



THE
JERE BEASLEY REPORT

DECEMBER 2009

Beasley Allen

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

Helping those who need it most since 1979

Distributed to over 45,000 subscribers each month

www.BeasleyAllen.com

I. CAPITOL OBSERVATIONS

DR. BRONNER HITS THE NAIL ON THE HEAD

Dr. David Bronner spoke last month to the Montgomery Chamber of Commerce's annual economic summit, the Forum. He gave one of the best explanations of how all of the economic problems came about that put our nation into a severe recession. Dr. Bronner also made some projections on what Alabama citizens will face over the next two years. While it was not a pretty picture, it was one we all needed to hear. He pointed out how the state budgets would be affected in 2010 and 2011 due to the severe short fall in available revenues.

Dr. Bronner told the large crowd that Alabama state government has always operated "on the cheap." Even so, he pointed out that there has been unbelievable progress made in Alabama over the past 15 years. Dr. Bronner stressed that the need for moving forward—rather than backwards—must be addressed by our elected leaders during the next four years. Improvements that will benefit all Alabamians are vital to our state. Whether those improvements will come about depends on the persons we elect to office next year. Dr. Bronner suggested that each of us ask serious questions of the candidates and force meaningful debate before deciding on who all to vote for and certainly before going to the polls.

DR. REGINA BENJAMIN CONFIRMED AS U.S. SURGEON GENERAL

The U.S. Senate has confirmed Dr. Regina Benjamin to the position of U.S. Surgeon General. Confirmation came when Senate Minority Leader Mitch McConnell (R-KY), and other Senate Republicans, finally allowed her nomination to go through. They had delayed the confirmation for several weeks over an unrelated issue. This is a great

day for Alabama and I believe for the United States of America. Dr. Benjamin, who was nominated for the post in July by President Obama, will now be the nation's chief health educator. She will do an outstanding job and all Alabamians should be proud of her and I believe they are.

ALABAMA TAXES INCOMES OF POOR MORE THAN ANY OTHER STATE

As we hear constantly from our political leaders, Alabama has one of the lightest tax burdens in the nation and that's considered to be a good thing by most folks. The U.S. Census Bureau released a report recently showing that individuals and businesses in Alabama paid fewer taxes in the 2007 fiscal year than residents and companies in any other state. Adjusted for incomes, Alabama had the third-lowest tax burden in the nation. While this is good news, it doesn't tell the whole story. The reality is that we have a tax structure that is regressive and totally unfair to middle and low-income citizens. It especially hits the latter group extremely hard.

The national study of state tax systems shows Alabama takes a larger share of low-income families' meager earnings than any other state. Alabama has a history of confiscating the money of people who can least afford to pay for state services. The poor and the near-poor have been victims of an inequitable tax structure in our state for many years. I believe it's past time for a reform of our state's tax structure to take place.

While the special interest groups may disagree, I believe we have a moral duty to reform our entire tax structure in Alabama. The current system favors the rich and powerful and penalizes those Alabama citizens in the middle and low-income categories. Those at the bottom are hit the hardest because of our emphasis on the sales tax as a main source of revenue. In fact, Alabama's tax structure rests largely on the sales tax. Obviously, poor families are

hit harder by the sales tax than wealthy and middle-class families.

We have an income tax in Alabama that kicks in well below the poverty level and a regressive sales tax that is levied even on food. Alabama's upside-down tax structure hampers the economic advancement of the poor. It also badly hurts education and other vital services and that will likely get worse next year. The system needs to be dismantled and rebuilt on a balanced foundation that draws more revenue from property taxes. Alabama has kept property taxes at a ridiculously low

IN THIS ISSUE

I.	Capitol Observations	2
II.	Drug Manufacturers Fraud	4
	Litigation	
III.	Purely Political News & Views	5
IV.	Legislative Happenings	6
V.	Court Watch	6
VI.	The National Scene	7
VII.	The Corporate World	8
VIII.	Product Liability Update	9
IX.	Mass Torts Update	12
X.	Business Litigation	19
XI.	An Update On Securities Litigation	20
XII.	Employment and FLSA Litigation	21
XIII.	Insurance and Finance Update	21
XIV.	Premises Liability Update	22
XV.	Workplace Hazards	23
XVI.	Transportation	24
XVII.	Healthcare Issues	26
XVIII.	Environmental Concerns	26
XIX.	The Consumer Corner	28
XX.	Recalls Update	31
XXI.	Firm Activities	33
XXII.	Special Recognitions	35
XXIII.	Favorite Bible Verses	37
XXIV.	Closing Observations	38
XXV.	Parting Words	38

level for more than a century. Don't you believe it's time in Alabama to change our ways?

Source: Associated Press, *Mobile Press Register* and *Alabama Arise*

U.S. CHAMBER OF COMMERCE WORKS FOR THE RICH AND POWERFUL

The U.S. Chamber of Commerce, led by Thomas Donohue, is a lobby group in Washington that without question is politically powerful. It claims to have 300,000 members with some of the largest companies in Corporate America on its rolls. Many observers say the Chamber has done some strange things recently. For example, it supported the Bush bailout program (TARP) and the Obama fiscal stimulus measure and claimed credit for getting both through Congress. It has also opposed efforts to combat climate change which is impossible to understand—that is, until you look at some of its members and consider their special interest in that topic.

The main thrust of the national Chamber is to work for and protect the interests of the rich and powerful and they have done a very good job on that front. But smaller business owners should wonder where their interests rank on the Chamber's list of priorities. The record shows clearly that maintaining the status quo in our Nation's Capitol is tops on the Chamber's priority list. I would say the Chamber has done extremely well in its lobbying activities on that front. As we all know, there is a huge amount of entrenched self-interest in the status quo in Washington.

Lobbyists are paid extremely well to keep things as they are and that has been the case for years. Reinforcing the status quo is their collective goal and that is seldom in the best interest of ordinary folks in this country. President Obama is trying to disrupt the way things have worked in Washington over the past many years. He doesn't believe that way of running the government has served the American people as a whole very well and I agree with him whole-heartedly. This President wants

to give the people a real voice in the affairs of their government. I see the Chamber of Commerce as a real stumbling block for him!

A LOOK AT HOW MOST SOUTHERNERS FEEL

A recent poll shows Southerners are greatly worried about job loss and the economy. The poll results reveal that most Southerners don't believe the federal government is doing enough to address either of these problems. The Winthrop Poll conducted in 11 Southern states found the economy was the top concern of four in ten—the same share of people who said they were concerned about losing their jobs. Overall, the economy was the biggest worry for 39% of Southerners, followed by health care and unemployment at 12% each. Meanwhile, 38% said they were somewhat concerned or very concerned about possibly losing their jobs during the next year.

The poll respondents overwhelmingly said that getting out of the nation's financial mess is something the government should take the lead on. Nearly 72% said they favored new government programs to create jobs. Meanwhile, 63% said the federal government needs to give aid to states in serious financial trouble. Those positions were strongest among Democrats and independents, while Republicans were narrowly opposed. Nonetheless, nearly 58% of the Southerners polled said the current federal stimulus efforts were making things worse or having no effect.

Source: *Tuscaloosa News*

PACT CONTRACTS MUST BE HONORED

While there has been a great deal of talk over the past several months about Alabama's Prepaid Affordable College Tuition Trust Fund (PACT), we have seen no real action taken toward solving a major problem that affects lots of Alabamians. The PACT program was established to provide benefits to all contract holders in the form of tuition and fees to attend Alabama's col-

leges or universities. The PACT Board exercises full authority over the actuarial and financial safety and solvency over the PACT plan to meet the obligations of PACT contract beneficiaries.

PACT assets were reduced by hundreds of millions of dollars due to massive losses in the underlying equity of PACT's assets. In laymen's language, they lost their shirts in the stock market. As has been documented, the investment losses made it impossible for PACT to meet its obligations for approximately 48,000 PACT contract holders. These contracts were purchased by persons who relied implicitly on the "promises made, promises kept" guarantees and representations stated in PACT contracts. Based on reliable information, many also relied on communications from persons associated with PACT.

Since the beginning of PACT 20 years ago, 76,251 contracts have been purchased to provide the stated benefits of the PACT contracts. Folks are greatly upset and rightfully so at what has happened. The massive unfunded liabilities of PACT's plan to meet the obligations for the active 48,000 contract holders are the focal point of the problem. All contracts entered into by the PACT Board with nearly 48,000 future university and college students must be honored.

It has been reported that the investment fund backing Alabama's prepaid college tuition program is about \$350 million short of what it needs to meet its obligations. The program's assets, once valued at nearly \$900 million, were heavily invested in stocks, and their value fell below \$500 million. The program now lacks the resources to meet its obligations. The Governor and the Legislature must work together to save this program. The 2010 Legislative session begins in January. Gov. Riley, legislators from both political parties and members of the PACT Board must work out a solution to this matter in advance and have any needed legislation ready for introduction when the legislators come to Montgomery for the session.

ALABAMA'S ETHICS LAW SHOULD BE TOUGHER

Alabama's Ethics Commission operates sort of like a combination of a police department for public officials and a source of information about the laws governing their conduct. The Commission receives citizens' reports of potential violations, investigates these complaints and, where appropriate, punishes wrongdoing. In my opinion, the Commissioner doesn't have all the tools it needs to do its job. There are 40 states that have ethics commissions and 37 grant their commissions the power to subpoena witnesses. There are three states that don't: Alabama, Michigan and North Carolina.

The Alabama Ethics Commission needs some help in its authority to investigate public corruption. Currently, the Commission can look into ethics complaints against public officials, but only upon a signed formal complaint and with the voluntary cooperation of subjects. When wrongdoing is found, the commission can either fine the individual or refer the case to the state Attorney General or the District Attorney of the county where the offense occurred. The Alabama Ethics Commission needs the authority to subpoena witnesses and records. I believe the Legislature should pass the necessary legislation to give the Alabama Ethics Commission subpoena power.

Source: *Mobile Press Register*

MADD NEEDS YOUR HELP

Mothers Against Drunk Drivers (MADD) is an organization that works tirelessly to make our highways safer and to save lives. During the holiday season the consumption of alcoholic beverages increases and that leads to drunks behind the wheels of vehicles on the roads throughout the country. MADD has fought hard to bring about changes in the laws that relate to drinking and driving, but there is much yet to be done in that arena. Such things as mandatory ignition interlock devices and stronger laws and enforcement

against drunk driving are needed and MADD is working on those projects at the federal and state levels.

MADD currently has the Campaign to Eliminate Drunk Driving in progress and needs your help. Please make a financial donation during the holidays. Send your check to MADD at 511 East John Carpenter Freeway, Suite 700, Irving, Texas 75062. You can get more information on MADD by going to www.madd.org or by calling 1-800-GET-MADD. Also make a pledge not to drink and drive and to make sure your family and friends make a similar pledge.

II. DRUG MANUFACTURERS FRAUD LITIGATION

UPDATE ON KENTUCKY'S CASE AGAINST SANDOZ

You will recall that a jury found against Sandoz in the civil case filed by the State of Kentucky. Now the judge in that case has awarded a total of \$13,632,000 to Kentucky in civil penalties. This was based on 13,632 separate violations by Sandoz in submitting false prices to the Medicaid program at \$1,000 per violation. This covered the entire damages period which consisted of 64 months. In addition, the Court granted the State's motion for prejudgment interest, as well as its motion for post-judgment interest (which is at 9%) on the compensatory damages only.

VERDICT IN KENTUCKY AGAINST GSK

There was also a verdict last month against GlaxoSmithKline in Kentucky. The jury awarded \$661,000 in damages in that state's Medicaid fraud case. The trial judge can still award significant fines in the case since the jury found that GlaxoSmithKline violated the state's Consumer Protection Act. Based on the Sandoz result, that will substantially increase the amount of the total verdict.

UTAH SETTLES LAWSUIT WITH ELI LILLY FOR \$24 MILLION

The state of Utah has settled its lawsuit against Eli Lilly for \$24 million. The settlement was based on the pharmaceutical giant's off-label marketing of Zyprexa, which as you know is an anti-psychotic drug. Utah Attorney General Mark Shurtleff made the announcement on November 11th, pointing out that "the victims were those who could least afford health care." The settlement money comes at an opportune time for Utah. In January, state lawmakers will have to deal with a potential \$850 million shortfall.

Source: News Release From Attorney Generals' Office

DRUG FIRMS SETTLE LAWSUIT ALLEGING INFLATED PRICES

Iowa has settled Medicaid fraud claims with a number of drug manufacturers for \$4.3 million. The claims against the pharmaceutical companies involved submitting false prices which resulted in taxpayers being overcharged for medications. Eight of 78 companies the state sued in federal court two years ago are paying to settle allegations that they intentionally cheated the Iowa Medicaid program by charging inflated drug prices. The settlement was announced by Attorney General Tom Miller, who said the settlement represents a very small portion of the drug companies that were sued by the state in 2007. The state's lawsuit continues against about 70 other drug manufacturers. Each is alleged to have overpriced its products to increase reimbursements paid by the state's Medicaid program.

The drug companies that settled are among the smallest of the ones that were sued by Iowa. The fraudulent prices exceeded the true prices by as much as 1,000% between 1992 and 2005. During that period, Iowa's Medicaid program spent \$1.6 billion on the 78 companies' drugs.

Source: *Des Moines Register*

ASTRAZENECA PAYS \$520 MILLION TO SETTLE SEROQUEL CASES

AstraZeneca, one of the drug manufacturers sued in Alabama, has reached a \$520 million agreement to settle two federal investigations and two whistleblower lawsuits over the sale and marketing of Seroquel, its blockbuster psychiatric drug. One of the investigations related to “selected physicians who participated in clinical trials involving Seroquel,” according to AstraZeneca in a government filing. The other case related to off-label promotion of the drug. As a result of aggressive marketing, Seroquel has been increasingly used for children and elderly people for indications not approved by the Food and Drug Administration. Doctors are permitted to prescribe any approved drug for off-label uses. Seroquel was the top-selling antipsychotic drug in America. It has had \$17 billion in sales in the United States since 2004, according to IMS Health, a research firm.

AstraZeneca joins a list of drug manufacturers that have paid billions of dollars to settle investigations initiated by complaints from former company insiders. Earlier this year, Eli Lilly & Company paid \$1.4 billion over its marketing of Zyprexa, another antipsychotic drug. Pfizer is paying \$2.3 billion, including a record \$1.195 billion criminal fine, mostly over its painkiller Bextra, which has been withdrawn from the market.

According to AstraZeneca, 14,444 civil lawsuits have been filed over the drug against the company as of October 9th. Many patients have developed diabetes and other health problems because of misleading marketing. It should be noted that in an internal email message, an AstraZeneca official said “a great ‘smoke and mirrors’ job” had been done on a “buried” study in 1997, the year the FDA approved Seroquel. Significantly, we saw that identical statement made in our Medicaid fraud case.

Source: *New York Times*

CALIFORNIA AND 14 OTHER STATES SUE AMGEN OVER ANEMIA DRUG

Fifteen states have filed a lawsuit against Amgen Inc., the biotech giant, accusing the company of offering kickbacks to medical providers to boost sales across the country of its anemia drug Aranesp. This is a drug that has been beset by safety concerns. In a suit, filed in federal court in Massachusetts, the states accuse Amgen sales representatives of encouraging doctors and other healthcare providers to bill insurers for Aranesp that the practitioners received free from the company.

The practice, which the suit contends was known to Amgen’s upper management, is said to have cost taxpayer-funded Medicaid programs and other insurers millions of dollars in overpayments. The suit also alleges that Amgen, which is based in Thousand Oaks, California, conspired with two other Defendants—ASD Healthcare (a drug wholesaler) and International Nephrology (a group drug-purchasing network)—to offer “illegal inducements” to medical providers to increase sales of Aranesp. These allegedly included sham consulting agreements, weekend retreats and other rewards.

Anemia drugs, including Aranesp and two others produced by Amgen—Epopen and Procrit—are given to kidney disease and cancer patients to boost red blood cell production and raise hemoglobin levels. According to a report on a 2006 Congressional hearing, the drugs are the single biggest medication expense for the Medicare program.

The recently-filed lawsuit against Amgen focuses on a practice known as “overfill.” Aranesp is often sold in one-dose vials. Pharmaceutical industry standards require that drug makers include a small amount of medicine in excess of the prescribed dosage—known as overfill—in such vials, according to the suit. However, the suit alleges that at least as far back as 2002, Amgen manufactured Aranesp with overfills that were well above the recommended amounts. According to the suit, the overfill allowed doctors, hospi-

tals and other medical providers to bill their patients’ insurers for medicine that the provider had essentially gotten free. It’s alleged in the suit that: “In offering the overfill inducement to medical providers, Amgen’s sales force encouraged medical providers to administer higher doses of Aranesp to patients without any clinical need for that higher dose.”

Amgen prepared spreadsheets calculating potential revenue from overfill billings that the drug maker’s sales reps could show to their clients during office visits, the lawsuit contends. In the suit, one Amgen saleswoman alleges that she was trained “how to show medical providers the overfill and other economic incentives without leaving any documentation behind.” The lawsuit describes alleged instances of New York healthcare facilities submitting Medicaid reimbursement claims for Aranesp that were ineligible for payment because Amgen’s alleged overfill practices violated the state’s anti-kickback laws.

The states involved in the lawsuit accuse Amgen of violating a variety of state laws, including fraud, false claims and unjust-enrichment statutes. The suit is seeking triple damages and civil penalties, which in some states amount to \$10,000 per violation.

Source: *Los Angeles Times*

III. PURELY POLITICAL NEWS & VIEWS

STATE GOP WILL APPARENTLY PLAY ROUGH NEXT YEAR

It appears from media accounts that the Alabama Republican Party will play pretty rough in the upcoming political races. The GOP leaders are on record as saying this will be their plan to put the party in control of the Alabama Legislature. I found it sort of weird for them to make their plan public this early since it really affects the 2010 general election.

The last phase of the party's Campaign 2010, which includes an effort to take control of the Legislature from the Democrats, was laid out recently by Mike Hubbard, who is chairman of the Alabama Republican Party, and Del Marsh, a state Senator from Anniston.

Several newspaper editorial writers have cautioned the GOP leadership to be careful when throwing stones at the Democrats, especially if some of their leaders, either in the past or currently, live in "glass houses." That seems to be good, sound advice, but I doubt it will be followed.

TIM JAMES IS MAKING A MOVE

It appears that Tim James is gaining ground on Roy Moore (who continues to lead in all of the polls) in his campaign to be governor of Alabama. It also appears that the James campaign will be extremely well funded and that is a major plus for Tim. My long-time friend Guice Slawson is heavily involved in the James campaign and that also has to be a big plus for Tim. There is no question about Tim's willingness to work. Nor can his toughness be challenged. In my opinion Tim will definitely be a leading contender for the GOP nomination.

MICHEL NICROSI TO RUN FOR ATTORNEY GENERAL

Michel Nicrosi, a former assistant U.S. Attorney in South Alabama, has made it official. She will join the race for Attorney General as a Democrat. Michel, who had been considered for the U.S. Attorney spot in Alabama's Middle District, becomes the fourth candidate in the race. Giles Perkins, former executive director of the Alabama Democratic Party, has announced that he will run to become the state's top prosecutor. On the Republican side, incumbent Attorney General Troy King faces a strong primary challenge from Birmingham lobbyist/lawyer Luther Strange who most believe is being financed by the powerful drug industry.

Source: *Mobile Press Register*

IV. LEGISLATIVE HAPPENINGS

SPECIAL ELECTION RESULTS

There have been winners declared in two more special elections in Alabama. This has been the season for such elections in our state.

Elaine Beech Wins House Seat

Democrat Elaine Beech has won the special election for the open seat in Alabama House of Representatives District 65. The newly-elected House member, a Chatom pharmacist, received 53% of the votes in the race. Her Republican opponent, Jerry Reed, received 47%. Ms. Beech, who currently serves on the Washington County school board, will give up her seat on that board.

Lawrence McAdory Wins Runoff

Lawrence McAdory, who served previously in the House of Representatives, will return to the Legislature after beating out political newcomer Claire Mitchell in a runoff election for the vacant seat in House District 56. No Republicans ran for the seat, so this one is decided.

V. COURT WATCH

SUPREME COURT UPHOLDS TENNESSEE MINIVAN PUNITIVE DAMAGES AWARD

The U.S. Supreme Court has allowed a punitive damages award arising out of a Tennessee case to stand. The case, *Flax v. DaimlerChrysler Corp.*, involved a product liability claim. A substantial award of punitive damages in the case had been upheld by the Tennessee Supreme Court in a detailed opinion. The Highest Court in the land recently

denied the Defendant's petition for a writ of certiorari to the High Court.

The tragic facts of the case need to be mentioned briefly. Joshua Flax, an eight-month old infant, was riding in a child's safety seat in the right rear passenger seat of a 1998 Dodge Caravan in Davidson County, Tennessee, with his mother in the left rear passenger seat. The infant's grandfather was driving the van, and another passenger was seated in the right front seat. The van was struck in the rear by a pickup truck that was traveling at an excessive speed. The velocity of the collision caused the backs of the seats of the mother, the grandfather, and the front seat passenger to yield rearward in a reclining position. The back of the head of the front seat passenger struck Joshua's forehead, fracturing his skull and causing severe brain damage. As you may know, the seatback in cars is supposed to be a safety device and should help protect occupants. Joshua died the next day from his injuries.

During the trial, the experts for both parties testified that Joshua would not have been seriously injured if the seat in front of him had not yielded rearward. DaimlerChrysler asserted during the trial that the rearward yielding of the seats protected the occupants of the seats, that the seats exceeded government safety regulations, and that other automobile manufacturers utilized similar seats. The Plaintiffs produced a former employee of the carmaker at trial who testified that he was fired as a whistleblower because he investigated minivan seat safety problems in the mid-1990s.

A Nashville jury found that company was liable and awarded \$2.5 million in compensatory damages and \$98 million in punitive damages. The trial court reduced the punitive damages to \$13,367,345 for the wrongful death of the infant and \$6,632,655 in punitive damages to the mother on her negligent infliction of emotional distress claim. The Court of Appeals of Tennessee reversed both punitive damages

awards. Subsequently, the Tennessee Supreme Court affirmed the denial of punitive damages for the mother's claim, but upheld the award of punitive damages on the wrongful death claim. Justice Holder, in her majority opinion, wrote that DaimlerChrysler had marketed the Dodge Caravan as a vehicle that placed safety first. It was stated in the opinion:

Not only did DCC fail to warn customers or redesign its product, DCC hid the evidence and continued to market the Caravan as a vehicle that put safety first. Because the jury's verdict is supported by clear and convincing material evidence, we must affirm the jury's finding of recklessness.... In addition, DCC deceitfully covered up evidence of the deficiencies of its seat design while simultaneously advertising the Caravan as a vehicle that put children's safety first.

DaimlerChrysler argued to the Supreme Court that the award of punitive damages on the wrongful death claim was excessive and that the Trial Court violated the due process requirements by allowing the jury to consider harm to non-parties. They also argued that the award was not justified because the evidence did not support a finding of recklessness by the company.

The Tennessee Supreme Court held that the 1 to 5.35 ratio was acceptable in this case. Furthermore, the Court said a punitive damage award of \$13,367,345 is consistent with the concept that the reprehensibility of a Defendant's conduct is the most important part of the due process guideposts. The Court said the award was justified by DaimlerChrysler's long-term pattern of conduct that resulted in severe injuries to the Plaintiffs and showed a conscious disregard for the safety of Tennessee citizens. It's certainly significant that the U.S. Supreme Court refused to hear this case.

Source: law.lexisnexis.com

VI. THE NATIONAL SCENE

RECENT POLL RESULTS SHOW MOST AMERICANS ARE INDEPENDENT

Three major polls released recently by recognized public opinion pollsters have findings that both political parties should heed. Most of the questions in the polls dealt with the ongoing health-care debate in Washington and there were mixed results on that subject. But I thought one of the most significant findings from the polls was that most Americans consider themselves to be independent from a political perspective. In one of the polls (*NBC-Wall Street Journal*) the findings were Independents 44%, Democrats 30%, and GOP 17%.

DRUG MAKERS RAISE PRICES IN FACE OF HEALTH CARE REFORM

The drug manufacturers have claimed to support the badly-needed health care reform by agreeing to take \$8 billion a year off the nation's drug costs after the legislation takes effect. That sounds real good, but the industry has been hard at work raising its prices at the fastest rate in years. In the last year, the drug industry has raised the wholesale prices of brand-name prescription drugs by about 9%, according to industry analysts. That will add more than \$10 billion to the nation's drug bill, which is on track to exceed \$300 billion this year. By at least one analysis, it is the highest annual rate of inflation for drug prices since 1992. The American public should be outraged!

CORPS OF ENGINEERS RESPONSIBLE IN KATRINA FLOODING CASE

A federal judge in Louisiana has ruled that the U.S. Army Corps of Engineers' failure to properly maintain and operate the Mississippi River-Gulf Outlet (MRGO) was a substantial cause for the flooding of part of the New

Orleans-area during Hurricane Katrina in 2005. The Plaintiffs contended in the class action lawsuit that continuing environmental damage resulting from construction by the Corps of the MRGO, a 75-mile, man-made shipping channel dubbed "hurricane highway," left the area vulnerable to flooding. U.S. District Judge Stanwood Duval Jr. wrote in his opinion:

The negligence of the Corps, in this instance by failing to maintain the MRGO properly, was not policy, but insouciance, myopia and shortsightedness. For over forty years, the Corps was aware that the Reach II levee protecting Chalmette and the Lower Ninth Ward was going to be compromised by the continued deterioration of the MRGO.

While the Corps had the "opportunity to take a myriad of actions to alleviate this deterioration or rehabilitate this deterioration," it failed to do so, Judge Duval wrote. He said the Corps had introduced no evidence in the course of the court proceedings that "tips the balance in its favor." The judge awarded some \$700,000 in damages to three individuals and one business in the St. Bernard Parish area.

The award raises the possibility that the government may be liable for billions of dollars of damages suffered by more than 120,000 other area businesses and residents who filed similar claims after Katrina. Judge Duval found in this case that the Corps' failure to maintain the MRGO did not contribute to the flooding in New Orleans East after Katrina. The U.S. Department of Justice is expected to appeal the ruling to the U.S. Court of Appeals for the Fifth Circuit.

Source: *Insurance Journal*

VII. THE CORPORATE WORLD

JP MORGAN PAYING \$700 MILLION TO SETTLE SEC CHARGES

JP Morgan Chase & Co. has agreed to a settlement worth more than \$700 million with the Securities and Exchange Commission. The settlement arose out of charges by federal regulators that the Wall Street bank made unlawful payments to friends of public officials to win municipal bond business in Jefferson County. As all Alabamians are painfully aware, the scandal over the county's \$3.9 billion debt has pushed our largest county to the brink of filing what would be the biggest municipal bankruptcy in U.S. history.

Interest-rate swap contracts with the county worth \$700 million had been cancelled by JP Morgan in March. JP Morgan will pay a \$25 million civil fine, a \$50 million payment to the county and will forfeit \$647 million in termination fees it claims the county owes from the canceled swap agreements.

The SEC has also filed a lawsuit against two former managing directors of JP Morgan Chase Bank, alleging that Charles LeCroy and Douglas MacFaddin arranged the payment of millions of dollars in bogus consulting fees to two other investment banks that had a "close relationship" with county commissioners. In return, the suit says JP Morgan was paid to structure \$5 billion interest-rate swaps, which were a type of insurance agreement that purported to protect the county's billions in sewer bonds from swinging interest rates.

JP Morgan's securities division was the managing underwriter of the bond offerings and its affiliated bank served as swap provider for the transactions. JP Morgan failed to disclose any of the unlawful payments or conflicts of interest in the bond offering documents, but passed on the cost of the payments by charging the county higher interest

rates on the swap transactions, according to the SEC.

Source: Associated Press

LAWSUIT FILED BY JEFFERSON COUNTY

In a related matter, Jefferson County has filed suit against JP Morgan Chase & Co. and others. This suit, contending that some of the county's sewer systems financing deals were tainted by fraud and conspiracy, appears to be long overdue. The suit filed in Jefferson County Circuit Court claims the deals increased the county's sewer bond debt by millions of dollars and exposed the county "to an unconscionable degree" of financial risk. The county, which has been pushed to the brink of bankruptcy by the huge debt, could recover damages in this case estimated to be in the billions of dollars.

Source: Birmingham News

STRYKER UNIT INDICTED IN MARKETING SCHEME

Medical device maker Stryker Biotech LLC and some of its top management have been indicted on federal charges they conducted a fraudulent marketing scheme for bone-growth products. As you know, Stryker Biotech, based in Hopkinton, Mass., is a division of Stryker Corp. of Kalamazoo, Michigan, a maker of orthopedic devices and other hospital products.

The indictment charged Stryker Biotech, its former president, Mark Philip, and three current sales managers with a scheme that involved devices used during invasive spinal and long bone surgeries. Both Philip and the company also were charged with making false statements to the U.S. Food and Drug Administration. Stryker has been the target of a federal grand jury probe, which began in 2008, related to its bone growth products. Stryker and its executives promoted devices known as OP-1 Implant and OP-1 Putty for use in a manner that was different from the use approved by the FDA, according to the Justice Department.

The company had a federal exemption that authorized it to sell only limited quantities of the bone-growth products for "humanitarian" reasons to treat a rare condition. Instead, the government says Stryker promoted a combination of the devices with a bone void filler, called Calstrux, and provided "recipes" of how to mix the OP-1 products with Calstrux in ways never presented to or approved by the FDA. If convicted on all charges, Stryker Biotech faces fines of \$500,000 or twice the gross gain or loss from the offense, on each count. The indicted individuals face lengthy jail terms if convicted of wire fraud, conspiracy and misbranding charges.

Source: Reuters

BIRMINGHAM LAWYER APPOINTED TO IMPORTANT FEDERAL POST

Tom Krebs has been named to a senior post with the Congressional commission investigating the near collapse of the nation's financial system last year. Tom will serve in a senior post on the panel. The Birmingham lawyer, who is the former head of the Alabama Securities Commission, was named assistant director and deputy general counsel of the Financial Crisis Inquiry Commission (FCIC). Tom, who is with the Birmingham law firm of Haskell Slaughter Young & Rediker, will begin work in Washington immediately.

As you will recall, the FCIC was formed by Congress this year to examine the causes of the meltdown that cost hundreds of thousands of jobs after bankruptcies and major financial losses at major Wall Street firms. The role of highly-leveraged mortgage-backed investments and so-called "derivative investments," which represent little more than speculation on the direction of interest rates by some of the country's most respected financial institutions, should be looked at carefully and appropriate action taken.

Tom has developed a national reputation as both a regulator and lawyer in the private sector for his ability to "investigate and prosecute financial

corruption.” It was reported that Congress expects findings and an official report by December 2010. I predict that Tom will do an outstanding job and we all wish him the very best.

Source: *Birmingham News*

OMNICARE SETTLES KICKBACK SCHEME CLAIM

At least \$68 billion is lost **every year** to health care fraud—and that is considered to be a conservative estimate. Most would agree that we need to crack down hard on those who cheat the system. That’s certainly how I believe most Americans feel. Based on what I have learned in litigation, the drug industry is one of the worst corporate offenders ever. But there are certainly others who apparently believe cheating the federal and state governments is OK.

Omnicare Inc., the nation’s largest pharmacy for nursing homes, agreed to pay the federal government and several states \$98 million to resolve allegations that they were involved in a fraudulent kickback scheme with nursing homes and drug manufacturers. According to the federal government, Omnicare allegedly “solicited and received” kickbacks from healthcare giant Johnson & Johnson in exchange for “agreeing to recommend that physicians prescribe” the company’s anti-psychotic drug, Risperdal. The government reported that the payments to Johnson & Johnson were disguised as data fees, educational grants, and fees to attend Omnicare meetings. However, Johnson & Johnson was not the only player in this fraud game.

The government alleged that Omnicare also solicited and received \$8 million in kickbacks from drug manufacturer IVAX (a unit of Teva Pharmaceutical Industries Ltd.) in exchange for Omnicare’s agreement to purchase \$50 million in drugs from IVAX. Omnicare allegedly also paid kickbacks to nursing home chains—in one case shelling out \$50 million to just two of these chains.

The Justice Department stated that Omnicare’s alleged actions with both Johnson & Johnson and IVAX caused false claims to be submitted to Medicare, Medicaid, and other federal healthcare programs. Assistant Attorney General Tony West stated that “these Defendants broke the law to take advantage of our nation’s most vulnerable citizens—the elderly and the poor.” He went on to say:

Illegal conduct like this can undermine the medical judgments of healthcare professionals, lead to patients being prescribed medications they do not need, and drive up the costs of healthcare.

This Omnicare case originated with five lawsuits filed by individuals who reported the alleged false claims to the government. Johnson & Johnson was served with two whistleblower lawsuits in April that were connected to its conduct with Omnicare. The Justice Department said that it expects to make a decision soon as to whether it will intervene in the lawsuits against Johnson & Johnson. As far as IVAX is concerned, the Justice Department reported that IVAX will pay \$14 million to settle allegations of its behavior in this kickback scheme.

As you are probably aware, many states and the Department of Justice have sued J&J, Ivax, and other pharmaceutical companies for making false claims to State Medicaid programs. This newest scheme to defraud Medicare and Medicaid—by providing illegal kickbacks to Omnicare—appears to be just another example of big pharmaceutical companies cheating the system in order to inflate their profits with taxpayer dollars. As counsel for seven state Medicaid programs in the AWP litigation, our firm is working to reign in these pharmaceutical giants who apparently believe that they just don’t have to follow the rules like everyone else. If you need additional information on this matter contact Clay Barnett at 800-898-2034 or by email Clay.Barnett@beasleylln.com.

Sources: The Associated Press, *CBS Evening News*, and *Wall Street Journal*

VIII. PRODUCT LIABILITY UPDATE

RUNAWAY TOYOTA CASES IGNORED

We have written about Toyota and its sudden acceleration problems in prior issues. An ongoing *Los Angeles Times* investigation has revealed that more than 1,000 Toyota and Lexus owners have reported since 2001 that their vehicles suddenly accelerated on their own. In many of these cases, the vehicles slammed into trees, parked cars and brick walls, among other obstacles. The crashes resulted in at least 19 deaths and scores of injuries over the last decade. Federal regulators say that is far more than any other automaker has experienced. NHTSA has done a poor job of carrying out its responsibilities in regard to this problem.

Owner complaints helped trigger at least eight investigations into sudden acceleration in Toyota and Lexus vehicles by the National Highway Traffic Safety Administration in the last seven years. As reported, Toyota Motor Corp. recalled fewer than 85,000 vehicles in response to two of those probes. NHTSA closed six other cases without finding a defect. But according to the *Times* those investigations systematically excluded or dismissed the majority of complaints by owners that their Toyota and Lexus vehicles had suddenly accelerated, which sharply narrowed the scope of the probes. Meanwhile, fatal crashes involving Toyota vehicles continued to increase. In a written statement, the NHTSA told the *Times* its records show that a total of 15 people died in crashes related to possible sudden acceleration in Toyota vehicles from the 2002 model year and newer, compared with 11 such deaths in vehicles made by all other automakers.

The Times located federal and other records of 19 fatalities involving Toyota and Lexus vehicles from the same model years in which sudden or unintended acceleration may have

been a factor, as well as more than 1,000 reports by owners that their vehicles had suddenly accelerated. Independent safety expert Sean Kane, president of Safety Research and Strategies, says he has identified nearly 2,000 sudden-acceleration cases for Toyota vehicles built since 2001. Other experts say the numbers may be far higher, based on a 2007 NHTSA survey of 600 Lexus owners that found 10% complained they had experienced sudden acceleration.

Just as this issue was going to the printer, we learned that Toyota had recalled all of the accelerator pedals in the cars. I am not sure how extensive this recall is.

Source: *Los Angeles Times*

MEMPHIS JURY AWARDS \$6.5 MILLION TO TEENAGER INJURED BY FORD SEATBELT

A Memphis jury has returned a \$6.5 million judgment against Ford Motor Co. to the family of a boy who was critically injured in a 2002 two-car crash that also killed three men, including his father and grandfather. The Circuit Court jury found that Ford was liable for 15% of its \$43.8 million total judgment because the adult seatbelt used by six-year-old Billy Meals was deemed to be defective and not suitable for a child. The rest of the judgment was against the deceased driver of the other vehicle whose estate was not a party in this case.

Billy Meals, now 14, remains paralyzed below the waist. He was in the back seat of his grandfather's 1995 Mercury Grand Marquis in an adult seatbelt with the shoulder strap behind his back because it did not fit. Jurors found that Ford was responsible for the boy's enhanced injuries in the accident, which occurred in 2002. The Meals' vehicle was struck head-on by a 1972 Oldsmobile Cutlass driven by John M. Harris, who was also killed. Police spotted him driving at a high rate of speed just before the crash and witnesses said his car clipped another vehicle, veered into the southbound lanes of the highway and hit the Meals'

car. Harris, who was intoxicated and had cocaine in his system, was found to be 70% at fault. The boy's father was found to be 15% at fault as the custodial parent at the time of the accident. Neither was a party in the suit.

Source: *The Commercial Appeal*

TORSION BAR LOAD LIMITERS ARE A DANGEROUS FIX FOR A NON-EXISTENT PROBLEM

Many of you remember the rip stitch seatbelt designs of a few years back that purposely allowed slack to be placed into the belt system when the belt was loaded. Those seatbelts resulted in numerous unnecessary injuries and deaths when the belts became too loose to protect the occupants. Those designs are no longer in use, but another design with the same effect is being used in many vehicles on the road today. That design is the torsion bar load limiter retractor.

A torsion bar is a device designed to purposely allow a section of the belt to spool out of the seat belt retractor in a frontal collision when the belt exhibits pressure of around 600-800 lbs. Automobile manufacturers allegedly include the torsion bar to improve chest g's [the forces the chest sees from the belt in an accident] for safety. It does so by spooling the shoulder belt webbing several inches when the pressure reaches 600-800 lbs.

The problem is that chest g's aren't really causing problems in the real world. Car manufacturers never had a problem passing the federal guidelines for chest pressure even before the inclusion of this component. They didn't even have a problem before airbags, and airbags improved the issue. So why are the car manufacturers putting torsion bars in vehicles? The real reason is marketing to sell more cars. The auto manufacturers can get better test scores on the New Car Assessment Program during their frontal crash tests by including this device. These better scores result in more stars for safety.

The problem with the torsion bar arises when those seatbelts are involved in rollover crashes. Rollovers, unfortunately, aren't tested in the safety rating testing. The actuation of the torsion device during a rollover allows too much slack in the belt system. The occupant is allowed to be thrown about the vehicle without the benefit of a tight belt.

Correcting this problem would be easy by simply raising the deployment of the torsion bar to 900-1200 lbs. This would allow the real world safety of chest g's to be lowered without the problem we are seeing in rollovers. They won't likely do this without pressure because it won't benefit their beloved safety ratings. We call for safety that protects people in the real world instead of gimmicks to make some numbers look better. If you have further questions about this topic, please contact Chris Glover in our firm at 800-898-2034 or by email at chris.glover@beasleyallen.com.

AN UPDATE ON THE PROBLEM OF TIRE AGING

With the holidays fast approaching, many of you will be heading out to visit family and friends. Before starting on a trip, many people will get the oil checked in their cars. Some will even have mechanical and safety inspections done on the vehicles. These are things normally done before traveling. Those inspections will include having the air pressure checked in your tires and visually inspecting the tire tread wear. So, if there are not many miles on a particular tire, and the treads are not worn, and the tire appears new, it should be OK to drive on those tires, right? Not necessarily.

One of the most important problems facing drivers is aging tires. Tire aging is one of those hidden hazards that we don't even think about until it is too late. When you purchase your car and it comes with a spare, or if you purchase a new set of tires and a spare, the spare is usually of the same age as the tires that you place into service on your car.

So, as you use your tires for a few years, they age. How about that “brand new” spare tire in the back? It looks brand new doesn’t it? But it is really just as old as the other tires on your car. So, if you have a flat and replace that flat with the spare, that spare is not new. It is just as old as the tire you replaced.

Tires are usually made of rubber (real or synthetic), and all rubber products deteriorate with age, even if they are not actually being used. So, the spare tire has been deteriorating in the back of your car while it was not in use. The components of an aging tire can dry out, the rubber can deteriorate, and the adhesion between the tire parts can break down. So, the components of the tire that were once fused together properly can break apart while the vehicle is in motion. Unfortunately, this can happen while you are driving on that spare tire at highway speeds and result in serious and even fatal accidents. For safety sake, replace your tires, even the spare, regularly and do not use a tire that you know is old, even if it does not appear to be worn.

All tires have DOT identification numbers on them. The last three or four digits of those numbers can help you figure out the age of the tire. The first two numbers are the week the tire was manufactured and the last two digits (or just the last digit for tires made in 1999 or earlier) show the year. Most tire manufacturers recommend that tires not be in service after six years. So, even if a tire has never been placed into service on a vehicle, still looks new, and has no tread wear, it should not be used on your car because it could be an accident waiting to happen. So, a “new” tire sitting in a warehouse for six or more years should not be sold for use on your vehicle.

If you, or someone you know, have been the victim of an age-related tire failure, you may have a products liability claim against the tire’s manufacturer, seller, or even the car company that used the tires on its vehicles. If you would like more information or have a question, you can contact Greg Allen (Greg.Allen@beasleyallen.com) or Cole

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

FAMILY FILES WRONGFUL DEATH SUIT AGAINST MAKER OF ROBE

Atwilda Brown, an 80-year-old woman, died trying to pour herself a cup of hot chocolate. As she reached across the electric stove to get a teapot full of hot water in her kitchen on a Saturday night in February 2005, the sleeve of her chenille robe brushed against the stove’s burner and caught fire. Reports indicate the elderly woman ran to her bedroom trying to put out the flames engulfing her robe as her disabled husband looked on. But by the time she threw the robe to the floor it was too late. More than 35% of her arms and back were burned and she died a few weeks later after being transferred to a Burn Center.

Mrs. Brown is one of at least nine people across the country to die of burns suffered when their robes, sold by the Blair Corp. of Warren, Pennsylvania, caught fire, according to federal officials. The wrongful death lawsuit was filed by Mrs. Brown’s family in U.S. District Court in Hartford, alleging that the company made robes made of flammable material from Pakistan without doing the proper testing. It’s also alleged that the robes were designed in a manner that turned them into fire traps when ignited.

Meanwhile, the U.S. Consumer Products Safety Commission, which already has recalled Blair’s chenille full-length robes like the one Mrs. Brown was wearing, expanded the recall to include any chenille tops and jackets made by the same Pakistani manufacturer and sold by Blair. All told, more than 300,000 robes have now been recalled. A CPSC spokesman, Scott Wolfson, had this to say:

This robe is highly flammable, flames travel quickly up the robe. It is a deadly risk to women.

It was reported that Mrs. Brown’s robe, with a matching pair of slippers, arrived in late January 2005 and was

the latest in a long line of garments she had purchased from Blair, a company known to market clothing to older women. She stayed home on the night of the fire to care for her husband rather than go to their daughter’s 60th birthday party. Her family didn’t know what caused the robe to ignite and burn so quickly. And, it wasn’t until four years later that they got a clue to what happened and the information came from the Blair Corp. The company sent a recall letter, dated in April of this year, to Mrs. Atwilda Brown, warning her that the robe she bought in January 2005 was highly flammable. Obviously, this notice came much too late to save her life!

Source: Courant.com

MONTANA JURY AWARDS \$850,000 IN ALUMINUM BAT LAWSUIT

A jury in Montana has found that the maker of Louisville Slugger baseball bats failed to adequately warn about the dangers the product can pose. A family was awarded \$850,000 for the 2003 death of their son who was pitching in a baseball game. The family of Brandon Patch contended that aluminum baseball bats are dangerous because they cause a baseball to travel at a greater speed than a wooden bat does. The parents said that their 18-year-old son did not have enough time to react to the ball being struck before it hit him in the head. Brandon was pitching in an American Legion baseball game in Helena, Montana., in 2003 when the incident occurred.

The jury awarded a total of \$850,000 in damages against Louisville, Kentucky-based Hillerich & Bradsby for failure to place warnings on the product. The parents said that they hope the decision will make more people aware of the dangers associated with aluminum bats and that more youth leagues will switch to using wooden bats. Hillerich & Bradsby had argued that accidents are bound to happen in baseball games and there’s nothing inherently unsafe about aluminum baseball bats.

As most parents with children know, metal bats started being used in amateur sports in the 1970s. Interestingly, professional baseball still uses wood bats. Some amateur teams have decided to switch to wooden bats in recent years, in part due to Brandon's death. He was pitching for the Miles City Mavericks when the ball ricocheted off his head, eventually falling behind first base after traveling as high as 50 feet in the air. The youngster died within hours from his injury.

His family's lawsuit was one of several in recent years involving aluminum bats made by Hillerich & Bradsby. Last year, the family of a New Jersey boy who suffered brain damage after he was struck by a line drive off an aluminum Louisville Slugger bat sued the company and others, saying they should have known it was dangerous. Steven Domalewski was 12 when he was struck by the ball in 2006. His family's suit is pending in New Jersey Superior Court.

In 2002, the parents of teenage pitcher Jeremy Brett of Enid, Oklahoma, won a jury verdict against Hillerich & Bradsby and was awarded damages. The couple filed suit after Jeremy was hit in the head with a ball hit off an aluminum bat made by the company, suffering severe head injuries. The bottom line is that schools and team sponsors must make a decision on whether to use the aluminum bats, which won't break, or to use wood bats which now break far too easily. It's a matter of weighing economic factors against safety issues.

Source: Associated Press

BABY'S DEATH RESULTS IN LAWSUIT AGAINST WAL-MART

A lawsuit has been filed against Wal-Mart arising out of the tragic death of a six-month-old baby. It's alleged in the suit that the giant retailer is liable for selling a defective bassinet that allegedly killed the child last year. Kennedy Renee Jones died on August 21, 2008, while in a bassinet manufactured by Simplicity Inc. of Reading, Pennsylvania.

The family purchased the bassinet at a Wal-Mart in Shawnee, Kansas. It's alleged that the young child died of strangulation and that the baby was placed in the bassinet to go to sleep. She was subsequently found with her neck trapped between the bars of the bassinet on the side where it opens, according to the Complaint.

The contention is that the bassinet was defective and "unreasonably dangerous" because the bars on the side that opens were too far apart—large enough for an infant to become trapped between the bars and the floor of the bassinet with a pad on it. The suit claims Wal-Mart is liable vicariously for the actions of its agents in China who assembled the product.

The recall was issued by Wal-Mart after the Consumer Product Safety Commission issued an imminent hazard warning on the product. Wal-Mart removed the product from sale on its Web site. The lawsuit alleges Wal-Mart and Simplicity knew about the bassinet's defect because the product caused the death in Missouri of another infant in September 2007. The Consumer Product Safety Commission, in its news release, reported a four-month-old girl became entrapped in the metal bars of the bassinet and died. It's alleged in the lawsuit that, despite this knowledge, the companies failed to remove the product from the market.

Source: *The Morning News*

IX. MASS TORTS UPDATE

DOUBLE TROUBLE FOR PFIZER

Connie Barton and Donna Kendall have something in common: they stood up to one of the largest and most powerful drug companies in a court of law—and each of them won. On November 23, 2009, in Philadelphia, Pennsylvania, there were two verdicts against Wyeth (a division of Pfizer) over its hormone therapy drugs (Premarin

and Prempro). In each case, the juries awarded these women significant compensatory and punitive damages ranging from more than \$34 million to \$78 million. And this is just the tip of the iceberg, as Wyeth faces lawsuits from more than 10,000 additional women who also claim that Wyeth's drugs gave them breast cancer. A third punitive verdict that was awarded in the case of *Daniel v. Wyeth* was scheduled to be released on November 23rd, but Wyeth was granted emergency relief on that day to keep the third verdict sealed.

The evidence at these trials showed Wyeth's unrelenting campaign to make billions of dollars in profit from these drugs while keeping the truth about the drugs' dangers secret. Jurors were shocked to learn that:

- Wyeth was on notice of the need to study whether combination hormone therapy causes breast cancer as early as 1975, but failed to conduct a single breast cancer study over the course of the next three decades—despite over a dozen red flags that breast cancer was a safety problem;
- Instead of studying the breast cancer risk, Wyeth took active steps to downplay, dismiss and contain the release of data from other institutions' studies that showed such risk;
- Even worse, Wyeth ghost-wrote dozens of medical articles that minimized the breast cancer risk and exaggerated the benefits of hormone therapy and then published these articles in reputable medical journals under independent doctors' names;
- It was not until a government study was stopped early because of breast cancer that the world learned the truth;
- Studies now confirm that 200,000 women—grandmothers, mothers, sisters and wives—would not have suffered breast cancer but for their use of combination hormone therapy drugs.

These verdicts clearly show that when jurors hear how Wyeth put huge profits over the safety of patients, they will react with a strong message of outrage. Just last month, a legal ruling from the Court of Appeals for the Eighth Circuit confirmed that Wyeth did wrong and that juries should be permitted to hear this evidence and determine whether the company should be punished. Robert Peck, President of the Constitutional Law Center, explains that this ruling shows that “Wyeth’s behavior outraged these judges.”

As Michael Richmond, who was a jury foreperson in a Prempro trial, explained: “Wyeth had no concern whatsoever for the health of the patients. They were only concerned about their profits.” These verdicts—with significant punitive awards—confirm the anger of a community when the truth is learned about how the drug industry operates.

Of the 12 verdicts to date, Plaintiffs have been awarded substantial amounts by ten of the 12 juries. Every jury that has been permitted to deliberate on punitive damages has returned substantial punitive damage awards. In addition, thirteen women have settled their hormone therapy claims with Wyeth or Pfizer. For a summary of all hormone therapy verdicts to date, visit this web site (<http://www.hrt-legal.com/>). You can also view there a video summarizing some of the evidence heard by juries in these cases.

Our friend Tobi Millrood did a remarkable job of representing Mrs. Kendall, who suffered a double mastectomy as a result of Prempro-induced breast cancer. Zoe Littlepage and Rainey Booth, who are also very good friends of our firm, also did remarkable jobs of representing Mrs. Barton, who suffered a mastectomy as a result of Prempro-induced breast cancer.

Our firm represents a number of women who have filed suit against Wyeth and/or Pfizer. We are currently set for trial in Philadelphia, Pennsylvania on February 16, 2010. We are also hopeful that several other hormone therapy cases will soon be set for trial

in other parts of the country. If you would like more information please contact one of our lawyers -Ted Meadows, Melissa Prickett or Russ Abney. You can contact them at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com, Melissa.Prickett@beasleyallen.com, or Russ.Abney@beasleyallen.com.

AN UPDATE ON ACTIVITIES IN THE FIRM'S MASS TORTS SECTION

The year 2009 has been a busy one for everybody in our Mass Torts Section. Winding up the Vioxx settlement has been extremely labor- and time-intensive. Finally, we are seeing some daylight now at the end of that long tunnel. The Section’s lawyers and support staff are currently investigating and/or litigating a number of drugs and medical devices. We will discuss some of them in this section.

ACTIQ AND FENTORA: OPIOID NARCOTICS USED FOR MIGRAINE/HEADACHE PAIN

As you probably know, thousands of persons suffer from migraine/headache pain. Despite concerns raised by many experts, doctors sometimes use opioid narcotics for treatment of such pain. Given the strength of many of these drugs and the potential risk of improper patient selection, improper dosing and mis-use, certain patients may be placed at risk from these drugs. A number of concerns have also been raised about subtle, or sometimes not so subtle, acts by drug companies encouraging doctors to prescribe these drugs for purposes not specifically approved by the FDA.

Actiq is a powerful opioid narcotic that is delivered to the bloodstream by a lollipop lozenge. Anesta, a Utah-based corporation, developed Actiq. The company was purchased by Cephalon in 2000. Actiq initially had sales in the tens of millions, but as a result of Cephalon’s aggressive marketing, sales rose to over \$500 million dollars by 2006.

Actiq was approved by the FDA for the limited use of breakthrough pain in

cancer patients who were “opioid tolerant.” Breakthrough Pain (BTP), a component of chronic pain, is a transitory flare of moderate-to-severe pain in patients with otherwise stable persistent pain. Patients considered opioid tolerant are those who are taking at least 60 mg of oral morphine per day, at least 25 mcg of transdermal fentanyl per hour, at least 30 mg of oxycodone daily, at least eight mg of oral hydromorphone daily, or an equi-analgesic dose of another opioid for a week or longer.

In 2007, a study by Prime Therapeutics reported Actiq had an “off-label” use of 90%. As we have mentioned quite often, off-label use refers to the use of a drug for a treatment other than the specific use approved by the FDA. While doctors are permitted to prescribe a drug for “off-label” use, drug companies are not allowed to promote or market a drug for uses other than those specifically approved by the FDA.

There is no safe dose of Actiq in patients who are not opioid tolerant. Fentanyl, a key ingredient in Actiq, has been linked to fatal respiratory complications. In fact, Actiq was associated with the deaths of 127 people. The FDA reported another 91 incidents of severe side effects.

The extraordinary “off-label” use of Actiq caused the FDA’s Office of Criminal Investigations and the U.S. Attorney General to undertake an investigation of Cephalon’s marketing practices. From 2001 through at least 2006, Cephalon was alleged to have promoted Actiq for non-cancer patients to use for such maladies as migraines, back pain, and even injuries. The government asserted that Cephalon had trained its sales force to disregard the FDA restrictions in the approved label.

The government’s investigation also found that Cephalon focused marketing efforts on doctors other than oncologists and that Cephalon structured its sales quotas and bonuses in such a way that sales representatives could only reach their goals if they sold the drug for off-label use. Cephalon ultimately pled guilty to a criminal charge for Distribution of Misbranded Drugs and paid a fine of \$425 million dollars.

Cephalon purchased Fentora, a new opioid drug, from Cima Labs. The company began marketing Fentora when Actiq became open for generics in the fall of 2006. Fentora, like Actiq, was approved for the very limited use of breakthrough pain in cancer patients. The FDA-approved indication for Fentora was for patients who were being treated around the clock with opioids. Fentora is reportedly three to four times more powerful than Actiq.

Within months, it was reported that the “off-label” sales of Fentora were very similar to those of Actiq. By early summer 2007, several deaths were associated with Fentora use. These deaths prompted Cephalon in September of 2007 to send a “Dear Doctor” letter reporting that “Serious Adverse Events, including deaths, have occurred in patients treated with Fentora.” Cephalon then blamed the deaths on improper patient selection, improper dosing, and/or improper product substitution.

Our Mass Torts Section is investigating claims where a doctor or hospital prescribed or administered Actiq, Fentora or another opioid narcotic for treatment other than breakthrough pain in cancer patients. If you or a loved one has suffered injury from taking either Actiq or Fentora or if you need additional information, please contact Leigh O’Dell or Alyce Addison at 1-800-898-2034 or by email at Leigh.Odell@beasleyallen.com or Alyce.Addison@beasleyallen.com. Lisa Bruner is the primary staff person on these drug cases. She can be reached by email at Lisa.Bruner@bealseyallen.com.

AVANDIA®

Avandia has been a very popular prescription used to treat patients with Type II diabetes. This drug has been associated with a significant increase in the risk of heart attacks, and an increase in the risk of death from cardiovascular causes.

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

BARD COMPOSIX KUGEL MESH HERNIA PATCH®

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

Not long after the patch was introduced to the market, the FDA began to receive reports of problems with the patch. By 2005, the number of reports had greatly increased regarding the recoil ring which could easily break. When the ring breaks, patients experience bowel perforations and other serious injuries. The reports prompted the FDA to issue a recall in December 2005 of the Bard Composix Kugel Mesh X-Large Patch. Doctors were warned to stop using that version of the Kugel Mesh Hernia Patch, and patients with this particular patch were told to seek medical attention if they experienced unexplained fever, persistent abdominal pain, or tenderness to the incision site. By February 2007, the Kugel Patch recall had been expanded twice to include several other sizes of the device.

Lawyer: Melissa Prickett
Primary Contact: Christi Bryant

CHANTIX®

The Section is investigating claims of death by suicide or attempted suicide resulting in permanent injury involving Chantix. The drug, marketed by Pfizer, is a prescription medication used to treat smoking addiction.

Lawyer: Frank Woodson
Primary Staff Contact: Cathy Perry

DIGITEK® (DIGOXIN)

Digitek is a medication used to treat congestive heart failure, abnormal heart rhythms and other heart conditions. Digitek was recalled due to the possibility that tablets were doubled in thickness and could contain twice the appropriate level of the active ingredient. There have also been reports of digitalis toxicity leading to death. The Section is investigating claims on behalf of clients who were taking Digitek and suffered a catastrophic injury or death due to digitalis toxicity.

Lawyer: Roger Smith
Primary Staff Contact:
Kristy Campbell

FOSAMAX®

Fosamax®, manufactured by Merck, is in a class of drugs called bisphosphonates. Fosamax® is commonly used in tablet form to prevent and treat osteoporosis in post-menopausal women. Fosamax can cause a serious bone disease called osteonecrosis of the Jaw (ONJ). Osteonecrosis is a disfiguring and disabling condition of the jaw bone that causes infection and rotting of the jaw bone. Typical presentation of osteonecrosis is pain, soft-tissue swelling and infection, loosening of teeth, drainage, and exposed bone. Symptoms may occur spontaneously, or at the site of previous tooth extraction.

Lawyers: Leigh O’Dell, Chad Cook, and Russ Abney
Primary Staff Contact:
Tabitha Dean

GADOLINIUM

The FDA has asked manufacturers of all Gadolinium-based contrast agents to include a black boxed warning on the product label. These contrast agents are used to enhance the quality of magnetic

resonance imaging (MRI) and can place patients at risk for developing a potentially fatal disease known as Nephrogenic Systemic Fibrosis (NSF) or Nephrogenic Fibrosing Dermopathy (NFD). People who develop NSF or NFD may experience a thickening of the skin and other organs, which can limit their ability to move, extend joints and can lead to significant pain and even death. The Section is currently evaluating these Gadolinium-based contrast agents involving patients who have developed nephrogenic systemic fibrosis or Nephrogenic Fibrosing Dermopathy.

Lawyer: Roger Smith
Primary Staff Contact:
Kristy Campbell

HEPARIN®

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

Lawyer: Chad Cook
Primary Staff Contact:
Tabitha Dean

HORMONE THERAPY

For years, women have taken Hormone Therapy (HT) to reduce the symptoms of menopause.

Studies now show that HT medications such as Prempro and Premarin can increase the risk of breast cancer, ovarian cancer, stroke and heart disease. We are currently investigating potential claims against the manufacturers of HT medications.

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

IPN THERAPY

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

Symptoms of peritonitis include abdominal pain, fever, change in bowel habits and malaise. As the peritonitis progresses, pain, nausea, vomiting, loss of appetite and hypothermia worsen. Treatment is antibiotic therapy, surgery, and fluid resuscitation. As many as 50% of patients with secondary peritonitis die of sepsis. The prognosis depends on the underlying condition of the patient, the rapidity of the diagnosis, and the subsequent treatment given.

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

ORAL SODIUM PHOSPHATE

Oral Sodium Phosphate is a laxative that is commonly given to patients to cleanse the bowels prior to procedures, such as colonoscopies, endoscopic and radiologic examinations, and surgeries. The primary product that is used

for this is Fleet® Phospho-Soda®. Fleet® Phospho-Soda® has been associated with severe and potentially fatal cases of renal or kidney failure. It is helpful if the client has undergone a kidney biopsy to determine the source or cause of the renal failure. The Section is handling cases involving cases of renal failure or death.

Lawyer: Roger Smith
Primary Staff Contact:
Kristy Campbell

PAXIL®

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

Lawyer: Chad Cook
Primary Staff Contact:
Tabitha Dean

PAIN PUMPS

Pain pumps are portable and often disposable pain management devices which continuously administer local anesthetic through a catheter to a surgical wound site for several days following surgery to decrease post-operative pain and assist in earlier rehabilitation.

Recently, the use of pain pumps to administer medication directly into the glenohumeral joint space following shoulder surgery has been linked to a severe condition called Postarthroscopic Glenohumeral

Chondrolysis (Chondrolysis), in which the cartilage of the humeral head and the glenoid space of the shoulder process has been destroyed and lost.

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

Lawyer: Frank Woodson
Primary Staff Contact: Cathy Perry

PERMAX® AND DOSTINEX®

These drugs are prescribed for the treatment of Parkinson's disease and other neurological problems such as restless leg syndrome (RLS). In a study reported in the *New England Journal of Medicine*, a statistically-significant percentage of those who used these drugs for longer than one year developed the potentially serious complication of valvular heart disease (VHD). Valvular heart disease is typically diagnosed by a painless and non-invasive test called an echocardiogram that uses sound waves to determine if the valves of the heart are functioning properly.

In many cases, valvular heart disease does not immediately result in symptoms, so if you have taken either of these drugs, we would suggest that you speak to your phy-

sician about having such a test, and about the nature of the risks associated with these two drugs.

These two drugs are chemically related to the diet drug "Fen-phen," which was also associated with development of valvular heart disease and another very rare condition called Primary Pulmonary Hypertension (PPH).

Lawyer: Navan Ward
Primary Staff Contact: Janet Pair

REGLAN®

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

Lawyers: Chad Cook and
Danielle W. Mason
Primary Staff Contact:
Tabitha Dean

STEVENS- JOHNSON SYNDROME

Stevens-Johnson syndrome is an immune complex hypersensitivity reaction that can be caused from an infection or immune response to drugs. It affects males and females of all ages. The most severe form of SJS is toxic epidermal necrolysis (TENS). Most cases of SJS appear in children and young

adults under age 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as NSAIDs, non-steroidal anti-inflammatory drugs.

Lawyer: Frank Woodson
Primary Staff Contact: Cathy Perry

TRASYLOL

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

Lawyer: Frank Woodson
Primary Staff Contact: Cathy Perry

YAZ, YASMINE, OR OCELLA

Yaz is a combination birth control pill containing drospirenone and ethinyl estradiol. It is marketed not only as a contraceptive, but as a proven treatment for premenstrual dysphoric disorder (PMDD), a condition with severe emotional and physical premenstrual symptoms. Yaz is also marketed as an effective treatment for moderate acne. Studies indicate, however, that Yaz poses a particular health hazard because a primary ingredient, drospirenone, is a diuretic, that can cause an increase in potassium levels in the blood and lead to hyperkalemia. Hyperkalemia causes heart rhythm disturbances

that can lead to sudden cardiac death, pulmonary embolism, or strokes. Diuretics can also cause significant problems with the gallbladder, leading to gallbladder removal.

Lawyers: Melissa Prickett and Alyce Addison
Primary Staff Contact: Gwyn Harris

ZITHROMAX

Zithromax (azithromycin), manufactured by Pfizer, is a popular antibiotic used most often to treat respiratory infections. It may also be prescribed to treat skin infections and some sexually transmitted diseases. Zithromax is taken once daily, usually for two to five days. Zithromax can cause liver damage resulting in death or liver transplant surgery. The symptoms for liver damage may include yellow eyes, abdominal pain, nausea, clay colored stools, and dark urine. Recent warnings have been added to the label regarding abnormal liver function, jaundice, necrosis, hepatic (liver) failure and death, which have been reported by persons taking this drug.

Lawyers: Chad Cook and Alyce Addison
Primary Staff Contact: Tabitha Dean

WYETH TO FACE NEW TRIAL ON PUNITIVE DAMAGES IN HORMONE REPLACEMENT CASE

We have written before about Donna Scroggin's hormone replacement product liability suit against Wyeth and Upjohn. During the spring 2008 trial, a jury in federal court in Arkansas found that Wyeth & Upjohn failed to warn Ms. Scroggin or her doctor of the increased risk of breast cancer resulting from the use of estrogen and progestin products. The jury awarded Ms. Scroggin \$2.75 million in compensatory damages and \$8 million in punitive damages against Upjohn. The

punitive award against Wyeth was for \$19 million.

Wyeth and Upjohn asked Judge William Wilson Jr. to vacate the jury's verdict. Judge Wilson upheld the jury's liability finding and the compensatory damage verdict of \$2.75 million, but vacated the punitive damages awards. On November 2nd, the U.S. Circuit Court of Appeals for the Eighth Circuit affirmed the \$2.75 million judgment against Wyeth and Upjohn.

The Eighth Circuit's decision is very good for victims of hormone replacement therapy, particularly as to the important issue of causation. The Circuit Court also upheld Judge Wilson's judgment as a matter of law with regard to punitive damages against Upjohn, but ordered a new trial for punitive damages against Wyeth. The Court held that:

The evidence presented could allow a jury to find or infer that Wyeth was guilty of malicious conduct within the meaning of Arkansas law.

James Morris Jr. of the Morris Law Firm in Austin, Texas, represents Ms. Scroggin. Erik Walker of the law firm of Hissey Kientz in Houston, Texas, argued the case on appeal before the Eighth Circuit for Ms. Scroggin.

Source: Law.com

A CLOSER LOOK AT GARDASIL AND MERCK'S MARKETING EFFORTS

Merck began marketing Gardasil in 2006 as a medicine that will prevent HPV infections leading to cervical cancer. Since the marketing began both the effectiveness and the actual safety of the drug have been called into question. Gardasil was commonly described as "100% effective." However, if you look far enough into the research, you will find the vaccine is 100% effective only against a few strains of HPV that causes cervical cancer. Those strains are associated with approximately 70% of the cervical cancer cases. The vaccine has no effect on the viral

strains which account for the other 30%.

The three-shot Gardasil regimen costs \$360! Compare this to a \$30 pap smear which has proven effective in preventing most cases of cervical cancer. Thanks to this relatively simple and inexpensive test, the National Institute of Health lists cervical cancer as a "rare disease."

When Merck was about to obtain FDA approval of Gardasil, it went to work, trying to make the new vaccination mandatory across the United States for girls between certain ages. As the *Wall Street Journal* explained in 2007, "mandatory vaccination across the United States would make an automatic blockbuster for Merck at a time when the patents on some of its best selling drugs are expiring and it is desperate to replace the revenue streams."

Even before Gardasil was approved by the FDA, Merck funded an elaborate television and magazine campaign which stressed the connection between HPV and cervical cancer. The "tell someone" ads depicted mothers with arms around their daughters expressing surprise as they learn how many people are infected by HPV. Merck's logo would flash briefly on the screen with no mention that it had a product on the way. Many women thought they were watching a public service announcement.

These ads exaggerated the threat of the HPV and cervical cancer. While the vast majority of sexually-active women can expect to be infected by HPV at some point during their lives, most of these infections clear up without doing harm. Merck also launched an aggressive lobbying campaign to persuade politicians that every 12- and 13-year-old girl in the United States should be vaccinated and that the states should pay for it. Far from a campaign to save women's lives, it is a campaign to increase sales.

Even one of the lead researchers on the Gardasil clinical trials, Dr. Diane Harper, has questioned Merck about its efforts in marketing. Dr. Harper was quoted as saying "Merck lobbied every opinion leader, women's group,

medical society, politician, and went directly to the people—it created a sense of panic that says you have to have this vaccine now.”

A lead researcher in the HPV vaccine development, Dr. Harper, recently astonished her peers at the 4th International Public Conference on Vaccination in October 2008. Dr. Harper commented that the rate of cervical cancer, which is caused by HPV, was already so low and so treatable that vaccinations would effectively do nothing to lower the incidence rate. According to Dr. Harper, the vaccine seems to be unnecessary. Dr. Harper also informed the audience that Merck had never conducted any safety or efficacy trials in girls under 15 years old and that vaccinating young girls en masse amounted to “a great big public health experiment.”

While Congress is debating health-care in Washington, perhaps a closer look at the drug industry would be in order. Wouldn't it be cheaper and safer to set up a program that ensures all girls and women are screened with a pap smear regularly? While the vaccine protects against 70% of all cervical cancers, pap smears detect 90–95%. Dr. Evan R. Myers, a doctor at Duke University (who has served as a consultant to Merck), has been quoted as saying that “if we had true universal screening—as in some Scandinavian countries—we probably wouldn't need both the vaccine and screening.”

In the meantime, Merck has lobbied hard to have governments and physicians vaccinate all women ages nine–26. There have been many adverse events reported as a result of Gardasil vaccine including dizziness, fainting, paralysis, acute onset rheumatoid arthritis, and even deaths.

Sources: www.healthbeatblog.org and Associated Press

NEW JERSEY COURT WEIGHING MASS TORT STATUS FOR SUITS OVER BIRTH CONTROL PILLS

We mentioned the drugs Yaz and Yasmin at the outset of this section. In several previous issues, we also

reported on the problems with the oral contraceptives and on the increasing number of lawsuits filed against Bayer HealthCare. These drugs continue to make headlines as the New Jersey judiciary is considering a request for mass tort status due to the growing number of suits alleging strokes and other serious health problems from Yaz, Yasmin and Ocella.

With 13 suits filed in his vicinage, Assignment Judge Donald Volkert Jr. wrote to the Acting Administrative Director of the Courts on October 22nd that “the case management and potential trial of this particular litigation would place a fairly substantial strain on our already limited resources.” There are 26 suits against the contraceptives' manufacturers pending in other counties, and Judge Volkert said Plaintiffs lawyers have told him the number could reach 1,000.

In a notice to the bar, the Administrative Office of the Courts says it will accept public comments until December 31st on the proposal to centralize the cases in Atlantic, Bergen or Middlesex counties, where mass torts are heard. Named Defendants in the suits are Bayer Healthcare Pharmaceuticals, a German company with U.S. headquarters in Wayne, which makes Yaz, and Barr Pharmaceuticals of Montvale, owned Teva Pharmaceuticals of Israel, which makes Ocella, a generic version.

Cited in Judge Volkert's mass tort application is a suit filed in Passaic, New Jersey, by ten women from Texas and Tennessee who allege they suffered from deep vein thrombosis, pulmonary embolism and other problems due to the prescription drugs. The suit asserts that “Defendants should have known that Yaz, Yasmin and Ocella created a higher risk of pulmonary embolism than other oral contraceptives on the market.” The suits allege that the drugs contain estrogen and progestin, which suppress ovulation and prevent pregnancy. The drugs also contain drospirenone, an ingredient not in other oral contraceptives. Drospirenone is allegedly unlike other progestins in the United States and was not marketed

in this country before its use in the three drugs.

In August, the *British Medical Journal* published two studies showing a higher risk of venous blood clots for women taking drospirenone than those who took other oral contraceptives. And on August 5th, the Food and Drug Administration issued a warning letter to Bayer for using low-quality batches of drospirenone from a plant in Germany.

Source: Law.com

STUDY RAISES NEW QUESTIONS ABOUT MERCK PILL ZETIA

A new study has raised new concerns about Zetia and Vytorin—drugs that are still taken by millions of Americans to lower cholesterol, despite questions raised last year about how well they work. In the study, Zetia failed to shrink buildup in artery walls while a rival drug, Niaspan, did so significantly. Zetia users also suffered more heart attacks and other problems although the numbers of these events are believed to be too small to draw firm conclusions on the risk at this stage.

Zetia has been on the market for about seven years. The results of the study were presented at an American Heart Association conference and were published by *The New England Journal of Medicine* last month. The study is too limited to warrant changing practices prescribing on its findings alone, many heart experts said. Patients also should not stop taking any heart medicine without checking with their doctors first, they warn. Our Mass Torts Section will monitor this situation.

Source: Associated Press

DATA FROM STUDIES OF PFIZER NEURONTIN DRUG MAY HAVE BEEN SKEWED

According to researchers, the results of studies of Pfizer's drug Neurontin for uses unapproved may have been skewed to emphasize favorable results. Comparisons of internal company documents with published data from 12 clinical trials found inconsistencies

between data that made it into the medical journals and findings from the original trials, according to a report in the *New England Journal of Medicine*. Discrepancies included reports of positive results from trials that were initially found to be negative, and primary study goals reported as secondary study goals.

Pfizer has paid \$430 million in criminal fines and civil penalties in 2004 for urging doctors to prescribe Neurontin for off-label uses. But the drug maker says the new review isn't credible and the company didn't attempt to mislead the medical community. In reply, the study's author, Dr. Kay Dickersin, a professor of epidemiology at the Johns Hopkins Bloomberg School of Public Health, stated:

The trouble is, as a scientist, the publication has always been held up to me as the truth. It's the scientific record. What this study indicated is we can't believe that record.

The internal documents revealing the discrepancies were obtained as a result of lawsuits filed against Pfizer for promoting Neurontin, or gabapentin, for off-label uses, according to the *Journal* report. Dr. Dickersin, who has been an expert witness in litigation against Pfizer, agreed to participate on the condition that she be allowed to publish information from unsealed documents. Her earnings as an expert went to related research at Johns Hopkins.

Internal documents show that the study originally had 21 primary objectives of off-label uses of Neurontin. Six of these objectives weren't included in published reports, and four were reported as secondary goals, according to the study as published in the *Journal*. For eight of the 12 published trials, the definition of the primary study goal differed between the internal and published documents. Seven of the nine trials published as full-length research articles reported statistically significant results for the study's main goal, and in more than half of those, the outcome differed between the pub-

lished account and the internal documents, the study showed.

According to Dr. Dickersin, doctors are allowed to prescribe drugs for uses not approved by the FDA, and drug makers are allowed to provide publications about off-label uses. She believes more disclosure is needed, however, to ensure the validity of studies on off-label uses funded by the drug industry. Dr. Dickersin pointed out that doctors "have nothing but the published literature" when deciding how to use drugs for unapproved uses. The American public is slowly catching on to how the powerful drug industry operates and they don't like what they are seeing!

Source: *Bloomberg*

FDA REQUIRES WARNINGS ON ANESTHETICS AND PAIN PUMPS

Our Mass Torts Section has been litigating shoulder pain pump cases for the last two years. These cases involve an extreme injury to the shoulder cartilage after local anesthetics are infused into the joint space for 48—72 hours after surgery. Evidence suggests that this will kill all the cartilage in the patient's shoulder. The FDA has reviewed adverse event reports related to chondrolysis in the shoulder and finally issued an order requiring a change in warning labels.

We are glad to see the FDA action. We believe it is the very action that some brave orthopedic surgeons have been calling for quite some time. The action by the FDA will require the manufacturers of the anesthetics to change their product labels to warn healthcare professionals that the anesthetics can damage cartilage. The FDA will also require the manufacturers of the pain pumps that may be used to infuse the local anesthetic to have similar warnings for their products. If you need additional information on the pain pumps litigation, contact Frank Woodson at 800-898-2034 or Frank.Woodson@beasleyallen.com.

Source: FDA Website

X. BUSINESS LITIGATION

DANIEL MOORE WINS HIS CASE AGAINST THE UNIVERSITY OF ALABAMA

Daniel Moore is probably better known to real Alabama football fans than most men who either coached or played at the University with the exception of Paul Bryant, Gene Stallings, Joe Namath and even the current coach, Nick Saban. I suspect most real followers of the Crimson Tide have one of Daniel Moore's paintings or at least a print. A federal judge has ruled that the artist did not violate trademark laws by painting scenes of University of Alabama football without licensing the work through the school. The University sued Moore in 2005, alleging that he painted scenes of Crimson Tide football games without permission and reissued licensed prints without paying royalties. Moore denied violating trademark laws and claimed his art is speech protected by the U.S. Constitution.

U.S. District Court Judge Robert Propst, in an opinion issued on November 2nd, rejected the University's argument that Moore's paintings showed "trade dress." Judge Propst said the depiction of uniforms is incidental to the purpose of the paintings. The ruling has been hailed as a huge victory for artists. Frankly, I believe the correct result was reached by the Court and hopefully this matter will end. Hopefully, I haven't offended all of my Bama buddies!

Source: Associated Press

FLORIDA SUES ONLINE TRAVEL COMPANIES OVER HOTEL TAXES

The State of Florida has filed suit against online travel reservation companies over hotel taxes. This is the latest in a series of lawsuits nationwide claiming the sites owe local authorities millions of dollars. Attorney General Bill McCollum filed suit against Expedia and Orbitz last month, claiming they

failed to pay Florida the full amount of taxes collected on hotel room rentals through their sites. The Attorney General has this to say:

The customer is paying the tax already. Orbitz and Expedia are not remitting to the state all the taxes they have collected.

Consumers are charged a rate when they book a room online, and the company later reimburses the hotels a lesser amount, allowing them to pocket service fees. The taxes are paid on that less expensive rate, which has led to legal action by cities and states that claim they are being cheated out of millions of dollars in tax dollars. The Florida lawsuit, filed in a state Circuit Court in Tallahassee, claims the companies have been keeping some of the tax as profit.

Similar complaints against online travel companies have been filed by a number of cities including Atlanta, Chicago, New York, Philadelphia and San Francisco. Officials have alleged that online travel services charged customers for local tourism taxes, but failed to remit those funds.

Source: USA Today

AUTO REPAIR SHOPS WIN \$15 MILLION FROM INSURER

A Connecticut jury has awarded \$15 million to automobile repair shop owners in their lawsuit accusing an affiliate of The Hartford Financial Services Group of unfair trade practices. The state court jury found in favor of the Auto Body Association of Connecticut. This group has been battling the Hartford Fire Insurance Co. for six years over appraisals and labor costs for vehicle repairs.

The owners' group said the insurer's labor rates were artificially low and the company discouraged the use of independent appraisers in favor of its own appraisers, in order to control all aspects of car repairs. The Hartford says it will appeal the verdict. State Attorney General Richard Blumenthal believes that appraisers should not be

influenced by insurance companies and I agree with him.

Source: Yahoo News

XI. AN UPDATE ON SECURITIES LITIGATION

WELLS FARGO WILL REPAY \$1.4 BILLION TO INVESTORS

Wells Fargo Bank has agreed to pay \$1.4 billion to investors to settle allegations that the bank promised strong returns on auction-rate securities before the markets froze. The bank will have to buy back all types of nonliquid auction-rate securities (ARS) from thousands of retail customers, charities and small businesses across the country by February 2010. The settlement resolves a lawsuit filed by California Attorney General Jerry Brown and a separate investigation by a multistate task force of securities regulators formed by the North American Securities Administrators Association, an investor-protection group.

Wells Fargo marketed the securities as highly lucrative, cashlike investments, convincing investors, businesses and charities that they could get their money back every eight days. As part of the settlements, the bank will pay \$1.9 million in penalties to individual states. Eligible investors will receive information about the buyback offer by mail within 90 days from the settlement date, which I believe was November 18th.

Source: SFGate.com

SECURITIES LAWSUIT AGAINST WASHINGTON MUTUAL BANK MOVES FORWARD

A federal judge has refused to dismiss a multibillion dollar securities fraud case against former officers, directors, accountants and underwriters of Washington Mutual Bank. As you may recall, Washington Mutual collapsed last year

in the biggest bank failure in U.S. history. Some of the claims and a \$400 million securities issue were dismissed from the case in the judge's ruling. Significantly, the judge refused to dismiss any of the Defendants, including Kerry K. Killinger, who was chief executive of the bank from its explosive growth after he took over in 1990 until shortly before it collapsed on September 25, 2008.

Class action status will now be sought in the case. Ontario Teachers Plan Fund will be the lead Plaintiff if the lawsuit is certified as a class action. Other former officers of the bank were named as Defendants in the lawsuit, a consolidation of three class-action cases. These officers include four former executive vice presidents—Thomas Casey, chief financial officer; Stephen Rotella, chief operating officer; Ronald Cathcart, chief enterprise risk officer, and David Schneider, president of home loans.

The lawsuit focuses mainly on practices involving home loans, the bank's principal business, and on securities issued by the bank and its subsidiaries from October 19, 2005, to July 23, 2008. The Plaintiffs, described as "everything from mom and pop investors to sophisticated institutional funds," accuse the bank executives and directors of misrepresenting the failed bank's lending practices and standards, concealing activity such as pressuring appraisers to inflate home values, and filing false and misleading reports with the Securities and Exchange Commission. Chad Johnson, chief lawyer for the Plaintiffs, in a news release, said:

This case is built on facts provided by dozens of courageous former WaMu employees who were willing to tell the truth about the predatory lending practices that were directed by top executives at WaMu. Those reprehensible practices hurt shareholders and borrowers alike and ultimately led to WaMu's demise.

According to court documents, losses to the Ontario teacher's pension fund alone from alleged

wrongdoing by Washington Mutual, underwriters and accountants are estimated at \$24 million. The Complaint cites four securities offerings in which the bank raised about \$4.8 billion. In her ruling, the judge removed \$400 million in 5.5% notes, which involved one of the four offerings, from the case because none of the Plaintiffs had bought any of those notes. It is possible that additional Plaintiffs who purchased some of those notes could be added to the case. The case has been set for trial for May 2, 2011.

Source: Associated Press

STATE STREET CORP. SETTLES CLASS ACTION

State Street Corp. has settled litigation arising out of losses by investors in some strategies managed by State Street Global Advisors. The company will pay \$89.8 million in the lawsuit seeking class-action status regarding investors in active fixed income funds. The settlement agreement is subject to court approval. State Street has added \$250 million to its legal reserve which brings the total reserve to \$443 million. The company says that should cover the potential resolution of proceedings by the Securities and Exchange Commission and other government authorities as well as the lawsuit.

Adding to the company's woes, California filed a suit against State Street in October, claiming the bank secretly overcharged both the state's retirement system, Calpers, and the state's teachers' retirement system by more than \$56 million in currencies trades since 2001. State Street has denied any wrongdoing in that suit and said it will defend itself against any litigation.

Source: *CNN Money*

XII. EMPLOYMENT AND FLSA LITIGATION

MARSH & MCLENNAN SETTLE PENSION PLANS' SUIT FOR \$400 MILLION

Insurance broker Marsh & McLennan Cos. Inc. will pay \$400 million as part of a class action settlement filed five years ago by state pension plan administrators in New Jersey and Ohio in connection with a probe of the company's acceptance of contingent commissions. The settlement has received preliminary approval by a federal judge in New York. The lead Plaintiffs in the suit—the New Jersey Division of Investment, Public Employees Retirement System of Ohio, State Teachers Retirement System of Ohio and the Ohio Bureau of Workers' Compensation—alleged that Marsh & McLennan broke federal securities laws by misrepresenting the nature of its contingent commission revenue.

A final approval hearing is scheduled for the 23rd of this month. The company also has announced that the ERISA class action lawsuit filed in 2004 in the U.S. District Court for the Southern District of New York was settled for \$35 million, \$25 million of which will be covered by insurance.

Source: *Insurance Journal*

BEER DISTRIBUTOR WORKERS WIN \$41 MILLION IN BACK PAY

A case of bad-faith bargaining involving five southeastern Michigan beer distributors and their union employees has been concluded after more than a decade with workers sharing in a \$41-million payment. It is one of the largest back pay awards the National Labor Relations Board has ever ordered. Some 2,000 employees will share the award with the individual awards ranging from \$1.50 to a \$282,000 award for back pay made to one employee. That person says he still suffers medical problems from work he should not have been made to do.

Hubert Distributors paid out \$10.2 million to members of the International Brotherhood of Teamsters Local 1038 under the NLRB award. The NLRB said in a news release that the case revolved around five companies: Don Lee Distributors Inc. in Sterling Heights, Powers Distributing Co. in Lake Orion, Eastown Distributors Co. in Highland Park, Oak Distributing Co. in Flint and Hubert—and an illegal pact they made for negotiating with the union.

After a period of negotiations, each employer would declare an impasse and impose a new contract with what the NLRB described as “substantially lower income and reduced benefits for employees, particularly the drivers.” There appears to have been a plan to “bust the union.” The union filed charges of bad-faith bargaining and sought back pay from April 1991 through June 1998. A subsequent investigation uncovered the illegal mutual aid pact between the companies. An administrative law judge ruled on the Teamsters' behalf and the appeal by the employers failed. The U.S. Supreme Court declined to hear the employers' appeal in 1999.

All the distributors—other than Hubert—agreed to settlement terms six years ago, and much of the \$41 million has been paid out in the intervening years. The NLRB said Hubert continued to litigate the methodology for determining payment. Once Hubert's last appeal failed in 2006, the agency moved to locate the 300 workers left to be covered and set payments, which were concluded by August of this year. The NLRB closed the books on the case in September.

Source: *Free Press*

XIII. INSURANCE AND FINANCE UPDATE

\$50 MILLION SETTLEMENT REACHED IN METLIFE SUIT

MetLife has agreed to pay \$50 million to settle a class action claim that it

defrauded 8.6 million policy holders when it converted from a mutual company in 2000 to one that is publicly traded. The settlement was reached after a jury had been selected in a case, and after Judge Jack B. Weinstein, the trial judge, ruled that MetLife could introduce a 103-page decision of the New York State Superintendent of Insurance approving both the conversion itself and the disclosure documents that MetLife had mailed to its policyholders. Judge Weinstein expressed skepticism about the strength of the Plaintiffs' case and that led to the settlement.

The settlement also resolves a state-court class action pending in Manhattan. The two class actions in New York are the last of nine lawsuits filed against MetLife charging that the conversion was tainted with fraud. The other seven lawsuits were dismissed. Judge Weinstein set a hearing on the fairness of the settlement for the 30th of this month.

If approved, class members will not receive direct payments as a result of the settlement. Instead, the amount set aside at the time of the conversion to continue generating dividends for policyholders whose policies entitled them to receive dividends will be augmented by what remains of the \$50 million after payment of expenses and attorney's fees. The settlement also invokes the *cy pres* doctrine to provide for a \$2.5 million payment to a nonprofit health research organization in lieu of compensation to those policyholders who did not have a right to receive dividends.

The class in the federal lawsuit claimed that MetLife violated federal securities laws by making significant omissions and misleading statements in materials sent to policyholders to win their support for the conversion. A majority of 93% approved the conversion in April 2000. Before ordering a fairness hearing, Judge Weinstein issued an opinion on the proposed settlement, finding it "probable" that the settlement will be found "fair, reasonable and adequate."

According to the formula used in the notice to the class, the lawyers for federal Plaintiffs estimated the class would recover \$8 billion if it prevailed on all claims. MetLife's lawyers reported that the federal class would receive nothing even if it prevailed on all its claims. So there was a large range both between the two estimates and also between the amount claimed by the Plaintiffs and the settlement amount.

The lawyers for the state class estimated that its claims were worth between \$400 million and \$1.6 billion. Judge Weinstein wrote in his opinion that the settlement appears to have reached "an appropriate balance of the risks and benefits for all of those involved in this complex litigation." A special master was appointed by the court to explore settlement possibilities with the parties.

Source: *Law.com*

GEORGIA INSURANCE COMMISSIONER FINES UNITED HEALTHCARE \$750,000

Georgia Insurance Commissioner John W. Oxendine has signed a consent order directing United Healthcare Insurance Company, and sister companies United Healthcare of Georgia Inc., American Medical Security Life Insurance Company and Golden Rule Insurance Company, to pay a combined fine of \$750,000 for delaying payment on thousands of health claims. Commissioner Oxendine said:

It is unfortunate that fines must be imposed to encourage compliance. Consumers and doctors deserve prompt payment. I will continue to aggressively pursue those companies who do not comply with the law.

To ensure managed care plans were complying with Georgia law, Commissioner Oxendine issued a directive in August 1999 that all healthcare plans licensed in Georgia would be required to submit claims data every quarter, beginning with the third quarter of 1999. Based on data submitted through

March 31, 2009 by the fined companies, it was determined that the companies were in violation of Georgia insurance law regarding prompt payment of claims.

It appears that in the near future other insurance companies will be fined in Georgia. Consumers having difficulty with their HMO or with any insurer should contact Commissioner Oxendine's Consumer Services Division at 404-656-2070 or 1-800-656-2298 from 8 a.m. to 7 p.m., Monday through Friday. Persons may visit the Department's Web site at www.gainsurance.org to obtain a complaint form and instructions for submitting it. It's interesting to note that neither Alabama's insurance department nor its commissioner has the authority to issue fines. Do you think maybe the Governor and Legislators in Alabama should change the law and allow fines to be levied?

Source: *WALBNews.com*

XIV. PREMISES LIABILITY UPDATE

SETTLEMENT IS REACHED IN DAM BREACH

While the incident described below that led to litigation happened in Hawaii, it's certainly worth reporting because of all the rain we have had this year. The families of seven people who died in the Ka Loko Dam breach on March 14, 2006, and property owners who suffered damage, have reached a settlement with the State of Hawaii, James Pflueger, the dam owner, the Mary Lucas Trust, and others. A judge in Hawaii has approved the settlement, but the amount of money paid by the Defendants is confidential.

The settlement avoids a long, complicated and emotional trial, which had been scheduled to begin in February and projected to last for nearly a year. During mediation lawyers for all parties were able to reach the out-of-court agreement. Teresa Tico, a Kauai-based

lawyer, who represented the Plaintiffs, had this to say:

The settlement was very important. It's been a very emotional case. This day is a great day for justice. It brings closure to our clients.

Seven people died when the Ka Loko Dam breached after weeks of heavy rain, sending 1.6 million tons of water downstream through the property of an individual. Seven people were swept away and died. Other downstream property owners, including well-known entertainer Bette Midler, also filed lawsuits.

A special grand jury on Kauai indicted the dam owner last year on seven counts of manslaughter and one count of first-degree reckless endangerment in connection with the dam breach. The state alleges that the owner covered the dam's spillway, an emergency feature used to keep water from flowing over the top of the dam.

Source: *Star Bulletin*

DEARBORN FAMILY SUES WATER PARK

The family of a three-year-old Dearborn boy who drowned in August at the Kalahari water park in Sandusky, Ohio, has filed a wrongful death lawsuit against the resort. The child drowned in a three-foot-deep kiddie pool in an outdoor portion of the resort known as the Lagoon. The lawsuit, filed in U.S. District Court in Toledo, alleges that the child didn't have on a life vest as required by Kalahari policy and the park "did not have adequate lifeguards monitoring and guarding the Lagoon." The child's mother lost sight of him as he entered the pool, which contained more than 50 people. When employees found the child, he was face down in the Lagoon. He died later at an area hospital.

The lawsuit claims Kalahari "should have known that additional lifeguards were needed to monitor the Lagoon," with more than 50 people wading there, and "should have known that the child wasn't wearing a U.S. Coast Guard

approved life vest." Kalahari brings in more than 1 million guests each year to its 250,000 square-foot water park, according to the lawsuit.

Source: *Freep.com*

JURY AWARDS FORMER GYMNASTICS COACH \$25.5 MILLION

A Jacksonville jury has awarded \$25.5 million to a former gymnastics coach for injuries he suffered at a gym that left him a quadriplegic. Most of the award is for medical expenses incurred by Shane Downey, 32, who was injured while using a piece of tumbling equipment in 2000. Jurors found North Florida Gymnastics and Cheerleading 100% negligent for not supervising Downey on the equipment. Downey, who now lives in Texas, fell and broke his neck.

Source: *Jacksonville.com*

XV. WORKPLACE HAZARDS

BP HIT WITH A RECORD \$87 MILLION FINE BY OSHA

The Occupational Safety and Health Administration has issued a record \$87 million fine against oil giant BP for failing to correct safety hazards after a 2005 explosion killed 15 people at its Texas City refinery. The fine—the largest in OSHA's history—comes after a six-month inspection revealed hundreds of violations of a 2005 agreement to repair hazards at the refinery. OSHA also says the company committed hundreds of new violations by failing to follow industry controls on pressure relief safety systems and other precautions.

OSHA also said that the company committed hundreds of new violations by failing to follow industry controls on pressure relief safety systems and other precautions. A BP spokesman claimed the company believed it was in "full compliance" with the settlement

agreement and that the company will work with government officials to resolve the issue.

Since the explosion, BP has settled more than 4,000 civil claims, paid from a \$2.1 billion fund it set aside to resolve claims.

Sources: *Associated Press, Houston Chronicle, and CBS News*

OSHA FINES MASSACHUSETTS FIRM OVER ICE MACHINE DEATH

Northern Wind Inc., a Massachusetts seafood processing plant, faces \$66,800 in fines following an investigation into the death of a worker who became caught in an industrial ice-making machine. The federal Occupational Safety and Health Administration cited the company with nearly two dozen alleged violations of workplace safety standards.

Joseph Teixeira, a 40-year-old worker, was killed on May 4th when he got caught in the moving parts of the machine when it unexpectedly turned on while he was performing maintenance work. OSHA says the company lacked procedures to make sure that the machine could not accidentally become active while employees were working inside.

Source: *Insurance Journal*

JURY AWARDS MAN \$7.6 MILLION OVER LUNG DISEASE

A jury in Warren County, Miss., has awarded \$7.6 million to a former sandblaster who developed severe silicosis. The verdict is the first silicosis case in Mississippi to be tried before a judge. Robert Eastman sandblasted for about 25 years at Marathon Letourneau in Vicksburg and used Mississippi Valley Silica Co. Inc.'s sand from 1963 until 1978. He now suffers from progressive pulmonary massive fibrosis as a result of severe silicosis.

There was substantial proof introduced at trial that Mississippi Valley Silica Co. Inc. knew that using sand while abrasive blasting caused the incurable, deadly progressive disease

silicosis. As you may know, silicosis is an incurable, sometimes fatal lung disease caused by inhalation of silica, the primary ingredient in sand and most rocks. Mississippi Valley Silica is expected to appeal.

Source: *The Clarion-Ledger*

JURY AWARDS \$1.3 MILLION IN UNION PACIFIC SEXUAL DISCRIMINATION CASE

A jury has awarded more than \$1.3 million in a sex discrimination and retaliation case brought against Union Pacific Railroad in Kansas City. The state court jury found that Serena Eickhoff, a former locomotive shop foreman for the railroad, had been harassed and wrongly fired. The jury awarded \$120,000 in actual damages and \$1.27 million in punitive damages.

Ms. Eickhoff alleged that she was verbally harassed and accosted by her subordinates and supervisors. The jury found that the Complaint and the testimony at trial showed a pattern of sexually-hostile language and behavior was directed at the employee. After the employee complained, the company retaliated by placing her on probation and, later, firing her without sufficient cause, without taking any action against her male co-workers. Ms. Eickhoff had worked for the railroad for nine years and was the only female foreman in the railroad's Kansas City facility. The trial judge reserved the right to award future damages or order Ms. Eickhoff's reinstatement to the job.

Source: *Kansas City Star*

XVI. TRANSPORTATION

OBAMA ADMINISTRATION WORKS TO KEEP TIRED TRUCKERS OFF THE ROADS

The Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA) have agreed to abandon their defense of unsafe, longer working hour standards for truckers the Bush administration

issued in 2003. In a settlement of a lawsuit brought by Public Citizen, Advocates for Highway and Auto Safety, the Truck Safety Coalition and the International Brotherhood of Teamsters, the agencies agreed to start a new round of rulemaking that hopefully will result in reduced hours of service for truckers.

In March 2009, the four groups asked the U.S. Court of Appeals in Washington, D.C., to throw out the hours-of-service rule for the third time. Twice before, in 2004 and 2007, the court vacated the rule on the grounds that the government did not adequately consider the effects of longer hours on traffic safety and driver health. Nevertheless, the Bush administration reissued the same rule each time. The rule dramatically expanded driving and working hours by allowing truck drivers to drive up to 11 consecutive hours (instead of ten) each shift and by cutting the off-duty rest and recovery time at the end of the week from a full weekend of 50 or more hours to as little as 34 hours. Frankly, from a safety perspective, that action is impossible to defend.

As a result, the rule allowed truckers to spend up to 17 more hours driving each week than previously allowed, a more than 25% increase over the prior rule, despite strong evidence that the increased hours would lead to more traffic fatalities and serious consequences for driver health. The referenced settlement requires the government to draft a new proposed rule governing hours of service within nine months and to publish a final rule within 21 months. Greg Beck, the Public Citizen lawyer handling the case, had this to say:

We are pleased that the government has decided to take seriously its responsibility to protect truck drivers and the public from unsafe driving conditions instead of bending to the interests of the trucking industry.

Jackie Gillan, vice president of Advocates for Highway and Auto Safety, a group that works to enhance safety, added:

Every day, truck drivers fall asleep in their cabs, and all too frequently the results are catastrophic. Unfortunately, these incidents and crashes don't garner the same government attention and action as airline pilot fatigue. The DOT needs to reform the hours-of-service rule for truck drivers because longer operating and working hours have serious health and safety consequences for workers and the public.

Daphne Izer, co-founder, of Parents Against Tired Truckers, whose son and three friends were killed in a 1993 crash caused by a tired trucker, observed:

The good news is that there will be a new hours-of-service rule that hopefully will protect truck drivers and families like mine. The bad news is that the Obama administration nominee to lead the federal agency responsible for issuing this new rule is a trucking industry lobbyist. This nomination puts the trucking industry in the driver's seat and will detour any meaningful and overdue reforms.

My long-time friend, Joan Claybrook, former president of Public Citizen, who is now chair of the board of directors of Citizens for Reliable and Safe Highways, had this to say:

There is a reason that the truck driving profession is often referred to as "sweatshops on wheels." The Bush administration rule increasing truck driver hours of service was one of the worst anti-worker and anti-safety regulations issued these past eight years. It is time for the DOT to issue a rule that advances safety interests and not the economic interests of the industry.

Jim Hoffa, general president of the International Brotherhood of Teamsters, said his group will continue to push for a rule that protects truck

drivers instead of the greed of the trucking industry. He correctly observed that “longer hours behind the wheels are dangerous for our members and the driving public.”

Hopefully, we will now see even more changes in Washington that will make our highways safer for all citizens. That is certainly good news for all citizens.

Source: Public Citizen

FAILED TIRE MAIN FOUND TO BE PRIMARY CAUSE OF FATAL BUS WRECK

A federal agency has concluded a punctured tire that had lost too much air caused the fatal crash last year of an interstate bus in North Texas that was carrying Vietnamese Catholics from Houston to Missouri. The National Transportation Safety Board formally adopted the report of its investigation. The report contains 24 conclusions and a dozen new recommendations. It also reiterates five previous recommendations.

The NTSB said the August 8, 2008, crash and high death toll were caused by three things: a damaged front tire that failed; a guard rail on a bridge that was not substantial enough to keep the bus from veering off the road and toppling over; and the lack of safety protection for the occupants. The bus was owned by a Houston charter operation that had been ordered closed less than two months earlier by a federal safety inspector.

Source: *Houston Chronicle*

FAMILY SUES DRIVER IN FATAL ALCOHOL-RELATED COLLISION

The family of Marco Salazar, a 54-year-old man killed last year in a head-on, alcohol-related collision, has filed a wrongful death lawsuit against the driver of the other car and her parents. Christine Meneses, on behalf of her siblings and grandmother, filed suit against Elizabeth Tuccini, the 22-year-old drunk driver.

Ms. Tuccini was found guilty of negligent homicide for the December 2008

death. She was drunk and driving at a high speed when she collided head-on with the Salazar vehicle. Her blood alcohol level was 0.157 about 90 minutes after the crash. The legal limit in Arizona is 0.08. Ms. Tuccini admitted to authorities she had mixed a pint of Jägermeister with Red Bull before getting behind the wheel of her pickup truck. The lawsuit seeks both compensatory and punitive damages from Ms. Tuccini and her parents, whose car she was driving. This case is just another example of the tragic consequences of drinking and driving.

Source: *Arizona Daily Star*

PARTIES SETTLE LAWSUIT IN FATAL RAFT ACCIDENT

Grand Teton Lodge Co. has settled a lawsuit over a 2006 rafting accident on the Snake River that killed three people. The settlement was announced to a jury that had been hearing evidence during the trial of the case for a little over two weeks. The terms of the settlement are confidential. The private company offers lodging, rafting and other services in Grand Teton National Park.

John and Elizabeth Rizas, of Beaufort, South Carolina, and Linda Clark, of Shreveport, Louisiana, died when the raft they were riding in hit a snag and ejected them, their guide and nine other passengers into the water on June 2, 2006. The company was responsible for underplaying the danger of river rafting to encourage people to book the trip. All the passengers had signed a form acknowledging that they knew river rafting was inherently dangerous. But the lodge company downplayed the possibility of danger and failed to discuss the implications of river conditions that day.

The National Park Service concluded that the accident was caused by a “change in channel conditions.” But it appears the agency found no sign of recklessness or inattention by the guide. Earlier the judge in the case had granted motions by Vail Resorts Inc., a parent company of the Grand Teton

Lodge Co., and Tauck World Discovery, a travel company based in Norwalk, Connecticut, and dismissed them as Defendants.

Source: Associated Press

JURY AWARDS \$5.25 MILLION IN WRONGFUL DEATH CASE

A jury has awarded \$5.25 million to the parents and sibling of a 16-year-old girl who was killed in a motor vehicle crash in 2008. The jury found that Don B. Swisher Trucking Corp., McCann Delivery Service and Kenneth Barbour were negligent when Barbour hit Sydney Aichs' car with a tractor-trailer while running a red light on May 9, 2008, at an intersection. Barbour pleaded guilty to involuntary manslaughter and reckless driving earlier this year and was sentenced to a two-year active prison sentence. The teenager's parents filed a lawsuit against all of the Defendants in 2008. The Complaint alleged that Barbour's employers didn't train or supervise him adequately and allowed him to drive a truck with defective parts.

Source: *Daily Progress*

JURY AWARDS \$8 MILLION TO STATE LIBRARIAN

A Richmond, Va. jury has awarded a research librarian at the Library of Virginia \$8 million in damages in a lawsuit. The woman was struck by a GRTC Transit System bus and was severely injured. Meikiu Lo, now 34, suffered spinal and shoulder damage and multiple hip and pelvis fractures that resulted in chronic pain after a GRTC bus making a right turn struck her as she crossed a street beside the library where she worked two years ago. She had waited on the sidewalk and was two-thirds of the way across the street when the bus, making a right turn off a city street, struck her. Ms. Lo will likely undergo multiple surgeries for hip replacements before she is 50. Lawyers for GRTC had offered to settle the case for \$1.8 million prior to the trial. Their

offer was not accepted and the case went to trial.

Source: *Richmond Times-Dispatch*

XVII. HEALTH CARE ISSUES

UNIVERSAL HEALTH UNIT PAYS \$27.5 MILLION TO SETTLE CLAIMS

A subsidiary of Universal Health Services Inc. has agreed to pay \$27.5 million to settle allegations that it illegally paid compensation to doctors to refer patients to its hospitals. The unit, McAllen Hospitals LP, which does business as South Texas Health System, allegedly disguised the payments as sham contracts, including medical directorships and lease agreements, between 1999 and 2006, according to the U.S. Justice Department.

The company also entered into a five-year agreement that requires it to set up a system for tracking and evaluating financial arrangements between its healthcare facilities and referral sources. Tony West, Assistant Attorney General for the Justice Department's civil division, said in a statement:

Improper financial relationships between healthcare providers and their referral sources can corrupt a physician's judgment about the patient's true healthcare needs.

Fraud in Corporate America is bad generally, but when the fraud is in a healthcare setting, it's especially troubling and can't be tolerated. Unfortunately, this type of conduct has become commonplace and most folks don't even know it.

Source: Reuters

DUTCH PULL PFIZER VACCINE BATCH AFTER INFANTS DIE

Dutch authorities have banned use of a batch of Pfizer's Prevenar, or Prevnar, after three infants died within two

weeks of receiving the anti-infection vaccination. A spokeswoman for the Dutch health institute RIVM, addressing the problem, said:

On average about five to ten deaths are reported annually after babies get vaccines. We now have three cases in a short period. That is unusual and the reason for suspending the batch.

RIVM was said to be investigating the cause of the infants' deaths. Other batches of Prevenar, known as Prevnar in the United States, will continue to be used. Pfizer spokeswoman Gwen Fisher said preliminary investigations by the company and health authorities had found no link between the vaccinations and the deaths. She said the company initiated the "quarantine" of the batch which she said contained 110,000 doses of Prevenar, used to prevent pneumonia and related infections. Ms. Fisher told Reuters that the three infants also received two unrelated other vaccines as part of routine immunizations. She says no other Prevenar batches were suspended and infants in the Netherlands will continue to be vaccinated with it as part of routine immunization.

According to a spokesman for the European Medicines Agency in London, its officials were working with the Dutch authorities to find out if there were any safety issues with the vaccine batch. The vaccine is one of the most widely used in the world and generated sales for U.S. drug maker Wyeth of \$2.7 billion in 2008. Wyeth, which has just been acquired by Pfizer, had asked for the suspension of batch D66977 of Prevenar.

Source: Reuters

XVIII. ENVIRONMENTAL CONCERNS

OUR LEADERS NEED TO GET SERIOUS ABOUT OUR NATION'S WATER RESOURCES

Study after study continues to show that our nation's water resources are being destroyed at an alarming rate as a result of contamination. We rely on water to quench our thirst, feed our families and provide much needed recreation to our busy lives. Unfortunately, big corporations and special interest groups are sacrificing our nation's well-being and continue to dump thousands of gallons of waste and toxic substances into our streams, rivers and oceans. Making matters worse, most state and some federal regulators are highly sympathetic to big business, and as a result, are not enforcing those few regulations that do exist.

Water pollution is affecting folks from every corner of our country. Off the coast of Washington state, a mysterious algae mixed with sea foam has killed more than 8,000 seabirds. Researchers remain puzzled over what is causing the algae to grow. A thousand miles off the coast of California, researchers have discovered the Great Pacific Garbage Patch—a swirling vortex roughly twice the size of Texas filled with tiny bits of plastic and other debris. Every summer a dead zone of oxygen-depleted water the size of Massachusetts forms in the Gulf of Mexico. Other dead zones have been discovered off the coast of Oregon as well as in the Chesapeake Bay, Lake Erie and the Baltic and Black Seas.

Neither do the reports stop at our nation's borders that touch oceans. A new environmental report suggests that half of America's rivers and lakes are too polluted to safely swim in. Environment America, the founder of a recent report on the nation's waterways, concluded that the damage caused to our lakes and rivers is due in part to industrial facilities that use our waterways as a dumping ground for

nearly 232 million pounds of toxic chemicals. In total, the report found toxic chemicals were dumped into 1,900 waterways across the nation's 50 states. The report, which used releases reported in the EPA's Toxics Release Inventory for 2007, concluded that most of the toxic chemicals found in the report were persistent toxins. Persistent toxins refer to toxins that don't just break down and go away—they keep polluting the water and continue to remain for long periods of time. Major findings from Environment America's report include:

- Indiana topped the nation with over 27 million pounds of toxic chemicals dumped into the state's waterways in 2007.
- ExxonMobil Refining & Supply Baton Rouge Refinery released over 4.2 million pounds of toxic chemical waste into the Mississippi River in Louisiana. The ExxonMobil refinery was one of the largest reported polluters of toxic chemicals in the country in 2007.
- The top three waterways in the nation for most toxic chemicals discharged in 2007 were the Ohio River, New River and Mississippi River. The Ohio River also topped the nation for toxic chemicals that are known to cause either cancer or reproductive disorders.
- Finally, and most depressing for folks in our state, is the conclusion that the Alabama River had the highest amount of toxic chemicals causing developmental disorders in the nation in 2007. Folks in Alabama deserve better.

It is appalling that a select few can sacrifice the health of our children instead of being held accountable for their actions. Our leaders, both in Alabama and nationally, need to get their act together and enforce environmental standards against big corporations. Otherwise, our children will be the ones that suffer at yet another means of corporate greed.

Our firm is currently on the front line in trying to hold big companies responsible for the destruction their waste causes as a result of greed. In the past our environmental section achieved a monumental settlement in the Tolbert PCB case in Anniston, as well as a \$20 million jury verdict for citizens of Columbus, Ga. affected by carbon black contamination. Currently, we are litigating leaking underground storage tank cases throughout the State of Alabama, obtained class certification in a very important PFC drinking water contamination case in New Jersey, and are continuing to seek justice on behalf of citizens of Kingston, Tenn. for substantial property damages caused by the Kingston coal ash spill.

Sources: McClatchy Newspapers, All Headline News, and Environment America

\$19.5 MILLION JUDGMENT AWARDED AGAINST SHELL OIL FOR VIOLATING UST LAWS

California's Attorney General, Jerry Brown, has won a \$19.5 million judgment against Shell Oil Company and its affiliates for violating California's hazardous waste and underground storage tank (UST) laws. Shell Oil Co. disregarded the state's underground fuel storage and hazardous waste laws, committing hundreds of environmental violations at its gasoline stations across California. In addition to the monetary fine, the judgment requires Shell to comply with state UST laws and improve its spill and alarm monitoring, employee training, hazardous waste management and emergency response procedures at its gasoline stations.

Unfortunately, Shell's profit-driven, reckless conduct in disregarding the public's health and safety by failing to insure that dangerous chemicals are not released from their USTs is not unique to California, or even to Shell itself. Leaking USTs are a potentially deadly problem plaguing every city and every state in this country. These USTs are owned by an untold number of petroleum distributors, both large and small. According to the United States Environmental Protection Agency, there

are currently more than 479,000 confirmed releases of hazardous petroleum-related chemicals from USTs in the United States—more than 11,000 of these UST releases have occurred in Alabama.

Lawyers in our firm are fighting to protect the rights of clients whose health and property have been damaged by contamination from a leaking UST. If you would like more information, believe that your health or property may have been harmed by a leaking UST, or have questions, you can contact Chris Boutwell (Chris.Boutwell@beasleyallen.com) in our office at 800-898-2034.

Source: *CSP Daily News*

UST LEAK THREATENS NORTH ALABAMA RESIDENTS

Our firm is committed to protecting the rights of people who have been harmed by a release of toxic substances from leaking underground storage tanks (USTs). We are currently completing an investigation on behalf of multiple clients in north Alabama whose health and property rights have been threatened by a gasoline leak from an UST.

The UST spill, which has been classified as a threat to active domestic water supplies, is located in a neighborhood of residential and commercial properties. Gasoline odors have been detected in private water wells which were the drinking water source of some residents. Testing of this drinking water revealed benzene concentrations above the level deemed safe by the Alabama Department of Environmental Management (ADEM). Benzene is a known cancer-causing agent and is most often linked to certain kinds of leukemia. The water in the drinking wells exceeded ADEM levels for other petroleum-related chemicals as well.

Environmental testing indicates that the petroleum contamination has spread through the soil and groundwater over a large area of the surrounding neighborhood. Because of the negligent and wanton conduct of those who

had a duty to ensure that petroleum products did not escape from the UST and endanger neighboring residents and their property, our clients' health has been harmed or put in jeopardy and they have suffered multiple violations of their property rights. Rhon Jones and Chris Boutwell, lawyers in our firm, anticipate filing claims on behalf of these clients by year's end. If you need more information, contact them at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or Chris.Boutwell@beasleyallen.com.

XIX. THE CONSUMER CORNER

FEWER 2010-MODEL VEHICLES PASS TOUGHER SAFETY TESTS

At least one test for safety ratings on automobiles has gotten lots tougher and that's good news for all U.S. citizens. A new roof-strength requirement aimed at protecting passengers in rollover crashes has cut the number of top-rated vehicles from 94 in 2009 to 27 for the 2010 model year. The Insurance Institute for Highway Safety added the roof test to the already-rigorous tests it uses to address increasingly-specific circumstances under which drivers and passengers are injured and killed in collisions.

The Institute, an auto-safety research group, named 19 cars and eight sport-utility vehicles as "top safety picks." Among them are the Audi A3, Honda Civic, Dodge Journey and Ford Taurus. Auto makers with the most top-rated models include Subaru, a unit of Fuji Heavy Industries, with five vehicles making the cut. Ford Motor Co. and its Volvo unit had six top-rated vehicles, and Volkswagen AG and its Audi unit combined for five vehicles. Four Chrysler LLC vehicles got the top rating. General Motors Corp.'s Buick LaCrosse and Chevrolet Malibu are also on the list. Among major auto makers with no top picks is Toyota Motor Corp.

To become a top safety pick, a vehicle must have the insurance group's top rating of "good" in front, side, rollover and rear-impact crash tests and also have electronic stability control, which helps drivers maintain control of their vehicles in situations that might otherwise result in crashes.

According to Adrian Lund, president of the Insurance Institute, his group tests about 50 to 55 vehicles during the model year. Additional cars are tested at the request of car makers. In those tests the car makers pay for the test vehicle. At the beginning of the 2009 model year, 72 vehicles received the group's top rating. By the end of the year, following additional tests, the list grew to 94. But, as expected, the 2010-model roof-strength requirement reduced the list considerably. In this test, a metal plate is pressed against one corner of the roof. To receive a top rating, the roof must withstand a force equal to four times the vehicle's weight without crushing the roof five inches inward.

Earlier this year, the National Highway Traffic Safety Administration finally decided to make its roof-strength test more stringent. In NHTSA's new test, a force equal to 2.5 times a vehicle's weight will be applied separately to the right and left sides of the roof. The rule will limit how much the roof can buckle under the pressure. As you may know, the previous standard was 1.5 times the vehicle's weight. The federal standard sets a minimum requirement every vehicle must meet. The Insurance Institute tests are designed to show consumers the differences between one vehicle and another under more severe crash conditions. This is the main difference between the two safety groups' test programs.

Roof strength has long been a point of contention between the Insurance Institute and the auto industry. For many years, car makers have resisted tougher roof-strength standards. The Institute believes that, while seat belts and crash-avoidance technology like electronic stability control are critical in reducing rollover fatalities, a strong roof is better at maintaining the overall integrity of a vehicle's passenger compartment. The Institute's research,

which looked specifically at rollover crashes, shows that occupants die more often in vehicles with weaker roofs. NHTSA has known this for a long time, and so have the automobile manufacturers. Hopefully, once the president and Congress get through with health-care reform they will take a closer look at NHTSA and do some reform there.

Source: *Wall Street Journal*

COMMISSIONER BORG LISTS ALABAMA'S TOP FIVE INVESTOR TRAPS

Scams are a big-time problem for folks year-round, but they always seem to increase dramatically during the Thanksgiving and Christmas holidays. According to Joe Borg, Commissioner of the Alabama Securities Commission, there are lots of scams being perpetrated in Alabama. Many of them target would-be investors. Commissioner Borg, in an interview with WSEA-TV in Montgomery, said there are five main investor traps. At the top of the list are Ponzi schemes—a scam Bernie Madoff made famous—and they are still a major problem. Concerning this type scam, Commissioner Borg observed:

We've had our own mini-Madoffs in Alabama. In a Ponzi scheme, someone promises you big returns on your investment when in fact, they're just paying you back small portions of your money. This is the most common scam we see in Alabama, usually associated with affinity groups like a church or a club.

The second trap involves Short Term Commercial Promissory Notes. That's when someone starting up a new business guarantees higher-than-normal rates of return.

The third trap involves Real Estate Investment Schemes. These often come in the wake of natural disasters like hurricanes. The concept is that they will pool money from investors and buy all this distressed property. These types of investments are not always legitimate.

Entertainment Investments are listed as trap number four. These can be legitimate, but investors should check out any investment proposals carefully before getting involved.

Trap number five on the list involves Gold Scams. Gold prices are at their highest levels in years and gold may well be a good investment. But folks need to watch out who they are dealing with. There is much fraudulent activity out there and just not enough gold to back up all of the proposals for investments.

Commissioner Borg advises all potential investors to check everything out before investing. Anyone who sells investment products in our state must be licensed by the Alabama Securities Commission. So when considering an investment, if there is any concern—or you don't know the folks who are making a proposal—check with the Commission, which can be reached at 1-800-222-1253. For more information about the Alabama Securities Commission, check out its Web site at www.asc.state.al.us.

Source: WSFA-TV News

COURT REJECTS SETTLEMENT WITH TD AMERITRADE OVER SECURITY BREACH

A federal judge has rejected a class action lawsuit settlement between TD Ameritrade and as many as 6 million of its clients, saying the deal offers little benefit to customers whose confidential information was hacked in one of the largest security breaches in U.S. history. Public Citizen filed an opposition to the settlement last year in the U.S. District Court for the Northern District of California on behalf of its client, Matthew Elvey, an Ameritrade customer and lead Plaintiff in the class action suit against the Internet stock-trading company. Public Citizen argued that the proposed settlement did little to address the breach that allowed hackers access to customers' Social Security numbers, birth dates, e-mail addresses and other personal information.

The company's offer to provide its clients with a one-year subscription to anti-spam software would do nothing to protect customers from identity theft and would be useless to those who already have anti-spam software or could obtain similar protection for free. Regardless of what compensation Ameritrade offers, the company promised little to prevent a future breach or to reassure customers who had been complaining for almost two years that their private account information was being stolen from the company. Greg Beck, the Public Citizen lawyer, represents Elvey, along with Mark A. Chavez, who is with Chavez & Gertler in California. Concerning the Court's refusal to approve the settlement, Greg observed:

The Court recognized that the settlement benefits Ameritrade more than its customers. Ameritrade should not get off the hook for its massive security breach until it comes clean with its clients and shows it has fixed the problem.

Elvey, a San Francisco Bay-area computer consultant, learned of the security breach when he started receiving spam at an e-mail address he used exclusively with his Ameritrade account. When he informed Ameritrade of the problem in November 2006, the company responded via e-mail that it was "conducting a thorough investigation into this matter." Ameritrade did not admit the existence of the breach until September 2007, after Elvey moved for an injunction forcing the company to disclose how his e-mail address had been compromised. At about the time that the breach came to light, Elvey's Social Security number was used in a fraudulent transaction.

Elvey asked the judge to reject the settlement agreed to by Ameritrade and his former lawyer unless Ameritrade agreed to make information about the breach available to the public, including when it happened and what information was taken. That seems like a most reasonable request. He also wants the company to do a better job informing its customers about the breach and

the risk of identity theft. The rejection of the proposed settlement allows the sides to either reach a new agreement or proceed to trial.

Source: Public Citizen

DEBT FIRM SETTLES CLASS-ACTION LAWSUIT

American Corrective Counseling Services, a California debt collection company, has agreed to a \$2.55 million judgment to settle a lawsuit brought by thousands of Pennsylvanians who contended they were wrongly led to believe they had to pay costly fees to avoid criminal charges for bouncing checks. The settlement was approved in bankruptcy court in Delaware. The company sent out letters as recently as last winter to people who bounced checks, purporting to be from various Pennsylvania district attorneys' offices. The letters indicated that a crime had been committed, but that the check bouncers could clear up the matter by paying off the checks and various fees and by attending a financial accountability class.

In one case, an elderly woman wrote a bad check for \$27.17 to Kmart and was informed she had to pay \$72.17 in fees, plus another \$170 for the accountability class. The Community Justice Project in Pittsburgh represented the Plaintiffs' class. Donald Driscoll, a lawyer with the group, said this woman believed she was going to be arrested. She actually thought that a charge had been filed and she was going to go to jail.

Most cases were unlikely to be prosecuted because the people did not mean to bounce the checks. Because the company doesn't have the money to pay the full amount of the settlement, the Plaintiff's lawyer hopes to collect from the debt company's insurer on behalf of about 15,000 Pennsylvanians. Folks who had to pay fees and attend class are eligible to receive a payment from the settlement.

Driscoll doesn't believe the debt collection program is allowed under Pennsylvania law. ACCS contracted with district attorneys in at least 20 Pennsyl-

vania counties. Prosecutors received fees under their contract with ACCS to resolve bounced check cases outside of court. Deepak Gupta, a lawyer with Public Citizen, which is also suing the company, said many prosecutors are not aware of the group's heavy tactics.

American Corrective Counseling Services' practices have led to criticisms and lawsuits elsewhere. Public Citizen has brought class-action lawsuits against the company in California, Florida and Indiana, claiming American Corrective Counseling Services violated the Fair Debt Collection Practices Act. The company now operates as National Corrective Group, but their practices remain largely the same. Gupta had this to say about how the collection process involving prosecutors works:

They are renting out the name and authority of the prosecutor. It's a misuse of public authority and also, it's a scam. Consumers think they're talking to their local prosecutor's office, but they're actually talking with the debt collector in California.

While prosecutors can find such programs tempting because they bring in free money, most may not realize how the debt collectors really operate. I have to believe if they did know most would never participate.

Source: Associated Press

CVS PAYS \$875,000 FOR SELLING EXPIRED FOOD AND MEDICINE

The New York Attorney General's office has reached an \$875,000 settlement with CVS Pharmacy to stop sales of expired products—including food, medicine and baby formula. Attorney General Andrew Cuomo, who announced the agreement, filed suit after investigators bought expired goods in 60% of the CVS stores they canvassed across the state. CVS has about 432 New York stores.

The settlement brings to an end a lawsuit that the state filed after it said CVS breached a prior agreement to halt

expired sales. A CVS spokesman says the company is committed to keeping expired products off the shelves. But it appears that really hasn't been the case at all of its stores. Attorney General Cuomo reached a similar settlement with Rite Aid in 2008.

Source: USA Today

KNOW AND USE YOUR LOCAL PHARMACIST

An incident that occurred in California is a reminder that it pays to deal with a local pharmacist whom you know and trust. In this case, a five-year-old girl was given the wrong prescription. A doctor had prescribed Tamiflu, a compound that fights flu viruses for the child. The prescription was called or faxed into a Walgreens pharmacy in Ceres, California.

Directions on the bottle labeled Tamiflu were followed by the child's mother. After the medicine was taken by the child over a period of two days, a call came to the mother from Walgreens with this message, "We don't know who it is but somebody has the wrong medicine." The caller asked about the color of the medication. The product for the child was actually white. The mother discovered her daughter had been given amiodarone, a medication for irregular heart beats. This put the child's mother into a panic mode.

The child's mother quickly drove home and called 911 for an ambulance to take her daughter to the hospital. Emergency room doctors ordered an electrocardiogram (EKG). While the first tests results were fine, a second EKG showed an abnormality with the child's heart.

Walgreens admitted to a mistake and apologized to the child's family. According to a Walgreen spokesman, the company has a multi-step prescription filling process with numerous safety checks in each step to reduce the chance of human error. While the child, at last report, was feeling better, an EKG has shown abnormality in her heart. Hopefully, this will be resolved without further problems. I have

always believed it's best to have a local pharmacist—a person you know and trust—and then use that same person when filing prescriptions.

Source: News10.net

FLORIDA JURY ORDERS PHILIP MORRIS TO PAY \$300 MILLION TO FORMER SMOKER

In another significant tobacco case, a South Florida jury has ordered Philip Morris USA to pay \$300 million to a former smoker. The jurors found that the tobacco company's negligence was the cause of her emphysema. The award for Cindy Naugle, 61, is the largest to date among the thousands of lawsuits filed in the state against tobacco companies.

The jury awarded \$56 million in compensatory damages and \$244 million in punitive damages to the Plaintiff against Richmond, Va.-based Philip Morris USA, a unit of Altria Group Inc. The case is one of 8,000 lawsuits filed against tobacco companies by Florida smokers and their families.

Source: Law.com

WATCH RELEASES ITS WORST TOYS LIST

The World Against Toys Causing Harm, Inc. (WATCH), has released its annual "Ten Worst Toys" list to aid parents when shopping this holiday season. The list consists of toys with the potential to cause injury, or even death. The organization in particular warns against chemical and lead in toys, and also of less publicized issues, such as choking from small parts, impact injuries and risk of strangulation.

Since last year's "Ten Worst Toys" conference, WATCH says there have been 31 toy recalls representing more than 4,640,000 units of dangerous toys. This is Watch's 2009 Ten Worst Toys List:

- Disney-Pixar Wall-E Foam Rocket Launcher: According to WATCH, this toy has the potential for "eye and other impact injuries."
- Moon Board Pogo Board: This toy, which was manufactured by Big Time

Toys, LLC, has the potential for head and impact injuries, according to WATCH.

- Curious Baby Curious George Counting—My First Book Of Numbers: WATCH says that this book, from Houghton Mifflin Harcourt Publishing Company, presents a risk of choking injuries.
- The Dark Knight Batman Figure: This figurine from Mattel features hard, pointy ears, which WATCH warns could cause blunt impact and penetration injuries.
- X-Men Origins Slashin' Action Wolverine: WATCH says that this action figure from Hasbro features plastic claws that could cause eye and other impact injuries.
- Lots To Love Babies Mini Nursery: WATCH says this toy from JC Toys Group, Inc., has small parts that present a choking risk.
- Just Kidz Junior Musical Instruments: This toy from Kmart Corporation presents a choking risk, according to WATCH.
- CAT Rugged Mini: WATCH says this toy vehicle from Toy State International Limited presents the potential for puncture wounds.
- Pucci Pups Maltese: This plush pet from Battat Incorporated has a leash that causes a strangulation risk and long fur that presents an aspiration hazard, according to WATCH.
- Spy Gear Viper-Blaster: WATCH says that this toy from Wild Planet Entertainment, Inc., presents a risk for eye injuries.

Source: WAPT.com

XX. RECALLS UPDATE

Because of the large number of recalls each month, we changed the format of the recalls section of the *Report* a few issues back. The decision to list recalls by subject with a brief

description seems to be working well. 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 WILL REPAIR FLOOR PEDALS ON RECALLED VEHICLES

Toyota Motor Corp., will repair accelerator pedals on about 4 million vehicles in the U.S. that are involved in its biggest recall. The company will also install a brake override system on some of the vehicles. The recall is the result of Toyota's sudden acceleration problem. The recall affects models of Toyota's top-selling Camry as well as its Lexus and Prius cars and Tacoma and Tundra trucks.

The models involved in the recall are the 2007 to 2010 model-year Camry sedans; 2005 to 2010 Avalon sedans; 2004 to 2009 Prius hybrids; 2005 to 2010 Tacoma pickups; 2007 to 2010 Tundra pickups; and Lexus's 2007 to 2010 ES 350, 2006 to 2010 IS 250 and 2006 to 2010 IS 350 sedans. The number of vehicles affected increased from the 3.8 million announced in October because of additional vehicles sold since then.

TOYOTA TO RECALL 110,000 TUNDRAS OVER RUST

Toyota will recall 110,000 Tundra trucks from the 2000-2003 model years to address excessive rust on the vehicle's frame. The NHTSA is alerting owners of the Tundras to remove spare tires mounted underneath the vehicle. Excessive corrosion due to road salt could lead to part of the vehicle's frame failing and the spare tire falling onto the roadway, creating a hazard for other vehicles. The recall involves 2000-2003 model year Tundras registered in 20 "cold weather" states, including Ohio, and the District of Columbia.

CHRYSLER RECALLS JEEP WRANGLERS

Chrysler is recalling certain model year Jeep Wranglers manufactured

between June 2006 through July 2008. These vehicles, equipped with automatic transmission, were not equipped with a transmission fluid temperature warning system. Fluid could boil over and may come into contact with a hot engine or exhaust component and cause a fire. There are 161,450 units involved. Dealers will inspect and install a "hot oil" message in the instrument cluster and a chime indicating an elevated transmission fluid condition. The recall is expected to begin during December 2009. Owners may contact Chrysler at 1-800-835-1403.

STORK CRAFT TO RECALL 2.1 MILLION CRIBS

The Consumer Product Safety Commission has announced the largest crib recall in United States history, involving cribs with dropdown sides, fearing they may be unsafe, even deadly. The CPSC, in cooperation with Stork Craft Manufacturing Inc., of British Columbia, Canada, today announced the voluntary recall of more than 2.1 million Stork Craft drop-side cribs, including about 147,000 Stork Craft drop-side cribs with the Fisher-Price logo. The recall involves approximately 1,213,000 units distributed in the United States and 968,000 units distributed in Canada.

The CPSC tells parents and caregivers to immediately stop using the recalled cribs, wait for the free repair kit, and do not attempt to fix the cribs without the kit. They should find an alternative, safe sleeping environment for their baby. Consumers should contact Stork Craft to receive a free repair kit that converts the drop-side on these cribs to a fixed side.

According to the Consumer Product Safety Commission there have been dozens of deaths over the past decade involving drop-side cribs made by different manufacturers. The federal government has recalled nearly 5 million cribs in the past two years—the vast majority of them cribs with drop sides. This recall involves multiple models of drop-side cribs made by Stork Craft—from January 1993 to October 2009—

147,000 of them with the Fisher Price logo. Malfunctioning plastic hardware is to blame.

NEAR STRANGULATION OF CHILDREN PROMPTS RECALL OF SHADES

Louis Hornick & Co. Inc., of New York, has issued a recall for their Dublin Energy Solution Roman Shades. Strangulations can occur when a child places his/her neck between the exposed inner cord and the fabric on the backside of the blind or when a child pulls the cord out and wraps it around his/her neck. There have been two reports of children becoming entangled in the exposed inner cord on the back of the shade.

250 MILLION ACCUSURE INSULIN SYRINGES RECALLED

An Alabama company is recalling about 250 million Accusure insulin syringes nationwide. Qualitest Pharmaceuticals says it has received about four complaints related to the needle detaching from the syringe, but no reports of injuries. If the needle becomes detached during use, it can become stuck in the insulin vial, push back into the syringe, or remain in the skin after an injection.

The recall includes all Accusure insulin syringes, regardless of lot number. They were distributed from January 2002 to October 2009 to wholesale and retail pharmacies nationwide and in Puerto Rico. The recalled syringes come from multiple manufacturers. Consumers who have these products should stop using them and contact the company at 800-444-4011 for more information.

TWO DEATHS POSSIBLE IN GROUND BEEF RECALL

Two deaths and 26 other illnesses may be linked to fresh ground beef that has been recalled by the U.S. Department of Agriculture because it might be contaminated with E. coli bacteria. One

of the deaths involved a New York adult with several underlying health conditions. The other is a death previously reported by New Hampshire, where state health officials said a patient died due to complications. All but three of the suspected infections are in the northeastern U.S. and 18 are in New England. Ashville, New York-based Fairbank Farms recalled almost 546,000 pounds of fresh ground beef that had been distributed in September to stores from North Carolina to Maine.

SAMSUNG™ OVER-THE-RANGE MICROWAVES RECALLED DUE TO SHOCK HAZARD

Samsung Electronics America Inc., of Ridgefield Park, N.J., has recalled about 43,000 Samsung Over-the-Range Microwave Ovens. If an installation bolt comes in contact with an electrical component inside the unit and the microwave is plugged into an ungrounded outlet, it could create a shock hazard. The recall involves Samsung 1000 watt over-the-range microwave ovens. The ovens were sold at retail stores nationwide from January through July, 2009 for between \$180 and \$200. Consumers should immediately unplug and stop using the recalled product, and contact Samsung to schedule a free repair. For additional information, contact Samsung toll-free at (888) 402-6974, or visit the firm's Web site at www.samsung.com/otrrecall.

STROLLER COMPANY ANNOUNCES MAJOR SAFETY RECALL

Major stroller maker Maclaren expects to recall 1 million umbrella strollers on Tuesday, due to a potential finger hazard for children. A side hinge mechanism poses a hazard to children's fingers when the umbrella stroller is being opened or closed, the company says. Maclaren, one of the leading stroller makers, is making the voluntary recall after reports of 12 injuries, according to a report in the *New York Daily News*. All Maclaren strollers sold since 1999 are included in the recall,

the newspaper reported. The company, in cooperation with the U.S. Consumer Product Safety Commission, is providing consumers and retailers free repair kits which will cover a joint on the umbrella stroller's hinge mechanism.

CONSUMER WATCH: JELLY BELLY RECALL

Jelly Belly Candy Company is recalling mislabeled packages of its candy. The affected packages are 7.5-ounce cylinder-style packages of 49 flavors Jelly Belly jelly beans. The mislabeled packages failed to list peanut butter and peanut flour in the ingredient statement. That could cause life threatening allergic reactions in those with nut allergies. The Jelly Belly 49 Flavors cylinder packages were shipped to approximately 200 independent stores nationwide from September 29 to October 30, 2009. Product was packaged in a clear 7.5-ounce acetate cylinder with white label on the bottom of the package with lot codes 090925, 090928, 090929 or 091001. On the package, you'll find UPC code 071567989398.

Consumers who have a peanut allergy and purchased this product in the last five weeks are urged to return it to Jelly Belly Candy Company, One Jelly Belly Lane, Fairfield, California, 94533. Consumers and retailers with questions about the recall should call the Jelly Belly Hotline at 800-522-3267.

ADVENTURE PLAYSETS RECALL OF BACKYARD SWING SETS DUE TO FALL HAZARD

About 275,000 Adventure Playsets Wooden Play Sets have been recalled in the United States and 6,800 in Canada by distributor Adventure Playsets, of Amarillo, Texas. The plastic coated lumber on the horizontal ladder (monkey bar/swing beam) can weaken over time due to rotting of the white-wood (spruce, pine and fir species), resulting in a fall hazard. Adventure Playsets has received more than 1,400 reports of rotting ladders involving 16 injuries that resulted in nine emer-

gency room visits. The injuries include two arm fractures, lacerations, scrapes, and bruises to children younger than eight years old. Most of the reported injuries occurred when the swing came out of the monkey bar/ swing beam that had rotted.

This recall involves wooden play sets with swings, slides and ladders. Each set has an overhead monkey bar ladder that acts as both the monkey bar and swing beam, and an end ladder coated with cranberry or green plastic. The swing sets were sold at Wal-Mart, Toys R Us, Academy Sports, Menards, and Mill stores nationwide, and online at Walmart.com, ToyRUs.com, Willygoat.com and through the DMSI catalog from January 2004 through December 2007 for between \$300 and \$600. Consumers should immediately stop using the swing sets and contact Adventure Playsets to receive a replacement kit. For more information, contact Adventure Playsets toll-free at (877) 840-9068, or visit their Web site at www.adventureplaysets.com. Consumers can also email them at custservice@adventureplaysets.com.

CHILDREN'S ART EASELS RECALLED BY MACPHERSON'S

MacPherson's, of Emeryville, California, has recalled Young Artist Easels. The chalkboard surface coating contains high levels of lead, violating the federal lead paint standard. This recall involves a children's art easel which has a chalkboard surface on one side and a white board surface on the other side. The item number is AA13301 and the UPC number is 082435133010 which can be found on the original packaging. The sets were sold at art supply stores nationwide and online from July 2004 through June 2009 for about \$75. Consumers should immediately take these recalled easels away from children and contact the company to receive a free replacement chalkboard panel. For additional information, contact MacPherson's at (866) 319-5335, visit their Web site at www.art-alternatives.com/recall or send email to recall@macphersonart.com.

TREESTANDS RECALLED BY GANDER MOUNTAIN COMPANY DUE TO FALL HAZARD

About 13,000 Hang-On Fixed Position Treestands, manufactured by StrongBuilt, of Waterproof, Louisiana, have been recalled. The clasp may open unexpectedly if the strap is fastened incorrectly, causing the treestand and user to fall to the ground. Gander Mountain has received two reports of consumers falling while using the treestands: one sustained unspecified injuries and a second person sustained a broken pelvis and broken arm. Gander Mountain is recalling the 2008 model GMT101 and 2008 model GMT103 Hang-On Fixed Position Treestands.

The treestands were sold only at Gander Mountain stores from July 2008 until July 2009. The GMT101 was sold for about \$60 and the GMT103 was sold for about \$80. Consumers should immediately stop using the recalled treestands and return them to Gander Mountain for a refund, exchange for a 2009 model or a store credit. For additional information, contact Gander Mountain at (888)-542-6337 or visit their Web site at www.gandermountain.com.

GAS GRILLS RECALLED

The U.S. Consumer Product Safety Commission and Health Canada have jointly announced a voluntary recall of Perfect Flame SLG Series Gas Grills, including about 663,000 in the United States and about 1,700 in Canada. Consumers should stop using recalled products immediately unless otherwise instructed. The burners can deteriorate causing irregular flames and the lids of some models can catch fire, posing fire and burn hazards to the consumer. Consumers should immediately stop using the product and contact L G Sourcing to receive free replacement burners and, depending on the model of the grill owned, a free replacement lid. For additional information, contact them toll-free at (888) 840-9590 anytime, or visit www.lowes.com.

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.

XXI. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

NEW LAWYERS AT THE FIRM

We have had some personnel changes recently at the firm relating to lawyers. Two experienced lawyers joined us recently and they will be valuable additions to the firm. I will mention each of them below.

TIM FIEDLER

Timothy R. Fiedler joined our firm in October 2009 and works in the Consumer Fraud section. Tim, who comes to us from Florida, has more than nine years of legal experience. He will be working on various class actions, securities litigation, complex litigation and with the firm's ongoing Medicaid Fraud cases.

Tim graduated from Samford University's Cumberland School of Law in 2000. He began his law practice in Central Florida and practiced in that area until he moved to Montgomery and joined the firm. Tim has had a great deal of success as a lawyer and brings a great deal of experience to the firm.

Tim is married to the former Mary Margaret (Meg) Williams of Ozark, Ala., and they have a four-year-old son, Will. Tim and his family are consistently active in church, civic, and charitable organizations. We are most fortunate to have Tim join us and he has hit the ground running.

ARCHIE GRUBB

Archie Grubb, who also joined the firm in October, works in the Consumer Fraud section. Prior to joining the firm, Archie lived and

worked in Columbus, Ga. Archie's practice there over six years has included personal injury, insurance defense, criminal defense, and consumer bankruptcy. He has been lead or co-counsel in a large number of civil and criminal trials.

Archie, who is a 2003 graduate of the University of Alabama School of Law, was admitted to practice in Alabama in 2003 and Georgia in 2004. He is a 1995 graduate of the University of Alabama honors program, where he received his degree with a double-major in History and Political Science. Archie was a member of the Georgia Trial Lawyers Association and served as President of the Chattahoochee Bar Association. He is a member of the Alabama Association for Justice.

Archie, who grew up in Eufaula, Ala., comes from a long line of lawyers. His late father and grandfather were practicing lawyers in Alabama, and his great-grandfather was a federal judge in Birmingham. Archie is married to the former Mary Lynn Pugh of Columbus, Ga., and they have two sons, Win and Sam. We are most fortunate to have a lawyer with Archie's experience join us. He will be an asset to the firm.

THERE IS JOY IN GIVING DURING THE HOLIDAY SEASON

Wendi Lewis, who works in the firm's Information Technology Section, wrote the following article concerning activities of our employees during the holidays. It's great to know that folks who work at our firm do so much good for others. They have been very busy getting ready for the holidays and deserve lots of credit for their dedicated efforts.

Beasley Allen employees are uniquely involved in outreach projects throughout the year, supporting programs that vary from blood drives to fund-raising, and the occasional special request to simply

help a family or individual in need by donating a particular item. But it is during the holiday season, beginning in November to encompass feeding the hungry at Thanksgiving, and extending through Christmas, that our employees' generous nature and whole-hearted embrace of the true meaning of the season really shines.

While there are often opportunities that crop up unexpectedly to help our neighbors, especially in this tough economic climate, there are a number of projects that Beasley Allen employees look forward to each year. Some reach out around the world, and others affect those right here in our backyard. Programs include:

FAMILY SUNSHINE CENTER THANKSGIVING

Chaired by Angela Talley, this program works to fill the table with gracious bounty for families affected by domestic abuse. The Family Sunshine Center provides shelter, counseling and comfort to women and their children who are the victims of abuse. Beasley Allen employees help fill the table with a traditional holiday meal by collecting items including cornmeal, sugar, flour, canned and fresh fruit, and other staples. Several staff members enjoy visiting the Sunshine Center each year to deliver the items. "I just love being able to meet the mothers," Angela says. "Our firm's blessings to them always make them so happy!"

OPERATION CHRISTMAS CHILD

Chairperson Kelli Flanagan recruits volunteers each year for this unique program of Christian relief and evangelism. Employees fill a shoebox or similar sized box with gifts for a child. People throughout the country and around the world participate in this program, operated by the organization

Samaritan's Purse, reaching more than 1 million children in disadvantaged situations every year. Gift boxes are delivered to children around the world, including countries in Africa, Eastern Europe and Central Asia, and missionaries are able to share the original Christmas story—the birth of Jesus—while delivering gifts. Each year Beasley Allen employees fill more than 70 boxes for needy children.

OPERATION: WE CARE, SOLDIER MINISTRY

This program, headed up by Beasley Allen employee Tabitha McGuire, asks anyone who would like to participate to adopt a soldier for Christmas. The program includes Airmen, Soldiers, Sailors and Marines who will not be home for the Christmas Holidays, ensuring that they know someone cares for them and appreciates their service to their country. Christmas care packages to our fighting men and women include necessities as well as "treats," filled with items such as magazines, hand towels, wash cloths, insulated cups with lids, word puzzle books, hard candy, Gatorade packets, beef jerky, power/energy bars, packs of crackers, foot powder, deodorant, gum, devotional books, and more. Most importantly, volunteers in this project include a personal note or card to let the soldier know that people back home appreciate their sacrifice and remember them. "It's fitting for us as a free people to publicly and intentionally acknowledge, thank and bless those men and women who have paid a heavy price to ensure our liberty," Kelli says. "Freedom, as they say, is never free."

TOY STORE HANDS OF CHRIST

Beasley Allen employees donate new toys for children ages infant to 18 years old, which are placed in the "Toy Store" operated by

Chisholm Ministry Center. These items are marked down to extremely reduced rates, ranging from about \$.50 to \$3.00, allowing low income families who cannot afford to pay retail prices to enjoy the experience of Christmas shopping for their children. The Toy Store ministry was established to help place dignity and respect back into the home by affording parents the opportunity to provide a Christmas for their children. This ministry effort is chaired by Beasley Allen employee Sherry McHenry.

FRIENDSHIP MISSIONS

Organized each year by Willa Carpenter, this outreach collects items such as blankets, adult men and women's clothing, non-prescription medications, and personal hygiene items for residents of the Friendship Missions shelter. Friendship Mission is a PCA Presbyterian church and shelter located on the western side of Montgomery. The church and shelter provide two worship services each day except Saturday, hot meals for all homeless and poor who attend, and counseling and Bible study on weeknights for about 50 people living in the shelter. Gifts collected for this project also will be distributed to the homeless and poor who live outside the shelter as well.

CAPITOL HILL NURSING HOME

This project provides a Merry Christmas for the residents of Capitol Hill Nursing Home. Many of the people at this home never receive any visitors, and very often these gifts are the only ones they will receive to cheer their holiday season. Capitol Hill Nursing Home provides an "angel tree" for residents, where they may write their Christmas wish on a provided angel-shaped card and hang it on the tree. Beasley Allen employees adopt an angel or two, fulfilling the hopes they find on each card. Requests include such gifts as slippers, robes, lotions and lounge-

wear. Many Beasley Allen employees enjoy visiting the home when all the gifts are collected, seeing first-hand the joy on residents' faces as their gifts are delivered by these special Santas.

XXII. SPECIAL RECOGNITIONS

We are featuring one of our lawyers this month who, at a very young age, has already enjoyed a diverse and most meaningful career. To say that Leigh O'Dell's life has been interesting is an understatement.

LEIGH O'DELL

Growing up and thinking about her future career Leigh O'Dell always figured she'd play a role in her family's business. Her father, Billy O'Dell, was a small business owner in the field of mining. When she began college, Leigh chose accounting as her major. After graduation from Auburn University in 1990, she enrolled in the University of Alabama School of Law. While at the University of Alabama School of Law, Leigh served as Managing Editor of the *Alabama Law Review*. Her plans were to practice tax and transactional law for her family's company. But then, her father unexpectedly passed away during Leigh's third year of law school.

Originally from Prattville and feeling a need to return home following her father's death, Leigh took a position as a law clerk for the Honorable Ira DeMent, a federal judge in the Middle District of Alabama, and worked there from 1993-1994. It was with Judge DeMent, a great judge, that Leigh gained more exposure to litigation, and decided that she wanted to be in the courtroom.

Leigh accepted a position at our firm, working in the areas of commercial litigation and appellate law. She enjoyed the work, but she couldn't shake a nagging feeling that the Lord had other plans for her besides practicing law. So, in September of 1997, Leigh attended a large women's Bible study conference. Among 20,000 women of faith, she felt a dynamic teaching experience she had never before encountered. When Leigh returned from the meeting, she felt led to pray about her next steps. Leigh says:

I asked the Lord to teach me how to practice law and still have time for people, or make a change in my life.

God opened a most unexpected door, when Leigh was asked to take a position with Focus on the Family, as Director of Women's Ministries. She would be tasked with organizing and implementing the Renewing the Heart program, a series of one-day arena events designed to encourage and refresh women through worship and the Word of God. She accepted on January 22, 1998 and left the firm to pursue a new challenge. Leigh observed:

I had been to two women's retreats in my life. I had no experience. As Director, I was tasked with organizing meetings for women in 18,000-seat arenas. The Lord must have a sense of humor.

After working in the ministry for two years, Leigh came back to the firm for a short time in 2000, before joining AnGeL Ministries, the ministry of Anne Graham Lotz, daughter of Dr. Billy Graham. As Director of Events, Leigh was responsible for developing and directing the operational aspects of Just Give Me Jesus, a series of free, two-day revivals. Leigh says:

Through my experience at Focus and particularly, as I worked with Anne, I realized more than ever that in my own strength, I can do nothing but where the Lord calls you to something, He promises to equip and empower you with His strength. And throughout the process, you experience His grace, mercy, and love in a way that you never have before.

Since the year 2000, 34 revivals have taken place throughout the United States and the world, including South Korea, Paraguay, Ukraine, Moldova, and the United Kingdom. Just Give Me Jesus is devoted to the exaltation of Jesus Christ and is designed to draw God's people into a fresh encounter with Jesus Christ through the preaching of God's Word, prayer and worship.

At the end of 2000, Leigh came back to the practice of law full time when she accepted a position in the Mass Torts section in our firm, to work on the ongoing Vioxx litigation. She says she felt the Lord clearly called her back to the law, just as He directed her into the full-time ministry at other times in her life. Though Leigh admits she was a "little scared" to answer the call, she says the transition was made easier by knowing the type of firm Beasley Allen is from having worked here previously. Leigh says:

I believe the firm's commitment not only to espouse Christian values but to actively live those values out on the daily anvil of practice sets the firm apart. As I considered returning to practice, this core value was paramount in my decision-making process.

Leigh participates regularly as a guest speaker in the firm's weekly Bible study luncheon, to which all employees are invited. She also recently helped start a Bible study for women lawyers who work in Mass Torts. The weekly session is conducted over the telephone. "We have conference calls for business all the time, so why not a Bible study?," Leigh observed with a chuckle. Currently, as many as nine women par-

ticipate in the worship program each week, from all over the country, including three who live in California. Leigh says:

What I have learned is that our mission field is between our own two feet—life is ministry. Serving God to the fullest wherever He has called you—whether in vocational ministry or in law practice—is the greatest adventure, the greatest joy, a person can experience.

Leigh is the daughter of the late Billy O'Dell and Beverly O'Dell Malone. She enjoys spending time with her sixteen nieces and nephews as well as playing tennis, participating in other sporting activities, and cheering on the Auburn Tigers. She is a member of the Alabama Trial Lawyers Association, Montgomery County Trial Lawyers Association, American Bar Association and Christian Legal Society.

A MESSAGE FROM ALABAMA STATE BAR PRESIDENT TOM METHVIN

A LOOK BACK AT FIRST 100 DAYS OF TERM

On July 18, it was my privilege to begin my term as President of your Alabama State Bar.

While serving as President-Elect, one of the projects that meant the most to me was establishing a program to help people facing home foreclosure. In partnership with Legal Services Alabama, the Access to Justice committee and the Alabama Civil Justice Foundation, we established the Mortgage Foreclosure Assistance Program. It provides an 800-number (Hotline) for people to call for free legal assistance. We ran statewide public service announcements on TV to promote the program.

From March 1, 2008, through October 7, 2009, the Hotline has received more than 5,000 calls, and we have spoken with over

3,600 callers (some phoned multiple times). We opened over 3,000 mortgage cases and have completed over 2,300 of those cases. There are currently more than 900 open cases that attorneys are working on with clients. As an outgrowth of this partnership with LSA, we received another grant from the Access to Justice Commission to hire a lawyer to be housed at Legal Services, to assist our VLP with domestic violence cases.

Inspired by the success of the program, and determined to help more people in need of legal services, we decided that Access to Justice would be the focus of my year as Bar president. Recognizing the importance of access to justice for the poorest among us, the American Bar Association declared Oct. 25-31, 2009, as its first ever National Pro Bono Week.

The Alabama State Bar wholeheartedly participated in this important event, involving lawyers from every circuit in the state and all the law schools to provide pro bono services in their communities. As part of the event, we set a number of goals designed to help those in need, to promote service in the Volunteer Lawyer Program (VLP) to our colleagues, to help increase funding for these services, to raise public awareness and to get more lawyers to help.

Outreach activities included VLP clinics providing free legal services as well as continuing education seminars for lawyers and law students to encourage pro bono work. Bar members also were enlisted to speak to members of the media, as well as to their local civic clubs and organizations to raise awareness in the community about the nature of pro bono work, and the dedication of our volunteer lawyers.

Many people say that a society should be judged on how it treats the least among them. As lawyers we are leaders of society and have a duty to try to help the less fortunate. Through your continued service, we will continue to be able to provide true access to justice for “the least of these” in our community.

As we move forward, there is still much work to be done statewide. We must increase existing funding for Legal Services Alabama (LSA) so it can hire more lawyers. We also need to increase awareness of the need for civil justice funding among the public, the members of the Bar, and the court system.

It’s the right thing to do, and now is the right time to do it.

JONES LAW STUDENTS ARE CHAMPS

Congratulations to Jones School of Law students, Ben Green, Jason Isbell, and Clayton Tartt. They won the Region VII of the 60th Annual National Moot Court Competition last month. Arguing in front of distinguished lawyers from all over Alabama, the Jones students won the regional title by defeating Vanderbilt, University of Tennessee, and Ole Miss, among others. Clayton Tartt was named “best advocate” in both the preliminary round and the final round of the competition.

In February, the Jones students will compete in New York City, for the most prestigious law school advocacy national title. Never in the history of this 60-year-old tournament has a “provisionally ABA approved school” accomplished such a feat. Professor Adam MacLeod is the team’s coach and he also is to be congratulated.

MY MISTAKE

I need to apologize for leaving out the credit for the photo of Julia Beasley that was included in last month’s issue. The photo accompanied the story

about Julia’s win in the Music City Futurity cutting horse show. The photo should be credited to Littlefield Photography who allowed us to use the photo in the *Report*. I am sorry that we failed to do that and sincerely apologize for the oversight.

XXIII. FAVORITE BIBLE VERSES

Ellen Royal, one of our firm’s dedicated employees, wanted us to include Psalm 103, which contains a good message and especially during the holidays, in this month’s issue. That was an excellent suggestion and I have set it out as a holiday message for all.

Praise the Lord, O my soul; all my inmost being, praise his holy name. Praise the Lord, O my soul, and forget not all his benefits—who forgives all your sins and heals all your diseases, who redeems your life from the pit and crowns you with love and compassion, who satisfies your desires with good things so that your youth is renewed like the eagle’s. The Lord works righteousness and justice for all the oppressed. He made known his ways to Moses, his deeds to the people of Israel: The Lord is compassionate and gracious, slow to anger, abounding in love. He will not always accuse, nor will he harbor his anger forever; he does not treat us as our sins deserve or repay us according to our iniquities.

For as high as the heavens are above the earth, so great is his love for those who fear him; as far as the east is from the west, so far has he removed our transgressions from us. As a father has compassion on his children, so the Lord has compassion on those who fear him; for he knows how we are formed, he remembers that we are dust.

As for man, his days are like grass, he flourishes like a flower of the field; the wind blows over it and it is gone, and

its place remembers it no more. But from everlasting to everlasting the Lord’s love is with those who fear him, and his righteousness with their children’s children—with those who keep his covenant and remember to obey his precepts.

The Lord has established his throne in heaven, and his kingdom rules over all. Praise the Lord, you his angels, you mighty ones who do his bidding, who obey his word. Praise the Lord, all his heavenly hosts, you his servants who do his will. Praise the Lord, all his works everywhere in his dominion. Praise the Lord, O my soul.

Psalm 103

The Christian Legal Society has again sent in a number of verses. They were all so good and timely, we decided to use all of them.

I will give you a new heart and put a new spirit within you; I will take the heart of stone out of your flesh and give you a heart of flesh. I will put My Spirit within you and cause you to walk in My statutes, and you will keep My judgments and do them.

Ezekiel 36:26-27

To them God willed to make known what are the riches of the glory of this mystery among the Gentiles: which is Christ in you, the hope of glory.

Colossians 1:27

Knowing that from the Lord you will receive the reward of the inheritance; for you serve the Lord Christ.

Colossians 3:24

It is because of him that you are in Christ Jesus, who has become for us wisdom from God—that is, our righteousness, holiness and redemption.

1 Corinthians 1:30

For He Himself is our peace, who has made both one, and has broken down the middle wall of separation.

Ephesians 2: 14

Randy Strickland, who works for the State of Alabama, attends St. James United Methodist Church. He sent in the following verse:

Jesus said, "Let the little children come to me, and do not hinder them, for the kingdom of heaven belongs to such as these."

Matthew 19:14

The following verse came from Lance Kelley, a resident of Butler County. I understand Lance and his wife Hope are moving to Lee County.

God is our refuge and strength, A very present help in trouble.

Psalms 46:1

The Christian Legal Society also sent us the following prayer. It serves as a very clear reminder that we must all keep things in perspective and that our focus must always be on God, our provider.

Lord, may it not be that the focus of control in my life would be a composite of external forces. God forbid that I should build my life upon the sands of professional reputation or, worse, upon the deceitfulness of riches. You are my Life, and You dwell within me. My ambition is to walk worthy of You, period. Work now in me to will and to do of Your good pleasure.

XXIV. CLOSING OBSERVATIONS

A GOOD REMINDER

I have been reminded again by several of our readers to include the following verse, which we should all not only read but follow its mandate to the letter on a daily basis, in this issue.

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

forgive their sin and will heal their land.

2 Chronicles 7:14

My prayer is that people across our nation will collectively do this and then enjoy what follows.

DEALING WITH REGULAR DAYS SHOULD BE A PRIORITY

The true test of a person's spiritual life and character is not what he does in the extraordinary moments of life, but what he does during the ordinary times when there is nothing tremendous or exciting happening. A person's real worth is revealed in his or her attitude toward the ordinary things of life when that person is not under the spotlight. Quite often, it's easy to stress and put our main emphasis on the "big stuff" and let our guard down when dealing with the "little things" that occupy most of our time during the week. I have learned—with God's help—to take things as they come and not ignore the routine or ordinary events that are a part of my life.

XXV. PARTING WORDS

I asked Leigh O'Dell, who is featured in this issue, to do a special piece on Christmas for our readers. She graciously agreed to do so. The following is her message and I believe we should all share it with our families and friends during this time of year.

WHAT ARE YOU GIVING JESUS FOR CHRISTMAS THIS YEAR?

The Christmas season is a time of celebration—a time to celebrate the birth of Jesus Christ, to fellowship and enjoy family and friends, to give and receive gifts. As I prepare to celebrate Christmas, I love to think about what I will give each of my sixteen

nieces and nephews. I think about what they would like, what would make them feel special, what they are interested in, and what I think they might need. I love trying to think of and find that "perfect" gift. After I have made my list, I then make preparations to get the gifts, wrap them, and make sure they are ready by Christmas Eve. It takes time and effort and going to malls (which I detest) and battling traffic (which is frustrating!), but I do it. Why? Because I love them! It is my pleasure because I love the recipient of the gift.

God loves us so much that He prepared the Perfect Gift for you and for me. He sent His Son, Jesus Christ, that we might have the opportunity to be forgiven of our sins and to have the hope of heaven. What a gift! Matthew 2 tells the story of three kings or wise men that travelled a long distance to meet Jesus, the Christ Child. According to verse 11 when they entered the house where Jesus was living, "they saw the Child with Mary His mother, and they fell to the ground and worshipped Him. Then, opening their treasures, they presented to Him gifts of gold, frankincense, and myrrh." When they had a personal experience with the Living God, they bowed down in worship and gave Him gifts.

As I embark on the Christmas season this year, I want to follow the example of these three kings. I want to stop, step away from the busyness of life, and worship Jesus—worship Him in His glory, in His power and in His grace. I also want to follow their example of giving gifts to Jesus. As I spend time preparing gifts for my family, I want to prepare gifts for Jesus that I might express my love, adoration, and worship of Him. Have you considered what you might give Jesus for Christmas this year? Have you asked Him

what He wants for His birthday? Have you made your list for Him? Here are a few "gift ideas" from His Word that you might consider:

- **The gift of yourself.** *If you have never placed your faith in Jesus, never acknowledged that you are a sinner and asked Him to forgive you of your sins, never entered into a personal relationship with Him, give Him the gift of yourself this Christmas, by placing your faith in Him and asking Him to be the Lord of your life. (John 3:16; 1 John 2:12)*
- **Worship.** *Spend time alone worshipping the Lord for His goodness, exalting His holiness, and reverencing His majesty. (Ps. 95:1-7)*
- **Repentance.** *Ask the Lord if there is anything in your life for which you*

need to ask His forgiveness, any habit or sin that you need to stop. If anything comes to mind, stop right now and ask the Lord for forgiveness. (2 Chron. 7:14; 1 John 1:9)

- **Service.** *Ask the Lord if there is any special act of service, kindness, or compassion that you might do this Christmas season in honor of Jesus, as a special gift to Him. (Romans 12:1-2)*
- **Forgiveness.** *Maybe there is a broken relationship in your life that needs restoration and reconciliation. Maybe there is someone for whom you harbor bitterness and un-forgiveness. Follow Christ's command this Christmas. In obedience, forgive, reach out to that person because of your love for Christ, and do all that you can in*

your power to restore the relationship. (Col. 3:13-14)

This Christmas season let's not get caught up in commercialism and activity. Instead, let's focus on the One whose birthday we celebrate. "And the Word became flesh and dwelt among us, and we beheld His glory, the glory as of the only begotten of the Father, full of grace and truth." (John 1:14) What are you giving Jesus for Christmas this year?

I wish for all of you and your families a blessed Christmas and a happy, prosperous and joyous new year. May 2010 bring peace for all people in this great land we all love. Our prayers for peace go out especially to our military personnel who find themselves in harm's way during this very special time of year.

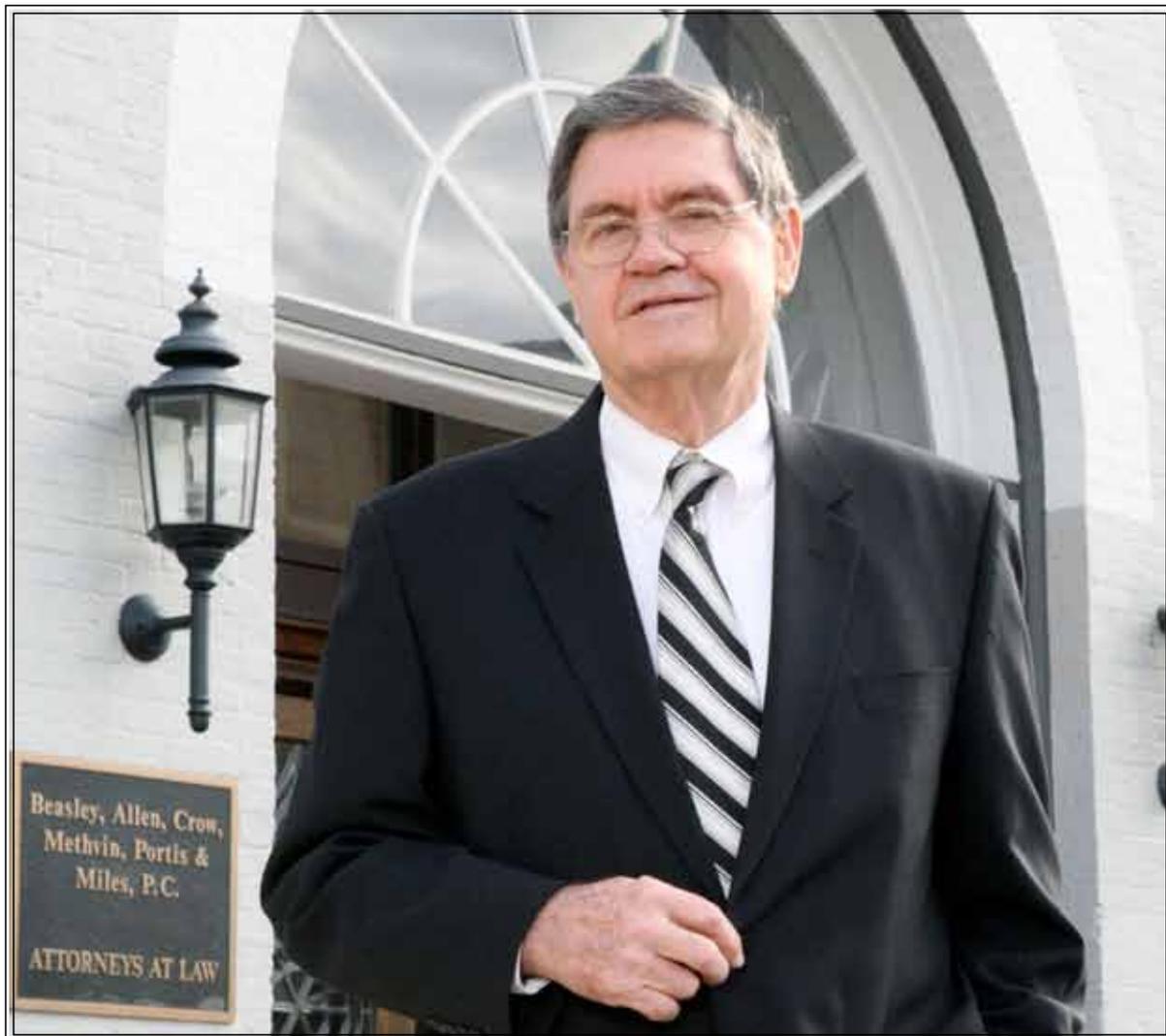
***To view this publication on-line,
add or change an address,
or contact us about this publication,
please visit our Website: BeasleyAllen.com***

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

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

PRESORTED
STANDARD
U.S. POSTAGE
PAID
MONTGOMERY, AL
PERMIT NO. 275

RETURN SERVICE REQUESTED



Jere Locke Beasley, founding shareholder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs 44 lawyers and more than 200 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 30 years.

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

No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.