Shamberg, Johnson & Bergman
Trial Attorneys

Winter 2012 *Issue 33*

Insurance Claim Blunder Costs 100 Times Policy Limits

An insurance company's failure to timely offer its $100,000 liability policy after a motor vehicle accident resulted in the company's payment of a $10.25 million settlement of a Kansas "bad faith" action handled by Vic Bergman and Dave DeGreeff. The case was battled in state and federal court for three years.

On May 29, 2009, our 15-year-old client was injured when the car in which she was riding ran a yield sign in rural Lyon County, Kansas, slid under the side of a tanker-trailer unit and rolled over. She was Lifeflighted to Topeka, with devastating injuries. The hospital bill alone, submitted to the insurance adjuster just two months after the collision, exceeded $530,000. The insurance company for the 17-year-old driver of the car received written notice of the incident within two days.

Our client was permanently and severely disabled while riding in this vehicle, which slid under the side of a tanker-trailer unit and rolled over. The insurance company did not initially offer its $100,000 policy limits.

Vic Bergman was employed two

Insurance Claim Blunder Continued on Page 2

Welcome

Insurance claims practices are often costly to claimants in both money and emotional energy, and usually there is no redress. But as the lead case in this issue illustrates, when the insurer crosses the line from simply frustrating the claimant to disregarding the rights of the insured, both Kansas and Missouri law appropriately provide potent remedies. Our firm has worked hard for many years to understand where the line is, and to hold insurance companies accountable for their bad faith or negligent claims practices. In the end, this results in settlements that are more prompt and fair for our clients.

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weeks later. He spoke briefly to the driver's mother, who said the policy limits were only $100,000. But since she worked for an insurance agency, Bergman was skeptical; he wanted confirmation of the limits from the adjuster. Bergman immediately called the claims adjuster, who had already inspected the scene and vehicles, and had obtained an admission from the insured driver that he drove through a stop sign. The adjuster knew our client was comatose in the intensive care unit on life support with a poor prognosis. Bergman asked for confirmation of policy limits and existence of any umbrella coverage. The adjuster said to send a letter of representation, "and we'll go from there." On the same day Bergman talked with the adjuster, a home office claims superintendent reviewed the file, concluding there was "clear liability" and "catastrophic damages."

Failing to get a response to his representation letter for 30 days, Bergman called the adjuster in July, left a voicemail, without response. His associate called again in mid-August 2009 and was asked by the apologetic adjuster to send another letter of representation, which was sent that day. By mid-September 2009 still having received no response to three telephone calls and two letters, Bergman advised the clients of his opinion that the insurance company was in bad faith under Kansas law. He recommended suing the driver, getting a judgment and then pursuing the excess liability claim against the company.

In cases of reasonably clear liability, Kansas law requires liability insurance companies to initiate settlement negotiations. This independent fiduciary and contractual duty does not depend on a demand from the claimant. If the insurer may be able to protect its policyholder from excess liability by an offer of settlement within policy limits then, under Kansas law, the insurer must initiate settlement.

The unique features of this case were the absence of any offer to settle the case made on behalf of our client, and the lack of any notice or deadline to the company that after a certain date the company's failure to act on behalf of its insured would be considered in "bad faith" and the opportunity to settle would be withdrawn.

Bergman filed suit against the 17-year-old driver in Lyon County in November 2009. About one month later the company offered its $100,000 policy limits, which were promptly rejected.

The insurance company then deposited its $100,000 policy into Lyon County court in an interpleader action and also filed a declaratory judgment action in Lyon County asking the court to determine that it had fulfilled its duty to its insured by payment of its policy limits. The declaratory judgment action was dismissed as premature, and the interpleader was allowed to stand.

The suit against the insured driver was resolved by an agreement, pursuant to Glenn v. Fleming, 247 Kan. 296, 799 P.2d 79 (1990), with the driver admitting fault and agreeing to let the court determine damages at an evidentiary hearing through live testimony from plaintiff and her family and stipulated reports of a physiatrist, a life care planner and an economist. The driver also assigned his rights to a negligence/bad faith claim against his insurance company to our client. Our client agreed not to execute on the judgment against the driver beyond the insurance policy limits. In January 2011, after an evidentiary hearing, the Hon. Janice Russell, sitting in the Lyon County District Court entered judgment for $18,676,499.77.

The insurance company then promptly refiled its declaratory judgment action, this time in federal court. Bergman and Dave DeGreeff filed a counterclaim "bad faith" action, which was aggressively litigated before the Hon. Julie Robinson and Magistrate Kenneth G. Gale.

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Gymnastics Injury Settles for Policy Limits Despite Waiver

A gymnastics facility's failure to appropriately design and maintain a foam landing pit lead to a catastrophic cervical spinal cord injury and partial paralysis. While attending a paid, open gym session where participants could use various equipment, our client attempted a round-off backflip into a pit filled with foam blocks and hit his head on the pit's back wall, resulting in a C-6 burst fracture.

Despite a signed liability waiver, which the defense contended required proof of reckless or wanton conduct under Kansas law, the case settled for the gymnastics center's $1 million policy limits. Scott Nutter and Douglas Bradley represented the 20-year-old Army soldier.

During discovery, an inspection of the gymnastics facility revealed that the landing pit was 14 feet long, six feet short of recommendations in safety manuals published by USA Gymnastics, which provides industry guidelines and standards. Surveillance video obtained early in our investigation captured the accident and confirmed that our client would not have struck his head had the pit been six feet longer.

The surveillance video also showed that our client's take-off was affected by what appeared to be a soft floor. The facility inspection revealed that a layer of foam flooring hung at least four inches beyond the front end of the landing pit, preventing our client from jumping from a solid base when he attempted the flip. This weakened defendant's comparative fault argument that our client failed to perform a proper tumbling maneuver and provided a design/maintenance claim against the facility.

Other negligence theories focused on a lack of competent supervision and not having adequate foam cubes in the pit to prevent gymnasts from hitting the pit's walls.

The gymnastics facility moved for summary judgment, because our client had signed a liability waiver. We argued that under Kansas law, liability waivers cannot excuse reckless and wanton conduct and that the facility's failure to follow industry standards went beyond ordinary negligence. We also argued that the liability waiver was not enforceable against the ordinary negligence claims, because it contained broad language and should not apply given the totality of the circumstances.

During our investigation, we learned that gymnastics facilities often do not comply with safety recommendations and guidelines for their equipment. Gymnastics facilities also often have open gym sessions where untrained and inexperienced gymnasts can use dangerous equipment with minimal supervision. Practitioners should keep these considerations in mind when reviewing a potential personal injury claim involving a gymnastics facility. ■

This foam pit was six feet short of recommended guidelines, causing our client to strike his head on the pit's rear ledge and resulting in partial paralysis.

Recommended guidelines for loose foam training pit dimensions

Event	Length	Width	Depth
Tumbling	20'	10'	6' – 8'
Vaulting	20'	10'	6' – 8'
Uneven Bars	30'	10'	6' – 8'
Balance Beam Dismounts	15'	8'	6' – 8'
Rings	18'	8'	6' – 8'
Horizontal Bar	36'	8' – 10'	6' – 8'
Mini-trampoline Dismounts	30'	10'	6' – 8'

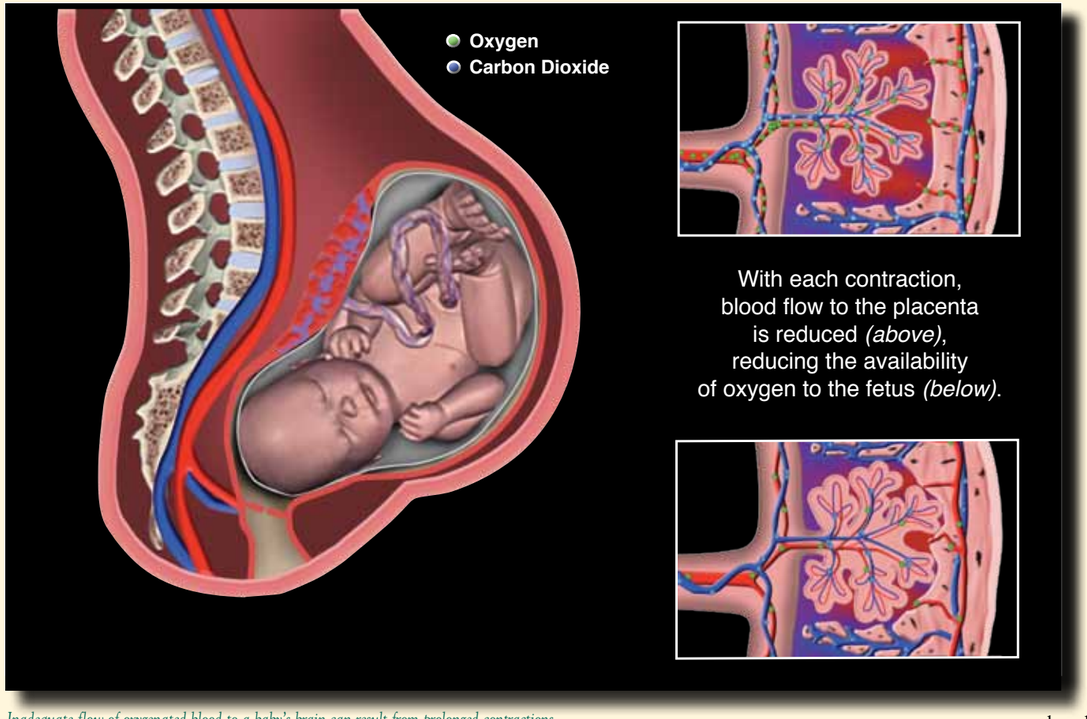
Published guidelines from USA Gymnastics required the tumbling pit to be at least 20 feet long.

Improper Elective Birth Induction Leads to Cerebral Palsy

An unfortunate newborn suffered cerebral palsy as the result of negligent labor and delivery at a rural southwest Kansas hospital, resulting in a $4 million settlement. It was yet another birth injury that resulted from an ill-advised elective induction and a poorly trained and inexperienced nurse who did not understand the basic principles of Pitocin use, fetal heart monitoring or patient evaluation.

Our client's mother was admitted to the hospital for a questionable induction of labor using Pitocin (oxytocin) at 39 weeks. The Pitocin was ordered before the physician saw or examined the patient. The nurse doubled the dose every 15 minutes, which is highly aggressive and not within the standard of care. The labor did not progress normally. After two and a half hours of Pitocin, the doctor ruptured the membrane and installed an internal uterine pressure catheter.

But he did not evaluate the clinical picture and left too quickly, just before a dramatic decrease in the fetal heart rate. The nurse did not appreciate the abnormalities. Hours later, providers recognized the need for a rapid delivery by cesarean section and did so in 13 minutes. The baby – our client – was in critical condition at birth. For some unexplained reason, cord blood gases were not initially obtained. But three hours later, they showed persistent, severe metabolic acidosis, caused by an inadequate flow of oxygenated blood through the placenta to the baby's brain in the hours before delivery. As a result, our young client sustained brain injury and severe cerebral palsy.



Inadequate flow of oxygenated blood to a baby's brain can result from prolonged contractions.

Vic Bergman and David DeGreeff, along with referring co-counsel Steve Brave, represented the plaintiff. Experts were obtained in obstetrics and gynecology, labor and delivery nursing, neuroradiology, neurology, neonatology, life care planning and economics.

Negligence was shared by the physician, the nurses and the hospital. The nurses completely mismanaged the Pitocin, which significantly contributed to the unfortunate outcome. They failed to appreciate the significance of many abnormal findings and report them to the physician. They failed to evaluate the patient correctly. Hospital protocols with regard to the use of Pitocin were confusing and misleading. The hospital failed to provide competent nurses or to validate critically important nursing competencies. The physician abdicated his direct responsibility

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Improper Elective Birth Induction Continued from Page 4

to the patient, particularly in light of the obvious limited competency of the nurses and his office location just one minute from the mother's hospital room. He failed to adequately evaluate his patient during the course of the day. His decision to induce labor was questionable, particularly because he did not assess his patient before making the order and did not obtain informed consent.

We alleged that had the nurses timely recognized the fetal abnormalities and called the physician to the bedside, an emergent cesarean section would have been performed at least hours earlier, resulting in a perfectly healthy baby. This was a completely preventable tragedy.

Some of the settlement funds, which came from the physician and the hospital, went to two structured settlements for the child. Recovery was limited because a county employed the hospital and physician, so they were covered by the Kansas Tort Claims Act, which limited damages against each to $500,000 or the amount of liability insurance, whichever is greater. A $5 million policy covered both the hospital and physician. Given the overall ceiling on recovery of $5 million we think the settlement was advantageous.

Our Firm will stay committed to representing children and their families who are injured at birth through mismanagement of pregnancy, labor, delivery and early childhood care.

Rules Changes Address Social Media

Like the advent of the Internet and e-mail 20 years ago, Twitter will become an integral part of your practice, if it isn't already. More importantly, changes to the Rules of Professional Conduct adopted by the American Bar Association direct attorneys to have a basic understanding of Twitter and other social media platforms.

In August 2012, the ABA changed several rules and comments in recognition of new issues raised by attorneys' use of social media. These include our duties to prospective clients, communications about a lawyer's services, advertising, direct contact with prospective clients, and the unauthorized practice of law. The changes recognize and accommodate practitioners' use of social media. The changes will be enforceable in each state that adopts them as part of the rules of professional conduct. Ethical issues aside, attorneys should become familiar with social media for client development, investigating cases and researching potential jurors.

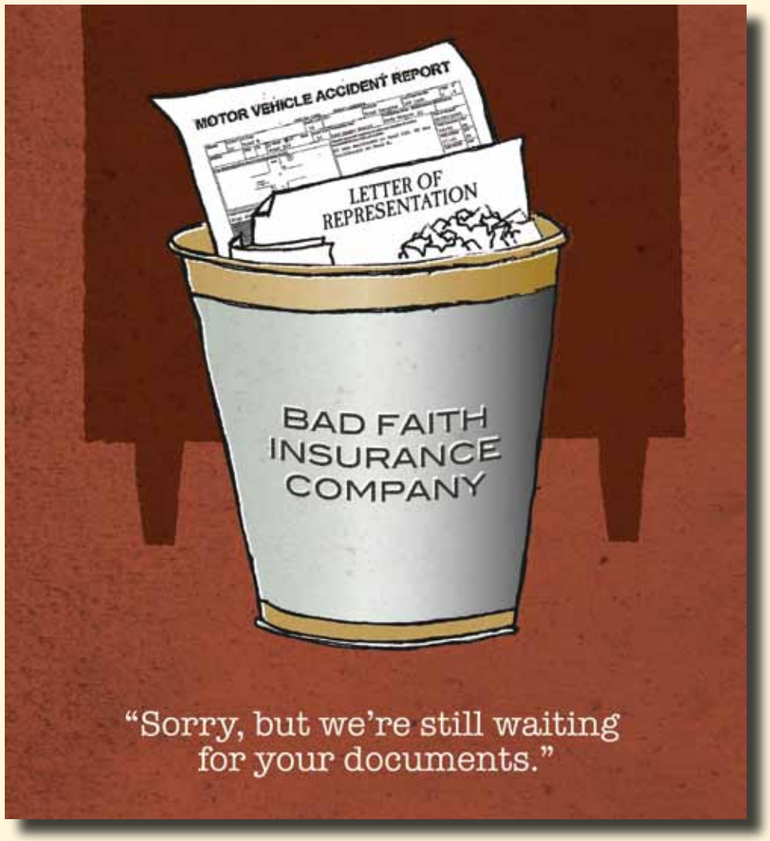
Twitter developed as a method for a group of software designers to exchange text messages. It has quickly evolved into a global marketplace of ideas, becoming what an influential and early pioneer of Apple described as "the most powerful branding mechanism since television." To familiarize yourself with Twitter, visit www.twitter.com and create an account. There is no need to "tweet" any messages or content. You can simply see what others, including many attorneys and law firms, are tweeting.

The benefits of Twitter for attorneys abound. Twitter offers new possibilities for marketing, for finding statements made by parties and by witnesses, and for discovering the attitudes and political leanings of potential jurors. But these benefits raise new ethical concerns, primarily in contacting prospective clients and witnesses, advertising, and safeguarding client confidentiality. Any analysis of the ethical implications of Twitter or social media should start with the following. Similar to websites, the general public (including jurors) can search for an attorney's publicly available tweets, just as potential clients check out an attorney's web site. When an attorney sends out a tweet, it is received by followers who have proactively decided to follow that attorney on Twitter. So some of the more strict ethical guidelines concerning traditional, mass media attorney advertising, such as via radio, television or billboards, likely do not apply to Twitter, because the audience receiving an attorney's tweets has either sought them out or signed up to follow that attorney. Practitioners should check their states' disciplinary committees for guidance or opinions concerning Twitter or other social media.

For more information, visit www.twitter.com. Follow us on @sjblawoffice.

Insurance Claim Blunder Continued from Page 2

Bergman's theory was that the insurance company was negligent in failing to respond to five requests for proof of policy limits, which made it impractical for the plaintiff to initiate settlement negotiations. Discovery showed that the company knew there was clear liability and catastrophic damages within weeks. Suit was filed more than five months later. Once its driver was sued, the opportunity to settle for policy limits was withdrawn, and as a consequence the insurance company had exposed its insured to a huge judgment that would never have occurred but for its failure to offer policy limits.



Bergman testified at deposition that his client would have accepted the $100,000 policy limits had it been offered by mid-September 2009, satisfying the causation requirement of the bad faith case.

The insurance company argued several reasons for not initiating settlement negotiations. First, it claimed its adjuster did not receive the first letter of representation. But it offered no reason for not promptly responding to the later calls or the second letter.

Second, the company cited the lack of a demand for policy limits on behalf of our client. Bergman countered that he could not make a demand until the policy limits were verified in writing, and Kansas law places the duty to initiate settlement on the insurance company. A demand is not required.

Third, the company argued that a lack of clarity on medical liens prevented an offer of settlement. Depositions of the company's claims personnel and their attorneys, however, established that personal injury cases are routinely settled pending the resolution of liens.

Finally, the company argued that the Lyon County sheriff had refused to release its report until a decision was made about criminal charges, thereby delaying the company from evaluating the fault of its insured and possibly third party fault; i.e. the county or truck driver. The company claimed that the report was not in its file until mid-November, two months after the causation deadline established by Bergman. Following depositions of the insurance company personnel, Bergman and DeGreeff subpoenaed the sheriff's department records, and documented that the insured's mother personally picked up and paid for a copy of the report in August 2009 and forwarded it to the claims adjuster a week later, well before the mid-September deadline. Plaintiff's experts said the company negligently and inexplicably failed to get the report into its file until November.

This stunning settlement of more than 100 times policy limits reaffirms the strong Kansas case law and public policy requiring insurance companies to protect their policyholders when possible, and initiate settlement negotiations when in their insured's best interests.

Practice Tip

Don't Overspend on Medical Records

A recent change in Missouri law has significantly reduced the expense of acquiring patients' medical records, lowering an often costly barrier to investigating potential cases. A change in Kansas law may follow soon.

In many of our cases, we have paid hundreds or thousands of dollars to collect voluminous medical records. As more health care providers use electronic medical records, those fees are dropping.

Both Missouri and Kansas statutes regulate the fees for providing medical records. Last year Missouri revised its statute (Mo. Rev. Stat. 191.227) to limit charges by healthcare providers who store records in electronic or digital format to $5 plus 50 cents/page, or $25 total, whichever is less. We recently received a $609.13 pre-bill from a local hospital for our client's 1,106 page medical chart.

We contacted their Release of Information department and requested the 1,106 page record on CD only. The hospital balked, saying the $609.13 charge would remain the same. After numerous conversations with the Release of Information supervisor, the pre-bill was reduced to just $40.60.

Last year, Kansas repealed its statute regulating medical records fees (K.S.A. § 65-4971). In its place, K.S.A. § 65-6827 gives the secretary of the Kansas Department of Health and Environment the authority to set medical records fees. KDHE planned to adopt a policy governing records fees this fall.

If your practice includes collecting medical records, request them in "digital format." Then examine invoices from providers, because some continue to charge the fees for paper records. Even if you don't store the records digitally, you can print them for much less than the 52 cents per page currently charged by Missouri healthcare providers for paper records.

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.

Answers to Puzzler: Across: 1) Chariots 7) Mayan 8) Donuts 12) Grapes 14) Polka 15) Effigies 16) Spring 17) Roman 18) Solstice Down: 2) Honey 3) Red 4) Stolen 5) Backwards 6) Bubbles 9) Fireworks 10) Kwanzaa 11) Resolutions 13) Confetti

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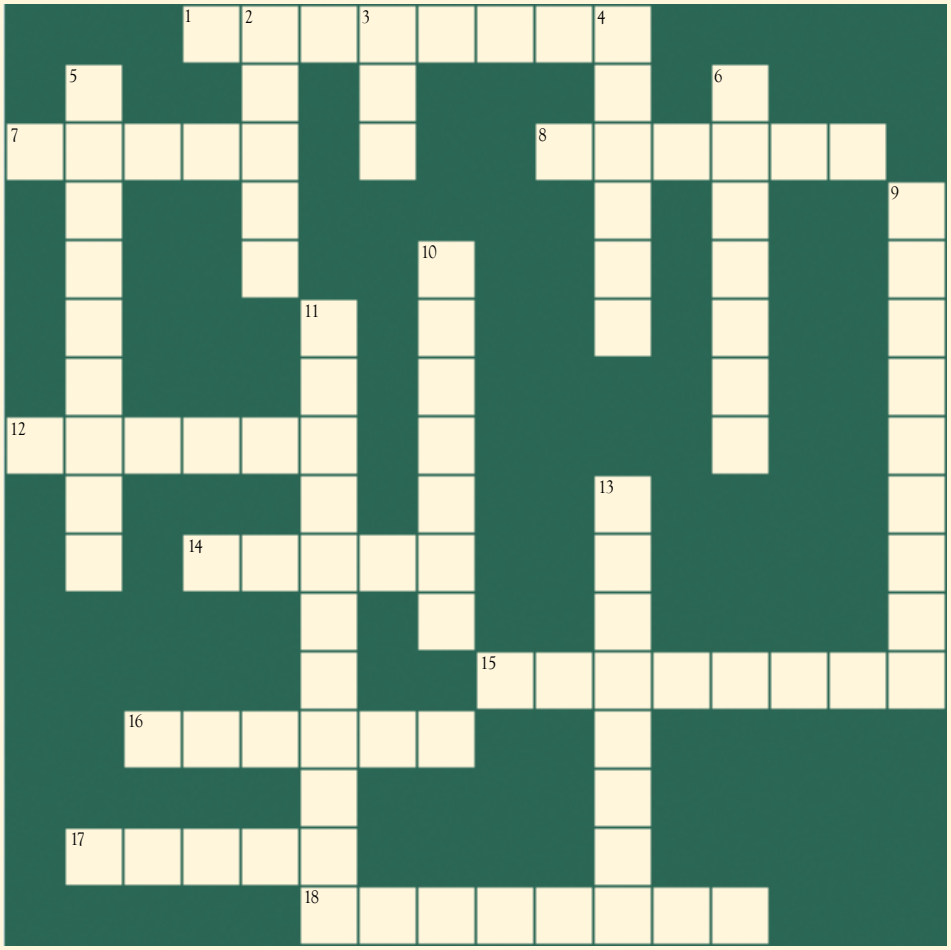
Past results afford no guarantee of future results.
Every case is different and must be judged on its own merits.
The contents of this Newsletter do not constitute legal advice.

New Year Trivia Puzzler



Across

1. In the early 20th century, Pasadena's Tournament of Roses featured not a football game but a race of Roman _____.
7. According to the _____ calendar, there will be no New Year 2013, because the world will end on December 21, 2012.
8. In Holland, these treats are eaten to symbolize coming full circle and completing a year's cycle.
12. In Spain, tradition calls for eating 12 ____ at midnight on New Year's Eve, one for each bell of the clock or for each month of good luck.
14. In the Philippines, eating round fruits and wearing _____ dots can ensure a prosperous New Year.
15. In Ecuador, the new year is celebrated by the burning of _____ representing the past year's people and events.
16. Many countries still celebrate the new year during this traditional season of rebirth and new crops.
17. Janus, the _____ god of gates, doors and beginnings, was traditionally honored on January 1. He had two faces, one looking forward and one looking backward.
18. The second new moon after the winter _____ determines the date of the Chinese new year.

Down

2. During Rosh Hashanah, the Jewish new year, apples and _____ are eaten to symbolize a sweet new year.
3. To encourage good luck for the coming year, Italians wear this color of underwear on New Year's Day.
4. According to the National Insurance Crime Bureau, more vehicles are _____ on New Year's Day than on any other holiday.
5. Lobsters are thought to be a bad New Year's food because they walk _____ and can bring about a reversal of fortune.
6. A scientist once calculated that a bottle of champagne contains 49 million of these, give or take a few.
9. The Times Square New Year's Eve ball developed because of a ban on these traditional New Year's festivities.
10. This celebration means "first fruits" in Swahili.
11. The practice of making these on New Year's can be traced back to the Babylonians. Current research shows that 25 percent of people forget theirs' before the end of January.
13. Throughout the year, Times Square visitors write New Year wishes on pieces of _____, which are then showered over the crowd at the end of the year.