

# HOLLIS & WRIGHT, P.C.

ATTORNEYS AT LAW

NEW S L E T T E R



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## Automotive Products Liability

*part 2 of 4*

*By Chris Glover*

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Products liability cases may often be hidden in your motor vehicle cases. It is important to know what to look for in order to fully evaluate all aspects of your case. Any accident that results in catastrophic injury, such as death, paralysis, or brain damage should be reviewed in order to determine if a products liability claim is present. I offer the following as a checklist for potential future cases that may warrant further investigation.

### 1. Seat Belt Defects

When restraint systems in automobiles and trucks work properly they indisputably prevent or lessen injury in crashes. When they fail, seatbelts can allow or even cause serious injury and death. A seatbelt defect may be present if, (1) the occupant is believed to

have been belted but found unbelted post accident, (2) the occupant is belted but contacts the vehicle interior which results in injury, (3) the seat belt buckle is latched after the accident but the occupant is ejected or outside the belt, (4) the seat belt webbing is "spooled" out or loose after the accident, (5) the belted occupant is injured but the passenger compartment is intact.

### 2. Seat Belt Spool Out

Conventional seat belt retractors are designed with an internal pendulum or ball sensor, which swings forward during rapid deceleration as in braking or upon impact. If the teeth on the retractor spool do not engage the latch plate quick enough, then excessive slack is spooled out before locking.



When dealing with retractor spool out cases they often turn on the forensic evidence found on the belt system. This physical evidence called "load marks", is typically left on the belt webbing, inside the retractor, buckle, or D-ring when the retractor locks under accident conditions.

### 3. Front and Side Airbag Defects

Not all airbag systems are created equal. Issues may include whether the cause of the injury itself was an overpowered or untethered airbag, whether the airbag fired late or not at all, or even whether a part of the bag tore or failed during deployment. An airbag defect may appear if any of these factors are present:

- The airbag is deployed in a collision slower than 10 miles per hour.
- The frontal airbag failed to deploy with obvious damage to the front bumper.
- The side torso or head airbag failed to deploy with obvious damage to the side of the vehicle.
- The side head airbag failed to deploy in a rollover crash.
- The occupant is severely injured despite or because of airbag deployment.

### Untethered Airbags

Many mid to late 90s model vehicles did not equip their passenger airbags with internal tethers. Internal tethers were designed to limit the rearward excursion of the bag into the passenger compartment. An occupant should come into the bag instead of the bag into the occupant, which can cause catastrophic facial injuries, including serious eye injury. Internal tethers were a cheap solution to this dangerous condition. I have found that early airbags in the Ford Escort, Ford Windstar and Toyota Camry failed to use tethers in the passenger airbag.

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*Hyundai Motor Co. recalled 240,000 Elantra sedans in September 2005 because of airbag problems. In that case, the problem was a computer on the passenger side that could mistake a child restraint seat as an adult, potentially causing harm to a baby*

### *Torn Tether*

I was recently involved in a case where the tether in a Geo Metro driver bag tore, allowing the bag to deploy six inches further back, and at such power that the driver was driven back into the seat so hard that he bent back the seatback and broke his neck.

The tether, designed to limit rearward deployment, failed leaving the occupant a paraplegic.

### *Failure to Deploy*

Numerous vehicles are now equipped with both frontal and side airbag systems. Frontal airbags are designed for deployment in frontal collisions. Side airbags are, likewise, designed for deployment in side collisions. Airbag deployment failure can be the result of numerous factors, including improper positioning of sensors, removal of sensors, defective sensors and sensor rotation.

### *Late Deployment*

In these cases, the black box shows deployment of the bag at 100 to 150 milliseconds. By that time the crash is over, and the driver's head is vulnerably close to the deploying airbag. This proximity frequently results in unnecessary bag-inflicted injury to the occupant. This frequently occurs during pole or tree impacts, where the car companies may have cut corners on their developmental testing to develop the algorithm for the sensor manufacturers.

*Next Issue: Part 3 of 4: Roof Crush and Rollover*

## **Nursing Home Arbitration Contract Challenged**

*By Kathryn Harrington  
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Nursing home litigation took center stage with the plaintiff's bar in the mid 1990's. Due to the advent of arbitration clauses in most nursing home admission contracts, victims are losing advocates to this litigation in our state. Recently I have successfully challenged an arbitration clause in a nursing home case based upon a finding by the court that the contract was one of adhesion.

Initially the case was a personal injury action filed after a resident fell and sustained life-threatening injuries, which ultimately led to a wrongful death action after the resident died from injuries sustained during the fall. The defendants filed a motion to compel arbitration. A request was made to the court to allow me to conduct discovery on the question of whether the family who admitted the client to the nursing home had a reasonable choice in deciding to sign a contract, which contained an arbitration clause. The motion



was granted, and I gathered and presented evidence to the court that there were no nursing homes in a reasonable distance from the plaintiff's home that did not contain an arbitration provision. Based upon the evidence presented by the plaintiff, the court found that the contract was one

of adhesion and denied the defendant's motion to compel arbitration. The defendants have filed a notice of appeal on the issue to the Alabama Supreme Court and the outcome of that appeal will be critical to the future rights of nursing home residents around the State of Alabama.





## Kathryn Harrington of Hollis & Wright Appointed to Zyprexa PSC

The Honorable Jack B. Weinstein, the Federal District Judge in the Eastern District of New York, has appointed Kathryn Harrington as one of 12 members nationally to the Plaintiff's Steering Committee for the Zyprexa mass tort litigation. Judge Weinstein has chosen the Multi District Litigation panel to oversee several thousand Zyprexa cases, which have been filed across the country.

The plaintiff's attorneys on the PSC will submit cases from which the MDL court will then select cases to be tried in April 2007 in the Eastern district of New York. The members of the Plaintiff Steering Committee are currently working with nationally recognized experts in the field of diabetes as well as the other fields involved in this litigation as they prepare for these upcoming trials.

## Subrogation in Civil Cases: Part 1

Rarely is there a personal injury case that does not require the practitioner to resolve a subrogation issue prior to seeing the case to conclusion. "Subrogation is an equitable doctrine intended to prevent the insured from recovering twice for a single injury and to reimburse the insurer for payments it made that should, in fairness, be borne by another." *Wolfe v. Alfa Mut. Ins. Co.*, 880 So. 2d 1163, 1166 (Ala. Civ. App. 2003) (quoting *Int'l Underwriters/Brokers, Inc. v. Liao*, 548 So. 2d 163 (Ala. 1989)). "In Alabama, subrogation is not a matter of strict right but is an equitable principle that is dependent on the particular facts of a case." *Smith v. Alabama Medicaid Agency*, 461 So. 2d 817, 819 (Ala. Civ. App. 1984) (citing *Zeigler v. Blount Brothers Construction Co.*, 364 So. 2d 1163 (Ala. 1978)). Accordingly, a practitioner must carefully evaluate the personal injury claim and correctly identify any potential subrogation interest. The sooner the practitioner identifies any potential subrogation claims, the easier and more efficient the final resolution will be.

Alabama law is clear that "an insured's 'demand against the wrongdoer must be satisfied so as to relieve him of trouble and risk; and it is this securing of satisfaction by the insured which gives the insurer the right to be subrogated to the rights of the insured against the wrongdoer.'" *Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C.*, 792 So. 2d 369, 372-73 (Ala. 2000) (quoting *Aetna Ins. Co. v. Hann*, 72 So. 48 (Ala. 1916)). This is commonly referred to as the "made-whole" doctrine and application of this doctrine continues to evolve in

Alabama.

Most recently, in 2000, the Alabama Supreme Court overruled *Powell v. Blue Cross & Blue Shield of Alabama*, 581 So. 2d 772 (Ala. 1990) with its decision in *Ex parte State Farm Fire & Cas. Co.*, 764 So. 2d 543 (Ala. 2000). For ten years, *Powell* and its progeny held that the "made-whole" doctrine applied in all cases where the insurer has paid claims of its insured. In *State Farm*, the court was persuaded that strict adherence to the "made-whole" rule could prevent an insurer from asserting subrogation rights after compensating an injured party merely because a nominal deductible was subtracted from the compensation pursuant to the insurance



contract. *Ex parte State Farm Fire & Cas. Co.*, 764 So. 2d 543, 545 (Ala. 2000) (citing *State Farm Fire & Cas. Co. v. Hanning*, 764 So. 2d 538, 542 (Ala. Civ. App. 1999)). Thus, the Court recognized the inherent inequity in applying the *Powell* rule and reinstated the rule of *Int'l Underwriters/Brokers, Inc. v. Liao*, 548 So. 2d 163 (Ala. 1989).

In returning to the rule of *Liao*, the Court held that "equitable principles apply to all instances of subrogation *except when the contract expressly provides otherwise.*" *Wolfe v. Alfa Mut. Ins. Co.*, 880 So. 2d 1163, 1166 (Ala. Civ. App. 2003) (quoting *Int'l Underwriters/Brokers, Inc. v. Liao*, 548 So. 2d 163, 165 (Ala. 1989)). In other words, the "made-whole" doctrine will apply in all subrogation cases unless the contract "expressly provides" that it does not apply.

Alabama courts have not articulated a clear standard for evaluating when contract language does expressly provide that the "made-whole" doctrine will not apply. Case law

does suggest that the contract must contain specific provisions regarding the insurer's subrogation rights that are contrary to established equitable principles; however, there is no indication that the contract must explicitly reference the "made-whole" doctrine. *See Wolfe v. Alfa Mut. Ins. Co.*, 880 So. 2d 1163 (Ala. Civ. App. 2003).

In *Wolfe*, the court held that two clauses in a homeowner's policy, neither of which expressly referenced the "made-whole" doctrine, were sufficient to modify the general rule that the insurer has no right of subrogation until the insured has recovered an amount in excess of his loss. *Id.* at 1167. The first clause in the contract stated that "If [Alfa] make[s] a payment ...and the person to or for whom payment was made has a right to recover damages for another, [Alfa] shall be subrogated to that right." *Id.* at 1166. The second clause stated that "If [Alfa] make[s] a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall hold in trust for [Alfa] the proceeds of the recovery and shall reimburse [Alfa] to the extent of [its] payments, costs, and fees." *Id.* However, the court did recognize that other jurisdictions have determined that such language is inadequate to disclaim the "made-whole" doctrine. *Id.* at 1168. Because this area of the law remains unsettled, the practitioner must carefully examine the language of any applicable insurance policy to determine if the made-whole doctrine is applicable and determine whether subrogation rights exist.

## Product Recalls

### ***FDA Informs Public of Nationwide Recall of 500mg Strength Store-Brand Acetaminophen Caplets - [www.fda.gov](http://www.fda.gov)***

The U.S. Food and Drug Administration (FDA) is alerting the public to a voluntary recall being conducted by Perrigo Company (Perrigo) of Allegan, Michigan for 383 lots of acetaminophen 500mg caplets manufactured and distributed under various store-brands as a result of small metal fragments found in a small number of these caplets. Approximately 11 million bottles containing varying quantities of acetaminophen 500mg caplets are affected by this recall.

### ***Black & Decker Recalls Blower/Vacuums for Fire Hazard - [www.cspc.gov](http://www.cspc.gov)***

Black & Decker (U.S.) Inc., of Towson, Md., is voluntarily recalling about 272,000 Black & Decker BV4000 Type 1 Blower/Vacs. A loose connection between the blower/vac and an extension cord can cause overheating, posing a fire hazard.

### ***Consumer Alert: Britax Child Safety, Inc. to Conduct Safety Recall for "Companion" Child Safety Seats - [www.nhtsa.dot.gov](http://www.nhtsa.dot.gov)***

Britax Child Safety, Inc. is conducting a

safety recall campaign, starting September 29, 2006, for the "Companion" rear-facing, infant-only child safety seat (Model E9L14). The recall includes seats produced from October 31, 2003, through June 6, 2004.

### ***Counterfeit Blood Glucose Test Strips - [www.fda.gov](http://www.fda.gov)***

On October 13, 2006, the U.S. Food and Drug Administration (FDA) alerted the public to counterfeit blood glucose test strips being sold in the United States for use with various models of LifeScan, Inc., One Touch Brand Blood Glucose Monitors. These test strips are used by people with diabetes to measure their blood glucose.

## New Attorney Announcements

### ***Kathryn S. Harrington [kathrynh@hollis-wright.com](mailto:kathrynh@hollis-wright.com)***



Kathryn S. Harrington joined Hollis & Wright in April of 2006 to head the mass tort and class action department. Kathryn has been practicing law for over 23 years and is admitted to practice before United States Supreme Court; the Eleventh Circuit Court of Appeals; and the United States District Courts for the Northern District and Middle District of Alabama. She is a member of the American Bar Association, The Alabama Bar Association, The American Trial Lawyers Association, and the Alabama Trial Lawyers Association. She is also a past president of the Women's Caucus for the Alabama Trial Lawyer's Association. Kathryn S. Harrington is married to the Honorable Hub B. Harrington, Circuit Judge with the 18th Judicial District in Shelby County, Alabama. They currently reside in Indian Springs, Alabama with their son, Michael.

### ***Jennifer R. Lacy [jenniferl@hollis-wright.com](mailto:jenniferl@hollis-wright.com)***



Jennifer R. Lacy joined Hollis & Wright in August of 2006. She graduated with honors from Faulkner University with a Bachelor's Degree in criminal justice. In May of 2005 she graduated from Birmingham School of Law and was admitted to the Bar in September of 2005. Jennifer resides in Jefferson County with her husband and two children. Currently she is involved in handling mass torts, personal injury, and medical malpractice cases.

### ***Joshua L. Firth [joshf@hollis-wright.com](mailto:joshf@hollis-wright.com)***



Josh Firth is a graduate of Samford University, where he received his Bachelor's of Science in Biology as well as a Minor in Fine Arts in 2002. He then attended Cumberland School of Law, graduating in May 2006 and joined Hollis & Wright in September. While at Cumberland, he was recognized as a Presidential Scholar and repeated Dean's List member. Josh lives in Homewood with his wife, Jenny, a teacher in the Vestavia Hills School system, and his son, Winston. He works primarily in the areas of personal injury, worker's compensation, product's liability and appellate work.



### Our Practice Areas Include

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*Mississippi Supreme Court advises that a decision on legal services is important and should not be based solely on advertisements. Free Background information is available upon request to a Mississippi attorney. The listing of any area of practice by a Mississippi attorney does not indicate any certification of expertise therein.*

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