



THE
JERE BEASLEY REPORT

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Beasley Allen

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I. CAPITOL OBSERVATIONS

ALABAMA SUPREME COURT RULES FOR DRUG COMPANIES

In a shocking development, the Alabama Supreme Court reversed three of the State of Alabama’s Medicaid fraud lawsuits that were on appeal. The Court refused the state’s multiple requests for oral argument in the cases, considered to be among the most important cases to be heard by this Court in years. To say the least, that was more than just unusual. The case against AstraZeneca, one of the Defendants, had been on appeal for 13 months.

By refusing to allow oral argument, the Court did not allow the members of the news media who had not attended the actual trials that began in 2008 to hear first-hand about the bad conduct of these companies. The AstraZeneca case had been pending for so long that even the few members of the news media that attended that trial may have forgotten just how strong the State’s case against that Defendant really was.

I also find it most unusual that absolutely nothing relating to the Defendants’ bad conduct was even mentioned by the Court in its opinion. The decision reached by the Alabama Supreme Court is most difficult to understand when you consider that:

- The federal government did an investigation in 2002 and reported in 2003 that the drug manufacturers had been committing massive frauds in the Medicaid program and issued guidelines designed to eliminate the fraudulent conduct. If the federal government hadn’t known about the fraudulent activity how could individual state Medicaid agencies be expected to know especially since most have been underfunded and understaffed?

- Committing fraud against the Medicaid program hurts the elderly, the disabled, the young, and the poor as well as every Alabama taxpayer;
- The federal government had conducted an investigation and found massive frauds by drug manufacturers in the state Medicaid programs.
- AstraZeneca—one of the companies—entered a guilty plea to a charge of criminal fraud in federal court involving state Medicaid reimbursement;
- AstraZeneca paid a criminal fine of \$570 million relating to that criminal guilty plea;
- AstraZeneca settled state Medicaid fraud cases involving reimbursement for \$355 million;
- A top official at AstraZeneca prepared an internal pricing document containing a virtual roadmap for cheating state Medicaid agencies;
- AstraZeneca, as a part of the settlements mentioned above, agreed to submit true prices to state Medicaid agencies;
- AARP—a national group with 500,000 Alabama members—has fully supported Alabama in its lawsuit against the drug companies and in the appeal;
- Thirteen state Attorneys General have supported Alabama’s position and each filed a brief on Alabama’s behalf;
- Since the Alabama case was tried—and after the case was appealed in July 2008 to the Alabama Supreme Court—a Federal Appeals Court heard a separate appeal in a case where AstraZeneca was found guilty of fraudulent conduct in a Medicaid reimbursement case;
- A Federal Appeals Court in that case found that AstraZeneca was guilty of extremely bad conduct;

- A Kentucky jury, after hearing the same evidence we had developed and presented in the Alabama case, delivered a verdict against the drug manufacturer in the amount of \$14.72 million. This verdict came one day before Alabama’s cases were reversed.
- We had settled with several drug manufacturers in Alabama—with the very same law and the very same facts involved—for \$138 million.

Taking all of the above into consideration, and knowing the facts of this

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case, it is extremely difficult to see how the Alabama Supreme Court could side with the drug companies and against the citizens of Alabama who are in the Medicaid program and against all Alabamians who pay taxes that support the program. All Alabamians are the losers, and politically-powerful drug companies were declared winners by the Alabama Supreme Court. This is a sad day for the Alabama Medicaid Program and all Alabama taxpayers.

We have asked the Supreme Court to reconsider what it has done. We again requested an opportunity to appear before the Court and argue in person the State's case. Hopefully, the Court will grant oral argument so that the people of Alabama can find out exactly what has happened to them.

JUDGE AGAIN RULES AGAINST GEORGIA IN WATER FIGHT

A judge has again ruled against Georgia in the tri-state water wars, refusing to agree that an order he issued in July was a final judgment in the case. The judge also said his prior order does not provide injunctive relief as the state claims. Senior U.S. District Judge Paul Magnuson ruled in July that it is illegal for the U.S. Army Corps of Engineers to draw water from Lake Lanier to meet the needs of metro Atlanta's 3.5 million residents. He stayed the case for three years to give Georgia, Alabama and Florida time to work out a water-sharing plan.

The Georgia parties, which include the state, the Atlanta Regional Commission and the city of Atlanta, are seeking an appeal to the 11th U.S. Circuit Court of Appeals in Atlanta. They say Magnuson's order constitutes an injunction, which would give them one avenue of immediate appeal, but the judge disagreed. Separately, the Georgia parties asked Judge Magnuson to enter a final judgment in a lawsuit the state filed in 2000 when it sought a permanent reallocation of about 34% of Lake Lanier's water for Atlanta.

This is one of seven lawsuits that have been consolidated and put before Judge Magnuson in the water wars litigation. In his July order, the Judge denied Georgia's request for the permanent reallocation of Lake Lanier's water, saying a prior ruling by the Federal Appeals Court in Washington had foreclosed the issue. By refusing to enter a final judgment there is nothing for Georgia to appeal. It's pretty clear that this judge is ready for the litigation to end. Judge Magnuson said the matter was stayed for three years to allow the parties and the political system to attempt to reach a solution and he "fully anticipates" a resolution will be made before the deadline.

Source: Associated Press

II. DRUG MANUFACTURERS FRAUD LITIGATION

DRUG MAKER TO PAY STATE \$25.1 MILLION TO SETTLE ZYPREXA LAWSUIT

Drug maker Eli Lilly and Co. will pay the State of Connecticut \$25.1 million to settle that state's Zyprexa lawsuit. The company marketed the antipsychotic drug Zyprexa for unapproved uses and hid the drug's side effects for more than ten years. Attorney General Richard Blumenthal sued the company last year, alleging that Lilly's efforts to promote the drug harmed consumers. Zyprexa has been linked to diabetes and significant weight gain. It cost state medical assistance programs more than \$190 million to buy the drug and millions more to treat the injuries it caused.

This settlement, similar to recent agreements we have reported on relating to settlements with two other states, requires the company to meet stricter standards for marketing in the future. Attorney

General Blumenthal had this to say about the settlement:

This illicit multibillion-dollar drug marketing scheme corrupted health care at the expense of taxpayers, senior citizens, children and others who suffered serious side effects from Zyprexa. Eli Lilly was aided and abetted by so-called independent physicians paid handsomely to promote Zyprexa for unapproved off-label uses—ghostwriting articles, downplaying dangers and pitching the product.

As reported, Lilly also has settled Zyprexa-related lawsuits with Alaska and West Virginia. Ten other states still have lawsuits pending. As reported, in a January settlement with the federal government, Lilly agreed to pay \$1.4 billion in fines for promoting Zyprexa for unapproved uses. The company also agreed to plead guilty to a criminal charge.

Source: Courant.com

FOUR PHARMACEUTICAL COMPANIES SETTLE FCA CLAIMS FOR \$124 MILLION

Four pharmaceutical companies have agreed to settle False Claims Act allegations relating to Medicaid fraud for a combined \$124 million. Mylan Pharmaceuticals Inc., UDL Laboratories Inc., AstraZeneca Pharmaceuticals and Ortho McNeil Pharmaceutical Inc. entered into settlement agreements with the Justice Department in claims that the companies failed to pay appropriate rebates to state Medicaid programs for drugs that the state programs paid for. According to the Justice Department, the companies agreed to pay quarterly rebates to Medicaid based on the amount of money the state programs were paying for the pharmaceutical companies' drugs.

A lead prosecutor in the case, John Farley, an Assistant U.S. Attorney in Concord, says that health care fraud prosecution is a big concern. Mylan and UDL agreed to pay \$118 million to resolve allegations that they underpaid their rebate obligations. AstraZeneca

paid \$2.6 million to the state and federal governments, and Ortho McNeil paid \$3.4 million. Assistant Attorney General Tony West had this to say about the settlements:

These cases exemplify the strong cooperation between the Department of Justice and the states in protecting American taxpayers.

John Kacavas, U.S. Attorney for the District of New Hampshire, said in a statement that “[t]he government is committed to identifying health care fraud and ensuring that companies that benefit from doing business with the government agree to play by the rules.”

I wonder how the Alabama Supreme Court feels about a drug company having to “play by the rules?”

Source: Law.com

SOUTH CAROLINA SETTLES FOR \$45 MILLION WITH DRUG MAKER

South Carolina has reached a \$45 million settlement with drug maker Eli Lilly & Co. over the company’s marketing of an anti-psychotic drug. South Carolina Attorney General Henry McMaster made the announcement on October 23rd. The Attorney General sued the Indiana-based drug maker in 2007, arguing it had improperly marketed Zyprexa. The settlement, which is the second largest settlement deal in state history, recovers state funds used to treat illnesses caused by the drug.

Source: Associated Press

COMPANY SUED OVER OFF-LABEL MARKETING OF ANTI-DEPRESSANTS

Class actions accusing Forest Labs of illegally marketing anti-depressants for pediatric use have been consolidated as a multi-district litigation in the U.S. District Court for the District of Massachusetts in Boston. The suits accuse Forest of engaging in false and misleading promotion of Celexa and Lexapro for pediatric and adolescent use. It’s alleged in the complaints that the

company promoted the results of a positive study on pediatric use of Celexa, while covering up negative results of another study.

It appears that the company encouraged doctors to increase prescriptions by giving them illegal payments, expensive meals and lavish entertainment. Two class actions were transferred to the MDL. One was originally filed in Missouri and one in New York. Three other cases had been filed in the MDL.

The cases include consumers and third-party payers who are seeking reimbursement for paying costs associated with the off-label promotion to children. In August, the Judicial Panel on Multidistrict Litigation ruled that Massachusetts is an appropriate forum for the litigation. This was because two *qui tam* actions were already pending there.

Source: Lawyers USA Online

III. PURELY POLITICAL NEWS & VIEWS

ARTUR DAVIS OUTLINES HIS PLAN TO CUT STATE SPENDING

Artur Davis has pledged not to raise taxes on individuals to deal with the state’s financial crisis. Instead, he believes the state could save more than \$500 million by tackling waste and fraud. In a news conference in Montgomery last month, Artur called for more prosecutions of Medicaid fraud and more auditors to collect unpaid taxes, as well as bulk purchasing of prescription medications, and a reduction of no-bid contracts and the outsourcing of government work.

Artur is correct when he says the next Governor will face a fiscal crisis. He is also correct that the people of Alabama want their elected leaders to be good financial stewards. Artur had this to say:

At a minimum they want to know we’re going to manage their dollars wisely. We ought to be transparent about taxpayer dollars. I know that is not the normal way of doing things in Montgomery.

Artur was very clear that he won’t look to raise money to deal with the state’s fiscal crisis by raising taxes on individuals. He favors reexamining the state tax code, which he says gives large tax breaks to out-of-state corporations. The total savings to the State from all of the different programs amount to well over \$500 million.

ALABAMA POLICE GROUP ENDORSES TROY KING

The state’s largest police group has endorsed Alabama Attorney General Troy King’s campaign for re-election. The Alabama State Fraternal Order of Police says Troy earned its endorsement for his support of law enforcement. The group has 8,700 members and represents police, deputies and state troopers. Bill Davis, president of the Alabama FOP, had this to say:

The law enforcement officers in Alabama have no greater friend than Troy King.

Troy faces Republican lawyer-lobbyist Luther Strange of Birmingham in the GOP primary next year. From all accounts this promises to be a knock-down, drag-out affair. The race may wind up with the powerful special interests on one side and the people of Alabama on the other.

Source: Mobile Press Register

GILES PERKINS IS RUNNING FOR ATTORNEY GENERAL

Giles Perkins, a Birmingham lawyer, is running for Alabama Attorney General as a Democrat. Giles, who served as executive director of the Alabama Democratic Party in 1997-

1998, made his announcement last month. He has been active in many Democratic campaigns, including the Presidential runs of John Edwards and Barack Obama. Former U.S. Attorney Doug Jones of Birmingham will serve as his campaign chairman.

Giles is experienced in party politics and has good friends around the state. There may be others who will get in this race as Democrats. Two lawyers—James Anderson of Montgomery and Michel Nicrosi from Mobile—reportedly have feelers out and may decide to run.

Source: Associated Press

IV. RECENTLY FILED CASES

SUIT FILED AGAINST COE MANUFACTURING COMPANY AND OTHERS

We recently filed a lawsuit against Coe Manufacturing Company and two individuals in a state court in Jackson County, Florida. We represent Karen Dudley and Karina Ja-Vaughan Dudley who lost their husband and father respectively when he was killed while working for Spanish Trail Lumber Company in Marianna, Florida.

On March 26, 2009, Rufus Dudley was standing near an industrial planer at the in-feed section of the large wood working machine as 2X4's were being fed into it. One of the 2X4's became stuck. Suddenly, the planer ejected the twelve foot piece of lumber out of the in-feed section, striking Mr. Dudley in the chest and killing him.

The planer was made by Ohio-based Coe Manufacturing Company. The company is now owned by U.S. Natural Resources, Inc. Coe sold the planer to Mr. Dudley's employer in 2005 and installed the planer on the premises of Spanish Trail. The planer was made by Coe without adequate guards and safety devices to prevent the ejection and kickback of large pieces of lumber

while the planer is being operated. We will prove that the planer is defective and unreasonably dangerous because it lacked very basic safety devices which have been required on similar wood working machines for over 40 years.

In addition, we have brought suit against Mr. Dudley's supervisors. Remarkably, this was not the first time that this particularly planer ejected a large piece of wood out of its front section. In fact, according to the investigation done by the local authorities, several pieces of lumber had been ejected out of the in-feed section of the wood working machine prior to this date. Instead of equipping the machine with the proper and needed guards, the employer installed a metal screen in an attempt to stop the pieces of wood. Apparently, the metal screen or fence-like device had been struck so many times that a small hole had begun to open.

Tragically, on this day, the metal screen finally failed and did not stop the piece of wood which killed Mr. Dudley while he was on the job. Cole Portis, Rick Morrison, and I are representing the Dudley family in this case.

LAWSUIT FILED AGAINST BLAIR CORPORATION AND OTHERS

Our firm has filed a lawsuit against Blair Corporation and three independent testing companies in the U. S. District Court for the Middle District of Alabama. We represent Harold Ledbetter who lost his mother, Annie Thrash. On the morning of October 30, 2008, Mrs. Thrash was in her apartment in Opelika, Alabama. She was making coffee at a gas stove when the chenille robe she was wearing caught fire. Mrs. Thrash was severely burned and died as a result of these burns.

Mrs. Thrash purchased her robe from Blair Corporation of Warren, Pennsylvania. We will prove that the Blair robe was defective and dangerous and that it failed to meet the Federal Flammability standards. Blair has admitted that it became aware of reports concerning

flammability issues with its chenille robes in the fall of 2008. In April of this year, after learning of six separate fire-related deaths associated with its chenille robes, Blair Corporation and the Consumer Product Safety Commission recalled the robes.

Blair statements indicate that the other companies, also named as Defendants in this case, whose independent commercial testing labs were used to test the flammability of the robes, issued passing test reports that every lot of the robes passed Federal flammability standards. Upon receiving three complaints regarding the flammability of the robes in late 2008 and early 2009, Blair retested every lot of chenille robes that remained in its stock. It was then discovered by Blair that the some or all of the remaining garments did not pass Federal flammability standards.

Interestingly, two companies whose independent commercial testing labs were used to test the flammability of these robes, STR and Bureau Veritas, submitted comments to the Consumer Product Safety Commission on proposed rulemaking to update the *Standard for the Flammability of Clothing Textiles* in 2006 and 2007. Rick Morrison and Cole Portis from our firm represent the family of Annie Thrash.

V. LEGISLATIVE HAPPENINGS

A LOOK TO 2010 IN ALABAMA

It certainly appears that the financial crisis facing state government in Alabama looms much larger for next year's regular session than was originally projected by state financial officers. All state services and public education funding at every level will almost certainly have to be cut drastically due to a lack of funds. There will be no new taxes imposed by the legislature in 2010 and that's a virtual cer-

tainly. But, Governor Bob Riley may decide that his legacy should include putting the state's fiscal house—for both the present and for the future—on solid ground. That would be good news for all Alabama citizens regardless of where they might fall out politically.

A POSSIBLE SPECIAL SESSION

There has been much speculation around the State Capital that Governor Riley will call one or more special sessions later this year. The one subject most mentioned concerns the need to reform Alabama's outdated ethics law. While that reform is badly needed, due to the severe money woes facing state government, a good vote count by the Governor is a must before he calls legislators back to Montgomery.

CONSTITUTIONAL REFORM STILL NEEDED

Alabama Citizens for Constitutional Reform has started another round of statewide meetings to discuss holding a constitution convention. As all Alabama citizens know, our state has the nation's longest, most-amended constitution. I sincerely believe that the document is in need of reform. For more than a decade, a growing grassroots campaign has been waged to draft a new constitution. But thus far all efforts to get any reform through the Legislature have failed. There have been lots of amendments but no real reform, and the prospects for anything happening next year are slim to none—unless ordinary citizens get involved.

VI. COURT WATCH

MAJOR SUPREME COURT CASES FOR THE NEW TERM

The U.S Supreme Court will take up a number of high-profile cases in its term that began on October 5th. From

all accounts, it appears this will be a very busy term. A few of the cases to be heard are mentioned below:

- **Another Federal Preemption Case:** The Court will hear a case concerning whether a state court lawsuit over a federal employee's health care benefits is preempted by federal law. The lawsuit was initially filed by Juli Pollitt, a government employee, against Health Care Service Corp.
- **Guns:** The Second Amendment's right to keep and bear arms has never been held to apply to state and local laws restricting guns. The Court is taking up a challenge to a handgun ban in Chicago to decide whether this right, like many others in the Bill of Rights, acts to restrict state and local laws or only federal statutes. If the Court sides with gun rights supporters, lawsuits to overturn all manner of gun control laws are likely.
- **Mutual fund fees:** A fight over the fees paid to an investment adviser gives the Court a timely chance to weigh in on compensation paid to financial services executives. Individual mutual fund investors claim in a suit that they are paying unreasonably higher fees than institutional investors to the adviser who chooses their funds' stocks. The Court could use this case to resolve disagreements among lower courts about whether Plaintiffs must prove merely that the fees are excessive or demonstrate that the adviser misled the mutual funds' directors who approved the fees.
- **Honest services fraud:** Newspaper baron Conrad Black and a former Alaska legislator separately are challenging their fraud convictions under an open-ended federal law that has become a favorite of prosecutors in white-collar and public corruption cases. The law says that depriving the public or, in Black's case, shareholders of your honest services is a crime.

Justice Antonin Scalia pointed out recently that, taken to its extreme, the law could be used to prosecute any employee who has ever called in sick to attend a ballgame.

- **Vioxx suits:** Merck & Co. shareholders sued the drug maker for securities fraud after its former blockbuster painkiller Vioxx was pulled from the market. The suit concerns whether Merck provided adequate information about Vioxx's risks. But at issue before the Court is whether the shareholders waited too long to file their suits. The Court could use the case to decide what constitutes proper notice to investors under securities laws.
- **Sarbanes-Oxley:** The Court could decide the validity of a part of the Sarbanes-Oxley anti-fraud law, enacted as Congress' response to the wave of corporate scandals that started with energy giant Enron's collapse. The court is considering whether the board established to oversee the accounting industry by the 2002 law violates the constitutionally-mandated separation of powers between the branches of government. One irony of the case is that pro-business conservatives who are mounting the legal challenge are arguing that President Barack Obama should have more power to control the makeup of the board, while his administration is defending the law.
- **Employment Cases:** There will be a number of cases dealing with employment issues before the Court.

Source: Associated Press

RAILROAD COMPANY FOUND GUILTY OF SOME VERY BAD MISCONDUCT

Burlington Northern Santa Fe Corp. engaged in a "staggering" pattern of misconduct aimed at covering up its role in the deaths of four young people whose car collided with a train largely because a crossing gate wasn't working properly. To punish the railroad, which

began destroying evidence within minutes of the 2003 accident, a judge awarded an additional \$4 million to the victims' families. That award comes on top of \$21.6 million from a jury that placed 90% of the blame for the accident on Burlington Northern. The judge's order stated:

When encountering conduct as egregious as that of BNSF, this court...has a duty to impose sanctions of a sufficient severity in order to deter future misconduct of the same caliber.

On the date of the incident in 2003, a westbound freight train traveling at 59 miles per hour collided with Brian Frazier's car as it crossed the tracks at about 10 p.m. in Anoka, Minnesota. Burlington Northern claimed that the driver ignored a warning signal and tried to beat the crossing gate, but a jury found that the crossing gate wasn't working properly. The trial judge found that the railroad company lost or fabricated evidence, interfered with the families' investigation of the accident and "knowingly advanced lies, misleading facts and/or misrepresentations" in order to conceal the truth. This sort of conduct by parties involved in litigation can't be tolerated!

Source: Sanluisobispo.com

AMR SETTLES WITH FOUR FEMALE PATIENTS AFTER \$3.25 MILLION VERDICT

American Medical Response Northwest and its parent company have agreed to settle four more lawsuits against them for failing to stop a paramedic from groping female patients in the back of his ambulance. The confidential settlements came just before the civil trial of Betty Rotting, the second of six women to sue Portland-based AMR NW and Denver-based parent company AMR. As we reported last month, 29-year-old Royshekka Herring won a \$3.25 million verdict against AMR after a month-long jury trial.

Mrs. Rotting was 73 in December 2006 when paramedic Lannie Haszard cupped her breasts and slid his hand up her gown and onto her inner thigh. Rotting said Haszard asked her sexually suggestive questions, such as "Are you hot?" but when she complained, AMR brushed her off.

Greg Kafoury, a lawyer from Oregon who represented Ms. Herring and the other women, said the terms of the settlement prevent him from talking about the amount of money that will change hands. Kafoury argued during Herring's trial that AMR could have prevented the abuse by paramedic Haszard by heeding reports from other women. Haszard, an EMT or paramedic of 16 years, pleaded guilty and was sentenced to five years in prison in August 2008 for groping four female patients. A sixth woman has sued AMR, and that suit is still pending.

Source: *The Oregonian*

VII. THE NATIONAL SCENE

Over the past weeks, news on the national scene has been dominated by two issues—the healthcare reform debate and the war in Afghanistan—with the former getting most of the attention. Most would agree that our nation is currently witnessing the most partisan approach to Washington problem-solving in recent memory. Nobody seems to like anybody anymore and that's a sad commentary on the times. A good dose of civility, some common decency and little respect is needed in Congress. But, those lobbyists in Washington who have a vested interest in maintaining the status quo most likely are beyond help.

JUDGE DISMISSES LAWSUITS AGAINST BLACKWATER

A federal judge has dismissed a series of lawsuits filed by Iraqi victims of the

contractor once known as Blackwater USA. The judge is allowing the Plaintiffs, however, to refile their claims. The ruling by Judge T.S. Ellis dismissed claims filed by 64 Plaintiffs – including the estates of 19 people who died—all who say Blackwater employees engaged in indiscriminate killings and beatings. The lawsuits also claim the company, now known as Xe, "fostered a culture of lawlessness" while it held a State Department contract to protect U.S. diplomats in Iraq.

The judge will allow the Plaintiffs to refile, but only if they will be able to prove that employees engaged in intentional killings and beatings. He said a pattern of recklessness or a culture of lawlessness is not enough to sustain an allegation of war crimes under the Alien Tort Statute, the federal law that governs the issue. Xe's lawyers argued that the lawsuits should be dismissed regardless of the intent factor because the allegations involve political questions that cannot be resolved by the courts. They also claimed private entities can't be sued under the Alien Tort Statute. Fortunately, Judge Ellis rejected those arguments.

It should be noted that a federal judge in Washington is considering what evidence to allow in a criminal prosecution of five Blackwater security guards accused of killing 14 unarmed Iraqi civilians in Baghdad in September 2007.

Source: Associated Press

LAWSUIT FILED OVER STUDENT'S DRINKING DEATH

We have written previously on the evils of hazing on college campuses. Another lawsuit has been filed against a group of college students accused of plying another student with alcohol during a fatal hazing at a banned fraternity in western New York. The student, Arman Partamian, was found dead on March 1st after drinking heavily for three days trying to gain membership in the off-campus fraternity at the State University of New York in Geneseo. In a wrongful death lawsuit filed by the

father, damages are sought from six young men and two co-owners of the fraternity property.

Two former members of the fraternity are charged with hazing and criminally negligent homicide, which are felonies. A third pleaded guilty to a misdemeanor in return for three months of weekends in jail. The decedent was a sophomore at the school. I am not sure what it will take to wake up parents of students who may be subjected to this type of behavior. Hazing is not only “stupid,” it’s dangerous!

Source: Associated Press

VIII. THE CORPORATE WORLD

CORPORATE AMERICA STILL HASN’T LEARNED ITS LESSON

I really thought that the corporate banks and financial institutions on Wall Street that took our economy to the brink of collapse had learned their lesson and would not oppose efforts in Congress designed to make sure nothing like this would happen again. But I was wrong. Even now they are spending millions to defeat reform that would crack down on and put a stop to their predatory practices. They don’t want a federal agency looking out for consumers, and they are hard at work on Capitol Hill to defeat the much-needed Consumer Financial Protection Agency.

Unfortunately, some in Congress are siding with the big banks to undermine reform. It’s very important to make sure real reform takes place and not some weakened effort that won’t get the badly-needed job done. Weak regulation and in some cases virtually no regulation got us into this mess. The financial industry concentrated on lobbying in Washington, while consumers living in states where voters want more consumer protections and a better environment for community banks

were powerless. Hopefully, a strong bill will pass in Congress and be signed into law by President Obama.

Source: Public Citizen

JAIL TIME NEEDED FOR GUILTY PARTIES IN FALSE CLAIMS CASES

Hundreds of cases have been brought against large corporations over the past few years alleging those companies cheated the federal government and violated the False Claims Act. While the government has recovered hundreds of millions of dollars in settlements of those cases, very few individual executives of those corporations have been criminally prosecuted and sent to jail.

According to a report in the *Corporate Crime Reporter*, of the top 100 False Claims Act cases, not one executive has been criminally prosecuted. On the other hand, if you are an individual and you steal from the federal government, it is likely that you will end up in jail and be excluded from future government contracts. Patrick Burns, who is with Taxpayers Against Fraud, observed:

If you are an individual and you steal \$140,000 from the government, you are going to jail. But if you are a big corporation, you have 5,000 employees and you steal \$140 million, you pay a fine. Nobody goes to jail. Nobody is excluded from government contracts.

According to Mr. Burns, of the top 400 False Claims Act cases, only a handful of individuals were convicted and sentenced to jail time. And there is growing outrage at the inability of the Justice Department to prosecute individual executives involved in major False Claims Act cases. A prime example is the Pfizer case, where the powerful drug company pled guilty to unlawfully promoting prescription drugs and paid a total of \$2.3 billion—including a \$1.3

billion criminal fine. Public Citizen’s Dr. Sidney Wolfe had this to say:

Unfortunately, the ever-escalating fines are unlikely to stop drug companies from continuing to bribe doctors because they represent just a fraction of drug company profits and no one has gone to jail. Until corporate titans are forced to fork over a much larger portion of their illegally gotten profits and individual executives are put behind bars, nothing will change.

Mr. Burns suggests a middle ground between putting executives in jail and doing nothing. This is what he believes the government should have done in addition to the penalties imposed in the Pfizer case:

Exclude the Pfizer executives from ever working for a company in the health care field. That’s almost as good as jail without the cost and risk of criminal prosecution. It’s an administrative action. If you exclude somebody from working in the health care arena, that sends a powerful message. It’s easier than criminal prosecution, and it will be just as effective and less costly. The companies won’t fight back as hard. You want to have a chilling effect on fraud. If the company is paying money—it’s just a tick on their balance sheet. It’s not a heavy enough hit. Ultimately, the pain has to be felt personally by the people in the industry. Excluding the culpable executives for ten years from the industry is all you have to do. As a society, we do not like sending overeducated white collar executives to jail. We just don’t. You have to be Bernie Madoff to get serious time.

I am convinced that the government should go after all of the individuals who mastermind massive corporate frauds in the criminal courts. We have

seen examples of corporations paying large fines and the individuals going free with no consequences. Many of those companies become repeat offenders and keep committing the very same fraud. If you agree that individuals should also be prosecuted in these cases, let your U.S. Senators and House members hear from you. While no new laws should be required, those officials can have an influence with the Department Of Justice.

Source: *Corporate Crime Reporter*

WELLS FARGO PROFITS RISE WHILE CONSUMERS SUFFER

Last month Wells Fargo & Co. reported a \$2.6 billion third-quarter profit. The company's retail banking operations, including the loan business it acquired with the purchase of Wachovia Corp., appears to be doing very well. But Wells Fargo joined other big banks in reporting continuing heavy losses from failed loans. Well Fargo's losses climbed to \$5.1 billion, or 2.5% of its loan portfolio. That is up from \$2 billion a year ago and \$4.4 billion in the second quarter.

Source: Associated Press

PFIZER-WYETH MERGER APPROVED

In January of this year the Pfizer-Wyeth deal was announced and received approval from the European Commission in July. The merger was approved in mid-October by the Federal Trade Commission and Canadian Competition Bureau. But the companies were requested to divest assets in the animal health market as a condition of government approval. Pfizer will sell its horse vaccine business as well as half of Wyeth's animal health business. A German company is expected to buy those divisions. Pfizer will also change a Canadian distribution agreement for Estring (a hormone therapy product).

Pfizer is facing patent expirations on billions of dollars' worth of drugs

within the next few years, including best-selling Lipitor. However, Pfizer is acquiring Wyeth's top-selling drugs, including Effexor (an antidepressant) and Enbrel (for rheumatoid arthritis). Pfizer will also acquire Wyeth's biotechnology drugs and vaccines like Prevnar. The \$68 billion merger will make Pfizer the world's largest drug maker by revenue.

Source: *The New York Times* and *Wall Street Journal*

IX. PRODUCT LIABILITY UPDATE

SAFETY GROUP WANTS A RECALL OF GRAND CHEROKEE JEEPS

A consumer advocacy group has asked the National Highway Traffic Safety Administration to recall 3 million Jeep Grand Cherokees that have a potential fire danger from their gas tanks. Grand Cherokees from the 1993 through 2004 model years have "a fatal crash-fire occurrence rate that is about four times higher than SUV's made by other companies," Clarence Ditlow, the executive director of the Center for Auto Safety, wrote in the request to the federal highway safety administration.

Mr. Ditlow told the agency his search of its Fatality Analysis Reporting System found 172 fatal fire crashes resulting in 254 deaths between 1992, when the Grand Cherokee was introduced, and 2008. He said that included 44 crashes that resulted in 64 deaths in which investigators said the "most harmful event" causing the deaths was fire. Nearly all of the fires and fatalities occurred in Grand Cherokees made before the 2005 model year. The highway safety administration began investigating the gas-tank fire hazard of the 1971-'76 Ford Pinto on the basis of far fewer crashes, the petition said.

The safety administration's Web site says the reporting system gets its information from sources including police and medical reports. Those files show

information ranging from the points of impact to the primary cause of deaths, including fire. Typically, the safety administration begins defect investigations based on consumer complaints or its own research. But individuals and organizations can submit a petition requesting a defect investigation that could lead to a recall. The agency then decides whether an investigation is warranted.

The Center for Auto Safety's petition says the plastic fuel tank on 1993-2004 Grand Cherokees is not adequately protected from a rear impact because it is behind the rear axle. The petition quotes a study by the Motor Vehicle Fire Research Institute of Charlottesville, Virginia, that found a bolt for the rear sway bar was a little more than a tenth of an inch away from the gas tank. That means it could easily be punctured in a crash, according to Mr. Ditlow. An optional Jeep skid plate to cover the gas tank and protect it during off-road driving would reduce the danger. The petition also says that the plastic gas tank "degrades over time," making leaks more likely, and that the fuel-filler neck can be torn off in crashes. The petition filed by the Center says that:

The design is so bad that Chrysler frequently settles lawsuits without extensive discovery and subject to confidentiality agreements.

When the Grand Cherokee was redesigned for the 2005 model year, the fuel tank was put in front of the rear axle. It was stated in the court's petition:

Since the relocation of the fuel tank in 2005 and later Grand Cherokees, there has only been one fatal fire crash in the redesigned vehicle. And that fire occurred after both occupants had been ejected in a rollover of a 2008 Grand Cherokee, so that the deaths were not caused by fire.

When the automaker underwent Chapter 11 bankruptcy reorganization

earlier this year it asked the judge to give it immunity from any future product liability suits filed by people who had already bought its vehicles. Even with consumer advocacy groups protesting, the judge approved that request. Later, as consumer groups lobbied Congress for help, Chrysler announced that it had reconsidered and would accept legal responsibility for those vehicles. That came about because consumer groups didn't give up the fight.

Source: *New York Times*

WRONGFUL DEATH SETTLEMENT INVOLVING CHRYSLER PICKUP APPROVED

The bankruptcy court judge overseeing certain Chrysler assets has approved a \$24 million settlement in the death of a California longshoreman who was run over by a Dodge pickup. The settlement comes more than two years after a Los Angeles Superior Court jury awarded damages of more than \$55 million to the family of Richard Mraz. The family contended that the automaker had failed to fix and adequately warn consumers about a transmission defect that made it appear trucks were in park position, when they actually were between gears. This created a most serious hazard.

An appeal of the jury verdict by the former DaimlerChrysler was delayed by Chrysler's Chapter 11 bankruptcy filing in April. Subsequently negotiations between the parties resulted in a settlement and it was approved by U.S. Judge Arthur Gonzalez in Manhattan. Mraz suffered fatal head injuries when he was run over by a 1992 Dodge Dakota at the Port of Los Angeles on April 13, 2004. He had left the truck running without setting the parking brake. Lawyers for the family contended that the truck slipped into reverse after Mraz got out of the vehicle.

DaimlerChrysler has received more than 1,000 "park-to-reverse" complaints involving 1988 through 2003 model

Dakotas. The company issued a recall in 2000, but it was for repairs that failed to fix the problem. DaimlerChrysler denied there was a defect and blamed Mraz, saying he failed to follow proper safety procedures. Jurors found in March 2007 that DaimlerChrysler was negligent in the truck's design, and also for failing to warn consumers or adequately recall the vehicle.

The settlement negotiations were conducted with Safeco Insurance Co., the insurance company that issued the appeal bond. The negotiations focused in part on how compensation to the family would affect Chrysler's creditors based on how the appeal bond was structured. Safeco had posted an \$81 million bond to guarantee payment of the judgment and interest after the judgment. Charles Naylor, a lawyer for the family, who is with the Loeff Cabraser Heimann & Bernstein law firm, had this to say concerning the settlement:

Ultimately, the \$24 million settlement offered a substantial return to Chrysler's creditors while providing fair compensation to the Mraz family, our ultimate goal.

This was a very good result for the Mraz family considering the bankruptcy. Hopefully, Congress will eventually take the necessary action to assure that persons who were victims of wrongdoing by "old Chrysler" are fairly and adequately compensated. There are lots of folks who fall in that category and badly need help.

Source: Associated Press

COURT RULES THAT FORD CAN BE SUED FOR AIRBAG FAILURE

The Indiana Court of Appeals has ruled that federal vehicle safety regulations don't preempt a failure-to-warn claim involving an airbag that deployed and severely injured a child. This reversed a trial court ruling. An eight-year-old girl suffered serious brain injuries when the airbag in her parents'

1997 Ford pickup truck deployed and struck her in the head. The parents alleged that their daughter's injuries were caused in part by Ford's defective instructions and warnings with respect to the front passenger seat airbag and airbag deactivation switch.

The trial court judge held that the failure-to-warn claim was preempted by the National Traffic and Motor Vehicle Safety Act. But the Appeals Court disagreed, reversed the lower court and remanded the case for further proceedings. The Appeals Court stated in its ruling:

Common tort actions are not expressly preempted...[T]he duty the [Plaintiffs] seek to impose neither actually conflicts with [the statute] nor stands as an obstacle to the accomplishment and execution of federal objectives regarding airbag warnings. Therefore, preemption was not a basis on which to grant summary judgment to Ford.

The case will now be tried in the trial court. The Indiana Court's decision was correct and a very good one. It's refreshing to see the courts following the established law and also doing the right thing.

Source: *Lawyers USA Online*

CHILD CAR SEAT MAKER LIABLE FOR WRONGFUL DEATH

The Montana Supreme Court has ruled that a child car seat manufacturer could not avoid liability for an infant's death based on evidence that its product complied with federal safety standards. The Supreme Court affirmed a \$6.7 million award of compensatory damages in the case. The Plaintiffs' four-month-old son was killed when the Evenflo car safety seat he was in was ejected from his parents' vehicle in a rollover crash. The parents sued Evenflo for strict product liability, alleging that the company's car seat was defectively designed because the

plastic seatbelt hooks that secured the seat in the vehicle were prone to fracturing.

Evenflo argued that its product complied with federal safety standards for child car seats. But the Court rejected Evenflo's invitation to adopt the Restatement (Third) of Torts: Products Liability §4, which provides that compliance with a government safety regulation is admissible in connection with a defective design claim. Instead, the Court ruled that such evidence was inadmissible on the issue of liability. In its opinion, the Supreme Court said:

To recognize Section 4 ... would inject into strict products liability analysis the manufacturer's reasonableness and level of care—concepts that are fundamental to negligence law, but irrelevant on the issue of design defect liability.

The Court concluded that evidence “of Evenflo's good faith effort to comply with all government regulations, including [federal safety standards for child car seats], ‘would be evidence of conduct inconsistent with the mental state requisite for punitive damages.’” Accordingly, the Court vacated a punitive award of \$3.7 million with instructions that Evenflo be allowed to introduce evidence of its compliance with federal standards in a new trial on the punitive aspect of the jury's verdict.

Source: *Lawyers USA Online*

TOYOTA RECALLS 3.8 MILLION VEHICLES

Toyota Motor Corp. has recalled 3.8 million vehicles in the United States, which is the company's largest-ever recall in this country. According to Toyota, the recall will address problems with a removable floor mat that could cause accelerators to get stuck and lead to a crash. The recall will involve popular models such as the Toyota Camry, the top-selling passenger car in America, and the Toyota Prius, the best-selling gas-electric hybrid.

Toyota reportedly is working with officials with the National Highway Traffic Safety Administration to find a remedy to fix the problem. Owners were notified about the recall. Toyota says until the company finds a remedy, owners should take out the removable floor mat on the driver's side and not replace it. Interestingly, a Toyota spokesperson had this to say:

A stuck open accelerator pedal may result in very high vehicle speeds and make it difficult to stop a vehicle, which could cause a crash, serious injury or death.

NHTSA said it had received reports of 102 incidents in which the accelerator may have become stuck on the Toyota vehicles involved. It was unclear how many led to crashes, but the recent recall was prompted by a high speed crash in August in California of a Lexus speeding out of control. In that case, as the vehicle hit speeds exceeding 120 mph, family members made a frantic 911 call, saying the accelerator was stuck and they couldn't stop the vehicle.

The recall will affect 2007-2010 model year Toyota Camry, 2005-2010 Toyota Avalon, 2004-2009 Toyota Prius, 2005-2010 Tacoma, 2007-2010 Toyota Tundra, 2007-2010 Lexus ES350 and 2006-2010 Lexus IS250 and IS350. Toyota's previously largest U.S. recall was about 900,000 vehicles in 2005 to fix a steering issue. At press time, the company hadn't said how many complaints it has received about the accelerator issue.

In mid-September, Toyota ordered 1,400 Toyota and Lexus dealers nationwide to ensure that each new, used and loaner vehicles had the proper floor mats and that the mats were properly secured. In September 2007, Toyota recalled an accessory all-weather floor mat sold for use in some 2007 and 2008 model year Lexus ES 350 and Toyota Camry vehicles because of similar problems.

Toyota now says the carmaker's dealers can sell new vehicles with mats secured in “jury-rig fashion” with plastic ties. But the automaker isn't ready to let customers bring in their own Toyota and Lexus vehicles for the same treatment. And it doesn't recommend that customers secure the mats of their vehicles on their own using the same simple method. Fashioning a solution for cars it sells while not allowing owners to do the same is sort of unusual to say the least. In fact, Toyota is sending a mixed message.

For more information about the recall, consumers can contact the National Highway Traffic Safety Administration's hotline at (888) 327-4236, Toyota at (800) 331-4331 or Lexus at (800) 255-3987.

Source: Associated Press and *USA Today*

THE TOYOTA RECALL FAILS TO ADDRESS ALL SAFETY CONCERNS

It must be noted the massive safety recall by Toyota mentioned above doesn't address a potentially dangerous mechanical defect causing the sudden, unexplained acceleration accidents. While the mats may well be a contributing factor in some cases, there is much more to this story.

A defective engine throttle control system—not floor mats interfering with gas pedals—is causing many accidents due to Unintended Acceleration. It's the opinion of many safety advocates that removing floor mats alone won't stop those accidents. Based on the experience our firm and others have had with these cases, I believe that Toyota's electronic throttle control system has been a factor in a number of sudden, unintended acceleration accidents. In the older vehicles, the floor mat problem doesn't seem to be the issue.

According to *Safety Research & Strategies*, the problem appeared to increase beginning with the 2002 Camry, when Toyota installed a new electronic throttle control for a rede-

signed model. Since then, problems have been reported in the Camry, Camry Solara, Lexus ES 300 and ES 330s, Sienna, Tacoma and RAV4 vehicles, covering models years from 2002 and later.

Our firm currently is representing clients in four cases involving unintended acceleration accidents with Toyotas. We filed suit last year in Oklahoma state court on behalf of Jean Bookout, a Yukon, Okla. woman who survived a 2007 crash. Ms. Bookout was driving her 2005 Camry and exiting an interstate highway when the car suddenly accelerated. She applied the brakes, including the emergency brake, but the car continued to speed out of control, leaving 100-foot skid marks before crashing into an embankment. Ms. Bookout survived, but her friend, passenger Barbara Schwarz, died. Our firm is now investigating three other similar accidents.

We believe that in some cases this sudden acceleration occurs after a person takes his foot off the gas. Other lawyers across the country have seen the very same thing. We plan to ask the court to allow our firm to share discovery in the case with other victims' lawyers. We need to be able to share amongst each other, to help our clients, and to make sure that the problem is addressed by NHTSA. I believe—as do others—that NHTSA should conduct a complete and thorough investigation. But, as you may know, NHTSA largely relies on information from manufacturers in making evaluations and decisions. Toyota has been accused of being less than forthright about product liability issues and that appears to be the case with the sudden acceleration problem.

Source: *Lawyers USA Online*

WIDOW OF POLICE OFFICER CRASH VICTIM FILES LAWSUIT

The widow of a police officer has filed a wrongful death lawsuit against Ford Motor Company in a state court.

Officer George Brentar died in the line of duty on October 10, 2007 while following a speeding car onto an interstate highway. His car, a Crown Victoria Police Interceptor, hydroplaned and crashed into a pole and then burst into flames. The officer was trapped inside the car. Two off-duty policemen from Erie, Penn., tried to pull Officer Brentar from the burning car, but were not able to get close enough.

The lawsuit alleges, among other things, that Ford was negligent in failing to equip the vehicle with an Electronic Stability Control system and for locating the fuel tank in the rear crush zone. As you may recall, there have been lots of cases against Ford involving fuel tank-related fires with these vehicles.

Source: *The News Herald*

ALABAMA WOMAN WINS HER CASE AGAINST FORD MOTOR CO.

A jury in Etowah County, Alabama, awarded an \$8.5 million judgment last month to a Gadsden woman in a product liability case. The verdict was in a 2005 lawsuit filed against Ford Motor Company over a rollover wreck of a Mercury Mountaineer in 2003 on Interstate 20 near Douglasville, Ga. The accident killed two people and injured two others. Latoya Duckett, a passenger in the vehicle, filed suit in 2005, contending that the vehicle was unstable and rolled over too easily. Ms. Duckett, who is 28 years of age, had her right leg amputated just below the knee and her left arm is paralyzed as a result of the accident. She also suffered some brain injury.

A separate case brought against Ford Motor Company for the deaths of Antonio Simon and Anasha Davis, the husband and daughter of the driver, Pat Simon, was settled confidentially several years ago. The driver was not seriously injured in the accident. Jason Knowles, a Gadsden lawyer with the firm of Cusimano, Keener, Roberts,

Knowles and Raley, was the lead lawyer for Ms. Duckett and did a very good job.

Source: *Gadsden Times*

JURY VERDICT IN SUIT OVER FAN THAT CAUSED A FATAL FIRE

A jury returned a verdict last month against West Chester-based fan manufacturer Lasko Products, Inc., and awarded \$13.5 million in damages. A faulty fan motor ignited a 2005 blaze that killed a seven-year-old boy. Lasko, the largest fan manufacturer in the United States, discovered a defect in the China-made motors in their portable fans in 1999 and developed corrective technology in 2004.

The company failed to alert consumers who already had the defective fans nor did it report the problem to the Consumer Product Safety Commission until after Joshua Foster died on June 14, 2005, when the fan in his mother's bedroom caught fire. Joshua died of thermal burns and smoke inhalation. The jury's verdict was as follows: \$4 million to his mother; \$2 million for emotional distress to his sister, \$10,000 in funeral expenses and \$7.5 million to Joshua's estate.

In February, 2006, Lasko recalled about 5.6 million fans that were manufactured between 1999 and 2001 and sold in stores as late as 2004 due to "a potential electrical failure in the fan motor (that) can pose a fire hazard." The Consumer Product Safety Commission announced earlier this year that Lasko agreed to pay a \$500,000 civil penalty for failing to report incidents of its fans' malfunctions. Matthew D'Annunzio of the Blank Rome law firm in Center City, Penn., represented the Plaintiffs and did a very good job.

Source: *Philadelphia Daily News*

MESOTHELIOMA DEATH RESULTS IN \$1.4 MILLION VERDICT

The wife of a pipefitter who died from mesothelioma cancer was awarded \$1.4 million recently by a Ten-

nessee jury. North Brothers sold defective products that exposed the decedent to asbestos. The mesothelioma death lawsuit was brought by Marian Jackson, the wife of deceased pipefitter Kenneth Wayne Jackson, against North Brothers (also known as National Services Industries) and several other Defendants. All of the other Defendants except North Brothers either settled or were dismissed from the case before trial. The jury returned the verdict in Hamilton County Circuit Court.

Kenneth Wayne Jackson was exposed to asbestos fibers during his work as a pipefitter at Combustion Engineering in Chattanooga, Tenn., from 1952 through 1986. By selling products to the facility that contained asbestos, which was known to cause health problems, North Brothers was selling defective products. Mesothelioma is a rare form of cancer that attacks the lungs and chest lining. It is caused by asbestos exposure, usually resulting from inhaling or consuming asbestos fibers used in industrial processes. As a result of a long latency period of between 20 and 40 years between exposure to asbestos and diagnosis, the cancer is often at a very advanced stage by the time it is discovered and often results in death.

Asbestos was widely used in a variety of manufacturing and construction applications throughout the last century. Use peaked in 1973, before the toxic substance was banned in 1982. Despite the ban, the U.S. Centers for Disease Control and Prevention says the number of mesothelioma deaths continues to rise each year due to the latency period, with the number expected to peak in 2010.

Pipefitters are considered to be a high-risk group for developing illnesses associated with asbestos exposure. Asbestos was used heavily in insulation of pipes between the 1940s and 1980s, and pipefitters often had to work in close, cramped quarters, breathing air heavily laden with asbestos fibers. In addition, pipefitters often had to cut or

grind down asbestos products, such as asbestos paper and insulation blocks, to meet specific size requirements for projects.

Asbestos litigation is the longest running mass tort in U.S. history, with the first asbestos exposure lawsuit filed in 1929. Over 600,000 people have filed lawsuits against 6,000 Defendants after being diagnosed with mesothelioma, asbestosis or other asbestos-related diseases. Jimmy Rodgers with the law firm of Summers & Wyatt in Chattanooga, along with attorneys Rett Guerry and Ben Cunningham from the Motley Rice law firm out of Charleston, S.C., represented the Plaintiff in this case and did a very good job.

\$2.25 MILLION AWARDED IN CASE OVER ANOTHER ASBESTOS DEATH

A jury has ordered a St. Louis-based supplier of industrial control valves and control systems to pay the estate of a Niagara Falls man \$2.25 million. The jury in Buffalo, New York, found Fisher Controls liable for the asbestos-caused mesothelioma that killed Ronald Drabczyk, a former Hooker Chemical repairman, who died at age 70 in 2005. This was nine years after his retirement from the Niagara Falls plant.

Between 1970 and 1988, Drabczyk regularly repaired valves manufactured by Fisher Controls that contained asbestos gaskets and packing, trial attorneys said. The jury found Fisher Controls had acted with reckless disregard for Drabczyk's workplace safety, making it 100% financially responsible under New York law for his painful death. The verdict, which includes a \$750,000 punitive damages award, marks both the first time Fisher Controls has been found liable for using asbestos in its products and the first punitive damages award in a New York State asbestos case in more than 20 years.

Jordan Fox of the New York firm of Belluck & Fox, Michael P. Joyce of Boston, Mass., and Cherie L. Peterson of

the Buffalo firm of Lipsitz, Green, Scime and Cambria represented the family and did a very good job. During the jury trial these lawyers for the family established that officials of Fisher Controls, a subsidiary of Emerson Electric Co., were aware of the dangers of asbestos in the workplace as early as 1946, but failed to place any warnings on their products.

Source: *The Buffalo News*

FIRM CONTACTS ON MESOTHELIOMA LITIGATION

Mike Andrews and Ben Locklar with our firm represent many individuals who are suffering from mesothelioma as a result of exposure to asbestos. If you would like more information or have any questions about mesothelioma claims, contact Mike or Ben in our office at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com or Ben.Locklar@beasleyallen.com.

X. MASS TORTS UPDATE

HEALTH CONCERNS OVER POPULAR CONTRACEPTIVES

As we have reported previously, the oral contraceptives Yaz and Yasmin, which are the top-selling pharmaceutical line for Bayer HealthCare, are being marketed and sold to the public for more than just pregnancy prevention. For example, Yaz, the top-selling birth control pill in the United States, utilized multimillion-dollar marketing campaigns promoting the drug as a quality-of-life treatment to combat acne and severe premenstrual depression.

Yaz, a newer sister drug to Yasmin, contains less estrogen. The franchise had worldwide sales of about \$1.8 billion last year, based on Bayer's successful positioning of Yasmin and Yaz as the go-to drug brands for women under

35. Yaz and Yasmin put women at higher risk for blood clots, strokes and other health problems than some other birth control pills do. Interestingly, a large European health study, sponsored by Bayer, the German pharmaceutical giant, reported the opposite conclusion. The Bayer-financed study said that cardiovascular risks in women taking Bayer products were comparable to those taking an older formula of birth control pills.

Regulators are finding other faults with the Yaz franchise. The Food and Drug Administration earlier this year asked Bayer to correct misleading television commercials. Recently, the FDA cited the company for not following proper quality control procedures at a plant that makes hormone ingredients.

Birth control pills work by altering a woman's hormone levels. Researchers have long known that taking a combination hormone birth control pill—which contains estrogen and a progestin hormone—can increase the risk of stroke and blood clots in the legs and lungs. This is because estrogen can play a role in blood coagulation. In fact, since the introduction of oral contraceptives in the 1960s, drug companies have greatly reduced estrogen doses to decrease the risk of thrombosis (blood clots).

With lower-dose estrogen pills now available, the safety debate, continuing for the last decade, has focused on whether the type of progestin in a formula may also play a role in the risk of cardiovascular problems. In 2001, the FDA approved Yasmin, which contains a novel progestin called drospirenone. Yaz, which contains drospirenone and a lower dose of estrogen, received approval from the FDA in 2006. The drug's label says that because drospirenone can increase potassium levels in the body, it may put women who have liver or kidney problems at risk for serious heart problems.

Lots of women have filed suits against Bayer, contending they developed blood clots, heart attacks and other health problems because they

took the drugs. Bayer knew or reasonably should have known that the drug's use carried a higher risk. As mentioned above, last October the FDA sent Bayer a warning letter, citing the company for running two false and misleading television ads about Yaz. According to the letter, the ads overstated the drug's efficacy, promoted it for conditions like premenstrual syndrome for which the drug is not approved, and minimized serious risks associated with the drug. In February, Bayer agreed to spend \$20 million on a corrective advertising campaign to counteract misimpressions created by the original television spots.

The FDA sent Bayer a warning letter recently about another problem that dealt with deviations from quality control standards at a manufacturing plant in Germany. The plant makes drospirenone and other hormone ingredients used in Bayer's birth control pills sold in the United States. The letter said that the way in which the facility calculated variability in ingredients did not meet American standards.

In addition to those mentioned above, two new lawsuits have been filed against Bayer by pension funds for Pennsylvania firefighters and city employees. These suits, like other suits, allege that the company concealed health risks associated with Yaz and Yasmin—such as an increased risk of strokes, heart attacks and blood clots—and lied about their effectiveness. The funds claim that Bayer defrauded investors by hiding the risks of these side effects, which led to incorrect estimates about the value of the company and Yaz and Yasmin.

Source: Lawyers USA Online and New York Times

JURY AWARDS PUNITIVE DAMAGES IN PREMPRO CASE

A jury in Philadelphia has found that Wyeth's hormone-replacement therapy drug Prempro caused an Illinois woman's invasive breast cancer and in the first phase of the trial awarded her \$3.7 million in compensatory damages.

Ms. Connie Barton, 64, was diagnosed with cancer in 2002, five years after she began taking Prempro to treat menopausal symptoms. After finding the company "willfully" hid evidence of a cancer link, the jury returned a punitive-damages verdict against Wyeth in the second phase of the trial. But, at the company's request, the amount of the punitive award was sealed by the court. This was most unusual, but was done because of a second Prempro case that was underway in the same courthouse.

Even though Wyeth knew back in the 1970s that these drugs had the potential to cause breast cancer, they didn't conduct the necessary studies. When bad study results did come out, Wyeth consistently downplayed those results and tried to discredit them. The company also worked hard to neutralize any critics. Sales of the drug have fallen sharply since 2002 when a large federal health study, the Women's Health Initiative, was stopped. Researchers had seen more breast cancers in those women on Prempro. A study this year shows that lung cancer seems more likely to prove fatal in women who are taking the combination drug. It's more than significant that when the prescriptions plummeted, so did the rates of breast cancer. Sadly, 200,000 women who got breast cancer could have avoided it had they not taken Prempro.

More than 6 million women have taken hormone-replacement medicines to treat menopause symptoms such as hot flashes, night sweats and mood swings. Until 1995, many combined Premarin, Wyeth's estrogen-based drug, with progestin-laden Provera, made by Pharmacia & Upjohn. Wyeth later combined the two hormones in Prempro. The drugs are still on the market, but sales of the pills started to fall sharply in 2002 after a study in this country linked the therapy to breast cancer and cardiovascular risks. Wyeth, based in Madison, N.J., was acquired by New York drug maker Pfizer Inc. for \$68 billion in October. Currently, Wyeth faces more than 9,000 lawsuits over its

menopause drugs, along with Pfizer's Pharmacia & Upjohn unit.

It was also significant that the Barton case was the first to be tried over Prempro since the U.S. Supreme Court's March 4th decision saying patients can sue drug makers over injuries from medicines approved by the government. That ruling broke a logjam of cases in state and federal courts. In that decision, the High Court said that the FDA's approval of a drug doesn't bar lawsuits under state law. That was the proper ruling based on how federal preemption had been handled over the years by all branches of the federal government. Now the public will see that Wyeth intentionally withheld its knowledge of the safety risks associated with Prempro. All citizens—not just victims—will learn how important the Supreme Court ruling was.

Source: *Bloomberg* and Associated Press

JURY ORDERS GLAXO TO PAY \$2.5 MILLION IN PAXIL CASE

A Philadelphia jury has ordered GlaxoSmithKline to pay \$2.5 million over birth defects allegedly caused to a three-year-old child by its antidepressant drug Paxil. The verdict is the first in about 600 similar Paxil lawsuits filed around the country. The jury found the company guilty of negligence, but not outrageous conduct. As a result, no punitive damages were awarded.

The son of Michelle David, who is from Philadelphia, was born four years ago with several heart defects. The child spent months in the hospital and has had several surgeries. He will need at least one more. His mother, who testified that there was no history of heart defects in her family, was prescribed Paxil in 2005 while she was pregnant. GlaxoSmithKline says it plans to appeal the verdict. As we have reported, the Food and Drug Administration issued warnings in 2005 that Paxil may be associated with birth defects.

The litigation stems from a 2005 study from GlaxoSmithKline, the drug's manu-

facturer, on Wellbutrin—another antidepressant—that used Paxil as a comparative drug. The study found that pregnant women taking Paxil see an increased risk of birth defects. Sean Tracey, who is with the Tracey Law Firm in Houston, represented the Plaintiff in the case and he did a very good job.

Source: Associated Press and *Lawyers USA Online*

MONTANA WOMAN AWARDED \$3.2 MILLION IN DRUG MAKER TRIAL

A Montana jury awarded \$3.2 million to a woman suing the maker of Zometa, a bone-strengthening drug. This decision could have a bearing on hundreds of cases against the company nationwide. Peggy L. Stevens filed suit against Novartis Pharmaceuticals Corp., alleging the company should have disclosed health risks associated with Zometa. Ms. Stevens developed dental and jaw-related problems after taking the drug for several years.

Novartis knew patients taking Zometa were vulnerable to a degenerative jaw disorder called osteonecrosis, particularly those patients who undergo invasive dental procedures. Symptoms include pain, loosening of teeth, exposed bone and infection. Novartis faces lawsuits from approximately 550 Plaintiffs whose cases have been consolidated in a Tennessee federal court and a New Jersey state court.

Ms. Stevens' condition is incurable and will result in lifelong disability. Novartis downplayed the drug's risks, and obscured and delayed the release of information to the public and the medical community to save a public relations problem. The jury awarded Ms. Stevens damages for lost income, pain, emotional suffering and for the alteration to her normal course of life. Terry Trieweiler, a Missoula lawyer, represented Ms. Stevens and did a very good job.

Source: *The Missoulian*

FIRST FOSAMAX® CASE ENDS IN MISTRIAL

The first Fosamax case in the country went to trial in August of this year in New York City. The trial began on August 11th in the U.S. District Court for the Southern District of New York. The Plaintiff was Shirley Boles, a 71-year-old retired sheriff's deputy from Fort Walton, Fla. Boles had taken Fosamax for approximately six years. She developed severe jaw-bone and dental problems, including infection and draining fistulas.

After four weeks of trial and several days of deliberations, Judge John F. Keenan declared a mistrial because the jury was unable to reach a unanimous verdict. The case is expected to be retried in the spring of 2010, after the trials of two other previously-scheduled bellwether cases in New York. There are approximately 1,500 Plaintiffs who have alleged that Fosamax caused their jaw problems, including osteonecrosis of the jaw, which is a disfiguring and debilitating condition.

Our firm continues to work on several Fosamax cases filed around the country, as well as a local case set for trial in Montgomery in March of 2010. If you need any information on Fosamax litigation contact Chad Cook at 800-898-2034 or by email at Chad.Cook@beasleyallen.com.

XI. BUSINESS LITIGATION

CITIGROUP SUES MORGAN STANLEY OVER \$245 MILLION CREDIT DEFAULT SWAP AGREEMENT

Citigroup has filed a lawsuit against Morgan Stanley in a Manhattan federal district court involving a credit default swap. While that may seem strange for a company like Citigroup to be a Plaintiff in this sort of lawsuit, it's a fact. They have sued one of their own. The bank claims that Morgan Stanley

renege on an agreement to pay Citigroup \$245 million in the event that an issuer of collateralized debt obligations (CDO) failed to make payments on a line of credit Citigroup provided. According to the Complaint, the liquidation of the CDO didn't cover the \$245 million Citigroup is owed. When Morgan Stanley refused to make up the difference, it was sued.

Source: Reuters

CITIGROUP TO PAY \$600,000 FINE OVER TAX-TRADING PLANS

Citigroup has agreed to pay a \$600,000 fine and be censured to settle regulators' charges that it failed to supervise complex stock-trading strategies aimed at reducing the bank's potential tax bill. The Financial Industry Regulatory Authority, the brokerage industry's self-policing organization, announced the civil fine against the bank's division Citigroup Global Markets.

Citigroup failed to supervise and control trading, and failed to prevent improper internal trades as well as those with some of the bank's trading partners, according to FINRA. The transactions in question occurred between 2000 and 2005. One of the strategies involved a Citigroup unit in New York buying stock from foreign brokerage customers. FINRA requested that after some time had elapsed, during which the taxable dividends on the stock were paid out, the stock be sold back to the customers.

When dividends on U.S. company shares are paid to foreign investors, they may be subject to U.S. withholding taxes. Under the Citigroup arrangement, certain foreign customers were deemed to receive a "dividend equivalent" in a swap, not considered to be subject to withholding taxes.

Source: *Denver Post*

XII. AN UPDATE ON SECURITIES LITIGATION

LAWSUIT TARGETS BROKERAGE FIRM

A Florida woman has sued her brokerage firm, claiming it advised her to invest in what her lawyers say was a \$2 billion Ponzi scheme. Ilene Grossbard is the Plaintiff in a federal lawsuit that seeks class-action status against Securities America Inc. and parent Ameriprise Financial Inc. The lawsuit, filed in federal court in Nebraska, alleges that Securities America sold hundreds of millions of dollars worth of securities in the form of notes for a medical receivables financing company.

That company, Medical Capital Holdings Inc., has been sued by the U.S. Securities and Exchange Commission for investor fraud. The SEC said that Med Cap, related entities and their principals, have raised more than \$2.2 billion since 2003 through the offering of notes. As of August 2008, five of those "special purpose corporations" are in default or are late in paying nearly \$1 billion in principal and interest to investors.

In the lawsuit, Ms. Grossbard alleges that in spring 2008 she invested, through Securities America, a total of \$112,000 in one of Med Cap's corporations and that Securities America (SA), "recklessly" recommended the investment without "undertaking any reasonable due diligence that would have immediately revealed Med Cap's fraud." SA allegedly made millions of dollars in commissions and fees and turned a blind eye to the truth, which is that the medical receivables company's accounting records and practices strongly pointed towards the existence of a Ponzi scheme.

Securities America, which is a subsidiary of Ameriprise Financial of Minneapolis, is an Omaha, Neb.-based brokerage. The lawsuit alleges that Securities

America violated Nebraska securities law and was negligent for failing to investigate accounting irregularities at Med Cap. The Complaint seeks class-action status to represent investors who bought the notes from November 21, 2007, through July 31, 2008.

Source: *Herald Tribune*

XIII. EMPLOYMENT AND FLSA LITIGATION

AN UPDATE ON FLSA LITIGATION

Our firm continues to handle Fair Labor Standards Act (FLSA) cases on a class-wide basis for employees of companies who have lawsuits for back wages wrongfully denied as a result of labor abuses. They all involve labor violations with a common theme: employers intentionally misclassify employees as managers and independent contractors in order to escape paying overtime pay.

One of the main reasons Congress passed the FLSA law in 1938 was to prohibit employers from unfair labor practices, one of which was over-working company employees. The law is clear that if an employer works an employee more than 40 hours a week, that employer must pay overtime (one and a half times the employee's hourly rate). Some companies try to place false titles on their employees, such as "managers," "assistant managers" or "independent contractors" to avoid the overtime penalty. The employers force these employees to work 50 to 100 hours per week, doing pure labor, not managerial work. There are companies all over this country violating these fair labor standards and the FLSA law provides a cause of action and a remedy in a court of law.

If you need any additional information relating to FLSA cases, contact Roman Shaul, Larry Golston, Lance Gould or Dee Miles at 800-898-2034 or

by email at Roman.Shaul@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com, or Dee.Miles@beasleyallen.com.

IMPORTANT FAMILY DOLLAR VERDICT AFFIRMED ON APPEAL

The U.S. Supreme Court will not review the \$35.6 million judgment against Family Dollar Stores Inc. As a result, the 2008 ruling by the U.S. Court of Appeals for the 11th Circuit will stand. It also means that the Plaintiffs, who number 1,424, are now entitled to receive about \$29,000 each in back pay.

The case dates back to 2001, when three then-Family Dollar workers filed suit claiming that Family Dollar was violating the U.S. Fair Labor Standards Act. The women, who later were joined in a class action suit, said that they were being forced to work an average of 60 to 70 hours a week—most of that time devoted to manual labor like mopping floors, unloading trucks and stocking shelves—but did not receive overtime pay because Family Dollar had given them the title of “manager.”

This case was very important and will help not only the Plaintiffs in the case but other employees. Allen Schreiber, a very good Birmingham lawyer who represented the Plaintiffs, had this to say:

What we really wanted was for them to have to change the way they do business. You can't call somebody a manager and then be exempt from overtime. They [the employees] didn't have any discretion about anything. It was just a way to work people for free.

The original 2001 suit ended in a mistrial, but a federal jury ruled in favor of the Plaintiffs in 2006. Last year, a three-judge panel of the U.S. 11th Circuit Court of Appeals upheld the judgment. The Court held that the jury reasonably determined that Family Dollar failed to meet its burden of

proving that Plaintiff store managers' primary duty was management.

I was shocked to learn, based on a statement from the company, that the payment practices of Family Dollar, which operates more than 6,600 stores in 44 states, will not change. It appears the big bosses at Family Dollar haven't yet learned their lesson. The company's policies are meant only to increase the company's profits at the expense of its employees. They work folks 70 hours a week and don't pay overtime, because it helps their bottom line. With interest, the Family Dollar judgment is now more than \$41 million. On average, each worker will receive an estimated \$28,792.13 in back pay and overtime.

Source: *Tuscaloosa News*

WORK PERFORMED AFTER YOU CLOCK OUT IS STILL WORK

In the past, employees who clocked in and out at work could be assured that when they left the job site they would be free from any obligations to their employer until the start of the next work day. However, recent technological advances have expanded the workplace into the employee's home and personal life. The development of PDAs, cell phones and email allows employers to stay in contact with their employees after the work day is over. Accordingly, some employers now expect employees to perform work related tasks even when they are “off the clock.” Technology has effectively turned the employee into a 24/7 worker.

Recently, three former T-Mobile employees filed a civil action in New York against their employer. The employees sought unpaid wages and overtime compensation pursuant to the Fair Labor Standards Act. The employees claim they were required to respond to emails, text messages and telephone calls from other T-Mobile personnel and customers after they were logged out. The employees

believe this is time for which they should be paid.

Like many employers, T-Mobile has taken the position that even if employees do spend some time working off the clock, this time is “de minimis” and should not be paid. Under the law, the “de minimis doctrine” allows employers to escape paying for work that is insubstantial. Some courts have even held that anytime worked that is only ten minutes or less should be considered de minimis. However, the fight is usually over whether the work really is “insubstantial.”

As you can imagine, the employees believe the work they complete off the clock is just as important as the work they perform while clocked in. Especially since it is the same type of work. Things that have been considered de minimis in the past have typically been things like booting up your computer, or swiping an access card through a security scanner. Very rarely do the courts consider something de minimis when it is a task that goes to the very core of what the company does and it is an activity they would not have trouble monitoring.

The general rule is that all hours worked should be paid. And it is the company's burden to prove that the time you are working is de minimis. This is often a tough burden for them to meet. Since the downturn in the economy and the overall tough economic climate have set in, we have seen many companies try and increase their profits by overworking and underpaying their employees. This is not something they should get away with. It has always been the American way that a worker should receive a fair day's pay, for a fair day's work.

If you would like more information on the subject or have a question, you can contact Roman Shaul in our office at 800-898-2034 or by email Roman.Shaul@beasleyallen.com.

XIV. INSURANCE AND FINANCE UPDATE

INSURERS ARE LIABLE FOR BAD FAITH COVERAGE DECISIONS

A most significant lawsuit has been filed against Cigna Corp. and it should get the attention of even the most “conservative” person in this country. The suit was filed by Hilda Sarkisyan after she paid a visit to Cigna’s Philadelphia headquarters. The visit came in 2008 some ten months after the company refused to pay for a liver transplant for the woman’s daughter. When Mrs. Sarkisyan, a real estate agent, got to the Cigna headquarters—simply asking for an apology from the company—she got something entirely different. Instead of getting an apology from Cigna, she received some very bad treatment.

Cigna employees treated Mrs. Sarkisyan badly, heckling her and acting in a bizarre and hostile manner. Mrs. Sarkisyan walked out of the headquarters, stunned and hurt. The suit started as a wrongful-death Complaint, contending that Cigna’s refusal to cover the transplant led to the 17-year-old’s death in 2007. A Los Angeles judge threw out the wrongful-death Complaint, saying it was barred by a 1987 U.S. Supreme Court ruling that shields employer-paid healthcare plans from damages over their coverage decisions. But U.S. District Judge Gary Allen Feess said the Sarkisyans could still pursue damages for any emotional distress caused by the Philadelphia incident.

While this development gives the parents an opportunity to sue Cigna, any relief for the real wrongdoing by Cigna was barred because of a very bad law. Patient advocates say this points to the need for federal legislation to allow people to sue health insurers for “the life-or-death decisions they make.” I believe most American citizens would agree with that premise.

The Sarkisyans contend that Cigna improperly refused the transplant that their daughter’s UCLA physicians said at the time was urgently needed to save her life, and that “the company reflexively issued a denial letter without looking into the specific circumstances.” The company said at the time that, for Nataline, the operation would have been experimental and was not covered. Nine days later, after a great deal of publicity, Cigna agreed to cover the transplant for the teenager. But it was too late—Nataline died hours later.

In throwing out the wrongful death claim, Judge Feess cited rulings by the U.S. Supreme Court and other courts interpreting 1974’s Employee Retirement Income Security Act, or ERISA, which governs employee retirement funds and benefit plans. Under ERISA, the courts have said, the only monetary damages that beneficiaries of workplace health plans can sue for are the costs of the treatment of service in dispute. The courthouse doors have been shut on most treatment coverage disputes involving workplace health plans, which are the source of medical insurance for 132 million workers and dependents.

Source: *Los Angeles Times*

MISSISSIPPI COURT SAYS HOME INSURANCE POLICY COVERS HURRICANE WIND DAMAGE

The Mississippi Supreme Court has ruled in a 9-0 decision that so-called “all-risk” home insurance policies may cover wind damage from hurricanes, even in situations where the loss is later exacerbated by water from storm surge. The court found that language in a policy may exclude storm damage when it is caused by a combination of wind and water acting together. But if wind and water damage can be distinguished, this exclusion does not apply. The court said a jury must decide whether the damage to the home of Margaret and Magruder Corban was caused by wind or water.

The ruling is a blow to some insurers that had argued that such damage is excluded by anti-concurrent cause (ACC) and other language in their policies. The 5th U.S. Circuit Court of Appeals had sided with insurers in previous cases. The state’s High Court has now decided that the ACC clause is not applicable because the wind and water losses were separate or in sequence, and not “indivisible.” Justice Michael K. Randolph wrote for the unanimous Court:

We conclude that the ACC clause has no application for losses caused by wind peril. An insurer may not abrogate its duty to indemnify for such loss by the occurrence of a subsequent, excluded cause or event.

The Mississippi Supreme Court ruled that once the wind loss occurred, the homeowners were entitled to coverage under the policy. In the opinion, the Court said:

No reasonable person can seriously dispute that if a loss occurs, caused by either a covered peril (wind) or an excluded peril (water), that particular loss is not changed by any subsequent cause or event. Nor can the loss be excluded after it has been suffered, as the right to be indemnified for a loss caused by a covered peril attaches at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured. An insurer cannot avoid its obligation to indemnify the insured based upon an event which occurs subsequent to the covered loss. The insured’s right to be indemnified for a covered loss vests at time of loss.

The Mississippi Supreme Court opinion is significant because it preempts federal rulings since insurance contracts are governed by state, not federal, law. The State Court said that

the Federal Circuit Court did not err in ruling that storm surge is included in the water damage exclusion, but was wrong in holding that the ACC clause is applicable. The Court sent the Corbans' case back to the trial court for a jury trial. The Corbans had sued their insurer, United Services Automobile Association, after Hurricane Katrina.

The decision is being seen as a landmark. It now places the burden for excluding coverage on the insurance industry. The opinion says homeowners "all risk" policies mean that concurrent actually means concurrent or at the same time, and in "all risk" policies it's the insurance company's burden to prove what part of the loss was caused by an excluded peril. The ACC clause does not relieve an insurance company of its obligation to establish causation if it seeks to exclude coverage for part of the loss caused by water, the firm said on its Web site.

The Battlesville, Mississippi, law firm of Smith, Phillips, Mitchell, Scott & Nowak represented the Corbans and did an excellent job. The Corban victory has been described as "bittersweet" because "thousands of Gulf Coast residents whose homes were destroyed by Katrina have been forced by economic circumstances to settle their insurance claims over the past four years under an erroneous interpretation of the law."

Source: *Insurance Journal*

THE HARTFORD SETTLES FOR \$1.3 MILLION IN PRICE-FIXING SUIT

The Hartford will pay \$1.3 million to settle allegations over its role in a scheme to improperly inflate insurance and reinsurance prices nationwide by more than a third. According to Connecticut Attorney General Richard Blumenthal, the antitrust settlement is the first of its kind in the reinsurance industry. The allegations stem from the Attorney General's ongoing litigation against Guy Carpenter & Co. – one of the world's largest reinsurance brokers

and a division of Marsh & McLennan – over practices like pay-to-play and price collusion between insurers and brokers. Attorney General Blumenthal believes the Hartford has provided his office "with critical cooperation and information necessary to stop a culture of collusion in the multi-billion dollar reinsurance industry."

Source: *Insurance Journal*

XV. PREDATORY LENDING UPDATE

ALABAMA GROUPS TARGET PREDATORY LENDERS

Anti-poverty groups laid the groundwork recently for a crack down on short-term lenders who charge exorbitant rates for their loans. The Alabama Appleseed Center for Law and Justice Inc., Arise Citizens' Policy Project, the Alabama Poverty Project and AARP Alabama joined forces to sponsor a summit on the high cost of credit for low-income residents in the state and what can be done to protect consumers. The goal appears to be to develop strategies to stop predatory, short-term lending in the state, particularly payday lending. The groups want to build coalitions that will expose predatory lending practices and raise awareness about how harmful they are to low-income Alabamians. This is needed to compete with the lobbyists who represent the short-term loan industry in Alabama.

Because 2010 is an election year for all legislators, it will be most difficult to pass any kind of sweeping reforms. Realistically, it will be hard to pass a bill that legislators would consider controversial unless there is a groundswell of support from the legislative districts. Stopping predatory lending practices should be a legislative priority. Educating the public about the issue is critically important. Coming up with workable alternatives to payday lenders

must be a part of any reform effort in this area.

Source: *Montgomery Advertiser*

SUBPRIME LENDER ABUSES FOUND IN REVERSE MORTGAGE MARKET

The types of consumer abuses that occur in the subprime mortgage market are also happening in the reverse mortgage market, according to a new report released by the National Consumer Law Center in Boston. The report, titled "*Subprime Revisited: How the Rise of the Reverse Mortgage Lending Industry Puts Older Homeowners at Risk*," contains some good information. It's stated in the report:

Many of the same players that fueled the subprime mortgage boom ... have turned their attention to the reverse market. Lenders, including some of the nation's largest banks, view that market as a source of profits that have dried up elsewhere. Mortgage brokers see it as a new source of rich fees.

Tara Twomey, a lawyer at the Center who authored the report, said in a written statement:

Well-funded marketing campaigns and perverse incentives to brokers are targeting seniors' home equity and using reverse mortgages as their tools.

The report calls for extending reverse mortgage protections to all equity conversion products aimed at seniors, prohibiting yield spread premiums and other perverse incentives in the reverse mortgage market, and requiring lenders to collect better data.

Source: *Lawyers USA Online*

XVI. PREMISES LIABILITY UPDATE

THE U.S. CHEMICAL SAFETY BOARD ISSUES A NATIONWIDE WARNING

Federal safety officials are warning workers around the country not to clear gas lines indoors after a North Carolina factory blast killed three people. The U.S. Chemical Safety Board said in a safety bulletin that a June explosion at a Slim Jim snack factory underscored that gas lines being worked on should never be cleared, or purged, indoors.

Investigators believe contractors installing a water heater vented natural gas inside the building, leading to the blast that injured dozens at the plant south of Raleigh, N.C., owned by Omaha, Neb.-based ConAgra Foods Inc. Officials suggested that workers vent gases to a location outdoors and use detectors to monitor gas levels, among other recommendations.

Source: Associated Press

WOMAN SETTLES HER LAWSUIT WITH TARGET

An 80-year-old woman has agreed to a \$7 million settlement with Target Corp. and a mechanical door company. She had been knocked to the ground by a faulty automatic door at a Target store in Rosemont, Ill., in 2007. The incident caused Claire Putman brain injuries and resulted in "cognitive deficits." Ms. Putman had to move into a nursing home because of her injuries.

The woman was walking into the Target store when the door malfunctioned and knocked her to the floor, causing her to hit her head. She was then struck by the door again as it continued to open and close. Before she was hurt, Ms. Putman cared for her 59-year-old daughter, who has "special needs."

Target failed to inspect and maintain the doors and didn't follow the safety guidelines provided by the manufacturer, Besam USA, which also was named as a Defendant in the suit. The Besam door didn't provide for a way to turn off the fail-safe system and wasn't designed to make noise or otherwise alert employees that the door was malfunctioning. Philip Corboy of the Chicago law firm, Corboy & Demetrio, represented Ms. Putman and did a very good job.

Source: ChicagoBreakingNews.com

\$3.1 MILLION DEFAMATION CASE AGAINST TARGET SETTLED

A Plaintiff who won \$3.1 million against Target after the company wrongly accused her of "shoplifting and trying to pay with a counterfeit bill" has now settled her case. Thinking that her \$100 bill was counterfeit, two different Target stores refused to complete the transaction, and then Target sent an e-mail to other businesses and law enforcement agencies warning them to be on the lookout for the Plaintiff, Ms. Cantrell. The e-mail was even sent to her own employer.

Ms. Cantrell learned of the e-mail after the Secret Service showed up at her job and conducted a custodial interview. She sued Target for defamation and negligence. A federal court jury in South Carolina awarded her \$100,000 in actual damages and \$3 million in punitive damages. A federal judge upheld the verdict, denying Target's motions, and the company then filed notice of appeal.

Subsequently, the case was settled during mediation. Three very good South Carolina lawyers, Bozzie Boggs, Robert B. Ransom and Billy Wilkins, represented the Plaintiff and they did a very good job. Her settlement is confidential.

Source: Lawyers USA Online

INSURERS PAY \$700,000 TO SETTLE MASSACHUSETTS LAWSUIT

The family of late Holy Cross football coach Dan Allen and two insurers have reached a settlement. This involves a claim against the contractor the family says contributed to Coach Allen's fatal illness. The settlement, which has been approved by a federal judge in Massachusetts, requires AIG and Zurich, the contractor's liability insurers, to pay the family \$681,250. Coach Allen died in May 2004 at age 48. The family's lawsuit claimed work done by Martin Surfacing Inc. at the school's field house in 2001, where his office was located, accelerated the coach's death from amyotrophic lateral sclerosis, or Lou Gehrig's disease, by exposing him to toxins.

Source: Insurance Journal

FEDERAL WAY WILL PAY \$2.2 MILLION IN PLAYGROUND LAWSUIT

The City of Federal Way, Wash., will pay \$2.2 million to the family of a 14-year-old girl who was choked by playground equipment three years ago. Tanayia Blanchard, who was 11 at the time, was found unconscious hanging by the neck from a rope tied to a playground ride. She suffered an irreversible brain injury and remains in a vegetative state. She requires 24-hour medical care and lives in a skilled nursing facility. Her doctor estimated she will live about 16 more years. The settlement received court approval.

The parents will receive part of the settlement, but the largest portion will go to the daughter's special needs trust. A settlement had previously been reached with the King County Housing Authority, which owns the Laurelwood Gardens Apartments where the family lived when the incident occurred on June 18, 2006. The Blanchards also accused the Housing Authority and the apartments' management company, Allied Group Inc., of negligence in monitoring the playground equipment. They were awarded \$7 million in that

settlement, which was covered by insurance.

The parents said the playground equipment, called a monorail or “zip line,” had a rope with a loop attached to its handle that was not part of the sliding ride. Witnesses said the rope had been tied to the ride so smaller children could use it. The girl’s neck became accidentally entangled in the rope and she was unable to free herself.

Source: *The News Tribune*

XVII. WORKPLACE HAZARDS

REPORT CITES LACK OF PRECAUTIONS IN 2008 SUGAR PLANT FIRE

We have written in prior issues about the huge fire last year at a sugar refinery near Savannah, Ga., that killed 14 workers and injured 36 more. A federal official now says that—after an investigation into the fire’s causes—it was entirely preventable. The owner of the plant, the Imperial Sugar Company, and the plant’s managers knew for decades about the hazards of sugar dust but failed to take the necessary precautions, according to the report, issued by the Chemical Safety Board, which investigates industrial chemical accidents.

The report blamed inadequate equipment design, poor maintenance and ineffective housekeeping for the explosion and fire in February 2008, and said that Imperial Sugar and the sugar industry as a whole were aware of the dangers of dust explosions at least as early as 1925. The report also cited internal memorandums at the plant, in Port Wentworth, Ga., dating from 1967, before it was owned by Imperial Sugar, showing that managers were concerned about the possibility that accumulations of sugar dust could ignite a chain of explosions that would destroy “large sections of the plant.”

The initial explosion most likely occurred inside a sugar conveyor situated beneath two silos, the report said. The conveyor had recently been enclosed, creating “a confined, unventilated space where sugar dust could accumulate to an explosive concentration,” the safety board said. That explosion quickly spread, igniting sugar dust and spilled sugar in adjacent areas. Imperial Sugar had not conducted evacuation drills and the explosion and fires disabled most emergency lighting, trapping workers in a dark maze of corridors, the report said.

The Chemical Safety Board does not issue citations or levy fines, but in July 2008, OSHA found violations at the Port Wentworth plant and at an Imperial Sugar plant in Gramercy, La., where an inspection five weeks after the Georgia fire found sugar dust four feet thick in some areas. The agency proposed fines of \$8.7 million, the third-largest in the agency’s history. Imperial Sugar is contesting the fine.

Source: *New York Times*

PAPER MILL BLAST LAWSUIT SETTLED

International Paper Co. has settled another federal lawsuit stemming from the 2008 explosion that killed a contract worker at a Mississippi plant and injured nearly two dozen others. Cases involving several injured workers are still pending. The terms of the most recent settlement were not disclosed. At least three other federal lawsuits ended in settlements in September. The terms of those deals also were sealed.

The explosion killed 28-year-old Marcus Christopher Broome and injured 22 others at International Paper’s Redwood plant on May 3, 2008. The plant, located about 30 miles west of Jackson, Mississippi, cooks fiber to make liner board, which is used for manufacturing corrugated containers. Several workers were left with serious burns or other injuries when a 12-story recovery boiler exploded as workers

tried to restart it after annual maintenance.

OSHA fined IP \$77,000 in the months following the explosion for two alleged violations. OSHA said IP started the boiler without adequate steam. The agency also said that there were no written procedures to determine if enough odorant was being added to the natural gas supply line. The odor is a necessary additive so workers know when the highly-volatile gas is present.

Source: *New York Times*

XVIII. TRANSPORTATION

DRIVING AND TEXTING IS VERY DANGEROUS

A report from AAA released recently reveals how dangerous it is to text while driving. Nearly one out of five U.S. drivers surveyed has read or sent a text message while behind the wheel, even though nearly all of the respondents in the AAA survey considered such action unacceptable. AAA Chief Executive Robert Darbelnet, in a statement accompanying the survey, commissioned by the AAA Foundation, observed:

The new technologies that help us multitask in our everyday lives and increasingly popular social media sites present a hard-to-resist challenge to the typically-safe driver. Enacting texting bans for drivers in all 50 states can halt the spread of this dangerous practice among motorists nationwide, and is a key legislative priority for AAA in state capitals.

Although nearly all respondents considered the practice of texting unacceptable, 18% said they had sent a text message while driving within a month of being surveyed. In a survey commissioned by Ford Motor Co. it was reported that 93% of 1,000 licensed drivers supported a nationwide ban on

texting while behind the wheel. AAA says surveys of its members also favor a ban. About a dozen states have imposed prohibitions, and proposals for a national ban have been introduced in Congress. The wireless industry -- including cellphone manufacturers, carriers, and some Internet companies represented by the CTIA-Wireless Association -- support state and local efforts to ban texting while driving.

The Obama administration reported that 58,790 people were killed and 515,000 injured last year in vehicle crashes connected to driver distraction. Driver distraction was involved in 16% of all fatal crashes in 2008. This is a good indication of the dangers of using mobile devices behind the wheel. The new data underscored the major problem of distractions involving young drivers. The greatest proportion of distracted drivers were those age 20 and under. Sixteen percent of all under-20 drivers involved in fatal crashes were reported to have been distracted while driving.

Eighteen states and the District of Columbia have passed laws making texting while driving illegal and seven states and the District have banned driving while talking on a handheld cell phone, according to the Insurance Institute for Highway Safety. Many safety groups have urged a nationwide ban on texting and on using handheld mobile devices while behind the wheel.

The National Safety Council wants a total ban on cell phone use while driving. The Washington-based Advocates for Highway and Auto Safety has petitioned the government to consider federal rules that restrict talking and texting by drivers of tractor trailers, motor coaches and large vans. Other groups have focused on texting, which has grown from nearly 10 billion messages a month in December 2005 to more than 110 billion in December 2008. In my opinion, it's high time that driving and texting are banned in all states.

Source: *Insurance Journal*

UNSAFE TRUCKS ON THIS COUNTRY'S HIGHWAYS

More than nine million trucks travel roads in this country each year. You may be shocked to learn that many of these trucks are in serious violation of Federal Safety Standards. These violations include such practices as overloading trucks, allowing unqualified or untrained drivers behind the wheel, failing to maintain tires and brakes, and salary systems that encourage truck drivers to exceed speed limits and maximum driving hours.

While the issues relating to truck safety violations largely go unnoticed, the effect of these violations are deadly. Although trucks make up less than 4% of all vehicles on U.S. roads, they are involved in 12% of all motor vehicle fatalities. One in 4,000 people die each year in collisions with trucks and over 80,000 more are seriously injured. More people die in collisions with trucks than in collisions with airplanes, trains, ships, and interstate buses combined. Truck accidents occur for a variety of reasons, but many are preventable. Quite often they are a direct result of trucking companies violating safety standards to cut corners and maximize profits. The unsafe trucking companies run the gamut from small fleets to large and include tractor trailers, cargo tank trucks, motor coaches, school buses, and more than 2000 hazmat companies.

The data for over 28,000 companies, found online at www.justice.org/truck-safetyviolations, is broken down by state. All of the listed companies have either conditional or unsatisfactory safety ratings. A conditional safety rating for a truck company means the company's records indicate their truck was out of compliance with one or more safety requirements. An unsatisfactory safety rating means the truck companies' records indicate evidence of substantial non-compliance with the safety requirements. The Federal Motor Carrier Safety Administration updates

the entire data base of unsafe truck companies on a monthly basis.

In June 2009 the Commercial Vehicle Safety Alliance (CVSA) conducted comprehensive road side inspections across the nation. Since the dates of the inspections were announced four months ahead of time—and given plenty of publicity within the trucking industry—the companies had plenty of warning to fix any existing problems. Even with the warning, 22% of the trucks failed inspections and were taken out of service.

Cutting corners on safety is relatively low risk because the chances of being caught are so small. Less than 1% of all trucks failed the CVSA inspection event. It should be noted that 87% of the companies in violation of safety standards have fleets of ten trucks or less. Trucks are vital to the U. S. economy. More than 9 million trucks travel our roads, hauling nearly 70% of all freight transported within the United States. For the 585,000 truck companies in the country, profit margins are slim. As a result they must be as economical as possible.

But, since trucks are inherently dangerous, safety issues must be addressed. Trucks are far larger and heavier than cars and take longer to stop and cause much more damage in collisions. It's important that our reliance on trucks, and the trucking industry's efforts to keep its costs down, must not override the need to maintain the highest possible safety standards. Clearly, there are safety problems in the trucking industry and the public needs to know the true state of truck safety. Much needs to be done to make our highways as safe as possible.

Sources: FMCSA, NTSB, GAO, CVSA and ATA.

MORE MOTORISTS DIE ON RURAL ROADS

It appears that more Americans die on lonely country roads than on more congested urban highways. This may come as a surprise to many of our readers. States are intensifying efforts

to reduce traffic fatalities on rural roads to counter a reality of highway safety. In 2008, 56% of the USA's 37,261 traffic deaths occurred on rural roads, according to the National Highway Traffic Safety Administration. About 23% of the population lives in rural areas.

Source: *USA Today*

CALIFORNIA JURY AWARDS \$49 MILLION IN A MOTOR VEHICLE CRASH

A California jury has found that the State of California and two truckers were responsible for the injuries suffered by a college student in a motor vehicle crash. The jury awarded \$49 million in damages after an accident that left a college student with brain damage. Drew Bianchi was riding in the back seat of a Toyota Avalon en route to a camping trip with three friends. The car was traveling on a state highway. Two trucks collided near the center line of the highway, and one of those trucks rammed into the rear of the Avalon that Bianchi was riding in. He now lives full time in a treatment facility in Bakersfield, near his family.

It was contended that reckless driving by the two truckers involved was the main factor in the accident. One of the truckers drifted across the center line. The other driver was texting at the time. The State of California entered into a \$10 million settlement before the case went to trial. The Claim against the state contended that Caltrans had failed to take several steps to remedy known safety issues on the road. With all the settlements and the jury award, Bianchi will receive a total of about \$61 million. It is expected that he will require specialized care for the rest of his life.

Source: *Insurance Journal*

\$6.5 MILLION SETTLEMENT IN DEATH OF COLLEGE STUDENT

The parent companies behind the VH1 reality series *Rock of Love with Brett Michaels* have agreed to settle a

lawsuit brought by the family of a college student killed in September of 2008 when a driver for the show fell asleep and crashed into her car. Kevetta Davis, 19, a sophomore studying to be a pharmacist at Southern Illinois University, was a passenger in a car headed north on an interstate highway that was struck by a truck. The driver, who was transporting equipment to the television series' next location shoot, had fallen asleep, crossed the road, and crashed into the car.

Ms. Davis and a friend, Yasmin Jackson, 19, of Belleville, Ill., were both killed. The truck driver, who worked for 51 Minds Entertainment, survived and was cited for driving with a suspended license and other offenses. The settlement agreement between Davis' family and Viacom, VH-1 Music, 51 Minds Entertainment and the driver, which calls for \$6.5 million to be paid, has received court approval.

Source: *Chicago Tribune*

LAWSUIT OVER DEATH OF BICYCLIST KILLED BY DRUNKEN DRIVER SETTLED

The parents of a bicyclist, who was struck and killed by a drunken driver in December, 2006, have settled their lawsuit against the driver and the bar that served her. The bar, Berky's, agreed to pay \$1 million in the death of Paul L'Ecuyer, and the insurance carrier for the drunk driver agreed to pay \$25,000. The settlement was agreed to one day before the case was to go to trial.

The drunk driver was sentenced to ten and a half years in prison in January 2008 after a jury convicted her of negligent homicide and aggravated DUI in the death. Prosecutors told jurors that the victim was riding his Schwinn bike in the five-foot-wide bike lane about 8:40 p.m. when Melissa Arrington swerved off the road, struck him and then continued for 800 feet before stopping. A blood test taken almost three hours after the collision showed the driver, who was driving on a suspended license for a prior DUI, had a

blood-alcohol content of 0.156%, nearly double the DUI level. A witness to the crash testified that the Arrington vehicle swerved off the road twice before the collision.

L'Ecuyer's parents filed a lawsuit against Berky's and the drunk driver to remind people they need to continue "working tirelessly to do away with drinking and driving and to over-serving at bars." They intend to use the settlement to fund a scholarship created in their son's name shortly after his death and to pay for the education of his nieces and nephews. Some of the settlement funds may also be donated to the University of Arizona and Phoenix College. John Osborne, a lawyer from Tucson, Ariz., represented the family and did a very good job.

Source: *Arizona Daily Star*

LAWSUIT FILED AGAINST A BAR THAT SERVED A DRUNK DRIVER

The parents of Panayiota Demetriou, a student who was killed by a drunken driver, have filed a lawsuit against the Queens cafe where a drunk driver got liquored up before the horrific accident. The lawsuit seeks monetary damages from the Cavo Cafe Lounge, which is in Astoria, New York, for serving alcohol to the drunk driver, Daryush Omar, "up to and past the point of intoxication."

Omar, who was 25 at the time, got behind the wheel of his car in the early-morning hours of November 16, 2008, and later ran through a red light. His vehicle, a Range Rover, collided with a livery cab, killing the driver, Bessy Velasquez, as well as Mrs. Demetriou, who was a passenger and on her way home. The 30-year-old was studying for a graduate degree in psychology at Pace University and planned to be a child psychologist.

Omar pleaded guilty to manslaughter and was sentenced to three and a half to ten years in prison. He acknowledged at the sentencing that he was served drinks at the lounge

after he was already intoxicated. Omar, an immigrant from Pakistan who resides in the country illegally, will be deported after he completes his sentence, and is also named as a Defendant in the suit. Sanford Rubenstein, a lawyer from Brooklyn, New York, represents the family of victim and did a very good job.

Source: *New York Daily News*

WIDOW FILES SUIT IN TOURIST HELICOPTER CRASH

We wrote about the crash involving an airplane and a helicopter in a prior issue. Now the widow of Ambler executive Steven Altman has filed a wrongful-death lawsuit in federal court in Philadelphia over the August 8th crash that killed nine persons, including Mr. Altman, over the Hudson River in New York City. The suit, filed by Pamela Altman, alleges that the helicopter tour company ran a reckless “bumper-car operation” and that its “bully” insurance companies had actually taken her to court trying to recover the cost of the lost helicopter.

Steven Altman, of the Altman Group in Fort Washington, was piloting the single-engine Piper that collided with the helicopter. The accident was captured on video and drew international attention. The Federal Aviation Administration may have some responsibility for the crash because of the actions of the air-traffic controller directing Altman. The Teterboro Airport controller made a personal call after clearing Mr. Altman for takeoff and was on the phone until the plane and helicopter collided. His supervisor had left the building to run a personal errand at the time. Both are now on administrative leave. A National Transportation Safety Board investigation remains open.

The wrongful death lawsuit seeks more than \$1.35 million in damages from the Liberty Helicopter Inc. tour company, helicopter owner Meridian Consulting Corp., manufacturer American Eurocopter L.L.C., and insurance

companies. The lawsuit alleges that “lax management and operational attitude” by Liberty Helicopter and Meridian Consulting caused “a horrid history of accidents” over the Hudson and East Rivers before Mr. Altman’s fatal crash and that the companies did little to prevent such accidents.

Steven Altman, was flying his brother, Daniel, and nephew, Douglas, to Ocean City, New Jersey. All were killed in the crash, as were the helicopter pilot and five Italian tourists. Arthur Wolk, a lawyer from Philadelphia, Pennsylvania, represents Mrs. Altman in her lawsuit.

Source: *Philadelphia Inquirer*

SETTLEMENT REACHED IN EMERGENCY MEDICAL SERVICES COPTER CRASH

A settlement has been reached by family members of a flight nurse and a paramedic who died last year when an emergency medical services helicopter crashed into the Laguna Madre. The \$14 million settlement resolves a lawsuit that family members of the victims filed against Metro Aviation Inc., the company that operated the Eurocopter AS350, and South Texas Emergency Care Foundation.

Metro Aviation, which was operating out of Harlingen as Valley AirCare, and South Texas Emergency Care Foundation, were Defendants in the case. The Foundation is a community-owned nonprofit organization that provides emergency medical services in the Harlingen area. Valley AirCare is its air medical division. The helicopter crashed in the Laguna Madre near South Padre Island the night of February 5, 2008. Marc Rosenthal, a lawyer from the Rosenthal & Watson law firm, represented both the Garcia and Sanchez families and did a very good job.

Source: *The Brownsville Herald*

NTSB FAULTS PILOTS AND THE FAA IN 2007 CHARTER PLANE CRASH

A fatal 2007 plane crash might have been avoided if federal inspectors had noticed that the charter airline allowed a convicted drug runner to conduct critical safety checks, according to a ruling by accident investigators. The National Transportation Safety Board blamed the June 4, 2007, crash into Lake Michigan on the two pilots. They suffered an emergency shortly after takeoff from Milwaukee that made their jet difficult to control, but they should have been able to return for a safe landing, according to the NTSB.

Both pilots were killed, as were four members of a University of Michigan lung transplant team. The investigators found that the charter firm, Marlin Air, falsified training records and routinely sidestepped safety requirements. In addition, it was determined that the pilots were unfamiliar with the jet. The problems had gone unnoticed by Federal Aviation Administration (FAA) inspectors. Specifically, the captain on the Cessna jet had been convicted of drug smuggling, but had been allowed by the FAA to conduct pilot inspections and oversee the company’s safety efforts.

Interestingly, it also was this pilot who apparently falsified training records. NTSB investigators found abundant evidence of safety problems at Marlin, including witnesses who said that Serra routinely violated federal rules. The company had been experiencing financial difficulties. Despite this, FAA inspectors did not find any problems either before or after the accident.

Source: *USA Today*

UNITED AND U.S. AIRWAYS FACE FAA SAFETY FINES

The Federal Aviation Administration has proposed levying multimillion-dollar fines against United Airlines and US Airways for safety violations, including flying a plane after mechanics stuffed

shop towels into an engine. The agency proposed a \$5.4 million fine against US Airways of Tempe, Ariz., for operating eight planes on a total of 1,647 flights from October, 2008 to January, 2009 in violation of safety directives or the company's own maintenance rules.

The FDA also said it is proposing a \$3.8 million fine against United of Chicago for operating one of its Boeing 737 aircraft on more than 200 flights with shop towels covering openings near where oil collects in the bottom of the engine instead of using protective caps required by the carrier's maintenance procedures.

These large fines reflect the large number of flights that were allowed to carry passengers in violation of safety requirements, according to the FAA. This is most disturbing and hopefully both the airlines involved and the government are working to make sure the safety issues are resolved.

Source: Associated Press

METROLINK TO PAY \$30 MILLION TO VICTIMS OF TRAIN CRASH

Metrolink has agreed to pay \$30 million to settle lawsuits filed by victims of the deadly train crash and derailment that happened in Glendale, Calif., four years ago. On January 25, 2005 a Metrolink commuter train struck a gasoline-drenched Jeep Cherokee that had been abandoned on the tracks in an industrial area. The train also slammed into a Union Pacific freight train and another Metrolink train moving in the opposite direction causing the commuter train to jack-knife. Eleven people were killed and 180 were injured.

The settlement involves nearly 90% of the injury and wrongful death cases filed against Metrolink. Both sides are continuing to negotiate settlements for the remaining cases ahead of trial set for January of next year. Investigators determined that the Jeep's owner, Juan Manuel Alvarez, deliberately drove his car onto the tracks and left it there

while he said he was trying to commit suicide because of family problems. As the train approached, Alvarez said he changed his mind, but was unable to move the vehicle.

Alvarez was convicted of 11 counts of murder with special circumstances on June 26, 2008. He was sentenced to eleven consecutive life terms on August 20, 2008. The 2005 Glendale train crash is the second deadliest in the history of Metrolink in Los Angeles. The most deadly crash took place on September 12, 2008 in Chatsworth. In that accident 25 people were killed. Jerome Ringler, a lawyer from Los Angeles, represented the crash victims. He did a very good job.

Source: Associated Press

JURY AWARDS DAMAGES IN DEATH OF HIGHWAY WORKER

An Indiana jury has ordered a group of highway contractors to pay \$10.2 million to the family of a worker killed in a 2006 construction accident. In the lawsuit, lawyers for the family of Jay Soots argued that the contractors were negligent for allowing workers to ride on an uncovered flatbed trailer and not requiring them to wear hard hats. Soots fell from the truck and was killed. The contractors will appeal the verdict.

Source: Bodily Injury Blog

XIX. HEALTH CARE ISSUES

THE UNITED STATES NEEDS A GOOD SYSTEM TO TRACK MEDICAL IMPLANTS

There is a need to have a good system in place to track medical implants. Many believe there is a major weakness in the nation's system for recalling thousands of medical devices routinely implanted in people's bodies, ranging from screws and plates to artificial knees and hips. Medical equipment

makers have no centralized system for tracking products throughout their life span. That means in some instances, manufacturers have no good way to know where problematic devices are or which patients got them.

Meanwhile, the number of items implanted in people's bodies is soaring, as is the number of recalls. Nearly 2,500 medical devices were recalled for potential safety problems in fiscal 2008, according to the Food and Drug Administration. That was nearly double the number reported the previous year and a 164% increase since 2000. In 2006 alone, surgeons implanted a million hip and knee replacements, according to the American Academy of Orthopedic Surgeons. That number is expected to quadruple by 2030.

It appears that the United States is far behind a number of other countries in this area of concern. Fadem's foundation and other groups have been pushing for years for better tracking of devices. They want to create something like the patient registries used in Sweden, England and Australia to keep tabs on artificial joints. Health care reform legislation being considered in Congress includes a proposal to set up the nation's first comprehensive medical device registry. Doctors say its primary use would be to uncover safety problems. It could also be used to locate patients quickly during a recall. The FDA currently requires comprehensive tracking of only 14 types of devices, including pacemakers, mechanical heart valves and breast implants. The agency says it is working toward better registration and tracking of other devices.

Manufacturers trace many other medical products only as far as the distributor. Finding them again is not always easy, particularly after they have been implanted into someone's body. Hospitals record the model and lot numbers of implants, but that information is often buried deep in billing records or operating-room log books. Manufacturers send out thousands of letters announcing recalls, and the FDA

puts the information on the Web, but the warnings sometimes go unnoticed.

It has been reported that there are some potential solutions in the works. The FDA has been laying the groundwork for a registry of patients with artificial joints, which are more prone to breakage than other types of implants and are also experiencing a huge surge in use. The agency is also working on a system that would make tracking easier by associating each medical device with a unique ID number. While there is still lots to be done, at least there is some progress being made.

Source: *Washington Post* and Associated Press

FDA RELEASES PLAN FOR BETTER RISK COMMUNICATION

The Food and Drug Administration is trying to better convey information such as recall notices and drug warnings to the public. The agency announced a new communication plan last month called "The Strategic Plan for Risk Communication." The plan, which is expected to take five years to implement, includes 70 different actions to improve risk communications. It includes creating a publicly-accessible database of FDA risk communications; using social media (like Twitter) to send out urgent messages on issues like food contamination outbreaks and recalls; and posting pictures of products affected by high-priority recalls.

Source: *Lawyers USA Online*

CRASH VICTIM AWARDED \$2.2 MILLION FOR BEDSORES FROM HOSPITAL STAY

A jury has ordered Westchester Medical Center to pay \$2.2 million to a quadriplegic man who got horrific bedsores while staying at the Valhalla hospital after a car crash in 2005. Eric Trainor, a 30-year-old former construction worker, was awarded the amount for pain and suffering in a trial in a state court in White Plains, New York.

The hospital's failure to turn Mr. Trainor every two hours during his six-week stay caused him to develop stage-four bedsores on his buttocks and lower back. It was said that the bedsores were all the way down to the bone and were very large. Mr. Trainor, who now lives in Springfield, Mass., with his parents, has suffered from the bedsores, which had to be surgically closed. The sores delayed his physical rehabilitation so much that he lost the chance to build upper-body strength.

Mr. Trainor was riding to a construction job with another contractor when their car skidded on ice and crashed on November 23, 2005. He was taken to Westchester Medical Center with a spinal cord injury. He could move his head, neck and shoulders, but little else. Because of the injury, Mr. Trainor couldn't feel the bedsores developing. The settlement money will help provide for the victim's three young children, replace his battery-powered wheelchair and allow him to buy a special van. Raymond J. Keegan, a lawyer from White Plains, New York, represented Mr. Trainor and did a very good job.

Source: *LoHud.com*

XX. ENVIRONMENTAL CONCERNS

A DANGEROUS PUBLIC THREAT CAUSED BY UST LEAKS

Leaking underground storage tanks (USTs) are a widespread problem across the United States. In Alabama, the Alabama Department of Environmental Management has active UST leak sites in all 67 counties. We are continuing our discussion this month of USTs by examining one of the potential health threats caused by leaking USTs.

Many dangerous chemicals are released into the environment when USTs containing gasoline or other

petroleum products leak. These dangerous chemicals can migrate thousands of feet through the soil and contaminate neighboring properties by seeping into homes and businesses without notice, thereby exposing people to toxic vapors and possibly creating a risk of explosion. These dangerous chemicals can also contaminate groundwater used to supply drinking water to neighboring residents.

Benzene, which is a colorless and highly-flammable liquid, is only one of the dangerous chemicals found in gasoline. Benzene is added to gasoline to increase the octane rating and reduce engine knocking. There has long been concern over benzene's dangerous health effects and the possibility of benzene entering the groundwater. Despite these safety concerns, the petroleum industry has continued to add benzene to gasoline. However, in recent years the EPA limited the allowable benzene content in gasoline to approximately 1%. Despite the EPA's limit, the amount of benzene in a ten-gallon gasoline leak is enough to contaminate about 12 million gallons of water. This could pose a serious health threat to people living in the vicinity of a leaking UST.

According to the United States Department of Health and Human Services, benzene is known to cause certain forms of cancer—especially acute myeloid leukemia and acute non-lymphocytic leukemia (AML & ANLL). Moreover, according to the Centers for Disease Control and Prevention (CDC), benzene causes anemia and can damage the immune system. The CDC also states that women exposed to benzene for more than one year may develop reproductive abnormalities. Benzene is also suspected of harming the nervous system, as well as the cardiovascular and respiratory systems.

If you believe a UST leak has occurred near your home or business or you need additional information regarding leaking USTs, you can contact Chris Boutwell (Chris.Boutwell@

beasleyallen.com) in our office at 800-898-2034.

Sources: <http://bt.cdc.gov/agent.benzene/basics/facts.asp>; Wikipedia; Boulder Area Sustainability Information Network

COAL ASH DISPOSAL IN THE UNITED STATES

As we have previously reported, our firm filed a class action lawsuit in January on behalf of residents and property owners affected by the catastrophic release of over a billion gallons of coal ash sludge onto over 300 acres and into the Emory River. Almost a year later, the clean-up continues and residents in the Kingston, Tenn., area continue to suffer from the effects of the spill and the clean-up. Officials recently announced that a portion of the Emory River will remain closed to all river traffic until February 15, 2010. This portion of the river was closed on August 11, 2009 so that larger dredges could be used to remove the coal ash from the river. In early February, the EPA and TVA will re-evaluate and determine when this section of the river can be re-opened.

To add insult to injury, residents in Kingston suffered another ash incident in September when ash rained down on the community. TVA issued a report saying that the event was caused by test burns of various types of coal. In the report, TVA noted again that exposure to coal ash should be avoided.

The cause for concern over coal ash disposal arises from the toxins found in the ash, and an independent report confirms that the TVA ash contains elevated levels of toxic elements. Researchers at Duke University and Georgia Tech recently published their analysis of the Kingston ash. The analysis found that the spilled Kingston sludge contains 75 parts per million of arsenic, 150 parts per billion of mercury, and eight picocuries per gram of total radium. A picocurie is a standard measure of radioactivity.

The Georgia Tech and Duke study confirms that the risk of exposure increases as the sludge dries out and

becomes airborne as dust. These dust particles could have a severe impact on health resulting in respiratory and other illnesses. The fine particulates are so small that they are easily inhaled into the deepest reaches of the lungs, and the Duke-Georgia Tech team stated that, "The smaller the particulate, the higher the concentration of trace metals and radioactivity it contains."

Hazards of coal ash and the handling of this by-product of coal combustion are the subject of growing national attention. CBS aired a segment about coal ash on a recent episode of *60 Minutes* and the *New York Times* ran an article on coal-fired power plants in its series, *Toxic Waters: A Series about the Worsening Pollution in American Waters and Regulators' Response*. The *Times* article stated that "[p]ower plants are the nation's biggest source of toxic waste, and while much of that waste once went into the sky, because of toughened air pollution laws, it now often goes into lakes and rivers, or landfills that have leaked into nearby groundwater." In the case of Kingston, 50 years of coal combustion waste currently resides in and around Watts Bar Reservoir, and cleanup is projected to take at least three years.

Our class action litigation seeks to hold TVA to its promise of cleaning up the Kingston spill completely and making those affected whole again. Meanwhile, TVA is seeking immunity from suit. Our litigation team continues to work to hold TVA accountable for this disaster. If you need additional information on this subject, contact Rhon Jones or David Byrne in our firm at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or David.Byrne@beasleyallen.com.

Sources: *Knoxville News Sentinel*, *New York Times*, *CBS News*

ARTUR DAVIS RAISES VALID QUESTIONS ABOUT COAL ASH

Artur Davis has called on the U.S. Environmental Protection Agency to evaluate claims from Perry County,

Ala., that the ash dumped there from the Tennessee spill referred to above be evaluated for health and safety concerns. In a letter to EPA Administrator Lisa Jackson, the Congressman asks for the EPA "to establish consistent standards at the federal level that would fully address these legitimate concerns about the content of coal ash waste." Artur pointed out that Pennsylvania refused the shipment because the ash failed to meet that state's environmental standards. But Alabama's weaker standards allowed our state to take the ash.

Artur and others believe that if coal ash poses an unacceptable level of risk, inconsistent state standards should be replaced with national guidelines that would put the safety of the people in one community on the same level as families living in another state.

Source: *Selma-Times Journal*

EXXON-MOBIL IS LIABLE FOR GROUNDWATER DANGERS

A jury has found Exxon-Mobil liable for contaminating New York City's groundwater with a gasoline additive and has awarded the city \$105 million. The jury in federal court in Manhattan issued its findings after an 11-week trial. The city sued Exxon-Mobil for the costs of removing a gasoline additive from drinking wells in Queens. The giant oil company argued that the company ignored warnings from its own scientists and engineers not to use the additive in areas that use groundwater for drinking water.

Source: *Forbes*

XXI. THE CONSUMER CORNER

FORD ADDS 4.5 MILLION VEHICLES TO DEFECTIVE SWITCH RECALL

Ford Motor Co. has added 4.5 million older-model vehicles to the long list of those recalled because a defective cruise control switch could cause a fire. The latest voluntary action pushes Ford's total recall due to faulty switches to 14.3 million registered vehicles over ten years, capping the company's largest cumulative recall in history involving a single problem.

The recall covers 1.1 million Ford Windstar minivans that had a small risk of fire due to internal leaking from the switches. Ford said in a letter to federal regulators that it found a small number of reported fires linked to the problem during an internal investigation that began last year, but did not specify how many. The remaining 3.4 million vehicles are Ford, Lincoln and Mercury models. Ford said there were no reports of fires with those models, which were mostly trucks and sport utility vehicles. Ford says they were included in the recall because they use the same switches. All vehicles covered by the recall are from the 1992 to 2003 model years.

Ford advised owners of all vehicles covered by the recall to park them outside until they are mailed instructions by the end of the month on how to get repairs. The automaker has been dealing for a decade with the problem. There have been hundreds of complaints and dozens of lawsuits over fires allegedly caused by faulty switches. A small number of injuries have also been linked to the problem, though none were reported in the latest recall. Previous recalls included some of Ford's most popular brands, like the popular F-series of pickup trucks.

Investigators for NHTSA found that the switches, made by Texas Instru-

ments, could leak internally, overheat and potentially ignite. The agency also identified four reports of leaking fluid damaging the antilock brake control module, resulting in a fire. The module is charged with electrical current and has the capacity to ignite the fluid. Clearly, it is an ignition source.

Even some vehicles without cruise control are part of the recall because they still have the switches with brake fluid routed through them. To repair the problem, dealers will install a harness to help prevent the fluid from flowing anywhere it could be ignited. Ford says it stopped using the Texas Instruments switch in 2003, according to Sherwood. The latest group of vehicles recalled is the last batch still on the road that had the switch installed.

Texas Instruments said in a statement released to media outlets that it manufactured a switch "to meet and exceed Ford's specifications" and that it is only one component of Ford's cruise control deactivation system. The company cited a 2006 NHTSA investigation that found multiple factors were to blame for fires. Texas Instruments no longer owns the division that made the switches.

The recall covers the following model years: 1995-2003 Ford Windstar; 2000-2003 Ford Excursion diesel; 1993-1997 and 1999-2003 Ford F-Super Duty diesel; 1992-2003 Ford Econoline; 1995-2002 Ford Explorer; 1995-2002 Mercury Mountaineer; 1995-1997 and 2001-2003 Ford Ranger; and 1994 Ford F35 Motorhome vehicles.

Source: Associated Press

GOVERNMENT ENHANCES ITS CRASH TEST PROGRAM FOR 2010

Beginning with the 2010 model year, new vehicle window stickers will feature an overall safety rating that combines frontal, side, and rollover tests. This will be similar to *Consumer Reports'* overall safety ratings that have been compiled each year since 2001. Behind that rating will be several

upgrades to the tests and rating processes used by the federal government. Most notably, female crash dummies will be used and a new side pole test will simulate a vehicle striking a tree.

Results from tests conducted by the National Highway Traffic Safety Administration through its New Car Assessment Program (NCAP) will be supplemented by a rating to indicate if advanced safety technologies such as electronic stability control (ESC), lane departure warning systems, and forward collision warning systems, are optional or standard equipment. But NHTSA won't rate the effectiveness of individual devices.

Changes to the program are warranted to better differentiate the crash performance between vehicles and clearly communicate which cars are safer. Back in 1978, when NHTSA began crashing cars at 35 mph into a flat barrier and rating them for frontal impact safety, less than 30% of the models tested earned four or five stars, or the equivalent, for the front driver. However, for model-year 2007, 98% of test vehicles earned four or five stars. But even so, it can be difficult for consumers to differentiate the performance for competing models based on NHTSA data alone.

NHTSA will continue to perform its front crash test at 35 mph using a rigid barrier. The side crash test remains based on a 3,015-pound car traveling at 38.5 mph striking the left side of the car. These tests are notably different from those conducted by the Insurance Institute for Highway Safety (IIHS). The IIHS used a frontal-offset test conducted at 40 mph, which simulates a typical head-on crash with another similar car. For the side test, the IIHS uses a 3,300-pound moving barrier that strikes higher up on the tested vehicle to simulate the car being hit on the side at 90 degrees by a typical-height SUV or truck. The test is conducted at 31 mph, a lower speed.

A new side-impact pole test has also been included in the NHTSA proposal that simulates a vehicle sliding off the

road and hitting a tree or telephone pole. This is a more severe test than the regular NCAP test, but it will only assess the injuries to the driver. As the new side-crash pole test is phased in, it's reported that most vehicles will meet the test requirements by September, 2014. On the road to improving side safety, all new passenger vehicles will meet the head injury requirements of the Institute's moving deformable barrier test by September, 2009.

Consumers Union says the addition of a small female dummy will enable the tests to better represent a broad range of body types, specifically addressing women and larger children. In addition, new testing for leg injuries will be done, adding to the injury risk assessment.

Consumers Union, as well as other organizations and automakers, submitted recommendations to NHTSA when comments were solicited on this topic last year. Notably, CU was a proponent for the female crash test dummy, and they supported maintaining the current crash test speeds. While CU says it is encouraged by the advancements this program will make, there were several suggestions made by CU that did not make the cut and which it felt have merit and are justified:

- Conduct a dynamic rollover test to assess body structure, seat belt design (including pretension), side-curtain airbags, roof strength, door locks, and the retention of window glazing, rather than the static roof crush tests.
- Review the implementation of rear-impact tests, like those conducted by the IIHS.
- Consider a manufacturer self-certifying process in which the industry would test and rate its own vehicles and undergo spot checking of their test results by NHTSA. This would operate much like the verification test process used by the IIHS for front crash ratings, and it would

accelerate the availability for crash data to consumers.

- Research a rear-visibility rating to address blind zones that put children at risk.
- Work with international safety researchers to develop a pedestrian-friendly rating.

Source: *Consumer Reports*

OFF-ROAD VEHICLES FACE MORE OVERSIGHT

The federal government is finally taking a closer look at off-road recreational vehicles, known as ROVs. The Consumer Product Safety Commission has voted to write mandatory rules to regulate the four-wheel vehicles. This comes as a result of more than 100 deaths since 2003. Riders also have suffered a large number of injuries with some of them leading to amputations.

ROVs, also called side-by-sides, are two-passenger motorized vehicles designed for drivers 16 years and older. These vehicles resemble a cross between a rugged-looking golf cart and a miniature-Jeep. They have a roll cage—metal bars framing the cab. The industry proposed voluntary regulations for side-by-sides, but according to CPSC staffers, these regulations fell short. Agency staff have expressed concern about the vehicles and rollover risks.

The commission will solicit comments from industry, consumer advocates and others as it writes the rules. It's projected that the process could take many months, even years, to complete. ROVs first appeared on the market in the late 1990s. Since 2003, 116 people have died, according to the CPSC, including young children, and more than 150 have been injured. Injuries have involved crushing fractures to legs, feet, and arms, and some riders have lost limbs.

Safety advocates say the commission's vote puts the industry on notice. Former agency chief, Nancy Nord, first

directed the CPSC staff to investigate the vehicles and deaths a year ago. Rachel Weintraub, director of product safety and senior counsel for the Consumer Federation of America, had this to say:

This is an instance where the industry has not been responding quickly and effectively enough to the well-documented hazards caused by these products.

In March, Yamaha Motor Corp. USA recalled more than 100,000 of its Rhino off-highway recreational vehicles for repairs after two models were linked to 46 deaths in the past six years. In a number of incidents, rollovers happened on level ground at relatively slow speeds. Yamaha executives were aware of the safety issues more than a year before their ROV—the Rhino—was introduced. A Rhino carrying top Yamaha executives rolled over at a testing ground in Kentucky 15 months prior to the line's debut.

The vehicles can reach top speeds of more than 35 miles an hour. Industry officials declined to say how fast they can go, but several dealers put top speeds at about 40 to 50 miles an hour. Currently, there are mandatory restrictions for ATVs, such as speed limits for youth models. But there are no standards, voluntary or otherwise, for the side-by-sides, which have the roll cage and a different steering system. About 140,000 ROVs were sold last year in the United States.

Source: *CBS News*

TIRE TREAD SEPARATION IS A SERIOUS SAFETY HAZARD

Tire tread separations constitute a serious safety hazard in this country. Passenger and light truck tire tread separations are by-products of steel-belted radial tire technology. This is due to the difficulty of getting adhesion of steel to rubber. As a result, there is a potential for tread separation of all steel-belted radial tires. The problem becomes

much greater at high speeds in hot weather. We have learned that tread belt separations are the most common mode of failure of the steel-belted radial tires and that they are the result of both design and manufacturing defects. When they do occur, the results can be catastrophic. These separations can cause vehicle rollovers and crashes in many instances at highway speeds. SUVs—because of their design—are more likely to rollover in the event of a tire separation.

UPDATE ON HOT FUEL LITIGATION

As previously reported, lawyers in our firm, Rhon Jones, Parker Miller and John Tomlinson, are playing pivotal roles in the Hot Fuel MDL consolidated in Kansas City, Kan. From Los Angeles to North Carolina, we are working alongside some of the best law firms in the country on behalf of good folks who have been wrongfully overcharged by Big Oil.

In previous reports, we have explained the phenomenon behind the thermal expansion of gasoline. As the temperature of motor fuel increases, the volume of the fuel will also increase—or expand. However, as the volume of the fuel increases, the energy within the gasoline will remain the same. Unless the fuel's temperature is compensated for, consumers in hot states like Alabama will be paying for more gallons than they are actually receiving.

How much are consumers losing due to hot fuel? A federal study conducted by the National Institute for Standard and Technology (NIST) found that the average temperature of gasoline in California underground storage tanks was 75 degrees year round. The Santa Monica-based Foundation for Taxpayer and Consumer Rights (FTCR) pointed out that if gasoline is at 90 degrees in temperature, the consumer has lost about 2% of mass and energy. Based on a price of \$4 per gallon, that translates to a loss of eight cents for every gallon.

However, in places like Florida, Georgia, Alabama, Texas, Arizona or California, the Defendants could easily be selling motor fuel to consumers with a temperature in excess of 105 degrees.

The big oil companies have had the technology to resolve the motor fuel temperature issue for decades. In fact, they are using it as you read this article at every level of the fuel distribution process—except at retail. In Canada, where the volume of motor fuel shrinks and consumers actually gain as a result of the cool temperatures, the oil companies retrofitted over 90% of their pumps in just a few years. However, the same companies argue that the technology doesn't exist to retrofit pumps, is impracticable, would require years of studies to determine whether it even works, and is simply too expensive to implement in the United States.

We are fighting to make sure oil companies pay back the funds they have pocketed as a result of hot fuel, and retrofit their station pumps with automatic temperature compensation devices. Currently, we are working to complete the necessary corporate representative depositions of the oil companies as part of the discovery process. Additionally, our firm is spearheading a major discovery campaign in both the United States and Canada regarding the development and implementation of automatic temperature compensation devices. As it stands, we are working tirelessly to respond to the many certification response briefs recently filed by the Defendants.

Since these are complex and difficult cases, they present a real challenge. But, we are working hard to ensure fairness for consumers and believe that goal can be achieved. If you have any questions, please contact Rhon Jones, Parker Miller or John Tomlinson at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Parker.Miller@beasleyallen.com, or John.Tomlinson@beasleyallen.com.

CRACKING RIGHTS ARE A THREAT TO PROPERTY OWNERS

The term “cracking rights” may not mean very much too many of our readers. This is the often-used slang term for the legal waiver/release section of some settlement agreements between property owners and mining companies. As we have explained in previous issues of the *Report*, longwall mining is considered a “high extraction” form of mining, where continuous seams of coal, sometimes miles long and over a thousand feet wide, are completely mined with no support left behind for surface properties. Given the lack of support, the effects of this mining technique can be devastating to homes and property above the longwall.

Before a longwall mining project ever begins, most jurisdictions, including Alabama, require the mining company to put the affected property owners on notice of the projected mine. At this point, the mining company should inform the property owners of its responsibility to pay for any damages that occur to the surface property as a result of the mine. However, the mining company will often pressure property owners into signing settlement agreements before the mining ever takes place and the property sustains damage.

As we have explained in previous *Reports*, it is our experience that settlement agreements should never be entered into without consulting an experienced lawyer. The mining company is interested in itself—not the property owner—and it is looking out for its own interest. You can rest assured that the mining company will always have a lawyer involved so it's very important for both sides to have experienced legal counsel at the settlement table.

We also believe a property owner should be very wary of entering into a settlement agreement before the damage actually occurs. For instance, the property damage could be much

worse than the mining company explained, or the diminution to property value much greater (and often is) than the mining company predicted. Oftentimes, these agreements may leave the sole determination of damage to the mining company—meaning that the hired experts of the mining company, and not the property owners, will determine whether the damage to the owner's home is from mine subsidence (and therefore within the coverage of the agreement) or not (leaving the property owner to foot the bill).

Property owners should be especially concerned with cracking rights. They attach to the property owner's deed, run with the land, and act as a past, present and future release of future damages against the mining company. For instance, if the owner wants to sell the property, it is likely that the mining company will be present on the day of sale to force the new owners to sign their legal rights away. If the buyers refuse to sign, the mining company could try to terminate the sale. Most troublesome, if the mining company mines another seam underneath the property in the future, the owner may have no legal remedy because all future rights were waived as part of the previous settlement agreement.

If you have any questions about long-wall mining or cracking rights, contact Rhon Jones or Parker Miller in our Toxic Torts Section at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or Parker.Miller@beasleyallen.com.

CPSC WORKS TO PREVENT TIP-OVER DEATHS AND INJURIES

The U.S. Consumer Product Safety Commission has issued a report that deals with tip-over deaths and injuries in the home. For young children, the home is a playground. While many parents childproof to ensure that their home is a safe place, some may not be aware that unsecured TVs, furniture and appliances are hidden hazards that are in almost every room. The CPSC is

urging parents to take simple, low-cost steps to prevent deaths and injuries associated with furniture, TV, and appliance tip-overs.

CPSC staff estimates that in 2006, 16,300 children five years old and younger were treated in emergency rooms because of injuries associated with TV, furniture, and appliance tip-overs. Between 2000 and 2006, CPSC staff received reports of 134 tip-over related deaths. Additionally, CPSC staff is aware of at least 30 media reports of tip-over deaths since January 2007 involving this same age group.

Typically, injuries and deaths occur when children climb onto, fall against, or pull themselves up on television stands, shelves, bookcases, dressers, desks, chests, and appliances. In some cases, televisions placed on top of furniture tip over and cause a child to suffer traumatic and sometimes fatal injuries. "The most devastating injuries resulting from furniture tipping on children are injuries to the brain and when a child is trapped under a heavy piece of furniture and suffocates," according to Dr. Gary Smith, who is Director of the Center for Injury Research and Policy at Nationwide Children's Hospital in Columbus, Ohio.

Recent revisions to the voluntary safety standards for clothes storage units provide for the inclusion of warning labels and additional hardware to secure the furniture to the floor or wall. To help prevent tip-over hazards, the CPSC offers the following safety tips:

- Furniture should be stable on its own. For added security, anchor chests or dressers, TV stands, bookcases and entertainment units to the floor or attach them to a wall.
- Place TVs on a sturdy, low-rise base. Avoid flimsy shelves.
- Push the TV as far back as possible.
- Place electrical cords out of a child's reach, and teach children not to play with them.

- Keep remote controls and other attractive items off the TV stand so children won't be tempted to grab for them and risk knocking the TV over.
- Make sure free-standing ranges and stoves are installed with anti-tip brackets.

Manufacturers and retailers also have an obligation to warn purchasers of the tip-over hazards. This is especially true because most adult homeowners really don't appreciate the risk these hazards present in their home.

Source: CPSC

SUIT ALLEGES ZIPCAR CHARGED EXCESSIVE FEES

Zipcar Inc., the fast-growing Cambridge self-serve car rental company, has been sued for allegedly charging customers excessive or hidden fees. The lawsuit was filed in federal court in Boston on behalf of Ryan Blay, an Illinois man who has been a Zipcar customer since April 2007, along with other customers who were potentially charged the fees. Zipcar, once a small local start-up, has become an international enterprise. The Plaintiffs seek to make the suit a class-action proceeding.

Zipcar rents vehicles by the hour and by the day from lots and garages scattered around Greater Boston and other cities. The privately-held company says it has about 320,000 customers in 28 states and provinces in North America and in London. So any improper fees could add up to millions of dollars in damages.

Specifically, the Complaint accused Zipcar of unfairly charging customers with a "discreet medley of customer charges." According to the suit, many customers may not even be aware of the charges because Zipcar does not send monthly statements. There are several charges that are the basis for the suit:

- **Phone fee.** A \$3.50 charge to talk to a customer service representative

even when customers call to report a problem that can't be handled through the website or automated phone system.

- **Parking tickets.** Customers who receive a parking ticket or traffic citation are typically charged for the cost of the ticket plus an additional fee, even when the ticket was issued in error and customers were not given any opportunity to appeal.
- **Late fee.** The fee is \$50 per hour up to \$150, three times the regular charge for a day's rental.
- **Lost items.** To retrieve an item left in a vehicle, customers are required to rent the car again for at least an hour unless customers retrieve the lost item within three hours after the reservation ended.
- **Inactivity fee.** Zipcar deducts \$20 per month from a customer's deposit until the deposit is depleted if the customer has not used the service for 12 consecutive months.

The lawsuit says the charges are "arbitrary and capricious" and disproportionate to the company's actual costs. The lawsuit says that "charges imposed by similar vehicle rental businesses are not nearly as exorbitant as Zipcar's."

Source: Boston.com

MATTEL TOY SETTLEMENT COULD TOTAL \$50 MILLION

Mattel Inc. and its Fisher-Price subsidiary have agreed to settle a consumer lawsuit for what could total more than \$50 million over the 2007 recall of millions of toys made in China that were found to contain high levels of lead. The proposed class action settlement, filed in a Los Angeles Court, will resolve 22 suits filed against Mattel and Fisher-Price and major retailers on behalf of millions of families who purchased or received the defective toys as gifts

before they were later recalled or withdrawn from the market.

The six Mattel-related recalls in 2007 involved more than 2 million toys, and were part of a slew of recalls by several dozen companies which resulted in a total of 21 million toys being recalled. The recalls resulted in Congress passing a new law that sets strict limits for lead, lead paint and chemicals known as phthalates. It mandates third-party testing for companies, big and small, making products geared for children 12 and under. Last year, Mattel and Fisher-Price agreed to pay \$12 million to 39 states to end a lengthy investigation into the lead-tainted toys. In June, Mattel also agreed to pay a \$2.3 million civil penalty for violating the lead paint ban. The companies have not had any lead-related toy recalls since 2007.

Joe Whatley of the law firm Whatley Drake & Kallas, located in Birmingham, Ala., and John Stoia Jr. of the law firm Coughlin Stoia Geller Rudman & Robbins, located in San Diego, Calif., represented the Plaintiffs and did a very good job.

Source: Associated Press

BLAIR EXPANDS RECALL TO ALL WOMEN'S CHENILLE APPAREL DUE TO BURN HAZARD

We mentioned the expansion of the robes recall by Blair LLC, in the Recall section. But we felt more ought to be said here on this subject. Blair is expanding its recall of women's full length chenille robes to include additional chenille robes and three other chenille products all manufactured by A-One Textile & Towel. The earlier recall of women's robes is being announced again.

In April 2009, Blair recalled 162,000 chenille robes after it learned of three robes catching on fire, including one report of second degree burns. Blair then received several reports of deaths due to robes catching fire. This prompted a second news release in June 2009 to again alert consumers to

the burn hazard for the chenille robes. After this re-announcement, Blair received four additional reports of deaths said to be due to the robes catching fire. Three of the four elderly victims were cooking and a fourth was tending a pellet stove. All nine reported deaths occurred prior to the April 2009 announcement of the recall.

Source: CPSC

XXII. RECALLS UPDATE

Because of the large number of recalls each month, we changed the format of the recalls section of the *Report* last month. We decided to list recalls by subject with a brief description. It should be noted that we are listing only some of the major recalls issued in recent weeks. The list of recalls for this issue is set out below:

TOYOTA AND LEXUS RECALL

We mentioned the massive recall by Toyota, which affects 3.8 million late-model Toyota and Lexus vehicles in the Product Liability Section. Toyota is launching its biggest recall ever to prevent sliding floor mats from jamming accelerator pedals.

FORD ADDS 4.5 MILLION VEHICLES TO RECALL LIST

Ford Motor Co. has added 4.5 million older-model vehicles to the long list of those recalled because a defective cruise control switch could cause a fire. The latest voluntary action pushes Ford's total recall due to faulty switches to 14.3 million registered vehicles over ten years, capping the company's largest cumulative recall in history involving a single problem.

COMPACT TRACTORS RECALLED BY JOHN DEERE DUE TO INJURY HAZARD

About 90 John Deere Compact Utility Tractors have been recalled by Deere & Company, of Moline, Ill. An incorrectly-sized differential was installed in the tractor transaxle affecting the engagement of the differential lock and causing the tractor to turn to the left when braking. This causes the vehicle to veer left when the brake is applied, posing a risk of collision and injury to the operator and bystanders.

BIG LOTS STORES RECALLS ABOUT 20,000 BUNK BEDS

About 20,000 wooden bunk beds have been recalled by Big Lots Stores, Inc., of Columbus, Ohio. The bunk beds' mattress support slats and side support railings can break, posing a risk of the bunk bed collapsing and a fall hazard to consumers.

GRAND TRUNK RECALLS PARACHUTE HAMMOCKS DUE TO FALL HAZARD

Travel Hammock Inc., doing business as Grand Trunk, of Skokie, Ill., has recalled its Single and Double "Parachute" Hammocks. The hammock's supporting hooks can fail, causing occupants to fall and suffer injuries. The firm has received nine incidents of hooks failing, resulting in bumps, bruises and/or scrapes.

DIVING EQUIPMENT RECALLED BY HALCYON MANUFACTURING

Halcyon Manufacturing Inc., of High Springs, Fla. has recalled about 20,300 pieces of Halcyon Diving Equipment. The over pressure valves in the diving equipment could fail allowing the buoyancy compensator devices and the diver lift inflatable devices to leak, posing a drowning hazard to divers.

SI TECH RECALLS DIVING SUIT HOSES DUE TO DROWNING HAZARD

About 65,000 Diving Air Hose for Dry Suits have been recalled by manufacturer SI Tech AB, of Brastad, Sweden. The hose contains an insert that can dislodge during diving and restrict air flow to the diver, posing a drowning hazard. SI Tech has received six reports of hose inserts dislodging, including one that was involved in the death of a diver in Los Angeles.

GUARDIAN FULL-FACE DIVING MASKS RECALLED

Undersea Systems International Inc., doing business as Ocean Technology Systems, of Santa Ana, California, has issued a recall for 900 Guardian Full-Face Masks. If significant pressure is applied vertically to the top and bottom of the visor clamp, the clear plastic visor may dislodge causing the mask to flood.

DEVILBISS REANNOUNCES RECALL OF PRESSURE WASHERS AND AIR COMPRESSORS

DeVilbiss Air Power Company, of Jackson, Tenn., has recalled about 620,000 of the company's pressure washers and air compressors. Previously, 72,000 compressors were recalled in December 2006. The pressure washers and air compressors have pneumatic tires with plastic hubs that can burst, posing fracture and laceration hazards to consumers.

DIRECTORS CHAIRS SOLD AT LOWE'S STORES RECALLED DUE TO FALL HAZARD

About 84,000 Folding Directors Chairs sold at Lowe's stores have been recalled by their manufacturer, White Tiger Traders Co. Ltd, of Taiwan. The chair back supports can break, posing a fall hazard to consumers.

J&J RECALLS SOME TYLENOL FOR INFANT & CHILDREN LOTS

Johnson & Johnson has recalled some lots of infants' and children's Tylenol because of a possible bacterial contamination of the popular pain and fever treatment. Tylenol products being recalled were manufactured between April and June 2008.

RAYNOR MARKETING RECALLS QUANTUM OFFICE CHAIRS

Quantum Realspace PRO™ 9000 Series Mid-Back Multifunction Mesh Chair and Multifunction Mesh Chair with Headrest have been recalled by Raynor Marketing LTD, of West Hempstead, New York. The chairs were manufactured in China by Comfort Office Furniture, LTD, (Evergood Co. Ltd.) and sold at Office Depot Stores and on the Web at www.OfficeDepot.com from May 2006 through August 2009. The bolts attaching the seatback on the recalled chairs can loosen and detach, posing a fall and injury hazard to consumers.

OFF-ROAD UTILITY VEHICLES RECALLED BY BAD BOY ENTERPRISES

Bad Boy Enterprises LLC, of Natchez, Mississippi, has issued a recall for 3,900 Classic Buggies they manufactured. The off-road vehicles can accelerate without warning, posing a risk of injury to the user and/or bystander. Bad Boy Enterprises has received 32 reports of unexpected acceleration, including reports of injuries such as a fractured toe, rotator cuff injury and sore muscles. This recall involves Bad Boy Buggy Standard model off-road utility vehicles.

IDEA VILLAGE RECALLS WIRELESS LIGHT SWITCHES DUE TO FIRE HAZARD

Idea Village Products Corp., of Wayne, New Jersey, has recalled 1.3 million Handy Switch, Wireless Light Switches.

The light switch receiver, which fits into the wall outlet, can overheat and pose a fire hazard to consumers.

BLAIR EXPANDS RECALL TO ALL WOMEN'S CHENILLE APPAREL

The U.S. Consumer Product Safety Commission (CPSC) and Blair LLC, of Warren, Pa., are expanding Blair's voluntary recall of women's full length chenille robes to include additional chenille robes and three other chenille products all manufactured by A-One Textile & Towel. CPSC and Blair also are re-announcing the earlier recall of women's robes.

FLATWARE RECALLED BY CAMBRIDGE SILVERSMITHS DUE TO CHOKING HAZARD

Cambridge Silversmiths Ltd. Inc., of Fairfield, N.J., has recalled about 13,000 Fiesta Masquerade and Home Olympic Flatware. The plastic decorative inserts on the flatware's handles can detach during dishwashing, posing a choking hazard to children. The company has received 28 reports of a plastic insert detaching from the flatware.

COBY ELECTRONICS RECALLS RECHARGEABLE BATTERIES SOLD WITH PORTABLE DVD/CD/MP3 PLAYERS

About 19,600 rechargeable batteries sold with portable DVD/CD/MP3 players have been recalled by Coby Electronics Corp., of Lake Success, New York. The rechargeable batteries can overheat, posing a fire hazard to consumers.

BABY FOOD RECALLED OVER BOTULISM RISK

Plum Organics of Emeryville, California, is recalling some of its apple and carrot portable pouch baby food because of concerns over possible botulism contamination. The product was sold individually throughout the

country at Toys-R-Us and Babies-R-Us stores.

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

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

DEBBIE CUNNINGHAM

Debbie Cunningham originally came to the firm as a temporary employee in March of 2008 in Mass Torts working on Vioxx cases. After a few months, she became a full-time employee. Debbie currently works as a Legal Secretary for Gibson Vance in Consumer Fraud Section. Her position is not your typical "Legal Secretary" position since Gibson does lots more than litigate cases on a regular basis. He currently is engaged in a great number of activities outside the firm. He is active nationally because of his involvement with the Association for Justice.

Debbie has been married to Jeff for 23 years. They have a 22-year-old daughter, Erin, who is a senior at the University of Alabama and a son, Nicholas, who is a freshman at UAB. She worked for more than 20 years in the securities industry before coming to work for Beasley Allen, and still holds several securities licenses. Debbie has a Series 6, 63 and 26 licenses. Her hobbies include going to Arts & Crafts festivals to find unique handmade, hand painted items. She and Jeff also love to take mini-vacations over three-day weekends. We are most fortunate to have Debbie with the firm.

JOSEPH FULLER

Joseph Fuller has been with the firm for a little over three years. He cur-

rently serves as a Staff Assistant/Law Clerk to Dee Miles in our Consumer Fraud Section. This entails researching case law from state and federal jurisdictions across the country and helping to write briefs. Joseph also works with class opt outs and performs damage calculations in cases.

Joseph currently holds a B.S. in Biology from the University of Alabama at Birmingham, and an M.B.A. with a finance concentration from Florida State University. He plans to finish his Juris Doctorate next month at Thomas Goode Jones School of Law. Joseph serves as a Senior Editor on the school's *Law Review* and is planning to take the Alabama Bar in February 2010.

Between working full-time and attending law school at night, Joseph doesn't have much free time. But, in what free time he does have, Joseph enjoys flying airplanes and he is just about finished with his private pilot's license. He also enjoys spending time with friends and watching HGTV. Joseph is a very good employee and we are fortunate to have him with us.

JUDAH HELMS

Judah Helms, who has been with the firm since October of 2006, currently works as a Runner. In this position Judah makes deliveries and pick-ups for lawyers and their staffs. He also stocks office supplies for each building as well as performing other odd jobs. Judah came to the firm as a temporary employee working with the Mass Torts staff on Vioxx cases before being moved to his current position. Judah, who is a junior at Auburn University at Montgomery where he is majoring in accounting, has made the Dean's List. His hobbies include kayaking, traveling, and following college football. This young man is a valuable employee, who works hard, and performs an important role at the firm.

KIM VAUGHN

Kim Vaughn, after a time away, has been back at the firm for a year and a half. She previously worked here for

about a year before moving back home to Florida. Kim currently works as legal assistant to LaBarron Boone in the Product Liability Section of the firm. She is responsible for drafting legal documents, research, tracking cases, trial preparation, deposition preparation, hearing preparation and scheduling, among other things. LaBarron, with Kim's help, handles wrongful death claims, product liability claims, tractor trailer wrecks, and catastrophic on-the-job injuries caused by defective products.

Kim is married to Stuart Vaughn and they have a sixteen-year-old son, Aaron. They are originally from the Gainesville, Fla., area and moved to Prattville in 2002. They moved to Bokeelia, Florida, in 2004 to be closer to family, but in 2008 decided to move back to Prattville due to missing their friends here in Alabama. We are mighty glad they made that decision.

Kim has an AS degree in Legal Assistant/Paralegal studies from Santa Fe Community College in Gainesville, Fla. She is an active member of the National Association of Legal Assistants (NALA). Her hobbies include photography, gardening, playing Bunko, spending time with family and friends and watching Aaron play high school sports. We are most fortunate to have Kim, who is a very good employee, back with us.

CHRIS GLOVER IS FIRM'S NEWEST SHAREHOLDER

Chris Glover has been made a shareholder. Chris, who practices in the firm's Personal Injury Section, has dedicated his career to representing injured individuals and their families in a wide range of serious injury and death claims, including those that were a result of defective products, car, commercial truck and workplace accidents.

Chris graduated from Cumberland School of Law and practiced in Birmingham, Ala., for a number of years before joining our firm in 2008. He has been recognized by his peers as a

leader and has been elected as a leader in many professional associations including the Chair of the American Association for Justice New Lawyer's Division, Chair of the Emerging Leader's Division of the Alabama Association for Justice, and Officer of the Southern Trial Lawyer's Association.

Chris is married to the former Erin Henley and they have two children, Kaitlyn and Andrew. He is active in church, civic and charitable organizations, including serving as a deacon and Sunday school teacher at his church for a number of years. We are truly blessed to have Chris in our firm.

BEASLEY ALLEN 2009 LEGAL STRATEGIES CONFERENCE AND EXPO

Our firm will once again host the largest conference for Alabama lawyers in private practice this month when we present the 2009 Legal Strategies Conference & Expo. This event used to be called the Beasley Allen Retreat, but the name has grown to reflect the changing nature of the event. Last year, the conference welcomed more than 900 lawyers to Montgomery for continuing legal education. Thus far registration for the year has already topped that figure. We now expect more than 1,000 lawyers to be in attendance. The event will be held on November 20-21 at the Renaissance Montgomery Hotel & Spa at the Convention Center.

We consider this to be the premiere annual event for Alabama lawyers in private practice. It gives us the opportunity to enhance our knowledge of current legal issues while earning continuing legal education credits. The event features a wide range of speakers this year, including former Alabama Governor Albert Brewer; Alabama's senior U.S. Senator Richard Shelby; Greg Cusimano, sought-after trial consultant with Winning Works LLC; Morris Dees, Founder and Chief Trial Counsel of the Southern Poverty Law Center; and noted sports author and head of

The Paul Finebaum Radio Network, Paul Finebaum.

This year, in response to the overwhelming feedback from last year's event, the Conference also will include a legal services expo featuring a very limited number of the nation's top legal services providers. Additionally, the BeasleyAllen.com Racing ARCA car will be on display. Other highlights of this year's conference include a prayer breakfast, luncheon, and dinner reception.

We would like to thank our sponsors for this event, including Lexis Nexis, LegalTube, Lawyers.com, Forge Consulting LLC, Freedom Court Reporting, Asbury Newton, and MediConnect Global. For more information, registration and a complete agenda, visit expo.beasleyallen.com.

XXIV. SPECIAL RECOGNITIONS

JULIA BEASLEY IS GOOD IN COURT AND ON A HORSE



The following is an article written by Helen Taylor featuring one of our lawyers. I believe you will find it most interesting.

As she rode her four-year-old gelding Quarter Horse, Vern, in the finals at the recent Music City Futurity cutting horse show in Franklin, Tennessee, Julia Beasley tried to relax. The horse trembled with intense concentration, anticipating the cow's next move to keep the cow in front of him.

When it was over, the pair earned the Reserve Champion title. Sam Shepard, Julia's trainer, made the Open finals on Vern at the Music City Futurity. Vern was the Non-Pro Champion recently at Magnolia Classic in Canton, Mississippi, with Julia and was Open Reserve Champion with Sam Shepard riding him.

Julia got into the sport of cutting by chance, after stopping at the Crawford Arena in Montgomery, Alabama, in 1999 when she spotted some horse trailers. She had actually started riding horses in the fourth grade when her family moved to Montgomery, but decided to take a break from the sport after getting bucked off a horse in the seventh grade. Shortly afterward, Julia began playing tennis and left behind her four-legged friends to earn a college scholarship on the tennis courts. After graduating from Cumberland School of Law in 1991, Julia says she had a desire to get back to horses, yearning to spend some time in the country and in the saddle. She took some lessons in English riding, but once she saw the cutting horse competition in 1999, she knew she had to try it. Some local friends she met at that first show brought a cutting horse out to her farm to let her try it out.

"I got on the horse, the cow moved, the horse took off to stop the cow and I fell off (because I looked down at the horse instead of keeping my eye on the cow). I first screamed and then I bought the horse," Julia recalls with a laugh. She knew in that instant this is what she wanted to do, although that was the first time to sit on a cutting horse and she knew nothing about "cutting." The sport of cutting is derived from the real-life skills needed by cowboys in the Old West working

a cattle ranch. The cutting horse is trained to separate one cow from the herd at the direction of the rider, and must then keep that cow separated from the others. This skill was used to pull cows for branding, medical attention or other purposes on the working ranch.

In a cutting horse competition, which is a 2.5-minute timed and judged competition, the rider must make a deep cut, drive out the herd of cattle and separate one cow from the herd. Then the rider must drop his or her reins and allow the horse to work the cow and keep it from returning to the herd. The ultimate goal is to work the cow in the middle of the pen. The horse and rider must work together as a team. The rider can stop working the cow once it is stopped or turns away. Then the rider goes back into the herd to separate and work another cow.

Julia purchased "Vern," whose registered name is Duallin in the Snow, from his previous owner, Terry Gay, in May. Vern, a registered Quarter Horse, was born on Walton's Rocking W Ranch in Millsap, Texas, and was owned by Alice Walton of the Wal-Mart Walton family, in 2005. His sire, Dual Rey, is a champion cutting horse. Vern came to Sam Shepard's barn as a yearling. Sam did an excellent job training Vern and demands that the horses he trains perform to their highest potential.

In addition to Vern, Julia has six other horses, including a three-year-old mare, named Thee One, who will be shown by her trainer, Sam Shepard, for the first time at the Championship Futurity at the Will Rogers Coliseum in Fort Worth, Texas, in December. Julia is also entered in the amateur class on Thee One. Her sire is Peptospoonful.

Julia keeps five of her horses at her Montgomery home, while Vern and Thee One (nicknamed "Strawberry") stay in training with Sam Shepard in Verbena, Alabama. A cutting horse usually begins his or her training at age two and begins to show at age three. Julia competes in the amateur class at National Cutting Horse Association (NCHA) Limited Aged Events (for young horses) like The Music City Futurity and other futurities, while trainer Sam Shepard also competes with the horses in the Open class for professional horse trainers. There are weekend shows each month (for all aged horses) in Montgomery and Geneva, Alabama, and Andalusia, Alabama, may begin to have regular cutting horse shows.

Vern is definitely the most athletic cutting horse Julia has ever ridden, she says. "He's really quick and very athletic. He knows how to use his body and is smart on a cow. I'm trying to teach myself to relax, to get out of his way and let him do his thing." Julia also gives all the credit for any success in cutting to God. "God has definitely blessed me with some very nice horses, an excellent trainer and a great family who encourages me, prays for me and takes over 'barn duty' when I go to a show," she said.

While she was thrilled with Vern's Reserve Champion win, she was excited about another honor the pair snagged in Franklin. They earned the top score in the first round of the four-year-old Amateur Class with a score of 219 and won a special award—a pink fleece horse cooler (used as a blanket to dry off the horse when sweaty in the winter) for breast cancer awareness, embroidered with the words, "I was

tough enough to wear pink at the Music City Futurity Award. "Winning that was so special to me because my mom is a breast cancer survivor," Julia said. This was the first year for this award. Julia says that "Vern will wear the pink cooler and will look good in it." Stacy Shepard and her husband, Austin Shepard, sponsored the award. Stacy's mother died of breast cancer when Stacy was just a teenager. The cooler will be a good reminder to everyone that one day we all hope to find a cure for breast cancer.

Helen Taylor
November 1, 2009

A MESSAGE FROM ALABAMA STATE BAR PRESIDENT TOM METHVIN

The Alabama State Bar was proud to help celebrate National Pro Bono Week, October 25-31, 2009. This celebration recognized the valuable work lawyers do throughout the year to represent those who cannot afford civil legal assistance. The event provided a time to reflect on this core value of our profession, celebrate the achievements of pro bono activities, and elevate them to even higher levels of service. This was also a time to both educate the public about the pro bono services attorneys provide, and to celebrate those providing those services—Alabama lawyers. In fact, Alabama was the first state in the nation to officially designate October 25-31, 2009 as Pro Bono Week.

Tom Methvin
November 1, 2009

XXV. FAVORITE BIBLE VERSES

Walter Albritton, one of the pastors at Saint James United Methodist Church, gave me what he refers to as his "life

verse." This verse is set out below and should be a life verse for each of us.

I can do all things through Christ who strengthens me.

Philippians 4:13

My good friend Pete Cobb, a lawyer with the Balch Bingham firm in Montgomery, sent in his favorite verse. Pete believes every Christian who has ever worked for a living has most likely meditated or prayed over this verse.

Whatever you do, work at it with all your heart, as working for the Lord and not for men, since you know that you will receive an inheritance from the Lord as a reward. It is the Lord Christ you are serving.

Colossians 3:23-24.

The Christian Legal Society sent in the following verses for this month's issue. By the way—I encourage all lawyers who have accepted Jesus Christ as their Lord and Savior to join this group.

And we know that all things work together for good to them that love God, to them who are called according to His purpose.

Romans 8:8

In everything give thanks, for this is the will of Christ Jesus concerning you.

1 Thess. 5:18

Giving thanks always for all things to God the Father in the name of our Lord Jesus Christ.

Eph. 5:20

Vickie Dearing, a lawyer from Jacksonville, Fla., sent in the following verse:

Yet the LORD longs to be gracious to you; he rises to show you compassion. For the LORD is a God of justice. Blessed are all who wait for him!

Isaiah 30:18

David Beasley, one of my "Beasley cousins," reminded me that II Chronicles 7:14 can't be over emphasized. David says this is his **current** favorite.

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

II Chronicles 7:14

I appreciate very much our readers sending in their favorite Bible verses. Some say it's really hard to select just one favorite verse since they have so many. From all accounts our readers like this feature of the *Report*.

XXVI. CLOSING OBSERVATIONS

THE LAST IN A SERIES FROM DR. JOHN ED MATHISON

The following is the fourth in the series by Dr. John Ed Mathison. We really appreciate John Ed making this contribution to the *Report*.

Is It Luck?

Often in life we falsely ascribe the term luck to situations and circumstances that really are the result of preparedness, hard work, and God's intervention. Some people collect lucky charms. Neither life nor luck is enhanced by rabbits' feet, horseshoes, or four leaf clovers. The real truth is that luck is what happens when hard work and opportunity cross paths. As Louis Pasteur put it, "Luck favors a prepared mind."

A few months ago 155 people on US Airways flight 1549 had a rare

experience, when that flight made an emergency landing on the Hudson River. The plane didn't break apart and there were no fatalities. Many people referred to it as "luck." It wasn't luck! That plane had a pilot, Captain Chesley Sullenberger, who had worked hard and was prepared for such a moment. He had a record as an instructor for other pilots in how to react in the situation in which he found himself. He had written manuals and had given lectures and offered training for other pilots. He had an opportunity to put all of that into practice.

When I am on an airplane, I don't want a "lucky" pilot, but one who is ready for all situations. I don't want the plane built by "lucky" people, but experts who build with excellence. I remember reading how the passengers said that most of them were praying. God answered their prayers—that wasn't luck but was the result of the intervention of God coupled with the exceptional expertise of a pilot.

If I want to improve my luck, I need to improve my preparation for life's experiences and rely more on the sovereignty of God. As one successful lawyer who was classified as being "lucky" wrote, "I am inclined to recall that luck usually visits me at 2:00 am on a cold morning when red-eyed and bone-weary I am poring over law books preparing a case. It never visits me when I am at the movies, when I am on the golf course, or when I am reclining in an easy chair." Ask God to help you make this a lucky day based on proper preparation, hard work, and complete trust in Him!

*John Ed Mathison
November 1, 2009*

Each installment in this series has been very well received by our readers.

I hope John Ed will write for us again in the future. If you would like to hear more from him, let us know.

A MESSAGE FROM A GOOD FRIEND IN TUSCALOOSA

My long time friend, Mike Bownes, who now lives in Tuscaloosa, sent in the message set out below. Mike serves as Secretary to the University of Alabama Board of Trustees and is Executive Assistant to the Chancellor. This message contains a good lesson for all of us.

I was just reading the story about Joseph in Genesis. Joseph is an excellent example of how tribulation can mold us if we use it as an opportunity to grow. His early life was filled with setbacks and disappointment. Daily as a child Joseph had to experience the envy and jealousy of his older brothers. These emotions reached the point to where they kidnapped him off and intended on killing him. After some debate instead of killing him immediately, they threw him into a pit.

Joseph spent the night in a dark hole with the fear of being murdered the next day by his own brothers. Before his brothers could come back merchants found Joseph and pulled him out of the pit and sold him into slavery. Joseph now had to deal with the disheartening and dreadful prospect of separation from his father and of a life of slavery in a foreign country. While a slave and due to false accusations against him, he was thrown into prison. Despite his demoralizing circumstances, it did not take Joseph long to find favor with the warden and was placed in charge of the other prisoners.

While in prison Joseph interpreted a dream for one of the Pharaoh's employees who was a fellow inmate. The employee promised Joseph that he would assist him if

he got out. However after the employee was reinstated to his position, he forgot Joseph. Joseph was forced to stay in prison for several years. Despite the adversity, captivity and betrayal, Joseph remained steadfast in his faith and relationship with God. Later, and through his Godly discernment, Joseph was able to interpret dreams and saved Egypt from devastation during a seven-year famine.

During this famine, Joseph's brothers came to Egypt for provisions. Despite the atrocities his brothers had committed, Joseph had the grace to forgive them. I wondered if in fact, it was actually the difficulties that he had faced that gave him the grace to forgive his brothers. Was it in fact the tribulation that molded him into the man he had become? If it had not been for the difficulties that Joseph experienced would he have forgiven his brothers?

Joseph is a wonderful inspiration in that he did not let his earthly circumstance determine his joy. Despite his predicament he derived his joy from our Savior. It is a choice! A wonderful godly woman sent me a quote the other day. "Peace is not the absence of conflict, but the ability to deal with it through the grace and power of the Lord!" Joseph ended up with vast wealth and power; however, the tribulation was the avenue to his success. His setback, in fact, had elevated him. God had enlarged Joseph through suffering. The dark pit and the cold iron bars that had captivated him eventually brought him prosperity.

*Michael A. Bownes
November 1, 2009*

XXVII. PARTING WORDS

Things don't always go as planned and neither do they always turn out like we would like for them to. This is a lesson that most of us learn very early in life. Sometimes these lessons are painful or hurtful to us and to others. Recently when my favorite baseball team, the Boston Red Sox, was eliminated from post-season play, I was very much disappointed. Then on Oct. 16th, when the Alabama Supreme Court, in three of the State's Medicaid fraud lawsuits, reversed \$274 million in jury verdicts, I was both shocked and disappointed. These cases were not only very strong, but the money awarded by three separate juries was badly needed by the State of Alabama. Governor Riley and the budget writers were counting on receiving those funds and Alabama taxpayers will be directly affected by what the court did. Finally, the Auburn Tigers—after reeling

off five straight impressive wins—have now lost three games in a row to SEC teams. Clearly, Auburn has fallen on hard times and lots of fair-weather fans are pretty close to jumping ship without really understanding that the Tigers are in rebuilding mode.

Even though two of the above events involve sporting teams and one is a very serious matter, I know for a fact that most folks don't like to lose in anything. But in life losses will occur—even when they shouldn't—and that's a reality for all of us.

With all of the adversity in life, it's real easy to get sort of down and out and to have negative thoughts about life in general. But, I finally learned a number of years back that we can turn any type adversity or hard times over to a loving and powerful God. Having the assurance that our God is in control of all things—good and bad—will get us through these times. It's critically important to keep our focus on our Lord and Savior and His promises at all times and not let other

influences control us. We must trust God—even in the darkest of times—and know that He has the authority and power to get us through the trials and tribulations that we certainly face. He truly understands all that we will ever have to deal with—regardless of the circumstances—and He is always available for us.

I was reminded during one of Walter Albritton's sermons recently that we must embrace by **faith** all that Jesus has taught us and keep **hope** alive. Remember what Jesus said in Matthew 6:26:

Look at the birds of the air; they do not sow or reap or store away in barns, and yet your heavenly Father feeds them. Are you not much more valuable than they?

My faith and hope lies in the promises of Jesus Christ and as a result I can deal with the present and look forward to the future with great anticipation. I trust that all of you can, too!

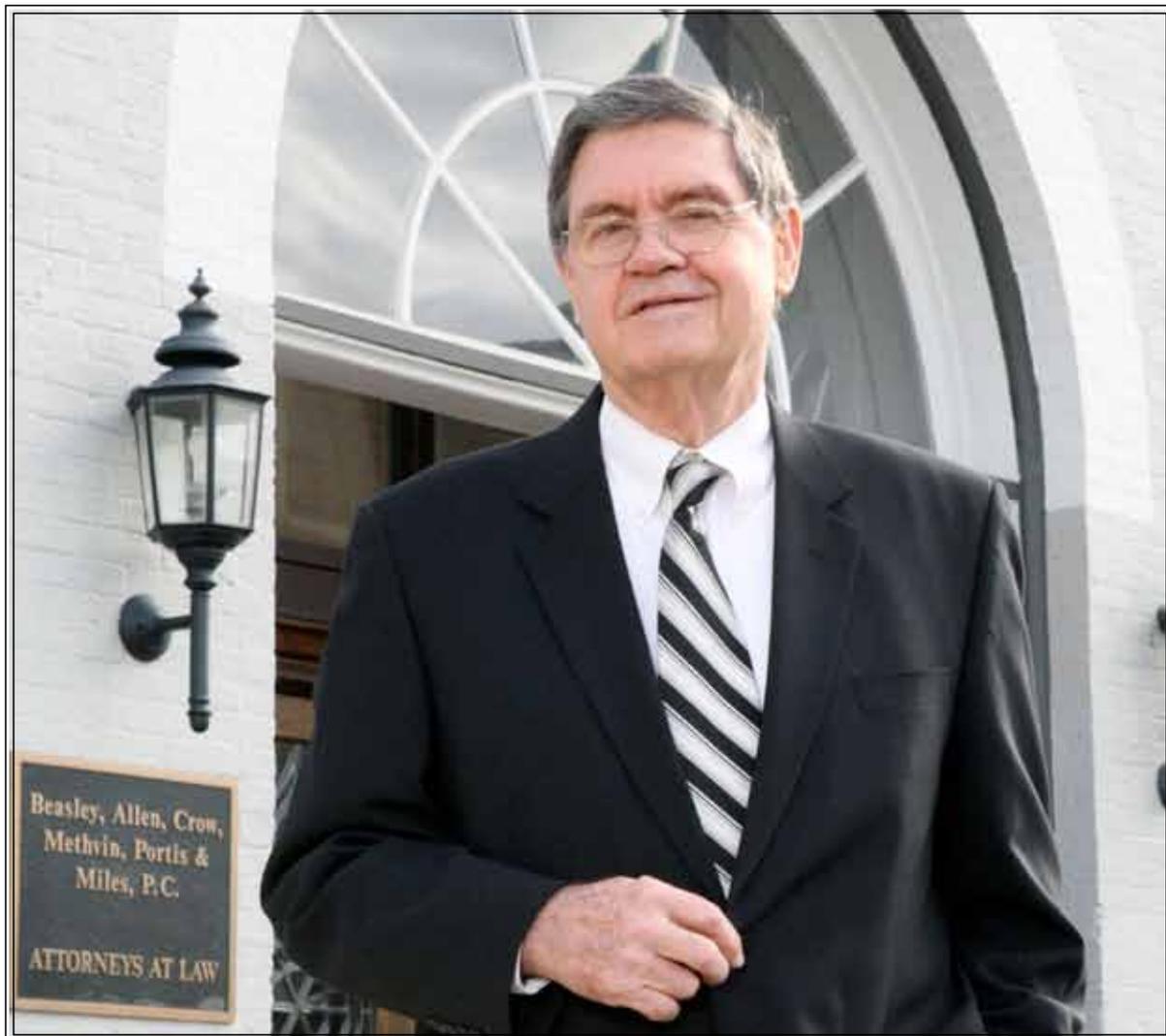
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