



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

KATRINA HURTS ALL OF US

It is good to know that the American people will rise to the occasion when a real need arises in our country. Our nation's history is filled with many such occasions. We now are witnessing another example of people meeting another challenge. Hurricane Katrina and Rita hit our Gulf Coast with unparalleled fury leaving vast destruction in their path. Never before have we faced two such powerful storms within weeks of each other. Fortunately, Rita lost some of its power just before reaching land. Even so, it did a tremendous amount of damage and there were lives lost.

We are witnessing another classic example of Americans responding when their neighbors are in real trouble. It is difficult for me to fully comprehend how bad things really were in the affected areas. I believe you would have to have been there to truly appreciate how grave the situation was. Our prayers have been and will continue to be with all of the victims. It is also difficult to believe that these storms actually hit five states on the Gulf Coast. The cleaning up, rebuilding, and restoration will be a long and costly ordeal. Thousands of folks are really hurting, but fortunately folks all over the United States are reaching out to help them. We can't afford to ignore the needs of these people. We have an obligation to support them. If there has ever been a time for all people in our country to forget politics and past differences - or at least put them aside - and work together, it is now!

A DAY OF PRAYER FOR HURRICANE VICTIMS

Friday, September 16th was a National

Day of Prayer for victims of Hurricane Katrina. President Bush had declared the day as a National Day of Prayer and Remembrance and encouraged Americans and places of worship to mark the day with special services and observances. People observed a day of prayer all over the country. In our state, Governor Bob Riley addressed a non-denominational service at Frazer Memorial United Methodist Church in Montgomery. There were other services held throughout our state and nation.

While one day of "called prayer" is good and helps us put things in perspective, we all have an obligation to pray each and every day for all of those who were hurt in any way by Katrina and Rita. People who remained in the areas struck by the storms, as well as the thousands who are now displaced, need our daily prayers and our full support. Many good people are without the basic necessities of life and have no access to money. They all need our help. May God bless, protect and comfort all who need help and also bless all of those who are helping out in some way.

THE GIANT OIL COMPANIES' BOSSES SHOULD BE ASHAMED

The giant oil companies are all making record profits, and the price of gasoline at the pump is an indication of how these companies really feel about ordinary folks in this country. It is all about profits and nothing more. Long before Katrina and Rita hit the Gulf Coast, the oil companies were increasing their prices at a record pace. For example, ExxonMobil announced all-time record profits during the last quarter. It is projected that the company's profits will exceed \$10 billion in the current quarter. In fact, their profits had the largest increase ever for a corporation in this country. After the storm first hit, all of the companies quickly used Katrina as an excuse to go even higher with their gas

prices. Now we have to deal with the aftermath of Rita. People all over the country are being hurt by corporate greed and are demanding answers. The Bush Administration's "cozy relationship" with the oil industry could work either for "good" or for "bad." The Administration could continue to support and protect the companies or they can use their "connections" to secure lower gas prices for the consuming public. It is my hope and prayer that the President will personally intervene and force the oil companies to put

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people first for a change. Some type of price controls could be the answer.

THE STATE OF ALABAMA DID WELL

The State of Alabama did a very good job of getting ready for Katrina. Governor Bob Riley showed excellent leadership, skills and the communication between all levels of government appeared to be very good in our state. Officials on the local level also did their part and performed very well. Of course, it's difficult to compare what happened in Alabama to Mississippi, Louisiana and Texas because of the severity of damage in those three states. But, it is quite appropriate to commend our leaders for a job well done.

PUBLIC CITIZEN SPEAKS OUT ON RISING GASOLINE PRICES

High gasoline prices cannot be blamed entirely on natural disasters, but also results from unchecked corporate behavior. This was the message delivered last month by Public Citizen to the Senate Committee on Commerce, Science and Transportation. Tyson Slocum, research director of Public Citizen's energy program, told the committee that recent oil company mergers are partly responsible for gasoline price spikes. He listed the following steps the government should take to alleviate high gasoline prices:

- The government should restore competitive markets by enforcing antitrust laws that make it illegal for companies to intentionally withhold an energy commodity from the market for the sole purpose of creating a shortage and driving up prices.
- The government also should re-regulate energy trading exchanges, boost fuel economy standards, and force the divestiture of assets to remedy the problem of too few companies controlling too much of the market.

Even before the impact of Hurricanes Katrina and Rita, gasoline prices, gasoline and oil prices have been creeping up for two years, in large part because of a wave of mergers in the oil industry. Last year, the top five U.S. oil refining companies controlled 56.3% of domestic oil refinery capacity. A decade ago, the 10 largest U.S. oil refining companies controlled 55.6% of refining capacity - which means that, due to mergers, the five largest oil refiners today control more capacity than the 10 largest did a decade ago. This consolidation makes it easier for oil companies to gouge consumers at the pumps. The five largest oil refiners - ConocoPhillips, Valero, ExxonMobil, Shell, and BP - have seen profits of \$228 billion since President Bush took office in 2001.

Despite government reports issued in 2001 and 2004 that directly link corporate mergers to high gasoline prices, no action has been taken to aid consumers who are suffering from a volatile market where prices spike day by day. Meanwhile, oil industry profits are at record highs, largely because of record refinery profit margins. While in 1999 U.S. oil refiners earned 22.8 cents for every gallon of gasoline they refined by 2004, that profit margin increased 80%, to 40.8 cents per gallon. Every meteorologist in the country is busy monitoring hurricanes, letting us know exactly when the next one is going to hit and where. This is a good thing and most necessary. But who is monitoring the companies that are jacking up gasoline prices for consumers under the guise of natural disasters? The federal government has the duty to protect us from dangerous weather. It is also government's duty to protect the American people from price gouging every day when they heat their homes, drive their cars, or travel by public transportation to their jobs or on family outings. Unfortunately, the government's efforts in this area have been grossly inadequate.

Source: *Public Citizen*

ATTORNEY GENERAL AND AGRICULTURE COMMISSIONER INVESTIGATE GAS PRICES

As mentioned above, people all over the country are outraged at the high price of gasoline and rightfully so. The Alabama Attorney General's office is trying to determine why the price of gasoline shot up sharply after Hurricane Katrina hit the Gulf Coast. Attorney General Troy King is doing the right thing and should be commended for his stand. As part of the investigation, 22 subpoenas were issued seeking detailed pricing information from businesses that sell gasoline. Alabama has joined with 44 other Attorneys General in the investigation of gas prices. In my opinion, this investigation is certainly warranted. It should go all the way up to the giant oil companies. That's where the problem really lies in my opinion.

Agriculture Commissioner Ron Sparks, whose office inspects and monitors gas pumps in Alabama, is working with the Attorney General to investigate gas prices. Ron told the Associated Press: "I want consumers to know that we are doing everything we can to protect them from those who want to try to take advantage during this state of emergency." As we all know, it's a crime to "price gouge" during a time of emergency, like a hurricane, mostly for charging too much for items like ice, generators, or a hotel room. In my opinion, gas should be included in that grouping. It is good to see public officials from different political parties working together to help Alabama citizens.

Source: *Associated Press*

MISSISSIPPI SUES INSURERS OVER FLOOD DAMAGE

Mississippi Attorney General Jim Hood has filed suit against five insurance companies. These companies are accused of cheating hurricane survivors out of millions of dollars. The Attorney General is trying to force them to pay

for flood damage to homes in the wake of Hurricane Katrina. He believes that Katrina's horrific winds and storm surge actually caused the bulk of the damage. The insurers named as defendants are Nationwide Mutual Insurance Co., State Farm Fire and Casualty Co., Allstate Property and Casualty Co., and United Services Automobile Association. Home-owners insurance typically doesn't cover damage from floods but does pay for damage caused by wind. Anybody who watched the television coverage of the hurricane knows that winds and storm surge caused tremendous damage to buildings. Many of the structures were destroyed long before any flooding occurred.

According to the Attorney General's office, insurance adjusters were getting victims to sign forms acknowledging that their policies didn't include flood damage. This was apparently being done in a manner that "smacks of fraud." I hope that wasn't across the board by all companies and those will turn out to be isolated incidents. I understand victims were told that the forms were purportedly for advance money on policies. If this proves to be a widespread fraud, somebody needs to go to jail.

The National Flood Insurance Program, run by the Federal Emergency Management Agency, only offers homeowners up to \$250,000 to rebuild damaged properties. The maximum for replacing property is \$100,000. The amount of damage done to insured property - homes and commercial buildings - will be very high. While New Orleans received the most news coverage, Mississippi was also hit very hard by Katrina. The destruction along the Gulf Coast was devastating. Alabama suffered damage, but nothing in comparison to Mississippi and Louisiana. Incidentally, many have forgotten that Katrina first hit south Florida and caused considerable damage there.

FIRST FEDERAL VIOXX TRIAL MOVED TO HOUSTON FROM NEW ORLEANS

Because of Katrina, our Vioxx trial has been moved to Houston, Texas. As you know, this will be the nation's first federal trial involving Merck & Co.'s painkiller. U.S. District Judge Eldon Fallon, who is overseeing thousands of federal civil lawsuits related to Vioxx, has ruled our case will proceed as scheduled on November 28th in Houston rather than in New Orleans, its original venue. We agreed - as did Merck's lawyers - for the judge to move the case to Houston.

Judge Fallon and his staff moved to temporary quarters at the federal courthouse in Houston after Katrina devastated New Orleans. As previously reported, the judge is handling pretrial coordination of more than 1,800 federal Vioxx lawsuits to streamline steps common to the cases, such as document gathering, witness depositions, and motions. Our case involves the death in 2001 of Richard Irvin Jr., a 53-year-old Florida man, who had a fatal heart attack after he took Vioxx to alleviate back pain. Mr. Irvin was in "very good health" when he started taking Vioxx. An autopsy confirms that Vioxx caused the death. We look forward to trying this case.

JOE TURNHAM RETURNS AS STATE DEMOCRATIC CHAIRMAN

The Alabama Democratic Party made a wise decision when they selected Joe Turnham of Auburn to serve as party chairman. In my opinion, Joe will work hard at rebuilding the party. He pledged to travel the state to re-energize folks who still consider themselves Democrats. The State Democratic Executive Committee met in Montgomery last month and overwhelmingly elected Joe to lead the state party. As you probably recall, Joe served as party chairman from 1995 to early 1998. He stepped down at that time to run for the U.S. House of Representatives. In addition

to choosing Joe as party chairman, the Democratic Executive Committee created two party vice-chairmanships and selected Dr. Paul Hubbert and Stewart Burkhalter, president of the Alabama AFL-CIO, to fill the slots. In my opinion, these men will do a good job.

Joe says his goals for the party include organizing more at the county level. He wants to make sure Democratic candidates for county offices have the same "high-tech campaign tools" available to them, that statewide candidates have. He says the party will utilize the Internet more in an effort to reach young voters. Dr. Hubbert observed that the Democratic Party has finally realized that Alabama is now a two-party state. He added that the party must take the next step of getting organized in every county to help Democrats running for county offices. It is interesting to note that many Alabamians, who in the past voted for Democrats such as Big Jim Folsom, George Wallace, Jim Allen, Albert Brewer, Howell Heflin, and John Sparkman, now vote for Republicans on the state level. However, at the local level Democratic candidates continue to do well. It will be interesting to see whether the new leadership team will be able to breathe new life into the State Democratic Party. If nothing else, I believe you will see the party put the interests of ordinary people at a much higher level on its list of priorities than has been the case in recent years. If that happens, I believe you will see Democratic candidates doing much better on the state level. In any event, selection of the new man at the top of the party is a step in the right direction.

SIEGELMAN WILL BE A CANDIDATE FOR GOVERNOR

Don Siegelman has already announced his plans to run for governor next year. He told The Associated Press last month: "I have listened to the people of Alabama. I have learned that a good

many of them want me in this race.” The former governor’s decision shouldn’t have come as a big surprise. He never quit running after losing to Governor Riley in the last election. The listening posts were just a slick political ploy to justify his decision. Some of my political friends tell me he still has a “power base” and enjoys a significant amount of support throughout the state. Time will tell if that is an accurate appraisal.

Source: Associated Press

RON SPARKS TO SEEK RE-ELECTION AS AGRICULTURE COMMISSIONER

State Agriculture Commissioner Ron Sparks has announced that he will run for a second term next year. His campaign platform will include expanding farm exports and keeping agricultural imports safe. Ron Sparks has been a very good agricultural commissioner. In fact, he has been the very best commissioner in my recollection. Ron has compiled an outstanding record. Hopefully, he won’t have any serious opposition. In my opinion, Ron deserves a second term. We need more folks like him in public office.

FEDERAL APPEALS COURT GIVES ATLANTA VICTORY IN WATER FIGHT

A federal appeals court in a recent ruling has given the Atlanta area a victory in its fight to be allowed to use more water from Lake Lanier and the Chattahoochee River to meet its water needs. The ruling by the U.S. Court of Appeals for the Eleventh Circuit reversed earlier decisions by an Alabama federal district court, which blocked metro Atlanta from getting additional water that state and local officials say is necessary for Atlanta to accommodate expected growth. The ruling, which sends the case back to the Alabama federal court, could allow Atlanta to take up to 50% more water from the lake and river. If the ruling stands, Atlanta

eventually would be able to take up to 537 million gallons of water a day out of the lake and the river below it. According to state environmental officials, the region could take up to 705 million gallons a day.

Alabama and Florida don’t want metro Atlanta to have the additional water for obvious reasons. The three states, which share the Chattahoochee River, have been fighting over that river since 1990. The river supplies metro Atlanta with most of its water. Alabama uses the river water for industry and barges. At the lower end, Florida wants enough water in the river to serve future development and to ensure the health of Apalachicola Bay, a rich estuary and commercial fishery. Each state has a real need and therein lies the problem. It would appear that a solution must be reached that will satisfy all of the needs – to the extent that is possible. If that doesn’t happen, the legal battles will continue.

Source: Associated Press

GOVERNOR RILEY AWARDS GRANTS

Recently, Governor Bob Riley awarded grants to two groups which have a common bond and that is making our highways safer. The Governor awarded \$92,500 to a student group that aims to reduce teenage deaths and injuries on state roads. Alabama’s Students Against Destructive Decisions (SADD) works with students to discourage them from underage drinking, drug use, and drunken driving. In making the grant, Governor Riley told the Associated Press:

Each year, too many teens lose their lives because they make the decision to drive after drinking or using drugs or get into a car with an impaired driver. SADD encourages teens to act responsibly and I am pleased to provide this support for its mission.

SADD will use the grant to pay for the work of its state coordinator and assistant coordinator, plus operating expenses such as travel and equipment. The coordinators develop new chapters, plan statewide education campaigns, and seek student leaders. In the past year, the group has increased the number of high school chapters by eight to 120 and added 12 junior and middle school chapter for a total of 20.

Governor Riley also made a grant in the amount of \$30,313 to Mothers Against Drunk Drivers. We all know about the good work being done by MADD. It is good to see government supporting their efforts. I am convinced that this grant money will be put to good use.

The money for each grant was made available through the Department of Justice. As we all know, drinking and driving is a major problem in Alabama. We should all support programs designed to curb drunk driving. In my opinion, these grants are a good investment and hopefully will help save lives on our highways.

Source: Associated Press

TIMBER COMPANY SETTLES INSURANCE DISPUTE

Recently, our firm represented Eufaula Pulpwood, Inc., a timber operation based in Eufaula, Alabama, in a most interesting lawsuit. The case involved the unreasonable delay by an insurance company in paying a legitimate insurance claim. It also involved a separate claim for bad faith. The lawsuit centered around a 1997 Morbark chipper harvester that burned during operations in the field. Immediately after the fire, Eufaula Pulpwood filed an appropriate claim with its insurer, Lexington Insurance Co. Rather than paying the claim as required in a timely fashion, the insurance company delayed payment by insisting that the chipper could be repaired even though Lexington’s own

adjuster who appraised the loss recommended that the chipper be paid as a total loss. Lexington then hired a second adjuster from Birmingham to get a second opinion. This adjuster also said the chipper was a total loss. Even the insurance agent who placed the coverage with Lexington encouraged the company to pay the claim.

We filed suit on behalf of Eufaula Pulpwood after months of delaying tactics by Lexington. Two days after suit was filed, our client's claim was paid in full. As a result of this delay in payment, however, Eufaula Pulpwood suffered loss profits in excess of \$1 million dollars, according to Ed Sauls, an accounting expert from Montgomery. The complaint stated claims against the insurance company for breach of contract and bad faith. The bad faith claim was settled a week before trial with the amount paid being confidential at Lexington's request. Clint Carter and I handled this matter for our firm along with Eufaula attorneys, Jimmy Calton, Sr. and Jim Calton, Jr.

JEEP WRANGLER SEAT BELT DEFECT CASE SETTLED

Our firm has recently reached a settlement with DaimlerChrysler Corporation in a wrongful death case arising out of a seatbelt defect involving a Jeep Wrangler. Jerry Reid, a resident of Barbour County, Alabama, was involved in a one vehicle accident, when he rolled over his 1999 Jeep Wrangler while attempting to avoid a trash can in the road. Mr. Reid was properly belted and did everything he could to avoid colliding with a large trash can which had been knocked out into the road. The Jeep overturned approximately 2 to 3 times resulting in injuries that caused Mr. Reid's death. He was found properly belted in his seat at the scene of the accident and his seat back had collapsed. Our design expert found that the seatbelt had failed to properly lock

and therefore failed to restrain Mr. Reid in his seat during the rollover event. This expert determined that the seatbelt spooled out, allowing Mr. Reid to come out of his seat and move beyond the protection of the roll cage provided with the vehicle. As a result of the failure of the seatbelt to properly restrain the occupant - as it should have done - Mr. Reid received severe head injuries that resulted in his death.

Our client, Mrs. Shirley Reid, the surviving widow, filed a product liability suit against DaimlerChrysler for the bad design of the seatbelt system in the Jeep Wrangler. It was our position that the seatbelt did not properly restrain Mr. Reid and that a design defect existed in the seatbelt. The seatbelt was not designed to restrain an occupant in a rollover which violated FMVSS requirements, SAE standards, and Chrysler's own internal standards. It was our expert's opinion that had the seatbelt had a simple cinching latch plate, that Mr. Reid would have survived the accident. Interestingly, every seating position in the vehicle, except the driver's position, contained a cinching latch plate. Our expert also opined that rollover-activated pretensioning devices would have eliminated the spool-out defect in the subject seatbelt system. Our pretrial discovery revealed that the 2005 Jeep Wrangler had installed driver's side pretensioners.

A DaimlerChrysler representative, testifying under oath, admitted that DaimlerChrysler did not know whether the seatbelt in the Wrangler would restrain an occupant in a rollover. This was because DaimlerChrysler had never tested the seatbelt in a rollover event. The DaimlerChrysler representative testified further that since federal motor vehicle safety standards don't require testing in rollover events, the company never considered that issue when designing and developing the Wrangler seatbelt system. However, the Jeep Wrangler contained no warnings indi-

cating that the seatbelt may not function to restrain an occupant during a rollover event. It is significant that DaimlerChrysler's sister corporation, Mercedes Benz, has included seatbelt safety systems in its vehicles for rollover protection for a number of years. There is no reason why the Jeep Wrangler should have ever been produced and sold without rollover testing to insure the safety of occupants in a Jeep Wrangler, which is known to have a higher rollover propensity when compared to other Chrysler passenger cars. Ben Baker and I represented Mrs. Reid along with Jim Martin of Eufaula, Alabama. At the defendant's request, the amount of the settlement is confidential.

WORKSHOP ON ALABAMA'S NEW SUNSHINE LAW

Public officials, both elected and appointed, as well as members of the media took part in a workshop in Mobile recently to work on Alabama's newly revised Sunshine Law. Earlier this year, the state Legislature completely overhauled Alabama's Sunshine Law. As you know, this is the law that requires governmental meetings to be open to the public. It is important for the officials to know how the new law will work and what their responsibilities are. Participants received a user-friendly manual that explains the new requirements in layman's terms. The rewritten Sunshine Law takes effect on October 1st. There have been a number of workshops on the new law held around the state. Attorney General Troy King and the Alabama Press Association co-sponsored the Mobile event. In my opinion, the new law will help the public find out what really goes on in governmental meetings and hopefully in government generally. Letting "more sunshine in" certainly won't hurt!

II. LEGISLATIVE HAPPENINGS

LOOKING AHEAD TO FUTURE SESSIONS

There isn't much to report on the legislative front at this time. For the past several weeks, many of the legislators have been busy raising campaign dollars for next year's elections. For weeks there have been rumors of possible special sessions. One such session would be for prison funding. There is also talk of a session to deal with a bond issue for education building needs. However, nothing official has come out of the Governor's office on either subject. But, there won't be a session called solely for prison funding. In my opinion, a bond issue session would also be a mistake. These two items are things that can wait for the regular session.

There is another problem on the horizon, however, and that deals with events caused primarily by Katrina. The legislature will have an expected fiscal problem when it comes to Montgomery next year. The additional spending caused by Katrina - which is certainly justified - will further pinch the state budgets. It is also possible that the second storm, Rita, could have an impact in Alabama. As a result, an already strapped General Fund will be in real trouble next year. The Special Education Trust Fund will also be affected by the increased demands on our school systems at every level. I hope the federal government will reimburse all of the additional funds our state will have to spend. I understand that Governor Riley and the legislative leaders are already making plans to deal with these additional problems. This would be an ideal time to restructure our entire tax structure. It is wishful think-

ing, however, to believe that it could happen in an election year.

THE NEED FOR ELECTION AND CAMPAIGN FINANCE REFORM

I still believe that Governor Riley should call the Legislature to Montgomery for a special session restricted to election and campaign finance reform. Because of the need to take care of unexpected problems caused by Katrina, however, I believe a session for reform should be called for January of next year. That would make any legislation passed apply to the 2006 elections in our state. I have heard from a number of legislators who say reform is needed and that they would support a good bipartisan plan. Bob Riley has an opportunity to go down in history as the Governor who finally gave ordinary people a real voice in the affairs of government. If he will spearhead this effort, he can be that Governor!

III. COURT WATCH

ALABAMA STATE BAR RESPONDS TO FALSE INFORMATION PUT OUT ON MERIT JUDICIAL SELECTION

The Alabama Bar Association's plan to change the method of selecting appellate judges has received a great deal of public and media attention. Most of this has been productive, fair and useful to the public. But, I was shocked to read the accusations made by the Republican Party aimed at my friend Bobby Segall. This attack came in the form of a news release put out by the party and was nothing more than a typical political message from a group that plays fast and loose with the truth. The Alabama Bar Association made the following response:

The Alabama State Bar is respond-

ing strongly to recent false and misleading information concerning a proposed judicial selection amendment supported by the bar.

Alabama State Bar President, Bobby Segall, says that the bar has been attempting to address the problem of judicial selection in Alabama for many years. Segall states that "The vast amounts of money spent in appellate court judicial elections, mostly derived from special interest contributions, have eroded respect for, and confidence in, Alabama's judiciary both on the part of lawyers and the public. Despite that we have for the most part excellent appellate court judges, people simply do not believe that appellate judges who have received huge contributions from special interest groups can be truly objective and even-handed. And, the problem has been exacerbated by recent demeaning political campaigns for judgeships."

The proposed constitutional amendment, endorsed by the Alabama State Bar Commission earlier in 2005, can be found on the bars website (www.alabar.org). (A copy of the amendment can be viewed and printed below.) Retired Alabama Supreme Court justice, Gorman Houston, a 19-year veteran of the court and participant in three statewide elections, will lead a non-partisan citizens group to promote dissemination of information about the merit judicial selection plan and to educate the electorate.

Its highlights include the creation of a broad based Judicial Nominating Commission (much like those in use presently in six of Alabama's judicial circuits) and a Judicial Evaluation Commission.

When there is a vacancy on an appellate court, the Nominating Commission will nominate three people, one of whom the Governor will appoint.

At the expiration of an appellate judge's term, the Judicial Evaluation Commission will publish its evaluation report, and the judge will stand for retention election.

Segall points out that the plan has come under grossly unfair and misleading attacks by Twinkle Andress Cavanaugh, the chair of Alabama's Republican Party. Others have raised good faith concerns.

The following points were made in the Bar Association's response to some of the "misstatements" in the GOP attack:

- The Alabama State Bar has supported a merit selection process for appellate judges for many years, including during the time Democrats were dominant on the appellate courts. In 1997, under the leadership of State Bar President Warren Lightfoot, the Board of Bar Commissioners endorsed a proposal very similar to the one now proposed. The Committee that proposed the present plan to the Bar Commission was chaired by former bar president Bill Clark. The committee, comprised of very conservative lawyers, the majority of whom are Republicans, studied the issue for two years before proposing the plan to the Bar Commission.
- This proposal provides more accountability than the present system of special interest dominated, big money contested elections. First, there is no accountability now until after a judge has served a term. After each term, accountability is limited to withstanding whatever challenge is mounted by specific opponents.
- Under this proposal, when one ini-

tially seeks appointment to a judicial vacancy, his or her qualifications are evaluated by a Judicial Nominating Commission and then by the Governor. These evaluations hold applicants for appointment accountable for their pre-application professional and personal conduct. After a judge completes each term, an objective evaluation conducted by the Judicial Evaluation Commission is provided to the public. The public then votes in a retention election on whether the judge is to serve another term or not. The public's attention is focused keenly and solely on the issue of the judge's prior service. That is accountability in the truest sense.

- Although the public does not vote for the initial selection of a judge, it does vote thereafter in retention elections.
- The Judicial Nominating Commission is not comprised entirely of lawyers and is certainly not dominated by trial lawyers. Rather the nine member Commission is comprised of four non-lawyers, four lawyers, and one sitting judge. Three of the four lawyers are appointed by the Board of Bar Commission and only one of the three can be a trial lawyer. One must be a member of the Alabama (civil) Defense Lawyers Association and one must be a member neither of the Trial Lawyers nor Defense Lawyers Associations. The predominantly black Alabama Lawyers Association appoints the fourth lawyer. Moreover, lawyers have nothing to do with the appointment of non-lawyers, and the appellate courts select the judge who serves on the Nominating Commission.
- The Judicial Evaluation Commission also includes non-lawyers. In fact, of the 11 people on the Commission, only four are practicing lawyers. Other members include the Chief Justice of the Alabama Supreme Court and the presiding judge of either the Court of Civil Appeals or the Court of

Criminal Appeals as determined by the Chief Justice. The dominant category of membership consists of five non-lawyers.

- This proposal protects presently serving judges (or at least those elected in November of 2006 - - the proposal under the best of circumstances will not be law by the time of that election) from ever again being subjected to contested, partisan, mud-slinging elections. Accordingly, assuming Republican judges are elected in November; those judges should/will have a decided advantage in remaining on the court. Moreover, whatever party is the dominant in Alabama should maintain dominance on the court because the ultimate appointment is made by the governor.
- The point is that there is no interest in changing the present make-up of the Court. The sole interest is in eliminating the kind of elections that destroy the faith lawyers and the public are willing to impose in the judiciary and, therefore, in our system of justice.
- Alabama is one out of only seven states that still elect judges in contested partisan elections. States that have carefully examined the grave harm contested elections do to their judges and to the public's confidence in the judiciary, have changed to selection systems like, or similar to, this proposal.
- According to the Montgomery Advertiser, for the last decade (ending with the 2004 elections), Alabama was first in the country in the money spent on State Supreme Court elections. During the decade, candidates for the Alabama Supreme Court spent \$41 million compared to the \$27.5 million spent by the second highest spender, candidates for the Texas Supreme Court.

Source: Alabama Bar Association

FINAL APPROVAL GIVEN TO CVS SETTLEMENT WITH SHAREHOLDERS

A federal judge has given final approval to the \$110 million settlement of a shareholders' lawsuit accusing CVS Corp. of making misleading statements to artificially raise its stock price. The lawsuit also accused the Rhode Island-based pharmacy chain of delaying accounting on merchandise discounts, counting the full value of the items in its earning reports. Interestingly, shareholders alleged that Chief Executive Thomas M. Ryan delayed reporting the company's plans to close 200 underperforming stores and personally sold more than 95,000 shares of CVS stock before telling investors that the company's second-quarter and full-year earnings would fall below projections in 2001.

The lead plaintiff in the case was the Plumbers & Pipefitters National Pension Fund. Any defendant who pays \$110 million to settle a lawsuit surely must have done "something wrong." I suspect the "business decision" excuse put out by CVS is simply trying to divert attention from what actually happened that gave rise to this lawsuit.

Source: *Boston Globe*

RECORD VERDICT IN SHELBY COUNTY

Last month, a Shelby County jury returned a \$29 million verdict against a trucking company and its driver. The verdict was for a Columbian woman who lost her husband in a wreck involving a truck owned by Hardway Hauling, Inc. This was the largest civil jury award of its kind to come out of Shelby County, which is generally considered to be a most conservative jurisdiction. The wrongful death case stemmed from a wreck that occurred on a state highway back in June of 2002. Timothy Robbins, Sr., a local resident, was killed in the wreck. His pick-up truck was struck head-on in his lane of travel by a

dump truck owned by Hardway Hauling.

The evidence at trial was that the wreck was caused by a combination of driver inattention, speed, out-of-repair brakes on the dump truck, and driving under the influence of methamphetamine. The evidence at trial was that Hardway Hauling had done little or no maintenance on the dump trucks it put on the road. The trucking company failed to follow federal safety regulations when it did not give the driver a drug test that would have revealed he was a binge user of methamphetamines. The police reported that the driver had methamphetamine in his system. It was shocking that the trucking company had never even tested the driver for drugs. This case is a classic example of a trucking company putting a defective vehicle on the road and allowing it to be operated by a driver on drugs.

JUDGE ROBERTS GETS ABA'S HIGHEST RATING

The ABA Standing Committee on Federal Judiciary has found Judge John Roberts "well-qualified," its highest rating, in his nomination to be chief justice of the United States. The committee said that Judge Roberts meets the highest standards - required not only of a justice, but also of a chief justice. This recommendation is one that should carry a great deal of weight and apparently it did. The Senate Judiciary Committee gave Judge Roberts a favorable vote on September 21st. The nomination then went to the full Senate for a final vote. Personally, I believe that Judge Roberts will be confirmed by a very large margin. In fact, by the time this issue is read, he most likely will have been confirmed by the Senate. Based on what I have seen thus far, I believe that he will be a very good Chief Justice. His stand on the moral issues facing America has to be good news for all of Americans.

SETTLEMENT REACHED IN DEATH CASE

A wrongful death lawsuit pending in a Mobile federal court has been settled for \$7.5 million. A Florida woman was killed after a peanut trailer's brake drum disengaged and struck her in the head on Interstate Highway 65. The accident occurred on Interstate Highway 65 in November of 2003. The defendants in the case were Golden Peanut Company, Christopher Thomas Inc., which is a Georgia trucking company, and WDL Reynolds LLC.

Clearly, the evidence in the case justified the amount of the settlement. Golden Peanut failed to add a preventive maintenance program or perform inspections on its trailers. The driver failed to perform an adequate pre-trip truck and trailer inspection that were required. WDL Reynolds failed to perform an adequate brake inspection on the trailer. Christopher Thomas, the trucking company, negligently entrusted its truck to the driver. The State Department of Transportation determined after the incident that the truck and trailer had more than 11 out-of-service violations or defects.

WYETH SETTLES CALIFORNIA LAWSUIT

Wyeth, the New Jersey-based pharmaceutical company, has settled its part of a lawsuit brought by the State of California. Wyeth and Abbott Laboratories had been sued for defrauding the state through a pricing plan that raised costs for a state drug program for the poor and elderly. California had filed the suit in 2003 with Wyeth and Abbott Laboratories as the original defendants in the case. Another 36 drug companies were added as defendants by amendment to the lawsuit. The case is pending in U.S. District Court in Boston. Abbott hasn't settled and remains a defendant.

JURY VERDICT UPHELD

On September 21st, a judge in Memphis, Tennessee, rejected Daimler-Chrysler AG's motion to reverse a \$48.8-million punitive jury award. The trial judge correctly found that the company's conduct caused the death of a 38-year-old woman in a Dodge Caravan accident. At trial it was proved that the victim was killed because the design of the minivan left people vulnerable in offset collisions, where only part of the front end is hit. This victim was driving a 2000 Caravan on an Arkansas highway in 2002 when it was hit nearly head-on by a Jeep Cherokee. In February, a jury awarded \$56.3 million to the victim's family and \$2 million to the family of her mother, who was also killed in the accident. The jury's \$48.8-million punitive judgment was assessed only for the driver's death.

IV. THE NATIONAL SCENE

A NEED FOR AN INDEPENDENT INVESTIGATION AFTER THE STORM

Based on what we saw in the wake of Hurricane Katrina, it's clear that we are much less safe in this country than we thought when it comes to dealing with a disaster of that magnitude. It was obvious that the preparation and response by government at every level was very poor. Alabama and Mississippi did a much better job than the state and local authorities in Louisiana. While the local officials in Louisiana made mistakes, the efforts by top officials in the federal government were substandard at best. The federal government's very slow and uncoordinated responses to Katrina should serve as a needed wake-up call for our national political leaders. We have had four years after September

11th to get prepared for disasters, and our overall response to Katrina leaves me greatly concerned. Unfortunately, the federal government failed to respond to an emergency every bit as serious and deadly as a terrorist attack. The preparation and response to the second storm, Rita, showed that we did learn from Katrina. The responses in both Texas and Louisiana were much better and the federal government seemed to get most things right. Even so, there were areas where definite improvements are still needed.

It was quite obvious that FEMA was totally unprepared to deal with the aftermath of Katrina especially in the early stages. For days, it seemed that FEMA didn't have a game plan and seemed totally lost. Based on everything I have seen and read, the agency needs a complete overhaul and we need to get rid of all of the "political hacks" who have been put in important positions. We must determine if putting FEMA under Homeland Security was a wise decision.

Clearly, we must first solve the immediate problems and then take a look back to find out where the real problems were and what needs to be done to correct them. I believe that an independent "Disaster Commission," modeled after the 9/11 Commission, is needed to find out what all went wrong. We can't afford to let the politicians from either party run this investigation. We need independent men and women, who are qualified and who have the experience and ability required to do this job. One thing is certain, we don't need an early investigation that could be nothing more than a cover up of the government's obvious shortcomings. We need a "Disaster Commission" and here's why.

- **We need to learn from both hurricanes.** The scale of the disasters makes it urgent that we learn from all of the mistakes that were made. We also need to see what all went right.

It doesn't take a genius to figure out that the government can't investigate itself. That means appointing an independent group of experts to sort through the data is critical.

- **We need to locate and isolate the other Michael Browns.** FEMA director Michael Brown was forced to resign after Katrina. Brown had no experience in emergency management - his last job was as the director of the International Arabian Horses Association. And there are many other political appointees like Brown who could get in the way during a future emergency. Brown should never have been in such a critical position and that was quite apparent. If there are any more like him - they too need to go.

- **No President should investigate his or her own government.** No chief executive should have to investigate his or her own government nor should it be allowed. Politics should have nothing to do with any such inquiry. It is too important to our nation.

In my opinion, the 9/11 Commission is a good model for the "Disaster Commission." It was independent, bipartisan and provided all Americans with an honest and frank assessment of what happened on September 11th. Clearly, support for a "Disaster Commission" is growing. It is absolutely urgent for Congress to establish such an independent commission and work to make America safe. Our next major disaster could be an earthquake, a river flood, a tornado, another hurricane, or even a massive terrorist attack. We must be prepared for any such event. I don't really see the blame game that followed Katrina doing much to solve the obvious problem. It will take everybody working together to not only spot problems, but to solve them in the short term and then plan for future disasters. We simply can't afford another Katrina type disaster.

INSURANCE COMPANIES SHOULD PAY ALL LEGITIMATE CLAIMS

It is quite obvious that the cleanup from two massive hurricanes will last for months. The massive rebuilding effort affecting five states will take much longer. A big fight over who will shoulder the enormous cost of damage to thousands of homes has already started. It appears that few homeowners in the hardest hit Gulf Coast states had any flood insurance. Standard homeowners' policies attempt to exclude flood coverage. This coverage generally must be bought from the federal government and is capped at \$250,000. The real problem will be to determine whether the structural damage was caused by "flooding" or by "wind" or by the "storm surge." In my opinion, the insurance companies should pay all legitimate claims and not try to find ways to avoid paying for covered losses. I say give the companies a fair chance to do the right thing but don't let them refuse to pay valid claims in full. The Insurance Commissioners in Alabama, Mississippi, Louisiana, Texas, and Florida must get actively involved to make sure the policyholders in their states are protected. When putting the final parts of this report together Rita had hit shore and early reports were coming in. Therefore, I am not aware of the full extent of the damage from that storm. I pray it wasn't as bad as forecast. Early reports indicate that appears to have been the case.

NURSING HOME OWNERS CHARGED IN STORM DEATHS

Because there were so many tragic stories coming out of New Orleans, it's hard to pinpoint one as the worst. It actually is very hard to get a handle on how bad things really were in the days after the storm hit. But, one of the

saddest stories concerned the tragic deaths of residents at a New Orleans nursing home. The owners of St. Rita's, a nursing home where 34 elderly patients drowned, were arrested and charged with homicide. Their deaths - it would appear - could have been avoided by an early evacuation of the facility. It is difficult to understand why the owners elected not to do this. State authorities say the death toll would have been much lower if the owners of the St. Rita's had heeded warnings to evacuate their patients as Katrina came ashore on August 29th. Louisiana Attorney General Foti said:

The pathetic thing in this case was that they were asked if they wanted to move them and they did not. They were warned repeatedly that this storm was coming. In effect, their inaction resulted in the deaths of these people. They had a duty and a standard of care to people who could not care for themselves. If you or I decided we are going to stay, we do it of our own free will. ... The people at the nursing home don't have that choice. Thirty-four people drowned in a nursing home when it should have been evacuated. I cannot say it any plainer than that.

The Attorney General says that he is going to investigate every death at nursing homes and hospitals that were not from natural causes. Another case will involve the Memorial Medical Center in New Orleans where more than 40 corpses were found. Tenet Healthcare Corp., which owns Memorial Medical Center, claims that no one still alive was left behind when help finally came. Nevertheless, there were four days at the facility where patients were left with poor sanitation, without power, air conditioning and running water, and with temperatures in the building approaching 110 degrees at

the hospital. Again, one has to wonder why patients weren't moved out given there were early warnings of the approaching storm and of its severity.

WE HAD BEST PAY ATTENTION TO THE FEDERAL BUDGET DEFICIT

It appears that politicians from both the Republican and Democratic parties are ready to spend what ever it takes to rebuild New Orleans and other areas ravaged by two hurricanes. Nobody should quarrel with the need for federal assistance, especially in the hardest hit areas. While the funding is necessary and commendable, there is still a need for controls over the spending. After Katrina, Congress rushed the Bush Administration's request to boost emergency storm-related spending to \$62 billion though both houses. This amount, while just a drop in the bucket, will add to an already alarming budget deficit. Now we have Rita to deal with. Between supplemental spending for the hurricane's aftermath and Iraq, it has been predicted that the U.S. budget deficit for fiscal year 2006 (beginning October 1st) will top \$500 billion. I suspect it will be much higher than anticipated. In any event, the deficit is already completely out of control and will get much worse unless somebody in a leadership role steps up and sets some spending priorities and places real controls over government spending. Even the emergency spending for Katrina and Rita, which is certainly needed, must be controlled to the extent possible. No-bid contracts of \$500 million, with payments made on a cost-plus basis, have the potential for real abuse. This type spending must be watched closely and controlled. We don't need for government to line the pockets of political cronies, and I hope that won't happen.

There will be a bipartisan package of tax breaks for storm victims, charitable

donors, and those hiring or retaining workers from the affected areas. That's good! There will be additional tax breaks to encourage economic redevelopment in the devastated areas - and possibly, aid airlines, farmers, small businesses, and other industries arguably affected by high fuel prices or other storm impact fallout. That is also very good! But, what about the tax cuts Republicans were planning before the storms hit? Those cuts are designed to benefit the "ultra rich" in our country. The repeal of the estate tax, which is being pushed by Senator Bill Frist, is another big fiscal problem. It too benefits the "super rich," and affects only a small percentage of our population. We don't need tax cuts for the rich and neither do we need to repeal the estate tax. This is especially true, considering the massive spending in Iraq, with no end in sight there, and the emergency spending for Katrina and Rita. Nevertheless, Republican leaders say they intend to use the budget "reconciliation" process to push through \$70 billion in other tax cuts during the current session. Reconciliation, which has been delayed for more than a month, allows tax breaks and budget cuts to slide through without being subject to a Senate filibuster.

I have to wonder how so-called conservatives in the GOP can justify accepting a budget deficit of record proportions. When will the Washington politicians get serious about controlling the deficit? Many experts say that won't happen until financial markets - through higher interest rates or a plunging dollar - force them to take action. I believe it's high time that ordinary folks demand some fiscal accountability in Washington. Maybe that will be a "good thing" that comes out of the misery caused by Katrina and Rita.

Source: *Forbes News Service*

SOME DON'T LIKE THE GOOD WORK DONE BY WHISTLE-BLOWERS

Almost every day we learn that another big corporation has settled a claim based on fraud against the federal government. Many of these claims were uncovered by an employee who reported the wrongdoing. As a result, the False Claims Act has been one of the best tools for fighting corporate fraud. Now there is a strong movement in Congress these days to curb the use of this Act. This federal law has become the government's most formidable weapon against corporate fraud and especially healthcare fraud. But the success of the law, which has recovered almost \$8 billion in fraud cases since 1987, has prompted a serious attack by so-called "conservatives." They want to drastically cut back the use of the Act. If successful, they will take away the authority to pay rewards to whistle-blowers who provide inside information on improper activities by medical groups, drug companies, and other healthcare providers. Grover Norquist, a "prominent conservative" is leading the campaign. Congress is being called on to change the way the Act works. If this happens, it will be a big win for Corporate America. Without the False Claims Act, a great deal of the fraud would go undetected. The motivation by the Norquist group is to limit the exposure of large corporations to legal challenges. The effort has sought to place limits on access to the courts. A classic example was the successful drive to curb class action lawsuits. Another is the continuing push for "tort reform." All of this was done to protect corporate wrongdoers.

Under current law, whistle-blowers can get up to 30% of civil court settlements and judgments awarded to the government. Defenders of the law say that it is working as intended - and that reducing whistle-blower awards would amount to a government surrender on

healthcare fraud, which skims an estimated \$60 billion a year from Medicare and Medicaid. In recent years, the list of companies that have settled fraud cases with the government reads like a drug industry "who's who." Among them are Pfizer/Warner-Lambert, Schering-Plough, AstraZeneca, Bayer Corp., TAP Pharmaceutical Products and Glaxo-SmithKline. Since the mid-1990s, healthcare companies have replaced defense contractors as the main targets of federal fraud prosecutors. The Justice Department is currently investigating about 150 allegations of drug pricing fraud. This should shock the folks in this country who work hard and pay their taxes.

Here's how the False Claims Act works. Under the law a whistle-blower can file a sealed civil suit on behalf of the government in federal court. Government prosecutors review the complaint and decide whether to take over the case. The law has a provision to prevent someone engaged in fraud from being rewarded as a whistle-blower. Another section provides that any reward will go to the whistle-blower who first files a complaint. That keeps an employee from sitting back and letting the fraud "grow" before making a complaint. This pretty well knocks down the "delay theory," put out by critics since a person who lets a scheme build up in hope of a bigger reward could lose it all if another person blows the whistle first. I suspect that pharmaceutical companies are behind the movement to scrap the Act. This view is shared by a number of congressional supporters of the Act. Senator Charles E. Grassley (R-IA) and Representative F. James Sensenbrenner Jr. (R-WI) wrote in a recent letter to lawmakers:

This effort appears to be organized by companies that have themselves been sued ... for defrauding the Medicare and Medicaid programs.

Senator Grassley heads the Senate Finance Committee and Representative Sensenbrenner heads the House Judiciary Committee. Senator Grassley co-authored a 1986 revision of the existing law that strengthened the incentives for whistle-blowers. If anybody believes the pharmaceutical industry isn't backing Mr. Norquist and his group, I suspect that person would be a good prospect to buy "beachfront property in Arizona." With all of the corporate fraud being uncovered in government contracts and in dealings with government programs, I hope and pray that the Norquist movement will fail.

Source: *Los Angeles Times*

WHISTLE-BLOWERS ARE DEALT WITH HARSHLY IN THIS ADMINISTRATION

The Bush Administration is making no secret of its determination to "punish" whistle-blowers and other federal workers who don't follow the "company line" in lock-step. When a federal employee blows the whistle or even questions Administration policy, retaliation against that person generally comes swiftly and with a vengeance. It is hardly something you would expect from a "compassionate" Administration. The *New York Times* had a good article on this subject in its September 1st edition. The article gives several examples of how it doesn't pay to question policy decisions in Washington these days. Those who do are apparently singled out and made an example for others who might see the need to question the Bush Administration's policy.

Source: *New York Times*

NEW REPORT WARNS OF THE RISING THREAT CAUSED BY CLIMATE CHANGES

I sincerely believe that global warming is a serious threat to our environment, our health, and to our economic well-being. It may well be the

cause of all the very powerful storms and other unusual weather happening that we have seen in recent months. Hurricanes Katrina & Rita should be a reminder to the governments at every level and the general public that we in America are at risk from escalating losses from hurricanes and other weather-related events because of climate change resulting from the effects of global warming. An excellent article on this subject appeared in a recent issue of *Time* magazine. You can access it at www.time.com/time/magazine/article/0,9171,1109337,00.html. It is recommended reading.

A new report released recently by the Ceres investor coalition cites a 15-fold increase in insured losses from catastrophic weather events over the past 30 years. The report was written by the following named experts: Dr. Evan Mills, a scientist with the U.S. Department of Energy's Lawrence Berkeley National Laboratory; Richard Roth Jr., former chief property and casualty actuary and assistant commissioner at the California Department of Insurance, who now works with a leading U.S. actuarial consulting firm; and Eugene Lecomte, president emeritus at the Institute for Business and Home Safety in Boston.

While no individual hurricane can be attributed to global warming, the report says that rising global temperatures in the coming decades are likely to cause significant increases in severe weather events such as hurricanes, floods, hailstorms, wildfires, droughts, and heat waves. It doesn't take a report to let us know that we are experiencing more frequent and more powerful weather events throughout the world. In addition to the hurricanes, we're seeing all kinds of extreme weather in the Great Plains in this country, including drought, tornadoes, brushfires, and severe hailstorms. Our government needs to wake up to the threats of global warming before it's too late. We

can't afford to let the bosses at the giant oil companies dictate policy at the White House on matters dealing with this critical issue.

Source: *The Insurance Journal*

DRUG COMPANIES TRY TO CHANGE THEIR BAD IMAGE

Over the past several months, it has become quite evident that the pharmaceutical industry is trying hard to change its public image. Currently, there is a strong distrust of drug companies by ordinary Americans. In my opinion, this distrust has been "earned" by the drug companies and will be hard to shake. In recent opinion polls the drug industry ranked among the least trusted industries in the country. A *Wall Street Journal/NBC News* poll conducted in January found that only 3% of people polled thought that drug companies were working for the public good. Significantly, it showed that 76% thought the companies were mostly interested in making a profit. I wouldn't be surprised if the numbers weren't much worse for the industry at present.

I predict that the drug companies will work extra hard in the coming weeks to revamp their image. It appears that expanded access to low-cost drugs for the poor will be one of the methods used. Over the past year, the industry's trade association set up the Partnership for Prescription Assistance, which includes a website and hotline staffed by 450 operators to help consumers enroll in programs that give discounted drugs to the poor and uninsured. The companies spent millions advertising the partnership. The industry's trade association, the Pharmaceutical Research and Manufacturers of America, hired a new top lobbyist, former Representative Billy Tauzin (R-LA), who had headed the powerful House Committee on Energy and Commerce. Tauzin, who has been a great friend of the drug companies, has

a pretty tough row to hoe. His charge is to win back the public trust. It appears that Tauzin has his work cut out on this project.

The American people are having a difficult time understanding how the drug companies can continue to increase the retail price of their drugs. The industry is making record profits and many of their customers are really hurting financially. The local drug stores are making modest profits so they can't be blamed for the large price increases. Pharmaceutical costs are clearly out of hand. While prescription drugs account for only about 10% of overall health care expenditures, they make up nearly a quarter of consumer's out-of-pocket costs. The drug industry's direct-to-consumer advertising of their drugs makes things even worse. Consumers are paying for that advertising and without question this adds greatly to the price of drugs.

Source: *Wall Street Journal*

HEALTH AGENCY TIGHTENS RULES GOVERNING FEDERAL SCIENTISTS

The National Institutes of Health (NIH) announced rules last month that ban its scientists from consulting for drug companies. Dr. Elias A. Zerhouni, director of the health institutes, at a news conference, stated: "Our research should be based on scientific evidence that is not influenced by any other factors." The rules are being issued after disclosures that scientists at the institutes "leveraged their positions" to land lucrative consulting contracts that seemed to conflict with their official duties or at least overlap with them. Critics were concerned that, as a result, research by the agency could be tainted. An investigation by the agency concluded that 44 of its 1,200 senior scientists appeared to have violated rules governing consulting and that 9 of them might have violated criminal laws.

Under the new rules, the top 200 executives will be required to keep the value of their holdings in any single drug company below \$15,000. Some 6,000 other employees will have to submit their holdings in such companies for review. If the holdings are determined to conflict with official responsibilities, the employees will be asked to sell these shares, officials said. Agency scientists will be allowed to hold fiduciary positions in medical societies as part of their lives outside the agency, a practice that the proposed rules would have banned. While they fall short of the proposed rules, I believe the newly adopted rules are a step in the right direction.

I can't say from personal knowledge that the influence of the pharmaceutical industry on NIH employees has been a real problem. But, I can say - based on what I do know - that there is certainly the appearance of potential problems. Many consumer groups believe the problem is a reality and one that needs a stronger fix. Some of these consumer groups believe the rules don't go far enough. For example, Dr. Sidney M. Wolfe, director of the health research group at Public Citizen, noted that the new rules will let employees deliver medical education lectures paid for by drug companies. Although no strings are supposed to be attached to the financing, Dr. Wolfe pointed out that scientists who disagreed with the positions of the drug industry "were rarely invited to give such lectures." The controversy surrounding consulting work and scientists' relationships with drug companies has caused the health institutes to be looked at in a more critical light. The NIH for years has enjoyed highly favorable press coverage and widespread support on Capitol Hill. Recently, that appears to have changed, at least to some degree. The new rules went into effect on Tuesday, August 30th. Officials will have to divest their

stock portfolios by January 30, 2006.

Source: *New York Times*

CONFERENCE STUDIES POVERTY AND HEALTH WOES

It is a crying shame that poverty remains a most serious problem in many parts of the world. Obviously, it is worse in the underdeveloped regions. But, even in prosperous countries such as the United States, poverty is still a real problem. The magnitude of the problem in our country became most apparent because of what happened when Katrina hit New Orleans. We were made to witness firsthand by way of television news coverage how many people lived in poverty in the City of New Orleans. It was quite a wake-up call for many of us.

Clearly, the poverty issue is one that affects all countries. Scientists and officials from around the world met recently in Bombay to examine the impact that poverty has on health problems in the developing world. They also explored how to increase research into fighting diseases that affect the poor. Poverty, often accompanied by poor sanitation and limited access to drinking water, has created wide gaps between rich and poor in terms of health. Scientists at the conference urged that research facilities be improved in countries like Brazil and India. While poverty is a problem in most every country, it is especially devastating in developing countries.

The participants at the conference were urged to make the development of vaccines their highest priority. Research institutes were asked to take up the development of robust drugs for tuberculosis and waterborne diseases. Vaccines are needed to free the world of malaria, diarrhea, and typhoid in the next decade. Some 700 participants from 90 countries, including Britain, France, Australia, and the United States,

took part in the conference. Global efforts are needed to ensure that more health research benefits the poorest and the neediest in the world. The forum, which was founded in 1998, is supported by the World Bank, the World Health Organization, and the governments of Canada, Denmark, Ireland, Mexico, Norway, Sweden, and Switzerland. Eradicating poverty and hunger in our world must be a top priority for all governments worldwide. By doing its part, the United States will not only be doing the right thing, it will help restore our image as a caring nation. I believe that is critically important in today's world.

Source: *Associated Press*

PEOPLE SPEAK OUT AGAINST REALITY SHOWS

I have never understood why anybody watches reality television. I am hopeful these shows are finally wearing out their welcome with the public. A recent poll reveals some good news in that regard. Four out of five Americans say they think too many reality shows are on the air, according to an AP-TV Guide poll. Few people believe there's much "reality" in reality TV. A total of 82%, according to the poll, said the shows are either "totally made up" or "mostly distorted." The poll also found:

- Half of Americans believe there are too many crime shows on television. The longtime staple of TV dramas has proliferated with the success of franchises such as "CSI: Crime Scene Investigation" and "Law & Order."
- Of all the new shows introduced last year, "CSI: New York" has the most people looking forward to its return. "Desperate Housewives," twice as popular with women as it is with men, came in second.
- People watch more TV as they get

older. The median number of hours that people over 65 say they watch is 14.7 per week. For those 18 to 34 - young people that TV advertisers are desperate to reach - it's nine hours.

In my opinion, we all have an obligation to work toward cleaning up television broadcasting. There is far too much violence, profanity, and sexual content in what our children are exposed to on a daily basis. Reality television is far from the real world or at least I hope and pray that it is. I sincerely believe that a vast majority of Americans would support programming that carries a "G" rating. If you agree, get involved and be a part of the solution to a most serious problem. The first place to start in is your own home - set up some television watching rules and find ways to block out programming not suitable to watch. The next step is to contact the politicians who can do something about the problem. Lastly, join a group that is involved in fighting for your beliefs. I recommend The Parents Television Council for your consideration. You can find out about them at www.parentstv.org. You might also encourage your church to get involved in the fight to clean up television programming.

JUSTICE DEPARTMENT SHOULD FIGHT FOR THE PLEDGE OF ALLEGIANCE

U.S. Attorney General Alberto Gonzales has said that the Justice Department will fight to overturn a federal court ruling that the Pledge of Allegiance can't be recited in public schools because it contains a reference to God. The Attorney General said the pledge is one of several expressions of national identity and patriotism that include a mention of God and that it doesn't violate the Constitution's ban on state-sponsored religion. He said that the high court "has affirmed time and again that such official acknowledgments of

our nation's religious heritage, foundation, and character are constitutional." His statement was released shortly after the ruling by a U.S. District Judge in San Francisco. I support the Attorney General's position on this issue. It is difficult to understand why we can't recognize God in the Pledge of Allegiance. If we don't stand up to those who would take every reference to God out of government, our children and grandchildren will suffer for our timidity in years to come. If there has ever been a time not to turn our backs on God, it is now!

BORG ELECTED TO HEAD INTERNATIONAL SECURITIES ORGANIZATION

Joe Borg, Director of the Alabama Securities Commission, has been elected to the position of President-elect for the North American Securities Administrators Association (NASAA) and will serve as President beginning September 2006. This is the second time for Joe to hold this prestigious position. Only one person has ever served two terms as president in the 87 year history of NASAA. Organized in 1919, the North American Securities Administrators Association (NASAA) is the oldest international organization devoted to investor protection. NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. This is an honor both for Joe and for our state. He will do an outstanding job!

FDA COMMISSIONER CRAWFORD RESIGNS

In a surprise move, U.S. Food and Drug Administration Commissioner Lester Crawford resigned suddenly on September 23rd. Dr. Crawford had presided over the regulatory agency for three years. Andrew von Eschenbach, the head of the National Cancer Institute,

was named as his temporary replacement. Dr. Crawford, who until July was only an “acting” commissioner, leaves behind an FDA beset by controversies. In his defense, he inherited an agency that was pretty much an extension of the drug industry. Unfortunately, Dr. Crawford failed to really provide the strong leadership required to right things at the FDA.

U.S. Sen. Charles Grassley (R-IA), who has been highly critical of the FDA, issued a statement calling for new leadership that would “reinvigorate the agency.” Senator Grassley wrote:

In recent years, the FDA has demonstrated a too-cozy relationship with the pharmaceutical industry and an attitude of shielding rather than disclosing information. The opportunity to name a new commissioner is a chance to take the agency in a necessary new direction. Now is the time to reform the FDA's culture and reassert that the agency's top priority is what's good for John Q. Public when it comes to reviewing drugs in the marketplace and making new miracle medicines available.

Hopefully, a strong person with ability, experience and a sense of fairness will be selected as the permanent head of the FDA. It is very important – critically so – that the person selected has no ties to the powerful pharmaceutical industry. Perhaps, Dr. David Graham would be a good choice.

V. THE CORPORATE WORLD

U.S. CHAMBER OF COMMERCE LIKES THE COURTS – SOMETIMES

The U.S. Chamber of Commerce,

which has repeatedly taken the position that there are too many lawsuits, seems to believe a lawsuit is just fine when it accomplishes their own objectives. Thomas Donohue, the U.S. Chamber of Commerce President, has been a local critic of all lawsuits. But, he is now singing a different tune. Donohue, in a stern warning, told European union policy makers if they adopt a version of proposed new chemical industry regulations, which are now moving through the European Parliament, they would be sued. Donohue said, “We’re going to sue the hell out of them on some of this stuff.”

The chemicals legislation, being considered by the European Parliament, is what has Donohue’s “dander” up. He made his lawsuit threat against European environmental groups and policy makers. The World Wildlife Fund, which is an influential environmental group, says the current proposal before the European union is about improving the health of the average citizen. The new regulations would require the chemical industry to conduct more rigorous testing of chemical substances to ensure they are not harming human, animal or plant life. As you probably all have read, many studies and reports have recently shown test results where traces of chemicals are beginning to show up in people’s blood in many parts of the world. I guess the moral of this story is that the U.S. Chamber of Commerce is **opposed** to lawsuits, unless it is its **own** lawsuit designed to further its own goals. The truth of the matter is that the Chamber doesn’t believe ordinary folks should have access to the judicial system when Corporate America is the wrongdoer.

Source: *Wall Street Journal*

CORPORATE FRAUD MUST BE PROSECUTED

Anybody who has watched the television news lately knows that corporate

crime is a huge problem in the United States. For years the problem was largely ignored by government at every level and that was most unfortunate. Those in government have finally started to pay attention and to take action to prosecute the wrongdoers. We must continue to prosecute corporate criminals in this country. In my opinion, those in the corporate world who violate the law must be dealt with just like any other common thief. The penalties should include jail time for the individuals in addition to large fines for the companies. That’s the only way to put a stop to corporate crime. The sentences handed down last month to Kozlowski and Swartz as a result of their convictions in the Tyco debacle will do more to get the attention of other top executives who might be tempted to steal from their companies and stockholders. It will also deter corporate bosses who believe “cheating” the government isn’t really a crime.

KPMG AND THE FEDERAL GOVERNMENT REACH A SETTLEMENT

KPMG and federal prosecutors have reached a \$456 million settlement in the government’s case against the accounting company. KPMG will now be able to avoid a criminal indictment over its sales of tax shelters it now admits were fraudulent. But, KPMG still faces a number of civil lawsuits filed by former tax shelter clients. There are also class action suits by investors over accounting irregularities at former audit clients, such as Xerox Corp. Other government probes are continuing, including criminal and civil investigations by the Mississippi Attorney General’s office related to a state tax shelter KPMG scan involving WorldCom Inc. during the 1990s. You will recall that WorldCom has settled with the State of Mississippi for avoiding the payment of state taxes.

The most recent settlement agreement was submitted to the federal court in New York for approval. With KPMG's settlement now finalized, the first wave of federal indictments against former KPMG partners followed. Additional indictments are expected to come down in the coming months. The government filed a statement of facts that includes a single charge of conspiracy to commit tax fraud by KPMG. The company won't be criminally prosecuted on the charge, so long as the firm complies with the terms of its agreement with the government, which will remain in force through December 31, 2006. The government won't charge KPMG with obstruction of justice.

Under terms of the so-called "deferred-prosecution agreement," KPMG will pay the \$456 million in penalties - equal to 11% of the firm's fiscal 2004 revenue - in installments over the next 16 months and continue to cooperate with the government's tax-shelter probes. The penalties come to about \$300,000 per partner, based on the 1,524 partners KPMG reported last year. Apparently, the Justice Department did a deferred-prosecution agreement so the company wouldn't go out of business. KPMG's admissions will help prosecutors at any future trials of former KPMG partners, as well as bankers, lawyers, and outside advisers. It is possible that even some former KPMG clients who participated in the shelters could be targets. KPMG sold the shelters, which generated billions of dollars in false tax losses, to hundreds of wealthy Americans from 1996 to 2002. KPMG admitted the strategy it sold under the name "Bond Linked Issue Premium Structure," or Blips, was a fraudulent tax shelter. KPMG also admitted to fraudulent conduct in connection with two other shelters, known by the names "Flip" and "Opis." It should be noted, however, that KPMG didn't admit those two shelters were fraudulent.

Some of the major banks that provided financing for the shelter transactions: Deutsche Bank AG, HVB Group, and UBS AG. HVB is cooperating with investigators.

Source: *Wall Street Journal*

RANCHO MIRAGE HOSPITAL PAYS \$8 MILLION TO SETTLE FRAUD SUIT

Eisenhower Medical Center, which is located in the desert east of Los Angeles, has paid \$8 million to settle allegations that it defrauded Medicare during the 1990s. The hospital engaged in an accounting scheme in which costs were manipulated to gain a higher reimbursement from Medicare. The U.S. Attorney's office in Los Angeles handled this matter and announced the settlement. The settlement amount is about double what the hospital allegedly overcharged the government between 1990 and 1998, prosecutors reported.

Overbilling allegations were first raised in a 1998 whistleblower lawsuit filed by a former employee of Healthcare Financial Advisors (HFA), a consulting firm that Eisenhower used to prepare Medicare reimbursement reports. The whistleblower alleged HFA helped Eisenhower and other hospitals prepare two cost reports - a padded one submitted to Medicare and a second, more conservative one, for in-house use. The allegedly fraudulent cost reports sought reimbursement for things that Medicare will not reimburse, such as the hospital's adult day-care center, a gift store, and off-site clinics. The whistleblower in the case has led to four hospitals paying more than \$34 million in settlements, including facilities in Bakersfield, New Mexico, and Texas.

A BAD COURT RULING FOR INVESTORS

The U.S. Court of Appeals for the Eleventh Circuit in Atlanta has ruled that the Securities and Exchange Commission can no longer use broad injunctive

orders. That has been a legal tool used by the SEC to deter securities law violations. As a result, the agency will likely have to revamp its use of civil injunctions. The SEC regularly seeks broad injunctive orders in its enforcement actions as a way to deter individuals or entities from engaging in future misconduct. The orders typically bar a defendant from violating certain statutes or regulations rather than prohibiting a specific act, such as insider trading or accounting fraud. Under this ruling, the broad injunctive orders the SEC commonly seeks are now "unenforceable." The court said an injunction must be written so that a defendant knows exactly what conduct the court has prohibited.

This issue has been before the federal appellate courts before this recent ruling. At least one other circuit court has said in the past that injunctive orders citing a statute are specific enough. The ruling may prompt the SEC to be more conservative in how it words injunctive orders, particularly in the Eleventh Circuit, which covers my home state of Alabama, as well as Florida and Georgia.

In the past, the SEC has generally sought broader injunctions in an effort to deter repeat offenders. This was to deal with those companies that would change their scams to avoid detection. In addition to the use of injunctions, the SEC has levied large fines as a deterrent against future misconduct. But the SEC still seeks injunctions in most cases. If an injunction is violated, the SEC can file civil contempt charges, which can result in fines. In some cases criminal charges can be a part of the process. Injunctions also create a record that authorities can use to ask a court for more severe penalties. Many of the large companies can afford to pay larger fines because of the tremendous amounts brought in by the scams. The court said broad injunctions can strip a defendant of due process rights,

because a contempt proceeding requires a lower burden of proof than would a new lawsuit the SEC might file on the fresh misconduct. I don't believe this court ruling will help consumers who are victimized by some in Corporate America.

Source: *Wall Street Journal*

\$137.5 MILLION PAID IN SETTLEMENT OF KICKBACK SUITS

Caremark RX, Inc., the giant pharmacy benefits manager (PBM), and the Justice Department have agreed to a \$137.5 million settlement of lawsuits originally filed by whistle-blowers claiming a predecessor company received kickbacks affecting several federal health-care programs. Nashville, Tennessee-based Caremark is one of the larger PBMs that will benefit greatly by the changes in the new Medicare law. The settlement was approved by a Philadelphia federal court on September 16th. Caremark is the second largest PBM in the United States. Its AdvancePCS subsidiary provided pharmacy services to health plans covering federal employees and senior citizens who participated in Medicare Plus Choice programs.

The lawsuits were filed in 2002 under the whistle-blower provisions of the Federal False Claims Act by three former executives of AdvancePCS Inc., a Texas-based pharmacy benefits manager that Caremark acquired in March 2004. The Justice Department joined the lawsuits after they were filed. The lawsuits contended AdvancePCS took kickbacks from drug makers to give their products favorable treatment under contracts with the Federal Employees Health Benefit Program and other government programs. Not dismissed by the settlement are whistle-blower claims on behalf of California, Delaware, District of Columbia, Florida, Illinois, Louisiana, Massachusetts, Tennessee, Texas, and Virginia.

Source: *Associated Press*

WHISTLE-BLOWERS AWARDED DAMAGES FOR RAISING SAFETY CONCERNS

It has been pointed out that employees who report corporate wrongdoing are often singled out, retaliated against, and made examples by their bosses. Eight years after Hanford pipefitters blew the whistle on a hazardous-waste cleanup contractor over safety problems, the workers were awarded more than \$4.7 million in damages. A jury agreed that the 11 workers were laid off and harassed for their actions. The jury awarded back wages and, in most cases, damages for emotional distress. The individual awards ranged from \$89,700 to \$553,700. This verdict was intended to send a message that workers can speak out about safety violations without having to be fearful of bad things happening to them as a result.

Fluor Federal Services was sued by an employee in state court for what he claimed was retaliation for raising safety concerns while working on a project with massive tanks containing radioactive waste buried at the Hanford Nuclear Reservation. After refusing to use valves the employee thought were weak, he and four other workers in his crew were laid off. The U.S. Energy Department is now responsible for the cleanup of Hanford, contaminated after decades of production of plutonium and other radioactive material used for bomb making. The federal agency - Fluor's employer - has a policy of paying for its contractors' legal costs in whistle-blower cases. That should change. Taxpayers shouldn't have to reimburse corporations that cheat or commit wrongs and have to pay for what they did. A whistle-blower group filed the lawsuit on behalf of the workers.

Source: *Seattle Post-Intelligencer*

GLAXOSMITHKLINE PAYS \$150 MILLION IN SETTLEMENT

GlaxoSmithKline PLC has agreed to pay more than \$150 million to settle fraud allegations over the pricing and marketing of two anti-nausea drugs, according to the Justice Department. The pharmaceutical maker engaged in a scheme to inflate the price of Zofran and Kytril for the federal Medicare and Medicaid programs, which reimburse health care providers based on the manufacturers' prices, the government said. The drugs are used mainly to counter nausea brought on by chemotherapy and radiation. But the company charged health care providers less for the drugs, knowing that the providers would get to pocket the difference, according to the Justice Department.

This is the latest in a series of fraud settlements with major drug manufacturers that reap millions of dollars from the giant federal programs. An investigation was opened by the government into the drugs' pricing after Ven-A-Care of the Florida Keys, Inc., a small home-infusion company, filed a whistleblower lawsuit that first raised the allegations. This is just another case of where a large corporation commits fraud and cheats the government out of tremendous sums of money. One has to wonder, how many cheat and never get caught?

Source: *Associated Press*

JUDGE REFUSES TO OVERTURN CONVICTIONS IN McWANE DUMPING CASE

A federal judge has refused to overturn the convictions against McWane Inc. and three of its executives stemming from illegal dumping into Avondale Creek in Jefferson County. You will recall, as previously reported, that a jury convicted the Birmingham-based pipe maker and three executives in June. These defendants had asked U.S. District Judge Robert Propst to either order them acquitted or to grant a new trial.

The judge refused their request. McWane and defendants James Delk and Michael Devine were convicted of conspiring to violate the Clean Water Act and discharging pollutants into Avondale Creek. McWane and Charles Robinson were found guilty of filing a false report with the Environmental Protection Agency. The defendants are scheduled for sentencing on December 5th. I hope the sentences will be stiff enough to discourage others who may be tempted to violate the laws designed to protect our environment.

Source: Associated Press

TWO FORMER TYCO EXECS SENTENCED

The two former Tyco International executives convicted of stealing millions of dollars from their company have been sentenced to prison. Tyco's former CEO Dennis Kozlowski, and Mark Swartz, the company's former finance chief, were convicted on grand larceny, securities fraud, and other charges in June. The two men now face up to 25 years in prison. They were sentenced to eight-and-a-third to 25 years for their criminal acts. Kozlowski and Swartz were each convicted after a four-month trial on 22 counts of grand larceny, falsifying business records, securities fraud, and conspiracy.

The two convicted felons were accused of illegally taking some \$600 million from the company by giving themselves more than \$150 million in illegal bonuses, forgiving loans to themselves, and manipulating the company's stock price by lying about Tyco's finances. The jury returned 22 guilty verdicts out of 23 counts for each defendant. Each was acquitted of a single count of falsifying records about company loans for homes in Boca Raton, Florida. Tyco, which has about 250,000 employees and \$40 billion in annual revenue, makes electronics and medical supplies and owns the ADT

home security business. Nominally based in Bermuda, in order to avoid paying U.S. taxes, it's the company's headquarters are in West Windsor, New Jersey.

Source: Associated Press

VI. CAMPAIGN FINANCE REFORM

SLUSH FUND LEGISLATION IN THE U.S. SENATE

Two powerful Republican Senators are trying to help their buddies stay in the Senate. Using an unrelated transportation bill, Senate Majority leader Bill Frist (R-TN) and Senate Majority Whip Mitch McConnell (R-KY) quietly inserted a provision that would overturn a post-Watergate reform designed to prevent an incumbent from transferring large sums of money to his or her own re-election campaign from a slush fund the incumbent operates. The slush fund is cleverly called a "Leadership PAC," which contains money politicians use to influence their fellow lawmakers. If this measure passes, incumbent senators will be able to transfer their Leadership PAC money to a national political party - which can then spend the money to re-elect that incumbent. If that sounds "bad," it's because it is!

Unfortunately, it gets even worse. Using this loophole, incumbents will be able to raise four times as much money from corporations and eight times as much money from the wealthy as they can now. And their challengers in elections will not have the ability to do this. It has been labeled "an Incumbent Protection Act!" An analysis by Public Citizen shows that incumbent officeholders stand to dramatically boost their campaign fundraising prowess at the expense of challengers. By eliminating limits on contributions that "Leadership

PACs" can make to political parties, officeholders could take advantage of two separate campaign fundraising committees rather than the single campaign committee available to challengers.

Public Citizen's analysis shows that incumbent senators, who run for re-election every six years, could use unlimited transfers from Leadership PACs to boost their campaign fundraising by at least 20% - and probably much more. The 57 Leadership PACs run by sitting senators raised a total of \$80 million during the 2000, 2002, and 2004 elections. They spent a total of \$404.1 million on their races during that period. If the Frist-McConnell proposal had been law during that period, that \$80 million could have been transferred to the political parties and spent to support these incumbents or to oppose their challengers. To see the analysis of Leadership PAC funds for the Senate during the 2000 to 2004 election cycles, go to <http://www.citizen.org/documents/PublicLeadershipPAC.pdf>.

Leadership PACs, which can be created by any member of Congress, are a special - and legally questionable - class of political committees. They are not codified in federal law. Nevertheless, federal elections officials have allowed them as a means to help pay for duties associated with serving in Congress, such as travel for speechmaking, and to make limited contributions to other candidates and party committees, in the amount of \$5,000 per election and \$15,000 per year respectively. These funds are not supposed to be used to promote the candidacy of the officeholder who operates the Leadership PAC. But political parties are free to spend funds on behalf of the incumbent who transfers the money to them.

The Frist-McConnell proposal would allow wealthy special interests to have even more influence over lawmakers. Currently, candidates may receive up to

\$4,200 per election cycle (primary and general) from individual contributors to pay for their campaigns. Individuals and PACs may also give an additional \$5,000 per year to an officeholder's Leadership PAC. Under Frist-McConnell, individuals effectively would be able to contribute \$34,200 to support a lawmaker's campaign, or eight times more to support their candidacy than they can now - the \$4,200 that can be directly contributed to a senator's campaign and another \$30,000 (\$5,000 per year during a senator's six-year term) to his Leadership PAC. Similarly, corporate and union PACs effectively would be able to increase their giving to an incumbent fourfold - from the current \$10,000 per election cycle to \$40,000.

Frist, the second most prolific Leadership PAC fundraiser in the Senate, raised \$6.1 million over the past six years for his Leadership PAC and spent \$7.5 million on his re-election. Having the ability to transfer the \$6.1 million in his Leadership PAC would have amounted to an 80% increase in the funds he could have raised to support his candidacy. Similarly, McConnell's Leadership PAC raised \$2 million, and he spent \$5.7 million to get re-elected. His Leadership PAC money could have increased his campaign funds by 34%. Senators John McCain (R-AZ) and Russ Feingold (D-WI) introduced an amendment to strip the Frist-McConnell proposal from the transportation appropriations bill. At press time, the bill and this amendment were still pending. Hopefully, there will be good news to report on this in the next issue.

Source: Public Citizen

VII. CONGRESSIONAL UPDATE

THE ALABAMA LEAGUE OF ENVIRONMENTAL ACTION VOTERS SPEAKS OUT ON ASBESTOS

The Alabama League of Environmental Action Voters (AlaLEAVs) works hard to protect the environment in our state. As a part of its mission, AlaLEAVs also works for a safer workplace for Alabama workers. Obviously, asbestos has been a "killer" in the workplace, and thousands of workers and their families have suffered as a result. Recently, Jeff Martin, Executive Director of AlaLEAVs, issued the following statement relating to the asbestos problem.

Every year, 10,000 people in the U.S. lose their battle against mesothelioma, an always-deadly form of lung cancer caused solely by exposure to asbestos. Because of its lengthy latency period, it can take decades to become ill from asbestos, which is why those of us who live and work in Alabama still should be concerned about the fact there are asbestos contaminated sites right here, right now.

Both of Alabama's U.S. Senators have expressed reservations about Senate Bill 852, the Asbestos Trust Fund Bill. Senator Jeff Sessions aired his concerns about the bill even as he made a last-minute decision to help get it passed out of the Senate Judiciary committee for further negotiations. For the sake of the many Alabama families who may develop this deadly disease and need the medical and legal assistance they deserve, we hope our two senators will take an even closer look at this legislation before it comes to a floor vote in September.

The bill as currently written would undermine asbestos victims' legal rights through the establishment of a federal trust fund that will take victims' claims from the court system and force them into an untested, under-funded and over-burdened federal bureaucracy. Will this bill fairly and honorably compensate asbestos victims for their wage losses, medical costs, pain and suffering, and eventually loss of life? I think not. For many, this is a blatant corporate, financial and political fight. The bill is primarily intended to immunize corporations, including General Electric, Halliburton and Honeywell. Even more disturbing is that under the bill, victims living in Libby, Montana are guaranteed at least \$400,000 in compensation. Where is the guarantee for the working men and women of Alabama who may have been exposed to asbestos while simply trying to make an honest living?

The W.R. Grace Company located in Libby, Montana shipped 1,122 tons of asbestos to two sites in the Birmingham area knowing of its inevitably dangerous effects. Isn't asbestos in Alabama just as deadly as asbestos in Montana? Why should the home state of this one company be guaranteed benefits when Alabama is guaranteed nothing?

Although proponents of the legislation frequently refer to the "70 companies" that have gone bankrupt, in reality, the lion's share of these "bankruptcies" have been little more than reshuffling a company's debt on paper, with little or no effect on shareholder value or jobs lost. In fact, the corporate crisis that threatens to loom as a result of this legislation

is the unfair burden that would be placed on small and medium sized “mom and pop” businesses who would be forced into paying into the asbestos trust fund at a higher rate than their liabilities would suggest is equitable, and they would forfeit their insurance as part of this plan - a move that could cause some to lose their family business.

An increasingly disturbing development in this proposed legislation concerns the danger of naturally occurring asbestos sites. According to a recent study conducted by the U.S. Geological Survey, naturally occurring asbestos has been located in 19 sites so far in Alabama, with the possibility of many more existing sites all over the state. A recent study conducted by scientists at the University of California-Davis show the closer you live to asbestos, the higher your chances of developing mesothelioma. These asbestos mineral deposits can be disturbed through simple, everyday outdoor activities such as gardening, horseback riding, ball playing and construction.

It is clear through this study that something must be done to make the public more aware of the hazards of naturally occurring asbestos. However, the only current activity that is working to “protect” anyone from the hazards of asbestos is an effort led by some members of Congress to protect the very companies who have knowingly exposed millions of people to this mineral.

And one more little fact, Alabama’s asbestos mortality rate places nineteenth in the nation and both Jefferson and Mobile Counties rank among the top 100

counties in the United States for asbestos-related deaths.

Many states already have enacted their own asbestos legislation. The current federal legislation being proposed would preempt local and state laws created by local people to protect them from asbestos-related illness. Is this the right approach to a problem that in Alabama, we don’t yet even know its severity?

We urge both Senators Richard Shelby and Jeff Sessions to take a harder look at this legislation and oppose it in its current form. The working families of Alabama deserve at least the same guarantees and protections as those in Montana. And we certainly don’t need the federal government telling us how to compensate families in need.

Source: AlaLEAVs News Release

NEW LAW REDUCES AUTO RENTAL LIABILITY

On the national level, amendments can be added to bills in Congress that have no connection to the original bill. As a result, things can be “slipped through” on occasion. Hidden in the recently passed \$287 billion federal transportation funding act is a “tort reform” provision eliminating vicarious liability laws applying to auto rental and leasing companies in 16 states and the District of Columbia. The provision, opposed by the National Conference of State Legislators and consumer groups, prohibits states from holding owners of motor vehicle rental and leasing companies liable for accidents involving their vehicles.

States whose vicarious liability statutes are preempted are Arizona, Connecticut, Delaware, Iowa, Maine, Nevada, New York, California, Florida, Idaho, Michigan, Minnesota, Oklahoma,

Pennsylvania, Wisconsin, and Rhode Island. Under the laws of those states, owners of leasing or rental companies could be held liable for injuries caused by a negligent driver if the driver did not have sufficient insurance coverage. A culmination of a 10-year lobbying effort by various transportation groups finally paid off for the industry. In 1996, a similar provision as part of a regular products liability bill, passed the House and Senate, but President Clinton vetoed the measure. This tort reform provision would never have passed had it been presented on its merits and not attached to the transportation bill.

The auto rental and leasing business is highly profitable. These rental car companies should have liability when they rent their cars to bad drivers who cause accidents. These companies are making big money without any real concern for who they put behind the wheel of their cars. Safety on our highways suffers as a result. The law becomes effective immediately. Even claims involving injuries that occurred before the effective date are covered. By getting this provision erected, the industry will save billions of dollars. Instead of shielding this industry, we should take steps to make sure that bad drivers aren’t put on the road with no insurance and with no way of holding the companies liable.

VIII. PRODUCT LIABILITY UPDATE

NEW ROOF CRUSH STANDARD WOULD BE A BLOW TO SAFETY

On August 19, 2005, the National Highway Traffic Safety Administration (NHTSA) published a notice of proposed rulemaking to revamp the Federal Motor Vehicle Safety Standard No. 216, which regulates roof crush. The original roof crush standard was

adopted in the early 1970s. That standard has received much criticism because the test used to determine whether a vehicle will pass the test is nothing close to a real-world test. The lack of crashworthiness involving vehicle roofs is evident by the fact that 20% of all vehicle fatalities are the result of rollovers, yet only 3% to 4% of all accidents involve rollovers. These numbers show the danger of roof collapse.

The current roof crush standard requires that the manufacturer use a ram with a platform placed at an angle on the vehicle's roof to test for compliance with the standard. The roof is only required to withstand pressure equal to 1.5 times the vehicle's weight, allowing five inches of crush. Of course, using a ram is not representative of a real-world dynamic rollover. NHTSA, in its new proposed rule, would raise the standard to 2.5 times the vehicle's weight. Unfortunately, the new rule keeps the same test method and does not require a dynamic or dolly rollover to test the vehicle's roof strength in a real-world type crash. Even more frightening, NHTSA is proposing that if the manufacturer complies with this rule, it will preempt all state laws and court decisions. In other words, if a vehicle meets that standard, which all will likely meet, it takes away the victim's right to sue the manufacturer for a defective roof.

Federal rules normally are intended to be minimum standards. Adding the preemption language basically allows the manufacturer to use the federal standard as both a minimum and maximum standard. Under the regulation there is no incentive for the manufacturer to design its vehicle above the standard or to design it for protection of the occupants. Unfortunately, most manufacturers will likely design the vehicle roof to meet the standard as opposed to designing the vehicle roof to protect the occupant in the event of a rollover crash. The standard, as proposed, will take away the manufacturer's incentive to

design out a known danger. The new standard is too weak to have much effect, according to a number of experts in the field.

Over the past two decades motorists have suffered catastrophic head and neck injuries in rollover accidents. The current standard does not have the preemptive language, and a small percentage of consumers who have suffered severe injury or death of a loved one have looked to the civil justice system to find reparation for the injuries sustained. According to Sean Kane, president of Safety Research and Strategies, Inc., "what's happening with the new rule is that the standard will undermine the state of art in design. By including the preemption language, they are putting a ceiling on safety and that takes away the incentive for innovative design."

With the increasing popularity of SUVs, the danger from rollover has increased dramatically. SUVs generally have a higher center of gravity and a narrower track width, which makes them more prone to rollover. There is no minimum agency standard for rollover resistance and there never has been. The NHTSA has developed a voluntary star rating system based upon a stability factor. The SUVs will continue to roll over and their roofs will continue to crush. The new rule, if adopted with the preemptive language, will leave consumers with no recourse or cause of action under state tort law. Injuries occurring from roof crush are some of the most catastrophic. Persons are often rendered quadriplegic or brain damaged from the collapse of a roof.

The new rule changes the requirements for the roof crush from a movement of not more than five inches to a rule requiring that the roof not have head contact with a 50th percentile seated dummy. The coverage of the standard applies to light trucks weighing up to 10,000 pounds. The NHTSA rejected suggested changes that

required testing of roof strength with a dynamic test, such as an inverted drop test; testing the roof strength without the windshield in place; and testing the seatbelt system to judge its effectiveness in keeping an occupant in the seat during a rollover, all of which are reasonable suggestions. While requiring an increase in roof strength is a good thing, the rule does not go far enough, and the preemption clause of the new rule will assure devastating consequences for some unfortunate people. This proposed rule appears to be another effort by the Bush Administration and its Big Business "base" to restrict access by consumers to the courts for the benefit of Corporate America and to the detriment of public safety.

FORD RECALL INVOLVES MILLIONS OF VEHICLES

The Ford Motor Company has recalled close to four million pickup trucks and sport utility vehicles. The automaker says that a leak-prone cruise control system could ignite fires. The recall, the fifth-largest by an automaker in United States history, involves some of Ford's most popular trucks and SUVs, including the nation's top-selling vehicle, the F-150 pickup. Ford Expeditions, Broncos and Lincoln Navigators are also included in the recall, which affects many models from as far back as 1994 up to 2002. Owners of affected vehicles were to be notified by mail immediately. Toyota recalled nearly a million older pickups and SUVs, citing a malfunctioning steering mechanism. At Ford, the system in question is the focus of a continuing federal safety inquiry and numerous lawsuits now pending against Ford. In most cases, victims assert that fires in their Ford vehicles caused property damage. But, there are lawsuits where it is alleged that the fires caused deaths.

For the first time, Ford has acknowledged that the cruise control system was malfunctioning and in some cases causing fires. As expected, however, the company says it had “found no sign that the fires were responsible for any deaths.” The company said “Ford has no evidence indicating that any of these actually relate to the switch.” This was in a letter to the National Highway Traffic Safety Administration (NHTSA). Ford said it believed that brake fluid may leak from the switch that deactivates the cruise control once the driver steps on the brake pedal. According to Ford, that fluid can drip down to the cruise control’s electrical component, cause corrosion, and ignite a fire.

To fix the problem, Ford will install a harness between the deactivation switch and the cruise control device that is intended to act as a circuit breaker. NHTSA has an ongoing investigation into the problem. Ford has installed similar cruise control deactivation switches on 12.2 million vehicles that have not been recalled. Thus far there have been no reported fires for those models. While safety advocates have urged Ford to recall all 16 million vehicles in which the switches were installed, the company limited its recall to about 3.8 million SUVs and pickups. Ford says the distance between the deactivation switch and the cruise control mechanism makes the recalled switches more prone to overheating than the other 12.2 million. In the recalled switches, the two parts are closer together, meaning that leaking brake fluid has a shorter span to travel before it reaches the system’s electrical component; that makes it less likely the brake fluid will evaporate before it reaches the electrical parts, according to the company.

Auto safety watchdog groups were not too sure about Ford’s recall announcement. Some questioned whether it included enough vehicles.

Clarence M. Ditlow, executive director of the Center for Auto Safety in Washington, stated: “Ford did the right thing. But the big issue here is whether Ford has gone far enough.” Coincidentally, on the same day of the recall Ralph Nader, a long time consumer advocate, wrote a letter to Ford’s chairman and chief executive, William Clay Ford Jr. Nader pressed Ford to recall all vehicles with switches similar to the ones known to be failing. In his letter, Nader wrote: “How much longer will you allow this \$20 part to imperil the public?”

The recall is the latest turn in the inquiry into the cruise control system, which is now suspected in almost 1,200 vehicle fires, according to the NHTSA. Late last year, the agency opened an investigation into 2001 models of the F-150, Expedition, and Navigator after reports of vehicle fires. Once Ford agreed to voluntarily recall the vehicles, which totaled about 738,000, NHTSA tabled its inquiry. But, Ford owners continued to report fires. In March NHTSA widened its investigation. Ford, after conducting its own internal investigation, said it “did not have any evidence that the switches were causing the fires.” Now the company is saying the switches were actually contributing to the fires.

Sources: *New York Times and Associated Press*

FORD SUED IN MISSOURI

A Missouri man has sued Ford Motor Co., claiming that known defects in a Ford Expedition SUV led to the death of his wife and daughter. It is claimed that Ford knew about defects in both the door latches and seat belts that led to the deaths. The complaint, filed in a Missouri state court, alleges that Ford took steps to conceal this information from the public. The two women were killed on November 22, 2003, when they were traveling from Missouri to Colorado in a 1998 Ford Expedition. According to the

complaint, the Expedition suddenly lost stability and control, resulting in uncontrollable steering and multiple rollovers. The women died after being thrown from the car because of the defective stability, safety restraints, and door latch mechanisms. Both women were wearing seat belts.

GOVERNMENT PROBING NISSAN MURANO FUEL TANKS

The government has opened an investigation into whether the fuel tank in the Nissan Murano sport utility vehicle is susceptible to punctures from road debris during normal driving. The National Highway Traffic Safety Administration (NHTSA) says that the inquiry involved about 124,000 Muranos from the 2004-2005 model years. About 140,000 of the sport utility vehicles from the 2003-05 model years were recalled in August because of concerns that a broken wire within the alternator could deplete power and lead to a crash. NHTSA said it received four complaints of the fuel tanks being punctured during normal driving conditions, leading to fuel leakage and the need for a replacement tank. The agency will conduct a preliminary investigation to determine the extent of the problem. According to Nissan, the automaker hasn’t received a significant number of complaints and is working with NHTSA to investigate the issue. To my knowledge, there have been no reports of injuries or fatalities linked to the potential defect.

SEVERAL MINIVANS FARE POORLY IN SAFETY TESTS

Head restraints in some minivans inadequately protect people against neck injuries in rear-end crashes, according to a report by the insurance industry. Earning poor overall ratings were seven models subjected to a simulated

crash: versions of the 2004-2006 model years of the Dodge Grand Caravan and its corporate twin, the Chrysler Town & Country; a version of the 2005-2006 Toyota Sienna; and four General Motors Corp. minivans from the 2005-2006 model years - the Chevrolet Uplander, Buick Terraza, Pontiac Montana SV6, and Saturn Relay.

The 2004-2006 Ford Freestar and Mercury Monterey received the highest rating, or good, from the Insurance Institute for Highway Safety. An edition of the Dodge Grand Caravan and Chrysler Town & Country with adjustable lumbar and head restraints got the second-highest rating, or acceptable. The 2005-06 Honda Odyssey received the second-lowest, or marginal. Adrian Lund, the Institute's chief operating officer, observed:

It's disappointing that so many minivan seats are rated poor for rear impact protection. Drivers of minivans spend a lot of time on urban and suburban roads where rear-end collisions are common in stop-and-go traffic.

The minivans were tested on a crash simulation sled. It replicates the forces in a stationary vehicle that is struck in the rear by a similar vehicle at 20 mph. Vehicles got a higher rating if the head restraint contacted the dummy's head quickly and the forces on the dummy's neck and the acceleration of the torso were low.

The testing also evaluated the height of the restraint and its horizontal distance behind the back of the head of an average-size man. A head restraint should extend at least as high as the top of the ears of the tallest motorist and be placed close to the back of the head so the restraint can support it early in a rear-end crash, the institute said. Models that received poor or marginal scores for the restraint design were given poor overall marks because they could not be positioned to protect many motorists,

according to the institute. Those vehicles included the 2003-2005 Chevrolet Astro; the 2004-2005 Dodge Grand Caravan with fixed head restraints; the 2003-2005 GMC Safari; the 2004-2006 Mazda MPV; the 2004-2006 Nissan Quest; and the 2005-2006 Toyota Sienna models without adjustable lumbar. For obvious reasons, minivans are popular with women drivers. They are used to transport children, groceries and other cargo. The car makers know that many mothers frequently drive minivans. According to reports, women tend to be more vulnerable to whiplash injuries, which account for about 2 million insurance claims annually, and that is most significant.

Source: Associated Press

DOCTORS BLAME TASER STUN GUN FOR FIBRILLATION

A shock from a Taser stun gun caused a teenager in Chicago to go into ventricular fibrillation, a usually fatal heart disturbance, according to a letter published recently in The New England Journal of Medicine. The letter, written by two doctors at Children's Memorial Hospital in Chicago, appears to be the first medically documented case of ventricular fibrillation caused by a Taser gun. As you know, Tasers are pistol-like weapons that fire electrified barbs up to 25 feet, immobilizing people with painful shocks. Taser International, which makes the guns, has said that Tasers cannot cause fibrillation, a condition in which the heart loses the ability to pump blood. If not immediately reversed, fibrillation causes death within minutes. Dr. Wayne H. Franklin, a pediatric electrophysiologist at Children's Memorial and one of the letter's authors, said the teenager in the Chicago case would have died if he had not been received immediate care. According to Dr. Franklin, an electrocardiogram or heart rhythm test, administered to the teenager proved that he

suffered fibrillation.

About 130 people have died after being shocked by a Taser, including nearly 70 in the last 12 months, according to Amnesty International. This group has called for a moratorium on the use of the guns. It should be noted that in most cases, autopsy reports have not found the Taser to be the cause of death. In 2003 and 2004, use of Tasers spread rapidly among American police departments as officers sought ways to control suspects without fighting with them or using firearms. The use of the Taser appears to have been justified and was working pretty well. But sales of the guns have dropped significantly this year because of the safety questions. Tasers cause the muscles to contract uncontrollably. Repeated Taser shocks may cause the blood to become highly acidic and the body to overheat, both potentially fatal conditions, scientists report.

DEFIBRILLATOR DEFECTS ON THE RISE

Recently, there have been numerous reports of malfunctions in implanted heart defibrillators. Actually these malfunctions were on the rise even before this summer's massive recall by Guidant Corp. The research by Harvard University scientists, sponsored by the Food and Drug Administration (FDA), revealed that about 20 of every 1,000 defibrillators implanted are malfunctioning, and defects led to 31 deaths between 1990 and 2002. While the deaths represent only a fraction of the more than 400,000 defibrillators implanted during those years, they are enough to be alarming. The report was made public last month. Regulators continue to struggle with how to better ensure the safety of these hard-to-replace devices.

Clearly, this study should alert the FDA that there is a trend that needs to be addressed. The agency must improve the way it regulates these products. The

FDA and cardiac specialists are discussing safety problems with implanted defibrillators and pacemakers. In the last nine months, the nation's three leading defibrillator makers - Guidant, Medtronic and St. Jude Medical - have issued recalls or safety warnings affecting more than 200,000 defibrillators. Guidant in particular has come under fire after acknowledging that it waited three years before alerting doctors and some 24,000 patients about an electrical system defect with one of its recalled models ultimately linked to two deaths.

It is good to see that the FDA is considering changes to the way it monitors such devices. The study, conducted for the agency by Dr. William Maisel, a Harvard medical professor, found that from 1990 to 2002, there were 2.25 million pacemakers and almost 416,000 implanted cardiac defibrillators, or ICDs, implanted in the United States. More than 17,000 of them, 8,834 pacemakers and 8,489 ICDs, had to be surgically removed because of confirmed malfunctions. Eighty percent were device hardware problems, such as with electrical connections.

It is especially troubling that a dangerous trend was discovered. In the mid-1990s, some 7.9 ICDs per 1,000 implants were replaced because of malfunctions. That rose to a high of 38.6 per 1,000 implants in 2001 before dropping slightly to a rate of 20.7 the following year. More than half of the malfunctions occurred during the study's last three years. In contrast, the rate of replacement for malfunctioning pacemakers steadily dropped during the study, to a low of 1.4 per 1,000 implants. There were 30 confirmed deaths due to malfunctioning pacemakers during the 12-year period, a lower rate than for defibrillators because so many more pacemakers were implanted.

Source: *Associated Press*

IX. MASS TORTS UPDATE

Pfizer Injectable COX-2 Was Not Approved By The FDA

The Food and Drug Administration (FDA) has issued a "non-approvable letter" to Pfizer Inc. for parecoxib sodium, an injectable COX-2 inhibitor used to treat acute pain. This is a most significant event. Pfizer is not happy and says it plans to meet with the regulatory agency to address concerns. Non-approvable letters are issued to a drug's sponsor when the FDA does not find adequate data in a company's marketing application to warrant approval. As we all know, COX-2 inhibitors have come under heavy scrutiny by the FDA because that class of drugs increases the risk of heart problems. The public has become aware of these problems because of the publicity over Vioxx and the litigation against Merck.

As you know, Pfizer markets Celebrex. In April, the FDA asked Pfizer to take the drug's successor, Bextra, off the U.S. market. Parecoxib sodium is marketed by Pfizer worldwide, mostly under the brand name Dynastat. I commend the FDA for taking this action. In my opinion, the agency did the right thing. Hopefully, this means the FDA will start looking out for the public and making safety its very top priority. I have to believe all of the attention over the Vioxx litigation is responsible for the changes at the FDA.

The New Jersey Verdict

At press time, the second Vioxx case to go to trial was being tried in Atlantic City, New Jersey. It was beginning its third week. From all accounts, things have gone well for the plaintiff. Media reports indicate that Merck's new trial team was playing "hard ball" in this case.

The company's bosses appeared to have learned some lessons from the Texas trial. The case is expected to last for at least one more week.

Texas Attorney General Says Merck's Guilty Of Medicaid Fraud

Texas Attorney General Greg Abbott is really going after Merck & Co. in a Texas state court. The Attorney General is handling the State of Texas' lawsuit against Merck. The original suit was filed against Merck in June of this year, alleging the company failed to disclose the adverse effects of Vioxx while offering it to the state's Medicaid program as a safe painkiller. The lawsuit alleges that "hiding this information" violated the Texas Medicaid Fraud Prevention Act. On August 4th, Merck requested the case be moved to the New Orleans federal court where all of the federal Vioxx cases are being handled in the consolidated Multi-District Litigation preceeding. But a U.S. District Judge in Texas correctly sent the case back to state court, where the case will be tried.

The State of Texas is seeking restitution, plus interest, for all Medicaid payments made to Merck for Vioxx prescriptions, as well as civil penalties. The damages in this case will be very large. The Texas Medicaid Program reimbursed pharmacists \$56 million for Vioxx prescriptions. The Attorney General's lawsuit is invoking the Texas Medicaid Fraud Prevention Act, a state law that will triple the \$56 million to \$168 million. It will be interesting to see whether Attorneys General in other states will file similar lawsuits. I believe that most every state would have a similar claim against Merck even though the Texas Attorney General is traveling against Merck under a state statute. I am convinced that common law fraud theories would apply in any state.

A MULTI-BILLION-DOLLAR EXPOSURE FOR MERCK

As reported, the second state court trial involving Vioxx was being tried in New Jersey as this issue went to the printer. That case involved one individual plaintiff suing Merck for damages. Currently, there are about 5,000 personal injury suits involving Vioxx filed nationwide. In addition, there is a very important class action case pending. On July 29th, a New Jersey Superior Court judge certified a national class action covering every private third-party payer that allowed members of its health benefits plan to buy Vioxx. With 20 million Vioxx users in the United States alone since 1999, Merck's exposure could be well into the billions if it loses that case. The case is styled *International Union of Operating Engineers Local 68 Welfare Fund v. Merck & Co. Inc.*

The majority of Vioxx purchases were through plans run by insurance companies and health maintenance organizations. Unlike the individual personal injury claimants, in the class action case the lawyers won't have to prove that anyone suffered injury. The suit was filed under New Jersey's Consumer Fraud Act. Under that act all that has to be proved is that the third-party payers were influenced by unconscionable Merck business practices - primarily deceptive marketing and promotion of Vioxx, either affirmatively or by omitting critical data such as the potential for heart attacks.

New Jersey's Consumer Fraud Act does not require proof that the buyer relied on the allegedly false advertising or that there is a specific causal link between a purchase and the marketing but instead only that there was a "causal nexus between the concealment of the material and the loss." If the engineers' union wins in the New Jersey case, all third-party payers nationwide can recoup payments to the company.

Under the New Jersey Act, they are entitled to collect treble damages as well as attorneys' fees. Chris Seeger, of Seeger Weiss in New York and Newark, and co-counsel John Keefe Jr., of Lynch Keefe Bartels in Shrewsbury, New Jersey, are handling this most important case. Some carriers, HMOs, unions, or plan administrators can opt out of the class. As filed, the class excludes government entities and the Medicaid and Medicare programs.

Source: *New Jersey Law Journal*

A BREAKDOWN OF VIOXX-RELATED SUITS FILED TO DATE

The number of lawsuits filed against Merck & Co. since it withdrew Vioxx from the market last September is growing daily. It has been reported that as of September 5th, more than 5,000 lawsuits have been filed against Merck. That number doesn't come as a surprise. Our firm has reviewed and evaluated over 10,000 individual cases. At press time, the pending cases include:

- 1,811 federal lawsuits consolidated for pretrial coordination in what's called multidistrict litigation to streamline steps common to the cases, such as document gathering and witness depositions.
- More than 290 federal lawsuits pending but not yet consolidated with the others.
- More than 250 cases pending in California state courts.
- About 2,475 cases pending and coordinated under one judge in Atlantic County, New Jersey.
- More than 200 cases pending in state courts elsewhere.

The above categories include 148 potential class action cases, which could eventually include many plaintiffs if judges certify them as class actions. A

handful of those cases involve union health plans, insurers and other third-party payers seeking reimbursement of money they paid for Vioxx for their prescription plan members. One such class action suit filed by a New Jersey union has already been certified. The New Jersey total is as of September 1st, while the other numbers are as of August 15th.

The lawsuits allege Vioxx caused heart attacks, strokes, gastrointestinal bleeding, dangerous blood clots, or kidney damage. The cases handled by our firm mostly involve heart attack and strokes. Some potential class action suits seek future medical monitoring for Vioxx users who have not suffered health problems thus far. Merck also faces lawsuits in federal court from stockholders seeking reimbursement for billions of dollars of losses they suffered when Merck shares dropped sharply after the company pulled Vioxx from the market. When you consider how badly Merck misled both the public and the medical community in its marketing of Vioxx, the magnitude of litigation against the company is certainly not surprising. Neither is Merck's lack of concern for its victims or their families.

Source: *Associated Press*

MERCK ATTEMPTS TO INFLUENCE POTENTIAL JURORS

During the months leading up to the first Vioxx trial in Texas this summer, Merck doubled the amount of advertising money spent to promote its damaged corporate image. From January through June, just a few weeks before the Texas trial began, Merck spent \$8.9 million on image ads. This was up from \$4.6 million during all of last year. The onset of the multimedia campaign, which is called "Putting Patients First," continues to run on television and in magazines nationwide. In my opinion, all of this is a blatant

attempt by Merck to influence folks who are potential jurors in pending cases.

It is interesting that Merck's slick advertising campaign was still running when the company's lawyers asked a state Superior Court judge in New Jersey to ban video equipment in her Atlantic City courtroom. The second Vioxx trial was starting at the time. Merck told the judge that "broadcast coverage" of the trial would "imperil" the company's ability to find a "fair and impartial jury" to try the Vioxx cases in New Jersey or elsewhere. The judge correctly denied Merck's request. The company also cited negative publicity about the Texas trial as it unsuccessfully sought the delay in the New Jersey case. This advertising campaign is clearly improper because the timing could certainly influence jurors. Merck's ad campaign is a ploy used by drug companies in other cases in obvious attempts to influence jurors and their families.

Source: *New Jersey Star Ledger*

MULTI-DISTRICT LITIGATION INVOLVING CELEBREX AND BEXTRA

The Judicial Panel on Multidistrict Litigation (JPML) entered an order last month transferring over 30 cases alleging injuries caused by Bextra and Celebrex to a single federal judge in California. According to the order released by the JPML, one docket involving personal injury claims and sales and marketing claims related to the drugs will be overseen by Judge Charles R. Breyer of the U.S. District Court for the Northern District of California. Because we have a good number of individual cases filed, it is likely that we will have a leadership role in the MDL. I suspect we have more cases pending than any other firm in the country. Paul Sizemore and Navan Ward have been working on Celebrex and Bextra cases for several years. We have screened our cases very carefully and believe that our inventory

is made up of extremely strong cases.

Numerous plaintiffs moved to create Celebrex and Bextra MDLs after the FDA requested that Pfizer remove Bextra from the market because of potentially fatal side effects and required that the manufacturer include stricter warnings on Celebrex's labeling to indicate the risk of cardiovascular injury. In all, four prospective dockets were created for products liability and marketing and sales practices claims, or a combination of both. Pfizer, which as you know, manufactures Celebrex and Bextra, opposed centralization of all products liability actions, but supported consolidation of the marketing/sales practices cases. According to the JPML order, the actions in all four multidistrict dockets involve common questions of fact and centralization of the claims as one multidistrict proceeding will serve the convenience of all parties. The JPML order stated:

Thus we have searched for a transferee judge with the time and experience to steer this complex litigation on a prudent course. By centralizing this litigation in the Northern District of California before Judge Charles R. Breyer, we are assigning this litigation to a jurist experienced in complex multidistrict litigation and sitting in a district with the capacity to handle this litigation.

We agree with the panel on the selection of Judge Breyer. We look forward to having our federal cases handled in his court. Judge Breyer is an experienced trial judge who enjoys a very good reputation. He is well respected by lawyers who have practiced in his court.

Source: www.harrismartin.com

THE FDA DIDN'T DO ITS JOB ON CRESTOR

People throughout the country are now becoming aware of the shortcom-

ings of the federal Food and Drug Administration (FDA). Much of this has come about as the result of the media's attention given to Merck's problems with Vioxx. It has also put in focus the cozy relationship of the FDA and the pharmaceutical industry. The FDA - to be brutally frank - has done a poor job of regulating the pharmaceutical company. Another example of the poor job done by the FDA involves Crestor, a cholesterol lowering statin medication, manufactured and marketed by AstraZeneca.

Crestor is the only statin in which rhabdomyolysis (a severe muscle wasting injury that can cause death) was seen in controlled clinical trials before the drug was ever approved. Baycol, another cholesterol lowering medication, was eventually banned because it caused rhabdomyolysis at higher rates than the other five statins on the market. Crestor is unique in that it can directly affect the kidneys adversely. The kidney risks alone should have been sufficient for the FDA not to approve the drug, particularly given there is no evidence that Crestor can lower the risk of either heart attack or stroke.

One of our clients is a prime example of why Crestor should never have been approved or should have been used only as a second line treatment. Our law firm has filed a lawsuit in Ohio for a client who had taken Zocor for approximately four to five years. Within three months of being switched over to Crestor, our client suffered rhabdomyolysis and acute renal failure. She now has permanent kidney damage and must undergo weekly dialysis treatments for the rest of her life.

It appears that physicians who were wary of rhabdomyolysis problems after Baycol appear to have been careful in prescribing Crestor, there is evidence Crestor may be causing severe problems at more than twice the rate of other alternative statin medications currently

on the market. In a recently released study Crestor was found to be the most dangerous of the current statin medications. That was the finding of the researchers of the Tufts - New England Medical Center and Tufts University School of Medicine. The results of the study were published in the May 23, 2005 issue of the medical journal "Circulation." With five older and less dangerous statins already on the market, why is the FDA allowing AstraZeneca to sell a dangerous product? There are safer and more effective choices for consumers.

WOMEN SUE DRUG MAKER WYETH

Thousands of American women are filing lawsuits against Wyeth Pharmaceuticals, alleging that its hormone replacement medications caused breast cancer, blood clots, and other serious health problems. The suits were filed in U.S. District Court in Cleveland. Women filing the suits contend that their use of Wyeth-produced hormone-replacement therapy led to their breast cancers. The lawsuits allege that Premarin, Provera, and Prempro are "dangerous and defective drugs." Wyeth faces between 3,600 and 5,500 lawsuits by women who say they were harmed by hormone therapy.

A key basis of the lawsuit is the Women's Health Initiative study of estrogen-progestin therapy released in July 2002. The trial of 16,000 women was stopped abruptly by the National Heart, Lung, and Blood Institute (part of the National Institutes of Health) when it was discovered that women taking estrogen-progestin had a 26% increased risk of breast cancer, a 41% increased risk of strokes, a 29% increased risk of heart attacks, a 100% increased risk of blood clots, and a 22% increased risk of cardiovascular disease. In the case of breast cancer the belief is that estrogen can fuel certain cancer cells to spread, when without the added estrogen they

would not have proliferated. Specific biological markers in patients can identify whether their type of cancer was fueled by estrogen.

The lawsuits accuse Wyeth of failing to conduct adequate research before the drugs went on the market, failing to undertake adequate surveillance after the drugs were approved by the FDA, and failing to provide proper warnings of the health risks. The cases are not part of a class action. However, the cases will be combined under an Arkansas federal judge during the discovery phase, after which the cases will be returned to the jurisdictions where they were filed to be heard individually.

Source: *Associated Press*

LILLY WANTS INSURERS TO PAY FOR ZYPREXA CLAIMS

Eli Lilly and Co. wants its insurers to cover nearly half of the \$1 billion the drug maker has set aside to pay product liability claims involving its top-selling drug, the anti-psychotic treatment Zyprexa. Lilly is seeking about \$465 million from the insurers. The Indianapolis-based company filed suit in March in federal court in Indianapolis against five of its insurers to try to force them to pay. A \$465 million payout by insurers would help cover the \$1.07 billion Zyprexa-related write-off Lilly took in the second quarter regarding claims over Zyprexa. Four of the insurers argue Lilly bought liability coverage for Zyprexa in 2000 without disclosing that it knew then the drug could cause harmful, diabetes-related side effects in some users. The insurers argue that if they had known about Zyprexa's serious side effects, they "would not have agreed to insure Lilly at all, would have excluded coverage for Zyprexa ... or would have provided insurance coverage to Lilly on terms and conditions substantially different." "Lilly knew Zyprexa represented a serious liability exposure to it and to any insurer that

provided coverage to Lilly," said SR International Business Insurance Co., one of the companies Lilly is suing.

The other companies Lilly is suing are North American Specialty Insurance Co., Winterthur Schweizerische Versicherungs AG, Gerling-Konzern Allgemeine Versicherungs AG, and ELCO Insurance Co. All but ELCO have refused to pay claims Lilly has submitted to reimburse it for legal bills and other costs related to Zyprexa product liability litigation. ELCO said it should be dismissed from the lawsuit because ELCO has not refused to pay claims it has gotten from Lilly. Based in Bermuda, ELCO is a Lilly fully-owned subsidiary. The five companies provided about \$400 million in coverage that Lilly wants them to honor. Lilly is in discussions with additional insurers regarding the remaining amount in Zyprexa liability coverage. In June, Lilly agreed to settle most of the 8,000 U.S. claims against it from Zyprexa users, who allege the drug caused diabetes-related side effects. The settlement of existing and new claims will cost about \$1 billion. Zyprexa is Lilly's top-selling drug.

Source: *Associated Press*

1,000 LAWSUITS FILED AGAINST OXYCONTIN MAKER

A massive number of lawsuits were filed last month against Purdue Pharma, the maker of OxyContin, in New York state court. One thousand "accidental addicts" filed these suits, which will be managed by the state's Nascent Litigation Coordinating Panel. The panel had ordered coordination of OxyContin actions earlier after a state Supreme Court judge had denied the request for a class action. In that case, the court stated:

Clearly ... it will be in the interests of all parties to have common discovery issues coordinated. It will also promote efficiency and ease

the burdens on the court system to have these related matters pending during the pretrial phase before one Justice rather than perhaps many, each of whom would have to become familiar with the medical and factual issues in order to address discovery questions and other problems that may arise.

The state court system's Administrative Board created the Litigation Coordinating Panel in 2002, making it the third such formal statewide coordinating system in the United States. New York's class action regulations are considered among the nation's most restrictive. It was reported by the Wall Street Journal that the board intended the panel to promote efficiency in handling cases that involved common issues but failed to meet the state's high certification standards for class actions. This is the state equivalent of the federal Multidistrict Litigation procedures.

The New York procedure works this way: coordination joins cases for pretrial purposes, generally from discovery through the decision of any dispositive motions, and the cases then return to their original venues for trial. In these cases, each plaintiff alleges that OxyContin is as addictive as any other opiate, but that Purdue Pharma marketed it as a safe, effective pain medication. The plaintiffs claim they became addicted, suffering side effects including vomiting, blurred vision, paranoia and panic attacks. The drug has reported annual sales of \$1.8 billion.

Source: Wall Street Journal

FDA PANEL FAVORS NEW DIABETES DRUG

A Food and Drug Administration (FDA) panel says a new type of diabetes drug by Bristol-Myers Squibb Co. and Merck & Co. should be approved by the agency despite cardiovascular concerns.

The outside panel of medical experts voted 8 to 1 in favor of the drug, which would be sold for adult-onset, or Type II, diabetes under the brand name Pargluva. But the panel recommended Pargluva not be prescribed with sulfonylurea drugs, a common class of diabetes medications. This is because the drug might raise the risk of cardiovascular problems such as heart attacks and strokes. The FDA usually follows the advice of its panels, but it isn't required to. Before the meeting, some analysts predicted Pargluva could reach blockbuster status of \$1 billion in annual sales by about 2009.

The FDA raised cardiovascular concerns about Pargluva because there was a slight increase in events such as heart failure and strokes among the 3,000 patients in the clinical trials compared with those not receiving the drug. There were nine cardiovascular-related deaths among Pargluva users, but an FDA medical reviewer said the agency couldn't conclude the deaths were linked to the drug. One member, an endocrinologist, believes Pargluva's risk can be easily managed. Bristol-Myers has promised to conduct additional research to study cardiovascular risks if Pargluva is approved. The drug is designed to control patients' blood sugar and brings down triglycerides, or fats in the blood, while current drugs target just the blood sugar. It targets two types of receptor cells known as PPARs. Two other diabetes drugs on the market target the one receptor that controls blood sugar. Those drugs are sold under the brand names Avandia (manufactured by GlaxoSmithKline PLC) and Actos (manufactured by Takeda Pharmaceuticals North America Inc. and Eli Lilly & Co.). Studies of Pargluva showed some patients experienced fluid retention and edema, which puts them at risk for cardiovascular problems such as heart failure, a well-known side effect seen among some patients taking Actos

and Avandia. The FDA is having difficulty grappling with the issue of whether the increase in fluid retention is similar to that seen with the other diabetes drugs or "whether some other, unexpected pharmacologic effect was manifest." The agency said cardiovascular risks are difficult to sort out because having diabetes itself raises heart attack and stroke risks. About 18 million Americans have diabetes, a disease characterized by high blood-glucose levels that result from the body's inability to use or produce insulin.

Studies showed Pargluva had a lower rate of problems when it was administered alone rather than in combination with other diabetes drugs already on the market. The panel voted 7 to 2 to approve Pargluva's use with metformin, but voted 6 to 3 against its use in combination with sulfonylurea. I hope the FDA will be able to monitor this drug once it is put on the market. If finally approved by the regulatory agency, it should have a strong label warning on the cardiovascular risks.

Source: Wall Street Journal

ANTICANCER DRUG CAN INCREASE RISK OF HEART PROBLEMS

It appears that the anticancer drug Herceptin, produced by Genentech Inc., can significantly increase the risk of heart problems. An early review of a recent study indicates that the risk is significant. The company confirmed this finding in a letter released by the U.S. Food and Drug Administration (FDA). The undated letter says the increase is "significant" compared with patients who received only chemotherapy. Genentech also sent the warning to doctors. The drug's label includes information about possible heart failure and heart ventricle problems. According to the letter, the study aimed to "quantify the risk." The study of 2,043 breast cancer patients found a higher incidence

of damage to the heart in the 1,019 patients taking Herceptin. Such damage can lead to heart failure and, in some cases, death. The company's letter says:

A statistically significant increase in the 3-year cumulative incidence of ... congestive heart failure and cardiac death was observed in patients who received the Herceptin-containing regimen.

This amounts to a 4.1% increase, compared with chemotherapy alone, which was put at 0.8%. The FDA released the letter on its website. The results of the study were first presented at a conference in May of this year. The final analysis is ongoing. Herceptin is an anti-cancer drug and not just a pain killer like the Cox-2 inhibitors. Even so, the heart attack risk must be looked at carefully by the medical community.

Source: Reuters News Service

X. BUSINESS LITIGATION

JUSTICE DEPARTMENT FILES ANTITRUST LAWSUIT

The Justice Department has sued the National Association of Realtors claiming it unfairly limits competition by allowing real estate agents to withhold home listings from Internet-based brokers. The antitrust lawsuit, filed in U.S. District Court in Chicago, follows lengthy negotiations in which the government pressed the Realtors to drop restrictions designed to protect traditional brokers. Even though the association announced changes to its original plan, the new steps were insufficient to ward off the lawsuit. It appears that the organization kept in place brokers' ability to discriminate against competitors who post listings online. Internet brokerages operate in the top dozen

real estate markets in the country, and their numbers are growing. The online brokers often charge lower fees and allow consumers to review listings at their own pace. The Justice Department says that the Realtors' policy prevents brokers who rely on the Internet from being able to show customers all the houses that may be for sale in the locations and price ranges they're seeking.

Source: Associated Press

EQUITAS TO PAY \$300 MILLION TO SETTLE 6 ASBESTOS CLAIMS

Reports from Reuters, the Financial Times and other sources indicate that Equitas, the Lloyd's runoff vehicle, has settled six additional asbestos claims. The insurer will pay 167 million pounds (\$300 million) to settle the claims. It was reported that Equitas has reached settlement agreements with Kaiser Aluminum Corp., Crane Co., Congoleum, and three other companies, as yet unidentified, to bring ongoing litigation to an end. The agreements with Kaiser and Congoleum must still be approved by U.S. bankruptcy courts.

Source: Associated Press

CAR DEALER SUES AUTOMAKER

A New Jersey car dealership has sued Mitsubishi Motors, blaming the carmaker for deceiving it about the company's problems. Vineland Mitsubishi filed the lawsuit in U.S. District Court, claiming that Mitsubishi Motors North America, based in Cypress, California, forced the dealer to spend \$2 million on a new building and sell cars to customers who could not make payments. Mitsubishi has had a great deal of difficulty in the last few years. It has struggled to revive its image after acknowledging five years ago that it had systematically hidden auto defects to avoid recalls. Mitsubishi's 2005 U.S. sales volume was down 29% through

August compared to 2004. The Vineland dealership claims Mitsubishi's problems cost it more than \$2 million.

VERIZON SUES TELEMARETERS FOR CELL CALLS

Verizon Wireless has sued two telemarketing companies over claims they made hundreds of thousands of unsolicited calls to cell phone users. Verizon Wireless claimed that Resort Marketing Trends of Coral Springs, Florida, and Intelligent Alternatives of San Diego, California, of using automatic dialers and prerecorded messages to make hundreds of thousands of calls to Verizon Wireless customers. Telemarketers are barred from calling customers on their cell phones without consent under federal laws aimed at cracking down on unsolicited sales calls from companies selling vacations, mortgages, and other goods. Verizon, the second largest U.S. mobile phone carrier, is the first U.S. wireless provider to sue telemarketers. The federal government and several states have previously filed similar suits. "These telemarketing calls not only invade the privacy of Verizon Wireless' customers and employees, they also damage Verizon Wireless' relationships with its customers and impose customer-service costs on Verizon Wireless," the company said in a lawsuit filed against Resort Marketing in state court in Somerville, New Jersey. Anything that will stop telemarketing firms from making unwanted calls is certainly welcome.

Source: The Seattle Times and Bloomberg News

SUNOCO WINS BATTLE WITH ITS OWN INSURANCE COMPANY

Sunoco, Inc. has won a huge victory in its litigation over insurance coverage for several pending lawsuits over alleged groundwater contamination caused by Methyl Tertiary-Butyl Ether, or

MTBE. Sunoco manufactures this popular gasoline additive. A U.S. district court was faced with the question of whether all pending MTBE cases are legally one "occurrence" under the policy or whether each of the some 70 suits must be considered a separate occurrence. Sunoco's insurance company, Illinois National Insurance Company, claims that coverage on the \$50 million policy had not yet been triggered because the policy calls for Sunoco to be self-insured for \$250,000 per occurrence, with a \$5 million aggregate self-insured retention. Sunoco, however, argued that although it has not yet spent \$250,000 in defending each of the cases, the coverage should now be triggered because it has already spent more than \$5 million in defending all of the cases. The court ruled for Sunoco, finding that all of the underlying lawsuits allegedly arise from the same proximate cause, thus becoming one "occurrence" as a matter of law. This is a large victory for Sunoco's legal team.

You may recall that MTBE is a gasoline additive that was first marketed in the late 1970s, designed to boost octane levels in higher grades of gasoline. Many MTBE lawsuits have been consolidated in the U.S. District Court for the Southern District of New York. These suits generally contend that Sunoco is liable, along with other manufacturers and distributors of MTBE, for bodily injury and property damage. They further contend that MTBE was defectively designed and constituted a dangerous product, and that Sunoco breached a duty to warn of its dangers. The litigation thus far has had highs and lows for the plaintiffs and defendants. A U.S. district judge has ruled that the MTBE litigation cannot be certified as a class action. But, the spring of this year, the U.S. district court refused to dismiss the claims by municipal plaintiffs. The court noted that they could pursue their claims under a modification of the

theory of market share liability.

Source: *Legal Intelligencer*

WAL-MART FACES A NEW CLASS ACTION LAWSUIT

Another class action lawsuit was filed on September 13th against Wal-Mart. Advocates for workers in six countries, who charged the world's largest retailer overlooks labor abuse at factories run by its suppliers, filed the lawsuit in California Superior Court in Los Angeles. Fifteen workers in Bangladesh, Swaziland, Indonesia, China, and Nicaragua are the named plaintiffs. The lawsuit claims they were paid below minimum wage in their country, forced to work unpaid overtime, and in some cases even endured beatings by supervisors. It asserts that Wal-Mart failed to enforce worker treatment provisions of its contracts with suppliers. The lawsuit also lists four California plaintiffs, including two unionized workers at Kroger unit Ralphs and at Safeway grocery stores, who claim Wal-Mart's entry into Southern California forced their employers to reduce pay and benefits. The lawsuit could cover a class of anywhere from 100,000 to 500,000 workers. The International Labor Rights Fund is bringing the action.

Sources: *USA Today* and *Reuters News Service*

ANHEUSER PAYS \$120 MILLION TO SETTLE MARIS CASE

Being a real baseball fan, I was interested in the outcome of a lawsuit involving the family of Roger Maris, the former Yankee slugger. I always liked Maris, even though I have been a longtime Red Sox fan, and was glad to see his family finally prevail in this litigation. Anheuser-Busch Co. Inc. has agreed to pay \$120 million to settle a defamation lawsuit brought by the family of the former major league baseball star. The Maris family had operated Maris Distrib-

uting Co. since Roger Maris' baseball days. Anheuser-Busch had allegedly made false statements about the Maris' beer distributorship, which was located in Florida in the Gainesville-Ocala area. Anheuser-Busch had ended its relationship with the Maris family's business several years ago.

AUDITOR TO PAY \$18 MILLION FOR FAILURE TO FOLLOW GAAP

Symbol Technologies Inc., a maker of bar-code scanners and other inventory management products, has settled a lawsuit with its former auditor PricewaterhouseCoopers. The accounting firm paid \$18 million to Telxon Corp., a wholly owned subsidiary of Symbol. Telxon, which was acquired by Symbol in 2000, sued PricewaterhouseCoopers in 2001 for not conducting its audits in accordance with generally accepted accounting principles for the years 1996 through the first half of 1999. Telxon had to restate its financial results, which led to a shareholder class action charging Telxon with misleading investors. In February 2004, Telxon received approval to pay \$37 million to settle the class action.

WORLD COM JUDGE APPROVES PAYMENT OF \$3.5 BILLION TO INVESTORS

On September 21st a federal judge approved more than \$3.5 billion to WorldCom investors. The award raises the total compensation for the plaintiffs to \$6.1 billion. The order by Southern District of New York Judge Denise Cote brings to a close a major chapter of the largest corporate fraud of the post-Enron era. Among the defendants to sign off on these settlements were 17 underwriters, 12 WorldCom directors, the company's former auditor Arthur Andersen, and former CEO Bernard Ebbers and ex-CFO Scott Sullivan.

Source: *New York Law Journal*

JUDGE ORDERS MEDIATION IN SEC SUIT AGAINST SCRUSHY

U.S. District Judge Inge Johnson has ordered mediation in the government's federal court civil suit against Richard Scrushy. In a brief order, the judge wrote that mediation was appropriate in the Securities and Exchange Commission's suit against Scrushy because separate federal lawsuits filed by investors previously were referred to a mediator. In its lawsuit, the SEC is seeking some \$785 million from Scrushy for his alleged leadership of the Healthcare fraud. It will be interesting to see whether Scrushy's lawyers will let this case go to trial.

XI. INSURANCE AND FINANCE UPDATE

AMERICANS FOR INSURANCE REFORM CREATES 'KATRINA INSURANCE HOTLINE'

On September 12th Americans for Insurance Reform ("AIR"), a coalition of more than 100 public interest groups from around the country, announced the creation of a toll-free KATRINA INSURANCE HOTLINE: 888-450-5545. The hotline, which will be staffed Monday through Friday, 10 a.m. to 6 p.m. EST, will be a clearinghouse for complaints by Hurricane Katrina victims who are being unfairly treated or denied claims by insurance companies on their hurricane-related insurance policies. AIR is encouraging victims of Hurricane Katrina who feel they have being unfairly treated or denied a claim by their insurance company to call the hotline and relate their story.

AIR says that while it will not be able to directly solve victims' insurance problems, it will monitor complaints, refer them to government officials where appropriate, such as insurance depart-

ments and Attorneys General, keep records, and generally act as a clearinghouse for information. AIR is a project of the national consumer organization, Center for Justice & Democracy. For more information about AIR, see <http://insurance-reform.org>.

ALABAMA OFFICIALS JOIN MULTI-STATE SETTLEMENT

A settlement that affects several states has been reached with the brokerage firm Waddell & Reed, Inc. a Kansas City brokerage and insurance firm. Walter A. Bell, Alabama Commissioner of Insurance, and Joseph P. Borg, Director of the Alabama Securities Commission, have announced the multi-state settlement with Waddell & Reed. Investors from Alabama who were affected by Waddell & Reed's actions will be contacted and should receive restitution for losses incurred.

The Alabama Securities Commission and the Alabama Department of Insurance participated in a multi-state investigation into Waddell & Reed's sales practices. The investigation found that many of the customers who paid surrender charges were likely to lose money or receive reduced benefits when they were encouraged to switch to a new product. Waddell & Reed began a campaign to switch customers from variable annuities issued by United Investors when the companies failed to agree on how to split fees collected from policyholders. Waddell & Reed and Nationwide then entered into a fee sharing agreement and pressured many policyholders to switch their variable annuities without providing substantial information about the negative impacts of this transaction to the customer.

Waddell & Reed allegedly violated securities and insurance laws. They failed to ensure that customers who were convinced to switch to a new annuity, received suitable investments, engaged in dishonest or unethical prac-

tices in the exchange of annuities, and failed to supervise its financial advisors or employees. While the company neither admits nor denies the allegations, it agreed to implement a restitution plan, change its sales practices, and pay penalties to regulators. Commissioner Bell says:

Cooperation with other state securities and insurance regulators prove that a multi-state effort can work effectively to resolve a complex issue across many jurisdictions. Inducing customers to switch these variable annuities to the policyholder's detriment and the improper conduct by Waddell & Reed will not be tolerated.

Director Borg, who has been a long-time crusader for consumer and investor rights, added:

We are proud to be a part of this joint effort of securities and insurance regulators. Alabama citizens who invested in these variable annuities with Waddell and Reed will be contacted in the near future to receive restitution of surrender charges and the value differential of any death benefit loss. Variable annuities fall into the category of being both an insurance and securities product. Since there have been numerous problems concerning disclosure and product suitability with variable annuities, this Commission recommends that investors fully understand these insurance style investments before investing.

The Alabama Securities Commission and Alabama Department of Insurance caution Alabama citizens that, when facing a surrender penalty to move or switch to another insurance or securities product, a "red flag" should be raised and customers should clearly understand whether they will be in a

better financial position after purchasing the new product. Before you consider investing in securities or exchanging one variable annuity for another, contact the Alabama Department of Insurance or the Alabama Securities Commission for product information. You should check out the license and registration status or professional background concerning the company/salesperson offering the product.

Source: The Alabama Securities Commission

ALABAMA COMMISSIONER ASKS CARRIERS FOR 60 DAY GRACE PERIOD

Alabama's Insurance Commissioner Walter Bell has asked all insurers in Alabama to provide a 60 day grace period for customers who have claims related to Hurricane Katrina to prevent the cancellation of policies from late payments. The Commissioner also requested health insurance companies to waive restrictions regarding out-of-network doctors and prescription services. Bell says insurers should reimburse health care providers at their contracted network rate or highest benefit level - whichever is higher. He says the purpose is to limit the out-of-pocket expense to victims. Policy provisions regarding co-payments, deductible or co-insurance do not change. According to the Commissioner, an "overwhelming majority" of insurance companies have already instituted some kind of grace period. The changes are retroactive to August 29th and expire after October 29th.

Source: Alabama Insurance Commission Press Release

INSURANCE RESERVES DISCOVERABLE IN BAD FAITH CASE

A most significant discovery ruling in a bad faith case was recently brought to my attention. A federal judge in Pennsyl-

vania ruled that an insurer must turn over documents relating to its "reserves" to the plaintiff's lawyers. Additionally, the court said the company had to produce the "mental impressions" of its investigators. The court found each of those issues to be "germane" to the issues being litigated. In his opinion in *Maiden Creek T.V. Appliance Inc. v. General Casualty Insurance Co.*, 2005 U.S. Dist. LEXIS 14693, No. Civ.A. 05-667, (E.D. Pa. July 21, 2005), U.S. District Judge Harvey Bartle III said he recognized that courts have consistently held that reserve information is ordinarily not discoverable because of the "tenuous link between reserves and actual liability."

In its order the court stated that liability in the case was undisputed, and that plaintiff had made a claim for bad faith. Thus, the reserve information was held to be "germane" to the insurance company's analysis of the value of the insured's claims, and therefore was discoverable on the question of bad faith. Furthermore, mental impressions of an insurer's non-attorney agents contained in "claims files" were also at issue and discoverable. This ruling is a good one and is legally sound.

Source: *The Legal Intelligencer*

INSURANCE BROKER SETTLES SUIT FOR \$30 MILLION

Connecticut officials recently announced a \$30 million settlement with an insurance broker that will benefit consumers and businesses nationwide. The settlement unleashed a flood of accusations against Travelers, The Hartford, and others accused of paying secret kickbacks. Hilb Rogal & Hobbs Co., a Virginia-based insurance agency and broker with a major office in Hartford Connecticut, also agreed to pay a \$250,000 fine to the Connecticut Insurance Department in a related matter. A lawsuit filed by Connecticut

Attorney General Richard Blumenthal accused the broker of collecting extra commissions from certain insurers to steer more business to them without telling customers. The suit was dismissed as part of the settlement.

The agreement is the first state settlement in which thousands of consumers - not just businesses - are declared direct victims of scheming by insurers and brokers and are awarded millions in restitution. The Connecticut suit, part of nationwide investigations of the industry, poses the strongest accusations yet against Travelers Property Casualty Corp. and The Hartford Financial Services Group. While MetLife and CNA were also implicated in the suit, neither company was a named defendant. General Blumenthal won't say whether legal action will be brought against the insurers cited in the suit, but says the settlement is a template for future resolutions of wrongdoing in the industry. General Blumenthal stated:

This settlement is the first involving insurance agents, the first really to involve product lines that go to 'Joe Main Street insurance consumer' - owners of automobiles, homes and small businesses who purchase insurance.

The Connecticut suit alleges violations of unfair trade and insurance practices laws by Hilb Rogal. It also mentions the role of executives of Travelers and The Hartford in creating or enforcing the agreements with Hilb Rogal for the alleged steering of customers. Travelers (now part of The St. Paul Travelers Cos.) The Hartford, and MetLife reportedly have been cooperating with the Attorney General's office.

Hilb Rogal's \$30 million payment is earmarked for restitution to tens of thousands of individual consumers and small businesses across the nation. Individual amounts will depend on the premiums paid by the customer, and the

amount of hidden commissions paid by insurers to Hilb Rogal on that customer's business over as much as four years. Hilb Rogal was to have notified clients by mail by August 1, 2006 that they are eligible for cash by returning a claim form. Insurance Commissioner Susan Cogswell, whose department joined the Attorney General in the investigation, says the settlement "will send a strong message to the producer [agent and broker] community that if they do put their financial interests ahead of their consumers, it will not be tolerated."

The lawsuit against Hilb paints a sordid picture of "back-door agreements" the firm had with insurers. These agreements go back to at least 1998, involving well-orchestrated efforts to conceal certain commissions from customers. The suit alleges that Hilb decided in 1997 to shift more business to fewer insurers to get higher bonus or "contingent" commissions from the favored ones, through "carrier consolidation agreements." I understand that Hilb's hidden commissions comprised roughly 6% of its total revenue. According to media reports, from 1998 through 2004, the firm made about \$180 million from such payments. Hilb terminated its agreements with the "Big 3" after New York Attorney General Eliot Spitzer sued a larger broker for alleged hidden kickbacks and bid-rigging. The suit implicated offices of The Hartford in Florida and California of abetting the bid-rigging, but the company wasn't named as a defendant.

It appears that the broker initially approached Travelers, The Hartford, The St. Paul Cos., American International Group, CNA, and Fireman's Fund, but narrowed the field to "the Big 3" - Travelers, Hartford, and CNA. It is alleged in the suit that in July 1998, a Hilb Rogal team flew to Connecticut to negotiate the agreements and met with the president of The Hartford one day and the president of Travelers the next day. In a

letter to Hilb Rogal, an unnamed Travelers senior vice-president wrote that the agreement between the two companies would be "handled with ABSOLUTE CONFIDENTIALITY" and that Hilb would limit such arrangements to three national carriers, the suit says. The lawsuit alleges further that Hilb Rogal's small business customers - those generating less than \$500 in commissions - "were to be steered wholesale to The Hartford, even if those customers had their insurance with Travelers or CNA." Businesses generating \$500 to \$1,000 in commissions would be "given over" to The Hartford, though customers with CNA or Travelers would be allowed to keep that insurance. The \$1,000-commission threshold was later increased to \$2,000. Customers steered to The Hartford were serviced by the insurer's service centers instead of by Hilb Rogal. But The Hartford's personnel answering the phones "were instructed to tell callers they worked for HRH (Hilb Rogal)," the suit says. Consumers calling with a question about coverage or to report a claim believed they were speaking "to their supposedly 'independent' insurance agent."

Source: *The Courant*

NEW YORK ATTORNEY GENERAL INDICTS FORMER MARSH EXECUTIVES

Last month, New York Attorney General Eliot Spitzer and Insurance Superintendent Howard Mills announced the indictment of eight former executives of insurance brokerage giant Marsh Inc. for their roles in a massive bid rigging scheme that defrauded clients of millions of dollars. The former managers are accused of colluding with executives at leading insurance companies to arrange non-competitive bids and conveying these bids to Marsh clients under false pretenses. The indictments come after 17 individuals at five companies, including

eight former Marsh employees, previously pleaded guilty to criminal charges in the ongoing insurance industry investigation that began over a year ago.

The indictment charges that from November 1998 to September 2004, the defendants colluded with executives at American International Group, Zurich American Insurance Company, ACE USA, Liberty International Insurance Company, and other companies to rig the market for excess casualty insurance. According to the indictment, defendants and other Marsh employees told their excess casualty clients that they obtained bids for their business from insurance companies in an open and competitive bidding process. The indictment maintains that the defendants had rigged the process in the following ways:

- Before any bids were submitted, the defendants determined which insurance company would win the business.
 - They set a "target" for the winner to submit as its bid.
 - They obtained losing bids, which they called "B quotes," from other participating insurance companies.
 - By misleading customers into believing that the customers' interests came first, the conspirators fraudulently obtained millions of dollars in commissions and fees for Marsh and millions of dollars in premiums for the insurance companies.
- The victim companies ranged from high technology firms to a fruit cannery to a cosmetics manufacturer. In 2004, the Attorney General had settled a civil case with Marsh. Among other things, a restitution fund of \$850 million was set up by Marsh. Agreements have also been reached with the Aon Corporation and Willis North America that will respectively result in restitution to policyholders of \$190 million and \$150

million, along with reforms adopted by Marsh. Other areas of the investigation's focus include so-called "finite insurance" and insurance industry accounting irregularities.

Source: *Corporate Crime Reporter*

XII. PREMISES LIABILITY UPDATE

ADULTS LEGALLY RESPONSIBLE FOR UNDERAGE DRINKERS

The South Carolina Supreme Court has ruled that adults can be held liable for damages caused after they knowingly served alcohol to minors. South Carolina's law makes it illegal to serve alcohol to people younger than 21. Past decisions had held that adults acting as "social hosts" could not be held responsible for deaths or injuries resulting from knowingly serving alcohol to other adults. But, the court reached a different result in the recent case involving minors. The court stated in the ruling:

Imposing liability on social hosts encourages them to be more vigilant about who is consuming alcohol at their social gatherings. People younger than 21 are incompetent by reason of their youth and inexperience to deal responsibly with the effects of alcohol.

While in most states social hosts haven't been legally responsible under "Dram Shop Acts" or case law for serving alcohol to minors, I hope other states will follow South Carolina's lead. In my opinion, this would be good for our country. It would certainly discourage adults from serving alcohol to minors.

Source: *Associated Press*

STORE HAS DUTY NOT TO GAS UP DRUNKEN DRIVER

Tennessee merchants selling products to visibly intoxicated people will be subject to more legal exposure because of a recent ruling by that state's high court. The court found a convenience store had a duty not to sell gasoline to a drunk customer who was later involved in a head-on collision. Whether the company owning a gas station was negligent in selling gasoline to an intoxicated person was said by the Tennessee Supreme Court to be a jury question. In July 2000, employees of an Exxon convenience store in Knox County, Tennessee, sold gasoline to Brian Tarver. An employee at the station, operated by East Tennessee Pioneer Oil Co., had previously refused to sell beer to Tarver because she felt he was intoxicated. Allegedly, store employees had helped Tarver pump gas into his car. Shortly afterward, Tarver drove in the wrong lanes of a highway and crashed into a car occupied by two individuals. Each of these persons was severely injured and sued the company in June 2001. They contend that the company's employees were negligent in allowing a clearly intoxicated person to buy gasoline and operate a car.

The plaintiffs also alleged that furnishing gas to an intoxicated driver amounted to negligent entrustment. It was further alleged that the defendant was negligent because it violated certain statutes related to drunken drivers. The defendant claimed that its employees owed no duty of care to third parties on the road and that the sale of gasoline wasn't the proximate cause of the accident. A trial judge dismissed the lawsuit, saying "plaintiffs' claim for relief is not recognizable under the law as it stands right now." The Tennessee Court of Appeals affirmed as to the claims of negligence per se (violation of the statutes) and negligent entrustment, but reversed as

to the "general negligence claim." On appeal, the Tennessee Supreme Court unanimously found the defendant could be liable both under a general negligence claim and a claim for negligent entrustment. The court wrote in its opinion:

Simply stated, the defendant convenience store owed a duty to act with reasonable care under all the circumstances. Under the facts of this case, we conclude that the acts of the defendant in selling gasoline to an obviously intoxicated driver and/or assisting an obviously intoxicated driver in pumping gasoline into his vehicle created a foreseeable risk to persons on the roadway, including the plaintiffs.

The Tennessee Supreme Court noted store employees must know the person is intoxicated and that the intoxicated person is the driver of a vehicle. The court also stressed that store employees do not have a duty "to physically restrain or otherwise prevent intoxicated persons from driving." The court also determined that the plaintiffs are entitled to a jury trial on the negligent entrustment claim. The defendant argued there was no negligent entrustment because the defendant did not retain ownership or control over the gasoline, which was the product sold. This is a most interesting case. It will be watched closely to see how it turns out. Clearly, the owners of convenience stores in Tennessee will have a definite interest in this case - as will store owners in other states.

JURY AWARDS WOMAN'S FAMILY \$13.3 MILLION IN POLLUTION CASE

BP Amoco has been ordered to pay the family of a former Sugar Creek resident \$13.3 million because of a rare blood disorder that killed her. Nancy Ryan lived within 500 feet of the former

Amoco oil refinery in Sugar Creek for four years before she moved. She died in November. Her family claimed that benzene from petroleum products that had leaked into the ground and surface water was caused the death. There are 24 other lawsuits filed on behalf of families against BP Corp. of North America Inc. All of the plaintiffs - some of whom are still alive - have suffered some sort of leukemia or lymphoma. Mrs. Ryan, who was 69 when she died, had lived near the refinery from 1956 to 1960. BP Amoco's lawyers had argued that scientific evidence showed no link between the oil refinery and Ryan's blood disease.

Source: *Kansas City Star*

XIII. WORKPLACE HAZARDS

McWANE'S UNION FOUNDRY TO PLEAD GUILTY IN WORKER DEATH

Union Foundry, a division of McWane Inc. of Birmingham, Alabama, has pleaded guilty and will pay a \$4.5 million fine in connection with a federal environmental crime and a safety violation that led to the death of a maintenance employee in 2000. The Anniston-based company, which makes ductile cast iron fittings, was charged with willfully violating the Occupational Safety and Health Act by allowing an employee to work in the area of a conveyor belt while it was operating without a safety guard. The employee, an electrician who had served in the Navy, was killed on August 22, 2000.

Union Foundry was also charged with treating hazardous waste generated by the foundry without the appropriate permits from the U.S. Environmental Protection Agency or the Alabama Department of Environmental Management. Prosecutors said this occurred

from December 1997 to May 2000. The waste was dust from air emissions of the iron furnace, which had the characteristics of lead and cadmium. McWane had been warned multiple times and it didn't take action soon enough. McWane is a \$1.9 billion-a-year company based in Birmingham, with 23 plants in North America. The company and three of its executives were convicted of environmental crimes by a federal jury in June.

Source: *Associated Press*

WORKER SETTLES LAWSUIT OVER EXPOSURE TO WELDING FUMES

Presently, there is a multi-district panel involving welding rod litigation meaning all of the cases in federal courts have been consolidated in one location. The first of the cases in the MDL was set for trial recently in Mississippi. A shipyard worker, who said his neurological problems were caused by inhaling fumes from welding rods, has settled his lawsuit against two manufacturers. The 38-year-old man had been a welder at Ingalls Shipyard, in Pascagoula, Mississippi, since 1997. He began having various physical problems two years later. The worker suffered shakes as well as balance and speech problems. The settlement avoided a trial, which was to have started on September 7th in Mississippi. This case was the first scheduled for trial out of some 6,000 welding lawsuits that were consolidated in U.S. District Court in Cleveland, Mississippi, to simplify legal issues.

Evidence would have been presented to a jury that the worker's illness was caused by welding fumes, a diagnosis made in 2000 by doctors at Baylor Medical Center in Houston. U.S. District Judge Kathleen M. O'Malley, who has been deciding pretrial issues for the welding cases across the country, presided over this case. The defendants were Hobart Brothers Co., based in Troy, Ohio, and ESAB Group Inc., based in

London, England. Each of these companies makes welding products.

The worker in this case was exposed to the same kind of fumes all other welders were exposed to, but for a shorter period of time than most. The settlement will not keep any other welding fume cases from going to trial. The key question - whether welding fumes cause a plaintiff's neurological illnesses such as manganese poisoning or Parkinson's disease - will be decided on a case-by-case basis. The multidistrict litigation involves about 70 defendants. If you want more information concerning the MDL, you can go to www.welding-rod-litigation.com.

JURY AWARDS \$15 MILLION IN CASE AGAINST POPCORN MAKER

A jury awarded a former popcorn-plant worker \$15 million last month after finding that his exposure to butter-flavoring fumes led to his severe respiratory problems. The verdict brings to nearly \$53 million the total amount awarded in the last two years against the makers of the popcorn flavoring, International Flavors & Fragrances Inc. of New York and a subsidiary, Bush Boake Allen Inc. Four other plaintiffs reached confidential settlements with the defendants last year. The plant where the plaintiffs worked, the Gilster-Mary Lee Corp. microwave popcorn factory in Jasper, Missouri, has paid the employees workers' compensation and has not been named as a defendant in any of the actions.

The latest case was filed by a 35 year old Missouri resident machine operator who filled popcorn bags with salt and butter flavoring. He had worked at the plant from 1989 to 2001. The worker developed bronchiolitis obliterans, a rare, progressive lung disease that may require him to get a lung transplant. The worker is one of about 30 former and current workers at the Jasper plant who have sued International Flavors

and Bush Boake Allen. At least 20 more cases are pending and awaiting trial. The company has appealed the earlier jury verdicts.

Source: *Kansas City Star*

INSURERS OBLIGATED TO DEFEND IN ASBESTOS CLAIMS

A Philadelphia judge has ruled that the commercial liability insurers for shipping and engineering giant Kvaerner are obligated to defend the company against thousands of asbestos actions filed against it since the fall of 2001. The case was handled in Philadelphia's Commerce Case Management Program. Interpreting the language of policies issued to Kvaerner by One Beacon, the judge held that the asbestos-related personal injury claims at issue did not, as the insurance company had contended, stem from "a single occurrence" as defined in the policies. The judge wrote:

Kvaerner's activities which triggered the underlying claims did not arise from a single, negligent practice that could be considered one cause, such as distributing a uniformly defective product from a single manufacturer or selling a product containing asbestos from one location. Instead the exposure to asbestos arose from the construction of furnaces at different sites, at different times and for varying lengths of time. Consequently, the claimants that were exposed to asbestos at the same location and at the same time were exposed to "substantially the same general condition." Accordingly, the claims for each site should be considered one occurrence.

The judge ordered the insurance companies to pay 100% of the defense costs incurred by the company after September 2001 in defense against asbestos claims. The court's ruling means that

the liability limits on Kvaerner's policies could be applied several times over, instead of just once. According to the judge's opinion, 5,993 asbestos claims had been filed against Kvaerner as of March 2005, and about 3,500 of those remain active and open. It was reported that similar claims are being brought against Kvaerner at a rate of 100 per month.

Over the course of decades Kvaerner took over the assets and liabilities of Arthur G. McKee & Co., which designed and constructed boilers and furnaces used at industrial plants. A predecessor company of One Beacon, the insurer, had issued six policies of insurance, covering the years 1964 to 1982, to what ultimately became Kvaerner subsidiaries. A Century predecessor had issued four policies covering the years 1982 to 1986 to companies that also subsequently became parts of the Kvaerner conglomerate. Upon receipt of the bodily injury claims, Kvaerner requested that defendants provide a defense. Although the insurance company defendants had actually **paid** Kvaerner's past defense costs incurred with respect to some claims through a certain date in 2004, the companies hadn't assumed the duty to **defend**. As a result, Kvaerner was forced to use in-house counsel and various law firms across the country to defend the claims.

Under the language of the relevant policies, all injury or damage "arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." The judge agreed with Kvaerner that its interpretation of the policies' language conforms to industry standards and denied a defense motion for summary judgment as to the scope of the duty to defend. Kvaerner has incurred millions of dollars' worth of legal fees in the several years it has been defending against the asbestos suits at issue. This case involves a most significant coverage issue.

Source: *The Legal Intelligencer*

ALLSTATE TO SETTLE OVERTIME CLAIMS

Allstate Corp. will pay as much as \$120 million to settle claims that some of its white-collar employees in California were routinely required to work long hours without overtime pay. The case is the latest in a series of class action lawsuits putting pressure on California employers to revamp their white-collar pay policies. Previous settlements by RadioShack Corp., Bank of America Corp., Starbucks Corp., and Rite Aid Corp. highlighted the practice of classifying workers as managers or administrators to avoid paying overtime. In the Allstate case, adjusters alleged that the company refused to pay overtime, but routinely assigned them so many claims that they had to work nights and weekends to keep up. Allstate would send the adjusters home with their laptops. They would work long hours at work and then go home and continue to work. Almost 3,000 California-based adjusters are eligible to receive payments that could range from \$1,000 to \$100,000, depending on each employee's tenure with Allstate and the amount of overtime worked.

The proposed settlement is subject to approval by a Los Angeles County Superior Court judge. The Allstate case is part of a wave of class action litigation by white-collar workers claiming overtime exploitation in industries such as retail, restaurants, and banking. Under California law, employers are required to pay-time-and-a-half for hours exceeding eight hours of work a day. It also requires employers to pay the overtime premium to many white-collar workers - regardless of title - who spend more than half their time flipping burgers, running cash registers, or doing other non-managerial or non-administrative work. Such violations are more difficult to prove under federal law, which governs most states.

Experts said the California suits have had a major effect on the way national

employers pay a variety of white-collar workers in the state. Large national employers now are more inclined to classify certain California white-collar workers, such as store managers, as nonexempt, allowing them to collect overtime. In the Allstate case, some plaintiffs alleged that they had to work six days or more a week to keep up with their claims loads. Similar suits are pending against other insurers, and several have settled. In January, State Farm Insurance Cos. agreed to pay \$135 million to settle an overtime lawsuit on behalf of 2,600 claims adjusters in California. Los Angeles-based Farmers Insurance Exchange agreed last September to pay as much as \$210 million to resolve the overtime claims of 2,400 adjusters.

Source: *Los Angeles Times*

RADIOSHACK LOSES ROUND IN OVERTIME LAWSUIT

In a case similar to the Allstate case referred to above, a federal judge has ordered RadioShack Corp. to pay overtime to several hundred current and former store managers as part of a class action lawsuit against the electronics retailer. The ruling is estimated to cost RadioShack \$5 million to \$15 million. A larger case involving more than 3,000 employees is scheduled for trial in February. The workers argued that they were essentially sales people with limited management duties and that RadioShack improperly classified them as managers to avoid paying overtime. U.S. District Judge Rebecca R. Pallmeyer of Chicago agreed, at least for some of the managers.

In a ruling last month, Judge Pallmeyer said managers who worked more than 40 hours a week but did not regularly supervise two or more subordinates should have been paid overtime. The judge's ruling will benefit 600 to 1,000 store managers and cost the chain up to \$15 million. If lawyers are unable to agree within 45 days which employees should be paid and how

much they should get, the judge will appoint someone to make those decisions. A jury trial is scheduled for February to decide the claims of store managers who presumably did supervise at least two subordinates and determine whether RadioShack willfully violated labor laws, which could double the damages.

The Chicago lawsuit was filed in October 2002 and involves nearly 3,300 employees, nearly half the current and former workers who were eligible to join the class action case. RadioShack settled a previous overtime case in California for \$29 million. About 600 store managers who did not join the current case in Chicago are suing RadioShack in Miami. Similar class action lawsuits have been filed around the country in the past five years on behalf of white-collar workers in industries such as retailing, restaurants, and banking who claimed they were improperly classified as managers to avoid paying overtime.

Source: *Associated Press*

XIV. TRANSPORTATION

TRANSPORTATION FATALITIES FALL IN 2004

Transportation fatalities in the United States decreased slightly in 2004, according to preliminary figures released last month by the National Transportation Safety Board (NTSB). Deaths from transportation accidents in the United States in 2004 totaled 44,870, down from the 45,158 fatalities in 2003. Even with these improving numbers, the yearly toll, especially on our highways, is clearly unacceptable. Government at all levels needs to do more to protect the traveling public. The following fatalities were included in this report:

- Highway transportation, which accounts for the largest portion of fatalities, decreased from 42,884 in

2003 to 42,636 in 2004. The number of fatalities increased in the motorcycle, light trucks and van, and, medium and heavy trucks categories. However, there was a decrease in the number of deaths occurring in the passenger car category, which recorded 634 fewer fatalities in 2004 than in 2003.

- The number of persons killed in all aviation accidents dropped from 710 in 2003 to 651 in 2004. There were no fatalities on commuter carriers in 2004. The number of general aviation fatalities also decreased from 632 in 2003 to 556 in 2004. There were 14 airline fatalities, 13 of which occurred in a crash of a Jetstream aircraft in Missouri. Air taxi fatalities increased from 42 to 65.
- Total rail fatalities increased from 760 in 2003 to 802 in 2004, reflecting a rise in every category except passenger fatalities, which remained at 3. Fatalities occurring on light rail, heavy rail, and commuter rail increased from 165 to 186.
- Marine deaths decreased from 792 to 757, with every category except cargo transportation showing a decrease. Cargo transport fatalities were up from 19 to 25. Recreational boating fatalities, the largest category of marine deaths, decreased from 703 to 676.
- Pipeline fatalities increased from 12 to 24, 19 of them related to gas pipelines and five to liquid pipeline operations.

Source: *The Insurance Journal*

PRIMARY CAUSES OF FATAL CRASHES IN ALABAMA

In previous issues we have tried to furnish pertinent information concerning safety issues on Alabama's highways. In recent studies, the causes of fatal

crashes in our state were identified. In every crash involving a death, there is always a cause of that crash. It is important to look carefully at those causes so that deaths can be prevented in the future. The recent studies reveal that the top five causes of fatal crashes in Alabama in 2004 are:

- Speeding;
- Driving under the influence;
- Driver not in control of vehicle;
- Driving on the wrong side of the road; and
- Failure to yield right of way.

Obviously, there will be crashes in which more than one of the five causes contributed. For example, quite often drinking will result in one or more of the other causes being involved in a crash.

Source: Alabama State Troopers – Federal Statistics

ALCOHOL- RELATED HIGHWAY DEATHS UP

The number of fatal crashes in Alabama involving alcohol use has climbed 16% this year over the same period in 2004. This year, as of July 31st, state troopers investigated 122 alcohol-related fatal wrecks. Last year there were 105 alcohol-related crashes through July 31st. The 16% increase in the number of alcohol-related deaths is a most disturbing trend and one that must be addressed. As reported, this year the number of overall fatalities in wrecks investigated by state troopers through July 31st of this year has decreased 2% from 450 in 2004 to 442. Checkpoints were set up around the state during the Labor Day weekend as part of the “You Drink & Drive, You Lose” campaign. I am hopeful these check points resulted in the saving of lives. While the State of Alabama has done a good job of bringing the consequences of drinking and driving to the public’s attention, we need to do more.

UNSAFE TRUCKS GO UNINSPECTED IN ALABAMA

There are many trucks on Alabama highways that shouldn’t be on the road. Thousands of big trucks travel Alabama’s highways with bad brakes, bad tires, and bad drivers. A *Birmingham News* analysis of federal inspection records came up with some disturbing findings. Many of those dangerous trucks in recent years have been involved in accidents that have killed hundreds, injured thousands, and cost millions in highway repairs. The *News* found that about 10 times a day, on average, a truck crashes on an Alabama highway, giving the state one of the nation’s highest accident rates. Alabama’s inspection program – responsible for taking dangerous trucks off the road – is much smaller than similar programs in surrounding states, with just a few dozen inspectors and only one permanent weigh station. The result is more unsafe trucks on Alabama’s highways.

As we all know, in Alabama, we have a severe shortage of state troopers. It is quite obvious that truckers know this and regularly ignore speed limits. Truckers also know that Alabama doesn’t have enough troopers to inspect their rigs. As a result, there’s less chance they’ll be caught with safety problems. A national survey of truck drivers by *Overdrive* magazine last year rated Alabama’s truck inspection program the country’s weakest. Alabama is ranked 48th in the nation for its low rate of inspections performed, eighth nationally for the high rate of truck accidents, and second nationally for the high rate of fatal truck crashes, according to 2003 records, the most recent year with complete statistics. Fewer truck inspections mean a greater risk of wrecks involving trucks that shouldn’t be on Alabama’s roads. That is something that our political leaders must address.

When troopers perform more truck inspections, truck owners and drivers are less likely to put dangerous trucks on the road. In 2000, troopers inspected 31,227 trucks and drivers, and took 20% off the road because of safety problems. In 2003, troopers inspected 27,311 trucks and drivers, and took 30% off the road, according to data from the Federal Motor Carrier Safety Administration. Truck inspectors nationally in 2003 took about 22% of trucks off the road because of safety problems.

There were 3,455 crashes in 2003 involving big trucks in Alabama, resulting in 147 deaths. This gave the state the second highest rate of fatal crashes, according to the U.S. Department of Transportation. Dangerous trucks are less likely to have accidents in neighboring states, where more truck inspections are performed. Records show that the surrounding states have a better accident rate than Alabama. Tennessee performed twice as many inspections as Alabama in 2003 and ranked 50th in truck accidents for each 100 million miles traveled. Florida and Mississippi more than doubled Alabama’s number of inspections, and ranked 42nd and 27th, respectively, in accidents. Georgia had nearly three times as many inspections and ranked 21st. Neighboring states are catching more dangerous trucks at permanent inspection stations set up along their highways. Tennessee has 10 truck inspection stations, Georgia has 19, Florida 20, and Mississippi 32. Alabama has one permanent inspection station near Heflin on Interstate 20. Clearly, one such station is not enough. We have a number of interstate highways criss-crossing our state. Trucks come into Alabama from Mississippi, Tennessee, Georgia, and Florida. It makes no sense to allow unsafe trucks to remain on our highways. Transportation officials in Alabama told the *News* portable inspection units are cheaper

and that permanent stations are too expensive to maintain.

Sources: The *Birmingham News* and the Department of Public Safety

SAFETY OFFICIAL FIGHTS FOR HIGHWAY SAFETY

For the past several years, Captain Harry Kearley, with the Alabama Department of Public Safety, has been fighting for stronger laws on truck inspections. For the past two years, Captain Kearley has tried unsuccessfully to get something done in the Alabama Legislature. This dedicated public servant, who heads the department's truck inspection unit, sought legislation this year requiring truck companies that operate only in the state to register their rigs for a special database. The trucks - those hauling things like logs, concrete, or construction trash in the state - aren't required to register with federal transportation officials as are the often-bigger rigs that operate regionally and nationally. I hope this legislation will be passed in the next session of the Alabama Legislature.

Once they are registered, unsafe trucks can be tracked by inspectors to the company listed with the Alabama Department of Revenue. Revenue officials then could revoke the company's vehicle registrations if multiple safety problems are found with its trucks. Currently, if a company has unsafe trucks on the road, company owners can move them between several businesses they own and keep the trucks on the road. Senator Quinton Ross Jr., D-Montgomery, and State Representative David Grimes, R-Montgomery, are the legislators who have tried to get Captain Kearley's bill passed in the Alabama Legislature. These men should be commended for their efforts. I hope they will be successful in the next session. If you agree, ask the legislators in your area to support this bill.

Source: *The Birmingham News*

WRONGFUL DEATH SUIT SETTLED

An interesting case out of Boston is worth mentioning this month. The family of a Wellesley man who suffered a fatal heart attack on a commuter train that continued to make stops to pick up passengers has settled their wrongful death lawsuit against the Massachusetts Bay Transportation Authority (MBTA) and Amtrak for \$3.9 million. The settlement was recently approved by the MBTA board of directors. The case was scheduled to go to trial in federal court in Boston this month.

James R. Allen, 61, an internationally recognized coastal scientist who worked for the U.S. Geological Survey, was stricken on July 30, 2002. The commuter train he was on continued to make scheduled stops despite pleas from other passengers to seek medical help. More than 20 minutes after Allen collapsed, paramedics unsuccessfully used a defibrillator at the Back Bay station to try to revive him. It is significant that since this case was filed, there have been changes in the MBTA's emergency procedures. The MBTA blamed Amtrak for Allen's death and says it will sue the corporation to recover the full amount of the settlement.

Amtrak contracted with the MBTA to run the commuter rail system and it was an Amtrak conductor who allegedly refused to stop the train. Amtrak no longer runs the MBTA's commuter trains. Since Allen's death, the MBTA has deployed 60 defibrillators in subway stations, some commuter rail stations, and vehicles. The MBTA has also changed its procedures, including instructing train workers to stop at the next station during medical emergencies. Medical specialists were to testify that if Allen had been treated with a defibrillator within 10 to 12 minutes of his collapse, he probably would have survived. Allen boarded the train and lost consciousness. People on the train told investigators they were

"horrified" when the conductor continued to pick up passengers.

Source: *Boston Globe*

U.S. PROSECUTORS ALLEGE SAFETY VIOLATIONS BY AMERICAN AIRLINES

American Airlines put its passengers at risk and violated multiple federal air safety regulations in 2003 by allowing one of its jets to fly with a leaky fuel tank, according to a civil complaint filed by the U.S. Attorney's office in Brooklyn. The complaint seeks more than \$1 million in penalties against the airline. The complaint alleges that on November 17, 2003, a Federal Aviation Administration (FAA) inspector was a passenger on an American flight from Orlando to New York's La Guardia Airport when he saw fuel leaking from a wing of the McDonnell Douglas MD-82.

According to the complaint, the inspector warned the flight crew about the leak and demanded it be recorded in the aircraft's maintenance log. But, "no such entry was made by the pilot or maintenance personnel," according to the complaint. It was alleged further that American allowed the "unsafe and un-airworthy" jet to take 53 commercial flights over two weeks before it was repaired during a regularly scheduled maintenance check. During that period, it was alleged that the "aircraft was operated in a careless and reckless manner so as to endanger the life or property of another." This sort of thing can't be tolerated, and I hope the FAA will clamp down on all airlines to make sure it never happens again.

Source: *USA Today*

A LITTLE GIRL WAS TRAGICALLY KILLED

A San Francisco jury awarded \$27 million recently to the family of Elizabeth Dominguez, a 4-year-old girl who was killed in 2003 when she was struck by a truck owned by the City of San

Francisco. The jury found that the driver of the truck was negligent. The little girl was walking on the sidewalk with her mother when the truck came onto the sidewalk, hit her, and pinned her against the wall of a restaurant. Elizabeth was severely injured and died at the scene. This was the largest personal injury award ever made by a jury against the City and County of San Francisco. It was certainly justified based on the facts of the case.

XV. ARBITRATION UPDATE

SUIT ALLEGES CREDIT-CARD COMPANIES COLLUDED

Many of the largest U.S. credit-card companies require customers to sign away their ability to take disputes to court. Instead consumers are required to settle disagreements in arbitration. A lawsuit filed in New York federal court alleges eight leading credit card companies violated U.S. antitrust laws by colluding to promote arbitration of customer disputes. The *Wall Street Journal* reported on this suit in its September 1st issue. The complaint alleges Bank of America Corp., Capital One Financial Corp. Corp., J.P. Morgan Chase & Co, Morgan Stanley's Discover unit, Citigroup Inc., MBNA Corp., Provident Financial Corp., and Britain's HSBC Holdings plc "combined, conspired and agreed to implement and/or maintain mandatory arbitration." The companies allegedly held secret meetings where they colluded to promote arbitration, in violation of federal antitrust laws.

The suit was filed in August on behalf of seven plaintiffs who live in California, Pennsylvania, New York, Illinois, and New Jersey. Some of the banks named allegedly convened a group in 1999 called the "Arbitration Coalition" or

"Arbitration Group," according to the *Journal*. The suit seeks class action status. It claims that bank representatives spoke or met at least 20 times from 1999 to 2003 to share experiences from arbitration as well as advice on how to set up arbitration agreements with consumers that would withstand challenges in court.

In general, it is illegal under federal antitrust law for competitors in any industry to secretly collude to restrict trade or commerce. This is a most important lawsuit and one that consumer groups should back. A recent study by Ernst & Young, citing criticism of arbitration, reported that while consumers sometimes can opt out of mandatory arbitration clauses, they rarely know such an option exists. Usually that option is buried in a card agreement's fine print. Most card holders don't even know an arbitration agreement is hidden in their contract.

Source: *Wall Street Journal*

XVI. ENVIRONMENTAL CONCERNS

COMMUNITY STOPS DUMP ON U.S. CIVIL RIGHTS TRAIL

For seven long years the citizens of Lowndes County, Alabama, fought the placement of a regional landfill on U.S. Highway 80 between Lowndesboro and Burkville. That stretch of road is part of the historic 1965 Voting Rights March. It is fitting that on the 40th year anniversary of that march, Waste Management has permanently pulled out of the dump project. Barbara Evans, Executive Director of Alabama Watch, organized the fight against the dump back in 1998. This lady is due a great deal of credit for this victory. The struggle against the dump brought a diverse group of citizens together and that is

also good news. The Lowndes County Commission had approved the dump application in 1998 despite a public hearing at which citizens protested the action.

Citizens in the affected area banded together and were able to stir up a tremendous amount of media support. The town of Lowndesboro hired a good team of lawyers who filed suit. The legal action resulted in the Alabama Department of Environmental Management being issued a temporary stay for all Alabama landfills until a proper and legal solid waste plan was put into place at the state level. The fight made the front page of the *New York Times* and a spot on National Public Radio. Doyle Fuller and Susan Copeland from Montgomery were the lawyers who successfully kept this landfill from becoming a reality. This was a classic example of David taking on Goliath and winning the battle. This victory shows what can happen when folks get together and fight a worthy cause.

CHEMICAL COMPANY LINKED TO BRAIN TUMORS

A class action suit has been filed in Pennsylvania for thousands of employees against Rohm & Haas Company, a chemical company, alleging that the employees should be tested for brain tumors because of a cluster of deadly cancers among workers at a research campus. The suit alleges that there is evidence to establish a workplace link to certain cancers. Roughly 6,000 chemists, office workers, and others have worked at the campus since it opened in 1963. Roughly 1,000 still work there. The suit seeks periodic MRIs and neurologic testing for thousands of others. A retired worker, who does not yet have cancer, filed the suit.

Scientists at this complex work on chemicals used in household and industrial products, including such items as

shampoos, paint, plastics, and dashboards. Along with the class action, individual lawsuits have been filed on behalf of two long-time scientists who have been diagnosed with glioblastoma, an aggressive type of brain cancer. One of the individuals died in 2003, and the other continues to fight the disease. He is currently seeking treatment at a Texas cancer center that is not covered by his healthcare network. Both of the men, who have been diagnosed with Glioblastoma, worked on the development of agricultural products, such as pesticides.

Among the allegations in the suits is that Rohm & Haas has failed to warn employees about potential toxins or carcinogens. It is also claimed that the company failed to train them in their proper handling. It is interesting to note that Rohm & Haas conducted its own study in 2004 and found no significant links among 15 workers who developed brain tumors at its Suburban Spring House Campus since 1973. It may be a "coincidence," but all but one of those workers has died. While I haven't seen the in-house study by Rohm & Haas, I would have to question its objectivity.

Source: *Associated Press*

SETTLEMENT REACHED OVER CONTAMINATION

A settlement was reached in a lawsuit against the City of Jacksonville, Florida. Residents who claimed they were exposed to toxic ash produced by municipal trash incinerators and buried in predominantly African American neighborhoods, have reached a \$75 million settlement with the city. The settlement agreement was approved by the City Council on September 1st. Under the settlement, contaminated soil at four ash sites will have to be replaced. Some residents from the most polluted areas will be relocated. Factors such as whether residents were exposed to ash as an adult or a child

will apparently determine how much each of the 4,600 residents who are part of the class action will receive from the settlement. The lawsuit had claimed residents were exposed to lead, arsenic, mercury, and other toxins in the ash produced by incinerators for fifty years, ending in the 1960s. The settlement brings justice to residents of predominantly African-American neighborhoods on the city's north side and that's good.

The settlement has an interesting twist. The city is responsible for paying the first \$25 million in cash by December of this year. The city and lawyers for the plaintiffs will then seek to recover the balance of the \$75 million from insurance companies that covered the city over much of the roughly 40-year period that the incinerators and ash dump sites were active. It will be a joint effort by the city and the plaintiffs' legal team. The class action lawsuit, filed in 2003, claimed the city polluted neighborhoods surrounding four former dump sites, as well as areas surrounding three old incinerators. The plaintiffs claimed exposure to pollutants caused health problems. Contaminants in the incinerator ash included arsenic, lead, and mercury, according to media reports.

Source: *Austin Business Journal*

A DIOXIN VERDICT AGAINST DUPONT IN MISSISSIPPI

An oyster fisherman, who had claimed chemicals from a DuPont factory in Mississippi caused his rare blood cancer, was awarded \$14 million in his lawsuit. About 2,000 suits have been filed involving dioxins in this DuPont factory. This was the first case to be tried and the plaintiff in the case, who suffers from multiple myeloma, won it. DuPont officials claim there is no connection between their operations and any health effects suffered by the fisherman. The lawsuits contend

that releases of dioxins from the plant caused a variety of serious health problems. DuPont Delisle makes titanium dioxide, a white pigment used in paint, plastics, toothpaste, and other products. Evidence in the case included testimony that releases from faulty disposal stacks often produced clouds of dust floating over the employee parking lot that took the paint off cars. DuPont later installed an automated car wash for workers to drive through at the end of the day.

Dioxins are very dangerous and can be hazardous even in small amounts. The claims in the cases included allegations that the chemicals entered the plaintiff's body through the air and by eating oysters harvested from St. Louis Bay on the Gulf of Mexico. Interestingly, DuPont did not call any witnesses at trial. Just before the trial began, the state Supreme Court upheld sanctions issued by the trial judge in the case excluding nine DuPont witnesses from testifying in the case. The judge had ruled that DuPont deliberately avoided depositions of its witnesses by not giving the plaintiff's lawyers an opportunity to question them before the trial. DuPont plans to appeal the jury verdict.

Source: *Associated Press*

BOEING SETTLES ROCKETDYNE-RELATED LAWSUIT

The Boeing Co. has settled a Rocketdyne lawsuit filed by more than 100 Santa Susana Field Lab neighbors who blamed cancers and other ailments on the rocket-engine manufacturing and testing facility. The personal injury allegations were settled as the case was scheduled to start. The amount of the settlement is confidential. The case has been pending for eight years. The plaintiff's had filed suit in March 1997 claiming hazardous and radioactive substances caused cancers, thyroid and autoimmune disorders in residents who lived near Rocketdyne in the western

San Fernando Valley. Boeing tested rocket engines and developed nuclear power systems at the Rocketdyne site. There was a partial meltdown of the facility's nuclear reactor in 1959. Boeing sold its Rocketdyne unit to Pratt & Whitney in August, but retained the field lab and all environmental responsibilities.

XVII. THE CONSUMER CORNER

1.7 MILLION CHILDREN LIVE WITH LOADED, UNLOCKED GUNS

According to a new study published in the journal *Pediatrics*, about 1.7 million U.S. children live in homes that have loaded and unlocked guns. The study was based on a telephone survey of about 241,000 adults. Thirty three percent of those adults kept firearms in or around the home. The highest percentage was Wyoming and the lowest percentage was the District of Columbia. Of those surveyed just over 4% said they keep loaded and unlocked guns and 2.5% kept loaded and unlocked guns in homes where children lived. Even at those percentages, the number of children involved is significant. Alabama, at 7.3%, had the highest proportion of homes where children lived and firearms were kept loaded and unlocked.

About 1,400 children are killed by firearms each year, according to the federal Centers for Disease Control (CDC). It is not clear how many of those are the result of guns being left around the house. Another study in the *Journal of the American Medical Association* showed that safe gun storage prevents deaths. Not surprisingly, the study found that in homes with guns, there were fewer incidents of shootings when guns were kept locked, unloaded, and separated from ammunition.

Many people believe that they have

sufficiently taught or warned their children about the dangers of guns that they don't have to worry about keeping loaded and unlocked guns in their homes. But, other children who visit a home in which these guns are kept may not be informed at all about this danger and may not know a real firearm from a toy. Parents and grandparents should take all necessary precautions to safeguard their own and visiting children. There is a simple solution to the problem: either keep guns unloaded or use locking devices. The risk is too great - when little children are involved - to take a chance.

Source: Associated Press

NHTSA PROPOSES NEW CHILD BOOSTER SEAT RULES

The National Highway Traffic Safety Administration (NHTSA) has proposed new requirements for child safety seat manufacturers that choose to make booster seats for older and heavier children. The new proposal requires these manufacturers to build seats capable of protecting children up to 10 years old and weighing up to 80 pounds from death or serious injury in 30 mile-per-hour crashes. Also, under the proposal NHTSA would use a new, fully instrumented dummy simulating an 80-pound, 10 year-old child to make sure seats meet the proposed new requirements. Currently, NHTSA tests booster seats rated to accommodate children weighing a maximum of 65 pounds.

Anton's Law required NHTSA to expand the scope of federal standards governing child safety seats, including booster seats. The new proposal is part of the agency's continuing efforts to improve child occupant safety. The law was named after Anton Skeen, a four-year boy who was ejected and killed in a car crash in Oregon in 1996. Clearly, child safety seats and booster seats must protect children. It is NHTSA's duty to

make sure that happens. Hopefully, the new proposal is a good response to Congress' mandate.

XVIII. RECALLS UPDATE

GM RECALLING 800,000 PICKUPS AND SUVs

General Motors Corp. is recalling about 800,000 sport utility vehicles and pickup trucks in 14 northern states because corrosion was affecting the antilock brake system, leading to more than 200 low-speed crashes. The recall involved the 1999-2002 model years of the Chevrolet Avalanche, Chevrolet Silverado, Chevrolet Tahoe, GMC Sierra, GMC Yukon, and GMC Yukon XL. In late April, the National Highway Traffic Safety Administration opened an investigation of more than 1.2 million GM pickups and SUVs in 20 states because of questions over the antilock brakes. That investigation is still pending. Salt corrosion and road grime can wedge its way into a plastic piece that covers the ABS sensor near the wheel hub, according to information received from General Motors.

The corrosion leads the sensors to activate the ABS system at speeds of about 4 mph to about 11 mph, requiring a longer stopping distance. The ABS system is generally started at speeds of 15 to 20 mph. According to GM, there have been 228 crashes reported through the end of May, including 10 minor injuries. The recall involves less than 20% of the vehicles built during the four model years. The states include: Connecticut, Illinois, Indiana, Massachusetts, Maine, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and West Virginia.

HYUNDAI RECALLS 36,000 SONATAS

Hyundai Motor Co. has issued a recall of 36,000 Sonata sedans, some of which were produced in the Hyundai facility in my hometown of Montgomery. The recall was initiated because of problems with the driver's seat belt snagging a lever used to recline the front seat, Hyundai officials said. The problem was identified during tests of the 2006 Sonata conducted June 28th by the Insurance Institute for Highway Safety. A Hyundai spokesman said the company was conducting the recall "to ensure the quality and safety of our vehicles." The company says it is not aware of any incidents or injuries.

Hyundai issued the recall after the problem was found. Both the four- and six-cylinder models use the same seats, and each is being recalled. The majority of the six-cylinder Sonatas come out of the Montgomery plant. According to Hyundai, the company stopped building the seat with the lever in question on August 16th. More than a month-and-a-half lapsed between finding the problem, however, and fixing it at the manufacturing plant. Many of the cars being recalled still are on dealer lots and never reached customers. A mailing to customers should go out this month, instructing them to visit a dealership and have the part changed.

Source: *The Associated Press*

HYUNDAI RECALLS ELANTRA OVER AIRBAG SYSTEM

Hyundai Motor Co. is also recalling 240,000 Elantra sedans because the computer that operates the airbag system could confuse a child seat for an adult in the front passenger seat. The recall involves vehicles from the 2004-2005 model years. The Elantra is the automaker's most popular-selling vehicle in the United States. An evaluation conducted by the National

Highway Traffic Safety Administration found that a child seat in the front passenger seat could be misclassified by the airbag sensor system as an adult passenger. Hyundai says it could only happen if a child seat was installed after an adult had been in the passenger seat and then the ignition was turned off. Under that scenario, when the vehicle was turned back on, the system's memory would misinterpret the child seat as an adult passenger. According to the company, it could lead to the deployment of the front airbag and side-impact airbag in a crash. Normally, those airbags would not deploy if the system properly identified a child restraint seat because the impact of the bags could injure a child.

Owners are expected to be notified by mail in October. Dealers will fix the problem by reprogramming the computer system. The Elantra starts at \$13,299, according to the automaker's website. Hyundai issued a separate recall in August of about 36,000 2006 Sonata sedans because of problems with the driver's seat belt getting caught up with a knob used to recline the front seat.

TOYOTA RECALLS VEHICLES

Toyota Motor Corp. has recalled 978,000 sport utility vehicles and pickup trucks over complaints that a rod linking the steering wheel and the wheels could fracture when the steering wheel is turned while the vehicle is stopped. The affected vehicles include the 1990-1995 4Runner SUV, 1989-1995 truck 4WD, and 1993-1998 T100 pickup. The Toyota recall, which began in mid-September, was based on seven confirmed cases of the power steering problem in T100 vehicles. Thus far, no crashes have been tied to the issue. Interestingly, Toyota's U.S. sales were up 11.4% in the first eight months of this year, compared with an average increase of 3.5% for the Big Three. Car sales

made up most of that increase. Sales of light trucks, including the 4Runner, were up only 2%.

CHRYSLER RECALLING JEEP GRAND CHEROKEES

DaimlerChrysler AG's Chrysler Group is recalling more than 100,000 Jeep Grand Cherokee sport utility vehicles because water contamination of the transmission fluid could lead to fires under the hood. The recall involves 2005 model year vehicles with 3.7 liter engines and automatic transmissions. This involves about 45% of all Jeep Grand Cherokees sold from that year. Condensed water from the air conditioning system could drip down into the case that holds the transmission fluid, contaminating the fluid and leading to a shaking in the transmission. The automaker says this can happen only in a small number of vehicles.

If owners fail to address the shaking, the transmission would operate at higher temperatures and could boil the water in the transmission fluid and eject some of the fluid. The fluid could come into contact with a hot part of the exhaust system and cause an engine fire, he said. The automaker told the National Highway Traffic Safety Administration (NHTSA) that it has received four reports of fires in the vehicles from Dollar Rent A Car. Two of the fires happened in Hawaii and the other two took place in California and Washington state.

According to the company, less than 1% of the vehicle's owners have filed warranty claims citing the problem. In its filing with NHTSA, DaimlerChrysler estimated that less than 5% had the potential problem. All owners will be notified of the recall during this month. Motorists should have their vehicles inspected by a dealer.

TARGET RECALLS BICYCLE HELMETS

Target Corp. has recalled nearly 500,000 children's bicycle helmets because some of them do not meet government safety standards. The helmets, made by China's UNA International Ltd. and distributed by Dynacraft BSC Inc. of San Rafael, California, were sold under the Back Trails Jr. brand. The U.S. Consumer Product Safety Commission said no incidents or injuries have been reported involving the helmets, but recommended that consumers stop using them immediately. The helmets were sold between April 2004 and July 2005 and cost about \$13. Anyone who bought one of these helmets can return it to a Target store for a gift card in the amount of the purchase price, according to the company.

1.5 MILLION FOOD PROCESSORS RECALLED

The U.S. Consumer Product Safety Commission has announced that about 1.5 million Ultimate Chopper food processors are being recalled because they pose risks of injury, including amputation. A malfunction of the appliance allows it to operate without its lid. Ultimate Chopper LLC and the CPSC have received 17 reports of injury, including five requiring stitches or surgery. The Ultimate Chopper is a compact, single-speed food processor that can also function as a blender when an optional attachment is used with the base. The recalled product has been marketed and distributed through television infomercial sales, the company's website, and various retailers nationwide. The food processors were sold from March 2002 through July for about \$40. Consumers should inspect their Ultimate Chopper food processor to determine whether the interlocking lid is functioning properly. Consumers should remove the lid and blade assembly and test to see whether the unit will operate without the lid on. If the unit

turns on when the lid is removed, consumers should stop using it and contact Ultimate Chopper LLC to receive a free replacement unit. Consumers can call the company at (800) 819-6297 or visit its website, www.ultimatechopper.com, for more recall information.

XIX. SPECIAL PROJECTS

KATRINA RELIEF EFFORT

After Katrina hit, the employees in our firm pitched in to help our neighbors in Mississippi and Louisiana, as well as those in our home state of Alabama. Mississippi and Louisiana bore the brunt of the devastation caused by Katrina and that's where the most of our help went. We sent the 18-wheeler that normally transports our firm-sponsored race car to the affected area loaded with supplies. Grant Enfinger, our driver, and his family worked hard on this project. In addition, we also sent a tremendous amount of clothes, medicines, and other needed items to a local church for distribution in the affected areas. It was real good to see how our folks responded. Greg Calhoun of Calhoun Foods in Montgomery furnished a good supply of needed items from his stores to us - at no cost - which we helped distribute to the victims of Katrina. Helping people who went through this disaster and are now coping with difficult circumstances is an obligation we all share. I am proud of the folks who work at our firm and who care about the welfare of others.

A MESSAGE FROM AN OLD FRIEND FROM MOBILE

My friend Ed Kahalley Sr., who resides in Mobile Alabama, sent me a copy of an

interesting essay he had written. Titled "By Our Silence - We Are To Blame," the essay contains some insightful observations by Ed about some real problems in our country. Ed, who has never been afraid to speak his mind, has been active in Mobile and state politics for years and has helped elect some good folks to office. He was one of the late Jim Allen's close friends and advisors. In fact, Ed helped him get elected to the U.S. Senate in 1968. If you would like to obtain a copy of Ed's essay, contact him at P.O. Box 7656, Mobile, AL 36670. His telephone number is (251) 473-8791.

XX. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

Graham Esdale

Graham Esdale started his law career with the Jefferson County District Attorney's office. While there he was involved in over 150 trials. Graham was a member of the homicide and sex abuse division, which specialized in the prosecution of these complicated and sensitive crimes. He left the District Attorney's office in 1994 to enter civil practice, specializing in product liability and workplace litigation. Graham left Birmingham in the fall of 1996 to join our firm. Since joining our firm, his primary responsibilities have been in the area of product liability and workplace injury litigation.

Graham has been involved in the firm's tobacco litigation and other notable cases, including a \$114.5 million verdict against a bucket truck manufacturer. He also obtained a \$3 million verdict for a client against Alabama Power Company involving an electrical accident. Lately, Graham has been busy working on tire failures and the subsequent SUV rollovers that occur after a defective tire detreads.

Graham is married to the former Leigh Ann Hibbett of Florence, Alabama. They have two children, Whitney and Robert. The family attends the Episcopal Church of the Ascension. He is also a "big" Auburn football fan. Graham is a very good lawyer who really cares about his clients and does his best to obtain good results for them. We are fortunate to have him in the firm.

Judy Cole

Judy Cole, who has been with the firm for a total of eight years, currently works with Mike Crow in our Personal Injury section. As Mike's Legal Assistant, the bulk of Judy's work involves motor vehicle accident cases. She helps prepare cases and get them ready for trial. Originally from northeastern Maryland, Judy moved to Alabama in 1990. She has two daughters: Kyra Woodman, who lives in Birmingham with her husband, Hal, and their three children; and Cherisse Elliott, who lives in St. Louis, Missouri, with her husband, Darren, and their daughter. Judy enjoys painting in oils, cooking, cycling, swimming, and great music. She does excellent work and is a very good employee.

Angie Faust

Angie Faust has been with the firm for two years. She is currently a Staff Assistant in our Mass Torts Section working as part of our Vioxx team. Angie stays very busy dealing with file management and case work-up. Angie previously worked in our Personal Injury and Nursing Home Sections. She attended Prince Institute of Professional Studies - Court Stenography. Before entering the legal field, Angie worked for five years with the Department of Health and Human Services in the Maternal and Child Health Bureau in Rockville, Maryland. Angie and her husband, Terry, have a son, Brandon. She enjoys major landscaping projects, observing nature and spending time

with her husband, son, nieces, nephews, and friends. Angie is a very good employee who does excellent work.

XXI. SOME PERSONAL OBSERVATIONS

The effects of Katrina and Rita will be felt by all of us for years. Hundreds of thousands of residents in Louisiana, Mississippi, Texas, Alabama, and Florida suffered tremendous losses, and many citizens were displaced and will be for a good while. Thousands of folks are left without a home, a job, a vehicle, and with little, if any, access to money. There was also a very large loss of life - with the exact numbers still unknown - and that's the biggest loss. The rebuilding efforts - especially in Louisiana, Mississippi and Texas - will be extremely costly and will require years to complete. This tragic situation has had a two-fold result: (1) we now realize that thousands of folks in this country live in poverty, especially in our larger cities; and (2) we have become closer as a nation and have shown that we still are caring people. The misery and suffering of our fellow citizens have caused each of us to count our own blessings. It has also given us the opportunity to help others who are in need. One thing we all have to realize is that "lives" and not "stuff" are the only things that really count in times like these. Our priorities at home and at work may need to be rearranged.

I am hopeful our political leaders all learned lessons from the massive destruction caused by Katrina and Rita. There was an obvious breakdown in preparation for the first hurricane at all levels of government. This lack of preparation and a very slow response by the federal government have caused an unbelievably bad situation to exist in the aftermath of Katrina. One most apparent deficiency was the inability of the various levels of government to

communicate with each other after the storm hit shore. If our national government can send folks to the "moon," it would seem that it could develop a communications system that would be operational in the case of a massive disaster. We learned a painful lesson from Katrina, but hopefully we did learn that lesson well. Not knowing the full impact of Rita at this time, I am not sure how much the obviously better planning and preparation paid off. I pray that it was greatly beneficial to the areas hit.

I would like to mention one more thing about the storms. Thousands of people - many of them affected adversely by the storms - worked very hard to help others in all of the states hit by Katrina and Rita. But, much of the media attention was given to the "failures" relating to New Orleans. That's understandable because these failures caused a great deal of misery and hurt to the Katrina victims. I would like to single out those folks in that city who were the real heroes. There was an obvious lack of leadership, but there was no shortage of heroes. There were thousands of these heroes who worked around the clock in New Orleans to rescue folks who were left in harm's way. Rescue workers, firefighters, law enforcement personnel, military personnel and health care professionals all did outstanding work under the most difficult of circumstances. For example, many of the first-responders in New Orleans had suffered the loss of their own homes and property. Their efforts were above and beyond the call of duty. God will bless them for their caring spirit, dedication, sacrifice, and hard work.

XXII. SOME PARTING WORDS

In times like these, we must depend on our only real hope and that is in God's awesome power to overcome whatever seems to overwhelm us. Our prayers are powerful weapons and that's a fact. Prayer will work even when things appear to be totally hopeless. Consider these words from the Holy Bible:

God is our refuge and strength, an ever-present help in trouble. Therefore we will not fear, though the earth give way and the mountains fall into the heart of the sea, though its waters roar and foam and the mountains quake with their surging. There is a river whose streams make glad the city of God, the holy place where the Most High dwells. God is within

her, she will not fall; God will help her at break of day. Nations are in uproar, kingdoms fall; he lifts his voice, the earth melts. The LORD Almighty is with us; the God of Jacob is our fortress.

Psalm 46

Jesus knew that there would be times when hopelessness seemed to be the order of the day. His words give us comfort and hope.

Do not let your hearts be troubled. Trust in God; trust also in me.

John 14:1

I have told you these things, so that in me you may have peace. In this world you will have trouble. But take heart! I have overcome the world.

John 16:33

It is relatively easy for a man sitting comfortably in Montgomery, Alabama, who hasn't experienced what the residents of New Orleans went through, to say he would have had hope in the aftermath of Katrina. I haven't had to wonder how I would survive on a roof top along with my family as the waters were rising, surrounding my home. I haven't had to wonder how I would feed my family with no job, no money and no home left. I haven't had to wonder where I would sleep at night. I haven't had to move to another state wondering if some of my family members who are missing are safe. I sincerely want to believe that I would put my faith in God to keep hope alive. I do know that, even in those circumstances, God is bigger than any problems we could ever face in this world. God is our only hope - in times like these.

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