0.328%. The night before, he and 26 other Chi Psi fraternity pledges at CU were blindfolded and taken to a spot in the woods west of Boulder as part of an initiation ritual. During the ritual the pledges were forced to drink large amounts of whiskey and wine. After he was driven back to the fraternity, Gordie lapsed into unconsciousness. None of the fraternity members called 911 for hours afterward. Instead, some of the “brothers” scrawled vulgar phrases and drawings on his body.

A settlement was reached with several individual members of the fraternity about a year ago. Bruce Jones, a Denver lawyer, represented Gordie's mother and did a very good job. He had this to say:

I think it is a good and appropriate settlement. There are a number of things the fraternity has agreed to do to help police drinking and avoid these types of things in the future by how they handled pledging and initiation events and the like. This settlement resulted in some agreements that I think will ultimately be of benefit to the fraternity and

to future fraternity members because it could well result in saving lives. The fraternity has agreed to do a number of different things that will reduce the likelihood of a future death from alcohol poisoning like occurred with Gordie. From that standpoint, I'm very pleased with this outcome. The Lanabans have said on more than one occasion that the lawsuit wasn't about money. And the agreement they ended up arriving at with the fraternities really reflects that was a truthful statement—that they wanted reform and change.

University officials across the land should take steps to control the activities of fraternities on their respective campuses. Parents of students must also get involved and make sure this happens. Activities such as those involved in the Colorado case can't be tolerated. After all, we do live in a "civilized society!"

Source: *The Denver Post*

BURGER KING SETTLES INJURY CLAIM

The parents of a now-12-year-old California boy who fell from a play structure located on the premises of a Burger King restaurant, striking his head, which caused severe brain damage, have settled their claims. The franchise's parent company will pay \$20 Million in settlement for the injuries to Jacob Buckett and his sister, Isabelle, who was 5 at the time of the boy's fall in 2005 at the Temecula restaurant. The structure was inside the restaurant and there was no rubber beneath the bars, just hard tile. The defendants, the restaurant franchisee, the parent company, the playground manufacturer, and the installer of the playground were all named as defendants in the case. The settlement had a confidentiality clause, but several media outlets in the area have reported on the amount and that Burger King was involved.

The young boy suffered a severe traumatic brain injury, as well as injuries to his lungs, when he fell off the bars. The

equipment was designed to look like a fireman's pole with monkey bars. While the defendants contended that the responsibility for watching the boy was the father's, parents have an expectation of safety when they take their children to established public playgrounds.

The restaurant and installer should have placed rubber beneath the structure, rather than leaving the hard tile floor unprotected. Warning signs were not posted at the particular restaurant where the fall occurred, though other restaurants in the chain had such signs posted. There had been at least one prior fall-injury at this location.

After his initial treatment, Jacob was placed on a ventilator and stayed in a hospital for more than a month, before being admitted to a rehabilitation hospital for six weeks. Because of complications when a ventricle shunt was placed, he had to be readmitted to Children's Hospital in San Diego for two more months. The boy is still undergoing rehabilitation and has significant brain damage. The sister was awarded money in the settlement because she—as the result of seeing the fall—suffered negligent infliction of emotional distress.

Christopher Aitken, a lawyer with the San Diego firm of Walton Barber, represented the family and did an outstanding job of developing the case. This lawsuit raises awareness of the importance of safety at public playgrounds and the need to make safety of children at such locations a top priority.

Source: *The Desert Sun*

LAWSUITS ARISING OUT OF HOUSE EXPLOSION FILED

The family of a man who was killed in an explosion at a home in Plum, Penn., last year has sued Dominion Peoples Gas Co., Dominion Resources, Higgins Plumbing and W.S. Lea General Contracting. The suit alleges that each company was at fault in the natural gas explosion at the home of his daughter. The man's granddaughter, who was four at the time of the explosion, was thrown from the house and suffered a broken leg in the explosion. The child's parents and her grandmother are also

named as Plaintiffs in the suit.

Higgins Plumbing was hired to replace the sewer line on the property in 2003. In turn W.S. Lea General Contracting was hired by the plumbing company to do the excavation work. The complaint alleges that the gas line was damaged while it was exposed during the excavation. Dominion Peoples agrees with the family that the plumbing company and the contractor were negligent in their work on the property and are responsible for the gas leak that caused the explosion.

According to the complaint, Dominion Peoples breached its standard of care regarding the distribution of gas by failing to: inspect gas lines in search of leaks, to maintain the lines to ensure leaks don't occur, to replace pipes, to promptly locate and repair the gas leak, to properly odorize its natural gas, and failing to monitor the work of Lea and Higgins. Dominion Peoples admits it did not inspect the work site during construction, but the company denies that sections of the pipe, other than the leak site, were corroded.

Source: *Tribune-Review News Service*

WATER HEATER CAUSED FATAL EXPLOSION AT CALIFORNIA PLANT

According to authorities, a failing electric water heater caused an explosion that killed two people and injured another at a plastics manufacturing plant in Southern California. The force of the water heater blast in Rancho Santa Margarita was said to have left a concrete wall of the Solus Industrial Innovations building bulging out. There were fatalities and injuries. Firefighters found two bodies inside after the blast, and a third victim with minor injuries was taken to a hospital.

Source: *Associated Press*

JUDGE APPROVES PLAN IN CLUB FIRE SETTLEMENT

You may recall that we have written extensively in prior issues about the night club fire that occurred in Rhode Island in 2003. Survivors of the deadly fire and relatives of the 100 people

killed are close to sharing a \$176 million settlement. A federal magistrate judge has approved a proposal for distributing the money among the more than 300 people who filed suits over the fire. The fire began when pyrotechnics used as a stage prop by the 1980s rock band Great White ignited sound-proofing foam. The distribution formula was proposed by Duke University law professor Francis McGovern, who spent a considerable time in Alabama at the University of Alabama. He was hired by the victims' lawyers to work out a points system for survivors and relatives of victims of the fire.

The formula awards the largest shares to survivors who were most severely injured, but the precise sum each Plaintiff will receive hadn't been determined when this issue went to the printer. Payments will range from about \$20,000 to several million dollars. There were no objections to the distribution plan and the court approved it. The \$176 million comes from several dozen Defendants, including Anheuser-Busch, Clear Channel Broadcasting and The Home Depot.

After the fire, which injured more than 200 people, club owners Jeffrey and Michael Derderian pleaded no contest to involuntary manslaughter charges, and former Great White tour manager Daniel Biechele pleaded guilty to the same charges. Biechele was released from prison last year after serving less than two years in prison. Michael Derderian is due out on parole later this year; his brother was spared jail time.

Source: *Insurance Journal*

FAMILY SETTLES LAWSUIT FILED OVER INJURIES AT SCHOOL

The parents of a girl whose skull was fractured by a steel beam that crashed through her classroom ceiling have reached a settlement in their lawsuit against two construction companies and the Troy, Missouri school district. The terms of the settlement are confidential. The lawsuit was filed in Lincoln County on behalf of the child, who was injured in the 2006 incident at an elementary school in Moscow Mills, Mis-

souri. In addition to the school district and four administrators, the suit named Demien Construction Co. and Big Boy's Steel Erection.

The suit alleged that the companies were told not to work in areas occupied by students. It was contended that work on the classroom's roof and ceiling caused a dangerous condition. After she was injured, the child was airlifted to Cardinal Glennon Children's Medical Center in St. Louis, where surgeons used metal plates to help her skull heal. The family moved to Arizona after a doctor's suggested that the dry, warm climate might ease the headaches the child was experiencing. Apparently, the move has helped, since she appears now to have no permanent disability or problems.

Source: *St. Louis Post Dispatch*

AMUSEMENT PARK DEATH LAWSUIT SETTLED

The parents of a seven-year-old boy, who died on an amusement park ride in New York State, have settled their lawsuit against Westchester County, for \$1.25 million. The county also agreed to set up a scholarship in the child's name. Westchester County, which owns the amusement park, was said to have been negligent, causing the child's death in 2005. The boy was on Playland's Ye Old Mill, an indoor boat ride. He got out of his boat soon after the ride started and somehow ended up in its channel of water, dead from a blunt head injury. Officials acknowledged that the ride was understaffed.

Source: *Kansas City Star*

LAWSUIT FILED AGAINST DAY CARE CENTER

A wrongful death lawsuit has been filed by the mother of an 18-month-old who drowned in a hot tub at a North Las Vegas day care center back in January. The suit, filed in a state court, alleges Marisela's Family Day Care Center was negligent in failing to care for the infant. The child died after he and another child, who was three years old, were found in a hot tub attached to a pool at the home-based day care. The three-year-old survived, but tragically

the infant didn't. The day care's city business license has been canceled and it no longer is in operation.

It was alleged in the lawsuit that the day care facility held itself "out to the public and to Plaintiffs as being skilled, careful and diligently able to supervise, safeguard and protect the children under its care and supervision." Instead, the suit charges, the child who drowned "was caused to wander about the back yard, with no safety precautions in place. Facilities that care for children have a duty to take all reasonable means available to protect them. When they fail to do so, the consequences can be deadly, as in this case.

Source: *Las Vegas Sun*

XVI. WORKPLACE HAZARDS

OSHA SPEEDS UP POPCORN LUNG SAFEGUARDS

Labor Secretary Hilda Solis is moving quickly to deliver on her promise that the Obama administration would be more vigorous in protecting workers' safety than the Bush administration. As proof, the Labor Department sped up the process of establishing rules to protect workers from exposure to a harmful chemical sometimes used in making microwave-popcorn flavoring, which has been linked to a condition called "popcorn lung." This is a total reversal of the Bush Administration's approach to the issue. It's a good and early sign that the OSHA will be reinvigorated. The newly-appointed Secretary withdrew a Bush Administration initiative that unions said would have delayed the process of diacetyl standard-setting. That initiative, called an advance notice of proposed rule-making, was made just as former President Bush left office.

The Labor Department said diacetyl has been linked to the deaths of three workers exposed while manufacturing food flavorings. The exposure has been associated with a serious and potentially fatal lung disease, *bronchiolitis*

obliterans. The chemical is also used in flavorings for baked goods, snacks, dairy products, fats and oil for cooking, and certain beverages. Most exposure to workers is from manufacturing processes using butter and cheese flavorings, and sour cream, egg or yogurt flavors. Scientists have found that harmful exposure to diacetyl in the general population is rare.

Ms. Solis said she was “alarmed” that workers could still be at risk of developing a disease she tried to prevent when she was a member of Congress. “These deaths are preventable,” she said in a statement. Rep. Lynn Woolsey (D., Calif.), who presides over a workforce-protection subcommittee of the House Education and Labor Committee, applauded the action, saying: “Because of the Bush Administration’s foot dragging on this issue, this disease has already sickened and killed a number of workers nationwide.”

The Bush Administration also stalled on setting safety standards on issues such as mine injuries and hazards to nursing-home workers. President Obama has vowed to increase OSHA regulation. In his budget blueprint issued in February, he sought more money for the agency’s enforcement operations. Typically the Labor Department doesn’t ban chemicals, but OSHA does set permissible exposure levels for some.

Source: *Wall Street Journal*

MAN DOESN’T LIVE TO HEAR A JURY RETURN A VERDICT IN HIS CASE

A Sioux City man who suffered from “popcorn lung” was awarded \$7.5 million by a federal jury, but he didn’t get to hear the jury announce its verdict. Ronald Kuiper, 69, died of lung and heart failure one day before the verdict. A complication related to a condition linked to his work with an artificial flavoring as a butter-flavor mixer caused his death. Jurors ended six days of deliberations in the closely-watched product safety case. Mr. Kuiper was being treated at a local hospital and had less than 30% breathing capacity at the time of his death.

Mr. Kuiper had been relegated to

using a scooter to move, but was showing signs of improvement before he died. The jury verdict was against Givaudan Flavors Corp. of Cincinnati, a Defendant in the case, along with three other companies that made popcorn flavoring used at the American Pop Corn Co. Mr. Kuiper had been a butter-flavor mixer in the 1990s at the company’s facility. The other companies settled with the employee before trial. The flavoring contained diacetyl and the employee developed “popcorn lung.” He was diagnosed with the disease in 2006 after working at American Pop Corn Co. for 26 years.

The claims against the other companies named in the lawsuit—International Flavors & Fragrances Inc. of New York, Flavors of North America Inc. of Carol Stream, Ill., and Sensient Flavors Inc. of Indianapolis—were settled prior to the trial. Mr. Kuiper had appeared in the trial briefly to testify, but was excused from further attendance because of his medical condition. Kenneth McClain, the lawyer who represented the victim, observed:

It was really unfortunate that he was not able to see the verdict. This was a needless tragedy that could and should have been prevented. We hope that the end result of these cases is a focus on food safety in America. Mr. Kuiper was a very solid citizen and a hard worker who worked to support his family his whole life.

Five similar cases in Iowa are set for trial in July, and more than 300 other cases are pending nationwide. Verdicts as high as \$20 million have been awarded in other cases. It was too bad that the Labor Department had not taken the action referred to above. Hopefully, tragic endings like this one won’t be repeated in the future.

Source: *Des Moines Register*

JURY AWARDS \$2.6 MILLION IN ASBESTOS CASE

A jury in McLean County, Illinois, has awarded \$2.6 million to relatives of a woman who died as a result of an asbestos-related ailment. Jean Holmes

died in April 2006 of mesothelioma. Ms. Holmes was exposed to asbestos when she laundered clothing belonging to her husband, who worked at Bloomington’s Union Asbestos and Rubber Company during the 1960s. The Holmes’ family contended that she was never warned of the dangers of asbestos. It was alleged that defendants Pneumo Abex LLC and Honeywell International Inc., through their corporate predecessors, conspired with other companies to suppress information about the hazards of asbestos.

It is tragic that people are suffering and will continue to suffer because companies chose to make a conscious decision to expose people to asbestos. Mike Andrews handles mesothelioma cases for our firm. Mesothelioma is a deadly form of cancer that is caused by previous exposure to asbestos. If you would like more information or have any questions about asbestos exposure, you can contact Mike at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

Source: *Chicago Tribune*

MSHA TARGETS 15 MINING OPERATIONS

The federal Mine Safety and Health Administration (MSHA) has warned 15 mining operations to clean up their health and safety practices or face stricter enforcement. The agency said 13 coal mines, a dirt processing plant and a gold mine have been cited repeatedly for “significant and substantial” violations that could have caused serious injuries or illnesses. The mining operations named are supposed to craft plans for reducing violations and will be monitored closely by health and safety inspectors for 90 days. If they improve, MSHA says they won’t be listed as having a pattern of violations, which leads to greater scrutiny and tougher disciplinary action. MSHA wants the companies to “incorporate needed improvements into their safety and health programs.”

Five of the mines are located in Kentucky, four in West Virginia and three in Virginia. The agency also warned the dirt processing plant in California and a Nevada gold mine. Among other things,

the designation allows MSHA to interrupt production by ordering workers to leave a mine until a serious violation is corrected. The agency has issued similar warnings to more than 40 mining operations in the United States since mid-2007, including 16 last June. Those mines reduced their serious violation rates by an average of 74.81%, according to MSHA. Among the operations warned are two mines and a processing plant controlled by Richmond, Virginia-based Massey Energy Co., the nation's fourth-largest coal producer by revenue. The agency also singled out Richmond, Virginia-based James River Coal Co. about its Blue Diamond Coal Co.'s mine No. 77. Hidden Splendor Resources Inc. has been cited hundreds of times a year for violations at its Horizon mine 11 miles west of Helper, Utah, according to MSHA. Hidden Splendor is a subsidiary of Salt Lake City-based America West Resources Inc.

Source: Associated Press

XVII. TRANSPORTATION

SOME VALUABLE INFORMATION RELATING TO TRUCKING LITIGATION

One of the things our firm does to help the legal community and people generally is to inform lawyers about the kinds of cases we deal with every day. Also, our lawyers routinely write and publish articles in an effort to help injured people have access to the most informed legal representation available. One particular article, written recently by Chris Glover, a lawyer in our Personal Injury Section, was submitted for publication in *Sidebar*, which is a publication of the New Lawyer's Division of the American Association for Justice. With permission, we are including the article in this issue and hopefully our readers will find it useful. Leslie C. Ellis, a staff attorney with the firm, also contributed to the article.

TRUCKING LITIGATION

It may seem like a somewhat daunting task to prepare for a trucking case, but with proper preservation, gathering and planning, trucking cases do not have to be as formidable as they initially appear.

One of the most important things to realize is that trucking cases are not like typical car wreck cases. This difference is due, in part, to the fact that the trucking industry is highly regulated by our federal government through Federal Motor Carrier Safety Regulations (FMCSR) (<http://www.fmcsa.dot.gov/rules-regulations/rules-regulations.htm>). Every aspect of a trucking case, from preservation of evidence to proving negligence claims, is affected by the FMCSR. So, it is important to familiarize yourself with these rules and regulations or associate counsel skilled in this area.

PRE-SUIT INVESTIGATION

Remember, even if you get the case early on, your investigation is already behind. By the time you meet your client, several investigations have already been performed (law enforcement/ Department of Transportation (DOT), trucking company, and insurance company). So, after the initial client interview, send preservation letters to every potential Defendant and nonparty in possession of evidence, informing them of their legal duty to preserve evidence in a potential civil trial. For example, send a letter to the trucking company requesting preservation of driver logs, onboard computer data (i.e., electronic control module "ECM" data), and dispatch records. Otherwise, DOT regulations require that these records only be kept for six months. Preservation letters not only keep Defendants from discarding evidence in the normal course of business, but also prove notice if spoliation becomes an issue at a later date. Further, to prevent spoliation and

inadvertent loss of evidence, you should find, inspect and secure the accident vehicles as early as possible in your investigation.

Go to the scene of the accident with an investigator or accident reconstructionist and take your own photographs and video of the scene. Then, identify and contact all potential witnesses. Getting eyewitness information about speed, distance and driver behavior is crucial to your case. Since memories tend to fade with time, the quicker you are able to contact and interview witnesses, the more details you will be able to obtain.

After identifying the truck driver, obtain a complete driving history from each state in which he was issued a Commercial Driver's License (CDL). Also request a copy of the Uniform Traffic Accident Report. If there was a motor carrier inspection performed on the date of the wreck, obtain that report as well by contacting the Motor Carrier Safety Division of the Department of Public Safety. Further, if fatalities occurred, a Traffic Homicide Report from the Department of Public Safety should also be requested. It is also imperative that you contact the appropriate state agencies and request copies of any other filings or certificates concerning the trucking company.

POTENTIAL DEFENDANTS AND THEORIES OF LIABILITY

After conducting the pre-suit investigation, carefully review all of the evidence and identify any potentially responsible Defendants, taking care to consider the following people: truck driver; trucking company, owner of the tractor; owner of the trailer; freight broker; freight shipper; vehicle maintenance or servicing company, manufacturer of the tractor or trailer, and/or the man-

ufacturer of your client's vehicle.

Thoroughly research the facts of your case to ensure that you include all applicable theories of liability in your complaint. Some commonly used theories in truck cases include: negligence; wantonness; negligent entrustment; negligent/wanton hiring, retention, training and supervision; negligent maintenance of the vehicle and equipment; and product liability. Product liability cases are often overlooked, especially in a single vehicle accident involving a large truck. However, theories of defective roofs, seatbelts and the like apply equally to 18-wheeler trucks as they do to a car.

DISCOVERY

Your discovery should focus on establishing liability while still considering factors that substantiate a claim for punitive damages. During discovery, request the following: driver's qualification file and logs, daily inspection reports, annual inspection report, inspection, maintenance, and repair records, OEM data and/or printouts, any drug and/or alcohol tests taken after the accident, accident register, any bills of lading, weight tickets, or hotel receipts for the week preceding the accident, any policy and procedure manuals or training documents, medical records of the Defendant driver; medical records of your client, the motor carrier profile from the DOT and the DOT safety audit and rating of the trucking company.

After obtaining the responses to all written discovery, depose the truck driver, the trucking company corporative representative and the safety director. Be sure to question the safety director thoroughly regarding hiring criteria, safety policies, safety records and procedures as well as methods of driver monitoring.

The Federal Motor Carrier Safety Administration (FMCSA) maintains company safety profiles on carriers, available at <http://www.fmcsa.dot.gov/>.

Early in the litigation, determine the existence and amount of insurance coverage available in your case. Beyond the obvious discovery requests, take a look at www.saftersys.org to determine the amount of coverage the trucking company has obtained. Remember that FMCSR Part 387 sets out the minimum levels of financial responsibility for trucking companies. Also, it is important to note that one of the unique considerations of insurance coverage involving commercial carriers is the MCS-90 endorsement. This is a federally mandated endorsement for all commercial carriers over 10,000 lbs., enacted to prevent parties involved in the shipping of freight from denying responsibility and pointing the finger at each other and in effect preventing and/or delaying recovery to an injured party.

EXPERTS

Carefully consider the facts involved in your case and select appropriate experts. For example, if your case involves a serious and permanent injury, the use of an economist to prove loss of future earning and the use of a life care planner to prove future medical costs can greatly impact your case value.

It is a good idea to hire an accident reconstructionist early in the case so that he can be involved in the inspection of the accident scene and vehicles while the evidence is fresh. This expert is invaluable in your determination of liability and also in determining any aggravating circumstances such as speed or failure to take corrective action.

An expert knowledgeable in the FMCSR is also an important asset. Such experts can greatly assist you by determining if a safety or logbook violation exists as well as providing testimony regarding improper vehicle maintenance, inspection, and equipment. Also, an expert can assist you in preparing for the trucking company's depositions in your case.

CONCLUSION

Simply looking at the complexity of a trucking case, your head may begin to swim with the enormity of it all. Planning, however, is the key to cutting down the behemoth early in the process. With a step-by-step plan and organization, trucking cases can be successfully prepared.

Chris Glover
Personal Injury Section
April 2009

Our firm routinely evaluates 18-wheeler cases. If you would like more information on this subject or have a question, you can contact Chris Glover, Julia Beasley or Mike Crow at 800-898-2034 or by email at Chris.Glover@beasleyallen.com, Julia.Beasley@beasleyallen.com or Mike.Crow@beasleyallen.com.

DELAYS IN RUNWAY SAFETY IMPROVEMENTS AT BUSY AIRPORTS

As you may recall, a six-year-old boy was killed in Chicago when a runaway plane at Midway Airport crashed through a fence and collided with his family's car. That tragedy underscores what the government says is an urgent safety problem. Many airports have a real problem with adequate space at the end of runways. It was reported by Associated Press that eleven major airports are currently struggling to meet federal requirements that runways be surrounded by safety areas designed to give runaway planes extra room to stop.

A report recently released by the Transportation Department's inspector

general confirms the problem. The airports named account for nearly one quarter of the nation's air passenger travel. The airports are located in Baltimore, Boston, Charlotte, Fort Lauderdale, Los Angeles, New York, Philadelphia, Phoenix, San Francisco and Washington. It's said that all of the airports have been working for years to come up with solutions, but often there's no place to send runaway planes because the airports are hemmed in by highways, water, buildings or other obstructions. It should be noted, however, that Midway Chicago made safety improvements two years after the child's death. According to the report, between 1997 and 2007, 75 aircraft overran or veered off runways, resulting in nearly 200 injuries and 12 deaths. According to the report, in just three of the accidents cited, 80 injuries and the Chicago death referred to above could have been prevented if safety improvements to runways made after the accidents had been in place beforehand.

Safety areas typically are 1,000 feet long and 500 feet wide at each end of a runway, plus 250 feet along both sides of the runway. The Federal Aviation Administration has allowed some airports that don't have enough room for full-size safety areas to install crushable concrete beds called "engineered material arresting systems" at the ends of runways. The beds are designed to stop or slow planes, not unlike the way gravel-covered ramps on highways stop runaway trucks. The beds are typically about 600 feet long instead of 1,000 feet, saving space. It was reported that the beds at New York's John F. Kennedy International Airport have already halted three runaway planes.

The report said some of the 11 airports may not be able to meet a Congressional deadline of 2015 to put runway safety areas in place. Putting safety areas in place can require filling in wetlands, requiring environmental reviews that can take as long as 12 years to complete. Community opposition to airport expansion because of noise concerns has also been a factor. Concerning the risks, the report said:

Until these challenges and prob-

lems are addressed, aircraft will remain vulnerable to damage and, what is more important, their passengers remain at risk of potential injury from flights that undershoot, overrun or veer off a runway lacking a standard (runway safety area). Improvements need to be made at the 11 large airports sooner rather than later.

A spokesperson for the FAA says the agency has already spent \$2 billion helping hundreds of airports put runway safety areas in place. In addition to the roughly \$300 million budgeted annually for the program, the economic stimulus plan pushed by President Obama contains millions of extra dollars. It's been said that runway safety areas are one of the most difficult problems facing urban airports. It's a problem, however, that clearly must be resolved.

Source: Associated Press

ENGINEER INVITED TEEN TO OPERATE LOCOMOTIVE

When I start thinking I have seen it all when it comes to revelations in lawsuits, something new always seems to pop up. As you know, we have written in prior issues on the crash of a commuter train last year in California that killed 25 people. We have learned that the train's Engineer actually planned to let a teenage railroad fan operate the locomotive on the night of the collision. Federal investigators have released the transcript of text messages sent and received by engineer Robert Sanchez. In addition to the deaths, the crash also injured at least 130 people.

Investigators have laid out in a preliminary report the days and minutes leading up to the crash between the Metrolink train and a Union Pacific freight train that ended up on the same shared track and crashed head-on at 40 mph. Investigators have described a rash of safety violations, including a stop light that was ignored, cell phone use and text messaging. These were all actions that could have caused the collision. While the NTSB's investigation is expected to continue for several months,

investigators have said Sanchez sent and received 43 text messages and made four phone calls while on duty that day, including one that he sent 22 seconds before the collision. The large number of text messages was not uncommon for the engineer in the days leading up to the crash, according to investigators. As you may recall from prior reports, the engineer was killed in the collision.

According to the investigators, there was no sign of mechanical error involving the Metrolink train that was carrying 220 passengers. Investigator Wayne Workman told the NTSB's Board of Inquiry: "All the evidence is consistent with the Metrolink engineer failing to stop at a red signal." Investigators also found that the conductor of the Union Pacific train received and sent numerous text messages while on duty. In fact, it appears he was texting just minutes before the crash. While the conductor tested positive for marijuana, he was not driving the train at the time of the crash. In the investigation, the NTSB panel focused on cell phone use by train crew members; the operation of trackside signals designed to prevent collisions; and oversight and compliance with safety procedures during the crash.

There have been a number of lawsuits filed that allege Connex knew about the engineer's cell phone use, but did nothing about it. It appears Connex had a policy against use of cell phones, but apparently the rules weren't being consistently followed. When that policy went into effect in September 2006, officials stopped and boarded trains to check their employees' cell phone use. Interestingly, in one instance, Sanchez's cell phone was said to have rung while he was being interviewed.

Source: Associated Press

JURY AWARDS \$29.5 MILLION IN TRAIN DERAILMENT LAWSUIT

A jury in Cook County, Illinois, has awarded more than \$29.5 million to a 28-year-old Chicago woman who suffered massive brain injuries when a passenger train she was riding on derailed in 2005. The Plaintiff was

riding on a train that was traveling between Joliet and downtown Chicago in 2005, when it derailed, killing two people. The train was going 69 mph even though signals directed the engineer to slow the train to 10 mph to change tracks, according to a National Transportation Safety Board investigation. The engineer, who was suspended and later fired, finally admitted fault after extensive investigations revealed human error caused the derailment, not mechanical problems.

The railroad settled several other lawsuits—including two in which the commuter train service agreed to pay a total of \$11 million to the estates of the two people killed—and before this trial had offered the Plaintiff more than \$16 million. Metra has indicated it won't appeal the jury's verdict. The Plaintiff, who was pregnant when she was injured, requires extensive medical care and therapy. She uses a wheelchair, has no sense of smell or taste, and has severe body temperature control problems. Her baby was not hurt in the crash.

Daniel Kotin, a lawyer with Corboy & Demetrio, handled this case. His law firm represents 33 more people who were injured in the derailment. Metra has agreed to discuss settlements in all of those cases. It's refreshing to see a corporate Defendant accepting responsibility and settling claims without playing hardball with claimants.

Source: Associated Press

FAA SETTLES WITH SOUTHWEST AIRLINES FOR A \$7.5 MILLION FINE

Southwest Airlines will pay a fine of \$7.5 million for flying planes that had missed critical safety checks. Under the agreement, the airline will have nearly two years to pay the fine in three installments of \$2.5 million each. The total of the fine is \$2.5 million less than government regulators initially ordered. The first installment is due in ten business days from the signing of the settlement agreement. Last year, the Federal Aviation Administration ordered Southwest to pay \$10.2 million.

Had that remained the amount, it would have been the largest fine in the

agency's history. But the airline protested the fine and has been negotiating with the FAA for the past year, trying to reduce the amount. Federal investigations revealed that an FAA inspector had allowed the airline to keep flying dozens of planes overdue for maintenance. It appears Southwest came out pretty well on the fine considering the safety risks involved.

Source: Associated Press

JURY VERDICT IN A DRUNK DRIVING CASE

We wrote about this case of social host liability in the last issue. Now, a jury has heard a lawsuit arising out of the incident. George Baldwin was awarded a record jury verdict as a result of his being paralyzed in a car accident following the underage drinking party in a private home three years ago. A jury found that the insurance company of William Klairmont, who was driving drunk during the single-vehicle crash, will be responsible for \$33.2 million in damages. Patrick Salvi, the lawyer who represented the Plaintiff in the case, says:

The outcome in this case is the recognition by a Lake County jury that George has suffered a tremendous loss. The jury did the right thing. This verdict will take care of George's medical needs for the rest of his life so that he can live as full a life as possible in the face of physical disabilities.

Since Klairmont admitted fault in the case, the trial was only on damages. We wrote last month about the \$2.5 million settlement paid by the homeowners' insurance carrier. Lauralee Pfeifer was accused of failing to prevent the drinking party at her home hosted by her teenage daughters. It appears that, despite numerous opportunities to step in and stop the drinking that occurred in an upstairs bedroom, Mrs. Pfeifer did nothing to prevent the drinking party from continuing. The teenagers left the home after Mrs. Pfeifer's husband returned later that evening. Baldwin was riding as a passenger with Klarimont, who was 19 at

the time of the crash. The driver had been drinking heavily at the Pfeifer home that night and crashed his car.

Baldwin was not charged with underage drinking, but, Klarimont was cited for a DUI after registering a blood-alcohol level of .146. A black box inside the car indicated his vehicle was traveling 120 miles per hour just seconds before the crash. Baldwin wound up being paralyzed from the chest down. The vehicle Klairmont was driving was borrowed by his father's employer from a second family corporation. It's believed this will result in Baldwin being able to collect much, if not all, of the jury's verdict. This tragic case should be a lesson to persons who allow teenagers to drink in their home. Drunk drivers are a real problem on our highways and young drivers are a major part of the problem. Adults have a responsibility in cases such as this one to control drinking in the home.

Source: Lake County News-Sun

LAWSUIT FILED IN WORKER'S ROADSIDE DEATH

The family of a construction worker, who was killed in a chain reaction crash, has filed a lawsuit against the two individuals convicted in a criminal court of causing the death. The wrongful death lawsuit, filed in Roanoke County Circuit Court, contends that Tracie Dowell Nininger and Jeffrey Scott Dupree were solely responsible for the death of Richard Slone. During the criminal trial in October, lawyers for the pair argued that the victim's employer, Draper Paving Co., contributed to the crash by failing to comply with proper safety procedures at the site where the man was working. Both of the former real estate agents were found guilty of aggravated involuntary manslaughter and driving under the influence in the fatal wreck. Each was sentenced to two-and-a-half years in prison.

The wreck occurred just after midnight on a public highway where construction work was underway. A Draper supervisor was using a tractor in the blocked-off right lane to fill a ditch with asphalt with the left lane left open

to traffic. Because the tractor sometimes had to back into the left lane, a flagman was assigned to periodically stop traffic. According to testimony, on the night of the death, Nininger's Hummer H3 drove past the flagman and struck a blade mounted on the rear of the tractor. Dupree's Chevrolet Avalanche almost simultaneously struck the rear of the Hummer. The blade and the Hummer then crashed into a nearby dump truck, hitting the victim and cutting him nearly in half. Nininger and Dupree had been together at a local bar and grill in downtown Roanoke about half an hour before the crash. Nininger had a blood-alcohol content of 0.19%. Dupree refused to take a breath test but failed a field sobriety check. The civil lawsuit seeks both compensatory and punitive damages on behalf of the victim's 17-year-old daughter and 16-year-old son.

Source: *The Roanoke Times*

JURY AWARDS WOMAN \$65 MILLION IN 2007 VEHICLE CRASH

A jury in Polk County, Florida, has awarded a 21-year-old woman \$65 million for her injuries in a 2007 crash. The lawsuit arose out of a traffic crash that left Kendra Lymon in a coma and hospitalized for months. Ms. Lymon was driving her Dodge Neon when a tractor-trailer owned by an Auburndale-based company, Bynum Transport, crashed into her car. The truck's driver was working part-time for the trucking company. At trial the issue on liability was which driver had a green light at the intersection. An eyewitness testified that the Plaintiff had the green light.

Despite regaining consciousness and undergoing therapy, Ms. Lymon continues to require 24-hour care and supervision. Ms. Lymon, who was attending South Florida Community College, majoring in psychology, could speak six languages and was working as a residential aide for Florida Institute of Neurologic Rehabilitation. The injuries from the crash left her unable to care for herself. During a normal day, family members must help the woman bathe, dress, eat, go to the bathroom and do other routine tasks. She has trouble

walking and sometimes requires a wheelchair. Her mother says her daughter isn't able to speak much and that family members read to her, take her to the store and assist her with physical therapy exercises. Jim Freeman, a lawyer with the Tampa firm of Wilkes & McHugh, represented Ms. Lymon and did an outstanding job.

Source: *The Ledger*

\$45 MILLION AWARDED TO WOMAN PARALYZED IN CRASH

A California judge has awarded \$45 million in damages to a woman who was paralyzed when a wrecking and demolition company's truck ran a red light and hit her car at an intersection. Tricia Roth, now 41, a former software developer for Microsoft Corp., suffered a broken neck and spinal injuries in the September 2006 accident. According to her doctors, she requires full-time attendant care and will never walk again. The truck driver failed to see the traffic signal light and admitted that he was at fault. A Superior Court judge awarded the damages against Division 1 All Service and the driver.

Source: *San Francisco Chronicle*

JURY AWARDS \$23.75 MILLION AWARD IN INTERSTATE CRASH LAWSUIT

A jury awarded \$23.75 million last month to victims of a crash involving three cars and a tractor-trailer loaded with potatoes. Two people were killed in the accident, one was badly hurt and others were injured. On April 1, 2004, Joseph G. Sperl was northbound on I-55 and because of an earlier, unrelated accident, the man slowed his vehicle. His car was then hit by a tractor-trailer and that rig collided with a second vehicle driven by Thomas Sanders, who also died in the accident. Five other people were injured when two other semi-tractors and three more vehicles collided after the first crash.

DeAn Henry, who was driving the truck, was charged with driving on a suspended license and falsifying her log book. She pleaded guilty to the charges in 2005. A man who was injured joined the Sperl and Sanders

families in the lawsuit which was filed against the truck driver, C.H. Robinson Worldwide, the trucking company, and other Defendants.

Martin Healy, Jr. and Jack Cannon of the Healy Law Firm represented the Sperl family; John L. Cantlin of John L. Cantlin and Associates represented the Sanders family; and Joseph Shannon of the Shannon Law Group, represented the man who was injured. They all did good work for their clients.

Source: *The Herald News* and *Chicago Tribune*

STATE OF GEORGIA PAYS \$3 MILLION IN BUS CRASH

The State of Georgia has paid the maximum legal amount possible, \$3 million, to settle the claims by families of the victims of the 2007 wreck of the Bluffton University baseball team bus wreck, which killed seven and injured 28. State law limits Georgia's liability to \$3 million per occurrence, no matter how many are killed or injured. National Transportation Safety Board investigators said the bus driver thought he was staying in an HOV lane on Interstate 75 when he drove onto an exit ramp just north of Atlanta, running through a stop sign at highway speed and off of a bridge at the top of the ramp.

Five baseball players, the driver and his wife were killed in the crash. The state, in the rush to install HOV signs before the 1996 Olympic Games, left an important road sign off the HOV exit where the bus crashed. The sign they moved from the exit would have pointed out the continuing HOV lane. The National Transportation Safety Board found last year that the bus driver meant to take that lane, but mistakenly turned into the exit lane. NTSB investigators harshly criticized Georgia's HOV signs, and the crash led to revamped federal guidelines for HOV signs nationwide. Georgia's new signs are under contract and should start going up this summer, according to a DOT spokesman. The NTSB released recommendations in August urging more clear and consistent highway signs.

Source: *Associated Press* and *The Atlanta-Journal Constitution*

ALABAMA SEEKS TO REDUCE FARM TRAFFIC COLLISIONS

Moving farm equipment along a public road can be very dangerous. There were six fatalities and 120 wrecks involving farm machinery on Alabama roads in 2007. In the previous year, two fatalities from 104 wrecks were reported. Three deaths and 106 wrecks were reported in 2005. In an effort to reduce the number of accidents involving farm machinery on state roads, the Farmers Federation is teaming with the Alabama Department of Public Safety and Alabama Department of Transportation to increase awareness of slow-moving vehicles on public roads. The program, being called Farmer at Work, is a step in the right direction.

It's been reported that many motorists don't know that an orange triangle affixed to the rear of a vehicle means that it has a maximum speed of no more than 25 mph. That's not surprising because there hasn't been a great deal of education of the public on the subject. When a motorist approaches a slow-moving farm vehicle with such a sign, it can create a hazard if they aren't aware of what the sign means. The program is designed to get the message out on what those signs mean. Interestingly, the signs have been used since 1971.

As part of the Farmer at Work program, advertisements will be run in newspapers and magazines and public service announcements will be broadcast on television and radio stations around the state in an effort to increase awareness. It's reported that it takes less than five seconds to close a 100-yard gap between a vehicle traveling 55 mph and a farm machine traveling 25 mph. Motorists need to slow down as soon as they see a slow-moving vehicle and then pass only when it's safe to do so. The speed limit on rural roads in Alabama is 45 mph unless otherwise posted. Most farmers have to use public roads to move their equipment between fields that might be several miles apart. Hopefully, this program will be effective and save lives.

Source: *Associated Press and Insurance Journal*

XVIII. HEALTHCARE ISSUES

UNITED STATES MUST IMPROVE THE DELIVERY OF HEALTHCARE

There is one thing that almost every American citizen can agree on and that is that healthcare costs too much and delivers too little in the U.S. That is also the conclusion of the Business Roundtable, which represents CEOs of major U.S. companies. A report from the group says America's health care system has become a liability in a global economy. Concern about high U.S. costs has existed for years, and business executives—whose companies provide health coverage for workers—have long called for getting costs under control.

Now President Obama recognizes that the costs have become “unsustainable” and that the “system must be overhauled.” Americans spend \$2.4 trillion a year on healthcare. The Business Roundtable report says Americans in 2006 spent \$1,928 per capita on health care, at least two-and-a-half times more per person than any other advanced country. The report referred to above notes that higher U.S. spending funnels away resources that could be invested elsewhere in the economy, but fails to deliver a healthier work force. The bottom line is that Americans are not getting higher levels of health and quality of care in spite of the excessively high costs. Other countries spend less on health care and their workers are relatively healthier, the report said. Clearly, healthcare must be made available for all Americans, but at a reasonable cost. This is the challenge facing the Obama Administration and Congress.

Source: *Associated Press*

FOOD SAFETY LAWS IN THE U.S. MUST BE REFORMED

It's universally understood by food safety experts that the food safety laws in the United States are badly in need

of reform. The recent rash of nationwide illness outbreaks and recalls linked to peanut butter, spinach, tomatoes, peppers, ground beef, and other foods demonstrates the urgent need for Congress to address food safety. This reform must include not only increased funding for food safety, but more importantly, updating the underlying food safety laws to address current problems. A top priority is passage of FDA reform legislation that will provide adequate consumer protection. Several reform bills designed to reform the agency have been introduced in Congress. To be effective, any FDA reform legislation must:

- require food processors to establish process controls adequate to prevent contamination;
- require the FDA to establish performance standards to protect public health;
- allocate resources according to risk, yet still require the FDA to perform onsite inspection of all plants;
- provide for strong on-farm food safety standards and include a requirement for the FDA to inspect on the farm;
- provide adequate enforcement powers, including mandatory recall authority and traceback authority;
- limit the role of private third party certification to verification that company process control systems meet U.S. standards and reject certification as a substitute for inspection; and
- establish a system for determining equivalency of foreign food safety systems and foreign food plants before allowing food from those countries or plants into the United States.

It's most apparent that the FDA's food safety responsibilities have long been neglected by both the agency itself and its parent, the Department of Health and Human Services. Last fall, Rep. Rosa DeLauro, who is from Connecticut, introduced a bill to remove food safety functions from the FDA and create a new Food Safety Agency within HHS. Under the bill, drug and

device responsibilities would be carried out by a newly-named Federal Drug Administration. Passage of legislation creating this new agency is said to be a priority for the new Congress.

While inadequate funding of the FDA has been a major problem, it isn't the only problem. Recent increases in funding of the agency have been important in an effort to begin restoring the agency, but those are only a down-payment on the ultimate resources needed to assure a strong regulatory agency. Securing additional funds for the FDA in an FY 2009 omnibus bill and the FY 2010 budget should be legislative priorities for the Obama Administration. In that regard, President Obama, who has promised to bolster and reorganize the nation's broken food-safety system, has created a Food Safety Working Group. It will include the Secretaries of Health and Agriculture and will advise the President on which laws and regulations need to be changed. This is being done to foster coordination between federal agencies and to make sure that applicable laws are enforced.

A bipartisan group of powerful lawmakers in Congress has also promised to enact fundamental changes in the nation's food-protection system. The President has made clear that he not only supports that legislative effort, but has indicated that he also might push to expand it. Currently, a dozen federal agencies share responsibility for ensuring the safety of the nation's food supply, an oversight system that critics and government investigators have for years said needed major revisions. Each year, about 76 million people in the United States are sickened by contaminated food, hundreds of thousands are hospitalized and about 5,000 die, public health experts estimate.

Source: Consumer Federation of America and *New York Times*

NEW CONCERN OVER COUGH AND COLD MEDICINES FOR CHILDREN

Cough and cold medicines for children, which have been under scrutiny by regulators in the United States and Britain, have come into focus again. Regulators in Great Britain who looked

over evidence about the effectiveness of such pharmaceuticals in children up to age 12 say their review "found no robust evidence that these medicines work, and they can cause side effects, such as allergic reactions, effects on sleep or hallucinations." However, they said, "People who use these products for children, or who have used them in the past, do not need to worry. Neither do shelves need to be cleared." Previously, The U.S. Food and Drug Administration had advised parents not to give the medicines to children under age two, and questions were raised about giving them to children up to age six.

It makes no sense for the FDA to allow medicines for children to be on the market that not only don't work, but also have adverse side effects. Since the cold and cough medicines don't produce any good effects, parents shouldn't accept any risk at all for their children. It now appears that there is no proven benefit for any of these medications for children of any age.

Source: *CBS News*

ARIZONA JURY AWARDS LANDMARK \$11 MILLION VERDICT IN ASSISTED LIVING CASE

An Arizona jury awarded a verdict of \$11 million last month to the widow of a 36-year-old man with traumatic brain injury. The man died after ingesting foreign objects while in the care of Liberty Manor Residency, a Phoenix assisted living facility. The verdict included \$2 million for the estate of the decedent, \$5 million for his wife and \$4 million in punitive damages. This was the largest verdict ever awarded against an assisted living facility in the United States. The widow, Lydia Scherrer, had this to say: "I want this to be a lasting victory for all individuals with TBI or other disabilities living in assisted living centers or group homes."

Lydia Scherrer, represented by Craig Knapp, of the Scottsdale law firm of Knapp & Roberts, filed suit against Liberty Manor for abuse and neglect. In the wrongful death action punitive damages were sought. At trial, it came to light that Liberty Manor made numerous false entries in its charts with respect to Mr. Scherrer's care,

including notations of care on days when his wife had checked him out of the facility. Mrs. Scherrer, after the verdict, said she hoped that the verdict will force the assisted living facility industry to set and meet higher standards of care for their residents, resulting in enhanced protections for the defenseless individuals trusted to the care of others.

Source: *Yahoo.com*

XIX. ENVIRONMENTAL CONCERNS

UPDATE ON THE COAL ASH RETENTION POND LITIGATION

Our firm continues to work on behalf of those affected by the Tennessee Valley Authority coal ash spill in Kingston, Tennessee. As previously reported, we filed a class action suit on behalf of property owners damaged by the spill. The case is in its early stages, but a great deal of work has been done.

As previously reported, 5.4 million cubic yards (over 1 billion gallons) of coal ash were released when the TVA slurry pond failed. The pond failure flooded over 300 acres with toxic sludge that is nine feet deep in some areas. Interestingly, just two months prior to the disaster, the slurry pond passed inspection. On October 20, 2008, inspectors deemed the Kingston Fossil Plant's fly ash pond structurally sound. However, the inspectors didn't have enough time to complete their report before the pond collapsed.

In a report completed after the disaster, the engineers stated that the pond was in overall good condition even though the pond walls seeped water and were scarred by erosion in some places. Findings in prior annual reports show a long line of leaks, erosion, seepages and waterlogged walls.

As the TVA disaster has brought attention to the by-products of burning coal, one report asserts that nearly 100 coal ash dumps across the United States pose similar or even greater potential dangers than the TVA

Kingston plant. This largely unregulated practice of storing coal ash in slurry ponds routinely poses substantial risks to waterways, soil, and wildlife, and even endangers human life. The Environmental Integrity Project recently compiled industry data that shows over 124 million pounds of coal ash were disposed between 2000 and 2006.

TVA's coal-fired electric plant in Kingston deposited more than 2.2 million pounds of toxic materials into its holding pond in a single year. The Kingston site has been named to a list of the top 50 worst toxic chemical sites. The EIP report also found that 13 states have at least three coal ash dumps on the 50 worst toxic chemical lists. Indiana tops the list with 11 sites, followed by Ohio with eight. Kentucky and Alabama each have seven sites. Georgia and North Carolina have six each. West Virginia and Tennessee have four. Florida, Illinois, Michigan, Pennsylvania and Wyoming each have three sites.

The toxins found in coal ash include arsenic, lead, chromium, manganese, and barium. According to news reports, potential health problems associated with these toxic substances include cancer, liver damage and neurological complications, among other health problems. In a recent public meeting with Kingston residents, health officials warned that the dust associated with the spill will pose an increasing challenge as the slurry dries and spring winds arrive. In addition to layers of dust covering property, the fine particulate matter also is linked to respiratory illness. Already, there are reports of residents complaining of increased illness. A recent survey by the Tennessee Department of Health found that one third of residents living near the spill reported breathing problems and one half reported increased stress and anxiety.

Environmental regulators have approved TVA's initial plan to dredge the Emory River channel. For the last two months, workers have been stabilizing the ash and working on a plan to clean up the coal ash from surrounding property. Nearly three months after the spill, TVA received approval for the initial phase of its clean up plan. The cleanup is so massive that it will take

years to complete. TVA estimates the cost could be between \$525 million and \$825 million. The Tennessee Department of Environment and Conservation ordered total remediation so TVA must clean up the site completely. Our firm continues to work on behalf of Kingston residents. If you need additional information on the lawsuits filed or anything else relating to this matter, contact Rhon Jones (Rhon.Jones@beasleyallen.com) or David Byrne (David.Byrne@beasleyallen.com) in our firm at 800-898-2034.

Source: Associated Press

NEW YORK ATTORNEY GENERAL SUES FERTILIZER COMPANY TO HALT NOXIOUS ODORS

The New York State Attorney General's office has filed suit against New York Organic Fertilizer Company and its parent company, Synagro Technologies, Inc. This suit is an effort to force the South Bronx facility to end persistent noxious odors that have plagued the surrounding Hunts Point community. The odors produced by the facility, which have been variously described as smelling like raw sewage, feces, manure, and burning bodies, have allegedly disrupted routine activities in residential areas of Hunts Point, as well as at local schools, libraries and Barretto Point Park, a \$7.2 million New York City park opened in 2006. These odors also cause those living and working nearby to suffer serious health effects, including severe headaches, nausea, vomiting, difficulty in breathing, and asthma attacks. Attorney General Cuomo had this to say:

The NYOFCo facility has been a foul and persistent threat to Hunts Point for years. The stench has plagued the community, making simple activities like opening windows, walking to school or enjoying a local park not only unpleasant, but an actual health risk. Through this lawsuit, my office is joining with the residents of the South Bronx to protect their right to clean and healthy air.

The lawsuit charges that the NYOFCo

facility, located in the Hunts Point neighborhood of South Bronx, has created a public nuisance under New York State law by producing odors that "unreasonably interfere with the comfortable enjoyment of life or property." Further, the lawsuit charges that NYOFCo and Synagro have failed to control odors "so they do not constitute nuisances or threats to public health, safety or property." NYOFCo accepts sewage sludge from New York City's sewage treatment plants and processes it into fertilizer pellets for sale to out-of-state agricultural operations.

Since the facility began operations in 1991, residents, students and workers in the community have continually complained about foul, acrid odors emanating from it. The facility has repeatedly allowed noxious odors to escape from the facility, and has been cited for numerous violations by the city and state. The Attorney General's lawsuit aims to address the odor problems associated with the operation of the facility by requiring NYOFCo and Synagro to comprehensively investigate solutions to ending offensive and noxious odors in the community, and then to implement those that will be most effective.

Source: North Country Gazette

TOXIC SEWAGE SLUDGE USED AS FERTILIZER

Our firm is monitoring a situation in Decatur, Alabama, where sewage sludge from Decatur Utilities has been found to contain record amounts of Perfluorinated Compounds (PFCs), specifically PFOA and PFOS. EPA's Science Advisory Panel recommends that EPA classify PFOA as a likely human carcinogen, with numerous studies linking it to various cancers. Manufacturers use PFCs in making goods such as stain resistant carpet, microwave popcorn bags, and non-stick surfaces such as Teflon. The local sewage treatment plant in Decatur disposed of its sludge using the common practice of land application for fertilizer in Lawrence and Morgan counties. The sewage sludge has been land-applied as fertilizer for area farms for at least 12 years. It became the subject of one of the

Bush administration's last environmental advisories.

In November 2008, the Environmental Protection Agency issued a drinking water advisory due to possible PFC contamination in private drinking wells. EPA officials say that about 100 people use the wells that may be contaminated by the sludge. Testing of those wells was scheduled to begin in February of this year. The EPA advises people, who are concerned that their wells are contaminated, to use bottled water or point-of-use filters, installed at the faucet, with granulated, activated carbon.

According to news reports, Decatur Utilities treated 5,000 acres of agricultural land with the sludge, also called bio-solid fertilizer, from its sewage treatment plant. The utility discontinued the treatment in November of last year as a result of the EPA investigation. But, it should be noted that Decatur Utilities was first made aware of possible problems eighteen months ago when an unnamed local industry notified the utility that it was discharging abnormally high amounts of PFCs.

The U.S. Department of Agriculture and the Food and Drug Administration also are involved in the investigation because the sludge-treated area is used for various types of agricultural production, including cattle grazing and crop production. The initial tests reveal that the soil contamination levels are between five and 25 times higher than drinking water levels. As a result of the contamination, the EPA recently requested information from fourteen companies, including 3M, Japanese-based chemical manufacturer Daikin, Toray Fluorofibers, and Biological Processors of Alabama, Inc.

The Decatur case has prompted new interest in studying the health effects of PFCs and the EPA instituted drinking water limits in January in response to this case. This case and others call into question the 30-year policy encouraging use of municipal sewage sludge as a free alternative to commercial fertilizer. However, EPA officials instead of ending the give-away program, issued a statement saying these issues require strong national standards on sludge.

Lawyers in our Toxic Torts Section will continue to monitor the situation in Decatur on behalf of those affected by the contamination. Our firm has successfully represented clients in PFC cases nationwide. If you want more information, contact Rhon Jones at Rhon.Jones@beasleyallen.com or at 800-898-2034.

JURY AWARDS \$150 MILLION AGAINST EXXONMOBIL

A jury in Baltimore has awarded about \$150 million to nearly 300 people who sued ExxonMobil Corp. over wells contaminated by a gasoline leak north of the city. About 26,000 gallons of gasoline leaked from a gas station in February 2006 in Jacksonville. Officials estimated that about 675 gallons of fuel leaked every day for 37 days before it was detected.

The jury's verdict was in three categories: medical expenses, the devaluation of property values and emotional stress. Families were awarded amounts from \$300,000 to more than \$1 million based on the value of their homes. Medical expense awards ranged from \$4,000 to \$90,000. Families were awarded, on average, about \$1 million for emotional stress. Because the jury didn't find that ExxonMobil committed fraud, no punitive damages were awarded. In a prepared statement, ExxonMobil said:

As soon as the leak was discovered, we took immediate action and spared no expense.

According to ExxonMobil, it has spent to date more than \$38 million for cleanup activities under the Maryland Department of Environment's oversight and direction. While that may be true, there was much more that apparently should have been done.

Source: Associated Press

XX. THE CONSUMER CORNER

DRYWALL FROM CHINA BLAMED FOR PROBLEMS IN HOMES

A lawsuit seeking class action status has been filed in Florida, alleging that walls in homes were built with a corrosive Chinese-made drywall. Tests have shown that the drywall emits sulfur gases that corrode copper coils and electrical and plumbing components. Similar problems have been found in hundreds of Florida homes and homes in other states. Tens of thousands of homes could be affected. Issues in the lawsuit also have revived concerns about quality-control procedures of U.S. companies that use Chinese-made products, following episodes in recent years involving contaminated toothpaste and pet-food ingredients, lead-tainted toys and defective tires imported from China. In 2005 Chinese drywall imports increased significantly as a result of a drywall shortage driven by the booming housing market and rebuilding after Hurricanes Katrina and Wilma.

It has been reported that residents have suffered a host of health issues, including rashes, new allergies, asthma and sore throats, as a result of the drywall. In addition to seeking compensation, the suits that have been filed in several states are asking that persons be monitored long-term for health issues. Based on import records, it's estimated that up to 60,000 U.S. homes may be affected, with about half in Florida. Our firm is currently investigating potential claims relating to the drywall issues.

Source: USA Today

CHINA'S NEW FOOD SAFETY LAW MAY NOT BE STRONG ENOUGH

Following the massive tainted milk and pet food scandals that damaged the "Made in China" brand worldwide some major changes were made in China to address the food safety problems. But a number of Chinese experts

and consumers are concerned that the country's first food safety law may not be strong enough to prevent a repeat. The new law, which China's legislature passed recently, toughens penalties against makers of tainted food. It also establishes a Cabinet-level food safety commission to improve monitoring, beef up safety standards, and recall substandard products.

Previously, China had 13 governmental agencies charged with some aspect of food safety and none of them were very effective. After the new law, at least five of these agencies will remain heavily involved in handling food safety. Some Chinese food safety experts wanted a single, powerful agency to deal with all parts of food safety. The new law, effective June 1st, and the new commission, to be based in the Ministry of Health, represent the most forceful effort yet in China at solving food safety issues. Hopefully, it will prove to be effective. American consumers should be most interested in whether China has really solved its problems.

Source: USA Today

MAJOR FIRMS STOP SALES OF HARD-PLASTIC BABY BOTTLES

Six major companies have agreed to stop selling hard-plastic baby bottles containing bisphenol A, the industrial chemical suspected of harming human development. The purveyors of baby-care products—Playtex Products Inc., Gerber, Evenflo Co., Avent America Inc., Dr. Brown and Disney First Years—will no longer will market the shatter-proof polycarbonate bottles and some other baby products in the United States. Polycarbonate is made of bisphenol A, widely used in hundreds of commercial applications, including the inside lining of metal food and drink containers, epoxy resins and polyvinyl chloride plastics.

Connecticut Attorney General Richard Blumenthal announced the companies' decisions last month. He and the attorneys general from Delaware and New Jersey wrote to the companies last year, urging them to stop using the chemical, which mimics

the hormonal activity of estrogen and can alter the normal workings of genes. Health officials—cautious about possible ill effects—believe that infants and children are at the greatest risk because of their quickly developing bodies and sensitive systems.

As a result of pressure from consumer rights groups and a move toward toxic-free products, some companies have been making bisphenol A-free alternatives, including old-fashioned glass baby bottles. Nalgene, a leader in sales of portable drinking water bottles, discontinued its polycarbonate lines last year. Attorney General Blumenthal has asked for legislation to further restrict the chemical in baby products.

Last year, the Kid-Safe Chemicals Act was passed, banning plastic softeners known as phthalates, from children's products. A bill to expand the law is expected to be introduced in Congress this year to restrict bisphenol A in children's products. The industry has argued that bisphenol A levels in humans are too low to cause damage. They claim industry studies have found that the chemical causes no damage to laboratory animals or humans. But more than 150 government and academic-sponsored studies have found a series of development problems even at low exposures. Studies in laboratory animals indicate that even small amounts of bisphenol A can damage brain and reproductive systems, alter mammary and prostate glands and lead to heart disease, obesity and diabetes.

Source: San Francisco Chronicle

PROBABLE CARCINOGENS FOUND IN BABY TOILETRIES

More than half the baby shampoo, lotion and other infant care products analyzed by a health advocacy group were found to contain trace amounts of two chemicals that are believed to cause cancer. Some of the biggest names on the market, including Johnson & Johnson Baby Shampoo and Baby Magic lotion, tested positive for 1,4-dioxane or formaldehyde, or both, the nonprofit Campaign for Safe Cosmetics reported. The chemicals, which

the Environmental Protection Agency has characterized as probable carcinogens, are not intentionally added to the products and are not listed among ingredients on labels. Instead, they appear to be byproducts of the manufacturing process. Formaldehyde is created when other chemicals in the product break down over time, while 1,4-dioxane is formed when foaming agents are combined with ethylene oxide or similar petrochemicals.

The organization tested 48 baby bath products such as bubble bath and shampoo. Of those, 32 contained trace amounts of 1,4-dioxane and 23 contained small amounts of formaldehyde. Seventeen tested positive for both chemicals. Stacy Malkan, a spokeswoman for the Campaign for Safe Cosmetics said:

Our intention is not to alarm parents, but to inform parents that products that claim to be gentle and pure are contaminated with carcinogens, which is completely unnecessary.

The group is calling for the government to more strictly regulate personal care products such as shampoo, lotion and makeup. Companies that manufacture and sell the products tested by the group stressed that they comply with government standards. For example, Johnson & Johnson said in a statement:

The FDA and other government agencies around the world consider these trace levels safe, and all our products meet or exceed the regulatory requirements in every country where they are sold. We are disappointed that the Campaign for Safe Cosmetics has inaccurately characterized the safety of our products, misrepresented the overwhelming consensus of scientists and government agencies that review the safety of ingredients, and unnecessarily alarmed parents.

The European Union has banned 1,4-dioxane as an ingredient in personal care products, but the U.S. Food and Drug Administration has not established a safe limit for the chemical in

shampoo, lotion and other toiletries. The FDA maintains that the trace amounts found in those products are not harmful. But a 1982 study by the FDA showed that 1,4-dioxane can penetrate human skin when used in lotion. Health advocates argue that federal regulators have not considered the cumulative effect of chemicals in personal care products. The consumer advocate, Ms. Malkan, observed:

The levels we've found are relatively low, and the industry often says there's just a little bit of carcinogen in my product. The problem is, we're finding a little bit of carcinogen in many products. Many of these products are used every day, so we've got repeated and frequent exposure to these low levels of chemicals. They're not the safest and purest products, and parents ought to know that.

In addition, government studies have not examined the effect of chemical exposure on the particular vulnerabilities of infants and children, whose bodies are still developing, the advocates said. Several Democratic lawmakers said the report is evidence that the nation's chemical regulation system needs to be changed. Rep. Jan Schakowsky (Ill.) had this to say:

The fact that we are bathing our kids in products contaminated with carcinogens shows how woefully out of date our cosmetics laws are and how urgently they need to be updated. The science has moved forward; now the FDA needs to catch up and be given the authority to protect the health of Americans.

California Senator Dianne Feinstein, who called the findings "horrifying," intends to introduce legislation that would require stronger oversight of the cosmetics industry. If you would like to read the entire report, it can be found at <http://www.safecosmetics.org/toxictub>.

Source: *Washington Post*

MANUFACTURERS PROPOSE BAN ON DROP-SIDE CRIBS

Crib makers have proposed a ban on drop-side cribs because of concerns over infant deaths, injuries and a series of recalls in recent months. The proposal would end production of drop-side cribs—where one side moves up and down—and would require cribs to have four immovable sides. At press time, the proposal had not been finalized. The Consumer Product Safety Commission says at least three children have died in drop-side cribs in the last 18 months. The agency knows of more than two dozen incidents in which drop-sides detached from cribs.

Source: *Associated Press*

JUDGE DENIES CLASS ACTION IN CONSUMER VIOXX CASE

A New Jersey judge has refused to certify a class filed by consumers who took the painkiller Vioxx. The Plaintiffs were trying to sue as a group to recover their out-of-pocket costs against the drugmaker Merck & Co. As you will recall, Merck pulled Vioxx from the market in 2004 because it increased the risk of heart attack and stroke. Superior Court Judge Carol Higbee denied the request from former Vioxx users to certify a class in the lawsuit. Judge Higbee, seated in Atlantic City, has handled many of the thousands of personal injury lawsuits filed against Merck. Her ruling in the case brought by the Plaintiffs said it would be "unfair to Merck to certify a class and allow a jury to reach a uniform determination of liability," given that patients who took Vioxx had big differences in how long they took Vioxx and whether they used other pain relievers, as well as other factors.

The lawsuit was filed under New Jersey's Consumer Fraud Act, claiming the company had known of the cardiovascular risks of Vioxx since 1996, but used various strategies to conceal the risks and overstated the drug's safety and effectiveness in consumer ads. Merck's lawyers had argued a jury would have to consider whether each Plaintiff would have kept taking Vioxx if

more safety information had been available, as well as factors such as what an alternative drug would have cost.

Judge Higbee previously had denied certification of a class-action in a case brought by the Welfare Fund of a local union on behalf of health plans that had covered Vioxx costs for members. In both those cases, the Plaintiffs were seeking only economic damages. It should be noted that Judge Higbee's ruling doesn't affect our firm's settlements in the Vioxx cases. Our cases were totally unrelated to this case.

Source: *Associated Press*

ALABAMA ATTORNEY GENERAL WARNS CONSUMERS OF SCAMS

The Alabama Attorney General's office has seen a surge of complaints about debt reduction and credit repair scams. Attorney General Troy King, speaking at the U.S. Postal Service's annual recognition of National Consumer Protection Week in Birmingham recently, said his consumer protection division has experienced an increase in calls from homeowners reporting foreclosure prevention scams. The Attorney General observed:

People are hurting in this economy and scam artists are preying on families desperate for help. Remember what my daddy always told me—if something sounds too good to be true, it probably is.

There are all sorts of scams these days that prey on consumers who are hurting because of the "sick economy." The burden of heavy credit card debt along with mortgages owed to predatory lending is hurting folks badly. Good advice is to be wary of solicitations over credit debt and mortgage foreclosure prevention. These scams are certainly on the rise. Taxpayers and homeowners should be extra cautious about mail or email solicitations and should never give their personal information to strangers who offer assistance in the solicitation. Alabamians who experience any kind of consumer fraud should contact the Alabama Attor-

XXI. RECALLS UPDATE

We continue to see a good number of recalls of consumer products each month. The following recalls have been reported since the March issue of the *Report*:

GM RECALLING VEHICLES TO FIX SHIFT LEVER PROBLEM

General Motors Corp. has recalled about 277,000 vehicles because of a potential defect in the shift lever that could cause a vehicle to roll away. GM said the recall involves 2009 model year versions of the Buick Enclave; Chevrolet Cobalt, HHR, Malibu and Traverse; GMC Acadia; Pontiac G5 and G6; and the Saturn Aura and Outlook. GM spokeswoman Carolyn Markey said about 75,000 of the recalled vehicles have been purchased and the remainder are still at dealerships. She said dealers are inspecting the vehicles to see if they have any problems. No crashes or injuries have been reported, according to GM.

In some cases, the shift lever and the transmission gear's position may not match, meaning a driver could move the shifter to the park position but the transmission gear may not be in park. The potential defect could lead to a vehicle rolling away and crashing or make it more difficult for the driver to restart the car. Owners should have been notified about the recall late last month. Dealers will inspect the vehicle and may replace the shift cable if necessary. For more information, owners may contact Buick at (866) 608-8080, Chevrolet at (800) 630-2438, GMC at (866) 996-9463, Pontiac at (800) 620-7668 and Saturn at (800) 972-8876. Consumers may also go to GM's owner

78,000 BOWFLEX HOME GYMS RECALLED

Nearly 80,000 Bowflex home gyms are being recalled. The Bowflex Ultimate 2 Home Gym is the recalled product. The machines are made in China and imported by Nautilus. The problem is with the horizontal seat rail. It can fall if not manually latched. Nautilus has received 18 reports of injuries. The machines were sold through direct sales and at specialty stores from June 2005 through January 2009. Registered owners are being sent a free repair kit. You can call Nautilus for more information at (800) 259-9019.

1.6 MILLION MAYTAG REFRIGERATORS RECALLED

Maytag Corp. of Newton, Iowa, has recalled about 1.6 million refrigerators due to an electrical failure in the relay—the component that turns on the refrigerator's compressor—that can cause overheating and pose a serious fire hazard. Maytag has received 41 reports of refrigerator relay ignition, including 16 reports of property damage ranging from smoke damage to extensive kitchen damage. The recall includes certain Maytag, Jenn-Air, Amana, Admiral, Magic Chef, Performa by Maytag and Crosley brand side-by-side and top-freezer refrigerators. The affected refrigerators were manufactured in black, bisque, white and stainless steel. They have model and serial numbers printed on a label located on the top middle or left upper side of the refrigerator liner and have the model and serial number combinations on both side-by-side and top-freezer refrigerators.

Refrigerators with freezers on the bottom are not included in the

recall. Manufactured in the U.S., the recalled refrigerators were sold in department and appliance stores and by homebuilders nationwide from January 2001 through January 2004. They sold for between about \$350 and \$1600. Consumers who believe they may have a refrigerator included in the recall should contact Maytag to find out. If their refrigerator is included in the recall, they can schedule a free in-home repair. Do not return the refrigerator to where it was purchased. For more information, consumers can call Maytag toll-free at (866) 533-9817, or visit the Web site <http://www.repair.maytag.com/>.

INFANTINO RECALLS INFANT TOYS DUE TO CHOKING HAZARD

Infantino LLC, of San Diego, California, has recalled about 172,000 infant toys in the United States and 12,000 in Canada. The infant toys have blue metallic fabric that can detach from the toy, posing a choking hazard to young children. The firm has received 45 reports of the metallic fabric detaching from the toys. No injuries have been reported. The recalled infant toys and their model numbers are: Infantino Lil' Chef Set, 158-201 and 558-201; Infantino Activity Stacker, 158-202; and Infantino Tag Along Chime Trio, 150-3092.

The model number is located on a yellow tag on the toy. The toys were sold at Babies "R" Us, Target, Wal-Mart, Meijer and other specialty stores from June 2007 through February 2009 for between \$10 and \$20. Consumers should immediately take the recalled toys away from young children and contact Infantino for a free replacement toy or product. For additional information, contact Infantino toll-free at (888) 808-3111 or visit the Infantino Web site at www.infantino.com.

STATE FARM® RECALLS GOOD NEIGHBOR BEARS® DUE TO CHOKING HAZARD

State Farm, of Bloomington, Ill., has recalled about 800,000 State Farm Good Neighbor Bears in the United States and 27,000 in Canada. The eyes on these bears can come off, posing a choking hazard to young children. State Farm received one report of the plastic eye of a bear coming off and a child placing it in her mouth. No injuries have been reported. This recall involves the 11-inch (28 cm) and 18-inch (46 cm) State Farm Good Neighbor Bears with plastic eyes. The bears are brown and wear a white and red State Farm shirt. The bears were given away free through State Farm agents and at State Farm sponsored events from September 2005 through March 2007. Consumers should immediately take these bears away from young children and discard them. For additional information, contact State Farm toll-free at (877) 226-8079 Monday through Friday or visit the company's website at www.statefarm.com or www.statefarm.ca.

HAIR DRYERS RECALLED BY BIG LOTS STORES, INC.

Big Lots Stores, Inc., of Columbus, Ohio has recalled about 31,000 Style Elements Hair Dryers. The hair dryers are not equipped with an immersion protection device to prevent electrocution if the hair dryer falls into water. Electric shock protection devices are required by industry standards for all electric hand-held hair dryers. This recall involves Style Elements Cool Shot Turbo hair dryers. The hand-held dryers have a silver body and black handle. Model number 3615T is printed on a label near the on/off switch. The hair dryers were sold exclusively at Big Lots' stores nationwide from July 2008 through December 2009 for about

\$12. Consumers should immediately stop using the hair dryers and return them to any Big Lots store for a full refund. For additional information, contact Big Lots toll-free at (866) 244-5687 or visit the company's Web site at www.biglots.com.

FLIP FLOPS FOR CHILDREN RECALLED OVER LEAD WORRY

The Consumer Product Safety Commission has issued a recall on a brand of children's flip flops because the decorative paint on some models can contain levels of lead in excess of the federal standard. The Havaianas brand flip flops were sold under the names Baby Estampas, Baby Pets, Kids Apple, Kids Fairy, Kids Flores, Kids Lighthouse, Kids Monsters, Kids Surf, Baby Letrinhas, Kids Sports, Kids Candies, Kids Fun, Kids Love, Kids Sereias, Kids Speed, Kids Lucky Bug, Kids Pets, Kids Rock, Kids Slim, Kids Wonder Woman, Kids Small Flowers and Kids Tropical w/Kit. Havaianas flip flops without decorative paint are not being recalled.

The flip flops were sold in department and specialty stores nationwide from November 2006 through February 2009 for about \$15 to \$24 a pair. They are manufactured in Brazil. CPSC said consumers should stop using the flip flops immediately. The manufacturer, Alpargatas USA Inc., based in New York, is cooperating with the recall, and is offering to replace the flip flops, CPSC said. Consumers who wish to trade in their recalled flip flops should contact the manufacturer at <http://www.havaianas.com/CustomerService.html>.

PURE FISHING RECALLS CHILDREN'S FISHING GAMES

Pure Fishing Inc., of Columbia, S.C., has recalled about 2,600 Shakespeare Casting Game and

Fishing Kits. The label on the fishing rod contains a surface coating containing high levels of lead in violation of the ban on lead in paint. The recalled Shakespeare Casting Game and Fishing Kit consists of a red and blue rod and reel with red foam targets and hook. The label is found on the front of the reel and reads "Casting Fun." They were sold by specialty fishing retailers nationwide from November 2008 through January 2009 for about \$15. Consumers should immediately take the recalled game away from children and call Pure Fishing for a free replacement product or full refund. For additional information, contact Pure Fishing at (800) 466-5643 or visit the company's Web site at www.purefishing.com.

NORDSTROM RECALLS GIRL'S SHOES

Nordstrom has recalled about 31,000 pairs of girls' shoes. Surface paint on the outer sole of these shoes contains excessive levels of lead, violating the federal lead paint standard. The recall includes six styles of Nordstrom-brand shoes for girls. "Clarice-Fab" flats are bone colored with a bow. "Eva-Fab" are bone colored T-strap sandals. "Fern-Fab" are ankle strap sandals sold in bone, pink, white, blue polka-dot or pink polka-dot. "Lilly-Fab" are fuchsia gingham ballerina flats with a bow. "Rita-Fab" are ankle strap dress shoes sold in ivory linen, pink linen, white linen, cafe satin, silver satin or white satin. "Vivi-Fab" are open-toe dress shoes in bone, white, green polka-dot, lavender polka-dot or yellow polka-dot.

The shoes were sold in girls' sizes 10 through big-kids 7. All shoes have an embossed "NORDSTROM" printed on the insole. Only the colors identified above are subject to the recall. The shoes were sold exclusively at Nordstrom stores nationwide from September 2006 through February 2009 for

between about \$35 and \$45. Consumers should take the recalled shoes away from children immediately and return them to any Nordstrom store for a full refund or exchange. For additional information, call Nordstrom at (800) 804-0806, e-mail Nordstrom at contact@nordstrom.com, or visit the firm's Web site at www.nordstrom.com.

EDUCATIONAL CRAFT KITS RECALLED BY FLORACRAFT

FloraCraft Corp., of Ludington, Michigan, has recalled about 930,000 Solar System Kits and DNA Kits. The surface coating on the educational kit's wires can contain excessive levels of lead, violating the federal lead paint standard. This recall involves the "Solar System" and the "DNA" children's educational craft kits sold under the FloraCraft and HYGLOSS brand names. The kits contain green coated wires that measure 14 ½ inches long and Styrofoam shapes. The following model numbers are included in this recall: Solar System Kit SS2003, SS101, 59901, SS2003P; DNA Kit DNA2003, 59903, DNA2003P. The model number is located on the kit's packaging.

The kits were sold at Wal-Mart, Michaels, Jo-Ann Stores, Hobby Lobby and other retailers nationwide from January 2003 through February 2009 for between \$10 and \$30. For additional information, contact FloraCraft Corp. toll-free at (866) 775-8781, or visit the company's Web site at www.floracraft.com.

XXII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

The firm employees named below have been selected for special recognition this month. We receive lots of com-

ments each month concerning this part of the Report. Many readers say they like to read about the kind of folks who work at the firm.

JOHN TOMLINSON

John Tomlinson graduated from The University of Alabama in 1995, where he received his B.S. Degree in Commerce and Business Administration, with emphasis in Health Care Management. John was a member of the 1990 and 1991 University of Alabama football teams when Gene Stallings was the head coach. He was also a member of Sigma Chi Fraternity and participated in collegiate and charity organizations. Although John graduated from Jones School of Law in 2001, he was employed in the health care field in the Tuscaloosa area, where he received five years of managerial experience prior to joining our firm. John focuses in his practice on environmental litigation, but he has also worked on consumer fraud and business law before moving to the Toxic Torts Section. John currently serves as Treasurer for the Montgomery County Association for Justice. Also, he serves on the Selection Committee of the Jimmy Hitchcock Memorial Award, which recognizes Christian Leadership in Athletics for Montgomery County student athletes. John has a son, Jet. They are active members of First Baptist Church in Montgomery.

LORETTA FAIRLEY

Loretta Fairley, who is currently serving as an Accounting Clerk in the Accounting Department, has been with the firm for almost eight years. She works primarily with the Personal Injury Department processing invoices, check requests, reconciling Visa statements as well as performing other duties as needed. Loretta previously worked in the Personal Injury Department as a Clerical Assistant.

Loretta is a middle child in a sibling group of six and is the oldest girl. She is currently engaged to be married on the 18th of this month to a wonderful, God-fearing man. She is looking forward to expanding her family in the near future. Loretta, who has a B.S. degree in Secondary Education, has also obtained a certificate of completion from the School of Ministry at her church. That

certificate included basic ministry training in sermon delivery, teaching, prayer, and counseling.

In her free time, Loretta enjoys reading, writing, bowling and helping others. One of her favorite things right now is working with the children in the Children's Ministry at her church. She says they are always eager to learn new things and their excitement can be quite contagious. Loretta does very good work and we are most fortunate to have her in the firm.

PAM MURPHY

Pam Murphy, who has been with the firm for eight years, serves as a Medical Records Coordinator. In this position she is responsible of ordering medical records for all files within the Mass Tort Section. She also assists in other areas of mass torts as needed. Pam has one son and daughter-in-law, Kelly and Shea Murphy, owner of Murphy Excavation, and one three-year-old grandson, Wilson. Wilson is the light of her life and keeps her very busy. Pam's sister, Deborah Drinkard, also works in the firm as a Medical Records Coordinator. Pam attends First Pentecostal Church in Prattville. She enjoys walking, doing yard work and spending time with her family. Pam is a very good and dedicated employee who is doing extremely important work for the firm.

OLIVIA HODGES

Olivia Hodges, who has been with us for over eight years, currently serves as a Legal Secretary to Bill Robertson in our Consumer Fraud Section. In this position she keeps up with all of Bill's clients, sends and receives mail, and handles all his grids for current cases. Along with secretarial duties, Olivia opens all cases for Fraud and Personal Injury stemming from new client calls and the website. Olivia has two sons, Jakob, who is ten and Brayden who is five. She loves to fish with her boys and watch them play baseball. Olivia does very good work and we are fortunate to have her with the firm.

LAWCALL IS GETTING A GOOD RESPONSE

We have written about our firm's "LawCall" show on WSFA TV in prior issues. Thus far the responses we have been receiving have been very good. As reported, our firm is now sponsoring a weekly television show every Sunday night. One of our lawyers, Gibson Vance, takes all sorts of law-related questions from callers. Thus far, each night the switchboards have been jammed by the number of calls the show receives. During the past month, the show has covered such topics as Motor Vehicle Accidents, Bankruptcy and Workers' Compensation. One of the shows had no topic and callers set the agenda. Each week a guest appears with Gibson. So far, the guests have included Judge Jimmy Pool, Tom Edwards, Johnnie Smith, and Sandra Lewis. The firm is proud to sponsor the show and we hope it provides a community service for folks in our area of the state. Anybody who can't see the show live, can always watch it each week on our website at www.beasleyallen.com.

THE FIRM HELPS TO SPONSOR GOOD PROJECTS

Our firm has always felt that we should be actively involved in our community. As a result, we try to help out on as many projects in the area as we can. These are some of the more recent projects that our employees have worked on.

THE EXTREME MAKEOVER

The popular ABC Television program *Extreme Makeover: Home Edition* came to Montgomery and selected a family from the Capital City to be featured on an upcoming program. Our firm was invited to be a sponsor of the show. We felt its theme, "Heroes at Home," complimented our mission of "helping those who need it most."

A local family, the Jordans, were selected as recipients of the home makeover, recognizing their dedi-

cated community service through projects like Mothers Against Drunk Drivers and the state's Crime Victims Advocacy Program. The Jordans, Monica and Brady, lost a daughter to a domestic violence situation. They also lost their only son in an automobile accident. They are raising their three grandchildren, Miles, Shan, and Keiunta, along with another daughter, Brittany, who is a student at the University of Alabama Birmingham.

During production, some of our firm's staff learned that Monica Jordan had long dreamed of attending law school, and had originally hoped to attend with her daughter, Folashada, before she was tragically killed. We began talking to the show's producers about helping to make that dream come true. It was decided that Faulkner University Thomas Goode Jones School of Law, because of its dedication to community service and outreach, would be a logical choice for the school. As grace would have it, the school already was in the planning stages to establish a Public Interest Law Scholarship. The school's administration felt that Monica would be a wonderful role model for the program and agreed to name the new scholarship in honor of Monica and her family.

At a news conference in late February, Dean Charles I. Nelson announced that a permanent scholarship in honor of Monica Jordan, to be called *The Monica Jordan Public Interest Law Scholarship*, was being created at Jones. It will be awarded to a Jones law student who has demonstrated community service and plans to practice public interest law upon graduation. The first scholarship will be awarded in the fall semester of 2011 and the Law School hopes that Mrs. Jordan will be its first recipient.

The Extreme Makeover: Home Edition episode featuring the Jordans will

air this month. It can be seen on Sunday, April 26th at 7 p.m. Central Time on ABC.

OPERATION WARM HEART

Our firm is taking part in "Operation Warm Heart," which is a project of the United States Armed Forces. This project will provide needed items of all sorts to a number of children in Afghanistan. These children are in need of just about everything needed in everyday living. Currently, there are 100 girls and 120 boys ranging in ages, from one to 15 years, with the majority being between six and ten in this project.

This is an ongoing effort by the U.S. Military to support orphaned children in Afghanistan. In a region of the world where family and tribes are a person's identity, these children have neither. They are in need of basics: clothing, sandals, simple toys and school supplies. The project director has suggested to us that each box sent should contain an outfit, a pair of slip-on sandals, school supplies and a small toy.

XXIII. SPECIAL RECOGNITIONS

A MODEL WEB SITE FOR COURT SYSTEMS

The 15th Judicial Circuit, which serves Montgomery County, has developed a very good Web site. In fact, I understand it has been recognized as a model for other court systems. Until the original Web site was revised, finding out about the county's many judicial programs and services was virtually impossible. The Web site now provides information about available programs, including the model Community Correctional Facility; a drug and mental health court; and a progressive restorative justice program; the "Second Chance" trash

pickup and many others. The 15th Judicial Circuit is now in the forefront nationally in advancing a different matrix of problem solving relating to criminal matters. You can find out more on this by going to the Web site.

We are most fortunate in Montgomery County to have extremely good and highly qualified judges. This Web site gives citizens the opportunity to find out more about each of them. I believe that is very important since what they do is most important to our county and its citizens. The judges will continue to initiate and establish programs to improve the court system in Montgomery County and to reach out and help others. All of this has taken place under the leadership of Judge Charles Price, who is the presiding circuit judge. It should be noted that Circuit Judge Tracey McCooley and her staff worked hard to develop the Web site. Their goal was to provide more information about the available programs—information the community wanted and, more importantly, needed. The Web site is <http://15jc.alacourt.gov/>.

APRIL IS NATIONAL CHILD ABUSE PREVENTION MONTH

In 1982, Congress resolved to help raise awareness and educate the public about the issues of child abuse and neglect by designating the week of June 6-12 as the first National Child Abuse Prevention Week. In 1983, the month of April was declared the first National Child Abuse Prevention Month. The establishment of a Child Abuse Prevention Initiative as a year-long effort partners with the child abuse prevention community—organizations and individuals dedicated to raising awareness through a variety of tools, resources, activities and public awareness events.

In Alabama, the Department of Human Resources oversees the administration of services that help protect children and educate the public about the issues of neglect and abuse. These programs are provided through the Family Services Division of the organization. Services provided include:

- Maintaining the Central Registry on

Child Abuse and Neglect;

- Administering the Interstate Compact on the Placement of Children (ICPC), which reviews and facilitates applications for travel, placements, foster care, and adoptions of children entering and leaving the state;
- Applying for and monitoring grants for protective services projects; and
- Providing case consultation services.

Through work with organizations such as Brantwood Children's Home, employees at our firm are often brought face-to-face with the realities of a home torn apart by child abuse and neglect. At Brantwood, children who can no longer stay with their parents because of a dangerous or traumatic situation or another crisis, are brought into a new kind of family and a new kind of home. Brantwood provides a safe haven, a roof over their head, meals, and encouragement to help them grow into strong adults despite the challenges they face. Thank goodness for a place like Brantwood. It would be a tragedy for any child to face a life filled with anything but love and support, and that's why places like Brantwood are so important and must be supported.

Unfortunately, the number of children reported as abused or neglected continues to rise. The Department of Human Resources calls on the public for help in reporting any suspected abuse or neglect. There is a helpful list of Frequently Asked Questions on the Department web site to help identify child abuse, and to report it. Visit www.dhr.state.al.us/page.asp?pageid=348. For more information about Brantwood, visit www.brantwoodchildrenshome.org.

THE SPACE & ROCKET CENTER IS THE TOP ALABAMA TOURIST ATTRACTION

The U.S. Space and Rocket Center in Huntsville has edged out the Robert Trent Jones Golf Trail to rank number one in visitors last year among Alabama tourism attractions that charge admission. It was reported that more than 509,000 people visited the center,

which is celebrating the "Year of Apollo" to mark the 40th anniversary of the first moon landing. The previous number one attraction, The Robert Trent Jones Golf Trail ranked second with nearly 505,000 visitors. It should be noted that the golf trail had one of its course locations closed last year for renovation. The Birmingham Zoo ranked third with nearly 496,000 visitors and Birmingham's McWane Science Center was fourth with about 429,000. The attendance figures were released last month by the Alabama Tourism Department. Lee Sentell, who runs the Department, continues to do an outstanding job.

Source: Associated Press

BEASLEY ALLEN RACE CAR DRAWS FANS



Grant Enfinger, driver of the Beasley Allen Super Late Model race car for Beasley Allen Racing, brought the car to Montgomery on March 5th, as he traveled to Opp for the 33rd Annual Rattler Weekend. Grant, who won the 2008 Rattler 250, competed in the 2009 race on Sunday, March 8th. We had hoped that Grant would bring home the trophy for a second consecutive year, but that wasn't to be. In fact, Grant was doing very well until he was involved in a major pile up, resulting in totaling the car. Fortunately, Grant wasn't seriously hurt in the crash.

ALYCE SPRUELL TO LEAD ALABAMA STATE BAR IN 2010

Alyce Manley Spruell, from the Tuscaloosa law firm of Spruell & Powell, will become the President-Elect of the Alabama State Bar Association in July. Alyce will assume the role of President of the organization in July of

2010, at which time she will become the first female to hold that office. In my opinion, that honor is long overdue. Nevertheless, we are very proud of Alyce and we congratulate her!

XXIV. SOME CLOSING OBSERVATIONS

SOME QUESTION AND ANSWERS FROM A LAWYER WHO IS PROUD TO BE CALLED A TRIAL LAWYER

Last month I was asked to respond to a set of questions to be included for publication in a regional magazine. I agreed to do so. Since I thought this might be of interest to our readers, I am enclosing the questions and my answers in this issue.

- On what type of Plaintiff cases do you prefer to focus?

I really enjoy trying all sorts of cases but over the last 15 years have worked primarily in product liability and corporate fraud cases.

- Outside the office, what do you do for fun and relaxation?

I like to watch Boston Red Sox baseball on television when I can. I also try to attend as many Auburn University sporting events as possible during the year. The most fun I have, however, is spending time with my grandchildren.

- Who have been some of the mentors in your life?

My mother, Florence Camp Beasley, and my wife, Sara, have had the most influence in my life and I would consider each of them a mentor.

- Where did you grow up? What was your first job and a favorite memory from this experience?

I grew up in Clayton, Alabama, which is located in Barbour County. My first job was helping my mother in a small grocery store when I was about ten years old. I guess my favorite memory would be when I made my

first big sale on credit, which turned out to be not such a good thing. Nevertheless, I learned from that experience and also gained a great deal of insight into human nature during my time in that little store over the next few years.

- Tell us about your family and a favorite vacation you have taken with them.

Sara and I have three grown children and six grandchildren, all girls. Our favorite vacation is an annual trip to the beach around July 4th.

- What advice would you have for a new associate in your field?

Make sure any person who joins a law firm like ours really wants to be a trial lawyer.

- What is the best advice you have ever received?

The best advice I have ever gotten came from my mother who told me at an early age to follow the Golden Rule in my dealings with folks.

- What do you like most about what you do professionally?

I get great satisfaction out of helping folks who have a real need to be helped.

- What has been one of the most meaningful cases you have worked on throughout your career?

I really have a difficult time mentioning just one meaningful case. I consider each case that I have handled to have been important for that particular client. But if I had to single one case out, I would consider the one we handled for Dixie Spivey and her family several years ago involving the death of her husband against Kubota Tractor Company to be one case that had a lasting and good effect on an industry. After a week of trial, Mrs. Spivey refused to accept a \$10 Million settlement that had the condition of confidentiality attached to the offer. This courageous woman wanted the world to know what she had learned about the tractor industry. Eventually, she won that battle.

- If you weren't practicing law, what would you like to be doing?

I would enjoy coaching football at some level.

- You have enjoyed much success throughout your career—what motivates and inspires you in life?

I finally learned several years back to set my priorities and to try hard to follow them daily. I have told each new associate who comes into the firm that a lawyer practicing here should put God first, his or her family second, and the law firm third. I have found that set of rules works for me and it will work for anybody in any line of work in my opinion.

I must say that I am proud to be a trial lawyer and when I lose that feeling it will be time for me to take down my shingle and retire to the farm. But I don't foresee that happening anytime soon. I really enjoy what I do for a living and I get a great deal of satisfaction from helping folks who have been victims of corporate abuse and wrongdoing.

HANDLING STRESS IN A LIFE FULL OF STRESSFUL EVENTS

If any of our readers think I am relying on my good friend Rev. Walter Albritton for contributions to this Section, they are absolutely correct. Walter writes an article each week to appear in the *Opelika-Auburn News* and I always look forward to reading them. In my opinion, one of his recent messages is most appropriate for our times. Many people are very worried about the economy—many have lost their jobs—and many have lost their life savings. All of this causes stress to those so affected. Let's see what Walter had to say about stress and how to handle it.

SEVEN SECRETS FOR HANDLING THE STRESS OF DAILY LIVING

The word "stress" has multiple meanings. So many, in fact, that it has been called the most impre-

cisely defined word in the dictionary. Much like the word "love" the word stress is used in a dozen different ways in ordinary conversation. Your physician may order a "stress test" to determine the condition of your heart. Worrying about the outcome of the test can cause you to feel "stressed out." You may feel that your job is too demanding. The constant pressure makes you tired and irritable. You feel drained, overworked, and unable to cope. So you conclude the stress of your work is ruining your health. It is also affecting your home life. You are no longer fun to live with and you know it. You long for relief from the pressure of so much stress.

The solution may not be a different job. It may be simply learning to handle the stress tests of daily living. Instead of quitting your job, consider these seven secrets for managing daily stress:

Start thinking positively about stress. There is good stress and bad stress. It is not all bad. Some stress is necessary to make us productive. We endure the stress of work to avoid the stress of going hungry. Stress is like salt and pepper; a little of it makes food tastier while too much ruins it. Life without stress would be boring. The only people completely free of stress are stacked neatly in the cemetery. You are alive and life is stressful. Stress is a necessary element of life.

Take charge of your attitude. Learn to control the way you react to stressful situations. Assume command of your mind; you alone can determine how you will react to whatever tension you are facing. Make up your mind that even if others around you fall to pieces, you will remain calm. You cannot control the behavior of others. But you can control

your own. Though that is a big assignment and a lifelong challenge, you can do it.

Find something to laugh about no matter how tough things get. Remind yourself it could always be worse. Remember a time when it was and you got through it anyway. Laugh at yourself. When someone does something stupid, smile instead of getting angry. Recall how many blunders you have made. Think about how ridiculous it is to get bent out of shape over the silliest things. A hundred years from now, who will care? A little humor can ease the tension and restore your sanity.

Refuse to surrender to stress. Think of it as a monster trying to reduce you to a bundle of nerves. It has been on your back before and you can do it again because you are a survivor, not a victim. If you feel you are about to go over the edge, walk away. Take a breather. Leave the struggle for a spell. You can tackle it again tomorrow. Every battle does not have to be won today. If you go to pieces, stress wins. Refuse to lose.

Get some rest. It is amazing what rest will do for the human body and the mind. Eight hours of sleep can often restore your capacity to think clearly. Stop trying to "get everything done" today. Most of it can wait until tomorrow. Quit bragging about how little sleep you need at night. A good night's rest may be the best medicine you can take to cure the fever of stress.

Step back from the scene of your stress. Think objectively about your situation. Ask God for help. Ask for wisdom to pinpoint the major problem. Answer these questions hon-

estly: Are you trying to do too much? Is your plate too full? Would the universe collapse if you eliminated nonessentials and simplified your life? Would your life be freer of tension if you were content with doing fewer things, and doing them well?

Instead of expecting other people to make your life easier, start doing what you can to help yourself. Quit blaming other people for the tension in your life. Give them a break. They may be doing the best they can, given the fact that they must put up with you.

Stop giving people permission to make you angry. No one can irritate you unless you give them permission to do so. Refuse to give people such power over you. Stop allowing anyone to rattle your cage. Keep your cool. Remain unruffled and in charge of your own disposition. Then, when you put your head on your pillow at night, you can sleep like a baby. You can fall asleep thankful that you remained calm under the pressure that someone else tried to dump on you.

Stress can destroy us or bless us. Either we handle stress or it will mangle us. It all depends on our attitude toward it. Embrace it and manage it on a daily basis. Once we learn how to handle it we can make it work for us, making it more a friend than a foe. The inward calmness we gain from effective stress management is worth our best effort.

I hope that Walter's message on stress will give our readers renewed hope and help them deal with any stressful situations in their lives. God is still on His throne and He is readily available to help us get through tough times. It's good for us to be reminded of that truth from time to time!

FAVORITE BIBLE VERSES

Bobby Mozingo, one of the firm's investigators, furnished this verse which contains a message that is good for all of us to hear.

I can do all things through Christ which strengtheneth me.

Philippians 4:13

Pete Bridges, a lawyer in Baldwin County, sent in his favorite verse:

For I know the plans I have for you. Plans to prosper you and not to harm you, plans to give you hope and a future.

Jeremiah 29:11

Bryan Kelly, who is with Common Ground Ministries in Montgomery, sent in this verse.

O magnify the Lord with me and let us exalt his name together.

Psalms 34:3

XXV. SOME PARTING WORDS

SOME VERY GOOD INFORMATION

My friend, Wanda Devereaux, a Montgomery lawyer, volunteered to do a piece for the *Report* on Lent. I thought it would be good to include this since we are approaching Easter. The piece is set out below.

THE BLESSED SEASON OF LENT

Lent is the liturgical season of the Church calendar which precedes Easter. This year, Easter is on April 12th so we are drawing near to the end of Lent and I have some reflections on my Lenten observations this year and on the history and significance in general of Lent to those who engage in serious observation of this very important season. Lent is most

actively observed in this country by Roman Catholics, Episcopalians (Anglicans), Lutherans and several other denominations. The Lenten season begins with Ash Wednesday, which is marked by fasting and a worship service, usually a Eucharist (a worship service which includes administration of Holy Communion), during which ashes in the form of a cross are placed upon the worshipper's forehead as an outward symbol of the beginning of Lent and an inward symbol of the Biblical pronouncement that "From dust we are, to dust we shall return". (Ecclesiastes 3:20) Ash Wednesday is preceded by Shrove Tuesday (liturgical) or Fat Tuesday or Mardi Gras (secular), a day and night of festivity preceding the fasting period of Lent. The season is 40 days long, ending on the Friday before Palm Sunday. The 40 days represent the time Jesus spent in the desert, during which he battled with Satan, who repeatedly tempted Jesus into forswearing the Father. Sundays, considered to be "mini-Easters", are excluded in counting the 40 days of the season. There are many noted references to 40 in the Bible: the 40 days Moses spent on Mount Sinai, the 40 days and 40 nights of rain during Noah's time and the wandering of the Israelites in the desert seeking the Promised Land, which lasted 40 years.

Most people are familiar with the practice of "giving up something" during Lent; in theory, we give up something we love or enjoy—sweets, smoking, alcohol; or in a more abstract concept, we might forego unhealthy or negative activities such as unkindness toward others or impatience with those close to us. In practice, many of us fail in our Lenten intentions early on in the season. Over the past few years, I have committed to a different approach to my Lenten observations. Instead of giving up some-

thing, I select a few positive spiritual practices, chosen to acknowledge the true meaning of Lent which is to engage in a period of penance and introspection. Last year I wrote a personal note to someone each day, rather randomly selecting persons who came to mind. I chose close friends, casual acquaintances, people with whom I had not been in touch for years, and—perhaps most significantly persons with whom I had become estranged and even those whom I did not particularly like. The feedback I received from these notes was in many cases a total surprise and resulted in several instances of creating or restoring a positive relationship. I learned that people still love to get handwritten, personal notes in today's high-tech world of e-mailing and texting. The personal touch was appreciated by so many of those I wrote.

In fact, my note-writing proved to be such a positive experience that I am doing it again this year. Lent also provides an excellent opportunity to examine our Christian lives with the goal of deepening our spirituality and making us better servants of Christ. Examples of this way of observing Lent include daily Bible reading, daily prayer and a concentrated effort to live our lives as Christ would have us to do, particularly observing the second great commandment to "Love our neighbors as ourselves." This concept brings to mind the unattributed saying which advises to "preach the Gospel every day, with words when necessary."

This practice envelops the traditional purpose of Lent: preparation of the believer—through prayer; penitence and self-denial—for Holy Week, which marks the Death and Resurrection of Jesus and recalls the events linked to the Passion of Christ, culminating in the Easter Day observance of the Resurrection of Jesus Christ. Holy Week includes the following reli-

gious Holy Days: Palm Sunday marks Christ's triumphal entry into Jerusalem; Maundy Thursday (Holy Thursday) commemorates the Last Supper in a beautiful service during which the Altar is stripped and the sanctuary is plunged into darkness; Good Friday symbolizes the Crucifixion. Saturday before Easter is observed by Easter Vigil, the first official celebration of the Resurrection of Jesus. Faithful devotion to Lent and the joyous celebration of Holy Week provide the Christian with an unequalled opportunity to acknowledge the greatest of all events in Christian theology, the

sacrifice of the Father's Only Son that we might have eternal life, and the Resurrection. Diligent observation of Lent is not easy; it provides a real test of a Christian's devotion and faith and helps us to grow spiritually in the grace of God.

I appreciate very much Wanda taking the time to write this piece. It's important to have a good understanding of Lent and its significance. I must confess that Wanda educated me and I needed it.

The Easter Season is a very special time and it's a reminder that Jesus Christ died for us and was raised from the dead. This fact gives all of us the promise of eternal life. The resurrection

of Jesus is the very heart of Christianity. As Paul said in 1 Corinthians 15:

If Christ has not been raised, our preaching is useless and so is your faith... We are then found to be false witnesses about God, for we have testified about God that he raised Christ from the dead.

The Apostle then goes on to say that if Jesus Christ hadn't been raised our "faith is futile and we are still in our sins." As we celebrate Easter this month, let it be a renewal of our faith and hope for the future. Jesus Christ has risen and that's the good news of the season!

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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 for over 30 years.

Beasley Allen
BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
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No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.