THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

Recent Alabama Poll Results Are Most Interesting

The State of the State Survey for Alabama conducted by the Capital Survey Research Center was completed last month. This statewide survey, which covered three major topics, had some rather interesting findings. The topics covered were President Obama and the economy; bingo gaming legislation; and the proposed removal of the sales tax on groceries. These are the major findings from the survey:

- 86% want their legislators to vote for the bingo bill allowing a vote of the people, 72% state they will vote to approve regulating and taxing gaming, and 65% state that they will be less likely to vote for the reelection of their legislators, if they vote against allowing a vote on the issue.
- 64% support removing the sales tax on groceries with income caps.
- 67% believe President Obama is providing strong leadership and doing the best job possible.
- 68% are dissatisfied with how things are going nationally and about evenly divided on how things are going in the state.
- 60% believe President Obama has made a good faith effort to work with Republicans while 33% believe Republicans have made a good faith effort to work with the President.
- Voters are hopeful about the economy, believe the problems were inherited, and want to focus on the economy getting better rather than reducing the debt.
- Voters oppose Governor Riley's refusal of federal recovery funds for unemployment.
- Voters overwhelmingly support regulating and taxing bingo gaming and a compact with the Indian gaming operations.

The poll results indicate broad support for the positions stated above across party and demographic lines. I have found this polling group to be very accurate in its surveys. It will be interesting to see how the elected officials deal with the issues covered in the survey.

Source: Capital Survey Research Center

More Medicaid Fraud Cases Set For Trial In Alabama

Judge Charles Price has set a number of the Alabama Medicaid fraud cases for trial all the way into 2011 and that's very good news for Alabama citizens. The first three companies will be consolidated for trial beginning on June 22nd.

Pfizer Settles All Rezulin Cases

Rezulin was prescribed to approximately 1.9 million American diabetics before being pulled from the market in 2000 after the prescription medicine was linked to at least 63 deaths from liver failure. Numerous lawsuits were filed on behalf of those who died or suffered serious liver problems from taking this drug.

Pfizer Inc. has now resolved all but three of 35,000 claims related to Rezulin for a total of about $750 million. Pfizer, which is acquiring rival Wyeth for almost $64 billion, paid about $500 million to settle Rezulin cases consolidated in federal court in New York. The company also paid another $250 million to resolve suits filed in state courts.

In 2001, a Texas jury ordered Pfizer to pay $43 million to a 63-year-old diabetic who suffered liver damage while taking the drug. That case was subsequently settled for $30 million. In 2002, an Oklahoma jury ordered the drug maker to pay $11.6 million in damages to the family of a man who died after taking Rezulin. That award later was upheld on appeal.

Our firm represented over 5,000 Rezulin victims and we settled all of our clients' claims in early 2004. We are pleased to have been able to help those clients and their families reach a resolution of their claims.

Source: *Bloomberg*

Oregon Sues OppenheimerFunds Over College Savings Plan Losses

Oregon has become the first state to take legal action against OppenheimerFunds, Inc. over an estimated $37

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million in losses to 60,000 Oregon families who invested in the Oregon College Savings Plan. The suit, filed on April 13th in an Oregon state court, culminates a three-month investigation of complaints that Oppenheimer abandoned a conservative bond fund investing strategy in 2007 for a riskier portfolio that included credit default swaps and other high-risk derivatives. It's alleged in the suit that the plan had become "a hedge-fund like investment fund that took extreme risks in a search for speculative large gains." When filing the suit, John Kroger, Oregon's Attorney General, observed:

> *I think they were hoping to get risky equity-like returns in a bond fund. If they succeeded, they look like superstars, but unfortunately the strategy did not work.*

The plan was marketed to parents sending children to Oregon colleges as an "ultra-conservative" college portfolio that would protect principal and provide income. The plan made routine bond fund returns until 2008, when the Core Bond Fund lost nearly 36% of its value even though the benchmark index it was expected to use for investment decisions was up by 5%. The fund lost an additional 10% in the first quarter of 2009, according to the Attorney General. The plan included risky credit default swaps and other derivatives as part of a long-term investment plan. The fund was advertised as preserving capital for those close to sending children to college in a short number of years and it was not intended as a long-term strategy. The State Treasurer replaced the Core Bond Fund managed by Oppenheimer with a different fund on March 27th. The suit alleges negligence and breaches of contract and fiduciary duties. As expected, Oppenheimer denies any liability in this matter.

Source: *Law.com*

II. RECENT FILINGS AND SETTLEMENTS BY THE FIRM

Settlement Of Ford Explorer And Firestone Tire Case

As most Americans know, Ford and Firestone were involved in the world's largest tire recall in history a few years back. Firestone produced a special designed 15-inch ATX tire in 1990 which were installed by Ford on Explorers as original equipment. Tragically, the Firestone tires were defective and the Explorer was prone to rollover. Obviously, that was a very bad marriage and one that resulted in an untold number of catastrophic injuries and deaths. Unfortunately, the Ford and Firestone saga continues.

We have handled a number of cases over the past several years arising out of Firestone tire detreads and Explorer rollovers. Most recently, our firm settled a case on behalf of Mrs. Ethelene Baldwin, a Montgomery resident, who had been involved in a Ford rollover in 2007. Mrs. Baldwin was a front seat passenger in a 1996 Ford Explorer. She and other family members were traveling to Birmingham on I-65 when the left rear tire detreaded and the Explorer rolled over. Mrs. Baldwin, who was properly restrained in her seat belt, was partially ejected from the vehicle during the rollover and was severely injured. Even though the driver was traveling at highway speeds, approximately 70 miles per hour, he was unable to control the vehicle when the tire detreaded.

The tire detreaded because of defects known both to Ford and Firestone. It was originally a spare tire on this Explorer. Due to a recall, four of the original Firestone tires were taken off the Explorer, but the spare remained in the vehicle. Eventually the spare was put on the left rear of the Explorer and it was involved in this rollover.

Both Ford and Firestone knew all about the defective tires several years before that first tire recall took place in the United States. In fact, several years prior to the first recall, Ford implemented a series of "secret recalls" in Venezuela. Ford recognized the problem there and eventually remedied the problem by making the shock absorbers on the Explorer much stronger. We knew from handling a number of prior cases, including several arising in Venezuela, that the remedy was to replace the shocks with stiffer and stronger ones and to place them further outboard. The same fix was recommended by Ford engineers for the U.S. market, but it wasn't done. In fact, NHTSA was not even informed about all of the detread and rollover problems in Venezuela and several other foreign countries.

Firestone first recalled the defective tires in the United States in August of 2000. A recall notice was sent out at that time by first class mail. Over the next few years, Ford and Firestone came to realize that millions of recalled tires were still on the road and in use. Subsequently, a second recall was done in 2006. Significantly, Firestone sent out the second recall notice by third class mail and without a reply card. As you may know, third class mail is not forwarded if the addressee's address has changed. Also, the notice is not returned to the sender if it is not delivered. A tremendous number of owners never got a recall notice, resulting in millions of defective tires remaining on U.S. highways.

Neither our client nor the used car lot that sold the Explorer received any recall notice from either Ford or Firestone. A prior owner of this Explorer received a recall notice and, as a result, the four Firestone tires that were on the ground were replaced. But the spare remained with the vehicle.

The Defendants in the case, which was set for trial on April 20th in Montgomery County, were Ford Motor Co., Bridgestone/Firestone North American Tire LLC. We were able to settle the case with all Defendants on the Thurs-

day prior to the trial date. The amount of the settlement from each Defendant is confidential.

During our investigation of the Baldwin case, we found that Firestone tires that had been spares were still on Ford Explorers. Tragically, fatalities and serious injuries will continue until such time as Ford and Firestone locate and destroy all of the recalled tires that are still in service.

LaBarron Boone, Greg Allen, and I handled this case for Mrs. Baldwin. We know all that this lady has been through and what the future holds for her because of her injuries and disability. We are most pleased to have reached a settlement in her case that will make the future much better for her.

Settlement Of Roof Crush Case

Our firm settled a case recently that was pending against General Motors on behalf of our client who lost his wife when the 2001 Chevrolet S-10 Blazer in which they were traveling rolled over. Carl Hammond was driving the Blazer, his wife Theresa was riding in the front passenger seat and their two boys were in the back seat. All of them were wearing their seat belts. While traveling on U.S. Highway 431, just outside of Huntsville, at a speed of approximately 45 mph, the vehicle struck water, hydroplaned and rolled over in the roadway. During the rollover, the roof substantially crushed downward and inward over the front passenger area, compromising the vehicle's survival and the performance of Theresa's seat belt.

As a result of the roof crush and seat belt failure, Theresa was partially ejected out of the vehicle, causing severe injuries which led to her death. Our client and his sons walked away from the accident with virtually no injuries. It was clearly a survivable event but for the roof crush. But, they will forever have to live with the loss of a wife and mother because of the design decisions GM made which ignored rollover safety.

In a rollover accident, if an occupant stays in the vehicle and the vehicle's survival space is not compromised, that person should survive the accident. The roof is part of the structural support of a vehicle and helps form part of the "survival space" in a vehicle in the event of a crash. If a roof crushes substantially during an accident, it intrudes into the occupant's "survival space," thus, exposing occupants to serious and fatal injuries.

There are an estimated six million Blazers, including pickup trucks, on the road today. Studies have shown that SUVs are two and a half times more likely to roll over than passenger cars. In a recent report by the Insurance Institute for Highway Safety, it ranked the Blazer among the least-safe SUVs on the road.

GM has known for many years that its roofs are too weak. The company's own internal safety guideline for its test drivers reveal that GM knew all about the danger of its weak roofs. GM's safety guidelines require that its test drivers use a helmet and seat belt for a driving maneuver as simple as lane changes from zero to 55 mph if its static stability factor (SSF) is less than 1.10. This guideline includes the popular Blazer and Jimmy vehicles. Further, GM's Safety Guidelines require the installation of a roll bar or roll cage in the same vehicles under these same simple driving maneuvers in order to protect the occupants from roof crush.

GM continues to deny that roof crush causes injuries. Yet, it puts roll cages on its trucks for its own employees to protect them from roof crush. The sad reality is that, for 32 years, GM has known that its roofs on its vehicles were weak and not capable of withstanding forces in real world rollover accidents. But, during those 32 years, instead of strengthening its roofs to prevent deaths and serious injuries, GM has continued to deceive the federal government and the motoring public by claiming that roof crush does not matter. GM's failure to build its vehicles with strong roofs continues to tragically take the lives of people like our client's wife and others. The Hammond case was pending in Madison County at the time of settlement. The amount of the settlement is confidential at GM's request. Rick Morrison from our firm handled this case for the Hammond family and did a very good job for them.

Rhino Lawsuit Filed In Georgia

Our firm continues to pursue claims against Yamaha for injuries resulting in defects related to the Rhino. As discussed in previous issues of the Report, the Yamaha Rhino is a deadly vehicle that overturns under very foreseeable operating conditions. One of the Yamaha corporations operates out of Gwinnett County, Georgia. Hundreds of people have been injured or killed by the Yamaha Rhino. Many of those have chosen to file their cases in Gwinnett County, Georgia. Thus far approximately 70 cases have been filed there. We have filed and continue to file cases in that court and in other venues on behalf of those injured and killed by the Rhino. Chris Glover, Cole Portis and I will be handling these cases for the firm.

Product Liability Lawsuit Filed Against A Tree Stand Manufacturer

Our firm recently filed a product liability lawsuit against the manufacturer of a tree stand. In this case, we represent a young man from North Carolina who suffered severe back injuries when the ratchet strap on the tree stand broke causing the tree stand and this young man to fall from the tree to the ground. The hunting tree stand was purchased from Wal-Mart. Tragically, this particular tree stand was subject to a recall because of the defective strap. However, it was still being sold at the time of the accident.

When reviewing and investigating the claim on behalf of our client, we identified other lawsuits where the manufacturer of the tree stand was sued following a failure identical to our client's fall. One of those incidents

occurred in Alabama. Through that litigation we discovered the straps for the tree stand were made by a Chinese manufacturer. The straps were not properly tested and this failure to test most likely contributed to the tree stand failures.

The company filed bankruptcy, but has since emerged from it and is still in the business of manufacturing and selling tree stands. Our client used to be a brick mason, but as a result of his injuries he can no longer work. Our client is married and has children. His life has been forever changed because of corporate irresponsibility. Kendall Dunson from our firm will be the lead lawyer in this case.

Another Work Place Injury Results In a Product Liability Suit

Each year thousands of workers are injured or killed at their work place. Although a state's worker's compensation system places limitations on the ability of employees to hold employers accountable for these work-related injuries, many people do not realize that there may be another available source of recovery. Injuries in the work place are often caused by defective products. If a product causes an on-the-job injury, a product liability suit may be brought against the product's manufacturer. Unfortunately, catastrophic injuries, deaths, and amputations commonly occur from defective products found in the work place.

No clearer example of the tragic consequences of a defective product in the work place can be found than in one of our current cases. We represent a hard-working blue collar man who was severely burned as a result of a defective product. Our client was working in a manufacturing plant in Kentucky. The plant has a trolley system that carries hot molten aluminum in ladles across the ceiling. These trolleys carry the ladles over the heads of the employees working below the system on the floor of the plant. In this particular case, one of the back wire ropes attached to the trolley broke, causing a ladle full of the molten aluminum to spill on the floor.

The aluminum ignited hydraulic fluid on the floor creating a flash fire. Our client was unfortunately walking under the ladle at the time the incident occurred and was severely burned as a result of the flash fire. Our client sustained serious burns to his body. His medical bills are approaching $750,000.00. Because of his injuries, he will not be able to work for the rest of his life. Not only was his life changed forever, but his wife's life has also changed. She is now her husband's primary caretaker as he cannot perform everyday life activities without assistance.

Even though the rope was specifically manufactured for this type of trolley system, the rope was defectively designed because it was not strong enough to hold the system when the trolley's ladle was full of hot molten aluminum. Through discovery, we will learn the extent, if any, of testing the manufacturers did on the rope. Specifically, was testing performed by the manufacturer under similar conditions and in a similar environment as the conditions and environment found at the plant? Kendall Dunson is lead attorney on this case. If you need additional information on work-place injury litigation you can contact Kendall at 800-898-2034 or Kendall.Dunson@beasleyallen.com.

Wrongful Death Suit Filed For Illegal Sales Of Alcohol To Minors

Our firm represents the parents of a 19-year-old boy who was tragically killed in an automobile accident. It was discovered that, on the night of the accident, the Defendants sold beer to this teenager on two separate occasions. The alcohol sales were recorded by video surveillance tapes. The tapes confirmed that the clerk for the convenience store never requested any identification from the minor.

In the early 1900s, the Alabama Legislature recognized the dangers associated with the selling of alcohol to minors and saw the urgent need to protect children from their own immaturity as it relates to the drinking of alcohol. So the 1907 Legislature passed a statute prohibiting the furnishing of liquor to minors. This legislation eventually evolved into Ala. Code §6-5-70 (1975). This code section has been amended over the years, but in essence, it still makes it unlawful to sell or furnish spirituous liquor to a minor. What makes our case particularly tragic is, in the months leading up to this young man's death, the parents of this child repeatedly contacted the Defendants' store informing them that their son was a minor. They literally begged them not to sell any alcoholic beverages to him. The convenience store's conduct in this case is abhorrent.

In 2007, an estimated 12,998 people died in drunk driving related crashes. Many of those who died were minors. The company's conduct in this case represents the epitome of irresponsibility and a complete disregard for the laws of the State of Alabama and the safety of minors. Mike Crow from our firm will be the lead lawyer in this case.

III. LEGISLATIVE HAPPENINGS

Alabama Legislature Is Moving Into The Home Stretch

By the time this issue is received the Alabama Legislature will have less than ten legislative days left in the Regular Session. Obviously, there is a great deal of work to be done with a relatively short time to do what needs to be done. There are some tough issues left to be dealt with. As you probably know, the state budgets were saved from fiscal disaster because of the stimulus money received from the federal government. Without that

money state services and public education at every level would have been in jeopardy and the state in a real "fiscal mess." It would have been absolutely impossible to pass budgets without severe cuts in essential services if there had been no stimulus funds. Nobody can dispute the fact that the stimulus money saved the day for Alabama citizens.

Eventually a Governor and Legislature, acting in concert, in a bipartisan manner, will have to deal with the fiscal problems that have been virtually ignored to a very large degree over the past 25 years. For years, we have seen budgets passed with patches and short-term fixes, but with no real permanent fixes. The next Governor will have his or her hands full and will have to make some tough decisions at a very early date in 2011.

Alabama Still Needs A New Constitution

While there is still time for passage, it doesn't appear our state will be getting a new constitution in the immediate future. Unless things pick up very soon House Joint Resolution 91 and Senate Joint Resolution 20 won't pass during the current session. Only a great deal of public support from around the state, passed on to the Legislators, can make the difference. If enough people from around the state let their House and Senate members know that they support a new constitution the resolution will have a chance to pass. That would light a fire in the House and Senate on this issue. But time may have already run out for this session.

As a matter of fact, the Joint Resolution will allow the people of Alabama to vote for a Constitution Convention to rewrite the 1901 Alabama Constitution. The resolution was introduced in both the House and Senate by Speaker Pro Tem Demetrius Newton in the House (HJR 91) and by Senator Ted Little in the Senate (SJR 20). Each Resolution—unlike a bill—was sent to the Rules Committee in the respective chambers. One of them will have to come out of committee very soon if there is to be any chance for passage during the session.

As you may know, the Joint Resolutions are the same as the bills that have been offered by the sponsors for the past three years. The only difference is that a resolution doesn't require approval by the Governor. Many Legislators see the importance of moving forward on this issue and favor the convention approach. While the current resolutions have 26 co-signers in the House and 15 in the Senate, there are some powerful special interests at work opposing a new Constitution. They like the old one because it helps them control government at every level.

If you believe we need a new constitution and also trust the people of Alabama to make our own decisions, call your Legislators and let them know you want them to vote for the resolutions. Ask them to allow you and your fellow Alabamians to vote on whether to call a Constitutional Convention. In my opinion, a new constitution is badly needed and is important to our state's future.

Alabama's First Black Lawmakers Honored

Governor Bob Riley has signed a resolution honoring the state's first black lawmakers. The resolution, sponsored by Rep. Alvin Holmes of Montgomery, says black Alabama residents played an integral part in the Legislature from 1868 to 1878. There were 33 black lawmakers in the Legislature at the height of Reconstruction in 1874. The Governor signed the resolution on April 7th in the Old House Chamber. The names of the black Legislators will be placed on plaques that will be displayed in the rotunda, on the grounds outside the Capitol and inside the entrance to the Alabama Statehouse. In my opinion, this is a good thing and long overdue. Few Alabamians know every much about the role played by these black Legislators in our state's history.

Source: *Associated Press*

IV. COURT WATCH

Philip Morris Will Finally Have To Pay In Oregon

The U.S. Supreme Court has dismissed Philip Morris USA's appeal of a $79.5 million jury award to a smoker's widow. Hopefully, this will end the ten-year fight in the courts. In a one-sentence order, the court left in place a ruling by the Oregon Supreme Court in favor of Mayola Williams. Repeatedly the Oregon court, on numerous opportunities, upheld a verdict against the Altria Group Inc. unit in a fraud trial that took place way back in 1999.

The judgment has grown to just about $150 Million including accrued interest. The justices heard arguments in the case in December. Philip Morris had argued that the award should be thrown out and a new trial ordered because of flaws in the instructions given jurors before their deliberations. Business interests wanted the high court to use the case to set firm limits on the award of punitive damages. The case has been in the appellate courts for ten years and it's now over. The jury had found that Philip Morris should be held accountable for misleading people into thinking cigarettes weren't dangerous or addictive.

Ms. Williams' husband, Jesse, was a janitor in Portland who started smoking while he was in the Army in the 1950s. Mr. Williams died in 1997, six months after he was diagnosed with lung cancer. At trial, the widow was awarded $800,000 in actual damages. The punitive damages are about 97 times greater. A state court previously cut the compensatory award to $521,000. Sixty percent of the award will now go to an Oregon crime-victims fund.

The Oregon high court made its first decision in 2002, refusing to hear an

appeal from Philip Morris. Then the U.S. Supreme Court rejected the judgment of nearly $80 million, saying in another case that damages generally should be held to no more than nine times actual economic damages. It declined, however, to make that a firm rule. Next, the Oregon Supreme Court upheld the punitive damages, citing "extraordinarily reprehensible" conduct by Philip Morris officials. The U.S. Supreme Court then took a second look at the case. In 2007, the court said, in a 5-4 decision, that jurors may punish a Defendant only for harm done to someone who is suing, not other smokers who could make similar claims.

The state court was told to reconsider the award in the context of instructions for the trial jury that Philip Morris proposed, but which were rejected by the trial judge. In January, the Oregon court said there were other defects in the instructions that violated Oregon law, and again supported the trial judge's decision not to give the proposed instructions to the jury. It's real good to see this case finally come to a conclusion. Relatively few victims have ever been successful in litigation against the politically-powerful tobacco industry. Ms. Williams and her lawyers are to be commended for seeing this case to an end.

Source: *Associated Press*

Wyeth Must Face Woman's Prempro Lawsuit

A Texas appeals court has ruled that Wyeth, the drug maker being acquired by Pfizer Inc., must face a lawsuit filed by a woman who claims her breast cancer was caused by the menopause medicine Prempro. A state court judge had dismissed the case on federal preemption. The court said in its April 14th ruling, that Susan Brockert's "failure-to-warn" claims aren't preempted by federal drug-labeling regulations, overturning the lower court judge's finding. The ruling sent the case back to the lower court for further proceedings. In its ruling, the appeals panel cited the U.S. Supreme Court's Levine decision. As widely reported, the high court in that case said patients can sue drug makers for failing to provide adequate safety warnings, even when a treatment and its packaging are approved by the U.S. Food and Drug Administration.

While this is great news for Ms. Brockert, who contends Wyeth's Prempro caused her breast cancer, it's also very good news for the many Texas women who have filed similar lawsuits. Related lawsuits over hormone therapy drugs such as Prempro, Premarin and Provera that had been on hold pending a decision will now move forward. Approximately 14,000 women have filed hormone therapy lawsuits against Wyeth and Pfizer. As many as 6 million women took the hormone-replacement therapies to ease menopause symptoms, such as hot flashes and mood swings, before a 2002 study turned up cancer links.

In January, we reported on Senator Grassley's letter to Wyeth's CEO, Bernard Poussot, kicking off an investigation into their role in paying ghostwriters to publish medical articles favorable to Prempro. In March, we reported on the ever-mounting evidence that hormone therapy causes breast cancer. It should come as no surprise that in Pfizer's recent announcement to purchase Wyeth for $68 billion, they will pay Poussot $53 million to resign. Not bad for a man who seems to have crossed ethical guidelines in his work.

Ted Meadows, Russ Abney and Melissa Prickett, lawyers from our firm, are working on hormone therapy cases. They continue to investigate potential cases and are filing new cases. The firm will be litigating the cases that have already been filed and are now pending. If you need more information on this subject, contact any of the lawyers listed above at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com, Russ.Abney@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Source: *Bloomberg*

Retired Supreme Court Justice Favors Merit Selection Of Judges

Sandra Day O'Connor, the retired U.S. Supreme Court Justice, believes strongly that merit selection is the best way to choose judges and keep them independent. This well-respected public servant says it's hard for judges to remain impartial knowing their decisions will influence how long they keep their jobs. She believes the money being spent by people running for the judiciary in states that don't have merit selection is causing people to trust judges less. Justice O'Connor had this to say:

> *I hope that lawmakers will be cautious and look at what an independent judiciary has meant to this nation. Our judges must be capable of staying above politics if they're going to serve the function of making impartial decisions.*

Most supporters of electing judges claim that facing the voters makes judges more accountable to the people they serve. But Justice O'Connor believes judges aren't as effective if they have to worry about whether their decisions will be popular. She also contends that electing judges brings in other elements that are harmful to the judiciary. Groups that oppose merit selection frequently cite "judicial tyranny" as another reason judges should be elected. Judge O'Connor dismisses that contention, as well, saying:

> *Our forefathers would be surprised to find they were establishing a tyrannical system when they wrote the Constitution. The only way to stop the onslaught we now face is to build an informed citizenry that understands the need for an informed judiciary.*

Justice O'Connor has also expressed concern about Americans' lack of knowledge about government. She points out that more people can name an American Idol judge or two of the "Three Stooges" than the three branches of government. It's pretty

hard to disagree with Justice O'Connor on any of her views.

Source: *Associated Press*

V. THE NATIONAL SCENE

Lawsuit Against KBR Survives

We have written in prior issues on the electrocution deaths of American troops in Iraq. Recently, a federal judge denied Army contractor KBR's motion to dismiss a lawsuit filed by the mother of a soldier who was electrocuted in the shower while serving in Iraq. As previously reported, Houston-based contractor KBR failed to maintain the electrical infrastructure at the former estate of Saddam Hussein in Baghdad. On January 2, 2008, Staff Sgt. Ryan Maseth, an Army Ranger and Green Beret, was electrocuted as he showered while stationed there.

Lawyers for KBR argued that decisions made by the Army insulated the private military contractor from prosecution. Fortunately, U.S. District Judge Nora Barry Fischer disagreed, stating in her order:

> *This case does not involve claims arising from active military combat operations. The issues presented by [Ms. Harris'] claims involve the alleged negligent performance or non-performance of KBR in providing maintenance services to the United States Army. The lawsuit asks this court and a jury to determine whether the work that KBR actually performed at the [complex] was substandard, negligent work that resulted in Ryan Maseth's death.*

KBR lawyers also argued that the lawsuit should be dismissed because it could be a "potential embarrassment to the Army" and the U.S. government. Judge Fischer, however, noted that "the Army has not sought to intervene in this action nor expressed any concerns to this court." Without a doubt, KBR should be held accountable for the death of Sgt. Maseth and punished to the fullest extent of the law.

A military team sent to evaluate the electrical problems at U.S. facilities in Iraq determined there was a high risk that flawed wiring could cause "catastrophic results" which, as we now know, includes the electrocutions of American soldiers. According to the team, the use of a required device, commonly found in American homes to prevent electrical shocks, was "patchy at best" near showers and latrines in U.S. military facilities. The team also found widespread use of uncertified electrical devices and "incomplete application" of U.S. electrical codes in buildings throughout the war-torn country. As previously reported, at least three U.S. service members have been electrocuted in Iraq while taking showers in the six years since the Bush Administration ordered the invasion of the country.

A copy of the team's September 8th report to the then-commander in Iraq, Gen. David Petraeus, was obtained by the Associated Press through a Freedom of Information Act request. Senator Bob Casey has expressed his disappointment that the Pentagon failed to share the report with Congress when it was completed. The Pennsylvania Senator, who has been trying to get more answers about the electrical problems in the past year, recently observed:

> *This report from a U.S. military task force confirms my worst fears: a glaring pattern of shoddy application of relevant electrical codes, the absence of critical safeguards, and the lack of adequate oversight.*

Since this report to General Petraeus, Task Force SAFE in Iraq, which was created to deal with the electrical problems, began extensive inspections and repairs of wiring in about 90,000 U.S.-maintained facilities in Iraq. The Associated Press has reported previously that about a third of the inspections so far have turned up major electrical problems. While it appears a good number of those problems have now been fixed, about 65,000 facilities have yet to be inspected. The military says it could be November before all the inspections are complete.

In the meantime, the family of Sgt. Maseth continues with its lawsuit in an effort to obtain justice. I would like to see the executives at KBR held personally responsible for their actions in this matter. At least the Maseth lawsuit is still on track. I hope it will be successful.

Source: *Pittsburgh Post-Gazette* and *Associated Press*

President Obama Makes A Great Choice For Top Post At NHTSA

President Barack Obama has nominated Charles A. (Chuck) Hurley, the CEO of Mothers Against Drunk Driving, as the next administrator of the National Highway Traffic Safety Administration. The nominee, who has headed MADD since 2005, previously held senior leadership positions with the National Safety Council and the Insurance Institute for Highway Safety. Chuck Hurley has had a distinguished 30-year professional career and is a tremendous choice for this position. In addition to his work on drunk driving issues, he has worked extensively on airbag and seat belt issues, teen driving, and child passenger safety.

The nomination of a person to head up NHTSA with a history of working for safety—rather than against safety—is most refreshing. In my opinion, this will prove to be an outstanding selection to head up an extremely important regulatory agency. All Americans who believe safety should be a top priority for carmakers should applaud this move by the President.

Source: *Associated Press*

VI. THE CORPORATE WORLD

An Overseer Of Trials In Medicine Draws Fire

It appears that a Colorado company that drug and medical device makers pay to oversee patient safety during clinical trials does a poor job of supervising medical trials. Recently, the company, Coast Independent Review Board of Colorado Springs, approved a study that didn't even exist. In an interesting move, undercover federal investigators created a sham medical study to see how closely companies like Coast evaluate the studies they are paid to review. This company approves clinical-trial designs and patient-safety guidelines, which are critically important assignments. Companies and medical institutions are required to have an "independent" institutional review board approve these trials when they experiment on human subjects.

Two of Coast's competitors correctly refused to approve the study's design. But Coast approved a trial, which involved a make-believe surgical product called Adhesiabloc as well as researchers who did not exist. The company may be able to explain how it has approved a sham study, but I believe that will be most difficult. In fact, the company has agreed not to do any more trials for the drug industry. This was at the request of the FDA which said it had "serious concerns" about "Coast's ability to protect human subjects."

Source: *New York Times*

The Executive Bonus Turmoil

There is absolutely nothing wrong with a successful corporation rewarding its good executives with bonus payments at year's end. But I have a hard time understanding how a company that is close to insolvency can pay out large bonuses to its bosses. In that regard, we have seen huge bonuses being paid by companies that lost tremendous amounts of money during the "bonus year." AIG is just one such example, and there are scores of others. It's pretty well established that executive bonuses in such cases are alive and well in Corporate America. The public furor over questionable bonuses has placed a large bull's-eye on corporations that have engaged in such activity. Hopefully, shareholders will wake up and say enough is enough when it comes to rewarding incompetence.

Corporate Greed Must Be Regulated

We have seen over the past year what happens when Corporate America is allowed to operate with little or no regulation. A prime example is the lack of regulation of the financial institutions. And, we have also witnessed the results of ineffective or weak regulation of the drug industry. The new "Era of Accountability" brought on with the Obama Administration has set the stage for sweeping reforms in the ways that federal regulators do business.

From the financial services and defense contracting industries to the manufacturers of products including drugs, cars, toys, and others—no company can be immune to the need for good and effective regulation. Of course, there will be strong opposition from the corporate lobbyists and from some members of Congress. But the American people want change and that will drive this train in my opinion. Thus, I believe that President Obama will be successful in this area of concern.

U.S. Lawsuit Filed Against KPMG Over Audits Of Subprime Lender

A significant lawsuit has been filed against KPMG over claims that "grossly negligent audits" by the accounting giant helped trigger the collapse of New Century Financial Corp., a top subprime mortgage lender, at the start of the U.S. housing crisis. New Century, the largest independent provider of home loans to people with poor credit, filed for bankruptcy two years ago amid mounting customer defaults. Its failure rippled across the U.S. mortgage lending industry, sparking a string of other bankruptcies that spoiled financial markets as banks booked losses on billions of dollars in mortgage-linked securities at the heart of the current global financial crisis.

The lawsuit, filed on behalf of a liquidating trust formed by New Century debtors, was filed against both KPMG International and its U.S. arm, KPMG LLP. KPMG is accused of helping cover up "catastrophic" problems at New Century—including accounting and financial errors—that led to its collapse. The complaint alleges that, "as New Century's auditor, KPMG failed its public watchdog duty."

The suit demands at least $1 billion in damages. At one point, KPMG "did the unthinkable for a public auditor," the lawsuit alleges. It claims that KPMG issued an audit report on New Century's 2005 financial results before its audit was complete, "falsely enabling" New Century to file its annual report with the U.S. Securities and Exchange Commission. Many of the problems at New Century resulted from aggressive business practices that saw the company grow from originating $357 million in mortgage loans in its first year of operation in 1996 to about $60 billion in 2006.

Despite a denial of wrongdoing, a report by a court-appointed bankruptcy examiner found last year that KPMG contributed to New Century's questionable financial reporting practices through "troubling and puzzling conduct" including its alleged negligence. It is alleged in the suit:

> *Despite KPMG's promise that it would ensure that KPMG LLP audit services would comply with professional standards and regulatory requirements, KPMG LLP conducted grossly negligent audits and reviews of New Century that violated both professional standards and regulatory requirements.*

Separate suits were filed in federal courts in New York and Los Angeles. It will be most interesting to see how this lawsuit develops. This appears to be a highly significant lawsuit. Other accounting firms will be closely watching what happens in this litigation.

Source: *Insurance Journal*

Wells Fargo Accused Of Securities Fraud In State Lawsuit

The State of California has accused Wells Fargo & Co. of fraud for the company's role in an investment meltdown that has been compared in magnitude to the Bernard Madoff scandal. Attorney General Jerry Brown sued three Wells Fargo investment subsidiaries, alleging they committed securities fraud by telling California investors that $1.5 billion of risky securities sold to them were as safe as cash. The Attorney General had this to say when filing the suit:

> *The securities were sold to customers on the basis that they were like cash and people could get their money back in eight days. Now, it turns out they were not like cash and people can't get their money back even after many, many months, and they're mad as hell.*

The lawsuit, filed in state court in San Francisco, seeks to recover the money invested by about 2,400 Californians in what are known as auction-rate securities. These were marketed by the Wells Fargo subsidiaries. Auction-rate securities, generally backed by student loans, municipal bonds or other debt, have interest rates that are reset periodically through auctions—sometimes as often as once a week. More than $330 billion of the securities were sold in recent years to investors attracted to their yields, which could be one or more percentage points above a typical money market fund.

Regulators have alleged that many banks and investment firms deceived their clients into believing that auction-rate securities were as safe as a money market account. But when the market for auction-rate securities collapsed in February 2008, many investors couldn't sell the securities, or could sell them only at a loss. It's believed by some experts that auction-rate preferred securities are the largest fraud ever perpetrated by Wall Street on investors. Several financial-service companies that issued auction-rate debt have agreed to repurchase billions of dollars of the devalued securities to settle claims by regulators that they defrauded investors. Recently, Wachovia Corp., which Wells Fargo acquired last year, agreed to repurchase $1.5 billion of the securities from California investors in a settlement with the state Department of Corporations that also included a division of Citigroup Inc.

Brown's lawsuit names Wells Fargo Investments, Wells Fargo Brokerage Services and Wells Fargo Institutional Services as Defendants. It alleges that they began selling auction-rate securities in 2001 and continued to sell them right up to the collapse of the market last year, despite signs that the market was beginning to crack in the second half of 2007. It's alleged that Wells Fargo sales personnel weren't properly trained in the intricacies of auction-rate securities, and that the risks of the investments weren't explained to clients. Investors included retirees and small businesses, and accounts ranged from $25,000 into the millions of dollars.

Source: *Los Angeles Times*

An Update On Whistleblower Lawsuits

There have been a number of significant developments recently in whistleblower lawsuits. I will mention a few of them below.

Northrop Grumman-TRW Whistle-Blower Case Settled

In one of the nation's largest settlements in a whistle-blower case, Northrop Grumman Corp. has agreed to pay the federal government $325 million to resolve claims that TRW, which it acquired in 2002, provided defective parts for a spy satellite program in the 1990s. But in a rather weird twist, the federal government also has settled a separate, long-running dispute with Northrop and under that settlement the government will pay the aerospace company exactly $325 million. This essentially means that the two settlements are a wash and, as a result, no money will change hands.

Though Century City-based Northrop was the loser in the whistle-blower case, it successfully resolved a 13-year-old dispute over a missile program that was cancelled in 1995 for what the government said were cost and schedule overruns. In the TRW-Northrop whistleblower case, the settlement ended a seven-year legal fight initiated by a whistleblower. Robert Ferro, an engineer, in his role as a whistleblower, was awarded $48.7 million. But instead of that award being paid by Northrop, it will be paid by the federal government.

TRW sold the government electronic components that it knew would fail. Ferro is an electrical engineer for the Aerospace Corp., a federally funded research lab that was evaluating a satellite transistor for the Pentagon. He filed the lawsuit in 2002 under the False Claims Act, which allows people not affiliated with the government to sue federal contractors on behalf of the government. Ferro alleged that research conducted in 1995 "clearly demonstrated" the parts would fail if placed in satellites that were being developed for the secretive National Reconnaissance Office. But TRW didn't inform the government of the findings even after problems were intensified.

When the claimants are successful, they are entitled to receive 15% to

25% of the total settlement. This settlement was the largest ever in a Pentagon whistle-blower case. Eric R. Havian, a lawyer from San Francisco, represented the whistleblower and did an outstanding job.

Source: *Los Angeles Times*

Company Accused Of Contract Fraud

NetApp Inc. of Sunnyvale, California, a data-storage company, has agreed to pay the General Services Administration $128 million to settle a whistleblower complaint about its federal contracting. The Justice Department alleges that the company, NetApp Inc. of Sunnyvale, Calif., made false statements to the GSA about the discounts it was giving other customers and failed to extend proper discounts to the government. Roger Goldman, an attorney for the company, declined to comment.

The agreement represents the largest-ever settlement involving the GSA's federal supply procurement program. NetApp provides hardware, software and storage management services. The investigation relates to contracts NetApp had with the GSA between August 1997 and February 2005 to sell technology products to various federal agencies. GSA contract guidelines require companies to provide the government with accurate information about the discounts they offer to non-government commercial customers, helping the GSA to negotiate its best price. NetApp failed to give the Government accurate and complete data about the discounts offered to commercial customers.

Under the terms of the settlement, NetApp was obligated to pay the $128 million by April 27th. Igor Kapuscinski, then the federal systems manager for NetApp, filed a complaint in 2006 in U.S. District Court in Washington alleging fraudulent behavior by the company. This started the Justice Department investigation. Virgil McKnight, a lawyer with the Washington D.C. firm of Ashcraft & Geral, represented the whistleblower and did a very good job.

Source: *Washington Post*

Formula For Justice Chemist Blows Whistle On Medical Company

A settlement has been reached by the federal government in another significant whistleblower suit. It appears that a giant lab was making inaccurate test kits for dialysis patients. Thomas Cantor, the biochemist whose company supplied different test kits to clinical labs and who blew the whistle on the company, had this to say:

> *I'm not going to pocket it, the money part was never the motivation. It was always about patients. It broke my heart and was shocking what a company would do for money. I made it my business to go on a mission to make it stop.*

The whistleblower says the award money will fund research to treat drug-resistant infections like HIV and hepatitis. Five years ago, Cantor and his lawyers at the Washington firm of Phillips & Cohen sued Quest Diagnostics and its subsidiary Nichols Institute Diagnostics (NID) for Medicare fraud. The suit contended Quest and NID were billing the government for faulty medical tests and harmful Vitamin D therapies for inaccurately-diagnosed kidney disease. Cantor, president of Scantibodies Laboratory Inc., in California, learned of problems with Quest's faulty test kits after some doctors who disputed Quest's results asked him to conduct a second test. Cantor's tests showed Quest's findings were "consistently out of whack" and led him to check further.

NID has pleaded guilty to a felony charge of misbranding relating to a thyroid test for dialysis patients and agreed to pay a $40 million fine. In addition, Quest and NID agreed to pay the government a $262 million civil settlement. Under the federal False Claims Act, Cantor is entitled to a percentage of the settlement as an encouragement for whistleblowers to come forward. Before suing, Cantor sent thousands of e-mails to health care providers about the inaccurate tests without success. The Justice Department then investigated his allegations. Brooklyn U.S. Attorney Benton Campbell observed:

> *The American public has a right to expect medical device manufacturers to make accurate claims in their labeling, especially when the failure to meet those claims could indicate that the performance of the device is suspect.*

There has been a massive amount of fraud in federal programs and that is a sad commentary on our times. Companies can do well without cheating in these programs. The job of regulation and monitoring of government contractors must be done by the government. That simply has not been done well over the past several years. Whistleblowers are actually doing their job for the regulators and that's not the way it should be.

Source: *New York Daily News*

Massachusetts Approves Settlement In False Drug Price Lawsuit

A federal court in Massachusetts has given preliminary approval to a settlement in a case involving false drug prices by a drug wholesaler. The total settlement of the suit is $350 million. Con-

sumers will get some of their money back. The suit alleges that McKesson and FirstDataBank inflated the average wholesale price (AWP) of prescription drugs. The AWP is always set by the manufacturer and is passed on by a reporting company like FirstDataBank. According to the suit, the Defendants inflated a "mark-up factor" used to calculate the AWP of over 400 drugs.

Specifically, FirstData Bank, a publisher of drug data, told the pharmaceutical industry that it derived the AWP from "a survey" of wholesalers in an attempt to verify the prices reported by the manufacturer. In reality, however, McKesson was the only wholesaler that FirstData actually surveyed. The two companies increased the AWP markup from 20 to 25 percent for over 400 drugs, without any economic justification. To conceal the scheme, the companies only increased the markup when another price announcement was made by a drug manufacturer. While the Defendants deny any wrongdoing, they have agreed to reimburse eligible consumers. McKesson, a Fortune 500 health care services company, has agreed to pay $350 million into a settlement fund. Only $60 million of this will go directly to consumers with the rest allotted to be paid to "non-governmental third parties," including insurance companies. It should be noted that this case doesn't include state Medicaid programs. The fraud in those cases involved only the drug manufacturers and not the reporting services.

Eligible class members include anyone who paid a co-payment for one of the settlement drugs between August 1, 2001 and March 15, 2005, and uninsured or underinsured consumers who paid the full value of one of the drugs between August 1, 2001 and January 23, 2009. According to the Plaintiffs' lawyer, Steve W. Berman of Hagens Berman Sobol Shapiro, eligible class members would "receive some money back in the near future if they file a claim." Consumers who think they may be eligible to recover should fill out a claim form, available at the official settlement Web site, www.mckesson-awpsettlement.com.

Source: *Consumer Affairs*

VII. CONGRESSIONAL UPDATE

Congress Should Pass The Medical Device Safety Act

As we have reported in previous issues, the Medical Device Safety Act of 2009 is awaiting passage in Congress. I predict that this legislation will pass because of its importance from a public health perspective. The American people have been alerted to a massive problem relating to medical devices and to the efforts to protect wrongdoers. Several legal groups, including the American Bar Association, support passage of this Act. The legislation was introduced on March 5th after the U.S. Supreme Court's decision in the *Wyeth v. Levine* case.

In another case, *Riegel v. Medtronic*, the Supreme Court found last year that products liability claims against medical device manufacturer Medtronic were preempted by the Medical Device Amendments to the federal Food, Drug and Cosmetic Act. But on March 4th, the Supreme Court ruled in the Levine case that federal law governing warnings on prescription drug labels does not preempt state claims asserting that pharmaceutical companies failed to warn of risks associated with the medication.

A number of consumer groups, including Public Citizen and legal organizations such as the American Association for Justice and the Alliance for Justice, have been pushing hard for passage of the Medical Device Safety Act. It's most significant that the American Bar Association has joined with the consumer group. This legislation was introduced in both houses by Senator Ted Kennedy, the chairman of the Senate Committee on Health, Education, Labor and Pensions, and New Jersey Representative Frank Pallone Jr., the chairman of the House Committee on Energy and Commerce's Subcommittee on Health. The legislation has broad support in both the House and Senate. The American people are clearly in favor of prompt passage.

In March, more than 20 consumer, health, women's advocacy and legal groups sent letters to Senator Kennedy, Rep. Pallone and Rep. Henry Waxman, the chairman of the House Energy and Commerce Committee, urging passage of the Medical Device Safety Act. In the letters, it was stated:

> *Immunity should not be given to device manufacturers that fail to adequately warn about or prevent device risks; especially when the manufacturer knows, or should know, that the device could cause serious injuries or death.*

One of the legal groups, the Center for Justice & Democracy, which is a consumer organization focused on the courts, released a report recently on defective heart devices and implants. Joanne Doroshow, executive director of the Center, which is based in New York, made this observation concerning the need for legislative action:

> *These are the very type of patients whose rights have been wiped out as a result of the Supreme Court's decision last year, which is what Congress now needs to fix.*

Meanwhile, the American Bar Association has formed a task force to review its policy regarding federal preemption of state products liability tort laws. On December 29th, ABA President H. Thomas Wells Jr., a Birmingham, Alabama lawyer, sent letters to Rep. Pallone and Senator Kennedy supporting a bill that would overturn the decision in the Medtronic case. President Wells, who is a very good civil defense lawyer, stated:

> *State product liability law holds manufacturers accountable for injuries caused by their products when they are negligent or irre-*

sponsible. These laws permit an injured consumer to be compensated by a manufacturer found to be negligent. Legislation such as the Medical Device Safety Act is consistent with ABA policy supporting the continued right of the states and territories to regulate product liability law with discrete exceptions.

While I believe this legislation will pass, corporate lobbyists are hard at work trying to derail the effort. Hopefully, the overwhelming support in favor of the legislation will enable the bill to pass, and to pass soon. It's badly needed and would send the right message to the American people.

Source: *National Law Journal*

The Fair Elections Now Act Should Be Passed

We have seen big banks receive billions in bailout funds, and then turn around and lobby for little to no oversight or accountability for how our taxpayer dollars are to be spent. While they were busy lobbying, the banks neglected the critical issue at hand which is helping American homeowners who face foreclosure. We cannot allow campaign cash and powerful lobbyists to continue to win favors from Congress. Pay-to-play politics can't be allowed to continue in Washington, D.C., not with so much at stake. That's why Public Citizen is pushing for change through citizen-funded Fair Elections. I believe the time has come to move in that direction. Taking special interest money out of the political arena would do more to rid our nation's capital of partisan favoritism and actual corruption than any single one thing.

The Fair Elections Now Act, sponsored by Senators Dick Durbin (D-IL) and Arlen Specter (D-PA) and Representatives John Larsen (D-CT) and Walter Jones (R-NC), presents an exciting new approach to financing campaigns. This bipartisan bill creates an alternative to big special interest money in politics by allowing Congressional candidates to run a viable campaign on public funds and unlimited small contributions from ordinary citizens.

Passing this legislation will free members of Congress from spending time chasing contributions from lobbyists and corporate special interest groups. It would also return their focus to solving the critical issues confronting our Nation's problems: the economy, health care, and energy. The time has come for passing this landmark legislation, which will change the way politics operate in this country. It's time for the days of pay-to-play politics to end. If you agree, ask your members of Congress to become co-sponsors of the Fair Elections Now Act! Once the problems in Washington are handled, then the movement can be taken to the state houses.

Source: Public Citizen

The Influence Game In Our Nation's Capitol

Without any doubt, lobbying is big business in our Nation's Capitol. Over the years, powerful corporate lobbyists have had a tremendous influence—sometimes more than elected officials—on what happens in Washington. Lobbying has paid off for the lobbyists and the special interests. For example, big companies that spent hundreds of millions lobbying successfully for a tax break enacted in 2004 got a whopping **22,000-percent return** on that investment! That's pretty good proof that for those who can afford it, hiring a lobbyist can pay tremendous dividends. The figures, compiled by professors at the University of Kansas for a study released last month, offer a rarely-seen glimpse of how the lobbying business works, and why the industry is booming as never before.

President Barack Obama has promised to curb lobbyists' influence and I hope that he can convince Congress to go along with him. The professors' report details efforts by hundreds of companies in 2003 and 2004 to push through a one-time tax "holiday" that lowered for a year the tax rate they paid on profits earned abroad. All told, U.S. companies saved about $100 billion in taxes, with pharmaceutical powerhouses Pfizer and Merck & Co., technology giants IBM and Hewlett Packard, and health products maker Johnson & Johnson among its top beneficiaries. The study focuses on 93 firms that spent as much as $282.7 million lobbying on the issue during that period. Those companies ultimately saved a total of $62.5 billion through the tax change.

Researchers used publicly-available lobbying disclosures filed with Congress and financial statements submitted to the Securities and Exchange Commission to compare the amount each company saved with its lobbying expenditures. Stephen Mazza, who conducted the study along with Raquel Alexander and Susan Scholz, observed:

It calls into question what Congress did in 2004. It clearly is a very lucrative field for lobbyists. Congress wanted to create jobs, and what they probably did was create jobs for the lobbyists.

The results reflect one reason that lobbying—always a major industry in our Nation's Capitol—has experienced explosive growth in recent years. Companies and interest groups spent $3.42 billion lobbying Congress and the federal government in 2008, the last year for which such figures are available, according to the Center for Responsive Politics. That's a 14% jump from the previous year. There's growing evidence that companies get what they pay for—and maybe a lot more—from their lobbying efforts.

The Center for Responsive Politics is a nonpartisan group that tracks money in politics. It recently released a study comparing the amount spent by bailed-out banks on political contributions and lobbying with the amount of money they got from the Troubled Asset Relief Program, better known as

the Wall Street rescue fund. The results revealed that the banks received an overall 258,449% for the $114 million they spent on campaign donations and lobbying. That's not a bad return—even in good economic times—and it's certainly a great return in bad times. This sort of thing should shock most U.S. taxpayers and should get the attention of the politicians.

Source: *Associated Press*

VIII. PRODUCT LIABILITY UPDATE

A Continuing Series Highlighting Often Overlooked Product Claims In The Single Vehicle Accident

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

There are thought to be two collisions in an auto accident. The first collision is the vehicle's impact with another vehicle or object. The second collision is the passenger's impact with the interior of the vehicle, or in cases of ejection, impact outside the vehicle. Seat belt injuries occur when a defective seat belt fails to adequately protect a vehicle passenger in the "second collision" phase of an automobile accident. The purpose of a seat belt is to minimize the injuries caused in a second collision, by reducing or eliminating injurious occupant contact with the vehicle's interior. Seat belt injuries often occur when there is a seat belt design, production, or installation defect. There are a plethora of injuries that may occur as a result of a defective seat belt or from failure of a seat belt: spinal cord injury, brain or head injury, paralysis, internal injuries, amputations, broken bones, concussions and fatalities.

In a lap-belt-only design, often found in the rear center seating position, occupants may jack-knife over the seat belt, receiving injuries in the process. The seat belt itself can cause spine or internal injuries when the occupant's body bends over the seat belt webbing which then cuts into the soft tissue. Also, when the occupant's body juts forward, head injuries can result when the head hits a seat back or a support pillar in the vehicle. With a shoulder-belt-only design, often seen in Hyundai or Volkswagen vehicles, occupants may submarine under the belt, causing neck injuries and sometimes decapitation.

Passive restraint systems lull the occupant into a false feeling of safety when the shoulder belt slides around them. Passive restraint systems consist of a manual lap belt and a motorized shoulder belt, or are simply a door mounted three point system. For the first type, the manual belt combination, occupants often forget to latch the manual belt, creating a shoulder-belt-only system. Thus, much like the Hyundai and Volkswagen vehicles mentioned above, occupants may submarine under the belt. In the second type, the door-mounted, three-point system, if the door opens during an accident, the occupant can be ejected, often suffering horrific injuries or death.

Some of our clients have suffered catastrophic spinal cord injuries as a result of defective seat belt geometry design. Small stature persons are particularly susceptible to these types of injuries. The D-ring or shoulder strap anchor is typically placed in a position that is too high for a small stature person. As a result, the shoulder strap rides too high up on the occupants' neck and causes severe spinal injuries in a collision. Auto manufacturers have been aware of this seat belt geometry defect for some time.

A seat belt must not only be designed and mounted properly, but must latch properly and stay latched to provide maximum protection. Latching problems leave the occupant open for the possibility of being unrestrained in an accident. Inertial unlatching occurs when a seat belt buckle releases by itself during a collision. Inadvertent unlatching happens when the buckle opens as a result of some inadvertent contact by either the occupant or a component of the vehicle. Often a hand or arm contacts the release button causing an inadvertent unlatching. Possibly the scariest of all seat belt buckle defects is false latching. This occurs when the buckle appears to be latched, sounds like it is latched and looks like it is latched, but is not actually properly or fully engaged. In this situation, forces during the accident can cause the buckle to unlatch. We recently dealt with this issue in a case against a trucking manufacturer and a seat belt manufacturer where the decedent was killed after he was ejected from the vehicle.

There are several other possible defects that can occur with seat belts: the seat belt webbing can fail because of a defect within the webbing itself, or from a sharp item on the seat frame contacting the webbing during the collision; the retractor can fail to lock properly in an accident and cause an injury by allowing excess webbing to extend; and, a seat belt pretensioner, a device that removes excess slack from the seat belt webbing, could be missing from the design of the particular belt.

Lawyers who are evaluating potential claims should never rely on accident reports alone to determine if there is a seat belt defect. Often Police Officers

will say that there was no belt use if the occupant has been ejected or is not wearing the belt when the Officers arrive on the scene. As stated previously, an occupant can submarine under a belt, the belt may unlatch on its own from inertia, or a first arriver may have unlatched the occupant to administer lifesaving medical treatment. In short, don't rely on the accident report alone to determine if there is a seat belt defect case. You may have a seat belt defect case if:

- an occupant who was believed to have been belted is found unbelted after the accident;
- a belted occupant makes contact with the vehicle interior, resulting in injury;
- the occupant is ejected outside the vehicle or outside the restraint of the seat belt, but the seat belt buckle is latched;
- the webbing of the seat belt is loose after the accident;
- the webbing of the seat belt is torn;
- the door mounted seat belts in the vehicle were ineffective when the door of the vehicle opened;
- the seat belt is "only" a lap belt or shoulder belt;
- the vehicle occupant compartment is intact and a belted occupant is injured; or
- the seat belt mounts came loose from the floor or vehicle pillars during the accident.

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 seat belt. If you would like more information or have a question, you can contact either Cole Portis, Greg Allen, or Graham Esdale at 800-898-2034, or by email at Cole.Portis@beasleyallen.com, Greg.Allen@beasleyallen.com or Graham.Esdale@beasleyallen.com.

The New NHTSA Chief Should Address Roof Crush Standard

I mentioned in another section of this issue that the Obama Administration named Chuck Hurley as the new administrator to head the National Highway Traffic Safety Administration. NHTSA should immediately address the grossly-inadequate roof crush standard which is badly in need of upgrading. That action would make sure consumers have access to the courts when they have been harmed as a result of a roof crush event. As we have reported in prior issues, the current roof standard has been in place since 1973. This was before SUVs became a common and very popular mode of consumer transportation. In theory, the roof crush standard is supposed to address the safety of vehicles' roofs to withstand pressure when involved in rollover accidents.

As previously reported, NHTSA was required to deliver a roof crush standard to Congress by July 1, 2008. The agency had been ordered by Congress to strengthen its proposed rule because it did not significantly reduce loss of life and prevent injury. NHTSA asked for an extension until December 15, 2008, and then revised the date for issuing the final rule to April 30, 2009. Under the Bush Administration, NHTSA's safety regulations took a back seat to corporate profits. Hopefully, under the new leadership, NHTSA will again put safety as the agency's top priority. The first order of business should be to finalize a strong roof crush standard.

The Bush Administration proposed a roof crush standard that increased the ability of a roof to withstand a force equal to 2.5 times the unloaded vehicle's weight, a standard already met by 70% of domestic automobile manufacturers. The proposed rule would have saved an estimated 13 to 44 lives out the 10,000 persons that die every year in rollover crashes, less than 1%. Safety experts believe this standard did not go far enough because it would still result in most passengers in rollover accidents being killed or paralyzed. That's unacceptable.

The proposed rule during the Bush years also included preemption language that gave automobile manufacturers immunity from lawsuits, leaving manufacturers little incentive to make automobiles safer. The Bush Administration also included preemption language in preambles to safety regulations for occupant crash protection, side-impact protection, school bus seating and other final regulations. The Obama Administration should remove all preemption language and give consumers the right to seek justice in the courts. NHTSA should come up with a final roof crush standard that will save more lives, prevent more injuries, and give citizens just recourse in the courts. Under new leadership at the agency, I believe a new rule with a good standard will come out soon.

Source: AAJ

Major Yamaha Rhino Recall May Have Come Too Late For Many

The Consumer Product Safety Commission has announced a major recall of over 120,000 Yamaha Rhino off-highway recreational vehicles. The recall involves all Rhino 450, 660 and 700 model vehicles, which have been linked to 46 deaths and hundreds of injuries. Reports of serious injury and death linked to this vehicle have been reported since 2003, leaving many to wonder if this action is an example of "too little, too late."

Cole Portis, who heads up our firm's Product Liability Section, has reviewed over 75 Yamaha Rhino rollover claims in the past two years. Cole is concerned that this recall—while a good first step—fails to address the inherent design flaws that make the Yamaha Rhino so susceptible to low-speed rollovers. Cole remains hopeful, however, that this government recall will serve as a wakeup call and that Yamaha will re-evaluate its practice of putting profits over people.

According to an official news release, the CPSC staff has investigated more than 50 incidents involving 46 driver

and passenger deaths related to these two Rhino models. They report more than two-thirds of the cases involved rollovers, and of the rollover-related deaths and hundreds of reported injuries, many appear to involve turns at relatively low speed and on level terrain.

Almost immediately upon the Rhino entering the market, reports of rollover accidents with serious injuries began. The reports indicated that the Rhino was rolling over while turning at speeds of less than 20 mph on virtually flat ground. The Yamaha Rhino has caused a large number of devastating rollover accidents leaving adults and a number of children seriously injured, permanently maimed and, in some instances, dead.

There is evidence to suggest that Yamaha rushed the Rhino to the market before it properly tested them. Around 1990, Yamaha made an agreement with the CPSC not to produce any four-wheel ATV with a static lateral stability factor of less than .89. Because the Rhino is not an ATV—but instead is a UTV—Yamaha did not have to comply with its agreement with the CPSC. Testing of the Rhino verified that the Rhino's static lateral stability factor is about .86, thus making the Rhino less stable than any ATV being manufactured.

In lawsuits, discovery revealed that Yamaha was aware of problems with the instability of its design in 2002 before the Rhino first hit the market and was even concerned about future lawsuits as a result. Furthermore, it appears that Yamaha conducted no specific objective dynamic testing of its vehicle's lateral stability. No dynamic testing was performed despite Yamaha's knowledge that during some handling or performance tests, known as running tests, about 20 rollovers occurred on the Rhino prototype vehicle. Conveniently for Yamaha, either no documentation was made of these rollover accidents or the documentation was discarded. No instrumentation was utilized in the test vehicles to record information such as acceleration, speed, rollover rate, steer input, or the like. The vehicle stability analysis conducted by Yamaha on the Rhino design was almost entirely based upon the subjective assessment of Yamaha's test riders' perception of the vehicle. Yamaha has admitted that it did not do any dynamic testing of the Rhino to see what would happen to passengers in the event there was a rollover. In other words, Yamaha failed to do the kind of testing required to keep drivers and passengers safe while riding in the vehicle.

When confronted with the mounting injuries caused by the Rhino design, Yamaha took a well-used corporate strategy, and blamed the consumers for their own injuries, accusing them of using aggressive driving maneuvers. The following statement was made by Yamaha:

> *While the Rhino has been a reliable and versatile vehicle, some operators have engaged in aggressive driving (such as sliding, skidding, fishtailing, or doing donuts) or made abrupt maneuvers (such as turning the steering wheel too far or too fast) that have resulted in side rollovers—even on flat, open areas. Unfortunately, some occupants have been seriously injured during such rollovers when they put their arms or legs outside the vehicle, resulting in crushing or other injuries.*

In addition, in 2007, without admitting that the Rhino's design was defective, Yamaha made a "special offer" to Rhino owners to retrofit free of charge the older models of the Rhino (the 2004-2007 ATV models) with free half doors and a passenger handhold. Yamaha has also installed half doors and the handhold on its 2008 Rhino model. The company claimed that these features would help people keep their limbs inside the vehicle during a rollover. However, these design changes and retrofits did not address the underlying problem; that is, the unstable design and its tendency to tip over due to its narrow wheelbase, its high center of gravity, and its top-heavy design.

Finally, in March 2008, the Consumer Product Safety Commission (CPSC) announced a major recall of over 120,000 Yamaha Rhino off-highway recreational vehicles. The recall involves all Rhino 450, 660 and 700 model vehicles. If you need more information on Rhino issues, contact Cole Portis or Chris Glover in our firm at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Chris.Glover@beasleyallen.com. You can also get more information by visiting www.yamaha-rhino-lawyer.com.

Variety Of Airbags Recalled Over Possible Malfunctions

There have been a number of recalls recently relating to front airbags on the passenger side of vehicles. The concern is over possible malfunctions of the occupant detection system. These are some of the recalls:

- **General Motors:** 12,662 2009 Cadillac CTS sedans were recalled over a software problem that may disable the front-passenger airbag when it should be enabled or vice versa.
- **Nissan** has recalled more than 200,000 2007-08 Altima, 350Z, Murano and Rogue and Infiniti EX35, G35 and G37 vehicles to fix a sensor for the passenger-side airbag. An electronic component in the unit in the passenger seat cushion may have been made out of specification. Nissan is also recalling 16,365 2006 Murano and 2008 Infiniti EX35 SUVs to fix incorrectly-programmed software that may lead passenger-side airbags to fail.
- **BMW** is recalling 200,000 2006 3 Series and 2004-06 5 Series cars and 2004-06 X3 SUVs over concerns that the front-passenger airbag may not deploy in a crash. Small cracks could develop in a seat detection mat and deactivate the bags but activate the warning light.
- **Hyundai** is recalling 393,714 2006-08 Sonata sedans to fix a problem with the air-bag system in the front passenger seat. The affected cars

have an advanced system that disables the passenger front bag when it detects a child-restraint system or small child in the seat.

- **Ford** is recalling 470,000 2005-08 Mustangs to update passenger-side front-air-bag software. Ford says internal testing showed the airbag could injure a small, unbelted passenger.

For more recall information, visit the National Highway Traffic Safety Administration at www.safercar.gov.

Cooper Tire Sued Over Fatal Rollover Accident In Mexico

While traveling in Mexico in December 2007, one passenger in a 1997 Ford Explorer was killed and several were injured when the vehicle in which they were riding left the road and rolled over. It appears that the accident was caused by the tread on the vehicle's left rear tire suddenly and unexpectedly separating from the tire body. Suit was filed against Cooper Tire and Rubber Company on April 13, 2009 in the Texarkana Division of the Western District of Arkansas.

The tire that detreaded, a Cooper Discoverer H/T, was manufactured in Texarkana, Arkansas, in 2004. It's alleged in the lawsuit that Cooper Tire knew the tire presented an unreasonably dangerous condition and that it had a number of defects. The Plaintiffs state that the tire did not contain measures to prevent tread separation. Specifically, the tire design failed to incorporate a "belt wedge," nylon cap ply, or nylon edge strips. It also failed to employ a high-halobutyl content inner liner. Further, the Plaintiffs said that the tire did not incorporate an effective chemical to prevent premature aging of the tire materials and that the tire was poorly bonded allowing premature failure and tread separation. The Plaintiffs are seeking both compensatory and punitive damages in the case.

Source: *Associated Press*

There Are 2500 To 4500 New Mesothelioma Cases Each Year

Depending on which studies you read, the expert projections are that there will continue to be between 2500 and 4500 new cases of mesothelioma diagnosed each year for the foreseeable future. Our firm continues to actively pursue these cases around the country. Although many of the older (sometimes referred to as "tier one") companies are in bankruptcy, in many cases, smaller secondary companies have been identified as providing asbestos containing materials for various worksites.

The fact that many Defendants are in bankruptcy does not prohibit settlement from those companies although the amounts available from the various bankruptcy trusts are typically much lower than would be expected at trial. In addition to the traditional cases against asbestos suppliers and manufacturers of asbestos-containing products, in some instances, lawyers are focusing on premises liability exposure and property owners are joined in lawsuits where workers were neither protected nor warned about the presence of asbestos.

In addition to the continuing number of mesothelioma cases in the United States, international use of asbestos unfortunately assures that victims around the world will suffer from asbestos-related diseases for years to come. During the years that the United States saw dramatic reductions in the production and use of asbestos, countries such as India, Brazil and China experienced a sharp rise in asbestos production and use. Unfortunately, because of lax medical testing and treatment, and poor reporting and record keeping, the vast majority of mesothelioma cases in those countries go unreported.

Our firm has several mesothelioma cases set for trial this year and we are continuing to investigate new cases around the country. Mike Andrews and Matt Teague are the lead mesothelioma lawyers in our firm. They may be reached anytime for questions at 800-898-2034 or by email at Michael.Andrews@beasleyallen.com or Matt.Teague@beasleyallen.com.

Case Involving A Child Run Over By Mower Is Reversed On Appeal

As the result of an appeals court decision, a child who was injured by her grandfather's riding lawn mower will be allowed to pursue a strict liability claim against Simplicity Manufacturing, Inc., the machine's manufacturer. The 3rd Circuit Court of Appeals reversed a summary judgment in the case which had been entered by a lower court. The child had her left foot amputated after her grandfather backed over her leg while operating a riding mower manufactured by the Defendant. Suit was filed, alleging that the Defendant was at fault because the mower, a Regants model, was designed without any back-over protection.

The Defendant argued that under applicable Pennsylvania law, a manufacturer can only be strictly liable by an "intended user," not a bystander injured when its product is operated by the intended user. But the Appeals Court disagreed, stating:

> *We predict that if the Pennsylvania Supreme Court were confronted with this issue, it would adopt the Restatement (Third) of Torts, §§1 and 2, and thereby afford bystanders a cause of action in strict liability under the circumstances here.*

The Court further decided that the manufacturer could be sued for negligently designing the lawnmower without "no mow in reverse" features. This type of back-up protection was available to the Defendants.

Source: *Lawyers USA*

Ford Motor Co. Studying New Safety Features

Ford Motor Company has been researching two new designs for seat

belts and this could result in reducing injuries and deaths as a result of motor vehicle crashes. One possibility for a safety belt is a design that has four points, which would incorporate a lap belt and suspenders. This design is in lieu of the three-point seat belt that motorists are familiar with. The other safety belt that Ford is looking into has an airbag incorporated into it. There are still some technical challenges that need to be worked through for these safety belts to be useable.

In my opinion, this work by Ford makes sense. Hopefully, this work will result in enhanced safety features for cars. In recent research by Ford, many customers indicated that they were more comfortable and felt safer in four-point safety belts, than three-point belts. American citizens have become increasingly concerned with safety issues and expect the federal government and the automakers to do their part.

Study Says Minicar Buyers Sacrifice Safety

Consumers who buy minicars to economize on fuel are making a big tradeoff when it comes to safety in collisions, according to the Insurance Institute for Highway Safety. The Institute said that crash dummies in all three models tested—the Honda Fit, the Toyota Yaris and the Smart Fortwo—fared poorly in the collisions. By contrast, the midsize models into which they crashed fared well or at least acceptably. Since both the minicars and midsize cars were traveling 40 miles per hour, the crash occurs at 80 mph.

The Institute concluded that while driving smaller and lighter cars saves fuel, "downsizing and down-weighting is also associated with an increase in deaths on the highway," according to Adrian Lund, the Institute's president. The Institute did not quantify how many more highway deaths might be expected statistically from any increase in the use of minicars. The Institute usually tests cars individually, but in this case paired the Honda Fit with a Honda Accord, the Toyota Yaris with a Toyota Camry and the Smart Fortwo with a Mercedes C-Class. While the argument over weight versus safety is not a new one, it took on greater significance when gasoline prices rose sharply last year, making minicars more popular. Consumers are urged to seek out vehicles that burn less fuel so they will contribute less to global warming. Production of carbon dioxide, the main heat-trapping gas, is proportional to fuel use, and the Smart claims to be the highest-mileage car powered by gasoline on the American market.

When the Institute crashed the Smart into the Mercedes C-Class sedan, the Smart—which weighs half as much as the sedan—went airborne and spun around one and a half times. The Institute's crash laboratory did not clock the speed of the rebound, but calculated that in a collision between cars of that weight, the sedan would slow down by 27 mph while the two-seater would change speed by 53 mph, moving backward at 13 mph. The Institute suggested steps that would further both fuel economy and safety rather than put them in conflict (i.e., cutting the speed limit and reducing horsepower). But there appears to be little support for either of those proposals.

Some car efficiency experts have recommended making cars light but also large, with energy-absorbing crush zones. With several feet of car body in front of the driver, the energy of a crash can be dissipated and the suddenness of the change in velocity can be reduced.

Source: *New York Times*

IX. MASS TORTS UPDATE

Vioxx Settlement Program Update

The Vioxx Settlement Program continues to proceed on schedule. When the program was announced on November 9, 2007, one of its primary objectives was that it would not only fairly compensate victims but that compensation would be issued in a timely manner. From the beginning, the target for the heart attack final payment was summer 2009. The issuance of the final heart attack payment will mean that over 30,000 heart attack claims have been reviewed and processed and that $4 billion dollars has been paid to victims less than two years after the announcement of the program.

Due to the efforts of BrownGreer, the Vioxx Claims Administrator, the lawyers for claimants, Judge Eldon Fallon, and others, it appears almost certain that a final payment for heart attack claims will be issued during September of this year, meeting the deadline as outlined from the beginning. Though there is much to do during the final months before the scheduled final payment, the current developments are enormously encouraging and are further proof that the Vioxx Settlement Program is one of the most efficient settlement programs in the history of mass torts.

A total of 48,520 claimants have enrolled their claims in the Vioxx Settlement Program. Of the 30,142 heart attack claims that have been enrolled, interim payments have been issued to over 10,000 claimants with over $850 million being distributed to victims of Vioxx and their families. Interim payments in heart attack cases began in August 2008 and will continue over the coming months until the final payment in September.

Interim payments in stroke cases began in February 2009 in accordance with the terms of the settlement agreement. Of the 17,831 stroke claims that have been enrolled, interim payments have been issued to over 1,000 claimants with almost $30 million dollars being distributed to claimants and their families. Interim payments in stroke cases will continue with the final payment in stroke cases being contemplated in late 2009 or early 2010.

In addition, the Vioxx Settlement Agreement dictated that certain claims would be given extraordinary injury consideration under the Settlement

Program. The agreement established a $195 million fund for the compensation of extraordinary heart attack claims and $105 million dollars for the compensation of extraordinary stroke claims. Only those claims that qualify for compensation of the underlying heart attack or stroke claim will be considered for extraordinary treatment. On March 2, 2009, BrownGreer announced the implementation of the Vioxx Extraordinary Injury Program. The deadline for submitting applications for extraordinary injury compensation is September 1, 2009. Andy Birchfield, Leigh O'Dell, and Roger Smith, along with a great support team, have done a tremendous job in carrying out all of the work required to complete the settlements and get our clients paid.

Supreme Court Did The Right Thing In Levine Case

We have received a tremendous response to reports of the U.S. Supreme Court's ruling in the *Wyeth v. Levine* case. We are extremely gratified that the High Court upheld the traditional right of patients harmed by defective and mislabeled drugs to sue drug companies to recover compensation for their injuries. As we have learned in litigation, drug companies are far from perfect. They sometimes fail to identify and inform doctors and the Food and Drug Administration of problems with their products or their products' labels.

Unfortunately, we have also learned that the FDA is not perfect. The regulatory agency is overworked and underfunded. As a result, the FDA has to depend almost entirely on drug companies for information about the safety and effectiveness of drugs. We have seen how that simply hasn't worked very well. I don't believe that it ever will.

Perhaps most importantly, once a drug is marketed to thousands of people things are discovered that weren't known during the clinical trials for that drug—problems that arise as doctors prescribe and patients take the drug day in and day out. For all these reasons, legal immunity for drug manufacturers—as requested by the drug companies and pushed by the Bush Administration—would have been a huge mistake. Obviously, the Supreme Court appreciated that fact. The High Court seemed to appreciate that the civil justice system is consistent with, and indeed helps support, FDA authority to make drugs as safe and as effective as possible. The court emphatically rejected arguments by the drug company and the Bush Administration that compensation for patients was an obstacle to the accomplishment of the FDA's safety objectives.

The *Levine* case brought to the public's attention that real people are affected adversely when immunity from lawsuits is given to any group including manufacturers. The Plaintiff in the case, Diana Levine, lost her arm because Wyeth did not take a simple step to warn her doctors of an avoidable risk of gangrene, which was very well known to the company. Its anti-nausea drug should not have been administered by way of the IV-push method. The decision was not only a huge victory for Diana Levine, but for patients all across the country. And it was clearly a victory for public health.

Brian Wolfman, the director of the Public Citizen Litigation Group, served as one of Diana Levine's lawyers. Brian, who was lead counsel for Ms. Levine at the certiorari stage in the Supreme Court, has also represented many Plaintiffs in preemption cases before the Supreme Court and other courts. All American citizens owe Brian and all of the other lawyers who worked on the *Levine* case a tremendous vote of thanks.

Source: Public Citizen

Thyroid Drug Can Be Dangerous For Children

Two doctors have warned that a pill used for thyroid disease can cause fatal liver failure in children and should no longer be used to treat them. The drug of choice for treatment of children with Graves' disease is propylthiouracil or methimazole. This disease is the most common cause of an overactive thyroid. Other treatments are surgery and radioactive iodine. But over the past 60 years, reports have linked the use of propylthiouracil in children to liver failure, sometimes fatal or requiring a liver transplant.

Propylthiouracil (PTU) is also a primary treatment for adults with Graves' disease. But there appear to be fewer liver complications in adults, according to Dr. Donald R. Mattison of the Eunice Kennedy Shriver National Institute of Child Health and Human Development. Drs. Mattison and Scott A. Rivkees of Yale University School of Medicine, who noticed the problem in children and did research so doctors could learn more about the issue, estimate that five to ten children die each year from complications of the drug. Their estimate is based on reports to the Food and Drug Administration and from other sources.

In a letter published in the *New England Journal of Medicine* on April 9th, the doctors urged colleagues not to give propylthiouracil as an initial treatment to children for an overactive thyroid. Dr. Mattison told the Associated Press there are "no guidelines for treating Graves' disease in children, and most doctors don't know of this danger." Only about 8,000 youngsters have the disease and pediatricians might see only one or two cases in their careers.

Methimazole, sold both as a generic and under the brand name Tapazole, also can hurt the liver, but the damage is less severe and causes obvious symptoms. The damage is reversible once use of the drug stops, unlike with propylthiouracil. Dr. Mattison noted that methimazole is becoming more popular because it can be taken just once a day, instead of the two or three times a day for PTU. It should be noted that parents should contact their doctor before taking a child off either treatment, according to Dr. Mattison.

Source: *Associated Press*

Genentech Withdraws Psoriasis Drug Linked To Brain Infections

Genentech Inc. has started to pull its psoriasis treatment Raptiva from the U.S. market because of the drug's link to a rare, fatal brain disorder that has troubled at least four other medicines. Genentech, the biotechnology company acquired in March by Swiss drug maker Roche Holding AG, has told doctors not to write prescriptions for new patients as part of a phased withdrawal of Raptiva, which is to be completed by June 8th. According to Genentech, about 2,000 U.S. patients may currently be taking Raptiva.

The decision to withdraw the drug, which generated $108 million in U.S. sales for Genentech last year, came after three patients were diagnosed since October with the brain infection progressive multifocal leukoencephalopathy (PMT), two of whom died. The company has concluded that the risk of PML, which causes irreversible brain damage, outweighed Raptiva's benefits in controlling psoriasis. Raptiva, approved in 2003, was designed to suppress the abnormal immune response that triggers psoriasis, a painful, scaly rash that afflicts about 7.5 million Americans, according to the National Psoriasis Foundation.

At least four other drugs have been linked to PML risk. They include Roche's Cellcept, used to prevent transplant rejections; Biogen Idec Inc. and Genentech's cancer drug Rituxan; Biogen's multiple sclerosis treatment Tysabri and Genzyme's leukemia drug Campath. PML occurs when a common germ, called JC virus, mutates, then evades the body's immune defenses and penetrates the brain. Folks with suppressed immune systems are most at risk for PML.

Source: *Bloomberg*

Old Devices To Be Checked By The FDA

Federal regulators announced last month that they would ask makers of some of the riskiest medical devices on the market to prove that their products were safe and effective. This is a step that critics of the Food and Drug Administration have said was long overdue. In January, the Government Accountability Office issued a report critical of the FDA for failing for decades to fix its system for reviewing categories of devices that have been on the market since before the enactment of the medical device law in 1976. Such "legacy devices," as they are known, were originally allowed on the market with minimal testing. But Congress in the 1976 law told the FDA to gradually reclassify these older devices and decide which ones needed extensive testing before approval of new versions and which ones did not.

Unfortunately, the FDA never finished that process, and as a result 27 different types of devices were left unexamined. The products include artificial lung membranes, external defibrillators and various pacemaker components. For decades, the federal regulatory agency has approved devices in these categories for sale without demanding rigorous tests showing that they work safely. Investigators for the GAO stated that it's imperative that the FDA take "immediate steps" to fix its system for approving such devices. The agency agreed and, according to a report in the *Times*, the FDA says it has already undertaken a review of two of these older device types. The FDA announced last month that it was requiring makers of the other 25 types of devices to submit information to the agency within 120 days, detailing the products' safety and effectiveness.

It's not known how long the reclassification process for the older devices will take. The FDA must review each device type separately and that could take some time. According to the *New York Times*, industry groups predict that the FDA will conclude that most of the products are not risky enough to warrant greater scrutiny. The Advanced Medical Technology Association, a trade association, takes the position that the device types subject to the notice have already been thoroughly reviewed by the FDA. But consumer advocates argue that the agency's entire process for approving medical devices needs overhauling. Diana Zuckerman, president of the National Research Center for Women and Families, observed:

> *It's great that the FDA is finally going to look at pre-1976 devices, but the bigger problem is the low standards for approving any and all devices without clinical trials or any proof of safety or effectiveness.*

Based on knowledge gained in drug company litigation, I agree with the latter view. The FDA should make it a priority to upgrade its standards and procedures relating to the approval of medical devices. The agency simply hasn't done its required job in that area of its responsibilities. Hopefully, there will be a total reform at the FHA during the Obama Administration.

Source: *New York Times*

X. BUSINESS LITIGATION

Florida Attorney General Files Price Fixing Lawsuit

The Florida Attorney General's office has filed a lawsuit in federal court against nine auto-filter manufacturers alleging they conspired to illegally fix prices since at least 1999. The suit, the first to be filed by a state Attorney General, joins a nationwide group of filter-related suits consolidated in Chicago federal court. It's alleged in the Florida suit that executives of the companies met on numerous occasions to maintain artificially high prices and allocate customers and markets for oil, air and fuel filters. The Defendants named in the suit are: Champion Laboratories; Purolator Filters; Honeywell International; Wix Filtration; Cummins Filtration; Donaldson Co.; Baldwin Filters; Affinia Group; and ArvinMeritor. The suit seeks $1 million in fines for

each violation and any award it may receive tripled.

Source: *The Miami Herald*

ClearOne Trade Secrets Award Reduced To $9.7 Million

A federal judge has reduced the jury award for audio and video company ClearOne Communications Inc. to about $9.7 million. The case involved allegations that former ClearOne employees stole trade secrets related to audio-conferencing technology. The order, filed in the U.S. District Court for the Central District of Utah, resolves several motions filed after a jury awarded ClearOne approximately $10.5 million in November of last year.

Source: *Law 360*

Bristol-Myers To Pay $2.1 Million In Plavix Case

Bristol-Myers Squibb will pay a $2.1 million penalty for failing to inform the U.S. Federal Trade Commission about the company's earlier efforts to delay a generic form of Plavix, its blockbuster blood clot preventer. According to the FTC, the civil penalty is the largest ever allowed by the commission. Bristol-Myers was charged in 2006 with entering into agreements with Canadian drug maker Apotex in an effort to delay a U.S. launch of Apotex's copycat form of Plavix. This was in return for payments to Apotex from Bristol-Myers.

Despite the alleged arrangement, privately-held Apotex subsequently sold its generic in the United States for a short time before a federal judge barred future shipments of the product. Bristol-Myers' arrangement with Apotex violated the Medicare Modernization Act, which requires that certain drug company agreements be reported to the FTC and to the Department of Justice. In May, Bristol-Myers paid $1 million to settle federal criminal charges that it lied to the Department of Justice about its Plavix agreement with Apotex.

In December, Bristol-Myers settled an investigation over the same matter with the New York Attorney General's office on behalf of all 50 states and the District of Columbia for $1.1 million. The latest settlement with the FTC brings to an end all federal and state investigations into the negotiations with Apotex, which led to the ousting of Bristol-Myers's then-chief executive, Peter Dolan, in September 2006.

Source: *Reuters*

XI. INSURANCE AND FINANCE UPDATE

Consumer Advocates Oppose Federal Insurance Regulation Plans

As you probably know, there has been a strong push in Washington for federal regulation of insurance companies. But a number of insurance consumer advocates are wary of the current proposals for federal regulation of insurance currently being passed around in the halls of Congress. They prefer taking their chances with an imperfect state regulatory system over what many fear would likely emerge from Congress under any federal regulatory plan. Birny Birnbaum, executive director for the Center for Economic Justice, said his group is interested in going wherever consumers can get the best regulatory treatment. Most consumer groups believe the federal proposals are anti-consumer. While state-based regulation has its problems. I believe that ordinary citizens will still have better protection with state-based regulation than with any of the federal-regulation proposals that are being dismissed.

There may be a way to design a national regulatory scheme that is better than what consumers get now with the state-based regulation, but I doubt it. Based on the extremely poor regulation in other areas that we have seen from Washington over the years, I much prefer state regulation of insurance matters. But, it appears the debate on this issue will be ongoing. My choice would be to see state legislative bodies give state regulators more power and authority to regulate insurance and then monitor their performance. That would be the best route to take in my opinion.

Source: *Insurance Journal*

11th Circuit Court Of Appeals Issues Favorable FACTA Ruling

On April 9, 2009, the United States Court of Appeals for the 11th Circuit issued an important opinion in a case *(Grimes v. Rave Reviews Cinema, LLC)* being handled by our firm. This case had been consolidated on appeal with several other similar cases. These cases are national class actions brought for violations of the Fair and Accurate Credit Transaction Act (FACTA). It's alleged in each case that the Defendants illegally printed more than five digits of a customer's credit or debit card number on receipts. Congress enacted FACTA to protect citizens from having too much of their personal/private credit card information disclosed on printed receipts. The purpose of the Act was to prevent identity theft.

We filed the *Rave* case in Federal Court in Birmingham, Alabama. The trial judge ruled that FACTA was unconstitutional for a variety of reasons, but mainly that the guarantee of a penalty against statute violators between $100 and $1,000 per violation was constitutionally excessive. The 11th Circuit Court of Appeals reversed the lower court, holding that it was not yet an appropriate time to challenge the excessiveness of the statutory damages called for in the Act. Additionally, the panel reversed a ruling by the lower court that the statute was unconstitutionally vague on how a jury should be charged on awarding damages in the range of $100 to $1,000 per violation. The Court held that the statute clearly defines both the type conduct prohibited and the potential range of fines for a violation of the Act.

Our case was remanded to the Dis-

trict Court for further proceedings. We are now preparing to address the issue of class certification. The ruling on appeal was a positive win for consumers who are seeking to protect their identity rights under the statute. It was a most important decision by the Appeals Court. Jay Aughtman from our firm is the lead lawyer in this case and we believe it to be a very good one.

Arizona Jury Awards $55 Million In MetLife Auto Insurance Case

An Arizona jury has ordered MetLife to pay $55 million in a bad faith case. The claim arose out of the insurer's refusal to pay a $30,400 claim from a couple whose SUV was stolen and vandalized. A new Ford Explorer owned by Kenneth and Tammy Nardelli was stolen in Arizona from a shopping mall parking lot in 2002. The vehicle was later found in Mexico abandoned and severely damaged. A claim was made by the owners and a battle started over the refusal to cover their claim with MetLife's Auto & Home division. The dispute lasted for six-and-a-half years. Although the Nardellis contended that the vehicle was a total loss and could never be restored to its original condition, MetLife refused to replace the SUV. Instead, the insurer sent their insureds a check for $10,759 and cut off payments for a rental car required under their policy.

The Nardellis then filed suit, accusing MetLife of a deliberate bad faith scheme to deny them their rights under their insurance policy. During the trial the jury was asked to compensate the couple for their emotional distress and to award sufficient punitive damages to punish MetLife and set an example for other insurers. After a month-long trial, the jury found that MetLife had acted in bad faith in handling the Nardellis' claim. Jurors awarded the couple $155,000 in compensatory damages and $55 million in punitive damages.

Internal MetLife documents indicated that the car qualified under the company's rules for a total loss and should have been totaled. MetLife reported that it had a profit goal of $155 million for 2002, an increase of about $100 million from the previous year. There was an indication in the company's documents that if the division didn't make that goal, it would be sold. Documents—many of them marked confidential—showed there was extreme pressure on the claims department to assist in making that goal. Jurors viewed videos and documents produced by MetLife's home office and distributed to the claims office that encouraged staff to get tough on claims. MetLife also concealed information from the Nardellis that there was a provision in their policy stating that if the vehicle was less than a year old and had fewer than 15,000 miles, they were entitled to a replacement vehicle if their vehicle was totaled.

Richard A. Dillenburg of The Law Office of Richard A. Dillenburg in Tempe, Arizona, and Steven C. Dawson and Anita Rosenthal of Dawson & Rosenthal in Sedona, Arizona, represented the Plaintiffs and did a very good job.

Source: *Lawyers USA*

$6 Million Settlement Reached In Nationwide Suit

A $6 million settlement proposal has been reached in a class action lawsuit against Nationwide. A hearing will be held on June 5th to determine if the settlement will be given final approval. The lawsuit, filed by Michael Carr, claims Nationwide charged customers more than the guaranteed maximum premium on certain term life-insurance policies issued between February 10, 1990, and February 2, 2006. The settlement could affect as many as 200,000 people, most of whom have received a notice of the proposed class action settlement. For more information, visit www.excesspremiumlitigation.com.

Source: *The Columbus Dispatch*

Nationwide Insurance Sued Over Health Policies

A lawsuit has been filed against Nationwide Life Insurance Co. for the insurer's selling of fixed-payment health plans that allegedly violated minimum standards in the state of Washington and which had not been authorized by the state. In the case, filed in U.S. District Court, three individuals asked that the case be made a class action covering 465 others in Washington who bought Nationwide health plans through employers between April 16, 2003, and August 27, 2008. The Plaintiffs are seeking damages of up to $10,000 for each violation of Washington's Consumer Protection Act, plus refund of premiums, payment of previously denied claims, and legal costs.

If class action status is approved and the complaint is upheld, consumer protection violations alone could exceed $4.6 million—$10,000 per insured—and other damages could boost the total to more than $7 million. Consumer groups have been critical of fixed-payment or fixed-indemnity plans. Unlike plans which pay a percentage of medical expenses or cap the expenses a consumer must pay, fixed-payment plans set maximum payments for each service or expense that typically are far below what is charged by doctors, clinics, hospitals and other healthcare providers.

Such plans weren't allowed in Washington before July 22, 2007, and are now permitted only with full disclosure to consumers and—as has long been required for all insurance policies in Washington—by companies with a certificate of authorization to provide that type of coverage. Since such plans fall outside laws on portability of coverage, a person who seeks comprehensive coverage after being on a fixed-indemnity plan may have to undergo a medical examination and could be disqualified for pre-existing conditions.

The case is based largely on findings by the state insurance commissioner's office, which began investigating the

case of one of the Plaintiffs more than a year ago and allegedly uncovered information on other plan holders. I understand that Nationwide could be fined an unspecified amount for selling health plans in the state without a certificate of authorization until last August and for selling fixed-indemnity plans before they were allowed in July 2007.

Source: *Associated Press*

XII. SECURITIES CASES

Securities Litigation On The Rise

After a large increase in federal securities class actions in 2008, U.S. companies can expect to be under even more intense scrutiny by regulators and enforcement agencies this year as the global financial crisis unfolds. A great deal of corporate greed and fraudulent conduct has been uncovered. In its 2008 Securities Litigation Study released on April 16th, PricewaterhouseCoopers points out that 210 federal securities class actions were filed in 2008, a 29% increase from the 163 case filings a year earlier. It was said that 48 percent of all cases were in the financial services sector.

The study shows that the Securities and Exchange Commission and U.S. Department of Justice had an unprecedented number of Ponzi schemes on its radar last year. The SEC tracked 70 Ponzi cases between 2007-2008 and the Commodity Futures Trading Commission reported that it followed twice as many leads in possible Ponzi cases last year as was the case in 2007, resulting in prosecution in 15 cases.

Eighteen percent of lawsuits were filed against Fortune 500 companies, up from 12 percent in 2007. In addition, the number of class actions filed against foreign companies listed on U.S. stock exchanges reached an all-time high of 36 in 2008, up from 27 a year earlier. According to the study, three areas in which companies should be particularly watchful in the next few years are: Institutional-Plaintiff activity, particularly related to public and union pension funds; internal controls accounting-related allegations, and Foreign Corrupt Practices Act enforcement. Jay Aughtman, Scarlette Tuley, and Dee Miles are handling cases dealing with these sorts of securities cases. If you want more information you can contact them at 800-898-2034 or by email at Jay.Aughtman@beasleyallen.com, Scarlette.Tuley@beasleyallen.com or Dee.Miles@beasleyallen.com.

Source: *New Mexico Business Weekly*

More Cases Filed Against Regions-Morgan Keegan

We are filing approximately 75 individual cases against Regions Morgan-Keegan (RMK) on behalf of clients who lost substantial sums of money in certain RMK Bond Funds. These funds were managed by James Kelsoe and marketed by Morgan Keegan as being safe, conservative investments. But, in reality the funds had an unacceptable amount of risky investments in derivatives. Investors lost more than 70% of their investments in less than a year. Each case will proceed in a FINRA arbitration proceeding. Scarlette Tuley and Jay Aughtman will handle these cases for the firm. For more information, you can contact Scarlette or Jay at 800-898-2034 or by email at Scarlette.Tuley@beasleyallen.com or Jay.Aughtman@beasleyallen.com.

Bank Of America Accused In Ponzi Lawsuit

A class action lawsuit has been filed against Bank of America, alleging that the bank effectively set up a branch in a Long Island office that helped Nicholas Cosmo carry out a $380 million Ponzi scheme. The lawsuit, filed in Federal District Court in Brooklyn, contends that Bank of America "established, equipped and staffed" a branch office in the headquarters of Cosmo's firm, Agape Merchant Advance. The lawsuit contends that the bank knowingly "assisted, facilitated and furthered" Cosmo's fraudulent scheme. It's alleged in the lawsuit:

> *Bank of America was at the epicenter of this scheme. Without Bank of America's participation, the scheme would not have succeeded and grown to such an enormous size.*

The lawsuit seeks $400 million in damages from Bank of America and other Defendants. Cosmo surrendered to authorities in January in connection with a suspected Ponzi scheme involving what he called "private bridge loans" that promised investors returns of 48% to 80% a year. Many of his 1,500 investors were blue-collar workers and civil servants. According to the suit, representatives of Bank of America worked directly out of Cosmo's West Hempstead office, which was about 30 miles from the branch where Agape and Cosmo maintained their bank accounts.

In addition, it's alleged that Bank of America provided on-site representatives at Agape with bank equipment and computer systems that allowed direct access to the bank's accounts and systems. If the allegations prove to be true, this argument would appear to be contrary to normal banking practices. It's alleged that the bank's representatives had "actual knowledge" that Cosmo was "diverting money to his own account" and "engaging in virtually no legitimate business whatsoever." In a complaint filed in January by the Commodities Futures Trading Commission, the government contended that from 2004 to 2008, Cosmo operated a fraudulent trading scheme in which investors were solicited to provide short-term bridge loans but that the money instead went into commodities trading contracts that lost money.

This is not Cosmo's first rodeo. In fact, this is the second time that he has been accused of fraud. Cosmo had previously served 21 months in federal prison in Allenwood, Pennsylvania, for

mail fraud. Upon his release in 2000, Cosmo's broker's license was revoked. He founded Agape after leaving prison. The lawsuit also names a number of futures and commodities trading firms that, according to the lawsuit, "assisted Cosmo in running an illegal unregistered commodities pool." The suit says that the trading firms should "never have accepted this business," which violated "know your customer" duties that are required of these firms.

One of the firms named in the suit was MF Global. But a spokesperson for MF Global says that when the firm became aware of Cosmo's background last October, it closed his account and notified regulators. The account that Cosmo had, according to the spokesperson, was an individual account and was not an account set up on behalf of his investors.

Source: *The New York Times*

Texas Man Ordered To Pay $86 Million In Fraud Scheme

A Texas man, who was sentenced in March to a ten-year prison sentence for commodity fraud, has settled a civil suit filed against him by defrauded investors. George Hudgins, the owner of 3737 Financial L.P., was accused by investors and the federal government of orchestrating a fraudulent trading scheme involving commodity futures and options that bilked investors of nearly $71 million. Specifically, Hudgins was accused of violating the anti-fraud provisions of the Commodity Exchange Act. According to both the civil and criminal accusations against him, Hudgins lost the nearly $71 million dollars of investor funds trading silver, sugar and S&P 500 index futures through his firm.

Hudgins' problems began when he began soliciting investors with promotional packets, newsletters, group presentations, and face-to-face meetings. During these solicitations, Hudgins made false representations about how long his firm, 3737 Financial L.P., was in existence, the size of the firm's assets and the firm's history of profitability. For example, in a promotional packet used in January 2005, Hudgins claimed that 3737 Financial had gross annual returns of 22% to 99% from 2000 through 2007. However, according to the Commodity Futures Trading Commission, 3737 Financial did not exist before December 2003.

Instead of being a profitable enterprise, 3737 Financial actually had trading losses that exceeded $28 million, according to the lawsuit. It was alleged that Hudgins kept his fraudulent scheme going by paying $17 million in false "profits" to some investors using money he obtained from other investors. Hudgins is alleged to have used the remainder of the money to support an exorbitant lifestyle which consisted of owning several antique sports cars, Tiffany jewelry, a 300-acre ranch and an airplane. In the civil suit, U.S. District Judge Leonard Davis of the Eastern District of Texas approved a settlement in which Hudgins agreed to repay the investors and pay a $15 million fine to the CFTC.

Source: *Findlaw.com*

XIII. EMPLOYMENT LAW

Temporary Cost Cutting Measures Violate The Wage And Hour Laws

Today's difficult economic and financial climate has many companies considering various cost-cutting measures, including layoffs, reduced workweeks, pay reductions and voluntary furloughs. These actions raise wage and hour questions that often are overlooked. The unwary employer may reduce payroll costs but wind up with a wage and hour lawsuit as a result.

Typically, payroll is an employer's largest controllable expense. Therefore, when a company decides it needs to cut expenses, fast, they usually try and do it off the backs of their employees. Reducing payroll costs can take many forms including:

- involuntary layoffs, job eliminations and workforce reductions;
- temporary shutdowns during summer, holidays or other seasonal slow periods;
- voluntary furloughs;
- reduced workweeks;
- temporary or permanent reductions in salaries or hourly pay rates; and/or
- elimination of bonus programs or other incentive compensation.

What often gets overlooked, however, are wage and hour considerations. Many payroll reduction measures fail to comply with the Fair Labor Standards Act, as well as state wage and hour laws. The main wage and hour risk associated with these cost-saving measures relates to exempt employees (salaried employees). Employees who are classified as exempt under the executive, administrative, and professional exemptions generally must be paid on a "salary basis" to remain eligible for the overtime exemption. This means that the employee must receive the same amount of pay each pay period (at least $455 per week under the FLSA) regardless of the "quality" or "quantity" of work performed. Making certain deductions from or reductions to the employee's salary can result in the exemption being lost, not only for the affected employee, but also for other employees in the same job classification.

As a general rule an exempt employee's salary cannot be docked for an absence caused by the employer or the operating requirements of the business. The Department of Labor's ("DOL") regulations interpreting the FLSA put it this way: "If the employee is ready, willing and able to work, deductions may not be made for time when work is not available." So, if the operation is slow due to a struggling economy, the employer cannot tell exempt employees to stay home on Friday and then deduct a day's worth of pay from the exempt employee's salary. The prohibition on salary deductions

presents an obstacle to employers wishing to curtail payroll expenses via reduced workweeks, temporary layoffs, shutdowns and furloughs that impact partial workweeks.

There are some exceptions to the rule regarding when an employer can reduce a salaried employee's pay without violating the law. Most of the time those exceptions require the employer to shut down the operation for more than a full week and/or make a permanent, long-term switch to a shortened shift. In rare circumstances, an employer may announce an across-the-board cut in pay. This move is typically legal as long as the hourly employees still make more than the applicable minimum wage and the salaried employees make at least $455 per week.

If you have recently experienced a cut in pay and/or had your compensation reduced because of a scale back or economic slowdown, it may be worth asking a lawyer to review your circumstances. In many instances, the company may not be allowed to legally reduce your pay. If you need more information, contact Roman Shaul at 800-898-2034 or by email at Roman.Shaul@beasleyallen.com

The Weight Of Your Truck May Mean The Difference In Your Overtime Pay

Under the Fair Labor Standards Act (FLSA), "motor carriers" have traditionally been exempt from the overtime requirement that employees receive time and one-half for all hours worked in excess of 40 each week. However, recent legislation has narrowed the use of this exemption and now provides for more protection to workers than previously allowed. The SAFETEA-LU Technical Corrections Act of 2008 (TCA) restricts the classes of employees who might qualify for the motor carrier exemption. Unfortunately for workers, the TCA limits an employer's liability for certain overtime violations that occurred before August 10, 2006.

Generally, the motor-carrier exemption applies to employees who are under the regulatory authority of the Department of Transportation and for whom the U.S. Secretary of Transportation can set qualifications and maximum service hours. SAFETEA-LU limited the Transportation Secretary's power to certain employees whose work involves vehicles having either a gross-vehicle-weight or a gross-vehicle-weight-rating of at least 10,001 pounds or more. Despite the 10,001 pound limit, many companies used the motor carrier exemption in situations involving lighter vehicles, such as automobiles, small trucks, SUVs, and compact vans. In other words, there have been thousands of employees who most likely should have received overtime pay, but didn't.

Although the TCA restored some of the Secretary of Transportation's power, it does not permit the motor-carrier exemption to be premised on lighter vehicles. Instead, TCA defines a class of "covered employee[s]" that is subject to FLSA overtime despite the motor-carrier exemption. Broadly stated, a TCA "covered employee" is someone who might otherwise be within the motor-carrier exemption but:

- whose work even partly affects the operation of motor vehicles weighing 10,000 pounds or less (with limited exceptions); and
- who performs duties on such motor vehicles. As a result, an employer still cannot apply the motor- carrier exemption on most lighter vehicles.

Accordingly, if you know of a person who operates a light motor vehicle, but doesn't receive overtime pay for all hours worked over 40 each week, their employer may be in violation of the law. We have many clients where this has, in fact, been the case.

As the economy worsens and companies look for ways to save money, we expect that we will see even more companies try and squeeze dollars out of their employees by denying them wages to which they are legally entitled. If you need more information, contact Roman Shaul at 800-898-2034 or by email at Roman.Shaul@beasleyallen.com.

Merrill Lynch Settles Employee Lawsuit For $75 Million

Merrill Lynch & Co., now owned by Bank of America Corp., has agreed to pay $75 million to settle a class action lawsuit by employees who lost money investing in Merrill stock through their retirement plans. The Plaintiffs filed suit against Merrill in November 2007, alleging violations of the Employee Retirement Income Security Act. The parties reached a settlement in February and in March a federal judge gave it preliminary approval.

The Plaintiffs alleged that Merrill offered its stock as a retirement plan option when it was "imprudent" to do so, given the company's growing exposure to subprime mortgages and other toxic debt. According to the complaint, Merrill's actions ran "directly counter" to the purpose of ERISA pension plans to provide funds for employees' retirement. The class period covers September 30, 2006 through December 31, 2008. Merrill shares lost more than 80% of their value over that time, according to Merrill's website. Bank of America acquired Merrill on January 1, 2009. Merrill posted a $15.84 billion loss in the fourth quarter. A July 27th hearing has been set for final court approval of the settlement.

Source: *Reuters*

Court Rules That ERISA Doesn't Shield Tyco From Fraud Action

In a most significant decision, a federal judge has ruled that Tyco International Ltd. can't rely on an Employee Retirement Income Security Act provision that shields fiduciaries against liabilities from retirement plan losses stemming from beneficiaries' control over their assets. The ruling came in a class action that is part of multidistrict litigation alleging a massive accounting

fraud at Tyco. Judge Paul Barbadoro of the U.S. District Court for the District of New Hampshire granted the plan participants' motion for summary judgment that Tyco couldn't use the ERISA as a shield in the fraud case.

Source: *Law360*

XIV. PREDATORY LENDING

Payday Lenders Fight Legislation Limiting Activity

The payday loan industry is using a group of well-connected lobbyists, along with very large sums of campaign cash to key lawmakers, to keep from being properly regulated. Apparently, this strategy has paid off based on what is happening in Congress. Even a key Democrat who once tried to ban the practice now is pushing efforts to "regulate" payday lenders. The lawmaker, Rep. Luis Gutierrez (D-IL), says his bill does have crucial protections for borrowers and is "the best deal" he can get because of the industry's aggressive lobbying. Consumer groups are condemning the bill as a loophole-riddled gift to the industry. The payday lenders—a multi-billion dollar industry—are very powerful and their influence can't be underestimated.

It's undisputed that payday loans are very hurtful for low-income citizens. These are small, very short-term loans with extremely high interest rates that are in effect cash advances on a borrower's next paycheck. They're typically obtained when a borrower goes to a check-cashing outlet or an online equivalent, pays a fee and writes a post-dated check that the company agrees not to cash until the customer's payday. Finance charges typically amount to annual interest rates in the triple digits, around 400%, and can go as high as double that. Payday loans are inherently abusive products that trap borrowers in a devastating debt cycle. They are as bad and abusive as anything that folks who go paycheck to paycheck have to deal with.

Congress moved in 2006 to effectively ban payday lending for military personnel by imposing a 36% interest-rate cap for such borrowers, and 15 states either prohibit the practice outright or have similar caps. But the loans are virtually unregulated in two dozen other states, a situation that is intolerable. The Gutierrez bill—if passed—would cap the annual interest rate for a payday loan at 391%, ban so-called "rollovers"—where a borrower who can't afford to pay off the loan essentially renews it and pays large fees—and prevent lenders from suing borrowers or docking their wages to collect the debt.

But consumer groups say the legislation would do little to crack down on the most egregious payday lending practices. They argue it would for the first time lend federal legitimacy to usurious loans and undermine successful efforts under way in several states to slap tougher limits on the practice. Jean Ann Fox, who is with the Consumer Federation of America, says:

> *We don't believe that this is going to protect consumers. It would in fact condone the payday lending that can be extremely harmful to the people who can least afford it.*

Ms. Fox testified before Rep. Gutierrez's subcommittee on behalf of seven consumer groups that are rightly outraged about the measure. They're pushing to cap all lending interest rates at 36% annually. But it appears the lobbying activities by the payday lenders is paying off. The payday lending industry's trade association has spent more than $1 million annually for each of the last four years lobbying Congress, including $1.4 million last year, according to disclosures filed with Congress. It has beefed up its team of Washington hired guns to a dozen lobby firms, including well-connected financial services lobbyists Tim Rupli and Wright Andrews, who each have firms bearing their names.

Campaign giving has greatly increased in recent years. The industry also formed a political action committee that contributed more than $200,000 in 2007 and 2008, much of that to lawmakers who serve on the Senate Banking and House Financial Services committees, according to Federal Election Commission filings compiled by the Center for Responsive Politics. Those committees have jurisdiction over the industry. In addition to their trade association, individual payday lending companies including Cash America Inc. and Advance America Cash Advance, have also stepped up their political activities. Hopefully, President Obama and his allies in the House and Senate will prevail over the forces of evil and win this battle.

Source: *Associated Press*

XV. PREMISES LIABILITY UPDATE

Refinery Worker's Family Settles Refining Explosion Lawsuit

The family of a man who was killed in a Blue Island refinery explosion 14 years ago has reached a $6 million settlement with the refinery's operator. A Cook County judge approved the settlement between the family of Gary Szabla and Clark USA Inc., now called Premcor. The settlement awards the victim's widow $6 million in addition to the workers' compensation benefits she has already received. This settlement ends a 12-year legal battle that reached the Illinois Supreme Court. Szabla, 37, and a co-worker, Michael Forsythe, were killed on March 13, 1995 when a fire triggered an explosion at the Clark Oil refinery. Three others were injured in the blast. The families of the two workers filed wrongful death lawsuits.

A Cook County judge initially followed Clark USA's claim that, because it had no direct control over day-to-day

operations at the refinery, the company could not be sued. The company also claimed it was shielded from a lawsuit by Illinois' workers' compensation law. But the Plaintiff's lawyer responded by saying that the explosion resulted from severe budget cuts that resulted in refinery employees doing maintenance jobs they weren't trained for. The Illinois Appellate Court overturned the Cook County judge's decision, but Clark USA appealed to the state Supreme Court. The High Court in 2007 upheld the Appellate Court ruling, finding that the company could be held liable because it had direct control over the refinery's operating budget.

The Supreme Court also said Clark USA wasn't shielded by workers' compensation law because it didn't directly employ the two men who were killed. The settlement was reached in January, following a mediation session with a retired judge. Reportedly the lawsuit over Forsythe's death is close to a settlement. After the explosion, the U.S. Occupational Safety and Health Administration fined Clark Refining, the subsidiary that ran the refinery, $1.2 million, citing dozens of violations of workplace safety rules. Edward Willer, a lawyer with Corboy and Demetrio in Chicago, represented the Szabla family and did a very good job.

Source: *Southtown Star*

Owner Of Apollo Nuclear Plant Settles Suit With Residents

People who live near a former nuclear fuel plant will receive $52.5 million to settle their 14-year-old lawsuit against Babcock & Wilcox Co. The settlement, which was approved by a federal judge in Pittsburgh on April 17th, ends the final claim brought by 365 people who live in the Apollo area, which is about 35 miles northeast of Pittsburgh. The same group received $27.5 million to settle claims against Atlantic Richfield Co. Plant emissions and groundwater pollution caused an unusually high cancer rate, other illnesses and property damage. The case concerns the former Nuclear Materials and Equipment Corp. plant, which was built in 1957 and sold to ARCO in 1967. B&W bought the plant in 1971 and has been cleaning up the site since shutting it down in the 1980s.

Source: *Associated Press*

Imperial Sugar Was Warned Before Explosion

A consultant hired by Imperial Sugar issued a report warning the company about dust hazards at its Georgia refinery two days before a deadly explosion fueled by sugar dust erupted at the plant near Savannah, Georgia. According to the *Savannah Morning News*, the consultant, McAljon Engineering, warned the company in a report dated February 5, 2008 that the refinery's dust collection systems were impaired. Two days later, the massive explosion occurred in the plant, killing 14 workers and injuring dozens more. Imperial Sugar claims it did not receive the consultant's report until after the blast occurred. Federal investigators later blamed the explosion on sugar dust that ignited like gunpowder. Lawyers for Imperial Sugar claim that the consultant never made such a report and had actually faked it after the explosion.

But the Occupational Safety and Health Administration said last July that Imperial Sugar executives knew about dust hazards at the plant. The agency said its investigation of the Georgia explosion found company audits, insurance records and other documents showing the company had been warned about combustible dust hazards at its plants several times since 2002. OSHA has proposed fines totaling $8.7 million against Imperial Sugar for safety violations at the Georgia refinery and at another plant in Gramercy, La. The Sugarland, Texas-based company is contesting the fines.

The Savannah newspaper reported it obtained three reports—from 2006, 2007 and last year—from consultants hired by Imperial Sugar that cited problems with the refinery's dust collection systems. An August 2006 report said the safety system was outdated. The report dated two days before the deadly blast said parts of a machine used to suck dust from the air inside the plant were operating at about half the air flow they were designed to produce. A few dust collection pathways were blocked altogether. Imperial Sugar claims it did not ignore safety concerns raised by its consultants. Imperial says it took action in terms of repairs and maintenance to its dust collection systems prior to the February 7, 2008 explosion, along with many other efforts towards improving safety at the facility.

Source: *Associated Press*

Chemical Company Said To Have Withheld Information About Explosion

It appears that a chemical company withheld information about a huge explosion that occurred last August at the West Virginia plant. Managers refused for several hours to tell emergency responders the nature of the blast or the toxic chemical it released. They later misused a law intended to keep information from terrorists to try to stop federal investigators from learning what had happened. A U.S. House subcommittee has been investigating this matter. The explosion, at Bayer CropScience, in Institute, West Virginia, killed two employees and sickened six volunteer firefighters. It was felt ten miles away, and a tank weighing several thousand pounds "rocketed 50 feet through the plant," according to committee investigators.

Fortunately, it did not go in the direction of a tank holding the same chemical that killed thousands in a 1984 chemical plant explosion in Bhopal, India. Devices meant to detect releases of the chemical, methyl isocyanate, or MIC, had been disabled, and video cameras had been disconnected, steps that "raise concerns about an orchestrated effort by Bayer, a subsidiary of Bayer AG, to shroud the explosion in

secrecy," according to the subcommittee chairman, Representative Bart Stupak, Democrat of Michigan.

After the Bhopal catastrophe, Congress created an independent agency, the Chemical Safety and Hazard Investigation Board (CSB), to investigate chemical accidents in this country. But Bayer's chief executive, William Buckner, said in his prepared testimony for the committee that company officials believed they could "refuse to provide information" to the board. Later, Buckner said that company officials labeled some documents as having security-sensitive information in order to "discourage the CSB from even seeking this information."

The company acted under a 2002 law intended to make ports more secure—Bayer CropScience brings barges in on the Kanawha River—and said that it was under the jurisdiction of the Coast Guard, an agency that does not have extensive experience in chemical processing. In response to questions, Buckner said that the company later found that 88 percent of the 2,000 documents it had marked as being "security sensitive" were not.

The plant was previously owned by Union Carbide, which also owned the plant in Bhopal that had released tons of MIC in December 1984. It appears the company endangered people in the area by giving no meaningful information for hours and turning away six emergency responders.

Source: *New York Times*

$7.49 Million Awarded To Group Poisoned By Faulty Heater

Eighteen former Job Corps volunteers were awarded a total of $7.49 million in damages by a jury for brain injuries they suffered when a heating system malfunctioned and leaked carbon monoxide into their dormitory in Anaconda. The verdict was against Lennox Industries Inc. of Richardson, Texas, saying the corporation manufactured a line of defective heating systems that led to the poisoning of the volunteers. The Plaintiffs were asleep in the dormitory in August 2004 when the defective piping of a CompleteHeat furnace system malfunctioned, leaking the odorless gas throughout the building. The victims, many of them teenagers at the time, suffered permanent brain damage and other injuries. James K. Lubing, a lawyer from Jackson Hole, Wyoming, who helped try the case, said:

> *One night they were all sleeping in their dorm rooms and the next thing they know they're being airlifted all over the country. Some were unconscious, some were having seizures, the whole gamut. But they all suffered significant poisoning.*

Evidence presented at trial showed that Lennox distributed 40,000 furnaces of the same model and installed them in businesses and homes throughout the country. The lawsuit was filed in February 2006 and sought damages for brain injuries, physical and emotional pain, loss of established course of life, loss of earning capacity and medical bills. Anderson's Heating and Air Conditioning Inc. of Missoula, the company that installed the defective furnace, was a Defendant in the complaint, but reached a settlement before the trial. The jury found that Lennox was responsible for 70% of the negligence, while Anderson's was responsible for 30%. The jury awarded individual payments ranging from $268,000 to $591,000.

Source: *GreatFallsTribune.com*

Settlement Reached In Sauna Death Suit

A woman, whose husband died two years ago after being found unconscious in the men's sauna at the Lafayette Family YMCA, has settled the lawsuit she filed against the organization. The widow, Berma L. Johnson, recently received payment from the YMCA's liability insurance carrier in a confidential settlement. Mrs. Johnson filed the suit in February 2008 in a Louisiana state court, alleging that the YMCA failed to properly monitor the sauna and that employees may have removed or modified its timers. Attorney Jeff Coon represented Mrs. Johnson and did a very good job.

Source: *jconline.com*

Jury Awards Virginia Woman $3.2 Million

A woman whose pelvis was crushed when more than 350 pounds of countertops suddenly fell on her at an Ikea store has been awarded $3.2 million by a Fairfax County jury. A stack of four countertops and a door collapsed on her as she stopped near a section of bargain items at the Potomac Mills Ikea store in July 2006. The countertops were stacked upright on their short sides rather than their long eight-foot sides and were restrained only by an elastic bungee cord. The woman, who was an avid hiker and bicyclist, had a metal plate placed in her pelvis that was replaced with another device after the pain continued. According to her doctors the pain will likely continue for the rest of her life. This was a most significant premises liability lawsuit. Businesses that invite customers to shop at their retail stores must take precautions to ensure the safety of their customers.

Source: *Insurance Journal*

XVI. WORKPLACE HAZARDS

$7 Million Verdict In Construction Suit

A jury in Scott County, Wisconsin, has awarded more than $7 million to a Wisconsin man who fell three stories in a construction accident in Le Claire. The jury ruled for Allen Frohne, who suffered permanent injuries in a fall that occurred during construction of a Holiday Inn Express in 2005. He was injured when a lift tipped over. Mr.

Frohne had been hired as a sub-contractor to do the gutter work on the project. During the trial, an expert testified that eight OSHA violations occurred at the construction site. The judgment was against Le Claire Hotel Group and Gibbs Construction.

Source: *DesMoines Register*

Alabama Mine Operator Fined $280,000

A federal agency has levied a $280,000 fine against the operators of a coke mine in Shelby County, Alabama. The penalty was assessed against Shelby Mining Co., LLC, after two miners were seriously burned when methane ignited. According to the U.S. Department of Labor's Mine Safety and Health Administration, the miners were burned October 2, 2008 at Coke Mine No. 1 in Shelby County. An MSHA official said the mine has a history of methane ignitions, with eight being reported since October 2006.

Source: *Associated Press*

Massey Energy Fined $2.5 Million for Fatal West Virginia Mine Fire

A Massey Energy subsidiary was fined $2.5 million last month after a federal judge accepted the company's guilty plea to ten criminal charges for a fire that killed two West Virginia coal miners. U.S. District Judge John Copenhaver approved the plea deal by Aracoma Coal Co. despite a provision sparing Massey officials and the Richmond, Virginia, coal company from prosecution. The agreement also required Aracoma to pay a $1.7 million fine for civil violations found by the federal Mine Safety and Health Administration. The charges arise out of a January 19, 2006, fire at Aracoma's Alma No. 1 mine located about 60 miles from Charleston in West Virginia's southern coalfields. Aracoma pleaded guilty to violating several federal safety requirements.

Miners Don Bragg and Ellery Elvis Hatfield got lost when thick smoke entered what was supposed to be a sealed escape route. While other crewmembers escaped through a secondary tunnel, Bragg and Hatfield got separated and died. Government investigators later faulted Aracoma for removing two air-control walls that allowed smoke into the escape tunnel. Separate state and federal investigations concluded an overheated conveyer belt caused the fire. The Aracoma fire—along with methane gas explosions that killed 12 men at the Sago Mine in West Virginia and five at the Kentucky Darby mine in eastern Kentucky in 2006—prompted sweeping changes to federal and state coal mine safety laws.

U.S. Attorney Charles Miller said the "evidence simply did not support a criminal prosecution of Massey or its officers." He added that the violations were "limited to Aracoma." The investigation continues. Aracoma foreman David R. Runyon pleaded guilty to a misdemeanor charge of failing to conduct safety drills at the mine. His sentencing is scheduled for July 9th. Bruce Stanley, the lawyer who represents the two widows, asked Judge Copenhaver to reject the plea deal, saying it protects Massey and Chief Executive Don Blankenship. Massey, the nation's fourth-largest coal producer by revenue, settled a separate lawsuit brought by the widows in November.

Source: *Insurance Journal*

Family Sues In Death Of Construction Worker

The widow of a construction worker, who died last month when a building collapsed on him, has filed a wrongful death suit against Townhaven Construction and Stellar Staffing Inc., a subcontractor, and the job placement firm that hired him. It was alleged that the Defendants sent the worker to an unsafe jobsite. The 24-year-old worker was killed, and two other construction workers were injured, when a building at a former HouTex Inn collapsed during renovation on April 14th. Construction workers were replacing joists on the first floor of the building when the top floor began to shift. The building ultimately collapsed. According to reports, the structure had little bracing to stop the movement.

Source: *Houston Chronicle*

Companies Settle Lawsuit Over Fatal Crane Collapse

Two Seattle companies, Lease Crutcher Lewis and Magnusson Klemencic Associates (MKA), involved in erecting a construction crane that collapsed in 2006 in Bellevue, Washington, have settled a lawsuit filed by the parents of a Microsoft lawyer. The man was killed when the crane crushed him as he sat in his apartment. Lease Crutcher Lewis was the general contractor overseeing the operation of the building, which the crane was being used to construct. A third company, Northwest Tower Crane Services, which was found to have no responsibility for the collapse, was dismissed from the suit. It was alleged in the suit that all three companies were negligent in their roles in the installation, design and operation of the crane.

The 210-foot crane was being used to construct the Tower 333 building in downtown Bellevue. It came crashing down on two buildings, one being where the victim lived. MKA was in charge of the structural engineering of the crane while Lease Crutcher Lewis, as the general contractor, was overseeing the operation. State investigators fined Lease Crutcher Lewis and MKA for improper design and construction of the crane, but the citation against MKA was dismissed on appeal.

In an unusual arrangement, the crane had been attached to steel I-beams in an underground parking garage left over from an earlier, unfinished construction project on the site. After the crane was cut up and removed, its replacement was attached to a concrete pad on the ground, the traditional way to anchor a construction crane.

On the eve of trial, MKA admitted some liability in the collapse, but continued to blame Lease Crutcher Lewis for its role in the incident. Matthew

Knopp, a Seattle lawyer, represented the victim's family and did a very good job.

Source: *Seattle Times*

XVII. TRANSPORTATION

There Is A Strong Push For New Safety Rules

As we have reported in prior issues of the Report, there have been a number of bus disasters in the United States over the past two years. One such disaster, the crash of a chartered ski bus in Utah earlier this year, resulted in nine deaths and 42 other passengers injured. That incident got a great deal of national attention. The elements of the Utah crash—a stripped roof, the lack of seat belts, mass ejections—are far from extraordinary. This accident was one of half a dozen similarly deadly bus disasters in the United States over the past two years. The accidents have renewed calls for expanded federal safety oversight of the country's commercial bus industry.

According to the latest U.S. government data, 51 people died in commercial motor coach crashes in 2007, an increase from 39 in 2006. There were 57,000 bus crashes that year, although that number combines commercial accidents with those of other types of buses. Data from 2008 are not yet available. Since 2000—a year after the National Transportation Safety Board issued a report calling for stronger federal rules to prevent bus crash fatalities—401 people have died in motor coach accidents. Although the death rate is only half that of passenger cars, it is about four times that of passenger trains and 25 times that of commercial airliners.

Fortunately, even quite late, the NTSB is now making a strong push for better safety rules for buses. The board's recommendations for new bus safety rules include improved window designs and stronger roofs but still no seat belts. In response, federal regulators at the National Highway Traffic Safety Administration have started to crash-test buses, but they have yet to formally begin the process of writing new rules. Hopefully, the agency will move rapidly on this issue.

Legislation to overhaul motor coach safety has been reintroduced in Congress this year. Senators Sherrod Brown (D-Ohio) and Kay Bailey Hutchinson (R-Tex.) are pushing the legislation. Safety groups blame bus industry lobbying groups, including the American Bus Association, for pushing competing federal legislation that sets up roadblocks to new bus rules. An industry-backed bill unnecessarily draws out timetables for new rules, partly by demanding more scientific research. That is just another delaying tactic. Because of the reaction to the string of crashes, NHTSA, which has the power to mandate new motor coach safety equipment, has started to take action. Hopefully the agency will be serious about this undertaking.

I have never understood why buses shouldn't have seat belts. School buses, which are not required to have seat belts, have been the subject of deeper scrutiny over the years and must meet different safety standards. Officials in the motor coach industry say their business is safe. Gerald Donaldson, senior research director for the Advocates for Highway and Auto Safety, said regulators in the European Union and Australia have required seat belts on buses since the 1990s.

But Donaldson says the lack of U.S. regulations extends beyond seat belts. Motor coaches aren't required to have stability control that would protect against rollovers, a technology the government requires for passenger vehicles. Additionally, Donaldson questions the level of state and federal scrutiny of new bus companies, the thoroughness and frequency of vehicle inspections, border enforcement of the even more lightly-regulated Mexican buses, the absence of training and driving standards for drivers, and loopholes in medical rules relating to required examinations of drivers.

Source: *Washington Post*

Woman Run Over By Bus Is Awarded $27.5 Million

A jury in New York awarded $27.5 million last month to a woman who lost her left leg after a New York City Transit bus ran over her. The incident occurred as the bus was turning a corner two blocks from her apartment in 2005. The jury found both New York City Transit and the bus driver guilty of negligence and found them to be 100% responsible for the woman's injury.

The wheel, with its 40,000 pounds of weight, crushed a portion of the woman's lower left leg, from just above the ankle to below the knee, although the foot was not damaged. After trying to save the leg, the doctors had to amputate it. Two weeks later, the doctors had to perform another operation because of infection and amputated the remaining part of the woman's leg up to the groin. The woman has been unable to work since that time.

In recent months, New York juries have awarded three other Plaintiffs in personal injury cases against New York City Transit a total of about $11 million. The agency is appealing all of those verdicts.

Source: *The New York Times*

$13.7 Million Awarded In South Barrington Crash Lawsuit

A Cook County jury has found in favor of the family of a BMW salesman in its wrongful death suit against a man who took a test drive and crashed the car, killing the salesman. The jury awarded the decedent's family $13.7 million, concluding that Christopher Maher, the driver, was liable for the death. On the day of the crash, Maher, then 20 years of age, went to the BMW dealership where the salesman worked, presented his driver's license and took out a 2003 530i sedan for a test drive. The salesman sat in the front passenger seat, while two of Maher's friends sat in the rear.

At about 5:50 p.m. the BMW driven by the customer was traveling at about

95 mph when it clipped the front end of a car making a left turn onto the highway. The BWM then swerved and hit a light pole with the front passenger side of the car taking the brunt of the impact. Maher, who was ejected, and his two friends suffered serious injuries, but survived. The salesman died as a result of his injuries.

In October 2005, Maher pleaded guilty to aggravated speeding in connection with the crash. He was sentenced to one year of probation and 30 days of community service. Timothy J. Cavenagh, a lawyer from Chicago, represented the family of the salesman and did a very good job.

Source: *Chicagobreakingnews.com*

Trucker Who Waved Car Onto Highway Was At Fault In New Jersey Crash

A jury in New Jersey has returned a verdict of $1.5 million in damages in favor of a man who was injured while operating a motorcycle on a public highway. According to trial testimony, the June 2006 crash occurred after a truck driver waved another vehicle that was in a doughnut store lot into the highway. As that vehicle crossed the highway, it collided with the motorcycle. The driver of the motorcycle sustained a concussion, a permanent arm injury and cracked five teeth.

The truck driver denied at trial that he waved the car into traffic, but a police officer said the trucker told a different story at the scene. The verdict reflects a provision in state law which holds drivers in New Jersey liable if they negligently wave others into traffic. In most states it would be negligent conduct, but based on common law principles.

Source: *Insurance Journal*

Family Injured In New Jersey Car Crash Is Awarded $17 Million

A family injured in a head-on car crash in Tuckerton, New Jersey, has been awarded $17.5 million by an Ocean County jury. In August 2006, Jennifer Roden was driving to a car dealership with her husband and their three young children when another car crossed over the center line and struck their vehicle. All three children were hurt. One of the children suffered a spinal injury that left her with permanent leg paralysis. The other driver, Corey Clifford, who had just left work, was on his way home when the crash occurred. The Defendant admitted fault and the case was tried solely on damages. Norman M. Hobbie, a lawyer from Eatontown, New Jersey, represented the family and did a very good job.

Source: *Associated Press*

ASA Grounds Jets For Inspections

Atlantic Southeast Airlines, a major regional carrier for Delta Air Lines, grounded 60 of its 110 50-passenger jets last month after an internal audit raised safety concerns. The groundings caused some flight delays for passengers flying ASA. A paperwork audit raised questions about whether the engines on Bombardier CRJ200 jets had been properly inspected according to the guidelines provided by the engines' manufacturer. ASA reported the problem to the Federal Aviation Administration and grounded the planes so they could re-inspected as a precautionary measure. The airline provides air service to Birmingham, Montgomery and Mobile in our state.

Source: *Associated Press*

NTSB Says American Air Maintenance Led To Jet Fire

The National Transportation Safety Board has concluded that faulty maintenance caused an American Airlines engine fire that forced an emergency landing in St. Louis in 2007. The safety board found that the pilots' failure to complete a checklist during the emergency prolonged the fire, and American shortcomings in detecting maintenance flaws contributed. The findings may add pressure for maintenance improvement at AMR Corp.'s American, which was forced by regulators to ground planes last year for flawed inspections. In the St. Louis incident, workers repeatedly used a tool prohibited by the jet's maker to manually start the engine. In making the announcement, NTSB Acting Chairman Mark Rosenker told reporters:

> *You can't just be taking processes out of your hip pocket that are not the approved manuals, that are not the approved procedures, and expect to be able to get the appropriate results.*

Fortunately, the landing of flight 1400 in St. Louis on September 28, 2007, didn't result in injuries. The accident occurred shortly after the Boeing Co. MD-82 took off for Chicago with 138 passengers and a crew of five. The NTSB found that mechanics bent a component when they used the prohibited tool, leading to the fire. They used the method because other workers had failed to detect a worn-out filter that blocked normal starts, according to the board. It was found by the NTSB that mechanics replaced a start valve six times in 12 days before the accident, without realizing the actual problem was the filter.

According to a spokesman, American has learned a lesson from the incident. The carrier has taken steps that include replacing all filters in the fleet and emphasizing that company practices don't call for the engine-start method utilized that day. American, the world's second-largest airline, was forced by the Federal Aviation Administration in March and April 2008 to ground its fleet of 300 Boeing MD-80s to inspect and correct wiring in wheel wells. More than 3,300 flights were canceled and 360,000 passengers stranded during five days, as American examined and fixed wiring bundles.

In August, the FAA proposed fines of as much as $7.1 million against American over allegations of deferred maintenance, drug and alcohol testing deficiencies, and inadequate lighting inspections. American disagreed with

the FAA findings and said the proposed fines were "excessive." According to an NTSB investigator, the pilots in the St. Louis incident never completed a checklist for engine-fire emergencies, which delayed action to suppress the blaze. Board members also faulted the crew for informal conversation before the emergency, saying that there were a "host of serious problems going on in that cockpit." Fortunately, even with all of these problems, there wasn't a catastrophic accident. The pilots' union, the Allied Pilots Association, had told the board in January that it believed the evidence pointed to a failure to follow American's repair procedures, "clearly compromising the effectiveness of their maintenance reliability program."

The NTSB also faulted American's maintenance-monitoring system for not detecting the flaws, and recommended that the carrier correct deficiencies in the so-called Continuing Analysis and Surveillance System. On March 30th, the FAA began a comprehensive review of American's safety and operations, which was triggered in part by the MD-80 inspection lapses last year. Similar evaluations have occurred at Southwest Airlines Co. and Continental Airlines Inc. American is the second-biggest airline after Delta Air Lines Inc.

Source: *Bloomberg*

XVIII. ARBITRATION UPDATE

Federal Court Bars Arbitration Over Student Loan Terms

A federal judge has ruled that a student loan company accused of hiding fees in loan agreements can't force the lead Plaintiff in a putative class action into arbitration. Joshua G. Fensterstock, a 2003 Hofstra University School of Law graduate and now an associate at a law firm in Manhattan, sued the lender and a loan processing company in 2008 over terms in his student loan that he claimed would cost him thousands of unforeseen dollars. The Defendants, Education Finance Partners and Affiliated Computer Services, argued that the arbitration clause in the agreement should be enforced. But Judge Thomas P. Griesa found that the terms of the loan were unconscionable and he refused to compel arbitration.

After deciding that California law applied, Judge Griesa ruled that under the applicable law an arbitration clause requiring a consumer to waive the right to bring a class action is unconscionable:

- where the waiver is found in a consumer contract of adhesion;
- in a setting in which disputes between the contracting parties predictably involve small amounts of damages; and
- where it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money.

Judge Griesa first found that Fensterstock's promissory note was a contract of adhesion because it was presented on a "take it or leave it" basis with no opportunity to negotiate. The Defendants claimed that, as a lawyer, Fensterstock was sophisticated enough to have both understood the arbitration waiver and to have pursued other options. But the judge said there was no showing that Fensterstock could have obtained another consolidation loan that did not have a similar provision. This, he said in his order, was enough to show "procedural unconscionability in the context of class action waivers, where there is a high degree of substantive unconscionability because the waiver allows a company to reap a windfall from small injuries to individual consumers, while avoiding litigation." The Defendants argued that damages would be large enough to allow individual actions. Judge Griesa didn't accept that argument, saying:

> *This contention has no merit. The critical consideration is whether individual consumers will view their damages as sufficient to warrant the cost of individual litigation.*

Finally, the judge said the complaint, alleging that a party using superior bargaining power to cheat a large number of consumers out of a small amount of money, was sufficient to justify a class. Education Finance Partners is now in bankruptcy. In 2007, the company agreed to pay $2.5 million to settle charges brought by Attorney General Andrew Cuomo over its business practices. Fensterstock is represented by Alan E. Sash, a very good lawyer with the firm of McLaughlin & Stern located in New York City.

Source: *Law.com*

XIX. NURSING HOME UPDATE

Violent Nursing Home Attacks On The Rise

It's being said by elder law specialists that criminal offenders and mentally ill residents have caused an increase in patient-to-patient assaults at nursing homes. This growing violence has resulted in a rise in civil lawsuits by families of patients who have been assaulted by other residents. In a recent survey, Wes Bledsoe, founder of A Perfect Cause, a nonprofit nursing home residents' advocacy group in Oklahoma, found 1,600 registered sex offenders in nursing homes. The organization documented more than 60 rapes, murders and assaults committed by criminal offenders in nursing homes. Mr. Bledsoe had this to say concerning this area of concern:

> *It's a huge problem. The issue of nursing homes being dumping*

grounds is nothing new, and certainly for years we've had nursing homes serving not only the disabled and the elderly, but more people with mental illness, behavioral problems, drug rehabbers, alcohol rehabbers and criminal offenders being placed in these facilities by state agencies.

While there are no official figures on the numbers of mentally ill and criminal offenders being housed in nursing homes, a recent report by the Associated Press estimated that nearly 125,000 young and middle-aged adults with serious mental illnesses lived in U.S. nursing homes last year. Eric Carlson, a staff attorney at the National Senior Citizen Law Center in Los Angeles, said nursing homes that are having trouble filling their beds sometimes "start looking for residents, and get those residents from bad sources." In many instances, the staff is not aware of a resident's violent past. Because of health care privacy laws, the facility is not allowed to disclose information about a resident to other residents. Sadly, families often become aware that another resident has a history of violent behavior after their loved one is assaulted. Studies have shown that residents are being raped, physically assaulted and killed by other residents.

Jonathan Rosenfeld, a lawyer with the firm of Strellis & Field in Chicago, who is author of the nursinghomesabuse blog, says it's not just young mentally ill residents or those with criminal records who act out violently in nursing homes. In addition to the young people who have some violent tendencies, "there are older people who have similar violent tendencies who are inter-mixed with the general population," according to Mr. Rosenfeld. While some facilities have separate Alzheimer's or dementia wards, many allow disturbed older residents who are prone to violence to mingle with other residents, he said.

I agree with Mr. Rosenfeld that once a nursing home becomes aware that a resident has behaved violently or has a propensity toward violence, the facility has an obligation to take steps to protect others. This is one of the most preventable areas of injuries and harm to nursing home residents. A nursing home operator has an obligation to make good admission decisions and to monitor residents' safety.

Source: *Lawyers USA*

Assisted Living Lawsuits Mounting

After suffering a traumatic brain injury in a car crash in 1996, Earl Scherrer lapsed into a coma. He wasn't expected to live, but his wife, Lydia, refused to disconnect his life support. After 16 months, Mr. Scherrer began to emerge from his coma. Using first-grade reading and math texts, his wife helped him to slowly learn to speak again. In April 2006, Mrs. Scherrer placed him in Liberty Manor Residency, a Phoenix assisted living facility that promised 24-hour care.

A month later, Mrs. Scherrer received a call that her husband had been vomiting. She rushed over to Liberty Manor, brought her husband home and gave him a bath. Within minutes, he began vomiting again and died in his wife's arms. An autopsy revealed a number of foreign objects—plastic bags, catsup packets, candy wrappers and paper towels—in the man's stomach and small intestine. The medical examiner determined that the objects Mr. Scherrer had swallowed were significant contributing factors in his death.

Mrs. Scherrer sued Liberty Manor, alleging negligence, abuse and wrongful death. After an eight-day trial, a Phoenix jury found the facility liable for the death, and awarded $7 million in compensatory and $4 million in punitive damages. The $11 million verdict—the largest assisted living verdict in Arizona history—reflects the growing number of suits alleging abuse and neglect in the fast-growing assisted living industry

Since 1998, the number of assisted living facilities in the U.S. has grown from 28,000 to 38,000, caring for about 1 million seniors. Because they are not designated as medical care facilities, assisted living communities are not as carefully regulated as is the nursing home industry. The lack of regulation has opened the door to elder abuse and neglect. Eric Carlson, a lawyer at the National Senior Citizens Law Center in Los Angeles, observed:

There's much more variability in assisted living because the rules are different from state to state, and the rules tend to be loose to accommodate a wide range of facilities. You've got facilities that are really incompetent, but the state may not even have minimum standards.

Normally there are no nurses at the facilities and there's very little training of employees. Many times assisted living facilities are keeping residents that they don't have the capacity to care for. Unfortunately, many families with seniors living in assisted living facilities don't really consider the health-issues at the facilities. The Scherrer lawsuit was handled by Craig Knapp with the Arizona firm of Knapp and Roberts. He did an outstanding job in the case.

Source: *Lawyers USA*

XX. HEALTHCARE ISSUES

A Need For Healthcare For All Americans

It's difficult to understand how the Republican Party can oppose the Obama Administration's proposal to provide health insurance for all American citizens. In my opinion, each person in this country needs and deserves quality health care. The lack of healthcare for all too many folks has reached crisis levels in all parts of the U.S. Having the choice of a public health insurance option would make all

of our lives better and certainly is needed by those who have no health insurance coverage. The following are compelling reasons for supporting the President's efforts:

- Health care costs are spiraling out of control. From 2000 to 2008, health insurance premiums increased five times faster than wages.
- A public health insurance option would provide an affordable, quality alternative. Two new studies show that Americans could save 25% or more off of a traditional private plan. The *New York Times* says this would "keep the private plans honest." They'll have to lower rates and offer better value to compete.
- Plus, a public health insurance option would be reliable coverage for all. Private insurers are notorious for dumping people with little notice. A public option would allow consumers who've been dropped—or just don't like their current coverage—to switch to a steady public choice.

It appears that the public health insurance option is gaining ground in Congress. The Progressive Caucus recently endorsed the policy. And the chairmen of five critical Congressional committees came out in support. If you agree with President Obama let your Representatives and Senators know how you feel.

Traumatic Brain Injury Causes Long-Term Problems

Each year in the United States, nearly 1.5 million people will suffer a Traumatic Brain Injury (TBI). Causes for TBI vary from falls to traffic crashes and physical assaults. Additionally, a large number of military personnel returning from active war zones, such as the war in Iraq, suffer from TBIs. Traumatic Brain Injury is defined by the Brain Injury Association of America as a "blow or jolt to the head or a penetrating head injury that disrupts the function of the brain." While not all blows or jolts to the head result in TBI, it's sometimes hard to tell the severity of a brain injury right away. A TBI can result in short or long-term independent function problems.

It's reported that, of those who suffer TBIs, 50,000 die each year. The latest data show that 235,000 are hospitalized with 1.1 million persons treated and released from an emergency department. The Centers for Disease Control and Prevention estimates that more than 3 million Americans currently have a long-term need, which may be for life, for help in performing daily activities as a result of a TBI. Part of the insidious nature of TBIs is they are often missed in initial medical examinations after a blow or jolt to the head. Symptoms are subtle and can be easily overlooked. Also, the effects of TBI may be delayed and not be evident for days or weeks before they appear.

Carol Stanley, one of our employees, is quite familiar on a personal basis with the many surprises of TBI. In January 2007, she received word that her son Jason, a college student, had been the victim of a violent assault. Jason was pushed to the ground and hit his head on the pavement. While he was unconscious, his attackers continued to beat him. When Jason was initially examined by emergency personnel, he seemed relatively intact. He did have some cuts to his head but they weren't serious. Jason's doctors felt he was not seriously injured and assured his mother he would be fine. But within the next 24 hours, Jason woke up vomiting blood. Carol rushed him to the emergency room. Jason couldn't stand up without becoming dizzy and nauseated. Doctors then discovered fractures to his skull and jaw, and damage to the nerves in his right ear. Jason was transferred to the Intensive Care Unit, where he stayed for five days under close observation in the neurology ward.

Although Jason recovered, he is left with a Traumatic Brain Injury. He and his mother are now learning something else most people don't know about TBI: there are long-term lasting effects. People who suffer from TBI experience cognitive defects including difficulties with attention and memory, confusion, sleep disorder, emotional disorders, speech and language problems, and sensory and perceptual problems. They also might experience physical problems such as chronic pain and seizures. TBI also can increase the risk of developing conditions like Alzheimer's disease, Parkinson's disease, and other brain disorders that can become more prevalent with age. You can read Jason's Story at www.southerninjurylawyer.com.

Defibrillator Recall Raises More Concerns About FDA's Competency

If anyone needed further evidence that there are serious problems with the Food and Drug Administration's regulation and approval of medical devices, I believe all doubts have now been erased. A few weeks ago, Public Citizen sent a letter to Acting FDA Commissioner Frank Torti asking why the FDA has not announced the recall of a Welch Allyn automatic external defibrillator (AED), a life-saving device typically used by emergency personnel to resuscitate patients in cardiac arrest. Malfunctions related to this recall have been linked to two deaths. On February 26th, Welch Allyn initiated a Class 1 recall of 14,000 of its AEDs. So far, the FDA has made no effort to alert the American public. Dr. Sidney Wolfe of Public Citizen says:

> *Incredibly, this is the eighth—and most serious—recall of a Welch Allyn AED since 2004. That's alarming enough, but when viewed in the scope of the FDA's announced recalls of two other, unrelated medical devices, it raises serious concerns about the competency of the FDA and its ability to keep dangerous medical devices off the market. How many more deaths and near deaths because of delays in resuscitation*

will have to occur before the FDA takes more definitive action to end the use of these all-too-often defective Welch Allyn devices?

The FDA has done a poor job of regulation generally and unfortunately it's not confined to medical devices. For background on other issues related to medical devices, go to www.citizen.org.

Source: Public Citizen

Scientists Reject FDA Position On BPA Safety

An international consortium of industry, academic and government scientists has rejected as incomplete and unreliable the U.S. Food and Drug Administration's position that a chemical found in food containers and other household products is safe. The group, which met last month in Germany, is working to release a consensus statement in the next few weeks. The group raises questions about the two studies the FDA has used as its foundation to declare that bisphenol A (BPA) is safe in food and beverage containers. They call for a much broader look at the chemical than the FDA has given.

Source: *Mercury News*

XXI. ENVIRONMENTAL CONCERNS

Lawsuit Filed Over BP Oil Spills

The federal government and the State of Alaska have each filed separate lawsuits against BP Exploration (Alaska) Inc. over two oil spills at the nation's largest oil field. The March, 2006 spill, along with a smaller spill five months later, ultimately caused two acres of tundra and a frozen lake to be covered in crude oil. The spill was caused by an almond-sized leak in one of the company's pipes which had not been examined for erosion since 1998. In 2007, BP pleaded guilty to one violation of the Clean Water Act and agreed to pay $20 million in fines related to the spill. BP also admitted that it had failed to perform adequate assessments on the pipelines and had not mitigated the development of corrosion which led to the leaks.

The federal government's lawsuit, filed by the Justice Department on behalf of the Department of Transportation-Pipeline and Hazardous Materials Safety Administration and the Environmental Protection Agency, alleges violations of federal clean air and water laws. Specifically, it alleges that BP discharged more than 200,000 gallons of crude oil onto Alaska's North Slope in violation of federal law and that the company failed to implement spill prevention and control plans in accordance with good engineering practices. Additionally, the suit claims that BP violated the Clean Air Act by improperly removing materials containing asbestos from its pipelines and failing to comply with orders from the Department of Transportation to conduct certain testing, inspection, maintenance and repairs. The suit asks the court to impose stiff penalties and order BP to take actions to prevent future spills.

The state's lawsuit alleges violations of state environmental laws and loss of revenue for the state. Alaska is seeking restitution for its lost revenues during this period as well as for the reconstruction of a pipeline system. About 90% of Alaska's revenue comes from oil taxes and royalties. Between 2006 and 2008 oil production was slowed due to the spills. It is estimated that the spill caused a shortfall of about 35 million barrels.

Source: *Associated Press*

Update On Toxic Sewage Sludge Used As Fertilizer

Our firm is working with local counsel to investigate claims for Alabama farmers and other property owners affected by contaminated sewage sludge used as fertilizer in Franklin, Lawrence and Morgan counties. Wastewater treatment plants often provide their sludge, known as "biosolids," to farmers for use as fertilizer. The practice can benefit both farmers and wastewater treatment plants alike. The farmers receive low-cost or free fertilizer and the wastewater treatment plants reduce disposal costs by avoiding landfill or incineration fees. But this hasn't been the case in the Decatur, Alabama, area where this arrangement has been the subject of recent concern.

The biosolids and the fields where they were applied were found to contain elevated levels of perfluorochemicals (PFCs), specifically PFOA and PFOS. These chemicals are precursors to Teflon, Scotchguard, and other non-stick consumer goods, and EPA's Science Advisory Panel recommends that the EPA classify PFOA as a likely human carcinogen, with numerous studies linking it to various cancers. The EPA has requested information from 14 companies in the Decatur area which may use PFCs in their operations, including 3M, Japanese-based chemical manufacturer Daikin, Toray Flurofibers, and Biological Processors of Alabama, Inc.

In November of 2008, the EPA notified Decatur Utilities that the fields where the utility applied biosolids had alarmingly high levels of PFCs. Decatur Utility immediately stopped supplying biosolids to farms and instead diverted the sludge to local landfills, increasing its disposal costs approximately $50,000 per month. This additional cost could cause rate increases for the utility's customers.

As a result of the biosolid contamination in Decatur, EPA issued a health advisory in January 2009 that limits the amount of PFOS and PFOA in drinking water. To date, drinking water sampling in the Decatur area reveals that PFC levels are below the EPA limit; however, two private wells and numerous grazing ponds contain PFC levels much higher than the EPA limits. 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.

In addition to EPA water sampling, the U.S. Department of Agriculture recently purchased cattle in the area in order to conduct tissue samples. The USDA is testing to ensure that beef does not contain high levels of PFCs, and results should be available in May 2009. Beasley Allen lawyers will continue to monitor the situation in Decatur on behalf of those affected by the contamination. Our lawyers have successfully represented clients in PFC cases nationwide. If you need additional information on this subject, contact Rhon Jones or David Byrne in our firm at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or David.Byrne@beasleyallen.com.

An Update On The TVA Coal Sludge Class Action

Our firm continues to work on behalf of those affected by the Tennessee Valley Authority coal ash spill in Kingston, which is about 40 miles west of Knoxville. As previously reported, in December 2008, the TVA Kingston Fossil Plant released 5.4 million cubic yards (over 1 billion gallons) of coal ash when the TVA slurry pond failed. The pond failure flooded over 300 acres with toxic sludge that is nine feet high in some areas.

It has been over 100 days since the spill and numerous details about the cleanup are still speculative, including cost, schedule and waste disposal. TVA estimates that recovery costs range from $525 million to $845 million. TVA is exploring options for paying these costs, and rate increases are likely. In addition to the uncertain cleanup costs, TVA does not have a firm estimate on how long cleanup will take or where it will send the ash and other debris generated by the dredging and other cleanup activities.

As of mid-April, TVA had paid $20 million dollars to purchase over 220 acres of land affected by the spill. Over two-thirds of these 70 parcels have houses, trailers, or other structures on them. TVA's buyout program requires landowners to give up their right to pursue legal recourse from TVA, and it is unclear whether residents, in their desperation to leave the hazardous conditions, are getting fair deals.

In addition to the hardships that individual landowners suffer when relocating from their property, the county also is affected due to lost revenues. As property values decline due to the spill, so do the tax revenues associated with those properties. Therefore, Roane County likely will suffer from a lower tax base even though TVA has assured county officials that it will pay taxes on the property TVA purchases. As a tax-exempt entity, TVA normally is not required to pay property taxes. Diminished property values and the resulting loss in tax revenue affects all of the citizens of Roane County. Our firm is working on behalf of individuals and a class of clients in this lawsuit. Our firm is working to accomplish the following:

- Bring about a complete clean-up of the area;
- Ensure that our clients are fully compensated for the damage to their property (including their property values); and,
- Obtain long-term medical monitoring relief for area residents who have been exposed to the dangerous contaminants in TVA's coal ash sludge.

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

Source: *Knoxville News Sentinel*

Shell Settles Air Pollution Lawsuit In Texas

The giant oil company, Royal Dutch Shell, has reached a $5.8 million settlement over claims of air pollution at its Deer Park refinery near Houston, Texas. The proposed settlement would require Shell to reduce emissions from air pollutants from its plant by 80 percent within three years, upgrade chemical units and reduce gas flaring. The settlement is subject to review by the Environmental Protection Agency and the U.S. Justice Department and must be approved by the court. The case is pending in the United States District Court for the Southern District of Texas.

The Environment Texas Citizen Lobby and the Sierra Club sued Shell last year alleging violations of the Clean Air Act. The suit contended there had been more than 1,000 instances of illegal pollution at the plant since 2003, releasing a total of 5 million pounds of air pollutants into the atmosphere, including toxic chemicals like benzene and 1,3-butadiene, as well as sulfur dioxide and oxides of nitrogen. The settlement agreement focuses on reducing "upset emissions," which are defined as excess emissions occurring outside of routine operations, like equipment breaking down or malfunctioning, and which are not authorized by permit.

The Deer Park refinery, a 1,500-acre complex on the Houston Ship Channel, about 20 miles from downtown Houston, is the nation's eighth-largest oil refinery and one of the world's largest producers of petrochemicals. The facility is also the third-largest stationary source of air pollution in Harris County, which ranks among the worst in the nation in several measures of air quality, according to the environmental groups. Luke Metzger, director of Environment Texas, said the settlement could provide a new benchmark for operations in the petroleum and refining sector. He made this observation:

> *Shell will set an example for the rest of the industry that you can control these emissions. We can exert some pressure for the rest of the industry to similarly start to comply.*

Under the settlement, funds will be

used to finance environmental, public health and education projects in Harris County, including a project to reduce diesel emissions from school buses, and another project to install solar panels on public buildings. Neil Carman, a clean air specialist at the Sierra Club, had this to say:

> *We urge other oil and chemical companies in the region to take note of Shell's willingness to work constructively with us in developing solutions to the problems at the Deer Park facility—problems that are not unique to Shell.*

This is an encouraging development and all of the parties to the settlement agreement should be commended. However, the oil industry is making record profits and should be concerned about the environment. Hopefully, other companies will follow Shell's example.

Source: *New York Times*

EPA To Monitor Air Around 62 Schools

The Environmental Protection Agency will monitor 62 schools across the nation to determine whether the air around them contains toxic pollutants. EPA Administrator Lisa P. Jackson said in a written statement that "EPA, state, and local officials are mobilizing to determine where elevated levels of toxics pose a threat, so that we can take swift action to protect our children at their schools." Schools in 22 states were on the agency's list. Texas and Ohio had the most, with seven each, and Pennsylvania had six. The agency chose the schools after:

- examining the best information available on air pollution near the schools;
- gathering information on wind direction and speed; information from state and local air agencies; and
- the results of a recent newspaper analysis.

USA Today reported in December that the air outside 435 schools appeared to be more toxic than the air outside an Ohio school that was closed in 2005 because of unacceptable air quality. The newspaper based its findings on a government computer simulation. The government also used computer modeling to help choose the 62 schools. The schools include those in major cities—Los Angeles, California; Seattle, Washington; and Chicago, Illinois—as well as smaller towns—McKees Rocks, Pennsylvania; Story City, Iowa; and Tarrant City, Alabama. The schools range from elementary to high schools.

The EPA will redirect $2.25 million from community air monitoring grants to fund the plan. The monitoring will be phased over three months and will continue for 60 days at each school. Two types of pollutants in the air will be measured: those in gas form, including benzene, which U.S. authorities have declared a known carcinogen; and those in particle form, including metals. The pollutants monitored will vary by school, based on the best available information about the pollution sources in the area. The EPA has already identified the pollutants to be monitored at each school. After the monitoring, the EPA says it will analyze the results and project the potential long-term health concerns related to cancer and respiratory and neurological effects. If potential health concerns are high, the EPA says it will take steps to "mitigate the pollution causing the problems." The results from the project will be made public.

Source: *CNN*

XXII. THE CONSUMER CORNER

Polio Victim's 30-Year Crusade Results In A $22.5 Million Jury Award

In May 1979, Elizabeth Tenuto brought her five-month-old daughter, Diana, to a pediatrician in New York for her second dosage of an oral polio vaccine. A month later, Ms. Tenuto's husband, Dominick, contracted polio, apparently by touching Diana's stool while changing her diaper. Now, three decades after becoming permanently paralyzed, Mr. Tenuto has won a $22.3 million verdict in New York state court against Lederle Laboratories, the giant pharmaceutical company that manufactured the vaccine Orimune. It was alleged that the company negligently manufactured the vaccine and that it failed to adequately warn doctors of its dangers. The lawsuit brought by Mr. Tenuto and his wife, finally went to trial in February.

After closing arguments, Lederle offered $10 million to settle the case. Mr. Tenuto's lawyers, who had incurred approximately $500,000 in expenses over the years, encouraged him to reject the offer. The jury deliberated for one day before awarding Mr. Tenuto $17.5 million for past and future pain and suffering, plus $5 million for lost earnings and medical and rehabilitation expenses. Following a series of corporate transactions, Lederle itself is now part of Wyeth Pharmaceuticals, which recently signed an agreement to be acquired by Pfizer.

As we all know, polio was officially eradicated from the Americas in 1994. However, litigation continues with regard to the risks posed by the oral vaccine developed by Dr. Albert Sabin, which was long the drug of choice in the campaign against the disease. This case was filed in 1981. Much of the case's first two decades were consumed by motions, discovery and appeals, including a half dozen rulings in New York's appellate courts.

According to the Centers for Disease Control, between 1980 and 1998—at a time when more than 300 million doses of the vaccine were distributed—144 people in the United States contracted polio via a vaccine, including 86 vaccine recipients and 51 "contact" recipients. In underdeveloped countries, the rates have been much higher. Several small outbreaks

have forced entire communities to receive high-dose vaccinations. Since 2000, all U.S. vaccines administered have used inactivated viruses, reducing the risk of contact-associated polio to zero.

The jury found Lederle 100% liable for Mr. Tenuto's condition. Much has changed for this man in the three decades between his diagnosis and the jury's verdict. He aged from 31 to 61. He lost his job and, unable to work, spent more than 20 years volunteering at a hospital. His marriage broke up, and his ex-wife died. His three daughters are now adults—the youngest, Diana, recently turned 30. Mr. Tenuto is now a grandfather, twice over. It was a long, tough fight, but justice was finally done.

Source: *Law.com*

Jury Awards Couple $10.6 Million In Bank Fraud Case

A Jefferson Circuit Court jury found Branch Banking & Trust (BB&T) guilty of fraud in a trial completed last month and awarded a Louisville couple $10.6 million in damages. BB&T was found to have acted maliciously and was ordered to pay $9 million in punitive damages. Jurors found that Bank of Louisville, which was later acquired by BB&T, used false information in 2002 to persuade Larry and Linda Thompson to consolidate numerous bank loans they had for their real estate business into one mortgage with Bank of Louisville.

The Thompsons claimed that BB&T committed fraud by inducing them into a lending relationship through false representations and then destroyed their business by refusing to allow them to buy real estate, which had been part of their business for the past two decades. The bank originally filed a lawsuit to foreclose against the Thompsons in 2006, and the Thompsons filed a counter-complaint. After a six-day trial, the jury ruled 9-3 in favor of the Thompsons. This case is the first lender-liability case to go to trial in Kentucky in more than a decade. Larry Zielke, a Louisville lawyer, represented the Thompsons and did a very good job.

Source: *Courier-Journal*

Consumers Urged To Replace Dangerous Home Heating Vent Pipes

The U.S. Consumer Product Safety Commission and various home heating furnace, boiler, and high-temperature plastic vent pipe (HTPV) manufacturers are urging home owners who have not yet responded to the previously-announced 1998 recall, to do so immediately. After May 1, 2009, the remedy consumers receive will change. The recall originally included about 250,000 Plexvent and Ultravent HTPV pipe systems attached to gas or propane mid-efficiency furnaces and boilers in homes. The HTPV pipes can crack or separate at the joints and leak deadly carbon monoxide (CO) gas. After checking the vent pipes, consumers should call (800) 758-3688 to sign up for HTPV pipe system replacement.

Source: Consumer Product Safety Commission

The Nation's Food Supply Must Be Made Safe

The federal system designed to prevent food borne disease outbreaks or bioterrorism attacks is so inadequate that only five out of every 40 foods can be traced all the way through the supply chain, according to recent findings. A report from the Inspector General's office of the Department of Health and Human Services reveals that the self-reporting system used to keep track of these problems is not working. Although companies are required to keep records that would allow federal investigators to track food throughout the supply chain, many of the records are not detailed enough, and company managers are often unaware of the extent of reporting requirements. Rep. Rosa DeLauro (D-CT), who requested the investigation, had this to say:

> *The food safety regulatory structure lacks an adequate traceability system. Traceability is a critical tool in our ability to identify the source of a food-borne illness outbreak.*

According to the report, 70 out of 118 tested companies failed to meet the FDA's record-keeping requirements for information about suppliers, shippers and customers. "In some cases, managers had to look through large numbers of records—some of them paper-based—for contact information," according to the report. Rep. DeLauro said traceability will be a focal point of Congressional food safety reform measures. Lawmakers have increased their focus on strengthening the nation's food safety system in the wake of the recent salmonella outbreak linked to peanut butter food products. In addition to several bills being introduced in Congress that would strengthen record-keeping requirements and impose tougher penalties, it's significant that the Obama Administration has requested a thorough investigation of the federal food safety system.

The Obama Administration has now issued a tough warning to all food makers that sloppy manufacturing practices would no longer be tolerated. With that warning, the Administration signaled that it was substantially changing the way the government oversees food safety. Food-handling practices—that in the past would have resulted in mild warnings—may now lead to wide-ranging and expensive recalls, even before anyone becomes ill from contaminated food. Dr. David Acheson, associate commissioner for foods at the Food and Drug Administration, issued this warning:

> *The food industry needs to be on notice that FDA is going to be much more proactive and move things far faster. We're going to try to stop people from getting sick in the first place, as opposed to waiting until we have illness and death before we take action.*

Most folks are shocked when they learn that the FDA doesn't have the power to recall foods itself. Hopefully, we will see some real reforms in the way the federal government regulates food safety in this country now that an Administration is making this important issue a real priority.

Source: *Lawyers USA* and *New York Times*

A Brief Look At Electrical Accidents

Unfortunately, thousands of people are injured or killed each year as a result of contact with power lines or other power sources. Among these accidents are electric shocks, electrocutions, electrical explosions, electrical fires, and flash burns. We have learned that few people—including lawyers—know a great deal about electricity.

To cause a shock, electricity must enter one place on your body and exit at another. It is the current through your body that causes the shock, not the voltage at a single place. A bird on a high voltage wire gets no shock. It is common for one of the shock places to be the earth or a piece of metal connected to the earth. Electricity through your body spreads out between the two contact places and causes severe damage in between. If enough current passes through your heart, it can cause ventricular fibrillation followed by asphyxiation because the heart stops beating. Electric current can damage your organs and your nervous system and can also cause severe burns at entry and exit locations.

Electrical accidents in the home occur frequently. A common mode of shock comes from touching a defective electrical appliance such as a hair dryer with one hand and a water faucet with the other. Defective power tools also result in electrical shocks.

A very effective device in helping to prevent electrical accidents in the home is the Ground Fault Circuit Interrupter (GFCI). These are now used almost everywhere in homes. It is a circuit breaker which opens within a tenth of a second if a shock current exceeds 6 miliampers. They are incorporated in electrical outlets near water sources in bathrooms, kitchens, and laundry rooms.

Many electrical shocks result from the accidental touching of an overhead power line and many result in death or severe injury. These power lines can be contacted by cranes, irrigation pipes, grain augers, trucks, workers on scaffolding or roofs, boat masts, and radio and TV antennas.

The following are a few basic terms which will be useful to you in understanding how electrical accidents occur and may help you prevent them. They will also assist lawyers in dealing with electrical issues in lawsuits.

- **Conductor**—When you think about what a conductor is don't think of someone who leads an orchestra, but of something or someone that electricity can travel through. Copper and aluminum are good conductors of electricity, and most wiring comes from these materials.

- **Insulator**—This is the thing that keeps the conductor from conducting or controls how it conducts. An insulator is a material that prevents the flow of electricity. The polyethylene that encases copper wiring is an example. Also, power lines between utility poles are insulated by the air and height that separates them from the ground and people.

- **Voltage**—Electricity needs something to push it through the conductor. Voltage provides the pressure to make the current flow. "High voltage" factors have to do with whether it can cause a spark in the air or electric shock on contact.

- **Circuit**—The circuit provides the path for the electrical current to flow. In the case of a closed circuit, this is a complete path—coming from the source of the electricity, moving to the place it's needed and returning by the same route.

- **Open Circuit**—Something has stopped the flow and interrupted the continuity—maybe a piece of insulation getting in the way, or just simple wear and tear.

- **Short Circuit**—The "short" is an abnormal connection—between wires or between a wire and the ground. Shorts will trip a breaker. Ground-fault circuit interrupters (GFCIs) are receptacles or circuit breakers that shut off power instantly when a circuit shorts or overloads.

- **Overload**—an overload means you've got too much going on in one circuit. The wires get hot. The breaker calls a halt and trips off.

- **Circuit Breaker**—Each circuit is protected by a circuit breaker (or fuse) at the main panel. They shut off automatically if there's an overload or short—or manually when it's time to make repairs or upgrades.

- **Transmission Lines**—Power lines that carry high voltage electricity long distances.

- **Distribution Lines**—Power lines that carry electricity through towns and neighborhoods to homes and businesses. Distribution lines can run overhead or underground.

- **Service Line or Service Drop**—The electric wires that run from the pole to the meter at your residence. The most common service drop (typically) is known as tri-plex wire consisting of a bare center wire with two black, coded wires wrapped around it.

- **Electric Transformer**—A gray barrel-shaped objected mounted on the pole below the distribution lines which reduces the primary voltage down to household voltage levels.

Our firm regularly investigates electrical accidents to determine if there were reasonable alternatives available which would have prevented the accident. We are happy to answer any questions regarding an electrical accident. If you need more information contact Graham Esdale at 800-898-2034 or Graham.Esdale@beasleyallen.com.

Yamaha Offers Free Repair For Certain Vehicles

The U.S. Consumer Product Safety Commission has announced a free repair program to address safety issues with all Rhino 450, 660, and 700 model off-highway recreational vehicles. Yamaha Motor Corp. U.S.A. has suspended sale of these models immediately until they are repaired. Consumers should immediately stop using these already dangerous recreational vehicles until the repair is installed by a dealer.

CPSC staff has investigated more than 50 incidents involving 46 driver and passenger deaths in these two Rhino models. More than two-thirds of the cases involved rollovers. Of the rollover-related deaths and hundreds of reported injuries, some of which were serious, as we have reported, many appear to involve turns at relatively low speeds and on level terrain. About 120,000 of the 450 and 660 model Rhinos have been distributed nationwide since Fall 2003. Some units have been equipped by Yamaha with half doors and additional passenger handholds, either before or after sale.

Yamaha's repair includes the installation of a spacer on the rear wheels as well as the removal of the rear antisway bar to help reduce the chance of rollover and improve vehicle handling, and continued installation of half doors and additional passenger handholds where these features have not been previously installed to help keep occupants' arms and legs inside the vehicle during a rollover and reduce injuries. Owners of the affected Rhinos should stop using them and call their dealer to schedule an appointment to have repairs made once they are available and to take advantage of a free helmet offer.

Yamaha is also voluntarily implementing the same repair program and suspension of sale for the Rhino 700 model, in order to ensure customer satisfaction. Consumers should stop riding the 700 model until it is repaired. About 25,000 Rhino 700s are part of this repair program. Once these repairs have been made to their vehicles, Rhino users should always wear their helmet and seat belt and follow the safety instructions and warnings in the on-product labels, owner's manuals and other safety materials. For additional information on Rhino problems generally, you can contact Cole Portis or Chris Glover at our firm at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Chris.Glover@beasleyallen.com. You can also visit Yamaha's Web site at www.yamahamotor.com for information on this recall.

Source: Yamaharhinorolloverandrecall.com

Companies Fined Over Children's Clothing With Hood Drawstrings

T.J. Maxx, Marshalls and 12 other companies have agreed to pay a total of more than $1 million in civil penalties for failure to report safety hazards promptly. The companies were penalized for failing to promptly report sales of children's clothing with drawstrings through the hood or neck, according to the Consumer Product Safety Commission. These drawstrings can get caught in nearby objects and cause children to get trapped or strangled. Acting CPSC chairwoman Nancy Nord had this message to the manufacturers and sellers:

> *My message to children's clothing makers and sellers is clear: Drawstrings on children's garments put children at risk. CPSC will continue to search for and take action against drawstring violators.*

In May 2006, the commission announced that children's jackets and sweatshirts would be considered defective if they had hood and neck drawstrings. The agency says 14 companies failed to comply with a federal law that requires them to immediately report defective products. The companies deny knowingly violating the law. T.J. Maxx and Marshalls share a parent company, The TJX Companies, Inc. But two separate settlements were negotiated—one with TJX for $315,000 and one with Marshalls of MA Inc. for $235,000.

The other companies included in the agreement are: The Bon-Ton Stores, Inc.; Concord Buying Group Inc., doing business as A.J. Wright; Bob's Stores Corp.; Kidz World Inc., doing business as High Energy USA; Coolibar, Inc.; Brents-Riordan Co., LLC; Forman Mills, Inc.; Urgent Gear, Inc.; Seventy Two Inc.; Orioxi International Corp.; Outfitter Trading Co., LLC; and Retco Inc.

Source: *Associated Press*

Many Alabama Day Care Centers Operate Legally Without Licenses

A new national report shows that Alabama is one of 14 states that allows some child day care centers to operate without being licensed and with few restrictions. The Federation of Child Care Centers of Alabama released the report by the Applied Research Center of Oakland, California, last month at a news conference at the Alabama Statehouse. The executive director of FOCAL, Sophia Bracy Harris, says the Legislature needs to act to require unlicensed day care centers to at least meet minimum health and safety standards. While most privately-owned day care centers in Alabama are licensed, state law allows church-owned facilities to operate without a license. It was pointed out at the news conference that about 40% of Alabama's 2,000 centers are unlicensed.

Source: *Associated Press*

Alabama Foreclosures Rose More Than 200%

It has been reported that during March foreclosure activity in Alabama spiked significantly. The number of filings surged more than 200% over both the previous month and the year-ago period, according to information from mortgage research firm RealtyTrac. In March, there were 2,260 foreclosure filings across the state, a 217% rise from February and a 248% jump

from March 2008. The numbers are in line with a national trend of rising foreclosure rates, as well as reports that banks have accelerated foreclosure activity against delinquent homeowners in recent weeks.

In February, the state's foreclosure filings fell 22% from the previous month and stayed about even with the year-ago period. Yet, rising foreclosure rates are hitting states across the nation. For the first three months of 2009, foreclosure filings were reported on 803,489 U.S. properties, a 9% increase from the fourth quarter of 2008 and a 24% rise over the first quarter of 2008. For March alone, foreclosures across the nation rose 17.5% over the previous month and 46% over the year-ago period, with much of the activity in new foreclosure action. This suggests that many lenders were holding off on executing foreclosures due to moratoriums in the industry and legislative delays that have now been lifted. There were 3,669 foreclosure filings in Alabama during the first quarter, a 75% rise from the fourth quarter of 2008 and a 116% jump from the first quarter of 2008.

Source: *Birmingham News*

XXIII. RECALLS UPDATE

There were a good number of recalls over the past month. We will discuss briefly some of the more significant ones below.

GM Recalls 1.5 Million Cars Due To Fire Risk

General Motors Corp is recalling nearly 1.5 million Buick, Chevrolet, Oldsmobile and Pontiac mid-sized cars due to a potential leak of engine oil that could cause an engine fire. The recall applies to the 1997-2003 Buick Regal; 1998-2003 Chevrolet Lumina, Monte Carlo and Impala; 1998-99 Oldsmobile Intrigue; and 1997-2003 Pontiac Grand Prix, GM said in a filing with the National Highway Traffic Safety Administration. A total of 1,497,516 vehicles, all equipped with a 3.8 liter engine, are involved in the recall.

According to GM, some of the vehicles have a condition in which drops of engine oil may be deposited on the exhaust manifold under hard braking. NHTSA says that could start a small fire that could spread to a plastic spark plug wire channel and beyond, increasing the risk of an engine compartment fire. GM dealers will remove the plastic spark plug retention channel and install two new spark plug wire retainers free of charge.

Hyundai Recalls 500,000 Vehicles

Nearly 500,000 Hyundai vehicles are being recalled due to faulty brake lamp systems. The cars, some of which were made at the company's Montgomery plant, include the 2006-07 Sonatas and 2007 Santa Fe SUVs. The recall also covers 2005-07 Tucson trucks, 2006-07 Accents, 2007-08 Veracruz crossovers and each of the 2007 model Azeras, Elantras and Entourages.

The recall is being prompted because these vehicles' brake lights may fail to activate when the brakes are applied or continue to operate after the brakes are released. The malfunction may even affect the vehicles' electronic stability control and cruise control systems. If you have one of the affected Hyundai models you can have the system replaced without charge at your dealership. You can also call the Hyundai assistance line at 1-800-633-5151 for more information.

Deaths Prompt Yamaha Off-Road Recall

As mentioned in a separate section of this issue, Yamaha Motor Corp. USA recalled about 120,000 off-highway recreational vehicles for repairs, after two models were involved in 46 deaths. The Consumer Product Safety Commission announced the recall. All Rhino 450 and 660 model vehicles were recalled for repairs designed to prevent accidents that resulted in 46 deaths and hundreds of injuries. The reported deaths occurred between the fall of 2003, when the vehicles were first distributed, through this year.

Clothing Irons Recalled By Conair Corporation Due To Fire Hazard

About 45,000 clothing irons have been recalled by the distributor Conair Corporation, of Stamford, Conn. The clothing iron can overheat, posing a fire hazard to consumers. Conair has received three reports of overheating, including two fires resulting in property damage. No injuries have been reported. This recall involves Conair clothing irons with model numbers DPP1500, DPP1500R and DPP3500. The model number is printed below the soleplate. No other models are included in this recall. The irons were sold at department and retail stores nationwide from October 2008 through March 2009 for about $50. Consumers should immediately unplug and stop using the recalled clothing irons and contact Conair to receive a free comparable product. For additional information, contact Conair at (800) 687-6916 or visit the firm's Web site at www.Conair.com.

643,000 High Chairs Recalled

More than 640,000 high chairs have been recalled because of faulty screws that could cause infants to fall or choke, according to the Consumer Product Safety Commission. The voluntary recall in conjunction with the high chair's maker, Evenflo, came after more than 300 reports of seatbacks detaching or reclining unexpectedly. Additionally, there have been reports of screws falling out of the high chairs, which presented a choking hazard.

Recline fasteners and metal screws on both sides of the high chair can loosen and fall out, allowing the seatback to detach or recline unexpectedly. Children can fall backwards or fall out of the high chair and suffer bumps and bruises to the head, as well as abrasions and cuts. Detached hardware also could cause children to choke. Evenflo has received 320 reports of accidents.

All Evenflo Envision high chairs, including model numbers: 2891321, 2891321A, 2891333, 2891351, 2891351A, 2891365, 2891375, 2891403, 2891403A, 2891466, 2891466A, 2891478, 2891536, 2891536A, 2891573, 2891586, 2892351 and 2892351A are part of the recall. The model number can be found on a white label on the seatback. "Evenflo" and "Envision" are printed on the front of the tray, the CPSC said. The high chairs are made in China. The CPSC advises owners to immediately stop using the high chairs and contact Evenflo at (800) 233-5921 or visit the firm's Web site at www.evenflo.com.

SunKids Convertible Cribs Recalled By Suntech Enterprises

Suntech Enterprises Inc., of City of Commerce, California has recalled about 1,900 SunKids Convertible Cribs. The sides of the crib are made of mesh that expands, creating a gap between the side and the crib's mattress if it's not zipped into place, or a gap between the side and an added mattress. A young child can slip into this gap and become entrapped or suffocate. Also, the crib's drop side can fail to fully latch posing a fall hazard to young children. No injuries have been reported with this crib. However, CPSC is aware of the death of a five-month-old child in August 2008 involving another company's nearly-identical crib that was recalled. The child became entrapped between the mattress and the mesh side and suffocated. The recall involves the SunKids convertible crib/playpen/bassinet/bed with model number PY256. "SunKids" is embroidered on the bottom left of the crib's drop side.

The convertible cribs have a drop side rail, stationary side rail, canopy assembly, and bassinet. The sides of the convertible crib are fabric and mesh. The mattress support, bassinet, canopy, and bed skirt are covered in fabric. The fabric and the mesh were sold in navy blue, light blue, pink, beige, white, beige checker, and pink heart. The cribs were sold at small juvenile product retailers in New York, New Jersey, and California from January 2007 through October 2008 for about $100. Consumers should immediately stop using the recalled convertible cribs and return them to the store where purchased for a full refund. For additional information, contact Suntech Enterprises toll-free at (888) 268-8139.

Best Buy Recalls Television Sets Due To Fire Hazard

About 13,300 Insignia 26-inch flat-panel LCD model IS-LCDTV26 televisions have been recalled by Best Buy Co. Inc., of Richfield, Minn. The television's power supply can fail, posing a fire and burn hazard to consumers. Best Buy has received two reports of fires that included damage to the television and wall. One consumer reported minor burns to the hands. This recall involves Insignia 26-inch flat-panel LCD televisions, model number IS-LCDTV26. The model number is printed on the back of the television and the word "INSIGNIA" is printed on the bottom front. No other Insignia model televisions are involved in this recall.

The sets were sold exclusively at Best Buy stores nationwide, at ww.bestbuy.com, and www.bestbuyforbusiness.com from August 2005 through June 2006 for about $800. Consumers should immediately stop using the recalled televisions and contact the Best Buy hotline to receive a gift card for the value of a replacement television. For additional information, contact Best Buy at (800) 233-0462 or visit the firm's Web site at www.bestbuy.com.

Brave Products Reannounces Recall Of Log Splitters

Brave Products Inc., of Streator, Illinois has recalled its Log Splitters. The log splitter's hydraulic cylinders can have defective rod retention, causing the seals to leak and the rods to detach. This can result in serious injury to the operator, as the rod can rapidly and unexpectedly extend the splitting wedge. Brave Products originally received 59 reports of leaking cylinders and/or rod retention failure. One consumer reported a hand amputation that could have been caused by this cylinder defect. There have been 26 additional reports of failure, including units previously thought to be unaffected by the

earlier recalls. No new injuries have been reported.

The log splitters are made of steel and painted orange and black, or blue and black. They have trailer hitches and rubber tires. Each log splitter has a decal on the side that reads "Brave Products, Inc." or "Iron & Oak" and "__ ton" (either 15, 22, 26, or 34). The log splitters were sold at Ace, True Value, and Do It Best Hardware stores and independent power equipment dealers nationwide from January 2002 through April 2007 for between $900 and $2,000. Consumers, including those who contacted the firm after the previously announced recalls, should immediately stop using the recalled log splitters and contact the firm to receive a free replacement cylinder. For additional information, contact Brave Products at (800) 350-8739 or write to: Brave Products Inc., P.O. Box 577, Streator, IL 61364-0577. Consumers also can visit the company's Web sites at www.log splitters-ironoak.com, or www.brave products.com.

Atico International USA Recalls Coffeemakers

Atico International USA Inc., of Fort Lauderdale, Florida, has recalled *Signature Gourmet*™ 12-Cup Programmable Coffeemakers and *Kitchen Gourmet*® 10-Cup Coffeemakers. These coffeemakers can ignite due to an electrical failure, posing a fire hazard. Atico International USA, Inc. has received 23 reports of coffeemakers igniting, resulting in property damage. No injuries have been reported. This recall involves the following coffeemakers: Kitchen Gourmet® 10-Cup Coffeemaker, color White, model # XQ-673K, item # W14A3 714; and Signature Gourmet™ 12-Cup Programmable Coffeemaker, color Black, model # XQ-673BT or CM4 193D, item # W14A5084.

The name of the coffeemaker is printed on the front of the unit. The model number and the item number are printed on a sticker located on the bottom of the unit. The coffeemakers were sold at Walgreens stores nationwide from June 2004 through March 2009 for about $20 and the Kitchen Gourmet® 10-Cup coffeemaker from August 2006 through December 2008 for about $10. Consumers should immediately unplug and stop using the recalled coffeemaker and contact Atico International USA for instructions on returning the product for a full refund. Consumers should call Atico International USA toll-free at (877) 546-4835, or visit the company's Web site at www.aticousa.com.

Stanley And Solarwide Industrial Recall Stud Sensors

Solarwide Industrial Ltd., of Hong Kong has recalled about 78,000 Stanley® Stud Sensors 200 and Stanley® FatMax® Stud Sensors 400. The stud sensor can fail to calibrate properly and detect AC electrical wires behind the wall, posing a shock hazard to the user. The recalled stud sensor models include the Stanley® Stud Sensor 200 and Stanley® FatMax® Stud Sensor 400 with model numbers 77-720 and 77-730. The model number is located in a slide-out reference guide found in the base of the sensor's handle.

The sensors are made of black plastic with a wide yellow stripe down the center. "Stanley" or "FatMax" are printed on the front of the product. A date code is printed on the inside of the battery cover. Affected sensors have date codes that do not begin with the letter "R." Consumers should contact Stanley to determine if their stud sensor is included in the recall and to receive a free replacement sensor. For additional information, contact Stanley toll-free at (866) 215-1132 between from 8 a.m. and 5 p.m. ET Monday through Friday, visit the firm's Web site at www.stanleytools.com or e-mail Stanley at stanleytools@stanleycustomercare.com.

Simplicity Play Yards Recalled

About 25,000 Travel Tender Play Yards have been recalled. One or more rails can collapse unexpectedly, posing a fall or entrapment hazard to young children. The CPSC is aware of at least five reports of one or more rails collapsing. No injuries have been reported. The recalled play yards are portable and were sold with a bassinet, changing table and mobile features. The play yards bear the "Simplicity" logo. The model numbers are 5500DRM, 5500WDS, 5500FEL, 5501FEL, 5502MON, 5520PRO, 5550HAN, 5700MAN, and 5750MIR. The model number is located on a sticker on one of the legs underneath the play yard.

They were sold at Burlington Coat Factory stores nationwide and online at Babiesrus.com, Target.com and Kohls.com from March 2005 through January 2009 for about $100. Consumers should immediately stop using the play yards and return them to the place of purchase for a refund or replacement product. For additional information, contact the following retailers: Burlington Coat Factory, (888) 223-2628; Babies R Us, (800) 869-7787 or www.babiesrus.com; Target, (800) 440-0680 or www.target.com; Kohl's Department Stores, (866) 887-8884 or www.kohls.com.

GE Recalls Ranges Due To Fire And Burn Hazards

GE Consumer & Industrial has recalled about 28,000 GE Profile™ Freestanding Dual Fuel Ranges. The wiring in the rear of the range can overheat, posing a fire and burn hazard to consumers. GE is aware of 47 reports of overheated wiring, including 33 reports of wiring that caught fire. Of these, one fire caused structural damage to the home and there have been 14 reports of minor property damage. No injuries have been reported. This recall involves GE Profile 30" Freestanding Duel Fuel ranges. The ranges were sold in white, black, bisque and stainless steel. The model and serial numbers can be found on the left inside corner of the bottom drawer.

Consumers should immediately stop using the oven and contact GE for a free repair. Consumers can continue to use the cooktop burners. For additional information, contact GE toll-free at (888) 352-9764, or visit the firm's Web site at www.geappliances.com.

Women's Shoes Recalled By Wal-Mart Due To Fall Hazard

About 200,000 pairs of women's shoes have been recalled by Wal-Mart Stores Inc., of Bentonville, Arkansas. The shoes were manufactured by Joyfair Footwear, of Taipei, Taiwan. Heels on the shoes can easily detach, posing a fall hazard to consumers. No injuries have been reported. This recall involves women's sling-back, pointed-toe shoes sold under the George brand. The shoes were sold in three colors, black, grey and purple, and in sizes 5½ to 11. The shoes were sold exclusively at Wal-Mart stores nationwide from June 2008 through December 2008 for about $13. Consumers should immediately stop wearing the shoes and return them to the nearest Wal-Mart for a full refund. For additional information, contact Wal-Mart Stores at (800) 925-6278 or visit the firm's Web site at www.walmartstores.com for more information.

Coffeemakers Recalled By Philips Consumer Lifestyle

About 155,000 Philips Senseo One-Cup Coffeemakers have been recalled by Philips Consumer Lifestyle, of Stamford, Connecticut. An electrical fault and the build-up of calcium from hard or medium water can cause an obstruction in the coffeemaker. If this happens, the boiler can burst, posing a burn hazard to consumers. No injuries have been reported in the United States. The firm has received 17 reports of incidents in Europe, including six reports of minor personal injury involving first degree burns to the hands, arms and abdomen. This recall involves Senseo one-cup coffeemakers with model numbers HD 7810, HD 7811, HD 7815, HD 7820, HD 7832, and HD 7890. Model numbers are located on the bottom of the coffeemaker. Date codes are printed on the bottom of the coffeemaker. Coffeemakers made in China have date codes 0727 through 0847; coffeemakers made in Poland have date codes 0627 through 0847.

The coffeemakers were sold by Wal-Mart, Target and Safeway stores nationwide and online at Amazon.com between July 2006 through March 2009 for between $60 and $140. Consumers should immediately stop using the coffeemakers and contact Philips for instructions on receiving a free replacement unit. For additional information, contact Philips toll-free at (866) 604-0051. Consumers can also visit the firm's Web site at www.senseoexchange.com.

Fitness Balls Recalled After Bursting

About three million fitness balls sold in department stores and sporting good retailers nationwide have been voluntarily recalled following 47 reports that they unexpectedly burst, in some cases causing injuries, the Consumer Product Safety Commission said. The balls—carrying the names Bally Total Fitness, Everlast, Valeo and Body Fit—were distributed by EB Brands of Yonkers, NY and made in China. They were sold between May 2000 and February 2009 for between $15 and $30. The 55-, 65- and 75-centimeter sizes are involved in the recall, and were sold with a pump and inflation instructions. The CPSC believes the balls burst because they were over-inflated. Consumers should contact EB Brands by calling 800-624-5671 in order to receive updated inflation instructions.

Wal-Mart Recalls 91,000 Pairs Of Children's Shoes

Wal-Mart is recalling about 91,000 pairs of "CARS" Fleece Clog Children's Shoes. The shoe has four decorative wheels that can detach, posing a choking hazard to young children. Wal-Mart has received one report of a decorative wheel detaching from the shoe. No injuries have been reported. The shoes were sold exclusively at Wal-Mart stores in the United States and Canada from September 2008 through March 2009 for between $6 and $10 (U.S.) and for about $13 (CAN). Customers should immediately take this product away from children and return it to the nearest Wal-Mart store for a full refund. Consumers should contact Buster Brown & Co. for more information at (888) 869-1044.

Toaster Oven/Broilers Recalled By Haier America

About 106,000 Toaster Oven/Broilers have been recalled. Electrical connections in the toaster oven/broilers can become loose, posing electrical shock and burn hazards. Haier America has received two reports of minor burns and one report of a minor electrical shock to consumers, and one report of minor property damage. This recall involves toaster oven/broilers with model number RTO1400SS. The units are stainless steel and black plastic. "Haier" is printed on the front and the model number is printed on a label on the back of the toaster oven/broilers. Consumers should immediately stop using the recalled toaster oven/broilers and contact Haier America to receive a free replacement toaster oven/broiler. For additional information, contact Haier America at (866) 927-4810 anytime, or visit the firm's Web site at www.haieramerica.com.

Robes For Women Recalled Due To Burn Hazard

Blair LLC, of Warren, Pennsylvania, has recalled about 162,000 full length women's chenille robes. Some robes fail to meet federal flammability requirements and present a risk of serious burns to consumers if they are exposed to an open flame. Blair has received three reports of the robes catching on fire, including one report of second-degree burns. The recall involves the Full Length Women's Chenille Robe with the following item numbers: 3093111, 3093112, 3093113, 3093114, 3093115, and 3093116. The item number is identified on a label in the garment's neckline. This is a one-piece garment made of plush sculpted chenille, a shaped stand collar, and horizontal chenille front and back yolks and cuffs. The robe has a full-button front with seven matching button closures, long sleeves with self cuffs, a straight bottom with self hem, and two sideseam pockets.

The robe's sewn in label states: "100% Cotton, RN 81700, Made in Pakistan". Robes with other item numbers are not included in the recall. The robes were sold in Blair catalogs and the Blair Web site, and Blair stores in Warren and Grove City, Pennsylvania, and Wilmington, Delaware, from January 2003 through March 2009 from about $20 to $40. Consumers should stop wearing the garment immediately. Contact Blair LLC for information on returning the robe and to receive a refund or a $50 gift card for Blair merchandise. For more information, call Blair toll-free at (877) 392-7095, or visit the firm's Web site at www.blair.com/recall, or contact the firm by e-mail at blairproductrecall@blair.com.

Leg Curl Fitness Machines Recalled Due To Crushing Hazard

Paramount Fitness Corp., of Los Angeles, California has recalled about 150 Leg Curl Machines. A consumer's hand can become caught between the cylindrical counter weight and the frame of the fitness machine, posing a crushing hazard that can result in lacerations and finger amputation. Paramount has received three reports of incidents, including a finger amputation and two finger-crushing injuries. This recall involves the Paramount Fitness PL2100 leg curl machine. The single station weight machine is designed to exercise the hamstring muscles. Serial numbers involved in this recall include: PL21-9301-000 through PL21-9510-099. The serial number is printed on the back of the weight stack frame on the lower right. Model number PL2100 is printed on the exercise procedure label on the front of the machine. The Paramount Fitness logo is printed vertically on the frame. Consumers should immediately stop using the fitness machines and contact Paramount Fitness to receive a free repair kit. For additional information, contact Paramount Fitness at (888) 825-8905 between 7:30 a.m. and 4:30 p.m. PT daily, or visit the firm's Web site at www.paramountfitness.com.

California Plant Recalls Pistachio Products

A California food processing plant is voluntarily recalling up to 1 million pounds of roasted pistachio products that may have been contaminated with salmonella. The Food and Drug Administration announced the recall. The nuts came from Setton Farms in Terra Bella, California, about 75 miles south of Fresno. They were largely distributed in 2,000-pound containers to food wholesalers who would then package them for resale or incorporate them as ingredients in other products, such as ice cream and trail mix. No illnesses have been linked to this case, according to Dr. David Acheson, FDA's associate commissioner. But salmonella strains were found during routine tests by Kraft Foods, one of about three dozen companies that purchase pistachios from Setton Farms. Kraft notified the FDA on March 24th.

XXIV. FIRM ACTIVITIES

Employee Spotlights

BRENT WAREN

Brent Waren, who has been with us for eight years, is the System Administrator for our Information Technology Department. In this position, Brent handles Administration and management of the firm's data back-up system and servers and other related IT support responsibilities. Brent graduated from Troy University in 1996, receiving a B.S. degree in Management and Business Administration. He was the recipient of the Wallace Foundation Academic Leadership Scholarship and the Simpson Academic Scholarship. Brent is a Microsoft Certified Systems Engineer.

Brent has been married for 12 years to Michele, who is Director of Operations for the Alabama Dental Association. They have four-year-old twins, Grady and Madelyn Grace. Brent enjoys running, hunting, fishing—just about anything that involves being outdoors. He also enjoys gardening, traveling, spending time with his family, and Alabama football. Brent is a very good employee and we are fortunate to have him with us.

AVERY HARRIS

Avery Harris, who has been with the firm for seven years, currently serves as a Staff Assistant for Navan Ward in the Mass Torts Section. Avery's job requires him to make sure that statute of limitations are correct, that documents are received, that clients are called regularly, that medical records are ordered and reviewed. In essence, Avery's position is the life-line between the clients and their attorney. He started at the firm as a mail clerk, and served as a runner before moving up to staff assistant. Avery graduated from Jefferson Davis High School and also attended South University for computer information systems.

Avery, who is currently engaged to Ashley Cochran, enjoys sports, cooking and grilling out, the outdoors, and fishing. He is a member of Pleasant Grove Missionary Baptist Church. Avery is a dedicated employee who does good work. We are blessed to have him with us.

HOLLY NEWTON

Holly Newton, who has been with the firm for four years, is a clerk in the Consumer Fraud Section. In that role, she assists lawyers and legal assistants in the Section with any case they are handling. Currently, Holly is working on cases such as ones involving Countrywide, Ameriquest, and Renosol. She also assists Michelle Fulmer, Section Head Administration in the Fraud Section, handles all of the "mystery mail" we receive, and serves as a back-up for new client calls. Holly has also headed up the March of Dimes fundraiser for the firm for the past two years.

Holly and her husband Mac have a 16-month-old daughter, Aubrey. They enjoy going to the beach, getting together with family and friends, working in the yard, going to concerts, and playing with their daughter. Holly is a dedicated employee who does very good work. We are fortunate to have her with us.

A Special Thanks To Law Enforcement Officers And Their Families

Our firm said "thank you" last month to the dedicated men and women in law enforcement in the Montgomery County area who devote their lives to serve and protect the public. Personnel from all area law enforcement agencies and their families were invited to attend the annual Beasley Allen Fish Fry event on Thursday, April 16th, at the historic Train Shed in downtown Montgomery. Featured speakers included:

- Susan Moss, executive director of Central Alabama CrimeStoppers;
- Monica Jordan, advocate on behalf of Mothers Against Drunk Driving and the State of Alabama Crime Victims Commission; and
- Montgomery County District Attorney Ellen Brooks.

At the event the firm presented a donation of $2,500 each to the Montgomery Public Safety Insurance Fund (PSIF) and the Alabama State Troopers Association. As you may know, PSIF, established by Grant Sullivan and Jerry Willis, two Montgomery business leaders, funds life insurance and accidental death insurance policies for every firefighter, police officer and sheriff's deputy on active duty in Montgomery. A good number of local businesses support this program. Donations to the Alabama State Trooper Association fund life insurance for Troopers, and they also are used to purchase Trooper Teddy Bears. These special bears are used to comfort children involved in traumatic events or children who are hospitalized during the holiday season.

More than 200 law enforcement personnel and their family members attended this year's fish fry. A great meal was provided by Phil Norton and the Farmer's Market Café and everybody seemed to enjoy it. It was a very good event and we are proud to recognize law enforcement personnel who are dedicated to their work.

Beth Warren Trains To Help End Stroke Risks

Beth Warren, who has been a Legal Assistant with our firm for seven years, has been training since February to participate in the Country Music Marathon and Half Marathon in Nashville, Tenn. Just as this Report goes to press, Beth will be tackling the half-marathon walk on April 25th, which will be the first time she has participated in a marathon. This isn't just a personal fitness goal for Beth. She is walking on behalf of the American Stroke Association, to raise money for education and research, and to raise awareness about the dangers and warning signs of stroke. It's a cause that's very close to her heart. In 2006, Beth lost her

mother, Mary Jeanette Hardeman Warren, at age 62, from complications due to a stroke. Mrs. Warren had suffered a large stroke in 2001. Beth had this to say:

I saw the struggles she had after her stroke, as a result of the stroke, throughout the years before her death. Strokes can cause physical disabilities, and people often need a lot of assistance just to deal with everyday activities. I can't imagine what people do who don't have help.

Beth's mother began suffering a series of intense headaches prior to her stroke in 2001. Nobody in the family realized these were actually a series of mini-hemorrhagic strokes, or bleeding in her brain. Mrs. Warren went to the doctor in 2001 to find out what was causing the headaches, and while undergoing tests she suffered a major stroke. As a result, she couldn't walk, and had to learn to feed herself again. She couldn't be left alone, but required constant care and assistance with everything from dressing to bathing and other basic needs. Perhaps most heartbreaking for her family, Mrs. Warren lost the ability to relate to them, recognizing them, but not really understanding who they were.

The American Stroke Association operates the "Train to End Stroke" program that allows people to participate in marathons and half-marathons in different locations on behalf of stroke awareness. Beth committed to raise $3,000 to participate in the Nashville event. She raised the money through a variety of events including a "Jeans Day" at the firm—where employees donated $5 to wear jeans to work—a Bunko tournament, and a Final Four college basketball bracket.

The Stroke Association provided Beth with a handbook and training schedule to help her prepare, with walks gradually increasing in length to increase her endurance. The Association also provided her with official race gear, including a singlet, a special tank top to wear during the race to promote stroke awareness, as well as a hat and bag in which to keep her supplies. Beth observed:

I hope that by raising awareness, more people will learn about strokes, and recognize the signs of a stroke sooner. I feel that if we'd known more about stroke, maybe my mother could have been saved.

We are extremely proud of Beth for her involvement in this worthy cause. For more information about stroke, or to make a donation, visit the American Stroke Association online at www.**stroke association**.org.

Beasley Allen Raises The Awareness Of Mesothelioma

Staff from our firm participated in the American Cancer Society's "Bite the Tail Off Cancer" Crawfish Boil event on Saturday, April 4th, at Riverfront Park. The annual event, sponsored by the ACS Junior Executive Board, seeks to raise funds for the American Cancer Society. The event was attended by more than 800 people, and provided an opportunity for the firm to share information and raise awareness about mesothelioma, a deadly cancer caused only by exposure to asbestos.

This year, the event coincided with National Asbestos Awareness Week, April 1-7, 2009, which was recognized by a U.S. Senate resolution. On the local level, Montgomery Mayor Todd Strange presented a proclamation declaring Asbestos Awareness Week in Montgomery. Our firm has a website, **www.myMeso.org**, and provides a mesothelioma and asbestos awareness outreach program. Since 2008, myMeso.org has provided a forum to connect people affected by mesothelioma through an active blog-based web site and hands-on activities such as the crawfish boil. Outreach efforts were expanded in 2009 to include contributions to help support mesothelioma research through the Mesothelioma Applied Research Foundation.

During the crawfish boil event, staff from our firm distributed information about mesothelioma and the dangers of asbestos, and asked attendees to sign a petition to completely ban asbestos products in the United States. Wendi Lewis from our firm, a writer for myMeso.org, will visit Washington, D.C., in June to learn more about mesothelioma and ask Alabama's Congressional delegates to support a complete asbestos ban.

LawCall Is Still Getting Lots Of Interest

Since January, our firm has been hosting LawCall on WSFA each Sunday night. Each week the show covers different legal topics. Folks from all over the WSFA viewing area have been calling in with their questions. We are proud to sponsor this show. We believe that it provides a community service to the local area. Looking ahead, some of the topics for this month's shows will include, "Hurt on the Road", "Mom and the Law (Family Law)" and the popular "Ask Us Anything" category. Gibson Vance from our firm—along with Kim Wanus—are regulars on the show and are doing a very good job.

Grant Enfinger Had A Great Run At Talladega

Our firm's race car posted a third place finish on national television at the Talladega Superspeedway on April 24th. Our driver, Grant Enfinger, made his first run on a superspeedway which requires "drafting" in packs of cars at more than 180 miles per hour. It's a totally different driving experience. After qualifying eighth out of 41 competitors, Grant ran in the top ten most of the 250 mile race.

Grant is competing in an ARCA car, a stock car, which is essentially a NASCAR Cup vehicle with a slightly less powerful engine. Grant qualified the Beasley Allen car at more than 183 miles per hour and his speeds were

even faster during the race. He will be racing the firm's ARCA car on national television later in the year. We fully expect that the race team will continue posting top finishes.

Automotive racing engineers and trial lawyers have both contributed to passenger vehicle safety improvements. When manufacturers claim that cars and trucks can't be designed and made safer, Greg Allen and others have shown that race teams have improved both performance and safety. Grant will continue to do his part to drive the Beasley Allen car to the front of the pack. Our firm will continue to do its part to encourage the development and production of safer motor vehicles, including passenger cars, pickups, SUVs, and big rig and commercial trucks. We are very proud of Grant and his team. I predict the sports world will be hearing lots more from Grant in the not-too-distant future.

XXV. SPECIAL RECOGNITIONS

Fellowship Of Christian Athletes

As many of our readers know, the Fellowship of Christian Athletes is very active in Alabama. The FCA is doing the Lord's work working with young folks all over Alabama. Recently, I received a report from John Gibbons, State Director of FCA, who says that:

- 3000 students attended the FCA Senior Bowl Rally, January 27th in Mobile.
- Over 500 decisions for Christ were made.
- 310 college athletes from Auburn University, University of Alabama, University of North Alabama, Troy University, Alabama State, Tuskegee University, Jacksonville State University, West Alabama, Sanford, Miles College, Montevallo, Huntingdon and Alabama A&M attended the FCA College Advance in February.
- Over 30,000 students attended FCA Huddles at schools in January and February.
- Over 150 FCA coaches are involved in FCA Coaches Bible studies across the state.

This is real good news. I know firsthand that FCA, by working with Christian athletes and coaches, is able to reach students who otherwise may never even hear the good news about Jesus.

Beasley Allen Law Clerk Participates In National Competition

The American Bar Association recently sponsored the 34th Annual National Appellate Advocacy Competition in Chicago. This competition began with 187 teams from 111 law schools, who competed at six regional sites. This year's competition problem involved a war powers dispute between Congress and the President. Team members were required to write a brief on one side of the issue and to argue before a panel of judges as if they were in front of the United States Supreme Court. The top four teams from each region advanced to the national finals in Chicago. Some of the regional champions included Duke, Chicago-Kent, University of Texas, University of Florida, University of Oklahoma, Temple, Samford University, American University, Loyola-Chicago, Washington University, and Michigan State University.

Katie Langer, a law clerk in our Mass Torts Section, who is a third year law student at Faulkner University's Thomas Goode Jones School of Law, was the senior member of the appellate advocacy team which finished second in the nation out of 187 teams. Katie and her teammates, Ashley Penhale and Clayton Tartt, defeated teams from St. Mary's, Texas Tech and Seton Hall in the national elimination rounds to advance to the national championship on Saturday, April 4, 2009. The national championship round was held at the Chicago courtroom of the Illinois Supreme Court with Illinois Chief Justice Thomas R. Fitzgerald presiding.

South Texas defeated the Jones team in the final round, but the second place finish is the school's best result in just three years of eligibility as an American Bar Association-approved law school. Katie was named the fifth best advocate in the competition. This is a tremendous accomplishment for Katie. We are proud of her and the entire team. She will be an outstanding lawyer.

Alabama DHR Provides Parenting Assistance

This month we will celebrate Mother's Day. While many families will enjoy a day surrounded by loved ones, the holiday is a painful reminder for other families that life doesn't always go according to plans. Some families struggle to create a stable and strong home life, and aren't sure where to turn for help. Adults in the home may face serious problems of poverty or abuse, or they may simply need guidance to learn how to be a good parent. Whether the challenge is great or small, Alabama's Department of Human Resources (DHR) can provide the answer.

In 1993, the Alabama DHR became responsible for administering the state's Family Preservation and Support Services Program. The legislation is designed to promote family strength and stability, enhance parental functioning, and protect children. DHR operates 12 Family Service Centers throughout the state to provide community-based activities that increase the ability of families to successfully nurture their children.

The mission of each Family Service Center is for children to be protected from abuse and neglect. Also, whenever possible, families should be preserved and strengthened in order to nurture and raise children in safe, healthy and stable environments. Centers are com-

munity-based, comprehensive, accessible to the general population, and provide goal-directed services that are individualized, prevention-oriented and needs-based.

Centers provide services which include needs assessment, goal-setting, case management, and assistance for basic needs like health, safety and stability. They help families find food, clothing and shelter when needed or in a crisis. Supportive services such as childcare, job skills training, adult education, and transportation are provided. Parenting training, counseling services, and teaching budgeting are also furnished. The centers coordinate with individual county offices of the Department of Human Resources.

All Family Service Centers are funded through the Alabama DHR with federal funds from the Promoting Safe and Stable Families portion of the Adoption and Safe Families Act. Centers in the state are located in Dothan, Birmingham, Montgomery, Phenix City, Valley, Bay Minette, Anniston, Hayneville, Talladega, Greensboro, Sylacauga, and Tuscaloosa. For a complete list of Family Service Center locations and contact information, visit the Alabama Department of Human Resources online at www.dhr.state.al.us and click on the Family Services and Family Service Centers links, or call 334-242-1310.

Favorite Bible Verses

Recently, I met Victor Wyatt, a student at Huntingdon College, when I spoke to a class at the school. Victor, who is already an ordained minister, sent in this verse:

A good name is to be more desired than great wealth, favor is better than silver and gold.

Proverbs 22:1 NASB

My son Jere Beasley, Jr. furnished this timely verse, which is helpful in trying times such as these:

For God has not given us the spirit of fear; but one of power, and of love, and of a sound mind.

2 Timothy 1:7

The verse below was sent in by my longtime friend Bill Fuller:

But know that the Lord has set apart the faithful for himself; the Lord hears when I call to him.

Psalm 4:3

The following came from our Managing Partner, Tom Methvin, and is for all of us, especially for lawyers:

Open your mouth, judge righteously, And plead the cause of the poor and needy.

Proverbs 31:9

And finally, the following is a verse that my wife Sara selected which is most appropriate for the America we live in:

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

2 Chronicles 7:11-22

XXVI. SOME CLOSING OBSERVATIONS

I asked my good friend Dr. Lester Spencer, who serves as Senior Pastor at St. James United Methodist Church, to write this month for the Report. Lester gladly agreed to do so which I appreciate very much. As we all know, while pride can be a big time problem for most of us, humility is a virtue that oftentimes is way down our priority list in life. Lester did a very good job in teaching us how to have a humble heart.

Pursuing A Humble Heart

We have all heard the joke about the "humble guy" who wrote the books, Humility and How I Attained It, and its sequel, Humble and Proud of It.

Well, I don't know about you, but I feel like the least likely candidate to write an article on humility. Honestly, sometimes when I do make an attempt at being humble (which probably isn't often enough), I am instantly quite proud of my attempt at humility. Thus, my humility immediately evaporates, and I am back to square one again in my quest to be humble. It is a never ending circle…and a constant challenge to humble myself before the Lord and with others. My pride raises its ugly head way too often and is my primary enemy in this pursuit of a humble heart.

Perhaps, I should attempt a definition of humility to make sure we are talking about the same thing. When we look at Jesus and his example we see a clear picture of humility: Humility is not weakness or a putting down of one's self. It is rather the quiet strength that flows from a deep assurance that God is the only one ultimately in control. It is being courageous in the midst of difficulty, not because you are sure of yourself, but because you are sure of God's faithfulness and His heart concerning you!

Deep down, I really want to be like Jesus! I want to be one of those he speaks about in Matthew 5:5, "Blessed are the humble, for they shall inherit the earth." But most of the time, my humility is not where or what it needs to be, and I think most of us would admit that the Holy Spirit is still working on us in regards to our humility. God's "sanctifying grace"

is still at work in us, moving us onward "toward perfection" (as John Wesley put it) in Christ.

Having now confessed, it is vital that we understand how seriously the Lord regards humble hearts and how His disapproval is stirred by our proud spirits. The Bible is quite clear from Genesis to Revelation, that God loves and favors the humble. And, on the flip side of that, the Word tells us that God opposes the proud and haughty.

> *"God opposes the proud but favors the humble."*
>
> *James 4:6 (Proverbs 3:34)*
>
> *"The sacrifice you desire is a broken spirit. You will not reject a broken (humble) spirit and repentant heart, O God." Psalm 51:17*

We could list scripture after scripture on the subjects of humility and pride. I believe that most clear-thinking people, regardless of their beliefs or faith, would acknowledge that humility is a good and noble virtue that should be pursued. But—for those of us who call ourselves Christ-followers, not pursuing humility is really not an option—according to Christ and the scriptures.

So, how do we distinguish between Proud Spirits and Humble Hearts? Author Sylvia Gunter helps us with this in her book, Living In His Presence.

See the table on this page.

Wow! This list is very revealing, isn't it?

Now that you have read these distinguishing characteristics, which one would you say best describes you?

We might ask the Lord to reveal which traits of a proud spirit He finds in our lives. Use the left side

Characteristics of a Proud Spirit/ Humble Heart:

PROUD SPIRIT	HUMBLE HEART
Focus on the failure of others	Overwhelmed with a sense of their own spiritual need
Self-righteous, critical, fault-finding spirit; look at their own life through a telescope but others through a microscope	Compassionate, forgiving, look for the best in others
Look down on others	Esteem all others better than self
Independent/self-sufficient spirit	Dependent spirit, recognize their need for others
Maintain control, must have their own way	Surrender control
Have to prove that they are right	Willing to yield the right to be right!
Demanding spirit	Giving spirit
Self-protective of time, rights, reputation	Self-denying
Desire to be served	Motivated to serve others
Desire to be a success	Desire to be faithful to make others a success
Desire for self-advancement	Desire to promote others
Wounded when others are promoted and they are overlooked	Rejoice when others are lifted up
Feel confident in how much they know	Humbled by how much they have to learn
Self-conscious	Not concerned with self at all
Keep people at arm's length	Risk getting close to others, willing to take the risks of loving intimately
Quick to blame others	Accept personal responsibility, can see where they are wrong
Defensive when criticized	Receive criticism with a humble, open heart
Concerned about what others think	All that matters is what God knows
Work to maintain image and protect reputation	Die to own reputation
Find it difficult to share their spiritual needs with others	Willing to be open and transparent with others
Have a hard time saying, "I was wrong; will you please forgive me?"	Are quick to admit failure and seek forgiveness
Deal in generalities when confessing sins	Deal in specifics
Concerned about the consequences of their sins	Grieved over the cause/root of their sins
Wait for the other person to come and ask for forgiveness when there is misunderstanding or conflict	Take the initiative to be reconciled, see if they can get to the cross first!
Compare themselves with others and feel deserving of honor	Compare themselves to the holiness of God and feel desperate need for mercy
Blind to their true heart condition	Walk in the light
Don't think they have any need to repent	Continual heart attitude of repentance
Don't think they need revival (think everyone else does!)	Continually sense their need for a fresh encounter with the filling of the Holy Spirit!

for confession and repentance. And use the right side for intercession, prayer and characteristics to pursue!

I want to pursue a humble heart so that I may be more like Christ, and so that I may enjoy the favor of the Lord in my relationship with Him, my marriage, my family, my job, and all other aspects of my life! I am also very much aware that if I do not pursue a humble heart, the scriptures and my personal experiences remind me that the Lord himself will "humble the proud."

May the Lord transform us and bless us as we pursue being Christ-followers with humble hearts!

Amen!

Lester Spencer
Senior Pastor
St. James UMC

XVII. SOME PARTING WORDS

I must confess that I have always had a tendency to try to do things my way and felt that I could handle anything that came up. Unfortunately, I didn't always rely on God to help me or be my provider. It took me more than a few years to fully realize that the Lord is always present and with those who truly believe and trust in Him. Although unseen, God's presence allows us to depend on Him for the strength and courage to meet all of the challenges in our lives. The Holy Spirit is also available to us, regardless of the circumstances, whenever we ask for guidance and direction. That is a truth that many of us tend to ignore until we face a real difficult situation that overwhelms us.

It's interesting that I need just as much assistance in dealing in working through the good times as I do when the bad times arise. Pride seems to take over when times are good and it can also pose a problem when times go bad. At least, it does until I come to realize that most all bad situations are too much for me to handle alone. Therefore, I am trying hard to simply depend on the assurance that God through His Son, the Lord Jesus, and the Holy Spirit are with me constantly and readily available to me. Hopefully and prayerfully I am making progress in this area in my life.

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Jere Locke Beasley, founding shareholder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America.

Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs 44 lawyers and more than 200 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 30 years.

Beasley Allen
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Attorneys at law