# THE HARMONIE GROUP®

## 2010 SIGNIFICANT CASES

VERDICTS • DECLARATORY JUDGMENT • SUMMARY JUDGMENT
APPEALS • EVIDENTIARY • SUPREME COURT

The Harmonie Group firms understand that they are hired to obtain results: no matter the circumstances. Membership in Harmonie requires a proven ability to achieve favorable outcomes. Positive results for clients are a must. With firms working throughout the U.S., Mexico, and Europe, and with Harmonie's Canadian sister group, the Canadian Litigation Counsel, you have access to firms that provide global leadership in defense victories.

COUNSEL: **Frank M. Holbrook, William P. Thomas**
FIRM: **Butler, Snow, O'Mara, Stevens & Cannada, PLLC**
HEADQUARTERS: **Ridgeland, Mississippi**

## PRODUCT LIABILITY

A seventeen-year-old plaintiff was injured while operating a ten-year-old John Deere tractor and rotary cutter. The unbelted operator was ejected from the tractor and run over by the rotary cutter. The plaintiff suffered severe injuries requiring amputation and extensive rehabilitation. In the suit, the plaintiff pursued "crashworthiness" theories and alleged that the tractor and rotary cutter were each defective due to failure to include alternative designs that would have prevented the plaintiff's injuries. During the six-day trial, the plaintiff called three occupant protection and engineering experts. The plaintiff also called a life care planner and economist who opined that the plaintiff's actual damages were in excess of $14,000,000. The defense called four expert witnesses: two in-house design experts and separate experts in the fields of vehicle dynamics and occupant kinematics. The defense made extensive use of computer simulations to demonstrate the ineffectiveness of the plaintiff's proposed alternative designs. The plaintiff's counsel argued for a verdict of $60,000,000. After 30 minutes of deliberation the jury returned a verdict in favor of Deere & Company. ■

COUNSEL: **Mary Lee Ratzel and Michael J. Wirth**
FIRM: **Peterson, Johnson & Murray, S.C.**
HEADQUARTERS: **Milwaukee, Wisconsin**

## BIRTH INJURY/CEREBRAL PALSY

The plaintiffs alleged that the cause of a seventeen-year-old boy's cerebral palsy was inappropriate use of a vacuum extractor at the time of his birth and/or sequential use of the vacuum and forceps. It was alleged that this inappropriate use of instrumentation caused cerebral edema to his brain and ultimately led to cerebral palsy. The defense argued use of the vacuum and forceps was appropriate under the circumstances of the birth and within the accepted standard of care at the time. The defense provided expert medical testimony regarding evidence of in utero infection at the time of the minor plaintiff's birth, which was argued to be a more likely cause of his cerebral palsy.

The plaintiffs' damages were estimated to be $20,000,000–$30,000,000. After a two week trial the jury returned a defense verdict within an hour finding no negligence on the part of the defendant obstetrician in his delivery of the child. ■

COUNSEL: **Manny Sanchez**
FIRM: **Sanchez Daniels & Hoffman LLP**
HEADQUARTERS: **Chicago, Illinois**

## ASBESTOS

Jurors in a rare Madison County asbestos trial handed a victory to the defendant, Ford Motor Company, after an hour and a half of deliberations. Attorneys for the plaintiffs had asked for more than $14,000,000 in damages. Ford was sued along with a number of other brake manufacturers for allegedly selling products that caused a Chicago man's mesothelioma. Ford was the only defendant that did not settle its case with plaintiffs.

Lead defense counsel praised both the jury and Madison County Circuit Judge for the verdict. Defense called the plaintiff's counsel's plea for more than $14,000,000 "ridiculous," contending that the plaintiff did not work on Ford brakes and therefore, the company was not liable for his mesothelioma. ■

COUNSEL: **Andrew Horowitz**
FIRM: **Drew, Eckl & Farnham, LLP**
HEADQUARTERS: **Atlanta, Georgia**

## TRUCKING

In a trucking-negligence case, following a five day trial, the jury returned a defendant's verdict on behalf of Sindt Trucking, the Insurance Corporation of Hannover, and Mr. Graves. The action stemmed from an eight-vehicle accident involving several box trucks, 18-wheelers, and numerous cars. The plaintiff was severely disabled in the accident. The plaintiff incurred nearly $1,000,000 worth of medical treatment as a result of his injuries. In closing argument, the plaintiff's attorney asked for $15,000,000. At the end of the 5th day of trial, the jury returned a special verdict in favor of all of the defendants, specifically finding that the defendants did not proximately cause the plaintiff's accident or significant injuries. ■

COUNSEL: **Dan M. Hartzog and Stephanie A. Gaston**
FIRM: **Cranfill Sumner & Hartzog LLP**
HEADQUARTERS: **Raleigh, North Carolina**

## WRONGFUL DEATH; NEGLIGENT SECURITY

The plaintiff sued the housing authority alleging negligence and willful and wanton conduct. The case arose out of the wrongful death of an elderly resident of one of the housing authority properties, who was strangled to death in her apartment by a fellow resident. The deceased and the perpetrator lived on the same floor of a high-rise apartment complex designated for the elderly or disabled. While the deceased was eligible to live in the complex because of her age, the perpetrator was eligible to live in the complex because of his status as a disabled person. Issues in the case included allegations of improper screening, admission and retention of residents by the housing authority. The plaintiff estate offered the testimony of multiple witnesses at trial, including residents from the high-rise apartment complex where the deceased and the perpetrator resided, one of the police officers who responded to the deceased's murder, the medical examiner, and three retained experts. The defense obtained summary judgment as to the plaintiff's claim for punitive damages immediately before trial. After a two week jury trial, the plaintiff asked the jury to award over $10,000,000 in compensatory damages for funeral expenses, pain and suffering experienced by the deceased, and loss of society and companionship of the deceased to her two sons. The jury returned with a verdict of negligence against the housing authority, but awarded only $132,000. ■

COUNSEL: **Charles Spevacek and M. Gregory Simpson**
FIRM: **Meagher & Geer, P.L.L.P.**
HEADQUARTERS: **Minneapolis, Minnesota**

## DEFAMATION

The plaintiff, a lawyer, sued the Better Business Bureau's Minnesota chapter and its national council because it published a "Reliability Report" that gave him a rating of B-. The plaintiff sought damages for defamation per se as well as for lost business and emotional distress, and sought punitive damages alleging that the report was published with willful disregard to his rights. The court granted summary judgment for the BBB, holding that the report generated in accordance with the BBB's nationally uniform rating system was non-defamatory opinion. The court further held, for the first time in Minnesota, that the BBB is entitled to a qualified privilege defense to defamation claims arising from its Reliability Reports. ■

COUNSEL: **Kay J. Rice and Beth N. Nesis**
FIRM: **Cooper & Clough PC**
HEADQUARTERS: **Denver, Colorado**

## MEDICAL MALPRACTICE

The plaintiff patient went to the hospital complaining of severe pain in the right upper quadrant of his abdomen. After being evaluated and having various radiographic studies, a large cystic liver mass was found. The general surgeon ordered a CT-guided aspiration biopsy of the cyst for diagnostic purposes. The internal medicine physician agreed with the plan. During the procedure, as the radiologist (Cooper & Clough's client) advanced a needle through the liver and into the cyst, the patient became ill. His blood pressure and heart rate dropped and he suffered a cardiac arrest. This led to severe anoxic brain damage, and the patient has since been in a minimally conscious or vegetative state. The parties disagreed on the etiology of the cardiac arrest. The physicians claimed this was due to a malignant vasovagal reaction and that the patient could not be resuscitated due to his history of cocaine use. The plaintiff alleged that the cardiac arrest, which caused anoxic brain damage, was due to a severe allergic reaction, specifically an anaphylactic reaction caused by puncture of a hydatid cyst in the liver. The plaintiff claimed more than $16,000,000 in damages for his past expenses and ongoing care. Following a three-week trial, the jury found in favor of defendant physicians. ■

COUNSEL: **James R. Kahn and Seth L. Laver**
FIRM: **Margolis Edelstein**
HEADQUARTERS: **Philadelphia, Pennsylvania**

## COUNTERSUIT BY INSURED ATTORNEY

A real estate attorney was sued by owners of a development entity and accused of collusion and breach of fiduciary duty. After nearly two years of litigation, defense obtained summary judgment dismissing claims against the real estate attorney. The defense then pursued to trial a countersuit to collect attorney fees not paid for the attorney's work. The countersuit also sought damages for emotional distress the attorney sustained from tortious actions committed by the former plaintiffs around the time the litigation was instituted. These actions included defamatory statements to the press and a former employer and threatening, violent and anti-Semitic text messages to the attorney sent anonymously.

After a six-day jury trial a unanimous verdict for $1,200,000 in compensatory damages and $500,000 in punitive damages for the attorney was obtained against the former plaintiffs and an associate who participated in their actions. ■

COUNSEL: **Harry F. Mooney and V. Christopher Potenza**
FIRM: **Hurwitz & Fine, P. C.**
HEADQUARTERS: **Buffalo, New York**

## CHEMICAL BURN

The plaintiff brought suit alleging multiple violations of the labeling requirements of the Federal Hazardous Substances Act (FHSA) and the implementing regulations of the Consumer Products Safety Commission (CPSC) against Lafarge North America, Inc., manufacturer of "Lafarge Type I Portland Cement," and the retailer The Home Depot, Inc. The forty-two year old plaintiff suffered third-degree burns of both knees while mixing the cement for a home remodeling project. A two-week trial was held.

At the close of the proof, the Court directed a verdict finding the defendants violated the FHSA labeling requirements as a matter of law. In his summation, the plaintiffs' attorney asked the jury for damages in excess of $1,000,000. The jury apportioned 40% comparative fault against the injured plaintiff, and gave no award to the plaintiff's wife in returning a net verdict in the amount of $125,400, significantly less than the defendants' settlement offer. ■

COUNSEL: **Rob Jarosh and Lindsay Woznick**
FIRM: **Hirst Applegate, LLP**
HEADQUARTERS: **Cheyenne, Wyoming**
CO-COUNSEL: **Richard Tyler and Michael Drew of Jones, Walker – New Orleans**

## CONSTRUCTION CONTRACT

In a complex construction contract case, counsel successfully obtained a $6,200,000 jury verdict for their clients, Maintenance Enterprises, Inc. (MEI), and IMTC, Inc. In addition, the clients received nearly $1,000,000 in pre-judgment interest.

MEI and IMTC were the general contractors on the construction of a chemical plant owned by Dyno Nobel. Toward the end of the project, Dyno Nobel refused to pay MEI and IMTC more than $5,000,000 in invoices, and refused to return $1,000,000 in retainage to the contractors. Dyno Nobel claimed that it did not owe the money because the contract between the parties had a "not-to-exceed price" or cap and MEI and IMTC had already exceeded the cap. MEI and IMTC contended that Dyno Nobel breached the contract by not paying the final invoices and retainage because the contract was a straight time and materials contract that did not include a cap. After MEI and IMTC filed suit, Dyno Nobel counterclaimed alleging that MEI and IMTC breached the contract and caused Dyno Nobel to incur more than $1,000,000 in expenses repairing or finishing MEI and IMTC's work after they left the jobsite.

At the end of a 16-day trial, after less than two hours of deliberations, the jury returned a verdict in favor of MEI and IMTC. The jury concluded that Dyno Nobel had breached its contract with MEI and IMTC, and awarded the clients $6,241,804.90 in damages. The jury also found in favor of MEI and IMTC on Dyno Nobel's counterclaim concluding that they did not breach the contract. The court also denied Dyno Nobel's attempt to reduce the statutory pre-judgment interest rate and awarded $993,876.93 in prejudgment interest. ■

COUNSEL: **Daniel B. Herbert**
FIRM: **Manning & Kass | Ellrod, Ramirez, Trester LLP**
HEADQUARTERS: **Los Angeles, California**

## TRUSTS & ESTATES PRIOR CONTRACTUAL RIGHTS

Richard Arons, the client, was Michael Jackson's manager on the last five Jackson 5 albums and first five solo albums, including "Thriller," the best-selling album of all time, and "Off the Wall," also ranked among the best-selling. He is contractually entitled to royalties for these albums in perpetuity, and has received royalties for these albums for past 40 years. It was therefore surprising when the executors of the estate failed to give him notice of the probate in time for Mr. Arons to file his claim. In probate, claims filed beyond a very short cutoff are permanently barred, and the executors in this case vigorously opposed all other late-filed claims as well as the claims of other managers. It would have been difficult, moreover, for Mr. Arons to prove he could not otherwise have known of the probate in time to file his claim, given the vast amount of media coverage following Michael's death. When Mr. Arons submitted his petition for leave to file a late claim or for alternative relief, he was ridiculed in the press. TMZ's headline was "My Dog Ate My Creditor Claim."

The probate court, however, was persuaded otherwise, specifically finding that the royalty rights had in fact been assigned to Mr. Arons many years prior, and that, therefore, he was not a creditor of the estate subject to the usual claim file requirements. His contractual rights, in other words, survived the probate process, notwithstanding the statutory restrictions. This is of substantial benefit to Mr. Arons since sales of Jackson's albums are now better than ever. In the year following Jackson's death, his estate generated revenues of more than $1 Billion, as he became the first artist in history to have four of the top 20 best selling albums in a single year, with 20 of his albums making it into the top 40. ■

COUNSEL: **Robert Bodzin and Raymond Greene**
FIRM: **Burnham Brown**
HEADQUARTERS: **Oakland, California**

## JURY REJECTS REQUEST FOR $46.5 MILLION AWARD IN ADMITTED LIABILITY MULTI-VEHICLE WRONGFUL DEATH AND CATASTROPHIC PERSONAL INJURY TRIAL

The defendants were a major national produce company and its driver (who was also charged with vehicular manslaughter). The defense admitted liability. The plaintiffs included the wife and child of decedent who was killed instantly upon impact. The decedent driver's brother was in the passenger seat and witnessed the death and suffered his own personal injuries. The two back seat passengers suffered life threatening injuries and together incurred $3,000,000 in medical and hospital bills. At trial, one backseat passenger still used a walker and the other used a cane. Undisputed injuries included severed aortic artery, fractured pelvis, hips, arm, wrist, loss of a spleen, PTSD, major depression and complicated grief and bereavement. Disputed injuries included the need for a lifetime of round-the-clock care, brain damage, loss of bowel control and loss of kidneys requiring dialysis for life.

Before trial, statutory demands to settle all claims totaled $27,500,000 ($10,000,000 of which was for the death claim). The death claims settled the third week of trial for a total of $2,000,000. At trial, plaintiff's requests totaled $46,500,000. After three days of deliberations the jury awarded the remaining three plaintiffs $16,800,000, approximately $30,000,000 less than the request. ■

COUNSEL: **Steven DiSiervi and Gabrielle Puchalsky**
FIRM: **Abrams, Gorelick, Friedman & Jacobson, P.C.**
HEADQUARTERS: **New York, New York**

## JEWELER'S BLOCK SUBROGATION

Following a seven-day trial, a jury returned a verdict in favor of Hanover Insurance Company, awarding it ownership of a diamond that had been reported lost by a policy holder. The verdict permitted the insurer to recover the actual diamond, which was a paid loss under a policy of jeweler's block insurance.

The gem, a 10.65 carat diamond, named the "Glick Diamond", disappeared in 2001 from the offices of a New York jeweler within the Diamond District of New York City. The jeweler carried jeweler's block insurance and presented a claim for loss of the Glick Diamond to Hanover Insurance Company, who paid the claim. Prior to its disappearance, the Glick diamond had been analyzed and measured by the Gemological Institute of America ("GIA") and included information about the diamond's cut, weight, and both the internal characteristics and external flaws of the stone. The missing stone was reported to GIA and the loss was noted in GIA's database.

Four years later, a 10.59 carat diamond was presented to GIA for certification of its qualities. GIA performed an analysis of the diamond, measuring and assessing its cut, clarity, weight and color. GIA then made a routine comparison of that stone's measurements with those in its database, which revealed that this diamond had many similarities to the missing Glick diamond. GIA commenced an interpleader action, naming the parties with an apparent claim to the diamond as the defendants, and, in effect asking them and the Court to determine what should be done while GIA retained temporary possession of the diamond.

At trial, Hanover's attorneys, Abrams, Gorelick, led the jury through the evidence that the Glick Diamond and the subsequent diamond were, in fact, the same. They introduced testimony strongly suggesting that, in 2001, the Glick Diamond had been taken by a relative of a person who presently claimed to own the diamond. Adversarial witnesses presented an alternative story, in which the diamond was purchased from a Florida diamond dealer and brought back to New York.

Abrams, Gorelick also presented expert testimony that the Glick Diamond and the diamond subsequently submitted to GIA contained unique internal characteristics and external flaws, the diamond's "fingerprint." The expert stated that when you compared the "fingerprint" of the Glick Diamond and the "fingerprint" of the diamond subsequently submitted to GIA, they were identical. Abrams, Gorelick opined that the Glick Diamond and the diamond subsequently submitted to GIA were the same diamond.

After deliberating for one hour, the six person jury returned a unanimous verdict, finding that the diamond that had been submitted to GIA in 2005 was the same as the Glick Diamond lost in 2001. Hanover was granted possession of the diamond. ■

COUNSEL: **Peter J. Dunne**
FIRM: **Rabbitt, Pitzer and Snodgrass, P.C.**
HEADQUARTERS: **St. Louis, Missouri**

## GOVERNMENTAL LIABILITY

Three plaintiffs and two non-profit religious corporations sued state juvenile officers and Family Services officials for civil rights violations over the mass removal of 105 boarding school students by state officials from the Heartland Christian Academy, a private fundamentalist Christian school specialized in working with at-risk teens by means of religious therapy and strict discipline, including corporal punishment. The removal of all the boarding students at the school by state officials occurred during investigations into child abuse allegations arising from the disciplinary practices at the school. All but 30 of the students that were removed eventually returned to Heartland, and although several Heartland staff members were charged with felony child abuse, all Heartland employees were either acquitted or had the criminal charges against them ultimately dismissed. Prior to this suit, attorneys representing the school and staff members had prevailed in over 12 separate lawsuits that had been filed against various state agencies and officials arising from the removal. In this suit for damages, the plaintiffs sued for violation of their constitutional rights against unreasonable seizures, to family integrity and to freedom of association. The suit included claims for civil rights damages, punitive damages and attorney's fees. Four different law firms appeared at trial for the plaintiffs and the plaintiffs' attorney's fees and other claimed damages exceeded $10,000,000. At trial the plaintiffs argued that defendant had no reasonable grounds to believe that any student at Heartland was in imminent risk of harm and that the removal was a pretext for the true intention to damage Heartland and to force the school to close. The defendants argued at trial that the removal of students was reasonable due to ongoing concerns by the officials over the disciplinary practices at the school and the failure of Heartland staff to adequately address these concerns.

After a month long trial in Federal Court, the jury returned a unanimous verdict in favor of the defendant juvenile officers and other state officials. ■

COUNSEL: **Joan Cerniglia-Lowensen**
FIRM: **Hodes, Pessin & Katz, P.A.**
HEADQUARTERS: **Towson, Maryland**

## VETERINARY MALPRACTICE

A veterinarian was successfully defended in an action brought against him by an owner of a breeding stallion maintained at a local horse farm. The lawsuit alleged over $900,000 in damages for negligent use of the drug Reserpine. Specifically, the horse was brought from Australia for purposes of breeding with mares in the United States. Once here, the animal developed colic requiring an exploratory surgery. Post operatively, the animal then suffered an incisional hernia and required stall rest. During the rehabilitation period, the horse proved difficult to handle. It was determined that the animal was both a hazard to itself and to its trainers. The defendant veterinarian was called for both advice and the administration of a sedative to make handling the animal safer. The drug Reserpine was administered.

The choice of sedatives that can be used in equine medicine is few and all have numerous side effects including reproductive side effects. Consequently, balancing both the risk against the benefit, the defendant veterinarian chose Reserpine. Shortly after administering the drug, the animal developed diarrhea. The diarrhea rapidly progressed to colic and gastric rupture. The horse was then humanly euthanized.

The trial of this matter involved calling various experts in veterinary medicine, equine pharmacology, equine appraisers and economists. After a four day trial, the jury returned a verdict in favor of the defendant veterinarian in forty minutes. The jury found that none of the actions of the veterinarian were in any way a deviation from accepted standards of care. ■

COUNSEL: **Thomas A. Kendrick & James L. Pattillo**
FIRM: **Norman, Wood, Kendrick & Turner**
HEADQUARTERS: **Birmingham, Alabama**

## HOSPITAL LIABILITY

The threat of a pandemic H1N1 flu in 2009 produced a widespread demand for hand sanitizer. Dispensers began appearing in public areas, and the public became much more conscious of the benefits of the ethanol-based sanitizer. Although in use prior to 2009, hospitals also expanded access to hand sanitizer and made dispensers available in lobbies and public hallways. The defendant hospital was sued by a visitor, who claimed that he suffered serious injury when he fell on a gelatinous substance he assumed to be hand sanitizer. He underwent five surgeries as a result of his injuries, incurred almost $500,000 in medical expense, suffered an epidural hematoma that threatened paralysis, and was expected to undergo additional surgery in the future. The plaintiff contended that the hospital negligently created a hazardous condition by using hand sanitizer dispensers without catch basins to retain any excess sanitizer that could drip from the dispenser. The plaintiff argued for a verdict of $2,000,000. The jury rejected the theory of liability and returned a defense verdict in favor of the hospital. ■

COUNSEL: **D. Bryce Zoeller and Michael Wroblewski**
FIRM: **Kightlinger & Gray, LLP**
HEADQUARTERS: **Indianapolis, Indiana**

## TRUCKING-WRONGFUL DEATH

Counsel obtained a verdict for both UPS and the estate of the UPS driver in a case where the UPS driver was fatally injured when his semi-tractor impacted the rear of Road Ready Transport semi-tractor that had entered the interstate from the shoulder at 20 mph. Expert testimony proved that the Road Ready semi-tractor was parked at the end of the on-ramp prior to merging into traffic. At the time of the merge, the Road Ready semi-tractor was going 17 mph and had only reached a speed of 22 mph at impact. As a result of the impact, the UPS driver was killed and the UPS semi-tractor was destroyed. Claims were filed by UPS, the estate of the UPS driver and Road Ready Transport. The jury ultimately found in favor of both UPS and the estate of the UPS driver and awarded combined damages in excess of $1,150,000. ■

COUNSEL: **Scott Carey and Mason Wilson**
FIRM: **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**
HEADQUARTERS: **Nashville and Memphis, Tennessee**

## MOTORCYCLE FATALITY

The plaintiffs alleged a KLLM driver trainee was at fault in an accident in which the plaintiffs, while riding a motorcycle, struck a tractor-trailer driven by the trainee, who was turning across a divided highway to make a delivery at 1:30 a.m. Alcohol tests showed that the plaintiffs, who had been drinking earlier in the evening, were both over the legal limit at the time of the accident. The jury determined that the driver of the motorcycle was primarily at fault and did not award any damages. The jury further found that the passenger on the motorcycle was partially at fault for her injuries, and the jury awarded her no damages. ■

COUNSEL: **Elizabeth S. Skilling and Carson W. Johnson**
FIRM: **Harman, Claytor, Corrigan & Wellman, P.C.**
HEADQUARTERS: **Richmond, Virginia**

## INSURANCE COVERAGE

While sailing together on a year-long cruise on a sailboat, the claimant alleged that the insured bound and gagged her, causing personal injuries. She sued the insured for $10,000,000 under various theories and included allegations of negligence. The insurers sought declaratory judgment that they had no duty to defend or indemnify the insured in the underlying suit. The insurers contended that the underlying complaint failed to allege an occurrence and that the intentional acts exclusion applied to bar coverage.

A number of courts have dealt with the question of whether a mere allegation of negligence is sufficient to overcome the intentional acts exclusion in an insurance policy. The Court concluded that mere allegations of negligent conduct were insufficient to circumvent the intentional acts exclusion where the acts described were clearly intentional or deliberate. Further, since intentional acts are neither occurrences nor accidents, the Court found that the events giving rise to the complaint were not occurrences as defined by the policies, providing an additional basis for finding no coverage under the two policies.

The Court granted declaratory judgment in favor of the insurers. ■

COUNSEL: **David Keller, Janelle Schor, Wendy Stein and Dena Sacharow**
FIRM: **Keller Landsberg PA**
HEADQUARTERS: **Fort Lauderdale, Florida**

## LEGAL MALPRACTICE

The defense prevailed on a $200,000,000 claim for negligence and breach of fiduciary duty against a prominent trial lawyer and his law firm. Said firm's client was the leader and organizer of a criminal tax fraud conspiracy to divert federal payroll withholding trust fund taxes to operate and expand his business enterprises. The trial lawyer was appointed general counsel and a director of the client's company. The individual client and the company he controlled were indicted in connection with the scheme. The individual pled guilty, was convicted, sentenced to 22 years in federal prison and ordered to pay $181,000,000 in restitution. The corporation pled no contest, was convicted, and sentenced to pay restitution of $200,000,000 jointly with the controlling shareholder.

The individual client and his corporation filed separate lawsuits against the trial lawyer and his law firm each seeking relief for professional negligence and breach of fiduciary duty in failing to stop their criminal conduct. The claimant alleged that the defendants knew or should have known of the ongoing scheme despite the existence of an audited financial statement and voluminous evidence to the contrary. The defense secured final judgment in favor of the lawyer and law firm in the case filed by the individual, first earning a dismissal with prejudice as to all claims except for disgorgement, and thereafter securing summary judgment on the remaining disgorgement claim based on the unclean hands defense. The initial dismissal was secured as a result of asserting a collateral estoppel defense based on the individual's plea and conviction, despite Florida law which still requires identity of parties for the collateral estoppel defense. In opposing the recent motion for summary judgment on disgorgement based on unclean hands, the individual claimant argued that since he had forfeited his right to collection of any proceeds of his claim, the government and not the convicted felon, was the "real party in interest." The court rejected that argument and entered final summary judgment for the defendant trial lawyer and law firm. ■

COUNSEL: **Richmond Enochs and Paul Croker**
FIRM: **Wallace, Saunders, Austin, Brown & Enochs, Chartered**
HEADQUARTERS: **Overland Park, Kansas**

## COMMERCIAL MOTORCYCLE RACE – WANTON CONDUCT

This personal injury case arose out of a crash during a commercially sponsored motorcycle road race. The plaintiff's motorcycle left the track, traveled for approximately 250 feet, and struck a cement barrier outside. The plaintiff suffered numerous broken bones, severe injuries to internal organs and third-degree burns.

This case went to trial against the promoter and the racetrack owner on a theory of "wanton conduct." The firm represented both defendants. After a five-day trial and two days of deliberation, the jury returned a verdict against the promoter and in favor of the owner. The jury awarded the plaintiff roughly $2,600,000 in compensatory damages. Following entry of judgment, the defense moved for judgment as a matter of law, based on a claim of insufficient evidence to support a jury finding of wanton conduct. The court denied the motion for judgment as a matter of law and the motion for new trial, but granted in part the motion to alter or amend the judgment. The court then ordered entry of an amended judgment that reduced the damages by just over $1,000,000.

The defense appealed to the Tenth Circuit and the plaintiff cross-appealed. The Tenth Circuit easily concluded that the plaintiff failed to put on evidence based upon which a reasonable jury could have found that the promoter acted wantonly rather than merely negligently. As a result, the Tenth Circuit entered its decision reversing the lower court's denial of defense motion, vacating the jury's verdict on the plaintiff's wanton conduct claim, and remanding to the district court with instructions to enter judgment as a matter of law in favor of the promoter. ■

COUNSEL: **Brad Lindeman, Kate McBride, Molly Ryan, James Roegge**
FIRM: **Meagher & Geer, P.L.L.P.**
HEADQUARTERS: **Minneapolis, Minnesota**

## EMPLOYMENT LAW

Minnesota's supreme court has addressed the high-profile issue whether in-house lawyers have Whistleblower Act protection. The plaintiff was former general counsel to a corporation, whose job responsibilities included management of the company's litigation. The plaintiff asserted a claim under Minnesota's Whistleblower Act, arguing that he was terminated for sending an e-mail alleging, without evidence, that someone in management was concealing certain discovery documents in a pending intellectual-property case. The trial jury found in the plaintiff's favor. The Minnesota Court of Appeals reversed, finding that the Plaintiff did not engage in protected conduct within the meaning of the Minnesota Whistleblower Act, as he was merely performing his job duties. The Minnesota Supreme Court affirmed the Minnesota Court of Appeals decision, holding that while there is no job-duty defense as a matter of law, the undisputed facts presented at trial did not support the jury's verdict, as there was no evidence that Plaintiff was engaging in any conduct other than fulfilling his job responsibilities and because his purpose in sending the email was not to "expose" an illegality. The court held that to be protected, an employee must be acting outside the normal channels of the position held. A concurrence reasoned that the plaintiff's claim for wrongful termination under the Minnesota Whistleblower Act was barred because at trial, the plaintiff was found to have breached his fiduciary duties to the company by sending that email to someone outside the company. ■

COUNSEL: **Brian Voke**
FIRM: **Campbell Campbell Edwards & Conroy PC**
HEADQUARTERS: **Boston, Massachusetts**

## EVIDENTIARY: DAUBERT CHALLENGE PRODUCT LIABILITY/TOXIC TORT

The plaintiff sued Berryman Products and others, alleging that he developed acute promyelcytic leukemia as a result of exposure to benzene present in the defendants' products. The defendants asserted that there was no reliable scientific evidence to support plaintiff's experts' claims that benzene could cause this type of leukemia. A four day evidentiary hearing was conducted on a Daubert challenge by the defendants including testimony from the plaintiff's toxicologist and the defendants' epidemiologist, clinical pathologist, and toxicologist. At the conclusion of the hearing and after a review of numerous scientific studies the court held that the plaintiff's expert's opinion that benzene can cause acute promyelcytic leukemia was not supported by reliable science and entered judgment on behalf of the defendants. ■

COUNSEL: **Steven J. Renick and Patrick L. Hurley**
FIRM: **Manning & Kass | Ellrod, Ramirez, Trester LLP**
HEADQUARTERS: **Los Angeles, California**

# STATUTORY IMMUNITY FOR DOCTORS EMPLOYED BY THE UNITED STATES PUBLIC HEALTH SERVICE

Manning & Kass | Ellrod, Ramirez, Trester LLP partners Steven J. Renick and Patrick L. Hurley won a unanimous 9-0 victory at the United States Supreme Court in May 2010, defending the statutory immunity for doctors employed by the United States Public Health Service in Hui v. Castaneda, USSC Case No. 08-1529, 2010 U.S. LEXIS 3676 (May 3, 2010). This was the third unanimous victory at the U.S. Supreme Court for Mr. Renick.

The case involved medical treatment for an immigration detainee who eventually was diagnosed with cancer. The statutory scheme for recovery by a plaintiff in this area is that the plaintiff may sue the U.S. government through the Federal Tort Claims Act, but actions against individual doctors are prohibited by 42 U.S.C. section 233(a). This structure is designed to allow an injured plaintiff to recover for his injuries but protects doctors who are employed by the federal government. This protection provides an incentive to doctors to work for the Public Health Service.

Plaintiff Castaneda's family sued the treating doctors, asserting a civil rights violation - rather than traditional medical malpractice - in an effort to evade the statutory immunity provided to PHS doctors. The U.S. Supreme Court unanimously agreed with the arguments presented by Mr. Renick and Mr. Hurley on behalf of their client, one of the treating doctors, confirming that the immunity statute barred civil rights claims, as well as other tort claims. The Court stated: "the text of §233(a) plainly indicates that it precludes a Bivens [civil rights] action against [the individual doctors] for the harm alleged in this case."

Mr. Renick is a Certified Appellate Law Specialist. He filed successful petitions for certiorari at the U.S. Supreme Court in two other cases that resulted in unanimous victories for his clients: Conn v. Gabbert, 526 U.S. 286 (1999) and Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009). Mr. Renick and Mr. Hurley serve on the firm's Appellate and Law & Motion Team. ■

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