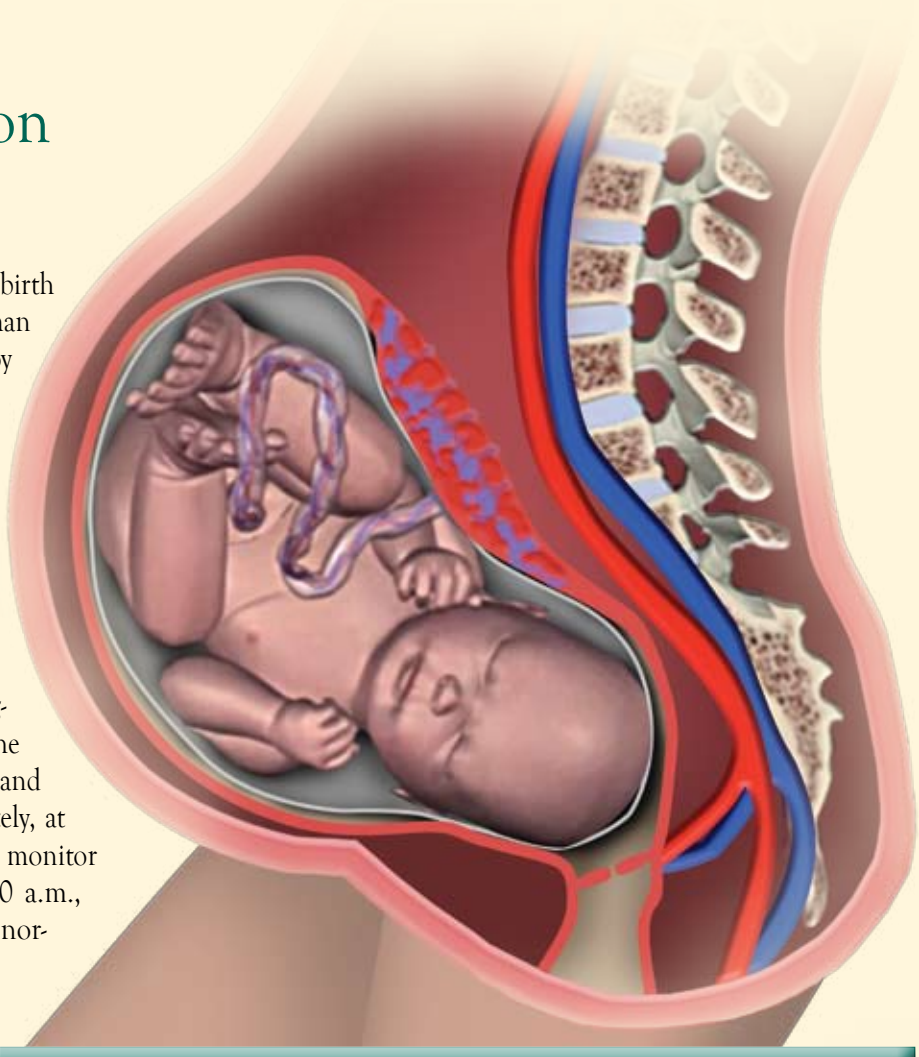
SHAMBERG, JOHNSON & BERGMAN
TRIAL ATTORNEYS

Fall 2010

Mismanaged Labor Results in $4.1 Million Settlement



In the latest in a long series of unfortunate birth injury cases litigated by our firm, Vic Bergman and Matt Birch represented the family of a boy born after a family practitioner's arduous and mismanaged attempt to induce labor. The case resulted in a $4.1 million settlement in Shawnee County, Kan., shortly before trial.

Luke Hamilton's ordeal began midmorning when a drug called Cytotec was used to ripen Jill Hamilton's cervix. Cytotec has been directly implicated in causing hyperstimulation (too many contractions) of the uterus. No progress had been made by late that evening, so the doctor told the nurse to give Jill a sleeping pill and start again the following morning. Unfortunately, at 11:20 p.m., the nurse turned off the fetal heart monitor and did not turn it back on until about 6:00 a.m., when it showed that Luke's heart rate was abnormal. His heart rate continued to wors-

Mismanaged Labor Continued on Page 4

Welcome

When it comes to "welcoming" people to our office, we want to recognize the best in the business, our receptionist, Pat Merrill.

This year, Pat celebrates 40 years of continuous service with our firm. Pat is the smiling and caring person who has greeted all of our clients and guests for 40 years, the person who has welcomed all of our

In This Issue

$2 Million Insurance Judgment Upheld

A medical negligence insurance company's refusal to provide coverage and defend an emergency physicians' group resulted in the Missouri Court of Appeals upholding a $2 million equitable garnishment judgment against the company.

In 2003, our client developed profuse sweating and nausea while walking on the Plaza. She presented to the emergency department at St. Luke's Hospital with a chief complaint of chest pain, which was related to a heart attack. Unfortunately, treatment was delayed because of an emergency physician's failure to recognize signs and symptoms of the heart attack.

Soon after discharge, the emergency physician reported the error to the medical director of his group. The director of the group sent an email to Intermed Insurance Company reporting approximately 100 occurrences that he felt might later turn into a claim. Within that list it stated our client's name, date of care, and "missed acute MI." This email was sent the week before the Intermed policy was set to expire and was intended to protect coverage for any of the listed incidents, because the physicians' group was taking its business to a different carrier.

The Intermed policy was a "claims-made" policy meaning that it covered only claims made during the policy period, regardless of when the incidents occurred. Pursuant to the policy, coverage was provided if, during the policy period, a claim was made against the insured arising out of professional services and was reported to the company. But the policy included an "awareness" provision, which broadened the event triggering coverage beyond a literal demand for money. An awareness provision allows an insured to report an incident despite the fact no formal claim has been made. Then, if a claim arises from the incident, it is deemed made at the time the incident was reported.

Intermed refused to open files on the approximately 100 occurrences on the rationale that the information provided was not sufficient.

When our client filed suit in 2004, Intermed refused to provide a defense or coverage, arguing that the inclusion of a few sparse details about the care did not constitute a "claim" or "incident" under the policy. This presented a significant problem to both the client's family and the defendants, because the insurance policy that began in early 2004 had significantly lower limits of liability than the Intermed policy. As a result, a Missouri "§ 537.060 agreement" was reached whereby the defendants agreed to allow a $2 million judgment. The client would then try to recover that amount in an equitable garnishment action against Intermed.

Matt Birch pursued the equitable garnishment action in Jackson County. In addition to extensive document discovery, numerous depositions were taken of claims and underwriting personnel at Intermed, which deposed every physician practicing in the emergency group who had a patient included on "the List."

Insurance Judgment Continued on Page 7

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Welcome Continued from Page 1

current employees from the first moment they enter our offices, the friendly voice on our telephones.

This year we also recognize Lynn Johnson for 40 years of service, Vic Bergman for 35 years and John Parisi for 20 years. These milestones represent the experience and continuity our firm brings to our relationships with clients and referring attorneys. At

Pat Merrill celebrates 40 years with the firm.

Shamberg, Johnson & Bergman, we believe that "Experience Pays," and that a warm welcome is a requirement. We congratulate Pat, Lynn, Vic and John.

Ford Settles Airbag Deployment Case After Expert Trial Testimony

Kora Parks was killed on November 28, 2006 when she lost control of her 2001 Lincoln LS sedan while rounding a sharp curve in Lake Lotawana, Missouri. The vehicle slid off the wet road and struck a tree on the driver's side near the B-pillar. The vehicle's side airbags failed to deploy, and Kora suffered a fatal brain injury.

This November 2006 accident resulted in the car's driver's side striking a tree near the front door handle. The vehicle's side airbag failed to deploy from the impact, resulting in a fatal brain injury. Our claim focused largely on Ford's failure to conduct thorough impact tests.

Scott Nutter and Doug Bradley along with our friend and co-counsel, Kevin Stanley of the Stanley Law Firm, filed suit against Ford alleging the side airbag system in the Lincoln LS was defectively designed. Discovery revealed that Ford – the maker of the Lincoln LS – did not properly test the vehicle's side airbag system. Side impacts happen at a variety of speeds, locations and angles along the vehicle.

Automakers must design side airbags to provide protection for the full range of foreseeable accidents. Ford, however, only ran tests where the car was struck by a pole at 15 mph at the H-point, essentially the driver's door handle. Ford ran all these tests at 90 degrees. We called them the "bullseye test." Ford did not run any tests where the pole struck in front or behind the bullseye. Ford also did not run tests at an angle. When asked whether the airbag would deploy if the car was struck 6 inches behind the bullseye, or at a small angle, Ford's in-house design engineers answered "I don't know." As such, Ford failed to conduct tests that would have allowed it to ensure the side airbag would deploy and provide protection in a real world accident like the one that killed Kora Parks.

Ford claimed the airbag did not deploy because the tree initially struck the Lincoln near the rear door handle and at a very sharp angle. Ford also claimed the airbag would not have protected Kora due to the severity of the crash.

The case went to trial beginning March 1, 2010, shortly after the highly publicized Toyota sudden-acceleration recall and still in the shadow of the federal government bailout of the automotive industry. Ford had spent much time and money marketing its decision to decline bailout funds. And we feared the Toyota recall would only further enhance the already strong "buy American" sentiment of eastern Jackson County, home to Ford and General Motors manufacturing plants. We knew jury selection would be critical. Although there were many among the panel who expressed strong pro-Ford sentiments, we were surprised to find the Toyota recall had created feelings of distrust toward the entire automotive industry. A handful of panel members even brought up Ford's past transgressions with the Pinto and the Explorer. The comments allowed for an open, balanced discussion of corporate responsibility and set the stage for our case.

The case settled on the fourth day of trial following the testimony of our accident reconstruction expert.

Elective Inductions Lead to Danger

As members of the national Birth Trauma Litigation Group, we are aware of litigation all over the United States arising from elective inductions of labor done not for any medical reason but simply for convenience. Doctors are encouraging and acquiescent in many elective inductions of labor. Drugs like Cytotec and Pitocin are being used to ripen the cervix and induce labor, but these drugs have a tendency to cause the uterus to contract too frequently. "Hyperstimulation" or "tachysystole" are terms used to describe abnormal excessive uterine activity.

Much published medical literature describes the physiologic effects of contractions on a fetus. When a contraction occurs, the fetus is squeezed – like being in the throes of a full body bear hug – which decreases fetal oxygen saturation. It is established that 90 to 120 seconds is necessary between each contraction for fetal oxygenation to recover. A healthy fetus can tolerate hyperstimulation for a while. But unless the condition is relieved, the oxygen deficit will eventually become too great, the fetal acid-base balance will then be affected, and a dangerous condition known as metabolic acidosis will occur, which leads to brain injury and cerebral palsy.

Our firm, and others around the country doing this type of work, are seeing many sad cases arising from unnecessary elective attempts at induction of labor, with the development of unrecognized or untreated hyperstimulation. These infants are at unnecessary risk for brain injury and cerebral palsy.

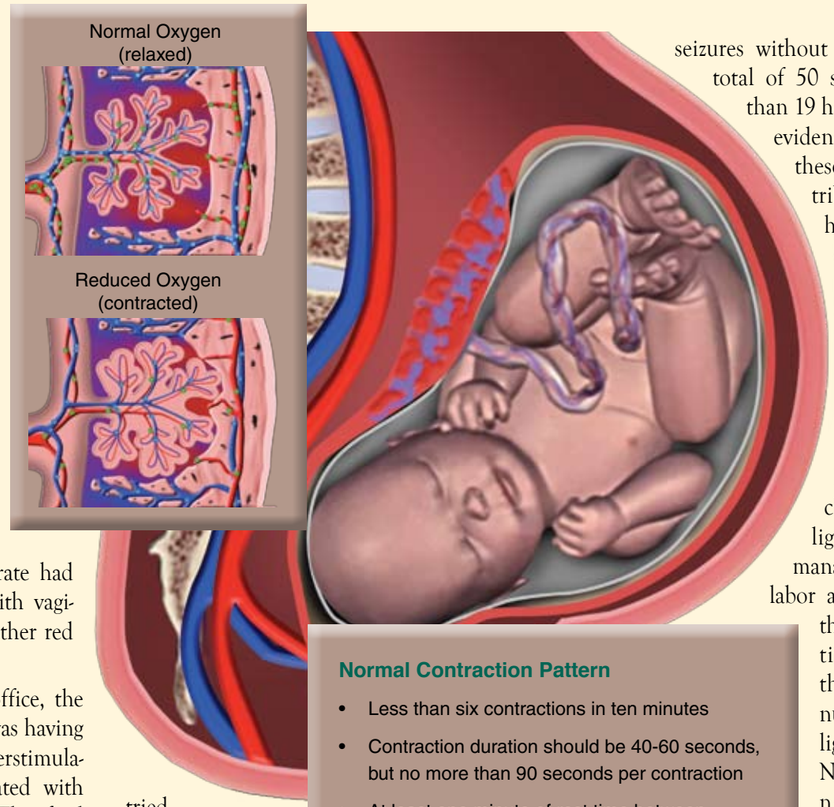
Mismanaged Labor Continued from Page 1

en to the point where the nurses administered intravenous fluids and oxygen. As early as 7:00 a.m., *uterine hyperstimulation* became an ongoing problem. *(Please see sidebar.)*

The family practitioner saw Jill at 7:30 a.m. and ruptured her membrane, producing a large amount of thick particulate meconium that should have been a red flag. In association with his examination, Luke's heart rate decreased to 70 bpm – the third time his heart rate had decelerated in association with vaginal exams that morning, another red flag.

At 9:00 a.m., while at his office, the doctor was notified that Jill was having late decelerations and hyperstimulation, a combination associated with fetal intolerance of labor. The fetal monitoring also revealed numerous other abnormalities. The doctor was not concerned, however, and neither were the nurses. The doctor chose not to go to the hospital. As a family practitioner, he did not have hospital privileges to do a cesarean section, so intervention, if necessary, would require calling an obstetrician. No obstetrician was called. Before 11:00 a.m., the nurse finally recognized the baby was in trouble. She called the doctor at 11:20 a.m. with her concerns, but he still did not consider it an emergency and did not request an obstetrician.

Upon arrival at the hospital, the family practitioner recognized that intervention was necessary, but he could not do a cesarean delivery. He unsuccessfully tried to deliver using a vacuum extractor. He then delivered with forceps, inflicting a fourth degree laceration on Jill.



Normal Contraction Pattern

- Less than six contractions in ten minutes
- Contraction duration should be 40-60 seconds, but no more than 90 seconds per contraction
- At least one minute of rest time between contractions

Contractions during labor are similar to the fetus being squeezed by a bear hug. Too frequent contractions – "hyperstimulation" – reduce fetal oxygenation by constraining blood flow. This can lead to metabolic acidosis, brain injury and cerebral palsy.

At birth, and still at 20 minutes of age, Luke had respiratory distress and a very floppy tone. Suspiciously, no cord blood gases were obtained to see if there was metabolic acidosis at the time of birth.

Luke was transferred to the neonatal intensive care unit. There, he developed severe and frequent seizures. Unfortunately, the seizures were not treated appropriately, and Luke continued to have prolonged seizures without breathing – a total of 50 seizures in less than 19 hours. Plaintiffs' evidence showed that these seizures contributed to Luke's hypoxic ischemic encephalopathy, the damage to his brain that caused Luke's cerebral palsy.

Plaintiffs claimed negligence in the management of the labor and delivery by the family practitioner and the obstetrical nurses, and negligence in the NICU by the neonatologist and the NICU nurses.

Experts were prepared to testify on behalf of the plaintiffs in the specialties of obstetrical nursing, neonatal nursing, obstetrics, neonatology, neuroradiology, placental pathology, life care planning and economics.

The case settled shortly before trial, including $1.3 million paid on behalf of the hospital, $2.7 million paid on behalf of the family practitioner, and $100,000 paid on behalf of the neonatologist. We believe this is the largest personal injury settlement in Shawnee County.

Jury Returns Rare Plaintiff's Verdict

A Johnson County jury returned a rare plaintiff's verdict in a medical negligence case this spring, providing compensation to a woman sent home from a surgical center despite suffering from a bowel perforation.

The case stemmed from a lap-band surgery in Overland Park, Kan. Several prior abdominal procedures on our client had resulted in significant abdominal adhesions, which the lap-band surgeon had to take down before placing an adjustable band around the stomach – an increasingly popular weight-loss method. Removing adhesions increases the risk of bowel perforations. At least two bowel perforations occurred during the lap-band procedure.

Because bowel perforations are recognized complications of the procedure, we did not allege that the surgery was negligently performed. However, in light of our client's surgical history, attorneys Matt Birch and David Morantz argued that the surgeon should have had a higher degree of suspicion for bowel perforations when the patient's vital signs began deteriorating the evening following surgery and into the next morning.

While staying overnight at the surgical center, the patient's temperature increased despite the administration of Tylenol. Her pulse rose above 100 beats/minute. And her respiratory rate increased to 20 breaths/minute and above. These increases helped establish that the patient was experiencing systemic inflammatory responses syndrome, or SIRS. The SIRS criteria – elevated temperature, elevated heart rate, elevated respiratory rate and elevated white blood cell count help physicians determine whether a patient is suffering from post-surgical complications, including bowel perforation. If a patient meets two of the criteria, the patient is considered to be septic.

Another marker proved a troubling trend. The patient's blood pressure, which had been high prior to the procedure, dropped sharply throughout the evening and into the following morning. A decrease in blood pressure combined with the SIRS indicators is an early sign of shock.

Rare Plaintiff's Verdict Continued on page 7

$15.275 Million Judgment Upheld

The Tenth Circuit Court of Appeals recently upheld a $15.275 million judgment stemming from a 2006 tractor/trailer collision in New Mexico that left our client partially paralyzed. Frederick v. Swift Transp. Co., 616 F.3d 1074 (10th Cir. 2010). Lynn Johnson, Scott Nutter and Doug Bradley tried the case in U.S. District Court in Wichita in November 2008. Our firm repre-

$15.275 Million Judgment Continued on page 7

Deck Collapse Leads to $2.18 Million in Settlements

Decks are a common but often overlooked safety hazard on homes that can cause serious injuries and death if not properly constructed. A recent Kansas case involving the collapse of a large elevated deck that killed a father and severely injured several others provides an example of the damage and tragedies deck collapses can cause – and of the legal hurdles in pursuing claims for such collapses.

In 2006, a Wichita resident and landowner near Fall River, Kan., in Elk County built a weekend getaway home. With the help of a friend who was a retired general contractor, the landowner hired subcontractors to pour foundation, run utilities and to perform other construction tasks. The house was set on a slope, which required an elevated deck to be attached to the downhill side.

The homeowner and the retired general contractor hired a framer to build the 12 x 36 foot deck. The deck builder asked the general contractor and homeowner to buy supplies for the job, including several lag bolts that were to attach the deck to the frame of the manufactured house.

After completion of the deck and payment to the builder, the homeowner discovered a box of leftover lag bolts. He and the retired general contractor friend decided to hold onto the bolts but did not ask the deck builder about them.

In May 2007, the homeowner held a housewarming party with more than 100 guests. While many guests were on the deck and many others below, the deck tore from the house and collapsed. Tragically, one man was killed and several others were seriously injured, including spinal injuries, pelvic fractures and broken limbs. A post-collapse inspection revealed that the main support affixing the deck to the house – called a ledger board – was attached to particle board with only a few nails inserted through vinyl siding. Although the ledger board was supposed to be bolted to the base of the house, only one of the lag bolts purchased for the project had been used – and it was only partially inserted.

This May 2007 deck collapse during a housewarming party caused one death and several serious injuries. Plaintiffs recovered against the homeowner after alleging improper oversight and supervision of the construction project.

A group of plaintiffs represented by a consortium of attorneys including John Parisi and David Morantz sued the deck builder, the retired general contractor and the homeowner in Sedgwick County. The deck builder's insurance carrier quickly interpleaded its $500,000.00. The retired general contractor's homeowner's insurance initially denied him coverage. The defendants filed several summary judgment motions, with the homeowner claiming that he and other home-owners could not be liable for the negligence of hired contractors.

Plaintiffs defeated the summary judgment motions by establishing that the homeowner in this case had an active role in overseeing and supervising the construction project, which included selecting contractors for the job and failing to follow up on why the bolts were not used on the deck.

The homeowner and his insurance company eventually agreed to settle all claims for $1.6 million. After the retired general contractor's homeowner's insurance agreed to pay $80,000, the claims settled for a total of $2.18 million.

$15.275 Million Judgment Continued From Page 5

sented a Yellow Transportation team driver who was in the sleeping berth at the time of the collision. The jury returned a plaintiffs' verdict for $23.5 million against Swift Transportation, which the Court reduced to a $15.275 million judgment for comparative fault of the plaintiff's co-driver, who was driving the truck and was killed in the accident. Last year, Swift settled a wrongful death claim brought by the family of the driver of the Yellow truck for $2.85 million.

Swift appealed the $15.275 million judgment, arguing that the trial court erred in its jury instruction and in evidentiary rulings. Specifically, Swift argued that its driver was outside the course and scope of her employment, because she had consumed methamphetamine before the accident.

The Tenth Circuit upheld the trial court's rulings and denied all points of Swift's appeal.

Swift satisfied the judgment by paying plaintiffs $15,554,624, which included $279,624 in post-judgment interest and court costs. The $23.5 million verdict is thought to be the largest personal injury verdict in Kansas.

Insurance Judgment Continued from Page 2

Following discovery and competing summary judgment motions, the Court granted our motion for summary judgment, holding that the notice supplied by the group before the expiration of the policy triggered coverage. Intermed appealed. The Missouri Court of Appeals for the Western District affirmed the trial court's ruling in Landry v. Intermed Insurance Co., 292 S.W.3d 352 (Mo. Ct. App. 2009). With interest on the initial $2 million judgment, the final judgment collected from Intermed totaled $2,714,418.74. Intermed made no offer to settle the case prior to judgment, and there were no negotiations.

Rare Plaintiff's Verdict Continued from Page 5

The patient was sent home shortly before noon after undergoing an x-ray study that required her to drink contrast material in order to see if it passed through the banded portion of the stomach. That evening, she lost the use of her legs and was rushed to the emergency department, where a CT scan showed the contrast material and free air outside of the bowel. A surgeon performed an emergent open procedure to remove a portion of the leaking bowel and the lap-band.

The most difficult aspect of the case was establishing which injuries resulted from the delayed diagnosis versus which injuries would have occurred despite the delay, which lasted approximately 14 hours. Expert testimony helped prove that the delay significantly lengthened the patient's long and difficult course of treatment after the bowel resection, largely because leaking bowel content resulted in peritonitis and organ damage. Complicating matters, however, was the absence of any hematology studies on the patient prior to being sent home that could have been compared to studies when she was admitted to the emergency department.

Referral Relationships

We welcome referrals or will associate with you, and we will be considerate of your relationship with your client.

We return referral fees in accordance with the rules of professional conduct.

Our goal is to maximize results for you and your client.

The jury agreed with plaintiff's arguments that the delay resulted in approximately $103,000.00 in medical expenses. After several hours of deliberation, the jury returned a verdict in plaintiff's favor for $178,860.90.

Answers to Thanksgiving Trivia Puzzler
Across: 1. October 5. Franklin 6. Bradford 8. Cornucopia 10. Roaster 12. Hurricane 14. Rockwell 15. Demeter 17. Felix 18. Columbus 19. Swanson *Down:* 2. Texas 3. Bears 4. Plymouth 5. FDR 7. Foil 9. Cranberry 11. Gobble 13.Mexico 16. Eels

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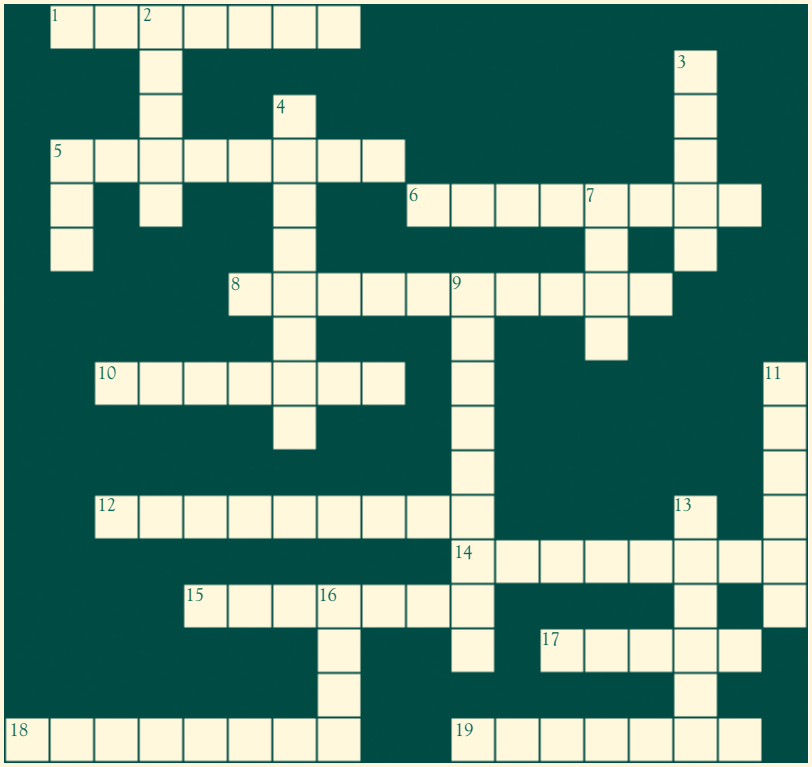
Past results afford no guarantee of future results.
Every case is different and must be judged on its own merits.
The contents of this Newsletter do not constitute legal advice.

Thanksgiving Trivia Puzzler



Across

1. In Canada, Thanksgiving is celebrated on the second Monday of what month, in part because of an earlier harvest.
5. Last name of politician and inventor who advocated making the turkey the national bird.
6. Pilgrim leader William _____ organized the first Thanksgiving feast in 1621.
8. Horn of Plenty.
10. A turkey younger than 16 weeks is called a fryer. A turkey between five to seven months old is called a _____.
12. In the Virgin Islands, a Thanksgiving Day is celebrated on October 25 to celebrate the end of what season.
14. Last name of artist of "Freedom from Want" illustration, which featured a Thanksgiving dinner and appeared in the Saturday Evening Post in 1943.
15. Harvest celebrations are thought to date back to a Greek festival honoring this goddess of grains, harvest and seasons.
17. In 1947, this Cat was the first balloon to appear in the Macy's Thanksgiving Day Parade.
18. According to legend, the name "turkey" comes from this lost explorer, who thought he was in India when he arrived in the New World, and called the pheasant a "tuka," an Indian term for peacock.
19. The first-ever TV dinner was created in 1953 when this food giant overestimated the amount of turkey Americans would consume that Thanksgiving and was left with 260 tons of frozen turkey.

Down

2. The governor of this state once refused to issue a Thanksgiving Proclamation, calling it a "damned Yankee institution."
3. Name of the NFL team that played the Detroit Lions on Thanksgiving Day in 1934, the first time the Lions played on Thanksgiving.
4. Name of rock where the Pilgrim's landed, which cracked during the Revolutionary War.
5. Initials of U.S. president who temporarily (due to protests) moved Thanksgiving to the third Thursday in November in order to lengthen the holiday shopping season.
7. Butterball recommends covering the turkey with this when it is 2/3 cooked.
9. Before being harvested and sold, a _____ must bounce at least four inches to ensure that it's ripe.
11. Female turkeys cluck. Male turkeys _____.
13. The turkey was first domesticated in Central America and neighboring _____.
16. Native American and former British slave Squanto taught the Pilgrims how to grow corn and to fish for _____, which some think were served at the first Thanksgiving meal.