



THE  
**JERE BEASLEY REPORT** FEBRUARY 2011

# Beasley Allen

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# I. CAPITOL OBSERVATIONS

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## ***THE BENTLEY ADMINISTRATION***

When Dr. Robert Bentley was sworn in as Alabama's Governor on January 17<sup>th</sup>, he immediately inherited a financial mess from the previous administration. If there is a silver lining, it's that the new Governor knows how bad things really are and he will start immediately with a plan to turn things around. Gov. Bentley has put together a very good team and that bodes well for the state. Having served in the Legislature for eight years, the Governor also understands how important it is for a chief executive to work closely with both the House and Senate. I have been most impressed with Gov. Bentley and I sincerely believe he is a good man who will put the people's interest first and who will work hard to make state government truly serve the people of Alabama.

## ***AUBURN WINS NATIONAL CHAMPIONSHIP***

While Alabama has lots to be proud of, winning the National Championship in football for two consecutive years by a state school is quite an accomplishment by any standard. Add to that two Heisman Trophy winners—back-to-back—and that is something no other state has done to my knowledge. Auburn University went undefeated, won the National Championship for 2010, and did it all with class and grace.

Auburn's 2010 season was an amazing story. This team and its coaches set a goal and the wins continued to mount up week-by-week with the team getting better as the season progressed. Winning the SEC championship with a convincing victory over a very good South Carolina team set the stage for the showdown in the desert. The win over a tremendously-talented Oregon team put the final stamp of approval on a tremendous season. I can say without reservation, as an Auburn man, that the 2010 Auburn Tigers were a fun team to watch throughout the season and without any doubt they were the best football team in the country.

## ***ALABAMA'S STATE EMPLOYEES***

It's been apparent over the years that some of our elected officials haven't really appreciated the good work done by state employees. Some have even used them as targets for their political gain. I have always believed that state employees in Alabama carry out their duties and responsibilities in a good way. As we all know by now, the financial crisis facing state government has put undue strain on every department and on its employees. That has made their jobs much harder.

We should remember that, by and large, these dedicated employees have kept the ship of state afloat in Alabama. Those in leadership roles in government should give our state employees credit for their good work and not penalize them. I believe that the overwhelming majority of folks who work for the state are good, hard-working and dedicated employees. Hopefully, there won't be massive lay-offs this year due to budget constraints. In my opinion, Gov. Bentley will work with the Legislators to bring about needed changes without hurting good state employees.

## ***COMMISSION CREATED TO EVALUATE STATE GOVERNMENT***

Gov. Robert Bentley has signed an executive order creating the Alabama Commission on Improving State Government. The Commission will be analyzing and exploring new ways to reduce government spending without curtailing needed services. All state agencies, departments and commissions were ordered by the Governor to evaluate the effectiveness and need for their current spending levels. Gov. Bentley says he wants to find duplicated, outdated, unnecessary and ineffective services. Any savings will be used to make state government operate better and more efficiently. Hopefully, this Commission will be able to come up with good solutions to help solve our state's fiscal problems.

## ***CHILDREN'S HEALTH INSURANCE BENEFITS***

As has been widely reported, Alabama was awarded \$55 million for exceeding all expectations in adding children to the

state's Medicaid rolls. In fact the state added 133,000 more children to the rolls than projected by a formulated-based line. Alabama's award was the largest and constituted one-fourth of the total amount awarded nationwide. For the second straight year, Alabama earned the largest performance bonus. It should be noted that only 15 states were awarded bonuses this year. All of this came about as a result of several years of outreach. Setting policies to cut red tape, thus making enrollment easier, was the primary reason for our state's success.

The newly-created Express Lane Eligibility program was definitely an important factor. This was a classic example of

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what can happen when state employees in the various departments work together in a collaborative spirit. What happened in Alabama was state government really helping children. Alabama Medicaid and their partners at the Alabama Department of Public Health and the Alabama Department of Human Resources have worked together in-step to prevent children from falling through the cracks when it comes to providing basic health insurance. The fact that Alabama is one of only 15 states to receive a performance bonus, and that we are receiving the largest bonus, demonstrates the effectiveness of our program.

The bonuses, awarded by the U.S. Department of Health and Human Services, are awarded nationally to recognize states which had implemented at least five of eight program features known to promote enrollment and retention in children's health insurance coverage and had increased state Medicaid enrollment above a target set by federal law. The bonus payments were part of the 2009 Children's Health Insurance Program Reauthorization (CHIPRA) legislation signed into law in February 2009.

Methods implemented in Alabama include providing 12 months of continuous enrollment, removing the requirement for an in-person interview in order to qualify for coverage, streamlining the eligibility renewal process, removal of asset limits for children and pregnant women, and use of a joint application between Medicaid and ALL Kids. It's really good to be able to report good things about Alabama.

Source: Associated Press

### **JOE BORG WILL SOON OVERSEE INVESTMENT ADVISERS IN ALABAMA**

Joe Borg, Alabama's securities commissioner, has done a good job of protecting Alabama investors during his tenure. His strategy for cracking down hard on financial crime is well known both in Alabama and around the U.S. Joe believes in punishing criminal wrongdoers with long prison sentences and hitting big financial firms that cheat investors with large fines. Joe is well-known as a very tough fellow among state securities regulators. He has a conviction rate of more than 95%, largely from cases involving mini-Madoff

investment schemes, unregistered brokers and penny-stock firms.

Many in Alabama don't realize that Joe will soon take on a new challenge. Under the Dodd-Frank financial-overhaul law passed by Congress, state securities regulators throughout the U.S. will take over the responsibility this summer for oversight of thousands of investment advisers with assets of \$25 million to \$100 million. Those advisers will no longer be overseen by the SEC. While it has been reported that the regulatory track record in many states is not too good, that's not the case in Alabama. Joe Borg and his staff have done a tremendous job.

In contrast to securities regulators in many states around the country, the budget for the Alabama Securities Commission, which only has 49 employees, increased for the current fiscal year. This increase will allow the Commission to add three employees to handle the investment-adviser work being outsourced by Washington. Hopefully, that will be enough to get the job done. It should be noted that the agency funds its operations from license fees and fines, contributing \$12.5 million to the state in fiscal 2010 and ordering the repayment of slightly more than \$1 million to alleged fraud victims.

Since Joe is appointed by the agency's commissioners, he is relatively immune to political pressures and that's good. Since Joe is serving under his fifth Alabama Governor, that pretty well tells us that the Commission has done its job well. State court judges in Alabama have followed Joe's belief that white-collar felonies should be prosecuted just as aggressively as street crime. We wish Joe the very best as he undertakes additional duties.

Source: Wall Street Journal

## **II. A REPORT ON THE GULF COAST DISASTER**

### **PRESIDENTIAL PANEL REPORTS**

The Presidential panel investigating the BP blowout concluded that three corporations were at fault, causing the April

20<sup>th</sup> rig explosion in the Gulf of Mexico. The panel found that decisions intended to save time and money created an unreasonable amount of risk that triggered the largest offshore oil spill in U.S. history. It was also stated in the report that this type disaster could happen again without significant reforms by industry and government. The commission findings—the result of an investigation requested by President Obama after the explosion—described systemic problems within the offshore energy industry and government regulators who oversee it.

The investigation found that poor decisions led to technical problems that caused the tragic incident that killed 11 people and spilled more than 200 million gallons of oil into the Gulf of Mexico. BP, Halliburton and Transocean, the three key companies involved with the well and the rig that exploded, each made individual decisions that increased risks of a blowout but saved significant time or money. But ultimately, the Deepwater Horizon disaster came down to a single failure, and that was management. When decisions were made, no one was considering the risk they were taking. The panel said that nine technical and engineering calls increased the risk of a blowout. The root causes are systemic, and absent significant reform in both industry practices and government policies, might well recur, the commission concluded its final report, which was delivered to the President on January 11<sup>th</sup>. This report is bad news for the three companies whose wrongdoing brought about the worst oil spill disaster in our nation's history. The losses and damages, personal and emotional, will be felt by people in the coastal states for years.

Source: Associated Press and New York Times

### **BP MAY NOT BE REQUIRED TO FUND SOME ECONOMIC RESTORATION EFFORTS**

Unfortunately the Oil Pollution Act doesn't require companies responsible for the massive Gulf oil spill to pay for restoring consumer confidence in the tourism and seafood industries. At least that's the opinion of the federal commission investigating the spill. As a result, if that's correct, Alabama must rely on the goodwill of BP PLC and the spill's other responsible parties to fund such economic restoration efforts. The final

report, released on January 11<sup>th</sup>, was not good news for this part of Alabama's problems resulting from the oil spill.

Additionally, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling recommended that 80% of Clean Water Act fines resulting from the spill should be spent on environmental restoration of the Gulf. That figure, with good reason, made some Alabama officials very unhappy. Most had pressed for more spending on economic restoration, which would help Alabama. It appears Louisiana will get the largest share of environmental restoration money.

President Obama established the commission in late May. Since that time, the group has traveled to the Gulf states and held several meetings exploring the disaster's causes and possible solutions. Many of the report's recommendations would need Congressional approval. Hopefully, Alabama's Congressional delegation will take the lead in passing the needed legislation.

Finding consensus across the Gulf state Congressional delegations could be difficult, if one state reaps most of the benefits. The report notes that Louisiana suffered most of the environmental damage. It recommends spending 80% of Clean Water Act money, an amount projected to be in the billions of dollars, strictly on environmental projects. Gov. Robert Bentley, who became Governor on January 17<sup>th</sup>, is reviewing the report. The Governor has stated that he is dedicated to restoring the coast and that's good news. The report also notes that while BP has come to agreements with Louisiana and Florida to help fund efforts aimed at boosting consumer confidence in Gulf tourism and seafood, a similar agreement with Alabama has not been reached. Such indirect financial harms are currently not compensable under the Oil Pollution Act. That must be changed by Congress.

Source: Al.com

### **REPORT NOT GOOD FOR ALABAMA'S OIL-SOAKED COAST**

Alabama's oil-threatened coast, along with other areas of the country, was among the top ten threatened places in the Southeast, according to a list compiled by the Southern Environmental Law

Center. The list, released on January 18<sup>th</sup>, stated that our coast faces "immediate, potentially irreversible" damage in 2011. The threat to our coast was said to be due to the continued threat from the BP oil spill in the Gulf of Mexico.

The Law Center defines the South as a six-state region including Alabama, Georgia, the Carolinas, Tennessee and Virginia. The threat to the Alabama coast is ongoing, even though the actual oil spill has been over for months, according to the report. Based on our involvement in litigation since April 20<sup>th</sup> of last year, I can say these folks are on target. Interestingly, the Law Center contends that federal drilling laws still don't have enough teeth to prevent another major spill.

A statement from the group touts its "legal efforts to strengthen oversight and regulation of offshore drilling, and to ensure that nothing like the disaster in the Gulf of Mexico is allowed to happen again."

Source: Associated Press

### **LOTS OF OIL STILL IN LOUISIANA MARSHES**

Contrary to what some may believe, a tremendous amount of oil from the massive oil spill remains in marshes off the coast of Louisiana. Officials from Louisiana are upset about the cleanup efforts by BP and the federal government, and rightly so. In early January, state and parish officials took media representatives on a boat tour of Barataria Bay, pointing out areas where oil is collecting in marshes and protective boom is either absent or overwhelmed by the oil. Plaquemines Parish President Billy Nungesser calls it "the biggest cover-up in the history of America." Nungesser was accompanied on the tour by Robert Barham, the secretary of Louisiana's Department of Wildlife and Fisheries. The environmentally-delicate Louisiana coastline is still in big trouble and that's a most serious matter.

The oil presents a number of environmental concerns. Among them is the damage done to the delicate reeds and grasses that grow in Louisiana's coastal estuaries. The marshes serve as nurseries for a variety of microscopic sea life—the bottom of the food chain that replenishes the abundant Gulf fisheries. Also, the killing of marsh grasses contributes to a long-standing erosion of Louisiana's coast

and barrier islands, the state's first line of protection against hurricanes.

Source: Associated Press

### **HIGH LEVELS OF TOXIC CHEMICALS FOUND IN COASTAL RESIDENTS**

Almost a year has passed since the Gulf oil spill. Unfortunately, much of the country's attention has been diverted to more recent events. But residents in the coastal counties continue to see more and more negative outcomes from the tragedy. When the Louisiana Environmental Action Network released the blood test results from 12 Gulf residents between the ages of ten and 66 that were taken in September, November, and December of 2010, the results were alarming. According to reports, these people were cleanup workers, crabbers, and people living along the coast. Four men, and two boys, aged ten and 11, were involved in the study.

Four of the people had unusually high levels of benzene, which is a highly-toxic chemical from crude oil. It has been linked to many health problems, including anemia, leukemia, irregular menstrual periods and ovarian shrinkage. Those four individuals, three adults and one ten-year-old boy, were all crabbers from the Biloxi area. Ethylbenzene was detected in all 12 blood samples from Gulf residents at high levels, and 11 of the 12 individuals had relatively high concentrations of xylenes. Ethylbenzene can cause damage to hearing and to the ear, dizziness, kidney damage, and may even cause cancer. Xylene can cause dizziness, headaches, skin irritation, confusion, and several other ailments. The two children had the greatest exposure of chemicals in their systems. The ten-year-old was experiencing severe respiratory problems as a result of the exposure. Hopefully, the federal government and the media won't ignore the potential health issues that the oil spill has caused.

### **HUNDREDS OF WORKERS SICKENED FROM OIL SPILL CLEANUP**

Lawyers in our firm are still being contacted by workers who have been sickened from the oil spill cleanup. Media reports also continue relating to the strange symptoms being experienced by

oil spill cleanup workers throughout the Gulf Coast as a result of their participation in the cleanup program. The workers, who were typically employed either by BP or through one of BP's sub-contractors, were hired to clean or repair boom, soak up oil, clean beaches or decontaminate boats coated with oil and dispersants. Now, it appears workers throughout the Gulf Coast are complaining of the same symptoms long after having left the cleanup program—difficulty breathing, nose bleeds, severe headaches, gastrointestinal issues, and skin and eye irritations.

Unfortunately, oil spill workers never really knew what they were getting themselves into. Oil contains multiple carcinogens, mutagens, and is dangerous at any level of exposure. Compounding the problem was BP's unprecedented use of toxic chemical dispersants. The two dispersants at issue, COREXIT 9500 and COREXIT EC 9527, contain petroleum-based chemicals and solvents that are known to cause central nervous system, blood, kidney, skin and liver problems.

BP and its contractors went out of their way to tell workers that the chemicals were safe—even though the evidence demonstrates they most assuredly were not. When the workers would specifically ask about the chemicals' danger, they were told the chemicals were safe "like hand soap." When workers requested respirators to protect their lungs, BP and their contractors refused—leaving the workers defenseless against inhaling significant quantities of dangerous chemicals over long periods of time. Raising concern over the dangerous condition would mean certain termination, which was something no worker could afford given the lack of alternative work on the Gulf Coast.

It should be noted that the oil spill commission tasked with determining the cause and impact of the BP oil spill expressed significant long-term human health concerns from exposure to oil and dispersants in its final report. The report maintains that response agencies did not initially issue personal safety equipment or guidelines to the workers. The report notes that "they missed the crucial window for screening their baseline physical health before the workers were directly exposed to oil products."

Now, it appears the fallout is underway. While it is unclear the precise number of

injured persons, we believe the impact could number in the thousands. Adding insult to injury, these workers cannot afford basic medical care because their insurance providers have refused coverage and the GCCF is denying the majority of cleanup worker claims. Add to all of this the action of BP and its claims man, Ken Feinberg, and it's quite evident these folks have serious problems.

Our firm is assisting injured cleanup workers and Gulf Coast residents with filing GCCF claims to pay for medical treatment, and if necessary, proceeding with the filing of lawsuits. These cases are extremely complicated and difficult, but we are fighting hard to make a difference. Anybody suffering from a severe illness as a result of exposure to oil and chemical dispersants, or having questions regarding exposure, can contact Parker Miller, a lawyer in our firm, who is working on the BP litigation, at Parker.Miller@beasleyallen.com, or by telephone at 800-898-2034 for more information.

Sources: The report of the President's Commission and *The Mobile Press Register*

### **GULF COAST RESIDENTS PETITION TO HAVE KEN FEINBERG FIRED**

I understand that more than 700 Gulf Coast residents have signed an online petition calling for Ken Feinberg to be fired. The petition states that the administrator of the Gulf Coast Claims Facility has not lived up to his promises to fairly, efficiently and consistently administer the \$20 billion claims fund in a manner consistent with the statutory requirements of the Oil Pollution Act of 1990. The petition sets out the following grounds as justification for Feinberg's firing:

- He is not an unbiased third party and should not be trusted to administer the GCCF;
- Contrary to his claims only 167,940 out of more than 468,000 Claimants had received compensation from the GCCF as of December 28, 2010;
- Feinberg has demonstrated that he is unable to process fair and consistent claim amounts for businesses, large and small; and
- His requirement that a Claimant sign a release of all future damages in order

to be eligible to receive a "final claim" payment.

Despite this petition and wide-spread criticism of his job performance, Feinberg continues to serve as the administrator of the GCCF. I will give him credit for being very good at public relations. He flies in—talks a lot but does little—and flies back to New York. The petition, dated January 10, 2011, can be reviewed online at <http://www.petitiononline.com>.

### **FEINBERG HAD TO BACK DOWN ON HIS LAWYER APPOINTMENT**

I was shocked to learn that one of three law firms appointed by Ken Feinberg in late December to advise people filing damage claims through the Gulf Coast Claims Facility had been working for BP since at least June. Feinberg, who is also working for BP, was aware that the Mississippi-based law firm had been working for BP when he chose the firm to advise individuals and businesses who had claims against BP. If what Feinberg did seems most unusual, I can assure you that it definitely was!

Feinberg hired the three law firms to offer free legal advice to Claimants. To accept a final payment through Feinberg's ever-changing process, Claimants must sign a waiver promising they will not seek future compensation from BP or any of the other wrongdoers involved in the spill. Consider that the Mississippi lawyers were representing BP, and at the same time, would be advising folks who have claims against BP. It's elementary that a lawyer can't represent parties with opposing interests. That's so basic that anybody—including Feinberg—had to have known it. This certainly appears to be a direct conflict.

I understand that lawyers from the Mississippi firm drafted contracts that were distributed to university scientists along the Gulf Coast and promised lucrative consulting fees to those who agreed to be a part of BP's legal defense against the federal lawsuit filed over the spill. Those contracts described the Mississippi lawyers as BP lawyers. Fortunately, Feinberg "saw the light" and withdrew this appointment of BP lawyers to represent BP's victims.

A nonprofit group had asked Attorneys General in the Gulf Coast states to pressure the Gulf Coast Claims Facility and BP

PLC to release all documents and contracts connecting the two entities. This was a reasonable request, especially in view of recent developments. Joanne Doroshov, the Executive Director of the Center for Justice and Democracy, sent a letter to the Attorneys General making this request. In her letter, Joanne wrote:

*Of all firms that Mr. Feinberg could hire, he chose this one to offer 'free legal advice' to victims filing damage claims against BP, asking them to release BP of all future liability. That Mr. Feinberg sees no ethical problem here is stunning.*

Ms. Doroshov's group made a similar information request of Feinberg and BP several weeks back, but she got no response. All of Feinberg's contracts with BP must be made public. It's not in anybody's best interest to let this man and BP's claims group operate in the dark.

Source: Al.com

### III. DRUG MANUFACTURERS FRAUD LITIGATION

#### **DRUG PRICING CASES**

Because of impending trials, the Montgomery County Circuit Court has ordered that all parties and their lawyers refrain from public discussion of any issues regarding the Medicaid fraud cases, commonly referred to as AWP (Average Wholesale Price) litigation. When the Court lifts this order, we will promptly provide updates from the various states.

#### **TEXAS RECOVERS \$65 MILLION FROM DRUG COMPANY**

Under the terms of a settlement, Mylan Laboratories Inc. will have to pay \$65 million to state and federal authorities. This settlement was the result of an agreement with Texas Attorney General Greg Abbott over charges that Mylan inaccurately reported drug prices to the Texas Medicaid program. Under the agreement, Texas, as its share of the recovery, will receive \$23 million. The price

Mylan provided to retail pharmacies caused the taxpayer-funded Texas Medicaid program to significantly overpay the pharmacies for certain generic drugs.

In 2007, Texas filed suit against Mylan and two other drug manufacturers. The first of those three cases settled last summer when Teva Pharmaceutical Industries Ltd. paid \$169 million to resolve claims brought by Texas, several other states and the federal government. The three Defendants named in the Texas lawsuit were:

- Teva Pharmaceuticals Inc. of Pennsylvania (with subsidiaries Lemmon Pharmaceuticals Inc., Copley Pharmaceuticals Inc., Ivax Pharmaceuticals Inc., Sicor Pharmaceuticals Inc., Teva Novopharm Inc. And Teva Pharmaceutical Industries Ltd.);
- Mylan Laboratories Inc. of Pennsylvania (with national subsidiaries Mylan Pharmaceuticals Inc. And UDL Laboratories Inc.); and
- Sandoz Inc. of New Jersey (with subsidiaries Geneva Pharmaceuticals Inc., Novartis Pharmaceuticals Inc., Eon Labs and Apothecan Inc.).

In order for pharmaceutical products to be eligible for reimbursement from Medicaid, Texas law requires that manufacturers accurately report market prices to the taxpayer-funded program. The Medicaid program bases its reimbursement to pharmacies on the pricing information reported to it by drug manufacturers. If Alabama citizens believe this all sounds familiar, it should. As you will recall, the State of Alabama filed a number of lawsuits against drug manufacturers based on identical claims. Several juries ruled in Alabama's favor, but the Alabama Supreme Court later ruled for the drug companies on the state's fraud claims.

It was revealed in a three-year investigation that the Defendants sold hundreds of Medicaid-covered drugs in Texas at steeply-discounted prices to large pharmacies such as Wal-Mart, CVS, Walgreens, and others—but concealed this same pricing information from the Texas Medicaid program. State officials were misled about current market prices for the drugs. Medicaid reimbursed the retailers at significantly higher rates than the discounted rates already established between the Defendants and retailers. Since 2003, settlements in the drug-pric-

ing cases have recovered more than \$300 million for the Texas Medicaid program.

Source: Insurance Journal

#### **PFIZER ORDERED TO PAY \$1.5 MILLION IN PREMPRO DAMAGES**

A jury has ruled that Pfizer Inc. must pay \$1.5 million in damages to a pharmacist who developed breast cancer after taking one of the company's menopause drugs. Jurors in federal court in San Juan, Puerto Rico, found that Pfizer's Wyeth subsidiary failed to properly warn Helen Rivera-Adams and her doctors about the health risks of its Prempro menopause medicine. Ms. Rivera-Adams, suffering from the late stages of cancer, wanted a trial so she could "get the message out that this drug is dangerous."

Until 1995, many menopausal women combined Premarin, Wyeth's estrogen-based drug, with progestin-laden Provera, made by Pfizer's Upjohn unit, to relieve their symptoms. Wyeth combined the two hormones in its Prempro pill. Pfizer, the world's largest drugmaker, completed its \$68 billion purchase of Wyeth last year. Pfizer's Wyeth and Upjohn units have now lost eight of the 15 Prempro cases decided by juries since trials began in 2006. The drugmaker got some of those verdicts thrown out after trial or had the awards reduced. It resolved some of the verdicts through settlements, while other decisions are on appeal.

The Plaintiff, a 62-year-old a pharmacist in San Juan, owns her own drugstore. Jurors found Prempro helped cause the woman's cancer and that Wyeth officials didn't provide adequate warnings about the drug's cancer risks to her or her doctors. Ms. Rivera-Adams took Prempro for 19 months before being diagnosed with cancer in January 2002. Michael Robb, a lawyer with Clark, Robb, Mason, Coulombe & Buschman, with offices in several Florida cities, including Miami, was the lead lawyer for Ms. Rivera-Adams, and he did a very good job.

Source: Bloomberg

#### **OREGON FILES SUIT AGAINST JOHNSON & JOHNSON**

Johnson & Johnson, after recalling more than 40 types of medicines last year, was sued by Oregon recently over claims

it put consumers at risk by secretly removing defective Motrin painkiller from store shelves. Attorney General John Kroger said Johnson & Johnson sought to avoid negative publicity with a plan to covertly buy up supplies of the defective product from retailers instead of conducting an open recall. The Complaint, filed in state court in Portland, seeks restitution for all Oregon purchases of Motrin, plus unspecified damages. Johnson & Johnson is accused of unlawful trade practices. J&J, the world's largest maker of health-care products, recalled the medicines because of contamination and inaccurate labeling.

The New Brunswick, N.J.-based company became the target of government investigation after it was forced to suspend operations at its McNeil Consumer Healthcare unit's Pennsylvania plant following a recall of children's Tylenol. The probe uncovered the company's attempt to use contractors to buy 88,000 packages of faulty drugs without notifying the U.S. Food and Drug Administration.

The Motrin tablets, which didn't dissolve properly, were sold in eight-caplet and 24-caplet containers at gas stations, truck stops and convenience stores. It was reported that J&J hired contractors to go into stores in early 2009 and secretly purchase the supplies. Oregon's Complaint cited an excerpt from company documents, in which J&J instructed contractors thusly: "You should simply 'act' like a regular customer while making these purchases. There must be no mention of this being a recall of the product." That was a slick way by the company to recall the products without actually having to recall them.

Source: *Bloomberg*

## IV. RECENT SETTLEMENTS BY THE FIRM

### SETTLEMENT OF A ROLLOVER CRASH AGAINST NISSAN

Our firm recently settled a case against a major Japanese auto manufacturer for roof crush which caused the paralysis of

44-year-old Anita Robinson. The accident happened near Sweetwater, Alabama, on July 12, 2007. Ms. Robinson was driving her car when another vehicle turned in front of her. She took an evasive action and the car went off the road and rolled over one and one-half times, landing on its roof. During the rollover event, the roof collapsed 12 inches, breaking Ms. Robinson's neck. That was the last day that she walked. Ms. Robinson was wearing her seatbelt and was wearing it properly. She was not speeding. Accident reconstructionists in this case admit that at the time Ms. Robinson's roof hit the ground the first time, the car was going less than 20 miles per hour.

Since the accident Ms. Robinson has spent more than six months in various hospitals in Alabama and Mississippi. She continues to have numerous health issues related to her paralysis. She is totally dependent on others for her care and will require 24-hour attendant care for the rest of her life. She will never be able to do the things she did before the accident. Her life care plan is over \$10 million.

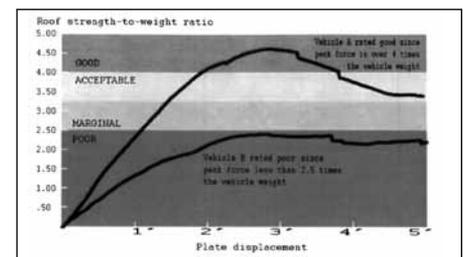
This case points up the problem of having a very weak federal roof crush standard. Federal Motor Vehicle Safety Standard 216 has been in effect since the 1970s. The standard only requires that the roof withstand the weight of the car by one and one-half times. In order to visualize just how weak the roof can be, if you took a vehicle and gently placed it on the ground on its roof and added one-half of the weight of the car to the bottom, as long as the roof does not crush more than five inches in that static position, the vehicle would likely pass the test. An egg could pass the test.

Another problem with the roof test is that it is a quasi-static test. A ram and platen is pushed very slowly over the driver's or passenger's side A and B pillar roof rails. In a real world rollover there is a substantial amount of kinetic energy placed into the roof suddenly. (The egg mentioned previously would obviously break if you picked it up and dropped it).

Fortunately the federal government recently recognized the weakness in the 1.5 strength-to-weight ratio. As of September 1, 2012, all new similar passenger cars will have to double the strength requirement to three times the weight of the car. The car will have to be tested on both sides of the roof and there will be

manikins placed in the vehicles during the testing for head clearance. The manufacturer in this case, like most manufacturers, added reinforcements in the area of the roof where the metal plate or test ram contacts the roof. Manufacturers can easily pass this test but in a real world rollover the roof will deform.

For years, manufacturers have insisted that roof strength does not matter in a rollover. The manufacturers have bogus testing that they claim proves that the injury occurs before the roof collapses. Fortunately, recent studies show the weakness of the diving theory. The Insurance Institute for Highway Safety has taken on this issue in recent years. The Insurance Institute now has a rating system for roof crush. The attached chart shows the criteria that the Insurance Institute for Highway Safety uses to judge the strength of roofs. Without the rating system consumers have no way of knowing whether their car has a safe roof or not.



To receive a good rating the roof has to meet a 4 to 1 strength-to-weight ratio. Consumers will now have a source of information regarding roof strength to help them determine where their car falls.

This is a tragic situation for a very nice lady. This type of accident could happen to anyone or to any member of his or her family. Hopefully, with the new standard, tragedies like this will be reduced in number and severity.

The name of the manufacturer has not been disclosed in this article as a part of the settlement. The manufacturer demanded that its name not be used as a condition of settlement. However, anyone who wishes to know the name of the manufacturer involved in this litigation can contact Greg Allen in our firm, who handled this case, and the name will be disclosed. The amount of the settlement is also confidential at the request of the manufacturer. Greg and his staff did a tremendous job in this case and represented a lady who badly needed our help.

### **CASE INVOLVING MOTOR VEHICLE ACCIDENT IN ELMORE COUNTY SETTLES**

A lawsuit arising out of a motor vehicle accident that occurred in Elmore County has been settled. On September 3, 2007, our client was operating her motor vehicle when a truck driver, who was operating a truck for his employers, turned directly into the pathway of her vehicle. The two vehicles collided and our client and her teenage daughter were severely injured. The mother sustained fractures to both hands which required surgery and continues to cause her pain. The case was handled by Julia A. Beasley from our firm.

### **CASE INVOLVING PIPE WHICH STRUCK MOTOR VEHICLE SETTLES**

Our firm settled a personal injury case during mediation last month. The case involved a motor vehicle that was struck by an unsecured pipe from a construction site that rolled downhill, onto Highway 280 and directly into the pathway of our client's vehicle. On August 4, 2009, our client was driving his vehicle on Highway 280 in Tallapoosa County, Alabama, when the pipe rolled downhill and onto Highway 280, causing it to crash into our client's vehicle. The construction company was installing a waterline at the site.

As a result of this incident, our client suffered serious injuries that required surgery. It was alleged in the lawsuit that the construction company was at fault for not securing the pipe and allowing it to get loose. The case was handled by Julia A. Beasley, who does motor vehicle litigation for our firm. The amount of the settlement is confidential at the request of the Defendant, but our client was totally satisfied with the settlement.

## **V. LEGISLATIVE HAPPENINGS IN ALABAMA**

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### **THE ORGANIZATIONAL SESSION OF THE ALABAMA LEGISLATURE**

The Alabama Legislature met in its organizational session on January 11<sup>th</sup> to elect its officers, appoint committees and do other work required by law. The Alabama House of Representatives voted without a dissenting vote to elect Rep. Mike Hubbard of Auburn to be Speaker of the House. Mike, the first Republican Speaker of the House in more than 100 years, was the only nominee for the position. Mike says he will be fair in all his dealings with members of the House and will work with all members. He pledges to make sure that everything is done in an above-board and honest way. Committees were appointed on January 12<sup>th</sup>.

The State Senate voted 29-0 to elect Sen. Del Marsh, R-Anniston, to the important position of Senate President Pro-Tem. Del has served in the Senate since 1998 and is well-respected by his peers. There are now 22 Republicans, 12 Democrats and one Independent in the Senate. The position of Senate President Pro-Tem is very important. Del had a huge role in assigning senators committees and will help direct traffic in the Senate for the full term. The ability of the President Pro-Tem, together with the Lieutenant Governor, to assign bills to committees is also very important. Deciding which committee will review each bill is a most significant role.

Source: *Birmingham News*

### **THE REGULAR SESSION WILL START NEXT MONTH**

The Alabama Legislature's regular session, during which the Legislators are supposed to pass budgets and other needed legislation, starts on March 1<sup>st</sup> and could last until June 13<sup>th</sup>. This will be one of the most difficult sessions in recent memory because of the state's extremely poor financial condition. To say that the new Governor and legislators are inheriting a fiscal mess may be an understatement. Some real tough decisions will

have to be made in order to solve the many fiscal problems facing our state.

Perhaps, out of the fiscal mess will come some long-range financial planning. Our state has patched and borrowed for years to keep state government operating with no real long-range plan and we are now paying the price for it. Long-range planning must be a top priority for this group of Legislators. Dealing with budgets for the next fiscal year has to come first, however, and that poses a major challenge for the Legislative leadership. Hopefully, there will be a bi-partisan approach to dealing with these problems during the session. If so, there will be progress made and some good things will happen.

Source: *Birmingham News*

## **VI. COURT WATCH**

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### **THE BAPTIST HEALTH DECISION IN ALABAMA**

The Alabama Supreme Court in a 4-3 opinion reversed a \$3.2 million wrongful death verdict that came out of Montgomery County. First, let me say that neither I nor our law firm were involved in this case. Neither does our firm sue doctors or hospitals in Alabama for medical malpractice. Because this decision has sent shock waves across the state—both in the legal community and with the public—I feel compelled to write on what the Court did. Hopefully, it's not as bad as it appears to be for all citizens of Alabama.

According to dissenting members of the Court, the ruling doesn't just throw out a jury's award, but sets a precedent that could shield Alabama hospitals from ever being sued regardless of their conduct. The Court voided the previous judgment, not based on whether the hospital was at fault, but on whether the hospital could even be sued. A majority of the Court ruled that governmental immunity should be extended to Baptist Health because of its relationship with state universities.

Chief Justice Sue Bell Cobb, one of the three dissenting Justices, went as far as to write that the majority's opinion essentially implies that Baptist Health "is no longer legally responsible for the harm that may be caused by its negligence in

providing health care to the citizens of this state.” The hospital had appealed a 2009 Montgomery County jury’s verdict that Baptist Health was negligent in failing to notify 73-year-old Lauree Ellison or her doctor that a throat culture had come back positive for Methicillin Resistant Staphylococcus Aureus. The culture was done during a visit to the Baptist Medical Center East emergency room in September of 2005. About two months later, Ms. Ellison was re-admitted to Baptist Medical Center East and diagnosed as having MRSA Pneumonia. She died five days later. The decision says the hospital can’t be sued because it had governmental immunity through its relationship to the University of Alabama and the University of Alabama at Birmingham Health System.

Shay Samples, a very good lawyer from Birmingham, represented the family. Shay says he was “shocked” by the opinion, especially since there was little debate over the issue of sovereign immunity in court. I understand that the lawyers for Baptist Health never seriously argued that immunity was an issue. If that’s correct, I too am shocked. It appears that other hospitals can now acquire the same immunity if they enter into similar partnerships with universities. Shay says the Court has “put the citizens of Alabama in an untenable position,” and that folks have been “stripped of their rights without a remedy.” It may be asking too much of this Court, but a rehearing of the case seems to be in order. There are two new members of the Court, who in my opinion will follow established law and do the right thing, and that could make a difference on rehearing.

Source: *Montgomery Advertiser*

### **AN UNEXPECTED CHANGE AT THE ALABAMA SUPREME COURT**

Alabama Supreme Court Justice Champ Lyons, Jr. resigned on January 14<sup>th</sup> and Gov. Riley appointed Jim Main to replace him for the final two years of the term. This came as a surprise even though Champ was said to be ready to leave the Court. Jim served as Gov. Riley’s state finance director before the Governor appointed him to the Alabama Court of Criminal Appeals in May 2009. Jim previously practiced law in Montgomery and was a partner in our firm.

Champ was appointed to the Supreme Court in 1998 by Gov. Fob James and he was elected to six-year terms in 2000 and 2006. Champ is known in legal circles as a legal scholar. Jim will be a very good addition to the Court. He is very smart, has excellent people skills, is a hard worker, and understands that judges don’t make laws under our system. I wish Jim the very best as he joins the High Court.

Source: Associated Press

### **JUSTICE KELLI WISE JOINS THE COURT**

Kelli Wise, who has served with distinction on the Alabama Court of Criminal Appeals, was sworn in last month as a Justice on the Alabama Supreme Court. The new member of the Court enjoyed a convincing win at the polls and will be another good addition to the High Court. In my opinion, she comes on without an agenda and that’s the way it should be for any person joining the Court. I wish Justice Wise the very best as she reaches another milestone in her legal career. I believe she will be an outstanding member of the Alabama Supreme Court.

### **ALABAMA CHIEF JUSTICE TO PROPOSE SENTENCING REFORMS FOR 2011**

Alabama Chief Justice Sue Bell Cobb will propose a series of sentencing reforms to the Alabama Legislature next month. She says they will save taxpayers money and improve public safety. The proposals, which come from a bipartisan committee that includes judges, prosecutors, law enforcement officials, legislators and victims rights groups, will focus on reducing the number of low-level drug offenders sentenced to prison terms. They would also create a new felony classification—called Class D—for low-level nonviolent crimes to keep those from leading to longer sentences.

Chief Justice Cobb hopes the measures will be considered and passed by the Alabama Legislature during the session. The committee proposing the bills includes President Pro-Tem Del Marsh, State Sen. Cam Ward, chairman of the Senate Judiciary Committee. The Chief Justice estimates that the proposals, if adopted, will save Alabama \$10 million

and reduce prison overcrowding. Alabama has the most overcrowded prison system in the country and the least funded. Alabama’s prisons are operating at 195% of capacity, with half the inmates incarcerated for drug-related offenses. Studies have shown an increased level of post-jail supervision for offenders can reduce repeat offenses. The commission favors increasing access to drug courts and, if prison populations can be reduced, using some of the cost savings for more probation officers. Chief Justice Cobb has worked hard to bring about needed changes in our judicial system. In my opinion, she has done an outstanding job.

Source: Al.com

### **CLASS CERTIFIED IN ALABAMA PREPAID TUITION LAWSUIT**

Montgomery County Circuit Judge Johnny Hardwick has certified a class in a lawsuit involving Alabama’s Prepaid Affordable College Tuition plan. This means all 42,000 participants remaining in the plan will be affected by the outcome of the lawsuit. The suit seeks to make sure tuition is paid under the financially-precarious program. Judge Hardwick ruled the suit will become class-action litigation covering all participants because they face similar legal issues with the plan. All PACT participants will now be able to get a court resolution defining their rights and the obligations of the state. The PACT board is a Defendant in the case.

The parents sued the program last year before the Legislature allocated \$548 million to the struggling program. Judge Hardwick denied a motion to dismiss the suit. The judge has also agreed to consider a counterclaim filed by the PACT board. Among other things, that counterclaim wants the judge to rule on what happens if money runs short, including whether the board can dissolve the program and how it should distribute the remaining funds. The judge divided the 42,000 participants into two groups based on whether they joined the PACT plan before or after the Legislature revised the PACT law in May 2001. That’s when the Legislature took out part of the PACT law that said the parents’ payment allowed their child to go to college “without further tuition costs or manda-

tory fees.” It will be interesting to see how this lawsuit turns out.

Source: Associated Press

### **ALABAMA SUPREME COURT REJECTS RICHARD SCRUSHY’S APPEAL**

On January 28<sup>th</sup>, the Alabama Supreme Court rejected the appeal by Richard Scrushy of the \$2.8 billion civil judgment levied against him in 2009. The state’s highest court reaffirmed the ruling in favor of HealthSouth Corp. shareholders. Former HealthSouth Chief Executive Scrushy was found to be “the CEO of the fraud” during the trial in Jefferson County Circuit Court.

Scrushy was held responsible for the massive accounting fraud that engulfed the company from 1996 through 2002 and ordered to pay the judgment to compensate HealthSouth for recovery expenses, and for fraudulent loans, related fees and interest costs that were found to exist only as a cover for the accounting subterfuge. Scrushy argued in his appeal that HealthSouth shareholders lacked the legal standing to bring the suit, that the matters in question had already been decided by other courts, and that the statute of limitations had passed.

Source: Al.com

## **VII. THE NATIONAL SCENE**

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### **IT’S TIME TO TONE DOWN THE POLITICAL RHETORIC IN THIS COUNTRY**

When U.S. Rep. Gabrielle Giffords, D-Ariz., was shot during a public appearance last month, the gunman did more than temporarily silence a voice in Congress. In addition to taking six innocent lives and leaving Rep. Giffords critically wounded, the attack served to open a reexamination of political discourse in our increasingly-polarized country. It has become quite obvious that there is more pure hate in America today than we have seen in years. Both major political parties have a moral duty to help bring about a “healing in the land,” and they must tone down their rhetoric. As former President Bill Clinton says, we must remember that

political rhetoric—and especially the messages of hate—falls on the “unhinged” and the “hinged” alike. Both groups respond to this type message and violent acts are always a possibility with those in the “unhinged” groups.

In what could end up being nothing more than a coincidence, Rep. Giffords’ district appeared in a campaign by Sarah Palin’s political action committee as one of the Congressional seats conservatives wanted to regain in the fall elections. The imagery, in light of the tragic shootings, was unfortunate at best. Each of the districts were “targeted” in the campaign ad. Gun sights were printed over each district. That is the sort of thing that has no place in the political arena. Palin’s very weird response after the shootings did nothing to calm the waters. In fact, it made matters worse.

But Palin is not alone. There are far too many voices in the political realm that have used violent imagery or rhetoric. People and groups on the left and right of the political spectrum have shown a willingness to vilify their opponents rather than simply argue their points. It’s past time for that sort of thing to be put on the shelf for good.

While such polarizing rhetoric is nothing new, our American government relies on the free exchange of information and argument. Hopefully, political figures and highly-paid talk show hosts have learned a lesson. There must be more civility when they disagree with folks. Workable policies can be created in our political process in spite of disagreement by focusing on debate and compromise. The last thing anyone in the U.S. should advocate is a chilling of our political process. It’s a vital part of our system of government. However, there are points beyond which rhetoric becomes inflammatory and is no longer reasonable or useful. We must all be careful not to cross that line.

### **BANK OF AMERICA TO PAY FANNIE MAE AND FREDDIE MAC \$2.8 BILLION**

Bank of America has agreed to pay \$2.8 billion to taxpayer-funded Fannie Mae and Freddie Mac to settle claims that it sold the mortgage giants bad home loans. The agreement is the largest so far between Fannie and Freddie and lenders that sold them loans during the sub-

prime lending boom and before standards were tightened. Fannie and Freddie buy about two-thirds of all home loans, then package and sell them to investors with a promise to cover losses and seek restitution for loans that they say failed to meet their underwriting standards. This is not an uncommon practice for all major banks.

The financial industry may face about \$52 billion in costs from such mortgage claims, according to a consensus of Wall Street analysts’ estimates. The agreement deals with loans originated by Countrywide Financial, one of the largest sub-prime lenders. Bank of America acquired it in 2008. The cost to Bank of America, the nation’s largest bank and mortgage servicer, was in line with most Wall Street estimates, which reduced fears among investors that costs could go much higher for the whole industry.

Fannie and Freddie, which were taken over by the government more than two years ago, may get more restitution than private investors. It’s said that lenders need the two mortgage giants to continue to buy their loans. The Federal Housing Finance Agency regulates Fannie and Freddie. Approximately \$3.3 billion in recent settlements have been returned to taxpayers. The Bank of America agreement resolves the bulk of Bank of America’s exposure to Fannie and Freddie. But it still faces potential liabilities from mortgages it sold to private investors. As part of the settlement, Bank of America made a \$1.28 billion cash payment to Freddie Mac and \$1.52 billion to Fannie Mae.

Source: USA Today

## **VIII. THE CORPORATE WORLD**

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### **MORE GUIDANT PROBLEMS**

A federal judge has approved a plea agreement last month that called for Boston Scientific Corp.’s Guidant unit to pay \$296 million for failing to properly disclose changes made to some implantable heart devices. But, as a part of his approval, the judge added three years of probation to the agreement. U.S. District Judge Donovan Frank had rejected the plea deal last spring as insufficient. His

acceptance came only after Guidant filed papers giving him more information about its compliance policies and community service programs. Guidant was given ten days to pay the fines and forfeiture fees. The \$296 million in fines and forfeiture fees is the largest criminal penalty ever against a medical device company. As part of the probation, the court will annually review Boston Scientific and Guidant's compliance efforts to make sure it can verify that Boston Scientific keeps its commitments.

Then the U.S. Justice Department filed a civil lawsuit last month against Boston Scientific Corp. And its Guidant subsidiary, alleging the Medicare program wrongly paid for heart devices that Guidant knew were faulty. The suit, filed in a Minnesota federal court, seeks to recover some of those federal health-care expenditures. The Department alleged that Guidant sold certain implantable defibrillators, used to detect and treat abnormal heart rhythms, even though it knew of serious safety concerns with the devices. The government says Guidant knowingly caused approximately 2,000 false or fraudulent claims to be submitted to Medicare.

Guidant withheld information from the U.S. Food and Drug Administration regarding catastrophic failures in some of its defibrillators. The company discovered problems with one of the products in 2002 and became aware of problems with two others in 2003 and 2004. Flaws with the devices have been responsible for at least 13 known deaths, though the total figure is likely higher, according to the government. Guidant issued a recall on the devices in June 2005. The device maker's troubles created an opening for Boston Scientific to buy the company in 2006.

Source: *Wall Street Journal* and *Law.com*

#### **LIBERTY MUTUAL WILL PAY \$7.5 MILLION TO SETTLE BID-RIGGING CHARGES**

Boston-based insurer Liberty Mutual will pay a combined \$7.5 million to New York and Connecticut to settle allegations that it steered insurance contracts by paying kickbacks to large insurance brokers. Under the settlement, New York will receive \$5.5 million and Connecticut \$2 million. The settlement, announced by Connecticut Attorney General Richard

Blumenthal, was the result of litigation arising out of the Attorney General's 2005 investigation of the insurance industry's business practices. The suit was filed in 2006. It's one of several suits brought by state prosecutors across the country, most notably in New York by former Attorney General Eliot Spitzer.

Source: *Insurance Journal*

#### **FORMER AIG EMPLOYEE FILES SUIT OVER AUDITS**

A former employee of American International Group, Wanda Mimms, has filed a lawsuit claiming that PricewaterhouseCoopers was negligent in its audits of AIG. It was also alleged that the board of the bailed-out insurer failed to pursue a claim against the accountants. The suit, filed in federal court in Manhattan, was brought as a derivative action on behalf of the AIG Incentive Savings Plan. The Defendants named in the complaint are PwC and AIG's board.

The Plaintiff contends the AIG incentive plan held shares in the company from late February 2008 through late January 2009. She says that PwC, as AIG's auditor, should have known the share price was inflated by inaccurate financial statements. The Plaintiff demanded in July 2010 that AIG's investment committee pursue action against PwC for losses in the plan. Her demand was referred to AIG's board, which rejected it in September. The lawsuit demands that PwC make the incentive plan whole for its losses, as well as other relief.

Source: *Insurance Journal*

#### **\$2.5 BILLION RECOVERED IN HEALTH CARE FRAUD**

The federal government recovered \$2.5 billion from health care fraud judgments in the budget year that ended in September. That was a record-breaking amount and credit must go both to whistle-blowers and to a renewed effort from the Obama administration. Health and Human Services Secretary Kathleen Sebelius says the money recovered in cases under the False Claims Act will help to prevent fraud in 2011. She also credits the healthcare law passed last year as being a big help in that area for the coming year. Overall the government

recovered \$4 billion. That includes \$1.5 billion in administrative findings. Thomas Perrelli, an associate attorney, had this to say:

*Our aggressive pursuit of health care fraud has resulted in the largest recovery of taxpayer dollars in the history of the Justice Department.*

The government said that whistle-blowers received about \$300 million in 2010 after turning in fraud they observed in the workplace. It should be noted that the new health care law created one agency and expanded another to help recover stolen money. The actuary for Medicare expects the provisions of the new law to save an additional \$4.9 billion in fraud and abuse during the next ten years. That money will be folded back into Medicare to help it remain solvent until at least 2027.

In 2011, the screening process for new Medicare providers and suppliers will be more strenuous. More than 19,000 businesses apply every month, but rules will prevent those that have a history of defrauding Medicare or state governments from providing services. Anybody who is caught cheating the government should be banned from government programs. More than half the money recovered came from pharmaceutical companies. For example, Novartis Pharmaceuticals paid \$420 million after its owners pleaded guilty to the illegal marketing of Trileptal, a medication approved for epilepsy, as a psychiatric and pain medication. It's high time that cheating the government and committing massive frauds relating to government programs be stopped!

Source: *USA Today*

## **IX. CONGRESSIONAL UPDATE**

### **CONGRESS MUST BE REMINDED OF THE 7TH AMENDMENT**

Many members of the newly-elected Congress campaigned long and hard, proclaiming their enthusiasm for and commitment to our Constitution. This group even read the Constitution aloud on the

House floor. New House rules were approved requiring that specific constitutional authority be cited to support every piece of legislation proposed in the new Congress. Hopefully, that was more than just political games.

The commitment by the constitutional conservatives to our country's founding principles has been widely proclaimed. It will be interesting to see if this group will support limiting the 7<sup>th</sup> Amendment right to trial by jury. The right to a trial by jury for civil suits dates back almost 800 years, to the signing of the Magna Carta. Article 39 of the Magna Carta specifically guaranteed the right to a jury trial for civil suits and criminal cases. The 7<sup>th</sup> Amendment is as clear as the Liberty Bell when it guarantees the right to a jury trial to every citizen.

Our Founding Fathers also agreed with the importance of a trial by jury. In the words of James Madison, "In suits at common law, trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." Other founders were equally adamant about the critical importance of access to civil justice. Thomas Jefferson called civil jury trials, "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

But unfortunately, that 7<sup>th</sup> Amendment right has been the most ignored and endangered of those rights enumerated in the Bill of Rights. Years of political and legal warfare by the giants of Corporate America, in the name of "economic efficiency," have succeeded in shredding our rights in a host of areas. Lawmakers beholden to lobbyists for insurance companies, the drug industry, financial institutions, and entities have for years pushed tort reform—providing immunity to wrongdoers at the expense of American consumers' 7<sup>th</sup> Amendment rights.

Americans universally know that the 2<sup>nd</sup> Amendment protects the right of the people to keep and bear arms. Our Founding Fathers had no intention of making the 2<sup>nd</sup> Amendment more or less important than the 7<sup>th</sup>, or any other part of the Bill of Rights. We cannot pick and choose which parts of the Constitution to follow or to ignore. It will be up to members of the 112<sup>th</sup> Congress to fulfill their campaign pledges and protect the Constitution. But some of them may have

to be reminded that the 7<sup>th</sup> Amendment is still around.

Source: Gibson Vance, President, AAJ

### **CONGRESS FAILED TO PASS THE MOTOR VEHICLE SAFETY ACT OF 2010**

While Congress did lots of good things last year, the members failed to address a major safety crisis. It went largely unnoticed that Congress failed to pass the Motor Vehicle Safety Act before it left our Nation's Capitol in December. With highway deaths once again rising after a four-year downturn, this failure to pass the legislation is a public health tragedy. In a year that began with runaway Toyotas and ended with Windstar rear axle fractures, one thing is very clear. NHTSA, the agency charged with the responsibility to regulate the automobile industry, does not have the authority or resources to stand up to an auto industry that always has and always will place profits above safety. NHTSA must be given the tools it needs so that the agency can do its job and protect U.S. citizens. Hopefully, Congress will make passage of this legislation a top priority in 2011.

### **BILL TO IMPROVE NATION'S FOOD SAFETY SIGNED INTO LAW**

President Obama signed the \$1.4 billion overhaul of the nation's food safety system on January 4<sup>th</sup>. Some lawmakers complained that the Act is too expensive and have threatened its funding. The first major overhaul of the food safety system since the 1930s, the law emphasizes prevention to help stop deadly outbreaks of food-borne illness before they occur, instead of reacting after consumers become ill.

It calls for increasing government inspections at food processing facilities and, for the first time, gives the Food and Drug Administration the power to order the recall of unsafe foods. President Obama made improving food safety a priority shortly after taking office in 2009. There have been several deadly outbreaks of E. coli and salmonella poisoning in peanuts, eggs and produce in the past few years.

Republicans who want to withhold funding would appear to have little

chance of succeeding. The bill passed Congress with broad bipartisan support last year on a 73-25 vote in the Senate and by 215-144 in the House. Major food companies backed the bill, recognizing that safe food is good for business. Recent outbreaks in spinach and other foods hurt those industries financially as consumers reacted to recalls or stopped buying those products. The CDC recently estimated that 48 million people—or one in six Americans—are sickened every year by a food-borne illness. Of that, 180,000 are hospitalized and 3,000 die. The U.S. has a population of more than 300 million.

Supporters of the law will press for full funding. Erik Olson, who directs food and consumer safety programs for the Pew Health Group, said the health care costs associated with an outbreak of contaminated food alone run into the tens of billions of dollars—far beyond what it would cost to put the law's new requirements into place. Democratic Senator Tom Harkin, a lead sponsor of the bill, has acknowledged the tough spending decisions that will have to be made, but he said food safety shouldn't be sacrificed in the process. "Fiscal responsibility does not necessitate abandoning or neglecting the need of American consumers for safe food," Senator Harkin said in a statement. The new law will do the following:

- Increase inspections of U.S. And foreign food facilities; the riskiest U.S. facilities would be inspected every three years. The FDA rarely inspected most facilities and farms, visiting some about once a decade and others not at all.
- Allow the FDA to order the recall of tainted food. Previously, the agency could only negotiate with businesses for voluntary recalls.
- Impose new safety regulations on producers of the highest-risk fruits and vegetables.
- Require processors to prepare detailed food safety plans and tell the FDA what steps they are taking to keep their food safe at different stages of production. The government would use the information to trace recalled foods.

The law exempts meat, poultry and processed eggs, since they are regulated by the Agriculture Department. Also

exempt are some small businesses, which had complained that the new requirements could force some of them into bankruptcy.

Source: Associated Press

### **CONGRESS FINALLY PASSES FIRST RESPONDERS BILL**

President Barack Obama has signed into law a bill to provide aid to survivors of the September 11<sup>th</sup> attacks and first responders who became ill working in the ruins at the World Trade Center. When you consider that the terrorist attacks took place in 2001, it's impossible to justify the delay in responding to this obvious need. The firefighters, police officers and first responders who risked their lives to save others certainly deserved better. A few Republicans tried to block the measure, claiming they were concerned with how to pay for the bill. Our government had a moral—if not legal—obligation to those people who will finally benefit by this bill's passage.

The \$4.2 billion measure will be paid for with a fee on some foreign companies that get U.S. government procurement contracts. It was a nine-year struggle to address the 9/11 health crisis and I commend those who fought so hard to get this badly-needed legislation passed. Certainly Congress had a moral obligation to care for those who rose to the defense of America in a time of war. The September 11, 2001 terrorist attacks were an attack on America by a foreign enemy and addressing its health impacts is a national duty.

Source: Associated Press

### **HOUSE PASSES REPEAL OF HEALTHCARE LAW**

On January 19<sup>th</sup>, the Republican-led U.S. House of Representatives passed a bill that would repeal the landmark healthcare reform law. The House voted 245-189 to repeal the law. The House measure will now go to the Senate. The reform bill was passed by Congress last year after a bitter debate. While most Americans know that a healthcare reform bill was passed, few have any idea what all the Act does for them. There has been a great deal of false or simply misleading information put out by opponents of the

law. Perhaps the attention on this debate will actually be a good thing. At least it will give proponents of the Act the opportunity to explain what all it really does.

The House Republicans were joined by three Democrats in backing the bill, which also needs Senate passage. Most observers say that is unlikely. Even if the Senate were to pass the measure, President Obama has vowed to veto any effort to repeal the healthcare law, one of his biggest legislative victories. Republican leaders said they were committed to trying to repeal it in order to honor a campaign pledge that helped them win control of the House and gain seats in the Senate in Congressional elections last November.

Interestingly, polls show that Americans are evenly split on the healthcare reform law. An *ABC News/Washington Post* poll found that more Americans now believe it will hurt rather than help the struggling U.S. economy. But the same poll also showed that just 18% favor full repeal of the law. The Republican opposition has skillfully made healthcare reform a referendum on the President.

Republicans say the law saddles businesses with high costs and complicated regulations. Democrats say the law is an historic move to deliver health insurance to more than 30 million people who currently cannot afford it while also lowering medical costs and providing more consumer protections. The law will also bar insurance companies from denying coverage to people with pre-existing health conditions. According to Treasury Secretary Timothy Geithner, repealing the law will damage the economy. He said that things must be done to bolster the recovery, and that "repealing the Affordable Care Act would be a step in the wrong direction."

Some, but not all, of the provisions in the law have gone into effect. They include allowing young people to stay on their parents' health insurance until age 26, improving drug savings for the elderly on the government's Medicare insurance program, and creating temporary high-risk pools to help people with medical conditions obtain health coverage. Other elements such as the creation of insurance exchanges to help individuals and small business compare and purchase plans will not go into effect until 2014.

In addition to what's going on in Congress, there have been constitutional attacks on the Act in several federal courts. Federal courts have issued differing positions on whether a mandate that Americans purchase health insurance is permissible under the U.S. Constitution. The constitutional question is expected to wind up before the U.S. Supreme Court. In the meanwhile, the media focus will be on the U.S. Senate.

Source: *Insurance Journal*

## **X. TOYOTA LITIGATION UPDATE**

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### **TOYOTA UPDATE**

As we have reported previously, Dee Miles and Ben Baker from our firm are serving on the Liaison Counsel Committee in the Toyota Sudden Unintended Acceleration MDL (Multi-District Litigation) currently pending in the United States District Court for the Central District of California and we are pleased to report that the case is proceeding swiftly. The Court has disposed of many preliminary matters, such as and among other things, Motions to Dismiss, Amendments to Complaints and Discovery Plan Orders.

We are currently in the second phase of discovery which involves in-depth depositions, voluminous document reviews and expert matters. The MDL is seeking to begin actual trials of some the cases as early as 2013, but there is much work to do between now and then.

The many class actions filed all over the country have been merged into a single consolidated Complaint. The discovery in both the class case and the individual death and serious injury cases is being conducted in harmony in an effort to expedite the cases to trial. This discovery process is also being done in conjunction with the many individual state cases that are not in the MDL, but are approaching trial dates as well. This effort appears to have been successful so far.

We will continue to update our readers on any and all developments with this very important MDL.

## **SOME INFORMATION ON SUDDEN ACCELERATION PROBLEMS**

According to a database compiled by Safety Research & Strategies (SRS), a Massachusetts-based safety organization, Toyota owners are still reporting Sudden Unintended Acceleration (SUA) incidents. SRS recently completed its latest review of the SUA data and confirmed that to be the case. The safety group said that the incidents included owners who had taken their vehicles in for the recall repairs. The database compiled by SRS consists of incidents from four sources:

- Consumer complaints to NHTSA through January 5, 2011;
- Toyota-submitted claims from several NHTSA investigations;
- Incidents reported by media organizations; and
- Incidents reported by consumers to SRS and others.

While there may be some duplication, SRS believes it is minimal. The database consists only of incidents reported from 1999 to Jan. 5, 2011, regardless of model year. SRS defines unintended acceleration as “any incident in which the complainant reported an engine acceleration that was unintended—regardless of whether the car was in gear.” The following is a breakdown of Toyota SUA incidents reported within the dates referred to above:

- Total incidents 6,496
- Crashes 2,483
- Injuries 1,156
- Deaths 54

SRS says that these numbers include only those that are in the public domain. Based on information supplied by Toyota to Congress last year, the number of incidents could be much higher. The House Committee on Energy and Commerce said there had been 37,900 customer contact reports identified by Toyota as “potentially related to sudden unintended acceleration.” SRS says further that its approach to compiling a database has been very conservative. Interestingly, the Camry models had the largest number of SUA incidents in the database, 415.

Source: SRS

## **INSURANCE COMPANIES SUE TOYOTA OVER ACCELERATION CRASHES**

Seven insurance companies have sued Toyota Motor Corp. in an attempt to recover money paid to cover crashes they blame on sudden acceleration. The insurers cite data that blames 725 crashes on the problem and fault Toyota for failing to equip its cars with an override system that would cause a car to idle if the brake and gas were deployed simultaneously. They are seeking damages in excess of \$230,000 from 14 crashes throughout the United States. The lawsuits allege that “certain of Toyota’s cars and trucks have a defect that causes sudden uncontrolled acceleration to speeds of up to 100 mph or more.”

The insurance companies are American Automobile Insurance Co., Fireman’s Fund Insurance, National Surety Corp., Ameriprise Insurance, IDS Property Casualty Insurance, Motorists Mutual Insurance and American Hardware Mutual Insurance. The lawsuits were filed in Los Angeles Superior Court.

Source: Associated Press

## **TOYOTA RECALLS 1.7 MILLION VEHICLES FOR FUEL LEAKS**

Toyota has recalled nearly 1.7 million cars worldwide for fuel leaks. This is the latest in an increasing number of quality problems for the automaker. Toyota’s latest recalls are mostly in Japan, but they also include the IS and GS Lexus luxury models sold in North America, where the world’s number one automaker faces the biggest obstacles to winning back customer trust.

One of the problems Toyota has announced in the recall is that an improper installation of a sensor to measure fuel pressure may cause the sensor to loosen as a result of engine vibration over time, and may possibly cause fuel leakage, according to the company. That problem also affects 280,000 Lexus cars sold abroad, 255,000 of them in North America and 10,000 in Europe. Included under that recall are the 2006 through 2007 Lexus GS300/350, 2006 through early 2009 Lexus IS250, and 2006 through early 2008 Lexus IS350 sold in the U.S. The very same problem was also found in the Crown and Mark X models sold in Japan. The second

problem, which affects 141,000 Avenis sedans and station wagons sold in Europe and New Zealand was caused by irregular work on the fuel pipe, which may cause cracks and fuel leakage, according to Toyota. The problem was also found in 16 models sold in Japan, including the Noah subcompact, RAV4 sport-utility vehicle and Wish cars. Toyota also recalled 6,000 trucks made by group company Daihatsu Motor Co., which were sold under the Toyota brand in Japan, for a problem with a metal part attaching a spare tire to the bottom of the truck. It appears the tire could come loose and fall on the road.

Source: MSN.com

## **TOYOTA SETTLES LAWSUIT OVER PRIUS HEADLIGHTS**

Toyota Motor Corp. has settled the class action lawsuit over headlights that shut off without warning in its 2006 to 2009 Prius hybrids. There have been at least 2,500 complaints from motorists on this problem. Under the terms of the settlement, eligible Prius owners will be reimbursed for their costs to fix failing headlight systems. They will also get their warranties for headlight problems extended to five years or 50,000 miles, rather than the standard three years or 36,000 miles. Judge Manuel Real of the U.S. District Court in Los Angeles certified the class and gave preliminary approval of the settlement last week. Under its terms, eligible Prius owners will be notified by mail starting next month and have 90 days thereafter to register with the class.

There was no dollar figure reported relating to the settlement. But it was estimated that the total could run into the tens of millions of dollars, based on the number of vehicles potentially affected by the headlight problem. As many as 320,000 owners of Priuses with optional high intensity discharge (HID) headlights may be covered by the agreement. To date, Toyota has not conceded that the 2006 to 2009 Prius hybrids have a defect in the lighting system. That’s despite the numerous complaints to regulators that the HID headlamps tend to suddenly turn off, with both headlights going out simultaneously in some cases. Obviously, that creates hazardous conditions in night driving. A small number of drivers have

alleged that the condition caused accidents or minor injuries.

NHTSA says its data doesn't reveal any deaths blamed on the problem. A review of the NHTSA database shows that 49% of all complaints about 2006 to 2009 Priuses were related to lighting, headlamps or visibility. A NHTSA investigation launched in April 2009 determined that there had been more than 2,250 complaints about failing headlamps lodged with the agency or Toyota. It was also revealed that Toyota had completed almost 28,000 warranty repairs of the HID system. That investigation was dropped in August 2009 after Toyota promised to initiate a "consumer service campaign" to address the issue. Complaints of headlight failure have continued to come in, however, with dozens lodged to NHTSA in the last few months. There have also been discussions of the problem on online forums.

Beyond the safety risks of the headlight problem, many consumers also complained that dealers refused to cover the costs of repair. Instead, they were forced to pay for new headlights, or in many cases a new onboard computer that controls the lighting system. The costs of repairs varied, but typically ran between \$250 and \$1,000, attorneys said. The settlement will allow consumers who have receipts for their repairs, either at a Toyota dealership or elsewhere, to file for reimbursement. Eric Gibbs, who is with the San Francisco firm, Girard Gibbs, is the lead lawyer for the Plaintiffs in this case. It appears that he has done a very good job.

Source: Los Angeles Times

### **TOYOTA WINS RULING AGAINST FORMER IN-HOUSE LAWYER**

Toyota has won its long-running battle with former in-house lawyer Dimitrios Biller. It appears the automaker won a complete victory in arbitration. Arbitrator Gary Taylor granted the company's Motion for Summary Judgment and dismissed Biller's RICO claims, and ruled against Biller's claims of defamation, fraud and false promises. The ruling was also in favor of the in-house lawyers Biller included in his lawsuit.

The arbitrator found Biller liable for breach of contract, citing "multiple instances of unauthorized disclosure" of

the company's confidential information. These disclosures took the form of postings on Biller's website, his public seminars, his discussions with the media, and his delivery of thousands of documents to a Texas court "without a request, subpoena or legal compulsion," according to the ruling.

The arbitrator awarded Toyota \$2.5 million for the unauthorized disclosures, and \$100,000 in punitive damages. He also entered a permanent injunction instructing Biller to return the confidential documents he took from Toyota and prohibiting him from future disclosures of confidential information. Even though this matter was decided in arbitration—and not by a court of law—it's still a major victory for Toyota.

Source: Law.com

## **XI. PRODUCT LIABILITY UPDATE**

### **AUTOMOBILE INDUSTRY RECALLED 20 MILLION VEHICLES IN 2010**

Automakers recalled about 20 million vehicles in 2010, led by high-profile recalls by Toyota that prompted new scrutiny of the auto industry's safety record. The number of recalls last year was the largest in the United States since 2004, according to an analysis of federal data by The Associated Press. The auto industry set a record with 30.8 million recalled vehicles that year.

Toyota Motor Corp. recalled about 7.1 million vehicles in 2010 to fix faulty gas pedals, floor mats that could trap accelerators, defective brakes and stalling engines. The safety woes by the world's No. 1 automaker brought more attention to auto safety from government regulators and the public, which filed more than 64,000 complaints with the National Highway Traffic Safety Administration, nearly double the number in a typical year.

Toyota was fined \$48.8 million by the government for its handling of three recalls dating back to 2004. Toyota has vowed to take a more proactive approach to safety, creating engineering teams that can quickly examine cars that are the subject of consumer complaints while

giving its U.S. offices a more direct role in safety-related decisions.

Among other automakers, General Motors Co. recalled about 4 million vehicles in 2010 while Japanese rivals Honda and Nissan both recalled more than 2 million cars and trucks. Chrysler recalled about 1.5 million vehicles and Ford called back more than 500,000 vehicles. The recall data was preliminary and the government is expected to release final numbers next year.

Source: Associated Press

### **TOP SAFETY PICKS BY IIHS**

Being as involved as our firm is in automotive product liability litigation, our lawyers often get asked "What is a safe car for me to buy?" While a lot depends on your individual needs, the key to finding the vehicle that meets your safety needs begins with thorough research. A good starting point is the Insurance Institute for Highway Safety ([www.iihs.org](http://www.iihs.org)). This organization is a leader in testing and evaluation of vehicle crashworthiness, and our lawyers often rely upon testing conducted by the Institute in our litigation.

The Institute recently released its 2011 *Top Safety Pick Awards*. Sixty-six vehicles were chosen to receive the *Top Safety Pick* award for 2011. IIHS, by way of these awards, recognizes the vehicles that do the best job of protecting people in front, side, rollover, and rear crashes based on testing conducted by the Institute. The testing and criteria required by the Institute is more stringent and significantly exceeds governmental requirements.

The Awards are given to vehicles by "class" and cover large/midsize/small cars, SUVs and minivans. Hyundai/Kia and Volkswagen/Audi led the awards with nine winners each. The newly-designed 2011 Ford Explorer won the first-ever *Top Safety Pick* for that vehicle model. The Volkswagen Touareg was the only "Large SUV" to win the award. A complete list of the 66 vehicles which earned the Top Safety Pick award can be viewed on the Institute's website. The website also has a helpful brochure that covers safety features consumers should look for when purchasing a vehicle ([www.iihs.org/brochures/pdf/sfsc.pdf](http://www.iihs.org/brochures/pdf/sfsc.pdf)).

Source: IIHS

## **NHTSA ISSUES RULE TO CUT DEATHS IN ROLLOVER CRASHES**

The federal government will require automakers to have new safety features for side windows to keep occupants from being ejected from cars and trucks during rollover crashes. David Strickland, administrator of the National Highway Traffic Safety Administration, had this to say when making the announcement: "Rollover crashes are the deadliest of all crash types, and this is another important step in our efforts to reduce fatalities and serious injuries that result from them."

NHTSA believes when fully implemented by model year 2018, the new rule will prevent an average of 373 deaths and 476 serious injuries every year. There were 8,267 deaths in rollover crashes in 2009, according to the latest data from the agency. The new rule applies to vehicles with a gross weight rating of 10,000 pounds or less, which includes cars and light trucks. It requires manufacturers to develop a countermeasure to prevent the equivalent of an unbelted adult from moving more than four inches past the side window opening in a crash.

NHTSA expects that manufacturers will meet the standard by modifying existing side-impact air bag curtains, making them larger to cover more of the window opening and more robust to remain inflated longer, and designing them to deploy in both side impacts and rollovers. The Transportation Department will begin phasing in the new standard during 2013. Not everybody in the automobile safety business agrees that the new rule is a good thing. The new rule "has relatively small costs and relatively small benefits," said automotive safety expert John Graham, dean of the School of Public and Environmental Affairs at Indiana University in Bloomington. He added:

*If it is the case that the rule offers safety benefits primarily to unbelted occupants, as seems likely, I question whether this rule was a good use of the agency's limited staff and engineering resources. Far more lives could be saved through a stronger agency focus on better enforcement of safety-belt use laws, a careful look into driver distraction issues, and vehicle crash compatibility standards to protect*

*people when vehicles of different sizes collide.*

The rule is part of the safety administration's initiative to improve the overall safety of occupants in rollover crashes. The agency has already issued a rule requiring electronic stability control in all new vehicles and a more stringent standard to keep roofs from being crushed.

Source: USA Today

## **COURT REFUSES TO RECONSIDER \$32.2 MILLION JUDGMENT AGAINST GOODYEAR**

The Nevada Supreme Court has refused to rehear its decision to uphold a \$32.2 million judgment against Goodyear Tire & Rubber Co. The case involved a single-car accident that killed three people and injured seven others. The Court, in a 6-1 decision, said it did not overlook any material facts or misapply the law, upholding rulings of the trial court.

During pre-trial maneuvering, Judge Sally Loehrer ruled Goodyear failed to produce a witness and gave improper responses to interrogatories. The Judge said Goodyear took the tactic of "stalling, obstructing and objecting." As a sanction, Judge Loehrer ruled Goodyear could not present a defense of liability, but only could argue to the jury the amount of compensatory damages. The 2004 accident occurred near Moab, Utah, on an interstate highway when a tire on the car blew out and the vehicle overturned. Three persons were killed.

The surviving relatives and guardians of children involved filed suit against Goodyear, Ford Motor Co. and Valley View Hitch & Truck Rental. Ford and Valley View settled their claims. The jury granted \$32.2 million in compensatory damages. Goodyear appealed the decision, claiming its due process rights had been violated and that the jury award was excessive. Simultaneously, the Plaintiffs appealed, claiming the circuit court erred in not allowing punitive damages. In a majority decision, the state Supreme Court denied both appeals.

Source: Bizactions.com

## **LAND ROVER LIABLE FOR SUV ROLLOVER**

The California Court of Appeals has ruled that Land Rover is strictly liable for severe spinal injuries suffered by a driver when his sports utility vehicle rolled over. The Appellate Court's ruling affirms a \$22 million jury verdict. A driver traveling 75 mph collided with the rear of the Plaintiff's 1998 Discovery as he was travelling 65 mph down a California freeway. In the collision, the Plaintiff's Discovery was forced into another vehicle. The chain reaction caused the Discovery to roll over several times before coming to a stop on its roof, which was crushed.

The Plaintiff suffered severe spinal injuries in the crash which left him quadriplegic. He filed his lawsuit against Land Rover, alleging that the Discovery was defectively designed because of its narrow track width. In addition, the Plaintiff alleged that the vehicle's roof could have been strengthened with minimal production cost. Land Rover contended on appeal that it could not be liable under the "risk-benefit" test, but the Court disagreed, explaining that the Plaintiff:

*established that the...Discovery would tip under evasive steering maneuvers and that slight modifications to the track width and center of gravity of the vehicle dramatically improved its rollover resistance. Similarly, modest enhancement of the roof support of the...Discovery yielded substantial gains in roof strength.*

The Court said that the Plaintiff's evidence "was more than sufficient to establish the Discovery's design presented an 'excessive preventable danger' and that 'the benefits of the...design' did not 'outweigh the risk of danger inherent in such design.'" This was a most significant ruling.

Source: Lawyers USA Online

## **DANGERS OF DEFECTIVE HANDHELD TOOLS**

Annually, over 100,000 injuries are caused by handheld power tools. Handheld power tools are common in work settings. However, with technological advances and increased availability through retail outlets like Wal-Mart, Home Depot, Lowe's and the like, injuries at home are on the rise. Manufacturers offer

handheld power tools to accomplish almost any task. These tools are smaller, more powerful, and are as dangerous as ever.

Injuries caused by these devices include simple lacerations, finger amputations, eye injuries and even death. Our law firm has handled numerous cases involving defective tools. A grinder cut a client's ulnar nerve rendering his hand virtually useless. Also, a nail gun misfired and struck a client in the eye. A cut-off machine kicked back and killed a client. These are just a few examples of how dangerous these devices can be. These injuries could be prevented with a simple design change. More often than not, the addition of a simple guard would significantly decrease the device's ability to maim or kill.

In certain cases, an optional safety device would have limited or even prevented an injury. The existence of an optional safety feature means the manufacturer has identified the hazard along with the ability to control the hazard. However, instead of making the device safer automatically, they put the burden on the consumer to make a design decision. Consumers often make their decisions based on price. Safety should never be optional and the consumer does not have access to the information and expertise available to the manufacturer. In pending lawsuits, we have found that optional safety devices are offered as standard equipment only after numerous people have been unnecessarily injured. Or, we may find that an identical device is offered with improved safety features with a different model number.

Consumers can protect themselves by researching the power tool before purchase to determine if a safer model is available from the same manufacturer or a different manufacturer. Research prior to purchase may disclose optional safety devices or even a recall on part of the product or the entire product. The nail gun that shot a large nail into a current client's eye was recalled. Interested consumers can check our website [www.beasleyallen.com](http://www.beasleyallen.com) or [CPSC.com](http://CPSC.com) to determine if their device has been or is the subject of a recall. Recalls are often issued too late, and adequate notice is rarely provided. If you need more information on this subject contact Kendall Dunson, a lawyer in our Personal Injury Section, at

800-898-2034 or by email at [Kendall.Dunson@beasleyallen.com](mailto:Kendall.Dunson@beasleyallen.com).

### **FIRM FILES FUEL-FED FIRE CASE AGAINST FORD MOTOR CO.**

Our firm has filed a lawsuit in the Circuit Court of Jefferson County, Alabama, on behalf of a young man badly burned and permanently injured when his car burned after a crash. The automobile manufacturer, Ford Motor Company, was aware that the design of the 1993 Ford Crown Victoria driven by the victim, 26-year-old Kevin Deandreas Boykins, was dangerous, presenting a significant risk of post-crash, fuel-fed fires, particularly in rear impacts.

Our client was badly burned in December when his car was struck in the rear by another vehicle. The impact caused the fuel system and gas tank of the Crown Victoria to fail, resulting in the spillage of a large amount of gasoline, which immediately ignited. The young man was severely burned when the passenger compartment of the Ford vehicle was engulfed in flames within seconds.

Ford is well aware that the Crown Victoria has serious design problems that cause it to be extremely unsafe in rear-end collisions. This known fire hazard has caused a number of deaths and severe burn injuries over the years. Ford has elected to put profits over safety and has failed to correct the fuel-fed fire problems caused by its defective design of these vehicles.

The lawsuit seeks to hold Ford accountable for the vehicle's lack of crashworthiness, and alleges negligence and wantonness. The other driver is also a Defendant in the lawsuit. Rick Morrison, a lawyer in our Products Liability Section, will be the lead lawyer in this case for Mr. Boykins and this writer will assist him.

## **XII. MASS TORTS UPDATE**

### **COMMITTEES APPOINTED IN DEPUY HIP IMPLANT MDL**

On January 26<sup>th</sup> Judge David A. Katz designated the lawyers who will serve on

key committees in the DePuy Hip Implant Products Liability Litigation MDL. Navan Ward from our firm was appointed by the judge to the Plaintiffs' Steering Committee. He was among the lawyers selected from firms around the U.S. To act on behalf of parties in the nationwide litigation. All of the cases are now in this MDL. This is quite an honor for Navan, who is in our Mass Torts Section, and who has been very active in the hip replacement litigation for our firm.

### **GADOLINIUM LITIGATION UPDATE**

Lawyers in our Mass Torts Section continue to receive reports from kidney disease patients who have suffered debilitating injuries caused by nephrogenic systemic fibrosis (NSF) due to receiving gadolinium-based contrast agents during MRI scans. Hundreds of lawsuits have been filed across the United States by individuals with impaired kidney function who had received gadolinium-based contrast agents and developed NSF.

The first NSF trial was scheduled for January 24<sup>th</sup> before Judge Polster in the U.S. District Court, Northern District of Ohio. We had not gotten a report on that case at press time. Hopefully, the trial got underway. The Plaintiffs in the case, Lorelei and Donald Knase, filed a lawsuit against GE Healthcare after Lorelei Knase developed NSF following MRI scans during which she received Omniscan. Mrs. Knase suffers from fibrosis in her hands, feet, arms, and legs. Settlements were reportedly reached in the other cases that were previously set for trial. The Plaintiffs' Steering Committee (PSC) recently filed a request for an order setting additional cases for trial in the Gadolinium MDL.

In 2007, the FDA asked manufacturers of gadolinium-based contrast agents to include a "black box" warning on their products' labeling stating that those with kidney problems who receive gadolinium-based contrast agents are at risk for developing NSF. The FDA recently mandated additional changes to labeling to safeguard those with kidney disease from receiving gadolinium-based contrast agents. NSF causes hardening of the skin and fibrosis of organs, which may lead to death. Unfortunately, NSF has no known treatment or cure.

Our firm is evaluating cases involving NSF resulting from receiving gadolinium-based contrast agents. If you have a need for more information, contact Roger Smith, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

#### **REGLAN LITIGATION UPDATE**

Cases against the manufacturers of brand name Reglan and generic metoclopramide continue to be filed in federal and state courts by Plaintiffs who suffer from Tardive Dyskinesia caused by the drug. At the end of 2009, state courts in Philadelphia became the first to decide to consolidate Reglan litigation in order to streamline the process and conserve judicial resources. Since that time, state courts in New Jersey and California have decided follow suit and act as central "hubs" for Reglan litigation.

In Pennsylvania, the first bellwether trials have been set, and trials are scheduled to go forward beginning in May 2011 through the fall. However, Defendant drug manufacturers are moving to stop further proceedings in Philadelphia that deal with generic manufacturer liability. Recently, the United States Supreme Court decided to hear on appeal two cases dealing with federal preemption of state law tort claims against generic drug manufacturers. Federal preemption is a legal concept that prevents a person from suing on an issue that is addressed by federal law or regulation. In cases against pharmaceutical manufacturers, the Supreme Court held in *Wyeth v. Levine* (2008) that no federal preemption exists against brand name manufacturers of prescription drugs, however, the issue currently before the Supreme Court is whether or not preemption exists against generic manufacturers.

Since these claims assert that the generic Defendants failed to adequately warn in their label about the risks associated with taking metoclopramide, generic drug makers argue that under current federal law, they are required to have a label that matches that of the brand name, and that the law prevents them from making any changes that would deviate from it. The Supreme Court's decision on this issue, which is expected in early summer 2011, without a doubt has major implications for the future of

all prescription drug litigation in this country. Attorneys representing Plaintiffs in this matter are working diligently to ensure that trial dates are kept on schedule and that litigation all over the country continues to proceed. If you need additional information, contact Danielle Mason, a lawyer in our Mass Torts Section, at Danielle.Mason@beasleyallen.com.

#### **FDA PROPOSES WITHDRAWING APPROVAL FOR AVASTIN**

Avastin, manufactured by Genetech, is an injectable cancer medicine that was first approved by the FDA in 2004 for treatment of advanced colon cancer. It was subsequently approved for advanced lung, kidney and brain cancers. In 2008, the FDA gave Avastin accelerated approval for metastatic breast cancer treatment based on a single clinical trial. After the accelerated approval for breast cancer, Genetec completed additional trials and submitted the data to the FDA. In July 2010, an independent advisory committee voted 12-1 to remove the breast cancer indication.

In December, the FDA announced that it is recommending removing the breast cancer indication from the label for Avastin because the drug has not been shown to be safe and effective for that use. The recommendation was made after results of four clinical trials indicated that the drug does not prolong overall survival in breast cancer patients or provide a sufficient benefit in slowing disease progression to outweigh the significant risk to patients. The risks include heart attack, stroke, severe high blood pressure, bleeding and hemorrhage, among others. The drug itself has not been removed from the market and will not have an immediate effect on its use in treating breast cancer.

Genetech has not agreed to remove the breast cancer indication voluntarily and has requested a public hearing to contest the FDA's determination. If you need additional information you can contact Melissa Prickett, a lawyer in our Mass Torts Section, from our firm at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

#### **ALABAMA COURT TO OVERSEE PFIZER LAWSUITS**

Nearly 1,200 lawsuits nationwide against pharmaceutical giant Pfizer Inc. over its anti-smoking drug Chantix will be handled in U.S. District Court in Birmingham. U.S. District Judge Inge Johnson will oversee pre-trial activity in the cases in which smokers and their families claim that Chantix left them with a variety of psychological problems. More suits are being filed daily from across the country. Chantix, a drug to help folks stop smoking, is made and sold by Pfizer.

The United States Judicial Panel on Multidistrict Litigation in late 2009 assigned the cases to Judge Johnson, who was handling two of the pending cases. The panel said that Judge Johnson "has the time and experience to steer this litigation on a prudent course." Since Judge Johnson was appointed, the number of Chantix cases filed in federal court has grown from 37 to nearly 1,200 as of January 3<sup>rd</sup>. It has been estimated that the number is expected to eventually top 2,000 cases. Ernie Corey, a very good lawyer with the Birmingham firm of Cory, Watson & Crowder, is the lead lawyer in this MDL. I suspect if you have questions that you can contact Ernie at 800-852-6299.

Source: Al.com

## **XIII. BUSINESS LITIGATION**

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#### **JURY AWARDS CRUISE SHIP \$24 MILLION IN LAWSUIT AGAINST ROLLS-ROYCE**

A jury has awarded \$24 million to Carnival Corp. in its lawsuit against Rolls-Royce PLC involving claims of a faulty propulsion system aboard the luxury liner *Queen Mary 2*. The federal court jury awarded \$16 million in damages for eight counts of fraud and \$8 million for breach of repair warranties. Carnival contended that the Mermaid propulsion system installed by Rolls on the *Queen Mary 2* was defective, suffered breakdowns and had to be serviced more often than advertised. The 1,132-foot *Queen Mary 2* is operated by Carnival subsidiary Cunard.

Source: Insurance Journal

## **INTERGRAPH SETTLES \$200 MILLION LAWSUIT WITH BENTLEY SYSTEMS**

A lawsuit that has been in court for eight years between the former Intergraph Corp. and Pennsylvania-based software maker Bentley Systems has been settled for nearly \$200 million. As part of a settlement agreed upon last month, Cobalt BSI Holding, which bought Intergraph in 2006, will sell back to Bentley its 15.6 million shares of Bentley stock, at a purchase price of just over \$12 per share, totaling about \$198 million.

Intergraph sold its civil engineering products to Bentley in 2000 and the deal included proceeds from maintenance contracts. In 2002 the companies began their long courtroom skirmish, with Intergraph challenging how much Bentley owed it from a promissory note and Bentley countersuing in connection with Intergraph's handling of the maintenance contracts. A settlement hearing before Circuit Judge Tom King, from Jefferson County, who gave preliminary approval to the settlement in December, is scheduled for February 10<sup>th</sup> at the Madison County Courthouse. Bartley Loftin III, a lawyer in the Huntsville office of Maynard Cooper & Gale, represented the Plaintiff and did a very good job.

Source: Al.com

## **XIV. AN UPDATE ON SECURITIES LITIGATION**

### **SECURITIES LAWSUITS IN 2010 SET NEW RECORD**

The number of securities lawsuits filed in 2010 was above the record number of suits filed in 2009. This was despite a slowdown of litigation related to the credit crisis. The number of new suits that can be connected to the recent credit crisis fell sharply in 2010. But the void was more than filled by suits related to mergers and acquisitions. There were also a number of lawsuits filed resulting from the Deepwater Horizon oil spill. These numbers were according to the latest quarterly review of securities litigation by Advisen Ltd., sponsored by Kaufman Dolowich Voluck & Gonzo

LLP. The most significant trend, according to the report, was the continued growth of suits filed in both federal and state courts alleging breach of fiduciary duties by company directors. These suits typically are the result of a merger or acquisition.

The record number of lawsuits filed, 1,196, tops the previous record 1,171 suits filed in 2009. That was a year dominated by litigation arising from the credit crisis, according to Advisen. While the total number of securities-related suits increased in 2010, the number of securities class action suits fell sharply. There were 193 as compared to 233 in 2009. Securities class action suits accounted for more than one third of securities suits filed prior to 2006, but represented only 16% of the 2010 total. Securities fraud suits, a category defined by Advisen to consist principally of suits brought by regulators and law enforcement agencies, made up 34% of the total.

Breach of fiduciary duties suits were a close second with 33% of all securities suits filed in the year, and led all other categories of suits by the fourth quarter. There have been fewer credit crisis suits filed, which accounts for the decrease in securities class action suit filings. The number of shareholder derivative suits was up in 2010, as was the number of so-called merger objection suits alleging breach of fiduciary duties.

Source: Insurance Journal

### **OUR FIRM CONTINUES TO INVESTIGATE QUI TAM SUITS**

Lawyers in our firm continue to investigate *qui tam* lawsuits brought under the False Claims Act, 31 U.S.C. § 3729 et seq. *Qui tam* suits, commonly called "whistleblower suits," are actions brought by private citizens on behalf of the United States to recover monies owed to the government. The law provides citizen-Plaintiffs, called "relators," with powerful incentives—sometimes up to 30% of the amount recovered—to report instances of fraud against the federal government. The relator must have first-hand knowledge of the alleged fraudulent activity. There are safeguards in place so that only claims with merit survive in the judicial system.

The medical and pharmaceutical fields continue to be fertile ground for whistle-

blower suits. For example, in January *60 Minutes* profiled Cheryl Eckard, the relator in a whistleblower suit against pharmaceutical giant GlaxoSmithKline. Ms. Eckard filed suit alleging that GlaxoSmithKline submitted false claims to government health programs to cover up instances of product contamination and mix-up at its Cidra, Puerto Rico, facility. Of course, it goes without saying that production line contamination and mix-ups of powerful medications can be devastating to consumers.

We should be able to take medications prescribed by our doctors without fear that the drugs have been contaminated or mixed up with other products. What is even worse is the GlaxoSmithKline was found to have attempted a cover-up of the problem! GlaxoSmithKline pleaded guilty to a felony and admitted that it distributed adulterated drugs. Consistent with the statutorily-proscribed practice of rewarding the relator for "blowing the whistle" on the fraudulent activity, Ms. Eckard received a portion of the \$750 million settlement!

Also, you will recall from our last issue that seven hospitals have agreed to pay \$6.3 million for overcharging Medicare for a type of back surgery known as "Kyphonplasty." This is in addition to previous settlements of 25 hospitals and Medtronic Spine, LLC (formerly known as Kyphon, Inc.) totalling \$101 million. Fraudulent overbilling of already cash-strapped state and federal health programs is a common target of *qui tam* suits, and rightly so—our government has a hard enough time making ends meet without being subjected to theft by those looking to take advantage of public programs meant to ensure health care for those who can least afford it.

We predict that settlements like these in false claims lawsuits will create a powerful incentive for more whistleblowers to come forward in 2011. For more information on *qui tam* suits, contact Archie Grubb, a lawyer in our Consumer Fraud Section at 800-898-2034 or Archie.Grubb@beasleyallen.com.

Source: LawyersandSettlements.com

### **SCHWAB UNITS TO PAY \$118.9 MILLION IN SETTLEMENT OVER BOND FUND RISKS**

Charles Schwab has agreed to pay \$118.9 million to settle federal regula-

tors' civil charges over disclosure of the risks the "YieldPlus Fund" of a short-term bond fund. The Securities and Exchange Commission announced the settlement with two Schwab units, Charles Schwab Investment Management and Charles Schwab & Co. According to the agency, Schwab marketed the fund as a conservative investment only slightly riskier than a money-market fund even though half its assets were invested in high-risk securities.

The SEC also filed a civil lawsuit against Kimon Daifotis, former chief investment officer for fixed income at Charles Schwab Investment Management, and Randall Merk, an executive vice president of Charles Schwab & Co. who was a trustee of YieldPlus and other Schwab funds. It is alleged in the suit that they committed fraud and other securities law violations in the offer and sale of the YieldPlus Fund. The company said it expects to take an after-tax charge of \$97 million against its earnings for the October-December quarter for the settlement.

The assets of the fund fell to \$1.8 billion from \$13.5 billion during an eight-month period in 2007-2008 as the mortgage-backed and other securities it held lost their value and investors redeemed their shares. The agency said the Schwab units failed to adequately inform investors about the risks of investing in the fund and how different it was from money-market funds.

The SEC also alleged that the fund violated its own policy on concentrations of holdings by investing more than 25% of fund assets in mortgage-backed securities. In addition, the SEC said that Schwab failed to have adequate policies to prevent the misuse of confidential information regarding the YieldPlus Fund. That allowed some funds and people related to Schwab to redeem their own shares in the fund during its decline, according to the SEC. They included Schwab Target Date Funds, which redeemed its shares in March 2008, the SEC said. The \$118.9 million being paid under the settlement includes about \$52.3 million in restitution of fees, about \$57.3 million in fines and \$9.3 million in interest.

Source: USA Today

### **PIMCO SETTLES CLASS-ACTION LAWSUIT**

Investment management firm Pimco will pay \$92 million to settle claims that it manipulated the U.S. bond market in 2005. The class-action lawsuit was filed in Chicago by Breakwater Trading and two investors who alleged that Pimco—the Pacific Investment Management Co. of Newport Beach, Calif.—had created an "artificial scarcity" in ten-year treasury notes.

The Plaintiffs had bet short on futures contracts that were tied to the Treasury notes. It was alleged in the Complaint that Pimco's "motive and intent for their foregoing manipulative act was to increase their financial return, including but not limited to, the return from the sale of their treasury notes futures positions at the artificially high prices created by their manipulations." Interestingly, Pimco claimed that all of the trades were properly designed to secure the best execution for its clients. The settlement is still subject to court approval.

Source: Los Angeles Times and New York Times

## **XV. INSURANCE AND FINANCE UPDATE**

### **SOME INSURERS LOW-BALLING BODILY INJURY CLAIMS**

It was reported recently in the *Insurance Journal* that some insurance companies that use computerized systems to process their claims are making unfair, "low-ball" claims offers to people injured in automobile accidents. The Consumer Federation of America (CFA), a consumer advocacy group, has warned that Colossus software and other similar programs used by insurers evaluate general damages for many bodily injury claims such as pain, suffering and anguish, but fail to estimate "special" damages such as past or future bills related to losses and reductions in wages. Neither are liability-related questions, or issues like the credibility of witnesses, taken into consideration by these systems.

Source: Insurance Journal

### **LIBERTY MUTUAL CONTINUES ITS FIGHT WITH AIG**

American International Group has negotiated a \$450 million settlement with seven of its competitors in the protracted litigation over its questionable reporting of workers' compensation premiums. But even with that settlement it doesn't appear the long-running battle over under-reported premiums is over for AIG. That's because the key party representing the class of insurers in the legal action—Liberty Mutual and its affiliates Safeco and Ohio Casualty—are refusing to go along with the settlement. Liberty Mutual says it will continue with litigation against AIG on its own.

The settlement with the seven workers' compensation writers comes on the heels of AIG agreeing to pay \$146.5 million in fines and additional taxes to state insurance regulators over similar charges of under-reporting of premiums. The under-reporting shortchanged states on taxes and companies that support residual markets on fees that are assessed based on premiums. The seven insurers that are willing to accept the \$450 million agreement from AIG are ACE INA Holdings, Auto-Owners Insurance Co., Companion Property & Casualty Insurance Co., FirstComp Insurance Co., The Hartford Financial Services group, Technology Insurance Co. And Travelers Indemnity Co.

These insurers have asked U.S. District Judge Robert Gettleman to let them accept the agreement for themselves and on behalf of the class of more than 500 other insurers affected, even though Liberty Mutual's Safeco and Ohio Casualty, the carriers that have taken the lead representing the class, want to continue with the litigation. State regulators, the examiners they appointed for this case, and insurers representing the majority of the board of the National Workers Compensation Reinsurance Pool, all support the settlement, according to AIG. This matter is pending in the Northern District of Illinois.

It should be noted that AIG has a long history of under-reporting its workers' compensation premiums. In 2006, in a case led by New York officials, AIG agreed to pay states \$343 million for under-reporting premiums. In 2007, the industry's National Workers' Compensation Reinsurance Pool and its administrator,

the National Council on Compensation Insurance, sued AIG, claiming it was due assessments lost because of under-reported premiums. But the trial judge ruled that the pool itself did not have standing to bring the suit. That left it up to insurers to sue on their own.

AIG says that three of its competitors in the suit—ACE, Hartford and Travelers—are also guilty of having under-reported in the past. The seven insurers told the judge that Safeco and Ohio Casualty should be allowed to pursue litigation on their own, but that they and the other hundreds of insurance companies “should not be compelled to have their claims pursued through years of additional litigation when a fair compromise has been reached.” But Safeco and Ohio Casualty maintain that the settlement is premature because it would end the litigation before the full extent of AIG’s wrongdoing has been revealed.

Source: *Insurance Journal*

#### **MADOFF SETTLEMENT GETS COURT APPROVAL**

A U.S. bankruptcy judge has approved a \$7.2 billion settlement between the trustee overseeing the dissolution of Bernard L. Madoff’s investment advisory firm and the estate of investor Jeffrey Picower, an investor. Irving Picard, the trustee liquidating Bernard L. Madoff Investment Securities LLC, sued Picower in May 2009, claiming he withdrew \$7.2 billion more than he invested and that he should have known Madoff was running a Ponzi scheme. It should be noted that Picower died in October 2009. The trustee says he hopes to recover enough money to pay all of Madoff’s victims, including those who withdrew more money from their Madoff accounts than they invested.

The settlement agreement brought the amount collected by authorities over the Madoff fraud to \$9.8 billion. Under the agreement, the Picower estate agreed to pay \$5 billion to the trustee for distribution to Madoff’s creditors. It also agreed to pay the government \$2.2 billion, which will be distributed to victims, under the trustee’s supervision. The settlement resolved a lawsuit filed by the trustee in May 2009. In the suit, it was alleged that Picower knew or should

have known that Madoff’s investments were phony.

Source: *Bloomberg*

#### **INVESTOR SUIT AGAINST BEAR STEARNS AND AUDITOR TO PROCEED**

A court has ruled that the Plaintiffs in one of the largest U.S. investor lawsuits arising out of the financial crisis can proceed. The case was filed against fallen investment bank Bear Stearns and its outside auditor, Deloitte & Touche. The court’s decision means that one-time Bear Stearns investors can move ahead with the securities class-action fraud case. But, it should be noted that the judge threw out two related lawsuits that had been rolled into the litigation. The investors allege that former Bear Stearns chiefs painted a wildly-misleading picture of the firm’s finances ahead of its March 2008 fall from grace.

In his ruling, U.S. District Judge Robert Sweet refused to dismiss the lawsuit led by the Michigan Retirement System, which held Bear Stearns shares in its portfolio. Judge Sweet tossed out the two related cases. One was a separate investor lawsuit and the other was brought on behalf of Bear employees who held the firm’s stock in a retirement plan. The allegation that Bear Stearns and top executives inflated the investment bank’s stock price by using misleading mortgage valuations to conceal potential losses in the housing market is a key issue in this securities fraud case.

The investors also accuse Deloitte of recklessly ignoring red flags about Bear’s financial statements and failing to adequately scrutinize its mortgage valuation models. It’s alleged that Deloitte’s audits “were so deficient that the audit amounted to no audit at all.” The case is pending in the U.S. District Court, Southern District of New York.

Source: *Insurance Journal*

#### **BEACON MUTUAL SUIT GRANTED CLASS-ACTION STATUS**

A judge in Rhode Island has granted class-action status to Plaintiffs in a case against Beacon Mutual Insurance Co. for inequitably distributing \$101 million in dividends among policyholders. Judge Michael A. Silverstein said in his ruling

that the focus of the suit is that Beacon Mutual is supposed to distribute surpluses among its policyholders, but that the company instead “engaged in a systematic scheme to divert over \$101 million to a small percent of its policyholders.”

The suit was filed in 2002 and the order referred to above came last month. Beacon is the state’s dominant workers’ compensation issuer, with about 11,000 policy holders. There are six named Plaintiffs, all businesses, in the lawsuit. It was reported that the case will actually involve as many as 15,000 Plaintiffs as class members with similar interests. The firm of Adkins, Kelston and Zavez, located in Boston, represents the Plaintiffs in this case.

Source: *Insurance Journal*

## **XVI. EMPLOYMENT AND FLSA LITIGATION**

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#### **BUTLER RETIREES AND SPOUSES RECEIVE AK STEEL BENEFITS**

A \$178.6 million settlement involving AK Steel Corp. has been approved by a federal judge in Ohio. About 3,000 retired workers from an AK Steel plant in western Pennsylvania or their spouses will continue to receive medical benefits under the settlement. Workers who retired from the Butler Works before 2006 sued last year in response to the Ohio-based steelmaker’s plan to cut some benefits and charge premiums for others in recent years. The workers’ suit contended that violated collective bargaining agreements that promised them company-funded medical benefits during retirement.

The settlement includes \$87.6 million AK Steel will spend on benefits through 2014 and \$91 million to establish a trust fund that will pay the benefits thereafter, freeing the steelmaker of legacy costs. The settlement piggybacks on case law established in a 2006 lawsuit that settled in 2008 between AK Steel and about 4,900 retirees from its flagship plant in Middletown, Ohio, near Cincinnati. That settlement established a \$663 million trust fund, managed by retirees that will continue to pay for their bene-

fits until they die, on which the Butler Works settlement was modeled.

Greg Coleman, of Knoxville, Tennessee, and Mona Lisa Wallace, of Salisbury, North Carolina, filed this lawsuit on behalf of the workers. They did very good work for their clients.

Source: *Bloomberg*

### **BANK OF AMERICA FACES NEW FAIR LABOR STANDARDS ACT LAWSUIT**

William Rushforth, a former Bank of America mortgage loan officer, filed a lawsuit in January 2011 under the Fair Labor Standards Act, alleging that Bank of America improperly failed to pay him and other loan officers overtime pay. The class action lawsuit, filed in the U.S. District Court for the Southern District of Texas, accuses the United States' largest bank holding company of intentionally misclassifying mortgage loan officers as exempt from overtime in order to avoid paying these employees compensation for overtime.

According to the lawsuit, Rushforth and other similarly-situated employees were paid commissions rather than a salary or hourly wage for their services. In addition, the Complaint alleges that the mortgage loan officers at Bank of America and its affiliate companies routinely worked more than 40 hours per week without receiving compensation at time-and-a-half of the employees' respective pay rate. In April 2010, the federal Judicial Panel on Multi-District Litigation (MDL) directed that twelve similar cases be combined for litigation against Bank of America. Like the Rushforth case, the MDL lawsuits were filed by mortgage loan officers who alleged that they also were misclassified as exempt employees and denied overtime compensation.

The MDL litigation is still pending and is very active. In an effort to help workers who have been wrongly denied their overtime compensation, lawyers in our firm routinely pursue class action litigation under the Fair Labor Standards Act to recover unpaid overtime wages. In fact, we are currently pursuing claims of unpaid overtime compensation on behalf of mortgage loan officers, pharmaceutical sales representatives and managers/assistant managers who have been improperly misclassified as being exempt from overtime compensation. For more infor-

mation, you can contact Larry Golston or Lance Gould, lawyers in our firm, at 800-898-2034 or by email at [Larry.Golston@beasleyallen.com](mailto:Larry.Golston@beasleyallen.com) or [Lance.Gould@beasleyallen.com](mailto:Lance.Gould@beasleyallen.com). You can also visit our website at [www.beasleyallen.com](http://www.beasleyallen.com).

Source: *Reuters*

### **MORTGAGE FIRM ACCUSED OF ANTI-MINORITY BIAS**

The State of Illinois has filed a lawsuit against former mortgage giant Countrywide Financial Corporation, alleging that it used discriminatory lending practices in regards to its minority borrowers. The lawsuit, which was filed in state court by Illinois Attorney General Lisa Madigan, alleged that an investigation had revealed African-American and Latino borrowers were much more likely to be given risky subprime loans by Countrywide as opposed to similarly-situated whites from 2005 to 2007. It was also alleged that a statistical analysis revealed Countrywide had charged Latino and African-American borrowers more interest and fees on certain mortgages than whites. Now a subsidiary of Bank of America, Countrywide Financial Corporation was the largest mortgage lender in Illinois from 2004 to 2006.

The lawsuit estimated that Countrywide's practices caused roughly 6,000 Latino and African-American borrowers to be led into subprime mortgages, and in some instances charged higher prices for their mortgages. Overall, the Illinois Attorney General's investigation determined that African-American and Latino borrowers were three times more likely to receive a higher-cost subprime mortgage than those of white borrowers.

As you should know, Countrywide has been hit with a number of lawsuits regarding its lending practices. In an unrelated lawsuit that was resolved in the fall of 2008, Illinois, California and at least six other states reached an \$8.8 billion settlement with Countrywide that stemmed from a lawsuit claiming the company and its executives had defrauded its borrowers. Additionally, in May of 2010, Countrywide agreed to pay \$108 million to settle Federal Trade Commission charges after allegations that the company collected excessive fees from cash-strapped borrowers who were struggling to keep their homes. These are

just two examples of several suits that have been filed against Countrywide targeting its wrongful lending practices.

If you have any questions about predatory lending or mortgage servicing fraud, please contact Bill Robertson, a lawyer in our firm's Consumer Fraud Section. Bill is currently handling cases against Countrywide and other companies involving predatory lending practices. He is also handling cases involving mortgage servicing fraud of several different companies. If you need more information, contact Bill at 800-898-2034 or by email at [Bill.Robertson@beasleyallen.com](mailto:Bill.Robertson@beasleyallen.com).

Source: *Chicago Tribune*

## **XVII. PREMISES LIABILITY UPDATE**

### **\$21 MILLION VERDICT FOR IRONWORKER IN CONSTRUCTION ACCIDENT**

A jury has awarded \$21 million to an Omaha man in a trial in Douglas County, Neb. The Plaintiff, Tim Bacon, had sued for injuries he suffered as a result of the failure of a product manufactured by DBI/SALA. The ironworker had been injured in a 2003 construction accident at the Qwest Center in Omaha after a piece of construction material fell and struck his self-retracting lifeline. He fell one story onto the floor below.

As a result of his fall, Bacon suffered a burst fracture of his thoracic spine that severely severed his spinal cord, and he was instantly paralyzed. Suit was filed against DBI/SALA, the manufacturer of the self-retracting lifeline, alleging that the line was defective because of insufficient warnings. Representatives from DBI/SALA acknowledged that the lifeline could fail if struck, but the company never warned users of that hazard. After hearing the evidence, the jury returned a verdict of \$21,131,633 in the Plaintiff's favor. Robert Pahlke and Robert Hippe, who are with the Robert Pahlke Law Group in Scottsbluff, and Britany Shotkoski, who is with Harris Kuhn Law firm in Omaha, represented Bacon in the trial. They did a very good job for their client.

Source: *Star Herald*

### **WRONGFUL DEATH LAWSUIT FILED IN FURNITURE STORE EXPLOSION**

The families of the man and woman killed in a furniture store explosion in Wayne, Mich. have filed a wrongful death lawsuit against Consumers Energy. In the suit, filed in state court, it was alleged that Consumers Energy, supplier of gas to the furniture store and surrounding neighborhood, was negligent in not evacuating the area after residents complained of a gas smell. Evacuations began after the blast. It was alleged Consumers Energy violated a section of the Michigan Public Service Commission's Michigan Gas Safety Standards reading, "If the investigation reveals a hazardous situation, then the operator shall take immediate action to evacuate, repair or isolate the facilities involved to reduce any danger to the public."

Consumers Energy received two calls on December 29<sup>th</sup>, the first at 6:40 and the last at 7:40 a.m. The technician was still in the area when the furniture store exploded at 9 a.m., trapping the store's owner, and killing two of his employees. The owner was injured, but survived and at press time he was in fair condition in a hospital burn center.

I understand that the gas leak, which was located near the store, was at a pipe coupling, and that the gas likely seeped into a nearby sewer main that serviced the furniture showroom. The piece of pipe is at a testing lab, according to Consumers Energy. Stuart Sklar represents both the Zell and Machniak families.

Source: Freep.com

### **TOXIC MOBILE HOME CLAIMS SETTLED**

Companies that manufactured mobile homes for FEMA after Hurricane Katrina have agreed to pay \$2.6 million to resolve thousands of claims that the temporary shelters exposed Gulf Coast storm victims to potentially dangerous fumes. The Plaintiffs and about two dozen mobile home makers and their subsidiaries have asked a federal judge in New Orleans to approve the proposed class-action settlement.

If approved, the settlement will benefit several thousand families who lived in the temporary shelters and contend they were exposed to dangerous levels of formaldehyde. The chemi-

cal commonly found in building materials can cause breathing problems and is classified as a carcinogen. It should be noted that the settlement doesn't involve claims of residents who lived in FEMA travel trailers, which housed the majority of storm victims.

Source: Associated Press

### **WRONGFUL-DEATH LAWSUIT FILED IN GAS PIPELINE BLAST**

A lawsuit has been filed against Pacific Gas & Electric Co. by the parents of Jessica Morales, one of eight people who died in the inferno from the San Bruno gas pipeline explosion. The wrongful-death lawsuit alleges that there has been "a long list of PG&E incidents and safety lapses." The Complaint criticizes the utility for its "sluggish" response to the September 9<sup>th</sup> incident and alleges that the pipeline was overpressurized at the time of the explosion and that PG&E failed to maintain or properly inspect the pipe or install automatic or remote shutoff valves.

Source: San Francisco Examiner

### **FAMILY OF HAZING VICTIM SETTLES USU LAWSUIT**

The family of a Utah State University freshman who died of alcohol poisoning in a 2008 hazing incident has settled its lawsuit against the school. The lawsuit alleged that the school failed to exercise meaningful oversight over its Greek-letter societies, long ignoring misbehavior at the Sigma Nu fraternity chapter where the student was a pledge. The 18-year-old student consumed a lethal dose of vodka at a party staged in his honor during initiation week in November 2008. The family wanted "some rules and procedures implemented at Utah State that would protect incoming freshman from the hazards of hazing and binge drinking." It appears that significant changes will now be made by the school as a result of this settlement. Hopefully, all colleges and universities will soon realize that the "animal house" mentality must be controlled on their campuses and especially within the fraternities.

Source: Salt Lake Tribune

### **\$1.2 MILLION AWARDED TO WOMAN IN COFFEE MACHINE SCALDING CASE**

A Georgia jury has awarded \$1.2 million to a woman who was scalded by 190-degree water that shot out of a convenience store's cappuccino machine. The 52-year-old woman was burned in 2007 at a QuikTrip convenience store. The company claimed that the woman's injury resulted from a rare accident. QuikTrip says it has since replaced the cappuccino machines at all its stores. The woman was burned on her hand and arm as she held her cup near the machine. It was reported that she could require an electronic implant to correct nerve damage caused by the burns. Nelson Tyrone III represented the Plaintiff and did a good job.

Source: Montgomery Advertiser

## **XVIII. WORKPLACE HAZARDS**

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### **JURY AWARDS INJURED WORKER \$50.6 MILLION IN DAMAGES**

A New York jury has awarded \$50.6 million to a worker left paralyzed after he fell 15 feet from a New York City scaffold in 2007. After a trial held solely on damages, the jury awarded the Plaintiff damages for economic loss, medical expenses and pain and suffering. The Plaintiff, Daniel Savillo, was less than two months into a new job with All Safe Heights Contracting Corp., a scaffolding company, when he was assigned to set up a platform on top of scaffolding in the company yard in Brooklyn. While laying sheets of metal on top of the scaffolding, the worker stepped on a badly-sized sheet and fell 15 feet, landing on the back of his neck. Savillo, 29, was diagnosed as a T-11 paraplegic with multiple brain hemorrhages and skull fractures.

Under New York law, Savillo couldn't sue his employer, but was allowed to sue the property owner, Greenpoint Landing Associates. In the case, Greenpoint brought in All Safe as a third party Defendant on the issue of damages. Before trial, the Plaintiff won Summary Judgment on the issue of Greenpoint's liability. A New York State labor code requires a property

owner or general contractor to provide safety measures for scaffolding work and other raised worksites. It's a strict liability statute. Greenpoint didn't provide any fall protection, such as safety nets to catch a falling worker or a harness and retractable lanyard similar to what rock climbers use.

It was reported that Savillo, who had a solid work history as a member of the bricklayers' union for over five years, took the job in scaffolding because it promised higher wages and benefits and more consistent work. A deposition of the owner of All Safe substantiated the Plaintiffs' claims. The cost of the Plaintiff's life care plan at present value was \$9.2 million. Past pain and suffering was valued at \$10 million and future pain and suffering at \$25 million. The Plaintiff rejected a settlement offer of \$8.1 million.

Interestingly, it was reported that no juror was over 30 years of age and that all jurors were well educated. At least half of the members of the jury had graduate degrees. Two of the jurors were lawyers and a tax lawyer at a national firm served as foreman. David Golomb of the Law Offices of David B. Golomb, located in New York City, represented the Plaintiff and did a very good job.

Source: *Lawyers USA Online*

### **\$7.75 MILLION SETTLEMENT IN WORKPLACE INJURY CASE**

A man who was seriously injured when a ladder he was standing on collapsed at the IBM East Fishkill facility in New York in 2003 has settled his claim for \$7.75 million. The settlement came after negotiations were completed before state Supreme Court Justice James Gilpatric. Joseph Carnevale, who was 25 at the time of the ladder collapse in 2003, was doing renovations at the IBM building. He was employed as a union sprinkler fitter by Dutchess Fire Protection of Wappingers Falls. The settlement will be paid by insurance companies for IBM, C.B. Strain & Sons Inc., Sordoni Skanska Inc. and Skanska USA Buildings Inc. The lawsuit had alleged violations of New York state Labor Law. Steven Melley represented the Plaintiff.

Source: *Dailyfreeman.com*

### **THE USE OF METHYL IODIDE CHALLENGED BY SUIT**

Environmentalists and farmworkers have challenged approval of a toxic fumigant and carcinogen for use on California crops and are urging Gov. Jerry Brown to reverse the decision. The coalition of advocacy groups filed a lawsuit calling the decision to register methyl iodide as a pesticide "irresponsible and illegal." The chemical, produced by Arysta Life-Science Corp. primarily for use on strawberry fields, was approved by the California Department of Pesticide Regulation despite concern from some scientists, toxicologists and environmentalists. The lawsuit claims methyl iodide is a poison that causes cancer and thyroid disease and can harm the lungs, liver, kidneys, brain and central nervous system.

The suit was filed in state court by Earthjustice and California Rural Legal Assistance Inc. on behalf of the United Farm Workers of America and several pesticide reform groups. It claims state approval of methyl iodide violates the California Environmental Quality Act, the California Birth Defects Prevention Act and the Pesticide Contamination Prevention Act. The Plaintiffs have accused the department of fast-tracking approval with an emergency declaration that was a ploy to win passage before Gov. Arnold Schwarzenegger left office.

Scientists first began experimenting with methyl iodide in the mid-1990s as a replacement for methyl bromide, which was being phased out because it was found to damage the ozone layer. It was approved by the U.S. Environmental Protection Agency in 2007 for use as a fumigant over the protests of more than two dozen California legislators and 54 scientists, including six Nobel laureates, who signed a letter opposing registration of the chemical. Methyl iodide is now licensed for use in 47 states.

Source: *Sfgate.com*

### **CITATIONS ISSUED IN GAS WELL EXPLOSION**

Federal officials plan on fining two companies for workplace safety violations in an oil storage tank explosion that killed a pair of welders. Northeast Energy Management Inc. will have to pay a penalty of \$159,390 and Huntley &

Huntley Inc. will be fined \$70,000 for the blast last year at a well site near Cheswick, in Indiana Township, Allegheny County, according to OSHA.

Two Northeast Energy employees were killed in the blast. The metal tank exploded after it heated up, causing oil vapor to fill the tank. The welders, who were there to repair pinhole leaks in the 5-ton tank, were killed when a spark ignited that vapor, causing the tank to rocket over 100-foot-tall trees and land about 220 feet away in the woods.

The tank ad held oil that was brought to the surface along with gas the well produced. The federal sanctions follow a penalty levied on one of the companies by state regulators. The Pennsylvania Department of Environmental Protection in October imposed a \$32,000 penalty against Huntley & Huntley, calling it part of a consent order and agreement to resolve violations of the Oil and Gas Act and the Solid Waste Management Act.

DEP officials said the blast damaged the well head and resulted in a spill of oil and brine. According to OSHA, Northeast Energy of Indiana failed to provide flame-retardant clothing or to ensure the tank being welded was clear of flammable material. OSHA issues a serious citation when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known. According to OSHA, Huntley, in Monroeville, was cited for not ensuring that Northeast had suitably trained the welders and supervisors. Robert Szymanski, director of OSHA's area office in Pittsburgh, stated:

*These companies did not ensure that proper welding procedures were followed, resulting in this tragic loss of life. OSHA remains committed to holding employers legally responsible when they fail to adhere to federal law and compromise the safety of workers.*

Northeast was cited with two willful workplace-safety violations and Huntley was cited with one. A willful violation exists when an employer has demonstrated either an intentional disregard for the requirements of the law or plain indifference to employee safety and health.

Source: *Associated Press*

## **XIX. TRANSPORTATION**

### **NEW RULES PROPOSED FOR COMMERCIAL TRUCK DRIVERS**

On December 29, 2010, the Federal Motor Carrier Safety Administration published a Notice of Proposed Rulemaking regarding commercial truck driver hours of service. The stated purpose of the new proposed Rule is “[t]o promote safety and to protect driver health” as well as “reduce safety and health risks associated with long hours.” The proposed rule would make seven changes from current requirements, which are designed to promote rested drivers and help insure fatigued drivers are not behind the wheel of commercial vehicles.

As our lawyers have learned over the years in handling truck litigation, fatigue for truck drivers is a very serious problem. In the Driver Fatigue and Alertness Study, it was found that fatigue leads to:

- increased lapses of attention;
- slower information-processing and decision making;
- longer reaction time to critical events;
- more variable and less effective control responses;
- decreased motivation to sustain performance;
- increased subjective feelings of drowsiness;
- decreased watchfulness;
- and decreased alertness to danger (Wylie, et al., 1997).

There is little dispute that these problems have the potential to become deadly behind the wheel of a tractor trailer truck. Thus, it was no surprise that researchers found that driving while drowsy increased an individual’s crash risk by four to six times (Klauer, et al., 2006).

Our firm has handled a large number of cases where driver fatigue clearly contributed to the cause of a motor vehicle crash. Unfortunately, many trucking companies do not have the procedural safeguards in place to reduce the likelihood

of driver fatigue and prevent violations of the Federal on-duty hour regulations. A recent case revealed that a trucking company had in excess of one hundred fatigue related Federal regulation violations. It was only a matter of time before this corporate culture of law breaking resulted in someone getting seriously injured or killed.

Advocates for highway and public safety, including Public Citizen, support the new rules. But Public Citizen says the rules need to be taken further in order to promote safer roads. But at least the new rules are a step in the right direction. Our firm will continue to push for safer roadways by holding trucking companies accountable for violating laws designed to keep fatigued drivers off the roadway. If you have any further questions relating to this matter, contact Chris Glover, a lawyer in our Personal Injury Section, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com.

Source: Public Citizen

### **JURY AWARDS \$14.4 MILLION IN WRONGFUL DEATH LAWSUIT**

The three young sons of a San Diego couple who were killed in a 2006 motor vehicle accident in Arizona were awarded \$14.4 million last month by a San Diego jury in a wrongful-death lawsuit against a San Diego car dealership. The children were Plaintiffs in the lawsuit against the dealer, Mossy Ford. Casey Barber was driving his Ford E350 Sportsmobile van on a highway near Page, Arizona, on July 31, 2006, when a tire-tread separation caused him to lose control of the vehicle, which rolled. Both occupants were killed in the crash.

Mossy Ford performed a faulty tire repair that led to the accident. Apparently, the damage to the tire was so bad that the dealership should not have attempted to repair it. The three sons were ages eight, five and three at the time of the accident. Casey Barber, a graduate of the University of San Diego, was a master carpenter and member of the Set Builders Union, and was involved in theater arts and production, stage managing and lighting techniques. His wife Melanie received a basketball scholarship to the University of California Riverside and later played professional club volleyball in Switzerland. Before the trial, an

\$8.3 million settlement was reached with other Defendants who did work on the van. The names of those Defendants remain confidential by agreement of the parties. Robert Buccola, of Dreyer Babich Buccola Wood in Sacramento, California, and Adam Shea, of Panish Shea & Boyle located in Los Angeles, represented the Plaintiffs.

Source: signonsandiego.com

### **MARYLAND FILES SUIT OVER MEDEVAC CRASH**

The state of Maryland has sued the federal government alleging that air traffic controllers were responsible for a 2008 medical helicopter crash. The state and its insurer, the Insurance Company of the State of Pennsylvania, are Plaintiffs in the lawsuit filed in U.S. District Court in Baltimore. The Maryland State Police helicopter crashed as it flew toward Andrews Air Force Base, Maryland, with two people on board who had been injured in a motor vehicle crash. The pilot, a paramedic, an emergency medical technician and one of the patients were killed. Another patient was severely injured.

An investigation by the National Transportation Safety Board found pilot error and poor training were to blame for the crash, which occurred in bad weather. But the lawsuit alleges that air traffic controllers committed a number of errors after the pilot said the weather prevented him from reaching his intended destination, a hospital in Prince George’s County. He was told that he would have to divert to Andrews.

Source: *The Baltimore Sun*

### **MISSISSIPPI LAWMAKERS PASS SCHOOL BUS SAFETY BILLS**

The Mississippi Senate has unanimously passed a bill designed to improve safety on school buses and on campuses during pick-up and drop-off times. The bill says striking a child with a vehicle after passing a school bus would be felony with a \$5,000 minimum fine and up to five years in prison. The House had previously passed a separate bill to increase fines and suspend the license of a driver passing a stopped school bus. The bill states that a driver striking a child while passing a bus can be charged

with aggravated assault and sentenced to a maximum 20 years in prison. Both bills would ban any school bus driver from using a cell phone while the bus is moving. Final action on this legislation is expected very soon.

Source: *Insurance Journal*

## XX. HEALTHCARE ISSUES

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### **FDA To MAKE CHANGES TO MEDICAL DEVICE REVIEW PROCESS**

The Food and Drug Administration is making changes to its process of reviewing certain medical devices before they go to market. The FDA says it will implement 25 actions this year, including streamlining the “de novo” review process for certain innovative, lower-risk medical devices; issuing guidance clarifying when clinical data should be submitted in a premarket submission; and establishing a new Center Science Council of senior FDA experts to ensure timely and consistent science-based decision making. According to the agency, the changes will encourage innovation while protecting patient safety and increasing transparency. Dr. Jeffrey Shuren, director of the FDA’s Center for Devices and Radiological Health, says:

*The moves will create a smarter medical device program that supports innovation, keeps jobs here at home and brings important, safe and effective technologies to patients quickly.*

The changes reflect some of the 55 recommendations made by two internal working groups set up by the agency to address concerns related to the premarket notification process. The groups found that the process for premarket review of lower-risk medical products such as certain catheters or diagnostic imaging devices—known as 501(k)—was unpredictable, inconsistent and opaque. Consumers and health care professionals commented that the review process wasn’t robust enough. The Center has also asked the independent, nonprofit Institute of Medicine to study the 501(k)

review program. That review is still underway.

Source: Lawyers USA Online

### **FDA WARNS OF LIVER DAMAGE REPORTS WITH SANOFI DRUG**

Federal health officials are warning doctors and patients that a recently-launched heart drug from Sanofi-Aventis SA has been linked to liver damage in a handful of patients. The Food and Drug Administration said last month it has received several reports of liver damage with Multaq tablets, including two cases in which patients had to have their livers removed. Both patients were women and about 70 years old. The women had been taking the drug for four-and-a-half months and six months, respectively.

The FDA approved Multaq in July 2009 to treat atrial flutter and atrial fibrillation which are irregular heart rhythms that can reduce blood flow and lead to stroke. More than a half-million prescriptions for Multaq have been written since the drug was approved. The FDA says it will add a new warning about the risk for liver damage to the label of Multaq. The agency said patients should contact their doctor if they experience signs of liver injury, including nausea, vomiting and fever. If doctors suspect a toxicity issue, according to the FDA, they should discontinue use of the drug and test the patient’s liver enzymes.

Liver toxicity is among the most common drug-related side effects across a number of medication classes. Multaq already carries a black box warning, the most severe type, stating the drug can cause severe complications, including death, in people with recent severe heart failure and should not be used in those patients. Common side effects of the twice-a-day tablets include fatigue, loss of strength, diarrhea, nausea and vomiting. Paris-based Sanofi reported \$84 million in sales for Multaq in the first half of 2009. It’s estimated that even with the safety warning U.S. sales of the drug will be \$521 million by 2016. Sales in the U.S. for 2010 were \$128 million.

Sanofi said in a statement it has already issued a letter about the liver injuries to doctors and other health care professionals who prescribe Multaq. The letter recommends prescribers consider giving liver enzyme tests during the first six

months of treatment. The company says it “will continue to be in communication with the FDA” and that this “issue will be closely reviewed and monitored.”

Source: *USA Today*

## XXI. ENVIRONMENTAL CONCERNS

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### **MORE PROBLEMS UNCOVERED AT TVA’S KINGSTON PLANT**

The two-year anniversary of the coal ash spill and resulting environmental disaster at TVA’s Kingston, Tenn. Power Plant has just passed. In the early morning hours of December 22, 2008, a coal ash impoundment at the Kingston facility collapsed and spilled more than 5.4 million cubic yards of coal ash sludge into the Emory River and surrounding properties. Clean-up costs for the spill are expected to exceed \$1.2 billion.

Given the magnitude of this disaster, Kingston residents were hopeful that TVA would do everything possible to improve its operating practices. But in mid-December TVA acknowledged that a new gypsum pond at the Kingston Plant is leaking through one of its side walls. Gypsum is a limestone product resulting from pollution-scrubbers that TVA uses at the facility.

TVA had a larger gypsum pond leak in early 2009 at its Widows Creek Fossil Plant. In response to the problems with its ash and gypsum ponds, TVA reportedly plans to phase out wet storage of all coal ash and residues in the next decade. Whether TVA carries through with its promises remains to be seen. In the meantime though, residents and businesses located near the TVA Kingston Plant have good reason to be skeptical. If you would like more information on this matter, please contact David Byrne at 800-898-2034 or by email at David.Byrne@beasleyallen.com.

### **EPA ANNOUNCES \$17 MILLION SETTLEMENT OVER CALIFORNIA DUMPING**

The U.S. Environmental Protection Agency has reached a \$17 million settlement with dozens of companies that

dumped hazardous waste at a facility near Los Angeles that was later designated a Superfund site. The EPA's Pacific Southwest Region settled with 275 companies that sent as much as 110,000 gallons of liquid hazardous waste to Operating Industries Inc., a dump located in Monterey Park, between 1948 and 1984.

The landfill was identified an environmental problem and named a Superfund site in 1986. Both the owner of the site and as many as 1,100 companies have been held responsible for the contamination and have contributed more than \$600 million to the dump's cleanup.

Source: Bloomberg

### **MINNESOTA SUES 3M OVER POLLUTION CLAIMS**

The state of Minnesota has filed suit against 3M Co., alleging that the company contaminated the state's waters for decades with chemicals used in some of its best-known products. The lawsuit, filed by Minnesota Attorney General Lori Swanson, seeks unspecified damages from 3M. According to the Complaint, filed in state court, St. Paul-based 3M polluted public and private wells in the state for years by pumping perfluorochemicals (PFCs) it uses to make fire retardants, paints, stain repellents and other products into waters flowing into the Mississippi River and also by burying the chemicals underground.

3M manufactured PFCs in the state from the 1950s through 2002. The company stopped making them following negotiations with the U.S. Environmental Protection Agency, which says the chemicals pose serious risks to human health and the environment. In 2007, the company signed a consent decree with Minnesota's pollution control agency and agreed to remediate a number of sites in Minnesota.

For some time, 3M has been engaged in settlement talks with the state to pay damages for the contamination. In 2007, the company agreed to temporarily toll the statute of limitations on any damage claims while negotiations continued. That agreement expired on December 30<sup>th</sup> without any progress on a final settlement. According to the Attorney General, 3M set aside \$117 million in reserves for potential environmental liability relating

to its disposal and discharge of PFCs. In comparison, General Electric Co. has paid out an estimated \$500 million so far to dredge the Hudson River in New York to remove polychlorinated biphenyls (PCBs), from the riverbed.

The EPA ordered GE in December to dredge deeper into the Hudson River as part of the next phase of an effort to remove the cancer-causing chemicals dumped into the river over decades. According to the Minnesota Department of Health, some PFCs released by 3M have been linked to cancer in experiments with laboratory animals. In a 2010 report, the health department noted that a recent study of 3M employees by the company suggested a positive association between exposure to some PFCs and prostate cancer, cerebrovascular disease and diabetes.

Source: Reuters

### **JUDGE APPROVES DUPONT POLLUTION SETTLEMENT**

The pollution case involving a former zinc-smelter site in West Virginia that we wrote about has been settled. DuPont will pay \$70 million and will fund a medical monitoring program for area residents. The settlement was presented to Judge Thomas A. Bedell for his approval in November. On January 4<sup>th</sup>, the judge approved the agreement, saying it passed the fairness test and would end court battles in his court, the state Supreme Court and federal court. Judge Bedell said he only received two objections to the settlement from the 8,500 class-action medical monitoring class members, and the 2,800 property class members.

As we reported last month, the case involved a zinc smelter that operated for 90 years in north-central West Virginia, producing more than 4 billion pounds of slab zinc and 400 million pounds of zinc dust for use in rust-proofing products, paint pigments and battery anodes. By 1971, a toxic waste pile stood 100 feet tall, covering nearly half the 112-acre site. Dust loaded with heavy metals and other toxins often blew into homes in Spelter and other small communities around the site.

This settlement ends the dispute over a 2007 jury verdict that found DuPont liable for creating the waste pile, and that it had deliberately downplayed and lied

about possible health threats. Jurors awarded \$380 million in punitive damages—an amount the state Supreme Court later reduced to \$196 million. The High Court also sent the case back to Judge Bedell, who presided over the jury trial, to conduct a trial over DuPont's claim that the residents failed to file their lawsuit within legal time limits. A trial had been scheduled for March 2011.

Source: Insurance Journal

## **XXII. THE CONSUMER CORNER**

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### **NATIONAL CLASS ACTION LAWSUIT FILED AGAINST TACO BELL**

Our firm has filed a consumer rights class action lawsuit against Taco Bell Corporation. The lawsuit challenges Taco Bell's practice of representing to consumers that its restaurants serve "seasoned ground beef" or "seasoned beef" filling in its products, when in fact a substantial amount of the filling contains substances other than beef. The lawsuit seeks to require Taco Bell to properly advertise and label food items, and to engage in a corrective advertising campaign to educate the public about the true content of its food products.

According to standards established by the U.S. Department of Agriculture (USDA), the meat filling in Taco Bell's products does not meet the minimum standard requirement to be labeled and advertised as "beef," seasoned or otherwise. The substantial amount of the filling is comprised of substances other than beef, and is required to be labeled and advertised as "taco meat filling." Taco meat filling includes ingredients added to increase the volume of the product, such as binders and extenders like "isolated oat product."

The federal government, through the USDA, FDA and FTC, provides definitions, standards and labeling guidelines for "seasoned ground beef." What Taco Bell is representing on its restaurant menu as "ground beef" does not meet any of those definitions, standards and labeling guidelines per the regulations. This product does not qualify to be considered "ground beef" and many of the "sea-

soning” ingredients are in fact binders, fillers and coloring. These ingredients increase the overall volume of this product, reducing the actual “beef” content per serving. It is against the law in this country to take someone’s money for a product that is misrepresented. This lawsuit seeks to put a stop to that type of conduct and practice.

The lawsuit was filed in the United States District Court Central District of California Southern Division: Dee Miles and Bill Hopkins from our firm, along with Timothy G. Blood, Leslie E. Hurst and Thomas J. O’Reardon, lawyers from the San Diego law firm of Blood Hurst & O’Reardon, LLP, will work on the case. The named Plaintiff, Amanda Obney, filed the suit on behalf of herself, all others similarly situated, and the general public.

#### **CPSC TO LAUNCH CONSUMER COMPLAINTS DATABASE**

The Consumer Product Safety Commission will launch an online public database that contains all consumer complaints about products. The searchable public database is set to launch in March, with complaints scheduled to post to the system within 15 days of receipt. The database is a result of the 2008 Consumer Product Safety Improvement Act. While the CPSC already collects reports of defective products from consumers, media accounts and health care providers, much of the information had remained private, under a Freedom of Information Act exemption. To gain access to the information, a citizen had to file a public-records request with the CPSC, which then had to consult with the manufacturer before releasing the information.

Under the new system, the CPSC has five days to notify a manufacturer when a consumer files a complaint. The company then has ten days to respond. It can challenge the complaint as false, argue that publication will give away a trade secret, or submit a response, which will be published with the complaint in the database. While the new database has received praise from most all consumer advocates, the *Washington Post* recently reported that the business community is “working behind the scenes to delay or revamp the project.” Hopefully, those efforts will fail.

Companies have expressed concern that complaints could contain inaccurate information, or fake problems posted by competitors. Some say that since the volume of complaints—16,000 consumer complaints were made in 2009—the CPSC won’t be able to investigate most of them. While that may be true, this project certainly seems to be a step in the right direction.

Source: *Lawyers USA Online*

#### **J&J DIRECTORS IGNORED “RED FLAGS” ON RECALLS AND INVESTIGATIONS**

A group of Johnson & Johnson shareholders has filed suit against the company, alleging that its directors ignored “red flags” foreshadowing product recalls and government probes of manufacturing defects and marketing practices. The shareholders have asked a judge to find that directors and top executives mismanaged J&J and to order them to pay damages. The Plaintiffs also want J&J to “improve its corporate governance and internal procedures.” The Complaint was filed in federal court in Trenton, N.J. Any money recovered would go to the company and not to individual investors.

J&J, the world’s largest maker of health-care products, recalled more than 40 types of medicines this year because of contamination and incorrect labeling. U.S. lawmakers began investigating J&J after a recall of batches of children’s Tylenol in April forced the company to suspend operations at a Pennsylvania plant. The probe uncovered the use of contractors to buy defective Motrin painkiller.

J&J also faces government investigations into whether it illegally marketed drugs and devices for uses not approved by the Food and Drug Administration and paid kickbacks. Shareholders have amended their derivative lawsuits that seek to force directors and officers to pay the company. It’s alleged that while J&J once set “the gold standard for integrity and excellence,” the directors’ “utter disregard for their fiduciary duties, including permitting and fostering a culture of systemic, calculated and widespread legal violations has destroyed J&J’s hard-earned reputation.”

It’s further alleged that the board received “years of red flag warnings of systemic misconduct.” These red flags

came in the form of federal and state regulatory investigations, subpoenas and requests for documents, FDA Warning Letters, news articles and the recall of products accounting for hundreds of millions of dollars in corporate losses, according to the Complaint. J&J got three letters from shareholders last year demanding that it “investigate a variety of alleged issues and take appropriate action.” The suing shareholders include the Minneapolis Firefighters’ Relief Association and the Hawaii Laborers Pension Fund.

Source: *Bloomberg*

#### **NETFLIX FACES CLASS ACTION IN SUBSCRIBER DVD LAWSUIT**

A federal judge has granted class-action certification to Netflix Inc. subscribers in their lawsuit against the company and Wal-Mart Stores Inc. for an alleged agreement to monopolize the DVD market. U.S. District Judge Phyllis Hamilton in an order said that the subscribers bringing suit against the companies in 2009 were “united by common and overlapping issues of fact and law.” Wal-Mart and the Plaintiffs reached a preliminary settlement of the lawsuit that could pay them as much as \$40 million in cash or equivalents. But the settlement doesn’t include Netflix.

The Plaintiffs charged that Netflix and Wal-Mart conspired in 2005 to divide the market for selling and renting DVDs in order to reduce competition. The companies formed an agreement in which Wal-Mart.com would stop renting DVDs online and Netflix wouldn’t offer them for sale. It was alleged that the agreement came after Blockbuster Inc. began offering DVD rentals online. Judge Hamilton said in her order: “As a result, millions of Netflix subscribers allegedly paid supra-competitive prices.”

It was alleged in the lawsuit that a conspiracy began when Reed Hastings, the chief executive officer of Netflix, met John Fleming, then the CEO of Wal-Mart.com, for dinner in January 2005 to discuss how to reduce competition in the DVD market in the U.S. At that time Netflix, based in Los Gatos, California, and Wal-Mart.com were competitors in online DVD rentals.

Source: *Bloomberg*

## **NINTENDO WARNS CHILDREN ABOUT ITS 3-D SYSTEM**

Nintendo is warning young children against playing 3-D video games on its upcoming handheld gaming system, the Nintendo 3DS. Children ages six and younger who play the 3-D games may have the growth of their eyes stunted, the company has said in a statement on its Japanese website.

The warning notes that parents can turn off the 3-D functionality of the handheld 3DS. They can also set passwords that keep kids from using that feature. The statement also asks everyone who plays the 3-D gaming system to take periodic breaks from the games as often as every hour or 30 minutes. The warning follows many others on the potential health effects of three-dimensional entertainment. TV makers have issued warnings about young people, pregnant women and even drunk people viewing 3-D TV, noting that the medium may cause nausea, dizziness and seizures.

In one such warning, it was said those risks are heightened in children. Nintendo has largely gotten favorable reviews for the 3DS system, which lets players see games in three dimensions without wearing the clunky glasses that are required for most 3-D television and movie displays. The company debuted the 3DS at a trade show and the \$300 device is scheduled to hit stores in Japan this month and then in the United States in March.

Source: CNN

## **LAWSUIT ACCUSES NEW BALANCE OF FALSE WALKING SHOE ADS**

A class action lawsuit has been filed against New Balance accusing the Boston-based sneaker company of false advertising. It is alleged that the company falsely claimed its toning walking shoes burned more calories and improved health. The lawsuit, filed in U.S. District Court in Boston, calls New Balance's marketing claims that the shoes increase muscle activation and calorie burn "false, misleading, and reasonably likely to deceive the public."

The lawsuit was filed on behalf of a named Plaintiff, Bistra Pashamova, on behalf of others like her who say they have been misled or harmed by the

sneakers. The suit seeks class action certification and monetary compensation. On the New Balance website, the company says its TrueBalance toning sneaker, "uses hidden balance board technology that encourages muscle activation in the glutes, quads, hamstrings and calves, which in turn burns calories." Studies cited in the lawsuit say the sneakers, which cost roughly \$100, do not necessarily boost health benefits and may even lead to injury.

Source: Reuters

## **A LOOK AT THE POWER BALANCE BRACELETS**

Power Balance, LLC, the company behind the Power Balance bracelet, has admitted to an Australian court that there is no proof to back up its claims that it improves athletic performance. The company has admitted "that there is no credible scientific evidence" that supports its claims.

The Australian Competition and Consumer Commission exposed the company's false claims in a December 22<sup>nd</sup> ruling, ordering Power Bracelet, LLC to withdraw its products from the market in the country and provide refunds to any customers who felt cheated. Power Balance bracelets hit the market in 2007 claiming to improve mental and physical performance by partnering with "key frequencies of the human energy system." Obviously, that wasn't true.

Over 2.5 million Power Balance bracelets have been sold worldwide at a cost of about \$30. Numerous professional athletes have been known to wear them as well. In fact, I have a few close friends who still wear them. It would have been lots cheaper for them to have bought a rubber band and they would have received the very same benefit.

Source: New York Daily News

## **COURT RULES AGAINST BANKS ON MORTGAGE ASSIGNMENTS**

The highest state court in Massachusetts upheld a decision last month invalidating foreclosure sales conducted by two banks to which mortgages had been assigned. The banks claimed that "securitization documents" they submitted established valid assignments that made

them the holders of the two mortgages before a notice of sale and foreclosure sale. The court disagreed with the banks and agreed with the trial judge that the Plaintiffs in these, which were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure.

As a result, the banks did not demonstrate that the foreclosure sales were valid to convey title to the subject properties. The court's order said that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale or the foreclosing entity must be one of the parties authorized to foreclose under state law.

Source: Lawyers USA Online

## **MORTGAGE HOLDER HAD DUTY TO RESPOND TO HOMEOWNERS**

A federal appeals court has ruled that a mortgage holder may have violated federal law by failing to respond to written complaints by homeowners concerning the processing of their mortgage payments. The Seventh Circuit reversed a summary judgment that had been entered by the trial court. The Plaintiffs executed a 30-year mortgage when they purchased their home. The original mortgage holder failed to correctly apply the Plaintiffs' monthly payments and threatened foreclosure.

Before that dispute was resolved, the Plaintiffs' mortgage was assigned to GMAC Mortgage Corporation. When the Plaintiffs' problems with the processing of their mortgage payments continued, they sued GMAC under the Real Estate Settlement Procedures Act. The Plaintiffs alleged that GMAC violated the Act by failing to provide them proper notice of the transfer of their mortgage and by failing to respond "promptly" to their "written requests for information" about their loan. GMAC claimed it was protected under the Act's "safe harbor" provision because it corrected errors within 60 days of discovering them and before the Plaintiffs filed their lawsuit.

But the Appeals Court concluded that GMAC was not eligible for the safe harbor because it failed to "notif[y] the person

concerned of the error” as required by the statute. The Court further decided that certain letters sent by the Plaintiffs were “qualified written requests” triggering GMAC’s statutory duty to make a prompt response. In reaching this conclusion, the Court rejected GMAC’s contention that the Plaintiffs’ correspondence lacked sufficient specificity. In its opinion, the Court wrote:

*Any reasonably stated written request for account information can be a qualified written request. To the extent that a borrower is able to provide reasons for a belief that the account is in error, the borrower should provide them, but any request for information made with sufficient detail is enough under RESPA to be a qualified written request and thus to trigger the servicer’s obligations to respond.*

The moral of this story is that banks must follow the law and must treat borrowers fairly. It’s good to see courts holding banks to that standard.

Source: *Lawyers USA Online*

### **RECALLED RENTAL CARS ARE STILL ON THE ROAD**

We have written in the last two issues about the problems of recalled cars being rented to folks by a number of rental car companies. If you don’t already know it, the American rental car industry is big business. The industry brought in more than \$20 billion last year. Unfortunately, many people who rent cars don’t realize that some of the rental cars are unsafe and shouldn’t be on the road. While it’s against the law for an automobile dealership to sell a car that is part of an open safety recall, rental car companies don’t have to follow that rule of law. They can and do rent cars that are under a safety recall. Congress should act on this problem at the earliest opportunity and make it illegal for rental car companies to rent a vehicle that is under a recall. If you agree, contact your U.S. Senators and House members and ask for their help.

### **FTC IS LOOKING INTO FOOTBALL HELMET CLAIMS**

The Federal Trade Commission is looking into possible action regarding safety claims made for new and reconditioned football helmets used by high school and younger players. Chairman Jon Leibowitz made the revelation in a letter to Sen. Tom Udall. The New Mexico Senator had requested an FTC investigation into what he called “misleading safety claims and deceptive practices.” The chairman wrote: “We agree that these are serious concerns and will determine what action by this agency may be appropriate.”

In the letter, obtained by The Associated Press, Chairman Leibowitz said that issues involving serious health concerns—especially those for children and young adults—are a “high priority for the commission.” The commission will be looking at several factors “in determining whether to take enforcement or other action.” In his letter to the FTC, Sen. Udall referred to what he called “misleading safety claims used in online video advertisements for helmets,” specifically citing Riddell and Schutt Sports. The senator was “troubled by misleading marketing claims by Riddell, a leading helmet maker that supplies the official helmet to the National Football League.” He quotes Riddell’s website as saying that “research shows a 31% reduction in the risk of concussion in players wearing a Riddell Revolution football helmet when compared to traditional helmets.”

According to Senator Udall, “there is actually very little scientific evidence to support the claim,” adding that the voluntary industry standards for football helmets do not specifically address concussion prevention or reduction. At the time of Sen. Udall’s letter, Riddell called his allegations “unfounded and unfair.” Schutt Sports said the company never claimed its helmets were “concussion reducing.” Last fall, Sen. Udall asked the Consumer Product Safety Commission to investigate whether safety standards for football helmets are adequate to protect young players from concussions.

Source: Associated Press

### **ALABAMA TREE-STAND DEATHS REPORTED**

As many of our readers know, it’s deer hunting season and that’s big in Alabama. There have been four deaths in our state within about three weeks caused by falls from tree stands. These elevated stands can be dangerous. All hunters should wear a full-body safety harness when using a tree stand. Harnesses are required when hunting on public land, including all the wildlife management areas in Alabama. But harnesses are not required when hunting on private land. Each of the four recent fatalities in Alabama have occurred on private lands. Most deer hunters use elevated stands, which give them a better view. These stands also put the hunters up out of the sight path of approaching deer, as well as elevating their scent trail. Millions of the stands have been sold nationwide in the last 30 years. Unfortunately, some have been found to be defective.

Approximately 86% of deer hunters in Alabama report using an elevated stand at some time during the season. But, according to reports about 40% never wear a harness. Part of the reason some hunters don’t wear harnesses may be the cost. A quality harness costs around \$100 to \$140. Manufacturers say the mountaineer-quality hardware required to build a safe harness drives the cost upward. Basically, the harnesses include shoulder, body and leg straps, with a sliding attachment for the tree. A tether clips to the back of the harness; if a fall occurs, the hunter is suspended with his back to the tree. The Tree Stand Manufacturers Association, a non-profit group that includes most of the top stand manufacturers in the nation, offers an on-line video on tree stand safety that might be a good reminder for all of us, no matter how experienced.

Source: AL.com

### **SETTLEMENT IN CLASS-ACTION LAWSUIT OVER BPA**

A class-action against Philips Electronics Corp., a maker of plastic baby bottles and sippy cups containing bisphenol-A or BPA, has been settled. The proposed settlement allows Plaintiffs to obtain a voucher or refund for the purchase of Avent baby products containing the con-

troversial chemical. Dozens of lawsuits have been filed alleging that BPA, which helps strengthen plastic and make food and beverage containers shatterproof, poses health hazards to children including cancer and developmental problems.

In 2008, the Food and Drug Administration said that BPA was safe, but subsequent reports from the Department of Health and Human Services' national toxicology program and a study by the University of Cincinnati raised red flags about its health risks, ranging from brain and hormonal dysfunction to coronary artery disease, stroke and type-2 diabetes. In 2009, the FDA said it would revisit the issue. Several manufacturers voluntarily agreed to remove the chemical from baby products. Federal legislation and several state laws have been introduced to ban BPA, which has also been banned in Canada and Japan.

Source: *Lawyers USA Online*

#### **MERRILL TO PAY \$10 MILLION FOR MISUSING CUSTOMER INFORMATION**

The Securities and Exchange Commission has charged Bank of America Corp.'s Merrill Lynch with securities fraud for misusing customer information and charging undisclosed trading fees. Merrill paid \$10 million to settle the charges, which focus on communications between the firm's proprietary and market-making stock trading desks from 2003 to 2007. Bank of America bought Merrill in January 2009.

Source: *Wall Street Journal*

#### **LIVE NATION SETTLES CLASS-ACTION LAWSUIT OVER FEES**

Live Nation Entertainment, an events promoter in California, has settled a class-action lawsuit over fees charged by its subsidiary, Ticketmaster. The lawsuit, originally filed by two individual Plaintiffs in a state court in 2003 and granted class-action status in September 2010, accused Ticketmaster of misleading customers when it added on \$14.50 to \$25 in delivery fees. The suit alleged that Ticketmaster suggested that the fees simply covered the cost of delivering the tickets, but that they were in fact designed to boost the company's profits. Live Nation, which merged last year with Ticketmas-

ter, agreed to settle the lawsuit in December, for \$22.3 million. Refunds will be made to affected customers.

Source: *Los Angeles Times*

## **XXIII. RECALLS UPDATE**

Once again, there have been a large number of product recalls over the past weeks. Unfortunately, as we have pointed out, serious safety-related recalls have become rather commonplace. The following are some of the more significant recalls since those reported in the January issue. Readers are encouraged to contact our firm if more information is needed on any of the recalls. We would also like to know if we have missed any safety recalls that should be included in this issue.

#### **FORD RECALLS 15,000 TRUCKS AND CROSSOVERS**

Ford is recalling nearly 15,000 trucks and crossovers due to problems with electrical systems that can short and create a fire. The recall includes some 2011 model year F-150, F-250, F-350, F-450, F-550, Ford Edge and Lincoln MKX vehicles. A Ford supplier of a control module produced the faulty product over a six-day period. F-Series trucks are built at the Claycomo plant. Owners may call Ford at 1-866-436-7332 to see if their vehicle is included in the recall.

#### **FORD RECALLS WINDSTAR MINIVANS OVER STEERING**

Ford Motor Co. has recalled more than 400,000 Windstar minivans in cold-weather states to fix brackets and mounts which could separate from the vehicle's subframe and cause a driver to lose control. The recall, the latest quality issue to afflict older Windstars, covered 425,288 minivans from the 1999-2003 model years sold or registered in 22 states and the District of Columbia. Ford said there had been seven crashes and five minor injuries connected to the recall.

Ford has recalled more than 600,000 of the minivans in the U.S. And Canada since August to address rear axles that can corrode and break. The National Highway Traffic Safety Administration also has been investigating corrosion problems in the minivans from the 1999-2003 model years. The minivans are still under review by the agency.

The recall affects brackets and mounts connected to the front subframe, which carries the engine, transaxle, steering rack and front suspension. According to NHTSA, if the mounts separate from the frame, a driver may experience reduced steering control. The recall is limited to states where road salt is used during the winter. They include: Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia and Wisconsin.

Ford is notifying owners this month and dealers will inspect the vehicles and install reinforcement brackets as parts become available. If a vehicle does not pass inspection before parts are available, Ford will provide a rental vehicle. If a dealer determines that the front subframe cannot be repaired, the company said it will offer to buy back the minivan. Owners can contact Ford at (866) 436-7332.

#### **CHRYSLER RECALLS THOUSANDS OF TRUCKS AND SUVs**

Chrysler is recalling nearly 150,000 trucks and SUVs to address several problems, including steering, air bag issues and the potential for trucks to stall. Chrysler is conducting three separate recalls to fix the problems. The first recall covers about 22,000 Dodge Ram trucks from the 2008-2011 model years to address steering problems. The second involves about 65,000 2009 model year Dodge Journey SUVs to fix side air bags that might not deploy. The last includes about 57,000 Dodge Ram 1500 trucks from the 2011

model year to fix components in rear axles that could cause the trucks to stall. Chrysler says owners can call (800) 853-1403 for more information.

#### **CHRYSLER AND DODGE VANS RECALLED**

2008 Chrysler Town and Country Vans and 2008 Dodge Caravans have been recalled. The vans may experience a water leak at the heating and air conditioner drain grommet, which could lead to illumination of the air-bag warning light and an inadvertent air-bag deployment. Dealers will replace the HVAC drain grommet free of charge. Consumers can call Chrysler at 800-853-1403.

#### **GM RECALLS ALMOST 100,000 VEHICLES**

General Motors Co. is recalling almost 100,000 vehicles to fix two problems that could cause the rear axle cross pin to shift out of place and the passenger-side air bag not to work. GM said that the air bag recall affects almost 96,000 2005 to 2007 model-year versions of the Cadillac CTS. The automaker said that repeated flexing of the sensing mat in the passenger seat can cause the mat to bend or fold so much that the sensor may not detect a passenger in the seat. As a result, the sensor will not activate the air bag in the event of a crash. The axle recall affects almost 1,300 2011 model-year versions of the Cadillac Escalade, Chevrolet Avalanche 1500 and Silverado 1500, as well as the GMC Sierra 1500.

#### **SAAB RECALLS CARS FOR FAULTY FUEL PUMPS**

Saab is recalling 4,400 passenger cars to fix fuel pumps that can seize and cause the engines to stall. Saab said the recall affects certain 2010 and 2011 model year 9-3 sedans built from June through October 2010. Dealers will replace the defective fuel pumps at no cost to owners, who will be notified. The recall is expected to begin around Feb. 18<sup>th</sup>.

Owners can contact Saab at 800-955-9007.

#### **SAFETY VACUUM RELEASE SYSTEM RECALLED BY VACLESS SYSTEMS INC.**

Vacless Systems Inc., of Sylmar, California, has recalled its Pool Safety Vacuum Release System. Improper plastic material found inside the recalled product has been attributed to vacuum release failures which create an entrapment hazard to swimmers and bathers. Vacless Systems Inc. has received no reports of incidents or injuries. The recalled product is a black plastic device that screws into the drain hole of a swimming pool or spa circulation pump. As part of the circulation systems, the device is designed to release the vacuum in a drain line whenever a submerged drain cover of a swimming pool or spa is completely covered.

The recalled product has model number SVRS10ADJ. The systems were sold by independent distributors or retailers for professional pool and spa products between July 2010 and September 2010 between \$480 and \$719. Consumers should immediately stop using their pool or spa. Distributors and dealers are directly notifying consumers of the recall and the Vacless SVRS repair program. Pool owners/operators who have not been directly notified should immediately contact Vacless Systems Inc. To implement the Vacless SVRS repair and testing procedure and to receive a replacement unit for installation. The instructions for the repair are also available at [www.vacless.com](http://www.vacless.com). For additional information, contact Vacless Systems Inc. directly at (818) 899-1755, e-mail the firm at [support@vacless.com](mailto:support@vacless.com) or visit the firm's website at [www.vacless.com](http://www.vacless.com)

#### **GE AND PROFESSIONAL SERIES BRAND DEHUMIDIFIERS RECALLED**

Nearly 200,000 GE and Professional Series brand dehumidifiers have been recalled because of a fire hazard. Although no injuries have been reported, GE and GD Midea Air

Conditioning Equipment, the China-based manufacturer, have received 14 incident reports, six of which involved property damage beyond the units.

Between February 2007 and June 2009, the dehumidifiers were sold at Walmart, Sam's Club, Home Depot, Menards and other retail stores throughout the country for between \$140 and \$180 per unit. The model number for GE dehumidifiers begin with AHK30LK, AHW30LK, AHM30LK, AHK40LK, AHH40LK, and AHM40LK while the Professional Series model number begins with PS78303. Consumers whose dehumidifiers are determined to be among those recalled will be able to return them to authorized service centers for a free repair.

#### **21,000 SUMP PUMPS RECALLED DUE TO ELECTROCUTION RISK**

The U.S. Consumer Products Safety Commission announced a voluntary recall of ITT sump pumps and effluent pumps last month due to a risk of electrocution. About 21,000 sump pumps and effluent pumps were sold by ITT Water Technology Inc. of Seneca Falls, New York, and sold nationwide through Goulds, Red Jacket and Bell & Gossett Pumps between December 2009 and July 2010 for between \$280 and \$700.

Pumps installed without a ground fault circuit interrupter present risk of electrocution or shock. The CPSC warned consumers not to touch the pumps or come in contact with water that may be around the location of a pump. To verify if a pump is involved in the recall, consumers were advised to contact ITT Water Technology to have a technician inspect the pump. Anybody who purchased a sump pump between December 2009 and July 2010 that is sky blue or red may have a recalled pump, according to the CPSC. Consumers can call 866-325-4204 for more information.

**CHRISTMAS TREE SHOPS INC. RECALLS OVEN RACK GUARD DUE TO FIRE HAZARD**

About 430 Oven Rack Guards have been recalled by Christmas Tree Shops Inc., of Union, New Jersey. The guards were manufactured by Gong Ming Xia Cun Plastic Mfy, Bao An, China. The product cannot withstand the high temperatures stated on the packaging and can overheat posing a fire hazard. The firm has received nine reports of the product causing smoke or catching fire. Of those eight reports, three consumers reported property damage and five reported injuries, such as headache, sore throat, nausea and eye irritation from smoke. The recalled Oven Rack Guard is intended to be placed on an oven rack to prevent burns on the arms or wrist when placing items in or removing them from an oven.

The Oven Rack Guard is off white in color, 18 inches long and contains five metal snaps that secure the Oven Rack Guard to the oven rack. The SKU number is 66262 and the UPC number is 15697769. Both numbers are located on the package. The guards were sold by Christmas Tree Shops primarily in the New England, Mid-Atlantic and Midwest regions in October 2010 for about \$3. Consumers should immediately stop using the recalled product and return it to any Christmas Tree Shops location for a full refund.

For additional information, contact Christmas Tree Shops toll-free at (888) 287-3232 with calls accepted 24 hours a day, 7 days per week, or visit its website at [www.christmas-treesshops.com](http://www.christmas-treesshops.com). CPSC is interested in receiving incident or injury reports that are either directly related to this product recall or involve a different hazard with the same product. You can report to the agency by visiting <https://www.cpsc.gov/cgibin/incident.aspx>.

**HOME HEATING AND COOLING THERMOSTATS RECALLED DUE TO FIRE HAZARD**

White-Rodgers of St. Louis, Mo. has recalled programmable thermo-

stats. This includes about 180,000 in the United States and 8,300 in Canada. The programmable thermostats constantly charge the backup AA batteries used to power the thermostat's clock. This can cause the batteries to leak, resulting in a fire hazard. The company says it's aware of three incidents involving minor property damage and that no injuries have been reported, according to the company.

This recall involves all White-Rodgers programmable thermostats with model numbers 1F88-XXX and 1F85RF-275 and date codes beginning with 05, 06, 07, 08, 09 and 1001 through 1039. The model number is printed on the thermostat's front pull-down panel door. The date code is located inside the removable front cover. White-Rodgers and/or the utility company's name and logo are printed on the front of the thermostat. These thermostats were sold to consumers who participated in energy conservation programs nationwide by more than 40 utility companies and by various HVAC wholesalers for about \$150.

Consumers should immediately remove the two AA batteries from the thermostat and contact White-Rodgers for a free repair kit. If battery removal causes changes in furnace operation, contact White-Rodgers. For additional information, contact White-Rodgers toll-free at (888) 624-1901 or visit its website at [www.regcen.com/Thermostat](http://www.regcen.com/Thermostat).

**XANTREX GT SERIES GRID TIE SOLAR INVERTERS RECALLED**

About 25,000 Xantrex Grid Tie Solar Inverters have been recalled by Xantrex Technology Inc., a subsidiary of Schneider Electric, of Livermore, Calif. A component of the inverter can degrade, causing out gassing within the wiring compartment of the inverter. When arcing occurs, gasses could build and force the compartment cover to be blown off. If the cover is blown off with sufficient force it can injure the user or person, or cause damage to property in close proximity to the inverter.

Schneider Electric has received five reports of wiring compartment covers being blown off. No injuries or property damage have been reported.

The recalled inverter converts solar photovoltaic voltages into utility grid voltages, allowing the owner to feed power into the electrical grid. The recalled units were manufactured between September 2005 and August 2010. These products were sold under the Xantrex, Sunpower, and General Electric brands. The brand name is printed on the front of the unit. The inverters were sold through solar distributors and system integrators nationwide and in Canada from September 2005 through January 2011 for between about \$2,500 and \$4,000. Consumers should immediately contact their authorized dealer to set up an appointment to get a free repair of the inverter. For more information, contact Xantrex Technology at (800) 714-7176.

**JOHNSON & JOHNSON RECALLS MORE PRODUCTS**

Johnson & Johnson has recalled about 43 million packages of Tylenol, Benadryl, Sudafed and Sinutab products from wholesalers because of past manufacturing practices like insufficient equipment cleaning systems. McNeil Consumer Healthcare, the consumer products unit of the company, is also recalling about four million packages of Roloids Multi-Symptom Berry tablets because of incomplete labels. The company said it was recalling the products as a precautionary measure and not because of any reports of health problems.

McNeil has been plagued by manufacturing and quality-control problems, leading to recalls last year of about 225 million bottles of over-the-counter drugs, according to company estimates. And the total number of McNeil products recalled last year is even higher when other kinds of packages are included. According to the Food and Drug Administration, McNeil recalled

“approximately 288 million drug product units” in 2010—including bottles, blister packs, vials, boxes and other objects.

This latest recall involves lots of Tylenol 8 Hour, Tylenol Arthritis Pain, Tylenol upper respiratory products, Benadryl, Sudafed PE and Sinutab, as well as the mislabeled Roloids. McNeil said that it is very unlikely that past production processes has impacted the quality of these products.

#### ***ASTHMA MEDICATION RECALLED FOR MISLABELED DOSAGE BOTTLES***

Albuterol Sulfate Inhalation solution in 0.083%, 3 milliliter unit dose vials has been recalled by Ritedose, the manufacturer, because of mislabeled dosage information. Incorrect asthma dosage could be fatal. Albuterol inhalation solution is inhaled through a nebulizer or inhaler to control asthma, prevent asthma attacks and restore normal breathing in time of asthma attack. The 2.5mg per 3 ml bottles have been incorrectly labeled on the embossed label as containing .05 mg/ 3 ml. Most of the other packaging labels are printed correctly, including over-wrap pouches and shelf cartons. But the incorrect label information could cause parents and adult users to miscalculate the dosage.

The concern is that folks will think that the bottle contains a much lower strength, when the actual dose is five times stronger. Med Watch and the Food and Drug Administration are further concerned that hospital, med-center and emergency patients may be given the higher dose, as correctly labeled outer packaging is generally discarded. Health care providers seeing only the mislabeled bottle would be very likely to give the wrong dose, especially since the two solution strengths are distilled in equal sized bottles. The .05 mg/3 ml bottles look just like the 2.5 mg./ 3 ml bottles. Only the strength differs. Albuterol Sulfate Inhalation is sold in single use dosage bottles, in 25, 30 and 60 count unit dose packages. Recalled Albuterol was sold

nationwide in the United States and in Puerto Rico. Symptoms of overdosing with Albuterol, known as albuterol toxicity, include headaches, nervousness, dizziness, seizures, high blood pressure, low potassium, angina and increased heart rates to 200 beats per minute.

#### ***NIGHT-LIGHTS RECALLED***

Forever-Glo Cylinder Nite Lights have been recalled. They were sold at hardware stores, lighting showrooms and home centers nationwide from May 2009 through September 2010 for about \$5. An electrical short-circuit in the night-light can cause it to overheat and smolder or melt, which can burn consumers or result in a fire. Consumers should immediately stop using the recalled night-lights and contact AmerTac for a full refund. For more information, call AmerTac at 800-420-7511, or visit [amertac.com](http://amertac.com).

#### ***STROLLERS RECALLED DUE TO AMPUTATION AND LACERATION HAZARDS***

Jogging strollers sold by phil&teds USA Inc., of Fort Collins, Colorado, have been recalled. When folding and unfolding the stroller, a consumer's finger can become caught in the hinge mechanism, posing amputation and laceration hazards. The company says it has received three reports of incidents resulting in injuries to the adult users including a finger tip amputation and two reports of lacerations. This recall involves sport v2 and classic v1 model single-seat Jogging Strollers. The three-wheel strollers have a metal frame, cloth seat and a canopy. The sport v2 model stroller was sold in red, orange, green, black, charcoal, navy and in graffiti print. Sport v2 serial numbers included in the recall are 0308/0001 to 0510/0840. The classic v1 model strollers were only sold in red. Serial numbers for the classic v1 are 0308/0001 to 0510/0906.

The first four digits of the serial number is a month/year date code

and the last four digits are for the individual stroller. Serial numbers are printed on the inside of the folding hinge. The phil&teds logo is located on the crotch piece of the harness on both models. The strollers were sold in specialty juvenile stores nationwide from May 2008 through July 2010 for between \$350 and \$450. Consumers should immediately stop using the recalled strollers and contact phil&teds USA to arrange for the shipping of a free hinge-cover kit and repair instructions. For additional information, contact phil&teds USA at (877) 432-1642 or visit the company's website at [www.philandteds.com/support](http://www.philandteds.com/support).

#### ***STEP LADDERS RECALLED***

The CPSC has reported that Frontgate Closet Ladders can break unexpectedly, causing a fall. The ladders have been recalled. About 860 breakings and 28 minor injuries have been reported. California-based Cinmar LLC sold the two- and three-step ladders in Frontgate stores in Georgia, North Carolina and Ohio, as well as in Frontgate and Sky Mall catalogs and on the same websites from December 2005 until July 2010. Those who purchased the ladders should stop using them and contact Frontgate for instructions on receiving a merchandise credit, the CPSC said.

#### ***TOY MOBILE PHONES RECALLED BY DISCOVERY TOYS***

Discovery Toys LLC, of Livermore, California, has recalled Toddler Talk Toy Mobile Phones. This includes about 2,900 toy phones in the United States and 700 in Canada. The clear plastic antenna can break off, posing a choking hazard to young children. Discovery Toys says it has received reports of three incidents in which the toy telephone's antenna broke off. A child was found mouth-ing the toy phone's antennae but it was removed by his mother. This recall involves a red and blue plastic battery-operated toy mobile phone with a small, clear antennae, buttons numbered “1, 2, 3, 4 and Play,” a

screen with a boy's face and the words "hello! hola! bonjour!" Only model number 1231 is involved in this recall. The model number is printed on the toy's packaging. "Discovery Toys" is stamped into the red plastic on the back of the toy. Discovery Toys sold the phones nationwide from September 2010 through November 2010 for about \$18.

Consumers should immediately take the recalled toy mobile phones away from young children and contact Discovery Toys for instructions on how to return them for a replacement toy. For additional information, contact Discovery Toys at (800) 426-4777 anytime, or visit its website at [www.discoverytoysinc.com](http://www.discoverytoysinc.com).

### **MORE DROP-SIDE CRIBS RECALLED**

About 300 Rosebud drop-side cribs have been recalled by Status Furniture, of Quebec, Canada (out of business) and the distributor/retailer The Land of Nod, of Northbrook, Ill. The drop-side rail hardware on the cribs can break or fail, allowing the drop side to detach from the crib. This recall includes "Rosebud" cribs manufactured by Status Furniture. The cribs are white or antique white and have plastic drop-side hardware. "Status Furniture" appears on crib labeling on the lower portion of the headboard. Model number "910" appears on the assembly instructions. The cribs were sold at The Land of Nod retail stores and online at [www.landofnod.com](http://www.landofnod.com) from January 2003 through September 2004 for about \$600.

Consumers should stop using these cribs immediately and contact The Land of Nod to receive instructions on how to receive a merchandise credit for the full purchase price of the crib. The Land of Nod is undertaking this recall for its customers because Status Furniture is out of business. In the meantime, parents are urged to find an alternative, safe sleeping environment for their child. For additional information, contact The Land of Nod at (800) 933-9904 or email at [recall@landofnod.com](mailto:recall@landofnod.com), or

visit its website at [www.landofnod.com](http://www.landofnod.com).

If you need more information on any of the recalls listed above, or would like information on a recall not listed, please visit our firm's web site at [www.Beasley-Allen.com/recalls](http://www.Beasley-Allen.com/recalls). We would also like to know if we have missed any significant recall that involves a safety issue this month. If so, please let us know. You may also contact Shanna Malone at [Shanna.Malone@beasleyallen.com](mailto:Shanna.Malone@beasleyallen.com) for more recall information.

## **XXIV. FIRM ACTIVITIES**

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### **EMPLOYEE SPOTLIGHTS**

#### **BILL HOPKINS**

Bill Hopkins, one of our newest lawyers, joined the firm on November 1, 2010. He is working in our Consumer Fraud Section. Bill, who was born and raised in Bishopville, South Carolina, attended North Carolina State University where he received his B.S. degree in Textile Chemistry in 1988. After graduation, Bill worked for nearly three years for Springs Industries, Inc., a large textile company, at a dyeing and finishing plant in Lancaster, South Carolina. He was working as a third shift superintendent at the time he was accepted into law school at the University of South Carolina.

During law school, Bill began clerking for the law firm of Whaley, McCutchen, Blanton & Rhodes, LLP, one of the oldest and most prestigious litigation firms in South Carolina, founded in 1936. Bill continued to work at the firm after graduation and ultimately became its Managing Partner. Bill and the firm were selected by South Carolina Attorney General Henry McMaster to represent the State of South Carolina in lawsuits brought against several pharmaceutical companies involving the reporting of false and inflated prices for drugs which resulted in overpayments by the State Medicaid and State Health Plan programs, known as the AWP litigation.

When Bill's old firm dissolved on December 31, 2007 after 71 years of continuous practice, Bill founded a new law firm and he continued to practice in that

firm, McCutchen Blanton Hopkins & Campbell, LLP, with Thomas McCutchen and Hoover Blanton, two of the most well-known and respected leaders of the South Carolina Bar until he joined our firm.

Bill was selected for inclusion in the 2011 edition of the *Best Lawyers in America*. He was also recently elected to the South Carolina Chapter of the American Board of Trial Advocates (ABOTA), which is a distinct recognition and privilege. ABOTA is a national organization comprised of both Plaintiff and Defense trial attorneys and is committed to the preservation of trial by jury. To be eligible for consideration, a lawyer must have tried at least 20 civil jury trials to verdict as lead counsel. Bill has tried over 50 civil cases to jury verdict as sole or lead counsel, in areas such as business torts, fraud, products liability, trade secrets, unfair trade practices, insurance matters and employment.

Bill has developed a successful class action practice, being appointed by several different courts as lead counsel or liaison counsel in many different class action cases. In fact, Bill had a long-standing relationship with our firm prior to coming with us. We first worked with Bill in 1995 when we joined forces in a class action suit against Life of Georgia Insurance Company. He will have an emphasis on class action litigation with our firm.

Bill is married to the former Rachel Jackson, who is from New Iberia, Louisiana, and they have a three-year-old son named Jack. Bill's son Clay attends Clemson University and his daughter Jordan attends the University of South Carolina. We are most fortunate to have a person with Bill's ability and experience join the firm. We consider him to be a most valuable addition to the firm.

#### **MICHAEL BUNN**

Michael Bunn, who came to work with the firm in October of 2009, is a Staff Assistant in our Consumer Fraud Section who works with Tim Fielder. Michael also works on special projects for Dee Miles and assists Bill Hopkins and Scarlette Tuley when needed. Michael has enjoyed being able to work with several of the lawyers in the Section on different projects. As a Staff Assistant, Michael does legal research, case investigations, and legal writing, and helps out wherever else his talents are needed.

Michael has been married to Heather for 15 years and they have three sons; Perry age 13, Jonathan age eight and Luke age six. Heather works from their home in Troy doing monogramming and embroidery. Michael graduated from Troy University in 1994 with a B.S. Business Administration, majoring in Finance. Before coming with us, Michael worked in sales and operations/management for several national and regional trucking companies. Michael then went back to school, enrolling at Jones School of Law in 2007 in the part-time program. He is scheduled to graduate from Jones in May 2011 and will sit for the Alabama Bar. Michael enjoys spending time with family, cooking, auto repair/restoration, golf, and fishing. He does a very good job for the firm and we are fortunate to have him with us.

#### **JACKIE JOHNSON**

Jackie Johnson, who has been with the firm since November 2004, started in our Fraud Section, assisting with scanning. Later she moved to our Mass Torts Section. Currently, Jackie is a Clerical Assistant. She helps collect important client information, which is vital in the preparation of our clients' cases. Jackie is the mother of three children Tamika, Javaris and Darryl. She is also a proud grandmother of three, David age 12, Denim age three, and Jamilah age three. Jackie spends her time enjoying her many hobbies, including shopping and cleaning. While Jackie is a tremendous organizer, she says her favorite activities are gardening and spending time with her grandchildren. Jackie is a hard worker and does good work. We are glad to have Jackie with us and consider her an asset for the firm.

#### **TERESA REID**

Teresa Reid began working at the firm in the Fall of 2005 as a part-time employee in the Mass Torts Section as a Clerical Assistant. Teresa takes pride in her job saying she realizes what she does "is very important to the accuracy and efficiency of the cases we win or settle on behalf of our clients." She currently scans documents into Prolaw, processes returned mail, works on mailings to our clients, sends copies of client correspondence to referring lawyers, and assists in other projects.

Teresa and her husband, Alan, will celebrate their 30<sup>th</sup> wedding anniversary in

March. They have a 20-year-old daughter, Katy, who is a student at AUM. Teresa graduated from St. Bernard Academy in Nashville and from Western Kentucky University where she earned a degree in Legal Secretarial Administration. Teresa and her husband enjoy doing as much as they can together—even if that means just being in the same room reading. She also enjoys nature walks, date nights, doing things which enhance her relationship with God, reading, and spending time with her family. Teresa also says she dotes on her "mighty dog" Hercules, a 13-pound Cavalier King Charles Spaniel. Teresa is a very good employee and we are blessed to have her with us.

## **XXV. SPECIAL RECOGNITIONS**

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#### ***KENDALL DUNSON MAKES HISTORY***

Kendall Dunson, a shareholder in our firm, was installed as president of the Montgomery County Bar Association last month, becoming the first-ever African American to lead the 96-year-old organization. Kendall took over as president at the MCBA annual meeting, succeeding Paul Clark, a lawyer with Balch and Bingham. Paul has done a very good job during his term.

Kendall's installation marks another milestone in the state's history, especially since Montgomery is the birthplace of the Civil Rights Movement. The MCBA strives to provide continuing education for lawyers and to foster professionalism among its members. Kendall, a native of LaGrange, Georgia, is married to attorney Samarra Munnerylyn Dunson, who is also a lawyer and who is the assistant general counsel for the Alabama Department of Public Health. We are extremely proud of Kendall. He is a very good lawyer and an even better person. We fully support him in his new undertaking. By the way, Kendall, a University of Georgia graduate, is a big fan of the Bulldogs.

#### ***JOHN TOMLINSON AND CLAY BARNETT BECOME SHAREHOLDERS***

John Tomlinson and Clay Barnett have been made Shareholders in the firm. John works in the firm's Environmental Law/ Toxic Torts section. He is currently involved in the pursuit of claims for several individuals and businesses against BP and other responsible parties as a result of the oil spill disaster in the Gulf of Mexico. He is also actively pursuing and investigating other claims related to nuisance, trespass to property, and personal injury due to exposure to toxic chemicals. In December 2010, John, who was selected as Beasley Allen's Lawyer of the Year for the Toxic Torts Section, has been working tirelessly on the BP litigation. He is a very good lawyer and does excellent work. We are blessed to have John with the firm.

Clay joined the firm's Consumer Fraud Section as an Associate in May 2007. His practice focuses primarily on pharmaceutical litigation, including the Average Wholesale Price litigation. Clay currently represents the states of Alabama, Mississippi, Kansas, Hawaii and Alaska in fraud actions filed against a long list of pharmaceutical companies. Since 2004, Clay has coached various local high school mock trial teams participating in the Alabama YMCA High School Mock Trial Competition. In addition, Clay has taken two different Alabama state teams to the National High School Mock Trial Competition (2006 and 2010). Clay is a very good lawyer who does excellent work. He is an important member of the Beasley Allen family.

#### ***STATE AUDITOR HAS HER PRIORITIES IN ORDER***

It was reported that State Auditor Samantha Shaw missed the swearing-in ceremony with other state officials on the Capitol steps because she was at the Atlanta airport to welcome her son, Army Capt. Gregory Shaw, home from Afghanistan. Luther Strange explained the absence of the two-term auditor to the inaugural crowd. He said that wild horses couldn't keep Mrs. Shaw from welcoming home her son. She scheduled a swearing-in ceremony later that day in her Capitol office with her husband, Supreme Court Justice Greg Shaw, presiding. Even though

the public swearing-in ceremony was important, it's clear that Mrs. Shaw has her priorities in order. Welcoming her son back to the U.S. was exactly where she should have been.

### **JOY TO LIFE FOUNDATION HONORED**

Montgomery-based MAX Credit Union held its eighth annual MAX Community Reception last month. The event honored the Joy to Life Foundation, along with founders Joy and Dickie Blondheim of Montgomery, as the recipients of the 2011 MAX Community Achievement Award. The annual event brings together a variety of community leaders to celebrate area successes and recognize organizations and individuals who make a significant difference in the quality of life in the River Region.

MAX honored Joy to Life for its vision in advocating free mammograms and early detection of breast cancer for medically under-served women less than 50 years old in 29 central Alabama counties. Joy Blondheim was diagnosed with breast cancer in April 1997, during and after which she felt a calling to help women in the Montgomery area who did not have the resources for early detection and treatment. In recent years, Joy and Dickie Blondheim have devoted their lives to working for others. This couple should be commended for all that they have done and it was most fitting that they were so honored.

### **A VERY SPECIAL AWARD TO A DESERVING INDIVIDUAL**

Last month our country honored the foremost hero of the Civil Rights Movement, Dr. Martin Luther King, Jr. events were held all across the U.S. That paid tribute to a man who had a dream of racial and social equality. Gov. Robert Bentley did the right thing when he allowed Dr. King's work and memory to be a central part of his inauguration. Also, Shay Farley, a lawyer with Alabama Appleseed, received an award which recognized the young professional in Montgomery who continues Dr. King's dream. Shay received the 2011 King Spirit Award. Her hard work and dedication to bring about change for folks who are disadvantaged and often forgotten by some

of our politicians was the reason she got the award. Shay is a deserving recipient of the award.

## **XXVI. FAVORITE BIBLE VERSES**

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Rebecca Huff, who works in our Mass Torts Section, says one of her favorite verses comes from John 20:31. She says even though her grandfather was a Methodist minister and her family church-going folks, she had a hard time understanding how God could have cared enough about her. This verse answered her questions as a 12-year-old when she became saved and it still reminds her today how much God cares.

*But these things are written that ye might believe that Jesus is the Christ, the Son of God; and that believing ye might have life through His name.*

John 20:31

Valerie Scroggins, who works in our Consumer Fraud Section, furnished a verse for this issue. It has a most profound message.

*I have been crucified with Christ; it is no longer I who live, but Christ lives in me; and the life which I now live in the flesh I live by faith in the Son of God who loved me and gave Himself for me.*

Galatians 2:20 (NKJV)

Teresa Reid, who works in our Mass Torts Section, has two scriptures on her bulletin board located right in front of her desk. Teresa says all she has to do is look up at the board when she needs comfort or perspective.

*Don't forget to be kind to strangers. For some who have done this have entertained angels without realizing it.*

Hebrews 13:2

*Let your light shine before men, that they may see your good works, and glorify your Father which is in heaven.*

Matthew 5:16.

Soo Seok Yang, a lawyer who works as a law clerk in our Mass Torts Section, furnished some of his favorite verses for this issue. Soo Seok and his family came to the U.S. in 2008 from Korea. He came to work with us on August 20, 2009, and has become a most valuable addition to the firm. These are his verses.

*Come to me, all you who are weary and burdened, and I will give you rest. Take my yoke upon you and learn from me, for I am gentle and humble in heart, and you will find rest for your souls. For my yoke is easy and my burden is light.*

Matthew 11:28-30

*But seek first the kingdom of God and His righteousness, and all these things shall be added to you.*

Matthew 6:33

*Now faith is the substance of things hoped for, the evidence of things not seen.*

Hebrews 11:1

My friend, Dot Robinson, who works for the Montgomery County Bar Association, sent in her favorite verse for this issue.

*Let us fix our eyes on Jesus, the author and perfecter of our faith, who for the joy set before him endured the cross, scorning its shame, and sat down at the right hand of the throne of God.*

Hebrews 12:2

Chris Glover, one of our lawyers, asked me to include one of his favorite verses in this issue. He says it reminds us of the power of the word of God to help us do what we can't do ourselves. It allows us to truly change our weaknesses into strengths. We are reminded that God can change our sinful nature to a life pleasing to Him.

*For this reason we also, since the day we heard it, do not cease to pray for you, and to ask that you may be filled with the knowledge of His will in all wisdom and spiritual understanding.*

Colossians 1:9

My long-time friend from Tuscaloosa, Mike Bownes, sent in the following verses:

*My brethren, count it all joy when you fall into various trials.*

James 1:2

*And He said to me, "My grace is sufficient for you, for My strength is made perfect in weakness." Therefore most gladly I will rather boast in my infirmities, that the power of Christ may rest upon me.*

II Cor. 12:9

Rev. Walter Albritton sent in a verse that hits the nail squarely on the head. It says it all!

*Jesus said to him, "I am the way, the truth, and the life. No one comes to the Father except through Me.*

John 14:6

## XXVII. CLOSING OBSERVATIONS

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Dot Robinson, who sent in a verse this month, also sent in a poem for this issue. It's quite good and also appropriate for all of us as we continue into the New Year.

### **THE REARVIEW MIRROR**

While driving along the road one day  
I diverted my attention and lost my way  
I was busy looking at what was behind  
To the things ahead I was temporarily blind.

Don't we do the same in life?  
Look back at all our pain and strife  
And forget to look at where we are going  
Missing blessings without even knowing.

We can learn from our past, that is true  
But the past is gone- it's done, it's through!  
Look back with thanksgiving in your heart

Then with the bad times, let them depart.

Look ahead for the blessings God has in store  
Trust in his goodness more and more  
God wants to be the focus of our gaze

As we trust in him for all our days.

Remember looking back should be a glance  
To relive your life, you won't get a chance  
Cherish your fond memories, let the pain go  
And then God's fullest blessings you'll know.

### **DEALING WITH ISSUES**

Some of us have a difficult time dealing with all of the issues that face us on a regular basis. Some of the matters that are sure to come up are complex and difficult. Others are less complex and less difficult. Some are expected to come up and others catch us by surprise on occasion. I believe that it's very important to plan for the expected and to be ready for the surprises.

We all need to make sure we are able to distinguish what is more important from those things that are in reality less important. But at the same time we must be careful not to let those less important things become unimportant. I have found from experience that doing the mundane and that which is considered less important **right** on a daily basis is in itself **very important**. Failing to handle those matters will create problems down the road.

So when we set our daily priorities in dealing with the essential matters that will come up, and being ready for life's surprises, keep this in mind. We should begin each day with the affirmation found in Psalms 118:24: "This is the day the LORD has made; We will rejoice and be glad in it." If we will do this daily, it will definitely make setting our priorities much easier and it will make sure we also take care of the surprises!

### **A MOTHER'S LETTER ABOUT HER SON'S ROLE ON THE AUBURN FOOTBALL TEAM**

A friend of mine sent me a letter that was written by Mrs. Teresa Caudle, the mother of an Auburn football player. While some readers may not recognize the name Neil Caudle, he was an important member of Auburn's National Championship team. Neil had been a highly-recruited quarterback out of Birmingham. But he had a series of serious knee injuries that set him back. This caused Neil never to start a game as an Auburn quarterback. But nevertheless, Neil was a key player during his time on the Plains, especially during his senior year. He was the holder on extra points and field goals. I don't recall Neil ever "messing up" in that role. Here's what his mama wrote about her son:

Hey, Auburn Fans! I just downloaded my pictures from the National Championship game. Because we were on the south end of the field, opposite from the action at the end of the game, I made pictures of the Jumbotron and scoreboard. The attached picture reveals that not only did #19 take the snap and hold the ball for the 19-yard field goal to break the 19-19 tie to win the National Championship, but there were 19 seconds on the play-clock.

All of us have to wonder at times whether or not we are in God's will. With each injury and disappointment, Keith and I wondered if God wanted Neil to play football at Auburn. But Neil always felt he was in God's will, even when things didn't go like he wanted them to. Getting to be a part of the National Championship team seemed to be an affirmation that he was right to stick it out. But God always exceeds our expectations. Sometimes God gives us signs.

You can do the math and see it is no coincidence. I believe God orchestrated Neil's last college football game to show His power and to affirm to Neil (and us) that number 19 was right where he was supposed to be all along. (Matthew 25:21)

For now I see through a glass, darkly; but then face to face: now I know in

part; but then shall I know even as I am known. (1 Corinthians 13:12)

God always does what He says he will do. (Psalm 33:4 and Psalm 145:13)

God is all powerful and He will never forsake us. (Psalm 37:28 and Romans 8:35)

God will bless those who seek to follow His will. (1 John 5:14 and Matthew 26:39)

God requires us to humble ourselves and take the form of a servant. (Matthew 20:26 and 23:12)

Verse-of-the-day today is this: "Even the youths shall faint and be weary, and the young men shall utterly fall: But they that wait upon the LORD shall renew their strength; they shall mount up with wings as eagles; they shall run, and not be weary; and they shall walk, and not faint." Isaiah 40:30-31

Thank you for sharing in this experience with us. Thank you for all your prayers and support. Our God is an awesome God!

War Eagle  
Teresa and Keith Caudle

#### **A MONTHLY REMINDER**

*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 Chron 7:14

## **XXVIII. PARTING WORDS**

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In a recent Sunday School class we discussed the role of the church in today's society. Without a doubt there are some real challenges facing the Christian church today. I am convinced that the real challenge for the church in this century is to remain faithful as God's servant—both as individuals and as Christian communities. Spiritual darkness, violence, idolatry, injustice, and oppression are found in virtually every place in the world, even in places where the church supposedly stands as God's light. Unfortunately, God's salvation and redemption has yet to reach to the end of the earth. As a result, God's glory has not been universally acknowledged. That

means there is much work yet to be done.

Our work as individuals is not complete and the work of the church certainly continues. We can learn our role from the Old Testament prophet Isaiah, who said: "My cause is with the Lord.... My God has become my strength." We must act out of that conviction on behalf of others. It's not enough to reach out just to our own and confine our "light" to the confines of our own communities. We have a mission to bring light to the whole world. I believe that should be a priority for the church and for each of us who are Christians.

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