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TRENDS FOR 2010

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I have been asked to discuss with you trends and developments in several general areas of litigation. Both the topic, trends, and the subject matter, several general areas of litigation, are quite broad. In any broad legal update seminar it is always difficult to decide where to begin your discussion. I have approached the topic outlined in your seminar brochure with two caveats. First, many of the important trends and issues in current accident and injury litigation involve the topic of subrogation and liens. I believe the issues of subrogation and medical liens are often the most frustrating aspects of accident litigation. Because attorneys Doug Fees and Eric Artrip will speak to you solely on this topic later today, I will attempt to limit my discussion of that issue. Second, attorneys Roy Braswell and Eric Artrip will also speak at length about medical malpractice litigation as well as recent developments in that area of the law. Thus, I will defer any discussion of medical malpractice in Alabama to them.

A. Accident Injury

1. Congressional Efforts to Resolve the Problem with Medicare Liens

As I mentioned above, the issues surrounding subrogation and liens are probably the most challenging issues facing attorneys routinely handling accident claims. I will defer to my peers speaking later today for an in-depth discussion of Alabama law on these issues. Since I am providing only a general update, I will confine my comments to pending legislation that would impact Medicare liens.

Many Americans receive medical coverage through Medicare. Like private coverage, Medicare has certain claims for reimbursement when a monetary recovery is received from a responsible party. However, unlike private coverage, Medicare's rights are a matter of Federal law. If I stated that the average attorney felt like these Federal laws gave Medicare every single right and advantage to the exclusion of the injured party, I would get almost unanimous agreement.

While accident attorneys are compelled to contact Medicare in an effort to re-pay the lien, Medicare itself often seems unresponsive or unwilling to respond. Indeed, the problem of dealing with Medicare is so huge that plaintiffs' attorneys around the United States routinely hold millions of dollars in their trust accounts unable to re-pay the government, while also prohibited from giving the money to their clients.[1] The one-sided nature of Medicare and its rights creates tremendous frustration for attorneys. Although the government will often fail in its duty to provide information necessary to re-pay liens for months and even years, the attorney must simply wait. Indeed, the government can return at a much later date and actually pursue claims against the attorneys and parties to the earlier settlement.[2]

In March, 2010, Representative Patrick Murphy (D-PA) introduced a bill into the U.S. House of Representatives concerning this significant issue.[3] The proposed legislation has support from varied groups, including groups often at odds with each other in matters of litigation.[4] The proposed legislation is fairly short. It provides short time limits for Medicare to respond when parties seek to reimburse prior payments for medical

[1] A July 10, 2009, article in the Miami Herald, titled *Medicare Won't Let Clients Re-Pay Government, Lawyers Say*, cites a figure of 201 million dollars from cases involving secondary payments as of early 2009.

[2] At present, there is a case pending in the United States District Court for the Northern District of Alabama in which the government has pursued claims for Medicare payments against a number of excellent attorneys and the very defendants who previously settled certain claims for personal injury. In that case, the government has argued that no statute of limitations applies to it and its rights. See, *United States of America v. Stricker*, et al.

[3] H.R. 4796-Medicare Secondary Payer Enhancement Act of 2010.

[4] These groups include a consumer group People over Profits, the American Association For Justice, the National Retail Federation, and Allstate Insurance.

treatment. This short time limit for response is coupled with language barring Medicare from later seeking reimbursement where it has failed to timely respond on the issue. As of the writing of this paper, this proposed legislation had been referred to the House Energy and Commerce Committee for further action. Also, as of July 13, the proposed legislation had 31 additional co-sponsors in the U.S. House of Representatives. However, with November elections looming, the likelihood of any legislation being passed this term continues to decrease.

2. Interesting Alabama Cases of 2010

In addition to proposed Medicare legislation that could greatly impact accident litigation, Alabama's appellate courts have issued several interesting decisions in 2010. I have outlined some of them below:

(a) The Trial Court May Not Charge the Jury on Contributory Negligence in the Absence of Substantial Evidence to Support that Affirmative Defense

In almost every accident case, the defendant's Answer contains a general assertion of contributory negligence. Regardless of the level of evidence in support of this affirmative defense at trial, the defendant will typically argue that the reasonableness of the plaintiff's conduct is at issue, and thus, a jury charge appropriate.

In the recent case of *Phillips v. Seward*, 2010 WL 2546414 (June 25, 2010) (Not yet released for publication), our Supreme Court addressed this very issue. The *Phillips* case involved an accident between a minivan and a tractor trailer rig. The minivan driver initially stopped in a turn lane to wait for traffic to clear on the highway so that she could merge into traffic. The defendant truck driver stopped behind her and waited. At some point, the minivan driver moved slightly forward as she waited, then again

stopped. At this point, the tractor trailer driver started forward, could not stop in time, and struck the minivan from the rear. At trial, the truck driver testified that the minivan was stopped at the time he struck it. The truck driver further agreed in his testimony that he could not fault the minivan driver and had no criticism of her. Despite this testimony, the defense counsel argued at trial that a contributory negligence jury charge was appropriate because the minivan driver had stopped her vehicle at a yield sign even though there was an open merge lane in front of her. The trial court agreed with the defense and provided the charge. In finding the trial court's provision of a jury charge for contributory negligence to be in error, our Supreme Court specifically held that

> We cannot agree that a fair-minded person in the exercise of impartial judgment could reasonably conclude that a driver attempting to merge in such circumstances acted unreasonably or negligently merely by beginning to move forward after she had stopped and then restopping.

Id. at *6.

This case should provide a valuable lesson to every plaintiff's attorney to challenge a defendant's request for a jury charge on contributory negligence where the evidence indicates that the plaintiff's conduct was reasonable at the time of the accident. The allowance of such a charge when not truly justified simply gives the jury an additional opportunity to return a defense verdict.

(b) An Unforeseeable Medical Condition Resulting in an Accident Cannot Support a Claim of Negligence

The case of *Malone v. Noblitt*, 2010 WL 3518735 (September 10, 2010) (Not yet released for publication) involved an automobile accident on Highway 72 when the defendant's vehicle crossed the median into oncoming traffic and struck a vehicle being driven by the plaintiff Bonnie Malone. The accident occurred in the early morning hours while the defendant was driving to his business. In deposition, the defendant testified

that he had no memory of the collision. He testified that he had not consumed any alcohol prior to the collision but had taken his prescription medications for high blood pressure and cholesterol that morning. A board certified neurologist who had examined the defendant at Huntsville Hospital at some point after the collision testified in deposition that he believed the defendant had suffered a seizure without any advance warning. The neurologist then testified that the defendant had no prior history of seizures. Based on this evidence, the defendant moved for a summary judgment. It appears that the plaintiff did not respond to the Motion for Summary Judgment. Thereafter, the trial court entered summary judgment in favor of the defendant. On appeal, our Court of Civil Appeals noted that the defendant had presented substantial evidence tending to prove that he "suffered an involuntary and unforeseeable loss of consciousness or awareness immediately before the accident." *Id.* at *5. As a result, the defendant did not negligently cause the collision. *Id.*

Cases involving sudden medical emergencies such as a seizure or a heart attack always presents significant issues. Certainly, where the medical emergency is unforeseeable, a defendant should not be guilty of negligence. The *Malone* case should also serve as a reminder that such medical emergencies should be investigated fully by the plaintiff's counsel. In *Malone*, plaintiff's counsel apparently made no filing in opposition to summary judgment. While such medical emergencies can sometimes be unforeseeable, they are often preceded by a significant history of problems of which the defendant is well aware. As a result, it is absolutely essential that counsel for the plaintiff conduct complete discovery, obtain all the defendant's medical records and speak to as many potential witnesses as possible. Last year, my partners Bud Watson and Ralph Hornsby, Jr., tried a case where a defendant had also suffered a seizure resulting in a collision. However, discovery in our case revealed a very different defendant than the one in *Malone*. In our case, the defendant had a significant history of known seizures. Moreover, the defendant's physician had instructed him on prior occasions to quit driving. Finally, the defendant had been involved in other mishaps when he had suffered

seizures while driving other vehicles. In our case, the defendant was clearly negligent and wanton in continuing to drive a vehicle in the face of such a known health danger. Following the trial, the jury returned a verdict in excess of one million dollars. Our case actually involved fairly small injuries. However, the facts surrounding the defendant's conduct were extremely egregious.

(c) A Verdict Against an Employer for the Negligent Hiring, Training, Retention, or Supervision of its Employee, Requires Proof of "Wrongful Conduct" on the Part of the Employee

The case of *Jones Express, Inc. v. Jackson,* 2010 WL 2629052 (June 30, 2010)(Not yet released for publication), involved a motor vehicle collision in Morgan County. On March 30, 2004, a tractor trailer truck driven by an employee of Jones Express collided with another vehicle at the intersection of Highway 67 and County Road 35, killing the other vehicle's driver. The parents of the deceased driver subsequently sued the trucking company and its truck driver. The parents pursued a wrongful death action alleging that the truck driver negligently caused the accident and also alleging negligent hiring, retention, and/or supervision against the trucking company. The main issue at trial appeared to be which vehicle ran the red light. After a jury trial, judgment was entered for the plaintiff parents on their negligent hiring claim against the trucking company but for the defendant truck driver on the underlying negligence claim. The trucking company appealed.

On appeal, our Supreme Court held that the jury's findings that the truck driver was not negligent but that his employer negligently hired him, were inconsistent. Our Supreme Court held that the inconsistency in the case arose because of the jury's un-reconcilable resolution of the dispositive issue, whether the defendant driver ran the red light. *Id.* at *7. The Court noted that the sole act of negligence alleged against the defendant truck driver as well as the sole act of incompetency alleged against that driver

as an employee of the trucking company, was whether the driver ran the red light. Thus, our Supreme Court held that it was inconsistent for the jury to conclude on one hand that the defendant driver ran the red light for purposes of holding his employer liable but then not rendering a verdict against him individually for running the red light.

The case presents some interesting arguments by the plaintiff's counsel concerning a resolution of this apparent inconsistency. The Alabama Supreme Court also noted several of its prior decisions as well as a Federal Court decision applying Alabama law, which all held generally that a claim for negligent hiring, training, retention, and/or supervision of an employee requires the plaintiff to prove underlying wrongful conduct of the employee. It is not sufficient that the defendant employer simply hire a known incompetent driver or fail to exercise reasonable care in hiring that driver. Liability requires some finding of underlying wrongful conduct that necessarily caused the injury.

(d) Believe It or Not -- The Leading Driver in a Multi-Car Collision Can Be Held Negligent

In the case of *Miller v. Cleckler*, 2010 WL 2342398 (June 11, 2010) (Not yet released for publication), our Court of Civil Appeals reviewed a case involving a four automobile chain reaction collision. Of course, conventional wisdom says that the driver striking the rear of another vehicle is at fault. However, this case applies traditional elements of negligence to show that conventional wisdom is not always correct.

In this case, Mrs. Miller was driving South on I65. She was driving a vehicle in the left lane behind her husband who was driving a separate automobile. The Defendant Cleckler was also driving South on I65 in a pickup truck. According to witness testimony, Cleckler was darting through traffic at a high rate of speed trying to pass everyone. At some point, Cleckler merged his truck into the left lane in front of Mr. Miller. According to Mr. Miller, Clecker then "slammed on his brakes." Naturally, all

the vehicles behind him had to immediately brake as well. Apparently, Mr. Miller was able to stop his vehicle short of a collision. Apparently, Mrs. Miller, the third vehicle, was also able to stop her vehicle short of a collision. However, a fourth vehicle behind them was unable to stop. That vehicle struck Mrs. Miller, who then struck the back of Mr. Miller's vehicle. Mr. Miller's vehicle then collided with the back of Cleckler's pickup truck.

Thereafter, Mrs. Miller sued Cleckler who was driving the lead vehicle, the pickup truck. She also sued the fourth vehicle, the vehicle directly behind her which actually struck her. Cleckler moved for summary judgment. One of his arguments for summary judgment was that Alabama law prohibits a driver from following too closely behind, i.e., I was the first vehicle in line so I cannot be at fault.

Our Court of Civil Appeals began by discussing the elements of a general negligence claim. After reviewing the issue, the Court concluded that the lead driver Cleckler's conduct could amount to negligence, making the lower court's summary judgment on this issue improper. Moreover, the Court of Civil Appeals also ruled that the conduct of the fourth driver in actually being the vehicle that first collided, setting off the chain of collisions, was not a sufficient intervening act to relieve Cleckler of his alleged initial negligence. The Court noted that to be a sufficient intervening cause, that cause must have been unforeseeable to Cleckler and must have been sufficient to be the sole proximate cause of the accident. On a side note, although the court allowed the negligence claim against Cleckler to proceed, it did affirm the trial court's summary judgment on the separate wantonness claim. I like this case because of its application of the elements of a negligence claim to all drivers. We have all been in the situation where a vehicle has suddenly merged in front of us and caused us to slam on our brakes quickly in order to avoid a collision.

(e) The Federal Motor Carrier Regulations Do Not Preempt Alabama Law

At the outset, let me state my opinion that the majority opinion of our Supreme Court examines this case from the wrong viewpoint. In the case of *Dickson v. Hotshot Express Inc.*, 2010 WL 753353 (March 5, 2010) (Not yet released for publication), the Alabama Supreme Court reviewed a case brought by the family of a passenger in a commercial truck. Apparently, the defendant truck driver had begun a cross country hauling trip for his employer Hotshot Express. A friend, Maurine Humphries, who had been friends with the truck driver for several years, decided to accompany him on the trip. The accident occurred in Carbon Hill, Alabama. At the time of the accident, it was raining. Apparently the truck hydroplaned, crossed the center lane, and then collided with an oncoming tractor-trailer. The passenger Humphries died in the collision.

The case involved issues surrounding Alabama's guest passenger statute as well as the Federal Motor Carrier Safety Act Regulations. The case was tried before a jury. At the close of the evidence, the plaintiff requested a jury charge as to the content of 49 C.F.R. §392.14, a regulation which basically states that a truck driver shall use extreme caution in the operation of a commercial motor vehicle when hazardous conditions, such as rain, are present. The plaintiff also requested a second jury charge pursuant to Ala. Code §32-9A-2(a)(1), which basically states that no person should operate a commercial motor vehicle in violation of the applicable Federal Motor Carrier Safety Act Regulations. The trial court denied both of the requested charges. The trial court did charge the jury concerning negligence, wantonness, and Alabama's guest passenger statute. The jury subsequently returned a verdict for the defendants. On appeal, the plaintiff contended that the trial court erred in failing to instruct the jury on the suggested charges. The plaintiff argued that the Federal Motor Carrier Safety Act Regulations preempt state law concerning the types of breaches of the standard of care for which a party may be held liable. However, the Alabama Supreme Court apparently framed the issue for its analysis as to whether the Federal Motor Carrier Safety Act Regulations

simply preempted Alabama's guest passenger statute. Thereafter, the Alabama Supreme Court affirmed the verdict for the defendants holding that these regulations did not preempt Alabama's guest passenger statute.

As I stated earlier, I do not believe that our Supreme Court properly viewed these issues. Instead, I agree with Chief Justice Cobb's dissent. Chief Justice Cobb agreed in her dissent that the regulations at issue did not preempt the guest passenger statute. Instead, Justice Cobb believed that the regulations were necessary to the jury's consideration of whether the truck driver violated the appropriate standard of care. Thus, the instructions should have been provided and would be relevant to the application of the issues surrounding negligence, wantonness, and the application of the guest passenger statute under these specific facts. I believe that Chief Justice Cobb's analysis is a better reasoned analysis on these issues.

B. Products Liability – Latest Product Recalls

1. Congressional Efforts to hold Foreign Manufacturers Accountable for Dangerous and Defective Products

In 2009, 83% of the recalls announced by the Consumer Products Safety Commission (CPSC) were from foreign manufacturers. [5] This statistic comes as no surprise to most people. So often, when we hear that a product has been coated with lead based paint, manufactured with a toxic substance, or assembled in a defective manner, we learn that the product was imported into our country.

On many levels, standards for domestic manufacturers are much higher than those which often exist in foreign countries. The disparities in standards between domestic and foreign manufacturers certainly create safety issues for us as attorneys. Separately, I

[5] Statistics compiled by the American Association for Justice.

believe these different standards also create significant business concerns for domestic manufacturers attempting to compete in the market.

The recent litigation concerning defective Chinese drywall highlights the problems with holding foreign manufacturers accountable for the injuries their products inflict upon the public. Millions of tons of defective Chinese drywall were imported into the United States for use in the construction of homes. After these homes were built, owners began complaining that the drywall emitted corrosive and irritating fumes. In November 2009, the Consumer Product Safety Commission (CPSC) completed a study of the issue, finding a "strong association between homes with the problem drywall and the levels of hydrogen sulfide in those homes and corrosion of metals in those homes."[6] The problems from this defective Chinese drywall have caused substantial damages to homeowners. The damages due to Chinese drywall have resulted in significant litigation against the foreign manufacturers as well as the domestic suppliers and retailers of the material. A history of this litigation clearly reveals the significant risk that the domestic suppliers will shoulder most of the damages while the foreign manufacturers are not held accountable. Indeed, at one point, one of the primary foreign manufacturers of this defective drywall had basically refused to even receive or answer any of the resulting lawsuits.

Foreign manufactures are often able to avoid their liability because of difficulties obtaining legal service of the claim on the company in its home country, issues related to whether the U.S. Court has jurisdiction over the manufacturer, and then problems collecting any eventual judgment. It is important to remember that the damages caused by a defective product will be borne by someone. If the foreign manufacturer avoids its responsibility, then the innocent consumer, our government, or a domestic company that actually distributed the product, will ultimately and unfortunately bear the loss.

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[6] U.S. Consumer Product Safety Commission, Press Statement on Corrosion in Homes and Connections to Chinese Drywall, November 23, 2009.

In February, several members of the U.S. House of Representatives introduced legislation that would make it easier to hold foreign manufacturers accountable for their defective products. *See,* H.R. 4678. Among other things, the proposed legislation would require foreign corporations to have an "agent" in the United States to accept service of process for civil and regulatory claims. The legislation would also require the manufacturer to consent to jurisdiction in a U.S. Court. At a minimum, jurisdiction could be established where the agent was based in the United States. In June, a congressional subcommittee held hearings on the proposed bill. The hearing brief prepared by the subcommittee staff summarizes some of the current problems with dangerous imported products. According to the subcommittee brief:

> The import of consumer products into the United States more than doubled in the decade between 1998 and 2007. This sharp rise in imported consumer products has been accompanied by an overall increase in product recalls and a disproportionate increase in the share of product recalls involving imported products-particularly products from China.
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> In 2007, the Consumer Products Safety Commission (CPSC) announced 473 recalls. This was the highest level of recalls in 10 years. Of those 473 recalls, 389 (82%) involved imported products. Of the 389 recalls involving imported products, 288 (74%) involve products from China. Among the defective imported products grabbing national attention in the past several years were: a children's craft kit containing beads coated with a chemical similar to a date rape drug; toy trains coated with lead paint; a contaminated blood thinning drug; and drywall omitting sulfurous gases.
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> While the CPSC has been working to bolster its surveillance of imported products and working with foreign governments to improve compliance with U.S. safety standards, holding foreign manufacturers accountable for injuries caused by defective products that make it into the hands of American consumers remains a problem. Victims trying to sue foreign manufacturers for injuries caused by

> defective products face significant obstacles with respect to providing service of process (notice about the litigation required to be given to the defendant) and establishing jurisdiction over foreign manufacturers in U.S. Courts.[7]

In the absence of this proposed legislation, injured victims trying to sue a foreign manufacturer face substantial hurdles simply obtaining the required service of process on the foreign defendant. The Hague Convention On Service Abroad Of Judicial and Extra Judicial Documents In Civil Or Commercial Matters, provides a very time-consuming method requiring all legal documents to be first translated into the foreign manufacturer's native language and then provided to a governmental authority for actual attempts at service. Even if the injured victim eventually has the foreign manufacturer served, the manufacturer will often challenge the suit by claiming the U.S. Court does not have personal jurisdiction over it due to its lack of actual contacts in the United States. The current rules work to greatly increase the time and expense on the innocent victims of the defective product and the judicial system as a whole. In addition, they often serve as a means for the manufacturer to escape ultimate liability for the damages caused by its defective product.

The current legislation does not cure the problem of defective products flooding our market. However, it does solve initial problems of service and jurisdiction. At my last review, this proposed legislation had been reported out of committee in the U.S. House of Representatives by a vote of 31 in favor to 22 against. Frankly, it is shocking that any of our lawmakers would vote against a bill that protects both consumers and domestic businesses.

2. Researching the Latest Product Recalls

How do we keep informed as to the latest product recalls? In a word, the Internet. I frequently review a couple sites that provide the latest information on most product

[7] Hearing Brief to Members of the Subcommittee, dated June 11, 2010.

recalls. Both are government sites and are great for beginning your research. The first is the site for The U.S. Consumer Product Safety Commission (www.cpsc.gov). The second is the site for the U.S. Food and Drug Administration (www.fda.gov). If you are researching solely food recalls, the Washington State law firm of Marler Clark (www.foodsafetynews.com) is recognized as a leading expert in this field and also maintains a great site for food issues.

3. A Sample of Recall Issues for 2010

This year has seen more recalls for dangerously defective products than can be discussed in this paper. The few product recalls listed below are provided to demonstrate the breadth and impact of a single defective product on the U.S. market. So far, in 2010 we have seen significant recalls, a sampling of which, includes the following:

Products

- Toyota – over 9 million vehicles
- Tylenol – 60 million units (complaints of nausea from the medication)
- Graco – 1.2 million high chairs (screws falling out) and 1.5 million strollers (finger amputation hazard)
- Delta Enterprise Corp - Over 2 million drop side cribs recalled
- Evenflo
- Jardine Enterprises
- LaJobi
- Million Dollar Baby
- Simmons Juvenile Product, Inc.

Again, this is merely a sample. A review of 2010 shows a substantial number of recalls for such issues as vehicles, children's products, lead (and other heavy metal) contaminated toys, and tools.

Food Items

- Midland farms – Improperly pasteurized milk which could contain listeria and salmonella (distributed in multiple North Eastern states)
- Basic Food Flavors – An ingredient in over 50 separate food products, hydrolyzed vegetable protein, contained salmonella.
- Wright County Egg – An Iowa company required to recall a half billion eggs due to salmonella contamination.
- Veron Foods, LLC – A Louisiana company had to recall 500,000 pounds of sausage due to listeria contamination.
- Specialty Farms – Alfalfa sprouts recalled due to listeria after being distributed in at least 9 states
- Perdue Farms – Georgia company recalled its chicken nuggets (distributed in Wal-Mart) for foreign materials in the product.

This is just a sample of the food recalls occurring in 2010. A review of these recalls shows that many involve contamination with listeria, salmonella, or e-coli. Another major area of concern involves food products contaminated with allergens such as milk or nuts but no label to warn of the danger. The mass distribution of our food supply often causes these contaminations to involve thousands of units distributed over multiple states.

4. A Sample of Some Ongoing Product Liability Litigation in 2010

(a) Medical Device Products

1. DePuy Orthopedics Hip Implant

Johnson & Johnson, with its DePuy subsidiary, announced in August 2010 that it is recalling parts used for hip replacements. The affected parts include the DePuy ASR XL Acetabular System (cup portion of the replacement joint) and the ASR Hip

Resurfacing System (system of capping the ball in a procedure that preserves more bone than traditional replacements). Serious problems with these implants include loosening (implant does not stay attached to the bone in the correct position), fractures of the bone around the implant, and dislocations. According to my information, approximately 93,000 patients have undergone these implants. At present, the potential litigation from this product is in its initial stages.

(b) Pharmaceutical Products

1. Yaz/Yasmin Birth Control Pills

Yaz and Yasmin are birth control pills manufactured by Bayer Corporation. They contain ethinyl estradiol and drospirenone. The use of drospirenone (DRSP) is unique to Yaz/Yasmin and is apparently not found in other birth control pills in the United States. DRSP impacts the body's normal mechanism of regulating a balance between salt and water. This results in extremely elevated potassium levels, known as hyperkalemia. Studies have reported potentially fatal arrhythmia and deep-vein thrombosis from this condition.

When I last checked the actual Multi-District Litigation (MDL) site for this litigation in August 2010, it appeared that over 2500 lawsuits had been filed. This number would not include over 400 in New Jersey where suits have also been consolidated. According to the August 2010 Federal Court MDL Status Conference, the attorneys for both the plaintiffs and defendants appeared to agree that the case is progressing such that the first Federal trial could start in September 2011.

2. Avandia

The drug Avandia entered the market in 1999 to treat diabetes. It is produced by GlaxcoSmithKline, a company that earned billions of dollars from marketing the drug.[8] In 2007, a FDA panel issued a black box warning saying that this medication was linked to potential increased risks of heart attack.

This summer presented a flurry of activity concerning the drug. First, The New York Times dropped a bombshell that the manufacturer hid test results from 1999 concerning this danger. Second, as knowledge of the drug's health implications became publicized, a new FDA panel met to discuss the future of the drug. At this meeting, a majority of the panel determined that the drug caused increase heart risks. Yet, the panel did not pull the drug from the market. Then, it was revealed that one panel member may have received money from the manufacturer. Finally, the company announced, later in the summer, that it had settled most of the suits against it.[9] I have included this litigation in my paper because a study of its history provides a great education on the process for approving and reviewing medications. A study of this history will certainly provide the perspective that our regulatory process is conflicted and compromised.[10]

3. Levaquin

Another current issue involves the popular antibiotic medication Levaquin. Johnson & Johnson manufacturers Levaquin. Levaquin is in a class of antibiotics known as fluoroquinolones. A large number of individuals have filed cases throughout the United States alleging that the drug causes tendonitis, tendinopathy, and tendon ruptures.

[8] I have written several entries on the saga of Avandia, including the manufacturer's cover-up and the conflicts impacting FDA regulation, in my personal blog at: www.alabamalitigationreview.com.
[9] This announcement appears to involve about 10,000 of the 13,000 lawsuits pending.
[10] Days after the preparation of this paper, the FDA further restricted the use of Avandia, making it a last resort for the treatment of diabetes.

Suits are pending in state courts. In addition, there is a MDL in the U.S. District Court in Minnesota. The parties in the MDL have agreed upon several cases as bellwether trials.

(c) Automotive Products

1. Toyota Litigation

One could literally write a book on the on-going issues with Toyota. At present, Toyota has recalled millions of its vehicles, covering over 15 different models. The recalls include problems with unexpected acceleration, faulty floor mats, brake problems, and drive shaft malfunctions.

The problems with sudden and unexpected acceleration have probably produced the most media attention. The cases arising from that issue have been consolidated for pretrial proceedings as part of a MDL, before the U.S. District Court for the Central District of California. Toyota has filed a motion to dismiss these cases which has been set for hearing in November. Meanwhile, the plaintiffs allege that documents reveal a problem with the electronic throttle, causing the vehicles to accelerate out of control. Additionally, plaintiffs contend that Toyota long knew the defect existed but concealed it. This case will continue to develop over the next few months.

2. Defective Tire Claims

One continuing issue that seems to get less attention than the massive Toyota recalls or the continuous issues with mass market pharmaceutical products, is the significant number of deadly highway accidents involving tire defect issues. This year, a jury in Florida returned a $5.6 million verdict against Goodyear in a claim alleging that the company sold a tire for use on recreational vehicles (RVs) although the company knew the model tire was not suitable for that use. While being used on a RV in that case, the tire suffered a catastrophic tread separation. The RV driver lost control and struck a line of trees. Three people in that RV suffered terrible injuries.

In a separate incident, several Florida teenagers were riding in a car on the interstate when its Cooper Tire suddenly suffered tread separation. The car rolled and several of the teenagers were killed. The subsequent lawsuit alleges that the company's manufacturing process creates defective tires.

In a third case, the Nevada Supreme Court affirmed a $32.2 million judgment against Goodyear in a single-car accident that killed three people and injured several other individuals. The vehicle overturned when the Goodyear tire blew out on the Interstate.

These tire tread cases involve complex issues of design and use. They also often involve fact-intensive defenses alleging that the plaintiff drivers were driving improperly.

(d) Consumer Products

1. Yamaha Rhino

Some of you may be familiar with the Yamaha Rhino off-road vehicle. The four-wheeled vehicles look like an off-the-road golf cart.

However, after being placed on the market, a flood of rollover accidents began being reported. Some of these rollovers resulted in horrific injuries. A September 18, 2010, article in The Orange County (California) Register, asserts that Yamaha presently faces about 700 injury and wrongful death claims and has already paid settlements in at least 40 other cases.

The interesting part of these cases is that Yamaha has actually had some success in defending the claims. Yamaha has successfully defended several cases through trial, including one in Alabama. However, a separate case in Georgia has resulted in a Plaintiff's verdict against the company. The company attributes its trial success to the

safety of its product while plaintiffs' attorneys discount that success by asserting the company cherry-picked cases involving careless conduct by the driver. With so many claims remaining, time may tell which argument is correct.

C. Premises Liability

1. The Obama Administration Has Placed An Emphasis on Federal Standards that May Impact Premises Liability

The last year has seen a renewed emphasis by our Federal government in two areas that could impact premises liability. First, the Federal government recently published revised regulations under the Americans with Disabilities Act.[11] Second, the last year has seen a renewed emphasis on OSHA enforcement. After handling cases involving injuries on work sites for many years, I believe there are significant issues involving OSHA, including inadequate accident reporting, inadequate inspections, and outdated regulations. Recently, OSHA regulations have begun to be updated in several key areas.

2. Interesting Alabama Cases of 2010

(a) Premises Liability Distinguished From General Negligence

I have now tried several cases where one of the battles between opposing counsel involved the provision of jury charges related to general negligence or premises liability. Clearly, defense counsel will often wish to frame the case as a premises liability case in order to charge the jury with the "open and obvious" defense. In the recent case of *Shelley v. White*, 2010 WL 1814678 (M.D. Ala. 2010) (Not yet released for publication), our Federal Court again addressed this issue. In *Shelley*, the plaintiff worked at a loading dock. He suffered injuries when the driver of a delivery truck pulled his truck away from the dock as the plaintiff was attempting to unload it.

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[11] Published on September 15, 2010.

At trial, the defendants contended that the case presented an issue of premises liability. Specifically, the defendants contended that the rules of the loading dock required the plaintiff to wait for a red light to go off before entering the trailer to unload it. Additionally, since the red light was still on at the time, the plaintiff was a trespasser on the trailer. As a result, the defendants requested certain jury charges related to these issues of premises liability.

According to the Court, the issue on review was "the standard for the jury to apply in evaluating the reasonableness of White's (the plaintiff) conduct." *Id.* at *1. In other words, was the appropriate standard one of general negligence principles or one of premises liability principles? The Court then noted that "[t]o answer that question, the court must determine whether the 'injury was caused by some affirmative conduct' of the premises owner or by a 'condition of the premises.'" *Id.* In resolving the issue in this case, the Court noted that the injury was caused by the driver's movement of the truck and not by a condition of the truck or trailer itself. Thus, traditional principles of negligence would apply, not principles of premises liability.

(b) Traditional Principles of Premises Liability Govern the Duties of a General Contractor to a Subcontractor on a Construction Site

Like the previous principles discussed in *Shelley*, an understanding of the general duties on a construction site is also essential for the attorney handling severe workplace injuries. In *W.C. Yates & Sons, Inc. v. Burkhardt*, 2010 WL 3518732 (Sept. 10, 2010) (Not yet released for publication), our Court of Civil Appeals addressed the injury claims of a subcontractor employee on a construction site against the general contractor. Generally, the duty of the general contractor to the subcontractor's employees is one of invitor-invitee applying traditional principles of premises liability. *Id.* at *2. Important to those principles is that a plaintiff "may not recover if the injury he receives is caused by an obvious or known defect in the premises." *Id.* (quoting Breeden v. Hardy Corp.,

562 So.2d 159, 160 (Ala. 1990)). Thus, our Court notes that the open and obvious doctrine will often present a substantial hurdle in these cases.

The plaintiff's attorney handling these cases should be very aware of this significant hurdle to imposing liability. One manner to circumvent this significant hurdle is to prove an affirmative act of negligence, rather than a condition. *See, Shelley, supra.*

The second method is to establish a "special" duty on the part of the general contractor. *Id.* at *2. In August, my partner Jennifer McKown and I tried a week-long trial involving a significant injury by a subcontractor employee on a construction site. Our client fell approximately 25 feet, suffering horrible, disabling injuries. He suffered his fall when he drove a mobile lift over a drop-off in the floor below him. Clearly, if traditional principles of premises liability applied, we would be facing a very difficult hurdle in the form of the open and obvious condition defense (and its jury charge). We were able to distinguish our case because the defendant general contractor did retain explicit, special duties in the contracts. These duties included an express duty to control the very method of work and to oversee all safety on site. In accordance with these duties, our client asserted that the defendant represented it would provide a spotter below him. After a week-long trial, our case went to the jury on issues of both general negligence and wantonness. The case subsequently resolved in a confidential settlement after the jury had been deliberating for several hours.

E. Wrongful Death

1. <u>An Update on Recent Alabama Case Law from 2010</u>

I discussed a couple recent wrongful death decisions in the prior section of this paper under the topic of accident litigation. These previously discussed cases, while involving deaths, presented issues important to the broader scope of accident litigation.

As it concerns wrongful death litigation specifically, the Alabama Supreme Court has released a pair of decisions in the last two years discussing the proper procedures to pursue a wrongful death action.

(a) An Administrator *ad litem* has Standing to Pursue a Wrongful Death Claim

The case of *Affinity Hospital, L.L.C. v. Williford*, 21 So.3d 712 (Ala.2009), involved a wrongful death claim against a hospital. On February 25, 2006, Kristopher Kean sought treatment at Baptist Medical Center – Montclair for suicidal thoughts. A hospital nurse interviewed him but then asked him to sit in a waiting area. Kean was later found dead in a restroom, having hung himself.

In February, 2007, a year later, Kean's mother petitioned the Probate Court to appoint the County Administrator as Administrator *ad litem* of Kean's estate. Kean's mother alleged in the petition that her son was unmarried, had no children, and died intestate.

Personally, I have used the method of seeking an Administrator *ad litem* on a couple occasions when the deceased's estate contained no real assets and I simply needed a representative to obtain medical records or other documents necessary to investigate a claim. However, I have always opened a full estate within the statute of limitations to pursue any wrongful death claims.

In *Affinity Hospital*, the Administrator *ad litem* filed a wrongful death action against the hospital and interviewing nurse. The Administrator *ad litem* timely filed the case within two years of Kean's death.

However, more than two years after the death, the County Administrator petitioned the Probate Court to grant her letters of administration, i.e., open a normal

estate. Thereafter, she amended the wrongful death complaint to continue the claim in her new capacity.

The defendants moved for summary judgment asserting that an Administrator *ad litem* lacked capacity or authority to file a wrongful death action on behalf of an estate. Additionally, the defendants contended that the later substitution occurred after the two year limitations period and did not relate back to the original filing.

In analyzing the issue, our Supreme Court noted that Ala. Code §6-5-410 allows a "personal representative" to pursue a wrongful death action. *Id.* at 715. However, the statute does not define "personal representative." Our Court then noted that Ala. Code §43-2-250 governs the role of an Administrator *ad litem.* That statute expressly provides for the appointment of an Administrator *ad litem* to represent an estate where there is not an Executor of Administrator. As a result, our Supreme Court concluded that the Administrator *ad litem* was a "personal representative" for purposes of Alabama's statute governing wrongful death claims.

This case is interesting for a couple reasons. First, I agree completely with the holding. The appointment of an Administrator *ad litem* can be much more economical than opening a normal estate. However, while I agree with the holding, Alabama law before this decision was not completely settled on these issues. As a result, these attorneys pursuing this wrongful death claim took quite a risk by not pursuing the claim through a normal administrator within the applicable two year limitation period. Contrast this decision with the results of the next case.

(b) A Person's Later Appointment As "Personal Representative" Does Not Relate Back To Their Earlier Filing of a Wrongful Death Lawsuit

The case of *Wood v. Wayman*, 2010 WL1837795 (May 7, 2010) (Not yet released for publication) also involved a wrongful death claim due to an alleged act of medical malpractice. In this case, Charles Wayman died on December 30, 2004, while under the care of his physicians. He left a will naming his wife Ann Wayman as his personal representative. On December 27, 2006, just before the two year limitation period expired, Ann Wayman filed a wrongful death suit. During discovery, the defendants learned that no estate had been opened on the deceased Charles Wayman. By this point, the two year limitations period had expired. The defendants moved for summary judgment which was denied by the trial court. However, the order of the trial court certifying for permissive appeal its interlocutory order denying summary judgment, presented the following specific question:

> The controlling question of law is whether [Wayman's] appointment as personal representative of the estate of Charles Wayman, accomplished after the statute of limitations for a wrongful death medical malpractice claim expired, can relate back to the filing of this lawsuit pursuant to Alabama Code §43-2-831 and *Ogle v. Gordon*, 706 So.2d 707 (Ala. 1997), or whether the Wrongful Death Statute and *Downtown Nursing v. Poole*, 375 So.2d 465 (Ala. 1979), dictate reversal.

Id. at *1. As the certified question revealed, conflicting legal precedent appears to exist on this issue. In analyzing the issue, our Supreme Court made several interesting conclusions.

First, the Supreme Court noted the provision in Alabama's Probate Code allowing the relation back of certain acts beneficial to an estate. However, the Court then held that because wrongful death proceeds are not distributed to an estate, this provision would not apply. Second, the Supreme Court noted *Ogle*, an earlier decision that clearly allowed the relation back of a person's appointment after expiration of the two year period. However, the Court distinguished *Ogle* by noting that the delayed appointment beyond

two years, in that case, was due to the Probate Court's dereliction of duty and not the plaintiff. The Court also noted that, in *Ogle*, you could relate the filing back to an actual date within the two year limitations period since that plaintiff had filed his petition for Letters of Administration within the two years. The Court concluded that the two year limitations period would not be tolled simply by filing a lawsuit.

In his dissent in *Wood*, Justice Murdock noted that it was a well-settled and "'practically universal' rule that the issuance of letters testamentary relates back to the decedent's 'time of death' and vindicates acts of the personal representative done in the interim." *Id.* at *7. Justice Murdock then concluded that "I cannot accept this Court's failure to apply the well settled rule concerning the relation back of a personal representative's authority to the date of the decedent's death." *Id.* at *9. I agree with Justice Murdock on this one. I believe the majority ignored well-settled rules concerning relation back. Moreover, the inconsistent application of that doctrine creates confusion in the law and sets a procedural hurdle in wrongful death litigation different from all other actions of the Personal Administrator.

2. A Novel Approach to the Punitive Nature of Wrongful Death Damages in Alabama

One unique aspect of Alabama law concerns the damages allowed in a wrongful death claim. Unlike other jurisdictions which allow compensatory damages, Alabama law allows only punitive damages in wrongful death claims. From a technical viewpoint, the unique nature of Alabama law creates problems and inconsistencies related to the interplay of a wrongful death action with several other Alabama laws. These include the impact of Alabama's Survival Statute on claims.

It also includes the practical difficulty of arguing for punitive damages in a death case involving uninsured/underinsured benefits. The following is a strategy our firm has

argued on several earlier occasions in wrongful death actions. We have previously written concerning this strategy and I will copy our earlier writing almost verbatim in the following paragraphs.

The following is one strategy that legal counsel might find helpful in wrongful death cases in Alabama. Again, in Alabama (the only such state), there are no compensatory damages in wrongful death cases. That means no recovery for medical expenses; no recovery for pain and suffering; no recovery for the huge financial impact to a family when a father or mother is killed.

The unique nature of Alabama law is not present because of some explicit statutory language. <u>It is a creation of our court</u>. Alabama courts have concluded that <u>life is priceless and therefore not amenable to crass valuation</u> in dollars. The only allowable damages are punitive.

Yet, in all cases where punitive damages are claimed, the plaintiff can expect from the defense a long list of boilerplate challenges suggesting that punitive damage rules are unconstitutionally vague. These defenses or motions to dismiss or strike contend that punitive damages should not be allowed because there is no objective standard by which to measure such damages. In other types of cases where compensatory damages are also allowed, the law does impose some standards by which to measure punitive damages in conjunction with the compensatory damages assessed. However, in the wrongful death context in Alabama, these objective comparisons are not present. The truth is that, as presently applied and in the abstract, these challenges to punitive damages in wrongful death claims are probably correct. The pattern jury instruction on punitive damages in Alabama also provides little guidance on this issue.

With this background, what is the novel strategy that could be argued in wrongful death cases in Alabama? It is a pre-trial offer of proof stating the following:

> The defendant has contended that there is no objective standard to direct a jury with regard to punitive damages. In analogous criminal cases (such as criminally negligent homicide cases) the Court is required by law, before setting sentence, to initiate victim impact statements pursuant to Ala. Rules of Criminal Procedure, Rule 26.3(7), which includes the economic and psychological impact on the family members. Therefore, the plaintiff offers to provide proof to the jury of the financial and psychological impact of the death of the victim on the victim's immediate family members. The plaintiff will provide evidence of victim impact from the victims themselves as well as through expert testimony from professionals such as physicians, psychologists, and economists. Additionally, pursuant to Ala. Rules of Criminal Procedure, Rule 26.8, the application of punishment requires a full evaluation of the wrong and all its consequences.

If accepted, the plaintiff could then provide testimony concerning the impact of the death upon the remaining family members. The offered approach does not conflict with the Alabama cases holding that a dollar value cannot be placed on the victim's life. Rather, the emphasis is on the impact of the wrong as a necessary part of reaching a reasonable decision as to the level of appropriate punishment to assess as punitive damages.

Although judges with whom this approach has been discussed and to whom this approach has been made have expressed great interest and intrigue, Alabama courts have yet to rule on such an offer of proof. On the occasions where we have made this offer in the past, a settlement for the applicable policy limits has soon followed. As a result, our firm has not yet pursued the issue to completion in Alabama's court system. In our conversations with opposing counsel, we believe that most defendants and their counsel do not wish to test this approach at an appellate court level.