THE NEWSLETTER OF FALL 2003

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Alaska Airlines Flight 261 Cases Resolved for Over $300 Million Dollars*

Attorney–Jamie R. Lebovitz

On January 31, 2000, at approximately 4:21 p.m., Pacific Time, a Boeing MD-83 aircraft (originally manufactured by McDonnell Douglas) operating as Alaska Airlines flight 261 crashed into the Pacific Ocean just outside of Los Angeles, California killing all 83 passengers and 5 crew members. The aircraft was flying from Puerto Vallarta, Mexico to San Francisco, California with a final destination of Seattle, Washington.

While in level cruise flight at 31,050 feet above sea level, the pilots of flight 261 were suddenly confronted with a loss of pitch (vertical) control of the aircraft. The airplane went into a rapid 8,000 foot dive that lasted 80 seconds, during which time the pilots struggled to regain control of the plane. The cockpit voice recorder (sometimes referred to as the black box) recorded the sounds and voices of the pilots during the final 30 minutes of the flight. During what would later be known as the first dive, the following was recorded:

- At 4:09 p.m., the Captain reported to Air Traffic Control, *Alaska 261 we are uh in a dive here.*
- At 4:10.01 p.m., the Captain reported, *I've lost control, vertical pitch* of the airplane.
- At 4:10.01 p.m., and for 33 more seconds, the overspeed warning alarm went off, signalling that the plane was in a precipitous dive at speeds which exceeded its structural design limitations.
- At 4:10.20, the Captain could be heard calling out to his co-pilot, *just help me.*
- At 4:10.33, the Captain reported to Air Traffic Control, *we got it back under control here.*

For the next 9 minutes of flight, at altitudes ranging from 22,000 to 17,000 feet, the pilots were attempting to stabilize and control the plane. Unbeknownst to them, a device known as a jackscrew (a structural attachment of the horizontal stabilizer which is critical for controlling the vertical pitch of the plane) was in the final stages of complete failure. (See diagram on page 3)

As the final 9 minutes of the black box reveal, the pilots' hope that they had regained control soon proved false:

- At 4:11.50 p.m., the Captain stated, *we're in much worse shape now.*
- At 4:12.33 p.m., the Captain radioed the Alaska Airlines maintenance station at Los Angeles International Airport to obtain instructions for dealing with the jammed horizontal stabilizer jackscrew and bringing the airplane in for a safe landing. Unfortunately, the Alaska maintenance personnel knew of no procedures that would enable the pilots to overcome the difficulty with controlling the plane.
- At 4:15.19 p.m., the First Officer (co-pilot) radioed Air Traffic Control and reported that they were at 22,500 feet, with a jammed stabilizer and that they were maintaining altitude with

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Birth Trauma Results in $7.7 Million Award

William S. Jacobson and Richard L. Demsey represented a pregnant mother who went to the hospital to have labor induced. Her doctors began the induction with Cervidil, a drug that thins out the cervix and prepares it for dilation. One of the side effects of Cervidil is uterine hyperstimulation, a condition in which the uterus contracts too fast to give adequate rest to the fetus. If not counteracted with the proper drugs, this condition can harm the fetus.

In this case, the mother developed uterine hyperstimulation which went unrecognized at first. By the time it was discovered, the baby was in too much trouble to attempt corrective drug therapy and an emergency Caesarean section had to be performed. Plaintiffs' experts testified that had the Caesarean section been done as little as 12 minutes earlier, the baby probably would have been born healthy. Instead, due to the delay, the child suffered an hypoxic brain injury and now has cerebral palsy.

The hospital attempted to excuse its conduct by arguing that the infant's brain injury was caused by an amniotic fluid embolus, which occurs when some of the amniotic fluid gets into the mother's circulation. The defendants retained eight expert witnesses, including one who claims to be the world's foremost expert on amniotic fluid embolus. In lengthy depositions, the defense experts' theory of what caused this birth trauma was largely discredited. The matter was settled shortly before trial for $7.7 million.

Just Say No to Senate Bill 80 and Caps on Damages

The Ohio legislature is considering passing Senate Bill 80, a law that drastically limits Ohioans' rights. Senate Bill 80 will place caps on damages juries can award injury victims for non-economic losses. These are intangible losses, such as permanent disfigurement, loss of companionship and care, and a lifetime of pain and suffering. In most cases, the plaintiff will never be able to recover more than $250,000 for such losses, or 3x that person's economic damages, to a maximum of $350,000. For the most serious of injuries, the cap is $500,000 for each plaintiff or a maximum of $1 million for each occurrence.

Complicated? Yes. Fair to Ohioans? No. Suppose a drunk driver hits a 6 year old child, paralyzing him from the neck down. Although payment of the child's medical bills will not be limited, the child's suffering *for the rest of his life* and his loss of the ability to walk, run, play sports, or even hold his own fork will be limited to a single arbitrary award of $500,000. And who will benefit from this limitation? The drunk driver and his insurance company.

By enacting caps on damages, the legislature is saying it doesn't trust Ohio voters to sit on juries and decide what amount of money is fair to award injury victims. The right to trial by jury is one of the fundamental rights upon which this Great Nation is based. Should we let the legislature whittle away this right by placing a one-size-fits-all limitation on pain and suffering damages?

The AARP, MADD, and the Ohio Fraternal Order of Police all have voiced opposition to Senate Bill 80. As FOP spokesman Mike Taylor said, "Senate Bill 80 goes much too far and would actually hurt people who have been seriously injured by wrongdoers. Police officers are trained to stand up and protect the most vulnerable among us. That's why we oppose Senate Bill 80."

Senate Bill 80 passed the Ohio Senate, but hasn't yet been heard by the House. It's not too late to stop this unjust law. Call your State Representative and let him or her know that Senate Bill 80 is wrong for Ohio. You can call your State Representative at 1-800-282-0253 between 8:30 a.m. and 5:00 p.m. Mon.-Fri. For mail or direct contact information, go to: **www.house.state.oh.us/jsps/Directory.jsp**. If you're not sure who your representative is, go to: **www.house.state.oh.us/jsps/Representatives.jsp**.

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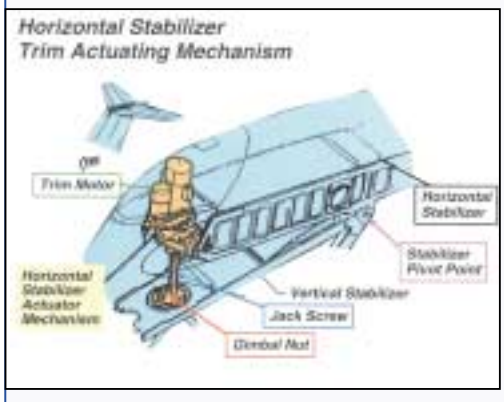
difficulty. At the request of the Captain, Air Traffic Control gave flight 261 a heading which directed the airplane out over the Pacific Ocean for further trouble shooting, prior to attempting an emergency landing at Los Angeles airport.

- At 4:17.04 p.m., the Captain instructed the head Flight Attendant that *everything* was to be *picked up, everybody* was to be *strapped down*, and that he was going to *unload the airplane* (a type of maneuver) and see if they could *regain control of it that way.*
- At 4:17.21 p.m, the Captain once again told the head Flight Attendant to make sure the passengers were *strapped in now* because he was going to *release the back pressure and see if (he) can get it back.* (The Captain was going to make certain adjustments to the flight control surfaces on the wings and tail to prepare the plane for a controlled descent and landing).
- At 4:18.47 p.m., the Captain told his co-pilot, *what I wanna do… is get the nose up… and then let the nose fall through and see if we can (stabilize the airplane) when it's unloaded.*
- At 4:18.56 p.m., the co-pilot indicated misgivings over the Captain's plan, stating, *you mean use this again (referring to the flaps and slats)? I don't think we should… if it can fly.*
- At 4:19.14 p.m., the co-pilot said, *if it's controllable, we oughta just try and land it.* The Captain replied, *you think so? Ok let's head for LA.*

For several more minutes, the pilots attempted to configure the plane to prepare for its descent into the LA airport. Then, at 4:19.36 p.m., an extremely loud noise was heard in the cockpit. The jackscrew had completely failed, causing the plane to lose all ability to remain at level flight.

From an altitude of 17,000 feet, the plane began its rapid and chaotic descent to the Pacific Ocean below. During this descent, which lasted 80 seconds, the aircraft and its occupants were subjected to extreme and violent aerodynamic forces that went well beyond the forces to which test and stunt pilots are ever subjected. Immediately after the loud bang, the aircraft went into a dive with its nose pointed straight towards the Pacific Ocean. Seconds later, the aircraft rolled onto its back. For the duration of the plunge, the plane flew upside-down, subjecting the passengers to negative and positive g forces, as well as lateral and longitudinal accelerations.



In the last split seconds of the flight, the black box recorded the co-pilot calling out *mayday* while loose articles hurled about in the cockpit. The Captain could be heard yelling *push and roll; push and roll*– a last desperate attempt to regain control of the rapidly descending, upside-down aircraft. Then the voices stopped.

- At 4:20.47 p.m., the plane hit the Pacific Ocean with such tremendous force that it resulted in near complete disintegration of the plane. This was not a survivable crash.

In the days following the crash, teams of NTSB, Coast Guard, and other government personnel recovered as much of the wreckage and physical evidence as possible. Ultimately, the suspect part of the aircraft, the jackscrew, was recovered. (SEE PHOTO). The condition of the jackscrew provided the first clue as to what had happened. Wrapped around the jackscrew was a coil-like material that proved to be the remains of a nut that had been stripped clean. When the nut lost its gripping power it destroyed the jack-screw's ability to adjust the position of the horizontal stabilizer. As the jackscrew was the plane's sole mechanism for adjusting the horizontal stabilizer, the disabling of the jackscrew meant the pilots could no longer control the plane's movement up-and-down.

This evidence was only the beginning of a lengthy investigation fueled by numerous questions. What was the mechanism that caused the jackscrew to fail? Who was responsible for its failure? Did the plane's design incorporate a system of redundancy that would prevent the plane from losing control if the jackscrew failed? Were there systems in place to permit a flight crew to safely detect and correct the problem? Was the failure of the jack-screw due to improper maintenance, or was it due to defective design?

In the aftermath of memorial services for the victims, when the grieving of their families turned to a quest for answers and justice, lawsuits were brought against Alaska Airlines, McDonnell Douglas, and Boeing (which had acquired McDonnell Douglas in 1997), as well as several other product defendants, in various federal courts across the United States. As with all major air crash disaster litigation, the many lawsuits were transferred to a single federal judge whose job it was to oversee the entire litigation. Judge Charles Legge of the federal district court in San Francisco presided over the flight 261 litigation until he retired in May of 2001. Afterward, Judge Charles Breyer was appointed as his replacement and presided over the litigation through its conclusion.

Attorney **Jamie R. Lebovitz**, a senior member of the Nurenberg, Plevin law firm, and Chair of the firm's Aviation Litigation Group, was one of just a handful of lawyers from around the United States appointed by Judge Legge as one of the lead attorneys to conduct the litigation on behalf of the victims' families. Lebovitz, who was retained personally by 18 of the families of the flight 261 victims, is among the few aviation attorneys in the United States who is regularly appointed to the plaintiffs' Steering Committees that represent the interests of the families of air crash victims.**

Over the next three and a half years, Mr. Lebovitz and his colleagues in the flight 261 litigation used every means to discover and identify the evidence that would answer the many complex questions raised by the crash.

Answers did not come easily. Boeing and Alaska, determined to mitigate their responsibility and financial exposure, mounted a strong defense. Pretrial preparation involved numerous battles. The defendants attempted to withhold key documents and information on the basis of confidentiality and other legal privileges; the defendants sought, through choice of law arguments, to have certain federal or state laws applied that would give them the least exposure to the families' damages claims. The defendants also engaged in finger pointing. Alaska Airlines blamed Boeing/McDonnell Douglas for selling it a dangerously defective plane; Boeing blamed Alaska Airlines for not maintaining or operating the aircraft according to prescribed procedures.

Despite these ongoing battles, the plaintiffs were successful not only in obtaining the allegedly confidential documents and getting a

favorable choice of law ruling, but ultimately in getting both Alaska and Boeing to admit their liability for causing the crash. To do so, the plaintiffs took over 100 depositions of Boeing and McDonnell Douglas engineers, as well as of pilots, mechanics, and flight operations personnel from Alaska Airlines; reviewed over half a million documents obtained from Alaska, Boeing, and others; recruited a dynamic brief writing team including Nurenberg, Plevin lawyers Kathleen St. John and Brenda Johnson, to research and brief the complex choice of law issues that would determine the damages available to each of the families; and retained numerous experts in the fields of aircraft design, pilot and flight operations, aerodynamics, metallurgy, forensic medicine, and aircrash reconstruction.

The evidence of Boeing and Alaska's misconduct that led to this crash was extensive and compelling. The following lists only some of the facts that were revealed during discovery:

- Boeing knew for well over 20 years prior to the crash that the means for inspecting the wear condition of the jackscrew were seriously flawed.
- Boeing knew that the type of jackscrews used on its aircraft often wore out at a rate well beyond what was expected.
- Boeing knew since the late 1960's that the failure of the jackscrew–which provides a single load path to the horizontal stabilizer–would produce catastrophic consequences. Despite this knowledge, Boeing failed to incorporate state-of-the-art systems of redundancy, as found in other models, which would have prevented this crash.
- Boeing knew that the trouble-shooting procedures for jammed horizontal stabilizer jackscrews contained in the MD-83 flight manual were dangerously flawed, and that by following these procedures pilots were unwittingly placing the aircraft and its occupants in grave danger.
- Boeing knew for over thirty years prior to the crash that jackscrews should be lubricated every 600 flight hours so as to ensure the longest possible useful and safe life. Despite this, and without any further testing, Boeing told airlines that it was safe to extend lubrication intervals to as much as every 3,600 flight hours.
- Alaska Airlines, on September 27, 1997, overruled a maintenance inspector's written order to remove and replace the jackscrew on the aircraft that, three years later, would operate (and crash) as flight 261. The mechanic had concluded that the jackscrew was worn to its maximum limits. Several days later, a maintenance supervisor from a different shift ordered that the jackscrew be re-inspected. On this second occasion, the supervisor gave the jackscrew a passing grade and the plane was returned to service. The next inspection scheduled for this plane was in March of 2000. The plane, however, crashed two months before then, in January 2000.
- Alaska Airlines extended the time intervals at which jackscrews in its fleet of aircraft were to be inspected and lubricated, beyond the intervals used by other major airlines. (Alaska relied on Boeing documents which lulled Alaska into believing it was safe to lubricate jackscrews every 2,500 flight hours as opposed to every 600 flight hours).

The trial in this case was set to begin on July 7, 2003. While some families opted to settle their cases early, for emotional or hardship reasons, others were determined to publically expose the wrongs committed by the defendants, in the hope that their efforts would prevent future catastrophes. The NTSB investigation, which took place simultaneously with the 261 litigation, resulted in a full and public disclosure of the wrongdoing by Alaska and Boeing. Importantly, the NTSB issued numerous safety recommendations and mandates to the FAA, Alaska, and Boeing so as to prevent a crash of this kind from ever occurring again. As of this writing, many of the safety recommendations have been implemented by airlines operating planes similar to that used in flight 261.

As the trial approached, an unprecedented move took place–both Alaska and Boeing admitted in open court full responsibility and accountability for their wrongdoing. At that juncture, the only issue remaining to be tried was the amount of damages to be awarded to each family for its devastating losses. A ruling by the court in May of 2001 (after many months of extensive briefing and court hearings) made it possible for the victims' families to recover damages from the defendants for the pain, suffering, fright and terror sustained by their loved ones; loss of financial support; loss of love, companionship, society, care and comfort; and the loss of the ability to accumulate assets in the victims' estates. With the exception of one case still pending in federal court in Los Angeles, all of the wrongful death cases stemming from the crash of flight 261 have been resolved.

Like most aircrash disasters, what happened to flight 261 was particularly tragic because it was preventable. Careless maintenance and defective design of systems which are supposed to protect passengers from in-flight component failures were the causes of this disaster. What happened to the 88 victims of this crash never should have happened.

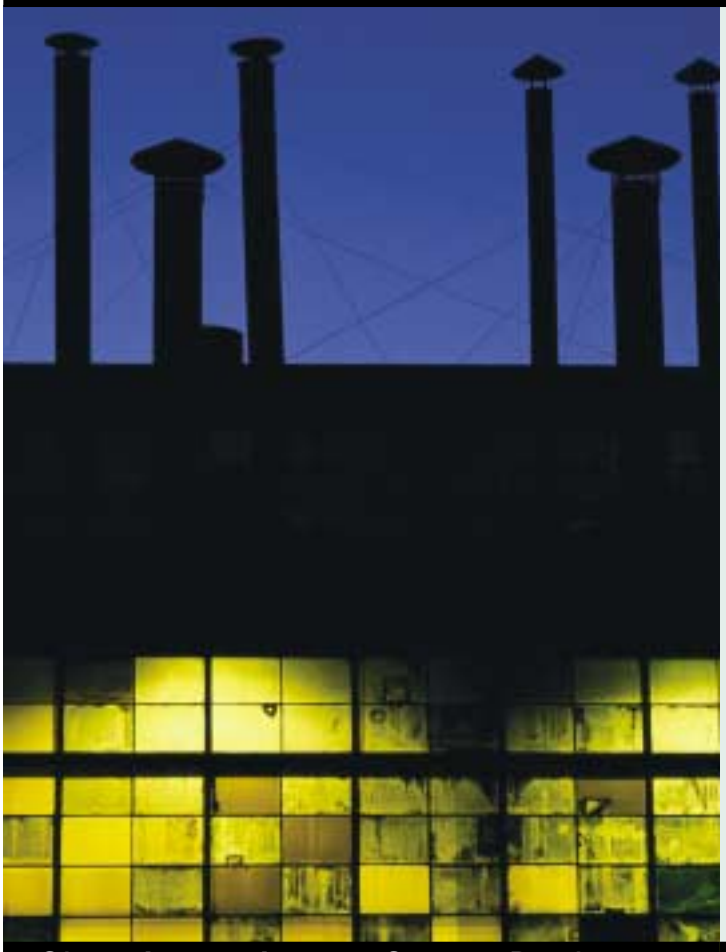
Fortunately, there is a Civil Justice system in the United States which allows the families of the crash victims not only to recover damages for their losses, but to expose the wrongdoing of major players in the industry and hold them accountable.

The flying public can take comfort in knowing that in the wake of human tragedy that has forever altered the lives of the husbands, wives, sons, daughters, grandparents and siblings of the 88 victims, some small good has been born. Thanks to the victims' families persistence in uncovering the truth, the airlines and the industry are compelled to change the way they do business and the skies are safer for those who fly.

*As reported in The Seattle Times July 4, 2003.

Among the notable air crash disasters for which Mr. Lebovitz has been counsel, are the following: **Singapore Airlines flight 006 disaster near Taipei, Taiwan; **USAir Flight 405** crash at La Guardia, NY; **Egyptair flight 990** crash near Nantucket Island, Maine; **Swissair flight 111** crash near Halifax, Nova Scotia; **USAir flight 427** crash near Pittsburgh, Pennsylvania; **Valujet flight 592** crash near Miami, Florida; **Delta Airlines flight 7529** crash at Carrollton, GA; **USAir flight 1016** crash at Charlotte International Airport; **USAir flight 1493** crash at Los Angeles International Airport; **United Airlines flight 811** disaster outside of Honululu, Hawaii; **TWA Flight 800** crash near Long Island, NY; **United Airlines flight 232** crash at Sioux City, Iowa

Unsafe Machinery Leads to Serious Injury



Employer & Press Manufacturer Pay $1.8 Million

David M. Paris represented a press operator whose leg was amputated on an unguarded press/conveyor system. The incident occurred when the employee slipped on oil leaking from the press and fell onto the conveyor system. The plaintiffs contended the accident would not have happened had the press/conveyor system been equipped with interlocking gates and light guards around the entire press line.

Suit was filed against the foreign manufacturer that designed and installed the press and the plaintiff's employer. The claim against the manufacturer was based on its failure to provide proper guarding systems. The claim against the employer was based on its knowingly subjecting its employees to a dangerous condition that was substantially certain to result in injury. Although the press was designed to be operated by a 4 man crew, the employer reduced the crew to 3 men, requiring the plaintiff to act as operator and quality control inspector. The work area was poorly lit and oil chronically leaked behind the press where the plaintiff frequently had to go to perform the quality control function. It was in this area, when plaintiff went behind the press to inspect a product being moved on the conveyor, that the plaintiff slipped on the oil. Four years earlier, another employee working on a different unguarded press/conveyor system in the same factory had lost an arm.

The defendants' experts disputed the manner in which the injury occurred. Before trial, the defendants jointly settled with the plaintiff for $1.8 million.

Class Action Against Spitzer Dealers

On April 3, 2003, the 8th District Court of Appeals affirmed a class certification order against Spitzer dealerships in the State of Ohio. David M. Paris and Brenda M. Johnson represent a class of consumers who were charged an amount of money in excess of the advertised price of each vehicle, specifically, a $97.50 charge contained in each pre-printed purchase and lease agreement. This charge was for "dealer overhead." Interestingly, in 1989, after being investigated by the Ohio Attorney General's office for violations of the Consumer Sales Practices Act, Spitzer agreed to stop charging consumers a fee of $97.50 for "delivery and handling" on each transaction. It was discovered at that time that the fee was intended to cover Spitzer's general overhead expenses. The Consent Judgment to which Spitzer agreed to be bound stated, among other things, that charging any fee simply to cover a portion of the dealer's general operating expenses was an unfair and deceptive act. It is believed that the class is comprised of approximately 100,000 consumers throughout the State of Ohio.

New Cases at Nurenberg, Plevin

23 year old Federal Reserve worker killed at Burke Lakefront Airport when struck by aircraft propeller.

30 year old passenger on Metrolink commuter train killed in Los Angeles when freight train collides head-on into commuter train. Scores of other passengers seriously injured.

Quarry worker in southern Ohio loses all fingers on both hands in mining injury.

11 year old girl rendered quadriplegic as the result of colliding with low-visibility wire while riding bike.

Man accused of shoplifting at local department store dies as the result of excessive force used by part-time security guard during the arrest.

Electrical cable splicer electrocuted when management allegedly implemented dangerous procedure that was substantially certain to result in injury.

33 year old heavy equipment operator killed due to vehicle roll-over during new runway construction project at Cleveland Hopkins International Airport.

Delay in diagnosis and treatment of metastatic cancer results in death of 52 year old man.

28 year old pregnant woman with 29 week old fetus suffers accidental extubation resulting in her death.

Medina Fair Grounds Explosion involving steam engine in July 2001 results in severe burns and other injuries to 3 clients of the firm.

Outbreak of Legionnaires Disease at the Ford plant in March 2001 results in 1 death and severe injuries to clients.

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Our Attorneys In The News

Leon M. Plevin, Esq. was selected by his peers to be featured in *Inside Business* magazine (Dec. 2002) as one of the leading lawyers in Northeast Ohio in 2002. Mr. Plevin has also just completed his fifth year as President of the Cleveland Artists Foundation (CAF), a non-profit arts and education organization with the purpose of preserving, researching, collecting and exhibiting the most significant visual art of the Northeast Ohio region.

Richard L. Demsey, Esq. has been teaching advanced classes in The Lawyering Process and Trial Tactics at CWRU School of Law. In the fall, he will be assisting with a new class that introduces some of these advanced skills to first year law students. In addition, he has been selected to serve on a committee made up of attorneys and other community leaders who will assist The Legal Aid Society of Cleveland with critically needed fund raising to provide even better legal services to qualified citizens in Cuyahoga and its surrounding counties.

Andrew R. Young, Esq. who chairs the Young Lawyers Section of the Ohio Academy of Trial Lawyers (OATL), has been awarded a Distinguished Services Award by OATL, and was recognized by the Ohio Senate for this award. Additionally, Mr. Young has won the May 2003 primary for a seat on North Ridgeville City Council. The general election will be held on November 4, 2003.

Kathleen J. St. John, Esq. was a lecturer at the 2003 Insurance Law Seminars sponsored by the Ohio Academy of Trial Lawyers (OATL) in Columbus, Cleveland, and Cincinnati in January 2003, and at the 46th Annual Convention for the OATL held in Cleveland in April 2003. Among the topics on which she spoke was *Ferrando v. Auto-Owners Mut. Ins. Co.* (2002), 98 Ohio St.3d 186, an underinsured motorist insurance case which she successfully argued in the Ohio Supreme Court in December of 2002.

Jonathan D. Mester, Esq.'s appointment to the Board of Trustees of the OATL has been renewed for another year. Mr. Mester has also served, in 2003, as a lecturer on nursing home liability for the National Business Institute and on recent "tort reform" legislation for the Cleveland Marshall College of Law Continuing Legal Education Program and the Cleveland Academy of Trial Attorneys.

Brenda M. Johnson, Esq. is the author of *Great-West Life & Annuity Ins. v. Knudson: How to Close the Door on Federal ERISA Subrogation Actions*, which was published in the Spring issue of Ohio Trial (Volume 13, Issue 1, 2003).