



THE
JERE BEASLEY REPORT

JULY 2011

Beasley Allen

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I. CAPITOL OBSERVATIONS

U.S. SUPREME COURT REFUSES TO HEAR PREMPRO APPEAL

The U.S. Supreme Court has refused to hear the appeal by Wyeth, a Pfizer unit, of a \$58 million award to three Nevada women who contracted breast cancer after taking the company's Premarin and Prempro menopause drugs. This leaves the award as the largest to be upheld on appeal in the thousands of hormone-replacement drug suits that have been filed. More than 6 million women took Prempro and other menopause drugs before a 2002 study revealed their links to cancer.

The Nevada Supreme Court ruled that jurors properly held Wyeth responsible for hiding the breast-cancer risks of Premarin and Prempro. The original award in 2007 totaled \$134.1 million to Arlene Rowatt, Jeraldine Scofield and Pamela Forrester. The trial judge later reduced the verdict to \$57.6 million. Wyeth wanted the High Court to order a new trial. The company contended that the jury was swayed by an "improper and inflammatory" closing argument by a lawyer representing the three women.

Lawyers representing the women urged the Supreme Court not to get involved, saying the award was warranted in light of the company's "extensive campaigns to provide false reassurances that its drugs were safe." Annual sales of Wyeth's hormone-replacement drugs exceeded \$2 billion before a 2002 study, sponsored by the U.S. National Institutes of Health, said that women using the medicines had a 24% higher risk of breast cancer. Until 1995, many patients combined Premarin, Wyeth's estrogen-based drug, with progestin-laden Provera, made by Pfizer's Pharmacia & Upjohn unit. Wyeth then combined the two hormones in Prempro. Folks should be shocked to hear that the drugs are still on the market.

Pfizer, the world's largest drugmaker, acquired Wyeth in 2009. The company, which has already settled a third of the pending cases over its Prempro menopause drug, set aside \$772 million to settle claims over the medicine. The three women were all in their 60s at the time of the verdict. Sadly, Ms. Forrester and Ms. Rowatt have since died of causes unrelated to the litigation. Every woman in the United States

owes a debt of gratitude to these three brave souls who fought the good fight and to their lawyers. Zoe Littlepage, from Little Rock, Ark., Rainey Booth from Tallahassee, Fla., and Peter Wetherall, from Reno, Nev., the lawyers who represented the women, all did a truly outstanding job. But the real heroes are the three women who brought this lawsuit and were not afraid to take on the powerful drug industry!

Source: *Bloomberg*

THE ANNISTON STAR EDITORIALIZES ON ALABAMA'S BUSINESS CLIMATE

The *Anniston Star* had a most interesting editorial in its June 7th edition relating to Alabama's business climate and tort reform. The writer is pretty much on target when it comes to our state's image in the business community. If you could recall all of the corporate money that has been spent over the years to create the belief that our country's court system is broken and needs fixing, we would have enough cash on hand to turn the federal government's current deficit into a hefty surplus. The myth of tort reform has worked in that it has kept lots of public relations firms in business. Let's see what the editorial in the *Star* had to say.

Open For Business In Alabama

More important to our new GOP legislative majority than bringing the state's indigent defense system under its control has been the passage of a plan to protect the business community from trial lawyers and their clients. Finally, after years of trying, Republicans (and a few Democrats) passed a tort reform package which, in the words of the chairman of the Business Council of Alabama's Board of Directors, let it be known that "Alabama is open for business."

Which begs the question, when hasn't it been? Although many business groups attacked Alabama courts as "judicial hell holes," it is hard to see how the fear of lawsuits prevented Gov. Bob Riley from recruiting the companies to Alabama that he did. Nor has anyone come forward with more than anecdotal evidence to suggest that companies are avoiding our state for fear they might be sued—unless, of course, they plan to do something that could lead to a suit.

Moreover, it can be argued that the primary cause of lawsuits in the state has been the way the Legislature, which has been controlled by Democrats until late last year, has historically catered to the interests of business. Even before the 1920s when

Gov. Bibb Graves decried the influence that the "Big Mules" (agriculture and industry) had on state government and denounced the Legislature for paying scant attention to the needs of working folks, this state has catered to commerce and manufacturing with low taxes, hostility to organized labor and few, if any, environmental regulations.

This left the courts as the only place where citizens can go with their grievances. Now that avenue of redress has been limited. In congratulating itself for getting tort reform passed, the Business Council of Alabama noted that tort reform will lead to "new businesses and new jobs." Maybe so. More likely, however, is that tort reform will simply be added to the list of things the

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Legislature has done for business which, in the long run, will benefit only business. Anything positive that the general public gets must be viewed in that context.

I have served on the Board of Directors of the Montgomery Area Chamber of Commerce for several years. During that time, I have heard from governors, key legislators and business leaders, all telling me how great the business climate is in Alabama. Perhaps, the tremendous industrial development success that our state has enjoyed over the past 20 years is the best evidence of how good that climate has really been. Nevertheless, the Alabama Legislature passed another tort reform package during the Regular Session.

Source: *Anniston Star*

ALABAMA'S TRIAL COURTS FACE FINANCIAL CRISIS

While Alabama's trial courts have incurred \$64 million in mandated budgetary increases over the past ten years, appropriations have only increased by \$32 million. That was a real blow and hurt the courts in every county. It should be noted that the court system has no control over these increases. They are for costs such as health insurance premiums, employee retirement contributions, funding for newly-created judgeships, and cost of living increases enacted by the Legislature. As a result of being grossly underfunded, the court system started layoffs in 2003. I understand that for the past three years a hiring freeze has been in effect and no merit raises have been granted.

Following the introduction of Gov. Bentley's budget for fiscal year 2012, which further reduced funding for the courts, the Chief Justice made repeated requests to the Legislature to adequately fund the court system. A funding mechanism was later proposed with the filing of House Bill 457 by Rep. Patricia Todd. This bill would have imposed an additional one dollar tax on tobacco products. The fiscal note on the bill was estimated at \$280 million, with \$9 million being earmarked for the courts. The bill never received a vote in the House Ways & Means Committee. In order to address the funding crisis, on April 12th, the Chief Justice issued an Administrative Order which includes:

- Authorization for each presiding circuit judge to close court offices to the public each Friday, so that employees can work undisturbed to process paperwork;

- Reduction in the number of civil jury trial weeks by 50%;
- Closing all multi-site court facilities in counties with more than one court facility; and
- Request for jurors to waive juror fees & mileage.

In addition to the 270 employees who were laid off during the past two years, beginning October 1st, an additional 279 employees will now lose their jobs. These layoffs will hurt all Alabama citizens. Some examples of how this will impact local courts are:

- To be fully staffed, Montgomery County should have 51 employees in the Circuit Clerk's office. Presently, there are 34 employees and this number will be further reduced to 22 in October.
- Shelby County, which is the fastest growing county in the state, should have 30 employees in the Clerk's office. Presently, there are 16 employees and this number will reduce to ten in October.
- My home county of Barbour has two courthouses. My long-time friend, Circuit Clerk David Nix, should have seven employees to handle the responsibilities of his office. He currently has five employees and that number will be reduced to 3 in October.

It's abundantly clear that we are facing a dire situation in our court system. Our citizens should best prepare themselves for extreme delays in the processing of civil, domestic relations, and child support cases. Criminal cases will be delayed and that leads to all sorts of problems. Collections of court-ordered monies, which include restitution for crime victims, will diminish greatly.

It has always been said that justice delayed is justice denied. It's quite apparent that justice has taken a severe hit in Alabama. Every Alabamian is entitled to a court system that is adequately funded and fully functional. That's a right afforded by the Constitution. As I have stated many times before, it's way past time for Alabama to overhaul its antiquated tax system and provide basic services to our citizens. We can no longer deal with problems by ignoring them. Gov. Bentley and the current group of Legislators inherited a fiscal mess when they took office, but that doesn't mean they should do as Governors and Legislators have done for years, refuse to face reality. That reality is the state must find

new revenues in order to adequately fund all essential needs.

A MUST SEE MOVIE FOR ALL AMERICAN CITIZENS

Any lawyer who has ever selected a jury for a civil trial over the last ten years has had to deal with the public's reaction to the infamous McDonald's coffee case. The public's perception of that case was because of a masterful public relations campaign. I am reasonably sure every person has heard about this case since it became the classic example of a "frivolous lawsuit." Anybody who read a newspaper or watched any television over the past decade has been bombarded with information about the case that was far from being truthful. I am reasonably sure that most folks now believe they know exactly what the McDonald's case was all about. I suspect most see it now as a greedy woman who hit the jackpot. That is not at all true.

The *Hot Coffee* movie, which recently appeared on HBO, attacks the general perception of the McDonald's case. It also goes much further into the tort reform debate. The movie gives folks for the first time an opportunity to reflect on their long-held beliefs about the American judicial system. It will make those who have been misled, wonder if their beliefs are valid.

Because of the success of the intense public relations campaign by the tort reformers, financed by tobacco, pharmaceutical and insurance companies, to name a few, many folks seriously believed our civil justice system wasn't impartial and was actually unfair. Potential jurors were led to believe that a large verdict, regardless of merit, will have a bad effect on them and would cost them in their pocketbooks. Most voters seem to believe that we have a court system out of control and one that badly needs reforming. As a result, they voted against their own economic and social interests.

The force behind the movie project is Susan Saladoff from Ashland, Ore. Susan, as director and producer of the movie, spent 25 years practicing law in the civil justice system, representing injured victims of corporate wrongdoing. Susan stopped practicing law in 2009 and devoted her time to producing this documentary. She began her career as a public interest lawyer with Trial Lawyers for Public Justice, now known as Public Justice. This organization, for the last 25 years, has been at the forefront of keeping America's courthouse doors open

to all citizens. Susan explains the purpose of the film this way:

I wanted to tell the truth about how our civil justice system in the U.S. is being distorted by huge public relations campaigns funded by large corporations to limit people's access to the court system. I used the McDonald's coffee case as a springboard to tell that story.

The film premiered at the 2011 Sundance Film Festival and is making the Film Festival circuit to rave reviews. *Hot Coffee* opened on June 27th on HBO as part of the summer documentary series. Once you see the film, you will quickly see it's not for lawyers. Instead it's for ordinary folks, young and old, regardless of their political leanings. You can get a feel for what the movie is all about by going to hotcoffeethemovie.com. The trailer will make you want to see the movie. You can also find out where it will be playing and also place an order for a DVD which should be available by the fall of 2011. I recommend that everybody see this movie!

Source: [Hotcoffeethemovie.com](http://hotcoffeethemovie.com)

THE ALABAMA CONSTITUTION ON IMMIGRATION

On occasion, I have wondered how many members of the Alabama Legislature have actually read the Alabama Constitution. Hopefully, all have at least read the original document and perhaps some of the many amendments. Apparently, in dealing with the immigration problems, a few of them missed Section 30 which deals specifically with immigration. This section, while it doesn't deal with illegal immigrants, does set out our state's Constitutional position on immigration. In that regard, Section 30 reads:

That immigration shall be encouraged; emigration shall not be prohibited, and no citizen shall be exiled.

While illegal immigration creates problems of all sorts, the roles of the states and federal government are quite different. The federal government has a duty to control our country's borders and to keep illegals out of the country to the extent possible. Immigration policy is without any doubt the direct responsibility of the federal government. The states' responsibilities, on the other hand, traditionally have been to enforce such laws dealing with immigration that are passed by Congress.

Unfortunately over the past few years, the immigration issue has become highly political with lots of politicians using it to their advantage. The legislation passed by the Alabama Legislature and signed into law will be discussed in the Legislative Section of this issue in more detail. I am not sure that Section 30 was ever considered when the immigration bill was passed and signed into law. But regardless, I predict that before the final chapter is written on this matter, a number of Legislators will regret passing this bill.

II. A REPORT ON THE GULF COAST DISASTER

AN UPDATE ON THE BP LITIGATION

Things have been very busy in the BP Multi District Litigation in New Orleans. Claims against BP, Transocean, Halliburton and Cameron continue to move forward at a brisk pace. The Limitation trial remains set for February 27, 2012 and is expected to last a few months. This trial will be the first real opportunity for the country, and likely the world, to learn what really happened leading up to this terrible disaster, one that will have a long-lasting and adverse effect on the Gulf Coast Region.

I suspect most people will be shocked to learn about the really bad conduct, as well as the attitude of certain companies involved in this tragic and avoidable disaster. A tremendous amount has been done by all of the lawyers working in the MDL and that will continue in order for the first trial to take place. Pretrial discovery, including a tremendous number of depositions, is going forward full force. All of the 19 lawyers from our firm who are working on this important litigation are very busy.

In June, depositions of BP executives were taken in England as part of the discovery process. The former BP CEO, Tony Hayward, was deposed. It will be very interesting when all that was uncovered in his deposition is made known to the public. Thus far, all of the depositions of key players from the various companies involved have gone very well. There will be many more depositions taken in the coming weeks.

So far, I understand that over 100,000 individuals and businesses have filed "short forms" and have joined the MDL and have

given notice in the Limitation proceeding. Momentum is building for those who were harmed to have their claims resolved in a real court of law, as opposed to being under a claims facility run by the slippery BP snake oil salesman, Ken Feinberg. We hear almost daily from our clients that the treatment they received from his "claim center" is not fair, not transparent, and with no standards of compensation that make any sense.

Businesses and individuals all along the Gulf Coast have been harmed in a way that I don't think Ken Feinberg or BP will ever understand or at least admit. Lots of folks in government may tell you "everything is fine" now, but let me assure you it's not fine for the victims. The people of our Gulf Coast are tough and resilient—that much we know—but they are still hurting. Our lawyers have heard the real stories of businesses that have shut their doors, laid off employees, or worse. They also know about the individuals who have lost their homes and jobs. Folks on the coast have had to undergo counseling in an effort to survive emotionally.

No matter what BP may tell the media, or what their TV ads say, there are real concerns that remain environmentally, ecologically and financially. Folks on the coast—and businesses that depend on the coast—have a long way to go before things are anywhere near back to normal. BP said it would "make things right," but that hasn't happened so far. Let me close by saying that I have never seen any event that has impacted so much of our Gulf Coast over such an extended period of time and that will have such significant future consequences.

TRANSOCEAN BLAMES BP

An internal investigation by Transocean, the owner of the rig that exploded in the Gulf of Mexico last year, puts lots of blame on oil giant BP for the disaster. According to the Transocean report, both the Deepwater Horizon explosion and resulting oil spill were the result of a succession of well design, construction, and temporary abandonment decisions that compromised the integrity of the well and compounded the risk of its failure. Transocean, a Swiss company, said many of the decisions were made by BP, the well's owner, in the two weeks before the incident. According to Transocean, its evidence indicates that BP failed to properly assess, manage and communicate risk. As we have previously reported, BP's own internal report on the disaster blamed a cascade of failures by mul-

multiple companies. Government investigations also have spread the blame around.

The Transocean report was said to be the culmination of work by an internal investigation team comprised of experts from various technical fields and other specialists. Transocean said the loss of evidence with the rig and the unavailability of certain witnesses limited its investigation and analysis in some areas. Among Transocean's findings:

- BP did not properly communicate to the drill crew the lack of testing on the cement or the uncertainty surrounding critical tests and procedures used to confirm the integrity of the barriers intended to inhibit the flow of hydrocarbons from the well. A hydrocarbon is a compound consisting of hydrogen and carbon that is found in oil and gas.
- BP adopted a technically complex nitrogen foam cement program for sealing the well. The resulting cementing job was of minimal quantity, left little margin for error, and was not tested adequately before or after the cementing operation. Further, the integrity of the cement may have been compromised by contamination, instability, and an inadequate number of devices used to center the casing in the wellbore.
- Cement contractor Halliburton and BP did not adequately test the cement slurry used to seal the well.
- BP also failed to assess the risk of the temporary abandonment procedure used at Macondo. BP generated at least five different temporary abandonment plans for the Macondo well between April 12, 2010, and April 20, 2010. After this series of last-minute alterations, BP proceeded with a temporary abandonment plan that created risk and did not have the required government approval.

You can rest assured that all of the companies, which are now Defendants in lawsuits arising out of the oil spill, share responsibility for the spill and resulting harm. They are pointing fingers at each other and have actually sued each other. Lawyers in our firm who are working on this litigation are convinced there is plenty of blame to go around.

Source: Al.com

LAWSUITS FILED FOR GULF OIL SPILL CLEANUP WORKERS

Our firm has filed suit on behalf of three persons who were made sick and are now disabled as a result of working in the clean-up effort. Their health was virtually destroyed. Each of them grew up on the water and were in good health. The Plaintiffs, Gary Stewart of Mobile, Ricky Thrasher of Orange Beach, and Robyn Hill of Foley, have very serious health problems. Each is unemployed, uninsured, in debt and in constant pain and discomfort. Because of their conditions, they can't work and can barely function. None of them had a clue what they were being exposed to during the oil spill cleanup.

Their lawsuits are now part of the Multi District Litigation pending in U.S. District Court in New Orleans. The three Plaintiffs are asking for compensatory damages, medical screening and monitoring. They are also asking for punitive damages because of the conduct of the Defendants, which include BP, Transocean Ltd., and Nalco Co.

BP purchased chemical dispersants from Nalco to use in the cleanup. The government didn't even know what chemicals were being used at first. In late May 2010, the Environmental Protection Agency directed BP to use a less toxic form of dispersant to break up the oil spill in the Gulf of Mexico. BP used more than 1.8 million gallons of two types of Corexit (9500 and 9527) and each is "harmful to human health." The workers should never have been exposed to these chemicals. The Defendants never warned them of the hazards and failed to provide any type protection for the workers. It wasn't until Stewart, a boat captain, returned to shore and took his boat to a decontamination site to be cleaned that he saw any reason to be concerned. When he saw that the dispersant had actually eaten the paint off the hull of his boat, he was greatly concerned about what it would do to humans.

The National Institute of Environmental Health Sciences is in the initial stages of a ten-year study to monitor and document the health of those who responded to the clean-up. Interestingly, BP contributed \$10 million to the study. The plan is to follow 55,000 workers and volunteers in Alabama, Louisiana, Mississippi and Florida. Even though it is helping to pay for this study, BP, as well as the other Defendants, has refused to pay any of those whose health has been destroyed by the chemicals used.

We are currently investigating potential claims on behalf of numerous others on the coast who were exposed to the chemicals. If you need more information about these

suits, contact Parker Miller or Rhon Jones in our firm's Toxic Torts Section at 800-898-2034 or by email at Parker.Miller@beasleyallen.com or Rhon.Jones@beasleyallen.com.

DEBATE CONTINUES OVER THE GULF'S POST-OIL SPILL CONDITION

Unfortunately, issues relating to the severity of the Gulf oil spill's environmental impact have divided public officials along state lines in the coastal states. Even in my state of Alabama it appears there is sharp disagreement over how things really are. There have been honest efforts by the state and others to promote the beaches and seafood industry in Alabama and that's good. But at the same time, the reality is that the long-range effect of the oil spill and potential health issues is still very much uncertain. The huge amounts of oil spilled and the large volume of chemicals pumped into the Gulf cause me great concern.

In my opinion, it's critical for independent studying of the effects of both to continue. Some seem to have forgotten that an estimated 206 million gallons of crude spilled into the Gulf last spring and summer. Compared The environmental consequences along the Gulf Coast have already been much more devastating than what was experienced in Alaska as a result of the 1989 *Exxon Valdez* disaster.

The distinction is significant in light of the \$5.4 billion to \$21.1 billion in Clean Water Act fines expected to be assessed against BP and other parties responsible for the spill. I predict the fines will approach if not exceed \$21 billion. Lawmakers in Washington are working on a bill to send most of the fine money to the affected Gulf states. But they have bogged down on several points. Perhaps chief among those points is how much money should be paid out for environmental as opposed to economic restoration. That's the big problem. How much each state should receive from the fines is also a big issue that must be resolved. Lawmakers should consider both environmental and economic issues in deciding the question of allocation.

Sen. Richard Shelby has been working on a compromise that would give the affected states flexibility in deciding whether to spend on environmental or economic projects. While it's very likely that the majority of the fine money will go to the environment, it's clear that more scientific study is needed. The bottom line is that Congress needs to make all of this a top priority and get a good bill passed very soon.

Source: Al.com

GCCF NAMES APPEALS JUDGES

The Gulf Coast Claims Facility (GCCF), the organization running BP's oil spill compensation system under the direction of Ken Feinberg, has appointed 25 people from Alabama, Mississippi, Florida and Louisiana to serve as appeals judges for the claims process. The persons appointed include former state Supreme Court Justices, law school deans and professors and other members of the legal community. It's a very good and qualified group. In March, the GCCF hired Jack Weiss, chancellor of Louisiana State University's law school, to select the panel. In my opinion, he did a good job. My question is: Why did Feinberg wait so long to get this done? Why wasn't it done months ago?

Anyone who files a claim valued at more than \$250,000 can protest the claims operation's initial ruling to the appeals panel. BP can protest the decision on any claim above \$500,000. The judges will serve in panels of three and the panels will have 14 days to rule on each case before them. If Claimants are not satisfied with the appeals ruling, they can file their claim with the U.S. Coast Guard, or they can sue BP and other companies involved in the spill. While this appeals process looks good on paper, the problem is not with the panel. Instead, it's how the GCCF has been handling claims. In my opinion that won't change.

More than 500,000 people and businesses have filed for reimbursement of losses with the GCCF since the Deepwater Horizon rig exploded over a year ago. So far the claims facility has only paid out \$4.4 billion. Business owners and elected officials have sharply criticized the operation, run by Ken Feinberg, who is being paid by BP, for offering payments that are much too small, delaying, and forcing spill victims to go through an onerous process to prove their losses. I am not sure appointing the appeals panel judges will change things for BP's victims to any large degree.

Source: Al.com

III. DRUG MANUFACTURERS FRAUD LITIGATION

JUDGE ORDERS DRUG COMPANY TO PAY SOUTH CAROLINA \$327 MILLION

A judge in South Carolina has ordered a Johnson & Johnson subsidiary to pay the State of South Carolina \$327 million for deceptive marketing of an antipsychotic drug. Judge Roger Couch ordered Janssen Pharmaceutica, Inc. To make the payment for violations of the South Carolina Unfair Trade Practices Act. A jury in March found that the subsidiary of the New Brunswick, N.J.-based drug manufacturer violated the law by sending misleading letters to about 7,200 doctors in South Carolina. The company downplayed links between diabetes and the schizophrenia drug Risperdal and improperly claimed the drug was safer than competing medications.

The amount was the largest drug marketing award to date in South Carolina history and the largest penalty ever levied for violations of the South Carolina Unfair Trade Practices Act. The blockbuster antipsychotic, which generated \$1.5 billion in sales last year, lost patent protection in 2008. South Carolina Unfair Trade Practices Act violations carry potential penalties of up to \$5,000 apiece, meaning the company faced possible consequences of more than \$3.1 billion, considering the 620,000 Risperdal prescriptions written for people on Medicaid and the state health plan alone. Opting not to consider the number of prescriptions in his equation, Judge Couch assessed a \$300 penalty per sample box of the drug that was distributed and a \$4,000 penalty per publication of the "Dear Doctor" letter, for a total penalty of more than \$327 million. The judge wrote in his order.

There is absolutely no doubt in my mind that the desire to protect market share overshadowed the good judgment of those in control at Janssen.

The jury found that the company also made tens of thousands of drug marketing-related visits that minimized Risperdal's link to diabetes, improperly claimed the drug was safer than other competing medications and enclosed misleading information inside drug packages. In his order, Judge Couch wrote that Janssen knew that Risperdal was associated with health problems,

but intentionally hid those studies. In his order, the judge wrote:

The Company systematically set about in a concerted effort to conceal that information and to manipulate the information available to the public for the purpose of protecting or improving its market share.

As you may recall, South Carolina reached a settlement with Pfizer Inc. for \$11 million over the company's disputed sales tactics for certain drugs. That was about double the amount the state would have gotten under a multistate settlement agreement. In 2009, the state reached a \$45 million settlement with Eli Lilly & Co. over the drug maker's marketing of an anti-psychotic drug. According to the drug maker, that was its largest settlement with a single state over Zyprexa.

South Carolina's case over Risperdal is the fourth to go to court nationally. A Pennsylvania case was dismissed in June, and a case in West Virginia was dropped in December. Janssen has appealed a Louisiana verdict ordering the company to pay nearly \$258 million for misrepresenting Risperdal's links to diabetes in that state. In May, Johnson & Johnson stated in a quarterly financial filing that it had set aside a reserve related to a federal criminal investigation of its sales and marketing practices for Risperdal.

Source: Associated Press

QUEST DIAGNOSTICS TO PAY \$241 MILLION FOR OVERCHARGES

We wrote last month about a settlement involving Quest Diagnostics Inc., but due to the timing of the settlement, and our press deadline, we weren't able to fully explain it. Quest agreed to repay California \$241 million for more than 15 years of overcharges to Medi-Cal. The settlement is the result of a lawsuit brought in 2005 by a whistleblower who alleged the labs systematically overcharged patients of Medi-Cal, the state's Medicaid program for the poor. The lawsuit also claimed Quest, California's biggest provider of medical lab testing, gave illegal kickbacks to doctors, hospitals and clinics that referred Medi-Cal patients and charged Medi-Cal up to six times more than other customers for tests. This is just another example of how corporations commit fraud against state Medicaid programs. Attorney General Kamala Harris had this to say in a written statement:

Medi-Cal providers and others who seek to cheat the state through false claims and illegal kickbacks should know that my office is watching and will prosecute.

The settlement is the largest ever recovered under California's False Claims Act. The whistleblower in the lawsuit was a smaller competitor, Hunter Laboratories Inc., whose CEO Chris Riedel complained that it was a struggle to compete with Quest's low rates for doctors, hospitals and clinics, noting they were much lower than what Medi-Cal was being charged.

Niall P. McCarthy and Justice T. Beyer, lawyers with the firm of Cotchett, Pitre, & McCarthy, represented the whistleblower in the case. The firm, which has offices in California, New York and Washington, D.C., did a tremendous job in this case. The lawyers were instrumental in negotiating the settlement. The Attorney General also is to be commended for pushing this case and obtaining justice for California taxpayers.

Source: Mercury News

IV. PURELY POLITICAL NEWS & VIEWS

ALABAMA PASSES THE NATION'S STRONGEST IMMIGRATION LAW

Alabama now has a new illegal immigration law, one being called the toughest in the country, and it's already causing a great deal of heated discussion. I don't believe anybody really thinks the new law won't cause our state some major problems. There are parts of this law that will be extremely costly and also very difficult to enforce. For example, the law contains provisions requiring public schools to determine students' immigration status and it also makes it a crime to knowingly give an illegal immigrant a ride of any sort. It authorizes police officers to arrest anyone "suspected" of being an illegal immigrant if they are stopped for "any other reason." Alabama employers will be required to use a federal system called E-Verify to determine if new workers are in the country legally.

I have to wonder if all of the companies in Alabama presently hiring Mexican workers fully realize what has happened to them and how it will affect them economically. I understand Legislators are already hearing from farmers, folks in the poultry industry, landscape company owners, home

builders, road contractors, restaurant owners and many others. All these folks have routinely hired Mexican workers. The bill's sponsors—and others who voted for it—may find that playing politics with the immigration issue might have been a mistake. What the pollsters told them about public opinion on this issue may be shifting. The furor accompanying passage of this legislation reminds me of the days in Alabama when a certain governor back in 1962 was shouting for the world to hear, "Segregation now and segregation forever." Hopefully, we aren't living in the past politically in our state.

You can rest assured that this law will be the subject of constitutional challenges. The American Civil Liberties Union and the Southern Poverty Law Center, among others, have indicated that they plan to challenge the law. The legal director for the Southern Poverty Law Center, Mary Bauer, confirms that a lawsuit will be filed before the provisions of the law are scheduled to take effect on September 1st. She had this to say about the law: "It is clearly unconstitutional. It's mean-spirited, racist and we think a court will enjoin it."

Even though I am not an expert on constitutional law, I don't believe the law will survive a constitutional challenge. The House sponsor, Rep. Micky Hammon, says the bill was written so that if any part of it is determined to be unconstitutional or violates federal law, the rest will stand. I will be greatly shocked if there will be much left to stand after the courts rule. Alabama's measure was said to be modeled on a similar law passed in Arizona. A federal judge has already blocked the most controversial parts of Arizona's law in a ruling last year after the Justice Department sued. A federal appeals court judge upheld the decision. Arizona Gov. Jan Brewer plans to appeal to the U.S. Supreme Court. Our neighboring state, Georgia, also passed a law cracking down on immigration this year, and civil liberties groups have filed a lawsuit in an effort to block it.

With all of the serious problems facing our state and the apparent lack of money, I have to wonder why illegal immigration has taken center stage with our political leaders. School administrators, who are losing teachers and the ability to even buy supplies, will now have an additional burden. Law enforcement officers, who are already overworked and grossly underpaid, will be required to take on a new responsibility under the law. I doubt they will be able to enforce this law. Once those who have been employing hard-working Mexicans realize what has happened to them,

they may be ready to "leave the Tea Party" and demand that the Legislature repeal the law. I understand lots of Legislators are already getting calls!

WHO ARE THE GUILTY PARTIES?

A friend asked me last month if I remembered when teachers, state employees, firefighters, police officers, senior citizens, children, folks on Medicaid, and others "crashed the stock market, wiped out much of our 401Ks, took trillions in taxpayer funded bail outs, spilled 200 million gallons of oil in the Gulf of Mexico, gave themselves billions in bonuses, and even paid no taxes?" When I heard that list of culprits, I was shocked. I never realized these folks had anything to do with any of those happenings. I had to think hard on when and how all of this happened—then I realized that my friend was only kidding. If the folks he mentioned weren't guilty, then who all were guilty? Maybe some of our readers can help me on this.

NEW ALABAMA CONGRESSIONAL MAP IS GOOD FOR INCUMBENTS

It appears that Alabama's seven members of the U.S. House of Representatives fared very well in the new Congressional districts. The Alabama Legislature accepted a Congressional map that makes mostly minor changes to the demographic makeup of the current districts. Gov. Robert Bentley supported the final map and signed the bill into law. The plan must still be approved by the U.S. Justice Department.

Congressional maps are redrawn every ten years after the Census to even out the population in each district. Fortunately, Alabama is not one of the states to gain or lose a seat in Congress this year. The Legislature's primary duty was to put 682,819 people in each district. That was up from 635,300. Obviously, that is impossible to do without dividing up some of our counties. For example, Montgomery County will be represented by three members of Congress. While that sounds good, I have to wonder if it really is.

Source: Al.com

THE LEGISLATURE DID SOMETHING THAT WAS LONG OVERDUE

During the just-completed Regular Session, the Alabama Legislature passed SB 112, which purports to remove the racist

and highly-offensive language from the Alabama Constitution, and that was long overdue. The voters will have to approve it in the upcoming election year. Frankly, I doubt that many folks even knew this language was in the document, but the action taken by the Legislature was good and needed. I only wish a bill could be passed that would “outlaw racism” once and for all in this country, but that is wishful thinking for sure. We should know by now, that no legislative body can pass a law that changes the hearts of men.

V. LEGISLATIVE HAPPENINGS

THE 2011 LEGISLATIVE SESSION COMES TO AN END

I had intended to do a review of the Regular Session’s accomplishments in this issue, but have decided to wait until next month. I will say, however, that the manner in which the Senate operated—with virtually no debate on any of the important bills passed in that body—has made our Legislature much like that in Nebraska. The only difference is that—in theory—we have two separate chambers, while Nebraska only has one. Some State House observers say Alabama, as a practical matter, now operates in the same manner as Nebraska which has a unicameral system. That is extremely dangerous for both the present and future in our state.

SPECIAL SESSION NEEDED FOR HOMEOWNERS INSURANCE REFORM

Senator Ben Brooks is correct in saying that there will be lots of attention paid to homeowners insurance reform in the next few months. Sen. Brooks believes a Special Session of the Legislature focused only on insurance reform should be called in the fall. The Mobile Senator says Gov. Robert Bentley, and now, many Legislators, support focusing on bills that will help lower insurance costs in the state. This is especially true after the tornadoes devastated areas of central and northern Alabama in April. We have seen in the past what hurricanes have done to coastal counties.

There were some bills passed in the Regular Session that will help. One that passed was a measure to establish a grant

program to allow homeowners to retro-fit their homes to higher standards to better withstand severe weather. Another bill allows homeowners to take a tax deduction for money spent to upgrade their homes to the standards set forth by the Insurance Institute for Business and Home Safety. Those upgrades include roof and foundation support, along with impact resistant windows and storm resistant shutters, among many other upgrades. If our Alabama readers agree with Sen. Brooks that we need insurance reform, let your Senators and House members know.

Source: wkrg.com

VI. COURT WATCH

U.S. SUPREME COURT PROTECTS GENERIC DRUG FIRMS

In a ruling that should shock any person who is now taking a generic drug, or who has taken generics in the past, the U.S. Supreme Court held last month that generic drug companies cannot be sued under state law over the companies failing to provide adequate label warnings about potential side effects. By a 5-4 vote, the Justices gave a huge victory to Teva Pharmaceutical Industries Mylan Inc.’s UDL Laboratories and Actavis Inc. by overturning four U.S. Appeals court rulings that allowed the lawsuits. The ruling also is seen as a stinging defeat, not only for persons damaged by generic drugs, but also for American taxpayers who now will have to pick up the massive remedial costs relating to the damages done by the manufacturers of these drugs.

Victims of wrongdoing by the generic manufacturers, many of whom have disabling injuries, may well have had the judicial system shut down for them. Hopefully, that won’t be the case. It’s most difficult to understand how the five Justices in the majority reached their decision. To say it defies logic is a gross understatement. I have to wonder if they really realize what great harm they have done to the American people.

The companies argued that federal law barred such lawsuits because the drug had been approved by the U.S. Food and Drug Administration. Under federal law, the Court said generic drugs were required to have the same labels as their brand name equivalents. Justice Clarence Thomas wrote the Court’s majority opinion, saying federal

drug regulations applicable to generic drug manufacturers directly conflicted with and thus pre-empted state lawsuits. The Justices reversed several U.S. Appeals court rulings that the lawsuits against the companies could go forward. Generic drugs account for more than 70% of all prescriptions filled in the United States.

Justices Sonia Sotomayor, Ruth Bader Ginsburg, Stephen Breyer and Elena Kagan dissented. The impact of this decision, which goes against the position taken by the federal government, including the FDA, will be discussed in more detail in the August issue. If this decision doesn’t wake up the public, I am afraid nothing will.

Source: *Insurance Journal*

U. S. SUPREME COURT RULES FOR WAL-MART IN SEX BIAS CLASS ACTION

In another blow to working people, the U.S. Supreme Court has rejected the huge class-action lawsuit charging sex discrimination at Wal-Mart Stores Inc. The ruling, handed down last month, could affect major cases in other industries. The Justices unanimously overturned a U.S. Appeals court ruling that more than a million female employees nationwide could join in the lawsuit as a class alleging that Wal-Mart paid women less and gave them fewer promotions. The Supreme Court agreed with Wal-Mart that the class-action certification violated federal rules for such lawsuits. In laymen terms, it was “too big to be a class.”

The Court accepted Wal-Mart’s argument that the female employees in different jobs at 3,400 different stores nationwide and with different supervisors do not have enough in common to be lumped together in a single class-action lawsuit. Clearly, the ruling was a setback for women’s groups, which have said a decision for the company could signal a significant retreat for women’s rights in the workplace.

Although the court rejected the class-action status, the small group of women who brought the lawsuit, such as Betty Dukes, a Wal-Mart greeter at a store in Pittsburg, Calif., still can pursue their individual claims. “The Court’s ruling erects substantially higher barriers for working women and men to vindicate rights to be free from employment discrimination,” the Plaintiffs said in a statement, stressing that the decision does not address whether Wal-Mart committed sex discrimination.

Justice Antonin Scalia concluded for the court majority that the class was not properly certified. “In all, Wal-Mart operates approximately 3,400 stores and employs

more than one million people. Because respondents wish to sue about literally millions of employment decisions at once, they need some glue holding the alleged reasons for all those decisions together," the Justice wrote. Justices Samuel Alito, Anthony Kennedy and Clarence Thomas and Chief Justice John Roberts joined with Justice Scalia in the case. The Court's other four Justices joined part of the majority opinion, but dissented in another part. The real effect of this decision, other than hurting lots of women, won't be known immediately.

Source: *Insurance Journal*

CLIMATE CHANGE LAWSUIT AGAINST UTILITIES REJECTED BY U.S. SUPREME COURT

The U.S. Supreme Court ruled last month that states can't invoke federal law to force utilities to cut greenhouse-gas emissions. This shuts off one avenue for groups that advocate stronger and badly-needed steps against climate change. The unanimous ruling is a victory for five companies—American Electric Power Co., Duke Energy Corp., Xcel Energy Inc., Southern Co. And the government-owned Tennessee Valley Authority. They had been sued by six U.S. states and New York City. The states, which sought a cap on emissions, argued that carbon dioxide spewed by the utilities is a public nuisance because it causes climate change. The Justices said the Environmental Protection Agency was better equipped than federal judges to assess the costs and benefits of reducing greenhouse gases.

The Court's decision appears to put the burden squarely on the EPA. The states sued in 2004, invoking both state and federal law. The Supreme Court case focused on the federal law claim and the Justices didn't rule on the state question. The states argued that the EPA still hasn't taken action to reduce carbon emissions from the plants named in the lawsuit.

Source: *Bloomberg*

SUPREME COURT RULES IN HALLIBURTON CASE

Halliburton Co. suffered a legal setback last month when the U.S. Supreme Court refused to make it harder for shareholders to proceed with some class-action securities-fraud lawsuits against publicly-traded companies. The Justices unanimously ruled

that a U.S. Appeals court was wrong when it refused class certification in a securities fraud lawsuit filed in 2002 on behalf of all buyers of Halliburton stock between June 1999 and December 2001. A group of mutual and pension fund investors claimed in the lawsuit that Halliburton understated its asbestos liabilities while overstating revenues in its engineering and construction business and also the benefits of its merger with Dresser Industries.

It was alleged in the lawsuit that those misstatements artificially pumped up Halliburton's stock price, and that the company eventually made corrective disclosures that caused its stock price to fall. A federal judge in Texas dismissed the lawsuit, ruling that the investors failed to prove their losses were tied to a particular statement made by the company or its officers—a concept known as loss causation. The federal appeals court agreed and ruled that, for the lawsuit to proceed as a class action, the Plaintiffs must first prove at the outset, by a preponderance of the evidence, that the alleged misrepresentations caused the stock price to fall, resulting in investor losses.

The appeals court bought Halliburton's arguments that the evidence failed to show the alleged misrepresentations had any impact on the stock price, ruling that the lawsuit could not proceed as a class action. But the Supreme Court in an opinion written by Chief Justice John Roberts, disagreed and reinstated the lawsuit. The opinion reads:

The question presented in this case is whether securities fraud Plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not.

This ruling is very important for a number of reasons. Discovery wouldn't be complete at the class certification stage of a case, which would make the Plaintiff's burden unduly harsh. Causation would be an issue in the case, but not on the certification issue.

Source: *Insurance Journal*

ALABAMA SUPREME COURT CHANGES LAW ON WANTON CONDUCT CASES

The Alabama Supreme Court has made a drastic change in lawsuits arising out of wanton conduct. In a case decided recently, the Court held that the statute of limitations for such cases is now two years, instead of six years, as it has been for a long time. The ruling will not apply retroactively and will

apply prospectively to cases filed after the ruling came down. I understand there will be a request for a rehearing in this case. As I read the decision, a party has two years from the date of the decision to file a wantonness claim that accrued before the decision unless the six year statute of limitations would expire before the end of that two year period. If the claim accrued more than four years ago, a party has a six year period to file a wantonness claim. If the claim accrued less than four years ago, a party would have two years from June 3, 2011 to file the wantonness claim. If that seems confusing, that's because it is.

JUDGE APPROVES \$3.4 BILLION INDIAN SUIT SETTLEMENT

A \$3.4 billion settlement in a class-action lawsuit for American Indians has received final approval from a federal judge. District Judge Thomas Hogan announced approval last month of the settlement in the case (*Cobell v. Salazar*), which found the Department of Interior mismanaged lands held in trust on behalf of Native Americans. The suit was originally settled in December 2009 and then approved by Congress last November.

The judge's approval will allow hundreds of thousands of Native Americans who either had Individual Indian Money accounts, an interest in trust, or restricted land managed by the Interior Department, to receive payments of at least \$1,000 each. Parts of the settlement will go toward buying interest in trust lands and a scholarship fund.

Source: *Reuters*

VII. THE CORPORATE WORLD

TWO GIANTS DO BATTLE IN THE U.S. SENATE

The recent battle in the U.S. Senate between banks and retail merchants was nothing like that between David and Goliath, as described in the Old Testament. In this battle, merchants triumphed over bankers in the quest for billions. The Senate voted to let the Federal Reserve curb the fees that retail stores pay financial institutions when a customer "swipes a debit card." While the merchants won, I'm

not so sure the nation's consumers have very much to celebrate from this battle. As a result of the vote, the Fed will be allowed to issue final rules on July 21st cutting the average 44 cents that banks charge for each debit card transaction. That fee, typically 1% to 2% of each purchase, according to estimates, produces \$16 billion in annual revenue for banks and credit card companies.

The central bank has proposed capping the so-called interchange fee at 12 cents, though the final plan could change slightly. Victorious merchants claim the lowered fees should allow them to drop prices. But the banks said they could be forced to increase charges for things like checking accounts to make up for lost earnings. It shouldn't be a big shock that each side challenged the other's claims. Interestingly, based on reports, consumer groups were not a united front in this fight. While U.S. PIRG, which represents state public interest research groups, said consumers would benefit, the Consumer Federation of America took no formal stance. Instead, it said it was concerned about what both industries might do.

In the vote, Senators trying to thwart the Fed's rules needed 60 votes to prevail but fell six votes short, 54-45. That delivered a victory for Sen. Richard Durbin, D-Ill., who got the provision placed into last year's financial overhaul law requiring the Fed's action. Thirty-five Republicans joined 19 Democrats in backing the unsuccessful effort to block the Fed. Thirty-two Democrats, 12 Republicans and an Independent voted to let the central bank move ahead. Interestingly, Sen. Joseph Lieberman, I-Conn., did not vote.

The roll call vote in the Senate defeated a proposal by Senators Jon Tester, D-Mont., and Bob Corker, R-Tenn. That would have delayed the Fed rule for a year. In the meantime, the Fed and three other agencies would have studied whether the Fed's current proposal is fair and rewritten it if at least two agencies decided it wasn't fair. It will be most interesting to see how things play out now that the Senate has voted against the banks. Hopefully, things will wind up being good for consumers. Edmund Mierzwinski, consumer program director for U.S. PIRG, said some banks might curtail the rewards programs that many attach to their debit cards, such as awarding cash back or airline miles. But he said checking account fees would not rise.

When one giant battles another grant—regardless of which giant wins—there is concern for how consumers will fare. This battle indirectly affects consumers, but only

time will tell exactly what the real effect of this "win" by one of the giants will be.

Source: Associated Press

MORGAN KEEGAN TO PAY \$200 MILLION TO SETTLE FRAUD CHARGES

Morgan Keegan & Co. And Morgan Asset Management have agreed to pay \$200 million to settle fraud charges related to subprime mortgage-backed securities. Morgan Keegan, a Memphis, Tenn.-based brokerage arm of Regions Financial Corp., as well as former portfolio manager James C. Kelsoe Jr. And comptroller Joseph Thompson Weller, were accused in an administrative proceeding last year of causing the false valuation of subprime mortgage-backed securities in five funds managed by Morgan Asset Management from January 2007 to July 2007. The Securities and Exchange Commission brought its enforcement action in coordination with the Financial Industry Regulatory Authority, or FINRA, and a task force of state regulators from Alabama, Kentucky, Mississippi, Tennessee and South Carolina.

Source: bizjournals.com

MORE PROBLEMS FOR REGIONS BANK

It was reported last month that board members at Regions Financial Corp. Are investigating claims that former executives delayed proper disclosures about loans that were going bad in 2008 and 2009. This news broke about the time a federal judge ruled that a lawsuit involving those allegations could go forward. U.S. District Court Judge Inge Johnson denied a motion in that case by Regions to dismiss the suit. This was good news for a pension fund for the Plaintiff in the case, Chicago-based Teamsters Local 703. Judge Johnson ruled that the Plaintiffs "have pled sufficient allegations that Regions' loan loss reserves were false and misleading."

The bank board's audit committee has hired Sullivan & Cromwell, a New York-based law firm, to investigate an allegation that \$150 million in bad loans were removed from a list of non-accruing loans in March 2009. *The Wall Street Journal*, citing unnamed sources and court documents, first reported the board's investigation. Judge Johnson's ruling details how Regions reviewed its bad loans to determine those from which the bank did not expect to collect payment, known as "non-accruals." Such loans require the bank to set aside reserves to cover those losses or to

write them off and count them against earnings.

According to the judge's ruling, the bank's special assets officers would compile monthly lists of loans that posed a high risk of default, based on the bank's nine-point scale. It appears that the bank would attempt to keep some loans from being lumped in the "non-accrual" category. The Federal Reserve has opened its own investigation into the allegations, as well as into Regions' loan classification practices. It should be noted that Regions has not repaid the \$3.5 billion it received from the federal government's Troubled Asset Relief Program. From all accounts, things don't look very good for Regions on any of the above.

Sources: *Birmingham News* and Associated Press

COURT APPROVES \$33 MILLION SETTLEMENT IN INVESTOR LAWSUIT

A judge granted preliminary approval last month to a settlement requiring Ambac Financial Group Inc., insurers and some banks to pay \$33 million to investors to resolve pending litigation. The bond insurer had been accused of hiding the risks it took on by guaranteeing risky mortgage debt. U.S. District Judge Naomi Reice Buchwald, sitting in Manhattan, called the two settlements reached last month "fair, reasonable and adequate," in her ruling. The Judge will consider final approval at a later date.

One settlement requires Ambac to pay \$2.5 million already held in escrow, and insurers for its officers and directors to pay \$24.6 million. The other calls for seven banks that underwrote Ambac debt to pay \$5.9 million. Once the nation's second-largest bond insurer, Ambac filed for bankruptcy protection from creditors last year. The New York Court of Appeals, the state's highest court, is reviewing a separate restructuring of larger rival MBIA Inc., which like Ambac suffered large losses insuring risky mortgage debt.

Investors accused Ambac and officials, including its CEO, of misleading them into believing the company insured only "the safest" transactions. They said Ambac then guaranteed billions of dollars of risky debt, and wrote credit default swaps to protect investors against default. The lawsuit covered investors who bought Ambac stock and bonds between Oct. 25, 2006 and April 22, 2008, as well as a February 2007 Ambac subordinated debt issue known as a DISCS offering.

Lead plaintiffs in the case are the Public School Teachers' Pension and Retirement Fund of Chicago, the Arkansas Teachers

Retirement System and the Public Employees' Retirement System of Mississippi. The banks include Bank of America Corp., Citigroup Inc., Goldman Sachs Group Inc., HSBC Holdings Plc, JPMorgan Chase & Co., UBS AG and Wells Fargo & Co.

Source: *Insurance Journal*

FEDERAL GOVERNMENT FAULTS THREE LENDERS OVER MORTGAGE-AID EFFORTS

The Obama administration has blamed the three largest U.S. mortgage lenders for the failures of its foreclosure-prevention program. It says these companies have done little to help people at risk of losing their homes. The Treasury Department said that Wells Fargo & Co., Bank of America and JPMorgan Chase & Co. have failed to help enough people permanently lower their mortgage payments so they can stay in their homes.

Based on those lenders' lackluster success for the first three months of 2011, the government is withholding financial incentives that amounted to up to \$1,000 per permanent loan modification. The three lenders incorrectly determined that many people were ineligible for the program, according to the government. As expected, the lenders are disputing the data. One of them, Wells Fargo, is formally appealing the government's decision to cut off its incentives.

As of last month, the three lenders had already received about \$24 million from the government. The program was launched in 2009 and was intended to help those at risk of foreclosure by lowering their monthly payments. Borrowers start with lower payments on a trial basis. But the program has struggled to convert them into permanent loan modifications.

More than 1.6 million troubled homeowners received trial modifications over the past two years. Roughly 44% of those who applied, or about 700,000, have had their mortgage permanently lowered as of April. A majority of the applicants, or about 843,000 homeowners, have dropped out of the program. Homeowners who are accepted into the program receive interest rates as low as 2% for five years. They can repay their loans over a longer period. The median savings for those who remain in the program is about \$526 per month. Homeowners have complained that the program has been a bureaucratic mess.

Source: *Atlanta Journal Constitution*

VIII. TOYOTA LITIGATION UPDATE

MDL JUDGE RULES FOR TOYOTA ON ECONOMIC LOSS CLAIMS

Judge James Selna, the federal judge in charge of the Toyota MDL, ruled that Toyota owners outside California who seek to recover losses in their vehicles' value resulting from unintended acceleration cannot pursue their claims under California's laws. The ruling was seen by some as a setback for the owners. California consumer protection laws may have given the owners a better chance than most states' laws to recover on their "economic loss" claims. According to Toyota Motor Corp., about 70% of the economic loss claims were originally filed in states other than California.

Judge Selna said applying California law would revive many claims that other U.S. states would not permit, violating principles set forth by the U.S. Supreme Court on which law to apply. The Judge wrote in his order:

Application of California law to a nationwide class, at least in some instances, would drastically expand the scope of relief available to Plaintiffs (to the detriment of Toyota).

Toyota owners have alleged that their vehicles lost value because the company failed to disclose and fix problems with electronic throttle control systems, causing the vehicles to surge forward unexpectedly.

Source: *Insurance Journal*

TOYOTA TO FACE 2013 TRIAL OVER SUDDEN ACCELERATION

Shortly after issuing the ruling mentioned above, Judge James Selna chose a Utah crash that killed two people as the first "bellwether trial" in the nationwide litigation over whether Toyota Motor Corp. made defective vehicles that sped up unexpectedly. In his order, Judge Selna set a February 19, 2013 trial for the bellwether case, concerning claims raised by the families of Paul Van Alfen and Charlene Lloyd. Mr. Van Alfen was killed when the 2008 Toyota Camry he was driving slammed into a wall opposite an exit ramp off an Interstate highway near

Wendover, Utah. Ms. Lloyd, a passenger, died from injuries she received in the crash.

The 2010 crash came after the Camry unexpectedly accelerated and did not stop even after Mr. Van Alfen applied the brakes. Mr. Van Alfen's wife Shirlene and son Cameron were injured in the crash. All have sued Toyota. Bellwether cases are important because their outcomes serve as a benchmark for future cases. Judge Selna said in his order that holding a trial in early 2013 will "markedly advance" the Toyota litigation and that a wrongful death case is most likely to meet that goal.

Source: *Insurance Journal*

IX. PRODUCT LIABILITY UPDATE

Lawyers in our firm's Personal Injury/Product Liability Section have been very busy over the past months. This section handles cases involving serious injuries and deaths arising out of any type of accident, including car crashes, 18-wheeler accidents and industrial and workplace accidents. Potential product liability claims are often overlooked by some lawyers when investigating what many view as routine accidents. We learned very early not to overlook those claims. In many motor vehicle crashes, some defect—either design or manufacturing—played a major role in causing the crash. Many single vehicle accidents are caused by a defective product.

A product liability claim focuses on whether or not the product is defective. An entire product may be defective, but it may be that a component part of the product will contain the defect. The product may well contain design, manufacturing, or warning defects. In some cases it will be a combination of these problems. The following are types of cases our firm handles on a regular basis. Hopefully, it will give you some idea of what goes on in the Section. Cole Portis heads up the Section and does an outstanding job of keeping things on track. We have excellent staff personnel, including legal assistants working with each lawyer, and six full-time investigators.

Tire Blow Outs

Tire failures, blowouts and detreads are foreseeable events. Manufacturers know that tire treads will wear with proper use and at some point fail if not serviced properly and replaced after

their intended period of use has expired. Tire tread separation can be caused by bonding problems in the tire manufacturing process, contaminants introduced into the tire during the tire making process, under-vulcanization, old ingredients, improper sized components, or something as simple as air being trapped in between the layers of the tire during manufacturing. Detreading of these defective tires can result in single- or multi-vehicle accidents, or even rollovers.

Our firm is currently involved in several defective tire cases. In one case, *Lapenna v. Cooper Tire Co.*, the decedents were driving a Ford Explorer down the interstate returning home after a visit with their son. The Cooper tire on the rear of the vehicle suffered a partial tread separation which caused the vehicle to go out of control. The vehicle rolled over resulting in the deaths of Mr. & Mrs. Lapenna, who were properly belted front seat occupants.

In *Henderson v Goodyear*, our client was seriously injured when the rear tire of his Harley-Davidson suddenly and catastrophically failed, causing our client to lose control of his motorcycle. Our client suffered serious and permanent personal physical injuries as a result. Goodyear Dunlop Tires North America, Ltd. And Harley-Davidson both were aware of the number of failures associated with this particular tire.

If you need more information on tire defects, contact Ben Baker or Rick Morrison at 800-898-2034 or by email at Ben.Baker@beasleyallen.com or Rick.Morrison@beasleyallen.com.

Roof Crush

To protect occupants in a rollover, maintaining survival space is very important. Survival space is the space around an occupant that remains free of intrusion in an accident. It is the area in which an occupant is able to “survive” the crash. A roof is part of the structural support of a vehicle and is therefore a critical component in keeping the occupant safe. If a roof crushes substantially during an accident, from a failure of the side rails, headers or support pillars, catastrophic injuries can occur. Often, this decreased survival space results in the occupant’s head impacting some portion of the vehicle causing death,

paralysis or brain damage. Sometimes, the occupant can even be partially ejected through an opening created during roof crush.

Over the years, our firm has handled a number of roof crush cases. In one case, *Pittman v. Ford*. Catherine Parker died as a result of the roof crushing in on her after her 1999 Ford Explorer overturned. At the time of the accident, Ms. Parker was properly belted. The jury awarded Ms. Parker’s estate \$2.75 million for wrongful death arising from Ford’s unreasonably dangerous roof design in the 1999 Ford Explorer.

For more information on roof crush cases, contact Greg Allen or Chris Glover at 800-898-2034 or by email at Greg.Allen@beasleyallen.com or Chris.Glover@beasleyallen.com.

Seat Belt Malfunctions

There are thought to be two collisions in an auto accident. The first collision is the vehicle’s impact with another vehicle or object. The second collision is the passenger’s impact with the interior of the vehicle, or in cases of ejection, impact outside the vehicle. Seat belt injuries can occur when a defective seat belt fails to adequately protect a vehicle passenger in the “second collision” phase of an automobile accident. The purpose of a seat belt is to minimize the injuries and damage caused in a second collision by reducing or eliminating injurious occupant contact with the vehicle’s interior. Seat belt injuries often occur when there is a seat belt design, production, or installation defect. There are a plethora of injuries that may occur as a result of a defective seat belt or from failure of a seat belt: spinal cord injury, brain or head injury, paralysis, internal injuries, amputations, broken bones, concussions and fatalities.

Our firm is currently involved in several defective seatbelt cases. In one case, *Riley v. Ford*, the Riley family had left a high school football game in south Mississippi, headed to their home. On the way, another vehicle struck their vehicle, causing their vehicle to go out of control, into the median, and flip. During the process, the seatbelts failed to hold in the mother and one of their children, a precious five-year-old child. The mother’s legs were ejected out of the window and the vehicle came to rest

on her legs, causing serious injury. A bracket which held the buckle assembly for the daughter’s seatbelt broke during the rollover process. The Riley’s daughter was partially ejected and killed.

We recently settled a products liability case in Clarke County, Ala. The case, *Clark v. General Motors*, arose from a single-vehicle rollover crash involving a 1999 Pontiac Grand Am that occurred on February 6, 2008. During the low speed rollover crash, Leanne Clark’s seatbelt opened up and she was ejected from the car. As a result of the seatbelt’s failure to restrain her during the rollover, Ms. Clark is now a paraplegic. Another company designed and manufactured the seat belt system, including the buckle used in the Grand Am. Both defendants knew the seatbelt would be used in foreseeable rollover crashes and that the buckle had failed previously in other rollover crashes. Despite this knowledge, the Defendants failed to test the buckle to ensure it would withstand a rollover crash and refused to implement a system to collect field complaints. This case was settled for an amount that is confidential against both defendants. We also agreed not to mention the name of the other Defendant in the *Report*.

If you need more information about seatbelt defects, contact Labarron Boone, Mike Andrews, or Ben Locklar at 800-898-2034 or by email at Labarron.Boone@beasleyallen.com, Michael.Andrews@beasleyallen.com, or Ben.Locklar@beasleyallen.com.

Toyota Sudden Unintended Accelerations

An ongoing *Los Angeles Times* investigation revealed that more than 1,000 Toyota and Lexus owners have reported since 2001 that their vehicles suddenly accelerated on their own, in many cases slamming into trees, parked cars and brick walls, among other obstacles, based on a review of federal records. The crashes resulted in at least 19 deaths and scores of injuries over the last decade. Federal regulators say that is far more than any other automaker has experienced.

Owner complaints helped trigger at least eight investigations into sudden acceleration in Toyota and Lexus vehicles by the National Highway Traffic Safety Administration in the last seven

years. Toyota Motor Corp. recalled fewer than 85,000 vehicles in response to two of those probes, and the federal agency closed six other cases without finding a defect. But those investigations systematically excluded or dismissed the majority of complaints by owners that their Toyota and Lexus vehicles had suddenly accelerated, which sharply narrowed the scope of the probes, the *Times* investigation revealed.

Federal officials eliminated broad categories of sudden-acceleration complaints, including cases in which drivers said they were unable to stop runaway cars using their brakes; incidents of unintended acceleration lasting more than a few seconds; and reports in which owners did not identify the possible causes of the problem.

NHTSA officials used the exclusions as part of their rationale to close at least five of the investigations without finding any defect, because—with fewer incidents to consider—the agency concluded there were not enough reported problems to warrant further inquiry. In a 2003 Lexus probe, for example, the agency threw out all but one of 37 customer complaints cited in a defect petition. It then halted further investigation, saying it “found no data indicating the existence of a defect trend.”

Meanwhile, fatal crashes involving Toyota vehicles continued to mount. In a written statement, the NHTSA said its records show that a total of 15 people died in crashes related to possible sudden acceleration in Toyota vehicles from the 2002 model year and newer, compared with 11 such deaths in vehicles made by all other automakers.

Despite Toyota issuing numerous recalls relating to sticky pedals and improper floor mats, accidents and deaths continue to occur. To date, there have been thousands of reports of unintended acceleration resulting in hundreds of injuries and at least 19 deaths. Toyota refuses to entertain any suggestion that its electronic throttle system could have played a role in these accidents, despite there being no viable alternative for why these crashes occurred.

Lawyers in the Section are representing a number of folks who have been injured as a result of Toyota SUA. One

of our clients is Mrs. Jean Bookout, who woke up in an Oklahoma hospital a month after a crash involving her 2005 Camry. She said her car sped out of control on a freeway and crashed into an embankment after she swerved onto an exit ramp. The car left behind long skid marks from her attempts to stop the vehicle with her brakes and emergency brake. Mrs. Bookout did everything she could to stop her Toyota Camry prior to the wreck. Mrs. Bookout sustained permanent memory loss among other severe injuries. We also represent the family of her best friend, Barbara Schwarz, who died in the accident.

If you need more information about Toyota or SUA cases, contact Graham Esdale or Ben Baker at 800-898-2034 or by email at Graham.Esdale@beasleyallen.com or Ben.Baker@beasleyallen.com.

Rollover and Stability Issues

Some sport utility vehicles (SUVs) and 15-passenger vans, often used to transport school children, church groups, and sports teams, may be prone to rollover due to their high center of gravity and narrow track width. After a driver makes an avoidance maneuver, he should be able to regain control of his vehicle or the vehicle should “slide out” on the road without rolling over. A vehicle should not roll over because of friction forces alone. A vehicle should not roll over on dry flat pavement. When a vehicle rolls over on dry, flat pavement more likely than not it is due to a defect in the design of the vehicle’s handling and stability.

Our firm is currently in litigation in a case (*Mims v. Suzuki*). Charles Mims was killed in a single vehicle accident while driving a 1993 Geo Tracker. Mr. Mims was wearing his seatbelt and was ejected during an on-road rollover. The Geo Tracker has a high rollover propensity and will roll over on flat level pavement from foreseeable accident avoidance lateral accelerations. The propensity for rollover can be avoided by lowering the center of gravity and widening the track width.

If you would like more information regarding the handling and stability of a vehicle, contact Greg Allen or Graham Esdale at 800-898-2034 or by email at Greg.Allen@beasleyallen.com or Graham.Esdale@beasleyallen.com.

Fuel-Fed Fires

Almost everyone remembers the infamous Ford Pinto. The Pinto had a fuel tank mounted behind the rear axle. This position allowed for dangerous, and often explosive, consequences in rear impact accidents. Similarly, there are vehicles with gas tanks mounted on the sides of the vehicle outside the structure of the frame. These “sidesaddle” tanks also leave the vehicle vulnerable to impact in a collision. The overall safest positioning of a gas tank is between the front and rear axles of the vehicle. However, manufacturers didn’t always follow this guideline and many vehicles do not provide the proper structural protection for the tank. Collisions with these vehicles can lead to fuel-fed fires.

Also, it is not always the location of the fuel tanks that can lead to fuel-fed fires. Design defects related to fuel-fed fires can involve several different vehicle systems. The design issues can relate to issues of fuel filler cap design, fuel line design, fuel tank design, and also include fuel pump design. Fuel systems should be designed to maintain their integrity during reasonably foreseeable accidents so that occupants do not lose their lives in otherwise survivable accidents. If the occupants can survive crash forces without serious injury, so should the fuel system.

Our firm currently represents the family of a young man who was severely burned in an accident because of the defective design of the fuel system and gas tank of his 1993 Ford Crown Victoria. In *Boykins v. Ford*, the fuel system and gas tank failure resulted in the spillage of large amounts of gasoline which immediately ignited and engulfed the passenger compartment of the car in a matter of seconds, including our client’s son. The son died two months later as a result of injuries received during the accident. We allege that Ford knew of the dangers associated with the 1993 Ford Crown Victoria’s defective fuel system and gas tank and had known about them for years prior to this accident.

If you would like more information regarding fuel-fed fire cases, please contact Rick Morrison or Labarron Boone at 800-898-2034 or by email at

Rick.Morrison@beasleyallen.com or Labarron.Boone@beasleyallen.com.

Airbags

Obviously, if an airbag fails to deploy, there may be an airbag case. However, don't overlook other airbag claims. Aggressive airbags which deploy at excessive speeds can cause head or neck injuries or other broken bones. Children are especially susceptible to injuries or death caused by an airbag. Children should always be seated upright and as far away from an airbag as possible. Late-deploying airbags can fail to protect an occupant from contact with the interior of the vehicle, thus causing injuries that could have been avoided. Airbags with a low deployment threshold can deploy at inopportune times in low speed impacts. These are often collisions that would have been injury free, if not for the airbag impacting the occupant.

Our firm just settled a claim with Ford Motor Company involving a 1997 Ford Contour. The airbag in the Contour deployed causing our client, Herlene James-Steele, to lose sight in one eye. The accident happened on the Queen Mary Highway in St. Croix on June 19, 2004. The airbag deployed in a very minor collision. The driver of Ms. James-Steele's car hit the back of an Isuzu Trooper going about 10 miles per hour. Experts for Ms. James-Steele determined that the barrier equivalent velocity was below the 8 mile per hour no-deploy threshold and was defective. The only injuries to the occupants in the crash were from the airbags deploying. The case was settled for a confidential amount after seven trial days and while the jury was deliberating. Since we just settled this case, a more thorough report will be issued next month.

The James-Steele case was handled by Greg Allen and Chris Glover from our firm, along with Richard Golomb, a lawyer from Philadelphia, and Glenda Cameron, a lawyer from the island of St. Croix. The case was tried in front of Judge Timothy Savage, a federal judge from Philadelphia. According to Greg, "the case tried very well and our client is pleased with the result." We are currently investigating several other cases in St. Croix.

If you would like more information regarding airbag cases, please contact

Chris Glover or Michael Andrews at 800-898-2034 or by email at Chris.Glover@beasleyallen.com or Michael.Andrews@beasleyallen.com.

Cab Guards and Under Ride Protection

Cab guards or headache racks are required as front-end structures on 18-wheelers that pull flat beds, trailers and log trailers and should function to prevent shifting cargo from contacting the cab of heavy trucks. Many cab guards are designed of welded heat-treated aluminum which results in a weakening of the cab guard over time. The weakening of the cab guard due to fatigue stress is relatively unknown to drivers. Many welding requirements established by national organizations are not followed by cab guard manufacturers. The failure to follow such guidelines result in poor welds, poor quality control, and poorly designed cab guards for their intended purpose of protecting truck occupants.

An under ride protection device extends below the trailer in order to prevent an automobile from riding under the trailer in the event of a rear impact. Many heavy trucks and/or trailers are defectively designed in that the vehicles do not have proper under ride protection devices. When a vehicle is allowed to under ride a heavy truck trailer, it results in severe injuries to vehicle occupants since passenger cars are substantially lower than the bed of heavy truck trailers. When appropriate under ride guards are in place, vehicles are prevented from under riding these trailers and severe injuries that occur in foreseeable rear end collisions are substantially reduced.

Our firm is currently working on a defective cab guard case. In that case, *Price v. Merritt*, Mr. Price was operating his 18-wheeler when a vehicle forced him off the road. His cargo of logs shifted forward impacting his cab guard or headache rack. The heat-treated aluminum cab guard failed, allowing the cargo to crush Mr. Price's cab. Cab guards made of light weight aluminum are designed to meet federal standards but they are not designed to withstand moving cargo. The cab guards falsely include warning labels that claim the cab guard is designed to stop cargo weighing approximately 40,000 lbs. Cab guards made of steel

are a safer alternative design. Steel is not brittle and will bend instead of failing during a severe impact.

If you would like more information regarding cab guards or under ride protection, please contact Cole Portis or Kendall Dunson at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Kendall.Dunson@beasleyallen.com.

Workplace Injuries

Each year thousands of workers are injured or killed at their work place. Although a state's workers' compensation system places limitations on the ability of employees to hold employers accountable for these work-related injuries, many people do not realize that there may be another available source of recovery. Injuries in the work place are often caused by defective products. If a product causes an on-the-job injury, a product liability suit may be brought against the product's manufacturer. Catastrophic injuries, deaths, and amputations unfortunately too commonly occur from defective products found in the work place.

Our firm handles numerous product cases each year that arose in the context of an accident that occurred on the job or in the workplace. One such case is *Huffman v. Stone & Webster*. Mr. Huffman was employed by Stone and Webster. He assisted with the construction of a scaffold, used by boilermakers and others to repair a downed boiler at one of the Alabama Power Company plants. The scaffold was provided by another company, which was responsible for ensuring the safety of the construction and removal of the scaffold. The scaffold was constructed in an unsafe condition, and, among other things, lacked head pans. Also, the disassembly process required of Mr. Huffman and his fellow workers was dangerous. During the disassembly process, a large board fell from a few stories above Mr. Huffman, striking his head with such force that it punctured a hole in his hard hat. Mr. Huffman suffered a serious and permanent head injury and will be unable to work again.

Another case is *Jones v. Gulf Equipment Company*. Mr. Jones was working for Gulf Equipment when a Federal Express shipment arrived at their lot. The rolls of wire weigh over 1000

pounds. In order to unload the rolls, the FedEx driver and employees of Gulf Equipment were required to position the roll at the back of the trailer to allow a forklift to grab hold of and remove the roll of wire. During the attempt to unload two rolls of wire, the FedEx driver and a co-employee of Mr. Jones positioned the roll of wire in such a fashion that it fell off the back of the trailer onto Mr. Jones. Mr. Jones has suffered a permanent and debilitating injury.

If you have any questions regarding an on-the-job injury or death, do not hesitate to contact Kendall Dunson, Michael Andrews or Ben Locklar at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com, Michael.Andrews@beasleyallen.com or Ben.Locklar@beasleyallen.com.

18-Wheeler Defects

Statistical evidence shows that approximately 1,000 heavy truck occupants are killed in crashes every year. During the 1980s, the National Highway Traffic Safety Administration sponsored a number of research papers that evaluated statistical information related to heavy truck crashes in the United States. The reports consistently found that the primary contributing factor to heavy truck occupant fatalities were injuries caused by ejection and roll-over which involved severe cab deformation and occupant entrapment. The same reports consistently found that the best way to reduce heavy truck occupant fatalities was to enhance the structural integrity of the cabs, and improve methods to reduce occupant impacts with the interior surfaces of the vehicles. Despite this overwhelming evidence, heavy truck crashworthiness and cab roof strength is not regulated by the federal government. In contrast, passenger car manufacturers are required to pass minimum roof strength and crashworthiness standards found in the Federal Motor Vehicle Safety Standards.

Although the crashworthiness of heavy truck cabs is not regulated in the United States, there have been foreign standards in place for years. Heavy trucks sold in foreign countries are required to meet a variety of crashworthiness and roof strength standards including the Swedish standard and the ECE Rule 29 standard. These

foreign standards require cab strength testing by static and dynamic loads. These particular tests require impacts to the roof, rear of the cab, front of the cab and the A pillars of the cab.

Apparently, in response to the overwhelming research data, American heavy truck manufacturers undertook the "Heavy Truck Crashworthiness Study" in conjunction with the Society of Automotive Engineers ("SAE") during the 1990s. This study culminated in an SAE recommended practice for testing the strength of heavy truck cabs. Unfortunately, the test does not simulate actual forces that would be imparted into a heavy truck cab that rolled over while travelling down the highway. As a result, heavy trucks manufactured in the United States still provide unsafe cabs of thin aluminum with fiberglass roofs. Therefore, truck occupant fatalities continue to occur in the event of rollovers. It is very difficult for a heavy truck driver to survive a wreck when the roof and cab structure disintegrate around him during a wreck and fail to maintain reasonable occupant survival space.

Bodily injuries can arise from other defects within the 18-wheeler itself, such as a headache (header board) rack defect, a seatbelt defect, an airbag defect, under ride protection defect, or any other defect. Our firm pursues these claims in Alabama under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). In other states, the laws of those states are the basis for claims.

If you would like more information regarding 18-wheeler accidents and the types of claims that may arise from them, contact Cole Portis or Ben Baker at 800-898-2034 or email them at Cole.Portis@beasleyallen.com or Ben.Baker@beasleyallen.com.

A FEDERAL JUDGE REJECTS PREEMPTION ARGUMENT IN WINDOW GLASS CASE

Most folks don't spend a great deal of time worrying about the type material that goes into the windows of their automobiles. I suspect they see that as the auto maker's job. But in the event of an accident, those windows could mean the difference between life and death. Last month, a ruling came down in a federal court case that will

assist folks who are injured in motor vehicle crashes in their lawsuits against car makers. It will make it easier to hold car makers accountable for failing to use the safest type of window materials in the side windows of passenger vehicles.

In the case, a federal judge in Arizona rejected a car maker's argument that federal law preempts tort claims alleging that a car was defective because its side windows were made of tempered glass, which shatters on impact, rather than laminated glass, which holds together in the event of a crash. Laminated glass helps to prevent ejections. It keeps occupants in the vehicle.

It's believed that this ruling in the case of *Bernal v. Daewoo* signals a potentially major shift in the law of automobile safety preemption. A number of courts have disagreed about whether window-glazing claims are preempted, creating a deep split of authority on this point. But the tide may well have turned when the U.S. Supreme Court decided *Williamson v. Mazda* earlier this year. This was seen as a seminal ruling that rejected federal preemption in a case involving a different—but similar—automobile safety standard.

The *Williamson* decision by the High Court should remove any doubt that window-glazing claims are not preempted by federal law. The *Bernal* court agreed, signaling that the law in this area will increasingly favor auto-injury victims. Federal Motor Vehicle Safety Standard 205 is "nothing more than a minimum federal safety standard" that "permits manufacturers to improve the safety of their vehicles by installing additional protections." There is nothing about this regulation that could possibly be undermined by a state court lawsuit. Lawsuits over product defects will actually enhance federal objectives by creating a strong incentive for car makers to make their cars safer.

Source: Public Justice

PLAYGROUND SAFETY IS A SUMMERTIME PROBLEM

Now that most schools around the country have completed the school year, playgrounds will be very busy over the next few months. Playground safety should concern parents and caregivers who supervise young children. Unfortunately, there are some hazards and safety risks for children on playgrounds throughout the U.S. In recent years, it is estimated that there are more than 200,000 injuries annually on public playgrounds across the country that require emergency room treatment.

Since falls are the most common playground hazard, the playground surface should be an important factor in choosing an area for children to play. Concrete, asphalt, or dirt surfaces are out-dated and should be avoided. Modern day facilities should have shock absorbing surface material such as rubber mats, rubber tile, or engineered wood fibers.

All playgrounds present some safety risks and because children can be anticipated to use equipment in unintended and unanticipated ways, inspection of the structures and equipment should be made prior to allowing children access to the area. Playgrounds are intended to be used by children of all ages and the lay-out should show distinct areas for different age groups. These areas should be separated by fences, benches, shrubs or structures. The following are some recommendations from the CPSC:

- Playgrounds should be designed to allow parents or caregivers to keep track of children as they move throughout the area and site lines should be unobstructed.
- Other areas that should be inspected are openings that could trap a child, guardrails on elevated platforms, exposed hardware, and any electrical poles or outlets.
- Children should not wear clothing with hoods or drawstrings while playing on equipment.
- During an inspection, if a hazard is detected, the proper owner or authorities should be notified. Have a safe summer and keep children free from hazards in playgrounds across America.

Source: Consumer Products Safety Commission's Public Playground Safety Handbook

\$55 MILLION SETTLEMENT IN CHINESE DRYWALL CASES

A Florida-based supplier of Chinese drywall has agreed to a \$55 million settlement of claims that the corrosive product damaged homes. The proposed settlement could resolve thousands of claims—mostly by Florida homeowners—against Banner Supply Company, several related companies and their insurers. Lawyers for the companies and homeowners are asking U.S. District Judge Eldon Fallon in New Orleans to approve the settlement.

If approved, only Plaintiffs whose homes contain Chinese drywall supplied by Banner would be eligible for shares of the settlement fund. Banner purchased roughly

1.4 million sheets of Chinese drywall, but claims it didn't know of any defects. The agreement covers just a portion of the claims by homeowners who blame drywall for a host of problems, including corrosion of electrical wiring, appliances and electronics.

Source: *USA Today*

WOMAN SUES AFTER BUG-REPELLENT EXPLOSION

A Florida woman who suffered severe third-degree burns after a bug-repellent burner exploded on her patio several months ago, has filed a lawsuit against Napa Home and Garden Inc. She alleged that the Georgia-based company and several subsidiaries marketed and sold a product that can blow up like napalm even when precautions are taken by the user. The product in question is the Napa FireLite pot, which uses a flammable gel with a lemon scent to promote a mosquito-free ambiance outdoors. The U.S. Consumer Product Safety Commission has started an investigation into fire pot gel fuels after a number of similar accidents had been reported nationwide. Ms. Ann B. Boney, the Plaintiff in this case, asked the manufacturer to recall the product. See the Recalls Section of this issue for more information on the recall.

Source: Jacksonville.com

KIDSANDCARS.ORG RENEWS REQUEST FOR TRUNK RECALL

Two young boys, ages two and four, died last month in Indiana after being trapped in the trunk of their family's 2000 Chevy Malibu. It isn't known how the boys got in the trunk, but KidsAndCars.org, a national child safety organization, has again called on General Motors Corp. To recall all vehicles with trunks from model years 2000 and 2001, and retrofit them with internal trunk releases. The advocacy group made a similar appeal in 2009 when an Arkansas boy, age five, and his sister, age four, died in the same model vehicle in 2009 when they were trapped in the trunk of a 2000 Malibu. Autopsies show that the recent deaths in Indiana were a result of hyperthermia, caused by the trunk's exceedingly hot temperatures.

A recent study conducted by KidsandCars found that 46 children have died in unintentional trunk entrapments since 1992. The study noted that 21 of the 46 deaths were in GM vehicles. After the Arkansas deaths, the organization called on

GM, the maker of the Chevy Malibu, to recall its 2000-2001 vehicles. In light of last week's deaths, it again urged GM to take action in an effort to prevent additional tragedies. As noted in a 1979 internal report issued by GM in response to the National Highway Traffic Safety Administration, which was provided to ABC News, the cost of installing an internal trunk release would have been three cents per car.

GM installed the device in its vehicles more than 20 years later after passage of legislation requiring them on cars produced after 2001. GM had previously said it would "equip most of its four-door family cars with an infrared sensing device that automatically unlocks the trunk if anyone is trapped inside." GM, after several studies, announced that it would "use the infrared technology to create an automatic system." But that technology was never made available to consumers.

GM also promised that an "automatic trunk-opening feature would be standard on the Chevrolet Impala" beginning in 2000 and would be phased in on most of GM's four-door cars by 2002. But GM never installed that feature. Ultimately, GM elected to implement an interior release handle in accordance with the NHTSA Standard. While GM offered retrofit kits, at a \$50 cost to the consumer, in 1999, it didn't begin automatically installing the devices in vehicles until the 2002 car models. By comparison, Ford Motor Co. began to automatically phase in internal trunk releases in its cars beginning in 1999, completing close to the entire process by February 2000.

Although cars produced after 2001 are required to have an internal trunk release, many cars before that date are not equipped with the potentially lifesaving tool. KidsandCars recommends a \$9.99 home-installed device called Easy Out Trunk Release Kit that glows in the dark so that anyone trapped inside can easily locate the release lever. In addition to installing internal trunk release kits, KidsAndCars offers these safety tips to keep children safe around vehicles:

- Keep vehicles locked at all times, even in the garage or driveway;
- Keys and remote openers should never be left within reach of children;
- When a child is missing, check vehicles and car trunks immediately;
- Install an after-market, trunk-release mechanism;

- Teach children that trunks are only used to transport cargo and are not safe places to play;
- Never leave children alone in or around cars, not even for a minute.

Hopefully, NHTSA and General Motors will take all actions necessary to eliminate this safety hazard once and for all.

Source: Associated Press

X. MASS TORTS UPDATE

JURY AWARDS \$10 MILLION TO TEENAGER IN MOTRIN LAWSUIT

A Philadelphia jury awarded \$10 million recently to a 13-year-old girl after finding that she suffered a life-threatening drug reaction back in 2000. Brianna Maya, a Tennessee resident, was three-and-a-half years old when she was given Children's Motrin brand ibuprofen. Over the next few days, after the over-the-counter medicine was given, a fine rash appeared on her body along with a mild redness around her eyes. This morphed into something insidious: a rare, painful and potentially fatal skin reaction that burned and blistered her body inside and out, blinded her in one eye and left her fighting for her life in a burn unit 1,000 miles from home. Doctors at Shriners Burn Hospital in Galveston, Texas, concluded that Brianna's reaction was triggered by Children's Motrin, a brand of the popular anti-inflammatory drug ibuprofen. As you may know, this is an over-the-counter drug that doesn't require a prescription.

In 2000, the label that her mother read on the Children's Motrin package made no mention of Brianna's diagnoses, Stevens-Johnson syndrome and toxic epidermal necrolysis syndrome (TENS). Stevens-Johnson blisters and breaks down the mucus membranes of the cornea, mouth, rectum, vagina and urethra. TENS, a more severe form, affects a greater percentage of the skin and mucus membranes.

Stevens-Johnson and TENS are variously estimated to affect from one in a million to eight in a million people. We have written in past issues how devastating SJS/TENS can be. It's virtually impossible to comprehend the effects on a person until you witness it. Brianna, now 13, has spent the last decade living the painful aftermath of SJS/TENS. She has undergone repeated eye

surgeries and suffered recurrent eye and lung infections. She developed seizures stemming from oxygen-deprivation during the worst of her illness last year. Doctors have had difficulty controlling her seizures because anti-seizure drugs can trigger Stevens-Johnson syndrome. She lost 84% of her skin, was blinded and suffered brain damage. Brianna's lung capacity is now 50% of normal.

It's significant that McNeil Laboratories issued warnings for prescription versions, but not over-the-counter versions. The primary issue in this case was what constitutes an adequate warning. It has been reported that some doctors are still unaware that medicines can trigger SJS/TENS. The drug companies have both a legal and moral obligation to inform the medical community and the public of known risks related to drugs they market. Keith Jensen, Eric Roberson and Xavier Gonzalez, lawyers with Ft. Worth-based Jensen Belew & Gonzalez; and Scott D. Levensten, of the Levensten law firm in Philadelphia, represented the Plaintiff. They did a very good job.

Sources: *The Philadelphia Inquirer*, *USA Today* and *Insurance Journal*

FDA TO CHANGE ZOCAR SAFETY LABEL

The U.S. Food and Drug Administration is changing the safety label of simvastatin 80 mg, a cholesterol-lowering medication. The changes to the label for simvastatin-containing medications are based on the FDA's review of the results of the seven-year Study of the Effectiveness of Additional Reductions in Cholesterol and Homocysteine clinical trial, other clinical trial data, and analyses of adverse events submitted to the FDA's Adverse Event Reporting System. The studies confirmed that patients taking simvastatin 80 mg daily had an increased risk of muscle injury compared to patients taking lower doses of simvastatin or other statin drugs.

The company concludes that risk of muscle injury is highest during the first year of treatment with the 80 mg dose of simvastatin. It is often the result of interactions with certain other medicines, and is frequently associated with a genetic predisposition for simvastatin-related muscle injury. Simvastatin is sold under the brand-name Zocor and as a single-ingredient generic product.

It is also sold in combination with ezetimibe as Vytorin and in combination with niacin as Simcor. The FDA has revised the drug labels for simvastatin and Vytorin to include the new 80 mg dosing restric-

tions. The agency also revised the labels for simvastatin, Vytorin and Simcor to include new dosing recommendations when these drugs are used with certain medications that interact to increase the level of simvastatin in the body, which can increase the risk for myopathy. According to the FDA Center for Drug Evaluation and Research Metabolism and Endocrinology Products, the agency has completed its review of the safety of high-dose simvastatin and is making label changes to reduce the risk of statin-associated muscle injury.

Source: packaging.pharmaceutical-business-review.com

ACTOS PULLED FROM MARKET IN TWO COUNTRIES

On June 10, 2001 the French Medicines Agency (Afssaps) suspended the sales of Takeda's diabetes drugs Actos (pioglitazone) and Competact because of fears of an association with bladder cancer. The French made the call after receiving new data from a retrospective cohort study carried out in the country which appears to indicate a slight increased risk of bladder cancer with pioglitazone-containing medicines. Following the French move, German authorities have now informed Takeda that they will take the same measures.

The European Medicines Agency (EMA) is currently investigating the safety of pioglitazone and is looking into a potential link with bladder cancer in patients with diabetes to clarify the drug's benefit-risk profile. In September 2010, the U.S. Food and Drug Administration began a review of Actos after receiving preliminary results from a long-term observational study designed to evaluate the risk of bladder cancer associated with use of the \$4 billion-a-year drug. Those findings are based on five-year data from an ongoing, ten-year observational study being carried out by the Japanese firm's North American division.

The glitazone class of diabetes drugs has been associated with severe adverse risks. Rezulin was pulled from the market because of the risk of the liver; Avandia has been pulled from the market because of the risk of heart attacks and now Actos may be pulled in many markets for an association with bladder cancer. Rezulin and Avandia resulted in much product liability litigation. If you need more information on this matter, you can contact Frank Woodson, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com.

Source: *Pharma Times Online*

FOSAMAX BONE FRACTURE LAWSUITS CONSOLIDATED

Lawsuits alleging that the osteoporosis drug Fosamax causes bone fractures have been consolidated in multidistrict litigation in federal court in New Jersey. About three dozen fracture lawsuits are pending in federal courts around the country. The MDL will also include new Complaints over femur fractures. These lawsuits will be overseen by U.S. District Court Judge Garrett E. Brown, Jr. The suits allege that Merck, the maker of Fosamax, failed to warn that the drug poses a higher risk of thigh bone fractures even with low impact.

In October, the FDA issued a warning about atypical femur fractures from Fosamax and other bisphosphonates, and required new labeling on the medications. Meanwhile, bellwether cases are still being tried in an earlier MDL involving Fosamax and different injuries. Those cases, which number around 1,000, allege that Fosamax causes osteonecrosis, or “jaw death” syndrome. Those trials have had mixed results, but more are being planned for trials for this year.

Lawyers in our firm’s Mass Torts Section have handled a number of Fosamax cases for women who were severely injured as a result of taking Fosamax. If you need more information on this subject, contact Chad Cook, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at Chad.Cook@beasleyallen.com.

Source: *Lawyers USA Online*

SSRI ANTIDEPRESSANTS PUT UNBORN BABIES AT RISK FOR BIRTH DEFECTS

A new Swedish study has verified that antidepressants known as selective serotonin reuptake inhibitors (SSRIs) increase the risk for birth defects when taken by the mother during early pregnancy. SSRIs, and a Combination Drug Containing an SSRI, include:

Celexa (citalopram), Fluvoxamine, Lexapro (escitalopram), Paxil (paroxetine), Prozac (fluoxetine), Symbyax (olanzapine/fluoxetine) Zoloft (sertraline)

A possible link between SSRIs and birth defects first came to light in late 2005, when the U.S. Food and Drug Administration issued a warning that data suggested a possible link between the antidepressant Paxil and birth defects, in particular heart defects. Paxil was downgraded from a Category C drug to a Category D. In the event you don’t know, and for your information, the drugs are classified as follows:

- Category A and B drugs are generally considered to be safe to use during pregnancy.
- Category C drugs should only be taken if the potential benefit outweighs the potential risk to the developing fetus.
- Category D drugs are those that pose a significant risk to a growing fetus and should only be taken when there is risk to the mother if she does not take the drug.

Besides Paxil, no other SSRI antidepressants are currently classified as Category D. The antidepressants, Zoloft, Lexapro, Celexa, Prozac and others, are still listed as a Category C. In 2007, Zoloft was the most prescribed antidepressant on the U.S. retail market with more than 29 million prescriptions. It is primarily used to treat major depression in adults as well as obsessive-compulsive, panic, and social anxiety disorders in adults and children.

The use of Zoloft by mothers during the first trimester of pregnancy has been said in the past to increase the risk of certain birth defects. For example, a study published in the *New England Journal of Medicine* found Zoloft likely contributed to birth defects such as omphalocele, limb reduction defects, and septal defects. But the new study puts the classification of all SSRIs into question.

Researchers found an association between antidepressant treatment and pre-existing diabetes and chronic hypertension, but also with many pregnancy complications. This was said by the group to be alarming. Rates of induced delivery and caesarean section were increased. The rate of preterm birth was also increased. Neonatal complications were common, and an increased risk for pulmonary hypertension of the newborn was verified. The study’s authors concluded:

Women using antidepressants during pregnancy and their newborns have increased pathology. It is not clear how much of this is due to drug use or underlying pathology.

I am convinced that in today’s world antidepressants are being used much too often. This study should get the public’s attention, as well as that of the medical community, and if that happens it will be good. For more information on this subject, you can contact Roger Smith, a lawyer in our firm’s Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

Source: *New England Journal of Medicine*

XI. BUSINESS LITIGATION

JUDGE AWARDS \$2 BILLION TO FORD DEALERS

An Ohio judge has awarded a \$2 billion judgment against Ford Motor Co. To a class of commercial truck dealers. In the suit, the dealers contended Ford overcharged them for 11 years. The dealers sued Ford in 2002, alleging that the company broke an agreement to sell trucks at published prices, which forced them to pay more from 1987 through 1998 which cut into their profits. On June 10th Judge Peter J. Corrigan upheld a \$4.5 million verdict that had been awarded to one Ohio dealer in February by a Cleveland jury.

Judge Corrigan also ruled that Ford had to pay similar damages and interest to a class of about 3,000 other dealers. Ford claims its wholesale price discount system “caused no harm” to their dealers. Interestingly, the Ohio Court of Appeals has already upheld Judge Corrigan when he certified the case as a class action. Ford says it will appeal. The Judge certified a class in 2005, allowing the dealers to pursue claims against Ford as a group. That decision was upheld on appeal and the Ohio Supreme Court refused to take Ford’s petition for review. Judge Corrigan has now upheld the jury’s finding that Ford breached a contract with its dealers through its wholesale pricing system and in affirming the verdict the Judge wrote:

Because every potential price was not published, each sale is affected by hidden discounts in each negotiation of the artificially inflated published price. As to all class members, it is undisputed that the franchise agreements were identical in all material aspects.

Ford was accused in the lawsuit of breaching an agreement with truck dealers by failing to publish to all of them all price concessions that were approved for any dealer, the company said in a regulatory filing. The class includes all Ford dealers who bought from the company any 600 series or higher truck over a period of about 11 years, starting in 1987. The Court also granted the dealers’ motion for summary judgment on liability.

The claims covered sales of 474,289 trucks. Judge Corrigan added \$6.65 million

in interest to the \$4.5 million jury verdict. The total \$2 billion judgment to the class includes about \$1.2 billion in interest. Judge Corrigan will stay execution of the judgment pending Ford's posting of a \$50 million bond. James Lowe, of Lowe Eklund Wakefield & Mulvihill, a firm from Cleveland, represented the Plaintiffs in this case. Based on all we have learned, he did a tremendous job in the case.

Source: Bloomberg

ACCOUNTING FIRM SUED OVER MEADOWCRAFT BANKRUPTCY

Wells Fargo, along with three others companies, have filed suit in Jefferson County Circuit Court against Warren Averett Kimbrough & Marino, a certified public accountant firm based in Birmingham. It was alleged that the firm was guilty of wrongdoing in the auditing of bankrupt furniture maker Meadowcraft Inc. The lawsuit alleges that Warren Averett failed to exercise adequate professional judgment and skepticism in auditing Meadowcraft in 2006 and 2007. Meadowcraft filed for bankruptcy in 2009 and its inventory was sold at auction.

The suit says Warren Averett's failure to detect millions of dollars of overvalued inventory led the lenders to extend additional loans that kept the company in business after it was in weak financial shape. It's alleged that those loans simply prolonged the company's inevitable spiral into bankruptcy at a cost of at least \$18 million to the banks. The Plaintiffs claim that Warren Averett's gross negligence, recklessness and fraud caused their losses. Other lenders joining Wells Fargo in the suit are Webster Business Credit Corp., Burdale Financial and RZB Finance.

Meadowcraft, which was privately owned, made outdoor furniture sold at mass merchandisers such as Wal-Mart Stores Inc. In 2009, plants in Birmingham, Selma and Wadley were closed. It's alleged in the suit that the company failed after the president and the chief financial officer faked assets and inventories in 2006 and 2007. Each year, inventory was reported at about \$40 million, when it was actually less than half that, according to allegations in the suit. The Plaintiffs say that the fraud made things look better than they were, qualifying Meadowcraft for the additional loans extended by the lenders. But the Plaintiffs say that the subterfuge should have been detected by the accounting firm. Generally accepted auditing standards require accounting firms to accurately observe and audit inventory numbers. The suit contends

that obsolete and diminished goods were being carried at full value, and that this should have been discovered by the auditing firm.

The suit seeks compensatory damages of at least \$18 million and punitive damages of at least \$10 million. When I read in the Complaint that the Plaintiffs were asking for punitive damages I was shocked. It's rather interesting—to say the least—that major players in Corporate America, such as Wells Fargo, believe that other corporate wrongdoers should be “punished.” I have never run into that belief in any of the cases our firm has filed on behalf of individuals against large corporations. Regardless of how bad the conduct may have been, the corporate Defendants never liked punitive damages and didn't even believe a corporate wrongdoing should be punished. This is indeed a most strange world in which we live!

Source: Al.com

XII. INVESTOR, INSURANCE AND FINANCE UPDATE

JPMORGAN PAYS \$153 MILLION TO SETTLE MORTGAGE CASE

JPMorgan has agreed to pay \$153.6 million to settle charges it misled investors in the sale of a complex mortgage-backed security. The charges arise out of the 2007 sale of a collateralized debt obligation (CDO) that JPMorgan Securities marketed to investors without disclosing that a hedge fund involved in the creation of the CDO was betting it would decline in value, according to the SEC. Robert Khuzami, the SEC's top enforcement officer:

JPMorgan marketed highly-complex CDO investments to investors with promises that the mortgage assets underlying the CDO would be selected by an independent manager looking out for investor interests.

The \$1.1 billion CDO in question—called “Squared CDO 2007-1”—was designed to allow investors to make bets on the housing market. According to the SEC, JPMorgan allowed Magnetar Capital, a Chicago-based hedge fund, to help select the underlying assets in the Squared CDO. By the time the deal closed, Magnetar had a \$600 million

“short” position in the CDO betting it would decline, compared with a \$8.9 million long position, according to the SEC. The sale occurred just as the housing market began to collapse and more homeowners started to default.

The \$153 million settlement will make the investors whole, according to the SEC. As part of the settlement, JPMorgan agreed to improve how it reviews and approves mortgage-backed securities, the SEC said. The agreement has many similarities to a settlement the SEC achieved last year with Goldman Sachs, which paid a record \$550 million to settle charges it misled investors in the sale of a CDO that was being shorted by Paulson & Co. The settlement is subject to court approval.

Source: CNN

SUPREME COURT DEFINES PRIMARY LIABILITY IN MUTUAL FUND PROSPECTUS CASE

The U.S. Supreme Court has ruled that Janus Capital Group Inc. And a subsidiary cannot be held liable in a lawsuit brought by shareholders over allegedly false statements in prospectuses for several Janus mutual funds. By a 5-4 vote, the Justices overturned a ruling by a U.S. Appeals court that a class-action securities fraud lawsuit could go forward. In backing Denver-based Janus, one of the largest mutual fund companies, the High Court's decision will mean few changes for the way big asset managers govern themselves—structures that could have faced a major overhaul if the ruling had gone the other way.

Janus, in appealing to the Supreme Court, argued that the funds were separate legal entities and that neither the parent company nor its subsidiary was responsible for the prospectuses and could not be held liable. Obviously, five members of the High Court agreed, ruling the alleged false statements in the prospectuses were made by an investment fund, not Janus Capital, and that Janus and the subsidiary therefore cannot be held liable in a private securities fraud lawsuit.

Janus paid \$225 million in 2004 to settle claims by regulators that it had failed to disclose the trading arrangements to long-term investors. Market timing—allowing favored investors to buy or sell shares based on outdated prices at the expense of other investors—took place at Janus and other fund firms in the last decade. The Obama administration supported the Plaintiffs before the Supreme Court while the Chamber of Commerce business group supported Janus. The

High Court previously has issued a number of rulings that limited private shareholder securities fraud lawsuits. Justice Clarence Thomas in the majority opinion said Janus Capital may have assisted the Janus Investment Fund with crafting what it said in the prospectuses, but Janus Capital itself did not actually make those statements.

Janus had argued that technically it is only a service provider to the funds. A federal judge initially sided with Janus. It's felt by some that the largest impact of this ruling could be to encourage other industries to adopt the split management structure of the mutual funds sector as a way to avoid liability.

Source: *Insurance Journal*

HACKING BLITZ CREATES HUGE CYBERINSURANCE DEMAND

The dramatic increase in hacker attacks is driving companies to seek "cyberinsurance" worth hundreds of millions of dollars, even though many policies can still leave them exposed to claims. Companies are having to enhance not just their information technology practices, but also their human resources and employee training functions just to get adequate coverage against intrusion. In some cases, they are also accepting deductibles in the tens of millions of dollars. According to reports, the demand for coverage is soaring. Companies are trying to protect themselves against civil lawsuits and the potential for fines by governments and regulators.

Source: *Insurance Journal*

XIII. EMPLOYMENT AND FLSA LITIGATION

\$187 MILLION WAL-MART JUDGMENT UPHELD

The Superior Court of Pennsylvania has affirmed a \$187 million award for Wal-Mart Stores Inc. employees who were allegedly forced to work off the clock and skip rest and meal breaks. In its opinion, the Appeals Court said there was sufficient evidence on the record to conclude that Wal-Mart breached its contract with its workers and violated state wage laws. The Court wrote:

The record reflects testimony and documentary evidence suggesting that

because of pressure from the home office to reduce labor costs and the availability of significant bonuses for managers based on store profitability, Wal-Mart's scheduling program created chronic understaffing, leading to widespread rest-break violations.

The Appeals Court also concluded that the trial court had not abused its discretion or violated Wal-Mart's due process. The Court did, however, reverse and remand the Plaintiffs' attorneys' fee award of \$45.6 million, saying that "the Court inadvertently double-counted contingency factors incorporated into the counsel fees." The original \$78 million verdict was handed down October 13, 2006. The jury found Wal-Mart liable for not paying employees for time spent working off the clock. That award was almost doubled in 2007 when the court added \$62.2 million in liquidated damages for the class of more than 187,000 Pennsylvania workers.

The suit was filed by two former Wal-Mart employees, Michelle Braun and Dolores Hummel, who claimed Wal-Mart owed them \$3 million for 180,000 off-the-clock hours from 1998 onward. It was contended that Wal-Mart made workers skip more than 33 million breaks and 2 million meal periods from 1998 to 2001. In its appeal, Wal-Mart claimed, among other things, that the case should not have been certified as a class action and that it had not breached a contract with its employees because the company's policies and its employee handbook did not establish a contract.

The class is represented by Michael Donovan of Donovan Searles LLC, Judith Spanier of Abbey Spanier Rodd & Abrams LLP, Gerald Bader Jr. of Bader & Associates LLC, and Rodney Bridgers of Frank Azar & Associates PC. They did excellent work in this case.

Source: *Law 360*

JURY AWARDS \$95 MILLION IN SEXUAL HARASSMENT SUIT

A jury has awarded \$95 million against Aaron's Inc. in a sexual harassment lawsuit. The Complaint was filed by a former employee of the Fairview Heights branch against her boss. The jury said the woman, whose life struggles became part of the case, is entitled to \$95 million in compensation. A cap on damages in federal sexual harassment cases will reduce that to about \$41.6 million. Ashley Alford, the Plain-

tiff, will receive \$15 million in compensatory damages and \$80 million in punitive damages. The rent-to-own company, which formerly operated as Aaron Rents, says it will appeal. The company operates a chain of more than 1,800 stores.

The EEOC and Aaron's entered a consent decree in December 2009 in which the company agreed not to discriminate against employees or subject them to sexual harassment or retaliate against them for reporting harassment. It also provided St. Louis area managers three hours of sexual harassment training, among other requirements. The company, based in Atlanta, has 1,146 corporate-owned stores and 664 franchise stores in 48 states, and more than 10,000 employees. David S. Ratner, managing partner of Morelli Ratner PC, a law firm with offices in New York and New Jersey, represented Ms. Ford in this case and did a good job.

Source: *Saint Louis Times Today*

GEORGIA COMPANY SETTLES SEXUAL HARASSMENT SUIT

An Atlanta-based security company has agreed to pay almost \$2 million to settle sexual harassment complaints involving its Birmingham, Ala. office. The Equal Employment Opportunity Commission says a district manager for U.S. Security Associates Inc. in Birmingham was accused of harassing female employees with sexual demands, inappropriate touching and other offensive conduct. The company previously lost a federal court verdict over the manager's actions. EEOC says six other women made similar allegations claiming the man sexually harassed them while working as a supervisor for the company in Mississippi after Hurricane Katrina. The \$1.95 million EEOC settlement involves seven women. The company's website describes it as one of the nation's large private security firms.

LAWSUIT SAYS KPMG FAILS TO FAIRLY PROMOTE WOMEN

A former female senior manager at KPMG has filed a class action lawsuit accusing the accounting firm of discriminating against its female employees in pay, promotions and pregnancy leave. The lawsuit, filed in a New York federal court seeks \$350 million in lost pay and benefits as well as other compensatory and punitive damages on behalf of thousands of current and former female managers at the company. The suit accuses

the accounting firm of fostering a hostile work environment where women are underpaid and seldom promoted to leadership positions.

While women constitute nearly half of all employees at the company, they make up only 18% of all KPMG partners, according to the Complaint. It was alleged that Ms. Kassman, after a “stellar” early career at KPMG, was in line for promotion to managing director when a “troika of men ... conspired to derail her career advancement,” the suit alleged. Male employees expressed gender hostility with complaints that Kassman was “too direct” and “unapproachable,” according to the suit. The company cut Kassman’s salary by \$20,000 without any business justification when she took maternity leave, the suit said. The suit alleged that working mothers at KPMG who opt for a flexible schedule are forced to accept reduced pay while still shouldering full-time responsibilities. The law firm of Sanford Wittels & Heisler, with offices in New York, Washington, D.C., and San Francisco, represents the Plaintiff in this case.

Source: Reuters

XIV. PREDATORY LENDING

MORTGAGE COMPANIES SETTLE LAWSUITS ON MILITARY FORECLOSURES

We wrote last month on an issue that was quite timely because of Memorial Day. It was an issue involving very bad treatment of the military by mortgage companies. Two mortgage servicing companies have now agreed to settle federal complaints that they wrongfully foreclosed on the homes of at least 178 military service members and to set aside a minimum of \$22 million to compensate those victims. The Justice Department had simultaneously filed and settled lawsuits against the two companies—a subsidiary of Bank of America formerly known as Countrywide Home Loans Servicing, and Saxon Mortgage Services, a subsidiary of Morgan Stanley. The companies were accused of knowingly and repeatedly violating the Servicemembers Civil Relief Act, the federal law that extends an array of financial and legal protections to military personnel. Specifically, the companies were accused of ignoring a provision of the law that required them to get court orders before foreclosing on active-duty service members.

The former Countrywide unit agreed to pay \$20 million to approximately 160 victims of illegal foreclosures from January 2006 to May 2009. It also agreed to reimburse victims of any other illegal military foreclosures found to have occurred from May 2009 to the end of last year. Further, it promised to upgrade its training and report future violations of the Civil Relief Act to the Justice Department.

According to Thomas E. Perez, Assistant Attorney General for the Justice Department’s civil rights division, the Countrywide settlement is “easily the largest amount ever recovered” by the Justice Department for violations of the Civil Relief Act. Saxon was accused of illegally foreclosing on approximately 18 service members, “some of whom were severely injured in the line of duty or suffer from post-traumatic stress disorder.” Most of the improper foreclosures began before Bank of America acquired Countrywide.

Saxon agreed to pay \$2.35 million to victims of the foreclosures, which occurred from January 2006 to May 2009. It also agreed to pay the victims of any subsequent wrongful military foreclosures, through the end of last year, and to upgrade its training programs. Both companies agreed to repair any damage their improper foreclosures had caused to the credit scores of the affected homeowners. There have been widely-publicized violations of the Civil Relief Act since well before January 2006, the starting date for these settlements. The Saxon investigation was based on a complaint by Sgt. James B. Hurley, an Iraq veteran who lost his home in western Michigan as a result of an improper foreclosure in 2005. Saxon and its co-Defendant in that case, Deutsche Bank, reached a confidential out-of-court settlement with the Hurley family early this year.

The 2006-9 period was chosen by the Justice Department because it encompassed the sharp increase in national foreclosure activity that began in late 2006. The terms of this settlement expand that window to the end of 2010. The two mortgage companies have set up a direct hot line [(800) 896-7743] for service personnel who believe they are eligible for relief under the settlements.

Any company that takes advantage of military families without any justification, and in clear violation of the law, should be punished severely and perhaps put out of business!

Source: New York Times

XV. PREMISES LIABILITY UPDATE

THE POOL SAFETY LAW IS NOT WORKING

As we have repeatedly said in prior issues, there are serious hazards associated with pool and spa drains. Children, and sometimes adults—even strong swimmers—can get sucked in by a pool or spa drain, trapping them underwater until they drown or, in some cases, are disemboweled. Unfortunately, children and many adults don’t appreciate these risks. To prevent those accidents, Congress passed the Virginia Graeme Baker Pool and Spa Safety Act in 2007. As you may recall, Virginia, the seven-year-old granddaughter of former Secretary of State James Baker, died in a hot tub in Northern Virginia in 2002 after getting trapped by the drain. This law has been on the books now for almost four years. Is it working as planned?

Pool safety advocates now say—some four years later—that the law’s not working as they had hoped. We mentioned in the June issue the pre-Memorial Day recall of more than 1 million pool drain covers designed to fix the problem. That recall only underscores how messy the implementation of the law has become. Nancy Baker, the mother whose lobbying efforts were largely responsible for getting the badly-needed law passed, had this to say:

You have a lot of pool owners that did work to become compliant, only to find out maybe it's not safe after all. The implementation of it, how else can I put it? It's just been botched.

The recall was the latest of many setbacks for the sponsors of the pool safety law. The law was supposed to award more than \$4 million in grants for states to bring their pool safety codes up to federal standards. To this day, not one state, including Alabama, has followed through on this requirement. Members of Congress complain that the Consumer Product Safety Commission undermined the law by eliminating the requirement for automatic drain shut-off switches as an additional layer of protection in some pools. Industry groups, without any real justification, took the position that the switches were unnecessary.

According to Sen. Mark Pryor of Arkansas, the law’s sponsor in the Senate, the decision by the CPSC “runs counter to both the spirit and letter” of the law. He certainly

should know. Sen. Pryor and five other U.S. Senators wrote in a letter to the CPSC: "In single drain pools, no drain cover—no matter how large or unblockable—can protect a child from entrapment if the drain cover is improperly installed or inadvertently removed."

Clearly, one of the biggest hurdles for the safety agency has been enforcement. The CPSC can't provide statistics on how many inspections have been done, but published a paperwork notice in 2009 estimating it would conduct 97 a year. Since then, the agency has contracted out with 16 state and local health departments to do more than 2,800 inspections, costing as much as \$400 each. Those contracts cover less than 1% of the 300,000 commercial pools in the United States. Neither does that include residential pools and spas. It was reported they number more than 16 million, according to industry data compiled by P.K. Data Inc.

The CPSC says it doesn't have the resources to educate this entire industry and let it exactly know what the law requires. But the mandate to the agency is clear, and that is, every single pool and spa in the country must be in compliance with the Act. The pool companies must be told exactly what they have to do. It appears what they have to do hasn't gotten through to the companies. The recall incident shows that to be true. An investigation by the CPSC, the safety agency with the responsibility of enforcement, found that the testing laboratories that certified drain covers as meeting safety standards applied those standards inconsistently and incorrectly, meaning many of the covers may be unsafe for the pools they're installed in. This is a major safety issue which must be addressed.

Source: USA Today

FAMILY FILES SUIT OVER ESCALATOR DEATH

Mark DiBona, a four-year-old boy, was killed in an escalator accident that happened in a Sears store, in the Auburn Mall. The companies involved in the installation and operation of the escalator failed to follow state rules and their own construction plans in 2009. In March of this year, the little boy was stepping onto the escalator in the Sears store when the momentum of the escalator handrail pulled him into a 6 1/4-inch gap between the escalator and a plexiglass barrier. He fell one story below and suffered severe head injuries. He died from his injuries the next day. The child's parents, Eric and Laura DiBona, have filed suit over the death.

Defendants in the suit are the Simon Property Group, Inc., Mayflower Auburn LP, Mall At Auburn LLC, Sears Roebuck and Co., Botany Bay Construction Co. Inc. And the Schindler Elevator Corp. It's alleged that the Defendants' negligence contributed to the child's death. According to the lawsuit, when new escalators were installed in the mall in 2009, the town of Auburn, Mass., approved a building permit that called for the installation of barriers to close the small gap that the boy went through and fell. The parents were with their son at the time of the fatal accident.

The lawsuit alleges that, when Botany Bay, as general contractor, oversaw the installation of the Schindler-built escalators, no one installed the barriers. This was a problem that should have been fixed sometime during the past two years by Sears and the mall operators. The blueprints are said to have called for a barrier. The death of the boy prompted the Governor's office to review escalator inspections statewide. This led to disciplinary action against two thirds of the escalator inspectors because they had approved escalators for public use with safety violations similar to those that led to the death in this case. W. Thomas Smith and Stacey Pietrowicz, lawyers with the Sugarman Law Firm in Boston, represent the family in the lawsuit.

Source: Boston.com

XVI. WORKPLACE HAZARDS

MACHINE GUARDING IS ESSENTIAL TO AVOID INJURY

According to the Bureau of Labor Statistics there were more than 6,200 work-related amputations in 2008. Although that number has been on the decline for over 30 years, amputations remain among the nation's top severe workplace injuries. Workers who suffer amputation are often permanently disabled. Machine guarding is an important precaution to avoid such injury.

As lawyers who handle work-related litigation will know, OSHA requires guarding of any machine part, function, or process that may cause injury to operators or others. This standard has been around since the inception of OSHA. It remains on the agency's list of most frequently cited regula-

tions. There are four basic approaches to machine guarding that are available for use:

- barrier guards;
- guarding devices;
- guarding by location; and
- warnings.

The barrier guard is a physical barrier between a hazard and anyone near it. Since some barrier guards can slow production, they are sometimes removed in order to increase efficiency. Safety experts say the best barrier guard is one built into the machine. If a guard has to be attached to a machine, it's absolutely necessary to use fasteners that require the use of a tool to install and remove. This will make the guard difficult to remove by a worker and is much safer.

Guarding devices include light screens, two-palm antilock push buttons, interlocks and pullbacks. These devices do not prevent a worker from touching machinery, but they will stop moving hazards before contact is made. Such devices must be installed and maintained properly to ensure maximum safety. Guarding by location, simply put, is placing machinery where no one can contact its hazards.

Neither location guarding or warnings should by themselves be the sole method of machinery guarding. Good safety experts all say guarding alone is not adequate. Good safety procedures and training should always accompany guarding in the workplace. There are companies, such as CED Investigative Technologies, with offices in New York/New England, Baltimore/Washington, Jacksonville/West Palm Beach, Greater Cleveland, and Chicago, which will have mechanical engineers and safety experts with industry experience in machine guarding. These companies should be used by employers to insure the safety of their employees to the extent possible. Also, the companies can furnish top-flight experts in the event that litigation becomes necessary because of injuries or death to workers where machine guarding is an issue.

Source: cedtechnologies.com

JURY AWARDS \$1.6 MILLION VERDICT IN WORK-RELATED LAWSUIT

A jury in Wilson County, Kan., recently awarded \$1.6 million in damages to a worker in a work-related lawsuit. Sam Rollings, the Plaintiff, worked at the Fredonia Cooperative Association, Inc. in Fredonia,

Kan. He suffered a devastating injury in January 2007 while working in a grain bin, sweeping out some corn when he slipped and his right foot and leg became caught by the drag chain of the conveyor system designed by Ken Babcock Sales, Inc. He suffered severe personal injury resulting in the loss of his leg.

The lawsuit alleged that Ken Babcock Sales Inc., failed to provide guards to protect workers engaged in required grain removal inside the grain bin and failed to provide instructions and warnings adequate to protect workers. The lawsuit further alleged that the grain conveying system was defective in its design and was in an unreasonably dangerous condition when it was sold to the Plaintiff's employer, the Fredonia Cooperative Association, Inc.

The Defense argued that the Plaintiff's employer was negligent in sending workers, including the Plaintiff, into the grain bin while a sweep auger and the grain conveyor were moving and energized. They maintained that the system designed by the Defendant was not unsafe if used consistent with warnings on the grain bin door not to enter the bin while parts were moving. The jury returned a verdict in favor of the Plaintiffs, awarding Rollings \$1.6 million to cover lost wages, lost earnings, medical expenses, and future medical care.

The jury found Defendant Babcock 46% at fault; the employer Fredonia Co-Op 44% at fault; and Plaintiff Rollings 10% at fault. The Plaintiff was represented by J.B. Dilsheimer, a lawyer with Cohen, Placitella & Roth, P.C., a Philadelphia firm, along with Timothy A. Short, from Pittsburgh, Kan. These lawyers did a very good job in this case.

Source: PRnewswire.com

OSHA FINES ALABAMA LUMBER MILL NEARLY \$2 MILLION

OSHA has issued 13 citations and levied \$1,939,000 in fines to a Phenix City, Ala., lumber yard for 24 safety violations. The violations include exposing employees to amputation and fall hazards. After workers complained about being exposed to amputation hazards, OSHA inspected the work-site. Two employees had been injured. OSHA then cited the lumber company for additional violations, including failure to properly shut down and lock machines.

Prior to these citations, it was reported that Phenix City Lumber had been cited 77 times by OSHA for serious safety and health violations since 2007. OSHA fined the lumber yard \$439,400 in September 2010

following the death of one worker and a critical injury to another. Phenix City Lumber had 15 business days in which to comply, request an informal conference with OSHA's area director, or contest the findings.

Source: Associated Press

OSHA CITES COOPER TIRE AND TWO CONTRACTORS

Cooper Tire & Rubber Co. was cited by the Occupational Safety and Health Administration, finding that the company committed safety violations at its plant in Tupelo, Miss. Cooper Tire has asked for a hearing with the Occupational Safety Health Review Commission, an agency independent of OSHA. OSHA assessed a \$254,900 fine for 25 violations against Cooper and two of its maintenance contractors.

The Tupelo plant was cited following an inspection at Cooper Tire's Findlay plant, which was fined \$213,500 for allegedly committing similar violations. OSHA said the citations include allegations of exposing workers to hazards associated with combustible dust. JESCO Maintenance Corp. and IH Services, maintenance contractors, were the other companies cited.

Source: wmtv.com

XVII. TRANSPORTATION

BUS COMPANY FACED SHUTDOWN WHEN IT CRASHED IN VIRGINIA

The federal Department of Transportation closed down a North Carolina bus company just hours after one of its buses rolled over on a Virginia highway, killing four passengers. Unfortunately, the shutdown came months after the company had amassed one of the worst safety records in the U.S. Over the past two years, Sky Express of Charlotte, N.C. repeatedly violated federal rules that require bus companies to keep fatigued drivers from getting behind the wheel and to make sure their drivers have proper licenses, medical certificates and English-language skills. You may be shocked to learn that the Federal Motor Carrier Safety Administration, which oversees bus and truck safety, had access to all of the information relating to the company's bad safety record. But for some reason, the agency really dropped the ball on this

matter, allowing the bus company, in spite of its awful safety record, to stay in business.

Sky Express' 99.7 score in driver fitness indicates that its record was worse than 99.7% of the nation's 3,900 bus operators. The company had a score of 86.2 in fatigued driving, and had been caught seven times since October 2009 allowing drivers to work excessive hours.

After a safety review of Sky Express, the Federal Motor Carrier Safety Administration on April 12th proposed shutting the company down. Sky Express appealed the shutdown proposal on May 11th and promised improvements. The agency rejected the appeal two days later. Sky Express could not be shut down immediately, according to the agency, because it says it had to wait 45 days from when it proposes a shutdown. After 45 days—on May 27th—instead of shutting down Sky Express, the agency decided instead to investigate new safety concerns. The probe was extended by ten days to "further investigate the carrier."

Virginia State Police blamed the crash on driver fatigue, a longstanding concern of federal officials and safety advocates, and a cause of several major bus crashes in recent years. The Sky Express bus was carrying 58 passengers from Greensboro, N.C., to New York City's Chinatown when it ran off Interstate 95 near Richmond about dawn and rolled over. Fifty-four people were injured in the incident. The driver, Kin Yiu Cheung, who suffered minor injuries, was charged with reckless driving. He was sent to jail.

The sequence described by Virginia police of this most recent bus incident is not new or unique. The same story—a tired driver drifting off a highway—caused a 2008 bus crash that killed nine passengers in Utah and a 2004 bus crash that killed 14 passengers and the driver in Arkansas, according to reports by the National Transportation Safety Board.

In a sharp rebuke to his own department, Transportation Secretary Ray LaHood got involved and made sure the North Carolina bus company was finally shut down. LaHood had this to say about his own agency:

I'm extremely disappointed that this carrier was allowed to continue operating unsafely when it should have been placed out of service.

The Federal Motor Carrier Safety Administration, an agency of the DOT, is in charge of bus and truck safety. There has been evidence of a heightened scrutiny of the nation's 3,700 intercity bus companies, which carry 750 million passengers a year and have been plagued by a string of fatal

crashes this year. LaHood criticized the agency for stretching its investigation beyond May 28th and ordered an immediate halt to such extensions, which federal rules allow but do not require before a bus company is closed. Eight bus companies facing closure have received extensions this year, according to the DOT. Hopefully, Sec. LaHood will clamp down on his own people, and will require them to do their jobs. From the content of his statement, delivered to the media, it appears the Secretary is serious and means business:

There is no excuse for delay when a bus operator should be put out of service for safety's sake. On my watch, there will never be another extension granted to a carrier we believe is unsafe.

The safety agency does in-depth examinations of companies that accumulate the most safety violations in random roadside inspections. It says violations alone cannot be the basis to shut down a company. The agency targets oft-cited companies for more thorough reviews and can issue a closure order after a review. LaHood says he plans to propose in December that the safety agency be allowed to close bus companies with excessive safety violations and without a fuller review.

There are numerous examples of the serious safety problem concerning driver fatigue. One good example is the March 2nd bus crash near New York City that killed 15 passengers. Investigators are looking into whether fatigue caused that crash. The company operating that bus, World Wide Travel of Brooklyn, N.Y., had five violations of fatigued-driving rules in the 22 months before the crash. As we have reported in prior issues of the *Report*, bus drivers can drive up to ten straight hours before being required to take eight hours off, and can work 15 hours, which includes non-driving time, before having to take an eight-hour break. The time-off requirements simply aren't adequate to ensure drivers are rested. It's time for the federal government agency with the responsibility of regulating to do its job!

Source: *USA Today*

SENATOR WANTS TO HALT RENTALS OF RECALLED VEHICLES

U.S. Senator Charles Schumer of New York is introducing a bill to stop car rental agencies from renting automobiles that are under recalls for problems that aren't yet fixed. The industry recently proposed a

two-tiered system in which cars would be kept off the road if the recall involved serious safety issues. Recalls considered less serious would be fixed as soon as possible, but the cars wouldn't be "grounded" until then, under the proposal by the American Car Rental Association. Sen. Schumer stated:

Rental car agencies appear more interested in reaping profit by keeping recalled vehicles on the road than they do with ensuring the safety of the individuals and families who are driving their cars.

This bill should be passed and promptly so. The law is needed because of serious crashes in recent years involving rental cars under recalls. He said car rental agencies must be held to the same standard as automobile dealerships that don't lease cars for longer terms until a problem identified in a recall is fixed. Sen. Schumer believes all recalled vehicles should be off the road until they're fixed. The latest proposal by car rental companies to create a vague double-standard that defines some recalled cars as safe and others as dangerous allows these companies to shirk their responsibility to folks who rent their vehicles. This is a most serious safety issue and one that Congress should act on. A consumer who rents a car, unlike a private owner, won't be notified that the car is under recall. That can no longer be tolerated.

Source: *Insurance Journal*

JURY AWARDS \$17 MILLION VERDICT IN DOCTOR'S DEATH

A San Diego jury recently awarded \$17.4 million in damages to the family of Dr. Michael Mazurek, a 41-year-old Naval surgeon, who was killed while he was riding his bicycle when he was struck by an ambulance owned by American Medical Response Inc. The verdict is believed to be the largest-ever individual wrongful death verdict in San Diego County. Dr. Mazurek, was an orthopedic trauma surgeon who served as director of Orthopedic Trauma, Tumor and Reconstructive Services at the Naval hospital in San Diego. Frank M. Pitre and Ara Jabaghourian, lawyers with Cotchett, Pitre & McCarthy, represented the family of Michael Mazurek and they did a very good job in this case.

Source: *Daily Journal*

JURY AWARDS \$11.8 MILLION IN DRUNK DRIVING ACCIDENT

A Maryland jury awarded more than \$11.8 million last month to a man whose car was rear-ended by a repeat drunk driver in August 2007. Michael W. Harris, the Plaintiff, developed a painful and debilitating nerve condition as a result of the crash that has largely confined him to a wheelchair. On the afternoon of August 28, 2007, Harris, then working as a landscaper, was stopped at an intersection when the drunk driver hit him from behind. The driver fled the scene, and when she was finally stopped, she failed two field sobriety tests and was booked for DUI. The woman had a long history of DUIs and was convicted of a separate DUI about a week after the Harris accident. Robert S. Weltchek and his son and law partner, Nolan, whose practice is in Philadelphia, tried this case and they did a very good job.

Source: *Lawyers USA Online*

XVIII. HEALTHCARE ISSUES

STUDY SAYS OVARIAN CANCER SCREENING IS INEFFECTIVE

A new study, released last month, says a commonly-used test for ovarian cancer doesn't increase a woman's chance of survival and may in fact create other health problems. This study was from UAB in Birmingham, Ala. And elsewhere. The study, which was published in the June 9th issue of the *Journal of the American Medical Association*, looked at the use of transvaginal ultrasound and a blood test doctors use to find an early sign of ovarian cancer and other tumors called CA-125. The two diagnostic tests are often provided by doctors annually or given to women who request screening.

Source: *Birmingham News*

FDA EXPANDS CANCER WARNING ON TWO POPULAR PROSTATE DRUGS

The Food and Drug Administration has expanded the warning label on a group of prostate drugs, saying they may increase the risk of a serious form of prostate cancer. The FDA is updating the warning information on a group of drugs including

GlaxoSmithKline's Avodart and Merck's Proscar, which are used to shrink the prostate. The warning indicates the drugs are linked to a greater risk of high-grade prostate cancers. While the drugs have been shown to reduce the risk of prostate cancer overall, according to the FDA, the drugs were linked to an increased risk of more serious cancers.

Earlier this year, Merck and GlaxoSmithKline asked the FDA to approve the drugs as preventive treatments for prostate cancer, but the agency refused, citing the risk of high-grade cancer. In March, GlaxoSmithKline said it was abandoning global efforts to get Avodart approved as a preventive cancer drug. The agency is basing its conclusions on a review of two studies in which about 27,000 men age 50 and older used the drugs for several years. The FDA said the risk of high-grade prostate cancers is small, but doctors should be aware of it. The drugs are also known as dutasteride and finasteride, respectively. Finasteride is also available as a low-cost generic.

Source: USA Today

FORMALDEHYDE AMONG SUBSTANCES ADDED TO CANCER LIST

Formaldehyde, a chemical used in embalming fluid and in consumer products, is known to cause cancer, according to a new report from the federal government. The 12th Report on Carcinogens, released on June 11th by the National Toxicology Program, officially added the chemical and several others to the list of substances known to cause cancer. The chemical industry had fought this move, resulting in years of delays. The industry claims the studies used to establish the link to cancer are not based on science.

Formaldehyde is a naturally-occurring chemical found in the environment in small amounts. But more concerning are the levels of the chemical used in household products such as some nail polishes, hair straightening products, pressed wood products as well as industrial glues and car exhaust. Formaldehyde is the main ingredient in embalming fluid used in the funeral industry. It is also a large component of the 'new car smell'—composed of fumes emanating from carpets, upholstery, plastics and glues used in new cars.

Dr. Otis Brawley, Chief Medical Officer at the American Cancer Society and CNNHealth.com contributor, stated that he's less concerned about the amount of formaldehyde average consumers are getting from household products, and more

concerned about workers exposed to the chemical. Dr. Brawley had this to say:

I worry about workers in the funeral industry, nail technicians and beauticians. It's not just one exposure. It's continuous exposure over time that increases risk.

Currently, formaldehyde is not listed on the labels of most products, so Dr. Brawley says it can be difficult to reduce exposure. He believes better labeling is on the way in light of the new report. Dr. Brawley believes that manufacturers will work very hard to get these things out of their products and that many companies will label their products 'formaldehyde free.' Despite a lack of information for average consumers, Dr. Brawley says there are some small ways to reduce your risk:

- Keep new cars and newly carpeted areas well ventilated;
- Ask manufacturers if their products are formaldehyde free; and
- Make sure if you work around formaldehyde, that your employer is following all OSHA regulations related to the chemical.

The report also added aristolochic acids—used in certain herbal remedies and teas—to the list of known carcinogens. It added certain inhalable glass wool fibers, styrene—a liquid used to make Styrofoam, and cobalt-tungsten carbide powders to the list of 'reasonably anticipated human carcinogens.'

Source: CNN

XIX. ENVIRONMENTAL CONCERNS

AN UPDATE ON OUR TOXIC TORTS SECTION

Rhon Jones heads up our firm's Toxic Torts Section which currently has 21 lawyers and 15 staff, making it one of the largest environmental sections representing Plaintiffs in the country. I asked Rhon to provide an update on some of the interesting lawsuits our lawyers and staff are involved in. In spite of his heavy schedule, due to the BP litigation, Rhon was able to do so. Protection of people and their property from large corporate polluters is a top priority for his section.

A unique feature of our growing environmental toxic tort practice is the ability to represent a large number of people harmed by damage to their property, health and well-being. Our lawyers in this section are fighting to make a difference in the lives of those threatened by environmental toxins that contaminate waterways, soil and wildlife, endangering human health and life, and quality of life. These toxins are man-made, usually chemicals or pollutants created by industry and either accidentally or carelessly allowed to seep or spew into the surrounding area. Lawyers in the section are currently working on the cases summarized below:

BP Oil Spill Litigation

The environmental section is working tirelessly on behalf of folks throughout the Gulf Coast who are hurting as a result of the Deepwater Horizon oil spill. The spill, which is considered the largest environmental disaster in United States history, released over 200 million gallons of crude oil into the Gulf of Mexico and killed 11 workers aboard the Deepwater Horizon oil rig last year when an explosion rocked the vessel and sent it to the bottom of the ocean. BP, Plc. was the majority owner of the well and was the operator of the rig. Transocean owned the rig and provided workers aboard it. Halliburton was responsible for the cementing at the well head—a very complex and critical procedure that some say may have been initial cause of the "blowout" explosion. Cameron owned the blowout preventer (BOP) device that was to prevent a blowout from ever occurring. Obviously, it did not work and there is some talk that the device may have been defective.

After the spill, the wrongdoers tried to cover up their massive problem by dumping thousands, if not millions, of gallons of toxic dispersant. We believe that it will come out later that those efforts made what was already a horrible situation even worse. The impact from the spill has been enormous—fishermen, seafood processors, seafood wholesalers, hotels, condo owners, realtors, restaurants, waiters, marinas, local and state governments, and a host of other businesses that either reside on or make their living off the Gulf Coast have been injured. All the while, folks that volunteered to clean up the spill and residents living along the Gulf

Coast have suffered health issues due to the dangerous toxins associated with chemical dispersants and oil.

Making matters worse, the Gulf Coast Claims Facility, which was set up as BP's agent to settle claims, has been far from transparent and fair with folks. What was promised as a simple and quick process for payment has turned into a drawn out and overly complicated claims process. The GCCF is requesting and delaying too many claims on account of information it either doesn't need or already has in other forms. Instead of providing legitimate offers to these desperate businesses, the GCCF is essentially denying their claims while offering small quick payments to settle all claims against all oil spill Defendants. We also learned this week that the GCCF had selected judges for reviewing GCCF claim appeals exceeding \$250,000 or where claims have precedential effect. It does not appear claimants will even have a chance to argue for their claims in front of these panels. Unfortunately, good folks throughout the Gulf Coast have been relegated to beggars as opposed to claimants. This is no surprise though—the GCCF is working for BP.

Our firm has filed lawsuits for hundreds of clients, and is aggressively pursuing justice for our clients on multiple fronts—including litigation and the GCCF. Rhon Jones, a steering committee member, along with several of our lawyers in his section, is working hard in the MDL. As we have reported, the oil spill multi-district litigation in Louisiana is moving at a rapid pace towards a limitation of liability trial in February. At that trial, we will learn everything about what was going on aboard the Deepwater Horizon, and who is responsible for causing the disaster. Recently, BP and the other Defendants tried to dismiss all of the Plaintiffs' claims on a legal technicality. Ironically, BP's multi-million dollar advertising campaign about "making it right" doesn't extend to the courthouse where desperate claimants are seeking compensation.

To better serve the needs of our clients, we have divided our lawyers into teams based on the type of client and claim. All of our lawyers have done an outstanding job handling some very significant litigation, but their work is

far from over. Our goal is to obtain the very best recovery possible for each of our clients.

For any questions you may have regarding governmental entities, contact David Byrne at David.Byrne@beasleyallen.com, Rick Stratton at Rick.Stratton@beasleyallen.com, Stephanie Emens at Stephanie.Emans@beasleyallen.com, Heidi Dunn at Heidi.Dunn@beasleyallen.com, or Mitch Dobbs at Mitch.Dobbs@beasleyallen.com.

For any questions you may have regarding condo, realtor or property claims, contact Chris Boutwell at Chris.Boutwell@beasleyallen.com, Chris Colee at Chris.Colee@beasleyallen.com, or Luke Bentley at Luke.Bentley@beasleyallen.com.

For any questions you may have regarding seafood processing companies, seafood wholesale companies, hotels, wedding companies, salons, loss of wage claims and theme parks, contact John Tomlinson at John.Tomlinson@beasleyallen.com, Will Sutton at Will.Sutton@beasleyallen.com, John Thomas at John.Thomas@beasleyallen.com, or Bea Sellers at Bea.Sellers@beasleyallen.com.

For any questions you may have regarding commercial and charter fishing businesses, deckhands, marinas, VOO contract disputes, and personal injury associated with the oil spill, contact Parker Miller at Parker.Miller@beasleyallen.com, Grant Cofer at Grant.Cofer@beasleyallen.com, or Kyle Shirley at Kyle.Shirley@beasleyallen.com.

For any questions you may have about restaurants, the construction industry, convenience stores, grocery stores and recreational parks, contact Rick Stratton at Rick.Stratton@beasleyallen.com, Chris Cleckley at Chris.Cleckley@beasleyallen.com, or Josh Jones at Josh.Jones@beasleyallen.com.

TVA Litigation

The firm is also serving as co-lead counsel in the TVA litigation in Tennessee. As all of our readers know by now, on December 22, 2008, TVA's Kingston plant released 5.4 million cubic yards of coal ash waste onto 300 surrounding acres. This is the largest accident of its kind in U.S. history, with clean-up expected to cost approximately \$1.2 billion and take until at least 2014 to

complete. TVA has admitted that the clean-up will not remove all of the ash from the rivers and will leave an untold amount of ash in Watts Bar Lake, which is made up of the Emory, Clinch, and Tennessee rivers.

Our firm represents property owners affected by the coal ash spill, and in September 2010, Plaintiffs moved the court to certify a class. The U.S. District Court recently ruled that class action trial format is not the most practical and efficient means of resolving all of the litigation. Instead, the Court ruled that the cases should proceed individually. This ruling does not affect the merits of the Plaintiffs' case, only how the litigation will be managed by the court.

Plaintiffs and their counsel have continued to gather evidence, and recently wrapped up discovery on June 14th. Prior to the end of discovery, Plaintiffs deposed more TVA executives and expert witnesses, including the TVA Inspector General, Richard Moore. The Inspector General issued a report in 2009 that was highly critical of TVA's handling of the investigation into the causes of the coal ash spill, and Plaintiffs had the opportunity to question the Inspector General on this report and other topics related to the Kingston disaster.

As of this writing, Parties are scheduled to appear in U.S. District Court on June 21st for a scheduling conference before U.S. District Court Judge Varlan. The cases are set for trial in the Eastern District of Tennessee beginning in mid-September of this year.

David Byrne and Brantley Fry are working on this case for the section and have done a great job. If you need additional information on this subject, contact David Byrne or Brantley Fry in our firm at 800-898-2034 or by email at David.Byrne@beasleyallen.com or Brantley.Fry@beasleyallen.com.

Hot Fuel Litigation

The firm also plays an important role in the Hot Fuel multi-district litigation centered in Kansas City, Kan. The case spans the entire southern portion of the United States, and includes lawsuits in 26 states. As we have reported, when customers purchase motor fuel by the gallon, they expect to receive a

gallon's worth of energy. However, as the temperature of fuel increases, the fuel expands in volume but the energy content remains the same—as if it never expanded. In other words, a gallon of hot fuel is less dense and contains less energy than a gallon of cold fuel. As a result, the oil companies are able to sell more hot gallons, but those gallons contain less energy per cubic inch. Ultimately, consumers in hot states, such as Alabama, Georgia and Florida, are receiving less energy per gallon to power their cars than they are actually paying for. As one might guess, oil companies are able to generate massive profits from this practice.

The oil industry has known about the effects temperature has on motor fuel for decades—and they take advantage of it. The industry helped establish the U.S. Petroleum Gallon, whereby a gallon of fuel is 231 cubic inches measured at 60 degrees. The oil industry also temperature compensates intra-industry transfers at practically every level of the distribution process except at retail. In Canada, where the fuel is cold and consumers could benefit from the sale of colder gallons with more energy, the oil companies temperature compensate at retail to make sure they don't lose money. However, the oil industry refuses to offer this same technology it has used for years to consumers at retail to ensure folks receive the fuel they purchase.

From defeating the Defendants' motions to dismiss to achieving class certification for an injunctive class in the State of Kansas, the Plaintiffs have achieved some significant victories. After years of argument, the Plaintiffs recently achieved another significant victory on appeal before the U.S. Court of Appeals for the 10th Circuit when the Court ruled the oil companies have to turn over internal lobbying documentation with oil trade groups. While the Defendants may appeal this ruling again, we are confident that both the District of Kansas and the 10th Circuit's opinions were correct.

Currently, liability discovery has closed in the case and the parties are gearing up for expert discovery. In addition, the first bellweather trial is expected to take place sometime next year for consumers in the State of Kansas. Rhon Jones is a steering committee member

in the litigation, and Parker Miller has played a very important role in the litigation's global offensive discovery efforts. Grant Cofer has also joined the Beasley Allen team and is doing a good job in this case. This is a difficult case, but we are working hard to make a difference.

If you have any questions about the litigation, you can contact Rhon, Parker or Grant at Rhon.Jones@beasleyallen.com, Parker.Miller@beasleyallen.com, or Grant.Cofer@beasleyallen.com, respectively.

Leaking Underground Storage Tank Cases

Lawyers in the Toxic Tort Section represent dozens of Plaintiffs in cases against owners of leaking underground storage tanks (USTs). Many gas stations across Alabama store petroleum products in aging USTs constructed of bare steel, which inevitably corrodes and allows gasoline to leak into the surrounding soil and groundwater. Some newer UST systems contain piping and other components that are susceptible to being dissolved or corroded by gasoline. The gasoline stored inside these USTs contains numerous toxic chemicals such as benzene (a known human carcinogen), toluene, ethyl benzene, xylene, and MTBE. When USTs leak, these toxic compounds move through the soil, contaminating the groundwater, threatening the health and safety of nearby residents, and limiting the use and value of the affected properties.

We are currently involved in lawsuits against UST owners and operators in six counties in Alabama, including the largest UST release ever reported in the state. Plaintiffs include people who live or own property near the leaking UST site, residents who obtain drinking water from wells near the site, and nearby businesses affected by the UST leak. These lawsuits typically involve claims for trespass, nuisance, and negligence against the UST owner. Beasley Allen's environmental attorneys have successfully recovered damages for numerous clients harmed by leaking USTs.

Chris Boutwell and Luke Bentley have done a very good job for their clients working on these cases. If you would like more information about leaking USTs, or believe that your health or property may have been harmed by a

leaking UST, you can contact Chris Boutwell (Chris.Boutwell@beasleyallen.com) or Luke Bentley (Luke.Bentley@beasleyallen.com) in our office at 800-898-2034.

Mine Subsidence Litigation

Our firm also represents some property owners in Walker County for damages associated with mine subsidence. In room and pillar mines like the one underneath our clients' properties, giant underground rooms are mined and coal "pillars" are left behind to support the surface. If the mining companies fail to leave behind coal pillars capable of permanently supporting the surface, an underground collapse can occur and cause damage to surface property in the form of mine subsidence. If subsidence occurs underneath a home, the effects can compromise the foundation, cause water and gas main failure (creating a fire hazard), destroy the roof line and crack floors and walls.

As we have reported previously, room and pillar mining lends itself to abuse by the coal companies. Regulations place a much higher emphasis on temporary stability of a mine structure to protect workers than on requiring the coal companies to provide permanent support of the surface. In addition, the more coal the company mines, the more money it makes. Finally, once a room is completely mined, it is often-times closed off forever—leaving any evidence of wrongdoing buried under thousands of tons of rock. Given this, it is no wonder that coal companies would choose to mine in a manner resulting in surface subsidence.

These cases are extremely complex and involve powerful Defendants with unlimited resources. Subsidence can be unpredictable, and can occur gradually or suddenly, and can appear in many different forms on the surface. Adding to the complexity of these cases, the mine at issue is often-times abandoned and sealed off—leaving only what appears on the surface and 20-year-old documents (or older) to tell the tale of the mining procedure.

Rhon Jones, Parker Miller and Kyle Shirley are working on these cases and the first subsidence case should try in August 2011. If you would like more information about these cases, please

contact Rhon Jones, Parker Miller or Kyle Shirley at Rhon.Jones@beasleyallen.com, Parker.Miller@beasleyallen.com and Kyle.Shirley@beasleyallen.com, respectively.

U.S. SUPREME COURT REJECTS GE CHALLENGE TO EPA CLEANUP ORDERS

The U.S. Supreme Court has rejected General Electric's challenge to part of a federal law that gives the Environmental Protection Agency the power to order companies to clean up hazardous waste. The Justices let stand a federal appeals court ruling that upheld a provision of the Comprehensive Environmental Response, Compensation, and Liability Act, known as the Superfund Act. The intent of this Act was to make sure polluters pay for environmental hazards they created.

Under the Superfund Act, EPA has the power to issue unilateral orders directing companies to clean up hazardous waste for which they are responsible if the sites pose an imminent and substantial threat to public safety. First, a district court judge, and then an appeals court, rejected GE's challenge to the law. In its appeal to the Supreme Court, GE claimed the cleanup orders violated constitutional due-process rights and impermissibly coerced compliance.

The U.S. Department of Justice opposed GE's appeal. It said the law provided sufficient procedural safeguards and companies that refuse to comply with an order can get a federal court hearing. Interestingly, the Supreme Court refused to hear GE's appeal without comment. That usually means the losing side's position was totally without merit.

Source: *Insurance Journal*

MINING CO. TO PAY \$263 MILLION TO SETTLE SUPERFUND SUIT

Hecla Mining Co., the largest mining company in Idaho's Silver Valley, will pay \$263.4 million plus interest to settle one of the nation's largest Superfund lawsuits. This was one of the top ten such settlements in history, according to the U.S. Environmental Protection Agency. The U.S. Department of Justice said that the company in Coeur d'Alene, Idaho, will pay the money to the United States, the state of Idaho and Coeur d'Alene tribal governments for releasing mining wastes into the environment during decades of silver production.

Hecla was the last major Defendant remaining in a huge Superfund lawsuit filed in federal court in Boise, Idaho, in 1991. Seventy-five percent of the money will go to the EPA for cleanup work. The remaining 25% will go to federal, state and tribal entities to help repair the environment and restore wildlife in the valley, the EPA said. Hecla is the nation's largest silver producer, operating the Lucky Friday Mine in the Silver Valley and a mine in Mexico.

The lawsuit was originally brought in 1991 against Hecla and other mining companies in the Silver Valley by the Coeur d'Alene Tribe, seeking penalties for damage to water, fish and birds caused by millions of tons of mining wastes that were released for decades into the South Fork of the Coeur d'Alene River and its tributaries.

The EPA has been performing cleanup work in the Coeur d'Alene River Basin since the early 1980's, and the lawsuit also sought to recover cleanup costs.

Settlements have already been reached with other mining companies that had historic operations in the valley, which is 50 miles east of Spokane, Wash. That included ASARCO, which along with Hecla, was a primary Defendant. ASARCO reached a settlement in 2008 to pay nearly \$500 million toward cleanup. The Bunker Hill Superfund site is one of the nation's largest and most contaminated, with widespread releases of toxic metals such as lead and arsenic that have sickened residents for decades. Despite years of cleanup, much contamination remains.

Before the EPA cleanup began, the Silver Valley was so saturated with pollution that it stripped the hillsides of vegetation and poisoned the blood of children, causing physical and emotional problems that continue to this day. The EPA has spent nearly 20 years removing lead from the environment here. The agency claims great success because the average blood lead level of children has dropped to about normal, which is 2 micrograms per deciliter of blood. Cleanup efforts have centered on public health, including replacing soil in about 5,800 residential yards. Meanwhile, Hecla Mining continues work to expand its Lucky Friday Mine. The company is spending \$200 million to increase silver production by about 60% and extend the mine life beyond 2030. A worker died at the mine after a roof caved in earlier this year. The consent decree is subject to a 30-day public comment period and approval by the federal court.

Source: Associated Press

\$5 MILLION SETTLEMENT REACHED IN COAL PLANT POLLUTION

GenOn Northeast Management Co., the operator of a coal-fired power plant located near Pittsburgh, has agreed to pay \$5 million to settle a lawsuit that alleges its discharges of potentially-toxic metals helped pollute a river and violated its permits thousands of times. The proposed settlement was filed in a Pittsburgh federal court. It now awaits approval from the judge and the federal government. If approved, this would bring to a close a 2007 lawsuit over discharges from the Conemaugh Generation Station.

The 1,700-megawatt coal-fired power plant sits on the Conemaugh River, about 50 miles east of Pittsburgh. Since at least 2005, the plant violated the federal Clean Water Act "practically every day" by discharging excessive amounts of aluminum, boron, iron, manganese and selenium in the approximately 2 million gallons of water it dumped into the Conemaugh each day, according to PennEnvironment and the Sierra Club, the environmental advocacy groups that filed lawsuit. PennEnvironment's executive director, David Masur, had this to say in a statement:

While this historic penalty will send a strong message to other companies in Pennsylvania and throughout the region, it is equally important that the company is now committed, at long last, to complying with its legal discharge limits and to reducing its pollution of the Conemaugh River. This was a David and Goliath-style fight—and the 'Davids' were able to deliver a critical victory to the people of Pennsylvania.

GenOn Northeast is a subsidiary of Houston-based GenOn Energy Inc., which is a part-owner of the plant, along with Public Service Enterprise Group Inc. of Newark, N.J., Constellation Energy Group Inc. of Baltimore and others. GenOn Energy is one of the largest power plant owners in the United States. It has an ownership stake in 18 power plants in Pennsylvania alone. The environmental groups say that some of the metals are toxic, and can harm aquatic life in a river already damaged by acidic drainage from coal mines.

The \$3.75 million portion of the settlement is the largest penalty in Pennsylvania history against a water polluter under the citizen enforcement provision of the federal Clean Water Act. The breakdown is \$3.5 million to support environmental cleanups in the Conemaugh River watershed, with

\$250,000 as a civil penalty. GenOn also must pay \$1.25 million for the groups' legal expenses.

Source: Associated Press

XX. THE CONSUMER CORNER

ONLY NEW AND SAFER CRIBS WILL NOW BE AVAILABLE FOR CONSUMER PURCHASE

A new generation of safer cribs should now be for sale in retail stores across the country. On June 28, 2011, anyone that manufactures or sells baby cribs is required to meet new and improved crib safety standards approved by the U.S. Consumer Product Safety Commission on December 15, 2010. The Commission voted last month to extend the length of time that short-term crib rental companies have to comply with the new mandatory standards for full-size and non-full-size baby cribs.

This extension gives crib rental companies until December 28, 2012 to update their inventory with compliant cribs, which is the same deadline for the public accommodation facilities that these companies serve. When the Commission approved the new rules in 2010, child care facilities, such as family child care homes and infant Head Start centers, and places of public accommodation, such as hotels and motels, were given until December 28, 2012 to have compliant cribs in their facilities. Today's vote by the Commission does not change the requirements on manufacturers or retailers of cribs.

The Commission also voted last month against granting an extension for retailers to comply with the new crib safety requirements. In turn, the Commission will continue to require companies that manufacture or sell cribs in the United States to comply with the new federal safety standards effective June 28, 2011. Federal mandatory crib standards had not been updated in nearly 30 years and the new rule will usher in a safer generation of cribs. These mandatory standards will:

- stop the manufacture and sale of dangerous, traditional drop-side cribs;
- make mattress supports stronger;
- improve slat strength;
- make crib hardware more durable; and

- make safety testing more rigorous.

The new safety standards aim to keep children safer in their cribs and prevent deaths resulting from detaching crib drop-sides and faulty or defective hardware. These crib standards were mandated by the Consumer Product Safety Improvement Act of 2008 (CPSIA). For more information on crib safety and safe sleep environments for baby, visit CPSC's crib information center at: www.cpsc.gov/cribs.

PONZI SCHEME LOSSES MAY REACH INTO MILLIONS

An alleged Ponzi scheme, operating in Jefferson County, Ala., ensnared at least 28 investors with possible losses in the millions of dollars, according to The Alabama Securities Commission. Spero X. Vourliotis of Birmingham was charged with securities fraud and other charges. Carey Michael Billingley of Rockford, a business partner of Vourliotis, also was arrested on securities charges.

The FBI is assisting the Jefferson County District Attorney's Office and the commission with the investigation. According to the commission, Vourliotis sold investments through self-described investment clubs called The Cornerstone Investment Group, The Capstone Group and the Tri Stone Group. The agency said the investigation indicated that Vourliotis was operating a classic "Ponzi" scheme, in which initial investors are paid from capital from later investors rather than from actual profits.

The commission said Vourliotis formed The Cornerstone Investment Group to pool capital from investors. But, after several months, he lost money through bad trades and began producing fraudulent financial statements to conceal losses. Billingsley allegedly partnered with Vourliotis in Tri Stone Investment Group and brought in new capital. Joe Borg, director of the Securities Commission, said in a statement:

This commission is committed to stopping any illegal actions involving securities and will do our best to seek appropriate punishment to those breaking the law and restitution to victims.

The Alabama Securities Commission, under the leadership of Joe Borg, does an excellent job for Alabama citizens. The commission staff works very hard and should be commended.

Sources: Al.com and Birmingham News

TAXING INTERNET ACCESS IS ILLEGAL

Sirius XM Radio, the dominant satellite radio provider in the U.S., is a Defendant in a class action lawsuit filed on behalf of all subscribers who paid fees or sales taxes for internet radio access and all consumers who purchased the "Family Plan" when it offered five (5) months free. This class action alleges that Sirius XM Radio has violated the federal Internet Tax Freedom Act 47 U.S.C. § 151.

The Internet Tax Freedom Act was signed into law on October 21, 1998 by President Bill Clinton and was extended in 2007 by President George W. Bush. This Act prevents federal, state, and local governments from the taxation of internet access. The purpose of the act is to allow open access to information as provided by internet service providers. Items or goods purchased through the internet are not included by the Act and state and local sales taxes may apply. Currently, the Internet Tax Freedom Act will remain law until November 2014.

Unfortunately, most consumers are unaware of this Act and are susceptible to being taken advantage of by internet service providers. Plaintiff Joel Broida has alleged that he was charged for internet connection and access to Sirius XM's internet radio and state and local taxes for internet access. This led to Mr. Broida's class action lawsuit on behalf of all consumers who have similarly been charged by Sirius XM Radio in violation of the Internet Tax Freedom Act. Mr. Broida also alleges violations of California's consumer protection laws, breach of contract, and false advertising.

Last year, AT&T Mobility reached an agreement to settle similar claims with a class action lawsuit filed against it. AT&T was accused of violating the Internet Tax Freedom Act through its regular charging of taxes for internet access while using certain services on several popular devices owned by consumers nationwide. For example, AT&T was accused of charging unlawful fees for iPhone data plans, Blackberry data plans, laptop connect cards, pay-per-use data services and other smart phone plans. Simply using the internet, ability to use email, and access to one's email contacts or calendar could lead to unlawful fees.

The settlement with AT&T provided consumers with three forms of relief. AT&T will no longer charge taxes for internet access unless required by state law. Also, AT&T is refunding consumers for taxes charged on internet access. Finally, AT&T is refunding any vendor's compensation they received

in those jurisdictions where compensation was awarded to AT&T.

Lawyers in our firm are continuing to investigate claims of violations of the Internet Tax Freedom Act. Consumers should be careful to check their bills and ensure they are not being unfairly taxed for internet access. We expect companies will learn that consumers will stand up for their right to be charged correctly and according to the law. For more information on the Internet Tax Freedom Act, you may contact Andrew Brashier, a lawyer in our Consumer Fraud Section, at 800-898-2034 or Andrew.Brashier@beasleyallen.com.

Sources: Sirius XM Radio Class Action Complaint, AT&T Class Action Settlement, Internet Tax Freedom Act

DOES THE WORLD'S BEST-SELLING HERBICIDE CAUSE BIRTH DEFECTS?

According to a report released on June 7th, industry regulators have known for years that Roundup, the world's best-selling herbicide produced by U.S. company Monsanto, causes birth defects. The report, "Roundup and birth defects: Is the public being kept in the dark?" found regulators knew as far back as 1980 that glyphosate, the chemical on which Roundup is based, can cause birth defects in laboratory animals. But despite such warnings, and although the European Commission has known that glyphosate causes malformations since at least 2002, the information was not made public.

The "Report" indicates that regulators also misled the public about glyphosate's safety. As recently as last year, the German Federal Office for Consumer Protection and Food Safety, the German government body dealing with the glyphosate review, told the European Commission that there was no evidence glyphosate causes birth defects. The report comes months after researchers found that genetically-modified crops used in conjunction with Roundup contain a pathogen that may cause animal miscarriages.

After observing the newly-discovered organism back in February, Don Huber, an emeritus professor at Purdue University, wrote an open letter to Secretary of Agriculture Tom Vilsack requesting a moratorium on deregulating crops genetically altered to be immune to Roundup, which are commonly called Roundup Ready crops. In the letter, Huber also commented on the herbicide itself, saying:

- "It is well-documented that glyphosate promotes soil pathogens and is already

implicated with the increase of more than 40 plant diseases;"

- "it dismantles plant defenses by chelating vital nutrients;" and
- "it reduces the bioavailability of nutrients in feed, which in turn can cause animal disorders."

Although glyphosate was originally due to be reviewed in 2012, the Commission decided late last year not to bring the review forward. Instead, it was delayed until 2015. The chemical will not be reviewed under more stringent, up-to-date standards until 2030. The report authors concluded:

Our examination of the evidence leads us to the conclusion that the current approval of glyphosate and Roundup is deeply flawed and unreliable.

What is more, we have learned from experts familiar with pesticide assessments and approvals that the case of glyphosate is not unusual. They say that the approvals of numerous pesticides rest on data and risk assessments that are just as scientifically flawed, if not more so. This is all the more reason why the Commission must urgently review glyphosate and other pesticides according to the most rigorous and up-to-date standards.

Source: *Huffington Post*

LAWSUIT FILED AGAINST MICHAELS STORES SEEKS CLASS-ACTION STATUS

Two lawsuits have been filed against Michaels Stores Inc., which disclosed that its checkout-line PIN pads were tampered with in Illinois and 19 other states. The lawsuits seek class-action status on behalf of consumers, alleging that the arts and crafts retailer failed to safeguard shoppers' credit and debit card information and PIN numbers. The latest lawsuit was filed in an Illinois federal court by Mary Allen. She said an \$18.16 purchase at a Michaels store on March 15th led to more than \$1,000 in unauthorized transactions. Her suit seeks class-action status for any U.S. resident who made at purchase at a Michaels store nationwide using a debit or credit card swiped through a PIN pad beginning Jan. 1, 2011.

Around March 15th, according to the lawsuit, Mary Allen used her Harris Bank debit card to buy \$18.16 in goods from a Michaels Store in Vernon Hills. It was alleged that she swiped her debit card through one of the tampered Michaels PIN pads and "unwittingly had her debit card

information and PIN number stolen as a result." On May 4th, when she tried to withdraw money at her local bank, it was blocked. A bank employee told Ms. Allen the card had been de-activated because of suspicious activity. An account record showed two unauthorized transactions on or about May 4th for \$503 each at two locations in California. Ms. Allen reported the theft to the police, but says she never received any alert from Michaels.

Michaels' has 964 stores in the United States. Some Michaels' customers reported fraudulent cash machine withdrawals, each totaling hundreds of dollars. The Allen lawsuit alleges:

Michaels' lack of adequate security granted easy access to third parties who tampered with in-store PIN pads to ... 'skim' unwitting customers' debit and credit card information and subsequently steal money directly from the victims' bank accounts. In essence, Michaels' security failure enabled cyber-pickpockets to steal customer financial data from within the retailer's stores and subsequently loot the customers' bank accounts from remote automated teller machines.

Skimming is a term that may be known to our readers. If not, it involves the unauthorized capture of debit or credit card magnetic strip data. I am told that "Magnetic strip technology" can be duplicated easily. This allows a third party to assume a victim's identity. As I understand it, skimmers are typically built with easily-obtainable electronic parts. A thief will use false card readers, combined with hidden wireless cameras or electronic membranes put over the PIN keypads, to capture a victim's card information and the PIN numbers punched. The information is transmitted to the thief, who can then create a bogus duplicate card or sell the information. Apparently, creating a duplicate takes only seconds using a card-cloning machine that can be bought online. These bogus cards, with the stolen PINs, can be used to withdraw cash from the victim's bank account at an ATM. This is a most serious matter and most folks don't realize it. According to the Electronic Funds Transfer Association, theft from ATM skimming exceeds \$1 billion annually.

According to the Allen lawsuit, the payment equipment might have been tampered with as early as February of this year. It said about 90 PIN pads showed signs of tampering. Violation of the Federal Stored Communications Act and the Illinois Consumer Fraud and Deceptive Practices Act

were alleged, as well as negligence by Michaels. The firm of Lite DePalma Greenberg of Chicago and Faruqi & Faruqi of New York are representing the Plaintiffs.

Source: *Chicago Tribune*

PROBLEMS WITH FORD F-150 WINDOW REGULATORS

Ford vehicles use electric motors to turn the window regulators in models equipped with power windows. Certain Ford model vehicles have had an inordinate amount of problems or failures with the window regulators, particularly the 2004 and 2005 model year trucks. Many consumers have complained of repeated and multiple failures of the window regulator in their Ford F-150 vehicles. In fact, the website www.carcomplaints.com list the failed window regulators on the 2004 Ford F-150 truck as number 13 of the top 20 most often reported vehicle complaints on its website. This website also has lodged over 200 complaints regarding window regulator problems with the 2005 Ford F-150.

The National Highway Traffic Safety Administration website reports over 140 complaints about the 2005 model year F-150 power windows alone. Even with all of these complaints to Ford and NHTSA, Ford has failed to issue a recall and has refused to reimburse vehicle owners for the cost of replacing the defective window regulators. Quite often, more than one replacement is required. Our firm is currently investigating these window regulator failures. If you or someone you know has had a failure of the window regulator in any model year Ford F-150 vehicle, you can contact Bill Hopkins, a lawyer in our Consumer Fraud Section, at 800-898-2034 or by email at Bill.Hopkins@beasleyallen.com.

THOUSANDS OF CITI CUSTOMERS AT RISK AFTER HACKER ATTACK

Citigroup Inc. reported last month that computer hackers breached the bank's network and accessed the data of about 200,000 bank card holders in North America. This is the latest of a series of cyber attacks on high-profile companies. According to Citi, the names of customers, account numbers and contact information, including email addresses, were viewed in the breach. It appears that the breach was discovered by the bank in early May. Citi claims other information, such as birth dates, social security numbers, card expiration dates and card security

codes (CVV) were not compromised. A spokesperson for Citi said by email:

We are contacting customers whose information was impacted. Citi has implemented enhanced procedures to prevent a recurrence of this type of event. For the security of these customers, we are not disclosing further details.

In the brief email statement, Citi did not say how the breach had occurred. Another Citi spokesman, James Griffiths, said the breach had affected 1% of North American card customers, which the bank's annual report says total 21 million. But like Japanese electronics and entertainment group Sony, which has declared several security breaches of its networks this year, Citi should come under fire for not telling customers sooner about the breach. Spokesman for Australia's Consumer Action Law Centre, an advocacy group, had this to say:

It may be the bank's business, but it's the consumer's personal information so consumers deserve to be told about security breaches immediately. It's hard to see any reason why this sort of breach couldn't have been disclosed much sooner.

The Citi problem is not unique to that company. It appears breaches of this sort by hackers are becoming fairly commonplace. This is a major problem that must be dealt with.

Source: *MSNBC*

COUNTERFEIT SMOKE ALARMS DISTRIBUTED IN ATLANTA

The U.S. Consumer Product Safety Commission is urging consumers in the Atlanta area to check their homes for counterfeit smoke alarms. About 18,500 counterfeit photoelectric smoke alarms were distributed for free in the Atlanta area between 2006 through May 2011 as part of the Atlanta Smoke Alarm Program. The smoke alarms can fail to alert consumers in the event of a fire.

The Atlanta Fire Rescue Department, which distributed the free smoke alarms as part of a fire safety campaign, has recalled the smoke alarms and is working to provide free smoke alarm inspections and replacement units. Consumers who received these alarms should immediately contact the Atlanta Smoke Alarm Recall Hotline at (404) 546-2733. The counterfeit alarms can be identified by a silver Underwriters Labora-

tories' UL label on the back and three sets of vented slots on the front.

CPSC has worked with the voluntary standards organizations to improve smoke alarm performance and reliability. Counterfeit alarms can put lives at risk. Working smoke alarms that meet the voluntary standards are proven to save lives. CPSC urges consumers to install smoke alarms on every level of the home, outside sleeping areas and inside bedrooms. Replace batteries at least once every year and test the alarms once a month.

Source: CPSC

FDA ANNOUNCES STRICTER SUNSCREEN RULES

The Food and Drug Administration is finally requiring new labels on sunscreens. The labels will be due by next summer. Consumers will then have a way to know how well a sunscreen protects them from skin cancer and wrinkles, not just sunburns. Unfortunately, it has taken the government 32 years to finally take this badly-needed action. The FDA, which first proposed changing sunscreen labels in 1978, recently announced the new rules on which products offer "broad protection" from both major forms of ultraviolet radiation, or UV. If you need more information, contact Shanna Malone at Shanna.Malone@beasleyallen.com.

CONSUMERS SHOULD REPORT PROBLEMS WITH PRODUCTS TO THE CPSC

I have been asked to explain the exact role of the Consumer Protection Safety Commission relating to product safety. By federal law, the CPSC is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of consumer products under the agency's jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than \$900 billion annually. The CPSC says it is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. The agency's work to ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters, and household chemicals—has contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

Under federal law, it's illegal to attempt to sell or resell a recalled product. To report a

dangerous product or a product-related injury, you can go online to: www.saferproducts.gov. You can also report an unsafe product by calling CPSC's Hotline at (800) 638-2772 or teletypewriter at (800) 638-8270 for the hearing impaired. For your information, there is a great deal of product safety information at www.saferproducts.gov. To join a free e-mail subscription list, you can go to <https://www.cpsc.gov/cpsclist.aspx>.

Source: CPSC

XXI. 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 has been a very large number of 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 June issue. Readers are encouraged to contact Shanna Malone, the Executive Editor of the Report, 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.

CHRYSLER RECALLS 11,000 CARS OVER STEERING ISSUE

Chrysler has recalled more than 11,000 cars, minivans and other models. The concern is defective steering columns that could injure drivers during a front-end crash. The company doesn't know of any crashes or injuries caused by the problem. The vehicles were built between mid-April and May of 2011. The recall includes the Chrysler Town & Country and 200 sedan and convertible; the Dodge Avenger, Caliber, Caravan, Journey and Nitro; and the Jeep Compass, Liberty, Patriot and Wrangler.

NHTSA said the recall was prompted by "a missing or incorrectly installed rivet" that could "compromise the ability of the steering column to support the occupant loads" in a front-end crash—leading to potential injuries.

GM TO RECALL 47,000 CADILLAC SRXs TO FIX AIR BAGS

General Motors is recalling more than 47,000 Cadillac SRX crossover vehicles in the U.S. because of a problem with the passenger side air bags. The National Highway Traffic Safety Administration, in documents posted on its website, said the right side head protection air bag won't inflate in a crash if no one is in the front seat. As a result, a right-side passenger in the back seat may not be protected and could get hurt in a front or side crash, the agency said in the documents. GM said no injuries have been reported.

Air bag sensors in the 2011 SRX, an SUV-like vehicle that's more nimble and efficient because it's built on car underpinnings, are programmed to turn off the passenger side air bags if no one is in the right-front seat, the agency said. But that conflicts with the owner's manual, which says the air bags will inflate regardless of whether the front seat is occupied. "Because the actions of the air bag and the owner's manual do not match, the vehicle is not compliant" with federal safety standards, NHTSA said.

The recall affects SRXs made between Feb. 2, 2010 and April 29th of this year and sold in North America. Dealers will reprogram the air bag sensors to fix the problem free of charge. GM will notify owners by mail starting Friday. GM said the recall also affects about 3,000 SRX models sold in Mexico and Canada. GM shares fell 12 cents to \$29.33 in pre-market trading.

STEERING DIFFICULTY PROMPTS RECALL OF 52,000 TOYOTA PRIUSES

Toyota—because of a problem with electric power steering—has recalled about 52,000 Priuses from 2001-3 in the United States. This is part of a global action affecting 106,000 vehicles. The electric power steering pinion-shaft attachment nuts could loosen and "over time, the customer will gradually notice significant increased steering effort when making a left turn," according to Toyota.

Toyota says it has received one unconfirmed report of a minor accident. While the company described the recall as voluntary, under federal regulations, once a manufacturer is aware

of a safety problem it must inform NHTSA within five business days of its plan for a recall.

Toyota has been looking into the problem for almost four years, according to a document filed with the safety agency, in which the company said it received a field technical report in August 2007 that the steering wheel locked up on a first-generation Japanese-market Prius. Toyota told NHTSA that it discovered that the locking nuts were loose and began investigating how the condition was created. Toyota also said it received sporadic reports of other vehicles with such problems, but it was not until late in May 2011 that brand engineers at Toyota determined the cause and concluded a recall was necessary.

The problem is related to tightening and lubricating grease from the rack-and-pinion assembly reaching the nuts. Because of differences between the right-hand and left-hand-drive models, the steering wheels on the Prius sold in the United States would not stick, although there could be a significant increase in driver effort, the company said. In 2000, Toyota recalled about 1,700 of its 2001 Prius models for a power-steering problem. The automaker told NHTSA at the time that a problem with the torque sensor might cause a "higher than normal" steering effort.

NHTSA had several dozen complaints from owners about problems with power steering on 2001-2 Priuses. One owner wrote that the power steering on his 2001 Prius failed at 13,396 miles, 65,427 miles and 105,000 miles. He said Toyota paid the first two times, but on the third failure the automaker covered parts but not labor.

VOLVO RECALLS S60s TO REPROGRAM FUEL PUMPS

Volvo has recalled certain model S60 sport sedans from the 2012 model year to fix their fuel-pumps. The recall, which affects 7,558 vehicles built from Nov. 18, 2010 through May 5, 2011, is part of a growing trend toward recalls for defects that are corrected with software upgrades instead of hand or power tools. In a document filed with the National Highway Traffic Safety Administration, the car maker said the

fuel pump software may not be compatible with all the fuel pumps in some cars and may not deliver fuel properly.

As a result, drivers may sense engine hesitation in some driving conditions, and in some cases the engine may stall as if the car has run out of fuel. Such sudden stalls increase the risk of a crash. Volvo notified owners about the recall last month. Dealers will upgrade the engine control module software free of charge.

HYUNDAI HAS RECALLED THE 2010 SANTA FE

The 2010 Hyundai Santa Fe has been recalled. The intermediate shaft may suffer from noise and excessive wear due to a misalignment of the intermediate shaft with the right-side output gear. Continuing to drive the vehicle in this condition leads to the development of a whirring/whining noise and can cause damage to the automatic transmission. This may cause the loss of motive power, increasing the risk of a crash. Dealers will replace the right side output gear and intermediate shaft free of charge. Call Hyundai at 800-633-5151. Only some cars or trucks recalled are affected. Contact a dealer for your model to see if it is included in the recall. If so, the dealer will tell you what to do.

MAZDA RECALLS 400,000 VEHICLES FOR POSSIBLE WIPER DEFECT

More than 400,000 Mazda3 and MAZDASPEED3 vehicles worldwide will be subject to recall by Mazda Motor Corp. After drivers reported defective windshield wiper motors. In documents posted Monday on the National Highway Traffic Safety Administration's Web site, Mazda is recalling 103,300 vehicles in the United States manufactured between Jan. 7, 2008, and Nov. 28, 2008. The ground terminal of the wiper motor may have been accidentally bent as the cars were assembled, Mazda said in the documents. The flaw may cause the wipers to stop working, which could prove dangerous in inclement weather.

The Japanese automaker first received complaints about the malfunction in late 2009, according to documents submitted to NHTSA. Mazda determined

that no recall was necessary at that time, but continued to monitor the situation, the documents show. In March 2010, Mazda reopened its investigation after more incidents were reported. Finally the automaker decided a recall was necessary "to remedy the concern because of an increase in the frequency of the occurrences."

TUFFTORQ YARD TRACTORS RECALL

Husqvarna Professional Products Inc., of Charlotte, N.C. has recalled about 1,600 Husqvarna Yard Tractors with TuffTorq K46LD Transaxle. The yard tractor's transaxle can experience intermittent drive failure, posing a risk of reduced or lost braking ability. This recall involves orange, Husqvarna yard tractors with TuffTorq K46LD transaxle. Yard tractors included in the recall have model numbers YTH-23V42LS and YTH24V48LS and serial numbers ranging from 050110 A001000 to 123110D999999. The first six digits of the serial number is a date code. Tractors included in the recall have a serial date range of May 1, 2010 through December 31, 2010. Model and serial information is located on an identification plate attached to the underside of the seat. The tractors were sold at Husqvarna authorized dealers nationwide from May 2010 through December 2010 for between \$2,300 and \$2,800. Consumers should immediately stop using the recalled yard tractors and contact Husqvarna to schedule a free repair at an authorized Husqvarna dealer. For more information, contact Husqvarna toll-free at (877) 257-6921. Consumers can also visit the company's website at www.husqvarna.us.

POURABLE FUEL GEL RECALLED AFTER INJURIES IN FIREPOT ACCIDENTS

A maker of pourable fuel gel for decorative firepots has recalled about a half-million bottles after learning of dozens of accidents, including two near-fatal ones in New York. Additional reports of severe burn accidents connected to the use of gel-fueled firepots, a relatively new product, have surfaced in states like California, Florida and Indiana. The manufacturer, Napa Home and Garden Inc. of Duluth, Ga., was aware of 37 reported accidents, 23 of

them involving injuries to consumers. The company has sold 460,000 containers of the fuel, a form of ethanol, in quart bottles and gallon jugs, since December 2009, under the names Napafire and Firegel.

Napa Home and Garden is offering full refunds of \$5 to \$78 to consumers who return the fuel to the original merchant—whether they bought it from retailers like Bed Bath & Beyond, ShopKo or Restoration Hardware, or through Amazon.com, catalog companies, decorators or landscape architects. Napa Home's are not the only fuel gel products linked to serious burn cases: BirdBrain Inc., a rival manufacturer based in Ypsilanti, Mich., is being sued by the parents of a 13-year-old New Jersey girl, an 8-year-old Maryland boy and a 3-year-old Illinois girl, each of whom spent weeks in the hospital recovering from severe burns last year.

TARGET EXPANDS RECALL OF CHILD BOOSTER SEATS

About 375,000 Circo Child Booster Seats have been recalled by Target, of Minneapolis, Minn. And 43,000 additional booster seats were recalled in August 2009.

The booster seat's restraint buckle can open unexpectedly, allowing a child to fall from the chair and be injured. Target says it has received ten additional reports of booster seat buckles opening unexpectedly, including three reports of a child falling forward out of the booster seat, hitting an object or the floor.

The expanded recall involves all Circo Booster Seats, including those sold as early as 2005. The plastic booster seats are blue with green trim and a white plastic restraint buckle. They attach to an adult chair to boost a child to a table. "Circo" and "Booster Seat" can be found on a green label located in the front of the booster seat. The seats were sold exclusively at Target stores nationwide from January 2005 through June 2009 for about \$13. Consumers should immediately stop using the recalled booster seats and return them to any Target store for a full refund. For additional information, contact Target at (800) 440-0680 or visit the company's website at www.target.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. You can let them know by visiting www.saferproducts.gov.

MORE THAN 33,000 BIKE HELMETS RECALLED ON CHIN STRAP FLAWS

Bell Sports has recalled about 33,600 Exodus full-face bicycle helmets in the U.S. And Canada because the plastic buckle on the chin strap can break, allowing the helmet to come off the wearer's head. The company received one report of a buckle failing during an accident, resulting in an injury that required stitches below the wearer's eye, according to the U.S. Consumer Product Safety Commission and Health Canada. Wal-Mart Stores Inc. And Amazon.com Inc. sold about 31,100 helmets in the U.S. And 2,500 in Canada between August 2009 and March 2011. Consumers should stop using the helmets immediately and contact Bell Sports for a replacement or refund.

QUALITY BICYCLE PRODUCTS RECALLS CIVIA BICYCLE RACKS

Quality Bicycle Products of Bloomington, Minn., has recalled about 100 carrier racks for mounting over the front bicycle wheel. The bicycle rack's mounting bracket can crack or break. When this happens, the rack can fall onto the bicycle's front wheel, posing a fall hazard to the rider. This recall involves Civia Loring bicycle racks. They have black aluminum tubing with bamboo panels and mount to the bicycle's front fork. The word "Civia" is printed on the rack's side panels. The racks were sold in independent bicycle stores nationwide from December 2009 through February 2011 for about \$175. Consumers should remove these racks from their bicycles immediately and contact the store where purchased for a full refund or replacement. For additional information, contact Quality Bicycle Products toll-free at (877) 311-7686 or visit the company's website at <http://civiacycles.com/aftermarketloringfrontrackrecall/>.

BRITAX RECALLS B-NIMBLE STROLLERS DUE TO RISK OF BRAKE FAILURE

Britax Child Safety Inc., of Charlotte, N.C., has recalled its B-Nimble Strollers. This recall includes about 20,000 in the United States and 800 in Canada. An audible click heard when the brake pedal is pressed can give a false impression that the brake is fully engaged when it is not. When the brake is not engaged, the stroller can move unexpectedly posing a risk of injury to the child occupant. Britax has received seven reports of the brake not being fully engaged. No injuries have been reported.

This recall involves B-Nimble umbrella strollers manufactured on or after August 1, 2010. Strollers included in the recall have model numbers U311771, U311773, U311775 and U311780. The date of manufacture labels and model numbers can be found on the lower frame/tube on either the left or the right side. The strollers were sold in a variety of colors including black and silver, Cowmooflage (black and white), green and red. The strollers were sold at juvenile product and mass merchandise stores nationwide and online retailers between September 2010 and June 2011 for about \$200. Consumers should immediately stop using their strollers and contact Britax for information and to request an improved replacement stroller. Consumers who resume use of their strollers while awaiting the replacement should always ensure that the brake is fully engaged. For additional information, contact Britax toll-free at (888) 427-4829 or visit the company's website at www.britaxusa.com.

LAN ENTERPRISES RECALLS ZOOOPER STROLLERS

About 2,300 Strollers have been recalled by distributor: Lan Enterprises, LLC, of Hillsboro, Ore. The opening between the armrest bar/snack tray and seat bottom of the stroller can allow an infant's body to pass through and become entrapped at the neck, posing a strangulation hazard to a child who is not harnessed. When using a stroller, parents are encouraged to always secure children by using the safety harness, and never leave the child unattended. This recall involves

Zooper strollers sold with an optional use snack tray and armrest bar. The four models of strollers included in this recall were manufactured between February 2009 and June 2010. A warning label attached to the seat has the stroller's production date code. The following models are included in the recall:

- Zooper Everyday—Tango—SL808G—022009-060510—2010, 2011
- Zooper Everyday—Twist—BU822B—060510—2011
- Zooper Everyday—Waltz—SL800J—022009-060510—2010, 2011
- Zooper Elite—Flamenco—SL350B—071509—2010

The strollers were sold at juvenile product and mass merchandise stores nationwide and online retailers, including Amazon.com, Costco.com and Dmartstores.com from May 2009 to May 2011 for between \$200 and \$800. Consumers should immediately remove the armrest bar and snack tray from the strollers and contact Zooper USA to receive a free replacement armrest bar and repair kit for the snack tray. Replacement parts will be available beginning July 1, 2011.

TRIMMERPLUS EDGER ATTACHMENTS RECALLED

MTD Products Inc, of Cleveland, Ohio, has recalled about 14,500 TrimmerPlus™ Edger Attachments. The steel shaft that drives the edger blade can break during use causing the edger blade to detach. If the blade detaches, it can hit the user or bystanders, posing a laceration hazard. This recall involves MTD TrimmerPlus™ Edger Attachment Model 41AJLE-C092 LE720. The edger is sold separately as an attachment and can be attached to most major brand attachment-capable trimmers. The edger is used to cut grass along an edge such as a driveway or sidewalk. "TrimmerPlus" and "LE720" are printed on the blade's housing. Only certain serial numbers—"1C##1DR####" through "1D##1DR####"—are included in the recall. The serial number and "MTD" are printed on white labels on the edger's pole.

The edgers were sold at Lowes and other hardware and home improve-

ment stores nationwide and on the Web between March 2011 and April 2011 for about \$70. Consumers should immediately stop using the recalled MTD TrimmerPlus™ Edgers and contact MTD to receive a free replacement. For additional information, contact the company toll-free at (888) 848-6038 or visit the company's website at www.mtdproducts.com.

BUNK BED RECALL PROMPTED BY IOWA CHILD'S DEATH

About 30,000 bunk beds have been recalled because of the threat of children becoming entrapped in the bed. A three-year-old Iowa boy died after such a mishap in March 2010. Big Lots of Columbus, Ohio, issued the recall of the metal futon bunk beds, which can entrap a child when the futon and its metal frame are lowered to a flat position. The recall was issued in cooperation with the Consumer Product Safety Commission.

The Burlington, Iowa, boy died when his head and neck became entrapped and the weight of the futon's metal frame prevented him from breathing. The bunk beds have an additional hazard. The space between the last rung on the bunk bed's ladder and the futon mattress is too small, which can allow a child's body to pass through but not the head, posing a head and neck entrapment hazard. The metal futon bunk beds have an upper bunk designed to hold a twin mattress. The bottom bunk has a convertible futon bed.

The recall includes metal futon bunk beds with model number BFB1008GE sold exclusively at Big Lots stores nationwide between January 2009 and April 2010 for about \$200. Consumers should immediately stop using the bunk beds and contact Big Lots for a free repair kit that contains new ladders and other parts that consumers can install at home. For additional information, contact Big Lots toll-free at 1-866-244-5687 or visit the company's website at www.biglots.com.

MORE BUNK BEDS RECALLED

Dorel Asia Wooden Bunk Beds have been recalled. You should discontinue use of the products immediately. For more information about the products,

call the CPSC's toll-free hotline, 800-638-2772. The Bunk Beds were sold at Walmart, Kmart, Target and online from September 2004 through September 2009 for about \$190. The wooden side rails that run from the headboard to the footboard and hold the bunk bed's mattress in place can split and cause the bunk bed to collapse, posing a fall hazard. Consumers should immediately contact Dorel Asia to receive a free repair kit. Until the kit is received, consumers should take down the bunk beds and only use them as separate twin beds.

GE AIR CONDITIONERS AND HEATERS RECALLED FOR REPAIRS

About 90,600 General Electric Zone-line air conditioners and heaters have been recalled due to a fire hazard. An electrical component in the heating system can fail, according to the Consumer Product Safety Commission. There have been four reports of incidents involving smoke or fire, two of which resulted in property damage.

The recall includes GE packaged terminal air conditioners (PTAC) and packaged terminal heat pumps manufactured between January 2010 and March 2011 with AZ41 and AZ61 model numbers. The recalled units were sold at authorized GE representatives and HVAC distributors nationwide for between \$1,000 and \$2,000. The devices are usually found in apartments and commercial spaces. Consumers should immediately stop using the units and contact General Electric for a free repair.

VENMAR VENTILATION RECALLS AIR EXCHANGERS DUE TO FIRE HAZARD

Venmar Ventilation Inc., of Quebec, Canada, has recalled about 1,400 Air Exchangers in the United States. The motor in the air exchangers can overheat, posing a fire hazard to consumers. The company has received nine reports of overheating incidents resulting in fires and property damage outside of the United States. No incidents have been reported in the United States. This recall involves air exchangers sold under different brands that are used to circulate air in and out of the home. The metal air exchangers are painted blue or grey. Air exchang-

ers included in the recall were manufactured from 1996 through 2001 and have brand and model information printed on the unit's rating plate or on the side of the unit. The air exchangers were sold at heating, plumbing and building supply distributors nationwide from January 1996 through December 2001 for between \$350 and \$850. Consumers should immediately turn off and stop using their air exchangers. Consumers should contact Venmar Ventilation to request a free inspection and repair by a Venmar field technician. For additional information, contact the Venmar Ventilation toll-free at (866) 441-4645, or visit the firm's website at www.venmar.ca.

HP RECALLS ANOTHER 162,000 NOTEBOOK BATTERIES FOR FIRE HAZARD

Hewlett-Packard Company, of Palo Alto, Calif., has now issued a recall for 162,600 batteries for their Lithium-ion batteries used in HP and Compaq notebook computers. The recalled lithium-ion batteries can overheat and rupture, posing fire and burn hazards to consumers. This follows a May 2009 recall by HP of 70,000 notebook batteries in both HP and Compaq portables because of a fire hazard. A year later, in May 2010, the company said it was recalling another 54,000.

Since the May 2010 recall expansion, HP has received 40 reports of batteries that overheated and ruptured, resulting in seven burns, one smoke inhalation injury and 36 instances of property damage.

Consumers should check any batteries they have bought as replacements or spares. HP also is sending letters to customers who may be affected. HP will replace recalled batteries at no cost. Stop using any battery that's part of the recall.

JANOME AMERICA INC. RECALLS ELNA SEWING MACHINES

Janome America Inc. of Mahwah, N.J. has recalled about 600 sewing machines. The wires inside the sewing machine can short circuit, posing a risk of fire. The firm says it knows of one report of a sewing machine catching fire. No company or property damage

have been reported, according to the company. This recall involves the Elna eXcellence 740 sewing machine. The machine is white and navy with a digital touch panel. "Elna" and "eXcellence 740" are printed on the front of the machine. Sewing machine stores nationwide sold the machines from September 2010 through April 2011 for about \$3,000. They were manufactured in Japan and Taiwan. Consumers should immediately unplug and stop using the machine and return it to the store where it was purchased for a free repair. For additional information, contact Janome America at (800) 631-0183 anytime or visit the company's website at www.elnausa.com.

SIMPLY THICK RECALLS PRODUCTS MANUFACTURED BY THERMO PAC,

Simply Thick, LLC has recalled its SimplyThick® thickening gel products manufactured since June 1, 2009 at a food processing plant located in Stone Mountain, Ga. This plant is currently owned and operated by Thermo Pac, LLC. This recall is limited to only those products manufactured at the Stone Mountain, Ga. plant. SimplyThick products manufactured at two additional food processing plants are not subject to this voluntary recall. For information on how to identify the products subject to this voluntary recall, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com.

The SimplyThick® thickening gel products are being recalled because the FDA advised the company that Thermo Pac, LLC failed to file with the FDA a scheduled process designed to ensure that vegetative cells (harmful bacteria) of possible public health significance are destroyed during the manufacturing process. This failure was discovered during an FDA inspection of the Thermo Pac, LLC Stone Mountain plant conducted from May 23rd through June 3, 2011.

Products manufactured at the Stone Mountain, Ga. plant subject to the recall were distributed across the United States and Canada through food service distributors, drug distributors, retail outlets (consisting primarily of pharmacies and durable medical equipment suppliers), medical facilities, and directly to consumers.

The company has notified its customers and medical professionals in Canada and in the United States and required them to follow the FDA's and the Canadian Food Inspection Agency's (CFIA) warning not to give Simply Thick® brand thickener to infants born before 37 weeks gestation who are currently receiving hospital care or have been discharged from the hospital in the past 30 days, pending the results of investigations by the company, the FDA and the CFIA.

The company warns against the use of SimplyThick® brand thickener with infants born before 37 weeks gestation who are currently receiving hospital care or have been discharged from the hospital in the past 30 days regardless of whether or not the product is affected by the recall. Anyone who has purchased or who has SimplyThick® thickening gel products manufactured at a food processing plant located in Stone Mountain, Ga. should contact the company directly at 1-800-205-7115 for a full refund or an exchange for product(s) unaffected by the recall. Consumers with questions may contact the company at its toll free number 1-800-205-7115 24 hours a day, or by email at latestinfo@simplythick.com.

RUGBY CHILDREN'S PAIN & FEVER CONCENTRATED DROPS RECALLED

About 898,000 Children's Pain & Fever Concentrated Drops have been recalled by the manufacturer Altaire Pharmaceuticals, Inc., of Aquebogue, N.Y. The drops were distributed by Rugby Laboratories, Inc., of Duluth, Ga. This over-the-counter medicine contains acetaminophen which calls for child-resistant packaging as required by the Poison Prevention Packaging Act. Although the original bottle has child-resistant packaging, a separate dropper unit provided for dispensing the drug to children does not. When in use, a child can access the medicine, posing serious health problems or death if more than the recommended dosage is consumed.

The recall involves Rugby Children's Pain & Fever Concentrated Drops (Acetaminophen Drops) in a 1/2 fl. oz. (15 ml) bottle size. The UPC code 305361936723 can be found with the bar code at the bottom of the box. The

lot numbers can be found stamped into the bottom of the carton with the expiration date and above the label on the bottle printed in black. The product was sold at drug stores, grocery stores and other retailers nationwide between January 2009 and June 2011 for about \$4. Consumers should immediately store this product with the child-resistant closure in place and keep it out of the reach of children. To arrange for a free replacement dropper, contact Altaire Pharmaceuticals at (800) 258-2471. For additional information, contact Rugby Laboratories at (800) 645-2158.

There were so many recalls since the June issue, that we couldn't get them all in this month. 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. As indicated at the outset, you may also contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information.

XXII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

JOE CAMPBELL

Joe Campbell, who has been with the firm for seven months, serves as a Law Clerk/Staff Assistant to Larry Golston in the Consumer Fraud Section. Joe assists Larry in interviewing potential clients and investigating their claims. He also helps with legal research on specific legal issues. Joe's mother, Charlene Campbell, is an elementary school teacher in Albany, Ga., and I understand a very good one. Joe also has a younger brother, Nick, 21, who is currently serving his country with the U.S. Army in Afghanistan.

Joe graduated Cum Laude from Troy University with a Bachelor's Degree in Criminal Justice. He is currently a third-year student at Thomas Goode Jones School of Law at Faulkner University. Joe also has been active in the Boy Scouts of America and is an Eagle Scout. He enjoys Auburn football, soccer, paintball, reading, and politics. Joe is a very

hard worker and a welcome addition to our firm. We are fortunate to have him with us.

PHYLLIS COTHRON

Phyllis Cothron has been with the firm for six months as a Staff Assistant in our Mass Torts Section. She works with Navan Ward, Jr., a lawyer in our Mass Torts Section, on the DePuy hip replacement litigation. Phyllis' responsibilities include assisting lawyers in contacting clients, receiving client calls and information, requesting and reviewing medical records, and ensuring clients files are all updated, accurate and complete.

Phyllis and her husband, Fred, have been married for 29 years. They have two sons, Cody and Will, a daughter-in-law Jennifer and a three-year-old granddaughter Caylee. They are members of Coosada Baptist Church where Phyllis teaches K-5 Sunday school. She enjoys reading, SEC football War Eagle style, camping, cooking, and spending time with family and friends. Phyllis is a very good employee who says she really enjoys her work. We are fortunate to have her with us.

JODI TURNER

Jodi Turner serves as a Legal Secretary for Bill Hopkins, a lawyer in our Consumer Fraud Section. She previously worked for the firm from 2001-2006 and left in order to spend more time with her five-year-old daughter Morgan. Jodi returned in February of this year and currently assists Bill who handles class action litigations. She has a number of important responsibilities, including communicating with clients and handling calls, updating and maintaining files, scheduling and calendaring all appointments, logging time worked on cases, and helping out in any way that is needed. Jodi's favorite hobbies are spending time with her family, shopping and swimming. I understand Jodi is also a huge Alabama football fan who, I'm told, has been known to let out a few "Roll Tides" on occasion. Jodi is a dedicated and hard working employee and we are fortunate to have her back with us.

XXIII. SPECIAL RECOGNITIONS

AWARD-WINNING AUTHOR WAYNE GREENHAW WILL BE MISSED

Alabama author and prize-winning journalist Wayne Greenhaw died last month, following complications from open-heart surgery. Wayne was a good man and a good friend and a gifted writer. He wrote 22 books and his latest, *Fighting the Devil in Dixie*, dealing with civil rights activists confronting the Ku Klux Klan from the 1950s through the mid-1980s, was published in early January. Wayne was certainly a prolific writer and a great one. I understand Wayne had an offer from a publishing company to write a novel based on his long-time friendship with author Harper Lee.

Wayne received numerous awards during his lifetime, including the Harper Lee Award for Alabama's Distinguished Writer in 2006 and the ninth Clarence Cason award for nonfiction in 2005 from the University of Alabama. *Fighting the Devil in Dixie* was said to be the fruition of a lifetime of work. Wayne was a history buff and was one of the most knowledgeable persons around on Alabama history. It was said by Rick Bragg, his good friend, that Wayne "not only saw history, he lived it." All who knew Wayne also knew that his writing reflected his passions. He was passionate about Alabama—could not tolerate wrongdoings, hated injustices—and was 100% supportive of folks who stood up to those injustices. Wayne Greenhaw will be missed by his many friends and even by those who didn't actually know him, but had the good fortune of knowing him through his many books.

NAVAN WARD TO LEAD THE ALABAMA LAWYERS ASSOCIATION

Navan Ward, a lawyer in the firm, assumed the role of President of the Alabama Lawyers Association at the organization's annual meeting last month. Navan follows another lawyer in our firm, Larry Golston, in this most prestigious office. Larry served as ALA President and his term ended last month. In assuming his new role, Navan said:

I look forward to continuing and expanding some of the projects that Larry was able to initiate during his

term in office. I also intend to expand the ALA's presence both in and out of the state. For example, we are planning a Lobby Day in Washington, DC, in order to address members of the U.S. Congress with concerns that we as minority attorneys have on the national level.

Established in 1971 as the Alabama Black Lawyers Association, it is the mission of the ALA to enhance the integrity of the legal profession, to improve the quality of legal services provided to the public and to protect the civil rights of the citizens of the State of Alabama. In addition to the Lobby Day, activities planned for the 2011-2012 ALA calendar include a summer social for student interns, new lawyer training, a membership drive phone-a-thon, a Christmas toy drive for needy children, a community education day and a Spring fundraiser. For more information about ALA, contact Navan at 334-269-2343 or 800-898-2034, or visit the organization online at www.ala-lawyers.org.

XXIV. FAVORITE BIBLE VERSES

Christi Bryant, one of our dedicated employees, has moved to Kentucky. Before leaving, she sent in four of her favorite scriptures. While we hate to lose Christi, we wish her the very best in her new home. She has been a blessing to all of us at Beasley Allen and she will be missed.

For all have sinned and come short of the glory of God.

Romans 3:23

For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord.

Romans 6:23

For by grace are ye saved through faith; and that not of yourselves; it is the gift of God: Not of works, lest any man should boast.

Eph 2:8-9

For whosoever shall call upon the name of the Lord shall be saved.

Romans 10:13

Ed and Sally Massey, who live in Washington County, but work in Mobile, have been good friends of ours for a very long time. Sara and I met them when I was managing the campaign of Jim Allen in his successful bid for the U.S. Senate. Ed was instrumental in helping to carry Mobile County for Jim Allen, who went on to be a great U.S. Senator. As they say back in my hometown of Clayton, the Massey's "are good folks." Ed, a tremendous lawyer practicing in Mobile, is well-respected by his peers. Sally sent in one of her life verses for this issue and says these verses have provided comfort for her family over the years.

Although the fig tree shall not blossom, neither shall fruit be in the vines; the labour of the olive shall fail, and the fields shall yield not meat; the flock shall be cut off from the fold, and there shall be no herd in the stalls: Yet I will rejoice in the LORD, I will joy in the God of my salvation. The LORD God is my strength, and he will make my feet like hinds' feet, and he will make me to walk upon mine high places.

Habakkuk 3:17-19

Ed also furnished Proverbs 3:5-6 for this issue and says those verses are his favorite. The Washington County native is also one of the biggest Crimson Tide football followers in the country. Over the years, I have learned to tolerate that.

Trust in the LORD with all your heart, And lean not on your own understanding; In all your ways acknowledge Him, And He shall direct your paths.

Proverbs 3:5-6

Willa Carpenter, who serves as our Human Resources Liaison, furnished the following verse:

Be kindly affectionate to one another with brotherly love, in honor giving preference to one another.

Romans 12:10

Corky Hawthorne, a lawyer from Montgomery, and another good friend, sent in a verse for this issue. Corky sends our firm a daily prayer which is greatly appreciated.

For our gospel did not come to you in word only, but also in power, and in the Holy Spirit and in much assurance, as you know what kind of men we were among you for your sake.

1 Thes 1:5

Dr. Joe Elrod came by the office last month and we had a very good visit. Joe was recently featured in an article by one of my favorite reporters, Al Benn, with the Montgomery Advertiser. Before he left the office, Joe furnished a verse for this issue.

Delight yourself also in the LORD, And He shall give you the desires of your heart.

Ps 37:4

Charles Myrick, one of our hard-working employees, furnished the following verse, which he says "tells it all."

But whoever lives by the truth comes into the light, so that it may be seen plainly that what he has done has been done through God. (NIV)

John 3:21

Lisa Temple, who is with an alarm company in Montgomery, Silent Sentry, sent in her favorite verse. Lisa is a law school graduate and is a multi-talented person. More importantly, she is a strong Christian.

Come to Me, all you who labor and are heavy laden, and I will give you rest.

Matt. 11:28

Krystin McHenry sent in a verse for this issue. This was the favorite verse of her very good friend, Mallory Garmon, who was killed in a motor vehicle accident on October 17, 2010. Four months later to the day, February 17th, Krystin was injured in an accident, but has made a good recovery. Krystin is the daughter of Major Mark McHenry, who is with the Alabama Department of Public Safety.

I can do all things through Christ who strengthens me.

Phil. 4:13

Pam Sexton sent in her favorite verse for this issue. You may recall that Pam's husband Tom had furnished a verse for a previous issue. Tom is the president of Pickwick Antiques, Inc. Pam is a school teacher in Montgomery, and a good one, who also helps out at Pickwick when needed. She is a very talented decorator and could do that full time if she didn't love being a teacher.

I thank my God upon every remembrance of you, always in every prayer of mine making request for you all with joy, for your fellowship in the gospel from the first day until now, being confident of this very thing,

that He who has begun a good work in you will complete it until the day of Jesus Christ;

Phil 1:3-6

Betty Baggott, who does a Bible study for our firm, sent in a verse that some of our political friends should read. Betty is a tremendous teacher and is in great demand as a motivational speaker. Her husband Bob, who died a few years back, was a Baptist preacher. He also served as Chaplain of the Auburn Tigers when his good friend Pat Dye was coach.

For whoever exalts himself will be humbled, and he who humbles himself will be exalted."

Luke 14:11

Finally, Laurice Kern, a long-time member of St. James United Methodist Church, gave me a verse for this issue. Laurice worked for Paul Hubbert at AEA for a long time. When she retired, Laurice worked part time at Pickwick Antiques. Then she retired again.

Therefore I say to you, whatever things you ask when you pray, believe that you receive them, and you will have them.

Mark 11:24

XXV. CLOSING OBSERVATIONS

WE MUST DEAL WITH POVERTY IN ALABAMA

I read a most interesting piece recently in *The Christian Alabamian*, the publication of The Christian Coalition of Alabama, concerning poverty in Alabama. The piece was in the June 12th issue. I would encourage our readers to read it. After I read it, I immediately thought about how the Alabama Legislature dealt with the fiscal problems caused by too little money available to even come close to adequately funding State government agencies and public education in our state. During the Regular Session, the approach taken by the GOP-controlled House and Senate was to put the burden on those in our state who are the least able to take a financial hit. Those who can afford to pay more came out in great shape in the Session.

Large out-of-state companies, which pay very little in the form of taxes in Alabama, also were virtually ignored as a source of needed revenue. When the super rich are compared to a single mother making \$12,500 a year when it comes to state tax burden, it's obvious who wins in that comparison. The article referred to above correctly stated that a major part of the solution to eliminate future poverty in our state is taking care of our educational system. I am afraid that was not the approach taken by the Legislature. The budgets were "balanced" on the backs of school teachers, state employees, working men and women and owners of small businesses. Those who fall in the upper levels of income were virtually ignored and were protected against anything that would cost them more money.

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 hear from heaven and will forgive their sin and will heal their land.

2 Chron7:14

WE CAN'T AFFORD TO IGNORE THIS ADVICE

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

Edmund Burke

XXVI. PARTING WORDS

I have been asked recently how a person can believe in a loving God who really cares when there are so many terrible things happening around the world. Certainly, we have had our share of those happenings in the United States. That is a good question and one that we can't avoid answering. First, God does love us and that should never be questioned or forgotten. God is always available to us and He wants the best for those who believe and have faith in His promises. He certainly does not want to see us hurt but that doesn't mean Christians won't have trials and tribulations during their time on this Earth. We will and that can't be denied.

The good news is that God provides us a tremendous capacity to overcome whatever comes our way. But we must remain

faithful and obedient regardless of our circumstances. The Old Testament book of Joshua is real good reading for anybody who doubts that God is faithful and always keeps His promises. We also have many examples in the New Testament of God's love and concern for His children. Jesus gives us real encouragement when He spoke in Mark 11:22-24:

So Jesus answered and said to them, "Have faith in God. For assuredly, I say to you, whoever says to this mountain, 'Be removed and be cast into the sea,' and does not doubt in his heart, but believes that those things he says will be done, he will have whatever he says. Therefore I say to you, whatever things you ask when you pray, believe that you receive them, and you will have them.

Mark 11:22-24

My prayer for all is that we won't get discouraged over world conditions and lose faith. Anybody who has doubts about how things will ultimately work out should read the Book of Revelation. The final result is laid out there and it's as clear as a bell. May God bless all of our readers and their families. May He also continue to bless America in spite of its shortcomings.

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