



THE  
**JERE BEASLEY REPORT**

APRIL 2011

# Beasley Allen

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# I. CAPITOL OBSERVATIONS

Alabama Conservation Commissioner Named To Oil Spill Panel

President Obama named Alabama Conservation Commissioner Gunter Guy Jr. To a task force working on recovery of the Gulf Coast after the BP oil spill. Gunter will be Alabama's representative on the Gulf Coast Ecosystem Restoration Task Force. The Task Force is to coordinate efforts to implement restoration programs along the Gulf Coast. It will also work with federal agencies to enhance economic benefits from ecosystem restoration. Gov. Robert Bentley recommended Gunter and the President made a very good decision when he followed the Governor's recommendation. Gunter will do an outstanding job in this most important undertaking.

## **FIRST DEEP-WATER DRILLING PERMIT APPROVED FOR GULF SINCE THE OIL SPILL**

The federal government has approved the first deep-water drilling permit in the Gulf of Mexico since last year's massive oil spill. The Bureau of Ocean Energy Management, Regulation and Enforcement issued a permit to Noble Energy Inc. To continue work on a well about 70 miles southeast of Venice, La. Noble started drilling the well four days before the Deepwater Horizon rig exploded. Drilling activity was suspended on June 12 under a moratorium the U.S. placed on exploration in waters deeper than 500 feet.

No new deep-water permits had been issued since the moratorium was lifted in October. Regulators have been under pressure from the oil industry and some lawmakers to get drilling projects in the Gulf started again while ensuring that new safeguards were in place. Director Michael Bromwich said that regulators approved the permit after the company demonstrated it is capable of containing a well blowout. Noble contracted with the Helix Well Containment Group to use its emergency capping stack to stop the flow of oil in case it loses control of a well.

As was previously reported, a consortium led by Exxon Mobil Corp. had offered another emergency containment solution. It was stated by Director Bromwich that "further deep-water permits will most likely be approved in the near future" based on

the same process that led to the approval of this permit. The U.S. has approved 37 other drilling permits, all of them in shallow water, since the moratorium was lifted.

Source: Associated Press

# II. A REPORT ON THE GULF COAST DISASTER

## **REPORT CONFIRMS THAT THE BLOWOUT PREVENTER WAS FLAWED**

It has been confirmed that the blowout preventer that should have stopped the BP oil spill failed because of a faulty design and a bent piece of pipe. A testing firm hired by the government announced its findings last month. This means that Cameron International and Transocean, the two companies that built and maintained the 300-ton safety device, will share with BP and others in the blame for the disaster. At least one outside expert believes the findings cast serious doubt on the reliability of all the other blowout preventers used by the drilling industry.

The report by the Norwegian firm Det Norske Veritas (DNV), while certainly not the final word on the disaster, does help answer one of the unanswered questions. The blowout preventer that sat at the wellhead and was supposed to prevent a spill in case of an explosion didn't do its job. The question is ... why? The report cast blame on the blowout preventer's blind shear rams, which are supposed to pinch a well shut in an emergency by shearing through the well's drill pipe. The report indicates that the shear rams couldn't do their job because the drill pipe had buckled, bowed and become stuck.

The 551-page report suggested that blowout preventers be designed or modified in such a way that the shear rams will completely cut through drill pipe regardless of the pipe's position. The blowout preventer was made by Cameron International and maintained by Transocean Ltd. The report also suggested that actions taken by the Transocean rig crew during its attempts to control the well around the time of the disaster may have contributed to the piece of drill pipe getting trapped.

The blowout preventer on the BP well was raised from the seafloor in early Sep-

tember and testing began at a NASA installation in New Orleans in November. Representatives for Cameron and Transocean were among a large group of interested parties that were allowed to monitor DNV's examination of the device. BP, the Justice Department and lawyers for Claimants also were allowed to monitor the testimony. But none were allowed any hands-on involvement. As we previously reported, BP has asked a federal judge for permission to conduct additional testing of its own. But Cameron has objected, saying any further testing should be done by a neutral party.

An investigation into what caused the rig explosion and oil spill is being overseen by a joint panel of the Coast Guard and the

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federal Bureau of Ocean Energy Management Regulation and Enforcement. The panel is scheduled to release a final report this summer assigning blame for the disaster. I suspect all of the companies having responsibility for the oil spill will start pointing fingers at each other. Thus far they have been “joined at the hip” and have allowed BP and the Gulf Coast Claims Facility to deal with the Claimants.

Source: Associated Press

### **BP OWES FEDERAL GOVERNMENT \$62 MILLION MORE FOR OIL SPILL CLEANUP**

The Obama Administration has billed BP for \$62 million spent by the federal government responding to the Gulf of Mexico oil spill. The bill was sent on March 12<sup>th</sup> and it was the tenth bill sent to BP and other companies responsible for the spill. BP is required to pay for the cost of government response to the oil spill. So far, BP has paid the federal government \$632 million for cleanup costs.

### **DEADLINE FOR FILING CLAIMS AGAINST TRANSOCEAN**

There is an important deadline this month for filing claims arising out of the oil spill. In order to preserve the ability to recover monetary damages against Transocean, the owner of the oil rig, any person or business must file a claim with the federal court in New Orleans by April 20<sup>th</sup>. Failure to file within that time will bar claims against Transocean. Claims can include personal injury, loss of earnings, property damage, business loss or other economic loss arising as a result of the oil spill. If you need more information relating to this important deadline, contact any of the lawyers in our Toxic Torts Section at (800) 898-2034. You can also contact Sandra Walters at the same number and she will direct you to a lawyer who can help you.

### **A MILESTONE DEFINED BY THE GULF COAST CLAIMS FACILITY**

This past month, Ken Feinberg’s claim facility hailed “an important milestone” in processing more than half of the 256,000 oil spill claims it has received since December. However, a closer look at the numbers illustrates another example of the Gulf Coast Claim Facility’s (GCCF) continued failure to be forthcoming with folks on the

Gulf Coast. For instance, Mr. Feinberg’s numbers rely almost entirely on “quick pay” settlements that require no documentation, involve pre-approved claims and marginal (if any) claim review. Significantly, these claims do not account for the thousands of financially-starved businesses and individuals that were wrongfully denied in the interim emergency process and now sit idle as their more substantive interim and final claims are reviewed. In total, only an estimated 168,000 of the 500,000 claims were paid in the interim emergency claims process.

Of the “more than half” of 256,000 claims processed, the quick pay claims account for nearly 100,000 or more. What’s worse, many of the individuals and businesses that signed their rights away at \$5,000 and \$25,000 did so during the Christmas season. Who can forget the media images of Gulf Coast residents forming lines outside the GCCF waiting to sign final settlements as Christmas presents and end-of-the-year expenses were coming due? Predictably, some of these same people are seeking to overturn the final settlement language and have filed lawsuits in Louisiana claiming they were wrongfully forced to sign their rights away.

Only 18,562 of the 155,000 applicants that filed interim or final claims have received offers. Disturbingly, of those 18,562 “offers,” only 40% were interim claims. This could mean that the GCCF is putting more emphasis on final claims to force individuals and businesses to settle out more quickly. Out of those same 155,000 interim and final claims, only 4% (6,632) have accepted offers from the GCCF.

Even more perplexing, the GCCF has denied 19,413 of the interim and final claims for failing to meet the extremely-high documentation standards that the GCCF requires. Moreover, 2,277 were told they would receive no further funds because they had already been covered by previous payments—even though we are less than one year removed from the spill and the full extent of damage to the Gulf Coast is unknown. David Wright, the owner of a south Baldwin County homebuilding company, who lost several contracts as a result of the spill, was forced to lay off workers. Those same workers were told by the GCCF that they would experience no further losses—even though they still remained unemployed. Mr. Wright had this to say: “They’re saying they had no loss when they’re unemployed. How can you

say there’s no loss? You try to feed a family with no job.”

In summary, the GCCF has denied more Claimants than it has paid in the interim and final claims process; has only made offers on 12% of those claims; and is claiming a “milestone” when it has only paid 4% of the 155,000 pending interim and final claims. Sounds more like a BP milestone than a milestone for Gulf Coast residents.

Sources: *The Mobile Press Register* and *Insurance Journal*

### **MUCH OIL FROM THE SPILL NEVER MADE IT TO THE SURFACE**

It is being reported by a group of scientists that much of the oil from the Deepwater Horizon oil spill never made it to the surface of the Gulf. Instead the oil became suspended in the water column. This was reported to a scientific conference held in Mobile last month. The 40<sup>th</sup> annual Benthic Ecology Meeting drew about 600 scientists from around the nation who study the creatures that live along the seafloor. The meeting was sponsored by the Dauphin Island Sea Lab and the University of South Alabama.

Two different groups presented research that examined the fate of oil in the Gulf, with both concluding that large plumes of oil sank to the depths of the sea. It was reported that there was a really large plume that stayed mostly in the deepest areas. The BP spill had a contaminated area that reached 50 miles from the wellhead. There were also reports on how the oil and chemicals have affected fish, crabs and other sea life. It’s interesting to note that BP is now saying that nobody knows how much oil was spilled into the Gulf.

Source: AL.com

### **A TEN-YEAR HEALTH STUDY UNDERWAY**

Federal researchers last month announced the beginning of a wide-ranging study into the possible health effects of the BP oil spill on cleanup workers. The study, which will be led by the National Institute of Environmental Health Sciences, will try to follow 20,000 workers for the next ten years, making it the largest study ever into the health effects of an oil spill. The first 1,000 invitations to take part in the study have already been sent out. Dale Sandler, chief of the epidemiology branch of the Institute, says the goal, is to eventually extend invitations to around 100,000

people who were involved in the cleanup. Most of these folks live in Alabama, Louisiana, Mississippi, and Florida.

Officials hope that around 55,000 of the invitees will enroll in the study. The group will then be narrowed further after an initial phone interview. Researchers will visit about 20,000 of these people at their homes, take samples and health measurements, conduct extensive interviews about their health histories and follow up with them over the next decade. From the first days of the oil spill, residents along the Gulf Coast have feared long-term health effects, a concern that was heightened by the unparalleled use of chemical dispersants. That fear may be well founded.

Since the massive spill on April 20<sup>th</sup>, there have been complaints of health effects from spill exposure around the coast. Some folks have experienced severe symptoms. Dr. Sandler says she knows of about 30 cases of people who have reported complex health complaints and high levels of chemicals in their blood. Hopefully, her information is correct, but since we have been contacted by more than 30 persons, I have to wonder how extensive her search was.

The study will look for any association between specific cleanup duties and the overall health of those enrolled in the study, according to Dr. Sandler. Respiratory problems were mentioned in particular as a focus. Researchers will also study seafood consumption, an area of concern for those who never worked in the spill, but live on the standard Gulf diet that includes shrimp and oysters.

It should be noted that the Gulf study will not provide health care to participants. However, the Institute is coordinating with local and state health departments and will refer some participants to local health care providers. Interestingly, the National Institutes of Health has committed \$19 million to the study, which includes \$6 million from BP. But officials made a special effort to convince all concerned that BP was otherwise not involved in the study.

Source: *New York Times*

### III. PURELY POLITICAL NEWS & VIEWS

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#### *THE 2010 GOVERNOR'S RACE IS OVER*

Apparently the message hasn't sunk in for a few key individuals in the Alabama Republican Party that the 2010 Governor's race in Alabama is over and that Robert Bentley won. There have been several happenings recently indicating that some in the party consider Bradley Byrne to be a co-Governor of sorts. Since the people of Alabama have elected a governor, it's time to forget 2010 and time for all Alabamians to join with the man who was elected and work with him for a better Alabama. He has his hands full dealing with the financial mess he inherited from his predecessor.

There also seems to be a movement in certain GOP circles to look ahead to 2014. That is certainly premature since the new Governor has only been in office for about two months. There is much to be done and Gov. Bentley is hard at work dealing with some very large problems. Nevertheless, lots of rumors are floating around Goat Hill about several prominent individuals who are already running, or considering running, for Governor in 2014.

Some observers believe the state's current fiscal problems will hurt the incumbent Governor so badly—even though he inherited the financial mess—that he will be a one-term chief executive. However, based on what we have seen thus far from Gov. Bentley, that sort of thinking may be way off base. I believe his straight talk and common sense approach to running the state appeals to an overwhelming majority of Alabamians. Perhaps Bentley detractors had best wait until the man has at least had a chance to straighten out the real mess he inherited and then allow him to start planning for the future. For the first time in many years long-range planning is part of an administration's overall plan for Alabama and that's certainly a step in the right direction.

There are too many major problems facing our state right now to allow the hard feelings which are still hanging around from 2010, or anybody's looking ahead to a race in 2014, to hurt remedial programs pushed by the Bentley Administration. The Governor needs help from Republicans and Democrats alike as he tries to pass budgets to keep the operations of both state government and education afloat. Gov. Bentley's

task is one requiring a bipartisan effort, not only from legislators, but also from the leadership of both political parties.

#### *THE IMMIGRATION ISSUE IN ALABAMA*

Over the past several years there has been much grandstanding by politicians over the immigration issue. While some of the politicians appear to be sincerely concerned over the issue, it's my opinion that many are not. Clearly, the illegal entry of individuals from Mexico causes serious problems on a number of fronts and creates a drain on tax dollars. Nevertheless, there are a good number of companies, large and small, hiring Mexicans to work for them. While I hear that some of them may be in the country illegally, hopefully that's not true.

A simple solution to the problem in Alabama—assuming there really is a major problem—is to pass a law making it a felony for the owner of a company to knowingly hire a person who is “illegally” in the United States. There is a bill in the Legislature that I understand does that and even more. I wonder how far the current bill will get during the session? I am told that the Mexican workers who are here legally are extremely hard workers and are earning their pay checks. It will be interesting to see how the Alabama Legislature deals with this largely “political” issue.

### IV. LEGISLATIVE HAPPENINGS

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#### *PUBLIC EMPLOYEES ARE NOT THE REAL PROBLEM*

The recent campaign waged against unions in Wisconsin by Gov. Scott Walker, a politician who seemed to blame public employees for all of his state's financial problems, stayed in the national media for weeks. His continuing attacks on public employees gained the Governor recognition outside his state and some say he may have gained political capital for a possible presidential race. Up until March 10<sup>th</sup>, however, Gov. Walker's efforts appeared to be more for show than aimed at real problem solving. That, unfortunately, has become the rule rather than the exception for some politicians. The extreme action taken by Gov. Walker and the GOP Senators

in a Senate vote on March 10<sup>th</sup> in Wisconsin may prove to have been a big mistake for him, and it may affect other politicians who consider working men and women to be the “enemy.”

While public employees—both at the federal and state levels—have always been convenient scapegoats, they now find themselves under a more concerted attack than ever before. There may be certain actions that are necessary in order to correct some fiscal problems relating to pensions and other benefits at the state and local levels, but the public attacks aren’t the answer in my opinion.

- Rather than attacking working men and women, our elected leaders on the national stage should be more concerned with:
- Plugging the loopholes in our tax laws that are much too favorable to Corporate America;
- Doing something about corporate executive pay that is higher than any person deserves for doing any job;
- Stopping Wall Street bonuses that are much higher today than before we bailed out Wall Street;
- The billions that are being paid to hedge-fund and private-equity managers who pay low taxes due to laws passed for their benefit;
- Putting a halt to the tax cuts for the super rich; and
- Making public education a top priority in budgets and not just in their public speeches.

I have a difficult time agreeing with a reform agenda that penalizes teachers, police officers, firefighters, sanitation workers and other public employees, and which virtually ignores the “fat cats” in the corporate world. We have seen a tremendous number of executives of large corporations who were guilty of pretty bad conduct. There also have been plenty of large companies paying almost no taxes, and with some, no taxes at all. All of the above makes me wonder if some of our politicians have taken aim at the wrong folks!

### **A LOOK AT THE REPUBLICAN LEGISLATIVE AGENDA**

There can be no doubt as to who is in control in the Alabama Legislature these

days. The Republican majority in both the House and Senate is clearly running the show. They are firmly in control of the legislative agenda in both chambers. It will be interesting to see how their handling of this total control over the legislative process works out in the long run. In the first five days of the 2011 regular session, one major bill was sent to the Governor and another key bill in their “Handshake with Alabama” was sent to Gov. Bentley’s desk shortly after the Legislators returned to work on March 22<sup>nd</sup> from a week of spring break.

During the 2010 campaign Republicans, in their so-called Handshake with Alabama, promised to make the budgeting process more fiscally responsible, to help small businesses, to fight illegal immigration, to require photo identification to vote, to increase the tax deduction for employers who provide health insurance, and to require a secret ballot in union elections. They seem well on their way to accomplishing all of these things.

Some Goat Hill observers—whose dogs haven’t been in the legislative fights so far—believe that the GOP leadership in both houses could be making a big mistake by refusing to allow highly-important legislation to be fully debated before forcing a vote. Even though “extended debate” has been misused over the years in a number of legislative sessions, it is still a time-honored tradition. It’s also critically important that adequate debate in both Houses be allowed on important legislation. That’s even more important in the Senate to allow full debate on important legislation. To do otherwise could eventually cause problems for those who are now in control. The shoe may be on the other foot in the future and that’s a political reality. Hopefully, the leaders in both houses will take a closer look at how debate issues are handled in the future.

### **THERE IS A DEMOCRATIC AGENDA**

Democrats in the Alabama Legislature announced their legislative agenda on March 9<sup>th</sup> at a news conference at the State House. They call their platform a “Handshake with Working People” and not with big corporations. This is the first regular session in which Democrats will be attempting to pass their agenda as a minority. It doesn’t appear they will get much done in the early part of the session. Instead, Democrats in both chambers will be playing defense, trying to slow down the pace. So far, those efforts have been unsuccessful.

The Democratic agenda includes online filing of campaign finance forms and creating a searchable database; trying to curb the purchase of medication used in making methamphetamines; fighting distracted driving; creating tax incentives for existing and potential industries using millions of dollars of revenue from offshore oil and gas; eliminating tax loop holes for out-of-state corporations that Democrats believe are costing the state millions of dollars in revenue; illegal immigration; and constitutional reform. All of these items are important and perhaps some of them have a chance of at least being debated.

### **TEA PARTY GROUP WILL KEEP A DAILY WATCH ON THE ALABAMA LEGISLATURE**

Tea Party members have stepped up their presence at the Alabama Legislature and say they are watching to see if the new Republican majority keeps its campaign promises. About 70 Tea Party members rallied on the State House steps shortly before the Legislature convened its 2011 session on March 1<sup>st</sup>. They announced the formation of Alabama Legislative Watchdogs.

Ms. Deanna Frankowski, the leader of the group, announced that Tea Party groups will have a daily presence in Montgomery to make sure legislators know they are being watched. Ms. Frankowski and other speakers at the rally criticized Gov. Robert Bentley and Agriculture Commissioner John McMillan for hiring their Democratic opponents. Ms. Frankowski said voters didn’t elect Republicans to do that, adding “if we wanted them in office, we would have elected them.” I really thought those hires set the tone for a bi-partisan approach to running state government and it seemed to be well received by most Alabamians.

Ms. Frankowski and other speakers at the rally made it clear that Tea Party members expect the GOP majority to crack down on illegal immigration, protect states’ rights and exempt Alabama from the federal health care plan. Sen. Scott Beason, R-Gardendale, spoke at the rally. He told the assembled group, “if we don’t do good things, we ought to be held accountable for that.” I predict that the Tea Party in Alabama will be “hard” to satisfy for their GOP buddies.

Source: Associated Press

## **MAKING A DIFFERENCE IN ALABAMA POLITICS**

The Christian Coalition of Alabama (CCA) is seeking to advocate the application of Christian values and principles to public policy that promote the general welfare and enhance the standard of living for all Alabamians. According to reports, the main legislative issues concerning the CCA in 2011 are: Education, Healthcare, Defending Traditional Marriage, Protection of Religious Freedom, and Protecting Innocent Human Life.

I believe most folks in our state want to make sure that our state leaders, both in the Legislative and Executive branches, respond to the real issues facing our state. As has become quite apparent, Gov. Robert Bentley inherited a financial mess, and one that to straighten out will take a major miracle. His job will be more difficult than any Alabama Governor has experienced in at least 50 years. Some extremely difficult decisions will have to be made and not all of them will be very popular. That's why it's important for Gov. Bentley to have the support of groups such as the CCA.

Source: ccalabama.wtvm.com

## **ALABAMA DEMOCRATS PUSH FOR REWRITE OF CONSTITUTION**

I mentioned above that Democrats in the Alabama Legislature again have Constitutional Reform on their agenda. It appears they will try to have a statewide referendum on whether citizens want a new state constitution. The Democrats want to allow citizens to vote yes or no on a constitutional convention that would rewrite Alabama's 1901 document. Rep. Demetrius Newton of Birmingham tried to pass a similar resolution in the past, but his efforts failed.

Rep. Merika Coleman of Midfield says the 1901 Constitution needs to be rewritten because it was designed to hold back women, blacks and poor whites. It's sort of hard to disagree with that assessment. Perhaps, an equally important reason for a new constitution is the simple fact that it's been amended over 1,000 times since 1901. I would like to see the people of Alabama have the opportunity to write a constitution that would reflect their views and be fair to all of our citizens. Will that happen any time soon? Unfortunately, I seriously doubt it!

Source: Associated Press

## **THE LEGISLATURE SHOULD BAN TEXTING WHILE DRIVING**

An Alabama House committee approved a bill that would prohibit sending text messages on a cell phone while driving a motor vehicle. The House Public Safety and Homeland Security Committee approved the bill introduced by Rep. Jim McClendon. The legislation would make it a traffic violation to drive on a public highway or street while text messaging. A driver would be fined \$25 for a first violation, \$50 for a second violation and \$75 the third time a driver is stopped for texting while driving. Rep. McClendon says texting is one of the most dangerous things someone can do while driving. Hopefully this will pass both the House and Senate and be signed into law.

Source: Associated Press

## **EQUAL PAY COMMISSION NEEDED**

The persistence of wage discrimination by sex and race in the U.S. is well-established. Unfortunately it has existed in Alabama and we have not done very much about it. Our state's wage disparities historically have been larger than the national average. Women in Alabama made 76.8 cents for every \$1 that men earned in 2009. For that year white Alabama workers made \$1 in median wages for every 75.5 cents that African Americans made. While the earnings gaps have narrowed considerably over the past three decades, we still have a serious problem. The Legislature should create an equal pay commission during the Regular Session. Previous attempts to do this have failed. Hopefully, this new group of Legislators will see a real need here and pass the legislation necessary to establish a commission.

## **LEGISLATORS SHOULD BE PAID AN ADEQUATE SALARY**

There was much talk about legislative salaries as the Regular Session of the Alabama Legislature got underway. Lots of it was done by folks seeking to gain politically by their comments. Others really believed legislators are overpaid or are being paid in the wrong way. Regardless, I have always believed that members of the Alabama Legislature should be paid a good salary and have a reasonable, but not excessive expense allowance. If you really look into this matter, I believe you will find such an approach makes sense.

The brief debate over rolling back the current salaries that came up at the outset of the Session was obviously more political posturing than anything else. Considering all of the demands on legislators—especially for those having more than one county in their district and requiring lots of travel and meetings—I don't believe the members of the House and Senate are overpaid. It's costly for them to live in Montgomery during the times that the legislature is in session. The current salary is \$52,000 annually with no separate expense allowance.

I don't believe the current pay is overly excessive because of the legislators' responsibilities. When they are required to be away from their homes, jobs and businesses should be taken into consideration. I believe that a commission set up to set salaries and expense allowances is the proper way to handle this sort of thing. Legislators shouldn't be allowed to deal with issues relating to their own pay. As a matter of interest, I doubt that many folks realize that the salary for legislators is actually set in the Alabama Constitution and its only \$10 per day. The rest of what the legislators receive is in the form of expenses. While it may not be popular from a political perspective to take a position that advocates paying legislators a reasonable salary, in my opinion, it's the right thing to do.

## **V. COURT WATCH**

### **LAYOFFS FOR ALABAMA'S COURT SYSTEM PROJECTED**

Alabama Chief Justice Sue Bell Cobb has warned there will be as many as 500 layoffs in the state court system starting October 1<sup>st</sup> under the proposed general fund budget. The Chief Justice told a joint session of the Legislature she was grateful that Gov. Bentley proposed a budget cut of only about 10% for the Unified Court System. It could have been much more. Nevertheless, the courts will be badly hurt.

The Chief Justice said she will have to immediately lay off 74 bailiffs and law clerks around the state, and that number would increase greatly in the next fiscal year. The court system requested \$162.7 million for fiscal 2012, but Gov. Bentley is proposing that the courts receive \$158.1 million. Chief Justice Cobb said she would be forced to cut out travel for judges

between circuits, and training expenditures have been eliminated. It's possible that the number of jury trials will be reduced.

Source: AL.com

## **ARTICLE EXAMINES SUPREME COURT'S TIES TO BIG BUSINESS**

A recent article penned by Josh Moon, a very good reporter with the Montgomery Advertiser, made some interesting observations about the Alabama Supreme Court. His article has received a great deal of attention around the state. I understand Mr. Moon has even been criticized in some quarters because of his observations concerning the Court. I am including the complete text of the article for your edification and comments.

### **ALABAMA SUPREME COURT SERVING AS SAFETY NET FOR BIG BUSINESS**

*Have you ever dreamed of being untouchable, of simply doing whatever you'd like and never having to worry about consequences? If you're a big business operating in Alabama, that dream is apparently a reality, thanks to the Alabama Supreme Court. No matter the screwup, no matter the negligent, borderline criminal acts committed by big business, the state's highest Court has acted as quite the magician's top but the last few years—making big problems and big verdicts simply vanish. And it's using some awfully flimsy excuses to pull off its tricks.*

*The most infuriating example came a few weeks ago, when the justices voted 4-3 to overturn a \$3.2 million verdict against Baptist Health—damages originally levied because of the hospital's alleged negligence in the death of Lauree Ellison, a 73-year-old woman from Wetumpka. Ellison had gone to Baptist Medical Center East in September 2005 after suffering a fall at work. While there she complained of a sore throat, so a throat culture was taken that came back negative. Ellison was later released, but the culture was allowed to continue growing. It revealed that Ellison had Methicillin-resistant Staphylococcus aureus (MRSA), a deadly infection if not treated early.*

*No one called Ellison. No one called her doctor.*

*Two months later, she was back in the hospital with MRSA pneumonia, and later died. Baptist appealed the judgment against it. One of the issues raised by Baptist's attorneys in the appeal was an off-the-wall argument that the hospital can't be sued because shortly before Ellison's visit, facing financial struggles, it transferred its operations to the University of Alabama and the University of Alabama at Birmingham Health System, thus making it a state entity and immune from lawsuits. The justices surprisingly agreed.*

*"It's the most unprecedented decision I've ever heard of," said Birmingham attorney Shay Samples, who represents the Ellison family. "Imagine that just because a business has a relationship with a state—not that it is a state entity, but just has a relationship with one—it can't be held accountable for its actions. I'm still astounded." He shouldn't be. The Alabama Supreme Court has over the last few years overturned a number of big verdicts against big business.*

*Two weeks ago, the high Court overturned an \$8.5 million verdict against Ford Motor Co. in a rollover case in Etowah County because the presiding judge limited the jury pool by asking potential jurors if they would be able to serve for three to four weeks.*

*In 2009, the Court tossed a \$274 million verdict against 13 pharmaceutical companies for defrauding the state's Medicaid system by overpricing prescription drugs, because, the justices said, the state didn't have to rely on that erroneous information.*

*In 2007, the Court overturned a \$3.85 million medical malpractice suit awarded to a Jackson couple whose baby had suffered brain damage due to birthing problems, because the judge had erred in giving the family procedural information about the delivery.*

*Also in 2007, the Court overturned a \$3.5 billion verdict against oil giant Exxon Mobil, which was accused by the Alabama conservation depart-*

*ment of intentionally underpaying royalties to the state, because the Court didn't believe the underpayments constituted fraud.*

*In 2003, the Court overturned an \$82 million verdict against GM for a defective design that resulted in a child being left with brain injuries following a crash, because five jurors were distant relatives or friends of an attorney who worked at the plaintiff's law firm. Are you getting a picture?*

*It seems as if the common man (or woman) goes into court not only outspent and out-lawyered by the companies he's facing off against, but also facing a group of justices who are leaning the other way from the start. And that lean, many argue, could have something to do with the excess money in the pockets of their robes. In the last election cycle, pro-business PACs poured money into races for judicial seats, including more than \$500,000 to Justice Mike Bolin, who wrote the majority opinion in the decision to overturn the Ellison case. Those donations continued a trend of pro-business groups and defense attorneys increasing spending on state judicial races.*

*How serious can those conflicts sometime be? Consider this: In the six years prior to the Exxon Mobil verdict being overturned, Harper's reported Alabama justices received more than \$5.5 million in donations from people and groups with direct ties to the oil company—that included donations from numerous attorneys defending the oil company in the suit. It's absurd. And absolutely maddening. It's time we demand the reappearance of some of that fairness and impartiality that's supposed to protect us.*

All any person, including victims of wrongdoing and business owners, who goes before a court either as a Plaintiff or Defendant should expect is a fair and impartial hearing for their claim or defense. That includes having judges in their case who will follow the existing law and apply that law to the facts. For that to happen, we must have a court system that is truly independent and fair to all litigants. Unfortunately, the perception today is that justice in Alabama is for sale and that's not good for anybody. I don't believe any judge

wants that to be how justice is perceived in Alabama. What do you think?

Source: Josh Moon  
*The Montgomery Advertiser*

### **SUPREME COURT MAKES AN IMPORTANT RULING IN A BUSINESS CASE**

The U.S. Supreme Court issued an important ruling last month relating to investor lawsuits. The Court held that investors can sue a corporation for purposefully withholding damaging information about a product and that employees can sue the company for retaliation without having to make a written complaint. The Justices ruled unanimously to allow a lawsuit by a group of investors against Matrixx Initiatives Inc., the makers of the now-discontinued Zicam nasal cold remedies, to go forward. The Court also ruled in a separate case on a 6-2 vote to let an employee's retaliation lawsuit proceed against Saint-Gobain Performance Plastics Corp.

In the Matrixx case, the High Court unanimously affirmed a decision by the 9<sup>th</sup> U.S. Circuit Court of Appeals to let a securities fraud lawsuit against the company go forward. A group of investors sued the Scottsdale, Ariz.-based company, complaining that the company made misleading statements about Zicam. The company said sales were going to rise and that reports of its product causing loss of smell were "completely unfounded and misleading." A federal judge granted Matrixx's motion to dismiss the lawsuit, accusing the company of misleading investors because there was no statistical proof at that time that the loss of smell was directly linked to Zicam.

But Justice Sonia Sotomayor, writing for the Court, said companies don't have to have concrete data before sharing what they have with investors. "Given that medical professionals and regulators act on the basis of evidence of causation that is not statistically significant, it stands to reason that in certain cases reasonable investors would as well," she wrote. Justice Sotomayor also said all of the allegations against Matrixx "give rise to a 'cogent and compelling' inference that Matrixx elected not to disclose the reports of adverse events not because it believed they were meaningless but because it understood their likely effect on the market." The case now goes back to the lower court. Matrixx withdrew Zicam Cold Remedy Swabs and Zicam Cold Remedy Gel from the market in June 2009 after the Food and Drug Administration told consumers they should stop

using the products because they can permanently damage the sense of smell.

In the Saint-Gobain case, the Justices ruled that there doesn't have to be a written complaint to a government agency for a worker to claim anti-retaliation protection under the Fair Labor Standards Act. The employee was fired from a Saint-Gobain Performance Plastics facility in Portage, Wis. He had complained to Saint-Gobain that the time clocks were placed in a location where employees would lose overtime. The company moved the clocks the same day he was fired, and settled with other employees for nearly \$1.5 million. The employee filed suit, saying he was fired because he spoke up. He claimed retaliation protection under the Fair Labor Standards Act, but the company said, and the U.S. Court of Appeals for the Seventh Circuit agreed, that to get protection workers who have "filed any complaint" about workplace conditions must have written it down. Justice Stephen Breyer, writing for the majority, said that Congress didn't mean to limit complaints in such a way.

Source: *Insurance Journal*

### **JEFFERSON COUNTY OCCUPATIONAL TAX RULED UNCONSTITUTIONAL**

The Alabama Supreme Court has ruled unanimously that the 2009 Jefferson County occupational tax law was unconstitutional. The Court ruled that the legislative act establishing the law was passed in violation of notice requirements and therefore unconstitutional. The High Court affirmed a ruling by Judge Charles Price, a highly-qualified and experienced judge from Montgomery, that public notices about the 2009 tax bill did not meet the requirements of Section 106 of the state constitution. The county had appealed to the Supreme Court.

Following the ruling, county commissioners said they will go to the Alabama Legislature for help. However, most members of the county's legislative delegation have said they are not inclined to pass a replacement occupational tax in the current session. That means Jefferson County most likely has a fiscal crisis that could shut down the government in Alabama's most populous county. It could put the county into bankruptcy.

Source: Al.com

## **VI. THE NATIONAL SCENE**

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### **MISSISSIPPI TOPS LIST OF MOST CONSERVATIVE STATES**

A national pollster has found that Mississippi is home to the largest percentage of self-identified political conservatives among the states in the U.S., with a slim majority identifying their political views as conservative. Alabama, Idaho, Utah, and Wyoming come close to the 50% conservative identification mark, according to Gallup's latest poll on the subject. The report from the poll said that "Mississippi is the first state to exceed 50% conservative identifiers in the three years Gallup has compiled ideological identification at the state level."

Vermont, Rhode Island, and the District of Columbia showed the greatest percentages of self-identified liberals, according to the survey. It was no surprise to learn that the most conservative states are typically in the South and West. The least conservative states are in the Eastern part of the country and on the West Coast. The top ten rankings make clear that "conservative identification" is much more common than "liberal identification," with each of the top ten conservative states at or above 45% identification and only the District of Columbia exceeding 31% liberal identification.

The report reveals that Americans nationwide are about twice as likely to identify as conservative as they are to identify as liberal. It also reports that Americans are more likely to say they are conservative than moderate, a trend that displays the power of political propaganda transmitted through the mass media to influence public opinion over time. Not surprisingly, then, conservatives outnumber liberals in every state. Only in the District of Columbia do liberal identifiers exceed conservative identifiers (41% to 18%). Vermont (30.7% conservative to 30.5% liberal), Rhode Island (29.9% to 29.3%), and Massachusetts (29.9% to 28.0%) have the closest state-level division between conservatives and liberals. Gallup concludes:

*The conservative political label continues to prevail by a significant margin in most of the U.S. states. Additionally, ideological identification has been largely stable in recent years even though there has been greater*

*change in party affiliation at the state level.*

The 2010 elections brought more politicians who label themselves as “conservative” into office at the state level. Some of the results are evident in the approaches state governments are taking to deal with their biggest challenges, such as attempts to cut pay or benefits of unionized state workers to address revenue shortfalls and budget deficits. It has always amazed me that working men and women, as well as retired workers, support candidates who sponsor or support programs that benefit only the folks who are among super rich and huge companies in Corporate America. Voting against their own interest appears to have become a pattern in some states over the past ten years.

Source: locustfork.net

### **BIG OIL HAS BEEN TURNED LOOSE ON U.S. TAXPAYERS**

It's no surprise that the American Petroleum Institute, the Big Oil industry's chief lobbying organization, says that it will start donating directly to political candidates. Martin Durbin, the Institute's executive vice president for government affairs, told Bloomberg News: “This is adding one more tool to our toolkit. At the end of the day, our mission is trying to influence the policy debate.” Since the U.S. Supreme Court allowed Big Oil to spend whatever it pleases, and with no restrictions, this announcement is bad news for ordinary folks in this country. Can you imagine turning companies such as BP and Exxon loose with absolutely no restrictions on how much those already powerful companies can spend directly on political campaigns?

Specifically, Big Oil seeks to influence the debate on such issues as offshore drilling, fossil fuel subsidies, alternative fuel sources, and government regulation. You are likely to hear candidates in upcoming elections advocating for:

- Preservation of the billions in subsidies that taxpayers give oil companies every year;
- Expansion of offshore drilling in vulnerable areas like the Arctic;
- Blocking regulations to curb climate change;
- Inadequate safety and environmental regulations for offshore drilling; and

- Less government regulation over oil companies, which is already very weak.

Then you might even learn that API is bankrolling the campaigns of those very candidates. The powerful oil companies will have their way more than ever to the detriment of ordinary citizens because of what the highest Court in the land has done. I have been somewhat surprised that the public hasn't been up in arms over what is happenings relating to the financing of political campaigns on the national and state levels. It's not because it doesn't affect them adversely, nor because they don't care; instead, it's largely because the public is uninformed.

Source: energyvox.org

## **VII. THE CORPORATE WORLD**

### **FEDERAL ENFORCEMENT AND RECOVERY ACT STRENGTHENS QUI TAM SUITS**

Lawyers in our firm are continuing to look into how the False Claims Act (31 U.S.C. §§ 3729-3733) has been empowered by 2009's Federal Enforcement and Recovery Act (FERA). Suits filed under the False Claims Act, commonly known as qui tam suits, involve persons who have knowledge of fraud being committed against the United States government. The law provides citizen-plaintiffs, referred to as “relators,” the ability to recover a portion of the amount recovered—sometimes up to 30%—for reporting instances of fraud against the United States government. Since 1986, relators have been awarded over \$3.2 billion and Fiscal Year 2010 saw relators awarded \$385 million.

Under FERA's new provisions, a subcontractor or other party working with a general contractor to provide a service to the government is liable for falsely submitting claims for payment. This opens up liability to third parties and others who are not directly dealing with the government. FERA also extends protection to contractors and agents who become “whistleblowers.” This new provision was created to encourage those with knowledge of fraud to come forward and save taxpayers money from unethical companies and agents who are trying to make money off of government projects.

Unfortunately, fraud has increased even by defense contractors who are supposed to supply our troops in Afghanistan and Iraq. The Chairman of the Senate Judiciary Committee, Senator Patrick Leahy (D-VT), held a hearing earlier this year regarding the impact of FERA on the False Claims Act. It should be noted that the Department of Justice was able to recover \$6.8 billion dollars since FERA was enacted. Sen. Leahy's Committee has heard testimony from two members of the Department of Justice. Assistant Attorney General Lanny Breuer spoke on the work of the criminal division and Assistant Attorney General Tony West updated the Committee on the efforts of the civil division in recovering money for U.S. Taxpayers. In just 2010 alone, \$2.5 billion was recovered by the federal government from health care fraud. Senator Leahy had this to say after one of the hearings:

*Americans are worried about their budgets at home. We need to protect their investment in their government. Fighting fraud and protecting taxpayer dollars are issues Democrats and Republicans have worked together to address in the past, and in these difficult economic times, we need to continue in that spirit of bipartisanship.*

Lawyers in our firm who handle these cases predict that the new tools provided by FERA will create a powerful incentive for more whistleblowers to come forward and help save millions of dollars of the taxpayers' money. For more information on qui tam suits, please contact Archie Grubb at 800-898-2034 or Archie.Grubb@beasleyallen.com.

Source: Sen. Leahy's Statement to the Senate Judiciary Committee

### **SOME INTERESTING RECOMMENDATIONS FOR POTENTIAL WHISTLEBLOWERS**

I doubt that many of our readers have ever heard of a man by the name of Stephen Kohn, even though his name has been quite well-known in some corporate circles. Mr. Kohn serves as the Executive Director of the National Whistleblower Center. For the past 25 years, this man has been fighting the whistleblower wars. In fact, he has written a handbook, *The Whistleblower's Handbook*, on the subject. This book is recommended for any person who is interested in combating fraud involving taxpayer funds.

As we have mentioned in several prior issues, lawsuits filed under the False Claims Act have brought in almost \$30 billion in recoveries to the U.S. Treasury. In addition to that Act, however, there are others of a similar nature. The newly-enacted Dodd-Frank whistleblower provision is one of them. It is available to citizens who report violations of the Foreign Corrupt Practices Act (FCPA) as well as other laws. Even the IRS has a program that rewards whistleblowers who blow the whistle on tax frauds.

Employees who are wondering whether to report fraud or criminal wrongdoing occurring in the company where they work, might want to consider how reporting the activity will affect them. Mr. Kohn has ten things an employee should consider before “blowing the whistle” on wrongdoing in a company.

- **Number Ten: Whistleblowing is More Effective than Regulation in Controlling Corporate Crime.** PriceWaterhouseCoopers interviewed 5400 CEOs, CFOs, and CCOs from nearly every major global corporation. They found that whistleblowers are the most effective source of information in both detecting and rooting out corporate criminal activity.
- **Number Nine: Don't Delay.** An employee might have the best case in the world—worth tens of millions to the government and millions to a whistleblower—but if the claim isn't filed on time, it could be worth nothing. Delay is deadly.
- **Number Eight: Be Prepared for All Hell to Break Loose.** Whistleblowers need to be prepared. They need to understand the serious nature of whistleblowing, the impact it may have on their career and family, and the necessary steps that they can take to protect themselves.
- **Number Seven: Embrace Your Inner Whistleblower.** Many who blow the whistle say they were just “doing my job!” No one takes a job “intending to become a whistleblower.” But sooner or later, an employee considering whether to blow the whistle will have to “embrace their inner whistleblower—or they will be in trouble. Without accepting this change in status, employees cannot begin to take the crucial steps to protect their careers,” according to Mr. Kohn. I believe what Mr. Kohn is saying is that potential whistleblowers will ultimately have to make it a question of right versus wrong and then

consider the consequences of their action or inaction.

- **Number Six: Don't Take Hush Money.** After filing a case, the corporation might try and buy the employee off. That has happened. One such case involved Brown & Root in 1987 and a journeyman electrician, Joseph Macktal, Jr. His is a most interesting story and one that may happen more than we know.
- **Number Five: Beware of Hotlines.** Big corporations often set up hotlines, with toll free numbers, and urge employees who witness wrongdoing to call the number and report the “concern.” Should a whistleblower do it? The hotline programs “empower the fox to police the chickens,” Mr. Kohn wrote in his handbook. But in some cases, hopefully, hotline use will work.
- **Number Four: Don't Take Legal Advice from a Corporate Compliance Officer.** “Compliance officers and hotline investigators work for the company—they do not work for the employees,” Kohn says. “They are under no obligation to inform employees of their rights or the laws that may protect them,” he adds.
- **Number Three: Be Skeptical about Corporate Confidentiality.** “It is well known that the very nature of an employee's complaint can act to ‘fingerprint’ the worker,” Kohn says. “Often, only a small group of workers are aware of the details concerning a regulatory violation.” When a corporate official commences his or her review of the complaint, “it is often not difficult for the employer to figure out the identity of the whistleblower.”
- **Number Two: Don't Break the Law.** Remember, if an employee is a whistleblower, he or she is blowing the whistle *on the corporate law breakers*. The employee doesn't want to be caught breaking the law while whistleblowing. “This is a basic rule that must be followed,” Kohn says. “If a court determines that an employee broke a criminal law in order to obtain evidence in the case, the employee will suffer a sanction. The case may be dismissed, the employee's credibility will be attacked, and there may even be a referral for a criminal prosecution.”
- **Number One: Follow the Money.** According to Mr. Kohn, this is the single most important rule. “Four major federal laws provide for the

payment of reward to whistleblowers who can prove that their employers committed fraud,” Kohn writes. “These rewards can be large.” An employee should make sure they select a lawyer who knows how to not only handle a whistleblower case, but is capable of protecting a whistleblower.

Relating to this subject, Mr. Kohn poses two basic questions to his fellow Americans who may find themselves in the role of a potential whistleblower:

If you think your boss may be a crook, if you think there may be safety violations at work, if you think your managers are cheating in tax payments, violating terms of government contracts, committing financial frauds, or violating the law, should you just stay silent?

Or should you figure out whether or not you could be a potential whistleblower, and then carefully determine what to do when the boss may be a crook?

Hopefully, the above information, which comes largely from work done by Mr. Kohn and his writing, will prove to be helpful. The important thing to remember is that blowing the whistle on fraud, criminal activity and safety violations—while necessary—is a most serious undertaking and one which should be taken only after weighting the risks involved. At the very least, Mr. Kohn's work should make us think and put things in perspective in the event we are ever put in a situation when whistleblowing is an option.

Source: *Corporate Crime Reporter*

### ***INSURERS ARE DOING VERY WELL IN TOUGH ECONOMIC TIMES***

It was reported recently that the nation's top five health insurers made nearly \$12 billion in profits last year. It appears that the insurers—UnitedHealth, WellPoint, Aetna, Humana and Cigna—were more profitable than the top five firms in the energy, construction, aviation, motor vehicle and parts manufacturing industries. A new fact sheet was released by Rep. Pete Stark (D-Calif.) revealing this information.

According to Rep. Stark, three of the insurers padded their profits by more than \$3.5 billion by boosting premiums. Meanwhile, he said, Aetna and WellPoint increased their profits by \$800 million by

spending less on medical care. Rep. Stark, the ranking member of the House Ways and Means health subpanel, touted healthcare reform provisions that require greater transparency from insurers. Rep. Stark said in a statement:

*While insurance companies were proposing double-digit premium increases on consumers, they were earning billions in profits at the same time. The health reform law protects consumers from unjustified premium hikes, while ensuring that premium dollars go primarily to medical care and not profits.*

The nation's health insurance lobby claims that industry profit margins have been generally declining since 2005. America's Health Insurance Plans said the insurers' average profit margins (4.9%) are slim compared to pharmaceutical companies (16%) and the entire healthcare sector (21%).

The Department of Health and Human Services announced \$200 million in grants last month to help states set up programs to scrutinize "unreasonable" rate hike proposals. Insurers that show a pattern of excessive rate hikes can be banned from offering plans in new state-run health insurance exchanges opening in 2014. New medical-loss ratio rules also require insurers to spend at least 80% (85% in the large group market) of premium dollars on healthcare services.

Source: TheHill.com

## **TWO BROTHERS ARE POWERHOUSES IN THE NATIONAL POLITICAL WORLD**

As I was working on this issue of the Report, I was reminded that Charles and David Koch had been financing a large part of the Tea Party Movement. I wonder how many of our readers even know who these two men are? First, let's look at their business operations. Koch Industries is an international conglomerate that is not only the second largest private company in this country, but it is the most politically active. To say they are extremely powerful on the national scene from a political perspective is grossly understating their influence. The Koch brothers, Charles and David, have been heavy contributors to the Tea Party movement in the U.S. They have skillfully used the Tea Party to push their political and economic agendas.

Over the past three years, Koch groups have spent tens of millions of dollars to

influence government policy. It has also been reported that these groups have financed junk academic studies to accomplish their goals. The interesting thing is that ordinary folks don't have a clue who the Koch brothers really are. If they did, I suspect they would be greatly concerned that any two private citizens could have such tremendous influence over what happens in the daily lives of U.S. citizens. Both are said to be life-long Libertarians who follow that party's extreme positions on government to the letter.

## **GUILTY PLEAS IN THE COLONIAL BANK CASE**

There were some rather significant developments recently in the criminal courts relating to Colonial Bank. First, on February 24<sup>th</sup>, the former treasurer of what had been one of the country's largest privately-held mortgage lenders pleaded guilty to a nearly \$2 billion fraud conspiracy that authorities say contributed to the failure of her employer as well as Colonial Bank. Desiree Brown, who is from Hernando, Fla., could receive up to 30 years when she is sentenced in June. Ms. Brown was an executive at Ocala, Fla.-based Taylor, Bean & Whitaker, which filed for bankruptcy in 2009.

Ms. Brown has admitted that she willingly participated in a scheme to sell more than \$400 million in fictitious mortgages to Alabama-based Colonial Bank. While other mortgages sold to Colonial actually existed, those had already been sold to other parties and were therefore worthless to the bank. When Colonial collapsed in 2009 it became the sixth-biggest bank failure in U.S. history. It was reported that subsequently Taylor Bean and Colonial used those fraudulent balance sheets to support an application by Colonial in October 2008 for \$570 million in taxpayer funding under the government's Troubled Assets Relief Program (TARP). It should be noted that neither Taylor, Bean nor Colonial actually received TARP funding. But in December 2008, the Treasury Department had issued conditional approval for \$553 million in funding to Colonial.

The former CEO of the company, Lee Bentley Farkas, is scheduled to go on trial this month. Ms. Brown's plea agreement requires her to testify against Farkas if prosecutors want her testimony. Also, the Securities and Exchange Commission filed related civil charges last month against Brown, accusing her of aiding the alleged fraud scheme and attempted TARP scam. The SEC will also seek civil penalties

against Ms. Brown. Lorin Reisner, Deputy Enforcement Director at the SEC, said in a statement:

*Brown willingly participated with Farkas in a \$1.5 billion fraud on Colonial Bank and its investors. Brown also aided efforts by Farkas to mislead Colonial Bank and its regulators regarding the bank's application for TARP funds.*

In another development, Catherine Kissick, a former executive at Alabama-based Colonial Bank, pleaded guilty to the fraud conspiracy. Ms. Kissick, who is from Orlando, Fla., entered her guilty plea in the same federal court in March. She admitted that she had conspired with the executives at Taylor, Bean.

Finally, another executive has also pleaded guilty to the billion-dollar fraud conspiracy. Teresa Kelly of Ocoee, Fla., pleaded guilty on March 16<sup>th</sup> to conspiring to commit bank, wire and securities fraud in federal court in Alexandria, Va. Ms. Kelly, a supervisor at Colonial Bank, has admitted knowingly being a part of a scheme involving the Bank's buying hundreds of millions of dollars in worthless mortgages from Taylor Bean. I don't know exactly where this ongoing investigation is headed, but these guilty pleas may prove to be most significant in the coming weeks.

Sources: Associated Press and *Montgomery Advertiser*

## **VIII. CAMPAIGN FINANCE REFORM**

### **IT IS TIME TO CHANGE THE WAY ELECTIONS ARE FINANCED**

Public Citizen has called on Congress to make some badly-needed changes in the laws governing elections in this country. As we all know, the U.S. Supreme Court turned over the financing of elections to Corporate America when it ruled campaign finance reform legislation passed by Congress to be unconstitutional in the case of *Citizens United v. FEC*. The decision, which found a corporation to have the same constitutional rights as a living human being, gave corporations the right to spend unlimited amounts to support or oppose candidates for elected office. If that seems rather weird, it certainly is. The 5-4 decision opened the

treasuries of Corporate America to have unlimited influence over elections. The authors of our constitution would be shocked if they were around today to see what the Court did and why.

The Supreme Court has given companies like Exxon, BP, Merrill Lynch, Tyson Foods, CIGNA, and hundreds of others, the unique ability to open their corporate treasuries to directly influence elections. Democracy was never intended to operate like that. Our Supreme Court has now given corporations the right and authority to spend unlimited amounts to undermine democracy. Democracy is supposed to have rule by the people in a country. That has always meant—until now—by real, live human beings—not corporations. Public Citizen had this to say recently in a statement that we received:

*Now the Supreme Court comes along and says that Congress acted unconstitutionally—and violated Corporate America's free speech rights. This is bad news for human beings and our democracy. How bad? Take the recent election. From 2009-2010, all candidates for U.S. House and Senate races combined spent about \$1.5 billion. In the same time frame, Exxon alone registered profits of \$40 billion.*

*So, in just one election cycle, a tiny fraction of Exxon's profits could be used to buy our democracy. Lock, stock and barrel. Pretty soon, we'll have politicians walking around with logos on their jackets—like a NASCAR driver—advertising their sponsors. Democrat or Republican, Conservative or Liberal, Blue State or Red State. It won't matter. Corporations will shower cash on any candidate who best represent their interests in Congress, your state house, your city council, or your state and local courts.*

*We've already seen a torrent of corporate money rush into politics. The large retailers Target and Best Buy, for example, spent money for a right-wing extremist gubernatorial candidate in Minnesota. And News Corp., which owns Fox News and the New York Post, contributed \$1 million to the Republican Governors Association, a partisan group dedicated to electing Republican governors. Health insurers, King Coal, Wall Street giants, Big Oil and more funneled tens of millions through front groups to*

*support pro-corporate candidates. The corporations have shifted the political makeup of Congress, and they're just getting started. 2010 was just practice for the presidential election of 2012.*

*And not all of the damage from the new corporate spending is direct. In the future, elected officials who want to do the right thing, won't. And if they do, they'll risk facing a barrage of corporate-funded attack ads and losing their jobs in the next election. In this environment, many candidates who would challenge corporate interests won't even bother to run. All this because five justices invented the idea that artificial entity corporations should be given the First Amendment protections intended for actual people.*

*The Supreme Court's recent decision is an absolute assault on democracy. Corporations are not people. They should not be able to use their massive accumulations of wealth to subvert the democratic process. It's time for human beings to fight back. The lines are now clearly drawn. Human beings vs. corporations. We cannot allow this decision to go unchallenged. And we will not. The day the Supreme Court handed down its decision in Citizens United and sided with corporations, we launched a national campaign on behalf of human beings and our democracy.*

We certainly have a rather weird situation in Congress with the House under GOP control and the Senate still, at least in theory, controlled by Democrats. Tragically, there is more partisanship and bitterness today than I can ever recall. The political climate is definitely “meaner” than I have seen in recent memory. Public Citizen is asking Congress to:

- Pass a Constitutional amendment overturning the Citizens United ruling and clarifying that the First Amendment does not apply to for-profit corporations;
- Approve public financing of campaigns; and
- Pass legislation requiring disclosure of all corporate money spent on elections.

Those are good recommendations from a group that is independent and free of influence from powerful lobbyists. For those of our readers who aren't familiar with all that

Public Citizen does, I will give a brief review of their work.

Public Citizen, for 40 years, has been at the forefront of the fight to rein in Wall Street, end corporate subsidies, deliver clean energy, remove dangerous drugs from the market, promote auto safety, advance open government, win a just trade policy, and crack down on corporate crime. This group has fought hard as a consumer advocate for the public interest.

Public Citizen also has been at the center of every campaign finance and lobby reform battle since the early 1970's. It played a lead role in passing a federal law requiring lobbyists to disclose who they give money to and who pays them. Public Citizen also helped pass historic legislation, known as McCain-Feingold, to restrict corporate political spending—the very law referred to above that was trashed by the Supreme Court. I can think of very few groups that work as hard for ordinary citizens in this country as does Public Citizen.

Public Citizen lawyers have argued 58 cases in front of the U.S. Supreme Court. Public Citizen has lawyers who are recognized experts in Supreme Court litigation and campaign finance reform law. That's the reason Public Citizen lawyers represented the McCain-Feingold sponsors in the Citizens United case. And now Public Citizen is taking on its biggest challenge ever. It is critically important to take back our democracy from the large corporations that have, with the help of the highest Court in the land, usurped it. We must stop the large corporations from a total political takeover of our democracy.

The Supreme Court's decision in *Citizens United* is tightening the corporate hammerlock over all aspects of our democracy—from state and local government to the highest levels of our federal government. Our Constitution begins with “We the People,” and that doesn't include corporations. It should be as clear as a bell that neither Exxon nor any huge corporation is a person. Simply put—corporations are not people. Now that five justices on the Supreme Court have decided otherwise, it's time for the American people to get involved and help overturn this horrendous decision. It will take an organized effort to get this done.

Source: Public Citizen

## IX. CONGRESSIONAL UPDATE

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### **BROTHER OF WORKER WHO WAS KILLED ON APRIL 20<sup>TH</sup> PLEADS WITH CONGRESS**

The brother of one of 11 workers killed on the Deepwater Horizon rig last year went to our Nation's Capitol and literally begged lawmakers to strengthen worker safety laws and increase oil company liability for such accidents. At a House Natural Resources Committee meeting, which heard mostly Republican criticism that the Obama administration is approving new drilling permits too slowly, Christopher Jones was one of the last speakers. Interestingly, this man was one of the few voices not calling for more drilling to be approved without delay. His was sort of like a voice in the wilderness, but what he was asking certainly makes sense and is badly needed. As expected, debate over stricter laws to govern drilling safety broke down along party lines.

In addition to asking for safety changes, Mr. Jones also wants the nearly century-old Death on the High Seas Act changed so victims' families can sue the responsible companies for pain and suffering. That certainly seems like something that lawmakers—both Democrats and Republicans—should support. But due to the tremendous influence of big oil lobbyists, combined with the high prices of gasoline recently, it's likely that the voices of persons like Mr. Jones will be ignored.

Source: AL.com

### **REINS ACT WOULD UNDERMINE CRUCIAL PUBLIC PROTECTIONS**

The House Judiciary Committee has moved one step closer to approving the Regulations in Need of Executive in Need of Scrutiny (REINS) Act (H.R. 10), a bill that would undermine the public protections most crucial to our health, safety, environment and economy. The Coalition for Sensible Safeguards (CSS) strongly opposes the REINS Act and its attempts to radically alter the balance of power in government and jeopardize the public interest.

The REINS Act would require Congressional approval of all major federal rules within 70 legislative days. Without approval, the rules would be nullified. If enacted, the bill will bog down these rules in Congress-

sional gridlock and endanger the common-sense standards that protect the food our families eat, the air our children breathe and the products we buy for our homes. The bill could also undermine new laws regulating Wall Street and expanding access to health care.

During a recent hearing of the Subcommittee on Courts, Commercial and Administrative Law, a letter sent by 72 labor, environmental, consumer advocacy, health care and other public interest organizations opposing the REINS Act was entered into the record. The group wrote:

*H.R. 10 would threaten new safeguards by causing unnecessary delay. H.R. 10 would also give special interests another opportunity to undermine public protections.*

The REINS Act may well have been approved by the Judiciary Committee by the time this issue is received. Once approved, the bill will move to the full House of Representatives. It's believed by CSS that House leaders will make the bill a high priority. David Goldston, director of government affairs for the Natural Resources Defense Council (a member organization of CSS), testified before the committee. Interestingly, he was the only witness on the panel opposed to H.R. 10. He stated:

*The bill could, in effect, impose a slow-motion government shutdown, and it would replace a process based on expertise, rationality and openness with one characterized by political maneuvering, economic clout and secrecy. The public would be less protected, and the political system would be more abused. Indeed, it is hard to imagine a more far-reaching, fundamental and damaging shift in the way the government goes about its business of safeguarding the public.*

If folks in every state knew what really goes on in our Nation's Capitol, I suspect there would be more ordinary citizens protesting than even that which we have seen so far from the Tea Party groups. The national media does a poor job—at best—of putting out information about happenings in Washington that the American people can really understand. The lobbyists in our Nation's Capitol do a most effective job of pushing their agendas and few of them push programs that benefit ordinary folks.

Source: citizen.org

## X. PRODUCT LIABILITY UPDATE

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### **PRODUCTS LIABILITY LAW IN THIS COUNTRY IS UNDER ATTACK**

Tort law in the American legal system has historically and traditionally had the purpose of protecting persons against unreasonable risks and conduct from individuals and corporations. Products liability law has developed over the last 100 years as the American legal system has attempted to balance this country's industrial progress with society's need to protect the consumer from dangerous and defective products. Despite this progress, manufacturers and corporations are currently attempting to undo this progress with legislative efforts in several states and at the federal level.

Historically, manufacturers and distributors of products were not liable for injuries caused by a defective product unless the person injured actually had privity of contract with the manufacturer or distributor. However, most courts recognized the hardships and inequities that this caused injured consumers and began to create exceptions to the privity rule. The New York Court of Appeals in 1916 in the now famous *McPherson v. Buick Motor Company* helped to start a legal trend towards our modern products liability law. In *McPherson*, the Court eliminated the need for privity and found that a manufacturer had a duty to manufacture a product with "due care" for any person that would ultimately use the product other than the original purchaser. Even Alabama adopted the reasoning of *McPherson* and abandoned the requirement of privity in negligence actions against manufacturers. This deviation from traditional tort law became known in Alabama as the "Manufacturer's Liability Doctrine."

As courts in this country continued to develop products liability law, the courts recognized the inherent difficulty in establishing that a manufacturer failed to exercise "due care" in the design or manufacture of a product. After all, most all evidence required to establish some fault in the design or manufacturing process was within the primary ownership of the manufacturer and difficult to obtain by an injured consumer. As a result, courts started to make exceptions to theories of liability under express and implied warranties. The advantage of warranty claims was that the

focus was on whether the product itself was defective and an injured consumer was not required to prove fault or lack of “due care.” However, there was a direct privity requirement with the manufacturer or distributor in order to prevail on one of these warranty theories.

Recognizing the shortcomings of negligence and warranty theories, the New Jersey Supreme Court in 1960 in *Henningesen v. Bloomfield Motors Inc.* held that the privity requirement was no longer required for an implied warranty suit against an automobile dealer. The New Jersey Supreme Court found that society’s interest of protecting consumers necessitated the elimination of the privity requirement between the manufacturer or dealer.

Finally, the California Supreme Court in *Greenman v. Yuba Power Products* in 1963 determined that liability to a consumer for a defective product was not governed by the law of contract warranties or negligence but by the “law of strict liability in tort.” This Court was the first court in America to impose strict liability in tort on a manufacturer of a defective product. Shortly thereafter, in 1965 the American Law Institute adopted Section 402A of the Restatement (Second) of Torts, which established a similar strict liability in tort for products liability as was imposed by the Court in *Greenman v. Yuba Power Products*. Alabama adopted a variation of this legal theory in 1976 known as the “Extended Manufacturers Liability Doctrine.”

Today, strict liability in tort for defective products is a well-recognized legal theory in American jurisprudence. In most instances, the focus of liability is not on whether the manufacturer acted with “due care” but instead on the condition of the product. In other words, was the product defective or unreasonably dangerous? If a product is deemed to be defective or unreasonably dangerous, it does not matter whether the manufacturer acted with “due care.” This has been a significant transition in American law. Because of strict products liability, many injured consumers have received just compensation when a defective product caused injuries or death.

The adoption of strict liability through the United States over the last 30 or 40 years has also created significant incentive for manufacturers and retailers to produce and sell safer products. Of course, with the advent of strict liability, manufacturers and retailers have been forced to expend more resources in providing proper engineering to ensure the design of safer products. In

order to preserve profits at the cost of safety, companies have taken their fight from the courts to the legislatures.

Currently, a number of state legislatures, including Alabama, Tennessee and Florida, have had significant bills introduced that would assist manufacturers and retailers in being immunized against claims related to selling defective products that cause injuries and death. In other words, a manufacturer and a retailer could reap significant profits and benefits from placing dangerous products in the stream of commerce but would not face any liability in the event such products injured or killed consumers. If these bills become law, 100 years of legal precedence will be thrown out for the sake of larger corporate profits and at the expense of safer consumer products.

The advent of strict liability law in American jurisprudence has had a significant impact on creating safer products and compensating those victims of unreasonably dangerous products that have been put into the stream of commerce. Consumers should be outraged that companies are actively trying to place their profits over consumer safety. Consumers should contact their state and federal legislators to make sure that pending products liability bills that would diminish consumer protection while increasing corporate profits are defeated. If manufacturers or retailers are going to earn a profit from designing and distributing unsafe products, they should also bear the burden of compensating those injured or killed by such dangerous products. If you want more information on this subject, contact Ben Baker, a Products Liability lawyer in our firm, at 800-898-2034 or by email at Ben.Baker@beasleyallen.com.

### **TRACTOR UPSETS ARE STILL A PROBLEM**

Tractor rollovers have always been a serious problem in this country. But with the introduction of rollover protective structures (ROPS), the number of deaths and injuries from tractor upsets were reduced dramatically. Because tractors are generally very sturdy machines, however, their longevity is such that there are many older non-ROPS tractors still in use. Rollover protective structures became standard in the mid-1980s. For a period of years many manufacturers in the early- to mid-80s made the ROPS a “delete option”. In other words, the dealers would offer the rollover protective structure as an option.

The average person, being unaware of the number of people being killed by

tractor rollovers, often would elect not to pay the extra money for the rollover protection. The purchaser had to sign a ROPS acknowledgement so the manufacturer could defend any future claim. Unfortunately, these tractors have been passed from user to user without the warning given by the dealers.

When a tractor is equipped with a rollover protective structure and the operator is using the available seatbelt, the death and severe injury rate drops dramatically. An operator of a tractor that is not equipped with a rollover protective structure should never use a seatbelt. The last thing you want to do is be strapped to a tractor that rolls over with no protection.

When folks think of tractor rollovers they usually think of a side rollover where a tractor is operated on a slope. That’s not the only way that tractor accidents happen. As a matter of fact, the most dangerous tractor rollover is a rear tip where the tractor front end rises and the machine rears over onto the operator. On the average, 20% to 30% of tractor rollovers are backwards rollovers. Rear rollovers are usually fatal.

The chances of surviving a tractor upset without injury are not good unless the tractor is equipped with rollover protection. In a backwards tip, the tractor hood can hit the ground in less than 1-½ seconds after the front wheels begin rising. After the wheels on the front of the tractor begin to rise, the operator has less than ¾ of a second to realize what is happening and to take preventative action as in pressing the clutch. Because of perception/reaction delays, frequently the tractor is past the critical point of no return before the operator is able to do anything to keep it from falling on him.

Many times rear upsets are caused by rear axle torque. Normally, the axle rotates when the clutch is released and the tractor moves ahead. But if the axle rotation is restrained in some way, for example in starting a heavy load or when the drive wheels are frozen to the ground, the twisting force of the axle can lift the front wheels off the ground and rotate the tractor backwards around the rear axle. If it’s easier for the engine power to lift the front wheels of the tractor than it is to move the tractor ahead or spin the wheels, the tractor will tip over backwards. Oftentimes there are rear upsets when the operator is trying to move heavy structures like pulling up trees or stumps. Hitching the chain or cable higher on the tractor rear end increases the chance that the tractor can be upset to the rear. It is best to hitch loads only to the draw bar. Many

people do not appreciate the danger in hitching above the draw bar. Most importantly always use a tractor with a rollover protective structure and seatbelt.

Side rollovers occur more frequently than rear tip ups, but are less likely to cause severe injury or death. Side rollovers occur when the center of gravity moves outside its base of stability. The tractor's base of stability is determined by the location (width) of its rear wheels and the type of chassis support on the front wheels. Things that can be done to prevent side rollovers are:

- set the wheel tread at its widest setting suitable for the job the operator must do;
- lock brake pedals together before driving at transport speeds;
- drive slowly, especially in slippery conditions and especially when turning;
- avoid crossing steep slopes if possible;
- avoid the collapse of ditches or riverbanks or lake dams; and
- operate the front end loader cautiously, keeping the bucket as low as possible, especially when loaded.

But even with these precautions rollovers can and do happen. Therefore, the most important way to prevent injury or death from tractor rollover—because of their unpredictability—is to have a good rollover protective structure and use the seatbelt. For side rollovers ROPS will limit the tractor to a 90 degree roll in most cases. It's better to put a fence at the edge of a cliff than to have an ambulance waiting in the valley below. If you would like more information on this subject, contact Greg Allen, who is in the firm's Personal Injury/Product Liability Section, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com. Greg has successfully handled a number of tractor rollover cases over the years.

#### **NEW STANDARDS NEEDED FOR UNDERRIDE GUARDS ON BIG RIGS**

New crash tests and analysis by the Insurance Institute for Highway Safety demonstrate that underride guards on tractor-trailers can fail in relatively low-speed crashes—with deadly consequences. The Institute is petitioning the federal government to require stronger underride guards that will remain in place

during a crash and to mandate guards for more large trucks and trailers.

As you may know, rear guards are the main countermeasure for reducing under-ride deaths and injuries when a passenger vehicle crashes into the back of a tractor-trailer. In 2009, 70% of the 3,163 people who died in all large truck crashes were occupants of cars or other passenger vehicles. Underride makes death or serious injury more likely since the upper part of the passenger vehicle's occupant compartment typically crushes as the truck body intrudes into the vehicle safety cage. Adrian Lund, Institute president, had this to say:

*Cars' front-end structures are designed to manage a tremendous amount of crash energy in a way that minimizes injuries for their occupants. Hitting the back of a large truck is a game changer. You might be riding in a vehicle that earns top marks in frontal crash tests, but if the truck's underride guard fails—or isn't there at all—your chances of walking away from even a relatively low-speed crash aren't good.*

The Institute has studied the underride crash problem for more than 30 years, including mid-1970s crash tests demonstrating how then-current guards were ineffective in preventing underride. In the latest study, the Institute analyzed case files from the Large Truck Crash Causation Study, a federal database of roughly 1,000 real-world crashes in 2001-03, to identify crash patterns leading to rear underride of heavy trucks and semi-trailers with and without guards.

Underride was a common outcome of the 115 crashes involving a passenger vehicle striking the back of a heavy truck or semi-trailer. Only 22% of the crashes didn't involve underride or had only negligible underride, a finding in line with prior studies. In 23 of the 28 cases in which someone in the passenger vehicle died, there was severe or catastrophic underride damage, meaning the entire front end or more of the vehicle slid beneath the truck. The National Highway Traffic Safety Administration has estimated that about 423 people in passenger vehicles die each year when their vehicles strike the backs of large trucks. More than 5,000 passenger vehicle occupants are injured. Mr. Lund observed:

*Under current certification standards, the trailer, underride guard, bolts, and welding don't have to be*

*tested as a whole system. That's a big part of the problem. Some manufacturers do test guards on the trailer. We think all guards should be evaluated this way. At the least, all rear guards should be as strong as the best one we tested. Another problem is that regulatory gaps allow many heavy trucks to forgo guards altogether. When they are present on exempt trucks, guards don't have to meet 1996 rules for strength or energy absorption. Underride standards haven't kept pace with improvements in passenger vehicle crashworthiness. Absent regulation, there's little incentive for manufacturers to improve underride countermeasures, so we hope NHTSA will move quickly on our petition.*

If you need additional information on this matter, including information on the testing done by the Institute, contact Greg Allen or Graham Esdale, lawyers in our Products Liability Section, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com or Graham.Esdale@beasleyallen.com.

Source: Insurance Institute for Highway Safety News Release, March 1, 2011.

#### **SUPREME COURT REVIVES FORD WINDOW DEFECT SUIT**

The U.S. Supreme Court has ordered a South Carolina court to reconsider its ruling that a suit against Ford Motor Company over allegedly defective windows is preempted by federal law. This decision follows the recent decision by the Court in a similar case against Mazda Motor Corp. The Justices held that their ruling in the Mazda case, which involved defective seat belts, meant the Ford decision by the South Carolina Supreme Court had to be revisited.

In the Mazda case, the Court ruled that federal car safety standards do not preempt state tort claims over injuries when the federal regulations are aimed at setting a minimum safety standard. The Justices correctly said that Plaintiffs cannot be barred from seeking damages at the state level for a company's failure to go above that minimum standard.

Though the cases involved window glass rather than seat belts, similar claims are at issue in this South Carolina case, the High Court ruled. The Court vacated the South Carolina court's ruling and remanded the case for further consideration. Both cases involve Federal Motor Vehicle Safety Stan-

dards that give carmakers the option of using two different types of safety features. In the Mazda case, it was a choice between lap seat belts and lap/shoulder belts. This South Carolina case deals with a choice between either tempered or laminated glass in the side windows of cars.

The South Carolina case was brought by Mary Robyn Priester, whose son James Priester was killed in a crash in 2002 when he was ejected from the side window of a 1997 Ford F-150. It was contended that the truck was defectively designed because its side windows were made of tempered glass, which shatters on impact, rather than laminated glass, which holds together on impact and is designed to prevent ejections. As with the Mazda case, the issue hinges on the extent to which federal regulations that give carmakers options on which safety features to include, preempt state law claims alleging a vehicle is defective for failing to choose one particular option.

The National Highway Traffic Safety Administration at one point considered requiring laminated glass in the side windows of all vehicles, but rejected that proposal in 2002, finding it would be too expensive for manufacturers. But, the agency cited the safety benefits of laminated glass and permits its use in vehicle windows, as well as the use of tempered glass. The South Carolina Supreme Court held that the claims in the Priester case were preempted because they conflict with the federal safety standard giving automakers a choice of glass.

The U.S. Supreme Court ruled in the Mazda case that the seat belt regulation was aimed at setting a minimum safety standard, and that giving carmakers a choice was not a significant regulatory objective. As a result, the Court ruled that the regulation does not preempt the state law claims.

Source: bizactions.com

## XI. MASS TORTS UPDATE

### **DEPUY'S HIP RECALL UPDATE**

After ASR XL Acetabular and ASR Resurfacing hip systems (ASR hips) were recalled in August 2010, the manufacturers, DePuy Orthopedics and Johnson and Johnson (J & J), launched a very aggressive campaign to defend the hip failure cases that have been

filed against them. The ASR hips have been shown to have an exceptionally high rate of revision (i.e., second / follow-up) surgeries within a short period of time from the original hip implant surgery. The metal-on-metal design of the ASR hips has led to metal particles entering into the user's bloodstream causing metal poisoning. This metal poisoning and the general defective design of the ASR hips have also led to instances of dislocation, hip mal-alignment issues and bone fractures. Combined, these issues were the primary reason for the ASR hip recall.

Realizing that they have a major problem with the defective ASR hips, DePuy and J & J immediately upon the recall instituted a "medical bill reimbursement program." This program allows DePuy to pay for medical bills associated with the follow-up care and treatment of the defective ASR hip device, including any potential revision surgeries. However, DePuy has required ASR hip users to obtain a claims number and sign a medical authorization release, which violates many of the users' rights. This release effectively authorizes DePuy to gain access and information about ASR users' potential case that DePuy would not otherwise have. For instance, the release allows DePuy, through the company that DePuy has hired to handle this program—Broadspire—to speak directly with the ASR user, his or her physicians, along with obtaining the ASR device if there is a need for a revision surgery. If an ASR device is in DePuy's possession that will negatively affect any potential client's case.

Recently, through the efforts of the MDL Plaintiffs' leadership committee (PSC), DePuy has agreed to not require clients to sign these releases and has agreed to pay for ASR users' medical bills. However, the ASR user should *not* communicate with DePuy or Broadspire directly. Instead, potential clients should go through their lawyer to handle any medical billing issues because DePuy and/or Broadspire has the ability to record any communications over the phone to use against a potential client. Direct communication between ASR users and DePuy can lead to many ways that DePuy can take advantage of an unrepresented ASR user. Therefore, if ASR hip users are interested in this reimbursement program, it would be in their best interest to get a lawyer to act on their behalf when dealing with DePuy or Broadspire regarding payment of their medical bills.

If you need additional information on the subject, contact Navan Ward, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Navan.Ward@beasleyallen.com. As

you may recall, Navan serves on the PSC for the MDL.

### **JURY AWARDS \$136.8 MILLION IN GENETICALLY-MODIFIED RICE LAWSUIT**

Riceland Foods, the largest rice cooperative in the country, filed suit in an Arkansas state court against Bayer Corporation for damages it suffered as a result of Bayer's gross negligence in allowing unapproved genetically-modified rice to contaminate U.S. natural long-grain rice. As a result of the contamination, countries within the European Union refused to purchase U.S. long grain rice. Rice farmers and cooperatives, like Riceland Foods, lost millions of dollars in sales and incurred substantial clean-up costs. Hundreds of lawsuits have been filed against Bayer in federal and state courts.

Riceland alleged in its lawsuit that the presence of Bayer's Liberty Link rice caused the cooperative to lose \$389 million in projected and future earnings. The jury found that Bayer caused tremendous harm to Riceland and the entire industry and awarded Riceland \$11.8 million in compensatory damages and \$125 million in punitive damages. The jury also found that Bayer was solely responsible for any damages incurred by farmers as a result of the loss of the European market.

Barry Deacon, a lawyer with Barrett & Deacon, located in Jonesboro, Ark., represented the plaintiff and did a very good job. Phil Beck, a lawyer with Bartlit, Beck, Herman, Franlinchar, & Scott in Chicago, represented Bayer.

Lawyers in the Mass Torts Section of our firm represent a number of rice farmers who have been damaged as a result of Bayer's wrongful conduct. If you need additional information on this subject, contact Leigh O'Dell, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Leigh.Odell@bealseyallen.com.

### **UPDATE ON DARVON/DARVOCET LITIGATION**

On November 19, 2010, the United States Food and Drug Administration recalled the pain medications Darvon and Darvocet from the market after a new study showed an increased risk of heart rhythm abnormalities in patients taking these drugs. The FDA also recalled all generic versions of the drug which contain the active ingredient propoxyphene.

These medications, which have been on the market for years, have been surrounded

by safety concerns for a long time. In addition to the more recent concerns of heart rhythm abnormalities, there have also been safety questions regarding suicidal risks and issues of overdosing as well. Public Citizen, a consumer advocacy group, petitioned the FDA for the removal of these drugs as far back as 1978 and as recently as 2006. Once again, foreign agencies were well ahead of the United States, with propoxyphene being pulled from the British market in 2005 and by the European Union in 2009.

The Judicial Panel on Multidistrict Litigation conducted a hearing in San Diego, Calif., late last month to determine if litigation involving these medications will be consolidated before one federal judge for pretrial proceedings as part of a Multidistrict Litigation (MDL). Several federal judges around the country have been proposed to oversee the propoxyphene MDL. The manufacturers of propoxyphene products have filed opposition to the consolidation. Lawyers from across the country will be monitoring these MDL proceedings since the outcome will help determine how this litigation will proceed. Our firm is currently investigating claims on behalf of clients who ingested Darvon or Darvocet and suffered a serious heart rhythm abnormality. For additional information you can contact Chad Cook, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Chad.Cook@beasleyallen.com.

## XII. BUSINESS LITIGATION

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### **JURY AWARDS \$1.18 MILLION VERDICT IN BUSINESS FRAUD CASE**

A Charleston County, S.C., jury awarded \$1,189,408 to Plaintiff Clifford Hansen after determining he had been unfairly excluded in a business purchase that he had personally developed. The jury found Defendant, Beechwood Development Group of South Carolina, LLC, to be accountable for the investment Mr. Hansen made in developing plans to purchase Hickory Springs Water Company. This is a company that bottles and distributes drinking water for retail and wholesale customers. The Defendants eventually purchased the business and assets of the company to the exclusion of the Plaintiff.

Evidence was introduced during the trial proving that Mr. Hansen invested consider-

able time and money in the development of the planned purchase. The testimony included his performing due diligence and paying engineers for hydrology studies of the natural springs used by the bottled water facility. The Defendants wrongfully converted and retained crucial information provided by or prepared based on information from Mr. Hansen in order to acquire Hickory Springs Water Company and its assets without including the Plaintiff.

Clifford Hansen grew up working in two water bottling businesses run by his father. His dream was to eventually own his own water company one day, a dream he shared with his father before his tragic premature death due to cancer. Unfortunately, the man's dream was stolen from him by some greedy businessmen who utilized Clifford's own hard work and due diligence to purchase this water company to his exclusion. Fortunately, the South Carolina jury did not let this injustice go unpunished. While Mr. Hansen still does not have his dream, at least he has some vindication.

This case was tried in the Court of Common Pleas for the Ninth Judicial Circuit, State of South Carolina, County of Charleston. Bill Hopkins, a lawyer in our Consumer Fraud Section, tried this case and did a very good job for his client. Bill practiced law for several years in South Carolina before joining our firm. If you need more information on the case, contact Bill at 800-898-2034 or by email at Bill.Hopkins@beasleyallen.com.

### **ALLSTATE SUES ANOTHER LENDER OVER MORTGAGE SECURITIES**

Allstate Corp. has filed suit against Credit Suisse Group AG, alleging that the Swiss bank caused losses by hiding the risks on \$232 million of mortgage securities it bought. Allstate, the largest publicly traded U.S. home and auto insurer, has filed similar lawsuits against at least four other lenders: Bank of America Corp., Citigroup Inc., Deutsche Bank AG and JPMorgan Chase & Co. The five lawsuits seek to recover losses that Allstate said it suffered on roughly \$2.1 billion of securities. It appears that big companies such as Allstate like the court system just fine when they find themselves in the role of a victim.

Source: *Insurance Journal*

### **FORD SETTLES FERRARI LAWSUIT**

Ford settled its lawsuit that had been filed against luxury automaker Ferrari over trademark infringement of its F-150 pickup. In the suit, Ford said Ferrari improperly used the name F150 for its new Formula 1 race car. To its credit, the following day, Ferrari said it would discontinue the usage of the F150 name and logo. Instead, it would only use the full formal name of the race car, which is Ferrari F150<sup>th</sup> Italia. Ford said the lawsuit was necessary to ensure that "Ford's famous and distinctive F-150 trademark will be protected." This was a quick result, but it happened only because a lawsuit was filed by Ford.

Source: Freep.com

## XIII. INSURANCE, FINANCE AND SECURITIES LITIGATION UPDATE

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### **JUDGE RULES AGAINST NORTHWESTERN MUTUAL LIFE IN CLASS ACTION**

A judge in Wisconsin has ruled that Northwestern Mutual Life Insurance Co. breached its contracts with thousands of annuity holders when it unilaterally changed how dividends were paid on pre-1985 annuities. In his ruling, Reserve Judge Dennis Flynn, of Racine, Wis., found the Milwaukee-based financial giant also breached its fiduciary duty, and duties of good faith, fair dealing and loyalty during the change-over. Judge Flynn wrote in his order that "intentional and repeated concealment of wrongdoing over a period of a quarter century took place." The decision followed a non-jury trial heard by the judge in November. Judge Flynn retained jurisdiction of the complicated case for "further and supplemental relief allowed as necessary and proper."

The class-action lawsuit was filed by investors who bought the annuities before 1985. It was contended that the change deprived them of potentially millions of dollars in dividends from Northwestern Mutual's general portfolio over the past 25 years and into the future. While annuity holders continued to receive what were called dividends, the lawsuit contends they

were merely interest payments from short-term bonds into which the company had switched the annuity assets.

The Court's order recapped much of the evidence from the trial, which featured 21 witnesses and more than 500 exhibits. Judge Flynn found testimony of the Defense experts "wanting," and specifically found retired Northwestern Mutual CEO Ed Zore to be, in his words, "not credible."

"His answer to the conundrums faced by Northwestern Mutual was to tell lies and manufacture reality," Judge Flynn wrote in an unusually harshly-worded order. The company says it will appeal. It will be most interesting to see what happens on appeal. Remember, this was a non-jury trial, heard by a judge, and that may make it difficult for the company on appeal.

Source: [jsonline.com](http://jsonline.com)

### **GEORGIA COURT RULES COMMERCIAL LIABILITY POLICY COVERS FAULTY WORK**

The Georgia Supreme Court has ruled that a general contractor can recover from its subcontractor's insurers for the cost of repairs for damage to surrounding property resulting from the subcontractor's faulty workmanship. The state's highest court found that negligent construction is an "occurrence" under a commercial general liability (CGL) policy and that damage to surrounding property caused by the faulty workmanship that is neither intended nor expected is covered. The Court said in its opinion:

*In reaching this holding, we reject out of hand the assertion that the acts of [the subcontractor] could not be deemed an occurrence or accident under the CGL policy because they were performed intentionally. [A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly.*

This ruling appears to be very significant because it eliminates one of the defenses most often relied-upon and cited defenses by insurers in construction cases. The Court's opinion makes it clear that an intentionally-performed act—such as the act of construction work—resulting in unintended damage because it was improperly performed can be an "occurrence."

Hathaway Development Company, a general contractor, had hired a plumbing subcontractor, Whisnant Contracting, Inc.,

to work on three projects. On one project, the subcontractor installed a four-inch pipe under a slab as opposed to the six-inch pipe called for in the building plans. The subcontractor also improperly installed a dishwasher supply line and installed a pipe that separated under hydrostatic pressure. Because of the damage sustained, Hathaway sued Whisnant not only for damage to the property in total, but also for the cost of fixing water and weather damage to surrounding properties.

After summary judgment was entered by the trial court against the subcontractor, Hathaway sued Whisnant's insurer, American Empire, for the damage. At issue in the case was whether Whisnant's actions constituted an "occurrence." That was because American Empire denied coverage, arguing that it did not constitute an occurrence. The policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general conditions." American Empire argued that Whisnant's shoddy workmanship could not be construed as an accident.

The lower court agreed and awarded summary judgment in favor of American Empire. But the Georgia Court of Appeals reversed that ruling, concluding that American Empire's policy covered damages arising out of an "occurrence," since the term "accident" is never defined. Absent such a definition, the Court said the law must accept the commonly-held definition found in *Black's Law Dictionary* that an accident is "an event happening without any human agency, or it happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens."

Source: *Insurance Journal*

### **WISCONSIN MEATPACKING PLANT FIRE CLAIM SETTLED FOR \$208 MILLION**

Smithfield Foods Inc., the parent company of Patrick Cudahy, has reached a \$208 million settlement with its insurance carriers over a fire that destroyed part of its meatpacking plant in a suburb of Milwaukee, Wis. There was an estimated \$50 million in damages to the plant caused by the July 2009 fire. It took days for area fire departments to extinguish the blaze, which started when a neighbor launched a military flare to celebrate the Fourth of July. The flare landed on the roof of the plant, thus causing the fire. Fortunately, no one was hurt in the fire. The money from the settlement with the insurance companies was

used to recover the value of the property and reimburse the production interruptions and resulting losses. About 1,400 workers were displaced by the fire, but nearly all returned to work within three months.

Source: *Insurance Journal*

### **INSURERS AND BROKERS SETTLE BID-RIGGING CASE FOR \$36.7 MILLION**

A majority of the 15 insurance company and broker Defendants in a long-running lawsuit accusing them of bid-rigging have reached a proposed settlement that will cost them about \$36.7 million. The antitrust class action is one of numerous cases that grew out of investigations conducted by former New York Attorney General Eliot Spitzer more than six years ago into whether brokers had conspired with insurers to fabricate bids to make commercial buyers believe their accounts were shopped around for the best deal and whether they hid some of the contingent commissions and fees paid to brokers.

The settlement was agreed to with brokers Aon, Willis and HRH (now owned by Willis) and with insurers American International Group, CNA, Crum & Forster, The Hartford, Liberty Mutual, Travelers and XL. According to the settlement, AIG, Travelers, Liberty Mutual and XL will collectively pay \$27 million into a fund for customers that purchased excess casualty insurance policies from them through the named brokers between 1998 and 2004.

Separately, CNA, Crum & Forster, The Hartford and brokers Aon and Willis/HRH will collectively pay a smaller sum, a total of \$9.7 million, to purchasers of commercial insurance for the same years. The \$37 million settlement must be approved by the court. The case in federal court in New Jersey is a consolidation of several class actions brought in 2004 by commercial insurance customers including Eagle Creek of California, OptiCare Health Systems, of Connecticut, QLM Associates of New Jersey and Accent on Eyes Corp. of New York against various brokers and insurers.

The suits alleged that the brokers and carriers engaged in unlawful practices in the placement of insurance and the collection of contingent commissions. Violations of federal antitrust and racketeering laws were alleged. The charges were dismissed by a court three years ago, but then were reopened in 2010. Insurance broker Marsh, an original Defendant, previously settled its role in the case.

Source: *Insurance Journal*

## XIV. EMPLOYMENT AND FLSA LITIGATION

### **GOODYEAR COLLECTIVE ACTION CONDITIONALLY CERTIFIED**

A Florida federal judge has granted conditional certification to a collective action of service managers who alleged that Goodyear Tire & Rubber Co. misclassified them as exempt and failed to pay them overtime. The collective action includes current and former Goodyear service managers who have worked more than 40 hours during one or more work weeks on or after January 2008 in any U.S. state, but did not receive overtime pay. The lawsuit seeks overtime compensation relief under the Fair Labor Standards Act.

Goodyear argued that the Plaintiffs were not similarly situated because the duties of service managers varied from store to store. The court pointed out, however, that a Goodyear corporate representative testified that the basic responsibilities for service managers were consistent throughout the 663 stores and there was a reasonable basis for the Plaintiffs' claim that there were other similarity-situated employees who wished to opt-in to the action.

Source: Law360

### **MEDLINE INDUSTRIES TO PAY \$91 MILLION**

Medline Industries, Inc, an Illinois medical supply company, will pay \$91 million to settle a whistleblower lawsuit accusing it of paying fraudulent kickbacks to hospitals and other health care providers that purchased medical equipment with federal funds. Medline will pay \$85 million to the United States, which will then pay \$23.4 million to the whistleblower, a former Medline employee. According to the settlement agreement, Medline will also pay \$6 million in attorneys' fees.

In his Complaint, the whistleblower contended that privately-held Medline offered the kickbacks to win new business. It was also alleged that by paying bribes and kickbacks, Medline caused the hospitals that took the bribes to submit false claims to Medicare and Medicaid. The Complaint further alleged that some of these kickbacks were falsely labeled as "rebates," and others took the form of junkets, expensive gifts and charitable donations. This appears to be another example of how some corpo-

rate bosses believe cheating the government is acceptable behavior. There is no telling how much fraud of this sort goes undetected, costing U.S. Taxpayers tremendous sums of money.

Source: Reuters

### **CAESAR'S ENTERTAINMENT IS SUED OVER SECONDHAND SMOKE**

The mother of a casino dealer who died of cancer has filed a class action lawsuit against Caesar's Entertainment, Inc., the owner of Harrah's New Orleans Casino. The company is accused of failing to protect the decedent, Maceo Bevrotte Jr., and other employees from dangerous levels of secondhand smoke. It was alleged by the Plaintiff that her son's cancer was "directly linked" to his prolonged exposure to secondhand smoke at the casino. He worked at Harrah's for about 15 years and died March 9, 2010. According to the Complaint, the dealer wasn't a smoker.

Ms. Bevrotte filed the Complaint on behalf of a putative class of over 1,000 past and current non-smoking employees at the New Orleans casino. The Complaint alleges Harrah's management does not allow its employees to choose to work only at non-smoking tables and forbids them from asking smoking customers to stop smoking or to blow the smoke away from the tables. According to the Complaint, Harrah's didn't try to reduce the risk of secondhand smoke until recently, by improving its ventilation system and designating some of its poker rooms and gaming tables as smoke-free.

### **JUDGE APPROVES SETTLEMENT IN PREMIERA OVERTIME LAWSUIT**

A federal judge has preliminarily approved a \$1.45 million settlement in a lawsuit alleging that Premera Blue Cross failed to pay overtime to a group of tech workers. The class-action lawsuit, filed last year in U.S. District Court in Seattle, alleged that the Mountlake Terrace-based health insurance company and its subsidiaries had misclassified about 133 tech support workers as exempt from overtime pay. After workers have a chance to comment on the settlement, Judge Thomas Zilly is scheduled to decide in June whether to give the settlement final approval.

Source: seattlepi.com

### **3M SETTLES AGE-DISCRIMINATION SUIT**

Minnesota's 3M Co. has agreed to pay up to \$12 million to settle an age-discrimination lawsuit with as many as 7,000 current and former employees. The 2004 lawsuit targeted the company's performance-review system, alleging that older workers were disproportionately downgraded. The company was also accused of favoring younger employees for certain training opportunities that could fast-track them for promotions. The Plaintiffs and 3M have filed a joint motion for preliminary approval of the settlement. 3M has also reached a settlement on a separate age-discrimination lawsuit that had been filed in San Jose, Calif., in 2009. Terms of that agreement have not been disclosed.

Source: Insurance Journal

### **REQUIRED PAY FOR TIMES WHEN NOT ACTUALLY WORKING**

Believe it or not there are times when the law requires an employer to pay its employees when they aren't working. I know what you are thinking—"Where do I sign up for that job?" Under federal law, an employer is generally required to pay an employee for all work performed. Under wage and hour law, the concept of "work" is a little broader than what most folks consider it to be. The Fair Labor Standards Act defines "employ" as "to suffer or permit to work." Therefore, there are times when an employee may be required to restrict his or her actions, or "suffer" as a result of their employer's request or requirement that they be available. Some examples of when you have to be paid not to work are:

- **On-Call time wages**—In some situations you may be clocked into work, or present at work, and waiting on an assignment. Similarly, you may be waiting on a task to be completed, or another employee, so you can perform your assigned duties. One example is a delivery driver who has to pick up individuals or merchandise. Many times these type employees are required to wait or be on-call, all the while waiting on a certain event. These periods should often be compensated.
- **Training and Education Wages**—Many jobs require employees to attend seminars and/or professional development programs. These types of events often require travel away from the employer's principal place of business. In many

instances the employee should be compensated for not only the time spent in the seminar, but traveling to and from the event.

- **Travel time**—In many occupations, there are times when an employee is required to drive out to a location, away from where the employer normally does business, to conduct job-related activities or work. Similarly, employees are often called out to work areas because of emergency situations. All of these times should be compensable.
- **Meal and Rest Breaks**—This area differs from state to state. However, under federal law, if an employee receives a break that is 20 minutes or less it is generally considered to be for the benefit of the employer and should be compensated. In contrast, if the break period is in excess of 20 minutes, it is generally assumed to be for the benefit of the employee and may not be compensable. There are several caveats on this point. First, the employee must be generally free from all working responsibility. It does not, however, mean that the employee has to be allowed to leave the working area. Secondly, the employee should be given a reasonable opportunity to take the full break and not use part of their break putting on or taking off required clothing or sanitizing.
- **Sleep**—Unfortunately, this category does not mean you can get paid to cat nap or daydream at work. This category of employment is one that generally requires an employee to be at work for a 24-hour period. Under Department of Labor regulations, part of that 24-hour period must be a designated block of sleep time.

If you need additional information on this subject, contact Roman Shaul, a lawyer in our Consumer Fraud Section, who has handled a number of cases under the FLSA.

Source: FindLaw.com (*5 Times When You Have to be Paid for Not Working*, October 19, 2010)

## XV. PREDATORY LENDING

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### **CLASS ACTION BANS AND MANDATORY ARBITRATION CLAUSES STRUCK DOWN**

Two internet payday lending companies charged Andrea Felts, a New Mexico resident, astronomical interest rates in violation of New Mexico law. Then the companies claimed that their mandatory arbitration clauses and class action bans barred Ms. Felts from holding them accountable. Last month, the New Mexico Court of Appeals held, as Public Justice had requested, that the companies' class action bans and mandatory arbitration clauses were unenforceable.

The Appeals Court gave Ms. Felts the go-ahead to join with other consumers and challenge the companies' lending practices in a class action. Now the companies will have to answer for conducting online payday lending in direct violation of New Mexico law. The case began in late 2007 when Ms. Felts, then a 38-year-old high school administrator in Albuquerque, was going through a costly divorce. In need of extra money to make ends meet, she turned to online payday lenders for three loans of around \$400 each.

Ms. Felts was then charged interest rates of 684%, 730% and 521% on her three loans. She couldn't keep up with her payments, and the lenders began to contact her repeatedly, both at work and at home. This unfortunate woman received more than 20 calls a day. Her teenage daughter was subjected to harassing calls, as well. The lenders even threatened Ms. Felts with jail time.

When Ms. Felts tried to bring a class action lawsuit on behalf of all consumers who had obtained small-dollar loans from these lenders, the lenders argued that the suit was barred by the arbitration clause and class action ban contained in all of their consumer contracts. Public Justice took on the case and handled the appeal, which was successful. The following lawyers should be commended for their good work in this matter: Senior Attorney Paul Bland, who argued the case; Amy Radon, the principal author of the successful brief; lead counsel for the Plaintiff, Rob Treinen of Albuquerque; and Plaintiff's co-lead counsel, Richard Fuller and Douglas Micko of the Schaefer Law Firm of Minneapolis, Minn. New Mexico Attorney General Gary King, along

with Assistant Attorney General Karen Meyers, who filed an *amicus* brief in support of Ms. Felts and her fellow consumers, should also be commended for their assistance.

Source: Public Justice

## XVI. WORKPLACE HAZARDS UPDATE

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### **DEADLY REDSTONE ARSENAL EXPLOSION CAUSED BY SAFETY LAPSE**

An investigation by Redstone Arsenal into the May 2010 explosion that killed two contractors blames Amtec Corp. for using unsuitable equipment and not developing adequate safety procedures for its use. The investigation determined that Amtec "exercised poor safety discipline" in its work with a rocket fuel component. The explosion that killed the two Amtec contractors, Jim Hawke and Jerry Grimes, involved attempts to remove ammonium perchlorate, an oxidizer used in solid rocket propellant, from weapons. The explosion killed the two men and destroyed a building on the premises.

Source: AL.com

### **ALABAMA PLANT FINED \$52,500 FOR AMMONIA LEAK**

A Mobile-area chicken plant was cited last month for 16 alleged health and safety violations and fined \$52,500 for an ammonia leak that sent more than 150 people to hospitals last summer and negatively affected area residents. The U.S. Department of Labor's Occupational Safety and Health Administration announced the citations against the Omaha, Neb.-based Millard Refrigerated Services Inc., which operates a plant along an industrial canal in Theodore that freezes and ships chicken.

Anhydrous ammonia, which is used as a refrigerant, leaked out of a 12-inch pipe on the roof of the facility in August. The vapors sickened workers at the Millard plant and at a site across the canal that was being used during the cleanup of the BP oil spill. According to OSHA, Millard failed to properly:

- analyze past incidents involving hazardous chemicals.

- ensure a safe and timely emergency shut-down.
- train workers in management of highly-hazardous chemicals and emergency respirators.
- investigate what contributed to an incident “that could have resulted in a catastrophic event.”

OSHA says that it inspected the Millard plant in Theodore in January 2007 and issued citations for safety violations. In 2008, according to OSHA, similar violations also were cited at Millard’s North Carolina plant.

Source: *Montgomery Advertiser*

**WRONGFUL DEATH SUITS FILED AGAINST MASSEY OVER WEST VIRGINIA MINE BLAST**

The families of two coal miners killed in the Upper Big Branch mine blast in West Virginia last year have filed wrongful death lawsuits against the mine’s owner, Massey Energy Co., saying it was a “catastrophe waiting to happen.” The suits were filed a week after Massey’s head of security at the West Virginia mine was charged with impeding investigators probing the April 5, 2010, explosion that killed 29 miners in the worst U.S. mine accident in four decades.

The families of Joe Marcum and Adam Morgan, who died in the explosion, are seeking compensatory and punitive damages as a result of “the willful, wanton and recklessly unsafe manner” in which Massey operated the mine. The Complaints allege Massey had “an abysmal safety record” and the number of federal safety violations more than doubled between 2008 and 2009—something then-Chief Executive Officer Don Blankenship was aware of.

The suits were filed in the circuit court in Boone County, W.V. A third suit was filed on behalf of Stanley Stewart, a miner who survived the explosion. The final report by the federal Mine Safety and Health Administration (MSHA) is not expected until later this year, but preliminary findings indicate the mine was not properly treated with crushed limestone to control buildup of explosive coal dust.

The suits also note preliminary findings that water spray nozzles on mining equipment were not operating properly to prevent sparks and reduce coal dust. Two separate suits were filed soon after the blast. Massey reached settlements with seven families of victims. Apparently, according to

my information, Massey has offered \$3 million to settle any claims against the company. As a matter of interest, Alpha Natural Resources has agreed to acquire Massey and the deal is expected to close in mid-year. The latest suits were filed against Massey and its subsidiary, Performance Coal, which operated Upper Big Branch.

The Complaints note that prior to the explosion, the mine was cited by MSHA 38 times for mine ventilation violations and 37 times for unsafe accumulations of combustible materials (coal dust). It’s alleged that “with the number of mine safety violations which existed and had been allowed to exist ... the Upper Big Branch mine was a catastrophe waiting to happen.” Tim Bailey, a lawyer with Bucci, Bailey, & Jarris, located in Charleston, W.V., represents the Plaintiffs in this matter.

Source: *Insurance Journal*

**NOTRE DAME FAULTED IN FOOTBALL-RELATED DEATH**

The University of Notre Dame has been cited for violating Indiana safety laws when a student employee fell to his death in October. The student, who was working for the school, was ordered to videotape a football practice from a scissor lift during a wind storm. A four-month investigation by the Indiana Department of Labor concluded that an unidentified athletic-department supervisor knowingly placed at risk the life of the student, Declan Sullivan, by instructing him to ascend 35 feet in the lift amid wind gusts the National Weather Service had warned could reach 60 miles per hour.

The student, who was 20 years old, stood on top of the lift in strong winds on the afternoon of October 27<sup>th</sup>. He was obviously scared since he sent Tweets to friends expressing fear for his life. Minutes after sending the message, the lift collapsed. Two other students who had been dispatched on top of separate lifts quickly came down following the incident. The investigation found evidence that overwhelmingly demonstrated the University had made “a decision to utilize its scissor lifts in known adverse weather conditions.” Lori Torres, a state Department of Labor commissioner, described the “knowing citation” issued against Notre Dame as “the most serious safety violation.”

Notre Dame was charged with six safety violations and was fined a total of \$77,500. In a statement, Notre Dame President John I. Jenkins reiterated his concession of last November that “we failed to keep [Declan

Sullivan] safe, and for that we remain profoundly sorry.” The state investigation found that University officials had failed to service the lifts, train students who used them and follow safety instructions, including keeping operating manuals aboard. Barry and Alison Sullivan, the parents of the student who was killed, expressed the hope that other schools would follow Notre Dame’s lead in halting use of the hydraulic lifts.

Source: *Wall Street Journal*

**XVII. TRANSPORTATION**

**PROPOSED TRUCKING HOURS OF SERVICE RULES NOT ADEQUATE TO SAFEGUARD ROADS**

The proposed rules for commercial truck drivers will not provide the adequate level of protection needed to prevent driver fatigue. The Federal Motor Carrier Safety Administration (FMCSA) has recommended a ten-hour driving time limit, but indicated they are open to maintaining the current 11-hour requirement. The American Association for Justice (AAJ) submitted comments last month opposing the change.

Every year more than 4,000 people are killed in accidents involving trucks, according to the FMCSA. According to the National Transportation Safety Board, driver fatigue is a factor in 30% to 40% of these crashes. In fact, research shows the risk of a crash increases twofold after eight hours of consecutive driving, and driver fatigue is the leading contributing factor in truck driver deaths from crashes. Driver fatigue puts not only the truck driver workforce at risk, but also other passengers who share the road.

My law partner, Gibson Vance, who is president of AAJ, believes “ensuring our roads are safe should be the FMCSA’s top priority,” and I certainly agree with him. AAJ also opposes FMCSA’s proposed 34-hour restart period, which would allow truck drivers to bypass the 60/70-hour duty limit. This 34-hour restart period cannot ensure a truck driver receives proper rest. AAJ recommends that the FMCSA mandate a 48-hour restart requirement to provide commercial truck drivers with greater rest and recovery time after working long hours. It would also shorten the work week, meaning less-fatigued drivers and safer highways. If you would like additional

information on any of the above, contact Gibson Vance or Ben Baker, both of whom are lawyers in our firm, at 800-898-2034 or by email at [Gibson.Vance@beasleyallen.com](mailto:Gibson.Vance@beasleyallen.com) or [Ben.Baker@beasleyallen.com](mailto:Ben.Baker@beasleyallen.com).

Source: AAJ

### **15 KILLED IN TOUR BUS ACCIDENT IN NEW YORK**

Fifteen people died in a tour bus crash in New York last month. At the time, the tour bus was returning from a casino when it overturned on the New England Thruway at about 5:30 a.m. on March 12<sup>th</sup>. The Worldwide Tour bus skidded on its side into a sign pole on the southbound side of Interstate 95. The sign post sheared off the top of the bus along the window line, nearly two-thirds the length of the vehicle. The bus was transporting over 30 passengers. In addition to the 15 fatalities, several other passengers were severely injured.

It has been learned that the driver of the bus has a criminal history that includes manslaughter and theft convictions. He was convicted of manslaughter for his role in a 1990 stabbing and served over two years in prison. The driver had also served about three years for grand larceny in October 1997. The man used aliases in both those cases. He had been a bus driver and was also arrested for driving without a license and having three police scanners in 2003. Does this sound like a man who should be driving a bus hired out to the public?

Alcohol and drug test results for the driver were pending at press time. An accident reconstruction team and the National Transportation Safety Board are now attempting to determine the cause of the accident and the speed of the bus prior to the incident. Federal Motor Carrier Safety Administration records listed World Wide Travel as having at least two other accidents in which people were injured in the past 24 months. The agency flagged the company for possible extra scrutiny due to violations involving driver fatigue regulations.

As expected, the investigation is focusing on the driver. His story was that his tour bus was clipped by a tractor-trailer, causing him to lose control. But that story has been contradicted by passengers and witnesses who saw the driver driving erratically before the crash. This was a tragedy involving the loss of 15 lives that could have been avoided!

Source: AL.com

### **JAPANESE FAMILY IN 2010 UTAH CRASH SUES TRAVEL COMPANIES**

The parents of a Japanese man killed in a van crash that claimed the lives of three tourists and injured 11 others last summer, have filed a wrongful death lawsuit against the van's driver and several travel companies. In the lawsuit filed in state court, Hideo and Akemi Hayase allege that an inexperienced driver tried to mask fatigue with energy drinks and caffeine gum before falling asleep and causing the crash near Cedar City on August 9<sup>th</sup>, that killed 20-year-old Hiroki Hayase.

Hideo and Akemi Hayase and their 14-year-old daughter, Mariko, were seriously injured in the crash. They were in a tour van on its way to Bryce Canyon National Park when it rolled on an interstate highway. The lawsuit seeks damages against the driver, Yasushi Mikuni, and two Utah companies, Canyon Transportation Inc. and Western Leisure Inc., for hiring a driver with "less than two months experience" and for not having the requisite commercial liability insurance. The suit also names a Japanese travel agency as a Defendant for failing to make sure the Utah companies were properly insured.

Source: sltrib.com

### **COUPLE AWARDED \$5.7 MILLION IN UTILITY-TRUCK CRASH SUIT**

A jury in California has awarded a couple \$5.7 million in a lawsuit arising out of an incident that occurred about two years ago. The couple's family van had been rear-ended by a Southern California Edison truck in a snowstorm. The jurors awarded Manuel Ornelas nearly \$160,000 for his current medical bills and lost wages, and \$1.2 million for future medical bills and lost wages. The jurors also awarded \$4.16 million for past and future physical pain and emotional suffering. His wife, Corina Ornelas, was awarded \$2,426 for medical bills and \$200,000 for emotional suffering and for loss of consortium.

Back in January, 2009, Manuel Ornelas had stopped his van safely in an appropriate area to install snow chains. The 10,000-pound Edison truck rear-ended his van, causing Mr. Ornelas to suffer severe injuries to his back and pelvis. The driver of the truck, who was 23 years old, was found to be driving too fast for the dangerous conditions. He had passed several signs that read, "Chains required," which could have had an effect on the verdict. As a result of the

crash, Mr. Ornelas, an engineer for the California Department of Transportation, is in constant and intense pain and is unable to work. According to testimony at trial, the former marathon runner now needs a cane to walk. He can't control his bowels and can't sit for long periods of time. Doing simple things such as picking up his children are no longer possible for this man.

Southern California Edison made an initial \$1.7 million offer of settlement prior to the trial. But as the trial progressed—especially after the testimony of several medical experts—the offer was increased to \$5 million. The Plaintiffs rejected that offer and let the jury decide the value of the claims. Patrick Toole and Richard C. Watters, lawyers with two firms in Fresno, Calif., represented the Plaintiff and they did a very good job.

Source: fresnobee.com

### **\$3 MILLION JURY AWARD IN PEDESTRIAN DEATH**

A circuit court civil jury in Prince George's County awarded \$3.3 million recently to relatives of a woman killed by a motorist as she walked on a stretch of a city street, Pennsylvania Avenue, that did not have a sidewalk or guard rails. The section of street where the incident occurred was maintained by the State of Maryland. The jury found the State of Maryland liable in the wrongful death lawsuit, and awarded \$2.5 million to Kayla Martin, the daughter of Ms. Kelay Smith, who was struck and killed by a motorist on August 12, 2008. Kayla was two years old at the time of the accident.

Ms. Smith was walking along the street when a car veered onto the shoulder and struck her and Derrick Jones, who died at the scene. Ms. Smith, who was five months pregnant at the time, died at a hospital. So did her unborn child. On the block where Ms. Smith and Mr. Jones were walking, there is a sidewalk at both ends of the street—but also a gap of about 200 feet where there is no sidewalk or guard rails. The two victims were struck as they walked along that section. It was argued that state officials should have provided a sidewalk, guard rails, or a combination of the two, to improve safety for pedestrians. In addition to the award for Kayla, the jury also awarded \$800,000 to Vicki Muhammad, Ms. Smith's mother. Terrell N. Roberts III, a lawyer from Riverdale, Md. represented Ms. Smith's family in the lawsuit and did a very good job.

Source: *Washington Post*

## **FAA SUED IN MEDEVAC HELICOPTER CRASH**

The mother of a victim in the September 2008 Maryland State Police helicopter crash that killed four people near Andrews Air Force Base has filed suit against the Federal Aviation Administration. It was alleged that the agency's air traffic controllers gave the pilot inaccurate weather information. The suit filed in U.S. District Court in Greenbelt by Stephanie D. Younger, mother of crash victim Ashley Younger, is expected to be the last of several filed against the FAA. The state of Maryland is among those who have sued the agency.

At the time of the crash, 17-year-old Ashley Younger was being transported to Prince George's Hospital Center for treatment of injuries she received in an automobile crash on the night of September 27, 2008. The helicopter, known as Trooper 2, crashed in rainy weather, killing the pilot, a paramedic and an emergency medical technician in addition to the teenager. The National Transportation Safety Board concluded that the primary cause of the crash was the pilot's decision to make a rapid descent and his misjudgment of weather conditions before he took off. But the Board also criticized the performance of FAA air traffic controllers at Ronald Reagan Washington National Airport and Andrews.

The lawsuit alleges that the controllers were unresponsive and inattentive after the pilot told them he had encountered deteriorating weather conditions that were preventing him from continuing the flight to the hospital. The suit also alleges that controllers gave the pilot outdated weather information that exaggerated the level of visibility as Bunker attempted an emergency landing at Andrews. In response to a previous suit brought by the widow of paramedic Mickey Lippy, the department blamed the pilot's actions as the cause of the crash.

Cara J. Luther, who is with Baua, Hedlund, Anistei & Goldman, located in Los Angeles, is the Plaintiff's lead lawyer in this case. According to Ms. Luther, Stephanie Younger, who represents her daughter's estate, is the last of those who filed the required claims against the government to file suit.

Source: *Baltimore Sun*

## **GOVERNMENT AGREES TO PAY \$3.25 MILLION FOR 2008 FATAL CRASH**

The federal government has agreed to pay more than \$3 million to settle a lawsuit

filed over a crash in Michigan that killed a man and his daughter. Dan Long and his daughter Emily were killed when their van was hit by a vehicle driven by a deputy U.S. marshal in 2008. The 43-year-old father and his five-year-old daughter were on their way to kindergarten at a school in Frankenmuth, Mich. The \$3.25 million settlement has received court approval. David Hoffman, a lawyer from Saginaw, Mich., represented the family and did a very good job.

Source: *Chicago Tribune*

## **XVIII. HEALTHCARE ISSUES**

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### **CADMIUM IN JEWELRY FOR CHILDREN IS A POISON RISK**

It has been reported that children can be exposed to as much as 100 times the recommended limit of cadmium when they mouth or accidentally swallow inexpensive jewelry. Canadian and U.S. product safety authorities are now investigating the presence of cadmium in children's jewelry imported from China. This came about due to an Associated Press investigation in January. AP found that some Chinese manufacturers have been substituting cadmium for lead in cheap charm bracelets and pendants being sold throughout the United States and possibly Canada.

As we have previously reported, cadmium, a heavy metal, can cause kidney, bone, lung, and liver disease. Due to the fact that cadmium can accumulate in the body, all exposures should be avoided. Researchers tested 92 pieces of cadmium-containing jewelry, and found a football pendant and a heart charm, for example, would expose children to 100 times the recommended limit on cadmium had they been swallowed. The study found that these results "indicate the potential for dangerous cadmium exposures to children who wear, mouth, or accidentally swallow high-cadmium jewelry items."

You can get more information from a recent online issue of the journal *Environmental Health Perspectives*. Scientists also did separate tests to mimic normal use by children that could scratch or damage the outer coating on the jewels. In those cases, the risk of exposure grew. For example, six damaged charms in the shape of sandals

yielded 30 times as much cadmium as undamaged charms.

The study's lead author, Jeffrey Weidenhamer, a chemistry professor at Ashland University in Ohio, said he hopes the potential hazards of cadmium-laden jewelry will be taken seriously since the amounts of cadmium were "extraordinarily high and clearly dangerous if these items were mouthed or swallowed by children."

Cadmium is a particular concern because it accumulates in the body over our lifetime, according to the researchers. The digestive systems of children are also more efficient at absorbing cadmium. It's impossible for parents to tell which items contain cadmium because it is not identified on the product. The study tested cadmium-laden jewelry, mostly charms and necklace pendants labeled for children and imported mainly from China. Most sold for less than \$5 each and were bought in 2009 and 2010. Agencies around the world, including the World Health Organization, are working to regulate the use and disposal of the heavy metal. The study was funded in part by a grant from the Dr. Scholl Foundation.

Source: *cbc.ca*

### **FDA CRACKS DOWN ON UNTESTED COLD MEDICINES**

The Food and Drug Administration will remove roughly 500 unapproved cold and allergy medications from the market as part of an ongoing crackdown on ineffective prescription drugs. The FDA requires companies to submit all new prescription drugs for scientific review before they are launched. But thousands of drugs actually predate the FDA's drug regulations and as a result have escaped scrutiny for decades.

Most of the drugs targeted by the latest action are pills using untested combinations of decongestant and cough-suppressing ingredients. Since most Americans buy their cold medicines over the counter, the prescription medicines cited by the FDA represent a small portion of the market. Deborah Autor, director of the FDA's Office of Compliance, observed: "We don't expect today's action to have a negative impact on consumers. There are multiple other products available to treat cold, cough and allergy symptoms."

The FDA said manufacturers who have not registered their products with the agency must halt production and shipments immediately. Among the drugs listed by the FDA are products like Pedialhist, a cold formula labeled for patients as young as one

month old. FDA regulations do not recommend cold medicines for any children under age two. Other drugs combine two varieties of the same ingredient, such as the allergy-reliever antihistamine. Regulators called such combinations “irrational,” and warned that they could cause excessive drowsiness.

The FDA says that doctors may not realize they are prescribing unapproved drugs because the products are often labeled just like FDA-approved products. It wasn't until 1962 that Congress ordered the FDA to review all new medications for effectiveness. Thousands of drugs already on the market were supposed to be evaluated over time. But some manufacturers claimed their medications were grandfathered under earlier laws.

The FDA began its latest crackdown on unapproved drugs in 2006 and has taken action against 17 types of medications and dozens of companies. Typically, the agency orders manufacturers to stop making and shipping drugs. The FDA also has seized millions of dollars' worth of medications. But federal law does not call for fines for selling unapproved drugs, and criminal prosecutions are rare.

Source: *USA Today*

## XIX. ENVIRONMENTAL CONCERNS

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### ***CLEAN AIR IN THIS COUNTRY IS WORTH FIGHTING FOR***

There have been constant battles over the past 40 years, especially during the years of the Bush Administration, over the amount of pollutants that could be put in the air in this country. Unfortunately, these battles have carried over into the Obama Administration. It's a never ending battle, and there is one thing for sure, the polluters never give up. It might be good for us to take a look at the evolution of the Clean Air Act.

The first Clean Air Act was passed by Congress in 1963. While this legislation was not very strong, at least it was a step in the right direction. The first legislation of any real consequence was passed in 1970. That Act was designed to affect our lives in a positive manner and to protect our health and that of future generations. Since 1970, we have come a long way, certainly too far

to go back to the days of filthy, dangerous contaminated air. The EPA will reassess the current standard for concentration of ozone in the outside air—now set at 75 parts per billion (ppb)—and the agency has the power and authority to affect tens of thousands of lives.

The EPA can either reduce the standard, increase it, or leave it as is. For example, if the EPA reduced the standard to 70 ppb, that would save up to 4,300 lives per year, avoid 6,700 hospital visits and 23,000 asthma attacks. But the EPA is under constant and tremendous pressure to relax the standards and that threatens the very air we breathe. There is currently legislation being pushed in Congress that would virtually cripple the EPA. The public must be informed and must fight to protect public health and safety.

The original Clean Air Act of 1963 established funding for the study and the cleanup of air pollution. But there was no comprehensive federal response to address air pollution until Congress passed the 1970 Act. Congress created the EPA during that same year and gave it the primary role in carrying out the newly-passed law. Since 1970, EPA has been responsible for a variety of Clean Air Act programs to reduce air pollution nationwide. Congress dramatically revised and expanded the Clean Air Act in 1990, providing EPA even broader authority to implement and enforce regulations reducing air pollutant emissions. The 1990 Amendments also placed an increased emphasis on more cost-effective approaches to reduce air pollution.

As most of our readers will likely know, the Clean Air Act covers the entire country. Even so, states, tribes and local governments do a lot of the work to meet the Act's requirements. For example, representatives from these agencies work with companies to reduce air pollution. They also review and approve permit applications for industries or chemical processes. The EPA sets limits on certain air pollutants, including setting limits on how much can be in the air anywhere in the United States. In theory this should help to ensure basic health and environmental protection from air pollution for all Americans. The Clean Air Act also gives the EPA the authority to limit emissions of air pollutants coming from sources such as chemical plants, utilities, and steel mills. Individual states or tribes can have stronger air pollution laws, but they can't have weaker pollution limits than those set by EPA. The key to the effectiveness of the Clean Air Act is strong, but fair, enforcement.

The EPA must approve state, tribal, and local agency plans for reducing air pollution. If a plan fails to meet the necessary requirements, the EPA can issue sanctions against the state. If necessary, the federal agency can take over enforcing the Clean Air Act in that area. The EPA assists state, tribal, and local agencies by providing research, expert studies, engineering designs, and funding to support clean air progress. Since 1970, Congress and the EPA have provided several billion dollars to the states, local agencies, and tribal nations to accomplish this.

In theory, it seems logical for state and local air pollution agencies to take the lead in carrying out the Clean Air Act. They should be able to develop solutions for pollution problems because of their special understanding of local industries, geography, housing, and travel patterns. State, local, and tribal governments also monitor air quality, inspect facilities under their jurisdictions and enforce Clean Air Act regulations. States have to develop State Implementation Plans (SIPs) that outline how each state will control air pollution under the Clean Air Act. A SIP is a collection of the regulations, programs and policies that a state will use to clean up polluted areas. The states are required to involve the public and industries through hearings and opportunities to comment on the development of each state plan.

Hopefully, the American people won't let Congress take us back to the conditions that existed prior to 1970. We have made progress—although a great deal remains to be done—and we certainly can't afford to lose ground. In fact, we need to increase our efforts and work to make our country healthier and safer.

Source: The EPA

### ***EPA PUSHES FOR NEW POLLUTION STANDARDS***

The Environmental Protection Agency has proposed new limits on the pollutants that coal-fired power plants emit, long-awaited regulations that health advocates said would clear the air and save lives. Eventually, the Power Plant Mercury and Air Toxic Standards would prevent 91% of the mercury contained in coal from escaping into the air when it is burned, according to the EPA. EPA Administrator Lisa Jackson said in a news conference last month in Washington:

*Today's announcement is 20 years in the making and is a milestone in the Clean Air Act's already unprecedented record of defending the health of American families. With the help of existing technologies we will be able to take reasonable steps to protect our children and loved ones and prevent premature deaths, heart attacks and asthma cases.*

The rule Administrator Jackson signed has a 60-day comment period before it becomes final, and the industry would have up to four years after that to install the pollution control devices. Mercury and other toxic air pollutants from coal- and oil-fired power plants can cause neurological damage in children, and certain metals have been linked to cancer. Leaders of the American Lung Association and the American Academy of Pediatrics endorsed the new EPA rule and appeared in support of Administrator Jackson and the EPA during the announcement.

About 400 coal plants around the country release 386,000 tons of toxic pollutants each year. "The message to the nation's electric power companies is, 'Start now,'" said Charles Connor, president and CEO of the American Lung Association. He added: "I can assure you no one will complain if the air gets cleaner faster." The EPA estimates that more than half of the nation's coal plants already have installed some form of pollution control device. It should be noted that complying with the new rule is estimated to cost the power industry \$10.9 billion.

Source: AL.com

### **CLEAN AIR LAWSUIT AGAINST ALABAMA POWER DISMISSED**

A federal judge in Birmingham has dismissed a decade-old lawsuit against Alabama Power Co. The suit claimed the amount of air pollution coming from five of the company's coal-fired power plants increased after modifications were made to the plants. U.S. District Court Judge Virginia Hopkins entered her order on March 14<sup>th</sup>. In the order, the judge wrote that in a teleconference in January with all sides, she had said that she could grant a summary judgment to all claims if there was no admissible evidence as to net emissions increases from the plants.

Judge Hopkins ruled that information about the increase in pollutants from the plants provided by two expert witnesses

for the federal government was not admissible in the case. Alabama Power had maintained from the start that its activities were always in full compliance with the federal Clean Air Act. The ruling by Judge Hopkins rejected the EPA's claims and also its methods for determining whether power plant maintenance projects trigger an obligation to get a new clean air permit. The order also supports the position that electric utilities can do routine maintenance and repairs on their coal-fired generating units without violating EPA's "New Source Review" regulations.

Source: AL.com

### **TVA FINED \$450,000 FOR CLEAN AIR ACT VIOLATIONS**

The Tennessee Valley Authority has been fined \$450,000 as a civil penalty for violating the Clean Air Act at the Widows Creek Fossil Plant in northeast Alabama. In a statement, the EPA said TVA agreed to the penalty to resolve allegations related to emissions of sulfur dioxide and nitrogen oxide. The emissions happened in 2003 and were traced to problems with ducts when TVA installed a system to reduce emissions. Martocci said all the duct work was replaced in 2005.

Source: Montgomery Advertiser

### **COMPANY FACES \$300 MILLION PENALTY IN PENNSYLVANIA POLLUTION SUIT**

GenOn Northeast Management Co. was found to be liable for fouling the Conemaugh River with metal discharges from a power plant in Indiana County since 2005 by a federal magistrate. This could result in a maximum civil penalty of more than \$300 million being levied. U.S. Magistrate Judge Robert Mitchell must still decide what penalty to impose. David Masur, the director of PennEnvironment which filed the citizen lawsuit in 2007 along with the Sierra Club, observed:

*Now we have to do the main part of what we've been trying to and that is to get the company to comply with the law after years of litigation. We need compliance, we need to make sure companies aren't making money or that there's a financial incentive to break the law.*

According to Josh Kratka, senior attorney for the National Environmental Law Center,

which helped file the suit, there are two specific issues which remain to be settled at a trial scheduled to start June 1<sup>st</sup> before Judge Mitchell: How big will the civil penalty be, and what kind of court order must the judge issue to ensure that GenOn complies with federal anti-pollution laws?

GenOn Northeast is a wholly-owned subsidiary of GenOn Energy Inc. of Houston, which owns 16.5% of the Conemaugh Generating Station in West Wheatfield Township about 50 miles east of Pittsburgh. GenOn Northeast operates the coal-fired power plant on behalf of its parent and seven other owners. The lawsuit was filed in April 2007 when Reliant Energy Inc. still controlled the plant. Reliant last year merged with another power company, Mirant, to create GenOn Energy.

Source: Insurance Journal

### **ADEM BUDGET CUTS MAY PROVE CATASTROPHIC**

The Alabama Department of Environmental Management is facing significant state and federal budget cuts over the next two years. This is a most serious matter and the cuts could undermine the agency's ability to staff and manage some of its federally-required programs. In late February, ADEM Director Lance LeFleur reported to the Environmental Management Commission (EMC) that the Governor's office might be forced to cut the agency's current budget by 15% and its 2012 budget by 20% to 25%.

ADEM gets about half of its budget from the federal government, and Lance said he expected a cut in that revenue stream, as well. Under President Obama's budget proposal, the U.S. Environmental Protection Agency faces a 13% cut, a reduction that is likely to filter down to the state level.

Director LeFleur also informed the EMC that the cuts are "potentially catastrophic," especially considering that ADEM's budget is at the same level it was 20 years ago. During that same 20-year time frame, the regulatory responsibilities that the EPA has placed on ADEM have greatly increased. He said the agency is focusing on preserving core functions that protect public health and is looking for more ways to streamline operations through automation. The department is working on a web-based system for people to report environmental problems and is working with regulated industries to have monitoring reports submitted electronically.

Despite these efforts, the latest cuts to ADEM's budget could possibly lead to an

EPA takeover of one or more of the critical federal programs that the state agency currently administers. While a federal takeover is extremely rare, EPA has threatened ADEM with this kind of move in the past—and may well carry through on its threats if ADEM can't demonstrate that it has the personnel or funds to do the job. Hopefully, the Governor and legislators will find a way to keep that from happening.

If you need additional information on this matter, contact David Byrne, a lawyer in our Toxic Torts Section, at 800-898-2034 or by email at David.Byrne@beasleyallen.com.

## XX. THE CONSUMER CORNER

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### **CONCERNS RAISED ABOUT POOL AND SPA DRAIN COVER TESTING AND ENTRAPMENT RISKS**

The U.S. Consumer Product Safety Commission is conducting an investigation into the safety of pool and spa drain covers and the adequacy of testing procedures used to determine the flow rating of these covers. The investigation has revealed that the testing protocols used by some laboratories may have been improper. As a result, some covers certified by these laboratories may not comply with the Virginia Graeme Baker Pool and Spa Safety Act, hereinafter referred to as "The Act." Pool and spa drains that use covers certified with inaccurate flow ratings may fail to prevent the hidden hazard of a drain entrapment.

As part of its investigation, the CPSC approved the issuance of subpoenas to three of the laboratories that tested pool and spa drain covers seeking information related to their protocols, the types of covers tested, and results of their testing. The CPSC received more than 17,000 pages of documents from these laboratories in response to the subpoenas, which the agency staff continues to analyze. The CPSC is working to ensure that the public is not endangered by unsafe drain covers in pools and spas. As a result, CPSC staff will conduct a public meeting on April 5<sup>th</sup>, to solicit answers from testing laboratories, drain cover manufacturers and other industry representatives regarding how the testing was conducted, the potential impact on consumer safety, and what changes are being made to the testing pro-

cedures. The CPSC is undertaking this effort in order to identify covers that have improper ratings and provide important safety information about drain covers to the public by Memorial Day weekend.

Gravity drainage systems and large, unblockable drain covers are not part of this investigation. The CPSC urges pool and spa owners to contact their service providers and product manufacturers for additional information on the testing and certification of drain covers. Heightened caution should always be exercised by pool operators, parents and caregivers in keeping children away from pool and spa drains and other openings. The risk to swimmers from a non-compliant drain cover is greatest in shallow kiddie pools, wading pools, or pools or spas with single main drain systems.

The Act was passed by Congress in December 2007 and went into effect in December 2008. Since then all public pools and spas have been required to install new anti-entrapment drain covers and other secondary devices or systems, on single blockable drain systems, in order to be compliant with the law. Residential pools may have made these changes as recommended by their pool service operator and any newly-constructed pools or spas since early 2009 should also have these new covers.

Source: CPSC Release

### **MOST RECALLED MEDICAL DEVICES WERE FAST-TRACKED BY THE FDA**

We have written in prior issues about the fast-track process employed by the FDA relating to new drug approvals. We have said consistently that the process was being badly abused. It's now being reported that the vast majority of medical devices recalled over a five-year period were either approved through the fast-track process, or were exempt from any FDA regulation, according to a study published in the Archives of Internal Medicine. According to the study, of the 113 medical devices recalled from 2005 through 2009 due to the risk of serious health problems or death, 80 were cleared through the 510(k) approval process. That is the fast track approach usually reserved for lower-risk medical products. Eight were exempt from FDA approval. Only 21 of the 113 devices had been approved through the full premarket approval process, the study found.

The report from the study stated that the findings "suggest that reform of the regula-

tory process is needed to ensure the safety of medical devices." Most of the recalled devices—about 35%—were cardiovascular devices, according to the study. Two-thirds of the recalled cardiovascular devices were cleared by the fast-track process. The FDA's 510(k) process has come under increased fire after critical medical journal reports, testimony before Congress and statements by public health advocates. These critiques led the FDA to announce earlier this year that it would implement changes to its process of reviewing devices deemed low risk before they go to market. The changes are designed to address some of the 55 recommendations made by two internal working groups set up by the agency. The groups found that the process for 510(k) review was unpredictable, inconsistent and opaque. There should be little doubt that the fast track process has been abused and should be changed by Congress if the FDA is unable to make the necessary changes on its own.

Source: *Lawyers USA Online*

### **NEW PRODUCT SAFETY DATABASE UNDER SCRUTINY**

The formal launch of the government database SaferProducts.gov took place on March 11<sup>th</sup>. As we previously reported, this is a place where folks can share complaints of injury or worse from everyday products such as cribs, high chairs, space heaters, toasters, and many others. But as expected, the database, overseen by the Consumer Product Safety Commission, isn't universally popular. Some manufacturers and a few members of Congress claim that such a "crowd-sourced" website will be bloated with bogus, inaccurate or misleading reports. I predict that the attacks on the database will intensify over the next few months.

### **THE PROBLEMS AT TRIAD ARE TROUBLING**

Triad's recent recall of all lots of its alcohol prep pads, wipes and swabs, totaling perhaps hundreds of millions of products sold in the U.S., Canada and Europe, is quite disturbing. At least two lawsuits are pending over use of the pads that caused injury. H&P Industries, doing business as the Triad Group, provides generic medical products sold under private labels of grocery stores such as Safeway and Kroger and drugstores such as CVS and Walgreens.

Documents that have become available reveal that FDA officials expressed concerns following visits to the Triad plant from July 15<sup>th</sup> to July 17, 2009, and again from April 19<sup>th</sup> to May 18, 2010. Inspectors reported that the company could not validate the processes used to ensure quality or sterility, not only of alcohol prep pads and wipes, but also for other products used for intimate care. Those include hemorrhoid creams, infant and adult glycerin suppositories and sterile lubricating jelly used in homes, as well as in clinics and hospitals for medical exams.

FDA inspectors cited Triad's sterilization process for alcohol prep products, questioning dosages of the gamma radiation process that ensures sterility. But, the inspectors said Triad's processes "may not be adequate to sterilize" the lubricating jelly. They also charged that Triad had failed to address "high microbial bioburden levels" previously detected in the purportedly-sterile jelly. Interestingly, information about the specific type of contamination was redacted in the documents. It appears that while the inspection process was working, neither the company nor FDA followed up to prevent the injuries that may have resulted from these products. The reason for the recalls is quite disturbing since it appears that both Triad and the FDA dropped the ball. The conditions discovered are alarming and point to a serious safety concern at Triad. Interestingly, the FDA has defended its delay in dealing with the safety issues at Triad.

Source: MSNBC

### **FDA WARNS OF BIRTH DEFECTS WITH TOPAMAX**

The U.S. Food and Drug Administration is warning women of child-bearing age that Topamax, which is an epilepsy drug, can increase the risk of birth defects around the mouth. Data collected from a registry of pregnant women showed a higher rate of cleft lip and cleft palate in babies whose mothers were taking the drug during the first trimester, according to the FDA. Infants who were exposed to the drug had a 1.4% rate of mouth defects, which was more than three times greater than that seen with other seizure medications. The frequency of the defects in mothers not taking any epilepsy medication is .07%. Dr. Russell Katz, director of the FDA's Division of Neurology Products, stated:

*Health care professionals should carefully consider the benefits and risks of topiramate when prescribing it to women of child-bearing age. Alternative medications that have a lower risk of birth defects should be considered.*

The FDA raised the drug's pregnancy category to D, which means there is evidence the drug can harm a human fetus, but there are situations where the drug's benefits to the mother could outweigh its risks. The FDA did not place the drug in "category X," which means the drug should never be used by women who are or may become pregnant.

Topamax is marketed by Johnson & Johnson to control seizures caused by epilepsy, a neurological disorder that causes excessive nerve signals in the brain. The drug is also used to prevent migraine headaches. Roughly 4.3 million patients filled prescriptions for the drug between 2007 and 2010. J&J and generic companies who market the drug, known as topiramate, will be required to add a stronger warning label about the drug's effect on pregnancies. Women taking topiramate should talk to their doctor immediately if they are planning to or become pregnant, the FDA said. Oral cleft defects occur when parts of the mouth do not completely fuse together, which can lead to difficulties eating and talking. The problem can usually be successfully treated with surgery that closes the lip or palate.

Source: USA Today

### **J&J IS WARNED BY THE FDA**

The FDA has warned Cordis, a unit of Johnson & Johnson, by letter about a failure to ensure that heart devices made at its Puerto Rico plant—such as stents used to prop open arteries—were manufactured with consistency. Specifically, the agency's inspectors found that Cordis' procedures did not prevent abnormal products or ensure that its devices met certain specifications.

The FDA uncovered the problems when it inspected the plant in September and October of 2010. Although the company has since said it would take steps to address the issues, agency officials said in the letter that those steps either did not work or did not go far enough. The FDA can seek penalties such as injunctions or fines. J&J's reputation has been badly tarnished by manufacturing and quality control prob-

lems at its plants that have led to a series of recalls of widely-used consumer healthcare medicines. Such products as Tylenol, Rolaids and Motrin, medical devices and other products, including syringes and sutures have been recalled.

### **ANOTHER WIN FOR CONSUMERS**

The Supreme Court of Louisiana ruled last month that a debt collector can't enforce an arbitration award without proof that the consumer agreed to arbitration. The ruling overturned the Court of Appeal's decision in the case. Public Justice lawyers represented the Defendant, William Weaver, in the case.

The debt collector in this case was seeking over \$32,000 from Mr. Weaver. After FIA Card Services (FIA) said that it was entitled to collect on the debt, which Mr. Weaver had allegedly incurred on an MBNA credit card, the National Arbitration Forum (NAF) entered an award for FIA in the full amount sought. As a general rule, the winning party in arbitration has up to one year to go to court and "confirm" the arbitration award. But the losing side usually has only 90 days to "vacate it."

When FIA sought to confirm the arbitration award in court, it provided only a copy of the award from the NAF, and undated, unsigned, barely legible MBNA credit card contracts that contained no mention of either FIA or Mr. Weaver. The NAF's involvement was also problematic. In 2009, the for-profit NAF was forced to abandon the consumer arbitration business after a scandal broke out. Historically, the NAF was known to side with creditors in almost every case.

A *BusinessWeek* investigation found that NAF arbitration awards were often pre-printed with the amount to be awarded to the creditor already filled in. Nonetheless, the trial court in Louisiana confirmed the \$32,000 against Mr. Weaver. Louisiana's First Circuit Court of Appeals affirmed, holding that if a creditor seeks confirmation of an arbitration award and the award is not vacated within 90 days, the trial court can do nothing but approve—even if the creditor failed to show that the consumer ever agreed to arbitration.

But many courts around the country had already ruled that the 90-day limit does not matter unless there is a valid arbitration agreement. The high courts of Arkansas, Montana, Kansas and Idaho reversed NAF awards on this exact issue for this reason. Now Louisiana has followed suit, thanks to

the good work of Leslie Bailey and Melanie Hirsch, lawyers from Public Justice and their co-counsel—Steve Conley of Covington, La., Bill Cherbonnier of Greta, La., and Garth Ridge of Baton Rouge, La. Mark Moreau, the Legal Director of Southeast Louisiana Legal Services, filed an *amicus* brief in support of Mr. Weaver. Incidentally, Ms. Hirsch served as a law clerk several years ago for U.S. District Judge Myron Thompson in Montgomery, Ala.

Source: Public Justice

### **BE AWARE OF TELEPHONE PHISHING SCAMS**

From time to time we see a rash of what is referred to as “phishing scams” taking place. For the uninformed among us, phishing is a way of attempting to acquire sensitive information such as usernames, passwords and credit card details by masquerading as a trustworthy entity in an electronic communication. Communications purporting to be from popular social web sites, auction sites, online payment processors or IT administrators are commonly used to lure the unsuspecting public. Phishing is typically carried out by e-mail or instant messaging, and it often directs users to enter details at a fake website whose look and feel are almost identical to the legitimate one.

Phishing is an example of social engineering techniques used to fool users, and exploits the poor usability of current web security technologies. Attempts to deal with the growing number of reported phishing incidents include legislation, user training, public awareness, and technical security measures. A phishing technique was described in detail in 1987, and the first recorded use of the term “phishing” was made in 1996. The term is a variant of *fishbing*, probably influenced by *phreaking*, and alludes to baits used to “catch” financial information and passwords.

For example, a caller might call and demand payment on a past due account and request a credit card or some type of immediate payment. Recently, there were a number of calls to businesses in the Montgomery area with a person claiming to be from AT&T. When these scams occur, do not give the caller any information. You can call the business, such as AT&T, to find out if anybody with the company has called you. AT&T never goes through a third party to contact a customer and that should put the customer on notice of a scam.

## **XXI. RECALLS UPDATE**

Once again, there has 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 March 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 35,000 RANGER, EDGE, MKX, F-SERIES VEHICLES**

Ford has issued two recalls for a total of about 35,000 pickups and crossovers in North America because of fire risks from fuel leak or electrical problems. The first recall includes about 24,000 2010 Ranger pickups with the 2.3-liter engine to fix fuel line chafing that could cause a leak and fire. Ford also is recalling for a second time more than 9,000 trucks and crossovers to fix a software problem with an electronic body control module that could lead to an electrical short. The recall involves 2011 Ford Edge and Lincoln MKX crossovers and F-150, F-250, F-350, F-450 and F-550 trucks. These vehicles were part of a group first recalled in December to inspect the part.

### **GM RECALLING CADILLAC CTS OVER VEHICLE HANDLING**

General Motors has recalled more than 50,000 Cadillac CTS vehicles worldwide to fix a loose joint that could cause a rear wheel to become unstable, making it hard for drivers to steer. GM says the recall affects more than 44,000 CTS vehicles in the United States from the 2009 and 2010 model years. The remaining vehicles were sold in China and around the globe. GM says there have been no injuries or fatalities related to the recall. The auto company said nuts in the rear suspension could become loose, causing a sudden change in the vehicle’s handling or making the driver lose control of the vehicle. Owners can contact

Cadillac at 866-982-2339 for more information.

### **HONDA RECALLS CIVIC HYBRIDS**

Honda Motor Co. has recalled more than 35,000 Civic hybrids in the United States to fix a problem with the electrical system that could cause the headlights to turn off or the engine to stall. Honda says its recall covers 2006-2007 model year Civic hybrids. The company said the voltage converter that relays power from the motor assist system to the vehicle’s electrical components could fail. Honda says it has received seven reports of stalling engines and 82 warranty claims connected to the problem. Dealers will replace the voltage converter at no charge.

### **HONDA ISSUES RECALL TO FIX POSSIBLE LEAKS**

Honda is recalling certain 2011 Civic models to check for faulty valves that could allow fuel to leak following a crash. The leaks cause fires and other problems. The recall affects 18,056 vehicles. The cars’ fuel pump assemblies include a part called a roll over valve that is designed to keep fuel from leaking if the car is involved in a roll-over crash. It is possible that the plastic cases that contain the roll over valves may crack or break because of a manufacturing defect. Such a break could cause the valve to fail, allow fuel to leak and increase the risk of a fire. Under the recall, dealers will inspect the fuel pump assembly and replace it if necessary. The service is free of charge. Owners can call Honda customer service at 1-800-999-1009.

### **TOYOTA RECALLS SUVs AND TRUCKS**

Toyota Motor Corp. has recalled about 22,000 SUVs and trucks to address faulty tire pressure monitoring systems. Toyota’s recall includes some versions of the 2008-2011 Toyota FJ Cruiser, Land Cruiser, Sequoia, Tacoma and Tundra. The systems that monitor the vehicles’ tire pressure did not comply with federal safety standards. Toyota said the systems didn’t illuminate on the dashboard at the minimum activation pressure and

needed to be recalibrated. Owners will be notified of the recall at a future date and dealers will fix the tire pressure monitoring system. Owners can call Toyota at (800) 331-4331.

### **CHRYSLER RECALLS VEHICLES DUE TO ENGINE SHUTOFF RISK**

Chrysler Group LLC has recalled more than 248,000 crossover wagon and minivans because of a defect that could allow the key to slip while driving, causing the engine to shut down without warning. The affected models are the Dodge Journey crossover and the Grand Caravan and Chrysler Town & Country minivans. The vehicles are for the model year 2010 and were made from August 3, 2009 to June 17, 2010. About 3% of the 248,437 recalled vehicles are likely to be affected, Chrysler said in a notice posted on the National Highway Traffic Safety Administration website.

### **CHRYSLER RECALLS JEEP WRANGLERS**

Chrysler Group LLC has recalled about 20,000 Jeep Wranglers from the 2010-2011 model years due to potentially loose fasteners to the front and rear axles. The issue could cause poor steering and handling or cause the driver to lose control of the vehicle. The Wranglers were built from mid-July 2010 through mid-September 2010. The recall began in mid-March. Dealers will tighten the fasteners. Owners can call Chrysler at (800) 853-1403.

### **HYUNDAI RECALLS ELANTRAS OVER AIR BAG SENSORS**

Hyundai Motor Co. is recalling Elantra sedans to fix faulty air bag sensors that could cause the front air bag to malfunction. Hyundai says it will issue separate recalls to fix the problem. The first recall covers more than 188,000 Elantras from the 2007 to 2009 model years. Dealers will fix an electrical connector for a sensor that's designed to deactivate the right front air bag under certain circumstances. The second recall covers nearly 100,000 Elantras from the 2007-2008 model years, that are also covered by the first recall. Dealers will fix a sensor on the seat

track of the driver's side that helps determine whether the air bag should deploy. The recalls will begin this month. Owners can call (800) 633-5151 for more information.

### **SPIDERS CAUSE MAZDA RECALL IN U.S**

Mazda Motor Corp. has recalled 52,000 cars, because of a spider that likes the smell of gasoline so much it chooses to build its webs in car emission systems. The National Highway Safety Commission told Mazda the spider webs may restrict a vent line, which could cause the emissions control system to increase pressure in the fuel tank. The build-up of webs in the emission systems could lead to fuel tank cracks and possible leaks.

The culprit is the Yellow Sac spider, a relatively common type of spider in the U.S., which makes the Mazda6 model of Mazda cars its home because it is lured inside by the smell of the fuel.

The affected model, the Mazda6, known as the Atenza in Japan, has two pipes coming out from its gas tank, which is extremely rare and means that the smell of gasoline is strong enough to draw the spider in but not strong enough to kill it. There was no similar problem with any other Mazda car. As part of the recall, dealers will install a spring to prevent spiders such as the Yellow Sac from entering the vent line.

### **JAGUAR RECALLS XK AND XF MODELS**

Luxury car maker Jaguar is recalling certain 2010 XK and XF models to fix a problem that could cause fluid leaks in the engine compartment. The recall includes 6,085 vehicles built from June 27, 2009, through March 10, 2010. In a defect notice filed with the National Highway Traffic Safety Administration, Jaguar says pipes that are part of the power steering system have a zinc-nickel plating that does not meet the company's standards for corrosion protection. As a result corrosion could eventually lead to pinholes in the pipes that would allow power steering fluid to leak. The loss of fluid would make the car harder to steer and could also cause a fire if it came in contact with a

hot surface under the hood. Under the recall, which is expected to begin on or before April 11, dealership technicians will replace the power steering fluid pipes with parts manufactured with the proper level of corrosion protection. The service is free of charge. Owners can contact Jaguar at 1-800-452-4827.

### **CONTINENTAL TIRE RECALL**

Continental Tire is recalling 390,000 truck tires, most of which are used as original tires on 2008-2009 Ford F-250 and F-350 trucks. Continental says about 330,000 of the tires were used on new Ford trucks while the rest were sold as replacement tires. The company says there was a fatal crash involving the tires in January 2011. Continental says some of the tires could experience uneven wear, vibration or separation between the belt edges in cases where the truck is overloaded or the tires are underinflated. The recalled tires are LT275/70R18 125/122S with outline white letters and black sidewall and ContiTrac size LT275/70R18 125/122S with black sidewall, produced between May 2007 and September 2008.

### **SUZUKI MOTOR CORP. RECALLS ATVs**

The American Suzuki Motor Corp. has recalled 29,000 ATVs due to a fire hazard. The Suzuki KingQuad ATVs were sold nationwide from July 2007 through February 2011 for between \$6,600 and \$9,500. Some of the all-terrain vehicles' plastic fuel tanks were made improperly and can develop leaks. The recall involves all 2008-2010 LT-A450X model Suzuki KingQuad ATVs. It also includes all 2009-2010 LT-A500X, 2008-2010 LT-A750X, and 2011 LT-A500X and LT-A750X models made before December 11, 2010. Consumers were advised to stop using the recalled ATVs and contact a Suzuki ATV dealer to schedule a free repair. Consumers can call Suzuki at 800-444-5077 for information or visit the company's website at [www.suzukicycles.com](http://www.suzukicycles.com).

### **SUZUKI MOTOR CORP. RECALLS QUADSPORT ATVs**

Suzuki Motor Corporation has also recalled about 1,350 Suzuki QuadSport ATVs. The distributors of the ATVs include American Suzuki Motor Corp., of Brea, Calif.; Montgomery Motors Ltd., of Honolulu, Hawaii; and Suzuki del Caribe Inc., of Rio Piedras, Puerto Rico. The regulator/rectifier circuit board can fail and cause the engine to stall during riding due to an insufficient battery charge, increasing the risk of a crash. American Suzuki has received 11 reports of regulator/rectifier failure. The company says no injuries have been reported.

This recall affects all 2009 LT-Z400 and LT-Z400Z QuadSport ATVs. The words "QuadSport" and the model number are written on the front left fender of the ATV. The ATVs were sold at Suzuki ATV dealers nationwide from September 2008 through February 2011 for between \$6,500 and \$6,700. Consumers should immediately stop using these vehicles and contact a local Suzuki ATV dealer to schedule an appointment for a free repair. Consumers with recalled ATVs are being sent a notice directly from Suzuki.

### **ROCKY MOUNTAIN BICYCLES RECALLED BY PROCYCLE**

Rocky Mountain Bicycles and Procycle Group, Inc., both of Canada, have recalled about 325 Rocky Mountain Bicycles. The front fork steering tube can break, posing a fall injury hazard. The company has received four reports of injuries, including three reports of cuts and scrapes and one report of a broken wrist. The recalled bicycles have Rocky Mountain Bicycle printed on the frame. Only bicycles with certain serial numbers, located on the bottom side of the bicycle, are included in this recall. The bicycles were sold at bicycle stores and other specialty stores nationwide and on the Web at [www.backcountry.com](http://www.backcountry.com) from June 2007 through November 2010 for between \$1,300 and \$1,700. Consumers should stop using the bicycles immediately and contact Procycle with the serial number to determine if it is included in the recall and to arrange for a free replacement of the fork. For additional information, contact Procy-

cle toll-free at (855) 880-9062, or visit the company's website at [www.bikes.com](http://www.bikes.com).

### **BAJA MOTORSPORTS RECALLS DIRT BIKES**

Baja Inc., which does business as Baja Motorsports, of Anderson, S.C., has recalled about 4,300 dirt bikes. Fuel can leak from the fuel tank, posing a fire and burn hazard to consumers. The company says it has received six reports of fires from fuel leakage including one report of minor burns to a consumer's legs. This recall involves all model DR50 and DR70 Baja dirt bikes with VIN numbers beginning with "L98." The model number and VIN are located on the product data plate, which is located on the side of the "goose neck" (where the handle bars meet the body of the bike). The dirt bikes were sold at Pep Boys stores nationwide from December 2010 through January 2011 for between \$550 and \$650. Consumers should immediately stop using the recalled dirt bikes and contact Baja Motorsports to schedule a free repair. For additional information, contact Baja Motorsports toll-free at (888) 863-2252 or visit the company's website at [www.bajamotorsports.com](http://www.bajamotorsports.com).

### **FELT BICYCLES RECALLS ADULT BICYCLES**

Felt Bicycles, of Irvine, Calif., has recalled about 1,550 2011 Felt Adult bicycles. The bicycles were manufactured by ADK Technology Limited of Guang Dong, China. The bicycle's fork can break, causing the rider to lose control, fall and suffer injuries. The recall includes all 2011 Felt F3, F4, F5 and F75 bicycles with carbon fiber frames and carbon fiber forks.

The bicycles were sold at bicycle specialty stores nationwide from July 2010 through November 2010 for between about \$1,400 and \$5,000. Consumers should immediately stop using the recalled bicycles and contact their local Felt Bicycles dealer to receive a free inspection and repair.

### **DELTA ENTERPRISE 'SAFETY PEG' DROP-SIDE CRIB RECALL TO REPAIR**

Delta Enterprise Corp., of New York, N.Y. has re-announced the 2008 recall of more than 985,000 drop-side cribs with "Crib Trigger Lock and Safety Peg" hardware. In January 2011, CPSC and Delta learned of a 2009 death in which a seven-month-old girl from Colorado Springs, Colo. became entrapped and suffocated between the detached drop-side and mattress of her recalled crib. The crib was purchased second-hand and re-assembled without safety pegs in the bottom tracks.

Missing safety pegs can create a situation where the crib's drop-side rail disengages from the track. This can create a hazardous space in which an infant can become entrapped and suffocate. At the time of the October 2008 recall, consumers were notified by the CPSC about the death of an eight-month-old girl who became entrapped and suffocated when the drop side of the crib detached. The crib involved in this incident also was re-assembled without safety pegs. At the time of the October 2008 recall announcement, there were reports of two entrapments and nine detachments in cribs without safety pegs.

This re-announcement involves cribs that were made in Taiwan and Indonesia. The cribs were sold at major retail stores including Kmart, Target and Wal-Mart between January 1995 and December 2005 (through September 2007 for model 4624) for about \$100. Delta's name and address is printed on the mattress support boards and the Delta logo is on the crib's top teether rail. Model numbers are located on the top of the mattress support board. Parents and caregivers should immediately stop using cribs that are missing a safety peg on either leg of the drop side. Call Delta toll-free at (800) 816-5304 anytime or visit the company's website at [www.cribrecallcenter.com](http://www.cribrecallcenter.com) to order a free repair kit.

Parents and caregivers should find a safe, alternative sleep environment for their child until the repair kit, with new safety pegs, is safely installed on the recalled cribs. You can check to see if your crib has been recalled at [www.cpsc.gov](http://www.cpsc.gov).

### **KAWASAKI MOTOR RECALLS BACKPACK BLOWERS DUE TO FIRE HAZARD**

Kawasaki Motor Corp. U.S.A., of Irvine, Calif., has recalled Gasoline-Powered Backpack Blowers. This recall includes about 3,400 blowers in the United States and 100 in Canada. The gasoline tank can split and leak fuel, posing a fire hazard to consumers. Kawasaki says no incidents or injuries have been reported. This recall involves gasoline-powered blowers sold under the Kawasaki brand name. Model and serial numbers are printed on the product's blower housing. Backpack blowers included in this recall have a white, translucent fuel tank. The blowers were sold by authorized service dealers nationwide from August 2008 through February 2011 for between \$420 and \$490. Consumers should immediately stop using the recalled products and return them to the nearest dealer for a free replacement fuel tank. For additional information, contact Kawasaki Motor toll-free at (877) 364-6404 or visit the company's website at [www.kawpowr.com](http://www.kawpowr.com). Consumers can also write to the firm at: Kawasaki Motor Corp. U.S.A. Consumer Service Department, 5080 36<sup>th</sup> St. SE, Grand Rapids, Mich. 49546.

### **SANUS ELEMENTS SURGE PROTECTORS RECALLED**

Milestone AV Technologies LLC, of Savage, Minn., and Rite-Tech Industrial Co., Ltd., of Taiwan, have recalled about 2,500 low-profile power conditioners/surge protectors. Improper grounding of the case and inadequate insulation for the circuit breaker poses an electrical shock hazard to consumers. This recall involves all Sanus Elements model ELM205 low-profile power conditioners or surge protectors. SANUS ELEMENTS is printed on the front of the unit and the model number is printed near the UL logo on the back.

The power protectors were sold by independent home theater dealers from June 2009 through December 2010 for about \$90. Consumers should immediately stop using the product and contact Milestone for a replacement product or refund. For additional information, contact Milestone toll-free at (877) 894-6280, or visit the compa-

ny's website at [www.milestone.com/](http://www.milestone.com/) recall.

### **LIEBHERR RECALLS BUILT-IN REFRIGERATORS DUE TO INJURY HAZARD**

Liebherr-Hausgeraete Lienz GmbH, of Austria, has recalled over 5,500 Liebherr Built-In 30-Inch Wide Bottom Freezer Refrigerators. The refrigerator's door can detach, posing an injury hazard to consumers. Liebherr has received ten reports of doors detaching. No injuries have been reported. This recall involves Liebherr built-in 30-inch wide bottom freezer refrigerators. The refrigerators were sold individually or as side-by-side companion units. The refrigerators come in stainless steel and various custom finishes and are built into the kitchen cabinetry. "Liebherr" is written on the top interior control panel. The model number can be found on a label located behind the bottom drawer on the left interior side of the single door refrigerator.

Appliance and specialty retailers nationwide sold the refrigerators from February 2004 through January 2011 for between \$4,400 and \$5,000. Consumers with recalled refrigerators should contact Liebherr immediately to schedule a free in-home repair. Consumers should check their refrigerator immediately to see whether the door hinge pin has become loose as indicated by a popped up hinge pin at the top or bottom. If the hinge has not become loose and the door is functioning properly, consumers may continue to use the refrigerator until it is repaired. For additional information, contact Liebherr toll-free at (877) 337-2653 or visit Liebherr's website at [www.liebherr.us](http://www.liebherr.us).

### **NATURAL GAS LOG SET BURNER ASSEMBLIES**

Lennox Hearth Products LLC, of Nashville, Tenn., has recalled about 3,200 Lennox Shadowdance Natural Gas Log Set Burner Assemblies. A crack can develop at the gas valve connection allowing natural gas to leak while the burner is in use, posing a risk of carbon monoxide poisoning. Lennox says it has received 20 reports of cracks at the

gas valve connection. No injuries have been reported according to the company. The product is used in a wood-burning fireplace or a ventless firebox enclosure.

The assemblies were sold under model numbers LSVFSD-18, LSVFSD-24 and LSVFSD-30, and include a burner and ceramic-fiber log set. Replacement gas burners also were sold separately under model number LSVFSD-NG. Burners included in this recall have serial numbers that begin with 6407, 6408, 6409 and 6410A through 6410G. The burner's model and serial numbers are printed on a metal identification plate attached to the burner. The gas log sets were sold by fireplace and HVAC retailers and installers nationwide from August 2007 through December 2010 for between \$700 and \$850. Consumers should immediately stop using the recalled natural gas log set burner assemblies. Consumers can contact Lennox to arrange for a free replacement of the burner. For additional information, please contact Lennox Hearth Products at (800) 299-0027.

### **BURLINGTON COAT FACTORY RECALLS SLOW COOKERS**

About 7,460 Slow Cookers sold by Burlington Coat Factory, of Burlington, N.J. and imported by Lehrhoff ABL, of Carlstadt, N.J. have been recalled. The slow cooker's control panel can overheat and melt, posing a fire hazard. The manufacturer has received 60 reports of the control panels smoking, melting and sparking, and three reports of panels catching fire. Fourteen incidents resulted in minor damage to countertops. No injuries have been reported. This recall involves Bella Kitchen 5-quart programmable slow cookers. The slow cookers are black with "Bella Kitchen" printed on the control panel.

Only slow cookers with model number WJ-5000DE and date codes 0907 or 0909 are included in this recall. The model number and the four-digit date code are printed on a label on the underside of the product. The slow cookers were sold at Burlington Coat Factory stores from June 2010 through December 2010 for \$20. Consumers should stop using the

slow cooker immediately, unplug it and return the slow cooker to Burlington Coat Factory for a full refund or store credit. For additional information, contact Burlington Coat Factory toll-free at (888) 223-2628 or visit the firm's website at [www.burlingtoncoatfactory.com](http://www.burlingtoncoatfactory.com).

### **SUNJOY INDUSTRIES RECALLS OUTDOOR WOOD BURNING FIREPLACES**

Sunjoy Industries Group Limited, of Steubenville, Ohio, has recalled its Free-standing Steel Outdoor Fireplaces. The recall includes about 20,000 fireplaces in the United States and 400 in Canada. The decorative bronze powder coat finish on the fireplace chimney can ignite during use, posing a fire hazard to consumers. Sunjoy says it has received 14 reports of the chimney's decorative powder coat finish catching fire, resulting in one report of melted siding. No injuries have been reported. This recall involves "Garden Treasures Living" steel outdoor fireplaces with a bronze finish chimney and slate colored accents. The wood burning fireplace is approximately 24 inches deep by 35 inches wide and 57 inches tall, has two glass doors and a tile back inside. Item number 0027705 and model number L-OF082PST-3 are printed on the front page of the product's instruction manual.

The fireplaces were sold at Lowe's retail stores nationwide from March 2010 through November 2010 for about \$300. Consumers should immediately stop using the fireplace and contact Sunjoy to obtain a free replacement chimney and chimney cap. For additional information, contact Sunjoy toll-free at (877) 343-5651 or visit the company's website at [www.sunjoy-direct.com/fireplacerecall.htm](http://www.sunjoy-direct.com/fireplacerecall.htm). Consumers can also email the company at [fireplacerecall@sunjoydirect.com](mailto:fireplacerecall@sunjoydirect.com).

### **WALL MOUNT FIREPLACES RECALLED BY SOUTHERN ENTERPRISES**

Southern Enterprises Inc. (SEI), of Coppell, Texas has recalled about 6,000 Cowie Gel-Fuel Wood Fireplaces. Heat from the operating unit causes the plastic mounting screws to deform causing the unit to fall from the wall, posing a fall and fire hazard. SEI says it

has received reports of 21 incidents of the product detaching from the wall and falling, causing heat damage and/or fire. Two reports of personal injuries, including a knee injury and broken toes have been reported. This recall involves Colin Cowie dual-positioning, wood wall-mount, gel-fuel fireplace with item No. 955-074.

The wooden wall mount fireplace has an espresso-colored finish with copper, silver or antique gold finished metal trim. It may be hung in a horizontal or vertical position. This recall involves units manufactured in July 2010. Lot number SEI/07/001 can be found on a label on the rear of the unit in the upper right hand corner when horizontal. The fireplaces were sold at Home Shopping Network between October and November 2010 for about \$250. Consumers should immediately stop using the recalled product and call SEI for a corrective retro fit kit that will be sent free of charge. For additional information, contact SEI at (877) 858-4959 or visit the company's website at [www.seidal.com/retrofit](http://www.seidal.com/retrofit).

### **FAB/STARPOINT RECALLS CIRCO BEADED DOOR CURTAINS**

FAB/Starpoint LLC, of New York, N.Y. has recalled 79,000 Circo beaded door curtains. The curtains were sold by Target Corp., of Minneapolis, Minn. Strangulations can occur when a child plays with the beaded strands by wrapping them around their necks or by creating loops in which they can insert their heads. Also, children can get entangled in the strands, which are prone to entangle, just by running through the doorway. The company has received three reports of entanglement. In January 2009, a nine-year old girl was entangled while passing through the beads and nearly choked as she continued walking through the curtain. In January 2010, a six-year old girl in Reno, Nev. became entangled in the bead strands as she passed through them and suffered slight lacerations to her neck. In April 2010, a girl became entangled as the beads swung back behind her father who had walked through the beads before her. She was pulled off her feet and momentarily suspended before she regained her footing and she received scratches to her neck.

The Circo pink door curtain is a set of two beaded door curtains, each of which is 12 inches wide and 72 inches long. The warnings on the packaging include: "Not for use in areas with children under 5 years of age. Plastic ornaments may pose strangulation or entanglement hazard. Not for use near cribs or playpens." The photograph on the packaging shows an installed door curtain at the doorway of a girl's bedroom with pink wall color, child-themed lamp and clock. There is a CAUTION statement included in the installation instructions that states: "Do not tie bottom to form loops." Consumers should immediately take down the curtains and contact FAB/Starpoint for a full refund. FAB/Starpoint will provide a postage-free package to consumers to return the door curtain. For additional information, contact FAB/Starpoint toll-free at (888) 333-2684 or visit the company's website at [www.fabny.com](http://www.fabny.com).

### **AOSOM RECALLS WOODEN PLAYPENS**

AOSOM LLC, of Tualatin, Ore., has recalled about 5,000 Wooden Playpens. The wooden playpen can break, split and/or crack at points where screws and other hardware are located. Small, broken wood pieces and hardware from the playpen can pose a risk of choking and laceration hazards to children. In addition, an unstable playpen can fall over onto a child, posing an entrapment hazard. AOSOM has received 69 reports of the wooden playpens breaking, splitting and/or cracking including one report of a child mouthing a piece of the broken wood and three reports of children found with a broken piece of wood and/or screw in their hand. The objects were removed without injury. This recall involves AOSOM wooden playpens made from pine wood. The firm's logo "A" and "www.AOSOM.com" is stamped on the gate of the playpen.

The playpens were sold online at AOSOM.com, Amazon.com, eBay.com and other online retailers from October 2008 through November 2010 for between \$30 and \$150. Consumers should immediately stop using the wooden playpens and contact AOSOM for instructions on how to return the product and receive a full

refund. For additional information, contact AOSOM toll-free at (877) 644-9366, or by e-mail at [service@aosom.com](mailto:service@aosom.com). Consumers can also visit the company's website at [www.aosom.com](http://www.aosom.com)

#### **'CAMP NOD' NIGHTLIGHTS RECALLED**

"Camp Nod" lantern-styled nightlights have been recalled due to a risk of shock and fire. About 9,700 lantern-style nightlights were imported from China by The Land of Nod of Northbrook, Ill., and sold at Land of Nod stores in Washington and Illinois from September 2004 through last October for about \$35. The firm says it has received 16 reports of the lamps short circuiting. Consumers were advised to stop using the nightlights and return them to Land of Nod to receive credit for the purchase. Consumers can call 800-933-9904 for information.

#### **PFIZER RECALLS PAIN DRUG ACQUIRED IN KING PURCHASE**

Pfizer Inc. has recalled an opioid painkiller obtained when it purchased King Pharmaceuticals. Embeda, which has annual sales of less than \$70 million, was recalled in the United States because of a stability defect found in the extended-release product during routine testing. The drug contains pellets of morphine that surround naltrexone, a chemical which blocks opiate effects if the product is crushed or chewed—thereby deterring misuse or abuse. The naltrexone component was shown to have degraded to unacceptable degrees in samples of Embeda that were tested. The problem is unlikely to pose a safety risk and patients can continue taking the drug as prescribed, according to the drug-maker. Embeda, approved by U.S. regulators in August 2009, was recalled three times last year due to other formulation problems, all relating to how it dissolves.

#### **J&J ANIMAS UNIT RECALLS LEAKY INSULIN CARTRIDGES**

Johnson & Johnson has recalled hundreds of thousands of potentially leaky insulin pump cartridges that could lead to serious health problems and

death. It also has been warned by the U.S. Food and Drug Administration due to manufacturing concerns regarding heart devices made at its Cordis unit's San German, Puerto Rico, facility.

J&J's Animas unit, the maker of the recalled cartridges and insulin pumps in which they are used by diabetics, said in a letter to patients that it found some of the cartridges can leak, resulting in delivery of less insulin than intended. Insufficient insulin can cause high blood sugar and a serious condition known as diabetic ketoacidosis, which can be fatal. A spokesperson for Animas says a leaking cartridge could also cause the pump to fail to sound an alarm if there were blockage in the infusion set.

We have learned that there have been reports of 22 adverse events experienced by patients. Fortunately, none involved hospitalization or death. A total of 384,180 2.0 milliliter insulin cartridges were recalled. The cartridges came from five lots shipped in the United States and one in France between November 30<sup>th</sup> and January 4<sup>th</sup>. A letter posted on the Animas website listed the specific U.S. recalled lot numbers. Animas says it informed physicians and the FDA about the recall.

#### **BABY JOGGING STROLLER ATTACHMENT RECALL**

A popular jogging stroller is being recalled because of an attached seat for babies that may not properly lock into place causing the child to fall out. The recall affects 1,545 Baby Jogger Jump Seats which attach to the Baby Jogger City Elite, Baby Jogger City Classic or Baby Jogger Summit strollers sold since January 2008. Four children have reportedly fallen out of the seats when they disengaged from the strollers. One baby was said to have suffered a broken nose.

This recall includes the Baby Jogger Jump Seat. The Jump Seat is a fabric seat accessory with the name "Baby Jogger" on the front that is attached to the mounting bracket on the frame of a Baby Jogger City Elite, Baby Jogger City Classic or Baby Jogger Summit stroller and allows a toddler and baby to ride together in the same stroller at

the same time. The item number is printed on the product packaging. The attachments were sold at juvenile products stores, mass merchandisers, and department stores nationwide and on the Web from January 2008 through July 2010 for about \$100. Anybody who has one of these should stop using it and contact Baby Jogger at (877) 506-2213, or by e-mail at [recall@babyjogger.com](mailto:recall@babyjogger.com) to receive Jump Seat safety straps and assembly instructions.

#### **IKEA COFFEE, TEA MAKERS ARE RECALLED**

IKEA Home Furnishings, of Conshohocken, Pa., has recalled FORSTA Coffee/Tea Makers. This recall includes 94,000 in the U.S. And 34,000 in Canada. Pressure from the metal pot holder against the coffee/tea maker can cause the glass to break unexpectedly, posing burn and laceration hazards. IKEA has received one report in the U.S. of a glass coffee/tea maker breaking. No injury was reported. IKEA has received 19 additional reports, outside of the U.S., of the glass coffee/tea makers breaking, resulting in 12 reports of burn injuries from spilled coffee/tea and one report of a laceration injury.

This recall involves FORSTA coffee/tea makers sold in sizes 0.4 and 1 liters. The coffee/tea maker is a press pot comprised of a handmade clear glass pot, metal holder and black plastic top and handle. Coffee/tea makers included in this recall have supplier number 20325, "IKEA" and "Made in China" etched on the bottom of the metal holder. The coffee Makers were sold exclusively at IKEA stores nationwide from January 2010 through December 2010 for between \$6 and \$10. Consumers should immediately stop using the FORSTA coffee/tea makers and bring it back to any IKEA store for a full refund. For additional information, contact IKEA toll-free at (888) 966-4532 anytime, or visit the company's website at [www.ikea-usa.com](http://www.ikea-usa.com)

#### **MANHATTAN GROUP RECALLS PARENTS WOODEN ACTIVITY TOYS**

About 400 Parents<sup>®</sup> Busy Time Activity Centers<sup>™</sup> have been recalled by Man-

hattan Group LLC, of Minneapolis, Minn. Wooden pegs on the xylophone activity can come loose, posing a choking hazard to young children. CPSC has received one report of a child putting a peg in his mouth. No injuries have been reported. The Parents® Busy Time Activity Centers™ is a wooden activity center cube-shaped toy that has a multi-colored bead run on the top. Activities on each side include a 4-tone xylophone and rasp, butterfly and caterpillar spinners, zig-zag drum, castanets, and pockets with "alligator," "bear," and "cat" pillow characters. Only items with wooden pegs bearing date code 400090GC are involved in this recall. The date code can be found on the bottom of the product packaging near the UPC code and on the tags on the bear character.

The activity centers were sold at specialty and gift stores, through mail order catalogs and online in the U.S. and Canada from December 2010 through February 2011 for about \$90. Consumers should take these recalled toys away from young children immediately and return them to the store where purchased for a full refund. Consumers can also contact Manhattan Group for instructions on receiving a replacement item or a full refund. For additional information, contact Manhattan Group at (800) 541-1345 or visit the company's Web site at [www.manhattantoy.com](http://www.manhattantoy.com). CPSC is still 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.

#### ***FUN WORLD RECALLS COSTUMES***

Fun World, Inc. A Division of Easter Unlimited, Inc. of Carle Place, N.Y., has recalled Little Pet Vet costumes and Dr. Littles costumes. The costumes are sold with a toy stethoscope accessory. The plastic ear pieces at the end of the stethoscope can be pulled off, posing a choking hazard to young children. This recall is limited to the stethoscope accessory from Fun World's toddler-sized Pet Vet and Dr. Littles costumes. The costumes include a white lab coat, a cap, scrub pants, a scrub shirt and a stethoscope. The cap and scrubs are pink, turquoise or blue. A tracking label bearing the code 10060GFI01 and a production date of

either Jan-Mar 2010 or Apr-Jun 2010 is sewn into the neck of the scrub shirt or the lab coat. The costumes were sold at novelty stores, costume and party supply stores nationwide from August 2010 through October 2010 for about \$15. Consumers should immediately take the stethoscope away from children and contact Fun World for instructions on returning the stethoscope for a full refund. For additional information, contact Fun World at (800) 247-5314 or by email at [support@fun-world.net](mailto:support@fun-world.net).

#### ***HOLIDAY-THEMED INFANT SLIPPERS RECALLED***

Atico International USA is recalling baby slippers due to a choking hazard. About 57,000 holiday rattle baby slippers—soft shoes with built-in rattles—were imported from China by Atico International USA of Fort Lauderdale, Fla., and sold nationwide at Walgreens stores from October 2010 through January 2011 for about \$5.

The company says it has received three reports of infants pulling on the stuffing in the slippers. In one near-choking incident, a seven-month-old baby was found with the stuffing in his mouth, the company said. The slippers have holiday themes, including reindeer, snowman, penguin and Santa Clause styles. Consumers were advised to stop using the slippers and return them to a Walgreens store for a full refund. Consumers can call 877-546-4835 for information.

#### ***MATILDA JANE RECALLS GIRL'S CHELSA DRESS***

Matilda Jane LLC of Fort Wayne, Ind., has recalled 1,500 Girl's Dress because the buttons can come off, posing a choking hazard. Matilda Jane has received one report of an incident with no injuries. The Chelsea dress is a girl's sleeveless sundress in sizes 2, 4, and 6. The top is white with green polka dots; the bottom is printed with a green and yellow floral design and has a multi-colored floral border at the hem. The dresses were sold at in-home trunk shows and online from February 1 through February 25, 2011. Anyone possessing this dress should return it for repair or refund by contacting

Matilda Jane Clothing at [recall@matildajaneclimbing.com](mailto:recall@matildajaneclimbing.com), by calling collect at 260-424-3511 or by visiting [www.matildajaneclimbing.com](http://www.matildajaneclimbing.com).

#### ***SEVEN TONS OF GROUND BEEF RECALLED***

Creekstone Farms, a Kansas company, has recalled more than 14,000 pounds of ground beef due to possible E. coli contamination. The recalled meat, sold in large packages and distributed in numerous states, comes from Creekstone Farms Premium Beef of Arkansas City, Kansas. Some 14,158 pounds of beef, in a handful of varieties, are subject to the recall, according to the U.S. Department of Agriculture's Food Safety and Inspection Service.

#### ***HAZELNUTS RECALLED BY DEFranco & SONS***

DeFranco & Sons of Los Angeles, Calif., has recalled bulk and consumer-packaged in-shell hazelnuts and mixed-nut products containing in-shell hazelnuts. The recalled products are linked to seven cases of Escherichia coli O157:H7 in Michigan, Minnesota and Wisconsin and may cause serious illness. Consumers who have purchased bulk in-shell hazelnuts or mixed-nut products containing in-shell hazelnuts should check with the retailer to determine if they are subject to the recall, or throw the nuts away. These nuts were distributed nationwide and to Canada from November 2<sup>nd</sup> to December 22, 2010. The in-shell hazelnuts may have been sold in two-pound and four-pound packages of mixed nuts, one-pound packages containing only in-shell hazelnuts or in open bins of nuts in grocery stores. Consumers with questions about this recall should contact DeFranco & Sons at 1-800-993-3992. The FDA encourages consumers with questions about nut safety to call 1-888-SAFEFOOD.

#### ***SKIPPY PEANUT BUTTER RECALLED DUE TO SALMONELLA***

Unilever United States Inc., the company that makes Skippy peanut butter, is recalling two of its spreads

that may be contaminated with salmonella. According to the company, no illnesses have been linked to the recall of the Skippy reduced fat creamy and reduced fat chunky brands. They are packaged in 16.3 oz. plastic jars with use-by dates of May 16-21, 2012.

Unilever says it detected possible salmonella through its own testing. The recalled jars were distributed to retail outlets in Arkansas, Connecticut, Delaware, Illinois, Iowa, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Virginia and Wisconsin, the company said. Salmonella can cause serious and sometimes fatal infections in those with weakened immune systems.

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.BeasleyAllen.com/recalls](http://www.BeasleyAllen.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@beasley-allen.com](mailto:Shanna.Malone@beasley-allen.com) for more recall information.

## XXII. FIRM ACTIVITIES

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### **CHRIS GLOVER WILL SERVE AS PRESIDENT OF STLA**

Chris Glover, a shareholder in the firm, was elected President of the Southern Trial Lawyers Association (STLA) at the organization's 23<sup>rd</sup> Annual Conference, held in New Orleans last month. The mission of the STLA is to promote fellowship, learning and networking among trial lawyers throughout the 13 southern states. Membership in the STLA is by nomination made by a member of the Board of Directors, with approval by other Board members from the nominee's state. It's said that STLA consists of some of the "best of the best" throughout the south.

Chris graduated from Cumberland School of Law and practiced law in Birmingham, Ala. for a number of years prior to joining our firm in 2008. He has dedicated his practice to protecting the rights of survivors of catastrophic personal injury and victims of wrongful death. He has represented injured individuals and their families in a wide range of serious injury and death claims,

including those that were the result of defective products, car, commercial truck, and workplace accidents. Chris has tried numerous cases that have resulted in verdicts or settlements in excess of one million dollars. A frequent lecturer, Chris has spoken across the country on issues concerning defective products, trial skills and effective leadership. Chris is married to the former Erin Henley and they have two children, Kaitlyn and Andrew.

### **JOHN TOMLINSON**

John Tomlinson graduated from The University of Alabama in 1995, with a B.S. Degree in Commerce and Business Administration. John was a member of the 1990 and 1991 University of Alabama football teams coached by one of the best ever, Gene Stallings. Prior to graduating from Jones School of Law in 2001, John was employed in the health care field in the Tuscaloosa area, where he received five years of managerial and health insurance experience. When John joined the firm as an associate in May 2002, he first worked in the Consumer Fraud Section.

John's work is now focused on environmental litigation. He is currently involved in the pursuit of claims for a good number of individuals and businesses against BP and other responsible parties as a result of the Gulf oil spill. John was one of several featured presenters for the August 24, 2010 "BP Oil Spill Reimbursement Webcast," presented by the Florida Institute of Certified Public Accountants (FICPA). There were more than 1,000 accountants from states along the Gulf Coast participating, including Florida, Alabama, Mississippi, Louisiana and Texas. His presentation was on "Rights of Impacted Parties." 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 was selected as the firm's Lawyer of the Year for the Toxic Torts Section.

John currently serves as Vice-President for the Montgomery County Association for Justice, where he has also served as Secretary, Treasurer, and as a member of the Board of Directors. John is a member of the Alabama State Bar, American Bar Association and Alabama Association for Justice. He also serves on the Selection Committee of the Jimmy Hitchcock Memorial Award, which recognizes Christian Leadership in Athletics for Montgomery County student athletes.

John is the youngest of six children. He grew up in Waynesboro, Miss., and later moved to Monroeville, Ala., where he gradu-

ated from high school and lettered in four sports. John's mother, Mary B. Tomlinson, still lives in Monroeville where she is a feature writer for the *Monroe Journal*. In the summer of 2000, John was a part of a climbing team that summited 14,411-foot Mount Rainier in Washington State. John has a six-year-old son, Jet. He and Jet enjoy watching movies and playing video games together. John is a member of First Baptist Church in Montgomery and is involved in many local charity and fund-raising events. We are extremely fortunate to have John on our team. He is doing some excellent work for his clients' cases arising out of the Gulf oil spill.

### **GRAHAM MOSLEY**

Graham Mosley has been with the firm for only five months. He is a staff assistant to Larry Golston in our Consumer Fraud Section. In this position, Graham assists in contacts with Larry's clients and helps to investigate their claims. Graham graduated from AUM and has plans to attend law school. He and his fiancée, Claire, will be married this month. Graham enjoys fly fishing, golf, and anything dealing with the outdoors. Even though he has only been with us for a short time, Graham is a hard worker and based on what we have seen, we believe he will be a very good employee. We are pleased to have him with us.

### **AMY SKELTON**

Amy Skelton, who has been with the firm for eight months, is currently a Legal Secretary assisting Richard Stratton, a lawyer working in the BP Oil Spill litigation. Amy helps to maintain all documents filed in the BP cases and circulates them on a daily basis to all of the lawyers in the Toxic Tort Section. She also is working with Brantley Fry, another lawyer, on the TVA Kingston Coal Ash Spill case. Amy received her diploma from Patterson State Technical College (now Trenholm Tech) and received a diploma in Office Automation with a certificate for a high grade point average.

Amy and her husband, Mark, have been married for 16 years. Mark works in the IT department at the Alabama Department of Public Health. They have two children: Patrick, who is 12 years old, attends Millbrook Middle School and is involved in its gifted program; and Madison, who is six, and attends Coosada Elementary in Millbrook. On weekends, Amy enjoys spending time with her family and taking trips to Gatlinburg, Tenn. And Destin, Fla. She also loves to watch college football and is a huge Alabama fan. Mark and Amy attend Hunter

Hills Church of Christ in Prattville. Amy is a dedicated employee who works hard on all of her projects. We are fortunate to have her with the firm.

#### **TAYLOR THOMAS**

Taylor Thomas, who has been with the firm for over nine years, currently works as a Clerical Assistant to Frank Woodson and Matt Munson, lawyers in our Mass Torts Section. Taylor works primarily with the filed pain pump cases. Her duties include several tasks that vary from Bates-stamping records to verifying clients' subrogation lien charts. She also reviews records before they are produced to defense lawyers. Taylor started as a Medical Records coordinator with the firm and also has worked in the IT Department. She is married to Scott Thomas and they have two daughters, one-year-old Emma Grace and three-year-old Kirsten. Scott also has an 11-year-old daughter, Destiny, and 15-year-old son Matt.

Taylor has her degree in Early Childhood/Elementary Education from Huntingdon College. She taught fifth and sixth grade in Autauga County Schools before coming to the firm. Taylor enjoys spending time with her family and as she says her little ones keep her on her toes. She also loves watching sports, especially Alabama football. Taylor is dedicated and a very good employee and we are fortunate to have her with us.

#### **FIRM SPONSORS GARDASIL FILM DOCUMENTING HARMFUL SIDE EFFECTS**

Our firm has committed financially to help a group of independent filmmakers in the creation of a documentary that would shed light on the harmful side effects of the HPV vaccine, Gardasil. Titled "One More Girl," the documentary will share the stories of individuals and families devastated following a Gardasil injection. The vaccine, which is touted as a prevention for four types of human papillomavirus (HPV) that could cause cervical cancer, has been linked to thousands of serious adverse event reports and more than 80 deaths. Leigh O'Dell, a lawyer in our Mass Torts Section, is working on a number of cases on behalf of clients who were harmed by Gardasil. Leigh had this to say:

*We believe that efforts such as this film, 'One More Girl,' are vital to getting the word out about the dangers of Gardasil. We are pleased to be able to support this worthwhile project and trust that many will*

*learn about the unreasonable risks associated with Gardasil prior to having their daughters vaccinated.*

The film's title is a play on the effective Gardasil advertising campaign, "One Less," which encouraged girls to be vaccinated so they could be "one less girl with cervical cancer." The drug is manufactured and marketed by Merck & Co. Filmmakers Ryan and David Richardson decided to make the film after their sister, Donielle Richardson, suffered an adverse reaction after receiving the vaccine. They found thousands of other cases of girls suffering serious illnesses, or who had died, after receiving the vaccine.

Their production company is named ThinkExist Productions. They have partnered with two Gardasil advocacy groups, TruthAboutGardasil.org and SANE VAX Inc., to develop the film, which will share personal stories of adverse reactions and deaths linked to the drug, and also will cover the social and political trail of deception over the global mass marketing of HPV vaccines. The film is expected to begin production this summer, with release tentatively scheduled in 2012. For more information, visit the official film website at [www.onemoregirlfilm.com](http://www.onemoregirlfilm.com).

#### **RENOVATION PROJECT AT COMMON GROUND**

Folks in our firm have been involved in a number of worthwhile projects recently. For example, our employees started an exciting renovation project for the youth and families served by Common Ground Montgomery last month. The project will create Youth Entrepreneurship and Housing Redevelopment Centers that will provide more opportunities for the community. Common Ground works to create a "safe haven" of love and grace, along with structure and discipline, for the children in West Montgomery when they are most vulnerable to the destructive influences of the streets. They also concentrate on investing in urban youth by focusing on holistic development.

WSFA and Faith Radio are our media partners for this special project. Volunteers from the *Montgomery Advertiser*, as well as from the community, are donating "sweat equity" hours to help in the construction and renovation activities. Employees from our firm volunteered their time to help with outdoor landscaping for this project. The site is located at 1516 Mobile Road in Montgomery. Helen Taylor is coordinating this project for the firm and she has

done a very good job. It's a good opportunity for us to help the folks at Common Ground who in turn help others.

#### **FOOTPRINTS TO THE FINISHLINE**

Another project our employees were involved in benefited babies and that's a good thing. The 3<sup>rd</sup> Annual Footprints to the Finishline was held on March 12<sup>th</sup> at Grace Pointe Church, with all proceeds benefiting the Footprints Ministry. This ministry, based at Heritage Baptist Church in Montgomery, distributes gift bags to families who have a baby admitted to the Neonatal Intensive Care Unit. They serve Baptist South, Baptist East (partnering with Grace Pointe Church), St. Vincent's Hospital in Birmingham, and Huntsville Hospital located in Huntsville, Ala. The main event was a 5K run, but there was also a one mile fun run. Our firm was a Bronze level sponsor of the Footprints race this year. Kelli Alfreds coordinated this event for the firm and did a very good job.

#### **MARCH OF DIMES MARCH FOR BABIES**

Once again our firm teamed up to participate in March for Babies 2011. This event helps raise money and promote awareness for the March of Dimes, helping them with their mission of research and education so that more babies can be born healthy. The event will be held on April 30<sup>th</sup> at the Montgomery Riverwalk Amphitheater. Holly Newton is again coordinating this event for our firm. We have an official ambassador for the walk and he is JP, the grandson of Sandra Walters.

JP was born on March 14, 2009, weighing 11lb 5oz. Sandra, who works with Rhon Jones in the Toxic Torts Section of the firm, says that for the four months JP was in the Neonatal Intensive Care Unit (NICU) at Baptist Medical Center, "he had the most caring doctors and nurses who were both knowledgeable and compassionate." Sandra says these healthcare professionals always made sure the family understood fully the care and treatment JP was receiving. Fortunately, JP will celebrate his second birthday next month.

Sandra says, as with any 2-year-old, her grandson is always ready to run and play. He is "full steam ahead." None of this would be possible without Baptist South's NICU. We are pleased to be able to help them so they can do their good and important work. When my wife Sara was teaching nursing at Troy University, she would take her stu-

dents to the NICU at Baptist for extensive training. I learned a great deal from Sara about the good work done at the NICU by the doctors and nurses. We are blessed to have the opportunity to help those medical professionals who are working with babies who badly need their help. Little JP's story is evidence of the good work done by these doctors and nurses.

## XXIII. SPECIAL RECOGNITIONS

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### **MARCH WAS BRAIN INJURY AWARENESS MONTH**

Each year, millions of people in the United States sustain traumatic brain injuries (TBI) from falls, motor vehicle traffic crashes, collisions with moving or stationary objects, and assaults. The Centers for Disease Control and Prevention (CDC) estimates TBI will affect 1.7 million people, resulting in 1.365 million emergency room visits; 275,000 hospitalizations, and 52,000 deaths every year. In order to bring awareness to brain injury and the lives of those affected by it, March is designated as national Brain Injury Awareness Month. This year, for the first time, Alabama has also specifically designated March as Brain Injury Awareness Month in the state, with a proclamation from Gov. Robert Bentley. Statistics show that nearly 10,000 people in Alabama receive a brain injury every year, resulting in 500 deaths and 1,500 disabilities among children and adults.

"Brain Injury Awareness Month honors the millions of survivors who, with proper acute care, therapeutic rehabilitation and adequate long-term supports, are living with brain injury every day," said Susan H. Connors, president and CEO of the Brain Injury Association of America. Goals for the statewide recognition of Brain Injury Awareness Month include honoring Alabama's citizens with Traumatic Brain Injury and their families, and increasing awareness to the general population about brain injury through the Alabama Head Injury Task Force.

The Task Force is a statewide advisory board for TBI, established in 1989 by the commissioner of the Alabama Department of Rehabilitation Services (ADRS). Its mission is to develop the ideal service delivery system for Alabamians who experience a TBI. Brain injury affects people in ways

that are invisible, that no one understands and it is often called the hidden disability. Carol Stanley, who is an employee with our firm, began crusading for awareness about TBI after her son, Jason, was injured during a violent crime. Carol is active with the Alabama Head Injury Task Force and we at Beasley Allen are proud of her. Carol had this to say:

*A brain injury is a forever life-altering experience for the TBI survivors and their families. Many characteristics of the brain injury impairment are not always familiar, and are not obvious to the general public, medical system, education system, legal system, judicial system, law enforcement and so on. My son's TBI journey has taken us down all those avenues, and this is why I feel TBI education and awareness for all people is so very important.*

Members of the Task Force include people with TBI, their family members, the Alabama Head Injury Foundation, the University of Alabama at Birmingham (UAB) TBI Model System, the Alabama Disabilities Advocacy Program, and the Coalition of Domestic Violence. The group also includes such state agencies as the Department of Human Resources, the Department of Mental Health, the Department of Senior Services, and the Alabama Medicaid Agency. According to Charles Priest, executive director of the Alabama Head Injury Foundation (AHIF):

*Due to recent events including concussions in the NFL, the assassination attempt on Congresswoman Giffords and the return of our 'wounded warriors,' the awareness of traumatic brain injury is increasing. The Alabama Head Injury Foundation is responding with a new focus on safety and prevention through car seat campaigns and sports concussion education. We welcome the opportunity to coordinate the activities for Brain Injury Awareness Month in Alabama.*

A person who has sustained a brain injury may access a specialized statewide network of staff who can work with the individual and his or her family to educate them about the brain injury and provide services and support. For more information, contact Maria Crowley, State Head Injury Coordinator, at 205-290-4590 or email her at maria.crowley@rehab.alabama.gov. Informa-

tion about TBI also was featured throughout the month of March on our firm's Personal Injury and Product Liability website at [www.southerninjurylawyer.com](http://www.southerninjurylawyer.com).

### **THE ANNIVERSARY OF BLOODY SUNDAY IN SELMA**

Selma marked the anniversary of a watershed moment of the civil rights movement last month. The 18<sup>th</sup> annual Bridge Crossing Jubilee took place last month in the west Alabama city during the first weekend of March. The event marked the 46<sup>th</sup> anniversary of what is universally known as "Bloody Sunday." As we all know—and some will remember—civil rights demonstrators marching toward Montgomery across the Edmund Pettus Bridge were attacked and many badly beaten on that sad day. But, the Selma-to-Montgomery march was held later, building momentum for passage of landmark voting rights laws. Over 1000 participants again walked across the bridge on Sunday, March 6<sup>th</sup>, capping the annual commemoration. It's good to remember and honor those folks who put their lives on the line in an effort to bring about badly-needed changes in the United States.

### **HARPER LEE AMONG 20 GIVEN NATIONAL MEDALS OF ARTS AND HUMANITIES**

Harper Lee, a native of Monroeville, Ala., whose *To Kill a Mockingbird* earned her the Pulitzer Prize and recognition as one of our country's most beloved novelists, has received another honor. Ms. Lee was among 20 Americans given the National Medal of Arts and Humanities last month, honoring them for their contribution to the arts, humanities and literature. To say that Harper Lee is a great American is a gross understatement!

### **NEWLY-APPOINTED MONTGOMERY POLICE CHIEF SWORN IN**

Kevin Murphy was sworn in recently as the Montgomery Police Department Chief of Police. Kevin has served as interim chief since August, and brings more than 26 years of police service to the position. He holds a bachelor's and master's from Auburn University at Montgomery, and has risen through the MPD ranks working as a patrolman and detective. In my opinion, Mayor Todd Strange made a good choice when he selected Kevin to be Chief of Police in the

Capital City. Kevin is a good man and I am convinced he will do an outstanding job. I have always believed that Montgomery—the Capital City—has an obligation to be the very best in each area of its civic and governmental responsibilities. We owe that, not only to the citizens of Montgomery, but to all Alabamians.

## XXIV. FAVORITE BIBLE VERSES

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Dr. Lester Spencer, Senior Pastor at St. James United Methodist Church, and a very good friend, sent in a verse that is timely as we approach Easter Sunday.

*that if you confess with your mouth the Lord Jesus and believe in your heart that God has raised Him from the dead, you will be saved.*

Romans 10:9

Woody Woodman, another good friend who attends church with Sara and me, sent in another timely verse:

*Praise be to the God and Father of our Lord Jesus Christ! In his great mercy he has given us new birth into a living hope through the resurrection of Jesus Christ from the dead, and into an inheritance that can never perish, spoil or fade. This inheritance is kept in heaven for you, who through faith are shielded by God's power until the coming of the salvation that is ready to be revealed in the last time.*

1 Peter 1:3-5

Willa Carpenter, who serves as Human Resources Liaison for the firm, furnished a verse for this issue. Willa has been with us for 18 years and is a most valuable employee. She has been and continues to be an inspiration for all of us at Beasley Allen.

*Be of good courage, and He shall strengthen your hearts, All you who hope in the Lord.*

Psalms 31:24

Mike Bush, one of our firm's investigators, also sent in a verse for this issue. Mike sends this verse each week to his son who is in school at the University of Alabama.

*There was given me a thorn in the flesh, a messenger of Satan to torment me—to keep me from exalting myself!...I implored the Lord three times that it might leave me. And He has said to me, 'My grace is sufficient for you, for My power is perfected in weakness.'*

2 Corinthians 12:7-9

My good friend, John Kline, a professor at Troy University, reminds us that prayer is a very powerful tool. John furnished this verse which is a powerful statement.

*The prayer of a righteous man is powerful and effective.*

James 5:16

My long time and very good friends, John & Winnie Howard, long-time members of St. James United Methodist Church, sent in a verse especially for all married couples. John was a faithful member of a Sunday School class I taught for several years. He was our "Designated Prayer," and in that capacity, wound up each session for us. By the way, the class was unofficially known as "the old codgers."

*Love suffers long and is kind; love does not envy; love does not parade itself, is not puffed up*

1 Cor. 13:4

Ben Locklar, a lawyer in our Personal Injury Section, has been studying the 103<sup>rd</sup> Psalm for a good while. He points out that this incredible piece of poetry, written by a man who loved the Lord and was inspired by the Holy Spirit, has a tremendous message for all of us. This man, King David, was not perfect. In fact, he stumbled badly as we all know during his lifetime. The fact that God forgave King David for his sins, means there is hope for all of us today.

*The Lord is compassionate and gracious, slow to anger, abounding in love. He will not always accuse, nor will he harbor his anger forever; he does not treat us as our sins deserve or repay us according to our iniquities. For as high as the heavens are above the earth, so great is his love for those who fear him; as far as the east is from the west, so far has he removed our transgressions from us.*

Psalms 103:9-12

## XXV. CLOSING OBSERVATIONS

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### ALL AMERICANS SHOULD TAKE THIS MESSAGE TO HEART

Many Americans have come to believe that one person really can't get much done to help solve the multitude of serious problems facing our country. As a result, we stay at home and leave the problem-solving to others. But that doesn't keep some of us from complaining about conditions in the U.S. And the world. We often complain when it appears no progress is being made toward solving our nation's many problems. That has to change. Good men and women must step up and be counted and that requires that they get involved. Let's see what a gentleman from Ireland had to say about civic involvement way back in the 18<sup>th</sup> century.

*All that is necessary for the triumph of evil is that good men do nothing.*

Edmund Burke  
Irish orator, philosopher, & politician  
(1729—1797)

Perhaps what Edmund Burke said hundreds of years ago applies more today than it did even then. Men and women who love our country should get involved and work hard to stamp out the forces of evil wherever those forces might reside. We can't afford to sit back and "do nothing" any longer.

### 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

## XXVI. PARTING WORDS

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### *THE DISASTER IN JAPAN*

The disaster in Japan, caused by the record-setting earthquake and massive tsunami that followed, is one of the worst disasters of its kind in recent memory. At press time, it was being reported that over 20,000 people were killed with many more still missing. Sadly, the death toll is certain to go higher. All of us at Beasley Allen hurt deeply for the people in Japan. It's difficult to watch the nightly news and see the devastation left behind for people in a country far away from where we reside. That distance between our two countries doesn't lessen the pain and despair of the Japanese people. Nor should it lessen our need and desire to pray for and support them.

This situation in Japan makes all of the problems that we in the United States are facing seem rather small and certainly less compelling. The radiation problems resulting from the accidents at the nuclear plants in the affected areas compound the short- and long-range problems for the Japanese people. Governments all over the world are working in a number of ways to help out in Japan. Food, medical and other supplies,

along with personnel, are being sent into the country. This help must continue until things in Japan are under control.

Our prayers continue to be with the Japanese people who have lost family members and friends and with those who are homeless. There are thousands who have lost their businesses and the ability to make a living for their families and our prayers also go out for them. The effects of this disaster will be with the Japanese people for a very long time and we must not let the passage of time put them out of our thoughts and prayers.

### *A LOOK AT THE RESURRECTION*

As we enter the Easter season, it's a good time to consider the impact of Jesus' resurrection. I don't believe that Christ's resurrection is that open for theological debate. But I realize there are many people who believe it's sufficient to simply believe that Jesus lived and died. I also realize that there are others who don't accept in any respect the truth of Jesus' being raised from the dead.

In any event, for Christians, the Savior's restoration to life is central to what He claimed about His identity and is central to Christianity as a faith. Many are asking what kind of man is this Jesus who rose from the

dead? The answer is that Jesus Christ is the Son of God, who died for our sins and rose again because death had no power over Him. The resurrection of Jesus validated His entire ministry. Jesus said and did things to reveal Himself as Lord. When Jesus—the Son of God, the perfect sacrifice for sin—conquered death, He confirmed His identity. Who but the Creator could return Himself to life?

The question can also be answered by saying that the kind of man who returns from the dead is one worthy of our hope. Jesus Christ affirmed God's power to give His followers eternal life. If our earthly existence was the end for us, it would put a totally different slant on how we lived our life. Fortunately, that's not the case. Instead, it's just the opening chapter of a beautiful and infinite relationship with God. So for Christians, the good news is that the best is yet to come! Apart from Jesus' resurrection, there is no hope. Those who chase after their own versions of immortality have no assurance of life after death. That's simply because there is none. Believers in Jesus Christ face death with the confidence that nothing can separate them from the love of God. My prayer is that the celebration of Easter has had a real meaning for each of you and your families. It's a most significant time in the life of a Christian!

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