



THE
JERE BEASLEY REPORT

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Beasley Allen

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

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I. CAPITOL OBSERVATIONS

ALABAMA NEEDS A TOTAL REVISION OF ITS TAX SYSTEM

Over the years I have constantly heard that desperate times always call for desperate measures. With that premise in mind, it's quite evident that state government in Alabama is facing a most desperate financial situation. It would be an understatement to say that we have a monumental fiscal crisis on our hands. Unfortunately, it's a crisis that will only get worse unless some real changes are made in our tax structure. For at least the past 50 years, Alabama Governors and Legislators have consistently promised "no new taxes" when running for their respective offices. During that same period of time, however, we have seen programs that are funded out of the General Fund and Special Education Trust Fund "patched" to the point that there is no longer room for even a small patch to be applied.

Since the days of Gov. George C. Wallace, the state's unofficial policy whenever fiscal problems arose was to "rob Peter to pay Paul." We are now paying for that approach to funding programs in government and that's bad news for Alabama citizens. A lack of long-range planning over the years has played a major role in our current financial problem. We have had no real long-range planning in state government, or at the very best a minimal amount, and that failure has caused our state to suffer greatly. I can never recall a time when we were in a worse shape in state government from a fiscal perspective. It's time to do much more than cut budgets and layoff state employees and teachers.

Without any doubt, it's time in Alabama to get rid of "unnecessary programs" both in state government and in public education. But to be realistic, there aren't that many programs that truly can be described as being unnecessary. And, even if we got rid of those that do qualify, it would save us very little money. On the other hand, eliminating or even cutting back on necessary programs will hurt our state and will wind up causing tremendous fiscal problems in the future. I believe all agree that cutting out a single program that is "essential" would be a tragic mistake. So what is the answer?

As mentioned above, with state finances in terrible shape and budgets being considered that will hurt lots of folks, it's time to start looking at ways to adequately fund state government, including public education. It's good to see Gov. Robert Bentley take steps to close corporate tax loopholes for multi-state and multi-national companies. That's long overdue and without question it should be done now. The Governor's plan is a good one and hopefully will have strong support in the Legislature. In my opinion, cutting out corporate tax loopholes should be the first order of business.

Under current law, any increase in state income tax collections would go to the Special Education Trust Fund, the main source of state tax dollars for public schools and colleges. It's been estimated that closing loopholes used by multi-state or multi-national corporations could raise about \$200 million a year. Gov. Bentley should be commended for taking a bold step in this direction.

The tax burden in our state on middle and low income Alabamians is totally inequitable and grossly unfair. Those who can least afford to pay are hit the hardest. Also, small business owners pay their share of taxes and they should not be treated unfairly. We have let the huge corporations off the hook for years in large part due to the existing loopholes in our tax laws.

Even before the loopholes are dealt with and closed, we should take a close look at our system of ad valorem taxation and make the needed changes. Property taxes in Alabama are much too low, making a restructuring of how we tax property an absolute necessity. The inequitable tax burden on middle and low income Alabamians has been and continues to be a major problem. This has held our state back both socially and economically. When compared with how large landowners and timber companies are taxed in our state, most all Alabama citizens are being treated unfairly. It's time to change things!

IT'S TIME TO FINALLY MAKE EDUCATION THE TOP PRIORITY

One has to wonder how we have gotten to the place in Alabama where the need for funding our prison system gets more attention from some persons in positions of leadership than does the need for adequate funding of public education. For years most political leaders in our state have claimed that public education was the top priority for them. But when you look at how we

have funded education in the past, and then look at the financial mess we now have in Alabama, it's evident that education hasn't been our state's top priority.

When you compare the annual expense of housing an inmate in Alabama with what we spend each year to educate a young person in our public schools in grades K through 12, it certainly appears that we have our priorities out of kilter. Over the last few years, in many states there has been an escalation of spending by state governments for prisons. Even though in Alabama we haven't seen that sort of funding, the prison system's needs get plenty of media attention. It's evident that the way we have neglected public education in our state has

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had an adverse impact on both education and the prison system.

It's not surprising to learn that studies show there is a definite connection between high incarceration rates and poorly performing schools. I am convinced that if we would increase spending significantly for grades K-12, and also for vocational education programs, our inmate populations over time would be sharply reduced. Of course, strict accountability must also be a part of spending of funds in education at every level. In any event, it's time we really made education the top priority in Alabama!

A FEW LEADERS IN ALABAMA SEE THE REAL PICTURE

I have a great deal of respect for Dr. David Bronner and I believe most folks in Alabama share my feelings. There is one thing for certain—Dr. Bronner is not afraid to let you know where he stands on important issues. That's an unusual, but good trait, and something we need more of in government. Dr. Bronner wrote the following article recently and it is both timely and right on target. I am including it in its entirety for our readers.

MY ANALYSIS

People across America want better schools and a better government. Some want Mandarin (Chinese) taught in the sixth grade or younger and smaller class sizes. Yet they do not talk about raising taxes to pay for what they advocate. Most everyone wants to "cut" spending, unless they will be affected. Our country has a serious problem, and it is not that difficult to understand.

Once we had a surplus, but you cannot conduct two wars without sacrifice. Instead of sacrifice, we cut taxes for the rich and expanded benefits like the Bush Medicare prescription drug benefit for seniors. For those who believe that Alabama is a high tax state; it is not. Quite the reverse is true. If Alabama only taxed its citizens at the same rate as Mississippi, we would have an additional \$700-800 million a year! Alabama currently ranks 49th in percentage of earnings going to the government.

Our progress over the last 15 years has been outstanding. Wanting to destroy everything that we have worked so hard to improve, shows none of the great "Alabama Leadership" I have grown to love. When Governor Wallace told America decades ago that they were paying too much in taxes, he seemingly forgot to qualify his arguments for Alabamians. Our immediate future looks bleak and will be if we allow this to happen!

I totally agree with Dr. Bronner's assessment of the situation facing our nation and he also is 100% correct on Alabama's plight. The Republican leadership in the Alabama Legislature should find time to at least consider Dr. Bronner's opinions. Hopefully, he has been involved by the Governor's office in helping to find long-range solutions to our state's financial problems. Without any doubt, it's time to make the tough decisions required when times are desperate. In my opinion, refusing to recognize that more revenues are needed, which is politically unpopular, will prove to be a big mistake.

GEORGE BECK NOMINATED AS U.S. ATTORNEY

President Obama has nominated George Beck to be U.S. Attorney in the Middle District of Alabama. This is one of the last federal prosecutor slots in the country still held by an appointee of former President George W. Bush. I'm not real sure why it took so long to make this nomination. In making the announcement, the President said:

For his diligence and relentless pursuit of justice, I have named George L. Beck to serve as a U.S. Attorney. I am confident he will serve the people of Alabama with distinction.

Of course, George's nomination must be confirmed by the U.S. Senate. Once confirmed, he would replace the current U.S. Attorney Leura Canary. I may be the only "Democrat" in Alabama who believes that Leura has done a good job, but the truth is, she really has. I strongly believe that George will do an outstanding job in this position, as well. He is both smart and tough and has the experience needed to get the job done. I have heard numerous persons say that George is the best-quali-

fied person to be nominated in recent memory and I totally agree with them. The President made an excellent choice for a most important position.

RETURN-TO-PRISON RATES REMAIN LARGELY UNCHANGED IN ALABAMA

I have always thought we had a revolving door policy—although unintended—in our prison system. Some 35 percent of the 10,880 state inmates who got out of prison in Alabama in 2004 returned within three years, a rate that was virtually unchanged from the three-year period between 1999 and 2002, according to a study released last month. Although the recidivism rate has remained unchanged, Alabama had the 15th lowest rate of the 41 states that reported data, according to the study by the Pew Center on the States. Nationally, the recidivism rate between 2004 and 2007 was 43 percent, compared with 45 percent in the 1999-2002 period. Apparently this was the first-ever state-by-state examination of return-to-prison rates. Adam Gelb, director of Pew's Public Safety Performance Project, made this observation:

Prison spending has escalated enormously over that period, over the past 30 years, but with barely noticeable impact on the rate of offenders returning to prison.

Alabama Supreme Court Chief Justice Sue Bell Cobb believes the state's return-to-prison rate will improve with the expansion of drug court programs, which provide treatment in lieu of prison for some Defendants. She says that almost every county in Alabama now has one. Judge Tracy McCooy, a well-respected Circuit Judge from Montgomery, was instrumental in getting the drug court program started. Data show there is a significant reduction in recidivism as inmates go through the program. Simply put, the drug courts really do work. The data show that drug courts save millions of dollars and make people safer.

Source: AL.com

II. MEDICARE FRAUD LITIGATION UPDATE

\$170 MILLION VERDICT RETURNED IN MEDICAID FRAUD CASE IN TEXAS

Generic drug manufacturer Actavis made a big mistake when it decided to take the Texas Average Wholesale Price (AWP) fraud case to a jury trial. The result was a record-setting verdict for damages in the amount of \$170 million against the drug manufacturer. The jury found that Actavis fraudulently misrepresented the price of its drugs to the State's Medicaid program, which is funded by taxpayers. The jurors ordered Actavis, along with its co-Defendant Actavis Elizabeth, LLC, to pay the State of Texas and the federal government \$170.3 million for defrauding the Medicaid program.

The Medicaid fraud suits, commonly referred to as the AWP Litigations, against drug manufacturers state that the companies are misreporting their drug prices in a deliberate effort to increase the payments received from State Medicaid systems. Under federal and state law, Medicaid payments to drug providers are derived using a series of pricing levels that the companies disclose to reporting services, which in turn provide the pricing information to state governments. As part of the joint state-federal Medicaid program, the states pay pharmaceutical providers millions of dollars a year. The AWP lawsuits allege that some average wholesale prices are as much as 6,000 percent higher than the drugs' true cost.

Texas Attorney General Greg Abbott stated that the \$170 million AWP verdict "shows we will effectively use the legal system to retrieve any funds that pharmaceutical manufacturers and other providers improperly take from the Medicaid program." The Attorney General added that "the jury determined that the Defendants owe \$170 million because of improper drug price reporting. Considering the hundreds of millions of dollars that are at stake, we will continue to vigilantly pursue providers that falsely report prices to Medicaid and defraud the taxpayers."

Several states have brought AWP fraud suits against drug manufacturers for the fraudulent reporting of their drug prices to the state Medicaid agencies. Along with the states' respective Attorneys General, our firm currently represents the citizens of Alaska, Alabama, Hawaii, Kansas, Louisiana,

Mississippi, South Carolina, and Utah in efforts to recover the billions of dollars in overpayments as a result of the drug manufacturers' fraudulent price reporting scheme. The State of Alabama has cases set for trial in state court this fall against drug manufacturers Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., and Watson Pharma, Inc.

Source: Press Release from Texas Attorney General's Office

ALABAMA SETTLES WITH CVS IN SUIT OVER DRUG COSTS

A national Medicaid fraud settlement was reached last month with CVS Pharmacy, Inc. That included Alabama. Under the settlement, CVS will pay \$17.5 million to the federal government and ten states. The case was pending in the U.S. District Court for the Western District of Wisconsin. The settlement resolves the claim that CVS overcharged the Medicaid programs for prescription drugs.

It's important that the state Attorneys General act as guardians of the taxpayers' money, and protect them against inappropriate or excessive charges against government agencies. Alabama Attorney General Luther Strange said he was proud of the work performed by our state's Medicaid Fraud Control Unit. Funds were recovered that are badly needed for vital services provided by the Alabama Medicaid Agency.

Alabama will receive \$1,150,254.00 from the settlement which represents both federal and state dollars paid for prescriptions drugs for Alabama Medicaid beneficiaries. Alabama will keep \$366,758.49 from the settlement as its share, with the remainder returning to the federal government to compensate for the portion it had overpaid.

CVS Pharmacy had billed the wrong amount to Medicaid for dual-eligible beneficiaries—Medicaid beneficiaries who also have third-party prescription coverage (other than Medicare). Pharmacies must bill the other insurer first, and submit a claim to Medicaid for only the amount of any remaining liability, typically the co-pay. The investigation found that CVS billed more than the allowed amount for certain dual-eligible claims, resulting in excessive reimbursement by the states.

Investigation of the case involved complex analysis of billing and payment information, cross-referenced to private insurance payments. The involved states assisted the U.S. Department of Justice, the U.S. Attorney's Office in the Western District of Wisconsin, and the U.S. Department

of Health and Human Services Office of Inspector General, in investigating and negotiating a settlement of the case. CVS Pharmacy operates more than 7,000 retail pharmacies across the United States.

As part of the settlement, an existing Corporate Integrity Agreement will be amended to require CVS to implement correct billing procedures and train employees. An independent review organization will regularly audit payments and issue reports on CVS's compliance. CVS has started working with individual state Medicaid offices to make sure it bills correctly for dual-eligible beneficiaries. It should be noted that since 2004, the Attorney General's Medicaid Fraud Control Unit has recovered more than \$30 million on behalf of Alabama's Medicaid program.

Source: Associated Press

THE MISSISSIPPI AWP TRIAL

Our firm recently completed the first Mississippi AWP (Average Wholesale Price) Medicaid Fraud trial in Brandon, Miss. We tried the case on behalf of the State of Mississippi. Dee Miles, Clay Barnett and Chad Stewart from our firm and our co-counsel Ronnie Musgrove, who is with the law firm of Copeland, Cook, Taylor and Bush, tried the case for two full weeks before the Chancery Court in Rankin County. Judge Thomas L. Zebert and Special Master Robert W. Sneed presided over the trial together. This first trial involved the pharmaceutical company Sandoz Inc. Even though we had settled with several drug manufacturers, this was the first case to actually be tried. There are more pending cases involving about 50 pharmaceutical company Defendants in cases in the Chancery Court. We believe that this trial, which was tried non-jury, went very well.

Attorney General Jim Hood, his staff, and the Division of Medicaid folks were most helpful in our trial preparation. It has been a great pleasure working with the Mississippi government on these very important cases. We are now in the process of the post-trial briefing and will submit Findings of Fact and Conclusions of Law to the court for final consideration. This process will take approximately 45 days to complete and then the case will be fully submitted for a decision by Judge Zebert and Special Master Sneed. We anticipate that a decision will be made in about six to eight weeks. Hopefully, it will be a good result for Mississippi.

III.

A REPORT ON THE GULF COAST DISASTER

BP SUES ITS PARTNERS

I thought from the beginning that the corporations that caused the Gulf disaster would eventually turn on each other and it appears that has now happened. BP filed a \$40 billion lawsuit last month blaming the Gulf disaster on its partners. In this lawsuit, BP said both Transocean (the rig owner) and Cameron International (the maker of the device that failed to stop the spill) were at fault. In its lawsuit, filed in federal court in New Orleans, BP said that Cameron International provided a blowout preventer with a faulty design, alleging that negligence by the manufacturer helped cause the disaster.

The suit seeks damages to help BP pay for the tens of billions of dollars in liabilities it has incurred from the disaster. Interestingly, BP said Transocean actually caused last year's deadly blowout and alleged in the Complaint that every single safety system and device and well control procedure on the Deepwater Horizon rig failed.

Not wanting to miss anybody, BP then filed suit against Halliburton (the cement contractor) alleging fraud, negligence and concealing material facts in connection with its work on the rig. That suit also claims damages. BP has estimated its total liability at \$40.9 billion, but it will have to pay many billions more because of the long-range effects of its wrongdoing. While BP is attempting to shift the blame to its partners, it won't get off the hook because its conduct was very bad and definitely contributed to cause the disaster.

Source: Associated Press

TRANSOCEAN GETS A BAD GRADE ON SAFETY

A Coast Guard report says that Transocean Ltd. had serious flaws in its safety management system and a poor safety culture that contributed to the explosion that resulted in the oil spill. The report also concludes that decisions made by workers aboard the rig "may have affected the explosions or their impact," such as failing to follow procedures for notifying other crew members about the emergency after the blast.

The report says that in the years leading up to the disaster, Transocean had "serious safety management system failures and a poor safety culture. These deficiencies indicate that Transocean's failure to have an effective safety management system and instill a culture that emphasizes and ensures safety contributed to this disaster," the report further stated. A panel of officials from the Coast Guard and Bureau of Ocean Energy Management Regulation and Enforcement held a series of seven hearings for its probe of the Gulf disaster. The Bureau is expected to release its own preliminary report on the explosion before the two agencies issue a joint final report later this year.

Source: Associated Press

THE CRISIS IN THE GULF IS FAR FROM OVER

A panel of researchers from the University of South Alabama believes it will take years to fully understand the impact of the BP oil spill. It's very clear that one year after the disaster the coastal states, including Alabama, still face many unanswered questions related to the spill. Dr. Steven Picou, a professor of sociology at the University of South Alabama, is leading a research project on the long-term consequences of the *Exxon Valdez* oil spill. That gives him a unique perspective on the Gulf Coast crisis. Dr. Picou correctly stated that Alaska residents are having to deal with the *Exxon Valdez* disaster more than two decades later. That fact should get the attention of all elected officials in the Gulf Coast states as well as those in Washington. We have a long road toward recovery in Alabama and in the other states affected by the oil spill.

The BP oil spill, much like the 1989 incident in Alaska, "is more complex and stressful" than hurricanes, earthquakes or other natural disasters. Hurricanes happen over a relatively short time span. Once they are over, however, the recovery process begins. That's not the case with disasters such as the Gulf Oil Spill. It can take decades—such as with the Alaska oil spill—before the full extent of damages is even known. Dr. Picou said his Alaska research shows that the Gulf Coast can expect a series of "secondary" disasters as a result of the BP spill. Those include the agonizing claims process, chronic health concerns and having to go through the litigation process.

Dr. Ronald D. Franks, a psychiatry professor who oversees the College of Medicine at the University of South Alabama, says his

research has identified higher rates of depression, substance abuse and domestic violence in areas affected by the spill. Dr. Franks expects it will take a minimum of four years for Gulf Coast residents to return to normal—about twice as long as the recovery from a hurricane or other natural disaster. Dr. Franks had this to say:

The economic stress and the litigation makes the population more vulnerable to these mental health problems. Technological disasters like the oil are a lot more serious, compared to natural disasters. It's up to us to respond and protect our people from these problems.

According to most scientists, it's far too soon to make definitive conclusions about the scale and scope of the marine disturbances. The uncertainty won't likely be resolved for years. The next phase of the disaster will be a debate over the actual damage caused by the spill and who all should be made to pay. The cause of the damage is quite evident, with that part of the debate centering on allocation of fault. Federal law requires the U.S. government to document a spill's environmental damage—a process called a Natural Resource Damage Assessment—and requires companies found responsible to pay to fix the damage. When the government and the companies are unable to agree on a settlement, the matter goes to court.

Drs. Picou and Franks were among a half-dozen experts from the University who spoke recently on topics related to the oil spill. The panel was co-sponsored by the University and the Coastal Alabama Leadership Council, a successor organization to the Alabama Coastal Recovery Commission. A video recording of the full panel discussion is available on the Recovery Commission's website at www.crcalabama.org.

Sources: *Mobile Press Register* and *Wall Street Journal*

CONGRESS HAS DONE LITTLE TO HELP THE COASTAL STATES

Now that the one-year anniversary of the Gulf oil disaster has passed, and with a great deal of media attention, it might be good to see what Congress has actually done to help get relief for coastal residents. Unfortunately, there's not much to report on that front insofar as activity in Congress is concerned. The failure on the part of our lawmakers to take the necessary action to help the states on the Gulf Coast is quite appar-

ent and is inexcusable. I fully expected Congress to address the multitude of issues related to the spill and pass the needed bills. Sadly, nothing has been done to address the major issues raised by the oil spill. These issues include industry liability limits, regulatory reform, coastal restoration, and the broader issues of energy policy.

There may be legitimate reasons for this Congressional inactivity, but I seriously doubt it. There are the usual suspects of partisan gridlock and political gamesmanship in what was, in 2010, a Congressional election year. The Republican takeover of the House changed the playing field in Congress which was a major victory for the powerful oil industry. It's quite apparent that the big oil companies are still calling the shots in Congress.

The recommendations of the National Oil Spill Commission, named by President Obama, calling for an overhaul of the government and industry approach to safety, have been virtually ignored. The Commission called for the creation of an independent safety agency within the Interior Department, a steep increase in the oil spill liability limit, and a big boost in spending for regulation, much of it paid for by fees on industry. No action has been taken on this last proposal, embraced by the Obama Administration and by many in Congress. The 101 spill-related bills introduced in the previous Congress have been cut down to 15 so far this year. That's not a good sign.

It appears that all of the talk about legislative reform relating to the oil spill has now been forgotten. The effort largely rests now with a single bill sponsored by Rep. Edward Markey, D-Mass., the top Democrat on the House Natural Resources Committee. While his bill would enact many of the Oil Spill Commission's recommendations, I am told that the bill's chances of passing are slim to none and we all know how that usually winds up.

Instead of dealing with the real issues, the Republicans who took over the House have focused their legislative efforts on reducing the regulations they claim hurt economic growth and job creation. The lack of effective regulations played a major role in the disaster and now the GOP wants even fewer regulations. It's very clear that the job of the powerful oil lobbyists for the industry has been made much easier.

At the height of public concern with the spill last year, the House, with the Democrats then in control, passed a bill that would set new standards for blowout preventers—the safety device that the oil spill commission says failed in the Macondo

disaster—as well as increased fines for violations of federal regulations, and new ethics rules for federal regulators. Interestingly, the Senate, which was also controlled by Democrats, never took up the bill. According to Senate Majority Leader Harry Reid, the 60 votes needed for passage couldn't be obtained because of opposition coming from most Republicans and from some Democrats.

Even a bill that would have increased liability for spills beyond the current \$75 million limit and would have directed most of the BP fine and penalty money to coastal restoration, never made it to the floor during the Senate's lame-duck session after the election. That session was consumed with legislation to extend the Bush tax cuts for the wealthy for two years. The many issues facing the coastal states were virtually ignored.

Legislation to give the BP Oil Spill Commission the same subpoena power given other investigative commissions couldn't even get to the floor. Another bill would have allowed families of the 11 rig workers killed in the explosion to collect damages comparable to those allowed for land-based accidents. Even that bill failed. In that case, a single Senator objected, preventing the bill from getting a vote. This effectively denied justice to the families of the 11 victims.

As a recent poll mentioned below indicates, legislation to direct 80 percent of the Clean Water Act penalty money to coastal restoration seems to have broad support. Gulf lawmakers, the Obama Administration, and the Oil Spill Commission (which made it one of its foremost recommendations) are all pushing the bill. But even with that support, the bill still hasn't been voted on. That's sort of hard to figure out.

Unfortunately, a year after the spill, time is not on the side of the few in Congress who really want the needed legislation passed. It hasn't helped that the news media has been diverted to other happenings around the world and has moved away from covering the Gulf disaster. This has made the job of BP (which has spent hundreds of millions of dollars on public relations) and others who oppose the legislation very easy. I would like to single out Rep. Jo Bonner for his hard work on behalf of the people in his Congressional district. He has worked tirelessly trying to get BP and Ken Feinberg to do the right thing and he is pushing hard to make something happen in Washington. Hopefully, the public will put more pressure on other members of Congress. If that happens, things in Washington will change for the better.

Source: NOLA.com

MAJORITY OF AMERICANS WANT OIL SPILL FINE MONEY SENT TO GULF COAST

Members of Congress should talk with their folks back home more often and also listen to them. An overwhelming majority of likely voters across the country and across the political spectrum appear to support Congressional action to direct oil spill fines to the Gulf Coast. A national survey found that more than four in five respondents nationwide said that the spill penalties should go to "restoration of the Mississippi River Delta and Gulf Coast." Nearly 70% felt strongly about this, according to the survey, which was conducted jointly by two Washington, D.C.-area polling groups and released by environmental advocates.

While Gulf Coast members of Congress are at odds over how much money each state should receive, as well as the rules for spending it, it's quite obvious that the money must go to the Gulf Coast states. But, legislation to direct the penalties to the Gulf has made little progress. Clean Water Act fine money could be over \$21 billion.

Louisiana Sens. Mary Landrieu, a Democrat, and David Vitter, a Republican, jointly introduced a bill recently to send most of the Clean Water Act fines to the Gulf Coast. The bill would devote 60 percent of the money to environmental restoration. The amount available for economic recovery would be no more than seven percent for each of the five states. Leaders from Alabama and Gulf states outside of Louisiana have expressed concern that money reserved for environmental use will flow disproportionately to Louisiana. The spill may have done more damage to the economies of Alabama, Mississippi and Florida than to their environments, public officials in those states have said. Rep. Jo Bonner, R-Mobile, is drafting his own bill to direct Clean Water Act fines to the Gulf Coast.

Source: Associated Press

BP'S ATTEMPTS TO CONTROL RESEARCH UNCOVERED

BP's efforts to control research dealing with the impact of the Gulf Oil Spill have been uncovered and it doesn't paint a very good picture of how BP operates. It was reported that BP officials tried to take control of a \$500 million fund pledged by the oil company for independent research into the consequences of the Gulf of Mexico oil disaster. Documents obtained under the Freedom of Information Act

revealed that BP officials openly discussed how to influence the work of scientists supported by the fund, which was created by the oil company in May last year. Russell Putt, a BP environmental expert, wrote in an email to colleagues on June 24, 2010:

Can we 'direct' GRI (Gulf of Mexico Research Initiative) funding to a specific study (as we now see the governor's offices trying to do)? What influence do we have over the vessels/equipment driving the studies vs the questions?

The email was obtained by Greenpeace and shared with the Guardian. The documents reinforce fears voiced by scientists that BP has too much leverage and influence over studies into the impact of last year's oil disaster. Those concerns go far beyond academic interest into the impact of the spill. BP faces billions in fines and penalties, and possible criminal charges arising from the disaster. Its total liability will depend in part on a final account produced by scientists on how much oil entered the Gulf from its blown-out well, and the damage done to marine life and coastal areas in Louisiana, Mississippi and Alabama. The oil company has disputed the government estimate that 4.1 million barrels of oil entered the Gulf.

While there is no evidence in the emails that BP officials were successful in directing research, it's very clear that was their intent. Fortunately, the fund has since established procedures to protect its independence. Other documents obtained by Greenpeace suggest that the politics of oil spill science was not confined to BP. For example, the White House clashed with officials from the National Oceanic and Atmospheric Administration and the Environmental Protection Agency last summer when drafting the administration's account of what has happened to the spilled oil. It certainly seems like the government wanted the public to believe things were much better than they really were. On occasion, it appeared the government was defending BP and the other wrongdoers and not really helping the victims of the spill.

Another email, written by Karen Ragoonanan-Jalim, a BP environmental officer based in Trinidad, contains minutes of a meeting in Houma, La., in which officials discussed what kind of studies might best serve the oil company's interests. Under agenda item two, the BP official writes:

Discussions around GRI and whether or not BP can influence this long-term research programme (\$500m)

to undertake the studies we believe will be useful in terms of understanding the fate and effects of the oil on the environment, eg can we steer the research in support of restoration ecology?

The BP official acknowledges that BP may not have that degree of control. "It may be possible for us to suggest the direction of the studies but without guarantee that they will be done," she said. The email goes on to say: "How do we determine what biological/ecological studies we (BP) will need to do in order to satisfy specific requirements (legislative/litigation, informing the response and remediation/restoration strategies)." Having dealt with BP and witnessing its power and influence in Washington, I wasn't at all surprised that the oil giant attempted to control the badly-needed research. When you consider the oil giant's very effective public relations campaign, at a cost in excess of \$200 million, this was to be expected.

Source: guardian.co.uk

IV. PURELY POLITICAL NEWS & VIEWS

PRESIDENTIAL RACE OF 2012 WILL BE INTERESTING

The Presidential race next year promises to be one of the most interesting in recent memory if the early stages of the race are any indication of what is to come about over the remaining months of this year and over into the next year. GOP candidates are already lining up to challenge President Obama. In fact, this race really got started even before the President was even sworn in. It's very evident that the Republicans have a weak field of candidates and that has to be good news for the Obama camp.

A rumor floating around Montgomery is that former Alabama Governor Bob Riley will test the waters and likely will be a candidate. One Southern Governor, Haley Barbour of Mississippi, announced on April 15th that he was dropping out of the race. His dropping out came as a big surprise to most observers. Barbour's decision may well increase the chances of a Riley campaign. But in any event, having Sarah Palin, Donald Trump and Newt Gingrich, as well as a number of Tea Party can-

didates running, will make for a most interesting race.

THE PRESIDENT'S DEFICIT PLAN

President Obama laid out his plan to reduce the federal government's deficit last month in a speech that has created a firestorm of criticism from the leadership of the GOP. The President said spending cuts and higher taxes must be part of any true deficit-reduction plan. He correctly stated that an end to Bush-era tax cuts for the wealthy had to be included in any workable plan. Many in our Nation's Capitol seem to have forgotten that the Bush Administration put us into two major wars, one of which has lasted longer than World War II. That, coupled with the tax cuts, has put our government in a real financial crisis. President Obama promised to protect Medicare, Medicaid and Social Security and that's exactly what most people wanted to hear.

It's quite evident that the federal government must learn to live within its means and while that won't be easy, it's an absolute necessity. We must also reduce our deficit and get back on a path that will allow the government to pay down the national debt. The President is correct, however, when he says all of this must be done in such a way to protect our nation's future which includes protecting the economic recovery that started in 2009 and has gradually improved. We must figure out a way to save industrial jobs in this country and keep companies from moving these jobs to other countries such as India and Mexico. We must create jobs and not lose them.

The National Republican Party is having difficulty deciding which of the many available candidates will have a chance to unseat President Obama. The list—while lengthy—is not too awfully impressive at this juncture. The strong presence of the Koch Brothers and the Tea Party zealots will make things tough for middle-of-the-road candidates. It will be impossible to satisfy them in my opinion. Adding to the GOP problems is the entry of Donald Trump into the Presidential sweepstakes.

A FORMER PRESIDENT IS RIGHT ON TARGET

I am in total agreement with Bill Clinton on most all of the issues facing our country. But the one on which that I agree with him the most relates to the on-going federal budget crisis. The former President is concerned that budget problems in our

Nation's Capitol "are being addressed without real concern for the impact it will have on individuals." He said recently that budget policy is being dictated by "ideologues bent on having a smaller government." President Clinton had this to say about what is going on in our Nation's Capitol:

We've gotten away from being a people-centered society (and become) a money-centered society. A consequence is that the have-nots have even less because the rich continue to hold a disproportionate amount of the nation's wealth. I don't think there is an ideological answer. I want everyone to have a philosophy. It can be a little liberal, a little bit conservative. There is a huge difference in having a philosophy and having an ideology. The people who made America had a philosophy. If you have an ideology you have the answer to the question before you look at the facts. The aspirations of ordinary folks are being overlooked as the nation tries to work through its budget woes.

In my opinion, the thing that made Bill Clinton a great President was his real understanding of the trials and tribulations of ordinary folks as well as their aspirations for a better life. President Obama and his advisors would be well-served if they would spend a few days behind closed doors with Bill Clinton and discuss the nation's problems with him. Of course, that would mean leaving some pretty big egos outside the meeting place.

V. LEGISLATIVE HAPPENINGS

PROPERTY TAX INCREASE UNLIKELY TO HAPPEN

I had hoped the Republican leadership in the Legislature would recognize the obvious need this year for ad valorem tax reform in Alabama. But I must admit that it was "wishful thinking" on my part. The two top-ranking members of the Alabama Legislature testified recently in a federal court trial and made it very clear that property taxes would not be raised in Alabama. The lawsuit seeks to strike down the state's current property tax laws. House Speaker

Mike Hubbard and Senate President Pro Tem Del Marsh testified in trial that GOP members of both houses had taken 2010 campaign pledges of "no new taxes." Each said that in the current economic climate there would be no push to raise taxes.

The federal lawsuit against the State of Alabama was brought by families of schoolchildren in Lawrence and Sumter counties. The lawsuit alleges the current property tax system discriminates against black schoolchildren because it taxes timber and farm land well below fair market value, leaving poor school districts with a too-small tax base. The Plaintiffs are asking U.S. District Judge Lynwood Smith, a veteran and widely-respected jurist, to find the property laws in the 1901 Alabama Constitution and subsequent amendments in violation of the Equal Protection Clause of the U.S. Constitution. They want Judge Smith to strike the laws down and give the Legislature a year to fix the problems.

Source:AL.com

ALABAMA CONSTITUTION REWRITE COMMISSION

Sen. Del Marsh, R-Anniston, President Pro-tem of the Senate, pushed a resolution through the Legislature that will set up a commission of 16 people that could suggest changes to Alabama's constitution through the Legislature with relative ease. It's pretty well agreed that the 1901 Constitution is too long, too cumbersome and needs to be updated in some manner. Sen. Marsh is ready to bring about some sort of reform. Under the Senator's proposal, which was put on the fast track to passage, the commission of state officials and their appointees will recommend, over a period of three years, piece-by-piece changes to much of the constitution. The Legislature could accept or reject each. Of course, any change proposed by lawmakers would take effect only if also approved by state voters in a referendum.

The Commission members under Sen. Marsh's resolution will be: Gov. Bentley and three people selected by the Governor; Sen. Marsh and three people named by him; Speaker Mike Hubbard and three people picked by him; and Rep. Paul DeMarco, R-Homewood; Rep. Randy Davis, R-Daphne; Sen. Ben Brooks, R-Mobile; and Sen. Bryan Taylor, R-Prattville. These four legislators chair the House and Senate judiciary and constitution and elections committees.

Alabama's constitution, which has over 1,000 amendments, is divided into 18 parts or articles. Sen. Marsh's commission will

have a schedule for considering changes to the Constitution over a period of three years. The articles to be considered in years 2012, 2013 and 2014 are:

- **February 2012:** Article 3 on distribution of powers, Article 9 on representation, and Article 4 on the legislative department.
- **February 2013:** Article 1, the declaration of rights, Article 5 on the executive department, and Article 14 on education.
- **January 2014:** Article 7 on impeachments, Article 10 on exemptions, including things exempted from sale for debt collections, and Article 17 on miscellaneous items such as a ban on holding a state and federal office at the same time.

While I have great respect for Sen. Marsh, and commend him for taking the initiative to get things moving, I believe it will be a huge mistake to have the commission members come solely from GOP ranks. The commission should reflect a cross section of our state's population. To have a commission with such an important function made up solely of Republications would be grossly unfair, and I believe would cause unnecessary problems. Hopefully, some of the persons who have worked very hard on constitutional reform over the past several years will be named to the commission.

Source: Birmingham News

VI. COURT WATCH

COURT IMPOSES LIMITS ON CLASS ACTIONS

The U.S. Supreme Court has severely limited the ability of ordinary folks to file class action lawsuits against large corporations whose conduct has injured or damaged a number of persons. With this decision, this Court has dealt a crushing blow for the rights of consumers. In a 5-4 split, the High Court's majority said businesses can block their customers from using class-action arbitration. Five members of the Court said federal laws allowing class-action arbitration override state laws that would invalidate contracts that ban it.

The decision came in a dispute between AT&T Mobility and a California couple who objected to being charged around \$30 in sales tax for what they were told was a free cell phone. Many large businesses have required arbitration clauses in consumer

contracts to protect them from having to face their customers in court. The Supreme Court's decision means that corporations won't have to worry anymore about consumers, or employees joining together and fighting them either in lawsuits or in arbitration. "Now, whenever you sign a contract to get a cell phone, open a bank account or take a job, you may be giving up your right to hold companies accountable for fraud, discrimination or other illegal practices," said Deepak Gupta, a Public Citizen lawyer who argued the case.

Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, believes the decision will greatly hurt the rights of consumers to be protected by state laws. Sen. Leahy had this to say after the Court's opinion was related:

Class actions are an effective way to ensure consumer protection, but today's opinion by the Roberts court continued to move in a direction that undermines this access to justice for hard-working Americans.

Justice Scalia, who wrote the opinion, was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito. The Court's four members who dissented were Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan. Justice Breyer said the High Court should not have interfered with the state law, saying:

California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the state does not adopt a special rule that disfavors arbitration.

This action by a divided court will go down as one of the most devastating decisions affecting consumers in recent years. Even the Tea Part zealots, who say they believe in the U.S. Constitution, should agree.

Source: Associated Press

U.S. SUPREME COURT WILL HEAR IMPORTANT SECURITIES FRAUD CASE

There is another important class action case before the U.S. Supreme Court. Arguments were heard last month in a case that could dramatically raise the bar for shareholders who want to file class-action lawsuits against public companies. There are dozens of shareholder class actions arising out of the financial meltdown making their way through the lower courts. The central

issue in the case, (*Erica P. John v. Halliburton*), is how courts should set the threshold for certifying a shareholder class action alleging securities fraud. A group of mutual and pension fund investors sued Halliburton in 2002, alleging that the oilfield services company understated its vulnerability to asbestos-related lawsuits and that it overstated its revenues. Those misstatements, the suit alleged, artificially caused a rise in Halliburton's stock price.

A federal trial court in Texas dismissed the case, ruling that shareholders hadn't proven that their losses were tied to a particular statement made by the company or its officers. That decision essentially imposed a new test for Plaintiffs to meet at the class-certification stage. A federal appeals court upheld the ruling. Plaintiffs' and Defense lawyers agree that a Supreme Court ruling upholding the lower courts could radically change the dynamic of shareholder lawsuits. Having to prove loss causation at that early stage of a case—prior to a motion to dismiss being heard—is virtually impossible in many cases. Plaintiffs have limited power to demand information from the other side.

The petitioner's case was presented by David Boies, who represented Al Gore before the Supreme Court in the disputed 2000 Presidential election. The U.S. government wrote a brief supporting the petitioners, arguing that the lower courts erred in establishing additional hurdles for Plaintiffs at the class-certification stage. The oral argument on behalf of the company was done by David Sterling of Baker Botts. A number of industry trade groups, including the Securities Industry and Financial Markets Association and U.S. Chamber of Commerce, have filed briefs for the company. A decision in the case is expected by the end of June. It will be interesting to see if "investors" are treated better by this court than ordinary folks.

Source: *Insurance Journal*

PREEMPTION IN GENERIC DRUG CASE BEFORE THE U.S. SUPREME COURT

Another very important case for American consumers is now before the U.S. Supreme Court. Oral argument was heard in the case last month that will decide whether a generic drug manufacturer has the same responsibility to warn of serious side effects that a brand-name manufacturer has. If the generic companies prevail, folks who take generic drugs will be left without

a remedy that is available to people who take brand-name drugs.

Gladys Mensing and Julie Demahy, the two Plaintiffs in cases before the Court, alleged that they developed the neurological disorder tardive dyskinesia from taking metoclopramide, the generic form of Reglan, to treat their stomach conditions (diabetic gastroparesis and gastroesophageal reflux) for years. They filed separate lawsuits against the manufacturers, alleging they were liable under state law for failing to warn that the drug could cause the disorder. The generic drugmakers argued that those claims were preempted by the Hatch-Waxman amendments to the Food, Drug, and Cosmetic Act, which require a generic label to match that of its associated brand-name drug. They claimed that because their labels had to match, the generic companies could not have strengthened them.

The Fifth and Eighth circuits held that the Plaintiffs' claims were not preempted, a ruling that was in line with the Supreme Court's 2009 decision in *Wyeth v. Levine* regarding brand-name drugs. It should be noted that every court since *Levine*, as well as the U.S. Solicitor General, has agreed. When the High Court decided to take up the issue, it consolidated the two lawsuits. Louis Bograd, senior litigation counsel with the Center for Constitutional Litigation in Washington, D.C., who argued the case for the Plaintiffs, told the Justices: "The central issue in this case is that petitioners, in the face of considerable information that the warnings on their products were inadequate, did nothing." Jay Lefkowitz of New York City argued the case for the generic drugmakers. In reporting adverse events to the FDA, he said, "we have done everything we are required to do." He contended that the companies were "not obligated to ask for a label change."

A long list of organizations submitted amicus briefs in support of the Plaintiffs. The lawyer for the Plaintiffs characterized the case as "the generic companies against the world." The American Medical Association and a group of seven other medical associations sided with the Plaintiffs, contending that "it should be the manifest public policy of this nation that all drug manufacturers—brand and generic—have a continuing duty to conduct themselves as vigilant, active, and responsible members of the health care community in furtherance of the safety and well-being of the American public." The powerful pharmaceutical industry is trying to escape liability and accountability for its wrongful conduct.

Rep. Henry Waxman (D-Cal.), who authored the Hatch-Waxman amendments, and the Attorneys General of 42 states and the District of Columbia, also submitted briefs supporting the Plaintiffs' position. If the Court rules for the Plaintiffs, doctors and patients will receive adequate warnings about the prescriptions they take. Such a ruling will result in preventing a tremendous number of injuries and deaths. Hopefully, the Justices on the Highest Court in the land will do the right thing in this case and affirm the two cases.

Source: Allison Torres Burtka, Justice.org

JUSTICE IN ALABAMA WILL SUFFER IF THE PROPOSED BUDGET CUTS STAND

Alabama's Chief Justice has ordered a reduction in the number of weeks for trials in courthouses statewide and has authorized the presiding circuit judge at every courthouse to close court offices one day per week if necessary because of cuts in the budget for the judicial branch of government. Chief Justice Sue Bell Cobb signed an order reducing the number of weeks for civil trials by half and the weeks for criminal trials by one-third. That was necessary, according to the Chief Justice, because the system won't have enough employees to conduct full court schedules. The court system laid off 120 workers last year and another 150 employees will be cut on May 1st. Chief Justice Cobb anticipates another 300 layoffs in October unless the Legislature provides the needed money to keep the courts open. These changes will hurt the citizens of Alabama. Hopefully, the legislators will find a way to adequately fund the judicial system. Under the Constitution, the judicial branch is a separate branch of government and as a result must be adequately funded.

NEW RECUSAL PROCEDURES RECOMMENDED

A new report by the defense bar in the U.S. warns that judicial independence and integrity are threatened by court funding cuts and the increasing flow of money into judicial elections. It was reported that almost half of state courts are now operating under hiring freezes, while others, including Alabama, have cut staff pay, implemented judicial furloughs and cut courthouse hours. The report, "Without Fear or Favor in 2011," comes from the Judicial Task Force of DRI—The Voice of the Defense Bar. In addition to discussing budget cuts across

the country affecting the judiciary, the report also addresses campaign funding issues for judges.

The report decries the influence resulting from the sums of money going into judicial elections. The U.S. Supreme Court's 2010 decision in *Citizens United* case, striking down restrictions on corporate campaign spending, has played a major role. Campaign contributions in 2010 state Supreme Court retention elections reached all-time highs, creating the appearance of "a judiciary indebted to campaign contributors, who include attorneys and parties likely to appear before the winning candidate," according to DRI.

Increased judicial campaign spending has also pushed advertising to new heights, the report notes. In 2008, a record of nearly \$20 million was spent on television ads in races for 26 state Supreme Court seats. There is great concern over the use of attack ads. These ads, which often are virtually impossible to trace to the real funding source, work against judicial independence. The public's perception of our judicial system is swayed in a negative manner because of how these ads focus on the outcome of controversial decisions, even though the law was followed by the judges being attacked. The DRI report includes several recommended solutions that call for:

- Required disclosure of those who fund third-party attack ads against judges.
- Automatic disqualification of judges who receive campaign contributions above a specific threshold from a party or lawyer appearing before the judge.
- Creation of an independent group or panel of judges at each level of the state's court system to hear and decide disqualification motions.
- Expanded use of nonpartisan judicial performance evaluations to provide information to voters in the 39 states that elect at least some of their judges. The evaluations, now used in 21 states, can also help judges improve and are helpful even in states where judges are appointed, according to the report. The commissions that perform the evaluations should be made up of both lawyers and non-lawyers; should strive for racial, political and gender balance; and should approach their work in a politically-neutral manner.

It's good to see that an issue that has flown largely under the radar screen of public opinion being brought to light. Hopefully, both Congress and state legisla-

tive bodies will pass some meaningful campaign finance reform legislation.

Source: *ABA Journal*

NEW JERSEY HIGH COURT DENIES EXXON APPEAL

The New Jersey Supreme Court has refused to hear an appeal from ExxonMobil over \$7 million awarded to a woman whose cancer was caused by contact with her husband's asbestos-laden clothes. A jury in 2008 found Bonnie Anderson had contracted mesothelioma from washing the clothes her husband wore at Exxon's Linden Bayway Refinery or through her own work there. Mrs. Anderson was an electrician at the refinery from 1975 to 1986, but she did not have contact with asbestos. She was diagnosed with malignant peritoneal mesothelioma in 2001. Her husband removed insulation to fix pumps and filters and does not have the disease. ExxonMobil argued there was no way to know how Mrs. Anderson got sick and the company wanted worker's compensation laws to limit the damages. The New Jersey Supreme Court disagreed and denied the appeal.

Source: *Insurance Journal*

PROPER FOUNDATION MUST BE LAID FOR RECONSTRUCTION VIDEOS

The 11th Circuit Court of Appeals has made it very clear that lawyers attempting to introduce demonstrative exhibits, including videos, must lay the proper foundation. Great care must be utilized in how this type evidence is prepared, authenticated and presented at trial. Videos that are used to recreate an incident, condition or scene that goes to an issue to be decided by the jury must meet a certain standard. That is, the video must be substantially similar as set out in *Barnes v. GM*, a previously decided 11th Circuit decision. The trial judge has wide discretion to admit evidence of experiments conducted under substantially similar conditions. The burden is on the offering party to lay a proper foundation. I suggest that all of our readers who are lawyers read the *Burchfield v. CSX Transportation* decision.

COMPANY USED A JUDICIAL HELL HOLE DEFENSE IN COURT

A judge in Illinois, in a ruling released on April 20th, revealed that a Chicago public

relations firm recommended tying the defense of a class-action lawsuit over water pollution to a campaign painting the local courts as a “judicial hellhole” friendly to frivolous lawsuits. This shocking revelation is found in the order issued by Circuit Court Judge William Mudge on a range of issues submitted to him in a pending case accusing agribusiness company Syngenta, a producer of the chemical atrazine, of polluting area groundwater.

The judge ordered the release of previously-undisclosed communications between the Jayne Thompson & Associates public relations firm and Syngenta. In the documents, the judge said the public relations firm outlined a plan to portray the Madison County court system as a source of “jackpot justice.” Pro-business groups, including the American Tort Reform Foundation and the U.S. Chamber of Commerce, have in past years criticized Madison and St. Clair counties as being too Plaintiff-friendly. The ruling said the documents show, in part, a strategy to:

enhance the public's perception of Syngenta and the herbicide it manufactures at the expense of the Madison County judicial system. The proposal actually outlines an aggressive public relations strategy to build upon or create a hostile attitude toward the Madison County judicial system.

A class-action lawsuit had been filed against Syngenta and other atrazine manufacturers in 2004 in the Madison County Circuit Court. The suit, filed on behalf of local sanitary and water districts, accuses the companies of polluting groundwater with the weed killer used on area farm fields. Syngenta has stood behind the product's safety, refuting studies about the herbicide's environmental and health effects. The 13-page proposal from the public relations firm to a Syngenta senior communications manager was dated October 3, 2005 and came while the case was being defended by the law firm representing the company.

The lawsuit was filed by the Chicago law firm Korein Tillery. Lawyers with the firm, asked Syngenta to turn over the documents as part of pretrial discovery. This led to the judge's order. The firm said in a statement that “the strategy was an example of large companies spending millions of dollars to subvert justice.” Stephen Tillery, the lead counsel for the Plaintiffs in the case, said the companies were trying to “prevent the people of our region from exercising their right to seek damages for injuries caused by

corporate misconduct, defective products, fraud and deceptive practices.” The judge ordered Syngenta to hand the documents over to the Plaintiffs within 14 days.

This sort of thing has no place in the judicial system. Claims in lawsuits should be decided based on the facts of individual cases with judges and juries applying the applicable law. Attempting to influence judges and jurors with a public relations campaign, especially one that puts a bad light on the courts and parties, is just plain wrong.

Source: stltoday.com

THE COURTS ARE THE PROPER PLACE TO HANDLE ILLEGAL GAMBLING

Cooper Shattuck, who is Gov. Bentley's legal advisor, was absolutely correct when he told the Birmingham News recently that state raids in Alabama are not “the preferred solution” when dealing with the electronic bingo issue. Cooper correctly pointed out that there are numerous legal options the state can pursue. His view is that Prohibition-style raids, which are short-term fixes, aren't the ultimate solution to the lingering gambling problem in our state. I totally agree with Cooper that the courts must decide whether electronic bingo machines being used in the state meet requirements of state law. In that regard, Cooper told Kim Chandler, the reporter with the News who interviewed him:

That's who will ultimately decide whether certain machines in certain locations are legal or illegal. It's not for the Governor to decide. It's not for the Attorney General to decide. It's for the courts to decide.

As all Alabamians know, in the last year of his tenure, former-Gov. Bob Riley used State Troopers and raids to shut down the non-Indian bingo casinos in the state. All of those casinos sat dormant until Greenetrack reopened in March, apparently using new electronic bingo machines. Soon after his inauguration, Gov. Bentley turned over enforcement of the bingo controversy to Attorney General Luther Strange, which was the proper thing to do.

On a personal note, I have never believed that the gambling casinos were good in any respect for Alabama. Gambling in any form on a large scale is nothing more than a tax on low income citizens. It drains money from folks generally who can't afford to lose a paycheck. Never should gambling be depended on as a base on which to finance

government or education. The problems the casinos bring with them greatly outweigh any financial benefit to the state and its citizens. But, I also believe just as strongly that the raids last year were a big mistake. The courts are where these battles should and must be fought.

Both Gov. Bentley and Attorney General Strange have a duty to see that the laws of this state are enforced. Fortunately, the Governor and Attorney General are working together on the gambling issue and that's good news for all Alabama citizens. It's time for this chapter in Alabama history to be over. If electronic machines used to “play bingo” are **illegal** under Alabama law, the courts should shut down the operators. On the other hand, if the machines are **legal**, the operators should be allowed to stay open and be heavily taxed. But in any event, the issue of legality should be resolved in the courts. I believe most Alabamians are ready for this chapter in our state's history to end one way or the other.

Source: Birmingham News

VII. THE NATIONAL SCENE

SOME INTERESTING POLLING INFORMATION RELATING TO BUDGET CUTS

A recent Pew poll revealed that a majority of Americans says that deficit reduction should be a top priority this year with our elected leaders in Washington, DC. But they are also very wary of any cuts to the entitlement programs that make up much of the federal government's spending. Nearly two-thirds were against changes to Social Security and Medicare. A recent CNN poll said that 87% of the American citizens believe that funding for those programs should either be increased or remain unchanged. It was very interesting that folks in the U.S. are far more willing to have cuts in defense spending.

It should be noted that almost two-thirds believe that military spending should be increased or kept at current levels. So it is quite evident that our political leaders both in the White House and in Congress will have a difficult time satisfying a majority of the American people as they try to put together budgets that call for massive cuts in federal spending.

LEGAL FEES FOR OVERSEEING FINANCIAL BAILOUTS

It was reported last month that the federal government paid more than \$27 million to law firms “overseeing financial bailouts.” This had pretty well gone unnoticed until recently when it became known. It seems most unusual that the Treasury paid this amount without requiring detailed bills or questioning “incomplete records,” according to a report from a government watchdog. The report from the Special Inspector General for the Troubled Asset Relief Program said:

Current contracts and fee bill review practices create an unacceptable risk that Treasury, and therefore the American Taxpayer, is overpaying for legal services.

It was indicated that the problems are much deeper than just the legal fee contracts. It would be interesting to see which firms did the “overseeing” and what expertise they have in this field. Hopefully everything can be justified. But something about this arrangement doesn’t meet the “smell test.”

Source: USA Today

VIII. THE CORPORATE WORLD

BIG OIL EXPECTED TO HAVE BEST YEAR SINCE 2008

While folks all across our country are hurting, having to deal with a wide range of financial problems, it appears the big oil companies will have their best years since 2008. For example, Exxon Mobil Corp., Chevron Corp. And ConocoPhillips reported a combined \$18.2 billion in first-quarter earnings. Exxon earned almost \$11 billion and Chevron Corp. showed a 43% increase in its earnings. Overall the three companies had a 40% increase from a year ago and just short of the \$20.2 billion they earned in the first three months of 2008. All of the other companies also showed tremendous earnings during the first quarter. Small business owners, working folks, and retirees should be up in arms over the price of gasoline at the pumps. The rising prices for unleaded gas and diesel, as well as food, airline fares, shipping costs and other things, are hurting

everybody in the U.S. It's impossible to justify any oil company making billions in earnings during a three-month period while socking it to their customers.

Source: Forbes

FALL-OUT FROM THE \$1.6 BILLION BANK OF AMERICA SETTLEMENT

The \$1.6 billion settlement by Bank of America involving highly-questionable home loans could wind up costing the bank a great deal more down the road. The settlement with Assured Guaranty Ltd resolved claims Bank of America was responsible for mortgage bonds full of loans by Bank of America's Countrywide Financial unit that did not meet lending standards. Assured Guaranty insured those bonds and when the loans went bad, investors suffered losses and the insurer had to pay out.

This huge settlement is a pretty good indication that there is a real issue. Several analysts have warned the bonds contain billions of dollars of improperly-written loans. Investors and bond insurers should have good claims and can force the Wall Street banks that created the bonds to cover their losses. It's been estimated that Wall Street could be facing lawsuits with damages exceeding more than \$100 billion. Bank of America's potential exposure alone has been estimated to be as high as \$30 billion.

Source: Insurance Journal

MAJOR BANKS TOLD TO REVIEW FORECLOSURES

Federal bank regulators announced new rules last month for 14 of the nation's largest mortgage servicers. The changes are designed to curb past and future foreclosure abuses. Spawned by a federal investigation that identified “significant weaknesses” in mortgage servicer practices, regulators said the changes represent major reforms in an industry that touches virtually every U.S. homeowner with a mortgage.

In the government's most forceful response yet to the nation's four-year foreclosure crisis, the regulators ordered the mortgage servicers to hire outside firms to review every foreclosure action they had pending from Jan. 1, 2009, through Dec. 31, 2010, identify borrowers harmed by the servicers' deficiencies and compensate them. They will also face unspecified financial penalties that are still to come, according to the regulators. The banks and other companies covered by the orders collect

the monthly payments from homeowners representing about two-thirds of the residential mortgage market.

The Comptroller of the Currency, along with the Federal Reserve and the Office of Thrift Supervision, investigated the servicers. Consumer advocates say the changes are too little, too late, create no meaningful protections for consumers and are far less aggressive than those being pursued by the 50 state Attorneys General, whose investigation of mortgage servicers is continuing.

The regulators said the mortgage servicers—including Bank of America, Citibank, JPMorgan Chase and Wells Fargo—had significant weaknesses in their mortgage servicing and foreclosure processes. The problems violated state and federal laws. Even more critically, they raised costs or limited the options of borrowers trying to keep their homes, slowed the housing market's recovery by prolonging the foreclosure crisis and placed excessive burdens on the court system, the regulators said. To correct those deficiencies, the mortgage servicers agreed to make changes that will include:

- Giving distressed homeowners a single point of contact when dealing with their mortgage servicer.
- Not foreclosing if modified mortgages are not delinquent.
- Increasing supervision of third-party vendors, including foreclosure law firms that handle work for them.
- Creating a process to let borrowers submit requests for remediation if they think they've been treated unfairly.

It appears that not everybody is satisfied with the government's actions. The regulators “let the banks play a ‘Get out of jail free’ card,” according to Adam Levitin, professor of law at Georgetown University. It will be interesting to see what effect the new regulations will actually have. Hopefully, they will prove to be a step in the right direction.

Source: USA Today

IX. CONGRESSIONAL UPDATE

CONGRESS SHOULD PASS THE BADLY-NEEDED SAFETY BILL

Deadly bus crashes over the past decade have claimed a tremendous number of lives. The recent New York accident mentioned in the April issue, which killed 15 passengers and critically injured several others, as well as recent bus accidents in New Hampshire and New Jersey appear to have brought about renewed interest on the part of Congress. Hopefully, as a result, bipartisan legislation that would require regulators to act on longstanding bus safety recommendations may pass. A Senate Commerce, Science and Transportation subcommittee held a hearing on the bill last month and Transportation Department officials were asked to explain their slow progress implementing bus safety recommendations made by the National Transportation Safety Board. Some of the recommendations have been ignored for more than a decade and that's inexcusable.

The recommendations, directed at large buses known as motor coaches, include requiring seatbelts for all passengers and electric onboard recorders that keep track of how many hours a driver has been behind the wheel. The NTSB also has urged that buses have stronger roofs that aren't easily crushed or sheared off to prevent passengers from being ejected in a rollover and to ensure they have enough space inside to survive. The Board wants bus windows to be glazed using new, more advanced methods so they hold together even when shattered. Lastly, the Board wants windows and exits that are easier for passengers to open. It's hard to believe that these recommendations haven't been mandated by Congress.

About half of all motor coach fatalities in recent years have occurred as the result of rollovers, and about 70 percent of those killed in rollover accidents were ejected from the bus, according to the Transportation Department. NTSB Chairwoman Deborah Hersman told The Associated Press:

It's frustrating to be on the sidelines and get called to yet another accident in (New York) and know the issues that we've made recommendations on are stagnating. If the regulatory agency had moved on their rulemak-

ings, or the Congress had required these things to be done, we might have been able to prevent some of these fatalities.

The safety board has scheduled a public forum this month on the Transportation Department's progress in implementing bus and truck recommendations. In November 2009, Transportation Secretary Ray LaHood announced a plan for issuing regulations that address many of the NTSB recommendations. The only recommendation that has been fully implemented is a ban on texting by bus and truck drivers. The Department also has proposed rules requiring seatbelts for all bus passengers and electric onboard recorders. A ban on handheld cellphone use by bus and truck drivers while driving was also proposed. Those rules have not been made final.

New bus driver testing standards to ensure uniformity across state licensing agencies and reduce the likelihood of licensing and testing fraud are certainly needed. The regulations will also require new drivers to obtain a commercial learner's permit prior to obtaining a commercial driver's license. The Department says it will issue new, mandatory training standards for entry level commercial bus drivers by this fall.

For some reason, defining what kind of training a driver must have before obtaining a commercial driver's license, and improving testing standards for drivers has been an especially difficult issue. It should be noted that Congress has been calling for the development of driver training and testing standards for 20 years. While the Department started to work on new rules in 1993, the rules were finally issued in 2004. But those rules were successfully challenged in court as being too weak and at odds with the Department's own safety data. The Transportation Department has been working on the latest round of driver training and testing regulations for nearly six years. In the meanwhile there have been numerous deaths and injuries that could have been avoided had the government acted.

According to the NTSB, 60% of the fatal motorcoach crashes the Board investigated over a 12-year period were the result of problems related to the driver. It appears that LaHood has significantly stepped up enforcement of bus safety regulations. That's definitely an improvement, compared to eight years of inaction during the Bush administration. During the last three years, the Department has placed 75 motorcoach carriers out-of-service for

safety violations. During the three years previous, only 46 carriers had been shut down. A very good bill, with wide bipartisan support, was all ready for Senate passage last year. But Sen. Tom Coburn, R-Okla., placed a hold on the measure. With Congress closing in on adjournment, and other pressing legislation waiting to be voted on, the bill died.

According to Sen. Coburn, the bill wasn't "cost-effective." It appears the Senator will oppose the bill again. But Sen. Sherrod Brown, D-Ohio, co-sponsor of the bus safety bill with Sen. Kay Bailey Hutchison, R-Texas, believes passengers would be willing to pay more for safety improvements. "These are relatively minor costs that are amortized over the life of a bus," Sen. Brown said in an interview with the Associated Press. Currently, there are about 750 million passenger trips a year on motorcoaches in the U.S. It's high time for the federal government to get serious about bus safety and to make the changes that are necessary. It's a matter of safety and that's very important to all of us.

Source: Associated Press

A PROPOSED BILL IN CONGRESS THAT IS AS ANTI-VICTIM AS IT GETS

H.R. 5, the so-called Help Efficient, Accessible, Low Cost, Timely Health Care (HEALTH) Act of 2011, is a terrible bill and is as anti-consumer and anti-victim as it gets. Actually this is the very same bill that was passed by the House of Representatives in 2005. This bill would severely limit the ability of injured patients and their families to hold health care and medical products providers accountable. The bill is broadly drafted by design and does more than deal with medical malpractice lawsuits. If passed, it would limit remedies against all for-profit nursing homes, insurance and pharmaceutical industries, manufacturers of medical devices, and even against doctors who commit intentional torts, such as sexual abuse.

Proponents of H.R. 5 have claimed, without any real justification, that the bill is necessary to create jobs and grow the economy. Even though Congress has been debating so-called medical malpractice tort reform for three decades, this is the first time that job creation has been used as the justification for a bill which would limit consumer and patient rights and decrease safety. When hospitals, nursing homes, and drug companies cannot be held fully accountable, there is no incentive to reduce

the 98,000 medical errors that reportedly kill patients every year. As a result, if this bill passes, even more patients may suffer injury, resulting in the need for additional medical care. Let's take a look at some of the ramifications that would come about if H.R. 5 becomes law:

- **The scope of the bill is huge.** Most folks don't realize this bill applies to medical malpractice, pharmaceutical products, medical devices, nursing homes and health insurance claims. If the proponents were truly concerned about doctors, why does this bill cover product liability claims against pharmaceutical and medical device manufacturers, and civil actions against nursing homes, HMOs, and insurers?
- **Sweeping preemption of state law.** The bill includes broad preemption of state law. This preemption is designed to override state laws that protect consumers and patients while keeping in place state laws that favor doctors, hospitals, nursing homes, HMOs, pharmaceutical and medical device manufacturers, and other health care Defendants.
 - Specifically, the bill preempts all areas of state law covered by the bill, including state rules regarding joint and several liability, the availability of damages, collateral sources, attorneys' fees, and periodic payments.
 - The bill does not preempt any state defenses designed to protect health care providers.
 - The bill would leave in place existing state damage caps on economic, non-economic, or punitive damages, but would impose the caps in the bill on states that do not have limitations on damages, including states whose limitations were struck down as unconstitutional by state Supreme Courts.
 - Some states would keep their damage caps, but be forced to also except federal cap mandates, undermining the work of state legislatures that have considered these issues in the past.
 - States with an overall medical malpractice cap, such as Indiana's \$1.25 million cap would also have to accept a \$250,000 non-economic damage cap for medical malpractice, medical products, insurance companies, and nursing homes.

- **Reduced statute of limitations.** The legislation reduces the amount of time an injured patient has to file a lawsuit to one year from the date the injury was discovered or should have been discovered, but not later than three years after the "manifestation" of injury. Claims filed by minors must be brought within three years from the date of injury, except that a claim brought by a minor under the age of six years may be commenced within three years from the date of discovery of the injury or before the minor's eighth birthday, whichever provides a longer period.
 - This statute of limitations, which is much more restrictive than a majority of state laws, would cut off meritorious claims involving diseases with long incubation periods.
 - Many states toll the statute of limitations for minors. This protects children who have life-altering injuries, but whose parents did not file a claim on their behalf.
 - The bill would preempt Delaware's newly-enacted law, which provides that children who are sexually abused by doctors have an unlimited period of time in which to file a claim.
- **Arbitrary and discriminatory \$250,000 cap on non-economic damages.** The bill limits non-economic damages to \$250,000 in the aggregate, regardless of the number of parties against whom the action is brought. This cap is more restrictive than any state cap that is currently in place.
 - Non-economic damages compensate patients for very real injuries—such as the loss of a limb or sight, the loss of mobility, the loss of fertility, excruciating pain and permanent and severe disfigurement. These dangers also compensate for the loss of a child or a spouse. These are very real damages, and juries are able to calculate them fairly.
 - Caps on non-economic damages disproportionately affect women, children, the elderly, the disabled, and others who may not have substantial economic loss such as lost wages or salary.
- **Severe restrictions on punitive damages.** The bill provides that punitive damages may only be awarded if the Plaintiff proves by an impossibly-heightened standard of "clear and convincing"

evidence that the Defendant acted with malicious intent to injure the Plaintiff or the Defendant understood the Plaintiff was substantially certain to suffer unnecessary injury, yet deliberately failed to avoid such injury. The bill does not create punitive damages in those states that don't recognize them. The bill further limits punitive damages to two times the amount of economic damages or \$250,000, whichever is greater. That's grossly unfair and will encourage—not deter—wrongful conduct.

- **Heightened pleading standards for punitive damages.** Punitive damages may not be sought by the Plaintiff initially. At the court's discretion, a Plaintiff may be allowed to file an amended pleading for punitive damages only after a finding by that court that there is a substantial probability that the Plaintiff will prevail.
- **Pharmaceutical corporations are immune from punitive damages.** The bill completely immunizes manufacturers of drugs and devices that are approved by the FDA from punitive damages. The bill also extends immunity to the manufacturers of drugs and devices that are not FDA-approved yet are "generally recognized as safe and effective." Finally, the bill immunizes the manufacturer or seller of drugs from punitive damages for packaging or labeling defects. These broad-based immunities completely undermine patient safety by eliminating the deterrent effect of punitive damages and have no relation to issues regarding medical malpractice.
- **Medical products and medical provider suits must be brought separately.** H.R. 5 requires that health care providers not be named as Defendants in the same cases as pharmaceutical or medical device manufacturers. Further, health care providers may not be held liable to an injured patient in a class action against pharmaceutical or medical device manufacturers. Of course, these requirements do not mean that the provider was not negligent. Instead of having all parties present and allowing the jury to evaluate the evidence, this provision will allow the Defendant to blame another Defendant who is not a party to the case. The result will be increased court filings and finger-pointing by wrongdoers while injured patients remain uncompensated.

- **Periodic payments of all future damages.** Allowing all future damages over \$50,000 to be paid periodically punishes meritorious patients who were injured by malpractice and unsafe products and leaves them vulnerable and under-compensated. Meanwhile, large insurance companies reap the interest benefits of a patient's jury award.

Obviously, H.R. 5, if passed, would be very bad for the American people and it should be defeated. In my opinion, it's one of the worst pieces of legislation, and certainly the most anti-consumer, to ever have been introduced in Congress. The powerful special interests are pulling out all stops in their efforts to pass it. They are using doctors—and their perceived fear of being sued—as a way to make the legislation look fair and good to the public.

Source: AAJ

X. PRODUCT LIABILITY UPDATE

TAINTED IV NUTRITION CAUSED BY STERILIZATION PROBLEM

Our firm is handling a number of cases arising out of the making and distributing of tainted IV nutritional products in Alabama hospitals. An investigation has revealed that the bacteria linked to the deaths of at least nine people in Alabama hospitals who received the tainted IV nutrition was found in tap water at the compounding pharmacy, an amino acid solution and equipment used there for compounding. The investigation was done by the Alabama State Health Department and the Centers for Disease Control and Prevention. The Birmingham-based pharmacy, Meds IV, mixed the intravenous nutritional supplements, called total parenteral nutrition or TPN, which are given to patients who cannot eat or be tube-fed. The product is believed to have been delivered to six Alabama hospitals. At least 19 patients were infected with *Serratia marcescens*, a bacteria that can be lethal if it enters the bloodstream, and the tragic deaths and serious injuries resulted.

In a news conference last month, State Health Officer Don Williamson said that the same strain of the virus was found on a water faucet that provided tap water that was used to clean some of the mixing

equipment at Meds IV. The same strain was also found inside a mixing vessel, stirrer and an amino acid solution that was a component of TPN. Dr. Williamson said that was probably contaminated in the pharmacy. He said investigators are now looking more closely at whether Meds IV filtered the product correctly to catch the bacteria.

Source: AL.com

OUR FIRM FILES ANOTHER CONTAMINATED IV LAWSUIT

Thus far, our firm has filed two wrongful death lawsuit involving IV packs filled with liquid nutritional supplements that were contaminated. The last lawsuit was filed on behalf of Lyndal Robinson, whose mother, Jewell Robinson, died after receiving contaminated total parenteral nutrition (TPN) at Shelby Baptist Medical Center in Shelby County, Ala. Mrs. Robinson, a lifelong resident of Chilton County, died because a product that was supposed to sustain life was actually the very thing that killed her. We are concerned that there will be more deaths and serious injuries reported before this ordeal is over.

Mrs. Robinson's family wants to see justice done and those responsible made accountable for this wrongdoing. We intend to do whatever is necessary to make sure that happens. The bacteria were identified as *Serratia marcescens*, organisms that can cause infection in several sites on the body including the urinary tract, respiratory tract, eyes, and in wounds. TPN is administered intravenously and is used in patients who cannot or should not get their nutrition through eating. In this case the bacteria entered the bloodstream due to the contaminated IV fluids.

The lawsuit was filed in the Circuit Court for Chilton County, Ala. The Defendants manufactured and distributed the contaminated TPN and should have known that the product was defective at the time it was placed in the stream of commerce. Shelby Baptist Medical Center is one of six hospitals identified by the Centers for Disease Control and Prevention (CDC) where infections were confirmed. The other facilities are Princeton Baptist Medical Center, Cooper Green Mercy Hospital, Medical West, Prattville Baptist Hospital and Select Specialty Hospital, a long-term acute care hospital that operates within Trinity Medical Center. Defendants named in the lawsuit are Meds I.V. LLC, Edward Cingoranelli, William Rogers and Bill Vise. Additional Defendants will be named as discovery in the case dic-

tates. We are currently investigating several other potential claims and most likely will file more suits.

CRASHWORTHINESS IN AVIATION

As most of our readers will already know, there is a legal concept that was first applied in the context of automobile collisions referred to as "crashworthiness." The doctrine assumed that cars are going to be involved in crashes and, therefore, they must be designed to reasonably protect occupants in foreseeable collisions. That's the law and it just makes good sense.

The same concept extends and applies to airplanes and helicopters. While airplanes and helicopters crash far less often, they do face foreseeable impacts and must be able to reasonably protect occupants from those impacts. Perhaps the most common impact an airplane or helicopter faces is that of bird impacts. This has been an issue since the beginning of manned flight, but there are certain things that can be done to protect aircraft from those bird impacts.

Our firm is involved in a case involving a collision between single 3.5 pound red tail hawk and a Sikorsky S76 C++ carrying nine occupants. The bird impact caused a complete engine failure of the aircraft. Shortly after the impact, eight of the nine persons on board lost their lives. I'm sure some of you will ask, where did this bird hit the aircraft? I suspect some of you are probably thinking it got clogged in the engines. Chris Glover, one of the lawyers handling this case for our firm, says he did too when he first heard of the crash. But, no, this bird simply hit the canopy and windshield. It was an impact that should have done nothing to the flight operations of this helicopter.

The National Transportation Safety Board investigation into this crash concluded that the windshield was not airworthy in the sense that it could not withstand the impact in this very foreseeable collision with the bird. The impact shattered the windshield causing hurricane force wind and noise inside the cockpit. Moreover, the NTSB found that Sikorsky in design placed the engine controls of the S76 C++ only a few inches behind this windshield and that they were susceptible to movement due to impacts. The impact forced the flight controls of the helicopter into the idle engine position effectively turning the helicopter off mid-flight. It all happened so fast that the pilots and passengers had no chance of survival.

Our investigation revealed that AAI, the company that made the windscreen, did no testing or analysis to determine how it would hold up from a bird impact. We also found that Sikorsky had previous problems with this engine throttle coming loose in bird impacts and that a design change made the engine controls less resistant to inadvertent movement. Simple design changes would have made these aircraft safe for these foreseeable impacts. Aircraft of this sort must be designed to be airworthy. If you have a question about aviation safety, please contact Chris Glover or Mike Andrews, two of the lawyers in our firm who handle aircraft cases, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com, or Mike Andrews, at Mike.Andrews@beasleyallen.com.

AGREEMENT REACHED ON ACCESS TO TOYOTA'S SOURCE CODE

An agreement has been reached with Toyota Motor Corp. That will require the company to turn over its source code, the "crown jewels" of the company, to the lead Plaintiffs' lawyers in the multidistrict litigation over sudden acceleration. The source code will provide evidence that defects in the electronic throttle-control system caused sudden acceleration in Toyota vehicles. Toyota has maintained there are no problems with the electronics but has agreed to turn over its source code to Plaintiffs' engineers under stringent security. Judge James Selna, who is overseeing the case in Santa Ana, Calif., has signed an order under seal approving the agreement.

Among the security measures in place are iris scans required for entry into a secure room in a neutral facility where the source code can be accessed. Engineers are required to print documents on numbered paper containing radio-frequency tags. Lawyers on both sides came up with a compromise to have the source code provided on a single computer located in a locked vault, while the engineers worked in the secured room.

Mark Robinson, a senior partner at Newport Beach, Calif.-based Robinson, Calcagnie & Robinson, is co-lead counsel on one of the Plaintiffs' steering committees in the case. The agreement will allow engineers to analyze more than 8 million lines of Toyota's source code. Toyota has recalled 8 million vehicles and paid \$48.8 million in civil penalties due to defective gas pedals and floor mats attributed to sudden acceleration. As you may recall,

Dee Miles from our firm also serves on the PSC in the MDL.

Source: Law.com

XI. MASS TORTS UPDATE

HORMONE THERAPY LITIGATION UPDATE

Last month we reported on the Pennsylvania Appellate Court decision affirming a \$1.5 million dollar compensatory and \$8.6 million dollar punitive award against Wyeth. The Plaintiff's lawyers, Zoe Littlepage and Rainey Booth, did an excellent job both with the trial and appeal of this case. Their client, Mary Daniel, was diagnosed with hormone positive breast cancer after taking Wyeth's hormone pill, Prempro, for 18 months. Since reporting on this decision, we have had folks ask about the verdict track record in this litigation which has been going on for several years now. Ted Meadows, a lawyer in our Mass Torts Section, has put together a chart relating to Prempro jury verdicts. You can find it on our website at www.BeasleyAllen.com or can get a copy by emailing Shanna Malone at Shanna.Malone@beasleyallen.com.

The chart reveals that Plaintiffs have won 12 of 18 trials. The average compensatory verdict has been \$2.6 million, which is certainly understandable given the serious nature of breast cancer. Each time jurors have been allowed to hear the evidence they have found the conduct of Wyeth and/or Upjohn to be so bad as to warrant punitive damages with the average punitive award being \$30.4 million. There are a number of Prempro trials scheduled this year, including two cases our firm will try in Montgomery in July and December. It will be interesting to see what jurors have to say in this litigation in the coming months.

BENZOCAINE PRODUCTS LINKED TO SERIOUS INJURY AND DEATH

The FDA recently issued a warning to the public about the use of over-the-counter products containing benzocaine, a local anesthetic used to relieve pain in the mouth and gums. The product is commonly used for pain associated with teething, canker sores, and irritation of the mouth and gums. The FDA became concerned about products containing benzocaine because

they may cause a rare but serious and possibly fatal condition where oxygen in the blood stream is greatly reduced. This condition is called methemoglobinemia. In the most serious cases, this condition can result in death. Benzocaine products do not currently carry any warnings regarding methemoglobinemia, therefore, the FDA is concerned that consumers might not be aware of the danger or know what to look for when using these products.

Signs and symptoms of methemoglobinemia include pale, gray or blue colored skin, lips and nail beds, shortness of breath, fatigue, confusion, headache, lightheadedness, and rapid heart rate. The FDA is particularly concerned about the use of benzocaine products in children under two years of age. There have been 21 reported cases of methemoglobinemia after using benzocaine gels and liquids. Eleven of the 21 cases occurred in children under age two.

If while using benzocaine products any of the symptoms of methemoglobinemia appear, persons should stop using the product immediately and call 911. If left untreated, serious cases may lead to permanent injury to the brain and body tissues, and even death. Parents are cautioned not to use this product on children less than two years of age unless it is given under the advice and supervision of a healthcare professional. These products should always be kept out of reach of children. The American Academy of Pediatrics recommends that for teething problems in children, safer alternatives such as chilled teething rings or gentle massage to the gums using a cloth or your finger are preferred over benzocaine products. For a list of products containing benzocaine, visit the FDA's website. If you need additional information, contact Danielle Mason, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Danielle.Mason@beasleyallen.com.

MERCK FACES 730 LAWSUITS OVER NUVARING

Lawsuits against Merck over its birth control ring Nuvaring total 730 as of the end of last year, according to the company's annual report. The suits allege that the etonogestrel and ethenyl estradiol combination contraceptive causes blood clotting such as pulmonary embolism, deep vein thrombosis, stroke, heart attack and death, and that the company overmarketed the drug and underwarned about its risks.

Over 600 suits are consolidated in federal multidistrict litigation in the Eastern Dis-

trict of Missouri under Judge Rodney Sipple. The remaining cases are in state courts, with 110 cases consolidated in New Jersey Superior Court. The first trials are expected to be held in the Spring of 2012.

Source: *Lawyers USA Online*

J&J CAN BE SUED FOR INADEQUATE MOTRIN WARNINGS

A U.S. District Court in Pennsylvania has ruled that the maker of Children's Motrin may be liable for failing to warn of the risk of liver damage and a serious skin disorder. The court denied the Defendants' motion for summary judgment. The Plaintiff in that case took Children's Motrin in 1996 when she was nine years old. It was contended that, as a result of taking the over-the-counter pain reliever, she suffered liver damage that required a liver transplant and also developed Stevens-Johnson Syndrome, a serious skin disorder. Children's Motrin is made by a subsidiary of Johnson & Johnson.

The Plaintiff sued Johnson & Johnson under various product liability theories. The pharmaceutical company argued that federal law preempted the Plaintiff's failure-to-warn claim. The court disagreed, explaining that:

If the Plaintiff's only complaint was that the label on the Children's Motrin she ingested in 1996 did not include the words 'Stevens-Johnson Syndrome' or the letters 'SJS,' Defendants might have a more compelling preemption argument. ... But the complaint goes beyond that to allege, inter alia, that Defendants failed to warn that 'if a rash, blistering, and/or mucosal reaction developed, that Children's Motrin should be stopped immediately and medical care should be sought.' ... [T]he FDA ultimately agreed in 2006 that a warning about such symptoms should be placed on Children's Motrin, and recommended such a warning at that time.

The court further concluded that the Plaintiff's evidence was sufficient to show that the lack of a better warning was the proximate cause of her injuries, and that Johnson & Johnson acted with "implied malice" for the purpose of pursuing punitive damages. But, the court ruled that the pharmaceutical company was not liable on the Plaintiff's remaining claims, which included allegations of negligent failure to test and design defect.

Source: *Lawyers USA Online*

A REPORT ON TOPAMAX LITIGATION

The Food and Drug Administration has warned the public of an increased risk of cleft lip and cleft palate in infants born to women treated with Topamax during pregnancy. This warning about serious adverse side effects to unborn children from the drug Topamax will have a definite impact on litigation. Ortho-McNeil's Topamax is approved by the FDA for the treatment of epilepsy and migraines. It was reported that the incidences of cleft lip and cleft palate are 21 times the normal rate of those birth defects.

In March, the FDA issued a warning letter and placed Topamax in Pregnancy Category D, meaning that pregnant women who take the drug are at high risk for developing serious birth defects. Based on the number of folks diagnosed with oral cleft conditions and the number of Topamax users, I'm fairly certain that a large number of suits will be filed. Both Topamax and its generic alternatives have been widely promoted for off-label uses like weight loss and alcohol and drug dependency. As a result, it's difficult to know exactly how many people actually used the drug. There are about a dozen generic manufacturers of this drug. Manufacturers are spread across the United States in states that include Florida, New Jersey and West Virginia.

Last year, Ortho McNeil's parent company, Johnson & Johnson, pled guilty to a misdemeanor under the Food, Drug and Cosmetic Act and paid a \$6.14 million criminal fine for promoting the off-label use of the drug for non-approved uses such as weight loss, alcohol dependence, eating disorders and mood and anxiety disorders. In addition, another subsidiary of the company agreed to pay more than \$75 million in a False Claims Act suit alleging it illegally promoted Topamax and caused false claims to be submitted to the government for unapproved uses.

Source: *Lawyers USA Online*

YAZ CONTRACEPTIVE CARRIES HIGHER RISKS

According to two new studies, the latest generation of birth control pills such as Yaz, Yasmin and Ocella pose a higher risk of blood clotting. The studies, published in the British Medical Journal, found that drospirenone, the new progestin component in the contraceptives, carries a two to three times greater risk of blood clots than previous types of birth control pills containing an older progestin ingredient called levonorg-

estrel. As we have reported previously, there are hundreds of lawsuits pending across the country. Those cases allege that Yaz, Yasmin and Ocella cause blood clots, as well as heart attacks, strokes and gallbladder failure.

Allegations in these cases have been that drospirenone, a diuretic, causes an increase in potassium to unsafe levels, which can disrupt heart rhythms and slow the flow of blood, leading to clotting. Bayer Healthcare Pharmaceuticals is the maker of Yaz/Yasmin. Last spring, the FDA required Bayer to update its ads and promotional materials after the company changed its warning label to include new information about the risk of thromboembolism compared to other contraceptives.

Our firm is handling a number of cases involving Yaz, Yasmin, and Ocella against Bayer. If you need more information contact Roger Smith, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

Source: *Lawyers USA Online*

XII. BUSINESS LITIGATION

MERCK AND J&J SETTLE THEIR DRUG RIGHTS DISPUTE

Drugmakers Merck and Johnson & Johnson have reached a settlement, ending a multibillion dollar arbitration dispute over rights to two lucrative drugs for immune disorders. Merck will pay J&J \$500 million, and the companies will divide distribution rights for Remicade and Simponi, which treat chronic inflammatory diseases like rheumatoid arthritis. J&J will have exclusive marketing rights for the drugs in Canada, Central and South America, the Middle East, Africa and Asia Pacific territories.

Merck retains the exclusive rights through Europe, Russia and Turkey and will divide the profit from those territories with J&J. When you consider the two drugs generate combined sales of several billion dollars annually, it's easy to figure out why the companies did battle. Schering-Plough had split revenue with J&J before Merck bought Schering-Plough in 2009. J&J had started an arbitration bid to gain all global revenue from the drugs. The matter has now been settled.

Source: *Forbes*

TENET SUES CHS ALLEGING MEDICARE FRAUD

Tenet Healthcare Corp. has filed suit against Nashville-based Community Health Systems Inc., accusing the company of padding its revenue numbers by regularly admitting patients who should be seen on an out-patient basis. The suit, filed in U.S. District Court in Texas, alleges that CHS has offered Tenet stockholders \$6 a share, including \$1 in CHS stock, in a takeover bid. The offer is said to be inadequate because of CHS's misleading financial statements. CHS is the parent of Birmingham's Trinity Medical Center. Tenet is the parent of Birmingham's Brookwood Medical Center, competitors in the Birmingham market.

Source: *Birmingham News*

AIG FILES LAWSUIT AGAINST TWO MONEY MANAGEMENT FIRMS

American International Group has sued two money management firms in an effort to recoup billions of dollars it claims were lost due to fraud. The insurer, 92 percent owned by the U.S. government, filed the suit against ICP Asset Management and Moore Capital in New York State Supreme Court. AIG contends it suffered huge losses by insuring mortgage securities that one of the financial firms created.

It was alleged in the lawsuit that the Defendants breached obligations to AIG related to the creation of complex collateralized debt obligations, or CDOs. AIG said it has suffered more than \$350 million in damages from the Defendants' misconduct, which included using inflated values on the mortgage bonds that were packaged into the CDOs. By inflating the values, AIG claims ICP created windfall profits for itself and increased its management fees. The lawsuit draws on allegations against ICP made by the Securities and Exchange Commission, which last year accused ICP of securities fraud. This was said by AIG to be the first of many more such suits to be filed against other companies.

Source: *Insurance Journal*

XIII. AN UPDATE ON SECURITIES LITIGATION

BANKS PUT THEIR OWN INTERESTS ABOVE THOSE OF THEIR CLIENTS

In 2007 JP Morgan Chase had \$500 million in client assets in a Sigma investment vehicle. Recently unsealed documents show that top JP Morgan management had been warned at that time about these investments, but did not move their clients' money. In fact, while the clients lost nearly all their money, its alleged in a lawsuit that JP Morgan made nearly \$1.9 billion by betting on Sigma's collapse. That's because as Sigma's troubles worsened, JP Morgan lent the vehicle billions of dollars and received valuable assets in the form of a security deposit.

A class action filed by several pension funds accuses JP Morgan of breaching its responsibility to keep its clients in safe investments. It's alleged that in the summer of 2007, JP Morgan invested the pension fund's money in notes issued by Sigma that would be repaid based on how Sigma's financial bets performed. Documents reveal that by August of that year JP Morgan executives elsewhere in the bank began to worry about Sigma and other similar entities call structured investment vehicles, or SIVs.

A number of emails circulating among upper management discussed the real probability that the whole sector was in trouble and that JP Morgan, on behalf of its clients, was among the top 12 SIV investors. In fact the bank's chief risk officer wrote that JP Morgan needed to protect the bank's position and not worry about what its clients were invested in.

By early 2008 JP Morgan had made a number of trades with Sigma even as internal documents indicated that management did not believe Sigma would survive, essentially betting the bank's money on Sigma failing and clients' money on Sigma thriving. When Sigma defaulted later that year, JP Morgan had lent it a total of \$8.4 billion and had received \$9.3 billion of assets as a security deposit. The suit indicates that the value of those assets rose and that JP Morgan recorded a gain of \$1.2 billion on assets it held as well as making \$228 million in fees from Sigma in exchange for loans.

JP Morgan clients, the pension funds, were not so fortunate. The suit states their

\$500 million became worth 6 cents on the dollar. The industry is watching this case closely as JP Morgan argues its various units could not share information due to Chinese Walls meant to prevent the spread of non-public information within the firm. However, that argument is greatly weakened by the fact that the documents show the information transcended departments and went all the way to top bank executives. The issue ultimately will be whether executives had a duty to share information that adversely affects their clients' investments. If you need additional information on this subject, contact Scarlett Tuley at 800-898-2034 or by email at Scarlette.Tuley@beasleyallen.com.

Source: *The New York Times*

SENATE REPORT SHOULD BE GOOD FOR INVESTORS' LAWSUITS

A scathing report by a U.S. Senate panel faulted Goldman Sachs Group Inc., Deutsche Bank AG and others for contributing to the financial crisis. This report will be helpful to investors who have filed lawsuits accusing the banks of putting their own interests ahead of those of their clients. The report by the Permanent Subcommittee on Investigations, which incidentally had bipartisan support, gave numerous examples of employees trashing the mortgage debt their banks were selling. Among the examples was a top Deutsche Bank trader who privately described some of the securities as "crap" and "pigs." Another example involved a Goldman salesman announcing, "I think I found a white elephant, flying pig and unicorn all at once" in identifying a potential buyer for debt that his bank created. That sort of corporate mindset tells us lots about how bad these companies really were. Does this sort of talk remind you of a certain Texas company that hurt so many people a few years ago?

A good number of investors lost money from the securities being sold by the companies mentioned in the report. I believe the matters referenced in report will be extremely helpful in the investor litigation. The report comes after two years of work and refers to thousands of confidential emails and other documents. The report depicts Wall Street as a runaway machine that bundled risky debt into collateralized debt obligations and other types of securities to win big fees, even as it worried that the resulting mess could unravel.

Among other entities whose actions or inaction the report addressed are the bank-

rupt Washington Mutual Inc., credit agencies Moody's and Standard & Poors, and regulators including the Office of Thrift Supervision. The report describes how Goldman and Deutsche Bank deceived clients into buying securities that the banks suspected were likely to implode and bet against with their own money. This appears to be the strong belief of the investigators who did the work resulting in a very revealing report.

Interestingly, the report stops short of calling for sanctions against individual executives, traders and directors. It's even more interesting that no senior bank officials have been held criminally liable in the United States for wrongdoing directly tied to the financial crisis. That's rather difficult to understand. Surely some criminal laws were violated based on what we have learned in litigation arising out of this sort of thing.

Source: *Insurance Journal*

XIV. INSURANCE AND FINANCE UPDATE

GOV. BENTLEY FORMS COASTAL INSURANCE COMMISSION

Gov. Robert Bentley has created a commission to study coastal insurance issues in Alabama. This is a prelude to a Special Session of the Legislature that the Governor has promised for later this year to address this most serious problem. Governor Bentley stated:

The lack of affordable homeowners' insurance for people who live on Alabama's coast impacts the entire state, far beyond the coastal communities. We must stop the rising cost of coastal insurance for the benefit of all Alabamians.

Gov. Bentley will appoint seven members of the commission, which will be "a diverse pool." The insurance panel of the Coastal Recovery Commission of Alabama—the oil spill recovery group—made more than 30 recommendations to restructure coastal insurance. The Homeowners' Hurricane Insurance Initiative, a group of residents in Mobile and Baldwin counties, wants insurers to reveal a history of premiums that they're collecting and losses that they're paying out, broken down by ZIP code. That certainly seems reasonable.

State Sen. Ben Brooks, R-Mobile, who has become a real leader in the state Senate, has

introduced seven bills that would definitely improve the current situation. He says insurers are using the pledge of a later Special Session to delay action in the ongoing Regular Session. The bill comes out of a Senate committee and, at press time, we were awaiting action by the full Senate. Senator Brooks supports the Governor's commission and he had this to say:

The Governor is new to office, and I believe the Governor is committed to insurance reform. I believe that this is part of his effort to evaluate proposed solutions and bring this issue to a head in the fall.

Individuals and businesses in our coastal counties need to have access to good, affordable insurance coverage. If you agree with that assessment let members of your legislative delegation know and ask them to help get the needed legislation passed. You might also let Gov. Bentley and Sen. Brooks know you appreciate their efforts.

Source: AL.com

THERE ARE LOTS OF UNINSURED VEHICLES ON OUR ROADWAYS

It appears that a tremendous number of vehicles on our nation's highways are not covered by liability insurance and are therefore uninsured. Across the United States, chances are roughly one in seven that a driver is uninsured. The estimated percentage of uninsured motorists stood at 13.8 percent in 2009, according to a new study from the Insurance Research Council (IRC). The group said the percentage declined four straight years before rising to 14.3 percent in 2008 and then dropping slightly in 2009.

The six states estimated to have the highest percentage of uninsured drivers are Mississippi with 28%, Alabama with 26%, and New Mexico with 26%, Tennessee with 24%, Oklahoma with 24%, and Florida with 24%. This is according to new estimates from IRC that are based on 2009 data. The five states estimated to have the lowest percentage of uninsured drivers are Massachusetts with 4.5%, Maine with 4.5%, New York with 5%, Pennsylvania with 7%, and Vermont with 7%. The research group says the economic downturn is likely a major factor in the brief increase in 2008.

In the ITC's new study, Uninsured Motorists, 2011 Edition, the estimates are based on the ratio of uninsured motorist (UM) insurance claim frequency to bodily injury claim frequency. UM claims are made by

individuals who are injured in accidents caused by uninsured drivers. Bodily injury claims are made by individuals injured in accidents caused by insured drivers. The study confirms that the magnitude of the uninsured motorist problem varies from state to state. Elizabeth A. Sprinkel, senior vice president of the IRC, had this to say:

Despite laws in many states requiring drivers to maintain insurance, about one in seven motorists remain uninsured. This forces responsible drivers who carry insurance to bear the burden of paying for injuries caused by drivers who carry no insurance at all.

The IRC study examines data collected from nine insurers, representing approximately 50 percent of the private passenger auto insurance market in the U.S. The IRC provides research on public policy issues affecting insurance companies and their customers. It is supported by property/casualty insurance organizations. Persons who do have insurance covering them and their vehicles should carry the highest amount of uninsured motorist coverage available to them. In the event an insured driver is involved in a motor vehicle crash with another driver who is either uninsured or under-insured, that becomes critically important.

Source: *Insurance Journal*

STATE FARM ORDERED TO PAY \$350 MILLION

As the result of a Texas court order, State Farm Insurance will have to pay nearly \$350 million to customers it overcharged dating back to 2003. State District Judge Tim Sulak found that Texas Insurance Commissioner Mike Geeslin acted properly when he ordered State Farm Lloyds, the company's homeowners subsidiary, to reimburse an estimated 1.2 million customers for overcharges as well as penalty interest.

According to the Insurance Department, as well as the state public insurance counsel, who represents consumers' interests, State Farm continued to overcharge customers for several years despite warnings from regulators that its rates were too high. State Farm claimed it owed nothing and said it has charged premiums for the past several years that were competitive with other companies. The dispute is over premiums charged for homeowners coverage between 2003 and 2008.

A new report from the Insurance Department indicated that State Farm had a very

profitable year in 2010, after paying out just 52 percent of its premiums to cover property losses. The 52 percent “loss ratio” was close to the state average of 48.4 percent for the 20 largest companies and significantly better than the 60 percent loss ratio that is considered a benchmark for profitability in Texas. Last year, State Farm Lloyds collected nearly \$1.7 billion in homeowners premiums in the Lone Star State.

The commissioner’s order for refunds was handed down in November 2009. Commissioner Geeslin called on State Farm in the order to either issue refund checks or provide a credit on policy renewals. Refunds for longtime customers were expected to range between \$200 and \$300.

Source: CHRON.com

JURY ORDERS STATE FARM TO PAY ITS INSURED DRIVER \$3 MILLION IN LAWSUIT

A Florida school teacher has been awarded \$3 million in damages after a jury found that State Farm Insurance Company refused to live up to its contract on a 2008 car accident. David Bowler, a State Farm insured, suffered a fractured neck and wrist in the accident. He filed suit against State Farm for damages and medical costs. The other driver involved in the crash, Randall Spivey, had only \$25,000 in liability insurance coverage. The Plaintiff had over \$2 million in uninsured motorist coverage that State Farm refused to pay. In its defense, State Farm claimed it was willing to negotiate a settlement for a lesser amount, but that the Plaintiff refused its offer to negotiate. In any event, State Farm refused to pay and a jury heard the case.

The jury ruled that State Farm had an obligation to pay the Plaintiff nearly \$3 million for medical costs and pain and suffering arising out of the accident. In Florida, all motorists are required to carry uninsured motorist coverage to insure against bodily injury and property damage in the event the motorist suffers injuries and the other driver either has no insurance or doesn’t have enough coverage to pay for the total amount of damages. The latter situation is referred to as underinsured motorists coverage. It’s pretty evident that State Farm should have at least defended the claim in a different manner.

Source: *Insurance Journal*

FLORIDA JURY AWARDS \$76 MILLION VERDICT

A Miami-Dade District Court found the former owners of Aries Insurance Co. guilty of diverting funds for personal use. The jury awarded a \$76 million verdict against former Aries owner Marcos Fraynd and his three children Paul Fraynd, Saul Fraynd and Fanny Fraynd. Aries was declared insolvent in 2002, leaving behind roughly 58,000 policyholders and creditors with unpaid claims. The Florida Insurance Guaranty Association and the Florida Workers’ Compensation Insurance Guaranty Association have paid out more than \$165 million to Aries claimants thus far and that figure is expected to top more than \$170 million when all claims are resolved.

The jury verdict will repay the guaranty funds for some of their payouts. In 2006, the state Department of Financial Services filed suit against the former owners and directors of Aries for diverting policyholder premiums and illegally distributing the money for personal use. The department so far has recovered over \$20 million from other parties through previous lawsuits. The company wrote personal and commercial auto and workers’ compensation business. In 2007, the Fraynds pled guilty to criminal charges and received various sentences for their roles in the insurer’s insolvency.

Source: *Insurance Journal*

STATES ARE INVESTIGATING LIFE INSURERS

States are investigating whether some of America’s largest life insurers are failing to ensure that they pay out on policies of deceased customers. This is a battle that could result in hundreds of millions of dollars going to consumers and state coffers. About three years ago, Verus Financial LLC, a little-known auditing firm, tried to get cash-strapped states to identify unclaimed life policies that those states could seize as abandoned property. Some 35 states eventually signed up for the project, agreeing to give the audit firm a portion of any money recovered. The Waterbury, Conn., firm is now examining nearly two dozen insurers. It will be very interesting to see how this works out.

Source: *Wall Street Journal*

TOM HANKS AND RITA WILSON FILE SUIT AGAINST INSURANCE BROKER

Actor Tom Hanks and his wife, Rita Wilson, have filed a lawsuit seeking

damages against their former insurance broker. It appears that the couple previously worked with the J.B. Goldman Insurance Agency for more than 20 years to secure various insurance coverages. Their lawsuit claims that when they switched brokers recently, the new broker discovered they were insured multiple times for the same things, and were being overcharged hundreds of thousands, if not millions, of dollars. This promises to be a most interesting case!

Source: *Insurance Journal*

XV. EMPLOYMENT AND FLSA LITIGATION

UPS CONTRACTORS WIN CLASS CERTIFICATION IN OVERTIME SUIT

A federal judge in Florida has conditionally approved collective action treatment for a group of UPS driver contractors who claim they should be treated like employees and paid overtime and minimum wage. The Plaintiffs said that they are unable to work for other companies because of restrictions placed on them by UPS. As such, the Plaintiffs allege that UPS wrongfully treats its drivers as independent contractors when they are more like employees, and uses the contractor status to deny them overtime and minimum wage.

The court found that Plaintiffs had offered sufficient proof that other similarly situated Plaintiffs exist and are interested in joining this action. The court ordered UPS to provide Plaintiffs’ counsel with the names and addresses of drivers nationwide so they can be notified of the suit.

Source: Law 360

CALL CENTER REPRESENTATIVES FILE FLSA ACTION

Several call center representatives of Farmers Insurance Group, 21st Century Insurance Co. And AIG Insurance Services, Inc. have filed a lawsuit in California alleging the insurers failed to pay them earned wages and overtime compensation. The lawsuit alleges that call center representatives engage in preparatory activities, as well as related work activities, during breaks and at the end of the work day. Courts have recognized that preparatory work duties “that are integral and indispen-

sible to the principal work activity” are compensable under the Fair Labor Standards Act.

According to the Complaint, the Defendants’ policies require the customer service representatives to be ready to answer a call at the beginning of their scheduled shift. However, a number of critical tasks must be performed before a representative is ready to answer a call. Plaintiffs contend they should be entitled to compensation for the time they spend working pre-shift, post shift and over unpaid meal breaks.

Source: Law360

LEVI STRAUSS SETTLES OVERTIME CASES

Levi Strauss will pay more than \$1 million in back overtime pay to almost 600 workers nationwide. A Labor Department investigation found Levi Strauss violated the federal Fair Labor Standards Act’s overtime and recordkeeping provisions. The investigation covered back pay for time worked over a two-year period. It was determined that the blue jeans maker misclassified some groups of employees, including assistant store managers of newly-acquired stores, as exempt from overtime. While assistant managers of existing stores were exempt from overtime pay, newly-hired workers were not.

The Labor Department also said Levi Strauss did not record all hours employees worked in its payroll system, with some assistant store managers required to work off-the-clock during certain times. Levi Strauss has agreed to pay the back wages, upgrade its time and attendance system and comply with the law in the future. The privately-held San Francisco company operates 164 stores and has more than 4,000 employees in the U.S. Its global operations cover more than 100 countries.

Source: *USA Today* and Associated Press

XVI. PREMISES LIABILITY UPDATE

JURY AWARDS WOMAN \$21 MILLION IN WAL-MART LAWSUIT

A \$21 million verdict was returned recently in a work-related case by a Pike County, Ala. jury. The Plaintiff, Rebekah Blades, suffered a life threatening injury at a Wal-Mart facility in 2008. The Plaintiff, who was 26 at the time of the accident, was

injured while working in one of the 14 banana ripening rooms at the Wal-Mart distribution center in Brundidge.

The center had expanded its capacity to handle produce, which included the large banana rooms that were about 30 feet tall. On the date in question, a 3- to 4-foot-tall metal plate which covered the trim at the top of one of the room’s doors, fell 30 feet as Ms. Blades stood in the doorway, striking her in the face. The woman’s face was literally cut open resulting in nerves and muscles in her face being severed. This was a most severe and disabling injury.

The lawsuit was filed against Thermal Technologies and its contractor, Hesel Contracting, which built the banana rooms along with their doors. The metal plate fell from the top of the doorway because it wasn’t properly secured with bolts. The outside contractors failed to follow their own plans and safely secure the piece of the metal that struck Ms. Blades in the face. Ms. Blades had reconstructive surgery on her face, along with plastic surgery to repair the scarring. In the days following the accident she developed seizures, which now occur on a regular basis. She also is at risk of a condition called sudden epileptic death. Because of her injuries, including the seizures, Ms. Blades can’t be alone and can’t care for her child. On one occasion, Ms. Blades had an episode and fell down the stairs with her child in her arms.

Mark Andrews, Cory Driggers and Dan Talmadge, lawyers with the Dothan firm of Morris, Cary, Andrews, Talmadge and Driggers, along with Richard Calhoun from Troy, represented Ms. Blades. They did an outstanding job in this case. I understand there was a high-low agreement agreed to by the parties prior to trial which means there will be no appeal by the Defendant in this case. The high number will be paid by the Defendant’s insurance carrier.

GUILTY PLEA IN SWIMMING POOL DROWNING CASE

A swimming pool company president charged in the death of a Connecticut boy in a 2007 drowning has pleaded guilty to criminally negligent homicide for not installing a state-mandated safety device. David Lionetti’s company, Shoreline Pools, also pleaded guilty to second-degree manslaughter and will pay \$150,000 for water-safety advertisements. The company failed to install a required safety device that would have prevented the boy’s arm from getting stuck in a powerful pump drain,

prosecutors alleged. This caused the death of six-year-old Zachary Cohn in 2007.

Had the safety device been installed, it would have detected the drain obstruction and turned the system off. A witness, the past president of the Northeast Pool and Spa Association, testified that he told Lionetti about the new state law as part of an awareness campaign the trade group conducted in October 2005. The trade group also sent alerts to Shoreline Pools about code changes. It appears that numerous employees of Shoreline Pools, including Lionetti, attended annual trade shows where the devices were displayed and marketed. Under the plea agreement, Lionetti will perform 500 hours of community service and repair 100 pools to comply with legal requirements and building codes.

Since 1985, more than 150 cases have been reported around the country of swimming pool drain entrapments, leading to at least 48 deaths. The entrapments also have caused many serious injuries, including dismemberments, of children and adults. I believe this is the first case where criminal charges were brought and the case settled by a guilty plea.

Source: *Insurance Journal*

LAWSUIT AGAINST DISNEY IN FATAL MONORAIL CRASH SETTLED

A wrongful death lawsuit, filed by the mother of a Walt Disney World monorail worker who was killed in 2009 while he was on the job, has been settled. The settlement is confidential and part of the court record is now sealed. Austin Wuennenberg, a 21-year-old Disney monorail pilot, was killed on July 5, 2009, when two monorails collided. His mother, Christine Wuennenberg, filed suit against Walt Disney Parks and Resorts in early 2010.

The crash occurred after midnight near the end of a workday. A monorail train was backing along a track switch that was supposed to re-align but didn’t, switching the monorail from the resort’s Epcot line to a short spur leading to a Magic Kingdom line. Since the switch never re-aligned, the train wound up driving in reverse, smashing into a second train piloted by the decedent. Disney has since said that the monorail pilot was told to go in reverse and that, before the collision, there was an incorrect report that the track switch had been aligned properly.

Source: *Orlando Sentinel*

JURY AWARDS \$18 MILLION AGAINST CITY FOR DANGEROUS CROSSWALK

A California jury found the city of Sacramento liable and returned an \$18 million verdict for not fixing or closing a dangerous crosswalk where a young doctor was struck by a car. The doctor, who was at the top of her residency program, had already authored important cancer research despite her young age. As a result of the accident, Dr. Cathy Liu suffered brain damages and is no longer able to practice medicine.

Dr. Liu, a 26-year-old first-year internal medicine resident, was about halfway across a busy two-lane street when she was struck by a car switching lanes. The intersection, which accommodated 16,000-20,000 vehicles per day in a 30 mph zone, had a crosswalk, but no signals. The intersection was situated in the middle of a big S curve. It was contended the intersection was dangerous and the city knew about it, but failed to either close the crosswalk or put up proper signals.

The city's own records showed that it had planned to change the intersection since 2001. The main purpose of redesigning the intersection appeared to be to make it safer for pedestrians. A letter from the city's mayor a year before Dr. Liu's accident encouraged the state public utilities commission to support the change, saying the redesign would "increase the level of safety for pedestrians" and force traffic to slow down considerably.

A 2002 federal highway administration study found that intersections with more than three lanes that have a marked crosswalk but no signal increases the risk pedestrians will be hit by four and a half times. Another danger of putting the crosswalk at that location was that trees blocked a pedestrian's ability to see oncoming traffic. The city's own pedestrian safety standards recommended that any crosswalk in a 30 mph speed limit zone where 15,000 cars passed per day have either a traffic signal or a pedestrian bridge. City engineers testified about their six-year effort to redesign the intersection.

During the trial, the Plaintiff's attorney and the city agreed to a high-low arrangement that guaranteed \$1 million, but capped damages at \$6 million. The jury awarded \$18 million, but found the city 51 percent at fault, Liu 10 percent at fault and the driver 39 percent at fault. Before the jury returned its verdict, a high-low agreement with the city Defendant was reached. Dugan Barr, of Barr & Mudford in Redding, Calif., represented the Plaintiff and did a very good job.

Source: *Lawyers USA Online*

FLORIDA FAMILY AWARDED \$6.9 MILLION IN SCHOOL-RELATED CASE

The family of a Florida high school student who suffered permanent brain injury at an after-school fundraiser in 2007 was awarded nearly \$6.9 million by a judge. Tatiana Abernathy, and her son, Dakota, 18, were awarded the money by First Judicial Circuit Judge Thomas Remington, who granted a motion for summary judgment for the Plaintiff. The \$6.9 million, plus attorney's fees and court costs, were awarded against Interstate Fire and Casualty Company and the Choctaw Touchdown Club, Inc. The case also involves product liability claims against Funtastic Factory, Inc., and Emerald Coast Entertainment, LLC, which are still pending.

In April 2007, Dakota Abernathy, an eighth grade student at the time, was critically injured while playing on an inflatable "bungee run." The student was participating in the First Annual Jellyfish Festival at Choctaw High School's football stadium. The school's Touchdown Club, made up of football patrons, school alumni, parents of players and family members who want to help the athletic program, was sponsoring the fundraiser. The young man was strapped into bungee cords. He ran to the end of what resembled a bowling alley lane and was snapped back to his starting place by the cords. In the bungee run, the harder the participant strains against the bungee cords, the harder the recoil.

After completing the bungee run, Dakota complained of being dizzy, threw up and went into convulsions. He was airlifted to a hospital in Pensacola where he underwent emergency surgery to remove a piece of his skull to ease brain swelling and drain blood buildup from a severe subdural hematoma. The youngster, who was in a coma, was placed on a ventilator. Doctors described his condition at the time as "shaken baby syndrome multiplied."

Dakota survived and went through months of rehabilitation at a hospital in Atlanta. He is now a senior in school and, with special provisions, will graduate this year. His plans to be an Air Force pilot will never materialize. Dixie Dan Powell, a lawyer with Powell Powell, & Powell, a law firm in Crestview, Fla. represented the family in the lawsuit and did a very good job. The Defendants have appealed the judge's decision.

Source: *crestviewbulletin.com*

LAWSUITS IN LOGAN CANAL BREACH SETTLED

Two lawsuits that were filed following a canal breach that killed a mother and her two children in 2009 have been settled. A wrongful death suit was filed in a state court against the City of Logan, Logan and Northern Irrigation Co., Utah State University, the Utah Department of Transportation and Eric Ashcroft, alleging the entities were aware of a dangerous condition, but failed to take adequate action. The city, UDOT and the company own and operate the canal and land around it and USU owns the hillside. Victor Alanis' two children and his wife died when the canal above their home broke July 11, 2009, sending a torrent of water and mud down the hillside. Mr. Alanis was away from home at the time.

Mr. Alanis reached agreements in late February with all the Defendants except Ashcroft, who owns the rental home involved in the incident. It was alleged that the landslide "flattened" the residence and buried the family alive. Various studies showed the bluff that held a portion of the Logan Northern Canal was hazardous and prone to landslides. Despite being notified in the days before the excessive water and runoff breached the canal, the Defendants failed to adequately inspect the area or warn residents of the potential danger.

A next-door neighbor also filed a lawsuit against the city, the canal company and UDOT after his home was damaged. He settled his claim in late March. It was alleged in this suit that the city and UDOT knew for years of a potential canal failure, but did not warn homeowners. The house was flooded on two levels with runoff from the canal break. Debris from the ensuing mudslide filled the kitchen, living room, family room and basement.

Source: *deseretnews.com*

OHIO STATE SETTLES ELEVATOR DEATH LAWSUIT

The parents of an Ohio State University freshman killed in an elevator accident have settled their lawsuit against the school. The Plaintiff's reached a \$1 million settlement with the university. The student, Andrew Polakowski, died on October 20, 2006, when he was pinned trying to leave an overcrowded elevator that was stuck between floors. The settlement also calls for \$612,500 in contributions to Ohio State toward the settlement from five companies involved in the manufacture and maintenance of elevators.

After the accident, the University reviewed how it handles elevator upgrades, repairs and emergency calls. Also, Ohio State now posts safety messages inside all elevators and adds extra messages outside dormitory elevators. The university also addresses elevator safety for all students the day they move into a dorm.

It was alleged in the lawsuit that the school was negligent with regard to the elevator that crushed the 18-year-old student. At the time of the accident, the elevator was crowded with 24 people, exceeding its weight capacity by as much as 1,100 pounds. Students piling onto the already-crowded elevator car may have encouraged still more people to enter, according to the police report on the accident which was released in 2007. After the lawsuit was filed, Ohio State University argued it was not responsible for the student's death because his own negligence caused or contributed to his injuries. Ohio State said the student helped to overcrowd the elevator, causing it to become stuck between floors. Peter Weinberger, a lawyer from Cleveland, represented the Plaintiffs in this case and did a very good job.

Source: Associated Press

SETTLEMENT REACHED IN DENTAL OFFICE CASE

A settlement has been reached in a lawsuit filed after a 20-year-old high school graduate suffered brain damage during a 2009 dental procedure in Lawrence, Kan. The lawsuit was filed in 2010 on behalf of Austin Stone by his guardians alleging oxygen and nitrous oxide lines were crossed during the design and construction of a new dental office. Stone had visited the office to get four wisdom teeth removed by the dentist, an oral surgeon, on March 30, 2009. Stone, who was in a coma after the incident, is now legally blind and has other health issues.

In January, a judge approved a \$3 million settlement in the case between Stone's family and Action Plumbing Inc. of Lawrence. The plumbing company installed medical gas lines at the new office. The amount of this settlement with the dental office, which was reached during mediation, was confidential under the agreement. The City of Lawrence was included as a Defendant because inspectors should have caught the switch in the lines. Other than the city and the dentist, other Defendants were Patterson Dental Supply Inc. of Topeka; Blanchard Design Group LLC of

Lawrence, the project's architect; general contractor Design Build Collaborative LLC of Lawrence; and mechanical engineers Hoss & Brown Inc. of Lawrence.

Source: LJWorld.com

JURY AWARDS FAMILY OF OFFICER \$37.5 MILLION

The family of Daniel Golden, a Huntsville, Ala. police officer, who was killed in a shooting, was awarded \$37.5 million in punitive damages by jury in Madison County, Ala. The officer's family sued Benito Albarran, the man who shot him, and El Jalisco Mexican, the restaurant where Albarran worked. The jury awarded the family \$25 million against Albarran and \$12.5 million against the restaurant. Officer Golden was killed in 2005 after answering a domestic dispute call at the restaurant. He was shot twice in the head and died from his wounds. Albarran was sentenced to death for the crime in 2008 and is on death row.

The restaurant was responsible for Albarran being drunk the night he shot Officer Golden. Alabama's dram shop law prohibits restaurants which serve alcohol from serving working employees and from serving anyone to the point of intoxication. Matt Milner, one of the lawyers for the family, said after the verdict:

The jury stood up for the Golden family, the Huntsville Police Department and the entire community.

Hopefully, this verdict will deter restaurant owners, operators and employees from serving any patrons to the point of intoxication or after having too much to drink. The verdict should send a message to other bars and restaurants that think the dram shop law doesn't apply to them. Obviously, the dram shop act was meant to protect the public from drunk drivers.

Source: *The Huntsville Times*

XVII. WORKPLACE HAZARDS

WORKERS' COMPENSATION REACHES A MILESTONE

This year marks the 100th anniversary of the workers' compensation system in the

United States. The system was originally designed as a trade off whereby workers would be compensated when they received an on-the-job injury without having to prove fault. In the trade, however, the worker gave up significant rights and could not file suit against his or her employer regardless of how bad the conduct causing the injury might be.

The amount of compensation under most state laws was scheduled and therefore limited. While other countries and even pirates had systems in place going back to the 18th century, the United States didn't have a workers' compensation system until the early 1900s. I believe Maryland was the first with a system in place in 1902. Many of the early acts were ruled unconstitutional as a violation of due process. Wisconsin was the first state to enact a system that survived legal challenge. Plans in the various states have evolved from that plan. Alabama joined up in 1919 with Mississippi being the last state to pass a law in 1948. I am not familiar with other states, but Alabama's current law favors the employer and may be the worst for workers in the country.

\$4.1 MILLION VERDICT IN WORKPLACE ACCIDENT CASE

A jury in Jefferson County, Texas, recently returned a verdict against United Scaffolding. The jury found that the company was 5 percent responsible for the Plaintiff's head injury and awarded Louie Meiers more than \$4.1 million in damages. On May 31, 2006, while working near a scaffold, Meiers suffered a head injury when a co-worker inadvertently pushed a 4-by-4 inch board off the scaffold's walkway. Meiers and other Performance Contractors employees were working at the Valero refinery when the incident occurred. There were no guards in place on the walkway to prevent board from being pushed off.

The jury found that Performance Contractors, Meiers' employer at the time, was 80 percent responsible for the incident. Jurors also found Jacobs Engineering, a third party in the suit, 15 percent responsible. Jurors assigned the remaining 5 percent of responsibility to United Scaffolding. Meiers was awarded \$1,500,000 in damages for mental anguish, \$790,000 in medical expenses, \$1,293,000 in lost wages and \$593,000 for his disabling impairment.

Source: setexasrecord.com

WOMAN WINS LAWSUIT AGAINST GOODYEAR

A jury in North Carolina has awarded \$450,000 to a woman who says she was wrongly fired from Goodyear Tire and Rubber Co.'s Fayetteville plant. The Plaintiff, Lashanda Shaw, was awarded the money in compensatory damages following a five-week trial at the Cumberland County Courthouse. Jurors unanimously decided on the compensatory damages, but voted not to award punitive damages.

The jurors found that Ms. Shaw was not discriminated against because of her race or sex, but determined that she was fired for making a complaint of discrimination. The jury also decided that the firing caused her severe emotional distress. Ms. Shaw filed the lawsuit against Goodyear and a night supervisor, Doug Swain, in 2009. According to the complaint, Ms. Shaw was hired by Goodyear in September 2007 as an area manager and was fired in August 2009. Ms. Shaw was the only African American area manager in her part of the plant, and her supervisor routinely harassed her during her employment. She was fired after filing a complaint with the Equal Employment Opportunity Commission.

On numerous occasions Ms. Shaw had complained of harassment and discrimination. There is no place in the workplace anywhere in the U.S. for harassment, discrimination and relation. A zero-tolerance policy in regards to complaints by employees should be the rule. Harvey Kennedy, who is with Kennedy, Kennedy, Kennedy and Kennedy, a firm located in Winston-Salem, represented Ms. Shaw and did a very good job.

Source: fayobserver.com

DUBOSE CONSTRUCTION CITED FOR SAFETY VIOLATIONS

The federal Occupational Safety and Health Administration has cited Dubose Construction Co. for exposing workers to potential cave-in hazards while relocating a water valve in Montgomery, Ala. The proposed penalties are \$46,970 in total. OSHA said the company is being cited for one willful safety violation with a proposed penalty of \$46,200 for exposing workers to cave-ins while working in an unprotected trench more than seven feet deep. Dubose Construction also received an other-than-serious citation with a \$770 penalty for not certifying a log of work-related injuries and illnesses in 2008. "The lack of cave-in protection at this worksite leaves Dubose Construction employees at risk of injury or

death," Kurt Petermeyer, OSHA's area director in Mobile, said in a statement.

Source: AL.com

XVIII. TRANSPORTATION

ALABAMA TRAFFIC FATALITIES ON THE RISE

A report from the Alabama Department of Public Safety says more people have died on Alabama's roadways this year than in the same period last year. The numbers are interesting since there were statewide and national declines in traffic fatalities over the last several years. It was reported that 137 people have been killed in traffic accidents since January, up from 129 at this time last year. There were 528 traffic fatalities investigated by State Troopers in 2010, a decline from 541 in 2009.

According to Trooper spokesman Kevin Cook, factors in the increase of deaths include distracted driving, speeding and drunks following too close. Troopers are implementing data-driven enforcement, which includes Trooper commanders incorporating more driver license checkpoints and patrols in areas more prone to crashes. Hopefully, all of this will result in fewer accidents and fewer deaths.

Source: Associated Press

MOTOR VEHICLE CRASH CASE SETTLED IN BIRMINGHAM

On the night of the annual football game between Alabama and Auburn in 2009, Cedric and Kedric Ballard were riding on a city street with their cousin, Daniel Brannon, in a Chevrolet Cavalier. They stopped for a red light and a van being driven by Curtis Lee Davis Jr., an employee of Carpet Care, violently collided with the rear of the Brannon vehicle. Davis was under the influence of alcohol at the time of the wreck and has subsequently been charged with murder and aggravated battery. Daniel Brannon was killed in the crash. His two passengers, and kin, only received minor injuries.

Carpet Care took the position that Davis was not their agent and was not working in the scope of his employment at the time. As a result, the employer argued that it should not be responsible for the crash. The case was settled for the liability insurance policy limits on the eve of trial. LaBarron Boone, a

lawyer in our firm's personal injury section, handled the case and did a very good job for the Brannon family.

TOUR BUSES NEED STRONGER AND MORE EFFECTIVE REGULATION

It has been reported that two tour bus companies in the United States have not received full government safety audits in more than two years. That is true even though roadside inspections have found problems that were serious enough to place the companies involved on what is referred to as "alert" status. These companies are but two of the hundreds of tour bus companies that have been cited for major safety violations.

The companies have received very little oversight or regulation of their full operations. This obviously is not good news. The government lists 433 companies on alert status. For your information, alerts are based on spot inspections of buses and drivers in the previous two years that found repeated or serious safety violations. It's most alarming to see the poor job being done by the Federal Motor Carrier Safety Administration, the federal agency that has the duty to oversee bus and truck safety.

LOG TRUCK CRASH VICTIM AWARDED \$13 MILLION

A jury in Nassau County, Fla., awarded nearly \$13 million recently to a woman whose life was forever changed by a collision with a poorly-lit log truck in 2005. Kecia Huckleby, who was 17 years old at the time, was riding home with her boyfriend on September 14, 2005. They were on a state highway near Hilliard, Fla., when a log truck attempted a U-turn in the dark just beyond the crest of the hill. Ms. Huckleby and Chandler Crumbley, the driver, received life-threatening injuries in the crash. The truck driver, Mark Masters, came out of the collision unharmed.

The jurors found the truck's driver, along with the trucking company, John T. Lee Inc., at fault and responsible for the wreck. The Florida Department of Transportation was found partially at fault for not posting a "no U-turn" sign on the road.

Ms. Huckleby suffered serious head injuries, was in a coma and has little memory of the crash. According to her mother, Rhonda Huckleby, the journey for her daughter has been very difficult. The jury assigned partial blame to Ms. Huckleby, because she was not wearing a seat belt. Crumbley, who was

driving the car, was also found by the jury to be partially at fault, but not responsible for the wreck. Robert Link, who is with Pajcic & Pajcic, located in Jacksonville, Fla., represented the Plaintiffs and did a very good job.

Source: news4jax.com and lawyersusaonline.com

JURY AWARDS \$2.8 MILLION TO FAMILY OF BIKER

The young daughter of a 23-year-old Palm Coast man who was killed while riding his motorcycle has been awarded a \$1 million verdict by a jury in Florida. The jury award was part of \$2.8 million in total damages returned to the survivors of Brian Heikkila, who died when a car struck his motorcycle on May 30, 2007, on a city street in Daytona Beach. Heikkila, who worked as a manager for Walmart, was riding his motorcycle near Halifax Health Medical Center. A Ford Mustang driven by Michael Hemphill, who failed to yield the right of way, collided with Heikkila, resulting in his death. The suit sought damages for pain, suffering and mental anguish.

In addition to \$1 million awarded to Heikkila's five-year-old daughter, Ryleigh, his parents will each receive \$500,000 under the verdict. Another \$798,000 was awarded for economic damages, including \$4,200 for funeral expenses. Heikkila, who was from Georgia, moved to the area in 2005. He enjoyed skateboarding, the outdoors and was a member of Tomoka Christian Church, his family said. David Sweat, a lawyer from Athens, Ga., represented the Plaintiffs and did a very good job.

Source: news-journalonline.com

SUIT FILED IN CASE OF WOMAN KILLED BY MONSTER TRUCK

The parents of a college student who was struck and killed by a monster truck outside a club in Dallas, Texas on March 17th have filed a wrongful death lawsuit against the driver of the truck and the club. The student, Kasey McKenzie, 23, was killed while leaving with friends after a party at the club shortly after 2 a.m. Eric Brent Crutchfield pulled his custom 2003 Ford F-250 truck out of a parking space and ran over the victim with both front and rear tires. Ms. McKenzie died at the scene.

The lawsuit alleges that the club was negligent because bartenders served Crutchfield past the legal limit of intoxication and allowed him to get in his vehicle and drive, even though it was apparent he was drunk.

Crutchfield told officers at the scene that he never saw the victim. The lawsuit also alleges that Crutchfield was driving with a suspended license and was so intoxicated at the time of Ms. McKenzie's death that he didn't know he had hit anyone.

It was alleged that Crutchfield's truck had a lift kit that limited his field of vision and that it did not comply with federal and state regulations. Crutchfield was charged with intoxication manslaughter after his blood alcohol level was shown to be 0.18, more than twice the legal limit at 0.08. Ms. McKenzie was enrolled at the University of North Texas and was on schedule to graduate with a degree in economics and international finance.

Source: Star Telegram

XIX. NURSING HOME UPDATE

HIDDEN CAMERA SHOWS NURSING HOME WORKERS ABUSING WOMAN

Family members of a 78-year-old woman used a hidden camera to capture nursing home employees in Haverford, Penn. hitting and taunting the resident. The video shows employees at the Quadrangle senior living facility hitting the woman who suffers from dementia, pulling at her sensitive ears, poking her eye and refusing to help her put on her shirt. Delaware County District Attorney Michael Green said:

The video depicts criminal activity directed at a senior victim in our county. It's abusive. ... It's the humiliation which is most difficult to watch on the video. No senior resident of a facility should be subjected to that kind of behavior, particularly from a health care provider.

The employee on camera was arrested and charged with aggravated assault and simple assault. Two other employees were also charged with the same offenses. The investigation is ongoing. The camera, hidden in a bedroom clock, was placed in the resident's room by her daughter and son-in-law after Quadrangle officials denied that the woman was being abused. The episode shown in the video is revolting, showing conduct that can't be tolerated in a civilized society.

Source: ABC News

XX. HEALTHCARE ISSUES

OFFICIALS SEIZE MORE THAN \$6 MILLION IN TRIAD PRODUCTS

It was reported by several media outlets that the Food and Drug Administration seized more than \$6 million worth of products from Triad Group in Hartland last month. U.S. marshals took a variety of drug products, including antiseptic products, nasal sprays and medicated wipes so that Triad would stop distributing them. According to the FDA, the products may pose a risk to public health.

Triad Group distributes products made by H&P Industries, and the companies are owned by the same parties. The FDA claims H&P Industries has failed to comply with federal manufacturing regulations. H&P Industries shut down production after U.S. marshals arrived to seize the products. The FDA had previously required the firm to stop making and distributing its drug products. H&P Industries has a history of making promises to improve safety practices, but failing to do so.

Sources: Chicago Tribune and Associated Press

HOSPITAL ERRORS SAID TO BE TEN TIMES HIGHER THAN THOUGHT

It was reported last month that about one in three people in the United States will encounter some kind of mistake during a hospital stay. The finding by U.S. researchers, which is based on a new tool for measuring hospital errors, is about ten times higher than estimates using older methods. These findings are shocking and mean a great deal of work remains in efforts to improve health quality. Susan Dentzer, editor-in-chief of Health Affairs, had this to say about the problem:

Without doubt, we've seen improvements in health care over the past decade, and even pockets of excellence, but overall progress has been agonizingly slow. It's clear that we still have a great deal of work to do in order to achieve a health care system that is consistently high-quality—that is, safe, effective, patient-centered, efficient, timely, and devoid of disparities based on race or ethnicity.

The special issue from Health Affairs came out ten years after an influential Institute of Medicine report that found significant gaps in health quality. Medical errors can range from bedsores to objects left in the body after surgery to life-threatening staph infections. *Health Affairs* published several studies in a special issue on patient safety.

A study by Dr. David Classen, from the University of Utah, and his colleagues compared a new quality yardstick developed at the Institute for Healthcare Improvement in Massachusetts, with two common older methods of detecting errors—reports of errors voluntarily included in the medical record and an older method for assessing errors developed by the U.S. Agency for Healthcare Research and Quality, or AHR. The study revealed that agreeing on “a yardstick for measuring the safety of care in hospitals,” has been a real challenge.

To find the best yardstick, the team tested three methods of tracking errors on the same set of medical records from three different hospitals. Among the 795 patient records reviewed, voluntary reporting detected four problems, the Agency for Healthcare Research’s quality indicator found 35, and the Institute for Healthcare Improvement’s tool detected 354 events—ten times more than AHR’s method. The team wrote:

Our findings indicate that two methods commonly used by most care delivery organizations and supported by policy makers to measure the safety of care ... fail to detect more than 90 percent of the adverse events that occur among hospitalized patients.

The findings suggest there may be many errors that go undetected. In a separate study found in the same issue, a team led by Dr. Jill Van Den Bos and colleagues at the Denver Health practice of the Milliman Inc. consulting firm, used insurance claims to estimate the annual cost of medical errors that harm patients to be \$17.1 billion in 2008 dollars. They found that ten types of errors accounted for more than two-thirds of the total cost, with the most common ones being pressure ulcers or bedsores, postoperative infections and persistent back pain following back surgery. The researchers recommended that those three types of errors should receive top priority for intervention and improvement. Both studies were supported by the Robert Wood Johnson Foundation, which focuses on U.S. healthcare issues.

Source: *MSNBC*

REPORT SAYS CHEMICALS WERE INJECTED INTO WELLS

Oil and gas companies injected hundreds of millions of gallons of hazardous or carcinogenic chemicals into wells in more than 13 states from 2005 to 2009, according to a Congressional investigation. It was reported that the chemicals were used by companies during a drilling process known as hydraulic fracturing, or hydrofracking, which involves the high-pressure injection of a mixture of water, sand and chemical additives into rock formations deep underground. The process, which is being used to tap into large reserves of natural gas around the country, opens fissures in the rock to stimulate the release of oil and gas.

Hydrofracking has attracted increased scrutiny from lawmakers and environmentalists. It’s believed that the chemicals used during the process can contaminate underground sources of drinking water. “Questions about the safety of hydraulic fracturing persist, which are compounded by the secrecy surrounding the chemicals used in hydraulic fracturing fluids,” said the report, which was written by Representatives Henry A. Waxman of California, Edward J. Markey of Massachusetts and Diana DeGette of Colorado. The report also faulted companies for at times “injecting fluids containing chemicals that they themselves cannot identify.”

The investigation into hydrofracking was initiated by the House Energy and Commerce Committee. It was found that 14 of the nation’s most active hydraulic fracturing companies used 866 million gallons of hydraulic fracturing products—not including water. More than 650 of these products contained chemicals that are known or possible human carcinogens, regulated under the Safe Drinking Water Act, or are listed as hazardous air pollutants, according to the report.

Some ingredients mixed into the hydraulic fracturing fluids were common and generally harmless, like salt and citric acid. Others were unexpected, like instant coffee and walnut hulls, the report said. Many ingredients were “extremely toxic,” including benzene, a known human carcinogen, and lead. Companies injected large amounts of other hazardous chemicals, including 11.4 million gallons of fluids containing at least one of the toxic or carcinogenic B.T.E.X. chemicals—benzene, toluene, xylene and ethylbenzene. The companies used the highest volume of fluids containing one or more carcinogens in Colorado, Oklahoma and Texas.

The report came two and a half months after an initial report by the same three lawmakers that found that 32.2 million gallons of fluids containing diesel, considered an especially hazardous pollutant because it contains benzene, were injected into the ground during hydrofracking by a dozen companies from 2005 to 2009, in possible violation of the Safe Drinking Water Act.

A 2010 report by Environmental Working Group, a research and advocacy organization, found that benzene levels in other hydrofracking ingredients were as much as 93 times higher than those found in diesel. The use of these chemicals has been a source of concern to regulators and environmentalists who worry that some of them could find their way out of a well bore—because of above-ground spills, underground failures of well casing or migration through layers of rock—and into nearby sources of drinking water. These contaminants also remain in the fluid that returns to the surface after a well is hydrofracked.

Source: *New York Times*

STUDY REVEALS MEAT TAINTED WITH BACTERIA

A new study says that nearly half of the meat and poultry in the U.S. is contaminated with “multi-drug-resistant” bacteria. While experts said the bacteria can be killed by thoroughly cooking the meat and poultry, the real risk is in cross-contamination and improper handling of the protein. I always thought that folks knew to thoroughly wash their hands after handling raw beef, chicken or turkey. But in the real world that doesn’t always happen before handling other food products. If you need more information, the report is published in the April 15th issue of *Clinical Infectious Diseases*.

Source: *CNN*

XXI. ENVIRONMENTAL CONCERNS

TVA TO PAY \$10 MILLION PENALTY IN CLEAN AIR SETTLEMENT

The Tennessee Valley Authority board is phasing out 300 to 400 jobs at its oldest coal-fired plants and will pay a \$10 million

penalty in a clean air agreement with the Environmental Protection Agency, several states and environmental groups. Coal-unit shutdowns will start in 2012. The shutdowns include six units at Widows Creek Fossil Plant in North Alabama, two units at John Sevier Fossil Plant in East Tennessee, and all ten units at Johnsonville Fossil Plant in Middle Tennessee.

Alabama, one of the states suing TVA, will receive more than \$11 million from the settlement. Money from the agreement will go toward reducing air pollution and improving energy efficiency. The settlement also will mean \$500,000 in fine payments to the state by TVA. The operations that account for about 16 percent of TVA's coal-fired capacity will be shuttered as part of the settlement. According to TVA executives, efforts will be made to provide other jobs, but they say TVA cannot guarantee that every displaced employee will be offered a job at the same location. According to Alabama Attorney General Luther Strange, the agreement resolves concerns about TVA's older coal plants.

Source: Associated Press

XXII. THE CONSUMER CORNER

NON-U.S. CAR BUYERS' CLAIMS AGAINST TOYOTA DISMISSED

A U.S. judge has dismissed claims against Toyota Motor Corp. by non-U.S. car buyers who say their vehicles lost value because of manufacturing defects. As has been widely reported, Toyota recalled 19 million vehicles globally since 2009 related to unintended sudden acceleration problems. As our readers know, a tremendous number of lawsuits were consolidated before a federal judge in Southern California.

In addition to a complaint filed by U.S. customers, Toyota was sued by foreign Plaintiffs who claimed that the company did not sufficiently address sudden unintended acceleration, leading to a drop in value. Judge James Selna ruled that the foreign Plaintiffs had not established the required legal standing to sue in U.S. federal court.

In a previously-entered order, Judge Selna left intact the bulk of claims brought by U.S. customers. The judge gave the foreign Plaintiffs an opportunity to amend their lawsuit to see if they could cure their problems. It

now appears that these claims will definitely have to be brought in the Plaintiffs' home countries, not in the U.S.

Source: *Insurance Journal*

CPSC APPROVES NEW MANDATORY STANDARD FOR TODDLER BEDS

The U.S. Consumer Product Safety Commission has unanimously approved a new mandatory standard to improve the safety of toddler beds. The new federal standard builds upon the ASTM voluntary standard for toddler beds (F1821-09) and adds additional protections to prevent injuries to children. The new federal standard requires the following:

- The upper edge of the guardrail must be at least five inches above the toddler bed's mattress.
- Spindle/slat strength testing for toddler beds must be consistent with the testing required for crib spindles/slats.
- Separate warning labels to address entrapment and strangulation hazards must appear on toddler beds.

CPSC is aware of 122 incidents from 2005 through 2010, including four deaths and 43 injuries associated with toddler beds. Cribs that convert into toddler beds also must comply with the new federal standard for toddler beds. The mandatory standard goes into effect six months after publication in the *Federal Register* for toddler beds manufactured or imported on or after that date. Congress, as part of the Consumer Product Safety Improvement Act of 2008, required the Commission to issue a mandatory standard for toddler beds, as well as other durable infant and toddler products. In addition to toddler beds, CPSC has issued mandatory standards for cribs, infant walkers and infant bath seats.

To report a dangerous product or a product-related injury, call CPSC's Hotline at (800) 638-2772 or CPSC's teletypewriter at (301) 595-7054. To join a CPSC e-mail subscription list, please go to <https://www.cpsc.gov/cpsclist.aspx>. Consumers can obtain recall and general safety information by logging on to CPSC's Web site at www.cpsc.gov.

Source: CPSC

A WARNING ON BUTTON BATTERY USE

Small, coin-sized batteries can be found in products in nearly every home in

America. They are commonly referred to as "button batteries," and are in thousands of products used in and around the home. Young children and senior adults are unintentionally swallowing the button batteries. In some cases, the consequences are immediate and devastating.

A recent study conducted by Dr. Toby Litovitz of the National Capital Poison Center, found that button battery-related incidents resulting in severe injury and fatality have increased sevenfold since 1985. The majority of reported incidents involve 20 mm diameter, or larger, 3 volt batteries. Occasionally, a swallowed battery will pass through the intestine. Most often, however, batteries that become lodged in the throat or intestine can generate and release hydroxide, resulting in dangerous chemical burns.

Incidents most often involve children younger than four years old and senior adults. In the majority of incidents, children gain access to batteries directly from games, toys, calculators, remote controls and other items commonly left within a child's reach. Senior adults have swallowed button batteries used in hearing aids after mistaking them for pills. Parents often are unaware that a child has swallowed the button battery, which makes it difficult to diagnose the problem. In fact, in the recent study, more than 60 percent of reported incidents initially were misdiagnosed. Symptoms resemble ailments common in children, such as an upset stomach and fever, and in some incidents, there are no symptoms at all. CPSC Chairman Inez Tenenbaum, stated:

These incidents are preventable and CPSC is working to get ahead of this emerging hazard quickly. Our consumer awareness efforts and outreach to the electronics industry are under way.

The CPSC has reached out to the electronics industry and battery manufacturers, urging them to develop warnings and industry standards to address this issue. The Commission recommends the following steps to prevent unintentional battery ingestion:

- Discard button batteries carefully.
- Do not allow children to play with button batteries, and keep button batteries out of your child's reach.
- Caution hearing aid users to keep hearing aids and batteries out of the reach of children.

- Never put button batteries in your mouth for any reason as they are easily swallowed accidentally.
- Always check medications before ingesting them. Adults have swallowed button batteries mistaken for pills or tablets.
- Keep remotes and other electronics out of your child's reach if the battery compartments do not have a screw to secure them. Use tape to help secure the battery compartment.

If a button battery is ingested, medical attention should be sought immediately. The National Battery Ingestion Hotline is available anytime at (202) 625-3333 (call collect if necessary), or call your poison center at (800) 222-1222.

Source: CPSC

PERSONAL INFORMATION OF THOUSANDS OF OIL SPILL CLAIMANTS IN JEOPARDY

When a BP employee lost a laptop in late March, the personal data belonging to thousands of residents who had filed claims for compensation after the Gulf oil spill were also lost. BP didn't immediately disclose the incident, but recently disclosed the potential data security breach to The Associated Press. BP said the company had mailed out letters to about 13,000 people, notifying them that their personal data was in the computer. According to a BP spokesman, the people with information on the laptop were all from Louisiana. Apparently, the data belonged to individuals who had filed claims with BP before the Gulf Coast Claims Facility took over the processing of claims in August. Hopefully, folks whose personal data have been compromised won't be damaged. They have already been hurt enough by BP. But there is certainly a very big risk involved in this lapse.

BANKS AND CREDIT CARD ISSUERS WARN OF EMAIL BREACH

The possible theft of millions of email addresses from an advertising company could cause problems for a tremendous number of people. Several large companies started last month to warn customers to expect fraudulent emails that try to coax account login information from them. Companies behind such brands as Chase, Citi and Best Buy reported that hackers may have learned their email addresses because of a security breach at a Dallas-based

company called Epsilon that manages email communications.

The email addresses could be used to target spam. It's also a standard tactic among "online fraudsters" to send emails to random people, purporting to be from a large bank and asking them to login in at a site that looks like the bank's site. Instead, the fraudulent site captures their login information and uses it to access the real account. The data breach could make these "phishing" attacks more efficient. That's because it allows the fraudsters to target people who actually have an account with the bank.

Among the companies affected are financial-service companies such as Capital One Financial Corp., Barclays Bank, U.S. Bancorp, Citigroup Inc., JPMorgan Chase & Co. And Ameriprise Financial Inc. Retailers involved include Best Buy Co., TiVo Inc., Walgreen Co. And Kroger Co. The College Board, the not-for-profit organization that runs the SATs, also warned that a hacker may have obtained student email addresses.

Walt Disney Co.'s travel subsidiary, Disney Destinations, has sent emails warning customers. Hotel chain Marriott International Inc. Also has issued a similar warning. Epsilon said that its system had been breached, exposing email addresses and customer names but no other personal information. Epsilon, a unit of Alliance Data Systems Corp., sends more than 40 billion emails annually and has more than 2,500 clients.

Source: Associated Press

XXIII. RECALLS UPDATE

Each month we hope that fewer product recalls will have been issued. But it appears that has not been the case recently. There have been numerous product recalls over the past weeks. Serious safety-related recalls have become rather commonplace. The following are some of the more significant recalls since those reported in the April 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 EXPANDS RECALL OF F-150 PICKUPS

Ford will expand the recall over air bag defects in its F-150 pickups, the country's top-selling vehicle. NHTSA told Ford to take this action. The agency had wanted Ford to recall more than the 144,000 trucks from model years 2005-06 that it agreed in February to fix. Some of the recalled trucks have air bags that may deploy when not needed, possibly injuring drivers or passengers. The recall this year followed a 2009 NHTSA investigation into 1.3 million of the trucks.

Ford finally agreed to widen the recall. The recall now covers nearly 1.2 million F-150s built for the 2004 and 2005 model years and some built for 2006. An electrical short can cause the air bags to inflate without a crash and could injure drivers. Ford said it would fix the problem in 150,000 trucks but had resisted the government's requests to expand the recall.

Owners are to take their trucks to a dealer to replace an air bag wire in the steering wheel. The wire can become chafed, causing a short circuit that can lead to the air bag inflating unexpectedly. The problem was fixed at Ford's factories in January 2006, so trucks made after that date are not susceptible to it. Ford said the company didn't recall the trucks five years ago because it didn't think there was a safety risk. Ford didn't want to have a large recall, saying it was not necessary. The expanded recall also includes 16,000 Lincoln LT pickups from the 2006 model year.

VOLKSWAGEN RECALLS CERTAIN NEW JETTAS TO FIX WIRING

Volkswagen of America Inc. has recalled certain 2011 Jetta models to fix a potential problem with the wiring of its anti-theft system and horn. The recall affects 71,043 Jettas built between March of 2010 and March of 2011. The problem stems from the a fuse that protects the car's anti-theft alarm and the converter box that operates the windshield wipers and headlights. Under certain rare circumstances a short circuit in the horn can cause the lights and wipers to stop working, which could increase the risk of a crash.

The recall is a glitch in the roll-out of a vehicle whose success is critical to Volkswagen. The auto giant reworked the Jetta for 2011 with the goal of making the car appealing to a wider audience, in part by cutting its price. Under the recall, dealer service technicians will reconfigure the wiring layout so that the horn and converter box do not share the same fuse. The company says no injuries or accidents have been reported as a result of the flaw. Customers with questions can contact Volkswagen customer service at 1-800-822-8987.

MERCEDES-BENZ RECALLS U.S. M-CLASS VEHICLES

Daimler AG's Mercedes-Benz has recalled 136,750 M-Class and M-Class AMG vehicles in the United States made from 1999 to 2004 for issues related to cruise control that may lead to a crash. Repairs will be made at Mercedes dealerships beginning in September.

NHTSA says applying the brakes to disengage cruise control may fail, increasing the chances of a crash. The Agency also says there are other ways, including working a "cruise control stalk" or pumping the brakes, that will still engage the system in the event that applying the brakes fails. The recall was prompted by several complaints from consumers, according to NHTSA. The recall covers model years 2000-2002 M-Class and 2000-2004 M-Class AMG vehicles.

CADILLAC CTS RECALLED

Cadillac has recalled its 2009-10 Cadillac CTS. Some of the vehicles have a condition in which a wax coating on the rear suspension toe link jam nuts may allow nuts to loosen. The toe link could separate allowing the rear wheel to turn inward or outward, increasing the risk of a crash. Dealers will repair free of charge. Call Cadillac at 866-982-2339.

TOYOTA RECALLS RAV4 AND HIGHLANDERS FOR FAULTY AIR-BAG SENSORS

More than three years after Toyota first learned that its curtain-shield air bags could deploy without a crash, the automaker is recalling almost 308,000 sport utility vehicles. The recall covers about 214,000 RAV4s from the 2007-8 model years and 94,000 Highlander and Highlander hybrids from 2008. The curtain shield is a tubular air bag mounted in the roof, just above the windows. In a side-impact crash or roll-over, it is designed to provide head protection for front and rear-seat passengers. It deploys with less force than frontal air bags.

While NHTSA has eight complaints on its Web site from owners reporting inadvertent deployments, the Agency never began an investigation. Five of those complaints were filed last year. Toyota said it learned of the problem in 2007 and discovered it was caused by a short circuit in two sensors. The automaker said it changed the sensor design in January 2008. Despite the change, Toyota has continued to receive reports of deployments.

Under federal regulations, a manufacturer has five days to inform the NHTSA of a safety problem and its plan for a recall, or face civil fines. Toyota paid almost \$49 million in fines last year, the maximum allowed, following three allegations by NHTSA that the automaker had not reported safety problems in a timely manner.

NISSAN IS RECALLING 196,000 VEHICLES

Nissan North America is recalling nearly 196,000 sport utility vehicles in the United States for corrosion problems that could damage steering and suspension systems. The recall extends to the Nissan Pathfinder from 1997 to 2003, and the Infiniti QX4 from 1996 to 2004. Corrosion of the strut tower could cause the steering column to break, resulting in the loss of steering control, which could result in a crash. Most of the vehicles were sold in Connecticut, Delaware, Iowa, Illinois, Indiana, Massachusetts, Maine, Maryland, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island,

Vermont, Washington D.C., West Virginia and Wisconsin. Nissan will inspect the SUVs and repair the vehicles free of charge as needed.

SCHOOL BUSES RECALLED FOR FIRE RISK

School bus manufacturer Blue Bird Body Co. has recalled about 3,900 large school buses for a potential fire hazard. A starter cable may rub against a power steering hose creating a short circuit that may result in a fire. The buses involved are model year 2004 through 2006 Blue Bird Vision buses manufactured from June 26, 2003, through December 9, 2004.

The problem was first discovered in December when routine inspections by customers began uncovering abrasion on some cables, according to a letter sent by Blue Bird to the National Highway Traffic Safety Administration. Blue Bird began its own investigation in January and found that about 5% of the buses had chafing on the starter cable. The bus maker will alert owners to inspect the buses and make sure there is enough space between the starter cable and the hose. In cases where there isn't enough space, Blue Bird will install a clamp to keep them apart and any damaged cables or hoses will be replaced free of charge. Recall notifications are expected to begin around May, 10.

Blue Bird has had other recalls in the past year involving potential fire hazards, including one involving a possible fuel leak and another involving a different potential short circuit. A spokesperson for Blue Bird did not immediately respond to requests for comment. In total, there are approximately 480,000 school buses on the road today, according to the American School Bus Council, an industry group.

BREAST DEVICE RECALL MADE MOST SEVERE

The recall of a medical device that left particles of tungsten in women's breasts has been classified as Class I, the most serious type of recall. This is the type involving "situations in which there is a reasonable probability that use of these products will cause serious adverse health consequences

or death.”The device, the Axxent FlexiShield Mini, was a pad made of tungsten and silicone rubber that was temporarily placed inside breast incisions during an unusual procedure in which women were given an entire course of radiation treatment in one dose after undergoing a lumpectomy for cancer. The pads were used to help direct the radiation beam and shield healthy tissue. But the pads were flawed, and left the breast tissue and chest muscles riddled with hundreds of tungsten particles.

It’s not known if tungsten is dangerous because relatively little research has been done on its long-term health effects in humans. But it shows up on mammograms and may make them difficult to read, which is especially troubling for women who have had breast cancer and worry about recurrences. The metal particles resemble calcium deposits, which can indicate cancer. That the tungsten shows up on mammograms is what made the recall Class I. The particles could interfere with diagnosis because they can be mistaken for cancerous calcifications or may hide real calcifications. Twenty-nine women are known to have been affected: 27 at Hoag Memorial Hospital Presbyterian in Newport Beach, Calif., and two at Karmanos-Crittenton Cancer Center in Rochester Hills, Mich. So far, 16 have had follow-up mammograms six months after their surgery, and all 16 were found to have tungsten particles.

The device was made by a company called Xoft, which was subsequently bought by another company, iCad. The Axxent FlexiShield Mini had been cleared by the drug agency in June 2009. It was put on the fast track process for approval. That process, known as 510(k), takes less time than the procedure used to approve a new device, and it generally does not require tests on humans. The shields, taken off the market in February, were cut to fit each patient. The cutting of the shields is believed to be the cause of the shedding of tungsten particles. But why that occurred is not clear, because the shields were meant to be cut and were made with that in mind.

SPOT SATELLITE COMMUNICATORS RECALLED

A federal watchdog agency said Spot LLC of Covington, La., is recalling 15,400 Spot Satellite Communicators that can fail to work at critical times. The U.S. Consumer Product Safety Commission said the internal voltage indicator in the devices can stop working, making it impossible to transmit messages or track information in emergency situations. The company has received reports of two Spot Satellite Communicators not working in temperatures below 40 degrees Fahrenheit, the Commission said.

The satellite communicators were imported from China and sold at sporting outlets from July 2010 through March 2011 for \$549. The communicators are used to send signals to satellites to relay the location of the user in emergencies. The device is palm-sized and sold with the DeLorme Earthmate PN-60w GPS. The GPS is not involved in the recall, however. Consumers were advised to stop using the recalled product and contact Spot LLC for a free replacement. Consumers can call 866-727-7733 for information.

DISNEY TRICYCLES BY KIDDELAND RECALLED

Around 9,000 Disney Princess Plastic Racing Tricycles in the United States and 700 in Canada have been recalled due to a laceration hazard. The Consumer Product Safety Commission and Health Canada said in a joint statement that children might cut themselves if they fall on the plastic castle display and the princess figures protruding from the top of the trike’s handle bar. Kiddieland Toys Limited, the manufacturer, has received three reports of children suffering facial lacerations.

The pink and fuschia trike was sold at Target, JCPenney, Meijer and H.E.B stores nationwide and online at Target.com from January 2009 through April 2011. Consumers should stop using the trikes immediately and contact the manufacturer for a free replacement handlebar that has the castle and princess figures enclosed in a rotating display, the statement said.

EXMARK PIONEER S-SERIES MOWERS RECALLED

Exmark, located in Beatrice, Neb., has recalled 750 Pioneer S-Series lawn mowers due to welds on motion-control linkage that can fail, federal regulators said. The U.S. Consumer Product Safety Commission said the failed welding can cause loss of control of the mowers, raising the risk of a crash. No incidents or injuries have been reported, the agency said. The recall involves 2011 zero-radius-turn riding mowers with red, welded tubular steel frames. They were sold with three deck sizes: 44, 48 and 52 inches. The recalled mowers are steered with two hand-held levers, rather than steering wheels.

The recall involves mowers with model number PNS20KA443 and serial numbers 928367 through 947833; model number PNS22KA483 with serial numbers 928417 through 949985; and model number PNS24KA523 with serial numbers 928492 through 950315. They were sold nationwide by Exmark dealers last month and in March for between \$6,881 and \$7,658. Consumers were advised to contact an Exmark dealer to have welded parts replaced. Consumers can call 800-667-5296 for information.

TORO RECALLS Z MASTER ZRT MOWERS

Bloomington, Minn., firm Toro Co. has recalled 3,700 riding lawn mowers due to faulty switches that may activate the mower improperly, federal regulators said. The U.S. Consumer Product Safety Commission said switches may activate the mower “when the operator vacates the seat,” which raises the risk of an injury from the mower blades. The mowers involved in the recall are large commercial duty ZRT mowers—ZRT standing for zero radius turn. They were sold with 52-inch and 72-inch cutting decks.

The recall involves mowers with model numbers 74264, 74265, 74266, 74267, 74274, 74253 and 74254. Various serial numbers also define which mowers are involved in the recall. The mowers were sold from September 2005 through January 2011 for between \$13,000 and \$17,000

each. An additional 109 mowers were sold in Canada. Mowers that have a light gray optional deluxe seat with an adjustable knob on the front, are involved in the recall. Consumers with these mowers were advised to contact a Toro dealer for instructions on how to modify the seat or to have a repair scheduled. Consumers can call 866-946-3109 for information.

CUB CADET RECALLS 4,300 MOWERS

A Cub Cadet has recalled 4,300 riding lawn mowers with potential fuel leak problems that pose a fire hazard. The Cleveland company is recalling 2011 model year mowers made for both commercial and private use. The models under recall include Cub Cadet Z Force 48, Z Force 54, Z Force S 46, Z Force S 48, Z Force S 54, Z Force S 60, Z Force Commercial 48, Z Force Commercial 60, Tank L48 and Tank L60.

The mowers were sold nationwide from February through March for between \$3,600 and \$7,000. Consumers were advised to stop using the mowers and store them outside. Consumers can contact Cub Cadet for free repairs. For information, consumers can call 888-848-6038.

ACTIVE LEISURE RECALLS 19,000 TENTS

Active Leisure has recalled 19,000 tents because of fire hazard issues. Active Leisure, based in China, recalled its 10-foot by 10-foot folding canopy tents with item number 544803 printed on the original packaging. They were sold exclusively at Costco Wholesale Corp. from Jan. 25 through February. The tents do not meet the flammability label claim on the unit, posing a fire hazard to consumers. No injuries have been reported. For more information, consumers should contact Active Leisure at 877-730-1583 between 9 a.m. and 5 p.m., Monday through Friday.

REDKEN 5TH AVENUE NYC RECALLS GUTS SPRAY MOUSSE FOAM

About 1 million Spray Mousse Foam Cans have been recalled by Redken 5th Avenue NYC of New York, NY. The

aerosol container's liner can corrode over time, posing a risk of the can rupturing and expelling its contents. Redken has received 41 reports of cans rupturing. No injuries have been reported. This recall involves Redken Guts 10 Volume Spray Mousse Foam sold in 10.58- and 2-ounce size cans. The hair styling product was sold in a silver container with black writing. "Redken" and "10" are printed on the front of the product. The product can be identified by a lot code printed on the bottom of the can. Lot codes included in this recall include:

- Any can with lot codes that do not contain a G or H as the third digit.
- Any can with the following lot codes: 32G10Y, 32G11Y, 32G20Y, 32G21Y, 32G23Y, 32G40Y, 32G41Y, 32G60Y, 32G61Y, 32G62Y, 32G70Y.

The cans were sold at hair salons and beauty supply stores nationwide from January 1998 through February 2011 for between \$4 and \$16. Consumers should immediately stop using the recalled mousse, record the product's lot code, then discard the contents by spraying them into a waste container in a well-ventilated area. Prior to disposing of the container, consumers should obtain the lot code from the container, then contact Redken for information on receiving a refund of the purchase price. For additional information, contact Redken toll-free at (888) 241-9504, or visit the firm's website at www.redken.com.

ROGUE FITNESS BARBELL BRACKETS RECALLED

Coulter Ventures LLC, doing business as Rogue Fitness, of Columbus, Ohio, and Columbus Machine Works Inc., of Columbus, Ohio, have recalled about 5,500 Rogue Fitness Barbell Brackets. The weld between the bracket and the pin that holds the barbell bracket in place on a weightlifting rack can break, causing the weights to fall, and posing an injury hazard to consumers. The company has received three reports of the weld between the bracket and the pin breaking, including one report of a consumer who received a sprained wrist. This recall involves Rogue Fitness J-Cup brackets used to hold barbells on weightlifting racks. The black metal brackets are

used with the Rogue Fitness' SPX Squat Press Stand, R-3 Racks, R-4 Racks and Infinity Rigs.

The barbell brackets were sold exclusively on Rogue Fitness' website www.roguefitness.com from March 2009 through December 2010 for about \$40. They were also sold as part of weightlifting racks and stands for between \$350 and \$3,400. Consumers should immediately stop using the recalled barbell brackets and contact Coulter to receive free replacement brackets. For additional information, contact Coulter toll-free at (888) 454-6925, visit the company's website at www.roguefitness.com or email the company at qc@roguefitness.com.

OCEAN TECHNOLOGY SYSTEMS RECALLS GUARDIAN DIVING MASKS

Undersea Systems International Inc., doing business as Ocean Technology Systems, of Santa Ana, Calif., has recalled Guardian full-face diving masks. The recall includes about 1,700 masks in the U.S. and 80 in Canada. The purge assembly on the diving mask can disengage from the regulator, resulting in loss of air to the diver. This poses a drowning hazard to the consumer. The company has received one report of a disengaged assembly. No injuries have been reported.

This recall involves Guardian full-face diving masks with serial numbers 9051284 through 10070954. The serial number is printed on the main regulator body. The diving masks were sold in various colors. The Ocean Technology Systems' logo is affixed to the front of the mask.

The masks were sold by diving equipment retailers and direct sales nationwide from September 2010 through November 2010 for about \$800. Consumers should immediately stop using the diving masks and contact Ocean Technology Systems for instructions on conducting a test of the regulator and returning the masks for a free repair. For additional information, contact Ocean Technology Systems toll-free at (877) 270-1984 anytime, or visit the company's website at www.otsc.com. Consumers can also email the company at recall@otsc.com.

LASKO RECALLS BOX FANS DUE TO FIRE HAZARD

About 4.8 million box fans have been recalled by the manufacturer, Lasko Products Inc., of West Chester, Penn. An electrical failure in the fan's motor poses a fire hazard to consumers. Lasko has received seven reports of fires associated with motor failures, including two house fires and one barn fire, resulting in extensive property damage. No injuries have been reported. This recall involves Lasko box fans with model numbers 3720, 3723, and 3733 and Galaxy box fans with model number 4733 that have the date "2002-03" or "2003-04" stamped on the bottom of the metal frame. "Lasko" or "Galaxy" is printed on the front of the fan. The model number is either stamped or printed on the bottom of the fans. The fans were sold at mass merchandisers nationwide from July 2002 through December 2005 for between \$12 and \$25. Consumers should immediately stop using the recalled fans and contact Lasko to receive a free fused plug safety adapter. For additional information, contact Lasko toll free at (877) 445-1314 anytime or visit the company's website at www.laskoproducts.com.

ADP RECALLS UNIT HEATERS DUE TO FIRE HAZARD

About 400 ADP FOA series unit heaters have been recalled by Advanced Distributor Products (ADP) LLC, of Grenada, Miss., and Lennox Industries Inc., of Richardson, Texas or Advanced Distributor Products (ADP) LLC, of Grenada, Miss. Some heaters were manufactured without a required flame rollout switch, which is a back-up device that shuts down the heater in the event of a heater failure. This poses a fire hazard. This recall involves certain ADP FOA series unit heaters. These unit heaters are separated combustion and gas-fired. The brand name "ADP", the model number and the serial number can be found on the nameplate located inside the control cabinet. The heaters were sold at ADP dealers and distributors nationwide from September 2003 through April 2011 for between \$2,700 and \$4,200. Consumers should stop using these recalled heaters immediately. Consumers should contact ADP to

schedule an inspection and, if necessary, repair of the heater. For additional information, contact ADP toll-free at (866) 303-8634, or visit the company's website at www.adpnow.com.

KINGSMAN FIREPLACES RECALLS GAS FIREPLACES

Kingsman Fireplaces, of Canada, has recalled about 40 Gas Fireplaces. Delayed ignition can cause the fireplace's propane gas to explode and break or shatter the glass door. This poses a laceration hazard to consumers nearby. Kingsman Fireplaces has received two reports of fireplace glass doors breaking. No injuries have been reported. This recall involves direct vent gas fireplaces sold under the name "Skyline Marquis collection." They run on propane gas. The model number is on the rating plate located on the bottom of the fireplace near the valve control. The fireplaces were sold by authorized distributors and specialty fireplace stores nationwide from April 2008 through December 2010 for between \$1,700 and \$2,900. Consumers should immediately stop using the recalled fireplaces and turn off the gas supply to the fireplace. Contact Kingsman Fireplaces to schedule a free repair. For additional information, contact Kingsman Fireplaces toll-free at (855) 593-3304, or visit the company's website at www.marquisfireplaces.net.

WILLIAMS-SONOMA RECALLS HOT CHOCOLATE POTS

Williams-Sonoma Inc., of San Francisco, Calif. and ICI USA, LLC, of Seattle, Wash. Have recalled Hot chocolate pots. This includes about 28,000 units in the United States and 700 in Canada. The handle of the hot chocolate pot can break off during use, posing burn and laceration hazards. The company has received 28 reports of handles breaking off of the pots, including eight reports of injuries involving minor burns or cuts. This recall involves the Whirly Whip hot chocolate pots sold individually as item number 2981454 or 4986535, and as part of the Whirly Whip hot chocolate pot gift set item number 3021714. The item number can be found on the product's box, below the bar code.

The pot is made of white porcelain and has a red handle. The lid has a red knob and a frother attached to the underside of the lid knob. The pots were sold at Williams-Sonoma stores nationwide, online at www.williams-sonoma.com and through Williams-Sonoma catalogs from October 2010 through January 2011 for between \$30 and \$40. Consumers should immediately stop using the recalled hot chocolate pots and either return the product to any Williams-Sonoma store or contact Williams-Sonoma for instructions on how to return the product for a full refund. For additional information, contact Williams-Sonoma toll-free at (855) 643-4206 or visit the company's website at www.williams-sonoma.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.

CANDLES RECALLED DUE TO FIRE AND BURN HAZARD

Pacific Trade International Inc. of Rockville, Md., has recalled 615,195 sets (about 7.48 million) tea lights. The candles have a clear, plastic cup that can melt or ignite, posing a fire and burn hazard to consumers. Pacific Trade has received one report of the plastic cup melting while in use. No injuries or property damage have been reported. The recall involves tea lights sold under the brand names Chesapeake Bay Candle and Modern Light. The candles are various colors. They were sold in sets or with tea light containers. Only tea lights that do not have any lettering imprinted on the bottom of the tea light cup are included in this recall. The tea lights were sold at Fred Meyer, Home Goods, Marshalls, Super Value, Target, TJ Maxx and Wegmans stores nationwide between July 2009 and February 2011 for between \$1 and \$12. Consumers should immediately stop using the candles and return them to the store where purchased for a store merchandise card equal to the purchase price. For additional information, contact the Pacific Trade International at (800) 331-8339, or visit the company's website at <http://www.chesapeakebaycandle.com>.

BABY MONITORS RECALLED

Rechargeable batteries sold with certain Summer Infant Slim and Secure Video Monitors have been recalled. The batteries were sold at Babies R Us from September 2009 through May 2010 for about \$200. The battery in the handheld video monitor can overheat and rupture, posing a burn hazard. Consumers should immediately stop using the monitors and contact Summer Infant at 800-426-8627 to receive a postage-paid envelope to return the defective battery in exchange for a free replacement. The monitor can continue to be used on AC power with power cord.

BESIDE INFANT SLEEPERS RECALLED

The Consumer Product Safety Commission is recalling over 75,000 Infant Bed-Side Sleepers because they could lead to entrapment, suffocation, and fall hazards. According to the CPSC, Arm's Reach Concepts is recalling about 76,000 Infant Bed-Side Sleepers because the fabric liner could pose a suffocation risk.

When the fabric liner is not used or is not securely attached, infants can fall from the raised mattress into the loose fabric at the bottom of the bed-side sleeper, or can become entrapped between the edges of the mattress. The CPSC and Arm's Reach has received ten reports of infants falling from the raised mattress, or becoming entrapped between the edge of the mattress and the side of the sleeper. No injuries have been reported.

This recall involves a product called a "co-sleeper" by the manufacturer. One side of the bed-side sleepers is lower than the other to allow positioning near a bed and access to the infant for care and feeding. This recall includes all Arm's Reach Original and Universal styles with manufacture dates between September 1997 and December 2001. The manufacture date and model number can be found on a sticker on one of the product's legs. Model numbers included in the recall begin with: Original - 8108, 8133, 8111, 8112 & 8199 and Universal—8311.

The bed-slide sleepers were sold at Burlington Coat Factory, Babies R Us and other retail stores nationwide from

September 1997 through December 2001 for about \$160. Consumers should immediately stop using the recalled bed-side sleepers and visit www.armsreach.com/instructions to view and download assembly instructions and to make sure that the product is properly configured. Consumers should also contact the company by phone or via the company website to receive hard-copy instructions by mail and an assembly/warning label. Consumers who are missing the fabric liner or other components should immediately contact Arm's Reach for an alternative remedy. For additional information, contact Arm's Reach at (800) 954-9353 or visit the company's website at www.armsreach.com.

WRIST RATTLES AND BABY BOOTIES RECALLED BY MIDWEST-CBK

Midwest-CBK Inc., of Union City, Tenn., has recalled Wrist Rattles and Baby Booties. This includes more than 10,000 wrist rattles and 11,000 pairs of baby booties in the United States and 600 wrist rattles and 700 pairs of baby booties in Canada. The pom-poms attached to the wrist rattles and booties can detach, posing a choking hazard. The company has received one report of a pom-pom detaching from the wrist rattle. No injuries have been reported. This recall involves the Monkees & Friends™ wrist rattles and baby booties. The wrist rattles and the booties are made of knitted yarn and have a monkey head and a pom-pom attached. Both come in multiple color combinations.

The wrist rattles and baby booties were sold at gift stores, drug stores, decor outlets and variety stores nationwide from June 2009 through March 2011. The wrist rattles sold for about \$5 and the booties sold for about \$13. Consumers should immediately take these recalled products away from children and return them to the store where they were purchased or to Midwest-CBK for a full refund. If you are unable to return the product to the store where it was purchased, contact Midwest-CBK to receive a prepaid shipping label. For additional information, contact Midwest-CBK toll-free at (800) 394-4225.

P.JAMAS CHILDREN'S SLEEPWEAR RECALLED DUE TO SAFETY VIOLATION

Fashionviews Inc., of New Rochelle, N.Y., has recalled about 4,000 P.Jamas children's sleepwear. The garments fail to meet federal flammability standards for children's sleepwear, posing a risk of burn injury to children. This recall involves all styles of P.Jamas brand name children's sleepwear including nightgowns and two-piece shirt/pant sets sold in children's sizes XS through XL. A garment label with the name P.Jamas in blue lettering on a white background is sewn to the center back of the garments. The children's sleepwear is made from 100 percent cotton, woven or knit fabrics. The garments are in a variety of pastel colors in solid, stripe or plaid patterns. Some nightgowns are hand smocked and some pajamas are trimmed in piping or rickrack.

The pajamas were sold at boutique shops nationwide and on the www.p-jamas.com website from January 2006 through October 2010 for between about \$50 and \$100. They were manufactured in Peru and Bolivia. Consumers should stop using the recalled sleepwear immediately and return the product to the retailer where purchased for a full refund. For additional information, contact P.Jamas toll-free at (888) 554-6495, visit the company's website at www.p-jamas.com or email contactus@p-jamas.com.

CLOTHING FOR GIRLS RECALLED BY MY MICHELLE

About 90,000 Girl's Tops have been recalled by the distributor My Michelle, of New York, N.Y. The jewelry and decorative trim attached to the girl's garments contain high levels of lead. Lead is toxic if ingested by young children and can cause adverse health effects. This recall involves girl's tops and dresses sold in sizes small to extra large and 7 to 16. The garments were sold in various styles including tops with beaded necklaces attached to the collar and tops with metallic beads attached to the collar. All styles of the tops and dresses have a black tag on the collar with pink print that reads "mymichelle."

The tops were sold at Burlington Coat Factory, Dillard's, J.C. Penney, Kohl's,

Army and Air Force Exchange (AAFES), K & G Fashion Superstore and other retail stores nationwide from January 2011 through March 2011 for about \$38. Consumers should immediately take the recalled garments away from children and contact My Michelle for information on receiving a full refund. For additional information, contact My Michelle at (800) 960-8791, or visit the company's website at www.mymichellerecall.com. Consumers can also email the company at customerservice@mymichellerecall.com.

PACIFIERS RECALLED BY KEY BABY DUE TO CHOKING HAZARD

Pampers® Natural Stages Infant Ortho and Bulb Pacifiers have been recalled by Key Baby LLC, of Lutz, Fla. And Tahoe Enterprises, of China. Pampers® licensed their brand name to Key Baby. The pacifiers fail to meet federal safety standards and pose a choking hazard to young children. The pacifier comes in yellow, pink or blue colors and is made of silicone. Only "Stage 1" pacifiers are recalled. "Stage 1" and "Ortho" or "Bulb" are printed on the package. The recalled pacifiers have an oval-shaped mouth guard and "Pampers" molded on to the handle side of the mouth guard. The product comes two per package. The pacifiers were sold at retail stores nationwide from April 2010 through February 2011 for about \$6. Consumers should immediately take the recalled pacifiers away from infants and contact Key Baby for instructions on returning the product for a full refund or \$10 coupon toward the purchase of any Pampers® Natural Stages products. For additional information, contact Key Baby toll-free at (800) 447-1224 anytime, or visit the company's web site at www.key-baby.com.

J&J RECALLS EPILEPSY PILLS

Johnson & Johnson has issued another recall. This one is for about 57,000 bottles of a widely used epilepsy pill, and is due to complaints of a chemical odor. Two lots of 100-milligram tablets of Topamax, sold between October 19th and December 28, 2010 are being recalled. The lot numbers are OKG110 and OLG222. J&J said fewer than 6,000 of the bottles are believed to still be on

the market. J&J said that the pills were sold only in the U.S. And Puerto Rico.

The New Brunswick, N.J., company has now issued 22 product recalls, involving well over 300 million bottles of medicines, since September 2009. Many of the recalls involved widely used nonprescription drugs such as Motrin and Children's Tylenol. The reasons have ranged from metal and other contaminants, to nauseating odors and packaging issues. Joint replacement systems so painful they required corrective surgery were also recalled, as were contact lenses that irritated eyes, along with potentially contaminated syringes full of the anti-psychotic drug Invega.

Johnson & Johnson said it had received four consumer complaints of an odor believed to be a chemical called TBA, or tribromoanisole, a byproduct of a chemical preservative sometimes used on shipping pallets. J&J said "a very small number of patients have reported temporary gastrointestinal symptoms," but TBA is not considered toxic. The same issue was linked to some of its previous recalls.

MORE TYLENOL BOTTLES RECALLED

Johnson & Johnson also has recalled another lot of Tylenol due to a musty odor which has already triggered five other recalls of the company's over-the-counter medicines. The latest recall involves more than 34,000 bottles of Tylenol 8 Hour Extended Release, which were distributed throughout the U.S. All of the products come from lot number ADM074, which appears on the bottom of the bottles.

ORTHO-McNEIL NEUROLOGICS RECALLS TWO LOTS OF TOPAMAX®

Ortho-McNeil Neurologics Division of Ortho-McNeil-Janssen Pharmaceuticals, Inc., has recalled two lots of TOPAMAX® (topiramate) 100mg Tablets. These two lots were shipped between 10/19/2010 and 12/28/2010 and distributed in the U.S. And Puerto Rico. The recall encompasses approximately 57,000 bottles of TOPAMAX®; but, the company believes there are fewer than 6,000 bottles remaining in the marketplace.

The recall is the result of four consumer reports of an uncharacteristic odor thought to be caused by trace amounts of TBA (2,4,6 tribromoanisole). TBA is a byproduct of a chemical preservative sometimes applied to wood often used in the construction of pallets on which products are transported and stored.

While no consumer actions are required, patients taking TOPAMAX® 100mg Tablets who experience an uncharacteristic odor associated with their medication should return the tablets to their pharmacist, and contact their healthcare professional if they have questions. Patients or healthcare professionals can contact the TOPAMAX® Line at 1-866-536-4398 (Monday—Friday, 9 am—5pm ET). Additional information about the recall can be found on Topamax.com, RxForSafety.com, and OrthoMcNeil-Neurologics.com.

MORE POTENTIALLY TAINTED MEDICAL PRODUCTS RECALLED

Medical device maker Smith & Nephew Inc. is recalling more products made by the Triad Group Inc. of Wisconsin, saying they could be contaminated with potentially dangerous bacteria. The new recall includes two types of products: wipes used to protect the skin before medical tapes and films are applied, and adhesive removers that can clean residues from the skin, according to the company. The products, including UNISOLVE Adhesive Remover Wipes, are widely used by diabetics and others who require daily medication. The move expands again the recall of products manufactured and distributed by H&P Industries Inc. And the Triad Group Inc. of Hartland, Wis., which were shuttered by the FDA. On April 6, U.S. Marshals seized more than \$6 million in medical supplies made by the twin family-owned firms.

H&P Industries products have been cited in at least three lawsuits that blame contaminated alcohol prep pads for serious injuries and a death. In January, H&P Industries launched a recall of all lots of alcohol wipes because of the potential for contamination with *Bacillus cereus*. The bacteria can cause serious life-threatening infec-

tions in ill and vulnerable people. H&P Industries also has issued recalls for lubricating jelly and povidone iodine wipes.

Since early January, the FDA has received 201 reports of problems with Triad alcohol wipes, including allegations of seven deaths, 114 infections and 87 minor problems, such as rashes, according to a summary of the agency's MedWatch reporting system. FDA officials are investigating the deaths.

Recalled products include REMOVE Universal Adhesive Remover Wipes, UNI-SOLVE Adhesive Remover Wipes, SKIN-PREP Protective Wipes, PERI-PREP Protective Wipes and NO-STING SKIN-PREP Protective Wipes. The affected product codes are 420400, 420471, 59420425, 403100, 402300, 59403125 and 59420600.

If you need more information on any of the recalls listed above, or would like information on a recall that you are aware of that we haven't listed, please visit our firm's web site at 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@beasleyallen.com for more recall information.

XXIV. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

CHAD STEWART

Chad Stewart recently joined the firm and he will be working in our Consumer Fraud Section. He comes back to Montgomery where his legal career began with judicial clerkships for Chief Judge Joel F. Dubina, Eleventh Circuit Court of Appeals, and U.S. District Judge Ira De Ment, Middle District of Alabama. For more than ten years, Chad has successfully litigated in the state and federal courts doing both trial and appellate work. He will be focusing in our firm primarily on the Medicaid Fraud Litigation, the Toyota Multidistrict Litigation and commercial fraud cases.

Chad recently helped try the firm's case for the State of Mississippi in its multi-million dollar Medicaid Fraud case against a number of drug manufacturers. His back-

ground in corporate law and civil litigation equips him to handle this type of complex consumer fraud litigation. Before coming with our firm, Chad was a partner in the firm Marsh, Cotter & Stewart in Enterprise, and prior to that time, he was with Sasser Littleton in Montgomery.

Chad attended Troy University on academic scholarship where he served as SGA Chief Justice and graduated *Magna Cum Laude* and Phi Kappa Phi in 1995. He earned his Juris Doctor degree from Cumberland School of Law in 1999, graduating *Magna Cum Laude* in the Top Ten of his class. While at Cumberland, Chad was a Senior Associate Editor of the *Cumberland Law Review*.

Chad has always been very active in his community in civic and church-related projects. He has given his time to a number of mission projects. Chad has been a Young Adult Sunday School Teacher, a Deacon, and member of the Personnel Committee at his home church which is First Baptist Church in Enterprise. Chad is also an avid outdoorsman and member of the Alabama Wildlife Federation. Chad and his wife Becky have three children, Cate, Ann Presley and Bo. We are pleased to welcome Chad to the firm.

BEVERLY JOHNSON

Beverly Johnson, who has been with the firm for a year, currently serves as Legal Secretary to Chris Glover in our Personal Injury/Products Liability Section. Before working with Chris, she worked with J.P. Sawyer. Since Chris travels a lot in his work, Beverly does a great deal of scheduling of his trips. She does a great job coordinating the schedule and handling things in the office when Chris is gone. Beverly says she loves that every day in her work brings something different.

Beverly and her husband Jerry have been married for almost two years. She has a daughter and son-in-law in Millbrook and two grandsons, Alex and Blake. Beverly also has a son who recently married and now lives in Deatsville. Beverly graduated from AUM and also completed all but a couple of classes for her master's degree in counseling. She used that knowledge in many hours of volunteerism with inner city children, teens with addictions and hospice work. Beverly says her best accomplishments in life have been her children. She enjoys reading, playing the piano and going to movies, but her interest in helping people with interior decorating and organizing is what she really enjoys doing the most in her spare time. Beverly is a good employee who is dedicated to her work

and to Chris' clients. We are fortunate to have her with us.

NICOLE MCARTHUR

Nicole McArthur started with the firm last June and she currently serves as a law clerk for Clay Barnett in our Consumer Fraud Section. She primarily works on AWP-related cases, which includes helping to draft responses to interrogatories, requests for production, and requests for admissions, and working with Clay in drafting summary judgment motions. Nicole recently spent two weeks in Mississippi helping with *Mississippi v. Sandoz* AWP trial.

Nicole received a Bachelor of Arts degree (cum laude) from Mercer University where she majored in Psychology and Criminal Justice. She is currently a third year law student at Thomas Goode Jones School of Law in Montgomery. While in law school Nicole has been involved with the Mock Trial Competition Team and was a finalist in the J. Greg Allen Mock Trial Competition. She is also the President of the Christian Legal Society. Nicole enjoys playing tennis, shopping, traveling, and spending time with her family and friends. We are fortunate to have such a talented and dedicated person working in the firm's fraud section.

JULIE OWENS

Julie Owens has been with the firm for a year and she currently works as a Legal Assistant to Richard D. Stratton in our Toxic Torts Section. Julie is hard at work on BP oil spill litigation cases. She gathers information, contacts clients, and organizes documents in cases. She also helps to file claims with the Gulf Coast Claims Facility for businesses that have suffered losses and been damaged as a result of the oil spill. Julie is originally from Dothan and moved to Birmingham in 1995 to attend the University of Alabama at Birmingham. She moved to Montgomery when she became employed with the firm.

Julie graduated from UAB with a Bachelor of Science degree in Criminal Justice and a minor in Sociology. After graduation, Julie attended Samford University where she received a Legal Assistant's certificate. Julie enjoys reading, painting and listening to music. She also loves the beach, spending time with her family and going to Auburn football games. Being a huge Auburn fan, Julie says college football is more than just a hobby for her. Julie is a dedicated employee who does a very good job in a challenging field of work. We are most fortunate to have her with us.

XXV. SPECIAL RECOGNITIONS

COMMON GROUND HAS GROUND BREAKING

Several weeks ago our firm started a project to create a youth entrepreneurship program in West Montgomery working with Common Ground Montgomery. The program included the renovation of a 4,300-square-foot double storefront building on Mobile Road, adjacent to Common Ground's existing facility. The project came to fruition on April 19th with the opening of the Common Ground Montgomery Annex, which will house the Urban SEED X-change. The name given to the program refers to the skills Common Ground wants the children who use the facility to develop. We all want them to develop their skills and to become good, productive citizens. Our firm contributed \$60,000 to this project to help fund renovations and furnish the space with the necessary equipment to successfully operate the centers.

The Urban SEED X-change will give area youth an avenue to develop real-world business experience as well as a positive work ethic. Middle school-age children from the after school program will be selected and taught the basics of business including managing, designing and marketing their product. Income earned in their businesses will go toward further educational opportunities. Space in the annex also can be used as a training center for adults participating in CGM's home ownership initiative, an extensive home ownership and financial literacy training program.

Since the kickoff, teams of volunteers have been hard at work, clearing debris from inside and around the building, installing new electrical systems, an air conditioning and heating system, and plumbing; scrubbing walls, scraping and mopping floors, priming and painting walls and floors, carpentry, and landscaping projects like laying sod, creating brick walkways and planting shrubbery, as well as installing desks, computers and other furniture in the classrooms and storefront.

Media partners for this project were WSFA-TV12 and Faith Radio. In addition to lawyers and employees from Beasley Allen, groups that worked on the project include Prattville Christian Academy, Huntingdon College, WSFA, Faith Radio, and *The Montgomery Advertiser*. Our motto is "helping those who need it most." This project can

really make a difference in Montgomery's future by providing opportunities for disadvantaged young people. For more information about Common Ground Montgomery and how you can help in its mission, visit www.cgmal.org.

THE FIRM'S BLOOD DRIVE HELPS PROVIDE THE GIFT OF LIFE

Each year, our firm hosts three blood drives in conjunction with LifeSouth Community Blood Centers. Held about every four months, each blood drive gathers about 30 pints of blood for local hospitals in Central Alabama. LifeSouth Community Blood Centers has donor centers in Alabama, Georgia and Florida committed to meeting the blood supply needs of local hospitals in the communities they serve. Each year, nearly 5 million Americans need a blood transfusion. This means collecting 266,000 blood donations every month. LifeSouth operates more than 30 donor centers and 37 bloodmobiles, and has more than 1,000 blood drives every month.

It's quite obvious there are no substitutes for blood when blood is needed. Patients who need blood transfusions to survive depend on volunteer donors who are willing to give the gift of life. We appreciate all of our employees who gave blood this year. Because of the devastating storms that hit much of our state on April 27th, leaving mass destruction, injuries and deaths in the wake, this blood drive took on even more meaning. To find out about the blood drives and how effective they have been, contact Helen Taylor at 800-898-2034 or by email at Helen.Taylor@beasleyallen.com.

XXVI. FAVORITE BIBLE VERSES

John Gibbons and Erich Armster, two of my favorite people, work for the Fellowship of Christian Athletes and are located in Montgomery. John and Eric do a tremendous job in bringing young folks to the Lord. John, who serves as the Alabama FCA Director, sent in this verse.

And from Jesus Christ, the faithful witness, the firstborn from the dead, and the ruler over the kings of the earth. To Him who loved us and washed us from our sins in His own blood, and has made us kings and

priests to His God and Father, to Him be glory and dominion forever and ever. Amen.

Rev. 1:5,6

Erick, who is the Area Urban Director for FCA in our area, sent in one of his favorite verses.

"For this very reason, make every effort to add to your faith goodness; and to goodness, knowledge; and to knowledge, self-control; and to self-control, perseverance; and to perseverance, godliness; and to godliness, brotherly kindness; and to brotherly kindness, love. For if you possess these qualities in increasing measure, they will keep you from being ineffective and unproductive in your knowledge of our Lord Jesus Christ."

2 Peter 1:5-8.

I encourage all of our readers to get involved with the FCA in your hometowns. The FCA deals directly with young people in our schools. I know from first-hand experience that their involvement can pay great dividends for the young people. There is a tremendous need to reach out to young people and to make them aware of how Jesus can change their lives forever. The FCA does an excellent job of doing just that.

Arnold Mooney, a longtime friend from Birmingham, who is one of the biggest supporters of Auburn football around, sent in the following verse.

Behold, I am with you and will keep you wherever you go, and will bring you back to this land; for I will not leave you until I have done what I have spoken to you."

Genesis 28:15

Kenneth Lougee, a lawyer with Siegfried & Jensen, a very good law firm in Salt Lake City, Utah, sent in a verse for this issue. He says this verse is for all of the trial lawyers who operate in an area where their opposition is always well financed with unlimited trial support and resources available to them.

Be strong and courageous, be not afraid nor dismayed for the king of Assyria, nor for all the multitude that is with him; for there be more with us than with him:

2 Chronicles 32: 7-8 (KJV)

My longtime friend Bill Fuller, a lawyer from Birmingham, sent in a verse for this issue. Bill, who specializes in elder-law, says this verse is a daily encouragement to him and others.

Blessed are those who seek Him with their whole heart!

Psalm 119:2

Linda Rush, who attends St. James United Methodist Church with Sara and me, sent in two verses for this issue.

Surely He has borne our griefs and carried our sorrows; yet we esteemed Him stricken, smitten by God, and afflicted. But He was wounded for our transgressions, He was bruised for our iniquities; the chastisement for our peace was upon Him, and by His stripes we are healed.

Isaiah 53:4-5

Who his own self bare our sins in his own body on the tree, that we being dead to sins, should live unto righteousness; by whose stripes you were healed.

1 Peter 2:24

Linda says that by believing what Jesus accomplished for us on the cross, we receive protection, healing, deliverance and provision. The resurrection power that raised Jesus from death can be ours, allowing us to overcome any challenge or difficulty we may encounter. That's most reassuring for all of us because we live in a very difficult time in world history.

I am also adding a verse for this issue that is most appropriate for any season. But it's especially timely during this time of the year.

For God so loved the world that He gave His only begotten Son, that whoever believes in Him should not perish but have everlasting life.

John 3:16

XXVII. CLOSING OBSERVATIONS

THE TRAGIC STORM OF APRIL 27TH

The tornados that hit Alabama unbelievably hard on April 27th left a path of massive destruction in a number of counties. It's being reported that this was one of the deadliest outbreaks of tornados in U.S. weather history. According to reports it was the worst in Alabama since 1952. Hundreds of lives in our state were lost and thousands injured. It's too early to know the number of homes and businesses that were damaged, with many being totally destroyed, but it will be in the thousands. It's very sad to see the vast extent of the damage to people in our state. Many families have either lost loved ones, had family members injured, lost their homes or have no jobs. Unfortunately, many have suffered all four. People across the state who were not hit by the storms must help those who were. It's the right thing to do. Our prayers go out to all who were hurt and damaged in any manner by the storms.

ALABAMA ASSOCIATION FOR JUSTICE STEPS IN TO HELP STORM VICTIMS

The Alabama Association for Justice, which is made up of trial lawyers, went to work early on April 28th to help the storm victims. Many lawyers, their families and employees have been helping in the clean up and are trying to make sure assistance in the form of food, water and housing is being made available to the victims. After the clean-up and the grieving, Alabamians will face the next step of rebuilding their lives. For most folks, that will mean filing insurance claims so they can get started with that process.

The Association, an organization of lawyers whose mission includes helping injured individuals and families, offered free help in filing insurance claims for all those in need. Persons needing help of this sort should go to www.alabamajustice.org and fill out the online form. Victims may also call the AAJ office at (334) 262-4974. Any person requesting help will then be matched with a lawyer in their area who can assist with filing the claims and also can answer any legal questions those affected may have. There will be no fees or charges to storm victims in connection

with this project. ALAJ President Courtney French stated:

The people who were affected by the storms are in our hearts and prayers. We want to do everything we can to help those affected by the storms. We pride ourselves on serving individuals and families in their time of need. This is one way where we can help. The insurance process can be an arduous one and we can help make the process easier.

The Alabama Association for Justice, and its sister organization, the Alabama Civil Justice Foundation, have donated nearly \$9 million since their founding to charitable causes in Alabama. This is another opportunity for lawyers who really want to help folks to do so and I am confident they will.

COURT DISMISSES CHALLENGE TO NATIONAL DAY OF PRAYER

A federal court ruled last month that a National Day of Prayer in our country is legal. The law calling for an annual National Day of Prayer imposes solely on the duties of the U.S. president, leaving private citizens no legal standing to challenge it, according to an appeals court. The unanimous decision overturns a 2010 lower court ruling that found the law to be unconstitutional.

The panel from the U.S. Court of Appeals for the Seventh Circuit described the Presidential proclamations that follow the law as requests, not commands of the public. "Those who do not agree with a President's statement may speak in opposition to it; they are not entitled to silence the speech of which they disapprove," the court said. The Freedom from Religion Foundation, which had argued that the proclamation violates the Constitution's prohibition of an official "establishment" of religion, challenged the law. The group plans to ask for a rehearing by the Court's full panel of judges. The ruling came weeks before a National Day of Prayer was to be held on May 5th. This special day will now be observed, which in my opinion, is a good thing for the United States of America. There has never been a time when prayer for our nation was more urgently needed!

Source: *USA Today*

GIBSON VANCE WROTE AN EXCELLENT OP-ED PIECE

Gibson Vance, a lawyer in our firm who is serving as President of the American Association for Justice, wrote an interesting op-ed piece that appeared in The Washington Post last month. It's an accurate rendition of how important the judicial system is when it comes to safety issues. I am including the message in its entirety below.

HOW OUR CARS GOT SAFER

Traffic deaths in the United States have dropped to their lowest level since 1949, according to a report released this month by the National Highway Traffic Safety Administration (NHTSA). Remarkably, this drop occurred even as Americans drove 21 billion more miles in 2010 than they had the previous year. The drop in fatalities is due in large part to the fact that cars are getting safer. Since the introduction of the Ford Pinto nearly four decades ago—a car synonymous with danger, destruction and executives putting profits ahead of consumer safety—amazing advancements have been made in auto safety. The technology is better, regulations are stronger and buyers have more information. Not surprisingly, consumers are drawn to cars with the latest safety features.

Yet these factors alone do not tell the whole story. History shows that litigation and the civil justice system have served as the most consistent and powerful forces in heightening safety standards, revealing previously concealed defects and regulatory weaknesses and deterring manufacturers from cutting corners on safety for the goal of greater profits. The Ford Pinto litigation sent a strong message to the auto industry. Unfortunately, manufacturers have still sold dangerous cars. In June 2004, a Dallas-area mother stopped her Ford F-150 truck to speak with her husband through the driver's side window. Her three-year-old daughter leaned out the passenger side window and accidentally bit the rocker switch, causing the window to close on her neck. When her parents noticed moments later, it was too late—their daughter was strangled.

As power windows became more common, so too did instances of children being strangled. Seven children died within a three-month period in 2004. Manufacturers were aware of the issue, and the fix was relatively simple and inexpensive. In response to regulations in other countries, European and Asian cars already used a safer switch, one that must be pulled up to raise a window and so did many U.S. manufacturers on cars they offered to foreign markets. Yet incredibly, U.S. manufacturers did not install the safer switches on domestic cars because NHTSA had no rules governing power-window safety. Litigation eventually forced universal acceptance of the safer switches in 2006. It is easy to take for granted just how much safer vehicles have become and how safety measures have been standardized. For years, the auto industry has worked to undermine regulations and limit its liability by pushing for complete immunity from lawsuits when their vehicles comply with minimum federal safety standards. This would, in short, be devastating for consumers.

Recall that the design of the Pinto met all government standards of the time. Had compliance with federal standards been a complete defense of vehicle safety, Ford could not have been held accountable for the many burn victims that the company was later shown to have anticipated. Put another way, without the civil justice system, gas tanks would still explode in rear-end collisions, seat belts and airbags would not be standard, and cars would roll over onto roofs that would be easily crushed. There are multiple reasons behind the welcome news that traffic deaths continue to decline. But the role of the civil justice system is often overlooked. Litigation has spurred safety innovations in vehicles for more than half a century and will continue to be essential in keeping Americans safe and holding manufacturers accountable.

Gibson Vance
President of the American Association
for Justice
April 15, 2001

TRIAL BY JURY HAS ALWAYS BEEN IMPORTANT IN THIS COUNTRY

The American jury system has been under constant attack over the past several years and the attacks have intensified and become more vicious in recent months. It's to the point that many folks, as well as some elected officials, have forgotten how important our jury system really is. It's well documented that the rights of citizens are being taken away or at least trampled upon. It's always good to reflect on how the right to trial by jury was looked upon by our founding fathers. The following statements pretty well sum up their feelings and beliefs about the importance of the right to trial by jury in this country.

The friends and adversaries of the plan of the constitutional convention, if they agree on nothing else, concur at least in the value they set upon trial by jury; the former regard it as a valuable safe guard to liberty; the latter represent it as the palladium of free government.

Alexander Hamilton (1788)

I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.

Thomas Jefferson (1788)

Trial by jury in civil cases is as essential to secure the liberty of the people as any of the pre-existent rights of nature.

James Madison (1789)

Without the trial by jury we have no way to keep us from being ridden like horses, fleeced like sheep, fed like swine and clothed like bounds.

John Adams

Those who would destroy our jury system and take away the right to trial by jury are undermining the one thing that has consistently protected the American people and preserved their rights and freedoms over the years. Unfortunately many, including even some judges, have forgotten that the right to trial by jury is guaranteed by the U.S. Constitution in both criminal and civil disputes. It's rather interesting, and also quite telling, that the attacks on juries and jurors have been made just on the civil jury side and on the folks serving just on the civil juries.

Those, who for ulterior and financial reasons, are behind the attacks on our jury system might consider the following warning, by a prophet in Old Testament times:

Woe to those who enact unjust statutes and who write oppressive decrees, depriving the needy of judgment and robbing my people's poor of their rights, making widows their plunder, and orphans their prey.

Isaiah 10:1-2

The American people had best wake up and collectively fight to preserve the jury system in our country. I believe more and more folks are realizing that they have been voting for candidates in recent years who don't have their best interest at heart. In fact, folks have been voting against their own self-interest.

A MONTHLY REMINDER

If my people, who are called by my name, will bumble themselves and pray and seek my face and turn from

their wicked ways, then will I bear from heaven and will forgive their sin and will heal their land.

2Chron7:14

XXVIII. PARTING WORDS

As Christians throughout the world having celebrated Easter on April 24th in a number of ways, it might be good to reflect on the sole reason for our happiness and joy on Easter Sunday. While Easter brings egg hunts and chocolate bunnies for the children (and for some adults), oftentimes we forget the real reason for celebrating this very special day. The celebration of the resurrection of Jesus Christ should be on our minds and in our hearts on every Easter Sunday.

Putting things in perspective, no event in history has had a greater impact on the world than has the resurrection of Jesus Christ. On Easter Sunday, the Church declares the greatest of all good news and that is that Jesus Christ has risen. As my

good friend and pastor Walter Albritton pointed out in a recent Easter sermon, the resurrection gives us hope that the grave is not the end of life for us.

As we reflect on the meaning of the resurrection, all of us should read the account of Jesus being raised from the dead by God, His Father, in each of the four Gospels. It's important to remember that had Jesus not been raised from the dead, as predicted in the Old Testament, and as told by Jesus to His apostles, there would be little of real value to our Christian faith. If one doesn't believe that Jesus was in fact raised from the dead, there is little else in the Christian faith that makes any sense. As for me and my house, we believe in the Virgin Birth, the death and the Resurrection of Jesus, as well as the Life Eternal that is guaranteed to all believers. My prayer is that all people everywhere will come to have the same belief.

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