



THE
JERE BEASLEY REPORT

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Beasley Allen

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I. CAPITOL OBSERVATIONS

ALABAMA SETTLES MEDICAID FRAUD CASES

The State of Alabama settled another round of Medicaid fraud drug cases last month for a total of \$89 million. This puts the total amount for settlements to date at \$123,750,000. This latest settlement is a major development in the ongoing litigation against a total of 72 pharmaceutical companies which defrauded the state's Medicaid system by overcharging for drugs. Our firm, along with the Hand Arndell firm, is representing the State in this litigation. Thus far there have also been jury verdicts of more than \$352.4 million against four pharmaceutical manufacturer Defendants. These cases are now on appeal. On May 26th, the Supreme Court denied a motion by Defendants to stay all trials until the pending appeals are heard.

This latest round of settlements settles Alabama's Medicaid fraud cases against six Defendants comprised of groups of drug manufacturers. These include Abbott Laboratories, Inc.; Aventis Pharmaceutical L.P., Aventis Behring L.L.C., ZLB Behring L.L.C. and Sanofi-Synthelabo, Inc.; TEVA Pharmaceuticals U.S.A., Inc., IVAX Corporation, IVAX Pharmaceuticals Inc., and Barr Laboratories, Inc.; Shering-Plough/Warrick Companies; Forest Laboratories Inc. and Forest Pharmaceuticals Inc.; and Baxter International Inc. and Baxter Healthcare Corporation.

Attorney General Troy King authorized this litigation and suit was filed on behalf of the State of Alabama in 2005 in Montgomery County Circuit Court, alleging massive reporting of false prices to the Medicaid Agency during the period 1991-2005. The pharmaceutical companies misrepresented, misreported and inflated prices for Medicaid drugs. The Attorney General had this to say about the recent settlement:

In January of 2005, I announced that I had taken legal action against these drug companies simply to right a wrong, and to recover public funds that had been illegally taken from our state. My intent was then—and is now—to make Alabama's taxpayers whole. That is what I have done, and what I will continue to do.

There are still lawsuits pending against 45 remaining Defendants in Alabama. The next trial is scheduled against Watson Pharmaceuticals, Inc., on June 22nd. Another trial involving Mylan Pharmaceuticals, Inc. is set for trial on September 21st.

Twenty-two states besides Alabama currently have pending AWP suits and our firm has been hired to represent seven of these states in their pending AWP Litigation. The real shame of these cases is that by overcharging the Medicaid system, the pharmaceutical companies are hurting those that are the most vulnerable, the weakest. This type of fraud affects the elderly, the poor, children—folks who rely on help from the Medicaid system in order to have access to health care and the medicine they need. These drug companies are lining their own pockets on the backs of these folks. Corporate fraud has become a national problem and it's largely the result of unregulated greed.

DRUG MANUFACTURER SETTLES MEDICAID FRAUD CASE

Sanofi-Aventis has agreed to pay \$95.5 Million in a settlement with the federal government. It was alleged that the drug manufacturer cheated Medicaid on the cost of nasal sprays. The Justice Department made the announcement on May 27th, saying that Aventis Pharmaceutical Inc., a subsidiary of the parent company, settled the fraud claims against it. Between 1995 and 2000 Aventis and its corporate predecessors misrepresented the best prices for Azmacort, Nasacort and Nasacort AQ, all nasal sprays. Under the law, Aventis was required to tell Medicaid the

lowest price that it charged companies for those products, and offer State Medicaid programs rebates based on those prices.

This is just another example of how truly bad the pharmaceutical industry is. It also points out how unregulated greed has cost the American taxpayers hundreds of millions of dollars resulting from outright fraud. It's sort of interesting that the U.S. Chamber of Commerce apparently believes its ok to cheat the government.

Source: Associated Press

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WYETH IS ACCUSED OF OVERCHARGING FOR PROTONIX

Drug maker Wyeth has been accused of cheating state and federal Medicaid programs out of millions of dollars by overcharging them for Protonix, the company's widely-used acid reflux drug. The Justice Department and 15 states have joined in two whistleblower lawsuits filed in federal court in Massachusetts against the company. As you may recall, New York-based drug maker Pfizer Inc. is in the process of acquiring Wyeth for more than \$60 billion in a deal expected to close later this year. Tony West, assistant attorney general for the Justice Department's Civil Division, had this to say about the lawsuits:

By offering massive discounts to hospitals, but then hiding that information from the Medicaid program, we believe Wyeth caused Medicaid programs throughout the country to pay much more for these drugs than they should have.

The federal government, which has aggressively pursued other drug makers in similar cases, is seeking penalties against the company of up to three times the amount lost by Medicaid. It's alleged in the suit that between 2000 and 2006, Wyeth offered very large discounts to thousands of hospitals for two versions of Protonix, a drug that suppresses stomach acid. The government alleges that the maneuver helped the company avoid paying hundreds of millions of dollars in rebates to Medicaid, a health care program for the poor that is funded by state and federal money.

Wyeth bundled the intravenous version of Protonix with the oral version in sales packages to hospitals, so the company could make more money in the lucrative outpatient market. For the past six years, the federal government and a number of states have held the nation's largest drug companies accountable for devising pricing schemes that cheated gov-

ernment health care programs out of billions of dollars.

The federal government has recovered more than \$5 billion since 2003. Last year, Merck agreed to pay \$650 million to settle allegations it overcharged Medicaid for the cholesterol medicine Zocor, the now withdrawn pain-reliever Vioxx, and other prescription drugs. The case against Merck, like the one against Wyeth, arose from lawsuits filed by whistleblowers under the False Claims Act and was then pursued by federal prosecutors. In 2007, Bristol-Myers agreed to pay \$515 million to settle federal and state allegations into its marketing and pricing practices. In that case, Bristol-Myers allegedly denied federal health care programs the same lower prices for its anti-depression drug Serzone that it was charging a larger commercial customer.

As part of the same suit, Bristol-Myers and its former subsidiary, Apothecon, were accused of inflating prices on an assortment of oncology and generic drugs, knowing federal health care programs established reimbursement rates based on those prices. The states joining the current lawsuit against Wyeth are California, Delaware, Florida, Illinois, Indiana, Louisiana, Massachusetts, New York, Michigan, Nevada, New Hampshire, Tennessee, Texas, Virginia and Wisconsin. The District of Columbia also is part of the litigation.

Source: *NJ.com*

ASTRAZENECA E-MAILS REVEAL THAT SEROQUEL RISKS WERE HIDDEN

It's become common knowledge that the FDA does a very poor job of regulating the politically-powerful drug industry. As a result, the drug manufacturers have been able to allow marketing executives to override the views of doctors and scientists on health and safety issues. An example of how this all works involves AstraZeneca PLC. For years marketing executives at AstraZeneca blocked efforts by company medical doctors and scientists to raise concerns that the antipsychotic drug Seroquel caused health

problems. The marketing group said that if the concern became public it would harm sales. Internal documents were released on May 20th in lawsuits that has been filed against the company by patients alleging they were harmed by the blockbuster drug for schizophrenia and bipolar disorder. The internal e-mails and other documents reveal efforts by the company to keep public information about Seroquel positive even though company's scientists and its marketing executives were at odds on safety issues.

Seroquel was AstraZeneca's number two drug in sales last year, with revenue of \$4.5 billion. Currently, AstraZeneca faces roughly 15,000 lawsuits over Seroquel, about 60% of them in state courts. The first state trial is set to begin in Delaware on June 29th. Thus far there have been no trials in federal court.

Source: *Yahoo News*

GEORGIA SETTLES WITH DRUG COMPANY FOR \$6 MILLION

Georgia has settled its claim against Eli Lilly and Co. over the pharmaceutical giant's off-label promotion of Zyprexa, the anti-psychotic drug. The state will get more than \$6 million from the settlement. Interestingly, a dozen other states have elected not to settle, but instead, those states have filed their own individual lawsuits that will seek damages. In part those states ask for reimbursement for Medicaid payments for unwarranted Zyprexa prescriptions. While Lilly has denied wrongdoing in these civil cases, it's evident that Lilly misled patients and their doctors about Zyprexa's potential side effects, which are diabetes, hyperglycemia and excessive weight gain.

Georgia was among 30 states that decided not to sue and accepted the settlement. State Attorney General Thurbert Baker believes that was best for state taxpayers. His office looked at the anticipated Medicaid losses and calculated the settlement amount would be about double the amount of Georgia's claims had suit been filed.

Actually, the total settlement for Georgia is more than \$15 million, with \$9 million going to reimburse the federal share of state Medicaid claims.

As we have reported in prior issues, Zyprexa has Food and Drug Administration approval for the treatment of schizophrenia and bipolar disorder. But Lilly's marketing campaign targeted patients with dementia, even though the company lacked FDA approval to do so. The drug was Lilly's best seller for years, bringing in billions of dollars. In January, Lilly pleaded guilty in criminal court to illegally marketing Zyprexa. It agreed to pay \$1.42 billion to resolve lawsuits and end the criminal investigation. This amount included \$800 million to settle civil cases, with \$438 million going to the federal government and \$362 million to the states. As a matter of interest, during a trial Alaska settled its individual Zyprexa lawsuit for \$15 million.

Source: *Atlanta-Journal Constitution*

INTERESTING POLL RESULTS IN ALABAMA

Sometimes it's interesting and revealing to compare how people feel about issues facing government and how our elected officials react to those very same issues. The Public Affairs Research Council of Alabama (PARCA) did a survey of Alabama citizens that assessed the public's response to the budget problems facing state government. The survey was completed earlier in the year and there were very few surprises in the attitudes of citizen across the state.

The survey revealed that the most important issues for the Alabama Legislature to address this year were economic in nature. Jobs and the state's economy topped the list, with over a third of those surveyed responding in that area. One-fifth identified education as a top priority. Nearly 10% considered the budget shortfall or proration most important. None of this should come as a big surprise.

In the survey, special attention was put on how funds should be spent in state budgets. The respondents identi-

fied four major areas of government investment of taxpayer dollars. Those were:

- Education was said to be the most important area of government service.
- Healthcare was second in importance.
- Public Safety was next as a priority for spending.
- Highways—both new construction and maintenance of existing roadways—came in last on the list.

Over the years there has been much debate over the earmarking of revenues in state government for specific uses. Interestingly, two-thirds of those surveyed in this poll identified the earmarking of revenues as a good thing. The areas where the respondents felt funds should be earmarked were education, healthcare, highways and public safety in that order.

It was very clear from the survey that Alabama citizens don't like proration and don't favor this approach as a means of keeping Alabama's budgets in balance. A majority of the citizens prefer to balance the budget in some other manner. Less than 40% indicated that across the board cuts was a good way to balance the budget. This is in keeping with the priorities for spending that were identified from the survey. Another interesting finding was that more people expressed a willingness to pay additional taxes to support public education. That was a mild surprise, but when you consider what's needed for the future good of our state, it really shouldn't be. In any event, it might be interesting to compare the results of this survey with the performance of state government in the months that followed the taking of the poll.

Source: *The Advisor*

FEDERAL JUDGE COMMENTS ON THE ONGOING THREE STATES WATER WAR

A federal judge is complaining that a protracted battle over the water

flowing from a reservoir near Atlanta has been taking place in what he refers to as "never-never land." U.S. District Judge Paul Manguson, who now has the case, is attempting to unravel 19 years of litigation between Florida, Georgia and Alabama over water from Lake Lanier, which is Atlanta's water supply, and which flows into the other two states. Alabama and Florida want to increase the amount of water released from Lake Lanier to benefit downstream power plants, farms and other businesses in their states.

Judge Manguson, who is based in Minnesota, is now in charge of the case. He has not indicated when he will rule on the legality of water supply allocations by the U.S. Army Corps of Engineers. But he did criticize the Corps for its part in the delays, saying that it has been sitting on this case with little to show for its efforts. The Corps is saying now that an environmental impact study will take another three years. A lawyer for the Justice Department told the judge there had been no action in the case for almost a dozen years because the states had been trying to work out an agreement on their own. I don't believe the judge bought that argument.

For those of our readers who haven't kept up with this litigation, the dispute centers on how much water the Army Corps of Engineers holds back in federal reservoirs near the head of the Chattahoochee and Flint river basins in north Georgia. The rivers flow south into Alabama and then into Florida, where they join to become the Apalachicola River. The Atlanta region relies on the lakes for drinking water, while Florida and Alabama depend on healthy flows downstream for commercial fisheries, oyster beds, farms, industrial users and municipalities. Obviously, each state has a valid argument for their respective positions. The Corps also is required to release adequate flows to ensure habitats for species protected by the Endangered Species Act and that adds another factor to the puzzle.

Matt Lemke, a lawyer with Birming-

ham-based Bradley Arant, who is representing Alabama, says the Corps of Engineers failed to comply with the Water Supply Act. Many of the arguments presented by the states centered on actions at the time the dam was being planned way back in 1946. Florida and Alabama argued the dam was built for hydroelectric power, flood control and navigation. But Georgia argued the reservoir was built as a water supply for the Atlanta area. Regardless of which state is correct, this is an issue that should have been resolved at the outset. In fact, this case should have been either settled or tried years ago. Hopefully, a workable agreement will come about very soon!

Source: *Associated Press*

A LOOK AHEAD TO 2010 IN ALABAMA POLITICS

I'm not sure all Alabamians realize what would have happened to their state government had federal stimulus money not been made available to Alabama by the Obama Administration. I understand from very good sources that state services and public education would have suffered beyond comprehension in the absence of those funds. Fortunately, the Governor and the Alabama Legislature were able to put off the day of fiscal reckoning in our state as a result of the stimulus money. But that day of reckoning will come in the very near future. From all accounts, it appears that the next Governor of Alabama and the next Legislature will inherit a fiscal nightmare. That will result from a combination of a bad national economy and past failures in Alabama to put our own fiscal house in order. Frankly, based on the long historical perspective, nothing will happen in any legislative session in 2010 to solve any fiscal problems for our state.

Even with these dismal prospects on the horizon, there are lots of folks who want to follow Bob Riley as governor. I hoped that the Riley legacy would have included a complete reform of our

state tax structure, but that didn't happen. Such a monumental undertaking certainly won't occur during his last year in office, since it will be an election year. But tax reform and putting our fiscal house in order will be a story for another day.

So for now, let's take a look at the folks who still are considered probable, or at least likely, candidates for Governor of Alabama. On the Democratic side, there are several folks who want to be our next governor. They are Sue Bell Cobb, Artur Davis, and Ron Sparks. Those seeking the top on the GOP side job include Robert Bentley, Charles Bishop, Bradley Byrne, Kay Ivey, Tim James, Bill Johnson, and Roy Moore. According to my information, Judge Moore is still leading the polls among likely Republican voters and I hear that isn't making the GOP bosses very happy.

Already a number of men who were thought to be sure candidates have taken their names out of consideration. Those include Roger Bedford, Jo Bonner, Jack Hawkins, Jim Folsom, and Seth Hammett. Roger Bedford, who would have made a very good governor in my opinion, elected to stay in the state Senate. Roger says he owes it to folks in his District to remain in the state Senate. The Franklin County native has been a most effective member of that body.

Interestingly, some political observers still believe Dr. David Bronner, who I believe is an ideal person to serve as governor and deal with the very tough issues of tax reform and fiscal responsibility, could be drafted by one of the parties. His entry would make things pick up considerably and would certainly make for a lively race. Even without Dr. Bronner, the next year in Alabama should be very interesting politically.

II. RECENT FILINGS AND SETTLEMENTS BY THE FIRM

GREG ALLEN SETTLES CASE WITH FORD MOTOR COMPANY

We settled a case with Ford Motor Company last month on behalf of Brad and Cindy Freeman of Yulee, Florida. Brad and Cindy, along with their niece, were returning home from visiting relatives and were traveling through St. Clair County, Alabama, on I-20. Brad was driving a 2001 Lincoln LS vehicle which was a new design sold by Ford. There was a comparable vehicle sold by Jaguar. As they were driving along the Interstate highway, there was a loud pop and the car pulled hard to the left. Brad was trying to correct the path of the vehicle when it went off the road and hit a concrete ditch.

When the car struck the ditch, Brad's seat bottomed out and he suffered a burst fracture in his lower spine. The car was traveling about 70 mph when Brad and others heard the sound. Both Brad and Cindy thought there was a tire explosion. But, in actuality the left front ball joint of the car broke. The reason the vehicle went off the road was because the left front tire and wheel came loose when the ball joint fractured. After the ball joint fractured, it severed the steering control arm so that Brad had no effective steering. It also severed the brake line which eliminated the use of front brakes on the vehicle. The ball joint broke because it was defective. There was a recall on this vehicle because the ball joint was not properly tightened at the factory. In addition there were design defects in that the ball joint, so that even if it was properly tightened, the joint still was not sufficiently strong for the application.

Ford contends that on this vehicle the recall had been performed and the ball joint was properly tightened. But

we would have proved at trial that simply tightening the ball joint nut wouldn't solve the problem. Interestingly, Ford increased the size and strength of the ball joint stud for later model vehicles. There had been a great number of complaints by people with the same vehicle having similar problems that were not in the recall population. This means there was more than just a problem with the tightening of the ball joint.

We asked Ford to produce all the documents involving the analysis of the problem including the documents which support the recall. For some reason Ford overlooked the critical documents in producing their recall documents. By filing a subpoena in Michigan, we were successful in getting documents from Lemforder, the manufacturer of the ball joint. The two critical documents from Lemforder revealed the problems resulting in the defective ball joint and also that the recall was going to be inadequate.

As we investigated the case, we determined that this car had been subject to a recall for having loose ball joints. Ford recalled 88,000 cars. A further investigation, however, revealed that Brad's car had actually been recalled and the ball joints tightened down in accordance with the recall. We were able to find the engineer, who is no longer with Ford and who actually designed the system for Ford. He admitted that the product was defective, but said it was a manufacturing defect. We later learned that Ford had actually increased the size of the ball joint. There have been many complaints of these ball joints breaking, even after the recall. Ford took the position that the wheel broke off when it hit the concrete ditch, however, the forensic investigation showed otherwise.

Brad was paralyzed for a time and continues to have significant difficulty. Fortunately, he is now walking, but will have to use dual canes. The life care plan and lost earning capacity for Brad Freeman was \$2,022,739 in present day value. His medical expenses to date are \$241,309.32. The case was settled after a

mediation session before Mike Maddox. The case was scheduled to go to trial on October 19th. Greg Allen from our firm handled this case, along with Dell Cross from Tuscaloosa, and Erby J. Fischer from Birmingham. They did an outstanding job for the clients in this case.

WRONGFUL DEATH LAWSUIT FILED AGAINST ETHEX CORPORATION AND KV PHARMACEUTICAL COMPANY

Our firm has filed a wrongful death lawsuit in an Alabama state court, against Ethex Corporation and KV Pharmaceutical Company, manufacturers of Isosorbide Mononitrate. As you may know, Isosorbide Mononitrate is used in the prevention and treatment of angina, or chest pain, caused by coronary artery disease. Isosorbide Mononitrate is one of many products subject to a recall by Ethex and KV Pharmaceutical on January 28, 2009. The recall was the result of manufacturing defects which caused the drugs to be double the appropriate strength, which made these drugs defective and unreasonably dangerous. But sadly, this recall comes too little and too late for Robert Jones, a resident of Barbour County, who died as a result of taking the defective Isosorbide Mononitrate tablets.

We have learned that the Food and Drug Administration has repeatedly warned Ethex Corporation and KV Pharmaceutical Company about violations of good manufacturing practices. On March 9, 2000, the FDA issued a Warning Letter to KV Pharmaceutical Company identifying numerous current good manufacturing practice violations and providing that a failure to correct the violations could lead to regulatory action, including seizure and/or injunction. FDA inspections continued to reveal violations of good manufacturing practices in inspections in April 2003, January 2004, January 2005, March 2006, April 2007, March 2008, August 2008, and February 2009.

Ethex Corporation and KV Pharmaceutical Company officials were notified of the results of these inspections

and were given opportunities to correct the ongoing violations, but failed to do so. Finally, on March 2, 2009, the United States District Court, Eastern District of Missouri, issued a Consent Decree ordering Ethex Corporation and KV Pharmaceutical Company to destroy:

- all drugs in their possession, custody, and/or control that are the subject of recalls announced by KV Pharmaceutical Company from May 2008 through February 3, 2009; and
- all other drugs in their possession, custody, and/or control, including all in-process drugs and drug components, as well as finished drugs.

The Consent Decree was the result of a history of continuing violations of current good manufacturing practices discovered through the Food and Drug Administration inspections of Ethex Corporation and KV Pharmaceutical Company's manufacturing facilities. Roger Smith, Andy Birchfield and I will try this case for the Jones family.

TWO CASES FILED AGAINST MAKER OF FLEET PHOSPHA-SODA

Our firm has recently filed two state-court lawsuits against the makers of Fleet Phospha-soda. The complaints in these two cases were filed in Montgomery County, Alabama, and St. Johns County, Florida, respectively. The Plaintiffs in these lawsuits used Fleet Phospha-soda prior to undergoing colonoscopies. Fleet Phospha-soda is made by C.B. Fleet Company, Inc., which is headquartered in Virginia.

Our clients were healthy women in their fifties who used the product as directed by their doctors. Shortly after ingesting Fleet Phospha-soda, the women went into renal failure and were diagnosed with a condition known as acute phosphate nephropathy or nephrocalcinosis. Fleet Phospha-soda was available over-the-counter, but has since been removed from the shelves. Currently, it may only be obtained by prescription.

C.B. Fleet knew for several years that the product was causing damage to the kidneys of the users, but continued to encourage physicians to use the product as a bowel cleansing agent. C.B. Fleet failed to adequately warn of the dangers associated with the product. Ben Locklar, a lawyer in our Mass Tort Section, is the lead lawyer in these cases. Andy Birchfield and I will work with him and help try the cases.

LAWSUIT FILED AGAINST MAZDA MOTOR CORPORATION AND FORD MOTOR CORPORATION

On March 4, 2009, 17-year-old Tara Jennings was driving her 2003 Mazda Tribute home from a friend's house. Tara was only traveling around 35 mph when, for some unknown reason, she overcorrected her car to the left. Her vehicle rolled over approximately 1½ times. Despite properly wearing her seat belt, Tara was partially ejected. Impact marks from her head were found on the outside roof of the car. This tragic incident caused her to receive traumatic brain injuries and a partially severed spinal cord that left portions of her body paralyzed.

Mazda is owned by Ford Motor Company and the two companies worked together to put the 2003 Mazda Tribute on the road. By 2003, Ford had incorporated various safety features in its own vehicles and in its subsidiary, Volvo, which if designed into the Mazda Tribute, would have prevented Tara from being partially ejected. These features include improved seat-belt pretensioners and side curtain airbags. Further, Ford and Mazda had incorporated electronic stability control on many of its vehicles by 2003. This feature would have prevented Tara from losing control of the Mazda vehicle in the first place. Our firm has recently filed suit in the Circuit Court of Marshall County, Alabama against Mazda and Ford for product defects that caused Tara's injuries. Chris Glover will be the lead lawyer for our firm in this case. Greg Allen and I will help Chris try this case.

More Lawsuits Filed For Property Owners Affected By Underground Storage Tank Leaks

Our firm continues to monitor the damages caused to residential and commercial properties as a result of underground storage tank leaks. Recently, we filed suit in the Circuit Court of Walker County, Alabama, for damages to properties owned by county residents resulting from leaking underground storage tanks located near their properties. The Defendants in that case are Moore Petroleum, Inc., RaceTrac Petroleum, Inc., and the Alabama Underground and Aboveground Storage Tank Trust Fund. This lawsuit alleges the underground storage tanks at the Belk's Food Mart and a Raceway service station incurred leaks, and released motor fuel which contaminated the Plaintiffs' nearby properties. Moore Petroleum and RaceTrac Petroleum owned and maintained the underground storage tanks involved in this litigation.

After testing was conducted by environmental contractors, it was determined that motor fuel had leaked from the storage tanks at issue, and contaminated the Plaintiffs' properties. Samples from the two service stations, as well as from the Plaintiffs' properties, reveal the presence of hazardous chemicals such as Benzene, Ethyl Benzene, Xylene, and MTBE, in quantities that exceed the allowable Maximum Contaminant Level (MCL).

We also have filed a second suit, this one in the Circuit Court of Barbour County, Alabama, for damages to the property of county residents. The property was contaminated by a leaking underground storage tank located at a Beeline service station in Eufaula, Alabama. The Defendants in this lawsuit are the Alabama Underground and Above Ground Storage Tank Trust Fund, and the current and former owners and managers of the tanks, Prem Properties, LLC, and Ben E Beard Oil Co.

The Defendants in these cases have a duty to make sure that petroleum products stored in the underground storage tanks were secure. They also had a duty

to adequately install, monitor, inspect, test, evaluate, assess, repair and maintain the UST, which they failed to do. The Defendants are responsible in damages under the theories of negligence, wantonness, trespass, nuisance and strict liability. Rhon Jones, David Byrne and Parker Miller will handle these two cases for our clients.

According to the U.S. Environmental Protection Agency, there are about 625,000 underground storage tanks nationwide that store petroleum or other hazardous substances. According to EPA regulations, it is the responsibility of an owner or operator of an underground storage tank system to take immediate action to stop the release of petroleum or other hazardous substances from the UST and to ensure there is no threat to the safety of people located in the area of the release. Studies indicate that one gallon of petroleum can contaminate one million gallons of water, and that one pin-prick size hole in a UST can leak 400 gallons of fuel per year. Gasoline, leaking from service stations, is one of the most common sources of ground water pollution. For more information, visit www.leaking-storage-tank.com or you can contact Parker Miller at 800-898-2034 or by email at Parker.Miller@beasleyallen.com.

III. ENVIRONMENTAL CONCERNS

CLASS ACTION FILED IN FLORIDA ARISING OUT OF THE STANFORD PONZI SCHEME

Our firm will be filing an extremely important class action lawsuit very soon in a federal court in Miami against Stanford Group Co., Stanford Financial & R. Allen Stanford and other related Defendants. This case arises out of the \$8 billion Ponzi scheme perpetrated on our clients by these Defendants and perhaps others. Suit will be filed and class action status sought on behalf of all citizens of Venezuela who did busi-

ness with the Defendants and who have incurred losses that total approximately \$4 billion in the aggregate. More will be written on this case next month. If you need more information on this suit or this type litigation, contact Jay Aughtman at 800-898-2034 or by email at Jay.Aughtman@beasleyallen.com.

IV. LEGISLATIVE HAPPENINGS

A BRIEF REVIEW OF THE REGULAR SESSION

Lots of folks are already evaluating the performance of the House and Senate in the recently-completed regular session of the Alabama Legislature. Interestingly, the session ended on a positive note. Compared to recent sessions, this one should be considered a success. Thanks to the federal stimulus money that was made available by the Obama Administration, both the general fund and education budgets were passed. That was real good news considering the fiscal problems facing the state.

TWO BILLS THAT FAILED TO MAKE IT THROUGH

There were two pieces of legislation that failed to pass during the session that warrant special mention:

ALABAMA WON'T GET A NEW CONSTITUTION

Alabama won't be getting a new constitution and neither will the people of Alabama have an opportunity to vote on this important issue. The Alabama House again killed efforts to rewrite Alabama's 1901 Constitution. The House voted 43-36 against the resolution by House Speaker Pro Tem Demetrius Newton to hold a statewide referendum on the issue next year. As we have reported previously, the Jeffer-

son County lawmaker's resolution would have called a convention to draft a new constitution to replace the often amended 108-year-old document. I believe a majority of Alabama citizens favor a new constitution, but again powerful special interests have a different view and they won again.

PACT BILL DIDN'T MAKE IT

State lawmakers refused to pass any of the bills that would have provided financial help to the state's Prepaid Affordable College Tuition Program. But the lawmakers did pass and send to Governor Riley for his review Senate Joint Resolution 150, which calls on the Retirement System of Alabama "to conduct a thorough actuarial study" of the PACT program, with RSA chief executive David Bronner directing the study. The resolution calls on RSA to report its findings and recommendations to Riley and legislators "as soon as possible."

Senator Roger Bedford, D-Russellville, said he was saddened and disappointed that lawmakers didn't pass a financial fix for PACT. He believes it is best, however, to allow Dr. Bronner to advise the Legislature on how to fix the problem. PACT has about 48,000 participants. Governor Riley has indicated a special session might be called to deal with this problem.

DEAN OF ALABAMA SENATE TO RETIRE AFTER EIGHT TERMS

The Alabama Legislature will lose one of its truly outstanding members—Democrat Bobby Denton of Muscle Shoals, the state's longest continually-serving state senator—at the end of his term. He will not seek re-election next year. Senator Denton will end a career that has earned him the title "Dean of the Senate." The northwest Alabama

native has served eight terms in the Senate and that's a very long time by any standard.

Senator Denton, who has had a distinguished career, was elected to his first term in the Senate in 1978. According to the Senator, the proudest accomplishment of his career was getting the four major towns in his district—Florence, Sheffield, Tuscumbia and Muscle Shoals—to work together on economic development, rather than competing with each other. The Senator has also helped develop the Alabama Music Hall of Fame and was instrumental in getting a major rail car manufacturing plant to locate in his Senate district.

Without any doubt, Bobby Denton, a good man by all standards, has been an outstanding legislator. He has been a credit to the entire State of Alabama. I really hate to see a person with his character, ability, dedication, and knowledge of state government step aside. This Senator—who is my very good friend—will be missed!

Source: *Associated Press*

V. COURT WATCH

FEDERAL APPEALS JUDGE NOMINATED FOR THE SUPREME COURT

President Barack Obama has nominated Federal Appeals Court Judge Sonia Sotomayor for the Supreme Court. The nominee is the first Hispanic in history selected to serve on the High Court. If confirmed by the Senate, Judge Sotomayor, 54, would succeed retiring Justice David Souter. It's highly significant that Judge Sotomayor will bring more judicial experience to the Supreme Court than any justice confirmed in the past 70 years.

President Obama wanted a Justice who combined intellect and empathy—the ability to understand the troubles of everyday Americans—and his nominee appears to meet those requirements. A graduate of Princeton University and Yale Law School, a former prosecutor and lawyer in

private practice, Judge Sotomayor became a federal judge for the Southern District of New York in 1992. As a judge, she has a bipartisan pedigree. She was first appointed by President George H.W. Bush, and in 1997 was named an appeals judge by President Bill Clinton. It will be most difficult for any Senator to oppose this nominee if qualifications and judicial temperament are considered.

SWEEPING VICTORY ON FEDERAL PREEMPTION

A landmark achievement relating to federal preemption was announced on May 20th in Washington. President Obama made it known that he would follow well-established law as it relates to preemption. From this date forward, the regulatory preemption of state common law will be strictly limited. Even regulations issued within the past ten years will have to be reviewed and in some cases amended. This is a major victory for the rights of all Americans and is the culmination of years of tireless and dedicated efforts by a number of consumer groups.

The President issued a Directive to the Heads of all Executive Branch Departments and Agencies stating the policy of his Administration to be that “preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.” From now on, preemption of state common law will no longer be presumed or asserted by regulatory agencies absent “explicit preemption by Congress or an otherwise sufficient basis under applicable legal principles.”

In order to ensure that executive departments and agencies include statements of preemption in regulations only when such statements have a sufficient legal basis, the President’s directive provides that:

- Heads of departments and agencies should not include in regulatory pre-

ambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation.

- Heads of departments and agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption.
- Heads of departments and agencies should review regulations issued within the past ten years that contain statements in regulatory preambles or codified provisions intended by the department or agency to preempt State law, in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption. Where the head of a department or agency determines that a regulatory statement of preemption or codified regulatory provision cannot be so justified, the head of that department or agency should initiate appropriate action, which may include amendment of the relevant regulation.

This is a tremendous victory for the American people. It reflects what the law has always been and how it was applied prior to the Bush years. This directive corrects a decade of abuse of the regulatory process and signifies a triumph both for states’ rights and for the legal rights of all Americans and their families. A debt of gratitude is owed to groups such as Public Citizen, Public Justice, and many others whose hard work made this happen. We are fortunate to have a President who respects the rule of law and understands how preemption has been applied wrongfully during the Bush years. Lawyers have been fighting the preemption battle day-in and day-out in courtrooms throughout America. Even with this important victory, however, we must not quit now. Instead, we must confront the continuing assaults on our civil justice system—and we must prevail for the good of all American citizens.

A NUMBER OF IMPORTANT SUPREME COURT CASES TO BE DECIDED

There are a number of significant cases pending in the U.S. Supreme Court to be decided in its current term. The following are highlights of some of these high-profile cases:

JUDICIAL ETHICS

A case from West Virginia tests when judges must step aside from disputes that involve people who backed their election. West Virginia Supreme Court Justice Brent Benjamin rejected pleas to excuse himself from a lawsuit involving a booster of his 2004 election campaign and cast the deciding vote in overturning a verdict, now more than \$82 million with interest, against his supporter’s company.

VOTING RIGHTS

At stake in this case is the federal government’s authority to prevent discriminatory voting changes through a provision of the landmark Voting Rights Act. This section forces all or parts of 16 states, many in the South, to submit proposed election changes to the Justice Department. In 2006, Congress extended the provision, first enacted in 1965, for 25 more years. The local Texas governing authority challenging the law says the safeguard once may have been needed to root out discrimination, but no longer can be justified in 2009, especially with an African-American president.

REVERSE DISCRIMINATION

One of the cases involves charges of reverse discrimination. White firefighters in New Haven, Conn., claim they were discriminated against when the city tossed out

the results of a promotion exam because too few minorities scored high enough. The City says it acted because it might have been vulnerable to claims that the exam had a “disparate impact” on minorities in violation of the Civil Rights Act of 1964. The white firefighters said the decision violated the same law’s prohibition on intentional discrimination.

STUDENT STRIP SEARCH

Another case involves the search of a student. A federal appeals court determined that an Arizona school official went too far by ordering a strip search of a 13-year-old eighth-grade girl accused of having prescription-strength Ibuprofen. The Justices appeared swayed by the argument of the school’s lawyer against tying the hands of administrators who must be able search for drugs and weapons on school grounds.

INVESTIGATING LENDING DISCRIMINATION

An important case involves a fight between the states and the federal government over who gets to investigate national banks. The Obama administration says federal law prohibits states from looking at the lending practices of those banks, even under state anti-discrimination laws. Federal courts have so far blocked an investigation begun by New York, which is backed by the other 49 states, of whether minorities were being charged higher interest rates on home mortgage loans by national banks with branches in New York.

CHALLENGE TO SARBANES-OXLEY

The Supreme Court will decide a constitutional challenge to the 2002 law that created a national

board to oversee U.S. public company auditors in the United States. The Justices agreed to review a ruling by a U.S. appeals court that upheld the Sarbanes-Oxley Act of 2002, which set up the private sector Public Company Accounting Oversight Board. The Free Enterprise Fund and a small Nevada accounting firm appealed to the Supreme Court claiming that the law violated constitutional requirements on separation of powers because it failed to allow adequate control of the board by the U.S. President.

The Board polices the U.S. audit industry, including the Big Four firms that review the books of major corporations: Ernst & Young LLP, KPMG, PricewaterhouseCoopers and Deloitte & Touche LLP. The Sarbanes-Oxley corporate reform law created the board in response to auditing scandals early in the decade that involved Enron Corp and other companies. The board’s members are appointed by the Securities and Exchange Commission, with consultation from the Federal Reserve Board and the Treasury Department. The SEC’s five commissioners are appointed by the White House with Senate consent.

Competitive Enterprise Institute, a public interest group representing Free Enterprise, said the PCAOB imposes massive regulatory burdens on public companies. The group argues that “the regulators are unaccountable to the people, the president or the senate.”

The lawsuit, filed in 2006, argued that the law unconstitutionally stripped the President of all power to appoint or remove Board members, or to supervise or control their activities. A federal judge and then the appeals court rejected the challenge. The appeals court ruled that past Supreme

Court decisions on the President’s relationship with administrative agencies meant the Board’s set-up must be upheld.

GOVERNOR RILEY APPOINTS JIM MAIN TO COURT OF CRIMINAL APPEALS

Governor Bob Riley has appointed my longtime friend and former law partner, Jim Main, to the vacancy on the Alabama Court of Criminal Appeals. Jim served with distinction as State Finance Director in the Riley Administration. The appointment was effective May 15th. When making the appointment of the Bullock County native, the Governor stated:

Jim Main’s commitment to public service, his work ethic, his legal background, his character, the unique perspective he’s gained from a diverse background, all these things make him absolutely the best choice for this judgeship. He will serve the people of Alabama well from this position of trust.

Perhaps Jim’s most important accomplishment as Finance Director was his attempt to transform the state’s budget process. That came about with the adoption of SMART Governing and it can take us into a new era insofar as state budgets are concerned. This concept has the potential to bring about an unprecedented level of accountability and transparency to the state’s budget process. In my opinion, state government will be more accountable and open because of Jim’s work in this important area.

Jim has served as State Finance Director since June 2004. Previously, he served as Senior Counsel to Governor Riley. He also served as Chief of Staff and Legal Advisor for Governor Fob James from 1997-1999. Jim was a partner in our firm for a number of years before joining the James Administration. He was a very good lawyer and I am confident that Jim will do an outstanding job on the Court. We all wish him the very best in this endeavor.

VI. THE NATIONAL SCENE

UNREGULATED GREED MUST BE STOPPED

Now that we have seen just how bad things can get relating to our nation's economy, it's time to get busy and correct the many mistakes of the past. It's my belief that the root cause of most of our economic problems has been **unregulated greed** in Corporate America. The failure to regulate our financial institutions has resulted in this greed running rampant though out the entire system.

The Obama Administration and Congress must completely overhaul our nation's financial industry. We have experienced the results of weak, and in some cases, no reform and all Americans are paying for that. Clearly, that's where reform must start. But it must be a total overhaul and not one that stops short of a badly-needed reform of a broken system. The lack of regulation, and the fact that some in the industry totally avoided any type regulation, resulted in economic chaos for the United States.

The entire financial system—banks, hedge funds, credit rating agencies, regulators, investment banks, insurance companies, among others—is intertwined and interlinked. If government is to really solve the problem, no part of the financial industry can be left out of the regulatory system. Nobody can be allowed to avoid regulation in the future.

There is one thing for certain—transparency around valuing any risk in the financial system is an absolute must. This has to include any type indemnity or insurance that would play a part in mitigating a risk. The federal government must have the authority and ability to streamline and simplify financial information so that consumers and investors will be able to make real informed choices. We have experienced some of the “dumbest” things done by supposedly “smart” people

who devised financial instruments that were never understood by investors or even government agencies.

The federal regulation must be designed for the twenty-first century and must be all-inclusive. The patchwork of regulation coming from countless state and federal agencies must be replaced with a strong centralized effort. I would prefer one strong federal agency with one set of rules designed to oversee all financial businesses—both those that pose systemic risk and those that don't. But, that may be too simple an approach for government to comprehend. In any event, Congress must draft strong, clear federal regulation that will protect our country from ever having to go through what we have experienced over the past several months.

LOBBYING ACTIVITIES INCREASE SHARPLY

America's oil and gas industry and the coal industry have increased their lobbying budgets by 50% in the first three months of this year. Key players have already spent \$44.5 million in a stepped-up effort to cut off support for cap and trade legislation to reduce greenhouse gas emissions. The campaign—predictably—involves industry front groups, lobby firms, television, radio and print advertising as well as well-placed donations to key members of Congress. The goal of this effort is to kill or at least water down cap and trade bills in Congress.

Interestingly, the donations of a “political nature” went to seven Democrats, all of whom received campaign donations in excess of \$100,000 from the oil and gas industry, coal producers and utilities during the 2008 elections. It's being reported that the fate of the legislation referred to above lies in the hands of twelve Democratic members of Congress and the seven mentioned in that groups. Another two of the groups received more than \$90,000 last year.

About 140 businesses and organizations entered the climate change debate on Capitol Hill in the first

quarter of this year. Those new players drove a 14% increase in the number of interests lobbying on global warming, compared to the same time last year. That increase comes on top of already rapid growth from 2003 through 2008, when the number of climate change lobbyists increased more than 400% to over 770. Most of them represent manufacturers, power companies, and the oil and gas industry.

It's quite evident that lobbyists have far too much power in our nation's capital. If you need some insight and information on lobbying reform you can contact the U.S. Public Interest Research Group at www.uspirg.org.

Source: The Guardian

INFLUENCE OF LOBBYISTS FOR SPECIAL INTERESTS MUST BE CURTAILED

While President Obama is working hard to make lobbying more transparent, Congress must also do its part. The tremendous influence and power of special interest lobbyists have been major reasons for the severe economic problems our country has experienced over the past months. These lobbyists never work for the common good, but instead work effectively for the corporate interests that pay them. A prime example of how powerful these lobbyists are involves the federal stimulus money. Their efforts to secure billions in economic stimulus money is something we do not need at this time.

Federal agencies are required to disclose on their websites when they are contacted by registered lobbyists about stimulus funds. Interestingly, only 70 comments have been revealed thus far. Ten departments have posted no such contacts according to *USA Today*. There were 24 departments and agencies committed to spending stimulus money that were reviewed by *USA Today*.

President Obama pledged during his campaign to reduce the power of lobbyists and special interests in Washington. Melanie Sloan, executive director of the watchdog group, Citizens for Responsibility and Ethics in Washington, had this to say:

We're looking to have more disclosure, not less. If this were supposed to give us more disclosure, why is it that you are not seeing lobbyists' communications?

In March, the President banned federal employees from discussing specific stimulus projects with registered federal lobbyists. Broad policy discussions are permitted, but must be disclosed on department websites. It's been reported that lobbying for stimulus funds has been identified by companies and that the lobbyists have been very effective. Craig Holman, who is with Public Citizen, believes the rules which were released on April 7th are a good first step in improving transparency in lobbying. In this regard, he had this to say:

Disclosing lobbying contacts is one of the most valuable pieces of information on influence peddling both on Capitol Hill and the Executive Branch. The Administration is trying to cope with how to make it actually happen.

It should be noted that several former Bush officials are in a revolving door situation in Washington. Ten of 34 cabinet members have taken private-sector jobs related to their previous positions in the federal government. That should never be tolerated—for obvious reasons—until a set number of years elapses from the last day of service. Our government in Washington will never be able to get spending under control—and furnish all of the programs and services needed—until such time as the lobbyists in Washington are controlled and their power and influence curtailed sharply.

FASB TIGHTENS OFF-BALANCE-SHEET LOAN RULES

The Financial Accounting Standards Board (FASB), the board that sets U.S. accounting standards, has moved to end companies' use of a device that allowed them to park hundreds of billions of dollars in loans off their

balance sheets without capital cushions. This was blamed for helping stoke banks' losses in the housing boom. The change will tighten the use of so-called "qualified special purpose entities" by requiring companies to report to regulators the loans contained in them and to increase their capital reserves in proportion as a cushion against potential losses. It was the lack of disclosure and absence of capital supporting ballooning subprime mortgage loans in these special entities that aggravated the massive losses sustained by banks, according to regulators.

The Board said the rule change was intended "to improve consistency and transparency in financial reporting." The FASB voted to adopt it at a public meeting of its five-member board held at its headquarters in Norwalk, Conn. A revised proposal had been opened to a public comment period that ended in November. This change by FASB is quite different from its move in April, which created some dissension among Board members. That would have given companies more leeway in valuing assets and reporting losses. That revision in the so-called "mark-to-market" accounting rules was expected to help boost battered banks' balance sheets. But the new rule change likely will result in financial institutions recognizing on their books billions in high-risk loans that may default.

This reversal by the FASB in acting on the "mark-to-market" rules came as the result of intense pressure from Congress, which threatened legislation. It was reported that the Board received hundreds of comment letters opposing the move from mutual funds, accounting firms and others contending that it would damage honest financial reckoning by "masking" the deficiencies and risks lurking within the system. Hopefully, the FASB has now done the "right thing." We will see.

Source: Associated Press

FORBES EDITOR SPEAKS OUT ON A NEED FOR REGULATION

An interesting editorial appeared in Forbes on May 11th and it sort of put things in perspective relating to federal regulation of Corporate America and how the U.S. legal system factors in. Since it's both fair and objective—and also very interesting—I am setting the editorial out in its entirety below.

NEEDED: TORT LAWYERS

Campylobacter, escherichia, salmonella, listeria—it's very dangerous to put things in your mouth. Food-borne illness sickens 76 million Americans a year, kills 5,000 and runs up \$3 billion in hospital costs. What's the answer to this epidemic? One possible solution is more government and more laws. Those familiar with the proclivities of this magazine will not be surprised that I take a dim view of this solution (and, in particular, of the proposed Food Safety Modernization Act, which would bury food preparers in paperwork). No, I would prefer to have the same government and the same laws, but—here's the surprise—more tort lawyers.

The tort bar has not, on the whole, covered itself with glory. A large fraction of asbestos cases, for instance, are based on quack readings of X-rays. But it's a different story in the narrow specialty of food-poisoning litigation. There the science is sound. The typical Plaintiff is the family of a child whose kidneys and other organs were damaged (in some cases fatally) by an E. coli infection. The link from the culprit food to the injured child is made unmistakable by genetic subtyping. The lawyer's main task is to argue over how much the kid's life is worth.

Meet William Marler, a 52-year-old Seattle attorney whose career was launched with a \$15.6 million set-

tlement against Jack in the Box. (This victim survived but lost her large intestine.) Sixteen years later he can brag that his firm, Marler Clark, has extracted just shy of half a billion dollars in settlements from food vendors. This suggests cumulative revenues of maybe \$150 million for a small firm (seven lawyers, one full-time epidemiologist). But letting lawyers get rich has a nice side effect. The settlements get the attention of food producers. Bill Marler is not shy about using the Web, press releases and Capitol Hill testimony to publicize what he's doing.

Government inspectors are on duty only some of the time, as we know from the Peanut Corp. of America fiasco. But the marketplace is a constant enforcer. Lawsuits do their part, along with the cost of recalls and the damage to brand names, to keep food companies alert. If it's expensive to make mistakes, more money will go into the detection and prevention of microbes. Entrepreneurs will find opportunity here.

Helen Coster writes (see "Do You Know Where That Berry Came From?") about one who has a system for tracing produce. Better detection would be good. It costs \$20 and 12 hours to detect an E. coli O157:H7 contamination. Maybe Becton, Dickinson could come up with a \$2, 12-minute sensor. Maybe, someday, Twitter will be detecting outbreaks of diarrhea before the city health inspectors do (see iwaspoisoned.com). Add technology to tort law and you get a powerful force for safety.

William Baldwin
Forbes.com
May 11, 2009

I don't mean to give the impression that Mr. Baldwin is pro-consumer or anti-big business. But I do believe he recognizes the importance of keeping the courts open to injured parties.

CONGRESS MUST STAND WITH OBAMA ON HEALTH CARE

An unlikely gathering of health care industry and union leaders joined with President Obama and at this juncture appear to be supporting a historic agreement to lower medical costs, which could save the average family in this country up to \$2,500. This kind of broad coalition would have been unthinkable in the past, when the old politics of division and short-term self-interest ruled the day. Many don't believe the insurance companies will stay hitched on this issue and simply want a seat at the table when plans are being made. But, I am convinced this is a new day in our nation's capital.

President Obama announced the three bedrock principles that any comprehensive health care reform must achieve which are: to reduce costs, guarantee choice, and ensure all Americans have quality, affordable health care. The President will need the support of all Americans to get his program through Congress by the end of the year. He has set a hard goal and to reach it the GOP must put aside politics as usual and lend a helping hand.

Many Republicans seem to be determined to oppose reform. Since the President's announcement lobbyists have been scrambling across Washington trying to control the issue. That means ordinary folks have to get busy and get involved. There's no time to lose. Since Congress is negotiating the details for health care reform, the first step is showing where the American people stand. The health care crisis is not new, but it's getting worse. For decades, real health care reform has been blocked by special interest lobbying and partisan politics. We simply cannot go any further down this dangerous road of delay and denial.

The agreement by those joining with the President marks only the beginning of the broad coalition needed. The most important reason this round of health care reform will be different is the American people really care and want change. Last fall millions of ordinary people came together in the election

and did the impossible. Now these same people and those who voted for the GOP nominee must join hands and make health care reform a reality. Even though the Administration and Congress are hammering out the details of the health care package, it could still go any number of ways. That's why ordinary folks must get involved.

Our elected members of Congress must understand that when the President lays out his three bedrock principles, Americans from every walk of life are standing with him. I am convinced that an overwhelming majority of Americans want the rising cost of health care to be brought down. They also want the freedom to keep whatever doctor and health care plan they have, or to choose a new doctor or health care plan if they have that desire. Most of all, they believe Americans must have quality, affordable health care. Meaningful reform that follows the President's guidelines is also essential for America's economic future. It will be the pillar of a new foundation for America.

This President is committed to health care reform and it's a key priority to this presidency. The dream of health care reform must finally be achieved in the United States of America. Hopefully, Congress—in a bipartisan effort—will support the President in this effort and get the job done.

SWIFTBOATING HEALTH CARE SOLUTIONS

While we all recognize the need for health care reform, many are hard at work trying to sway public opinion and influence members of Congress. Richard Scott, a multimillionaire investor and controversial former hospital chief executive, has become an unlikely and prominent leader of the opposition to health care reform, according to the *Washington Post*. The public relations firm promoting Scott and his front group is one of the "usual suspects." Few Americans know who CRC Public Relations is. For the uninformed, this is the conservative firm previously known as Creative Response Concepts, the

outfit that masterminded the successful “Swift Boat” attacks against Presidential candidate John F. Kerry in 2004. The firm is now working with Scott and his group, Conservatives for Patients’ Rights, in an effort to block reform of a broken health care system. Based on the Swift Boat campaign, it’s clear that this group plays fast and loose with the truth.

The disorganized Republican Party laid low for a time, waiting for President Obama and Democratic leaders to reveal the details of their plan before opposing it. But Scott was not waiting and he started to use \$5 million of his own money and up to \$15 million more from supporters to build resistance to any government-run program. His campaign included television ads featuring “horror stories” of Canadian and British residents who “allegedly suffered long waits for surgeries, couldn’t get the drugs they needed, or had to come to the United States for treatment.” These are the same scare tactics industry groups used to respond to the 2007 Michael Moore movie *Sicko* and also to promote the Swift Boat campaign used effectively to derail the Kerry presidential campaign.

Source: *PRWatch.org*

CORPORATE INFLUENCE UNDERMINES CLIMATE CHANGE BILL

Public Citizen believes that climate change legislation currently being debated in Congress will prove a boon to the coal and oil industries, will fail to protect consumers, and may very well not even curb global warming. According to Public Citizen, lawmakers have conducted closed door negotiations with polluters resulting in the bill being radically altered to accommodate the financial interests of big energy corporations while giving nothing new for the environment or for working families. It appears that lawmakers have decided to give away most of the pollution allowances for free for the next two decades—an approach that would hurt working families and

households the most—and would be counterproductive to the effort to combat climate change. We have already mentioned the increased lobbying activities on this issue.

The legislation could deprive the government of the money needed to invest in clean technologies and thwart the very goal of curbing global warming. According to Public Citizen, this is hardly the transformation this country needs to jump-start its economy and curb climate change. Instead, they say it’s more of the same old wait-and-see, special-interest-bailout approach that has gripped our nation’s capital for years. If you agree, tell your representatives in Washington that climate change legislation should not be weakened by the corrupting influence of big money. Ask them to make sure the people’s business should be done in front of the people and not behind closed doors.

Source: Public Citizen

PRESIDENT OBAMA TAKES AIM AT OFFSHORE TAX HAVENS

President Obama has presented a set of proposals aimed at changing international tax policy, calling for the elimination of benefits for companies and wealthy individuals that “park” their cash in offshore accounts. The President and Treasury Secretary Geithner announced their plans on May 5th, which will require an overhaul in the tax code. It is projected to raise \$210 billion in revenues over the next ten years.

One of the key proposed changes would restrict companies from deferring the payment of taxes on profits earned overseas. The plan also would keep firms from taking deductions against their taxes by inflating the amount of foreign taxes they paid. These plans are nothing new, since the President discussed his intentions during his presidential campaign. In a speech to Congress in February, as he outlined his priorities for the year, the President pledged to make the tax code more equitable by “finally ending the tax breaks for corporations that

ship our jobs overseas.” I applaud the President for taking this badly-needed step toward making our tax structure more fair and equitable.

Source: *New York Times*

LAWSUITS FILED OVER KBR BURN PITS

There is a kind of leukemia called acute myeloid leukemia (AML) which is causing the federal government to take another look at the defense contractor KBR. A very large number of Iraq war veterans have died in recent years of AML, and KBR appears to be a major contributor to these deaths. Elizabeth Burke, a lawyer with Burke O’Neil in Washington, D.C., is representing more than 70 former military personnel, contractors, and their survivors who are suing KBR. The lawsuits allege that the Houston-based contractor, which has made a financial killing in Iraq, jeopardized the health and safety of American soldiers and contractors in Iraq and Afghanistan by burning vast quantities of unsorted waste in enormous open-air burn pits with no safety controls.

KBR is accused of allowing thick, noxious smoke—coming off of flames sometimes colored blue or green by burning chemicals—to hang over U.S. bases and camps across Iraq and Afghanistan since 2004. It’s alleged that round-the-clock hazardous emissions from the burn pits caused serious respiratory illnesses, tumors and cancers in the Plaintiffs. It’s alleged in the lawsuit:

U.S. soldiers and other residents of the military bases and camps have become seriously ill, been diagnosed with serious and potentially fatal diseases and in some cases have died from the physical injuries and diseases caused by the exposure to hazardous smoke and fumes. KBR promised to minimize the environmental effects of the burn sites they operated in Iraq and Afghanistan and to minimize smoke exposure to people in and near the bases and camps. Instead, by forsaking safety for money, KBR willfully endangered

these men and women who honorably served their country in military service or in support of the military.

The burn pits are so large that tractors are used to push waste onto them and the flames shoot hundreds of feet into the sky, according to the lawsuits. KBR allegedly burned waste such as biohazard materials including human corpses, medical supplies, paints, solvents, asbestos, items containing pesticides, animal carcasses, tires, lithium batteries, styrofoam, wood, rubber, medical waste, large amounts of plastics, and even entire trucks. It appears that KBR knew, or certainly should have known, that operating vast open-air burn pits jeopardized the health and safety of thousands of Americans. In an interview by *Corporate Crime Reporter*, Ms. Burke observed:

AML is typically a young person's disease or a very old person's disease. It's very rare that it strikes healthy young men. We know that there are about 100 Iraq veterans who were between the ages of 25 and 45, who came back from Iraq, were diagnosed with AML. And all of them are gone. So, something has caused a chromosomal abnormality that is triggering this AML. When we talked to epidemiologists, they were just stunned by the numbers they were seeing.

The claims against the Defendants in the lawsuit include wrongful death, negligence, battery, breach of duty to warn, intentional infliction of emotional distress, and breach of contract. Class certification will be sought in the lawsuit to cover costs of medical monitoring, future medical expenses, and other damages for other individuals exposed to KBR burn pit emissions. It's high time for the federal government to ignore KBR's political connections and call this outfit on the carpet and then make them totally accountable for their actions in Iraq.

Source: *Corporate Crime Reporter*

STATES THAT RANK HIGHEST IN GUN DEATH RATES

In my opinion, all American citizens have the right to own a gun to protect their families and also to hunt. Without any doubt, the U.S. Constitution guarantees all of us that right and it should never be taken away. Reasonable gun control is needed, but it can't be allowed to go too far in violation of the Constitution. I believe there can be reasonable limits on gun purchases that work and protect the public. Gun control must never become solely a political issue. Unfortunately, it has in some circles and I don't see that changing anytime soon.

It was reported last month that states with higher gun ownership rates and weak gun laws have the highest rates of gun death. This is according to an analysis by the Violence Policy Center (VPC) of the 2006 national data (the most recent available) from the federal Centers for Disease Control and Prevention's National Center for Injury Prevention and Control. The analysis reveals that the five states with the highest per capita gun death rates were Louisiana, Alabama, Alaska, Mississippi and Nevada. Each of these states had a per capita gun death rate far exceeding the national per capita gun death rate of 10.32 per 100,000 for 2006.

Each state has what VPC calls lax gun laws and higher gun ownership rates. By contrast, states with strong gun laws and low rates of gun ownership had far lower rates of firearm-related death, according to the analysis. I don't believe ownership of guns is the problem, but instead, it's the unregulated sale of certain types of weapons that I see as the big problem.

Ranking last in the nation for gun death was Hawaii, followed by Massachusetts, Rhode Island, Connecticut, and New York. The VPC defined states with "weak" gun laws as those that add little or nothing to federal restrictions and have permissive concealed carry laws allowing civilians to carry concealed handguns. States with "strong" gun laws were defined as those that add significant state regulation in addi-

tion to federal law, such as restricting access to particularly hazardous types of firearms such as assault weapons, set minimum safety standards for firearms and/or require a permit to purchase a firearm, and have restrictive "concealed carry laws."

The Violence Policy Center is a national non-profit educational foundation that conducts research on violence in America and works to develop violence-reduction policies and proposals. The Center examines the role of firearms in America, conducts research on firearms violence, and explores new ways to decrease firearm-related death and injury. If you want more information on the states' rankings, go to <http://www.vpc.org/fadeathchart09.htm>.

Source: VPC

U.S. SUPREME COURT TAKES A STAND FOR DECENCY IN RECENT RULINGS

The U.S. Supreme Court has taken a strong stand for decency in two recent rulings. I give the Parents Television Council a great deal of credit for these rulings. This was a major victory in the fight to protect children and families from indecent content airing on the broadcast airwaves. In one case, the High Court has ordered the Third Circuit Court of Appeals to reexamine its ruling that gutted the \$550,000 fine levied by the Federal Communications Commission against CBS. As you will recall, the FCC fined CBS for allowing Janet Jackson's "striptease" to be aired during the 2004 Super Bowl, which shocked tens of millions of unsuspecting families and children. The Supreme Court, in its decision last month, sided not only with families, but with Congress and the overwhelming will of the American people in asking the Third Circuit to take another look at its ruling.

The Supreme Court, just a week prior to that opinion being released, had ruled that "fleeting" violations of the broadcast decency law can be considered indecent and result in fines for broadcasters. The Court affirmed the FCC's ability to sanction a broadcaster

for so-called “fleeting” violations of the broadcast decency law. That certainly is a step in the right direction and was the right thing to do.

If broadcasters are going to use the publicly-owned airwaves for free, they must also agree to abide by the terms of their licenses and by the broadcast decency law. The FCC should now act quickly on the backlog of broadcast indecency complaints filed by the public. The two recent Supreme Court decisions are huge victories for families. But, as expected, the TV Networks are gearing up for more legal challenges to fight common sense decency standards. An overwhelming majority of the American people—in my opinion—want television programming to be free of the “junk” that we have seen over the past few years.

I consider what the U.S. Supreme Court has done in these cases to be most important. Parents and others who want children protected are the real winners. Finding that the FCC does indeed have the authority to fine TV networks for using the “F-word” in front of children and ruling against CBS for their broadcast of the Janet Jackson “striptease,” the Supreme Court has given hope to the people. These two legal victories positively and profoundly affect every family in America.

Source: Parents Television Council

VII. THE CORPORATE WORLD

MASSACHUSETTS SETTLES BID-RIGGING SUIT AGAINST GREAT AMERICAN INSURANCE

Massachusetts Attorney General Martha Coakley has settled a bid-rigging lawsuit for her state against Ohio-based Great American Insurance Co. The insurer submitted a fake and intentionally uncompetitive insurance quote to Analog Devices Inc. of Norwood, Mass. as part of a scheme to make sure AIG won Analog Devices’

2004 insurance renewal. The Attorney General observed:

Rigging insurance bids is a serious offense that unfairly inflates insurance costs for consumers. We believe this settlement will deter similar unfair behavior in the future.

Under the terms of the settlement, Great American will pay \$60,000 to Analog Devices and \$116,000 to the Commonwealth. The agreement also requires Great American to undertake conduct reforms aimed at preventing insurance bid-rigging in excess casualty insurance. The insurer will also be required to retain certain records concerning its bidding practices. The suit, which was filed in January 2008, alleged that in 2004, at the request of insurance broker Marsh & McLennan Cos., Great American submitted the fake quote to make AIG’s bid appear to be competitive.

In return, Marsh allegedly steered another one of Analog Devices’ insurance policies to Great American at a pre-determined price. Insurers such as Great American and AIG paid Marsh & McLennan lucrative contingent commissions based on the volume of business Marsh placed with them. In January 2009, the Attorney General, along with eight other states, reached a \$7 million settlement with Marsh, resolving a four-year investigation by the states into Marsh’s role in the nationwide bid-rigging scheme.

Source: Massachusetts Attorney General’s Office

WELLCARE AGREES TO PAY \$80 MILLION TO SETTLE MEDICAID CASE

WellCare Health Plans Inc. will pay \$80 million to settle a Florida Medicaid fraud investigation. A management shake-up and the restatement of more than three years of the company’s earnings also resulted from the probe. The settlement resolves federal and state criminal investigations into allegations that WellCare defrauded Florida benefits programs for low-income adults and children of about \$40

million by improperly inflating what it spent on care. WellCare, based in Tampa, Florida, administers medical benefits for about 2.5 million enrollees in government-sponsored plans in several states.

Under a deferred prosecution agreement, the U.S. Attorney’s Office for the Middle District of Florida in Tampa filed a fraud conspiracy charge against the company, but won’t prosecute the case if WellCare meets all of the deal’s terms. According to U.S. Attorney A. Brian Albritton, had his office gone after a conviction, it likely would have put the insurer out of business. That would have hurt customers, innocent employees and shareholders. The settlement comes 18 months after more than 200 federal and state investigators raided the company’s headquarters, causing a sharp fall in its share price and resulting in multiple investigations into its Medicaid business.

Under the terms of the settlement, WellCare must forfeit \$40 million and pay another \$40 million in restitution to Florida’s Medicaid and “Healthy Kids” plans. WellCare also has agreed “to accept and acknowledge full responsibility for the conduct that led to the government’s investigations,” according to the deferred prosecution agreement. In addition, the company also must retain an independent monitor to review its business operations, cooperate with the government’s ongoing investigations and implement new procedures within 60 days to prevent future abuse or faulty reports to state health care programs.

The company has now established a regulatory-compliance committee and implemented other needed controls. Last July, when the company announced it would restate more than three years of results, it attributed the bad accounting to the “inappropriate tone” set by former executives. Hopefully, this company has learned its lesson and will now operate within the law.

Source: Wall Street Journal

KB HOME SUED OVER APPRAISAL METHODS

Home-buyers filed suit last month against KB Home in federal court in Phoenix, Arizona, claiming the builder conspired with Countrywide Financial to inflate appraisals for home sales in Arizona and Nevada. The class-action suit focuses on home sales in the two states since 2006. It's alleged that Los Angeles-based KB Home steered home buyers to Countrywide, which in turn steered them to LandSafe Appraisal Services, a wholly-owned subsidiary of Countrywide. LandSafe then used appraisers who would "come in at whatever number was necessary to close the deal at the price desired by Countrywide-KB," according to allegations in the lawsuit.

It appears from the complaint that appraisers would arrive at inflated values by selecting properties that weren't comparable, relying on pending sales instead of completed sales, and using false statements about the housing markets in Arizona and Nevada. If that is true, then revenues for KB Home and Countrywide would have been increased at a time when actual values were falling.

The impact of this scheme, according to the lawsuit, is staggering. The lawsuit was filed by the Seattle-based law firm Hagens Berman Sobol Shapiro on behalf of several Buckeye and Surprise residents who bought homes from KB in 2006. It's alleged that the average appraisal was inflated by \$20,000 for the more than 14,000 homes built in Arizona and Nevada. The suit—if a class is certified—will include any person who purchased a KB home in Arizona and Nevada since 2006 and used Countrywide as the lender.

Countrywide, now owned by Bank of America Corp., once the biggest U.S. mortgage lender, settled a multi-state lawsuit in October that alleged it used deceptive practices in its mortgage-lending business. The lawsuit claims the inflated appraisals contributed to the collapse of the secondary market for loans.

Source: *Arizona Daily Star*

NEW YORK LAWYER PLEADS GUILTY IN \$700 MILLION FRAUD

New York lawyer Marc Dreier has pleaded guilty to charges of defrauding hedge funds of about \$700 million, according to the U.S. Attorney for the Southern District of New York. Dreier pleaded guilty to conspiracy to commit securities and wire fraud, securities fraud, wire fraud and money laundering. He faces maximum prison time of 145 years, and must forfeit the "proceeds of the fraud offenses and property derived there from, including real estate, a yacht, and a number of works of art." An indictment was returned in a U.S. District Court in New York against Dreier in March.

Prosecutors alleged that from 2004 to 2008, Dreier sold fake promissory notes and misappropriated client funds from his law firm. Losses to Dreier's clients and purchasers of the various fake notes exceeded \$400 million, but Dreier himself collected over \$700 million in profits from the fake sales, according to the prosecutors involved in the case. Dreier is the founder and managing partner of Dreier LLP, a law firm of more than 250 attorneys with offices in New York City, Los Angeles, and elsewhere in the country.

Source: *CNN*

VIII. CONGRESSIONAL UPDATE

LOTS GOING ON IN CONGRESS

As we all know, there is a great deal going on in Congress that affects every American citizen in some respect. Because things can change over night, I won't attempt to write in detail on anything this month. I will say, however, that the following issues are critically important and are before the House and Senate:

- Health care reform
- Regulation of financial institutions

- Tax reform
- Climate change legislation
- Consumer reform legislation
- Budgetary issues

The Senate must deal with confirmation of the President's Supreme Court nominee. There are many more important issues to be dealt with that require action by both the House and Senate. Hopefully, there will be some results to report next month.

IX. PRODUCT LIABILITY UPDATE

THE SINGLE VEHICLE ACCIDENT: A CONTINUING SERIES HIGHLIGHTING OFTEN OVERLOOKED PRODUCT CLAIMS

THIS MONTH'S FOCUS: TIRE CASES

Two months ago, 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 readers on different kinds of product liability claims. In automobile cases, the defective product could actually be the entire vehicle, but it's usually a component part such as the seat belt or tires. Unfortunately, the average motorist has no idea how unprotected he or she will be in 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 seat belt defects and the dangerous consequences of those defects. This month, we take a look at tire failures.

Because of the publicity surrounding the Ford/Firestone litigation, tire failures have been reported with increasing frequency. Although most of us will log thousands of miles in our lifetimes without so much as an air leak, tire failures can and do occur regularly. Many of these failures can be directly attributed to manufacturing defects, design defects, or a tire manufacturer's failure to warn of dangers inherent in their products. These dangers have been known to the tire industry for years. Tire manufacturers know that tire treads will wear with proper use and at some point fail if not serviced properly and replaced after their intended period of use has expired. So, tire failures, blowouts and detreads are foreseeable events. Although not all tire failures result in serious accidents, the sudden failure of a tire can cause a vehicle to lose control and roll over or collide with other vehicles on the roadway. Tire failures are especially dangerous if the vehicle is traveling at highway speeds.

Tire tread separation can be caused by bonding problems in the tire manufacturing process, contaminants introduced into the tire during the tire making process, under-vulcanization, old ingredients, improper sized components, or something as simple as air being trapped in between the layers of the tire during manufacturing. Detreading of these defective tires can result in single or multi-vehicle accidents, or even rollovers. Even the auto manufacturers agree that drivers should be able to pull over, not rollover, when a tire detreads. Unfortunately that is not always the case. There may be a tire defect claim if an accident was caused by the failure of a tire, leading to loss of control of the vehicle.

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 problem and that includes defective tires. If you would like more information or have a question, you can contact Greg Allen (Greg.Allen@beasleyallen.com) or Cole

Portis (Cole.Portis@beasleyallen.com) in our office at 800-898-2034.

NHTSA RELEASES NEW ROOF CRUSH STANDARD

The National Highway Traffic and Safety Administration has issued its final rule on the standard for roof safety, doubling the requirement of weight that a vehicle's roof must be able to withstand. NHTSA Standard 216—which hadn't been updated in more than 35 years—now requires vehicle roofs to withstand three times their weight for vehicles weighing up to 6,000 pounds. The roof crush standard deals with the ability of a vehicle's roof to withstand pressure when involved in rollover accidents. Previously, the standard required a roof to withstand 1.5 times its weight.

The new rule will be phased into effect between September 1, 2012 and September 1, 2015. The agency was originally scheduled to issue the new standard by July 1, 2008, but it delayed after receiving complaints from safety advocates and members of Congress. NHTSA had previously proposed a change to the rule that increased the roof support requirement to 2.5 times a vehicle's weight. Also, the proposal included a very bad provision that would have allowed the federal standard to preempt state tort law claims.

It's most significant that all of the preemption language was removed from the final rule. That is a big win for the American people. Advocates had also sought a change to the testing protocol. Currently, tests are performed only on one side of a vehicle and are static, with the car stationary while a metal plate is pressed against the vehicle. Unfortunately, the new standard did not make the change to dynamic testing—where the car is in motion, replicating a real-life rollover scenario—but did change the testing protocol to include both sides of the vehicle. Hopefully, these needed changes will come in time. Even without this feature, this new rule will increase vehicle safety and save lives.

For vehicles less than 6,000 pounds the standard is clearly better than it used to be, but not for those vehicles in excess of 6,000 pounds. Those vehicles include a dual rear-wheel pickup truck, a 15-passenger van, or a large SUV such as a Ford Excursion. While the new rule is much better than the old rule, it can be made much stronger. Hopefully, that will happen.

IIHS RESEARCH ON CHILD SEATS IS REVEALING

The Insurance Institute for Highway Safety (IIHS) recently released some new research examining the effectiveness of child seats in regard to injury prevention. The study focused primarily on the effectiveness of child booster seats. While seatbelt use in the United States is at an all time high, unfortunately that does not necessarily translate into "proper usage." This is especially true in regard to small children. The IIHS report provides strong evidence that belt-positioning booster seats, coupled with lap/shoulder seatbelts, offer the safest way for children to travel in cars after they outgrow their child safety seats.

There has been much research and debate over the "forgotten child." This phenomena involves children, usually between ages four and eight, who have outgrown child safety seats but are not yet large enough to properly fit in standard lap/shoulder seatbelt systems. The IIHS research provides evidence of a significant benefit from the use of belt positioning booster seats which allow for a better fit for small children in lap/shoulder seatbelts.

The IIHS research examined data from the National Automotive Sampling System—Crashworthiness Data System (NASS-CDS) and the Partners for Child Passenger Safety (PCPS) child crash surveillance system. The analysis focused on the potential risk of "moderate or greater" injury among crash-involved booster-aged children. Of the 219 children riding in a belt-positioning booster seat with lap/shoulder belts, only 14 sustained moderate or greater

injuries. Analysis of the PCPS data revealed that only .68% of children with lap/shoulder belts with belt-positioning booster seats in rear rows suffered moderate or greater injuries. The data revealed that the risk of injury among children in belt-positioning booster seats with lap/shoulder belts was reduced by 57% compared with children using lap belts alone. The key take away from the study is that a lap-belt-only position is not optimal for booster-aged children due to the lack of torso restraint.

This study shows that the risk of injury for small children can be reduced significantly by the **proper selection and use** of child restraint devices. The IIHS has an excellent video resource for parents, schools, churches and other civic organizations. The video "Keeping Children Safe in Crashes" can be purchased on DVD from the IIHS website. Additionally, the video is available for viewing on the website which also has instructions and photographs on the proper selection and installation of child seat devices. This information can be viewed at www.iihs.org/research/topics/child_restraints. If you need any additional information you can contact J.P. Sawyer, one of the lawyers in our firm who handles product liability cases, at 800-898-2034 or JPSawyer@beasleyallen.com.

CONSUMERS UNION ADVOCATES BACKUP CAMERAS

Rear blind zones are a serious safety issue. According to federal statistics, about 228 people were backed over in 2008 in this country when drivers couldn't see them. Based on its years of experience with backup cameras and sensor systems, Consumers Union recommends a regulation be crafted to mandate such systems in order to remove deadly blind zones behind cars. In public comments made this week to the National Highway Traffic Safety Administration, Consumers Union, parent of *Consumer Reports*, recommended the agency adopt a standard requiring backup cameras and passive

sensors to alert drivers when they need to look at the rear-view screen.

Consumers Union says in its testing it found that no single system offers a perfect solution. Radar-based sensor systems generate frequent false alarms and also fail to warn drivers when a small object is near the back of the car. Too many false alarms can cause drivers to ignore the system when an alarm is actually justified. It's also known that drivers don't always look at video cameras. As a result, it was requested that the standard include requirements for screen clarity and size based on how far the screen is from the driver's eyes. While displays in a rear-view mirror can work well, some dashboard displays can be too small. The Toyota Venza was given as an example. It's estimated that the manufacturer's cost of a camera system shouldn't exceed \$100.

Consumers Union also believes that any standard needs to limit the delay between when the car is shifted into reverse and when the rear-view image appears on the screen. In some new-car systems that they have tested, it was reported that it takes several seconds for the image to appear after the car is put in reverse, making it long after you've started moving. In others, the dashboard screen won't display any image until the driver has accepted a legal disclaimer that appears every time the car is started. *Consumer Reports* has measured the blind zone behind cars for several years. For some SUVs and pickups, a short driver may not be able to see what is behind the rear bumper for up to 50 feet behind the vehicle. In addition, it was found that while some aftermarket camera systems work well, some inexpensive aftermarket backup cameras aren't durable, and some systems can be difficult to install.

Source: *Consumer Reports*

NHTSA INVESTIGATES TRANSMISSION HAZARDS

The National Highway Traffic Safety Administration has opened a formal investigation into consumer complaints

that certain Ford Explorers and Mercury Mountaineers can unexpectedly slip out of park. The defect investigation was launched on April 21st. The defect investigation document says:

A preliminary evaluation has been opened to assess the scope, frequency and potential safety consequences of the alleged defect and any relationship of the alleged gearshift lever mechanism failures to the alleged vehicle roll-away incidents.

NHTSA is looking at 2002 through 2005 model year Explorers and Mountaineers. The agency has received 11 complaints of vehicle rollaways after the driver shifted the vehicle into park. In addition, 61 other vehicle owners have alleged failure of the gear shift lever mechanism while shifting from or to the park position. There were about 1.4 million of the SUVs produced for the model years involved in the investigation.

Source: *Atlanta Journal-Constitution*

GEORGIA WOMAN WINS HER CASE INVOLVING A FAULTY FORD EXPLORER

A Georgia woman, whose lawyers proved that a transmission defect in her Ford Explorer led to her paralysis, was awarded \$40 million in damages recently by a DeKalb County jury. The jury's award to Jessica Mundy includes \$9 million in compensatory damages to her and \$1 million to her husband. In addition, there was an award of \$30 million in punitive damages. Ford Motor Co. and the Ford dealer, where Mundy purchased the 2004 Explorer that ran over her, were Defendants in the suit.

Ms. Mundy, who was 23 at the time of the November 2005 accident, contended in her suit that when motorists put their shifters into park, a design defect would cause Explorers to suddenly go into reverse. In her case, Ms. Mundy had gotten out of the Explorer to mail a package. The gear shifted from park to reverse and the vehicle ran over her, fracturing her spine. Video-

taped depositions were presented at trial of three people who said their Ford vehicles had similar instances of suddenly going out of park. The case was settled after the verdict, but its terms are confidential.

Ms. Mundy, who was trained as an accountant, had been a state employee prior to her injury. But she has been unable to work since the accident. Jeff Harris, a very good lawyer from Savannah, Georgia, represented this lady and did a very good job for her.

Source: *Atlanta Journal-Constitution*

NEW TRIAL ORDERED IN FORD POLICE CRUISER LAWSUIT

The Missouri Supreme Court has returned a lawsuit to a Missouri state court for a second trial. The suit concerns the issue of whether Ford police cruisers have a fatal fuel-system design. Ruling for Overland Park businessman Michael Nolte and the family of Missouri Highway Patrol Trooper Michael Newton, the Supreme Court found that errors by the trial judge gave Ford Motor Co. an unfair advantage during the 2005 trial.

The case arose out of a routine traffic stop by a State Trooper on May 22, 2003. Trooper Newton had pulled over Nolte for a traffic violation and they were sitting in the police cruiser as the trooper wrote a warning citation. The driver of a pickup truck, pulling an empty trailer, rammed the cruiser from behind, causing an instant explosion that killed Trooper Newton. Two passers-by pulled Nolte, who suffered serious burns, from the burning patrol car.

At trial, a jury found against the pickup driver's employer, awarding \$4 million to the Newton family and \$4.5 million to Nolte and his wife. But the jury ruled in favor of Ford, rejecting arguments that the cruiser had a serious design flaw. Kent Emison, one of the lawyers who represented the Newton family, observed: "We're convinced that Mike Newton would be alive today if there had been a safe fuel system on that patrol car." Lawyers representing Nolte and the Newton family

had argued that the fuel system's "defective" anti-spill valve and the placement of the fuel tank behind the rear axle made the car unreasonably dangerous.

At trial, the judge ruled that the Plaintiffs' lawyers could introduce evidence of only four prior incidents of gasoline tank explosions to show that the company knew of the problems even after it had developed an upgrade kit to install on patrol cars. But deposition testimony read to the jury by a lawyer for Ford showed that the carmaker knew of 11 such accidents after Ford introduced the upgrades. Four of these were before the Missouri accident and six afterward. But even with that evidence before the jury, the judge barred lawyers for Nolte and the Newton family from discussing all 11 accidents.

The trial judge later acknowledged at a post-trial hearing that he had been wrong, but he ruled that the outcome of the case would not have changed. The Supreme Court, finding that Nolte and the Newtons deserved a new trial, stated in the opinion:

By reading this testimony into the record, Ford's counsel injected evidence of all 11 accidents into the case. Thus, once the accidents were in evidence, Plaintiffs were entitled to discuss all 11 accidents despite the court's earlier ruling that only the four 'pre-Newton' accidents were admissible.

The case will now be retried in its entirety. It will be interesting to see if the Plaintiffs' lawyers can change the outcome this time. Based on the evidence available on the vehicle's design problems—including strong expert testimony—combined with the testimony from 11 similar incidents, the Plaintiffs should have a very good chance to win this case.

Source: *Kansas City Star*

\$18.3 MILLION VERDICT AGAINST FORD MOTOR CO.

A federal court jury awarded \$18.3 million recently to Dex Pierson, who

was made a quadriplegic in a rollover crash four years ago, against Ford Motor Co. Pierson, 38, was a member of a well known local band. He suffered severe spinal injuries in 2005 when a Ford passenger van that the band was traveling in ran off an icy highway in Iowa and rolled over in a ditch. Ford was sued for creating a defective seat-latching mechanism that caused his seat to come loose, resulting in his head hitting the roof of the van.

The \$18.3 million jury award includes \$12.3 million for past and future medical expenses and lost earnings and \$6 million for pain and suffering. As a result of the verdict, Pierson's future needs will be properly funded. Pierson, the only one of seven people in the van who was injured in the accident, will need care for life. He has lost the use of his legs and most of the use of his arms, but can move his arms a little by moving his shoulders. Dell'Osso, a lawyer with the Brandi Law Firm in San Francisco, represented the Plaintiff and did a very good job.

Source: *Bay City News*

JAGUAR ORDERED TO PAY \$21.1 MILLION IN ROLLOVER CASE

A Los Angeles judge has ordered Jaguar Land Rover to pay \$21.1 million to a man who was paralyzed in 2003 when his Land Rover Discovery sport utility vehicle rolled over several times after a collision on a California freeway. A 16-year-old driver's car sideswiped Pannu's vehicle and when Pannu attempted to avoid a collision, he lost control of his vehicle. Indian auto manufacturer Tata Motors acquired Jaguar Land Rover—and the company's liabilities—from Ford Motor Co. in 2008. The key reasons for the judge's decision were:

- The vehicle's high center of gravity made it susceptible to rolling over, and
- The vehicle's roof collapsed too easily, causing Sukhsagar Pannu to suffer a debilitating spinal cord injury.

Pannu, 53, who had played competitive field hockey in Hong Kong, permanently lost the use of his arms and legs as a result of the injury. He now lives with his parents and three children, who provide him around-the-clock care. The court's judgment was issued on May 18th coming after a trial. Garo Mardirossian represented the Plaintiff and did a very good job.

Source: *Los Angeles Times*

WOMAN AWARDED \$2.19 MILLION IN NISSAN LAWSUIT

A 63-year-old woman, who was seriously injured in a 2006 car accident, has been awarded \$2.19 million by a federal court jury. Rebecca Perdue filed her lawsuit against Nissan Motor Co., LTD, alleging that her 1995 Nissan Pathfinder failed to protect her during a 2006 collision. Mrs. Perdue's husband and their daughter were also named as Plaintiffs in the lawsuit. A jury in U.S. District Court found that Nissan was responsible for the woman's injuries.

In accordance with the jury's verdict, the judge issued a final judgment, which states there was a design defect to the structure of the Pathfinder at the time it left the possession of Nissan. It was also stated that the defect was a "producing cause" of Mrs. Perdue's injuries. The court also found there was no negligence by two others involved in the collision that caused or contributed to her injuries. Mrs. Perdue was traveling in the Pathfinder on a Tyler Street when her vehicle was struck by another vehicle. That vehicle had previously collided with yet another car. Mrs. Perdue was wearing her seatbelt at the time. It was contended that the Pathfinder was not reasonably crashworthy and was not reasonably fit for unintended, but clearly foreseeable, accidents.

The vehicle that struck Mrs. Perdue's Pathfinder hit the left front corner of the vehicle, causing the left front tire to drive back through the firewall and destroy "the footwell, floorpan and toeboard survival space." Mrs. Perdue suffered fractures to her

right tibia, fibula and both ankles and incurred \$130,000 in medical expenses. She will never walk normally again and experiences constant pain. Mrs. Perdue still has screws, plates and rods in her leg and ankles.

It was alleged that the design of the 1987-1995 Nissan Pathfinder was defective for not being able to protect the lower legs of a front seat occupant. It was also alleged that Nissan failed to conduct any crash testing or engineering analysis to evaluate the risks, hazards and dangers associated with the defect. The court found that Mrs. Perdue was entitled to damages of \$1.5 million for past and future pain and mental anguish; \$200,000 for past and future disfigurement; \$150,000 for past and future physical impairment; and \$197,000 in past medical expenses. The court also found that her husband was entitled to \$150,000 for past and future loss of companionship and society. The Plaintiffs were represented by Todd Tracy, of Dallas, and Melissa Richards Smith, of Marshall, each of whom did a very good job for their clients.

Source: *TylerPaper.com*

ON THE JOB PRODUCT CASES

Quite often our firm gets the opportunity to represent folks who are injured on the job and we are proud to do so. A worker can file a workers' compensation claim but typically the recovery in that sort of claim is woefully inadequate to compensate an injured worker. Thus, on many occasions a worker becomes frustrated and angry with the workers' compensation system that was set up at the turn of the century and hasn't been significantly improved since that time.

When an injured worker comes to our firm, we fully investigate the cause of an injury to determine if a third party, other than the employer, was responsible for the worker's injury. Quite often we discover that a machine that caused the injury was defectively designed.

When a machine is manufactured, the manufacturer must determine what

hazards are inherent in the operation of the machine. Once these hazards are determined, the manufacturer must ask itself whether the hazard can be "designed out" so that workers won't be injured. If the conclusion is that the hazard cannot be designed out then the manufacturer must next determine how to guard against the hazard. There are numerous effective guards, such as interlock devices, that can be put in place to prevent many horrific injuries to workers.

If the hazard cannot be designed out or guarded against, then a manufacturer must appropriately warn the user of the machine about the hazard. These warnings, however, must not be used as a tool to avoid designing out or guarding against the hazard. A warning is a last resort for a manufacturer if the first two options are not viable.

We are currently handling cases for workers who have been severely burned and who have lost arms and fingers due to a manufacturer's failure to follow the rules of designing out hazards, guarding against hazards, and warning against hazards. Fortunately, we have been able to achieve results that have significantly aided injured workers above and beyond the workers' compensation laws. These types of cases will always be a point of emphasis at our law firm. If you need additional information contact Cole Portis or Kendall Dunson at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Kendall.Dunson@beasleyallen.com.

X. MASS TORTS UPDATE

OUR MASS TORTS SECTION IS LOOKING AT A NUMBER OF DRUGS AND MEDICAL DEVICES

Over the past three years, our Mass Torts lawyers and staff have been very busy. The Vioxx litigation required the allocation of a great deal of firm

resources, but we can now see light at the end of the tunnel. During this time, however, we were able to keep up to speed on a number of other drugs and medical devices that are killing and damaging folks all over the country. Andy Birchfield, who heads up the Mass Torts Section, has furnished information on some of the active projects being worked on in the Section for this issue. In these cases, Andy assigns a lead lawyer for each drug or medical device. Other lawyers work on the individual cases along with the lead lawyer. Also, staff personnel are assigned to each case. I am setting a brief summary of each of the active projects below:

AVANDIA®

Avandia is widely used to treat patients with Type II diabetes mellitus. The drug has been associated with a significant increase in the risk of myocardial infarction and an increase in the risk of death from cardiovascular causes.

Lead Lawyers: Frank Woodson and Roger Smith
Primary Staff Contacts: Cathy Perry and April Worley

BARD COMPOSIX KUGEL MESH HERNIA PATCH®

The Composix Kugel Mesh Hernia Patch, manufactured by Davol, Inc., was first introduced in 2000. The patch is used to repair ventral hernias. In some cases, a hernia can be repaired surgically; however, when the stomach muscles can't withstand the stitching required, mesh is inserted and placed between the intestines and the stomach muscles to help contain the intestines.

Not long after the patch was introduced into the market, the FDA began to receive reports of problems with the patch. By 2005, the number of reports had greatly increased regarding the recoil ring which could easily break. When the ring breaks, patients experience bowel perforations and other serious injuries. The reports prompted the FDA to issue a recall in December 2005 of the Bard Composix Kugel

Mesh X-Large Patch. Doctors were warned to stop using that version of the Kugel Mesh Hernia Patch, and patients with this particular patch were told to seek medical attention if they experienced unexplained fever, persistent abdominal pain, or tenderness to the incision site. By February 2007, the Kugel Patch recall had been expanded twice to include several other sizes of the device.

The hernia mesh patch is inserted into the abdomen through a small incision. In order to fit through the incision, the mesh is folded in half by the surgeon. Once inside the abdomen, the mesh re-deploys as a result of a "memory recoil ring" that is embedded in the mesh. The patch was recalled by Davol after it was discovered that the "memory recoil ring," which opens the patch, can break under the stress of surgical placement. The ring can form a sharp, hard edge which can cut into and through internal organs.

Lead Lawyer: Benjamin L. Locklar
Primary Staff Contacts: Angie M. Faust and Nicole Tripp

CHANTIX®

We are investigating claims of suicide or attempted suicide resulting in permanent injury involving Chantix. Chantix (USA) or Champix (Europe and other countries), known generically as varenicline, is marketed by Pfizer as a prescription medication used to treat smoking addiction.

Lead Lawyer: Frank Woodson
Primary Staff Contacts: Cathy Perry

DIGITEK® (DIGOXIN)

Digitek is a medication used to treat congestive heart failure, abnormal heart rhythms and other heart conditions. On April 25, 2008, Actavis Totowa LLC, issued a Class I recall of Digitek® (digoxin). Digitek was recalled due to the possibility that tablets were doubled in thickness and could contain twice the appropriate level of the active ingredient. According to a press release from Digitek's manufacturer,

digitalis toxicity "can cause nausea, vomiting, dizziness, low blood pressure, cardiac instability, and bradycardia." There have also been reports of digitalis toxicity leading to death. We are investigating claims on behalf of clients who were taking Digitek and suffered a catastrophic injury or death due to digitalis toxicity.

Lead Lawyer: Benjamin L. Locklar
Primary Staff Contacts: Angie M. Faust and Nicole Tripp

FOSAMAX®

Fosamax® (alendronate sodium), manufactured by Merck, is in a class of drugs called bisphosphonates. Fosamax® is commonly used in tablet form to prevent and treat osteoporosis in postmenopausal women. Recently the *Journal of Oral and Maxillofacial Surgeons* reported a link between bisphosphonates and a serious bone disease called Osteonecrosis of the Jaw (ONJ). Osteonecrosis is a disfiguring and disabling condition of the jaw bone that causes infection and rotting of the jaw bone. Typical presentation of Osteonecrosis is pain, soft-tissue swelling and infection, loosening of teeth, drainage, and exposed bone. Symptoms may occur spontaneously, or at the site of previous tooth extraction.

Lead Lawyers: Russ Abney, Leigh O'Dell, and Chad Cook
Primary Staff Contacts: Cathy Perry, Lisa Bruner, and Tabitha Dean

GADOLINIUM

The U.S. Food and Drug Administration (FDA) recently asked manufacturers of all Gadolinium-based contrast agents to include a new boxed warning on the product label. These contrast agents are used to enhance the quality of magnetic resonance imaging (MRI) and magnetic resonance angiography (MRA). In patients with depressed kidney function (which is often unknown) exposure to Gadolinium places the patient at significant risk for developing a potentially fatal disease known as Nephrogenic Systemic Fibro-

sis (NSF) or Nephrogenic Fibrosing Dermopathy (NFD). People who develop NSF or NFD may experience a thickening of the skin and other organs, which can limit their ability to move, extend joints, and can lead to significant pain and even death. Other problems may include dark patches on the skin that appear rough and hard with raised plaques or papules, which may appear as elevations of the skin. Joint and bone pain, as well as swelling of the feet and hands, have also been reported. The FDA first warned about NSF and NFD associated with Gadolinium in June of 2006 and again in December of 2006. As of April of 2007, the FDA had received a considerable number of additional cases involving these conditions.

We are currently evaluating cases in which patients developed NSF or NFD after being exposed to any of these Gadolinium-based contrast agents: Magnevist, MultiHance, Omniscan, Opti-mark, and ProHance. Exposure to these agents is the only known cause of NSF and NFD.

Lead Lawyers: Benjamin L. Locklar and Russ Abney
Primary Staff Contacts: Angie M. Faust and Matt Yarema

HEPARIN®

Heparin is a prescription, injectable blood thinner, primarily used for hemodialysis and cardiac invasive procedures. Heparin has been found to be contaminated with *Serratia marcescens*, which has resulted in patient infections. CDC has confirmed growth of *Serratia marcescens* from several unopened syringes of the product on January 18, 2008. On January 25, 2008, Baxter Healthcare Corp. announced the voluntary recall of nine lots of heparin sodium injection 1000 units/ml, 10ml and 30ml multi-dose vials. We are currently investigating claims on behalf of individuals that suffered a severe allergic reaction, catastrophic permanent injury or death due to receiving contaminated heparin.

Lead Lawyers: Chad Cook
Primary Staff Contact: Tabitha Dean

HORMONE THERAPY

For years, women have taken Hormone Therapy (HT) to reduce the symptoms of menopause. Studies now show that HT medications such as Prempro and Premarin can increase the risk of breast cancer, ovarian cancer, stroke and heart disease. We are currently investigating potential claims against the manufacturers of HT medications.

Lead Lawyers: Ted Meadows, Melissa Prickett, Russ Abney, and Navan Ward
Primary Staff Contacts: Katie Tucker, Gwyn Harris, and Janet Pair

IPN THERAPY

On November 14, 2007 the FDA announced that Pentec Health recalled 27,000 bags of its IPN solution. The bags were dispensed in prescriptions filled on or before September 21, 2007 and were recalled due to an increased incidence in fungal peritonitis. The distribution was nationwide.

Peritonitis is an inflammation of the serous membrane that lines the abdominal cavity. Peritonitis is caused by infection of the abdominal cavity without obvious organ rupture (primary peritonitis) by perforation (rupture) of one of the internal organs (secondary peritonitis) OR by instillation of an irritating chemical into the abdominal cavity (chemical peritonitis).

Symptoms of peritonitis include abdominal pain, fever, change in bowel habits and malaise. As the peritonitis progresses, the pain worsens and is accompanied by nausea, loss of appetite and hypothermia.

Treatment involves antibiotic therapy, surgery, Fluid resuscitation. Up to 50% of patients with secondary peritonitis die of sepsis. The prognosis depends on the underlying condition of the patient, the rapidity of the diagnosis, and the subsequent treatment given.

Lead Lawyers: Ted Meadows and Russ Abney
Primary Staff Contact: Amy Brown

MEDTRONIC HEART DEVICE LEAD WIRE

On October 15, 2007, the Food and Drug Administration ("FDA") issued a Class I Recall involving the Medtronic, Inc., Sprint Fidelis® Defibrillator Leads, model numbers 6930, 6931, 6948 and 6949. This recall specifically relates to those leads manufactured from September 2004 through October 15, 2007. This action does not affect Medtronic pacemaker patients.

In March 2007, Medtronic reported two primary locations where chronic conductor fractures have occurred on Sprint Fidelis Leads: (1) the distal portion of the lead, affecting the ring electrode and (2) near the anchoring sleeve tie-down, affecting the helix tip electrode, and occasionally the high voltage conductor. High voltage conductor fractures could result in the ability to deliver defibrillation therapy. Anode or cathode conductor fractures may present increased impedance, oversensing, increased interval counts, multiple inappropriate shocks, and/or loss of pacing output. The potential for defibrillation lead fracture to result in or contribute to inappropriate shocks or death has been reported. As of October 4, 2007, approximately 268,000 Sprint Fidelis Leads had been implanted worldwide. Based on current information regarding the 268,000 implanted leads, Medtronic has identified five patient deaths in which a Sprint Fidelis Lead fracture may have been a possible or likely contributing factor. We are currently investigating claims involving the particular recalled leads.

Lead Lawyer: P. Leigh O'Dell
Primary Staff Contact: Lisa Bruner

ORAL SODIUM PHOSPHATE

Oral Sodium Phosphate is a laxative that is commonly given to patients to cleanse the bowels prior to procedures, such as colonoscopies, endoscopic and radiologic examinations, and surgeries. The primary product that is used for this is Fleet® Phospho-Soda®. Fleet® Phospho-Soda® has been

associated with severe and potentially fatal cases of renal or kidney failure. We are currently investigating claims of renal failure resulting in permanent injury, dialysis, death or other serious injuries following the administration of Fleet® Phospho-Soda®.

Lead Lawyer: Benjamin L. Locklar
Primary Staff Contact: Matt Yarema

PAXIL®

Paxil® (paroxetine) is an anti-depressant manufactured by GlaxoSmithKline. Recently Public Health Advisories have been issued for Paxil® regarding an increased risk of heart birth defects, persistent pulmonary hypertension (PPHN), omphalocele (an abnormality in newborns in which the infant's intestine or other abdominal organs protrude from the navel) or craniosynostosis (connections between sutures-skull bones, prematurely close during the first year of life, which causes an abnormally shaped skull) in children born to mothers exposed to Paxil®.

Lead Lawyer: Chad Cook
Primary Staff Contact: Tabitha Dean

PAIN PUMPS

Pain pumps are portable and often disposable pain management devices which continuously administer local anesthetic through a catheter to a surgical wound site for several days following surgery to decrease post-operative pain and assist in earlier rehabilitation. A "Y-connector" accessory is sometimes available so that the pain pump can be used on multiple wound sites. Examples of pain pump manufacturers include Stryker, I-Flow, CME McKinley, Breg, Medical Flow Systems, Baxter and Sgarlato Labs.

Recently, the use of pain pumps to administer medication directly into the glenohumeral joint space following shoulder surgery has been linked to a severe condition called Postarthroscopic Glenohumeral Chondrolysis ("Chondrolysis"), in which the cartilage of the humeral head and the glenoid space of the shoulder process has been

destroyed and lost. The destruction of the shoulder cartilage can be attributed to the application of anesthetic medication directly into the joint space via the pain pump catheter. In 2003, some pain pump manufacturers may have increased the anesthetic dosing capacity of their pain pumps, which may have hastened the onset of chondrolysis in some patients.

Chondrolysis symptoms usually present between six weeks and six months following surgery and include increased shoulder pain and stiffness, loss of cartilage, decreased range of motion, loss of shoulder joint space, crepitus in the shoulder and loss of strength. Patients suffering from chondrolysis are usually unable to complete their post-surgical physical therapy due to pain. Whatever the patient's condition was prior to his or her shoulder surgery, the post-operative diagnosis of chondrolysis is typically much worse. Ultimately, complete shoulder replacement surgery (acromioplasty) could become necessary in order to eliminate the painful and debilitating symptoms of chondrolysis.

Lead Lawyer: Frank Woodson
Primary Staff Contact: Cathy Perry

PERMAX® AND DOSTINEX®

These drugs are used in the treatment of Parkinson's disease and other neurological problems such as restless leg syndrome (RLS). In a recent *New England Journal of Medicine* study, a statistically significant percentage of those who used these drugs for greater than one year developed the potentially serious complication of valvular heart disease (VHD). Valvular heart disease is typically diagnosed by a painless and non-invasive test called an echocardiogram that uses sound waves to determine if the valves of the heart are functioning properly. In many cases, valvular heart disease does not immediately result in symptoms, so if you have taken either of these drugs, we would suggest that you speak to your physician about having such a test, and about the nature of the risks

associated with these two drugs. We would also caution you that we are not doctors and do not and cannot recommend any medical treatment, nor do we recommend that you stop taking Permax® and/or Dostinex® without first consulting your physician.

At this point, it appears that the only Parkinson's-related drugs with a demonstrated association with valvular heart disease are Permax® (also prescribed generically as pergolide mesylate) and Dostinex® (also prescribed generically as cabergoline). These two drugs are chemically related to the diet drug "Fen-phen", which was also related to the development of valvular heart disease and another very rare condition call Primary Pulmonary Hypertension (PPH).

Lead Lawyer: Navan Ward
Primary Staff Contact: Janet Pair

REGLAN®

Reglan is used to treat gastrointestinal disorders such as heartburn caused by reflux. The FDA recently required a black box warning linking Reglan and tardive dyskinesia. Symptoms of tardive dyskinesia include involuntary and repetitive movements like tongue thrusting, eye blinking and head jerking as well as involuntary movements of the fingers. These symptoms are rarely reversible and with no known treatment. Those at increased risk for developing tardive dyskinesia are the elderly, especially older women, and people who have taken the drug for a long period of time. The FDA has advised physicians to avoid long term use of Reglan and recommends that treatment not exceed three months. Reglan is available in formulations including tablets, syrups and injections. We are investigating claims of tardive dyskinesia or other serious involuntary movement disorders.

Lead Lawyer: Chad Cook
Primary Staff Contact: Tabitha Dean

STEVENS-JOHNSON SYNDROME

Stevens-Johnson syndrome is an immune complex hypersensitivity reac-

tion that can be caused from an infection or immune response to drugs. It is a severe expression of a simple rash known as erythema multiforme. SJS is also known as erythema multiforme major. It affects all ages and genders including pediatric populations. The most severe form of SJS is toxic epidermal necrolysis (TENS). SJS occurs twice as often in men as in women. Most cases of SJS appear in children and young adults under age 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as NSAIDs, non-steroidal anti-inflammatory drugs.

Lead Lawyer: Frank Woodson
Primary Staff Contact: Cathy Perry

TRASYLOL

Trasylol is indicated for prophylactic use to reduce perioperative blood loss and the need for blood transfusion in patients undergoing cardiopulmonary bypass surgery who are at an increased risk for blood loss and blood transfusion. Trasylol was manufactured by Bayer Pharmaceuticals and was approved by the FDA in 1993. On February 8, 2006, the FDA issued an advisory warning to doctors of the potential for renal toxicity and on November 5, 2007, the FDA and Bayer agreed to temporary marketing suspension of Trasylol. We are investigating potential Trasylol claims involving death after undergoing a coronary artery bypass procedure or kidney failure requiring dialysis or transplant.

Lead Lawyer: Frank Woodson
Primary Staff Contact: Cathy Perry

ZITHROMAX

Zithromax (azithromycin), manufactured by Pfizer, is a popular antibiotic used most often to treat respiratory infections, while also used to treat skin infections and some sexually transmitted diseases. Zithromax is taken once daily, usually two to five days under normal dosage. The most serious types of health problems that have

been attributed to Zithromax include liver damage resulting in death or liver transplant surgery. The symptoms for liver damage may include yellow eyes, abdominal pain, nausea, clay colored stools, and dark urine. Recent warnings have been added to the label regarding abnormal liver function, jaundice, necrosis, hepatic (liver) failure and death, which have been reported by persons taking this drug.

Lead Lawyer: Chad Cook
Primary Staff Contact: Tabitha Dean

THE U.S. SUPREME COURT RULING BREAKS DRUG LAWSUIT LOGJAM

The large number of lawsuits against GlaxoSmithKline Plc and Bristol-Myers Squibb Co., which have been sort of hanging around, are now moving toward trials. That important development comes because of the U.S. Supreme Court's March 4th ruling in the *Levine v. Wyeth* case. That decision broke a logjam of cases against drug manufacturers in state and federal courts. The result in that case has already affected more than 250 lawsuits involving at least ten companies that were in limbo before the ruling.

Source: Bloomberg

PLAVIX CASES BACK ON TRACK

An example of the breakup of the litigation logjam involves Plavix. Cases against the makers of Plavix, the popular blood thinning drug, are back on track now that the U.S. Supreme Court has ruled on federal preemption. A federal judge in New Jersey handling the 29 cases in the multi-district litigation had put the cases on hold awaiting the Court's decision. The suits allege that Bristol-Myers Squibb and Sanofi-Aventis, which manufacture and market Plavix, failed to warn about the increased risk of heart attack, stroke and potentially fatal blood disorders. Two new studies have surfaced in the past two months on the risks of blood thinners in combination with proton pump inhibitors, commonly prescribed

for gastrointestinal bleeding.

The suits allege that the manufacturers marketed Plavix for heart attack patients as an alternative to aspirin that caused less bleeding, despite studies that showed the opposite. In effect, they sold a drug that doesn't work and costs four dollars a pill, compared to aspirin that costs four cents a pill, which worked better and was safer. A very simple and honest warning was needed. All the company had to do was say Plavix was not as safe as aspirin. After a study showed that Plavix was not safer than aspirin, the companies switched the marketing campaign to promote a dual therapy of aspirin and Plavix.

Two recent studies indicate that the risk of heart attack or death is increased when Plavix is combined with proton pump inhibitors, like Nexium or Prilosec, which are often prescribed to prevent gastrointestinal bleeding. A number of cases also allege that Plavix causes a serious blood disorder, called thrombocytopenic purpura (TTP), that causes platelet destruction and is often fatal. Doctors can perform a blood test to see whether a patient has an early reaction to the drug. But how many times has a drug company told doctors they need to do a blood test when they prescribe a drug. I believe you know the obvious answer to that question.

Source: *Lawyers USA*

REGLAN AND TARDIVE DYSKINESIA

Reglan is a drug commonly prescribed to treat gastric reflux and diabetic gastric distress. Reglan is a dopamine agonist and inhibits the central and peripheral effects of apomorphine, induces release of prolactin and causes a transient increase in circulating aldosterone levels. Reglan is manufactured in tablet form by Schwarz Parma, Inc. and in an injectable form by Baxter Pharmaceuticals. Reglan has been on the market since the early 1980s and, therefore, has gone generic and is available under several other trade names as well as its chemical name Metoclopramide.

The drug has been indicated for short-term therapy (four to 12 weeks) since at least 2004. The label has also warned that tardive dyskinesia may develop in patients treated with Reglan and that risk of developing the condition and the likelihood that it will become irreversible are believed to increase with duration of treatment and cumulative dose. Tardive dyskinesia is a neurologic disorder characterized by involuntary, repetitive movements of the extremities, as well as grimacing, rapid blinking and impaired movement of the fingers.

While the manufacturer had previously warned of tardive dyskinesia as a possible side effect, recent published analysis showed that Reglan has surpassed haloperidol as the most common cause of drug-induced movement disorders. You may recall, Eli Lilly created a blockbuster drug, Zyprexa, based on its claim that its drug had a lower incidence of tardive dyskinesia than haloperidol. The studies, along with adverse event reports, also reveal that patients in large numbers (as many as 30%) are being prescribed this drug for longer than 90 days. Most reports of tardive dyskinesia have been in association with greater than 12 weeks exposure to Reglan. The manufacturer had previously represented the incidence of tardive dyskinesia to be about 0.2%. For patients on the drug more than 12 weeks, it appears the rate may be exponentially higher.

On May 9, 2009, the FDA, pursuant to its new powers under the amended Food, Drug and Cosmetic Act, ordered the manufacturers to add a Black Boxed Warning, the highest level of warning, and to submit a proposed Medication Guide for Reglan to explain these risks to patients. This is a very aggressive and rarely-seen pharmacovigilance enforcement action by the FDA. It would not be surprising to see this drug removed from the market

this year. If you need additional information contact Russ Abney at 800-898-

2034 or by email at Russ.Abney@beasleyallen.com.

Source: Risk Evaluation and Mitigation Strategies letter from Joyce Korvick, M.D., M.P.H., at the FDA to all manufacturers of Metoclopramide.

HYDROXYCUT DIET AIDS RECALLED AFTER WARNING

The U.S. Food and Drug Administration has warned consumers to stop using the popular Hydroxycut line of weight-loss products, citing reports of a death due to liver failure and other instances of serious health problems. The FDA has received 23 reports of significant adverse health effects in people who used Hydroxycut, including one person who required a liver transplant. Other complications included heart problems and a kind of muscle damage that could lead to kidney failure, according to the regulatory agency.

The Hydroxycut brand, which has been widely sold at national chain stores including GNC and the Vitamin Shoppe, includes pills, drinks and powders marketed to increase energy, burn calories and fat, and control appetite. The FDA says the maker reported selling more than 9 million units of the brand last year. Lovate Health Sciences of Oakville, Ontario, the maker, and its American distributor, are recalling 14 of the products. Two other products, Hydroxycut Cleanse and Hoodia, with different ingredients, are not affected by the recall.

According to the FDA, the new law requiring manufacturers to notify the agency of any reports of serious health problems helped officials identify a pattern of adverse events linked to Hydroxycut users. In addition, the agency cited reports in medical journals of serious liver disease being diagnosed in six people who had taken Hydroxycut. The consumers were healthy before using Hydroxycut and took the recommended dose. Because the formula for Hydroxycut has changed over time and because the product contains different amounts of a proprietary blend of ingredients, the

FDA hasn't determined which of the product's ingredients might constitute a health hazard.

A lawsuit filed in November of 2008 on behalf of the parents of Dennis Lopez in Texas, will be the first Hydroxycut case scheduled to go to trial. The child began taking MuscleTech Hydroxycut Hardcore in November 2006. He died of severe liver failure on February 12, 2007. The autopsy report shows that the causative factor in his death was the dietary supplement. A class action is being sought in the case, which would be the first in the United States against the manufacturer of Hydroxycut. If you need additional information on this subject, contact Roger Smith at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

Source: *New York Times*

THE FDA NEEDS AUTHORITY TO REGULATE DIETARY SUPPLEMENTS

The recall of Hydroxycut, which as pointed out above is one of the best-known weight-loss brands, is the latest in a series of incidents that raise the question of whether the FDA has adequate authority to regulate the dietary supplement industry and provide consumer protection. At issue is the difference in the way the agency oversees drugs—defined as products that prevent or cure disease—and dietary supplements, which can offer general health benefits but cannot claim to treat specific diseases or symptoms. Unlike drugs—whose manufacturers must provide safety and effectiveness data before receiving federal approval to sell the products—dietary supplements don't need FDA approval to go on sale. That means only the manufacturers of dietary supplements are themselves responsible for ensuring and documenting the safety and efficacy claims of their products. That's not good for obvious reasons.

According to the law governing dietary supplements, the FDA is empowered to act only in cases when it identifies a harmful or adulterated product that is already on sale. Dr. Linda

Katz, interim chief medical officer of the agency's Center for Food Safety and Applied Nutrition, told the *Times*:

Part of the problem as you know is that FDA looks at dietary supplements from a postmarket perspective, so that an isolated incident is often difficult to follow.

The agency has been on a campaign to identify and warn consumers about tainted weight-loss pills that illegally contain prescription drug ingredients. Since December, the FDA has issued a list of 70 brands that contained hidden and potential hazardous drugs including an antiseizure medication.

Source: *New York Times*

FDA ALERTS MEDICAL COMMUNITY OF NEW SUICIDE WARNINGS ON EPILEPSY DRUGS

The Food and Drug Administration has alerted medical doctors to new warnings on anti-seizure drugs about heightened risks of suicidal tendencies. This warning follows an earlier announcement by the FDA that the labels would be required. The labeling applies to more than 20 medications used to control seizures, psychiatric disorders and nerve pain. The warnings caution doctors that there is increased "risk of suicidal thoughts or behavior in patients taking these drugs for any indication."

Regulators highlighted the new language in letters sent to doctors, according to a posting on FDA's web site last month. The FDA announced in December that it would require the warnings. An analysis by FDA concluded that an additional two patients per 1,000 would have suicidal thoughts and behaviors when taking the drugs compared with placebo. If this is accurate, the heightened risk should be relatively small. Drugs bearing the new language include blockbuster products like GlaxoSmithKline's Lamictal, Johnson & Johnson's Topamax and Pfizer's Lyrica.

The FDA is requiring companies to distribute medication pamphlets to patients explaining the risks. The medication guides and the new warning

labels were approved by the agency on April 23rd. It should be noted that the FDA didn't add its sternest warning to the medications, following the advice of its outside experts, which is rather interesting. In July, a panel of advisers said adding the so-called "black box" warning, the strongest type available, could cause undue alarm among patients and cause them to stop taking their medications.

Anti-seizure drugs are used for a variety of illnesses besides epilepsy, including migraines, certain nerve-pain disorders, and mental illnesses such as bipolar disorder. According to the industry research firm IMS Health, the drugs were the fourth-best-selling class in the country last year with total sales of \$11.3 billion. If you need additional information on this subject, contact Chad Cook at 800-898-2034 or by email at Chad.Cook@beasleyallen.com.

Source: *Associated Press*

MORE RECALLS OF DIGOXIN

The makers of Digitek and its generic form, Digoxin, continue to have problems with their manufacturing processes. Several months ago, we first reported that a number of lots of the 0.125 mg Digitek tablets had been recalled by Actavis and Mylan, the makers and marketers of the drug. Subsequently, Actavis and Mylan did a total recall of the tablets manufactured in its plant in New Jersey, including the 0.25 mg dosage.

More recently, Caraco Pharmaceutical Laboratories, LTD, and AS Medication Solutions, LLC, the manufacturer and packager of the Caraco brand of Digoxin, the generic form of Digitek, recalled both its 0.125 and 0.25 mg pills because, like Digitek, some of the pills contained too much or too little of the drug's active ingredient. These recalls occurred on March 31st and May 12, 2009. The March 31, 2009 FDA Recall notice provides:

Digoxin is a drug product used to treat heart failure and abnormal heart rhythms. It has a narrow

therapeutic index and the existence of [a] higher than labeled dose may pose a risk of digoxin toxicity in patients with renal failure. Digoxin toxicity can cause nausea, vomiting, dizziness, low blood pressure, cardiac instability, and bradycardia. Death can also result from excessive digoxin intake. A lower than labeled dose may pose a risk of lack of efficacy potentially resulting in cardiac instability....

Our firm is reviewing Digitek and Digoxin cases. If you need more information, you should contact Ben Locklar at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

CONCERNS AFTER RAPTIVA WITHDRAWAL

Raptiva has been withdrawn from the market due to the possible risk of developing progressive multifocal leukoencephalopathy (PML). Many psoriasis sufferers are greatly concerned. Some users of this psoriasis drug have been taking it for several years and are just now finding out that they might be at risk.

PML leads to a gradual worsening in the way the nervous system works, which cannot be reversed, and death. People who have taken Raptiva and have severely weakened immune systems are most at risk. Longer, continuous use may further increase the risk. There is a website (www.psoriasis.org) that you might want to go to for more information. If you need additional information, you can contact Ben Locklar at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

UPDATE ON CHANTIX LITIGATION

In past issues, we have reported on Chantix, a Pfizer drug, which is prescribed to help people stop smoking. The FDA first warned Chantix users in November of 2007 that an ongoing safety review was being conducted showing an increase in suicidal

thoughts and suicidal behavior. Subsequently, the FDA required an additional update to the label in early 2008 involving serious neuropsychiatric symptoms. Since that time, the Federal Aviation Administration has banned pilots and flight controllers from using Chantix and the label now includes a medication guide warning users that they may have changes in behavior while taking Chantix. Nobody in my opinion should take Chantix, but many folks are still doing so in an attempt to stop smoking. We continue to investigate Chantix cases involving suicide or attempted suicide. If you need additional information, you can contact Frank Woodson or Chad Cook at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com or Chad.Cook@beasleyallen.com

MEDICAL DEVICE MAKER SETTLES CLAIM IN NEW JERSEY

The New Jersey Attorney General has announced a settlement with Synthes, the medical device maker. The company had been accused of failing to disclose financial conflicts of interest among doctors researching its products. The Attorney General's office is also investigating other similar conflicts in the medical device industry. At press time, subpoenas had been issued to five major device makers. Attorney General Anne Milgram said in a prepared statement:

It is outrageous that doctors who are testing, and in many cases, recommending the use of certain high-risk medical devices are being compensated with stock in the very companies that make these devices.

Under terms of the settlement, Synthes, the maker of the ProDisc artificial spinal disk, must disclose any future payments or investments held by doctors involved in researching its products. The company has agreed to make the information publicly available through its web site. Synthes has also agreed to stop paying doctors who are

conducting clinical trials of its products with stock or stock options. The settlement requires the company to pay \$236,000 to reimburse the attorney general's office for its investigation. The State pursued the case under its consumer fraud laws.

Synthes, based in West Chester, Pennsylvania, is a unit of a Swiss company with the same name. The ProDisc was the subject of an article in *The New York Times* in 2008 about surgeons who had conducted the clinical studies leading to the device's approval by the FDA. It was revealed in a lawsuit that was settled in 2007 that doctors at about half of the 17 research centers involved stood to profit if the ProDisc was successful.

In its subsequent investigation, New Jersey concluded that a majority of the doctors had significant investments in the products, but that Synthes failed to disclose the conflicts to the FDA. In a letter sent to the FDA and members of Congress, Attorney General Milgram criticized the agency for doing "nothing to regulate these conflicts," despite what she described as an obvious lack of disclosure from the researchers, including some forms that were signed and dated but otherwise left blank. The Attorney General called on the FDA to increase its oversight and develop new regulations requiring companies to disclose conflicts of interest to the public.

Source: *New York Times*

VIOXX CLASS ACTION SUIT IN CALIFORNIA REJECTED

A California state judge has rejected a proposed class-action lawsuit filed on behalf of state residents who took Vioxx before it was pulled from the market in 2004. Lawyers for former Vioxx users and health insurance plans were attempting to get Merck & Co. to repay what these residents paid for the drug. The Plaintiffs' lawyers argued patients would have taken other pain relievers had they known Vioxx doubled their risk of heart attack and stroke. But Judge Victoria Chaney of Los Angeles Superior Court ruled that

the patients and insurers cannot sue as a group and therefore couldn't proceed as a class. The judge said the individuals paid varying amounts for Vioxx and had too many other differences to sue jointly. Judges in other jurisdictions have rejected some other similar lawsuits against Merck.

Sources: *Forbes*, *Associated Press* and *Law.com*

COURT TO CONSIDER WHETHER TO ALLOW VIOXX LAWSUITS

The U.S. Supreme Court will decide whether shareholders can sue pharmaceutical company Merck & Co. because of the failure of Vioxx. The High Court agreed last month to review Merck's challenge to a federal appeals court's reinstatement of a class-action securities lawsuit. Investors had charged Merck with providing misleading information or omitting originally important information about the risks of Vioxx. A U.S. District Judge dismissed the November 2003 lawsuit, ruling that all the Plaintiffs' claims were time-barred under the statute of limitations. But the U.S. Court of Appeals for the Third Circuit decided to allow the lawsuits and Merck appealed to the Supreme Court. As we all know, Vioxx was pulled from the market because it doubled risks of heart attack, stroke and death. On the day it was pulled, stockholders lost a collective \$28 billion.

Source: *Associated Press*

XI. BUSINESS LITIGATION

VERDICT AGAINST TURNER BROADCASTING SYSTEM UPHELD

A Georgia Superior Court judge has ruled in a lawsuit that Turner Broadcasting System Inc. must pay David McDavid, a Texas businessman, \$281 million. A jury awarded that amount in a verdict last year. Judge Tom Campbell denied Turner's request to overturn the

verdict in favor of the Plaintiff, who accused the company of cheating him out of buying the Atlanta Hawks, Atlanta Thrashers and Philips Arena operating rights. In 2003, McDavid signed a letter of intent with Turner, a unit of Time Warner Inc., to purchase the teams. But in September 2003, Turner Broadcasting announced that it was selling the teams and the arena rights to an unrelated ownership group, the Atlanta Spirit. The lawsuit was subsequently filed that resulted in a verdict for the Plaintiff and against TBS.

Source: *National Law Journal*

MONSANTO SUES DUPONT OVER BIOTECH PATENTS

Monsanto Co. has filed a patent-infringement lawsuit against archrival DuPont Co. The lawsuit, filed last month in Federal District Court in Monsanto's hometown of St. Louis, is aimed at forcing DuPont's Pioneer Hi-Bred seed business to dismantle a herbicide-resistant soybean plant that DuPont hopes to begin selling to farmers in 2011. The new seed contains two genes that have been modified to make the plant tolerate herbicides. One is a DuPont gene that allows the soybean plant to tolerate exposure to glyphosate-based weedkiller, as well as to another herbicide called acetolol synthase.

The seed project has long been touted by DuPont as part of its strategy to offer farmers an alternative to herbicide-tolerant soybeans using Monsanto biotechnology. Such crops are popular with farmers because they make weed control much easier. The suit was prompted by the other gene, developed by Monsanto. Monsanto claims in its lawsuit that the 2002 contract that gave DuPont access to Monsanto's gene prohibits DuPont from combining it with any other company's glyphosate-tolerant gene in the same plant.

DuPont says that Monsanto's prohibition on combining its genes with those of other companies to form new seeds, called "stacking," was neutralized in 2008 when the U.S. Justice Department

ordered Monsanto to abandon similar restrictions on cottonseed breeders. DuPont said in a prepared statement that "Monsanto's so-called 'stacking' restriction is one of many practices that Monsanto engages in to limit the availability of competitive products." It's DuPont's position that "seed companies should be able to offer combinations of traits and germplasm without restrictions imposed by trait providers that attempt to limit those combinations."

There were numerous lawsuits involving Monsanto, DuPont's Pioneer unit, and other seed companies in the late 1990s and earlier in this decade. This litigation was over control of genetically-modified seeds. Nonetheless, DuPont said it decided to incorporate Monsanto's Roundup Ready gene because the combination increases crop yields.

Source: *Wall Street Journal*

XII. AN UPDATE ON SECURITIES CASES

SEC NEEDS MORE TRIAL LAWYERS TO HANDLE CASES

SEC Director Robert Khuzami has asked Congress for an increased budget, citing the agency's need for additional trial lawyers and staff to handle a large increase in cases. After Chairman Mary Schapiro took over as head of the SEC, new investigations have surged 32% since the end of January. Director Khuzami provided his request in written testimony to a Senate subcommittee overseeing the securities industry. He pointed out that compared with a year earlier the agency has gone to court almost four times as often to seek emergency orders to halt misconduct. The newly-appointed director made this most accurate observation:

We must convey to all Defendants in SEC actions that not only do

we assemble winning cases against them, but also we are prepared to go to trial and we will win. Without that credible threat, we are at a severe disadvantage.

Khuzami, a former federal prosecutor, is seeking to revitalize a division faulted for missing a number of incidents of fraudulent conduct, including the \$65 billion Madoff Ponzi scheme. The director says the agency needs to invest in technology to better analyze data and manage cases and must find ways to free investigators and accountants from tasks that could be handled by less qualified staff. Based on our experience in handling securities cases, there is a definite need for the SEC to rebuild its legal staff and technology investments.

The enforcement division must be able to do its job and handle the increase in cases. In the past, lawyers representing companies against the SEC have generally had more lawyers, more staff, superior technology, and more resources. That must change. The SEC must be able to do its job so investor confidence can be restored. Ms. Schapiro vowed to reinvigorate the enforcement program when she succeeded Christopher Cox, and that is badly needed. She named Khuzami to head the division in late March.

It should be noted that the number of SEC investigative lawyers decreased more than 11% from fiscal year 2004 to 2008, according to the Government Accountability Office. Its report faulted previous agency leaders for instituting policies that slowed cases and led enforcement-unit lawyers to conclude commissioners opposed fining companies. It was reported that investigators opened 287 inquiries since the end of January, compared with about 217 a year earlier. SEC lawyers have sought 27 emergency restraining orders, up from seven a year earlier. Commissioners have also issued 138 formal orders of investigation, an increase from 57, granting SEC lawyers more authority to subpoena documents and testimony.

Source: *Bloomberg*

COURT APPROVES \$843 MILLION FOR AIG INVESTORS HURT BY ALLEGED FRAUD

A federal court has approved the distribution of more than \$843 million to investors who were damaged at insurer American International Group. Checks will soon be mailed to more than 257,000 AIG investors who were affected by an accounting fraud at AIG. AIG, which has been propped up by billions of dollars in taxpayer funds, was charged with accounting fraud in 2006. The SEC alleged that the insurer falsified its financial statements from at least 2000 until 2005 and reported misleading information about its financial condition.

AIG must repay its ill-gotten gains, as well as penalties to the government, and that's good. In 2007, a federal court authorized the SEC to establish a "fair fund" to distribute the money to harmed AIG investors. Dick D'Anna, director of the SEC's office of collections and distributions, said in an agency statement:

The commission continues to utilize the tools that Congress provided to ensure that funds are returned to harmed investors to the greatest extent possible.

Companies like AIG—as a result of unregulated greed—have gotten away with a great deal of wrongdoing. It's good to see victims finally having their day for a change!

Source: *Insurance Journal*

SEC CHARGES RESERVE FUND OPERATORS WITH FRAUD

A major money market firm and its top managers have been charged with fraud by federal securities regulators for allegedly concealing key facts from investors as the company's flagship fund fell below the \$1-per-share industry standard last year. The Securities and Exchange Commission lawsuit accuses Reserve Management, Chairman Bruce Bent Sr. and President Bruce Bent II of running a "campaign of misinformation" about the shaken finances of the

firm's Primary fund after the bankruptcy of Lehman Bros. The \$62 billion Primary fund at the time held Lehman debt with a face value of \$785 million. The SEC charges that Reserve and its executives resorted to deception in an effort to halt a run of withdrawals by Primary fund investors. The SEC charged that:

Defendants engaged in a systematic campaign to deceive the investing public into believing that the Primary fund—their flagship money market fund—was safe and secure despite its substantial Lehman holdings. The alleged campaign involved "knowing dissemination" of false information to the fund's board of trustees, investors and rating agencies ... plus "knowing concealment" of the impact of the Lehman holdings.

Reserve falsely assured investors the firm would protect the fund's net asset value to "whatever degree is required," honor withdrawals and get a capital infusion. On September 16th, one day after the bankruptcy, the firm announced the Primary fund had "broken the buck" or fallen below the \$1-per-share needed to fully repay investors. The news rocked money market funds, prompting an emergency federal guarantee of an industry that is supposed to feature investor safety.

The SEC requested that a federal judge order a pro rata distribution to investors of the Primary fund's remaining holdings. That includes \$3.5 billion Reserve has held to defend against investor lawsuits. The SEC also seeks unspecified fines and repayment of improper gains.

Source: *USA Today*

SEC INVESTIGATING REGIONS SUBSIDIARY MORGAN KEEGAN & CO.

The Securities and Exchange Commission has notified Regions Financial Corp.'s Memphis-based subsidiary Morgan Keegan & Co. that it is investigating the firm. Regions said in a quar-

terly report that the SEC's investigation focuses on auction rate securities sold and underwritten by Morgan Keegan. According to the filing, the SEC sent a so-called "Wells notice" in March. The SEC is looking at disclosures about "liquidity risks" among other things."

The market for certain Morgan Keegan securities, whose interest rates were set through periodic bidding, collapsed when banks quit acting as a buyer of last resort at auctions. Morgan Keegan says it is preparing a response to the SEC. Morgan Keegan contends it started a voluntary repurchase program for auction bonds earlier this year that has reclaimed more than \$28 million in securities from clients.

Source: *Birmingham News*

FINRA SETTLES MORE ARS CASES

The Financial Industry Regulatory Authority (FINRA) has settled charges relating to the sale of auction rate securities (ARS) with four companies. FINRA, an independent regulator of the securities industry, settled with NatCity Investments Inc. of Cleveland, which was fined \$300,000; M&T Securities Inc. of Buffalo, which was fined \$200,000; Janney Montgomery Scott LLC of Philadelphia, which was fined \$200,000 and M&I Financial Advisors Inc. of Milwaukee, which was fined \$150,000.

As a part of the settlement, the companies agreed to initiate or complete offers to repurchase the securities sold to their customers where the customers' auctions of the securities had failed. Each company is required to provide notice to its eligible customers promptly. Repurchases must begin no later than 30 days after the settlement is approved and must be completed no later than 60 days after settlement approval.

Some auction rate securities became illiquid and basically worthless when auctions froze in February 2008. FINRA said its investigation found that some companies failed to adequately disclose to customers the potential for auction rate securities auctions to fail and the consequences of such failures. Some

companies also failed to establish and maintain a supervisory system reasonably designed to achieve compliance with the securities laws and FINRA rules concerning the marketing and sale of the securities. Susan L. Merrill, FINRA's chief of enforcement, observed:

Firms have an obligation to use fair and balanced marketing materials when selling any security, including auction rate securities. This includes full disclosure of liquidity risks, which unfortunately became a reality in the ARS market last year.

The organization's priority was to assure investors' access to the millions of dollars they invested in ARS. In addition to individual retail ARS investors, the buyback offers were made to non-profit charitable organizations and religious corporations or entities, trusts, corporate trusts, corporations, pension plans and educational institutions. To date, FINRA has concluded final settlements with nine companies, imposing a total of \$2.6 million in fines and guaranteeing the return of more than \$1.2 billion to investors.

Investigations continue and are ongoing at several other companies. According to FINRA, Sunburst Investment Services Inc. and Sunburst Robinson Humphrey Inc., both of Atlanta, haven't followed through on previously-announced settlements with FINRA. The investigation by FINRA into both firms' ARS-related activities is continuing. If you need additional information on ARS Litigation you should contact either Jay Aughtman or Scarlett Tuley at 800-898-2034 or by email at Jay.Aughtman@beasleyallen.com or Scarlett.Tuley@beasleyallen.com.

Source: Associated Press

SEC PLANS ACTION AGAINST JPMORGAN IN JEFFERSON COUNTY BOND DEALS

The U.S. Securities and Exchange Commission plans to file an enforcement action against JPMorgan Chase & Co., a Wall Street firm that arranged interest rate swap deals for Jefferson

County in 2002 and 2003. The SEC is alleging violations of federal securities laws and rates set by the Municipal Securities Rulemaking Board with respect to "certain transactions executed in 2002 and 2003 with Jefferson County." JPMorgan has been "engaged in discussions with the SEC staff in an attempt to resolve the matter prior to litigation," according to media reports.

The SEC's actions could make a settlement between JPMorgan and the County over the \$3.9 billion sewer debt more likely. Settlement negotiations have been going on for about 18 months between JPMorgan and the County. It's very likely that the SEC will settle on federal securities law violations and MSRB violations with JPMorgan.

It was also reported that the County is still negotiating with JPMorgan and other creditors in an effort to solve its financial crisis. JPMorgan is one of several parties that have offered \$1.3 billion in concessions to help solve Jefferson County's sewer crisis. JPMorgan bankers were among the financial advisers who persuaded Jefferson County officials in 2002 to replace traditional fixed-rate bonds with bonds having floating interest rates, including auction-rate securities whose terms are set through periodic bidding. Those auctions failed last year, causing interest rates to soar and pushing the County to the brink of bankruptcy.

JPMorgan and other firms have been at the center of parallel Justice Department and SEC criminal and civil probes of the municipal derivatives markets, according to reports. Bid-rigging and price-fixing are involved in the probes. The announcement of the enforcement action is a good indication that the SEC investigation is coming to a close.

A bill in the Alabama Legislature, which failed, would have allowed excess school sales tax revenue to go toward retiring Jefferson County's sewer debt. This seemed to be the best chance to solve the County's sewer crisis and reach a settlement with creditors. That bill's failure leaves raising rates to generate revenue for the sewer system as the only choice—albeit a

poor choice—to help the County avoid bankruptcy.

Source: Birmingham News

XIII. INSURANCE AND FINANCE UPDATE

\$17 MILLION JURY AWARD AGAINST AMERICAN FAMILY MUTUAL REINSTATED

A Missouri appeals court has reinstated a \$17 million jury award in a class action lawsuit against American Family Mutual Insurance Co. over aftermarket vehicle parts. The Missouri Court of Appeals for the Western District reinstated the award in the lawsuit brought by Plaintiffs Nicholas Smith and Amy and Bryce Johnson. The lower court judge had set aside the jury award in the case. The original \$17 million verdict, returned in March of 2007, covered an estimated 319,000 Missouri residents who made vehicle repair claims between May 1990 and December 2004. Jurors determined American Family allowed repair shops to use inferior, third-party equipment to repair policyholders' damaged vehicles.

The trial judge found that the Plaintiffs hadn't provided enough proof that they had suffered damages from the insurance company's policy allowing aftermarket parts in accident repairs and overturned the award. The case was filed in 2000 and certified as a national class action in 2001. The Missouri Supreme Court subsequently ruled that it could apply only to Missouri customers because other states differed in how they regulate insurance company's use of aftermarket parts.

As to the question of whether the Plaintiffs had presented sufficient evidence to prove they were harmed by the insurer's actions, the Appeals Court found that the trial court had erred in its decision. In this regard, the Appeals Court opinion stated:

The Plaintiffs presented sufficient evidence for a reasonable juror to

conclude that aftermarket parts are not of like kind and quality to OEM parts and that American Family breached its contracts with its policyholders when it paid to return the damaged vehicle to pre-loss condition based on the nature and cost of aftermarket parts.

Source: *The Insurance Journal* and *Associated Press*

SETTLEMENT MADE FINAL IN EATING DISORDERS SUIT

A federal judge in New Jersey has approved a class action settlement for people whose health insurance claims for eating disorders were denied. The settlement involved a suit brought against Horizon Blue Cross Blue Shield, New Jersey's largest health insurer. It will require Horizon to pay \$1.2 million for previously-denied claims and lift coverage limitations for eating disorders in the future. It's estimated that more than 500 policyholders will receive payments. Previously, the company limited treatment benefits because the disorders were classified as nonbiological in nature.

Source: *Lawyers USA*

XIV. PREMISES LIABILITY UPDATE

LAWYER SEEKS AMUSEMENT RIDE BRAIN INJURY DATA

Barry Novack, a dedicated California lawyer, is demanding that the amusement park industry release data on thrill ride-related brain injuries. This lawyer, who has a Ph.D in engineering, has filed 12 suits against amusement parks in the past decade with ten of them involving brain injuries. The cases involve rides that impose force on the head and neck of the riders, and are more likely to cause injury when the ride travels backward. While this type injury is much more common than the

public realizes, the industry has done a good job of keeping the data under wraps. In this regard, Novack says "what they put in the record as 'headache' turned out to be head bleed, and 'neck pain' turned out to be stroke."

A hearing was held in Orlando, Florida on May 15th on a motion to force Walt Disney World Co. to disclose data on brain injuries resulting from its rides. The motion stems from a suit filed in 2002 on behalf of Marvin Cohen, a 68-year-old man who suffered a stroke after he went on the Tower of Terror at Disney MGM Studios in 1998. Novack has compiled reports from public and confidential sources of 65 cases involving head, neck and brain injuries on the Tower of Terror rides in California and Florida.

Similar motions have been filed against Six Flags theme parks in a suit filed on behalf of Michaela Maychowitz, a seven-year-old who suffered a brain hemorrhage after riding the Hammerhead Shark ride at a Six Flags park near San Francisco in 2005. The child was temporarily paralyzed on her right side and still suffers from cognitive deficits as a result of the incident. Her doctors concluded that Micheala's injuries were caused by the dynamics of the ride, which spins riders around and upside down in a circle. A Superior Court judge in Los Angeles has ordered Six Flags to provide information on all brain bleed and stroke claims for all of their high-thrill rides across the country. That is welcome news!

Source: *Lawyers USA*

\$16 MILLION WRONGFUL DEATH VERDICT RETURNED IN DROWNING CASE

A California jury returned a verdict a few weeks ago in favor of the family of a four-year-old boy who drowned at an athletic club. The jury awarded more than \$16 million in the case. The child died in August of 2005. A video tape showed a counselor dunking children and roughhousing with them in the pool just before the boy drowned. The boy's parents filed a wrongful death suit

against Cathedral Oaks Tennis, Swim and Athletic Club. The jury that found the club and its employees, among other things, acted with willful misconduct. The boy was floating face down in the pool for eight minutes before anyone saw him. The jury awarded the parents \$14 million in compensatory damages in the first phase. In the second phase it awarded another \$2.3 million in punitive damages.

Source: *Associated Press*

COLLAPSED TRAINING FACILITY BUILDER HAD THREE OTHER BUILDINGS COLLAPSE

The collapse of the Dallas Cowboys' training facility received a great deal of media coverage primarily because of its connection to professional football. Now it's learned that the company that built the collapsed Dallas Cowboys' training facility also manufactured at least three other buildings that have fallen in heavy weather since 2002. The other tent-like facilities manufactured by Allentown, Pennsylvania-based Summit Structures LLC or its related company, Cover-All Building Systems, were warehouse-type buildings in Philadelphia and upstate New York and an indoor arena for horse competition in Oregon. It appears that all of those buildings fell in conditions that included heavy snow.

The collapse of the Cowboys' facility in heavy winds on May 2nd left 12 people injured, including a 33-year-old team staff member who is paralyzed from the waist down. The Occupational Safety and Health Administration has opened an investigation into the incident. There were other injuries to persons who were in the facility. The collapse of the Cowboys' facility, built in 2003 and upgraded in 2008, has focused attention on Summit as well as Cover-All, based in Saskatoon, Saskatchewan. Summit sells and sometimes installs structures fabricated by Cover-All. The following is a recap of the previous failures:

When a Summit structure covering freight for the Philadelphia

Regional Port Authority collapsed in February 2003, it resulted in a lengthy court battle that ended with a jury awarding the port more than \$3.4 million in damages. A judge in the case ruled that the building collapsed due to a failure of the design to account for snow buildup on the roof.

Another lawsuit, which is still pending, involves the collapse of a building for storing ice-melting chemicals in Fort Plain, New York. The suit, filed by the insurance carrier for the company that owned the building, alleges that Cover-All's negligence caused the building to fall when its membrane was ripped during a snowstorm in February 2007.

The Oregon case arose after a rancher had a Cover-All facility built on his property for dressage competition. The 15,840-square-foot building collapsed in January 2002 under the weight of snow that was "substantially" less than the capacity for which the structure was built, according to the lawsuit. The suit has since been settled.

I suspect there will be litigation arising out of the latest incident in Texas. The prior problems will certainly be a factor in that litigation and could result in punitive damages being awarded.

Source: Associated Press

FAMILY OF CRANE OILER FILES LAWSUIT AGAINST MGM MIRAGE

The relatives of a 39-year-old crane oiler who was killed last year in a construction accident at CityCenter has filed a wrongful death lawsuit. Dustin Tarter's death in May of last year, which at the time was the sixth death in 18 months at the mammoth Strip project, caused a one-day walkout by his fellow workers over unsafe working conditions. A series of articles in the *Las Vegas Sun* on the high rate of construc-

tion deaths on the Strip won this year's Pulitzer Prize for Public Service. The story of Tarter's death was among those written about in the articles.

The Defendants in the suit included: MGM Mirage, the project's owner; Perini Building Co., its general contractor; and Dielco Crane Service, the company operating the crane that crushed Tarter to death. When filing the lawsuit, Tracy Eglet, who is with the law firm of Mainor Eglet Cottle, located in Las Vegas, had this to say:

We believe the practices at the City Center project were shoddy at times and that unrealistic deadlines may have played a part in this. It appears that profits may have taken a greater priority than worker safety. Mr. Tarter's family has been devastated by his untimely death, as have other families who have lost loved ones on this project.

Last fall, the Nevada Occupational Safety and Health Administration fined Dielco \$12,000 for a series of violations, including failing to instruct employees to sound a horn before swinging the crane, a warning that could have prevented Tarter's death. The suit alleged that the crane was "defective" and that "the horn/warning system failed to perform as expected and was more dangerous than reasonably expected by an ordinary consumer." It's alleged in the complaint that the Dielco worker who was operating the crane at the time of Tarter's death had been drinking. But in its investigation, OSHA could not substantiate that claim. However, OSHA cited Dielco for failing to properly instruct employees on how to use the crane and failing to follow the manufacturer's guidelines.

Tarter was oiling the crane's tracks when the operator rotated the crane, causing the counterweight to drop and crush Tarter. The lawsuit alleged that MGM Mirage, Perini Building Co. and Dielco were negligent in their "hiring, training and supervision of employees" on the \$8.7 billion CityCenter job site.

The family, including Tarter's mother, seeks general and punitive damages in this lawsuit.

Source: *Las Vegas Sun*

WAL-MART SETTLES DEATH CLAIMS

Wal-Mart has settled claims arising out of an incident that occurred last year at one of its New York stores. The giant retailer will pay nearly \$2 million, including \$400,000 for victims' compensation, and will improve safety at all of its 92 New York stores to avoid criminal charges associated with the trampling death of a temporary employee at the store. Nassau County District Attorney Kathleen Rice says if she had pursued criminal charges against Wal-Mart, the company would have been subject to only a \$10,000 fine if convicted.

As was widely reported, a temporary worker at Wal-Mart's Valley Stream store was trampled by hundreds of bargain-hunters rushing into the store the morning after Thanksgiving. In addition, eleven others were injured that day. It was reported that the family plans to sue the county and the retailer for the death.

Source: Associated Press

CARBON MONOXIDE LAWSUITS SETTLED

Ginger Aldrich, a young woman who nearly died in 2005 from carbon monoxide poisoning at her apartment in Burlington, and the estate of her boyfriend who died, have settled their claims with a group of entities blamed for the tragedy. But the Aldrich case, which had been scheduled to go to trial on May 6th, and the lawsuit brought on behalf of the estate of Jeff Rodliff, were settled. The amounts of both settlements were confidential.

The 2005 carbon monoxide incident occurred in an apartment complex located next to the University of Vermont campus. According to police reports and other documents, the boiler in the building misfired, dislodging a section of plastic venting pipe which

sent carbon monoxide fumes into the four apartments. The problem went unnoticed until another tenant, who found herself struggling to maintain consciousness, managed to call the building's maintenance man. That person was able to tell him she could "smell something weird" in the building.

The maintenance man realized the tenant was suffering from carbon monoxide poisoning and told her to get out of the building. He then drove to the building to warn other apartment residents. When he arrived, Rodliff's body was found and 911 was called. Three women, including Ms. Aldrich, were unconscious and in critical condition by the time police and rescue workers arrived. Ms. Aldrich, the most severely affected survivor, remained in a coma for two weeks.

Eight lawsuits were filed by tenants sickened by the carbon monoxide exposure, which included the wrongful death case. Defendants in the lawsuits included 16 potentially responsible entities, including the companies that built and managed the complex and those involved in the installation and maintenance of the heating system, including the failed venting pipe. New England Air Systems, which was responsible for maintaining the heating system, wound up as the primary Defendant. It was learned that New England hadn't replaced the vent pipe involved, even though the pipe was the subject of a federal recall because of life-threatening problems with its durability.

Ms. Aldrich, who will struggle with physical and other disabilities for the rest of her life as a result of the poisoning, requested as part of the settlement that New England Air pay \$1,000 a year for ten years to the Burlington and St. Johnsbury fire departments for carbon monoxide awareness programs.

Interestingly, the ten-year deadline for free, company-arranged replacement of the Plexvent and Ultravent brand plastic vent pipe expired on May 1st, shortly after the settlement between the parties was reached. With the deadline passed, owners of the faulty vent pipe will still be reimbursed for replac-

ing the pipe, but will now be responsible for up-front payment of parts, labor, and permits, and for arranging to have the work done.

Two other cases filed by students sickened by carbon monoxide poisoning arising out of this incident were settled earlier and three more are still pending. Steve Adler, the lawyer who represented Ms. Aldrich, and Gary McQuesten, the lawyer who represented the Rodliff family, each did a very good job for their clients.

Source: *Burlington FreePress.com*

PET DOORS POSE DANGER TO CHILDREN

In the last decade, more than 100 children have been injured or drowned after exiting their homes through a pet door and falling into backyard pools. According to Sean Kane, president of Safety Research & Strategies, a safety consulting firm in Rehoboth, Massachusetts, pet door-related drownings have been under-reported because most accidental drownings are classified only by cause of death or injury and do not identify how the child accessed the water. Kane researched the number of pet door-related drownings at the request of trial lawyers representing families whose children drowned after crawling through pet doors. He made this observation:

Child injury researchers are well aware of the link between pet access doors and child injury and death, but many parents and caregivers do not appreciate the risk associated with use of a pet door, and how young children can drown, become lost, wander into streets, or otherwise become seriously injured or killed after exiting a home through a pet door.

Carol Ranfone, the mother of a two-year-old boy who died after he slipped through a pet door into a backyard pool in Orlando, Florida, has launched a website—www.petaccessdangers.org—to raise awareness about the issue. I suspect this is an area of concern that few parents—without first being edu-

cated on the subject—would recognize as a problem. Hopefully, this information will help to save innocent lives.

Source: *Lawyers USA*

LAWSUIT FILED AGAINST MANUFACTURER AND INSTALLER IN GARAGE DOOR DEATH

A family, whose six-year-old son was killed after a garage door closed on him, has filed a wrongful-death lawsuit against a Chicago homeowner and two companies believed to have manufactured and installed the door. The child died from compressional asphyxia after he was trapped under the garage door at a relative's home, according to the medical examiner's office. The victim's nine-year-old brother found the child fatally injured and alerted their mother who was in the home. The child had been playing outside the home at the time he was killed.

The suit names the homeowner, Mid-America Door Co. and Sears, Roebuck & Co. as Defendants. The suit alleged that the garage door wasn't equipped with a motion sensor and that the door "could unexpectedly close or fall." Since 1992, the U.S. Consumer Product Safety Commission has required garage door openers to have devices that reverse the door when it comes into contact with a person or object.

Source: *Chicago Tribune*

SETTLEMENT REACHED IN FATAL TACOMA FOUNDRY BLAST

A lawsuit over the death of a truck driver in an explosion at a Tacoma foundry has been settled. Charles McDonald, Sr. was fatally burned when propane he was unloading at Atlas Castings & Technology exploded in October of 2007. A hose owned by Atlas was missing a nozzle and clamps when McDonald arrived. Repairs had been made by inexperienced workers. The hose failed, releasing a cloud of propane that caught fire. The 8,000-tanker truck then exploded in an enormous fireball. The worker died a week later from the burns. John R. Christensen, a lawyer from Tacoma, Washing-

ton, represented the worker's family and did a very good job for his clients.

Source: *Associated Press*

JUDGE REFUSES TO DISMISS FRATERNITY HAZING LAWSUIT

A judge has denied a motion to dismiss a hazing lawsuit against Kappa Alpha Psi Fraternity Inc. Brent Whiteside, a student at Eastern Kentucky University, filed a lawsuit against the Philadelphia-based organization in January. It's alleged in the suit that the fraternity had a total disregard for the student's health, safety and welfare. The student sought admission into the ECU chapter of Kappa Alpha Psi in spring 2008. The suit says the fraternity is responsible for the hazing he sustained.

Kappa Alpha Psi filed a motion to dismiss the case, claiming the national organization had no duty to supervise the local chapters' members. The judge denied the motion. It was alleged in the lawsuit that the members of the ECU Kappa chapter repeatedly beat the student with their hands, fists, feet, paddles and canes as part of initiation rituals. This went on for a period from about January 29th to March 7, 2008. Members of the University of Kentucky chapter of the fraternity allegedly joined the others in the rituals on March 6th and at that time repeatedly punched and slapped the student. He was later hospitalized with kidney failure.

It's further alleged that Kappa Alpha Psi recklessly failed to supervise its members, which resulted in Whiteside's "serious and permanent physical injuries as well as mental impairment, anguish, embarrassment and humiliation." It was alleged that the student was unable to complete his spring 2008 semester at ECU, suffered lost wages and an impairment of his future earning capacity and that he will continue to incur significant medical expenses. Punitive damages are also being sought from the organizations.

As a matter of interest, three fraternity members, who were charged in January in relation to the student's hazing, pleaded guilty to fourth-degree

assault charges. They were sentenced to various lengths of home incarceration and will testify for the injured student and against the fraternity in the civil lawsuit.

Source: *Kentucky.com*

XV. WORKPLACE HAZARDS

WORKERS' COMPENSATION AND THIRD PARTY CLAIMS

Workers' compensation statutes were designed to compensate those who sustained injuries while working within the line and scope of their employment. Given the number of workers who are injured on the job each year, it is likely that a majority of us will either sustain an on-the-job injury, or we know someone who will. Despite the common occurrence of on-the-job injuries, it still amazes me that the vast majority of those injured employees are unfamiliar with what their rights are under the statutes. Once briefed on what benefits they are entitled to, injured workers are surprised to learn that workers' compensation benefits are not intended to make the worker whole. These statutes were obviously written with the employers' interests outweighing the interests of the injured employees.

Although workers' compensation statutes are adopted by each individual state, they are basically similar with respect to benefits available to injured employees. Medical benefits are provided to the injured employee for life; however, the insurer controls, for the most part, where and under what circumstances the medical care is provided. While the employee is out of work due to their injury, they are only paid $\frac{2}{3}$ of what they were making before their injury. Compensation for permanent injuries are capped at 300 weeks unless the employee is totally and permanently disabled. Employees who cannot return to gainful employ-

ment may receive benefits beyond 300 weeks. Whether temporarily or permanently injured, workers' compensation does not compensate the injured employee for past/future pain and suffering, no matter how severe or how long the pain and suffering endures. Workers' compensation also does not compensate the injured employee for past/future mental and emotional distress, loss of enjoyment of life, and, as stated earlier, the injured employee is not fully compensated for their loss of income. Furthermore, punitive damages are not available regardless of how wanton or egregious the conduct was that led to the injury. All of the damages not recoverable under workers' compensation are recoverable under theories of product liability and negligence. Finally, under workers' compensation laws, the injured employee can only sue his employer for workers' compensation benefits. Any other claims against the employer will be immediately dismissed.

Given the notable shortcomings of workers' compensation benefits, it is extremely important to evaluate on-the-job injury claims to determine if a third party claim exists against some other party. Commonly, injured employees are mangled or killed by defective machinery. In these cases, a third party claim can be filed against the designer, manufacturer, seller and/or the assembler of the machinery. In addition to defective machinery, employees can sustain injuries on the job due to the negligence of a third party. For example, we handled a case for a client who was severely burned when an explosion occurred at an oil refinery. In addition to his workers' compensation benefits, we pursued claims against the parties who negligently performed repair work at the oil facility that caused the explosion. The importance of examining third party claims when examining workers' compensation claims is extremely important to the client. All common law damages, past/future pain and suffering, past/future mental anguish, loss of enjoyment, lost income and punitive damages are

recoverable. Additionally, spouses of injured employees can file loss of services or consortium claims. This, of course, is not possible under workers' compensation.

When employees are injured on the job their lawyer should examine the facts and circumstances to determine if third party claims are viable. This analysis could very well mean the difference between partial and full compensation for their client. If you would like additional information on this subject contact Kendall Dunson at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

JURY AWARDS MORE THAN \$2 MILLION IN ASBESTOS CASE

A jury awarded the family of a deceased Bloomington woman more than \$2 million last month in a lawsuit related to her exposure to asbestos. The decedent contracted mesothelioma after being exposed to asbestos when she laundered the clothing of her husband, a worker at the former Union Asbestos & Rubber Company. The lawsuit was filed on behalf of the woman's family members. The husband had worked at the Bloomington plant, later called UNARCO Industries Inc., during the 1950s.

The jury also awarded \$100,000 in punitive damages against Pneumo Abex, LLC and \$400,000 against Honeywell International, Inc. It was contended that the two companies conspired with other firms, including UNARCO, Johns-Manville, Raybestos-Manhattan, Owens-Illinois, Owens Corning and Metropolitan Life Insurance Company to suppress information about the hazards of asbestos. If in fact those firms jointly agreed not to warn employees and customers about those dangers, punitive damages were certainly justified. James Wylder and Lisa Crowin, lawyers from Bloomington, Illinois, represented the family and did a very good job.

Source: Pantagraph.com

COURT SAYS WIDOW CAN SUE IN ASBESTOS CASE

An appeals court in Wisconsin has ruled that the widow of a worker in a manufacturing plant can sue a company that supplied brake parts containing asbestos for causing his death. The court reinstated a lawsuit filed by Vicki Tatera who was married to Walter Tatera, who died from mesothelioma in 2004. The lawsuit contends the worker developed cancer after working at a machine shop where he ground brake linings into specific shapes to be installed in automobiles. The appeals court ruled that the widow can sue the supplier of the linings, FMC Corp., in a suit alleging negligence for failing to warn that the parts contained asbestos and could be dangerous. The company has denied the allegations, claiming it was not at fault. This ruling sends the case back to the lower court for trial.

Source: Associated Press

SETTLEMENT REACHED IN CRANDALL CANYON MINE DISASTER LAWSUITS

Following months of negotiations, all of the parties in the civil lawsuits arising from the August 2007 Crandall Canyon Mine disaster have reached a settlement. The families of those killed and injured in the mine filed suits, all of which are included in the settlement. Back in 2007, six miners were trapped when an area of the Crandall Canyon coal mine collapsed near Huntington in Emery County. Days later, three rescuers died trying to reach the trapped miners. The bodies of those trapped inside were never recovered, and the mine was later permanently shuttered. Utah American Energy Inc. is the parent company of the mine operator, Genwal Resources Inc. Genwal Resources is a subsidiary of Ohio-based Murray Energy Corp. Edward Havas, a lawyer from Salt Lake City, represented the Plaintiffs in this litigation and did a very good job.

Source: Desert News

XVI. TRANSPORTATION

\$3.1 MILLION AWARDED IN DRUNK DRIVING DEATH CASE

The parents and estate of a 25-year-old dance teacher who was killed in a drunken driving crash in 2006 were awarded \$3.1 million in damages recently by a state court jury. The jury found Robert LaBarre, the man who killed Sheena Marie Villa, 85% liable for her death and awarded \$1.1 million in compensatory damages and \$2 million in punitive damages against him. But the jury found the bar that served LaBarre that night was not at fault. It found that the decedent, a passenger in the car, was 15% liable for her own death.

There was a dispute as to whether LaBarre was "visibly intoxicated" when he was served alcohol at the bar. The Plaintiff's lawyer attempted to prove that the bar continued to serve LaBarre even though he was "visibly intoxicated." But it appears that while LaBarre made two trips to the bar that night, he drank before and after his first visit and had "gulped down" vodka at an apartment after the second trip to the bar. That second visit ended more than an hour before the fatal crash that occurred at 3:15 a.m. on March 24, 2006.

In February 2007, LaBarre pleaded guilty to homicide by vehicle while driving drunk and related offenses. According to the investigating officers, he drove his sport utility vehicle about 85 mph on a city street in Allentown in the early morning—despite pleas from Ms. Villa and another passenger for him to slow down—and crashed his car into a tree. The back-seat passenger in the car, who was also Ms. Villa's boyfriend, survived. Police said LaBarre's blood-alcohol level was 0.24%, three times the legal limit. He was sentenced to five to 12 years in state prison.

Source: The Morning Call

THE FAMILY OF VICTIMS IN A MEXICAN BUS CRASH FILE SUIT

The families of two South Texas middle school teachers, who were among 11 people killed in Mexico when their bus was hit by a drunken driver's tractor-trailer, have filed a wrongful death lawsuit against the tour and bus companies. It's alleged in the suit against Monterrey-based Grupo Senda Auto-transporte and McAllen-based Viva Mexico Tours that the companies failed to provide safe transportation and subjected passengers to "an unusual risk of injury." Viva Mexico Tours hired the Grupo Senda bus.

The families seek damages for physical pain, suffering and mental anguish, and want reimbursement for medical expenses and lost wages. It's claimed that the tour company broke its promise to repay surviving family members for costs associated with funeral and medical expenses.

The two teachers were on a spring break tour of northern Mexico in March when a drunken driver lost control of his tractor-trailer and slammed into the bus carrying Americans and Canadians. Eleven people, including the two teachers and the bus driver, died on the stretch of highway near Saltillo, Mexico. Sixteen other passengers on the bus were injured. The passengers were on the first day of a four-day excursion to the Mexican cities of Zacatecas and Real de Catorce. Mexican authorities said the truck driver, Julio Cesar Rodriguez Garcia of Saltillo, was intoxicated and would face manslaughter charges.

Source: *Insurance Journal*

CRASH OF CONTINENTAL COMMUTER PLANE RAISES SAFETY ISSUES

The February crash of a Continental Connection commuter plane near Buffalo, which killed 50 people, has raised two significant safety issues. The National Transportation Safety Board started hearings on May 12th on the crash and some interesting information

was revealed. As a result, two safety gaps have become clear:

- A 1996 federal law intended to ensure that an airline hiring a new pilot would know about the pilot's previous problems failed to do the job; and
- the captain of the flight that crashed near Buffalo had never received hands-on training with a safety system that activated just before the plane crashed.

The *Wall Street Journal* reported that Captain Marvin Renslow had failed five "check rides," or hands-on tests, conducted in a cockpit or a simulator, before the crash. Colgan Air, which operated the flight for Continental, says that two of those tests had been conducted after the captain began working there in September 2005. Colgan Air said it had known about one previous failure at the time, but that Captain Renslow had not told the company about the two others.

It was reported that airlines have historically had trouble ascertaining the performance histories of their pilots. A law passed by Congress requires airlines to get the performance records of job candidates, waiving some privacy laws to make the information transfer possible and it would appear that Colgan Air should have been more diligent. But the law apparently did not cover the three tests Captain Renslow had failed before he was hired, because Colgan was in general aviation, meaning non-airline passenger flying.

The other "hole in the safety net" involves the actual pilot training. The Continental Connection flight crashed shortly after the activation of a safety system intended to prevent a condition called "aerodynamic stall," in which the wings lose lift because the plane is flying too slowly or at too great an angle to the oncoming wind. The system consists of a "stick shaker," a tactile warning that shakes the control column pilots use to adjust the plane's nose-up or nose-down attitude, and a "stick pusher," which forces the nose

down if the pilot fails to do so.

It was reported that the plane crashed after one of the two pilots jerked the stick back, forcing the nose too high, in what may have been an inappropriate reaction to the activation of the anti-stall system. Colgan Air reportedly trains its pilots in a flight simulator. In a flight simulator, it's not demonstrated how the safety system works. The FAA does not require it to do so. It was said by Colgan Air that "a stick pusher demonstration in an aircraft simulator is not required by the FAA and was not part of the training syllabus." Both of the safety problems mentioned above should be remedied by the FAA. Certainly, the past history of pilots and their training, once hired to fly commercial planes, are critically important from a safety perspective.

Source: *New York Times*

FLIGHT NURSE'S FAMILY SUES OVER FATAL HELICOPTER CRASH

The family of a flight nurse killed in a Decatur County medical helicopter crash in August has filed a lawsuit seeking compensation for her death. Sandra Pearson was killed along with the pilot, a paramedic, and the base manager, when the rotor came off their Bell 206 Longranger before it crashed in a field outside Burney, which is about 40 miles southeast of Indianapolis. The lawsuit, filed late last month in Marion Superior Court, names as Defendants Rolls-Royce, the helicopter's engine maker; Decatur County REMC, the utility responsible for maintaining power lines in the area; Rushville Memorial Hospital, which dispatched the helicopter; and Bell Helicopter Textron, the rotor manufacturer.

Rush Memorial Hospital contracted with Missouri-based Air Evac EMS, which owned and operated the helicopter, to provide air ambulance services. What caused the rotor blades to break in the August 31st crash has not been determined. The National Traffic Safety Board's investigation is ongoing. According to the NTSB's interim factual report, the crew had left a fundraising

event at a fire station in Burney about 1:20 p.m., destined for the aircraft's base in Rushville. Witnesses said they saw helicopter parts separate from the craft in flight before it crashed about a mile from the fire station. The rotor blades were found broken on the ground about 200 yards from the body of the helicopter.

Maintenance records show the helicopter was inspected ten days before the crash, the same day a low rumble and vibration from the rear of the aircraft was detected. The lawsuit alleges that engine maker Rolls-Royce failed to properly warn operators that a rumbling noise or vibration "was not engine-related but could signify an impending fatigue fracture of the main rotor blade." It accuses Bell Helicopter of selling the helicopter's rotor blades in defective condition. It also accuses Rush Memorial Hospital of dispatching the helicopter on an unsafe flight path, sending it on a non-emergency mission and failing to develop flight-risk evaluation programs.

Since 2000, there have been 125 air medical helicopter accidents, including one so far this year, according to NTSB data. The agency has made safety recommendations to the Federal Aviation Administration regarding emergency medical services aircraft. Some of the recommendations include requiring operators to implement flight risk evaluation programs and use formalized dispatch and flight-following procedures. A bill introduced in Congress this year, the Air Medical Safety Act, would establish more streamlined safety standards. Gary Robb, a very good lawyer from Kansas City, filed the suit on behalf of the two Pearson children.

Source: *Indianapolis Starr*

SUPREME COURT ALLOWS DERAILMENT LAWSUIT AGAINST RAILROAD TO PROCEED

The U.S. Supreme Court has refused to block a lawsuit against a railroad involved in a deadly derailment in North Dakota. The Justices declined last month to get involved in a dispute between the Canadian Pacific Railway

and residents of Minot, ND. The Minot residents want to sue the railroad over a 2002 derailment that sent a cloud of toxic anhydrous ammonia from farm fertilizer over the city. One man died trying to escape the fumes and others were treated at hospitals for eye and lung problems.

In 2006, a U.S. district judge ruled that federal law protected Canadian Pacific from claims stemming from the derailment. After Congress changed the law the same year, the St. Louis-based U.S. Court of Appeals for the Eighth Circuit said the claims could be pursued.

Source: *Associated Press*

XVII. ARBITRATION UPDATE

THE FAIR ARBITRATION NOW COALITION FIGHTS UNFAIR ARBITRATION

The Fair Arbitration Now Coalition, made up of several organizations, are hard at work fighting unfair arbitration. The groups represent millions of individual members interested in protecting the rights of all Americans—particularly the rights of consumers, employees, homeowners, and the elderly—relating to arbitration. The Coalition is also fighting to preserve hard-won civil rights. The Coalition is primarily concerned with how the proliferation of mandatory or forced arbitration in consumer contracts, employment contracts, nursing home admissions, and contracts for goods and services, has taken away some of the most basic consumer rights.

As we have stated, arbitration is not a term that should be buried in the fine print. It should never be forced upon people as a condition of taking a job, receiving medical care, or having access to basic consumer services. Mandatory or forced arbitration is a private system without an impartial judge, a jury, or even an effective appeal. Arbitrators are not required to follow the law, neither

is there a public review to make sure the arbitrator got it right. Moreover, arbitrators rely on repeat business from companies. So it should not be a surprise that consumers and employees lose most of the time when they are forced to go to arbitration.

The Fair Arbitration Now Coalition actually encourages voluntary arbitration. They only oppose the practice of forcing arbitration on consumers before a dispute ever arises. If arbitration is good for employees and consumers—as claimed by proponents of arbitration—folks should be allowed to choose to participate in arbitration after a dispute arises at a time when they can make an informed decision. Sadly, companies are using mandatory or forced arbitration to avoid accountability for this wrongdoing. The Fair Arbitration Now Coalition believes that when people are harmed by discrimination, negligence, defective products, or fraudulent scams, they have a right to equal justice. The Coalition invites all citizens to join their campaign to put an end to mandatory or forced arbitration. If you want more information, go to their Web site at www.fairarbitrationnow.org.

A GOOD ARTICLE ON ARBITRATION IN THE LOS ANGELES TIMES

We have tried hard over the past several years to alert the public about how bad mandatory, binding arbitration is for all consumers. But there are powerful forces promoting arbitration as a good thing for consumers and these forces have spent millions of dollars trying to sway public opinion on that issue. Recently, David Lazarus, a reporter with the *Los Angeles Times*, wrote a very good article on mandatory arbitration. I am including his article, largely because of its objectivity, in its entirety. This reporter gives a pretty good analysis of the current situation.

SUE THE COMPANY? MOST CONTRACTS FORCE CONSUMERS TO FORFEIT THAT RIGHT

If you have a credit card, a cell-phone or even just a job, chances are you've already signed away your right to sue if something goes wrong. Mandatory arbitration clauses have become a routine part of the fine print in most financial, telecom and employment contracts, as well as numerous other customer agreements. They typically require you to abandon the right to a jury trial or class-action lawsuit, and to agree instead to take any grievances to a professional arbitrator. But because of the way the system is set up, critics say, arbitration often favors the company and not the individual. So the likelihood of a positive outcome (for you) can be less than if you had pursued litigation.

Consumer advocates, sensing a shift in the political winds under President Obama, believe the time is right to challenge mandatory arbitration and have banded together to support legislation ending the practice. "We have no problem with arbitration," said David Arkush of the watchdog group Public Citizen. "We just want people to be able to choose it if they want it, rather than having it be required." He was speaking on behalf of the Fair Arbitration Now Coalition, an organization of consumer and community groups. The coalition released poll results last week showing most people have no idea they're giving up a constitutional right when they sign contracts containing an arbitration clause.

When details of mandatory arbitration are made clear, 59% of Americans say they oppose the practice and would back legisla-

tion requiring that arbitration be voluntary, the poll found. Easier said than done. Although bills have been introduced in the House and Senate ending mandatory arbitration, they're strongly opposed by some of the most powerful industries in the country, including banks, telecom providers and insurers. "We know it will be tough," Arkush said. "But we've probably got as good a chance now as we've ever had."

One of the biggest problems with mandatory arbitration clauses is their prohibition on joining class-action lawsuits. This effectively takes away consumers' single most powerful tool in seeking redress from companies for relatively minor grievances. More often than not, such issues would be too costly to pursue in court individually. Class-action suits allow consumers to join together in dealing with a deep-pocketed business, leveling the playing field. Another key problem with mandatory arbitration is that the company generally gets to pick the arbitrator, often a retired judge. These arbitrators thus have an incentive to keep the company happy if they want future employment.

"If a retired judge issued a significant anti-insurance decision, for example, there is no chance an insurance company would use him again," said Jeffrey Ebrlich, a Claremont attorney who has handled numerous arbitration cases. "The deck is stacked against consumers because the arbitrators don't want to offend the people who hire them." Fontana resident John Ramirez told me he experienced just such a situation after going into mandatory arbitration with his former employer, Tenet Healthcare Corp., in 2003.

Ramirez, 37, believed he'd been discriminated against because problems with a prosthetic leg

forced him to miss about six months of work. He lost his own leg in a childhood accident. "They started giving me a real hard time after I came back," Ramirez recalled. "I was forced to work the graveyard shift." He filed an arbitration claim seeking back pay and compensation for his claim of discrimination. But the arbitrator ruled against him. Ramirez thinks a jury would have been more sympathetic. "If I could have sued, I might have won," he said.

Tenet declined to comment. But Wayne Kessler, a spokesman for the American Arbitration Assn., a leading arbitration provider, said procedures are in place "that are fair and neutral, and which give all parties to a dispute an equal voice in the selection of an arbitrator." Or maybe not. Geoff Lysaught, director of the Searle Civil Justice Institute at Northwestern University School of Law, said researchers have found evidence that companies involved in repeated arbitrations tend to receive more favorable outcomes than infrequent participants. He said this may not necessarily reflect the fact that "repeat players" represent more revenue for arbitrators.

"The reason they may win more often is because they only arbitrate cases they think they can win," Lysaught said. "They settle all the others." He said this theory might also explain why consumers tend to win about half the cases they bring to arbitration, whereas companies win nearly 84% of cases they initiate. Perhaps. Or perhaps, as consumer advocates and lawyers say, it's because professional arbitrators know how their toast is buttered, and they have a built-in bias toward pleasing companies. Seems to me that if arbitration is indeed fair to everyone, it shouldn't have to be crammed down consumers' throats.

Arbitration should be offered as a cost-effective and relatively speedy alternative to litigation. But it should be just one option available, just as filing a lawsuit should be an option. By the same token, no company should be permitted to deny customers their right to a jury trial or to participate in class-action lawsuits. In a perfect world, such things wouldn't be necessary. But this isn't a perfect world.

David Lazarus
Los Angeles Times
May 3, 2009

ARBITRATION ORDERED IN SUIT OVER DEATH AT BP PLANT

There is an area outside of ordinary consumer transactions where arbitration is totally unfair and can never be justified. That is in the workplace. Arbitration should never be allowed where personal injury or death of an employee is involved. But, the U.S. Court of Appeals for the Fifth Circuit has ruled that the family of a worker killed in an accident at BP America Inc.'s Texas City, Texas, facility must arbitrate their wrongful death claim.

The Appellate Court said that's because the family is bound by an arbitration clause in the man's employment contract with his employer. The Appeals Court reversed a May 2008 ruling by the U.S. District Court for the Southern District of Texas, which denied BP's motion to compel arbitration on the claim.

There is no way to justify requiring a worker's family to have a wrongful death claim submitted to arbitration and to deny them access to the courts. Even if the worker had survived, and was suing for his injuries, arbitration has no place in that setting. An individual's right to a jury trial under the U.S. Constitution should prevail and it certainly should where a family is suing for the death of a family member based on the fault of another party.

Source: *Law 360*

XVIII. NURSING HOME UPDATE

FAMILY SUES NURSING HOME OVER SEX ATTACK ON RESIDENT

The family of a 69-year-old woman has filed a lawsuit against a suburban nursing home for failing to protect her from being sexually assaulted by a 21-year-old mentally ill resident. It's alleged that Maplewood Care's administrator tried to cover up a brutal rape by calling it consensual sex. This is an example of how mixing frail elderly residents and younger mentally ill residents in nursing homes can lead to violence if facilities do not monitor potentially dangerous residents.

Lincolnwood-based S.I.R. Management operates their nursing home and seven other Chicago-area facilities. It was reported that Christopher Shelton, 21, was missing at bed check, but "no search was made or alarm sounded to alert residents and staff that a young, aggressive, sexually frustrated, convicted felon was prowling the halls of the nursing home," according to the lawsuit. Later, a night shift nurse heard an elderly woman moaning and entered her room, a state investigation revealed. The nurse found the alleged victim crying and Shelton in her bathroom where he was calling 911 to report "someone attacking the woman." Paramedics and an emergency room doctor later examined the woman and noted signs of sexual trauma, according to the state investigator's report.

Shelton had been diagnosed with bipolar disorder with aggression when he was admitted to the nursing home in November. The state report showed he had told the nursing home staff in December that he was sexually frustrated, but the facility failed to monitor him more closely after that notice. The state and federal governments fined the nursing home \$44,400 for violations related to the incident. The lawsuit was filed in Cook County Circuit Court on behalf of a resident identified only as

Jane Doe to protect her privacy. The named Defendants are Maplewood Care, S.I.R. Management and the facility's former administrator.

According to the lawsuit, the administrator downplayed the incident as consensual sex in a report to the state and encouraged employees to lie about it to cover it up. Shelton, who was arrested at the nursing home, has pleaded not guilty to 11 counts including aggravated sexual assault in connection with the incident. The lawsuit alleges that the woman's family was not told the nursing home had admitted young adult residents "with a history of violent and aggressive criminal behaviors." Shelton, a convicted felon and a former resident of the Elgin facility, was readmitted to the home without a proper review of his criminal history. If the home had checked, it would have discovered Shelton had an outstanding arrest warrant on felony battery charges.

Nursing homes have become dumping grounds for young and middle-aged people with mental illness, according to an *Associated Press* analysis earlier this year. In its analysis, *Associated Press* said Illinois ranked highest among the states in the number of mentally ill adults under age 65 living in nursing homes—more than 12,000 last year.

Source: *Associated Press*

XIX. HEALTH CARE ISSUES

PHARMACISTS DISCUSS CVS CAREMARK CONCERNS

Dozens of pharmacists and customers are raising concerns with trade regulators about the influence of CVS Caremark Corp. over prescriptions and patient privacy. The National Community Pharmacists Association says CVS is using data on patients who don't buy from them to attract their business. According to the Association, CVS has

access to the competition's drug prices and sensitive information such as customer identities because it controls Caremark.

CVS bought Caremark, a pharmacy benefits manager, in 2007 at a cost of more than \$26 billion. CVS says the Association mischaracterizes its business and claims the Caremark deal has made pharmacy health care more "affordable and accessible." Anybody believing that claim would be an excellent candidate to buy the London Bridge. If the American people knew the full story of how Pharmacy Benefit Managers have actually added to the cost of healthcare, they would be outraged.

Source: *Associated Press*

FDA CONTINUES TO LAG IN FOOD SAFETY AUDITS

The Food and Drug Administration is still lagging behind in conducting food safety audits. It's being reported that the agency has conducted only about half the state food safety audits it promised in the two years before the recent peanut salmonella outbreak. New documents sent to Congress by the FDA reveal that the agency failed to do any of the required audits of state-run food inspections in five states during those states' budget years spanning 2007 and 2008. The FDA was unable to say whether audits were conducted at all in 11 additional states during that time, including Georgia and Texas, where salmonella was found in two peanut plants during a wide-ranging peanut recall earlier this year. Only 14 states saw 100% of the audits completed.

The FDA audits are a key part of the federal government's ability to ensure that food is inspected properly by states that contract with the FDA to perform safety checks. The agency turned over its records on the audits to the House Energy and Commerce Committee in response to questioning at hearings earlier this year. As widely reported, officials traced the salmonella outbreak to the Peanut Corp. of America's plant in Georgia and blamed the outbreak for the deaths of

at least nine people. Hundreds more were sickened.

Additional numbers for 2006 and 2007 reveal that no audits were done in Texas and seven other states during that period. The FDA has pretty well admitted that it has failed in its audit responsibilities. In a letter sent to Rep. Joe Barton, FDA acting assistant commissioner for legislation Stephen R. Mason said the recent salmonella outbreak "has highlighted limitations in our current approach and has prompted internal discussions on potential enhancements to the audit program."

In 2000, a report from the inspector general of the Health and Human Services Department, which oversees the FDA, said the agency needed to place a high priority on better evaluating the effectiveness of state inspections of food production facilities, which are done in place of federal inspections through contracts with the FDA. Part of the agency's response to that recommendation, put in place several years later, was a standard set by the FDA itself that 7% of all state inspections should be audited by the federal agency. In the documents provided, however, the FDA acknowledges that it has fallen far short of that goal. A summary of audits for 2007-2008 lists the total number of state contract inspections at 10,218, with only 358 audits completed. This is only about 3.5% of the audits, which is unacceptable.

It's documented that audits were not done at all in 2007-2008 in California, Iowa, Kansas, Nebraska and Wyoming. In the previous period documented by the agency, 2006-2007, audits were not done at all in Arkansas, Maryland, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wyoming. Only 9% of the promised audits were done in California in 2006-2007, during which time an E. coli outbreak in spinach caused more than 200 illnesses and three deaths. The data were collected from regional FDA coordinators; the specific time covered varies according to each state's budget year. The FDA says it is "evaluating approaches" for improving the audits.

Congress has vowed to step up oversight of the FDA, which does the bulk of food safety inspections, in the wake of the peanut recall and several other high-profile recalls in recent years. Several members have introduced bills to overhaul the agency, including proposals to separate its food safety and drug oversight duties, and to significantly increase funding. The American people are demanding that both Congress and the FDA live up to their responsibilities and make sure our nation's food supplies are safe.

It appears that the new "bosses" at the FDA will work diligently to correct the existing problems they inherited. On May 26th, the newly-confirmed FDA Commissioner, Margaret Hamburg, and her Deputy Commissioner, Joshua Sharfstein, wrote in the *New England Journal of Medicine* that things will surely get much better. They point out the need for cooperation between all agencies that play a part in the overall food safety system.

Source: *Associated Press*

OFFICIALS BLAME MINERAL OVERDOSE IN HORSE DEATHS

Since Julia Beasley, one of the lawyers in our firm, is in the horse business, recent events in Florida really got our attention. There, Florida's top veterinarian has blamed the deaths of 21 elite polo horses on an overdose of a common mineral that helps muscles recover from fatigue. According to Florida's State Veterinarian, Dr. Thomas J. Holt, toxicology tests on the dead horses showed significantly increased selenium levels. The horses from the Venezuelan-owned Lechuza Caracas team began collapsing on April 19th just as they were unloaded from trailers at the International Polo Club Palm Beach in Wellington. The horses were to be involved in a championship match at the club. Some died at the scene, others hours later. Dr. Holt says: "Signs exhibited by the horses and their rapid deaths were consistent with toxic doses of selenium." The team was preparing to play in the sport's U.S.

Open and was seen as a top contender.

Franck's Pharmacy in located in Ocala, Florida, the pharmacy that mixed a brew of vitamins and minerals for the team on order from its Florida veterinarian, has admitted that the strength of selenium was incorrect. It's not clear whether the incorrect amount was specified in the order from the veterinarian or was the result of a pharmacy error. In either event, the deaths of those horses was not only a tremendous loss, but should never have happened.

It appears the polo team wanted a compound similar to a name-brand supplement known as Biodyl. While that supplement is used around the world, it hasn't been approved by the Food and Drug Administration in the United States. But veterinarians often turn to compounding pharmacies like Franck's for medications that can't be found on shelves. However, the dispensaries generally can only recreate unapproved drugs in limited circumstances, such as for health reasons. The FDA and state authorities are investigating this tragic incident. Biodyl is a supplement made in France by the Duluth, Georgia-based animal pharmaceutical firm Merial Ltd. Thus far, it's not clear how close Franck's mixture came to the name-brand drug. According to the team their order was supposed to contain vitamin B, potassium, magnesium and selenium.

The injections provided by Franck's were given to the horses just hours before their deaths. Selenium is a common mineral needed in small doses by humans and animals for growth and tissue stabilization. It can also help muscles recover from fatigue. An overdose of selenium can cause the veins in the body to dilate, with no blood coming back to the heart. These horses died painful deaths—sad and tragic endings for the animals—and it appears negligence of one or more companies or entities was the cause.

Source: *Associated Press*

XX. ENVIRONMENTAL CONCERNS

UPDATE IN HOT FUEL LITIGATION

As we have mentioned over the past few months, our firm has taken a leadership role in the Hot Fuel Multi-District Litigation consolidated in Kansas City, Kansas. The lawsuit centers on fairness—consumers expect to get the energy they pay for to power their engines when they purchase motor fuel. But, when liquids like gasoline are heated, they expand in volume while the fuel's energy stays the same. As a result, hotter motor fuels are less dense and contain less energy than colder fuels.

The oil industry has known about the phenomenon of thermal expansion with liquids for decades. To ensure fairness and consistency in the market, the oil industry helped establish the U.S. Petroleum gallon, where a gallon of fuel is equal to 231 cubic inches at 60 degrees Fahrenheit. Unfortunately, fairness applies to everyone in the oil industry except the consumer. At every level of the distribution process, the oil giants compensate for the energy effects of temperature—everywhere, that is, except at retail with the consumer. Considering the average temperature in many states in the U.S. exceeds 60 degrees, or the standard temperature, many consumers are purchasing less fuel than they are paying for.

The Defendants, comprised mostly of the world's largest oil companies, argue that temperature compensating is too difficult to implement in the United States at retail. Interestingly, automatic temperature compensation, or ATC, has existed for many years. In fact, the same oil companies lobbied to install the devices in Canada where consumers get more fuel than they pay for because of the lower temperatures. The oil companies also say installing ATC would be too expensive. All the while, the same companies are raking in world record profits. Researchers suggest that consumers are overpaying nearly a billion

dollars for hot fuel.

Rhon Jones and Parker Miller, lawyers in our Toxic Torts Section, along with some of the best environmental law firms in the nation, are currently preparing certification motions to certify the class in the case. We are pleased to report that one company, Costco Wholesale, has settled pending court approval. Specifically, Costco has agreed to retrofit pumps in the states it adjusts on an intra-company basis. While this litigation has a long way to go, this settlement with Costco is a good start in ensuring fairness for consumers. If you need additional information, contact Parker Miller at 800-898-2034 or Parker.Miller@beasleyallen.com.

EPA RESTORES STRICTER REPORTING OF TOXIC POLLUTION

The Environmental Protection Agency recently reversed a 2006 Bush Administration decision that reduced the reporting requirements of over 3,500 facilities across the nation. The 2006 decision allowed facilities that used less than 5,000 pounds of toxic chemicals or released less than 2,000 pounds of toxic chemicals to submit shorter, less-detailed reports. It was claimed by the Bush Administration that the rule was designed to lessen the burden on industry. But several states sued the EPA over the diminished reporting requirements, contending that the Bush Administration's rule reduced the information available to the public about hazardous chemicals in their communities. Prior to the rule, more detailed information had to be provided in longer forms if there was as little as 500 pounds of toxic chemicals. This was a threshold that the Bush rule maintained only for some of the most dangerous chemicals.

The EPA maintains a database called the Toxics Release Inventory that collects information on the release of hundreds of chemicals from thousands of facilities. In a statement, EPA Administrator Lisa Jackson said that "people have a right to the information that might affect their health and the health

of their children—and EPA has a responsibility to provide it.”The diminished reporting requirements would have cut the number of emissions reports received by the government by a quarter. The new rule will apply to reports due July 1 and will cover emissions during 2008. Because the public has a right to know about the presence of hazardous chemicals in their communities I believe this is a good thing.

Source: *Associated Press*

U.S SUPREME COURT LIMITS LIABILITY OVER TOXIC SPILL CASES

The U.S. Supreme Court has made it harder for the government to recover the costs of environmental cleanups from companies with only minor or limited responsibility for toxic spills. The High Court’s decision tightened the reach of the Comprehensive Environmental Response, Compensation and Liability Act, commonly referred to as the Superfund law. Both the kinds of companies subject to liability and the situations in which partly-culpable companies can be made to bear the entire cost of cleanups, were limited by the Court.

The case arose from environmental contamination from a chemical distribution business in Arvin, Calif. The federal government had sought to hold the Shell Oil Company responsible for selling pesticides to the business, where the chemicals routinely leaked and spilled. The distribution business, Brown & Bryant, later became insolvent and went out of business.

Shell argued that it could not be held responsible for the spills because it did not qualify under the relevant part of the Superfund law, which applies to companies that “arranged for disposal” of hazardous substances. Justice John Paul Stevens, writing for the majority in the 8-to-1 decision, said the statutory language applied only when companies took “intentional steps to dispose of a hazardous substance.” Justice Stevens wrote that “Shell’s mere knowledge that spills and leaks continued to occur” with each delivery “is insuffi-

cient grounds for concluding that Shell ‘arranged for’ the disposal.”

Justice Ruth Bader Ginsburg, the sole dissenter, wrote that Shell was “well aware” that its deliveries “directly and routinely” resulted in spills and leaks for more than 20 years. The Justice, in her dissent, added that she would have placed the cleanup costs on a company “whose activities contributed to the contamination rather than on the tax-paying public.”

The decision also addressed the liability of two railroad companies that had leased land to the distribution business. The railroads were subject to Superfund liability. The issue for them was whether they could be made to pay all of the cleanup costs or just a portion of these costs. The trial judge limited the liability of the companies to 9% of the total. He based his calculations on how much land the companies owned, how long they owned it and where the bulk of the discharges happened. The United States Court of Appeals for the Ninth Circuit reversed the judge’s decision, saying those calculations were based on estimates. As a consequence, the Appeals Court said the companies could be held liable for the cost of the entire cleanup.

The Supreme Court reversed the Ninth Circuit’s decision, saying that apportionment of liability is appropriate so long as there is a reasonable basis for determining the contribution of each wrongdoer. Justice Ginsburg also dissented on that point, saying that the railroad companies, Burlington Northern and Santa Fe Railway Company, should have been required to prove their comparative lack of responsibility. Instead, she wrote, the companies simply disclaimed all responsibility, which is not how the adversary system is supposed to work. Justice Ginsburg would have returned the two cases to the lower courts to allow the parties to litigate the apportionment issue. But since no other Justice agreed with her views, it appears the law on the question of limited liability under the Superfund law is pretty well established.

Source: *New York Times*

CHEVRON USA ACCUSED OF HIDING MASSIVE ASPHALT OIL SPILL IN ALABAMA

Chevron USA Inc. has been accused of intentionally leaving up to a million gallons of spilled asphalt oil in fields and marshes that drain into Mobile Bay in Alabama. Chevron, which owned several oil storage tanks on Blakeley Island during the 1970s and 1980s, spilled the heavy oil in October 1976. A lawsuit filed by Gulf Coast Asphalt Co., the current owner of the former Chevron property, contends that Chevron went to great lengths to hide the oil when the property was sold in 1993. Gulf Coast Asphalt stores asphalt oil—a thick petroleum product used to coat roads and rooftops—and other products at the site.

The *Mobile Press-Register* reported at the time of the spill that about a knee-deep layer of asphalt oil from the 4.2 million-gallon spill spread across a stretch of road between the U.S. 90 Causeway and the Cochrane-Africatown USA Bridge. Chevron documents, entered as evidence in the case, suggest that company officials chose not to clean up all of the oil in marshy areas because of the cost. The company knew as early as 1978, according to the documents, that the cleanup attempt had failed to recover at least a third of the spilled asphalt. An internal Chevron memo, written in 1978 by the former plant manager, reads:

We now find that with each rain, considerable amounts of asphalt flow out of the marsh and come to rest in the area east of Highway 90.

The documents revealed that the manager was worried that “the media” would discover the oil in drainage ditches along the roadway, which drain into Mobile Bay. The spilled asphalt oil was rediscovered in 2002 after Gulf Coast Asphalt decided to construct new oil storage tanks on a section of the property where Chevron had three tanks, including the one that failed in 1976. All that remained of the Chevron tanks were the concrete pads they sat

upon. A pre-construction inspection revealed that the ground on the property was so thick with oil that it could not be built upon, according to Russell Lloyd, a Houston-based lawyer, representing Gulf Coast Asphalt.

It's alleged in the complaint that "oil erupts to the surface as the water table rises and falls, depending on the weather and rainfall." A *Press-Register* examination of the site last month reportedly found large amounts of a gooey, black, tar-like substance at numerous locations throughout the 75,000-square-foot property. In particular, a layer of oil several inches thick was said to be visible floating on top of six large holes punched into the concrete pads during the 2002 inspection. It was reported that black oil could be seen floating on top of water in numerous ditches in the area, including roadside ditches that drain into the Mobile River and the Bay.

Source: *Mobile Press-Register*

MODESTO AWARDED \$18 MILLION IN GROUNDWATER LAWSUIT

A San Francisco jury has awarded \$18.3 million to Modesto in a long-running lawsuit the City filed 11 years ago against producers of dry cleaning chemicals that leached into soil and polluted groundwater. Modesto intends to use the money primarily for groundwater cleanup. The City argues that the chemical makers—Dow Chemical of Michigan and PPG Industries of Pennsylvania—bear a share of the responsibility for what could amount to \$100 million in costs to remove perchloroethylene, a chemical referred to as PCE that is suspected of causing cancer, from Modesto groundwater.

The City has settled with several other chemical producers for more than \$23 million. It also has collected millions of dollars from insurance claims related to PCE leaking into groundwater from dry cleaners. The verdict against Dow and PPG centered on contamination from Elwood Dry Cleaning Service. The trial took about four months. The trial judge dismissed

most of the sites that Modesto claimed were contaminated, finding that the City didn't provide evidence to support the charges. Claims were dismissed by the judge against one of the chemical makers, R.R. Street of Illinois, that Modesto sued. There will likely be more litigation filed by cities in California over PCE cleanup.

Source: *The Modesto Bee*

W.R. GRACE AND THREE EXECUTIVES ACQUITTED IN ASBESTOS CASE

W.R. Grace & Co. and three former executives have been acquitted of federal charges that they knowingly allowed residents of a northwestern Montana town to be exposed to asbestos from its vermiculite mine. Residents of the town of Libby blame tremolite asbestos from the vermiculite for about 2,000 cases of illness and about 225 deaths in and around the community. Miners carried asbestos home on their clothes. Vermiculite was also used to cover school running tracks in Libby, and some residents actually used vermiculite as mulch in their home gardens.

The company and its one-time bosses were accused of knowingly endangering the lives of mine workers and other residents of Libby, and ignoring warnings by state agencies to clean up the vermiculite mining operation. They were also accused of Clean Air Act violations and obstruction of government efforts to address problems in Libby.

Grace also faces civil cases in which hundreds of Libby residents seek compensation for health problems. I believe that the company knew about the health hazards of asbestos, but covered it up for financial reasons and to avoid liability. Grace bought the mine in 1963 and closed it in 1990. Asbestos contamination in Libby led to environmental cleanup and health care services that have become a major economic force in the community once reliant on mining and logging. Cleanup overseen by the U.S. Environmental Protection Agency has cost tens of millions of dollars. The town, located at the hub of

an area with about 10,000 residents, now has a health clinic devoted to asbestos-related disease. Libby has held asbestos "health fairs" and a local company got into the business of manufacturing backpack-style carriers for oxygen tanks used to aid the breathing of people with asbestos-scarred lungs.

Source: *Associated Press*

XXI. THE CONSUMER CORNER

15-PASSENGER VAN ARE VERY DANGEROUS

As the summer travel season approaches, the National Highway Traffic Safety Administration is again urging all 15-passenger van users to take appropriate precautions to guard against the possibility of a tragic rollover crash. NHTSA knows from its research that 15-passenger vans have a much higher rollover risk than other passenger vehicles, especially when fully loaded with passengers and luggage. Frankly, it's my hope that no family now has a 15-passenger van or plans on taking a trip in one this summer. But if anybody just wants to live dangerously and put their family at risk of losing their lives and insists on using a 15-passenger van—the following are some safety tips that NHTSA recommends:

- Make sure all passengers are buckled up at all times.
- Make sure all drivers have training and experience. It should be noted, however, that even experienced drivers are virtually helpless when a 15-passenger van goes out of control and starts to rollover. But driver inexperience certainly won't help matters. Never let a young person drive these vehicles at any time.
- Pay special attention to tires prior to a trip. Examine tires for signs of wear and aging, and always check to see if they are properly inflated to the pres-

sure recommended by the manufacturer. Improperly inflated tires are another common contribution to rollover crashes, especially if the van is fully loaded with passengers and luggage.

I have made some changes in NHTSA's recommendations primarily because the lawyers in our firm who handle lawsuits involving these vehicles consider them too dangerous to own or drive. I totally agree with their assessment. If you want to know how dangerous the 15-passenger vans really are, contact Cole Portis at 800-898-2034 or by email at Cole.Portis@beasleyallen.com. You can also visit www.safercar.gov.

GOVERNMENT ORDERS WARNING LABEL FOR BOTOX

The Food and Drug Administration has ordered Botox and other similar antiwrinkle drugs to carry the most stringent kind of warning label. The FDA issued that order the day after the agency approved a new drug, Dysport, that is expected to be the first real challenger to Botox in the United States. Like Botox, Dysport is an injectable drug derived from the paralytic agent botulinum toxin. The FDA said such drugs must carry warning labels explaining that the material has the potential to spread from the injection site to distant parts of the body carrying with it the risk of serious difficulties, such as problems with swallowing or breathing.

Requiring a drug to carry the black-box warning—a box with bold-face risk information—is one of the strongest safety actions the FDA can take. Black boxes are typically reserved for medications known to have serious or life-threatening risks. For example, antidepressants carry black boxes warning of the increased danger of suicidal thoughts and actions. The FDA will also require makers of injectable toxins to send doctors letters warning of their risks and to produce a medication guide to be given to patients at the

time of injection. According to an FDA spokesperson, the problems have occurred primarily in patients who received overdoses of the drug for unapproved treatments.

While the drug—Botox—under the name Botox Cosmetic—is best known for its use to treat frown lines, it's also approved for several other uses. In 2000, the agency approved a different type of the toxin, Myobloc, to treat cervical dystonia. The agency has now approved Dysport for frown lines and cervical dystonia.

The new FDA requirement for a black-box warning on such drugs came 15 months after the agency received a petition from Public Citizen calling for more substantial warnings. In its petition, the consumer group said that the FDA had received reports of 180 serious health problems and 16 deaths connected to the injections. Interestingly, in its response to the petition, the FDA says it has identified even more reports of complications, including 225 reports of problems caused by the drug spreading from the injection site to distant parts of the body. Dr. Sidney M. Wolfe of Public Citizen says there would have been fewer problems if the FDA had acted a year earlier.

Source: *New York Times*

CHICAGO IS FIRST CITY TO BAN BPA BABY BOTTLES

Chicago has become the first U.S. city to adopt a ban on the sale of baby bottles and sippy cups containing the chemical BPA. The ban is slated to take effect on January 31, 2010. Alderman Manny Flores, co-sponsor of the measure, had this to say:

This is an important step in a landmark consumer protection initiative. This legislation will protect Chicago's children and send a clear message to other jurisdictions considering similar legislation.

As we have reported, BPA, or bisphenol A, is used to harden plastics in many consumer products including CDs,

sports safety equipment and reusable bottles. It's also present in some food container linings. Experts disagree on whether it poses health risks to humans, but some manufacturers of baby bottles have voluntarily removed it because of safety questions.

Advocates say Chicago is the third jurisdiction in the country to ban BPA from baby bottles and sippy cups. New York's Suffolk County was the first in April, and Minnesota passed a ban last month. Last year, Canada became the first country to announce plans for a similar ban. Some scientists and environmental advocates argue that BPA can mimic hormones and cause reproductive problems in children, but the chemicals industry says consumer products containing BPA pose no health threat. The U.S. Food and Drug Administration has said that FDA-approved products containing BPA that are currently on the market are safe; its review of BPA research is ongoing.

A proposed federal ban on BPA in food containers is pending in Congress, and 24 states have pending bills that would restrict BPA. *Consumer Reports* publisher Consumers Union, which has sought a national ban on BPA in food containers, praised Chicago's decision. The group's Urvashi Rangan said:

Nationwide consumers will remain at risk until federal action is taken. We are hopeful that the new leadership at FDA will act swiftly to address this important public health concern.

The American Chemistry Council, an industry group, issued a statement saying Chicago's ban is unwarranted. "The new Chicago law is contrary to the global consensus on the safety of BPA and ignores the expert evaluations of scientists and government bodies from around the world," the council said. Chicago's ordinance requires retailers to post notices declaring that products they sell do not contain BPA. Violators could be fined up to \$100 or more per offense and could lose their licenses.

Source: *Associated Press*

XXII. RECALLS UPDATE

The following are some of the significant recalls that were announced last month:

SUZUKI RECALLS ITS GSX-R1000

Suzuki Motor Corporation is recalling its GSX-R1000 motorcycles due to reports of and potential cracking or breakage of the motorcycle frame during the operation of this high performance bike. The recall applies to the Suzuki motorcycles made in 2005 and 2006. The recall is being prompted by reports of cracking and breakage of the frame concentrated at the front wheel/fork assembly. Suzuki acknowledged in its recall issued recently that due to the potential for frame failure, a crash could occur resulting in severe injury or death.

Suzuki is advising owners to take their motorcycles to a Suzuki dealership so they may be inspected for cracks and imperfections in the frame around the wheel/fork assembly. If Suzuki finds cracks during the inspection, the frame will be replaced with a new frame which is also retrofitted with a reinforcement brace. Suzuki will also add the reinforcement brace to those GSX-R1000 which do not exhibit cracks or imperfections in the frame. Suzuki is performing the necessary modifications to the motorcycle at no cost to the customer. You can also call American Suzuki Customer Service Department for assistance at (714) 572-1490.

A SECOND RECALL EXPANSION OF CRIBS SOLD BY BABIES'R'US

There has been another recall of Jardine Cribs. Consumers should

stop using the recalled products immediately unless otherwise instructed. There have been about 96,000 units recalled. Previously, in June 2008, 320,000 units were recalled, and in January 2009, 56,450 additional units were recalled. The cribs were manufactured by Jardine Enterprises, of Taipei, Taiwan. The wooden crib slats can break, creating a gap, which can pose an entrapment and strangulation hazard to infants and toddlers.

The Consumer Product Safety Commission has received 31 incident reports of slats breaking, including two reports of children becoming entrapped in the gap created by the broken slat on the crib models involved in the recall. In ten of these incidents, consumers reported that their child broke the slat while in the crib. There was one report of minor injuries according to the manufacturer. This recall involves seven models of Jardine wooden cribs with the date codes identified below. Cribs with other date codes are not affected by this recall. The date code and model number are printed on the label located on the inside of the bottom rail of the headboard or footboard. The additional recalled Jardine Cribs are listed below.

The cribs, which were manufactured in China and Vietnam, were sold at KidsWorld, Geoffrey Stores, Toys "R" Us, and Babies "R" Us stores nationwide, and at babiesrus.com, from September 2005 through April 2009 for between \$220 and \$330. Consumers should immediately stop using the recalled cribs and contact Jardine to receive a full credit toward the purchase of a new crib. Jardine will provide consumers with detailed instructions for purchasing cribs in retail stores and online. For additional information, contact Jardine at (800) 646-4106 or visit the firm's Web site at <http://www.jardinecribre recall.com/>.

Source: Consumer Product Safety Commission

FOLDING TOY BEACH CHAIRS RECALLED

About 260,000 Build-A-Bear Workshop®, Folding Toy Beach Chair for Stuffed Animals have been recalled in the United States and an additional 9,700 have been recalled in Canada. The chair's legs can bruise, pinch or cut fingers if caught while folding. There have been eight injuries reported. This recall involves a wood frame, canvas seat, toy beach chair for stuffed animals. Some styles include an attached pillow. The toy chairs are blue (style #'s 002281, 004463, 009907,

Model #	Description	Date Code Between
0102B00	Drop-side Natural Olympia Single	9/2005 - 1/2007
0102E00	Drop-side Dark Pine Olympia Single	9/2005 - 1/2008
0302P00	Black Olympia Lifetime	11/2005 - 5/2008
0302C00	White Olympia Lifetime	6/2006 - 12/2006
0312D00	Americana Pecan 4-in-1	5/2006 - 11/2007
0308L00	Antique Walnut Capri 4-in-1	12/2005 - 11/2007
0108C00	Drop-side White Capri Single	8/2006 - 11/2007

011565, 102281, 109907, 111565), red (style #'s 007391, 011566, 107391, 111566), fuchsia/white stripe (style #'s 013226, 113226), Orange/white stripe (style #'s 013227, 113227).

The chairs were sold by Build-A-Bear Workshop stores nationwide and online at www.buildabear.com from March 2001 through October 2008 for about \$8 in the US and from March 2003 through October 2008 in for about \$10 in Canada. Return the toy beach chair to any Build-A-Bear Workshop store to receive an \$8 USD/\$10 CDN store coupon. If it is not possible to return the toy chair to a store, you can contact the company for alternate instructions on receiving a refund. For additional information, please contact the Build-A-Bear Workshop toll-free at (866) 236-5683 or visit the company's Web site at www.buildabear.com.

EDDIE BAUER PLAY YARDS WITH ROCKING BASSINETS RECALLED

Dorel Juvenile Group Inc., of Columbus, Ind. Has recalled 71,000 Eddie Bauer Soothe & Sway Play Yards in the United States and about 5,600 in Canada. The play yard's rocking bassinet attachment can tilt even when secured by straps in the non-rocking mode or can stay tilted without returning to a level sleeping surface while in the rocking mode, causing an infant to roll to the corner or side of the bassinet. The infant can then become wedged in the corner or pressed against the side or bottom of the bassinet, posing a risk of suffocation or positional asphyxiation. The firm and CPSC have received ten reports of infants rolling to one side, including six that had their faces pressed against the side or the bottom of the bassinet. One child reportedly was turning purple and was out of breath when discovered. No injuries have been reported.

This recall involves Eddie Bauer Soothe & Sway portable play yards.

The convertible play yard has a bassinet and changing station feature. A mobile with three teddy bears was also sold with the play yard. Models included in the recall are 05046 (all units) and 05044 units manufactured before December 1, 2008. Different models were sold in Canada. Model numbers and manufacture dates are printed on a sticker on one of the support legs underneath the play yard. Manufacture dates are printed in the YY/MM/DD format. The play yards were sold at Target, Sears, and Burlington Coat Factory stores nationwide and by Internet retailers from January 2008 through May 2009 for about \$150. Consumers should immediately stop using the bassinet attachment of the play yard and contact Dorel Juvenile Group for a \$40 voucher toward the purchase of a new Dorel product. Consumers can continue using the play yard. For additional information, contact Dorel Juvenile Group toll-free at (888) 233-4903 or visit the firm's Web site at www.djgusa.com.

FDA EXPANDS RECALL ON CARACO BRAND DIGOXIN MEDICATION

The Food and Drug Administration and AS Medications Solutions LLC have announced a nationwide recall of all lots of the 0.25 mg. heart medication digoxin manufactured by Caraco Pharmaceuticals Laboratories distributed prior to March 31, 2009. The recall was said to be because they may differ in size and therefore may contain more or less of the active ingredient. This recall follows an alert issued by the company for the Caraco brand Digoxin, USP, 0.125 mg and the Digoxin, USP, 0.25 mg tablets, both distributed prior to 2009. That recall included both 100-count and 1,000-count tablets of both mgs. The latest recall adds the 20-count 0.25 mg tablet to the

recall. The specific product included in the recall NDC numbers are:

- Digoxin Tablets, USP, 0.125 mg
- 57664-437-88 (100-count)
- 57664-437-18 (1000-count)
- Digoxin Tablets, USP, 0.25 mg
- 57664-441-88 (100-count)
- 57664-441-18 (1000-count)

Digoxin is used to treat heart failure and abnormal heart rhythms. A higher-than-labeled dose may pose a risk of digoxin toxicity in patients with renal failure. Digoxin toxicity can cause nausea, vomiting, dizziness, low blood pressure, cardiac instability, bradycardia and death. A lower-than-labeled dose may pose a risk of lack of efficacy potentially resulting in cardiac instability.

Last year, Actavis Totowa LLC, a generic pharmaceutical company, initiated a Class 1 recall on Digitek brand digoxin tablets when it was learned that some tablets were oversized and contained twice the level of active ingredient, putting consumers at risk. Consumers of Caraco's digoxin tablets that fall within the recall should return these products to their pharmacy or place of purchase. Patients who have medical questions should contact their health care provider for additional instructions or guidance.

CANNONDALE RECALLS 1,500 BIKES DUE TO FAULTY PART

Cannondale Bicycle Corp. is recalling about 1,500 bicycles because of a faulty part that can cause riders to lose control and crash. The forks in the recalled bikes can lose alignment and cause the front wheel to turn unexpectedly, the Consumer Product Safety Commis-

sion said in a release. No incidents or injuries have been reported. The recall involves model year 2008 Cannondale Adventure 2, Adventure 3, Adventure 2 Feminine and Adventure 3 Feminine bicycles. Model names are printed on the bicycle's frame.

The bicycles have a suspension fork with the words "cannondale AT35 adventure trail" printed on them. The forks are from JD Components of Taiwan. Bicycles equipped with the Rock Shox i-ride fork are not included in the recall, according to the press release. The recalled bikes were sold at Cannondale dealers between February and April and cost between \$600 and \$800. Consumers should stop riding the bikes immediately and call their dealer for a free repair, the release said.

For additional information, contact Cannondale at (800) 245-3872 or visit the firm's Web site at www.cannondale.com. Cannondale, based in Bethel, Conn., makes aluminum bikes, offering about 80 models.

ILLINOIS FIRM RECALLS GROUND BEEF PRODUCTS

Valley Meats LLC, a Coal Valley, Illinois, establishment, has recalled approximately 95,898 pounds of ground beef products that may be contaminated with *E. coli* O157:H7.

These ground beef products were produced on March 10, 2009, and were distributed to various consignees nationwide. The problem was discovered through an epidemiological investigation of illnesses. On May 13, 2009, FSIS was informed by the Ohio Department of Health of a cluster of *E. coli* O157:H7 infections. Illnesses have been reported in Ohio, Pennsylvania, and Illinois. Individuals concerned about an illness should

contact a physician.

E. coli O157:H7 is a potentially deadly bacterium that can cause bloody diarrhea, dehydration, and in the most severe cases, kidney failure. The very young, seniors and persons with weak immune systems are the most susceptible to foodborne illness. Media and consumer questions regarding the recall should be directed to the company spokesperson at (309) 799-7341.

Consumers with food safety questions can "Ask Karen," the FSIS virtual representative available 24 hours a day at AskKaren.gov. The toll-free USDA Meat and Poultry Hotline 1-888-MPHotline (1-888-674-6854) is available in English and Spanish. Recorded food safety messages are available 24 hours a day.

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

TODD WALL

Todd Wall, who has been with the firm for over five years, serves as the Database Administrator in our Information Technology Department. Todd maintains our case management software, ProLaw, as well as handling upgrades, problems, and day-to-day maintenance issues. He also makes sure all information entered in our system is correct. Todd is responsible for producing different reports based on needs and specifications concerning referring lawyers, types of cases and other reporting on an as-needed basis.

Todd has been married to Stephanie, who also works for the firm, for two years. He has a 21-year-old son, Christopher, a 17-year-old son, Alex, and a 13-year-old son, Casey. Todd also has a three-year-old grand-daughter, Shelby. Todd spent eight years in the Air Force, where he gained valuable experience in computer operations. Todd participated in Operation Desert Storm as a Security Police Officer at Maxwell Air

Force Base. While in the military, he received awards in marksmanship and leadership, as well as the Presidential Award. He enjoys automation, programming, working on his car (a Cobra) and spending time with his family and friends. Todd is a very good employee and we are fortunate to have him with the firm.

DEBORAH DRINKARD

Deborah Drinkard, who has been with the firm for eight years, serves as a Medical Records Coordinator in our Mass Torts Section. In this position, Deborah orders all of the medical records that are needed for case evaluation and preparation in her section. She has been married to Lamar Drinkard for 26 years and they have three grandchildren, Cydnie, Alex, and Samantha. Deborah's sister, Pamela Murphy, also works at the firm as a Medical Records Coordinator. Deborah enjoys NASCAR Racing, Alabama football, spending time with her family and working in the yard with her husband. Deborah is a very good employee, who performs a most valuable job for the firm, and we are fortunate to have her with us.

CASE-SPECIFIC WEB SITES BRING ATTENTION TO IMPORTANT ISSUES

While most of you are familiar with the fact that our firm operates an award-winning web site at www.beasleyallen.com, many of our readers may not be aware that we also offer more than 25 case-specific web sites. These sites address specific legal issues in all practice areas, with topics ranging from personal injury and product liability to pharmaceutical cases involving Reglan, Heparin and Digitek; and environmental concerns including Leaking Underground Storage Tanks and the Coal Ash Spill in Kingston, Tenn., and many more.

These sites feature active "blogs," which provide a resource for the latest news and information about each topic, while establishing Beasley Allen as a voice on behalf of consumer advocacy. You can visit some of our most

active sites at:

- www.southerninjurylawyer.com
- www.myMeso.org
- www.mesothelioma.law.pro
- www.reglan-lawyer.net
- www.painpump.net
- www.yamaha-rhino-lawyer.com
- www.fairlabor-legal.com
- www.leaking-storage-tank.com

WENDI LEWIS ATTENDS MESOTHELIOMA SYMPOSIUM IN NATION'S CAPITOL

Current statistics show as many as 3,000 people are diagnosed with mesothelioma in the United States each year, and 10,000 Americans die from asbestos-related diseases. Mesothelioma is a deadly cancer that affects the lining of the lungs or, more rarely, the lining of the abdomen and/or the heart. There is only one way to develop this type of cancer—exposure to asbestos.

In February 2008, in an effort to raise awareness among the public about mesothelioma and the dangers of asbestos exposure, Beasley Allen established a web log (or “blog”) at www.myMeso.org. The site provides a forum for those affected by mesothelioma, and creates a network of information and resources expanding hope for a cure.

This month, Wendi Lewis, Beasley Allen’s communications director and writer for www.myMeso.org, will travel to Washington, D.C. to attend the 2009 International Symposium on Malignant Mesothelioma, presented by the Mesothelioma Applied Research Foundation (MARF). The conference (June 25-27) brings together patients, caregivers, family members and those with mesothelioma or who have lost a loved one to meso, as well as advocates, and medical and scientific experts.

The conference will provide information about research and treatment, and an opportunity for networking. High-

lights of the conference include a Tribute Ceremony to remember those who have lost their battle with mesothelioma, and a Celebration of Hope gala dinner to recognize the efforts of those working toward awareness and a cure.

MORE ON LAWCALL

As we have reported in prior issues of the *Report*, our firm is sponsoring “LawCall,” a live weekly 30-minute television show at 11:00 p.m. Sundays on WSFA. Gibson Vance, one of our lawyers, is a regular on the weekly show and fields various legal questions from callers. Kendall Dunson, who is a lawyer in our Personal Injury Section, fills in as the host in Gibson’s absence.

I understand that the switchboards at WSFA are overwhelmed each week by the number of calls the show receives. We try to get to each and every person who calls into the show, but because of the overwhelming response, we are just not able to answer every call. For those folks who can’t get through, they can still send their questions to the firm by way of the WSFA website www.wsfa.com or they can go directly to the Beasley Allen website, www.beasleyallen.com. Also, they can call us directly at 334-269-2343 and a lawyer from the firm will respond.

XXIV. SPECIAL RECOGNITIONS

HONOR FLIGHT PROGRAM ASSISTS WWII VETERANS

In May 2004, the World War II Memorial was added to the National Mall in Washington, D.C., to honor the 16 million veterans who served in the armed forces of the United States, the more than 400,000 who died, and all who supported the war effort from back home. The memorial is a monument to the spirit, sacrifice, and com-

mitment of the American people. It’s the only 20th century event commemorated on the National Mall’s central axis.

At the time the Memorial opened, Earl Morse, a retired Air Force Captain, was working as a physician’s assistant for the Department of Veteran’s Affairs, in a small clinic in Springfield, Ohio. Captain Morse asked the many World War II veterans who were patients at the clinic if they had been to see their memorial. All too often, the answer was no. For many of these seniors, the trip to our Nation’s Capitol was just not financially or physically possible. Many needed assistance for travel, but had no family or friends able to make the journey with them.

A private pilot, Captain Morse began offering to fly veterans to the memorial, and thus the Honor Flight program was born. Beginning with a small group of volunteer pilots and small planes in the Ohio area where Captain Morse lived, the program has since expanded to include commercial flights serving veterans throughout the country, with the help of a dedicated volunteer, Jeff Miller, of Hendersonville, North Carolina.

In February 2006, Captain Morse and Miller joined forces and co-founded the Honor Flight Network, which currently has 71 hubs in 30 states. Their goal is to establish a hub in all 50 states by the end of 2009. The Network aims to transport 25,000 veterans from across the United States to the World War II Memorial. In the future, Honor Flight hopes to expand its program to service veterans of the Korean War and the Vietnam War.

For more information, or to find out how you can sponsor the Honor Flight Network, visit www.honorflight.org. If you want to help financially, mail your tax-deductible donation to:

Honor Flight, Inc.

Attn: Tom O’Neal
300 E. Auburn Ave.
Springfield, OH 45505

XXV. CLOSING OBSERVATIONS

FAVORITE BIBLE VERSES

In a recent devotion, the following verses were used by Andy Birchfield, who heads up our Mass Torts Section:

Rejoice in the Lord always. Again I will say, rejoice! Let your gentleness be known to all men. The Lord is at hand. Be anxious for nothing, but in everything by prayer and supplication, with thanksgiving, let your requests be made known to God; and the peace of God, which surpasses all understanding, will guard your hearts and minds through Christ Jesus.

Philippians 4:4-7

My longtime friend, Woody Woodman, who is well known in Alabama political circles as the “sign man,” sent in the following verses:

Let Him have all your worries and cares, for He is always thinking about and watching everything that concerns you.

1 Peter 5:7

And now just as you trusted Christ to save you, trust Him, too, for each day's problems: live in vital union with Him.

Colossians 2:6

A SPECIAL WORD FROM ONE OF OUR LAWYERS

I asked Leigh O'Dell, one of our lawyers in the Mass Torts Section, to do a special piece this month that would be appropriate for our readers who face the difficult challenges of our times.

CONFRONTING OUR GIANTS

Life is, and always has been, full of challenges, obstacles, and problems. At the present time, however, it seems that some of the challenges that we are face are particularly intense. We face a serious economic crisis, an unfortunate fraying of our nation's moral fabric, and political unrest around the world. We also face challenges and problems that arise closer to home. In recent months, I have encountered people who are suffering serious difficulty—the loss of a loved one, the loss of a home to foreclosure, and the loss of a job. For some of us, our challenges are perhaps not as dramatic, but we find ourselves struggling with a difficult relationship, fear of the future, or the failing health of an aging parent. All of us face difficulties.

It seems to me that these situations could be considered in some ways to be “giants” in our lives. Without the right perspective, they are problems that can appear to be overwhelming and seemingly insurmountable. In God's word, a story is told of when the army of the nation of Israel, God's people, faced a “giant.” As King Saul and the Israelite army prepared for battle against the Philistines, a Philistine warrior named Goliath walked out onto the plain between the readying troops and issued this challenge: “I defy the ranks of Israel! Give me a man and let us fight each other. If he is able to kill me, we will become your subjects but if I kill him, you will serve our subjects and serve us.” (1 Samuel 17:8).

According to 1 Samuel 17, Goliath was a mountain of a man—he was 9 feet, 9 inches tall; his armor weighed 125 pounds; and his spear was the size of a fence post—the iron tip alone weighed 15 pounds. He was a

giant! King Saul and his army were terrified. A young man named David had been sent by his father to take provisions to his older brothers who served in King Saul's army. When he arrived onto the battle field, David heard Goliath's challenge, a challenge that Goliath had issued daily for 40 days. David was a shepherd boy, much more accustomed to watching over sheep in the solitude of the wilderness than waging war. But when David heard Goliath defy not only the army of God's people but in a sense God Himself, David was compelled to step in. From David, we learn the secrets of how to defeat the “giants” in our lives.

First, no matter what “giant” we face, we must confront it. David, upon hearing Goliath's challenge, sized up Goliath's power in light of God's power and immediately accepted Goliath's blasphemous challenge. Not only did he size up the giant in light of God's power, he also did not procrastinate. He agreed to fight Goliath on the very morning he arrived onto the battlefield. David's approach is a lesson for all of us. When faced with a challenge, problem or crisis, we should take the initiative to deal with the problem immediately, rather than waiting or avoiding it. It is always better to face a situation head on and to do so immediately.

Second, and most importantly, we have to trust in the Lord's power. Most of us remember this famous story and know that David killed Goliath with a sling and a stone. David did not trust in his own power or his own abilities, he trusted in the power of the Lord. When facing Goliath, David said, “You come to me with sword, spear, and javelin, but I come to you in the name of the Lord of Heaven's Armies—the God of the armies of Israel, whom you have defied. Today the Lord will

conquer you, and I will kill you and cut off your head.” (I Samuel 17:45-46). Like David, as we face life’s problems and obstacles, we must trust in the Lord’s power, not our own. In our own strength, we will certainly fail, but if we rely on His strength and His power, we shall certainly prevail no matter the seriousness or magnitude of the difficulty we face.

As we face the “giants” in our lives, let’s be encouraged and learn from David. We can trust that God will guide and strengthen us if we deal with the challenge head on and rely fully on His power and not our own.

*Leigh O’Dell
May 22, 2009*

I found Leigh’s words to be both encouraging and enlightening. Certainly, we all face our giants on a daily basis, with some of them being on the scale of Goliath, and we must deal with those challenges. We can handle them, but only by trusting God and relying on Him.

XXVI. PARTING WORDS

Now that schools are out around the country, the lives of most families, and especially those with school-age children, will take a different turn. The economic woes we are dealing with make this summer a real challenge for all of

us. As Leigh pointed out, some of those challenges will be most difficult. My prayer for each of us is that we will put our total trust in an all-powerful God, who is certainly capable of handling any problems that any of us will face this summer, and is readily available. May God bless, sustain and protect you all during the coming months.

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