



THE  
**JERE BEASLEY REPORT**

JANUARY 2006

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A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA

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# I. CAPITOL OBSERVATIONS

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## *AN UNWARRANTED ATTACK*

John Giles, who heads up the political organization called The Christian Coalition, made an attack on Attorney General Troy King that was both surprising and totally unwarranted. In essence, John claims that the Attorney General hasn't been tough enough on gambling in Alabama. Coming from the leader of a group that has secretly taken money from gambling sources in the past, I find the attack to be rather strange to say the least. I have never discussed the Attorney General's feeling about gambling in Alabama with him, but I have never considered him to be soft on the issue. In fact, his actions lead me to believe he doesn't like gambling and will enforce the existing laws to the limit.

I don't know if John has another candidate he is promoting or if he is just trying to shift attention away from his own group's gambling money problems. The latter may well be the case considering Ralph Reed's persisting problems relating directly to his strong gambling ties. Reed was said to be the gambling contact for Giles' group. In any event, John was off-base in his recent attack on Troy King, who I believe is doing a very good job as Attorney General. Perhaps, by the time you read this John will have apologized for his actions. At the very least—he should!

## *FORD SETTLES EXPLORER REAR END SKATE CASE*

Our firm recently settled a case with Ford Motor Co. involving a 1997 Explorer accident that occurred in Venezuela. The driver of the Explorer lost control over his vehicle in the accident when the passenger-side rear Firestone AT Wilderness tire lost its tread. As a result of the tread separation, the Explorer became uncontrollable, cross-

ing the median and colliding with a vehicle occupied by our clients, the Brzobohaty family. In the collision, Glenda Brzobohaty was injured along with her three children. The Brzobohaty's daughter, Karla, suffered slight physical injuries while their teenage daughter, Erika, suffered a permanent brain injury. The Brzobohaty's only son, Andres, died from his injuries. The family brought suit against Ford and Firestone in the Federal District Court for the Northern District of Alabama. At the time of the accident, the Brzobohaty family was residing in Alabama but had returned to Venezuela to visit family. The accident occurred when Glenda and her children were driving to the airport to meet Carlos. After the accident, the family came to our firm for help through Borden Ray, a very good Tuscaloosa lawyer, who assisted us in preparing this case for trial.

We settled with Firestone before the claims against Ford were set for trial. We then proceeded to get the case ready against Ford. Claims were made against Ford Motor Company for defects related to the handling characteristics of the Explorer during a tread separation event, as well as claims for failure to timely recall the tires on the Explorer. Specifically, we alleged that the Ford Explorer was unreasonably dangerous because of a defect known as rear axle "skate," which creates an oversteer condition that allows the rear axle of the vehicle to swing around uncontrollably during a tread separation event. The oversteer condition also makes the Explorer respond inappropriately to driver inputs.

Coincidentally, Venezuelan engineers with Ford determined nearly a year before this accident, as a result of investigating numerous Explorer accidents that occurred after a tread separation, that rear axle "skate" could be controlled if stiffer shocks were placed on the Explorer. Although Venezuelan engineers at Ford proposed a national recall to replace shock absorbers and tires on the Explorer in Venezuela, engineers in

the United States prevented the action from occurring. Nonetheless, Ford did institute a "silent recall," known as a technical service bulletin, where Ford would put stiffer shocks on an Explorer if a customer complained about rear axle skate.

Before this accident, Ford had recalled the exact same tire in Saudi Arabia because of excessive tread separations. This recall occurred ten months before this accident. In fact, two weeks after this accident, the driver of the Explorer received a recall notice from Ford offering to replace his Firestone tires. Addi-

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tionally, Ford expert engineers have testified under oath that the Ford Explorer was defective for handling under all foreseeable uses with a tread separated tire. Had Ford recalled the tires in Venezuela at the same time it did in Saudi Arabia or had gone forward with the shock replacement proposal, this tragic accident never would have occurred.

The Brzobohaty family has endured extremely difficult circumstances in overcoming the loss of Andres and working through the injuries received by Karla, Glenda and Erika. The impairment suffered by Erika has put the family through several years of stress and turmoil. The case was in the MDL for several years before being sent back to federal court in Birmingham. The family credits their faith in God for their ability to persevere through these extreme difficulties. We have considered it an honor to represent this exceptional family. The case settled after a jury was selected on December 20<sup>th</sup>. The amount of the settlement is confidential at Ford's request. It is good to know that we were able to help this family in a meaningful way. Cole Portis, Ben Baker, Greg Allen, and I, along with Borden Ray, handled this most significant case for the family.

#### *SETTLEMENT WITH GENERAL MOTORS*

Greg Allen of our firm has settled a most significant and important case with General Motors Corporation. The case, which was filed in Baldwin County, Alabama, involved a paralyzing injury to a beautiful young lady from Fairhope, Alabama. Our client was riding as the rear center seat passenger in a 2003 Pontiac Grand Am. The driver lost control and struck another vehicle head on. This young lady was wearing the available seatbelt for the rear center seat, which was a lap belt only. A friend of the young lady sitting next to her was wearing the available three-point seatbelt, which included a shoulder harness and lap belt. The friend was treated and

released from the hospital essentially unharmed. Our client received a typical lap belt injury that occurs from a poorly designed restraint system. This was a lap belt injury case.

The rear seat of the Grand Am was not designed with an anti-submarining seat pan. This young lady jackknifed over the belt, and her pelvis submarined under the belt, resulting in a spinal fracture. Our client's treating physician said that this was a classic seatbelt injury. We were able to prove that at least ten years before, in comparably priced and sized vehicles, GM was putting anti-submarining seat pans in their cars. In addition, by 2003 the majority of GM's vehicles had lap and shoulder harnesses in the center seat position. GM could not explain why this vehicle was not equipped with a three-point shoulder harness in the rear center seat position. GM's failure to put this \$12.00 seatbelt in the rear center seat position resulted in this young lady's life being changed forever.

We also found out that GM never tested the center seat lap belt in a crash or in a sled test. GM has known for decades the forces in a frontal collision may cause paralyzing injury with lap belts. As we prepared the case, we discovered that GM had not disclosed other similar lawsuits as required by the Court's order. We discovered that an eight-year-old child in Texas had unfortunately been the victim of the same seat and seatbelt design. The child is now a ventilator dependent quadriplegic.

When we pointed out to the Court that GM had failed to disclose the information, Judge Robert Wilters, a no-nonsense judge, entered an order sanctioning GM that allowed the other lawsuits into evidence without the necessity of laying the normal foundation. Shortly after the order was entered GM got serious about settling the case. This case points out how big corporations will test a trial judge. When a trial judge properly exercises his authority, that can make things happen rather quickly.

The funds in this case will be partially structured to take care of this young

lady's future needs. But, no amount of money will ever replace what she has lost as a result of GM's conduct. In 2003, Congress passed Anton's Law, which mandates that by model year 2007, all rear center seat positions will have to have a shoulder harness. GM knew this was coming, but failed to take appropriate action with this vehicle. It's really a shame that manufacturers have to be forced by the federal government to design their vehicles properly. The result in this case is a classic example of how important pre-trial discovery is in a product liability case. In my opinion, Greg Allen is the best lawyer in the country when it comes to discovery in cases of this sort. His technical knowledge and work ethic give him the ability to carry out effective discovery in complex cases against automobile manufacturers. We are most fortunate to have Greg in our firm.

#### *THE TEXAS VIOXX TRIAL*

The first federal court trial involving Vioxx was held in Houston, Texas, and it resulted in a mistrial. The jury, after hearing seven days of evidence, was deadlocked and reported to the judge that they couldn't reach a verdict. Judge Fallon, who tried a case in seven days that most observers thought would take three weeks, declared a mistrial because of the deadlock on the fourth day of jury deliberations. The case would have resulted in a mistrial due to false and misleading testimony given during the trial by a key Merck witness even if the jury had reached a verdict. The case tried very well for our side and we believed that the jury would return a substantial verdict against Merck. However, that turned out not to be the case. In any event, the case will be retried in New Orleans on February 6<sup>th</sup>.

Merck's conduct relating to the marketing of Vioxx was as bad as I have ever seen. As previously reported, the company was taken over by a "marketing group" in the mid-1990s. At that juncture the real doctors and scientists

were put on the shelf and the “master salesman” took over. We have seen the tragic results of that development. Merck was losing its patents on six major drugs at that time and the company had to have a “blockbuster drug” that would generate sales by the year 2000 in the multi-billion dollar range annually. As we now know, Vioxx was that drug. During the development and marketing of Vioxx, Merck successfully lied to the FDA, the medical community, and the public and were able to keep the heart attack risks associated with Vioxx hidden from prescribing doctors for at least 3 ½ years. As a result, the company was able to rake in huge sums of money from Vioxx sales. Before being pulled from the market in 2004, annual sales had reached \$2.6 billion. Hundreds of millions of dollars worth of stock were sold by the bosses at Merck before Vioxx left the market. That is another story, I suppose, and I have to wonder why no stockholders are concerned over that development.

Dr. Eric Topol, who is universally recognized as the leading cardiologist in the world, testified at our trial by videotaped deposition. He accused Merck of scientific misconduct in the development and marketing of Vioxx. Dr. Topol described Merck’s conduct relating to Vioxx as appalling. It is very significant that Dr. Topol says that short term use of Vioxx can result in heart attacks, which negates the myth Merck has put out to the media and the public that it takes 18 months of use for problems to occur. More will be said about Merck’s misconduct in the Mass Torts Section.

#### **COMMISSIONER SPARKS PRESENTS KATRINA RELIEF FUNDS**

In December, Alabama Commissioner of Agriculture & Industries Ron Sparks presented Governor Bob Riley, Montgomery Mayor Bobby Bright, and River Region United Way Executive Director Charlie Colvin with two checks for \$40,000 each from the Alabama Agricultural Relief Fund. The funds were raised

at the Alabama Katrina Relief Concert held in Montgomery this past September. The concert raised a total of \$120,000 for relief efforts in Alabama, with an equal amount going to the Governor’s “Operation Golden Rule,” the “United Way Local Relief Fund,” and the Department’s “Alabama Agricultural Relief Fund.” Both “Operation Golden Rule” and the “United Way Local Relief Fund” are being administered and disbursed by the United Way. The Department of Agriculture & Industries has formed a committee made up of agricultural specialists who have determined the distribution of the remaining \$40,000 of the relief funding. Commissioner Sparks, in making the presentation, stated:

*We put this concert together to raise money and try to help people affected by Hurricane Katrina. As most people who live here have seen, the outpouring of generosity from the people of Alabama has been overwhelming. I want to thank everyone who has helped to make a difference for the people who experienced such tragic losses.*

The September concert was held at the Montgomery Biscuits Baseball Stadium and featured performances by members of the band Alabama, Jeff Cook, Teddy Gentry, and Randy Owen, as well as Nashville songwriters Neal Thrasher, Wendell Mobley, Jason Sellers, and Jamie Johnson. The Alabama Katrina Relief Concert was a joint effort between employees of the Alabama Department of Agriculture and Industries and the City of Montgomery’s staff at Riverwalk Stadium. This is a prime example of how people can help other people who are in real need. All of those involved in this project should be commended. It is typical of Alabamians who will step up to the plate and help when folks are in need. The victims of Katrina have special needs that are still most apparent.

#### **NANCY WORLEY IS A GOOD SECRETARY OF STATE**

Nancy Worley is serving her first term in public office and is Alabama’s 50<sup>th</sup> Secretary of State. Nancy has done a very good job as Secretary of State. The Madison County native is an extremely hard worker and in my opinion has served our state well. Nancy worked in public education for years before running for public office. She has made a tremendous number of friends around the state over the years and those friends are extremely loyal to her. Personally, I believe that Nancy has performed well in a most important office. She has an open door policy, which folks like. The Secretary of State’s office is operated very efficiently and from what I hear Alabamians are satisfied with the services rendered. Being the Chief Election Official for the State of Alabama is an awesome responsibility and that is just one of Nancy’s responsibilities. The office has over a 1,000 duties designated by law. I believe that Nancy’s job performance entitles her to a second term.

#### **SENATOR FRIST GIVES AN ENORMOUS EARLY CHRISTMAS GIFT TO THE DRUG INDUSTRY**

On December 21<sup>st</sup> the U.S. Senate, at the request of Senate Majority Leader Bill Frist, gave the powerful drug industry an early Christmas present. A 45-page rider tacked on to the Defense spending bill conference report by Senator Frist absolves drug makers of responsibility even for gross negligence or recklessness when making tainted, defective or deceptively labeled products. Worse still, legal immunity under the bill would extend to already available commercial drugs if they are used to prevent, treat or cure a designated epidemic or pandemic disease. Clearly, the measure will reduce the incentive for drug makers to make safe pandemic vaccines or drugs, and will deter people from being vaccinated. Congress has done a great disservice by bowing once again to corporate greed. The manner in

which the drug industry has given virtual immunity for wrongdoing by the GOP leadership tells us how powerful the industry is.

Senator Frist's strong-arm tactics, which defied his own written assurances to conferees that the report would not contain the liability provision, demonstrate the extreme lengths to which he is willing to go to pay back corporate cronies at the public's expense. The powerful Senator's latest maneuver came despite his acknowledgment that even high-quality drugs and vaccines, let alone those hurried through production to meet emergency deadlines, may harm patients. For example, after the 2001 Capitol Hill anthrax scare, Senator Frist told CNN that Senate staffers should not be inoculated with the anthrax vaccine because of its potentially serious side effects. Yet his cautiousness has not extended to concern for the general public. Another example is a controversial adjuvant, MF59, which has been cited as a possible cause of Gulf War syndrome. It is being used by Chiron in its experimental avian flu vaccine, for which the company recently signed a \$62.5 million contract with the U.S. government. Under Frist's drug company immunity provision, Chiron would have no responsibility if anyone is injured by the substance.

The bill grants unprecedented immunity to the drug industry and forces citizens and first responders to choose the lesser of two large-looming evils: (1) taking the recommended countermeasure with its potential for causing harm; or, (2) taking a chance on contracting the pandemic disease. Some of the bills more outrageous provisions include:

- Sweeping, unchecked power for the Secretary of Health and Human Services (HHS) to activate drug company immunity. The Secretary of HHS may declare that a disease, health condition or threat constitutes a public health emergency or that there is a credible risk that these "may in the future" constitute such an emergency.

Not only is "public health emergency" undefined, but the terminology is so broad as to allow a declaration of emergency under virtually any circumstances whatsoever. The Secretary's decisions can be made with utter impunity. Some say the decision can't be reviewed or appealed to any court. Hopefully, that won't be the case.

- Danger to the public is not considered a factor in declaring an emergency. The only factor that the Secretary *must* take into account when determining whether to declare an emergency is the desirability of promoting development, manufacturing and marketing of pandemic products. The focus is on commercial interests rather than creating meaningful guidelines for assessing the degree of danger represented by a particular disease threat.
- All state laws regarding the designated products are pre-empted. State consumer protection laws—for example, one that requires a package label to warn against administering a vaccine containing Thimerosal to pregnant women—will no longer be enforceable. Laws deliberated and passed by state legislatures to ensure protection of residents against dangerous drugs—including laws making drug companies liable for injuries—will immediately be suspended upon declaration of an emergency by the Secretary of HHS.
- Obstacles to liability are impossibly high; the sole exception to immunity is conduct tantamount to criminal assault or murder. A company would lose its immunity only if the victim of one of its products could prove by clear and convincing evidence that the defendant had actual knowledge that use would result in injury or death. In fact, the bill expressly protects drug companies from liability for reckless conduct or gross negligence.

- Imposes archaic, onerous and out-moded procedural requirements on victims who attempt to hold drug companies accountable. The bill ignores modern legal rules and procedures developed over the years by the courts, instead reverting to the legal Dark Ages by imposing a combination of extraordinary technical pleading rules and bizarre requirements unknown to any other form of litigation, such as affidavits from *non-treating physicians* and certified medical records. Moreover, even if the victims get this far, a defendant company is still protected from suit if the HHS Secretary or U.S. Attorney General has not taken some enforcement action against it for violating the federal Food, Drug and Cosmetics Act.

The federal government certainly has a responsibility to protect the nation from the risk of widespread disease. However, allowing the powerful drug industry to market dangerous products and then barring consumers from meaningful recourse when injured is not the answer. The only way Senator Frist could get this bill passed in the Senate was to attach it to the defense appropriations bill. He did it with the help of the Speaker of the House late on a Sunday night without alerting the full Senate. I am told this was done after the conference committee report had been signed by many of the conferees. To assure passage of the drug provisions, a great number of other measures were added, including the hurricane relief appropriations.

This is not the first time that Senator Frist has done this sort of thing. In 2002, the powerful Senator surreptitiously exploited a procedural loophole in the legislative process to tuck an inconspicuous provision into the Homeland Security bill that shielded major Republican donor Eli Lilly from accountability for injuries caused by its vaccine preservative, Thimerosal. Congress was forced to repeal the measure when it was revealed later. As to the current bill, there may well be a constitutional problem relating to the immunity provisions of the bill.

As you may know, Former HealthSouth Corp. Chairman Richard Scrushy has filed separate suits against *The Birmingham News* and Paul Finebaum. Scrushy is seeking millions of dollars in damages in a pair of lawsuits filed in Jefferson County that accuse the newspaper and the Alabama radio personality and sports columnist of defaming him. Both lawsuits include claims that Finebaum and the *News* libeled him with coverage or comments suggesting that Scrushy joined a black church for legal, not spiritual, reasons. In September, Scrushy's wife, Leslie, joined her husband as a plaintiff in the Finebaum case. She cited a radio show in which Finebaum and his callers discussed who might play her should Hollywood make a "Scrushy Movie." According to the lawsuit, Finebaum "publicly described Mrs. Scrushy as plastic, as a gold digger, as a fake, as a phony, and as an air head," during a show last February.

In the case against the *News*, Scrushy cites a host of news stories, opinion pieces and editorial cartoons to bolster his assertion that the state's largest paper, among other things, was responsible for HealthSouth's March 2003 decision to remove Scrushy as chairman. It went largely unnoticed when Scrushy sued the *Birmingham News* last December. About four months later, he began proceedings against Finebaum and Clear Channel Worldwide, which broadcasts Finebaum's popular syndicated talk show. The lawsuit against Finebaum cites commentary on his radio show, as well as quotes by Finebaum in a New York Times story and in an interview on *CNN* after Scrushy was acquitted. I understand a hearing is scheduled on the suit against the *News* on the 20<sup>th</sup> of this month. The *News* will ask the court to dismiss all claims involving opinions. It would appear that Scrushy is a "public figure" which will make his burden of proof pretty high in his lawsuit. In any event, it will be interesting to see how this

chapter plays out. I may be missing something, but so far I haven't seen anything that, under well-established law, would give the defendants in the lawsuits much to worry about.

Source: *Mobile Register*

#### **SENATOR LOTT TAKES HIS INSURANCE CLAIM TO COURT**

Senator Trent Lott of Mississippi was one of the thousands of Katrina victims. He lost his family home and all of its antique furnishings. The Senator became so frustrated and angry when his claim wasn't paid promptly that he filed suit against State Farm Insurance Company, the insurance company that insured his home which was located on the gulf coast. The Senator—like thousands of Mississippi, Louisiana and Alabama citizens—suffered a serious loss that was covered by his insurance policy. In a media interview Senator Lott had this to say:

*That was my nest egg. It was about half my net worth. I have a \$400,000 loss after the flood insurance. Its appraised value was probably \$600,000 to \$700,000, but I had been offered more to sell it. That house was the first thing I ever had that was paid for.*

*I hooked up with my no-good brother-in-law (attorney Dickie Scruggs) on that. I've told him I don't believe in what he does, those big plaintiffs' suits, but how can insurance companies say we didn't have any wind damage from this storm? (State Farm) is telling me I had no wind damage whatsoever. It's not credible. What they should do is create zones, and say, OK, in Pascagoula, those of you in this zone had 12% or 40% or whatever percent was wind damage. At least something. My roof was over in my neighbor's yard after the storm. The chairman of (State Farm's) board really made me mad. I don't remember*

*his name—some funny-sounding Illinois name, Chicago accent. I talked to him after I had been dealing with them for so long. He said he would look into my situation. I told him I didn't want any special consideration. I wanted them to do what was right for everybody. In my case, if they would have even given me a little bit for wind damage, my argument would have been taken away.*

I have no problem with a U.S. Senator filing a lawsuit. I do have a problem, however, when a public official helps shut the courthouse door to ordinary citizens, but jumps into court every time he or she has a personal or family loss. Senator Lott has a history of supporting legislation designed to destroy the court system. In fact, he was one of the leaders in the efforts to restrict the rights of ordinary citizens to file lawsuits when they were victims of corporate wrongdoing. Now the Mississippi Senator must realize that he was clearly wrong in his prior attacks on the jury system. I hope that he won't revert back to his "old ways" once his insurance claim is resolved.

Source: *The Sun Herald*

## II. LEGISLATIVE HAPPENINGS

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### *THE REGULAR SESSION*

The regular session, which will start up on January 10<sup>th</sup>, should prove to be a most interesting one. If the legislators can pass the budgets on time I will consider the session a success. I really don't expect very much else of consequence to make it through both houses and become law. Some say that the best thing the Legislators could do would be come in—pass the budgets—and then go home. Of course, the powerful lobby groups would never let that happen—so

it's just wishful thinking to even consider that possibility. Seriously, there is much that could be done during the session. Perhaps, the members of the House and Senate can put a self-imposed moratorium on partisan politics for the duration of the session and do the people's business during the weeks they spend in Montgomery. If that were to happen, it would be most refreshing!

#### **A PEOPLE'S AGENDA**

I learned a long time ago that in Alabama only the Governor and the powerful lobby groups control what happens during any legislative session. It's clearly the governor's duty to come with a strong legislative agenda. The lobby groups—while they have no legal standing—are obviously much more powerful than any elected official other than the Governor. If I were in a position to design a legislative agenda, I would propose the following items for the Regular Session. This list could be labeled "The People's Agenda" and could be considered by our Legislators:

- Prompt passage of both budgets;
- Passage of strong election laws;
- Passage of strong laws to control lobbyists;
- Passage of strong campaign finance laws that would give ordinary citizens a real voice in government for the first time;
- Passage of legislation to protect consumers against mandatory, binding arbitration;
- Strengthening of Alabama's weak consumer protection laws;
- Adequate funding and staffing for the Alabama Insurance Department;
- Necessary funds to hire at least an additional 100 state troopers;
- Repeal of the Pay Day Loan Act and passage of a consumer friendly act to replace it;

- Passage of legislative authorizing a convention to replace Alabama's 1901 Constitution;
- Enactment of tax reform that would take the burden of taxation off of those who can least afford to bear that burden;
- Passage of a constitutional amendment that would place the Lt. Governor in the Executive Branch of government with no legislative duties; and
- Passage of additional legislation that would require the candidate for Governor and Lt. Governor to run as a team from the same political party.

### **III. COURT WATCH**

#### ***APPEALS COURT TO HEAR EXXON VALDEZ CASE***

The long-running Exxon Valdez lawsuit will have another day in court later this month. On January 27<sup>th</sup>, the U.S. Court of Appeals for the Ninth Circuit, located in San Francisco, will hear arguments over punitive damages from the 1989 Exxon Valdez oil spill in Prince William Sound. At issue will be whether plaintiffs should receive \$4.5 billion in punitive damages plus interest. I hope the hearing will be the final argument before the appeals court over punitive damages. Thus far the giant oil company has been successful in tying the case up in court for about 15 years. The decision by the Ninth Circuit—if it goes against Exxon—will most likely be appealed to the U.S. Supreme Court. That will mean further delay in Exxon having to pay for its misconduct.

Each year fewer fishermen, Native subsistence gatherers, and other plaintiffs are still alive as the case remains in court. I am told that approximately 3,000 of the plaintiffs have died while waiting to receive the billions in punitive damages a jury first ordered Exxon (now ExxonMobil) to pay in 1994. More than 30,000

plaintiffs who were damaged by the oil spill remain. ExxonMobil is so politically powerful that it believes the company can operate above the law and get away with it. I am hopeful that will change one of these days.

Even though the Valdez incident occurred years ago, you most likely recall how all of this came about. The Exxon Valdez ran aground on a charted reef in Prince William Sound in March 1989, creating America's largest tanker spill. The estimated 11 million gallons of spilled oil fouled the sound, contaminated an estimated 1,300 miles of shoreline, killed marine creatures, and disrupted commercial fishing. A jury in 1994 first awarded \$5 billion in punitive damages to people whose livelihoods were harmed by the spill. Exxon appealed and the Court of Appeals for the Ninth Circuit said in 2001 that the award was too much. The U.S. District Court trial judge, H. Russel Holland, has reviewed the amount twice at the direction of the appeals court. Judge Holland made his most recent ruling almost two years ago. The judge said Exxon should pay \$4.5 billion, an award that could amount to almost \$7 billion with interest. Judge Holland said Exxon had "demonstrated reckless disregard for a broad range of legitimate Alaska concerns." ExxonMobil, the world's largest publicly traded oil company, earned nearly \$10 billion in the third quarter of 2005. It can certainly afford to pay for its wrongdoing. The punitive award is certainly justified based on the company's misconduct and the tragic results of that wrongdoing.

*Source: Associated Press*

#### ***CALIFORNIA COURT UPHOLDS \$53 MILLION JUDGMENT AGAINST DRUNKEN DRIVER***

A state appeals court in California has upheld a \$53 million judgment against a drunken driver who broadsided a Berkeley woman who almost died from her injuries. The defendant was convicted of drunken driving in connection with the accident in Oakland in 2000 and served about 10 months in a fur-

lough program. The drunken driver, who was 22-years-old at the time of the accident, was speeding on a busy roadway after a night of drinking and playing cards. He crashed into Theresa Johnson, an innocent victim, who was headed to work at Oakland International Airport.

Last year, Ms. Johnson received a \$53 million jury verdict in Alameda County Superior Court for her pain and suffering. This is one of the largest amounts ever won by a victim of drunk driving. The accident left the victim with a crushed pelvis and punctured lungs. She has since undergone four major surgeries. The no-nonsense message from this case—drunk drivers will no longer be coddled—is one that I hope will have a good effect. While it's unlikely that Ms. Johnson will ever receive any money from her verdict, she was willing to go through a trial to send a strong message. She made this observation after the court decision:

*It's not so much about the money, but he should be accountable in some other way. He should be made to pay in some other way because he cannot pay financially.*

We must do everything possible to make our laws tougher and reduce the number of deaths and serious injuries caused by alcohol-related motor vehicle accidents. Law enforcement personnel and the courts will do their job if the lawmakers will give them all the help they need. We must also do a better job of educating the public on this issue. Parents must set a better example for their children relating to the consumption of alcoholic beverages.

#### **A CLOSER LOOK AT THE ZYPREXA SETTLEMENT MAY BE NEEDED**

A New Orleans law firm has challenged the legality of Eli Lilly and Co.'s \$700 million settlement to pay liability claims over its top-selling drug Zyprexa. The challenge aims to delay or stop plans to make payouts that could average in the tens of thousands of

dollars to people who say they got diabetes after taking the drug. The opposition could prolong the litigation involving Lilly. The challenge came as Lilly and plaintiffs' attorneys were drawing up guidelines to use in compensating claimants.

Most of the 8,000 claimants suffer from schizophrenia or manic depression, the most common ills treated by the Lilly drug. Payouts are slated to be made in the spring. In a motion filed in court, the Louisiana firm charges that the privately negotiated settlement "flies in the face" of laws governing federal lawsuits that are consolidated in one court. They say the payouts to those claiming harm from Lilly's drug should be put on hold until questions about the deal's legality are answered. The law firm charges that its clients' cases were stymied when the judge overseeing the settlement imposed a stay on evidence-gathering, which doesn't let any attorney's subpoena the Indianapolis drug maker's documents and depose its employees and others. The firm's motion also asks the federal judge to lift his stay.

Lilly has written off about \$1 billion against earnings in 2005 primarily to cover the cost of settling the Zyprexa claims. Lilly already has transferred \$500 million to administrators appointed by the judge. The money is drawing 3.65% annual interest in an account at Citibank. The judge instructed Lilly and the lawyers to design a payout plan that is simple to administer and will "get the money out" to claimants as quickly as possible. The settlement will be called off if fewer than 90% of the approximately 8,000 claimants accept payments offered to them. Whether they can meet that threshold is unknown. A good number of lawsuits were sent to the MDL and many of the plaintiffs are quite frustrated. I understand that no discovery has been done by the MDL for at least 6 months even though there is much that is needed. We will see what transpires with this settlement. Hopefully, the end result will be one that is fair and equitable for all persons with claims.

#### **BLIND WOMAN SETTLES SUIT AGAINST TELEMARKETING FIRM**

A blind woman has won a \$200,000 settlement from a Naperville, Illinois, telemarketing firm that refused to hire her in 2002 because she would have needed to bring her guide dog to work. Ginny Quick, a college graduate who reads Braille, said she took her guide dog to an interview at Americall Group's facility in Lansing, and she later got a letter saying the firm could not allow the dog in the workplace. The U.S. Equal Employment Opportunity Commission filed a federal lawsuit on her behalf in August 2004. The settlement also calls for Americall to train its managers and human resource employees on disability laws. Americall officials admitted no wrongdoing in the settlement and are committed to equal opportunity, said their attorney, Kathryn Korn.

#### **H&R BLOCK TO SETTLE REFUND LOAN SUITS**

Tax preparer H&R Block Inc. has agreed to pay \$62.5 million to settle a number of class-action lawsuits dealing with its use of refund anticipation loans. A Circuit Court Judge in West Virginia gave preliminary approval to the settlement on December 23<sup>rd</sup>. The settlement will resolve four class-action suits filed in Alabama, West Virginia, Ohio, and Maryland, as well as claims pending in 22 other states and the District of Columbia. A hearing has been set for final approval on June 8<sup>th</sup>.

The settlement is said to cover more than 8 million customers who got the loans between 1989 and 2005. Under the refund anticipation loans, customers entitled to a tax refund could receive most of the money in two or three business days by paying a fee to file the return electronically plus a loan-processing fee. Critics claim that such loans prey on low-income households, immigrants and financially unsophisticated taxpayers who aren't adequately informed about high interest rates.

Besides the money, H&R Block agreed

to advise customers in the future about other options in filing taxes and gaining refunds quickly, as well as any interest charges or other fees they would have to pay. The settlement clears up all but two lawsuits tied to the refund loans. A federal case accusing the company of racketeering is scheduled to go to trial in Chicago in March, and a case filed in 1992 is still pending in Pennsylvania.

Source: Associated Press

#### **AUTOMOBILE EXPERTS DO WELL IN PRODUCT LIABILITY CASES**

Our firm handles a great deal of product liability litigation against the automobile industry and by necessity, we have to retain expert witnesses in the areas of design, kinematics, accident reconstruction, and the like. The automobile companies do the same and they have little difficulty finding candidates. Actually, we find that the automobile manufacturers use virtually the same experts in all of our cases. All of these experts make a very good living testifying for the automobile manufacturers. Some will say “black” is “white” when asked to do so by their “payers.” Two examples that come to mind are Lee Carr and Don Tandy. Lee Carr, a former Ford Motor Company engineer, left the company in 1981 to form his own consulting firm. Since that time, Lee has served as an expert witness for the automobile industry with a major emphasis on Ford cases. Lee currently has his own firm, Carr Engineering, Inc. Don Tandy is also a regular on the product liability lawsuit circuit. To give you an idea of how well paid these experts are, consider the following:

*From 1992 to 2000, Lee Carr was paid by Ford, including payments to his company, a total of \$32,239,072.64. That would be approximately \$4 million per year. Lee also was paid a great deal by other automobile manufacturers. According to depositions and trial testimony, approximately 25-30% of the total amount received by Mr.*

*Carr and his company comes directly from Ford. Lee continues to work for Ford up to the present date and his annual income has apparently increased. I don't have the current figures, but I understand that Ford is paying Lee about \$6 million annually for the last few years. At a minimum of \$6 million per year, you can figure it out for yourself. He is doing quite well.*

*During the period of 2002 - 2005, Don Tandy, was paid \$22,281,978.23 by Ford Motor Company. Don, who worked for Carr Engineering, Inc., saw how well Lee Carr was doing and decided to try it on his own. He left in 2002 to form Tandy Engineering. It appears that he made a good decision from a financial perspective.*

There are many more experts who make their living testifying for the automobile companies. Most all of them are doing about the same as Carr and Tandy, which isn't too shabby. It's not hard to see why it's so easy for companies such as Ford, General Motors, and the other car companies to attract experts. We have to try our best to match the defendants in these cases. Fortunately, there are qualified men and women who don't mind taking on our cases. We have learned from experience that our experts must measure up from both a talent and experience perspective to meet the challenge.

#### **IV. THE NATIONAL SCENE**

##### **DRINKING AND DRIVING CAUSES GREAT MISERY**

In 2005 almost 17,000 Americans were killed in alcohol-related vehicle crashes. That's a death every 30 seconds. No person is safe until we can stop this senseless tragedy. The number

of persons killed in motor vehicle crashes caused by drunk drivers always increases during the holiday season. Sadly, a significant number of fatalities are teenagers. Young people view some 2,000 commercials each year—nearly 2,000 of these are for beer and wine—and that's not good. As we know all too well, the holiday season is the worst time of the year for this type advertising. From now through the Super Bowl, there will be no escaping the alcohol commercials available to be seen by our young people.

Fortunately, there are groups fighting to save lives and curtail drunk driving. I encourage all of our readers to support Mothers Against Drunk Driving. MADD has done an outstanding job over the years, but they still need our financial help to keep the fight going. The alcohol industry spends nearly \$2 billion each year on advertising and much of it is aimed toward the teenage audience. There must be alternative advertising to paint the complete picture. That's where MADD can help. Please send a generous check to MADD at 511 East John Carpenter Freeway, Suite 700, Irving, Texas, 75062. You can get more information concerning MADD by going to their website which is [www.madd.org](http://www.madd.org).

##### **PUBLIC CITIZEN MAKES A DIFFERENCE IN OUR NATION'S CAPITOL**

Public Citizen fights hard on a daily basis to protect the rights of consumers in Washington. In my opinion, they do a tremendous job. But, much of what the consumer advocacy group does goes largely unnoticed. Most folks don't even know what Public Citizen really is even though they benefit every day from the group's hard work. The following are some of the good works done by Public Citizen over the past year:

Asbestos Legislation

- Prepared a groundbreaking report showing how much Fortune 500 companies would save under the pro-

posed trust fund and exposing their lobbying campaign to get it. The report shaped media coverage and Senate debate over the bill.

- Prepared a blistering critique of the bill's outdated, unscientific medical criteria, based on the assessment made by four of the country's leading pulmonologists specializing in asbestos-related diseases.
- Prepared a national news conference with these doctors and asbestos victims who did not meet the medical criteria, to be held when legislative debate resumes.

#### Class Action Litigation

- Provided the leading consumer voice in Congress opposing legislation to federalize most class actions filed in state courts. Unfortunately, after eight years the legislation became law in February 2005.
- Helped build a coalition of more than 90 organizations opposed to the bill and helped to secure the opposition of 13 state attorneys general.

#### Challenging The Chamber

- Released an exposé on U.S. Chamber of Commerce president Tom Donohue's questionable activities, which garnered a front-page story in the New York Times Sunday Business section.
- Challenged the Chamber of Commerce's covert funneling of \$1.5 million into the 2004 Washington state attorney general race by filing a petition with the state elections agency.

#### Mandatory Arbitration

- Played a lead role in defining, launching, and sustaining the Give Me Back My Rights Campaign, which brings together more than two dozen public interest organizations in a nationwide effort to stop the use of binding

mandatory arbitration clauses in consumer, employment, and franchisee contracts.

#### Corruption In Washington

- Played a leading role in exposing how indicted House Majority Leader Tom DeLay (R-TX) tried to cripple the government's ability to investigate corruption, so that he and his cronies could curry favor with a shadow government of corporate lobbyists. Exposed how his replacement, Representative Roy Blunt (R-MO), is a chip off the old block.
- Filed an ethics complaint against Senate Majority Leader Bill Frist (R-TN) raising questions about possible insider trading of health care stocks.

#### Auto & Truck Safety

- Won a landmark victory requiring a rewrite of a rule that increased the number of hours already-exhausted truckers can drive and that failed to mandate onboard recorders to deter rampant cheating.
- Scored a major win in the highway funding bill, working with Senator Trent Lott (R-MS) to pass provisions tackling vehicle rollover and roof crush, passenger ejection, side impact crashes, 15-passenger van dangers, and child safety, and challenging National Highway Traffic Safety Administration's (NHTSA) roof crush rule as totally inadequate.
- Challenged NHTSA's new early warning rule, which limits public access to information about potential safety defects submitted by manufacturers.

#### In The Courts

- Prosecuted two major medical device appeals against federal pre-emption. Assisted with a number of prescription drug pre-emption cases, to help

combat a strong pro-industry posture by the Federal Food and Drug Administration (FDA).

- Arguing four cases in the current U.S. Supreme Court term, including one dealing with the Federal Tort Claims Act and another that would protect the free speech rights of government whistleblowers.

#### Drug, Worker & Patient Safety

- Released the 2005 edition of "Worst Pills Best Pills," Public Citizen's comprehensive consumer guide to prescription drugs. An expanded version of Public Citizen's website with the full content of the new 2005 edition is also available at: [WorstPills.org](http://WorstPills.org).
- Petitioned the FDA to ban the arthritis drug Bextra and the attention-deficit drug Cylert, both of which are no longer manufactured.
- Pressured the FDA to require a "black box" warning for erectile dysfunction drugs (Viagra, Cialis, Levitra) to warn of the potential for irreversible vision loss.
- First warned consumers in 2001 to avoid taking the now-banned Vioxx because of the increased risk of heart attacks. In fact, it was this exposure by Public Citizen that caused our law firm to get involved in the Vioxx fight.

#### ***TWO FEDERAL BOARDS BLAST BUS-TRUCK SAFETY AGENCY***

Many believe that the government department in charge of bus and truck safety isn't doing a very good job of monitoring problem carriers. Two independent federal agencies came to that conclusion recently. I share their opinion. An incident involving a bus full of elderly hurricane evacuees that caught fire near Dallas, Texas on September 23<sup>rd</sup> received a great deal of national attention. That accident killed 23 people. Although the Federal Motor Carrier Safety Administration flagged

the carrier, Global Limo, for more inspections, it now appears that regulators had never conducted a safety audit that could have shut down the company. As a result, Global had a driver safety rating worse than 97% of all bus companies. In spite of that record, the company was rated as “satisfactory,” which is shocking.

A report released by the Government Accountability Office (GAO) said the motor carrier agency’s system for assessing a company’s safety relies on “inaccurate crash information.” The National Transportation Safety Board said the agency was moving “disappointingly and excruciatingly” slowly to improve its rating system. Nonetheless, in a statement to the media, the Department of Transportation (DOT), stated:

*The Federal Motor Carrier Safety Administration is constantly working to improve its enforcement programs as part of its aggressive efforts to keep our roads safe.*

As you probably know the DOT oversees the motor carrier agency. The rating system, known as SafeStat, has been criticized for years for relying on inaccurate and outdated information. It is hard to understand why this serious deficiency hasn’t been corrected. The GAO noted that nearly a third of bus and truck crashes in fiscal 2004 weren’t reported by states to the federal government. But the report said the agency has improved at holding states more accountable and at training state and local law enforcement officers, who fill out crash reports. It is absolutely necessary for all states to provide needed safety information in an even more timely and accurate manner. During its annual meeting, the National Transportation Safety Board members admonished the agency on “most wanted safety recommendations,” which was broadcast online. One of the recommendations is to change the rating system so that companies that score poorly in either driver performance or vehicle condition are automatically rated “unsatisfactory.” The government

agency should be able to rate companies for safety, and it’s high time that a system is put in place that really works.

#### ***THE IMPACT OF CORPORATE CONTRIBUTIONS IN TEXAS ELECTION***

Most of us know that our political system in this country is broken and is badly in need of repair. Recent revelations in Washington should be enough to make Congress wake up and take appropriate action to clean up the system. Unfortunately, the vast army of lobbyists for the powerful forces in Corporate America won’t let that happen. However, all of the “bad stuff” isn’t confined to our nation’s capitol. A look at a situation in Texas is “Exhibit A” in this regard.

A deferred prosecution agreement with the Republican Party of Texas, following investigations into how corporate money was used during the 2002 elections, is extremely significant and hopefully will have a good effect nationwide. At the very least, the agreement is a positive step in uncovering widespread misuse of corporate money in Texas’ 2002 elections. There are a number of ongoing civil and criminal investigations into what appears to have been a coordinated strategy among Republican-affiliated groups to funnel millions of dollars of corporate money into political activities that are clearly prohibited under Texas campaign laws. According to Public Citizen, “Illegal corporate contributions and expenditures for anything other than administrative costs have been banned in Texas elections for more than 100 years.” The agreement entered into clearly shows that the Republican Party admits to playing a major role in the \$10 million corporate takeover of the Texas State House. After learning that much of the money had been spent on consultants, media and advertising, voter registrations, get out the vote efforts, and voter identification, Public Citizen and Common Cause in 2004 urged the Texas authorities to look into how more than \$5.7 million in corporate money

was spent by the Republican Party of Texas during the 2002 elections.

Documents from 2002 also show that the Texas Association of Business (TAB) spent \$1.9 million in corporate money in the election, Texas for a Republican Majority (TRMPAC) spent \$600,000, and the Law Enforcement Association of America (LEAA) spent \$2 million, totaling nearly \$10 million in corporate expenditures. The Republican Party clearly broke the rules in 2002. They will no longer be able to use corporate money in Texas to pay for get-out-the-vote efforts, run television ads or pay for their political consultants. That’s something that should happen in every state.

In the agreement, the Republican Party of Texas agreed that through March 31, 2007, it will refrain from these types of expenditures or face criminal prosecution for its activities in 2002. By using various bank accounts, the Republican Party was able to disguise the flow of money from the state to the national party, and then back again. The party collected more than \$5.7 million for the 2002 elections and it appears they may have used \$2.2 million of that illegally. The Texas party took that money and rerouted it nationally in such a way that it is nearly impossible to track. The deferred prosecution arrangement is another step in the investigations of illegal contributions in what could be as many as 73 criminal indictments for activities related to the 2002 races in Texas. Filings with the Texas Ethics Commission show that prior to 2002, less than \$2 million total had been spent in the 2000 election and less than \$1 million in the 1998 state elections.

In the future, all political parties should be made to abide by the law and work to make sure candidates are elected by people, not by powerful corporations. This will take some significant changes in election laws, however, at both the national and state levels. Hopefully, enough folks around the country are so sick and tired of all the wrongdoing and corruption we have seen in

recent years that they will demand that our political system be cleaned up. Until that happens we will continue to have the Tom DeLay's of the world being elected to high office and that's a national disgrace.

Source: Public Citizen

#### **PROSECUTORS SHOULD INVESTIGATE RALPH REED'S COVERT LOBBYING**

Texans for Public Justice, Common Cause Texas, and Public Citizen have jointly petitioned a court in Texas to investigate the Texas lobby activities of Ralph Reed. According to records in Texas, Reed did not register as a Texas lobbyist in 2001 or 2002, when he reportedly received \$4.2 million to lobby Texas state officials to shut down two Indian casinos in Texas. Embattled gambling lobbyists, Jack Abramoff and Michael Scanlon, who were working for a tribe that operated a competing casino in Louisiana, reportedly paid Reed to pressure Texas officials to close the Texas casinos. The watchdog groups contend that available evidence, including Reed's own electronic correspondence, indicates that Reed was engaged in lobbying activities that would have required him to register as a Texas lobbyist.

With Abramoff's aid, Reed helped convert the remains of televangelist Pat Robertson's 1988 presidential campaign into the powerful political machine called the Christian Coalition. Nine years later, Reed started his own lobby firm in Georgia called Century Strategies. You will recall that a U.S. Senate probe into Abramoff's Indian gambling activities has documented that Reed has close ties to gambling interests. It now appears that Abramoff hired Reed in 2001 to: kill a 2001 Texas bill (HB 514) that sought to keep the El Paso-based Tigua Tribe's Speaking Rock Casino open; and assure that then-Attorney General John Cornyn shut down Speaking Rock (in part by generating support for such a policy).

The ultimate source of Reed's multi-million-dollar fees for this lobby work

appears to be a casino operated by the Coshatta Tribe of Louisiana, which wanted to eliminate competition from Speaking Rock and a small Alabama Coshatta casino in East Texas. The Louisiana tribe hired Abramoff and Scanlon in April 2001, ultimately paying them \$32 million. As soon as Cornyn shut down Speaking Rock in February 2002, team Abramoff pulled off an extraordinary double play. Playing on their close ties to indicted former House Majority Leader Tom DeLay (who once had employed Scanlon as a press secretary), the same lobbyists who had worked behind the scenes to shutter Speaking Rock sold themselves to the Tigua tribe as the lobbyists who could press Congress to reopen that casino. The Tiguas—who hired Abramoff's team for an initial fee of \$4.2 million—have since accused Abramoff, Scanlon, and Reed of fraud. Craig McDonald, director of Texans for Public Justice, says:

*Apart from abandoning every scintilla of ethical behavior, Mr. Reed's Texas lobbying activity also appears to have broken Texas law. If Mr. Reed crossed the legal line when he crossed the Texas border to lobby for gambling interests, he must be held fully accountable.*

I understand that under Texas law, Reed was required to register as a lobbyist and disclose his client and his fees if he was compensated more than \$1,000 in a calendar quarter for lobbying Texas officials. Reed was reportedly paid many times that amount. Failure to register is a Class A misdemeanor and can bring a civil fine of up to three times the amount of unreported compensation. In electronic correspondence released by the U.S. Senate, Reed repeatedly told Abramoff that he was in direct contact with Cornyn's office, including the head of Cornyn's criminal division, over the casino closure battle. Reed's correspondence also indicates that he was in direct contact with Governor Rick Perry's office and with unnamed state lawmakers who were willing to

introduce helpful legislation.

The Texas Observer has reported that a 2003 Abramoff memo credits Reed with persuading then-Lt. Gov. Bill Ratliff to kill a 2001 bill that would have kept the Tigua casino in business. Ratliff acknowledged speaking with Reed but said that they discussed redistricting rather than gambling legislation. The media have reported that internal Abramoff and Scanlon documents reveal that Reed received up to \$4.2 million for his lobbying work in Texas in 2001 and 2002. Such compensation would rank Reed's lobby contract among the largest to ever come to light in Texas. Where I come from they would call Reed "a dirt-road sport," but not a person who could be trusted to tell the truth and that's most unfortunate.

Source: Public Citizen

#### **PTC FIGHTS TO CLEAN UP TELEVISION**

The Parents Television Council, a group that fights to protect our young people, has urged the U.S. Senate to quickly pass legislation to increase indecency fines for broadcasters and to give consumers cable choice. A letter was sent to Senator Ted Stevens (R-AK) and Senator Daniel Inouye (D-HI), chairman and co-chairman, respectively, of the Senate Committee on Commerce, Science and Transportation. The following are excerpts from the letter written by L. Brent Bozell, president of the Parents Television Council:

*You have seen the survey data. You have received the phone calls, letters, faxes, and e-mails that show conclusively that American families are fed up with this unremitting assault on their values. And they are demanding change. The entertainment industry which is responsible for this wretched state of affairs continues to balk and dodge in its refusal to correct this problem. You heard their arguments. There are three of them.*

*First, they posit the Vchip as the solution. But this is a dodge. The Vchip relies on an accurate ratings system and as has been proven time and again, the ratings system is a fraud. Now the industry would have you believe it is going to be serious and responsible about a ratings system –but isn't that precisely what they promised you nine years ago when they launched it? They have been mocking the public for nine years and cannot be trusted again.*

*But even if the ratings system were accurate, it does nothing to solve the problem. I gave you the analogy of the pothole in a public highway. Faced with that hazard, the solution is not a long debate about the size and appropriate descriptors of the warning sizes for the pothole. The solution is to fix the pothole. Likewise with the public airwaves. The solution is not warning labels for program content that clearly breaches community standards of decency. The solution is to uphold the law, with appropriate penalties for violations for those abusing the public trust in their use of the public airwaves.*

*The industry's second argument is that there is a demand for this offensive material and that the rights of the minority are equal to those of the majority.*

*The industry's final argument is that it enjoys a First Amendment right of artistic expression and government should do nothing to curtail that.*

*Now, one could effectively counter both those arguments as well, but I choose not to. You were very clear that you wanted to find a resolution. A resolution will be found only if there is some degree of compromise on both sides. Senators, there is a solution available,*

*and one that gives all parties what they say they want.*

The PTC made these observations in the letter that I believe the overwhelming majority of American citizens agree with:

- The industry must abide by community standards of decency while using the broadcast airwaves. This is not a proposal; this is law. Those airwaves must remain safe for families, and those who violate the public trust must be punished accordingly. We do not suggest a change in the indecency law, only a change in the fines for breaking the law. Everyone agrees the existing fine structure is meaningless. Legislation that increases the fine for violations to \$500,000 per violation, per affiliate, with a "3 strikes" license revocation hearing mandated for repeat offenders, is a solution.
- If the industry wants to air this indecent programming it can do so on cable television, which is not governed by federal indecency regulations. The top six media companies own two thirds of the networks on cable, so they have innumerable delivery vehicles on which they can air this material. Thus their artistic freedom is insured.
- Cable must be restructured and should accept an "a la carte formulation." It is simply not enough to give consumers tools to block offensive programming from their homes. It is an absolute outrage that those who find this programming so personally offensive for themselves and their families are being forced to subsidize it with their cable subscription. With a "cable choice" model, consumers will have the ability to choose and pay for the programs they want—period. Given that the industry suggests there is a market for offensive programming, that market can and should subsidize that programming. If the market exists, as the industry states, then everyone's a winner. That market gets

its programming, the industry gets to air that programming, and those who are offended by it not only don't have it in their homes, they are not subsidizing it.

This solution proposed by PTC doesn't give all parties everything they want. But, it does give the vast majority of Americans, who are deeply offended by such programming, the right not to have this filth pouring out of their television sets. It does give the industry the ability to continue producing and airing this material to satisfy what they say is a market demand. But, the industry must be controlled to the extent possible by government regulation. We should all thank the two senators mentioned for their diligent efforts and leadership on this most important issue. The fight to clean up television must be won and it will take folks getting involved. To speak with a representative from the Parents Television Council so that you can get more information, contact Kelly Oliver at (703) 683-5004, extension 140.

#### **PROBE NEEDED OF GIANT OIL COMPANY BOSSES**

Eight U.S. senators have asked the Justice Department to investigate whether any of the chief executives of five major oil companies lied or intentionally misled Congress during a recent hearing on industry profits. The issue involves a question by Senator Frank Lautenberg, (D-NJ), at the November 9<sup>th</sup> hearing about whether any of the representatives of the oil companies participated in Vice President Dick Cheney's 2001 energy task force activities. Testifying at the Senate hearing were the chief executives of ExxonMobil Corp., Chevron Corp., ConocoPhillips, Shell Oil Co., and BP America Inc. Four of the executives said they were not aware of any such participation and a fifth said he did not know. When one considers how the oil companies came out like "bandits" in the energy bill, you have to wonder what happened in the task force.

In subsequent letters, seeking to

clarify their responses, the oil company executives reiterated that they believe they responded truthfully. Some also acknowledged that their companies had contacts with task force staff members and discussed energy priorities. The senators wrote Attorney General Alberto Gonzales, stating: "Many of these latter statements (by the oil executives) admitted participation in task force activities and raised greater concern about the accuracy of the hearing testimony." While the executives were not under oath, the testimony may have violated federal laws prohibiting false statements to Congress.

The hearing was held by both the Senate Commerce, Science and Transportation Committee and the Senate Energy and Natural Resources Committee. Bill Wicker, a spokesman for Senator Jeff Bingaman of New Mexico, the top Democrat on the Energy Committee, said Senator Bingaman and other committee Democrats have concluded that neither Lautenberg's question nor the executives' response was "sufficiently precise to convince them that the representations delivered answers untruthfully." If there are grounds for the Justice Department to take action, it should happen. Of course, that is something the Justice Department is going to have to decide.

Three of the senators who signed the letter to Gonzales—Senators Maria Cantwell (D-WA), Daniel Inouye (D-HI), and Ron Wyden (D-OR)—are on the Energy Committee. The others are Senate Democratic leader Harry Reid (D-NV) and Senators Dick Durbin (D-IL), Barbara Boxer (D-CA) and Edward Kennedy (D-MA). Cheney's task force issued its report outlining the Administration's energy priorities in May 2001. The Vice-President's office has steadfastly refused to disclose what private parties may have participated in the process. This is a matter that should be cleared up, especially considering how the giant oil companies have such powerful political connections in the Bush Administration, and soon.

Source: *Forbes News*

#### **ALASKA FILES SUIT AGAINST BP AND EXXON MOBIL**

An antitrust lawsuit has been filed in Alaska against ExxonMobil Corp. and BP PLC. This suit that claims the two oil giants are restricting the nation's supply of natural gas and keeping prices at record highs. The lawsuit, filed in U.S. District Court in Fairbanks, says the two companies acted together to eliminate competition for the exploration, development, and marketing of natural gas from Alaska's North Slope to U.S. markets. David Boies, the attorney for the Alaska Gasline Port Authority, the entity that filed the lawsuit, says:

*The only reason for them to collusively not to sell is to try to continue the scarcity that has driven natural gas prices to historic highs.*

BP and ExxonMobil are two of Alaska's biggest oil and gas leaseholders, and are the operators for the North Slope's largest oil and gas fields, Prudhoe Bay and Point Thomson. Alaska's North Slope is estimated to have at least 35 trillion cubic feet of natural gas reserves, which could supply 7% to 10% of the nation's natural gas demand. The federal lawsuit arose from the producers' refusal to sell supplies of natural gas to the Port Authority, which wants to build a pipeline from the North Slope to Valdez. From there, the gas would be liquefied and shipped by tanker to the West Coast. The pipeline has become a hot political topic in Alaska.

Source: *Associated Press*

#### **STATE OF WASHINGTON SETTLES WRONGFUL DEATH CASE**

The State of Washington has agreed to pay the family of Paula Joyce \$6.5 million to settle a lawsuit that claimed officials caused Ms. Joyce's death by not properly supervising the ex-convict who killed her in 1997. This is the largest wrongful death settlement ever paid by that state. It brings an end a long legal battle over whether Depart-

ment of Corrections officials were responsible for Ms. Joyce's death. The wife and mother of four died on August 8, 1997 when her pickup was struck by a stolen Chevy Suburban driven by an ex-convict who was under state supervision. This man was speeding through Tacoma, Washington, smoking pot, and running red lights. He was convicted of second-degree murder for the death of Ms. Joyce.

The Joyce family sued the state in 1999, saying that Ms. Joyce wouldn't have died if the state had been properly supervising and monitoring the ex-convict. A jury in 2000 agreed and awarded the family \$22.5 million. The State Supreme Court, however, overturned the award in September because of a faulty jury instruction. But, the Court did affirm the Department of Corrections' duty to closely watch offenders in the community. In the trial, the focus was on what the DOC was actually doing and what it failed to do. There was an office in Seattle that wasn't doing its supervision properly. When you don't supervise at all, bad things can happen.

Most of the money from the settlement—\$6,450,000—will be paid by insurance companies. The remaining \$50,000 will come from the state's self-insurance fund. In an interesting development, the Department of Corrections will meet with the victim's husband to hear his perspectives on the Department's efforts to supervise offenders. Changes have taken place over the past five years since the Joyce incident. The ex-convict was on supervision for a 1995 assault conviction and a 1996 conviction for possession of stolen property. By the time Ms. Joyce died, Stewart had violated his release conditions more than 100 times, although his community corrections officers had filed only three violation reports with the courts. That sort of supervision, which really amounts to no supervision, is not acceptable.

Source: *The News Tribune*

**SOME RADICAL AND EXTREME CHANGES  
MUST TAKE PLACE AT FEMA**

We have learned from a report by Associated Press that internal meeting notes released by a union official say Homeland Security Secretary Michael Chertoff told employees that many changes planned for federal disaster response were just “a public relations ploy.” The purported statements were in typed notes issued on December 20th by a union representative for federal emergency workers. Hopefully, Chertoff wasn’t serious if he actually said this. FEMA’s performance in recent months has been a public disgrace. If there has ever been a federal agency that needed significant retooling it is FEMA. The post-Hurricane Katrina changes should be a very high priority for the federal government. Under the heading “Retooling/Chertoff’s remarks,” the typed notes said:

*The re-tooling is partially a perception ploy to make outsiders feel like we’ve actually made changes for the better.*

The notes were released by Leo Bosner, president of the American Federation of Government Employees local that represents headquarters workers at the Federal Emergency Management Agency. As you know, FEMA, once independent, is now part of the massive Department of Homeland Security. To his credit, Chertoff has repeatedly stressed the importance of improving disaster response in testimony before Congress and in public remarks. I hope he meant what he said to Congress and not what the released notes say he said privately. FEMA’s performance during and after Katrina was as bad as anything I have ever seen from the federal government and I have seen plenty of bad. A book could be written on FEMA’s “sorry performance.”

- Points in the notes, as reported by the Associated Press, include the following:
- Chertoff believes FEMA is not a response agency for disasters. “We

essentially should be only doing recovery.”

- The Homeland Security agency has drafted a proposal to place a senior federal official or Coast Guard admiral in 17 major cities to handle disaster responses. “This position essentially pre-empts our relationship with the states and locals in terms of response and recovery.”
- “A question came up ... on whether FEMA could take over a state’s functions if that state isn’t able to provide basic functions like evacuation. The biggest issue that came up apparently was the legality question.”

A special House inquiry into the government’s response to Katrina, chaired by Representative Tom Davis (R-VA), is expected to issue its findings by February 15<sup>th</sup>. Additionally, the White House is completing its own review of federal preparations and response to Katrina. Homeland Security and FEMA were widely blamed for the federal government’s sluggish response to Katrina, which left a tremendous number of victims without food, water, and safe shelter for days. The criticism led to the resignation of FEMA Director Michael Brown. This man, who had no significant disaster response experience, should never have been placed in charge of FEMA. My first recommendation to Congress would be make sure no federal agency is headed up by a political hack like Brown in the future. Congress should place meaningful qualifications for any appointed position such as the head of FEMA, regardless of who makes the appointment. However, there is much more that needs to be done to make FEMA an effective arm of government. Hopefully, Congress will see that FEMA is effectively retooled. We can’t afford another performance such as that we experienced with Katrina. The American people will not tolerate another Katrina performance by FEMA.

Source: Associated Press

**STUDY RAISES DOUBTS ABOUT PROPOSED  
ASBESTOS TRUST FUND**

There have been serious doubts raised concerning the proposed asbestos trust fund plan. In a new analysis of the proposed \$140 billion asbestos trust fund scheme included in a bill (S. 852) which was reported out of the Senate Judiciary Committee, the Congressional Budget Office continues to raise doubts over whether the trust fund created by the measure will have sufficient funds to pay expected claims. According to the CBO:

*The proposed trust fund might or might not have adequate resources to pay all valid claims. There is a significant likelihood that the fund’s revenues would fall short of the amount needed to pay valid claims, debt service, and administrative costs. The revenues collected under the bill would be, at most, about \$140 billion, but could be significantly less. If the value of valid claims was significantly more than \$130 billion, the fund’s revenues would probably be inadequate to pay all claims.*

To date, neither CBO nor any other analyst has publicly documented where the money would come from to sustain the trust fund or if there would be enough. While the CBO includes a critique of the recent Bates White study, which found that claims against the trust fund could exceed \$300 billion, the agency admitted that massive uncertainties continue to plague the legislation. The following are some of CBO’s findings:

- CBO could not estimate any costs or savings that might result from several features or consequences of the legislation. A number of those features could add to the cost of the legislation. In particular, CBO’s estimate does not include potential claims by individuals with older, so-called dormant, asbestos claims pending in the court system, who might seek

additional compensation from the fund.

- CBO's estimate also does not encompass: possible claims by family members of workers who were exposed to asbestos; the costs of any exceptional medical claims that could be made under the bill; the potential costs for residents of other areas of the country who might be deemed eligible to receive the same special treatment given to the residents of Libby, Montana, under the legislation; and the impact on costs of allowing CT scans to serve as documentation of pleural abnormalities.

Thomas O'Brien, chairman of the Coalition for Asbestos Reform, says that the CBO analysis confirms his group's concerns about the bill. In this regard, he stated:

*The uncertainties outlined in this report show that this proposed legislation is based on speculation and guesswork and is not ready for consideration by the full Senate. There is no way anyone can know what the overall impact of this legislation will be. One thing we do know, however, is that it is a \$140 billion tax primarily levied on small and medium sized businesses, including those in our coalition, and that it will not solve the problem. In fact, it will make things worse. The CBO report comes on the heels of yet another federal agency, the General Accounting Office (GAO), releasing a study demonstrating that historically, federal compensation programs invariably exceed initial estimates in terms of length of activity, number of claims, and ultimately, cost, he pointed out.*

O'Brien's coalition is a group of smaller and medium sized businesses and their insurance companies opposed to the trust fund mandated by the bill. Hopefully, the problems relating to the trust fund can be worked out and a good bill passed that will be satisfactory

to all involved parties. That, of course, must include satisfying the victims' needs in a reasonable and fair manner.

Source: *The Insurance Journal*

## V. THE CORPORATE WORLD

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### **McWANE EXECUTIVES ARE FINED AND GET PROBATION**

A federal judge in Birmingham has ordered that McWane, Inc. pay a \$5 million dollar fine and complete a \$2.7 million dollar environmental project for violating the Clean Water Act and discharging polluted waste water in Avondale Creek from its north Birmingham plant. Three of its executives will serve probation and pay fines. Two of the three executives will serve time on home detention, and the third must complete community service. You will recall that executives of McWane were convicted of conspiring to violate the Clean Water Act and polluting Avondale Creek. Executives were also convicted of filing a false report to the U.S. Environmental Protection Agency.

The company has asked the judge to let it complete a project in the community as part of its punishment, which includes the five-year probation. A \$2.7 million dollar project to build a storm water treatment facility, athletic fields, walking and bike trails and more on the banks of Village Creek, southwest of the Birmingham International Airport, were part of the plan. The project will need approval by the city of Birmingham.

This appears to close a chapter on the criminal part of this problem in Birmingham. You will recall that the accusations in the criminal trial covered actions from 1998 to 2001. During the five-week trial last year, prosecution witnesses testified that McWane and its managers gave orders for water tainted during the pipe making process to be pumped into storm drains and into the

creek. Environmental engineers testified during the trial that there were elevated levels of zinc, lead, oil, and grease in the water.

Even though this chapter has been concluded, there are apparently still hard feelings between McWane and the Department of Justice. The senior trial attorney in the Department of Justice Environmental Crime Section accused McWane of being a "corporate outlaw" and said that the company has a long history of environmental violations. Five U.S. subsidiaries of McWane were accused last year of environmental crimes. A Salt Lake City federal grand jury indicted McWane and its specific state's pipe subsidiary in Utah on environmental violation charges. We will see whether McWane has, indeed, learned anything from this sad event.

Source: *The Birmingham News*

### **JUDGE ORDERS SERONO TO PAY \$704 MILLION**

A federal judge has ordered the Swiss manufacturer of Serostim, an AIDS treatment drug, to pay \$704 million to settle claims that it offered kickbacks to doctors in an effort to boost its sagging sales. The settlement of the case had been announced in October. Serono Laboratories, the U.S. subsidiary of Geneva-based Serono, pleaded guilty last month in U.S. District Court in Boston to criminal conspiracy charges stemming from the fraud scheme. The company agreed to pay a criminal fine of \$136.9 million and pay an additional \$567 million to settle civil claims. The settlement also bars Rockland, Massachusetts-based Serono Laboratories from participating in federal health programs for five years. The sentence handed down by U.S. District Judge Reginald Lindsay is the third-largest fine imposed for health care fraud.

In 1996, the Food and Drug Administration approved Serostim for use in treating AIDS wasting, an often-fatal condition involving severe weight loss. Serostim, which contains the human

growth hormone Somatropin, hit the market around the same time as prostate inhibitor drugs, which sharply curbed the AIDS virus when patients used it in combinations, or “cocktails.” With the demand for Serostim declining, Serono Labs made illegal payments to physicians and offered them free trips to a conference in Cannes, France, in exchange for prescribing the drug.

Source: Associated Press

#### **CANCER DOCTORS PAY \$1.2 MILLION TO SETTLE OVERBILLING PROBE**

A physicians group in New York specializing in cancer treatment has paid \$1.2 million to settle an investigation into overbilling for Medicaid-paid drugs. State Attorney General Eliot Spitzer announced the settlement. New York Oncology and Hematology Inc., based in Albany, and its contracted manager, AOR Management Co. of Pennsylvania, were accused of billing the government health plan above the cost of the drugs the physicians dispensed. The overbilling of the program for the poor was allegedly done between January 1995 and mid-September 2002. To end the attorney general’s civil lawsuit, the companies also agreed to pay Medicaid the amount plus 9% interest and an additional \$7,500 to the state to pay for the investigation’s cost. The companies also agreed to drop its lawsuit against the state contesting Medicaid regulations regarding drug payments. New York’s state law doesn’t allow physicians to make a profit on drugs they dispense. The aim is to try to remove any profit motive from medical judgment. AOR is now part of U.S. Oncology Inc.

It has been estimated that there has been billions of dollars of fraud and waste in the Medicaid system. *The New York Times* estimated that as much as 40% of the multibillion dollar program in New York is lost each year. All states and the federal government should take steps to recover waste and fraudulent Medicaid spending. I fear that the problem exists in many states. At least,

New York’s Attorney General is taking some action.

Source: *New York Times*

#### **DE BEERS SETTLES CLASS-ACTION SUIT**

De Beers, the world’s No. 1 diamond supplier, has agreed to pay \$250 million to settle lawsuits by U.S. consumers who alleged that the company fixed the price of gems from 1994 to 2005. The settlement of the class action affects anyone who bought diamonds during the past 11 years. It got preliminary approval in December from U.S. District Judge Stanley Chesler in Trenton, New Jersey. De Beers, based in Johannesburg, South Africa, agreed to comply with U.S. antitrust laws.

De Beers, which Ernest Oppenheimer turned into a global cartel in the 1930s, pleaded guilty in July 2004 to fixing prices of industrial diamonds and agreed to a \$10-million fine, ending a 10-year fight with U.S. prosecutors. The company still faces other class-action suits alleging price fixing in the sale of industrial diamonds in the United States. Judge Chesler’s preliminary approval cleared the way for notification of consumers. The judge will hold a fairness hearing and appoint a special master to decide how to distribute the settlement to potentially millions of consumers. Notices will be published in newspapers and on the Internet telling diamond-buyers of the settlement. The special master will establish a mechanism for dividing the cash settlement.

Source: *Bloomberg News*

#### **FORMER QWEST CEO INDICTED**

Former Qwest CEO Joseph Nacchio has been indicted by a federal grand jury on charges of insider trading. Nacchio was charged on December 19th with profiting by insider trading in the sale of more than \$100 million of Qwest stock between January and May 2001. This was after he had been warned that the company wouldn’t

meet its revenue targets. Prosecutors want Nacchio to return approximately \$101 million in profits from the transactions. Each count carries a maximum penalty of 10 years in federal prison. Several other former Qwest executives were indicted and agreed to cooperate with federal prosecutors. Nacchio was fired in 2002 and replaced by former Ameritech chief Richard Notebaert. The company was then facing an investigation by the Securities and Exchange Commission over accounting procedures. In March, Qwest attempted to acquire MCI, but lost out to Verizon. This is another example of how corrupt many in Corporate America have become. All too many corporate bosses treat their companies like a personal asset and pretty much do as they please with corporate money and assets.

Source: Associated Press

## **VI. CONGRESSIONAL UPDATE**

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#### **VICE-PRESIDENT CHENEY BREAKS SENATE TIE ON SPENDING CUTS**

The Republican-controlled U.S. Senate passed legislation to cut federal deficits by \$39.7 billion on December 21<sup>st</sup> by the narrowest of margins, 51-50. Vice-President Dick Cheney cast the deciding vote. The measure imposes restraints in federal benefit programs such as Medicaid, Medicare, and student loans. While the Republican leadership said the cuts were necessary, Senate Democratic Leader Harry Reid of Nevada countered that the GOP was advancing “an ideologically driven, extreme, radical budget. It caters to lobbyists and an elite group of ultraconservative ideologues here in Washington, all at the expense of middle class Americans.”

At press time, I really don’t know exactly which programs were cut. I do know, however, that poor people in the United States don’t have highly paid lob-

bysts to protect their interests in Washington. This makes me believe that no program was cut that benefits the rich folks in our country and that cuts that were made will adversely affect the rest of our population and especially the poor. Hopefully, I will be proved wrong in my assessment. At least, the GOP has finally realized we have an all time record deficit and has taken some action.

#### **WEAK FEDERAL BILL THREATENS STATE PREDATORY LENDING LAWS**

State and federal officials have warned that a bill in Congress would weaken laws against predatory mortgage lending in 36 states, especially the 24 states with major anti-predatory lending laws on their books. Arkansas, Georgia, Illinois, Massachusetts, North Carolina, New York, New Jersey, New Mexico, and South Carolina are among those states considered to have the strongest laws. Other states with predatory lending laws include California, Colorado, Connecticut, Florida, Kentucky, Maine, Maryland, Nevada, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Wisconsin, and West Virginia.

The Ney-Kanjorski bill pending in Congress and supported by much of the lending industry would gut strong laws in these states. Chief Deputy Attorney General Stuart M. Bluestone of New Mexico said:

*Two years ago, New Mexico passed a progressive Home Loan Protection Act in response to an alarming rise in abusive mortgage lending practices and home foreclosures. Too many homeowners were losing home equity because dishonest lenders rolled points and fees into mortgage loans and did so repeatedly through abusive refinances. New Mexico's new law stops these abuses, but now Congress proposes in the Ney-Kanjorski bill to usurp our state's ability to protect our homeowners. That bill would gut our new effec-*

*tive law, install in its place a weak federal standard and prevent us from adequately protecting our residents from lending abuses.*

Massachusetts Representative John F. Quin, who is fighting for consumers, warned of the consequences of passing this legislation. He says:

*The passage of the Ney-Kanjorski bill would do irreparable damage to the protections afforded to consumers under the newly enacted anti-predatory lending law in Massachusetts. This bill is bad public policy and would weaken the ability of states to protect consumers from unscrupulous lenders.*

Predatory lenders prey on the most vulnerable people in our society and typically target minorities, the working poor, and the elderly with their high priced loans. Because of this, these groups pay more for loans than others in our society. Predatory lending encompasses a wide range of abusive practices by lenders. These practices include repeatedly refinancing home loans, charging excessive junk fees, and tacking on unnecessary extras such as premiums for credit insurance, all of which result in stealing the homeowner's equity in their home. These practices are designed to keep individuals in debt forever while fattening the profit of the lenders.

Predatory lending robs homeowners of more than \$9 billion a year. Predatory lenders threaten entire neighborhoods as people who are lured into borrowing more than they can afford at unconscionably high fees, later lose their homes to foreclosure. "We simply can't afford the costs that come with it: The boarded-up houses in struggling neighborhoods, the hard-earned gains of working-class people wiped out by predatory lenders. At bottom, that is what this debate is all about," said Mark Pierce, president of the Center for Responsible Lending.

An alternative bill that would

strengthen nationwide protections while letting states keep strong laws that protect homeowners has also been introduced. This bill is based on the State of North Carolina's predatory lending statute, widely considered the model for preventing abusive lending while preserving access to credit. The North Carolina legislation protects vulnerable consumers without cutting credit for lower income borrowers. It's time that all American consumers have the protection that North Carolina consumers now have.

Source: Center for Responsible Lending

## **VII. PRODUCT LIABILITY UPDATE**

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### **IMPORTANT SAFETY DOCUMENTS ARE NOW UNDER SEAL**

Trial Lawyers for Public Justice (TLPJ), representing Public Citizen, has filed a legal challenge to a Florida court order sealing crucial exhibits from a rollover case decided last spring over fatal injuries caused by the Ford Explorer. The key documents were publicized in news reports throughout the nation, but have now been sealed despite their direct relevance to a new proposed federal roof strength regulation undergoing public comment. The documents show that throughout the late 1990s, Ford successively weakened the roof of its Ford Explorer and that the vehicle has an extremely low margin of safety in rollover crashes. Testing documents from Volvo, which became a Ford subsidiary in 2000, also demonstrate that a strong roof can protect occupants in a rollover, and that, in developing its SUV, the XC-90, Volvo used a much stronger dynamic test to examine roof strength and the interaction of safety systems in a rollover. The public interest in these documents is acute because of the 10,000 people who die each year in rollover crashes and because the

National Highway Traffic Safety Administration (NHTSA) is considering a proposal to improve its roof strength safety standard for vehicles. What automakers know about injury prevention in rollovers should be fully disclosed and made part of the public record in NHTSA's pending rulemaking, which could affect vehicle safety for decades.

The exhibits were introduced in a public trial, in a Jacksonville Florida state court case. The exhibits remained publicly available in the clerk's office for weeks after the trial, generating nationwide news coverage. Ford eventually asked the trial court to seal the exhibits, relying on a pretrial gag order. In May 2005, the trial court granted Ford's motion, barring further public access. Although Public Citizen had legally obtained the documents, Volvo threatened to sue the organization if they were publicly disseminated. Public Citizen and TLPJ have now filed a motion to unseal the trial exhibits on the grounds that keeping them sealed violates Florida's Sunshine Act, which forbids court orders that conceal "public hazards," and the First Amendment of the U.S. Constitution, which creates a strong presumption of public access to information, brought to light in civil trials. Joan Claybrook, president of Public Citizen and former head of NHTSA stated:

*These documents are at the core of this vital public safety issue. They show that Ford made the Explorer's roof treacherously weak, and that Volvo has outlined a solution for all automakers that would prevent the ongoing tragedy of needless deaths in rollover crashes. The time has come for Ford to come clean about its role in rollover deaths, especially now that new roof crush safety standards are being drawn up.*

In the Florida case, Scott Duncan sued Ford after Duncan's 26-year-old wife, Claire, died in May 2001 when their Explorer rolled over. The case resulted

in a \$10.2 million jury award and revealed stunning new evidence showing Ford's extensive knowledge of how stronger roofs can prevent rollover injuries and deaths. Central to the case were crash-test videos, test reports and internal documents made public during the four-week trial. The Volvo documents showed that strengthening a SUVs roof would save lives. They also showed that Ford had made the Explorer's roof weaker, leaving its roof-strength-to-vehicle-weight ratio only a slim margin above the 35-year-old federal safety standard. Ford did not move to seal the Volvo documents at the time they were admitted at trial, nor for weeks afterward. In fact, after the trial concluded, the documents were widely disseminated. Public interest groups received the exhibits; many major news outlets wrote articles based on their content, including *The New York Times*, the *Los Angeles Times*, and *The Detroit News*; and they were posted on NHTSA's website. Several weeks after the trial had concluded, and after the documents had been widely circulated, Ford moved to enforce the protective order. The trial court granted Ford's motion, but stated that it would consider unsealing the documents if a third party moved for public access. In the wake of that ruling, and after receiving a letter from Ford saying that the documents contain trade secrets and were protected by the Duncan court's sealing order, NHTSA withdrew the contested documents from the agency's public docket on the roof crush rule-making, undermining the public's access to information about roof safety. TLPJ's Leslie Brueckner, lead counsel for Public Citizen, had this to say:

*To protect the safety of families who travel America's highways in SUVs, Florida's Sunshine Law and the First Amendment require that the shroud of secrecy be lifted from this key evidence. As the jury in this case found, the Ford Explorer is a public hazard, and these documents prove it. Public*

*safety demands that this evidence come to light.*

The Duncan case was the fourth jury trial loss for Ford in an Explorer rollover case between June 2004 and April 2005. The case is currently on appeal to an intermediate Florida appellate court. The legal team involved in the current fight over the documents also includes TLPJ's Rebecca Epstein and Charles Alford of Alford & Kalil P.A., in Jacksonville, Florida. The challenge is part of TLPJ's Project ACCESS, a 15-year-old project against excessive court secrecy, and the group's new Access to Justice Campaign, a nationwide initiative to keep America's courthouse doors open to all. I am hopeful this challenge will be successful since it involves a matter of great public interest.

Source: Public Citizen

#### **NHTSA'S PROPOSED ROOF CRUSH RULE'S GROSSLY INADEQUATE**

Over the past few weeks, several of our readers have requested that we include more detailed information on the actions by the National Traffic Safety Administration (NHTSA) relating to the roof crush issue. I will attempt to give a more complete account of how things stand at present. A proposed roof crush rule—the first change in vehicle roof strength standards in more than three decades—is so grossly inadequate that 70% of existing vehicles already meet it. The change proposed by NHTSA would require vehicle roofs to be only marginally stronger than they are today. The current standard requires a vehicle roof to withstand the force of 1.5 times the vehicle's weight. Because of certain provisions in the proposed standard, the agency will effectively require a roof to withstand just 1.64 times the vehicle weight—a paltry improvement. Rollover crashes kill 10,000 people each year, accounting for one-third of all occupant deaths in vehicle crashes. Many deaths and injuries that stem from rollover crashes occur when the roofs of vehi-

cles crush in, killing or paralyzing the occupants of the vehicles. In many cases when the roof crushes, the windows of the vehicle crush or blow out, seat belt and side air bag systems fail, and doors spring open, causing people to be ejected and killed.

The current roof crush rule was issued in 1971. The agency originally called for testing both sides of the roof, but General Motors Corporation (GM) argued that testing both sides of the roof was unnecessary. Years later, it was revealed in litigation that GM had used NHTSA's proposed two-sided test on six of its production model vehicles and that only one vehicle had passed. GM withheld its testing results from the agency but nevertheless argued for the one-sided test. NHTSA's final rule called for testing just one side of the roof. In 2000, after news of the Ford Explorer-Firestone tire rollover tragedies broke, NHTSA began mulling over a strengthening of the roof crush rule. But its proposed changes, released five years later, would do little to change the status quo. Even NHTSA says its proposed rule will save only 13 to 44 additional lives annually, an admission that the proposal is de minimis. Since 2000, 50,000 Americans have died in rollover crashes, making this one of the largest single causes of deaths in the new century. November 21<sup>st</sup> was the deadline NHTSA set to receive comments on its proposed rule. Public Citizen President Joan Claybrook made this observation:

*NHTSA is squandering an unprecedented opportunity to save lives by reducing rollover deaths. This is an egregious betrayal of the public trust. It is technologically feasible and cost-effective to make vehicle roofs much, much stronger. The government has an obligation to require auto manufacturers to do so. It is unconscionable that the agency has punted.*

Internal auto industry documents in NHTSA's possession show that auto manufacturers know the dynamics of

rollover crashes and understand how, using feasible, light weight, and cost-effective technology, to make much stronger roofs. NHTSA should make these Volvo XC-90 documents public because they show how one small company led the way in rollover safety. The proposed rule also contains a "pre-emption" provision that would prohibit people from suing manufacturers for injuries sustained from crushed roofs if the vehicles meet the government standard. This would effectively shut the courthouse doors on consumers and would remove incentives for manufacturers to make safe vehicles when minimal government standards are insufficient or outdated, or are not well enforced. It also would burden the taxpayers with the costs of these crashes.

NHTSA is proposing to increase the force that a vehicle's roof must withstand in tests to 2.5 times the vehicle's unloaded weight, up from the current 1.5 times. The increase is misleading, however, because NHTSA also has proposed changing the test requirements to allow greater roof intrusion. According to an analysis by Steve Batzer, a professional engineer and director of the Engineering Institute in Farmington, Arkansas, the average required increase in roof strength under the proposed rule amounts to requiring a roof to withstand just 1.64 times the vehicle weight, as measured by the current standard. In this regard, Mr. Batzer stated:

*This proposed standard does not meet the public's expectation that solid science is used as the basis of new safety standards. Further, it does not ensure that the solid majority of average-height, belted occupants can be protected from significant roof crush in the event of a high-speed rollover.*

The agency contends that strengthening roofs will add weight to vehicles and increase the propensity for rollover, but this is not true. NHTSA has been unable to document that an increase in vehicle weight would increase the risk

of rollovers. Further, manufacturers can strengthen roofs without adding weight, because many light-weight materials exist. Other key problems with the proposed roof crush rule include: It largely ignores the fact that a strong roof is crucial to preventing people from being ejected from vehicles that roll over. Including the benefits of preventing ejection would justify a much more stringent standard on a cost-benefit basis. The new test does not apply force to the roof in a manner that ensures injuries would be prevented in a real-world crash. It continues to use a static test in which weight is pressed on one side of the roof.

Instead, NHTSA should require a dynamic "dolly roll" test, in which vehicles are rolled off a fast-moving dolly, to simulate the injuries that occur in real-world crashes. This is the best way to test what happens in rollover crashes to a vehicle's roof, windows, belt system, side air bags and occupants. The dolly test is already routinely used by auto manufacturers and has been spelled out in FMVSS 208 (air bags, belts) as a voluntary standard since the 1970s. The proposal fails to comply with an August 2005 congressional mandate for safety upgrades to both the driver and passenger sides that requires both sides of the roof be tested. Instead, NHTSA calls for just one side to be tested. This measures what happens only in the first two quarter-turns of a rollover. But, the most serious injuries occur in the third and subsequent quarter-turns. The agency proposal relies on windshields to support roofs in rollovers, but in real world rollover crashes, windshields shatter, drastically reducing roof strength. The cost-benefit analysis is riddled with errors. The proposal lacks a scientific basis. The agency looks at vehicles after rollover crashes, analyzing roof intrusion, rather than analyzing what happens during a crash. Roofs are elastic and spring back, so analyzing post-crash intrusion is irrelevant to understanding how occupants are injured. NHTSA has a chance to do the

right thing, but it will take “bucking” the powerful automobile industry. Hopefully, right will prevail and a strong rule will be put in place that will save lives.

Source: Public Citizen

### **STATE ATTORNEYS GENERAL GET INVOLVED**

In a related matter, twenty-six state attorneys general, concerned about the federal roof crush proposal, urged the government on December 23rd to abandon language that could prevent people from suing automakers. These state officials took issue with part of a proposed regulation that would bar injured persons from suing automakers under state product-liability laws if their vehicles’ roofs meet new federal standards. Questioning the legal grounds for the provision, the Attorneys General argued it would infringe on states’ rights and would shift injured motorists’ medical costs to states. In a letter sent to NHTSA, the attorneys general wrote: “State governments and the federal government will have to cover millions of dollars in health care costs which they will pass along to taxpayers, costs that, by all rights, should be the responsibility of manufacturers.” The letter was written by Iowa Attorney General Tom Miller, a Democrat, and North Dakota Attorney General Wayne Stenehjem, a Republican, and signed by 24 others. Nineteen Democrats and seven Republicans signed onto the letter.

With rollover crashes killing more than 10,000 people a year, about one-third of traffic fatalities, the issue has been closely watched. Safety groups say the regulation should be much stronger and argue that well over half the vehicles already comply with the standard. NHTSA estimates nearly 600 fatalities and more than 800 serious injuries a year involve people wearing seat belts who come into contact with a collapsed roof during a rollover crash. The public deserves a stronger standard so that more lives can be saved. The letter was signed by Attorneys General from the following states: Alaska, Arkansas, Califor-

nia, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New York, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington State, West Virginia, and Wisconsin. It is most significant that this many Attorneys General would take such a strong stand on behalf of consumers.

Source: Associated Press

### **DEFECTIVE SEAT BELTS ARE A BIG PROBLEM**

The national average for seat belt use is at a high of 71% and that’s very good news. The increased use of the safety restraints come after a \$3.7 million campaign called “Click It or Ticket.” This program used paid advertising from public and private funds that warned communities that law enforcement would be out in force looking for violators of seat belt laws. These statistics are promising when reviewing the facts that in 1999 more than 32,000 drivers and passengers were killed in automobile crashes with an estimated 9,553 lives that could have been saved had seat belts been used. But these statistics do not show the bigger picture, the number of people injured or killed because of defective seat belts. Last year alone a number of car companies recalled their automobiles due to defective seat belts.

The “lock for latch” seat belt design is recognized as a safer design feature that will stay fastened while buckles lacking the feature may not. Mounting evidence has indicated that some seat belts appear to be more prone to failing during crashes than other belts. There are several different explanations that have been offered regarding seat belt failures. Inertial unlatching can occur when the seat belt becomes unlatched during a collision by inertial forces. The latch plate pulls out of the buckle leaving people unbelted and susceptible to further injury in accidents.

Defective seat belts may not properly restrain occupants of a vehicle due to

poor manufacturing or design. There have been warnings in the past against using buckles with no “lock-for-the-latch” design on seatbelts because they are more susceptible to inertial unlatching. False latching is a defective seat belt buckle problem that can occur when the buckle appears to be latched but actually is not. Because false latching occurs, vehicle occupants can be thrown from the car despite wearing the seat belt. Safety standards regarding false latching require buckles that are false latched to pull free at less than five pounds of pull—as a result a false-latched buckle would not withstand a simple pull on the belt to ensure it is properly latched.

Ford and General Motors 2000 model-year vehicles had more than 300,000 vehicles recalled because of safety concerns with the seat belt buckle latches. The seat belts may not properly restrain vehicle occupants during a crash. Ford vehicle’s that are affected by defective seat belts are selected Explorer SUVs, Ranger pickups, F-150 pickups, Lincoln Town Cars, Escorts, Mountaineers, Mercury Villager vans, Ford Contour, and Mercury Mystique sedans and Windstar vans.

Affected General Motors models of cars that are affected by defective seat belts include selected Buick Century, Chevrolet Lumina and Impala sedans, Monte Carlo coupes, Chevy Blazer SUVs, Chevy Venture minivans, GMC Jimmy SUVs, Oldsmobile Intriguo sedans, Olds Silhouette minivans, Olds Barvada SUVs, Pontiac Grand Prix sedans, Pontian Montana minivans and Saturn L-Series vehicles. The defective Ford and General Motors seat belts were manufactured by TRW, Inc, and said that latch assemblies were improperly heat-treated, which made them weaker than specified federal rules. TRW and the National Highway Traffic Safety Administration said they did not know of injuries as the result of the defective seat belts.

Some seat belt buckles are safer than

others. Manufacturers are not willing to make information public regarding seat belt buckles that are more prone to fail during crashes. Consumers are unable to make the distinction between safer safety belt models and what type of seat belt is in their vehicles until the information becomes available to the public. The “lock for the latch” seat belt buckle design helps to prevent buckles from opening during a crash and have been confirmed by tests performed by experts in the field of their safeness.

Because seat belts can fail and release during a crash it is often difficult to determine how many people are killed or injured every year due to defective seat belts. Inertial unlatching is a term that has been publicly dismissed by automakers and the U.S. government but is an obvious danger to many people. Patent literature, dating back to as early as 1952, shows the repeated warnings of the dangers of inertial unlatching. A patent from 1967 warned that seat belt buckles should be “positive locking” and not just “spring held”. In 1982 a patent was obtained which stated a properly designed latch should be physically blocked in the latched position to prevent unlatching by inertia forces acting on the vehicle body. However, anti-inertial unlatching features are still not used in all seat belt buckles in new cars.

So, while the increased seat belt use is good news, it's not good news that many of the seat belts in use are defective and don't work properly. The automobile industry has a duty to provide safe and workable restraint systems in the vehicles being sold. Hopefully, things will get better and soon.

#### *JURY AWARD REDUCED IN DEATH CASE*

A Superior Court judge in California has reduced a \$21 million jury verdict returned against the City of San Francisco to \$15 million. The parents of a 4-year-old girl, who was killed when she was hit by a Municipal Railway maintenance truck, had received the jury

award. The child was killed when she was struck by a truck driven by a Muni maintenance worker in San Francisco. The city argued that the September jury award was excessive because another driver had struck the Muni truck before the city vehicle hit the little girl on February 11, 2003. The judges ruling let stand a \$6.7 million jury award to another child and her grandmother, who were also injured in the accident.

#### *A \$16.6 MILLION VERDICT RETURNED AGAINST FORD MOTOR COMPANY*

A Texas jury has returned a \$16.6 million verdict against Ford Motor Company in the case of a rollover crash that killed a 13-year-old boy. The April 2003 wreck involved a Ford Explorer, which rolled over after the driver swerved to avoid hitting a deer. The victim was the driver's son. Ford has known for years that the Explorer's tires were too narrow to be safe and that the vehicle had stability and steering problems. During the two-week trial former Ford engineers, who had told Ford executives as far back as 1986 that the tires should be two inches wider to provide more stability, testified for the victim's family. Evidence at trial showed that the driver most likely was driving at 37 miles per hour when she veered right, turning the steering wheel 42 degrees. A vehicle that rolls over at 37 miles per hour and a steer of 42 degrees clearly is a defective vehicle. The verdict is the first of its kind in Texas and the third nationwide involving the Explorer.

*Source: The Daily News*

## VIII. MASS TORTS UPDATE

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#### *MERCK LIED TO THE NEJM*

For years, Merck & Co. had a good scientific reputation. But, all of that has changed and unfortunately not for the better. Before the giant drug company

was taken over by the marketing group that put the Merck doctors and scientists on the shelf, it had a very good record. Up to that point in time, science and medicine had been the top priority for the company. That has really changed. The marketing of Vioxx is a prime example of what happens when drug safety is placed far behind a company's profits. As a result of its change in philosophy, now the maker of Vioxx will suffer long-term consequences for a case of scientific misconduct that occurred five years ago. Last month editors at *The New England Journal of Medicine* published online an “Expression of Concern,” which says that important heart attack data were deleted from the manuscript of the VIGOR study, the biggest study of Vioxx, before it reached the Journal.

Dr. Gregory Curfman, an executive editor at the *Journal*, says that a computer disk had shown that the data, including three heart attacks suffered by patients taking Vioxx, had been intentionally deleted by Merck. Two Merck scientists were co-authors of the paper, including Dr. Alise Reicin, an executive who helped manage Vioxx's development and who has been called “the tenacious defender of Vioxx.” Dr. Reicin has been a key witness in court for Merck in the three Vioxx cases that have been tried. Her value to Merck as an expert has been severely damaged. Who could believe anything she says—even under oath?

Dr. Garret FitzGerald, a pharmacologist at the University of Pennsylvania, says that if the accusations by the *NEJM* are true, deliberately omitting data from the manuscript would be “extraordinarily serious.” What Merck did is clear evidence of how the company has lied to the FDA, the medical community, and the public. It now appears they lied to the one medical journal that all doctors rely on. In fact, the *NEJM* is generally referred to as the doctors' “bible.” Merck's conduct can't be tolerated and they should be held accountable. Medical doctors should be able to rely on articles in medical journals, and espe-

cially the NEJM, as being completely accurate. It is obvious that Merck used the VIGOR study as a marketing tool.

Dr. FitzGerald notes that with or without the heart attacks in question, patients taking Vioxx were far more likely to have heart attacks than those who were taking naproxen, a painkiller sold over-the-counter by Bayer as Aleve. The additional three heart attacks up the total in the Vioxx group from 17 to 20, meaning that patients were five times more likely to have heart attacks when on the drug, instead of four times more likely. A number of leading authorities have pointed out that, on the face of it, Merck's decision flouted standard scientific practice. Dr. Alastair Wood, associate dean of the Vanderbilt University School of Medicine, stated in an interview with the New York Times:

*The way the process is supposed to work is that people submit an article with the full facts in it, so that the rest of the world can look at the facts and draw a conclusion. If The New England Journal had that information at the time, prior to publication, they would have highlighted the risk much more prominently than they did.*

We intend to dig deeply into what Merck did relating the NEJM article, as well as with other articles where Merck employees or persons being paid by the powerful drug companies were involved. To put it mildly, all of this "stinks to high heaven!" When you consider that VIGOR was the big clinical study on Vioxx, it is quite apparent that the medical community would believe an article on the study in the NEJM to be totally accurate. Obviously, it wasn't. I have had a number of doctors tell me recently that they were shocked to learn that Merck would lie to the NEJM. These doctors depend on the Journal in their clinical practice. They say that if Merck would intentionally misled the journal, which they rely on much like the Bible, what can you believe that comes from their company?

We were able to expose two big lies by Merck during our Vioxx trial in Texas. Merck had been telling the medical community and the medical journals for years that Naproxen was cardio-protective. Another lie told—involved short term use of Vioxx. Over the past year, Merck has been saying to anybody who would listen—and especially the news media—that Vioxx only causes heart attacks after 18 months of use. Neither of those statements is true. I suppose if a company will lie to the NEJM, it will lie to the public. We now know that Naproxen is not cardio-protective and we also know that short term use of Vioxx causes heart attack. We intend to continue with our efforts to expose Merck's false statements to the public.

Source: Associated Press and The New York Times

#### DRUG STUDIES HIDE KEY DATA

Knowing what we do about the pharmaceutical industry, I was not surprised to learn that several major companies have been withholding important details about clinical drug trials. A study published in the New England Journal of Medicine in late December was quite revealing. The study says that companies, including Merck & Co., Pfizer Inc., and GlaxoSmithKline PLC, are obscuring basic information—including the names of some drugs under study—in reporting on trials of drugs to treat serious or life-threatening diseases. Interestingly, some of the drugs involved are already on the market. In addition, the companies are seeking approval for new uses of these drugs. In an editorial, the respected medical journal calls for investigators and patients to avoid participating in drug trials where companies take a secretive approach.

It should be noted that safety concerns over big-selling drugs—including Vioxx and Paxil—appeared well after the drugs were on the market. That has to tell us that either inadequate studies were done or the companies withheld critical information from the studies

that were done. The VIGOR study by Merck is a prime example. *The Wall Street Journal* says "For years, some drug companies kept secret the results of studies that reflected badly on their products and published only positive results." Critics of this practice, according to the *Journal*, said it helped to mask safety problems. In plain everyday language that simply means they hid the safety problems from public view. Our litigation experience with Merck certainly verifies that assessment. It's clear that Merck intentionally withheld critical information from the public and put thousands of persons at risk for heart attacks and strokes. Hopefully, the FDA and congress will take the action necessary to protect the public.

Source: Wall Street Journal

#### WRITERS PAID BY INDUSTRY PLAY BIG ROLE IN SOME MEDICAL JOURNALS

During our handling of lawsuits against the pharmaceutical industry, we have learned that the drug companies use their clout and connections to help create a favorable image for their drugs. Many of the articles published in medical journals are authored by employees of a drug company or by doctors who are being paid by a company for other work. There is now an open secret in medicine: Many of the articles that appear in scientific journals under the bylines of prominent academics are actually written by "ghostwriters" who are either employed or being paid by drug companies. These seemingly objective articles, which doctors around the world use to guide their care of patients, are often part of a marketing campaign by companies to promote a product or play up the condition it treats. Questions about the practice are mounting as medical journals face unprecedented scrutiny of their role as gatekeepers for scientific information.

For example as pointed out, the *New England Journal of Medicine* learned last month that a 2000 article it pub-

lished highlighting the advantages of Merck & Co.'s Vioxx painkiller omitted important information about heart attacks. Interestingly, that revelation came out just after we completed our Texas trial against Merck. The Journal says the deletions from a manuscript provided were intentionally made by Dr. Alice Reicin working from a Merck computer. That is more than just a little disturbing. It's morally corrupt and scientifically irresponsible. It should be noted that Dr. Reicin is a Merck employee. However, that shouldn't justify her actions.

The Annals of Internal Medicine tightened its policies on writer disclosure last year after a University of Arizona professor, listed as the lead author of a Vioxx article in 2003, said he had little to do with the research in it. Based on what we have learned, this appears to be a common practice. "Scientific research" should never be a part of a public relations or "marketing" campaign. Drug companies say they're providing a service to busy academic researchers, some of whom may not be skilled writers. The companies claim they don't intend for their ghostwriters to bias the tone of articles that appear under the researchers' names. The criticism of ghostwriting is one of several issues that have put scientific journals on the defensive.

Even journal editors acknowledged to the *Wall Street Journal* that they have sometimes "done a poor job of detecting when articles cherry-pick favorable data to promote a particular drug or treatment." Some health insurers have stopped taking what they read in the journals on faith and are employing analysts to scrutinize articles for negative data that are buried. Our experience with the pharmaceutical industry has made us suspicious of what is written by persons who are on the payroll of a powerful drug company—directly or indirectly. The unfortunate aspect of the practice is that doctors who prescribe drugs for their patients depend on journals, such as the *NEJM*, to guide them in their selection of drugs for their patients.

Source: *Wall Street Journal*

#### **STUDY SAYS COX-2 INHIBITORS NOT SAFER FOR STOMACH**

The major selling tool for Cox-2 inhibitors was that they would prevent perforations, ulcers and bleeds (PUBs) and the medical community believed it. A recent report by British researchers in the December 3<sup>rd</sup> issue of the *British Medical Journal* is not good news for the manufacturers of the Cox-2 inhibitors. As we all know, painkillers called Cox-2 inhibitors have long been touted as being much safer for your stomach. The new study says that's just not so. There is no evidence to support the claims that these drugs are less harmful to the stomach lining than many traditional anti-inflammatory medications, such as aspirin, according to the report. In the study, researchers at the University of Nottingham looked at 367 general practices for cases of upper gastrointestinal events, such as stomach ulcer or bleeding. The researchers matched cases with up to 10 control patients. For all patients, the researchers looked for prescriptions for anti-inflammatory drugs and aspirin in the three years before the study.

The researchers found an increased risk of gastrointestinal problems associated with using both Cox-2 inhibitors and other NSAIDs. Even after adjusting the data to account for other factors, the risk remained significantly high for the Cox-2 inhibitor rofecoxib (Vioxx) and the NSAIDs naproxen and diclofenac (Voltaren). However, the risk was slightly reduced for celecoxib (Celebrex). As you know, Celebrex is the only Cox-2 inhibitor that remains on the market after Vioxx and Bextra were pulled because of increased cardiovascular risks.

Cox-2 drugs were specifically designed to provide pain relief without the serious gastrointestinal side effects associated with the traditional NSAIDs. But, the researchers found "no consistent evidence of enhanced safety against gastrointestinal events with any of the new cyclo-oxygenase-2 inhibitors [cox-2 inhibitors], compared with non-

selective, nonsteroidal, anti-inflammatory drugs." One expert believes this study confirms the increased dangers of gastrointestinal (GI) bleeding when a cox-2 inhibitor and aspirin are used together. Dr. A. Mark Fendrick, a professor of internal medicine and health management and policy at the University of Michigan, stated:

*The fact that Cox-2 inhibitor drug users had higher rates of adverse GI events than nonusers comes as no surprise to me. Even a drug that might be safer than other alternatives doesn't mean that the drug is completely safe. Once again, this study confirms that the addition of aspirin to any NSAID, including Cox-2 inhibitors, is a very dangerous combination. It is right to take aspirin for your heart and a Cox-2 inhibitor for joint pain. But when you combine these two, they really present GI problems.*

Dr. Fendrick is concerned mostly about the danger of mixing Cox-2 inhibitors with aspirin. Another expert thinks this study shows that Cox-2 inhibitors increase the danger of GI bleeding and ulcers when used in clinical practice. Dr. Eric Matteson, a professor of medicine at the Mayo Clinic College of Medicine, in Rochester, Minnesota, stated:

*These drugs were touted as prevention of adverse GI events, which is completely false. There might be some reduction in risk, but it was never prevention. In actual practice, the utility of these drugs is very low in terms of reducing the risk for important GI side effects. This differs from what was found in clinical trials, which is always different from what is seen in actual practice.*

Dr. Matteson believes this study highlights the GI dangers of using any of these drugs. In this regard, he has said:

*All NSAIDs increase your risk for*

*stomach problems, including ulcers and bleeding, which can be serious and even fatal. This includes the cox-2 drugs.*

If the conclusions of this reported study turn out to be correct, companies like Merck and Pfizer will have lots of explaining to do. The selling point for Vioxx, Celebrex and Bextra was that they were good for the stomach. We know these drugs carry a tremendous heart attack risk and now it appears the “good for the stomach” story may just have been false. If that’s the case, then the heart attack risks take on even “darker” significance.

Source: *HealthDay News*

#### **AFTER EXPOSING VIOXX DANGERS, DR. TOPOL IS NOW ON MERCK’S HIT LIST**

Dr. Eric J. Topol, the cardiologist who testified in our Vioxx case in Texas, has come under attack by Merck & Co. In my opinion, these attacks are the direct result of his stand on Vioxx. As you know, Dr. Topol works at The Cleveland Clinic, a prominent medical center, and one that has been regarded as one of the nation’s best for years. In fact, the Clinic has been selected as the very best cardiac center in the U.S. for 10 years in a row. Dr. Topol has been outspoken in his criticism of drugs he deems dangerous. Because of his excellent reputation, the medical community listens to Dr. Topol. In our case, he only testified as a witness after Judge Fallon ordered him to appear for a deposition. In my opinion, his testimony was devastating to Merck. Companies like Merck don’t take this sort of criticism lightly. As you know, some of Dr. Topol’s strongest criticism has been aimed at Merck and Vioxx because of his concerns over the drug’s safety problems.

Many others share my view that Dr. Topol has been under attack by Merck simply because he testified in our Texas trial. In December, and after the trial, I was shocked to learn that Dr. Topol had been demoted at the clinic. Dr. Topol, who retains the position of chairman of

cardiovascular medicine at the clinic, has suggested in a webcast ([www.the-heart.org](http://www.the-heart.org)) that his unabashed willingness to take on Merck was a principal reason for his removal as head of the clinic’s medical college. We know from experience that those who challenge Merck come under a fierce and unrelenting attack very quickly. Merck will try to destroy any person who gets in their way.

It was Dr. Topol’s criticism of Merck, which was before our Texas trial, that initially got him in hot water. After the drug was withdrawn in September 2004 by Merck, Dr. Topol, who had questioned the drug’s cardiovascular safety in journal articles, criticized the company’s conduct. It was soon thereafter when Dr. Topol first found himself under attack. One might ask, how could the clinic find any fault with Dr. Topol’s performance? The answer is—they can’t. Dr. Topol says that the chairman of the Board of Trustees at Cleveland Clinic, Malachi Mixon, was contacted by Merck’s chief executive at the time, Raymond V. Gilmartin. Dr. Topol suggested in his webcast that actions by the clinic as they related to him might be related to the relationship between Mr. Gilmartin and Mr. Mixon, who attended Harvard Business School together.

Dr. Topol, who in 15 years at the clinic had been responsible for establishing the clinic’s medical school and elevating the reputation of its cardiovascular medicine unit, is well respected worldwide in the scientific and medical community. Based on our experiences with Merck, I can say without hesitation that the powerful drug company is certainly capable of going after Dr. Topol and The Cleveland Clinic as well. Tarnishing the clinic’s image as an institution conducting world-class medical research is not beneath Merck in my opinion. In fact, this is not the first time that Merck has used its power and influence to go after a critic or university. A prime example of how Merck operates is what Merck did to Stanford University when one of its scientists criticized Vioxx. In that case, Merck threatened to cut off all funding for the school.

Hopefully, Dr. Topol will be able to withstand the most recent attacks by Merck. I suspect his problems at the Clinic were designed to affect his future testimony against Merck in Vioxx case. As an aside, I don’t believe Dr. Topol will have any difficulty finding employment in the event he decides to leave The Cleveland Clinic. I would certainly recommend him to UAB in Birmingham. He would be quite a catch for the cardiac branch of the university hospital!

#### **BEASLEY ALLEN LAWYER APPOINTED A LEADER IN NATIONAL BEXTRA/CELEBREX LITIGATION**

A federal Multi-District Litigation proceeding has been established in the San Francisco, California area that will control the vast multitude of Bextra and Celebrex cases filed in this country. This Multi-District Litigation (“MDL”) will act as a “litigation sponge” that will govern all federal filings in the Bextra/Celebrex litigation. Moreover, a majority of the state court filings in this area will eventually end up in this MDL. The MDL will obviously play a major role in the eventual outcome of this litigation.

Our firm was honored when Judge Charles R. Breyer, the federal judge overseeing this complex litigation, chose Paul Sizemore from our firm as one of the leaders of this national litigation. He was appointed to the Plaintiffs’ Screening Committee (PSC) by Judge Breyer. In this role, Paul will serve as the representative of literally thousands of lawyers and tens of thousands of injured and damaged folks from across the country. This position will require Paul to act in a leadership role in court before the judge and will allow our firm to help conduct the depositions of important Pfizer officers and employees.

We proudly accept this leadership position and promise both our clients and those lawyers whom we represent that we will work tirelessly to hold Pfizer responsible for the dangerous drugs they placed on the market. We look forward to our day in court so that we can prove to a jury the validity of

our clients' claims. We will not back down and neither will we be intimidated by powerful multi-billion dollar corporations. We will continue, as we have for the past 25 years, to fight for the rights and honor of our clients as well as for all victims of corporate wrongdoing and misconduct.

#### ***THE MANUFACTURER OF CELEBREX MAY GET A BENEFIT FROM DELAY***

In attempts to revive Celebrex, its beleaguered painkiller, Pfizer has agreed to finance a study with an estimated cost of more than \$100 million dollars. Pfizer says its purpose in conducting this study is to examine the safety of Celebrex in arthritis patients at high risk for heart attacks and strokes. Interestingly, Dr. Stephen E. Nissen, a cardiologist at the Cleveland Clinic, an early critic of the COX-2 painkillers, will lead this study. The clinic's cardiovascular research center will coordinate the study of about 20,000 patients, which would be the first large scale trial to compare the safety of COX-2 painkillers with older non-steroidal anti-inflammatory drugs (NSAIDs) drugs in high risk patients. The study will take about eighteen months to sign up participants and patients will be followed for an average of two years. Patients in the study will have some form of arthritis along with histories including a previous heart attack, stroke, angina, coronary bypass surgery or stent procedures. Others will have diabetes, a known risk factor for cardiovascular disease. But, this study will not include countries of the European Union, where authorities recommend against use of Celebrex by high risk heart patients.

Celebrex fell under suspicion when its comparator COX-2 drug, Vioxx, was pulled off the market on September 30, 2004 after a study showed Vioxx greatly increased the risk of heart attacks and strokes. Shortly thereafter, in December, 2004, one of Pfizer's own studies showed a link between increased cardiovascular risks at higher doses. I hope

this study will provide a wealth of information to individuals wrestling with how to treat their arthritis. In the study, all patients will be given low dose aspirin, which is typical treatment for people with heart problems, as well as a drug to reduce stomach acid.

It has taken a long time for Pfizer to finally commit to this study, considering thousands of people's lives have been affected by Celebrex, along with other drugs in its class, which include Vioxx and Bextra. Back in October, 2004, Pfizer first said it planned to do a trial to examine Celebrex's cardiovascular safety. But, Pfizer declined to explain why the study has taken so long to develop. While some believe that Pfizer's initiation of this trial is the responsible thing to do, others insist that a study of this nature should have been done years ago. Certainly, doing the study before banking seven years of multi-billion dollar profits would have been the more responsible thing to do. Pfizer may simply be buying time for Celebrex, which currently is available on the U.S. market, but with a strong black-box warning. Vioxx is gone and so is Bextra. It is important for Pfizer to keep Celebrex on the market for obvious reasons. It is significant that on August 22, 2005, the Monday after Merck was hit with a multimillion-dollar verdict in the first trial related to Vioxx, Pfizer brought a team of academic researchers to meet with the FDA to discuss this gigantic clinical trial. The study will compare Celebrex to two other popular arthritis drugs, the active ingredients in Aleve and Advil, in patients who are already at high risk for heart attacks. Dr. Alastair Wood, associate dean at Vanderbilt University Medical School, says: "That's the study Merck said couldn't be done."

Already, the study is facing criticism. The trial will be conducted in Australia, the U.S., Eastern Europe and Switzerland, but not in most countries in the European Union, where Celebrex's labeling says it should not be given to patients at risk for heart attacks. Dr.

Garret FitzGerald, the University of Pennsylvania pharmacologist who raised the first alarms that the drugs might pose a heart risk, says he thinks giving the drug to patients at high risk of a heart attack or stroke may be "ethically questionable." Dr. FitzGerald also expressed concerns that the study could be just a way to buy Pfizer more time. Previous studies of heart risk with painkillers that were conducted by drug companies, such as Novartis' trial of its own experimental drug that was similar to Celebrex and Vioxx, have been criticized for not recruiting enough patients at risk to see a difference. FitzGerald has favored studies that would try to use small groups of patients to decipher what the differences between the drugs are as they act in the body. Dr. Nissen says Pfizer approached him and Dr. Topol in August. It should be noted that Dr. Topol is not participating in the study.

*Source: New York Times*

#### ***WHISTLE-BLOWER SUES PFIZER***

A former vice president at Pfizer who had raised issues of possible illegal activity at the company has filed a wrongful termination lawsuit against the drug maker. The lawsuit by the former executive, Peter Rost, accuses Pfizer of retaliating by denying him positions for which he was qualified. The suit was filed in federal District Court in Manhattan last month. A Pfizer spokesman claims that "the allegations in his suit are baseless." Pfizer last month confirmed that it had fired Mr. Rost after the federal government declined to join his whistleblower lawsuit against the giant drug company. Recently unsealed documents showed that Mr. Rost filed a lawsuit in June 2003, asserting that Genotropin, a human growth hormone, was being promoted illegally.

*Source: New York Times*

## **MORE DEATHS ARE LINKED TO HEART DEVICE**

The Guidant Corporation has furnished the Food and Drug Administration (FDA) several new reports about recent patient deaths associated with short-circuits in company heart devices. The three new cases all occurred after June when Guidant recalled the heart devices at issue. The recalls took place after the company came under scrutiny for failing to promptly warn doctors and patients about the risks of short circuits. The new reports bring the number of known deaths associated with the flaw to seven. The added reports may reflect the fact that doctors and family members, in light of the attention given to the Guidant devices, are increasingly having the units checked for problems after a heart patient's death. They also suggest that the devices' possible contributions to earlier deaths may have gone unnoticed because implanted heart units are not routinely examined post-mortem. The new data will be a problem for Guidant because the electrical failures, while involving different models, are all related to the company's use of an insulating material in a way that apparently made it prone to deterioration. The Justice Department, as part of an investigation into Guidant's handling of safety issues, is looking into its use of that material, called polyimide.

The Guidant devices at issue include a defibrillator known as the Prizm 2 DR as well as a combination pacemaker and defibrillator known as the Contak Renewal and a related product, the Contak Renewal 2. As we have reported, a defibrillator senses and interrupts a potentially fatal heart rhythm; a pacemaker regulates a heart that is beating too fast or too slowly. Heart devices, like defibrillators, are vital products and all manufacturers of them have experienced recalls and problems. Guidant's problems came to light in May when *The New York Times* reported that the company had not told doctors for three years that the Prizm 2 DR had short-circuited and failed more than two dozen

times. But internal testing by Guidant as well as reports filed with the FDA by the company indicates that the Contak Renewal and Contak Renewal 2 pose a significantly higher risk. The devices are used in patients with advanced congestive heart failure.

In both the Prizm 2 and Contak Renewal, Guidant used polyimide to insulate wiring within a component that sits atop the hermetically sealed portion of a heart device. That component contains the unit's battery and computer chip. Guidant's major competitors, Medtronic and St. Jude Medical, only use polyimide inside the sealed portion of a device where, engineers say, the material is not vulnerable to deterioration from exposure to moisture like bodily fluids. In August 2004, Guidant changed how it manufactured the Contak Renewal and Contak Renewal 2. The company said that it did not notify doctors about problems in those devices and the Prizm 2 DR earlier because the number of failures involving the units did not exceed company expectations, which is somewhat shocking. The Justice Department has subpoenaed records about polyimide from Accellent, a company that supplied materials to Guidant. At press time, the FDA's investigation into Guidant was continuing.

*Source: The New York Times*

## **THE POPULAR HERB KAVA MAY BE LINKED TO SERIOUS LIVER INJURY**

The Federal Food and Drug Administration (FDA) has begun investigating the blockbuster-selling herb Kava after a previously-healthy 45 year old woman used Kava and suddenly required a liver transplant. Kava is sold under a variety of names, including Ava, Awa, Intoxicating Pepper, Kava Root or Pepper, Kawa, Kew, Piper Methysticum, Rausch Pfeffer, Sakau, Tonga, Wurzelstock, and Yangona. Kava is promoted to relieve anxiety, stress, and insomnia. As you may know, Kava is a member of the pepper family and has long been used as a ceremonial

drink in the South Pacific. About two years ago, Kava in a pill form came on the market with a boom, bringing in about \$30 million annually in sales.

Although the cases of liver damage being investigated appear to be rare, the type being investigated involves severe liver damage. Kava users should consult a doctor if they experience any possible symptoms of liver disease, including jaundice or yellowing of the skin or eyes. The seriousness of these side effects made FDA officials decide it was time to alert Americans, even as the regulatory body is continuing to investigate the link between Kava and serious liver injury. Unfortunately, under federal law, the manufacturer does not have to prove dietary supplements are safe or work as advertised before they begin selling them. And, unlike in other countries, the FDA must prove a supplement is dangerous before it can halt sales. The law should be changed by Congress so that the public can be better protected.

## **PUBLIC CITIZEN SAYS DIABETES DRUG PARGLUVA SHOULD NOT BE APPROVED**

Public Citizen and two clinical trial experts have told the U.S. Food and Drug Administration (FDA) that the drug muraglitazar (Pargluva), which has received an "approvable" letter from the FDA, should not be approved for the treatment of diabetes because it increases the risk of death, congestive heart failure, and other adverse events, and because safer alternatives are available. In a letter sent to Andrew Von Eschenbach, the acting commissioner of the FDA, the authors questioned the benefits of the drug compared to other similar treatments. Public Citizen urged the FDA to not approve the drug until, at the very least, a five-year randomized controlled trial is completed to more thoroughly assess the drug's risks. In testimony before an FDA Advisory Committee in September, Public Citizen cited FDA briefing documents that showed an increase in deaths in patients taking Pargluva compared to patients taking

another type of diabetes drug or placebo. About half of the deaths were cardiovascular-related. Studies also show an increase in congestive heart failure, weight gain, and cancer associated with Pargluva.

Despite all of the evidence, the FDA advisory committee in a shocking move voted to approve the drug. But, the committee lacked a cardiologist and based its approval on the promise of future studies from the drug maker. Where have we heard that line before? The FDA, apparently, was not convinced of the drug's safety, and on October 18<sup>th</sup> notified the sponsoring companies, Bristol-Myers and Merck, that the drug was "approvable," pending additional studies.

Two days after that letter, another analysis of the drug maker's data was published by highly respected cardiologists at the Cleveland Clinic, Dr. Steven Nissen and Dr. Eric Topol. This analysis also depended on FDA documents and showed an increased risk of death, heart attack, or stroke. Additionally, an accompanying editorial in the Journal of the American Medical Association by Dr. James Brophy of McGill University, a signatory to the Public Citizen letter, states "the meticulous examination of the current evidence ... should focus serious attention on the potential cardiovascular risks of this drug." Dr. Peter Lurie, deputy director of Public Citizen's Health Research Group, says:

*The FDA clearly needs more information about this possibly lethal drug before it gives its stamp of approval. Relatively safe and effective drug treatments exist for diabetes, and since there is no evidence to demonstrate that Pargluva has any unique benefit over other drugs, there is no basis for approving it before it has cleared additional safety hurdles.*

Public Citizen was joined in its letter to the FDA by Dr. Curt Furberg, professor of Public Health Sciences at Wake Forest University School of Medicine. I hope the FDA will carefully scrutinize

all of the information available to it. Certainly, the potential risks appear to be greater than the drug's benefit at this point.

Source: Public Citizen

#### **PAXIL MAY CAUSE BIRTH DEFECTS**

In September, GlaxoSmithKline and the FDA notified healthcare professionals of changes to the pregnancy/precautions section of the prescribing information for Paxil and Paxil CR controlled release tablets. The new precautions label includes information regarding the possibility of major birth defects of infants born to women taking antidepressants during the first trimester of pregnancy. A recent study suggested an increase of overall major congenital malformations compared to Paxil as compared to other antidepressants. The FDA warns that if a woman is pregnant or is considering pregnancy, she should be aware of the risk associated with this drug. Clearly, women should discuss the potential risk of birth defects with their healthcare professionals before taking Paxil.

#### **FDA BARS IMAGING DRUG AFTER DEATHS**

Federal drug regulators have removed NeutroSpec, a radiological drug, from the market after two people died and 20 others became gravely ill moments after receiving it. NeutroSpec is injected and used to find internal infections, like appendicitis. Palatin Technologies, the drug's maker, had hoped that changing its label and sending a letter dated December 5<sup>th</sup> to physicians alerting them to the deaths would be enough to satisfy the FDA. But to their credit, FDA officials insisted on a withdrawal, and Palatin and its marketing partner, Mallinckrodt, agreed to suspend sales. Stocks of the drug should be returned to Palatin, according to FDA. Besides the two deaths and 20 serious reactions, 46 other patients experienced "similar but less severe events," according to the deputy director of the FDA's new-drug office. In

most cases, patients suffered cardiovascular problems like a heart attack or a sudden drop in blood pressure.

According to the FDA, eleven thousand patients have received NeutroSpec. Before the drug was approved, Palatin completed a clinical trial in 523 patients. While some of those patients experienced mild shortness of breath and a brief drop in blood pressure, there were no significant problems reported. According to the Times, NeutroSpec is likely to still be available to patients enrolled in a clinical trial. The drug was approved in 2004 exclusively for use in diagnosing appendicitis. But physical exams and standard imaging tests are normally adequate in diagnosing that infection. So NeutroSpec is most commonly used by physicians to diagnose other infections like those in bones. The medicine is a monoclonal antibody with a small radioactive signaler attached. When placed into patient's bloodstream, the medicine attaches itself to white blood cells, which are immune agents that fight infections. X-rays can then be used to uncover gatherings of white blood cells, showing where an infection is located in the body. Monoclonal antibodies were discovered decades ago, and researchers once hoped they would become the key to curing many diseases, including cancer. It will be interesting to see what happens at the FDA relating to this drug.

Source: New York Times

#### **ELI LILLY TO PAY \$36 MILLION FINE**

Eli Lilly & Co. agreed to plead guilty to a misdemeanor and pay \$36 million to settle charges of off-label promotion of its Evista osteoporosis treatment in 1998. The Indianapolis drug company has already taken a charge for the \$36 million fine. Eli Lilly was charged with promoting its Evista product for the prevention of breast cancer and for reducing cardiovascular risk, though neither of those uses has been approved by the Food and Drug Administration. Accord-

ing to Eli Lilly, both uses are the subject of large, multiyear clinical trials that began in the late 1990s. The company issued a statement saying it regrets the conduct and plans to “continue to take steps designed to assure that Lilly’s promotional activities remain fully compliant.” The settlement is subject to approval by the federal court in Indianapolis.

Source: *Wall Street Journal*

## IX. BUSINESS LITIGATION

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### **SCRUSHY SUES HEALTHSOUTH**

Richard M. Scrusby, the former HealthSouth Corp. CEO, has filed suit against his former company. In this civil suit, Scrusby is seeking more than \$70 million. While that might be “pocket change” for him, it’s “big money” for most folks. Scrusby claims that there was a breach of contract stemming from his March 2003 firing. As you know, Scrusby was fired shortly after a \$2.7 billion fraud was uncovered at the rehabilitation and medical services chain. HealthSouth board members had planned to vote him off the company’s board at a December 29<sup>th</sup> shareholders meeting, but Scrusby resigned on December 4<sup>th</sup> and formally invoked provisions requiring back payment and other benefits. Scrusby claims in the suit that his employment agreement with HealthSouth should remain in force because of his June acquittal on 36 criminal counts related to the fraud. But, he still faces civil lawsuits by the Securities and Exchange Commission and HealthSouth investors. Scrusby is also under criminal indictment in a Montgomery federal court.

According to allegations in the lawsuit, Scrusby’s 2002 contract calls for at least \$1.2 million per year in salary for his role as chairman and director, at least \$1.2 million per year in bonuses, a

portion of bonuses or incentive plans other top executives at HealthSouth were entitled to, stock options, employee benefits and various fringe benefits, and severance pay. HealthSouth considers Scrusby’s employment contract null and void and the company had given him notice to that effect in a March 19, 2003 letter. Scrusby’s lawyers maintain the agreement was good for five years and was to be extended each September 17<sup>th</sup> for an additional year unless the company notified him in writing it would not be extended. It doesn’t look like the Scrusby saga will ever end and it gets more interesting as time passes. If nothing else, Scrusby made Christmas better 2005 for his cadre of lawyers. They should all be thankful for this man’s generosity!

Source: *The Birmingham News*

### **AHOLD TO PAY SHAREHOLDERS \$1.1 BILLION TO SETTLE SUIT**

Royal Ahold, which owns the Stop & Shop and Giant supermarket chains in the United States along with other retail operations worldwide, has agreed to pay \$1.1 billion to settle a class action lawsuit brought by U.S. shareholders after its 2003 accounting scandal. Interestingly, the amount of the settlement paralleled that of the scandal. Ahold had overstated earnings by more than 1 billion euros in 1999-2002, mostly by inflating sales at its U.S. Foodservice subsidiary.

Ahold’s former top management resigned in February 2003 after the company made the fraud known. The company eventually restated earnings for 2002 to a loss of 4.33 billion euros (\$5.01 billion). It avoided bankruptcy by selling assets and by getting an emergency credit line from its banks. The agreement requires approval from a court in the Baltimore district, where the case was filed, and from holders of at least 180 million shares out of around 800 million shares that qualify.

There are also plans to sue Ahold’s former accountants, Deloitte & Touche,

for as much as \$3 billion for its actions. It is probable that the accounting firm is legally responsible to the shareholders for much of what took place. Had they done their job properly, the problems most likely wouldn’t have occurred. Ahold takes the position that Deloitte is not culpable in the fraud, which is most interesting. The U.S. Securities and Exchange Commission has settled civil fraud charges against Ahold and top executives without fining them. Two former top managers at Columbia, Md.-based U.S. Foodservice pleaded guilty to fraud charges in the United States, while the former chief financial officer and chief marketing officer have pleaded innocent. Former Ahold CEO Cees Van der Hoeven, former CFO Michiel Meurs, and two other top executives are expected to face criminal charges in the Netherlands in May 2006. All have said they are innocent of wrongdoing.

Sources: *USA Today* and *Associated Press*

### **FEDERATED SETTLES FUND PROBE FOR \$100 MILLION**

Federated Investors, one of the nation’s largest investment managers, has agreed to pay \$100 million to settle a state and federal investigation into improper mutual fund trading by selected groups at the expense of individual investors. New York Attorney General Eliot Spitzer, in a statement made relating to the settlement with the Securities and Exchange Commission, stated:

*With this agreement, virtually the entire mutual fund industry has now sworn off improper trading practices and agreed to compensate investors who were harmed. Federated worked with regulators to address problems with improper trading.*

Founded in 1955, Federated has assets under management of more than \$207 billion, according to the firm’s website. Federated is the 14<sup>th</sup> firm to settle improper mutual fund trading charges since Spitzer’s case against the Canary

Capital Partners firm in 2003. Federated has agreed to reforms and to pay \$35 million in restitution to investors, as well as \$45 million in civil penalties, and cut its management fees by \$20 million over five years. Federated will also hire a senior officer to monitor the setting of advisory fees for managing funds to be sure they are “at arm’s length and are reasonable.” The investigation of the company focused on mutual fund timing by insiders that can hurt long-term mutual fund shareholders by reducing their shares’ value.

Spitzer accused Federated of secret market timing with three trading groups, knowing it gave an unfair advantage to the groups over individual investors. There were other agreements that Federated failed to stop, according to Spitzer. Federated collected “substantial” fees on the traders’ assets as a result of the dealing. Federated secretly allowed Canary to make more than \$1.6 billion in timing transactions. Canary, in exchange, made a \$10 million investment in a Federated-advised fund. Federated then collected additional fees. Federated placed orders from a hedge fund after the 4 p.m. close of the markets, in violation of a law requiring that mutual fund orders be placed before the closing to receive that day’s price.

Source: USA Today and Associated Press

#### **JURY AWARDS \$52.5 MILLION IN ASBESTOS CASE**

A jury has awarded \$52.5 million to API Inc., a Minnesota construction company that sued its Boston-based insurer, One Beacon, for failing to defend it against hundreds of personal injury and wrongful death claims tied to asbestos exposure. I wonder if the U.S. Chamber of Commerce—a vocal critic of the court system—considers this to be a frivolous lawsuit. API’s lawyer had this to say about the verdict:

*The big message is you cannot mistreat your policyholders who went out and bought that insurance for protection.*

The jury awarded API \$27.5 million for breach of contract, \$10 million for operating in bad faith and \$15 million for breach of duty. API installed and distributed building insulation materials that included asbestos. The dispute centered on the existence and terms of insurance policies from 1958 to 1966. Starting in the 1980s, more than 700 lawsuits were filed against API, alleging wrongful death and injury resulting from asbestos exposure. API hired investigators to try to locate any records or evidence of insurance. The investigators never found policies but did undercover records indicating that the construction company was covered by General Accident Insurance Co. API then filed claims with the company’s successor, OneBeacon, which denied the existence of the insurance policies and then disputed the extent of the coverage. Citing its asbestos liabilities, API filed for Chapter 11 bankruptcy in January. API said OneBeacon’s denial of coverage had forced it to pay out \$41 million to settle asbestos claims.

#### **AON CLIENTS ACCEPT CLAIM SETTLEMENTS**

Recently, Chicago-based Aon Corp. announced that its clients have accepted more than 70% of the 352,000 offers made by the insurance broker to settle claims that it steered business to insurers who paid hidden fees. More than 900 of the company’s 1,000 largest clients by revenue were among those who accepted offers. The roughly \$140 million in claims will be paid out of a \$190 million fund created as part of a nationwide settlement Aon reached with prosecutors in Connecticut, Illinois and New York. People who opt into the settlement can’t sue Aon in the future.

Aon, the world’s second-largest insurance broker, along with competitors Marsh & McLennan Cos., the number one broker, and Willis Group Holdings Ltd., has been accused of steering business to insurers that paid hidden fees. In December, Illinois state court Judge Julia Nowicki delayed ruling on a separate

\$38 million settlement in a 1999 class-action lawsuit against Aon. The suit was filed by policyholders Alan Daniel and the Williamson County Agricultural Association. Judge Nowicki gave lawyers on both sides two weeks to file additional arguments in the suit, which also accused the insurance broker of favoring insurers that paid the hidden fees.

Source: *The Chicago Tribune*

## **X. INSURANCE AND FINANCE UPDATE**

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### **VIRGINIA AUTHORIZES PARTIAL PAYMENTS ON RECIPROCAL OF AMERICA CLAIMS**

Policyholders with a covered claim against insolvent Reciprocal of America can expect a partial payment soon. The Virginia State Corporation Commission (SCC) is authorizing the deputy receiver of the liquidated reciprocal insurer to make a 17% distribution to policyholder-level claimants. ROA primarily wrote hospital professional liability insurance, workers’ compensation insurance, and some ancillary insurance for its insureds. It also provided reinsurance to various companies, including three Tennessee risk retention groups, Doctors Insurance Reciprocal, American National Lawyers Insurance Reciprocal, and the Reciprocal Alliance.

ROA and its attorney-in-fact, The Reciprocal Group, were placed into receivership on January 29, 2003. On April 30, 2003, payment of all hospital liability claims was suspended by the deputy receiver. The SCC allowed the deputy receiver to continue paying certain workers’ compensation insurance claims, because recipients typically rely on such payments for their livelihood and medical care. As a result of the SCC’s order, Virginia Insurance Commissioner Alfred W. Gross, in his capacity as deputy receiver, is expected to modify soon his directive suspending payment of claims to allow for a partial distribution from the receivership estate. Vir-

ginia law requires that the deputy receiver treat all policyholder-level claimants equitably.

The 17% payment is capped at \$77.5 million, which Commissioner Gross believes is a conservative estimate of the assets that can be distributed at this time without an unreasonable risk that later-approved claims of equal priority will not receive the same percentage payment. The bar date for the filing of claims was September 30, 2004. While the number of claims that might be filed has been fixed, the dollar value that ROA may have to pay on those claims is unknown at this juncture. The partial payment does not include the outstanding creditor claims of the Tennessee risk retention groups (RRGs). But, the Tennessee receiver agrees with the partial payment arrangement. The agreement allows ROA and the Tennessee RRGs to cooperate in the preservation and marshalling of the assets of their respective receivership estates.

Source: *Insurance Journal*

#### **JURY AWARDS \$7.8 MILLION IN TEACHERS' FRAUD SUIT**

An Ohio jury has awarded \$7.8 million in a lawsuit filed by the State of Ohio's Teachers Retirement System accusing its pharmacy benefits manager of fraud. The 2003 suit alleged that Medco Health Solutions Inc. and parent Merck & Co. overcharged the fund. Ohio Attorney General Jim Petro said in a statement:

*Merck and Medco abused their relationship with STRS and placed corporate interests ahead of their obligations to Ohio's retired teachers. With this verdict, we've brought them to account for that.*

Franklin Lakes, New Jersey-based Medco provided pharmacy benefit services for the teacher's retirement system until 2001. The plan covered more than 100,000 retirees. The jury found that Medco was liable for constructive fraud and awarded \$6.9 million in damages.

The jury also ruled that Medco breached its duty to STRS Ohio in the amount of \$915,000. The jury said that Merck was jointly liable for the actions of Medco, its former subsidiary, but did not wrongfully interfere with the contract or business relationship with the state. Under Medco's 2003 spinoff agreement with Merck, Medco would assume any financial responsibility for such cases. The jury deadlocked on the plaintiffs' request for punitive damages. Medco says it will appeal the jury's decision.

Sources: *Associated Press*

#### **JUDGE CONFIRMS SOME \$900 MILLION IN EXECUTIVE LIFE VERDICTS AND SETTLEMENTS**

A federal judge in Los Angeles has ruled that the Artemis Company, reportedly a main conspirator in the fraudulent purchase of the Executive Life Insurance Co. (ELIC), must pay \$190 million plus interest—for a total of at least \$250 million—in restitution to victims of the fraud. The final decision in the case brings the total amount ordered or settled on behalf of defrauded ELIC policyholders to approximately \$900 million. The California Department of Insurance had long contended that a French consortium, including Artemis, committed fraud in order to gain control of ELIC and its assets during the early 1990s. The group hid the true identity of its controlling interest when it made an application for the ELIC purchase, allowing it to violate California laws regarding foreign ownership of insurance companies. The ruling by United States District Judge Howard Matz in Los Angeles upheld the Insurance Commissioner's position that a fraud was indeed committed. In reaching his ruling, Judge Matz stated in pertinent part:

*Owners and executives of insurance companies, including powerful and sophisticated companies like Artemis...must tell the truth and comply with the law.*

Before this ruling the Commissioner had secured settlements in the case with defendants CDR and Aurora. He also won default judgments against MAAF and Jean-Francois Henin. In May, a Los Angeles jury returned a verdict awarding the policyholders \$700 million in punitive damages against Artemis. In October, Judge Matz threw out that award. It is possible that the decision to throw out the jury verdict for punitive damages may be appealed. It is significant that every major participant in this fraud was brought to justice, either through criminal penalties, financial penalties, or both. The California Insurance Commissioner is to be commended for his zeal and persistence in staying the course until justice was done.

Source: *Insurance Journal*

#### **STATE FARM TOLD TO PAY \$8 MILLION TO MAN AND WOMAN ACQUITTED OF FRAUD**

State Farm Insurance has been ordered to pay more than \$8 million to a tow truck driver and his sister-in-law who were acquitted of insurance fraud after being accused of faking the theft of a vehicle. A circuit judge in Jackson County, Missouri said he would award \$4.5 million to Jennie Hampton of Olathe, Kansas and \$4.2 million to Marvin Vail of Edgerton, Kansas. After Hampton's vehicle was found burned in rural Miami County, Kansas, State Farm refused to pay her claim. The company accused her of lying in claiming that the Toyota's engine was in "excellent" condition before the reported theft. State Farm cited reports from several witnesses who told investigators Ms. Hampton had talked about engine problems and was looking for a new engine a few weeks before the event. One witness was reported to have overheard Vail, who worked as a tow-truck driver, stating that he was involved in towing the vehicle to where it was burned. Through the Insurance Crime Bureau, the case was forwarded to the district attorney's office in Johnson County,

Kansas, which filed charges. Hampton and Vail were acquitted in May 2001. State Farm and the Insurance Crime Bureau were said to have relied on incomplete, hearsay evidence in pushing the fraud prosecution. It appears they acted prematurely and without any real basis for seeking the indictment of the two individuals.

Source: *Kansas City Star*

#### **MISSISSIPPI INSURANCE COMMISSIONER ADOPTS FLORIDA'S MEDIATION PROGRAM**

A mediation program for homeowners battling insurance companies in the wake of Hurricane Katrina was unveiled last month by George Dale, Mississippi Insurance Commissioner, and it pretty well is a copy of the Florida program. The insurance commission's staff researched Florida's program for months. The Jackson Clarion-Ledger reported that the commissioner hopes to implement a similar program in Mississippi. Residents in south Mississippi have complained that insurance payments are too small and that insurance companies say flood damage is not covered. Homeowners are shocked to learn their coverage did not include flooding, although insurance companies excluded "high-water damage" in policies. Some homeowners, including U.S. Senator Trent Lott, are suing their insurers for coverage. Commissioner Dale has said he hopes this program limits the number of lawsuits. Under the Florida program, a consumer files a complaint, and the policyholder and insurance company have 21 days to reach a settlement. If they do not agree within that time frame, the parties then meet with a mediator to reach a settlement. I am not sure what happens if the mediation is unsuccessful. I assume a lawsuit could be the answer. At least one Mississippi resident, Senator Lott, believes that to be the case. He has filed suit and didn't wait for medication.

Source: *Insurance Journal*

#### **HEALTH INSURANCE COMPANY TO SETTLE CLAIMS**

Our neighboring state of Georgia seems to have a leg up on Alabama when it comes to regulating insurance companies and making them accountable to their policyholders. A recent development is a good example of what Georgia is doing. UnitedHealthcare of Georgia will have to pay \$2.3 million to settle late-pay claims by doctors and hospitals. Georgia law requires insurers to pay medical providers' claims within 15 business days and to explain why if they can't comply. State Insurance Commissioner John Oxendine says about 80,000 doctors' and hospitals' claims were not paid in a timely manner, which prompted the sanctions. The agreement calls for \$2.3 million in upfront payments with an additional \$500,000 suspended, pending the company's satisfactory completion of several requirements within the next 12 months.

I understand that this penalty for failure to pay the doctors and hospitals fast enough is the highest ever leveled against a health insurance company operating in Georgia. It is almost as much as the \$2.5 million in fines the state Insurance Department has imposed on health insurance companies since 1999 for violating the prompt-pay law. In September, UnitedHealthcare of Georgia was awarded a one-year state contract for \$55 million to run a health insurance network for 300,000 state employees, schoolteachers, retirees and their dependents. The insurance department fined UnitedHealthcare of Georgia in 2000 and 2001 a total of \$176,229 for similar offenses. Maybe those in state government in Alabama should take a look at what all Georgia is doing. Perhaps, we could borrow some of their ideas and programs and put them in place in Alabama.

Source: *Associated Press*

## **XI. PREDATORY LENDING**

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#### **PAYDAY LENDER IS SUED OVER RATES**

A Philadelphia company that makes so-called payday loans to people in need of quick cash is being accused by a legal-aid group of charging interest rates that are illegal under Pennsylvania law. The suit, filed by Community Legal Services, Inc., seeks class-action status. It names as defendants Frascella Enterprises Inc., which does business as Cash Today and its owners. Cash Today was making payday loans as an agent of County Bank until federal regulators applied pressure in May to the Rehoboth Beach, Delaware, bank. Payday loans in Pennsylvania often carry effective interest rates of 400% to 500%, well in excess of that state's usury ceiling of about 24%. But banks based outside the state are subject to interest-rate ceilings imposed in their home states, rather than those in Pennsylvania.

After County Bank withdrew from the payday-lending business, Cash Today began referring borrowers to an Internet-based lender licensed in Delaware by the owners of Frascella Enterprises the lawsuit alleges. The new arrangement, involving a nonbank lender, "doesn't even have the slightest argument of being legal," according to Irv Ackelsberg, a managing attorney at Community Legal Services.

A bill has been introduced in the Pennsylvania Legislature that would ban payday lending in that state. The General Assembly is also considering a bill that would require licensing and regulation of payday lenders. Payday lending has been labeled as financial quicksand that is designed to drag families into deeper debt at outrageous interest rates. I believe that is a pretty good description of an industry making billions preying on low-income citizens. We should all commend the Pennsylvania officials for their actions. In fact, I would salute any state's officials

who would go after the payday lending industry.

Source: *Philadelphia Inquirer*

## XII. PREMISES LIABILITY UPDATE

### **DISNEY ADMITS LIABILITY IN WRONGFUL DEATH LAWSUIT**

The Walt Disney Co. has admitted liability in the death of a 22-year-old man who was crushed on a roller coaster at Disneyland in 2003. Disney agreed to admit that the death of Marcelo Torres was caused by maintenance and mechanical failures on the Big Thunder Mountain Railroad as a condition of the settlement of the wrongful death lawsuit brought by his family. Interestingly, Disney had made the same admission of liability in 2003 after a state safety investigation concluded that poorly trained mechanics and ride operators, as well as mechanical failure, had caused the accident. Disney is known for aggressively defending itself against lawsuits over theme park accidents, which makes this public admission of liability most unusual.

The terms of the settlement are confidential, but Torres' parents announced the establishment of an arts scholarship at Brooks College, from which Torres graduated. A trial had been scheduled to start on December 19<sup>th</sup> in Orange County Superior Court. Marcelo Torres was killed and his best friend, Vicente Gutierrez, was injured when their railroad car derailed in a tunnel and crashed into another car that had come loose. Torres died at the scene and Gutierrez and several other passengers were hospitalized. Gutierrez was also a plaintiff in this case and his claim was settled as well.

Source: *Reuters News Service*

### **FAMILY SETTLES WITH THEME PARK IN FATAL ACCIDENT**

The family of a woman who fell from a Pigeon Forge amusement park ride has settled a lawsuit against the defunct park and the man convicted of reckless homicide in her death. The fifty-year-old woman was riding a ride called "The Hawk" last year at the Rockin' Raceway in Tennessee when her harness on the swinging gondola-style ride came loose causing her to fall 60 feet to the ground. The manager of Rockin' Raceway was sentenced to four years of probation in July. The ride's Italian manufacturer, Zamperla, was blamed for the accident. It is not known how much—if anything—was paid by the manufacturer and how much was paid by the liability insurance carrier. In any event, the case was settled.

### **MAN WHO SAVED A LITTLE GIRL'S LIFE SETTLES HIS CASE**

A man who threw himself on a 4-year-old girl to save her from being crushed by a falling movie theater sign and who himself suffered paralyzing injuries as a result has settled his lawsuit for \$12.7 million. The accident occurred on February 22, 2003, when a 1,700-pound sign located outside what was then the San Diego Sports Arena, fell. The theater was located very near the arena. If the man hadn't acted quickly—putting himself in harm's way—the child would have been killed. When the sign hit, the man absorbed most of the impact and his right leg and left ankle were shattered by the sign. He was left paralyzed with no sensation or ability for movement below the middle of his chest. Defendants in his case were Arena Group 2000, (the company that leased the sports arena from the city), Image National Inc., (the company that made the sign), and Mann Theatres. The City of San Diego owns the arena, renamed ipayOne Center in March. The city was not liable for injuries that occur on the property

under the terms of its lease with Arena Group 2000.

The man had taken the little girl, whom he was baby-sitting, to a restaurant about 6:30 that night to meet his former roommate. The three planned to attend a San Diego Gulls hockey game to be played in the arena. As they walked from the restaurant toward the sports arena, the man heard a sound from above, saw the falling sign and jumped toward the girl as the sign fell on top of them. Because of his serious injuries, he now has to use a wheelchair for day-to-day mobility.

The little girl suffered a fractured pelvis, but has since recovered. The child's family settled a separate lawsuit over the incident. Officials knew the sign was dangerous. Documents showed that theater owners knew as far back as 1996, the sign needed repair. In June 2002, the city notified Arena Group 2000 that the sign was a hazard that had to be removed under the conditions of the company's lease with the city. Unfortunately, that was never done and the sign finally fell.

Source: *Union-Tribune*

### **JURY AWARDS \$9 MILLION IN APARTMENT RAPE CASE**

In a recent issue, we mentioned the number of assaults and rapes that occur at apartment complexes throughout the country. A recent incident that occurred in Georgia resulted in a substantial jury verdict. A woman who was beaten, raped and robbed at her Marietta, Georgia, apartment, was awarded \$9 million in compensatory damages by a Fulton County jury last month. During the trial, in a surprise move, the defendant admitted that it was legally responsible for the attack. In laymen's language, this simply means the defendant admitted fault. At that juncture, the case then became one focused solely on damages. The verdict received a great deal of media attention and brought attention to a serious problem.

The victim was leaving her Hampton Village apartment about 9 p.m. on July 24, 1999, when she was accosted. Two men stuck a gun in her back and shoved her back in the apartment. One man robbed the apartment while the other man raped her. The two assailants were never caught. The complaint accused the defendants of failing to properly maintain and secure the apartment complex, and of creating a nuisance “by reason of their failure to remedy the dangerous condition of crime incidents that persisted over a period of time as a continuous and repetitious condition.” The jury obviously agreed and returned a record-setting verdict against the defendant. There had been prior incidents—including at least one rape—at the apartment. Security at apartment complexes is very important to tenants, it increases the legal duty of the owner and operator to provide adequate security.

Source: *Fulton County Daily Report*

### XIII. WORKPLACE HAZARDS

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#### *POPCORN PLANT LAWSUITS WINDING DOWN*

A lawsuit involving workers at a Jasper, Missouri, popcorn plant is nearing conclusion. A New York-based butter-flavoring manufacturer recently agreed to settlement terms with 17 plaintiffs. That brings to 54 the number of former plant workers, or their spouses, who have settled their cases with International Flavors & Fragrances Inc. In addition, four cases involving seven plaintiffs resulted in jury verdicts totaling nearly \$53 million. Each of those has been appealed. There are no other cases left at the trial court level.

Financial terms of the settlements are confidential. Most of the plaintiffs work or worked at the Gilster-Mary Lee popcorn plant in Jasper, which is located about 130 miles south of Kansas City. The victims have damaged airways

and breathing problems. They claim that their illnesses were caused by exposure to chemicals in the popcorn’s butter flavoring. They also contended that the manufacturer “failed to give instructions on safe use of the products.” Some of the plaintiffs have a rare illness called bronchiolitis obliterans, which often is caused by exposure to toxic fumes. It causes inflammation and scarring, which narrows the airways that enable people to breathe. The condition is irreversible. Some are permanently disabled, and others need lung transplants. Some can’t even mow their yards or play soccer with their children. Obviously, the effect of the toxic fumes on employees is devastating to their health.

Source: *The Kansas City Star*

#### **KMART WORKERS AND RETIREES REACH \$11.75 MILLION PENSION SETTLEMENT**

As many as 150,000 employees and retirees of the former Kmart Corp. will share \$11.75 million in a proposed settlement of a lawsuit against ex-company officials over the investment of pension funds in Kmart’s now worthless stock. The agreement involves those who participated in Kmart pensions from March 15, 1999, to March 6, 2003. The people involved lost between \$28 million and \$300 million. A U.S. district judge in Detroit is being asked to approve the settlement.

Quincie Rankin, a former employee of Kmart in Fairfield, Alabama, sued ex-Kmart Chief Executive Charles Conaway and other former executives and board members in March 2002. The suit said the company officials invested Kmart pension money in Kmart stock after the company filed for Chapter 11 bankruptcy protection on January 22, 2002. It has alleged that the officials failed to exercise proper care over the pension money. The settlement would be paid from proceeds of a \$25 million insurance policy from National Union Fire Insurance Co.

Kmart emerged from Chapter 11 bankruptcy protection in 2003 as Kmart

Holding Corp. In March, the Troy, Michigan-based company combined with Sears, Roebuck and Co. to form Sears Holdings. In August, the U.S. Securities and Exchange Commission (SEC) filed civil charges of securities fraud and aiding and abetting securities fraud against Conaway and former Kmart Chief Financial Officer John T. McDonald. The SEC said the executives made “materially false and misleading” disclosures to shareholders before the retailer’s bankruptcy filing. The agency’s complaint filed in U.S. District Court in Detroit also accused the men of aiding and abetting violations of rules that require publicly traded companies to file quarterly reports and to include material information in the reports so they are not misleading.

Source: *Associated Press*

#### **CONNECTICUT JURY AWARDS \$32 MILLION TO INJURED CONSTRUCTION WORKER**

A Waterbury, Connecticut jury has awarded \$32.1 million to a Bristol construction worker paralyzed in an accident more than a decade ago. Norman Pelletier, 54, was permanently paralyzed below the chest when a steel beam at a Shelton construction site broke loose and hit him. Although Mr. Pelletier can’t move the lower part of his body, he can still feel pain from his injuries. The worker won the right to sue Sordoni Skanska Construction of New Jersey in a precedent-setting state Supreme Court case two years ago. Sordoni had argued that because Mr. Pelletier worked for one of its subcontractors, Berlin Steel Construction Co., it could not be held responsible for his injuries.

Sordoni Skanska says it will appeal the verdict. If that appeal fails, the worker could receive an additional \$8 million in interest because the company rejected his offer to settle the case for \$6 million several years ago. The case, which was in court for 10 years, ended after five weeks of testimony in Waterbury Superior Court. About \$28.3 million of the \$32.1 million is for medical costs and

other damages, such as pain and suffering. The rest is for the wife's losses. When Mr. Pelletier was injured in June 1994, he worked for Berlin Steel Construction Co., a subcontractor for Sordoni Skanska on an expansion project at a Pitney Bowes facility in Shelton.

Source: *Associated Press*

#### **OSHA CITES GEORGIA COMPANY FOR HAZARDS**

The U.S. Labor Department's Occupational Safety and Health Administration (OSHA) has cited Joe Sikes Oil Service for exposing workers to safety and health hazards that contributed to a fatal accident June 19th at the company's Jefferson, Georgia, facility. OSHA's investigation revealed that the company failed to check the flammability of incoming waste oil products and to properly recycle the material. It was reported that equipment used for these operations had been inoperable for at least two years. An explosion, which occurred while waste oil was being transferred from a storage tank to a tanker truck, killed one employee. Gei-Thae Breezley, OSHA's Atlanta-East area director, said:

*This needless tragedy points to the dangers of employers becoming complacent when handling hazardous waste materials. The accident could have been prevented if the company had complied with OSHA and state regulations.*

- OSHA issued 22 serious citations against the company, including:
- failing to periodically inspect storage vessels;
- defective or inadequate storage tank equipment;
- lack of emergency training and equipment;
- several electrical violations; and
- improperly stored hazardous chemicals.

The penalties proposed by OSHA total \$30,400. The company had 15 working days from receipt to contest the citations and proposed penalties before the Occupational Safety and Health Review Commission.

#### **JURY AWARDED \$31 MILLION IN ASBESTOS SUIT**

A Florida jury has awarded \$31 million to a man, who claimed he contracted an incurable lung disease from working with brake pads and other automotive parts made with asbestos, in a lawsuit against several defendants. The 48-year-old mechanic was diagnosed with a rare form of cancer known as mesothelioma. Houston-based Cooper Industries and its former Pneumo Abex brake unit were defendants in the case, along with six other companies. Abex is liable for \$14.26 million of the \$31 million verdict. The six other companies were found partially negligent, under Florida law, but won't have to pay any of the verdict because they previously settled with the plaintiff. Those settlements were confidential.

The plaintiff had spent most of his career as a mechanic repairing automobiles and heavy-construction equipment. It was during that time, according to the lawsuit, that he inhaled asbestos from various auto parts. He subsequently went into his own business which was a pavement-marking company.

In July 2004, the plaintiff had sued more than a dozen automotive-parts manufacturers and distributors claiming the companies continued to sell asbestos-containing products even though they knew they were a health hazard. Cooper sold its automotive-parts division, including Abex, to Federal-Mogul in 1998. As part of the deal, Federal-Mogul agreed to defend any potential asbestos-related claims against Cooper. But after Federal-Mogul filed for bankruptcy in 2001, Cooper assumed responsibility for defending the asbestos-related lawsuits against Abex. That is why Cooper was a defendant in this case. The Miami-Dade Circuit Court

jury awarded the plaintiff \$3 million in economic damages and \$28 million in past and future damages for pain and suffering.

In a related matter, Cooper, a manufacturer of tools and electrical products, announced in late December that it had agreed to pay \$630 million to settle more than 38,000 claims against Abex. It is not known if the Florida case will be involved or whether it will be affected by that global settlement. Interestingly, the plaintiff in the most recent case had sought punitive damages in his lawsuit, but a new Florida law that took effect in July bars punitive damages in asbestos cases.

Source: *Miami Herald*

## **XIV. TRANSPORTATION**

#### **STUDY FAULTS CITY AND SOUTHWEST FOR MIDWAY DANGERS**

A report released last month reveals that for years the City of Chicago and Southwest have "carelessly ignored" the risks of short runways and insufficient overrun areas at Chicago's Midway Airport. An expert on transportation disasters came to that conclusion in a report on the most recent fatal accident at the airport. The crash was clearly avoidable. However, the outcome would have been much worse if fuel tanks on the plane had ruptured and caught fire. This is according to Gunnar Kuepper, chief of operations at Emergency & Disaster Management Inc., a Los Angeles-based company that advises government agencies and private businesses on emergency-planning strategy. Mr. Kuepper had this astute observation:

*This was not a surprising risk for anyone in the aviation industry. Surely it was a surprise for the people on the street outside Midway Airport who collided with a Boeing 737.*

For a fraction of the financial losses that Chicago and Southwest will pay out as a result of the accident, the city and its major airlines at Midway could have invested in safety systems to minimize the damage of a plane skidding off a runway. The Southwest flight landed in a snowstorm at Midway on December 8<sup>th</sup>, slid off the runway, crashed through barriers, and hit several cars on Central Avenue. A 6-year-old boy in one car was killed and 10 other people were hurt. The report concluded:

*Midway chose not to address and mitigate the apparent hazard.... Southwest did not seem to care about reducing the risk either.*

The report cited similarities to a 2000 accident in which a Southwest plane overran a runway in Burbank, California, in rainy weather and crashed into two cars on a street. After the accident, the Burbank Airport improved its safety areas at the ends of runways by installing pits of soft concrete that crushes under the heavy weight of planes to arrest momentum.

Chicago airport officials say they are working with the FAA on a plan to comply with a 2015 federal deadline to improve runway safety areas. Meanwhile, Southwest officials said that the captain of the Southwest plane that crashed at Midway didn't violate company policy by using the plane's autobrakes. Investigators with the National Transportation Safety Board have said the autobrakes were used in the maximum power setting and that they helped the pilots stop the plane. The family is filing suit for the death of an innocent child and was looking forward to Christmas and whose life was tragically lost. Other suits for the injured parties will also be filed.

Source: *The Chicago Tribune*

#### **UNLICENSED WORKERS DO CRITICAL WORK FOR AIRLINES**

A new report released recently paints a pretty bad picture relating to airline safety. Major U.S. airlines are using unli-

censed, lightly supervised contractors to perform safety-critical work such as replacing jet engines, according to this report. The report, issued by the inspector general of the U.S. Department of Transportation, raises concerns about the extent to which financially squeezed airlines are cutting costs by relying on repair contractors that are unsupervised by the Federal Aviation Administration. These findings are very troubling. The airline industry, during this financially troubled time, shouldn't be allowed to cut corners and, as a result hurt safety. Inspector General Kenneth Mead's report finds carriers are using unlicensed firms for more work, and for more sophisticated work, than was previously known by the FAA. The practice of using unlicensed contractors is legal, but Mead recommends that the FAA begin immediately to track unlicensed contractors.

Mead's report reviewed maintenance practices at airlines including American, American Eagle, Continental, Continental Express, Frontier and AirTran. Investigators visited contractors in Florida, Mexico and El Salvador. Mead's agency began its investigation following the fatal 2003 crash of an Air Midwest plane in Charlotte. Investigators blamed faulty repair work by an unlicensed contractor. FAA officials had believed airlines used unlicensed contractors mainly for minor repairs at small airports where no licensed shops exist. In fact, the report finds:

- Airlines are using unlicensed repair stations for safety-critical work that normally would be done by airlines' in-house mechanics or licensed contractors.
- Thirty-nine percent of maintenance contractors used by one large unnamed airline are unlicensed.
- At one unnamed airline, 74% of safety-critical repairs over three years were done by unlicensed firms.
- Five of six airlines reviewed rely mainly on phone contact to monitor work.

The report recommends the FAA immediately start tracking unlicensed maintenance contractors, identify which ones are doing safety-critical work and decide whether to limit the types of work they do. An FAA spokesman told USA Today the agency will consider the recommendations. Under intense cost pressure, major airlines as a group, now outsource more than half of annual maintenance spending. The report says lower cost is a key reason airlines are relying more on unlicensed contractors. Because they aren't required to meet federal standards, unlicensed shops tend to have lower overhead costs. It is difficult to believe that the FAA had so little knowledge on this subject. Clearly, the FAA should do a better job of keeping up with what these companies are doing. Safety must never be compromised and the FAA has a duty to make sure it isn't. Hopefully, the FAA will do more than just consider the report's recommendations.

Source: *USA Today*

#### **SOLE SURVIVOR SETTLES COPTER CRASH LAWSUIT**

The sole survivor of a Grand Canyon sightseeing air crash that killed six people in 2001 has settled a lawsuit involving the tour company, pilot and helicopter manufacturer. A confidential financial agreement was reached in the civil lawsuit stemming from the crash near Meadview, Arizona. The lawsuit named tour company Papillon Grand Canyon Helicopters in Las Vegas; American Eurocopter Corp. and Turbomeca Engine Corp., of Grand Prairie, Texas; Washington-based helicopter retailer Zuni LLC; and the estate of the pilot who died in the crash.

The plaintiff has been slowly rehabilitating from near-fatal injuries. The mother of two suffered a broken back, burns over 80% of her body, and had both legs amputated after the helicopter crashed into a cliff during a sightseeing tour to the Grand Canyon. Besides the pilot, the plaintiff's husband and four traveling companions were killed in the crash. The National Transportation

Safety Board blamed pilot error for the crash in a report last year.

Source: Associated Press

#### **FAMILY OF MISSING HONEYMOONER PLANS LAWSUIT AGAINST CRUISE SHIP**

We have mentioned in previous issues that there have been a good number of incidents on cruise ships such as rapes and assaults on passengers. A recent incident involving a Connecticut man has gotten a great deal of attention. The family of the man, who disappeared from a cruise ship during his honeymoon, is filing suit against the cruise operator. The company is accused of trying to cover up the incident and failing to ensure passenger safety. The passenger vanished on July 5<sup>th</sup> from a Royal Caribbean ship in the Mediterranean between Greece and Turkey. The FBI has been investigating, but no one has been charged and no body has been recovered. The family believes that foul play was involved, that their son did not accidentally fall off the ship, and did not commit suicide. Authorities have called the man's disappearance highly suspicious. Blood stains were found running from the balcony of his cabin to life boats. A bloody hand print was discovered on the side of the ship. The passenger was reported missing when the ship docked at Kusadasi, a resort area in the Aegean region of Turkey. Royal Caribbean officials in a statement have said that passenger safety is the company's top priority.

U.S. Representative Christopher Shays (R-CT) held congressional hearings on the cruise industry to educate legislators and the public on the frequency of such tragedies and the way the cruise lines respond. There have been at least 12 passengers who have vanished from cruises in the past six years. Legislation is being called for to protect passengers and their families. In this most recent incident, the cruise line initially released a statement saying that one of its passengers appeared to have fallen overboard. However, the family believes a murder was committed. The experience of the victim's wife after her husband

came up missing is shocking. The wife said she had been mistreated by officials from the cruise company and by the Turkish police after her husband disappeared. She also said that she was mocked and taunted at a Turkish police station, and taken to a hospital where a man lifted her shirt and looked down her pants. When the grief stricken lady returned to the port, she found that her belongings and those of her husband had been removed from the ship and left on the dock. The lady, who had just lost her husband, says the ship sailed without her that evening. She was left with no money and no plane ticket. The cruise line did not offer to help her with a flight, hotel arrangements, or anything else. The poor lady could not speak the native language and was virtually abandoned. It is hard to imagine how all of this could have happened.

The FBI has investigated about 300 cases of "crime on the open seas" in the last five years. Nearly half of those were sexual and physical assaults that occurred on cruise ships. Each year about 10 million Americans travel abroad on cruise ships. The federal government needs to take action to protect our citizens. Further hearings on the safety and security of cruise ships, including an exploration into the risks of piracy in international waters, will be held. Officials from the Navy and Coast Guard plan to study the reporting problem further to provide guidance to lawmakers about the need for laws or regulations. Obviously, something needs to be done and soon. Based on our experience, we know the cruise ship lines don't release information relating to the incidents unless they are forced to do so. We also know that many victims of rape and similar assaults never report the incidents to authorities. This industry should be subjected to intense scrutiny and corrective action taken to protect passengers by the U.S. Congress and by other governments.

#### **LACK OF SAFETY MEASURES IN THE TRUCKING INDUSTRY CAN COST LIVES**

Although tractor-trailers make up only a small percentage of the total vehicles on the road today, they cause a majority of fatalities. According to the Insurance Institute for Highway Safety, tractor-trailers have a substantially higher fatal crash rate per mile than passenger vehicles. This is very alarming, considering that most travel by tractor-trailers occurs on our interstates. Records reveal large tractor-trailers cause approximately 3,700 passenger deaths per year. This amounts to more than one-fifth of all passenger vehicle occupant deaths in multiple-vehicle crashes, according to the Insurance Institute of Highway Safety Fatality Facts Large Trucks 2002. With this knowledge, tractor-trailer companies should implement more stringent safety policies, procedures, and communication tracking systems to keep a better tab on its drivers and trucks.

One of the main reasons truckers are involved in wrecks is because drivers are often operating on the road with very little sleep. We have reported on this problem in several previous issues. The Federal Motor Safety Regulations did require that truck drivers not exceed eleven hours-of-service without ten hours-of-rest. With the high number of fatalities caused by tractor-trailers, it is amazing that this standard was recently decreased from ten hours to eight hours.

Many experts believe that the pay structure for truckers actually creates an incentive to violate the Federal Motor Vehicle Carrier Safety Regulations. The pay of most truck drivers' is based on the miles traveled. As a result, an unacceptable number of truckers falsify their mileage logs to allow them to drive more miles. The more miles the truckers drive, the more money the trucker and trucking company make. However, the more miles driven, the more fatigued, tired, and less attentive the driver becomes. No matter how you slice it, it's bad from a safety standpoint to tie

workers' wages directly to a factor that has a negative effect on safety.

The trucking industry is aware that the hours-of-service regulation is a common area of abuse. As a result, trucking companies should be made to have strict monitoring programs that identify violators. Even though many trucking companies attempt to shift blame to their drivers, it has become apparent to the regulating authorities that some trucking companies turn a blind-eye to the hours-of-service violation. It's pretty easy to figure out why—the more loads the truck driver can deliver—the more money the company makes. That encourages a driver to drive more hours.

In the long run, this nearsighted view ultimately costs lives and the trucking company. Failure to enforce safety policies and procedures results in an increased number of accidents, injuries and deaths. Some safety leaders in the trucking industry have placed safety first and found that it reduces the number of wrecks, reduces litigation expenses, and reduces the cost of lost cargo. Most of these companies who place safety first have gone to Global Positioning Systems (GPS) in order to track its vehicles and drivers. The companies that use GPS can reduce their crash frequency by 20%, compared to those companies who do not have GPS tracking, according to the Institute. Since 1996, Liberty Mutual Insurance Company, one of the leading insurers in the trucking industry, conducted an annual survey examining the trucking industry's best safety practices. In that survey, Liberty Mutual concluded that approximately 50% of all trucking companies use GPS as a means to reduce wrecks and track its drivers.

GPS tracking, not only reduces collisions, but it also provides the trucking company with a tool to increase customer satisfaction by more on-time deliveries. It also will reduce the number of lawsuits and thereby reduce claims. GPS can reduce litigation by supplying the company with instant real time information concerning a wreck such as speed, seatbelt usage, location,

time and forces involved in the collision. This information can be obtained by a truck line from the vehicle through a computer printout and forwarded to investigating authorities to prove that its vehicle was not at fault in the wreck. However, many companies, which don't put safety first, refuse to use GPS because it can also prove the opposite. The results can show that the trucker was speeding, driving recklessly, ran a stop light or violated hours-of-service rules at the time of the wreck.

The use of governors on vehicles by trucking companies is recommended. This is a safety mechanism used by safety conscious trucking companies is governors. A governor is a device that is attached to the engine that will not allow the truck to go over a predetermined maximum speed. The trucking companies that use governors and set the governors below 70 miles per hour have reduced crash frequency by 35%. Many drivers say they don't mind having a governor on their tractor. I suspect it is the companies who are driven by the bottom line and the ones who don't want them.

Last but not least, a simple communication plan, properly enforced has been shown to reduce crash frequency by 13%. Drivers who are required to communicate regularly with their company are less likely to drive drunk, sleepy, or fatigued. Furthermore, simple communication with drivers can also allow the company to avoid one of the most unthinkable potential uses of a truck—as a weapon of mass destruction. A company which implements and enforces a communication policy and uses GSP tracking is better equipped to avoid such a scenario. In fact, many authorities consider the use of a vehicle, such a tractor-trailer, a much more likely scenario than the use of airplanes in the 9/11 attack on New York City.

Trucking companies which implement and enforce safety policies and procedures can prevent thousand of deaths per year on our highways. They may also prevent or minimize the potential for one of these loaded 80,000

pound vehicles being used as a weapon for mass destruction.

Source: The Insurance Institute for Highway Safety

## XV. ARBITRATION UPDATE

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### *POLITICAL LEADERS NEED TO STAND UP AND BE COUNTED*

For years, our firm has been waging a battle to stop or at least slow down arbitration that is being forced on consumers. In our practice, we have seen first hand the evils of arbitration. All of us know that the consequences of arbitration to a consumer can never be good. Unfortunately when a consumer is forced into arbitration by a powerful corporation, the result is always bad. Now, I have one simple message for our political officials—both in Washington and at the local level—relating to arbitration as we enter the new year. That message is the forcing of mandatory, binding arbitration on consumers is wrong and can't be justified. Persons holding public office have an obligation to consumers to take action to right this wrong. First, we all know that arbitration was never intended to be used in consumer transactions and that is undisputed. Next we know that the U.S. Supreme Court has created consumer arbitration by abusing the Commerce Clause of the U.S. Constitution.

We have finally reached the point where the politicians need to stand up and be counted in this consumer battle. The issue is relatively simple and a solution is readily available. Congress should amend the Federal Arbitration Act and take consumer transactions of all kinds totally out of the Act. This should happen—but will it? If you believe that the Act should be amended in this manner, contact the members of Congress in your state and tell them so.

One of my New Year's resolutions is that I will never again vote for a politi-

cian who votes for arbitration to apply in consumer affairs. Neither do I intend to vote for a politician who refuses to stand up and be counted on this critical issue when given the opportunity. In my opinion, this is a principle that can no longer be compromised. I hope that I won't be alone in my stand.

## XVI. NURSING HOME UPDATE

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### *NURSING HOME TO PAY \$2.5 MILLION IN SETTLEMENT*

A Lawrenceville, Georgia, nursing home, accused of neglect by family members of three residents who died, has agreed to pay \$2.5 million to settle a state and federal investigation. Federal authorities in Atlanta announced the settlement on December 22<sup>nd</sup>. In the agreement, the Lawrenceville franchise of Life Care Center of America agreed to alter practices at the nursing home. Three separate civil suits are also pending against the nursing home. They were filed by members of the victims' families but kept under seal so federal and state authorities could begin their investigation without the nursing home's knowledge. These suits can now proceed and they should be successful.

*Source: Atlanta Journal Constitution*

## XVII. HEALTHCARE ISSUES

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### *LAB MISTAKES THREATEN CREDIBILITY*

Over the years there have been allegations of serious laboratory errors relating to medical tests. The public should be able to rely on a system that assures them that test results will be accurate and without error. However, that hasn't always been the case. A prime example of a hospital that has had major prob-

lems involves Magee Women's Hospital. At least 10 cases are pending in state courts claiming harm from lab mistakes at the hospital, a prominent regional hospital for women, which is part of the highly regarded University of Pittsburgh Medical Center. Physician whistle-blowers have complained about chronic lab problems and patterns of errors and sloppy record-keeping there. Magee officials have denied these allegations. It should be noted that the lab has continued to be accredited by federal inspectors.

Unfortunately, it appears that such conflicts are not restricted to the Pittsburgh hospital. There are a number of lawsuits and complaints, citing faulty lab operations, pending nationwide. Some of the country's top medical centers are being named. The number of problem labs facing threats that their accreditations could be revoked also is growing, according to the *Los Angeles Times*. Lab inspections are performed by organizations authorized by the federal government to inspect medical labs. One such federal accreditation agency, the College of American Pathologists (CAP), performs these inspections, even as litigation mounted against it in the Pennsylvania courts. Interestingly, Magee passed inspections by CAP. Unfortunately, there are other examples:

- In Maryland, a hospital lab sent out hundreds of HIV and hepatitis test results despite data showing that the results might be invalid and mistakenly lead infected patients to believe they were disease-free. The same laboratory had just received a top rating from CAP inspectors.
- In Yakima, Washington, eight emergency room doctors walked off their jobs to protest hospital deficiencies they said included lab mistakes, such as mixed-up blood samples. CAP had declared the lab "in good standing" the year before.
- At the famed Mayo Clinic in Minnesota, an allegedly misdiagnosed gall bladder cancer case led to revelations

of a close relationship between the clinic and CAP. A Mayo pathologist serving on a CAP advisory panel twice sought and obtained accreditation renewals despite unacceptable lab practices cited by CAP inspectors.

Such cases underscore concerns that lab mistakes are a growing national problem. Recently, there have been calls for improvement and closer scrutiny. There appear to be problems with quality in many states and the problems at the labs are "systemwide." Meanwhile, the number of problem labs officially cited with failing grades by accreditation agencies has increased. As recently as last spring, 10 medical labs had either lost accreditation or were "on the edge" of losing theirs. At Magee, a group of whistle-blowers, including two former staff doctors, is alleging a pattern of lab shortcomings and inadequate regulatory pressure to fix it.

The College of American Pathologists oversees about 6,000 laboratories, making inspections every two years. It also can perform unscheduled or emergency inspections. Significantly, CAP's funding comes from the very same labs and hospitals that it inspects. Each of them is billed for the costs of those inspections. As expected, such direct financial ties have encountered what I would consider valid criticism. In 2004, CAP declared that its annual revenue was \$115.5 million, which exceeded its expenses by about \$15 million. That is a pretty fair profit margin. The head of CAP collects about \$470,000 in annual salary and benefits, federal tax records show. Its teams of inspectors also come from the ranks of pathologists and lab technicians at the very hospitals they inspect.

Since it opened in 1915, Magee-Women's Hospital has grown to become a major regional and national center for women's and infants' healthcare, according to its website. Its reputation attracted some of the patients who are now suing the hospital. A good number of documented warnings from its staff have come from the litigation. These are potentially damaging internal

records. Some of those records reveal that Magee has struggled for years with increasing workloads at its laboratory. In one "self-assessment report" dated April 9, 1999, hospital officials said, "Due to the inadequate staff, quality improvement has taken a back seat to completion of patient tests, which has been the priority and necessarily so." Records also show that the volume of Pap smear specimens submitted to the lab jumped from 77,319 in 1995 to 131,383 in 2000, an increase of 80%, while staffing increased only slightly. Meanwhile, federally mandated reviews of past test results for cervical cancer was delayed for some patients as long as six years.

Two years ago, a whistle-blower focused state attention on Maryland General Hospital. The medical center had sent out hundreds of test results for HIV and hepatitis despite questions about lab equipment reliability. CAP, which had accredited the lab, refused the state health secretary's request for its inspection reports, prompting a showdown. Then-Secretary Nelson Sabatini threatened to revoke the accreditations of all Maryland labs certified by CAP. In that instance, CAP relented. Dr. Sabatini says: "The problem is a flawed regulatory system." He cited studies showing that hospital medical errors could account for as many as 100,000 deaths per year. When confronted, Dr. Sabatini reports that the following is the response from the hospitals:

*The hospitals say, "Leave us alone, and we'll fix it. Oh, and by the way, protect us from malpractice suits."*

Dr. Sabatini says further:

*How can you tell people to give up their right to sue with those numbers of mistakes?*

Dr. Sabatini recommends that the federal government contract directly with an agency like CAP to cut out financial ties between hospitals and inspectors. That certainly makes sense and it should be done. An arrangement

like that would eliminate any conflict of interest between CAP and the hospital.

The Mayo Clinic, located in Minnesota, enjoys a tremendous reputation in medical circles and with the public. It was reported that the Clinic has used a unique freezing and processing method to analyze tissues immediately during surgery. The trouble is that Mayo's slides only last three days, not the 10 years required by federal regulation. The Mayo Clinic has been cited repeatedly by CAP inspectors for failing to meet federal standards, yet it has received full accreditation. That accreditation has been renewed in recent years following appeals to CAP by a Mayo official with close ties to the accrediting agency. Records show that Dr. Lawrence J. Burgart, a Mayo pathologist, twice wrote to CAP contesting inspection deficiency notices. At the same time, Dr. Burgart was serving as a CAP advisor, heading its surgical pathology committee. The dual roles were disclosed in a malpractice case filed by the daughter of a longtime Mayo employee who became a cancer patient at the clinic. The suit accused Mayo of misreading pathology slides, a claim leading to the discovery that the slides were not retained in accordance with federal regulations. While CAP continued to accredit the Mayo lab, agency officials denied that Mayo received special treatment.

When hospitals such as The Mayo Clinic are experiencing problems with their laboratory facilities, one has to wonder how bad the lab problems are nationwide. Obviously, there is a most serious problem that currently exists. It is a scary thought that you or a family member might undergo major surgery that was not indicated because of an error in a test that turned out to be a "mistake." There have been enough cases where this very thing has happened to make us realize this is a most serious problem.

Source: *Los Angeles Times*

## **INSURERS' TACTICS IN MARKETING DRUG PLAN DRAW COMPLAINTS**

The American public is totally confused over the new Medicare Prescription Drug Act. To say there is mass confusion in a number of areas is a gross understatement. One area of concern deals with all of the different plans that are available. According to my brother, Billy Beasley, who is a practicing pharmacist, there is one part of the program that is causing tremendous problems. Billy says his customers and others he has talked with in his area are not only confused, but also are pretty much upset. I have heard more folks say they are confused over the Medicare D prescription plan that went into effect on January 1<sup>st</sup> and really have no idea of what plan to choose. There are at least 41 separate plans in Alabama to choose from as I understand it and all have a different list of drugs. However, nationwide the number of plans I believe is 270. A person could be taking a prescription drug now and find that under the new plan selected that the drug is not listed. I encourage all of our readers who are in the "confused group" to contact their personal pharmacist to get some help.

The aggressive tactics used by some insurance companies and agents to market Medicare's new prescription drug benefit are extremely troubling. Disciplinary action should be taken if the tactics used break either federal rules or state law. Possible violations reported to Medicare officials include uninvited door-to-door solicitation of business and misrepresentation of insurance products. Federal and state officials report they have also received complaints that some insurance agents identified themselves as working for the Social Security Administration or the federal Centers for Medicare and Medicaid Services. There are insurance agents actually going door-to-door in Alabama soliciting folks. They are working for the great number of insurance companies that are able to sell a plan.

Some insurance agents have asked beneficiaries for personal information like Social Security numbers and credit card or bank account numbers. The federal government can take a range of compliance actions, such as imposing a corrective action plan on an insurer or freezing its enrollment. States can fine insurance agents and suspend or revoke their licenses. Insurers are rushing into the Medicare market, offering drug coverage to 42 million people who are 65 and older or disabled. The new drug benefit is heavily subsidized by the federal government, but will be delivered by private health plans and insurers. Many of the insurers have little experience with Medicare. Marketing began on October 1<sup>st</sup>. The benefit takes effect on January 1<sup>st</sup>. People all over the country are totally confused over the new law.

Federal officials have issued rules and a 53,000-word set of guidelines for marketing the drug benefit. The guidelines allow use of insurance agents, including independent agents who represent more than one company, but stipulate that insurers are responsible for the conduct of their agents. Christopher Eisenberg, director of health plan accountability at the federal Medicare agency, reports that the federal government had received “more than 100 complaints concerning misconduct by independent agents” marketing Medicare products. Part of the problem is that the federal government and the states share responsibility for regulating the sale and marketing of Medicare drug plans, and the division of labor is not always clear.

Insurance agents are generally licensed and regulated by state government agencies. But the federal government regulates prescription drug plans and managed care plans, known as Medicare Advantage plans. When insurers sign contracts with Medicare, they promise to comply with all federal standards. In some circumstances, insurers offering the drug benefit, known as Part D of Medicare, can offer other types of insurance, as well as discounts on

hearing aids, eyeglasses, health club memberships, and general financial services. But state officials are leery of such sales activities, sometimes called cross selling. Christina Urias, director of the Arizona Insurance Department, said:

*By its very nature, the new Part D benefit is fundamentally confusing for the Medicare beneficiary. It is inappropriate to capitalize on that confusion with an offer or sale of other insurance products that may be unsuitable for that individual.*

Federal officials report that they are investigating reports that some agents had offered cash payments to Medicare beneficiaries as an inducement to enroll in a prescription drug plan or a managed care plan. The marketing guidelines prohibit “cash inducements” and cash gifts. The new market is intensely competitive, and many insurers say they are making greater use of independent agents. Federal rules allow insurers to pay fees, or commissions, for sales of Medicare products. Regence Blue Shield, in Seattle, recently told insurance agents and brokers that the new Medicare program provided a “new sales opportunity.” For sale of a free-standing drug plan, Regence said it was paying agents a commission of \$48 a year. For a managed care product, which includes medical and drug coverage, the commission is \$192 a year. The federal government is drafting a list of “best practices” for insurers and agents. For example, insurance company managers might “conduct on-the-job training for new agents by riding along with them to monitor their presentations to Medicare beneficiaries.”

Since marketing began on October 1<sup>st</sup>, some insurance companies have accused their competitors of making grossly inaccurate or misleading statements in sales presentations. While the federal government investigates such complaints, the abuses sometimes persist, insurers said. Insurers and agents said the Medicare marketing rules were complex. Insurance compa-

nies cannot directly compare their plans with others by name. An insurer can say that its drug plan is approved by Medicare, but cannot say the plan is endorsed or recommended by Medicare.

President Bush and GOP leaders pushed this legislation through Congress. I am convinced that the Act was passed to benefit insurance companies, managed care companies and benefit plan managers first and foremost. Big bucks will be made by all of them. Hopefully, the new act will benefit real people too in some respect; however, that remains to be seen at this juncture. I believe that anybody running for Congress next year who voted for the new law may have a difficult time getting seniors to vote for them. If I were a congressional candidate I would make sure this new act was a major issue.

Source: *The New York Times*

#### **NURSING HOMES ARE ALSO UNEASY ABOUT MEDICARE PLAN**

There is another area where people are very upset and that involves nursing home residents. With two weeks before the new Medicare drug benefit begins, concerns are growing about its effect on some of the nation’s 6.4 million people—many of whom are in nursing homes—who qualify for both Medicare and Medicaid. As I understand it, those beneficiaries, called “dual eligibles” in Medicare parlance, lost their state Medicaid drug coverage on January 1<sup>st</sup>, but were automatically enrolled in Medicare drug plans chosen at random. The following pretty well describes the problem areas:

- Some nursing home operators say they don’t know which plans their residents are enrolled in, and a special telephone line set up for them to get the information has been backlogged. The Medicare program says the website is fully updated with the enrollment assignments, and the telephone backlog is two or three days.

- Each nursing home is likely to have residents enrolled in several different plans, each potentially covering different drugs, with differing rules and varying pharmacies, which might not be contracted to serve that nursing home.
- Automatic dual-eligible enrollees who also have private retiree health insurance might lose those benefits if they stay in the Medicare drug plan. About 1% — or 65,000 people — have such coverage, according to a report from the Medicare Payment Advisory Commission, a government advisory body.
- Patient advocates say some of the Medicare/Medicaid eligibles could face problems as they are switched from a program with standard statewide benefits to one where the drugs covered vary by insurer. Some will also begin to pay a co-payment for drugs for the first time, in amounts ranging from \$1 to \$5 per prescription per month.

According to reports, nursing home residents take an average of eight or nine medications. Mike Conners, long-term care advocate at California Advocates for Nursing Home Reform, a non-profit organization, says in this regard:

*They had good coverage under Medicaid, which they are losing. It's a headache for residents, family and friends who have to make these difficult and complicated decision.*

Compounding the difficulties, many nursing home residents have dementia, and not all have family members who can help select a plan, according to Conners. To avoid potential conflicts of interest, nursing homes must be careful what advice administrators give to residents. They are not allowed to steer residents into particular plans. Unlike other Medicare members, the dual eligibles are allowed to switch drug plans, every month if they want.

Source: USA Today

#### **COMMISSIONER SPARKS ANNOUNCES PESTICIDE CLEAN DAY TOTALS**

The Alabama Agriculture & Industries has successfully completed its Pesticide Clean Day Program for 2005. Pesticide collection totals were over 6,800 pounds in Chilton County and over 41,500 pounds in Baldwin County. The Pesticide Clean Day Program allows farmers, nurserymen, and pest control operators to take advantage of safe disposal of unwanted or unused pesticide wastes at no charge. Commissioner Ron Sparks, who has been a most effective public official, says:

*This program helps to reduce the amount of unwanted pesticides in barns or storage areas that might otherwise filter into our groundwater. The Department's Pesticide Management Division has done a great job working with the Alabama Cooperative Extension Service, Legacy, and CAWACO to help our farmers protect the environment.*

Materials that were accepted for collection included insecticides, herbicides, fungicides, and other products such as defoliant and growth retardants. Products not being accepted were explosives or ordinance materials, petroleum products (such as motor oil), paints, tires, medical waste, radioactive materials, or seeds. Sponsors of the two day event included the Alabama Department of Agriculture & Industries, Alabama Cooperative Extension System, Legacy-Partners in Environmental Education, and CAWACO Resource Conservation and Development Council. For more information on future Pesticide Clean Day Programs, call Faye Golden in the Department of Agriculture and Industries' Pesticide Management Division at 334-240-6580.

#### **FDA ISSUES WARNING LETTER ON BLOOD SUGAR MONITORS**

California company LifeScan Inc. has been warned by the U.S. Food and Drug

Administration about problems with the company's One Touch Ultra and Ultra-Smart blood sugar monitors, which are used by millions of people around the world. The FDA said LifeScan did not meet the agency's manufacturing standards and also failed to properly investigate reports of serious health problems associated with the monitors that resulted in the hospitalization of five people, the Associated Press reported. LifeScan, based in Milpitas, California, is a subsidiary of Johnson and Johnson. The FDA sent a warning letter to LifeScan on December 7<sup>th</sup>, but only posted the letter on its website several weeks later. The letter was prompted by an FDA inspection of the company that began April 6<sup>th</sup>, the Associated Press reported.

Shortly after the start of the inspection, according to the Associated Press, LifeScan warned that patients using the monitors could unknowingly change the unit of measure on the monitors and misinterpret their blood sugar levels. The company later reported 40 reports of patient problems caused by incorrect readings. LifeScan stopped shipping the monitors last spring and has redesigned them, the Associated Press reported. In a statement, LifeScan said it has implemented a number of corrective measures.

Source: Associated Press

## **XVIII. ENVIRONMENTAL CONCERNS**

#### **EPA WANTS TO EASE POLLUTION REPORTING RULES**

If the Bush Administration and the EPA have their way, many factories and manufacturing plants will not be required to report on all of the air pollution released from their smokestacks nor to submit their reports annually. Companies that are regulated by the EPA are required to disclose their Toxic Release Inventories every year. They are

exempt from disclosing the release of certain chemicals only if the release is limited to less than 500 pounds annually. The EPA now wants to exempt companies from disclosing their toxic pollution if they claim to release fewer than 5,000 pounds of a specific chemical or if they store it on-site but claim to release “zero” amounts of the worst pollutants. Those pollutants include mercury, DDT, PCBs, and other chemicals that persist in the environment and work up the food chain. In addition, the EPA also plans to ask Congress for permission to require companies to submit their pollution accounting records every other year instead of annually.

The EPA said in September 2005 that it wants to reduce its “regulatory burden” on companies by allowing some to use a “short form” when they report their pollution to the EPA’s Toxic Release Inventory. This inventory program began under a 1986 Community Right-to-Know Law. If Congress goes along with this plan, the first year the changes would be in effect would be the year 2008. According to EPA officials, they would still receive some information about the types of toxic releases, but not some of the details about how each chemical was managed or released by the companies. Critics of the plan have been quick to point out that such a measure would reduce the information that the public has on more than 600 chemicals put in the air, water and land, making it harder for officials, communities, and environmental interest groups to help protect public health.

In my opinion, this is another example of an attempt by the Bush Administration and its EPA appointees to let polluters off the hook. By limiting the public’s right to receive and review this vital information, citizens will not be able to keep an eye on these important issues that affect their health and their communities. I urge you to contact your congressman and recommend that he or she reject this proposal.

Source: Associated Press

#### DUPONT AND EPA SETTLE CASE

DuPont Company and federal officials have reached a settlement on charges that the chemical company concealed possible harmful health effects associated with perfluorooctanoic acid, a chemical compound used to produce teflon. DuPont will pay the largest civil administrative penalty the EPA has ever obtained under any federal environmental statute—\$10.25 million dollars—to settle violations alleged by EPA over the company’s failure to comply with federal law. Under the terms of the settlement, recently filed with the agency’s Environmental Appeals Board, DuPont is also committing to spend \$6.25 million for supplemental environmental projects, which will be discussed in more detail below. Previous reports have indicated that the EPA could have fined DuPont as much as \$313 million for not disclosing what it knew about negative health effects stemming from the processing agent known as perfluorooctanoic acid (PFOA).

If that is true, I have to wonder how good this settlement really is. Several environmental groups had called on federal officials to impose a large penalty on DuPont for not telling the government that PFOA can pass from a mother’s blood to her fetus. The chemical has been linked to cancer and possible birth defects in animal studies. The settlement, which still must be approved by the Environmental Appeals Board, would resolve DuPont’s violations related to the synthetic chemical, PFOA under provisions of the Toxic Substances Control Act (TSCA) and the Resource Conservation and Recovery Act. The settlement is believed to have resolved four violations alleged in the agency’s two complaints filed against DuPont in July and December of 2004. It also resolves four additional counts involving information about PFOA that the EPA obtained after initiating its action against DuPont. Seven of the eight counts involve violations of the TSCA requirements that companies

report to EPA substantial risk information about chemicals they manufacture, process, or distribute in commerce. An EPA spokesperson said:

*This is the largest civil administrative penalty EPA has ever obtained under any environmental statute. Not by a little, by a lot...EPA takes violations of toxic substances laws seriously and is committed to enforcing those laws. This settlement sends a strong message that companies are responsible for promptly informing EPA about risk information associated with their chemicals.*

As we have previously reported, PFOA, which is also known as C8 or ammonium perfluorooctanoate, is used in the manufacturing process of fluoropolymers, including some Teflon® products at DuPont’s Washington Works facility in Washington, West Virginia. Fluoropolymers have desirable properties, including fire resistance in oil, stain, and grease and water repellency. It is used to provide non-stick surfaces on cookware and waterproof, breathable membranes for clothing.

As mentioned above, under the settlement, DuPont has voluntarily agreed to undertake two supplemental environmental projects (SEP) valued at \$6.25 million. The first SEP, valued at \$5 million and to be completed in three years, is a project designed to investigate the potential of nine unidentified DuPont fluorotelomer-based products to break down to form PFOA. This SEP will help industry, scientists, the public, and the EPA examine the potential sources of PFOA in the environment and potential routes of human exposure to PFOA. The public will have an opportunity to nominate members to a peer consultation panel, an independent group of scientists that will address specific charges identified in the SEP.

For the second SEP, DuPont will send \$1.25 million to implement over an expected three-year period the Micro Cell and Green Chemistry Project at

schools in Wood County, West Virginia. This SEP will foster science laboratory curriculum changes to reduce risks posed by chemicals in the schools. Using micro cell chemistry, which reduces exposure to chemicals, and green chemistry, an approach that uses safer chemicals, the project is supposed to reduce risks to children's health and enhance science and safety in all of the participating schools.

The violations resolved in the settlement consist of multiple failures to report information to EPA about substantial risk of injury to human health or the environment that DuPont obtained about PFOA from as early as 1981 and as recently as 2004. The violations fall generally within three types of categories:

- Human health information;
- Environmental contamination;
- Animal toxicity studies.

The consent agreement and SEPs can be viewed at <http://www.epa.gov/compliance/resources/cases/civil/tsca/dupont121405.html>. The full record of EPA's case against DuPont is available to the public through the EPA headquarters' hearing clerk, who is located in EPA's Office of Administrative Law Judges in Washington, D.C., (telephone:) 202-564-6263. Copies of the settlement are available to the public through the board's clerk, who is located in the Colorado Building, Washington, D.C., 202-233-0122. Additional information on PFOA can be found at <http://www.epa.gov.opptintr/pfoa>

#### **CLASS ACTION SUIT FILED AGAINST GENERAL MOTORS AND ALCOA**

A class action lawsuit has been filed on behalf of Mohawk Indians who are located near Messena, New York, against General Motors and Alcoa. It is alleged that for decades GM and Alcoa negligently disposed of PCBs at their Messena facilities, contaminating the air, surface water, ground water, sediments,

soil, fish, and wildlife. It also claims that Mohawk Indians living at Akwesasane were exposed to PCBs by way of contaminated fish and consumption of breast milk from mothers who were exposed. The complaint seeks compensatory and punitive damages, as well as the establishment of a trust fund to pay for future medical monitoring, testing, and treatment costs.

#### **RESIDENTS SETTLE AFTER EXPOSURE TO SOIL FUMIGANT**

Residents in a farming town in the San Joaquin Valley in California have settled their claims for exposure to a soil fumigant. The residents are to receive \$775,000 under the settlement agreement. A state investigation found that Western Farms Service applied metam-sodium incorrectly to fields near the residents' property in July 2002, allowing the chemical to drift through the residential neighborhood. More than 250 people became ill after the incident. A court has approved the settlement, ordering the company to pay a \$60,000 fine. The two companies involved, Western Farm Service and Kirshenmann Farms, will jointly pay the \$775,000 to the residents.

Source: *Mercury News*

## **XIX. TOBACCO LITIGATION UPDATE**

### **U.S. LOSES ITS TOP TOBACCO LAWYER**

As a result of the sharp reduction of her legal team, Sharon Eubanks, the architect of the government's racketeering case against cigarette makers, has resigned. The veteran lawyer resigned after 22 years at the Justice Department. Her decision comes as the Department awaits a ruling in the landmark tobacco case. Ms. Eubanks, who obviously had become quite frustrated before deciding to leave, says:

*The political appointees to whom I report made that an easy decision. I am looking forward to pursuing other opportunities in the practice of law.*

Ms. Eubanks said the tobacco litigation team, which at one time comprised about 35 lawyers at the department, had been reduced to a "skeleton crew" in recent weeks as many members were reassigned to other tasks. As the nine-month trial drew to a close in June of 2005, some members of the trial team expressed frustration after senior department officials decided to scale back requests for a 25-year, \$130 billion national smoking cessation program, to a \$14 billion quit-smoking program. Anti-smoking activist Matthew Myers expressed concern about Eubanks' departure and cutbacks in the legal team. Myers, president of the group Campaign for Tobacco-Free Kids, says: "We would hope that (Eubanks') departure is not the result of undue political influence." On October 17<sup>th</sup>, the Supreme Court rejected a Justice Department appeal aimed at resurrecting the government's biggest weapon in the case—a potential \$280 billion disgorgement of past industry profits. As you know, defendants in the lawsuit are Altria Group Inc. and its Philip Morris USA unit; Loews Corp.'s Lorillard Tobacco unit, which has a tracking stock, Carolina Group; Vector Group Ltd.'s Liggett Group; Reynolds American Inc.'s R.J. Reynolds Tobacco unit; and British American Tobacco Plc's unit British American Tobacco Investments Ltd.

The presiding judge in the case, U.S. District Judge Gladys Kessler, is expected to rule in coming months. The tobacco companies denied they illegally conspired to promote smoking and said the government has no grounds to pursue them after they overhauled marketing practices as part of a 1998 settlement with state attorneys general. But, anti-smoking groups have urged the government to continue pressing for tough sanctions and not to settle with the industry on weakened

terms. I never believed the Bush Administration would allow the Justice Department to hurt the big tobacco companies. While, it appears I was on target, it just took a little longer to scuttle the case than I thought it would. Chalk up another victory for the “bad guys!”

Source: Reuters News

## **\$10 BILLION TOBACCO JUDGMENT REVERSED ON APPEAL**

The Illinois Supreme Court’s has reversed the \$10.1 billion verdict against Philip Morris USA. The high court ruled 4-2 that the company that makes Marlboros and other brands is not liable in a class-action lawsuit accusing it of defrauding smokers in the marketing of “light” cigarettes. The suit had been seen as a milestone for anti-tobacco plaintiffs who claimed that the company’s practices harmed their pocketbooks, not their health. Smokers wanted their money back because they were misled into thinking they were buying a healthier cigarette. The lower court’s decision could not stand, the Supreme Court held, because Philip Morris was using the “light” advertising label allowed by the Federal Trade Commission, which regulates cigarette marketing. The federal authorization made the smokers’ claim exempt under Illinois consumer-protection laws, the court ruled. In its opinion the court stated:

*If the FTC has specifically authorized the use of the terms ‘lights’ and ‘lowered tar and nicotine’ by [Philip Morris USA] in its labeling and advertising, [the firm] may not be held liable under the Consumer Fraud Act, even if the terms might be deemed false, deceptive, or misleading.*

The court sent the case back to the Madison County court, where it originated, with instructions to dismiss the suit. It may be noteworthy that the appellate court’s decision was split. There were two concurring opinions and two dissents. I am not sure if this

case has any future as a class action. In fact, I seriously doubt that it will. Any claims will have to go forward—if at all—as separate lawsuits. That will make it most difficult in my opinion.

Source: Chicago Tribune

## **XX. THE CONSUMER CORNER**

### **WHISTLEBLOWER QUESTIONS SAFETY OF FOOD PACKAGING**

As you know, Teflon is a chemical that’s widely used in fast-food packages, candy wrappers, and microwave popcorn bags. It now appears that Teflon may pose a serious health hazard. Glen Evers, a former DuPont senior engineer, alleges the company has failed to disclose all it knew about the chemical. His allegations came as an environmental activist group has obtained internal DuPont documents and provided them to the Food and Drug Administration (FDA) for its review. In 1967, the FDA approved the chemical’s use in a wide range of food packages. The FDA says the agency hasn’t changed its position that food packaging containing the chemical is safe for consumer use. But, the agency confirms that it is investigating the chemical’s safety. Mr. Evers, a 22-year veteran of DuPont, says that the company failed to tell the FDA of internal studies showing that the chemical coating comes off food wrapping in greater concentrations than thought when the FDA first approved its use. The chemical is widely used in the paper wrapping for fast foods such as french fries and pizza, as well as candy wrappers, microwave popcorn bags, and other products. It helps to prevent grease stains from coming through the wrapper. Concerning the hazard, Mr. Evers says:

*You don’t see it, you don’t feel it, you can’t taste it. But when you open that bag...and you start*

*dipping your French fries in there, you are extracting fluorchemical... and you’re eating it.*

Once in the body, the chemical — zonyl — can break down into a chemical called PFOA. As we have reported, PFOA stays in the blood, a fact that was unknown when zonyl was first approved for use. The government says PFOA is now believed to be in the blood of nearly every American. PFOA bioaccumulates, which means the chemical goes into the blood, and stays there for a very long period of time. Studies have linked PFOA to cancer, organ damage, and other health effects in tests on laboratory animals. The Environmental Protection Agency currently is considering its safety in humans.

A DuPont memo from 1987, obtained by the Environmental Working Group, reveals test results that show the chemical zonyl was coming off food wrapping at three times the amount DuPont first thought it would. It appears the company never notified the FDA. DuPont is already under criminal investigation for failing to notify the government that PFOA might have been linked to birth defects of children born to workers at a DuPont plant in West Virginia. Tim Kropp of the Environmental Working Group, a toxicologist, stated:

*The documents that we are sending now to the FDA show that this is a pattern of cover-up and suppression.*

The company denies any suggestion of a cover-up and insists the chemical is perfectly safe for use in food wrapping even though it does come off in small amounts. DuPont claims those amounts don’t pose a health hazard. As expected, DuPont says it has “always complied with all FDA regulations and standards regarding these products.” Having dealt with the FDA, that doesn’t raise my comfort level very much.

Mr. Evers has filed suit against DuPont, asserting they fired him because of his opposition to some of their practices. DuPont says Evers “lost

his job in a restructuring” and denies his allegations. Mr. Evers makes this observation: “DuPont thinks that they have pollution rights to the blood of every American, every man, woman and child in the United States.” If he is correct, that’s a scary thought.

Source: ABC News

### **BE AWARE OF A JURY DUTY SCAM**

The Better Business Bureau has warned of a new scam targeting people across the nation. Scammers will call would-be victims, telling them they’re being called for jury duty. The caller will then ask for personal information, such as a social security number or a checking account number. Giving away personal information like that can leave people open to identity theft, one of the fastest growing personal crimes in America. This jury duty scam already has been reported in 11 states across the country. The FBI and some federal courts have issued nationwide alerts on their websites, warning consumers about the fraud. This is another example of how con artists will steal your identity and do you harm in the process. Never give personal information over the telephone—and that’s a rule that can’t be broken.

Source: Better Business Bureau

### **HACKERS HIT SAM’S CLUB**

A computer hacking scheme involving Sam’s Club has left about 500 members of the Alabama Credit Union exposed to fraud, according to a recent report by the Tuscaloosa News. Credit Union CEO Kayce Bell said Visa alerted them on December 5<sup>th</sup> that hackers stole debit and credit information. It is unclear whether they targeted any other financial institutions or merchants in West Alabama. The credit union is contacting affected members by phone and mail, advising them to make arrangements to block their accounts and have new cards reissued. Thus far, none of the credit union’s members

have reported fraudulent activity on their accounts. Sam’s Club said fraudulent charges appeared on statements of cardholders who bought gas at the wholesaler’s stations between September 21<sup>st</sup> and October 2<sup>nd</sup>.

Sources: *The Tuscaloosa News* and *The Associated Press*

### **DIRECTV TO PAY FOR DO-NOT-CALL VIOLATIONS**

DirecTV Inc. will pay \$5.35 million to settle charges that its telemarketers called households listed on the national do-not-call registry to pitch satellite TV programming. Federal Trade Commission (FTC) officials announced the settlement last month. The proposed settlement, if approved by a federal judge in Los Angeles, would be the FTC’s largest civil penalty in a consumer protection case. The DirecTV complaint, filed by the Department of Justice at the FTC’s request, named the company and five telemarketing firms it hired, as well as six principals of those firms. The multimillion-dollar penalty drives home a simple point, and that is “sellers are on the hook for calls placed on their behalf.” The complaint alleged that DirecTV and the various telemarketing firms violated do-not-call rules beginning in October 2003, the month the registry debuted.

The registry, which contains more than 110 million phone numbers, was designed to prevent consumers from receiving unwanted calls from telemarketers. Under the new rules, telemarketers must match their contact lists against the registry every 31 days. Companies that have recently done business with households are exempt, as are charities, pollsters and callers on behalf of politicians. In an unrelated case, DirecTV Inc. promised to reimburse unhappy customers and to make its advertised offers clearer. This is according to a settlement reached with 22 states over deceptive marketing complaints involving the company.

Source: *Associated Press*

### **BOYS HURT ON BIKES SUE WAL-MART**

Recently, there have been a number of safety complaints concerning bicycles sold by Wal-Mart. Most of the bicycles in question are mountain bikes and are imported from China. One such case involved Anthony McCurdy, who watched the front wheel fall off his bike while riding to a bowling alley. The 12-year-old’s face hit the sidewalk, and his bicycle landed on his chest. Short of breath, he got up, but then had a seizure and again fell face-first, knocking out his two top front teeth. Anthony, now a high school junior in West Chicago, said the crash more than five years ago changed him.

Anthony and eight other boys from around the nation are suing retail giant Wal-Mart Stores Inc., which sold the bikes, and a San Rafael, California company that imported them from China. The first trial in the case began on December 19<sup>th</sup> and at press time we didn’t know the result. The lawsuit asserted that the so-called quick-release devices on the front wheels malfunctioned when the bikes hit bumps. The clasps, used on millions of bicycles, are designed to hold the front-wheel axle to the frame and allow the wheel to be easily removed for repairs or transport. But, there have been a number of incidents where the front wheels came loose, causing severe injuries.

The boys and their parents also claim that Wal-Mart conspired with Dynacraft BSC Inc. of San Rafael and Carl Warren & Co., which investigated complaints for the importer, to cover up the defects. The suit alleges that Wal-Mart, which sold the bikes for about \$150 each, and the Marin, California importer, which has a record of failing to report injuries, knew the bikes were dangerous because of complaints from users, but failed to report alleged defects to government regulators while continuing to sell the bicycles.

The bikes alleged to have defective wheel-release levers are no longer being sold, but many of them are still in use.

Wal-Mart says the bicycles in question—mostly mountain bikes known as Next Ultra Shock and Next Shock Zone that had mechanisms allowing their front wheels to be removed with a hand lever—are safe as long as they are “properly used.” Under federal law, importers, distributors, retailers and manufacturers are required to tell regulators about anything “that could be a substantial product hazard or has injured or killed a consumer.” The firms are left to determine which injuries were caused by defects. The U.S. Consumer Product Safety Commission is investigating the parents’ claims of defective quick-release levers.

The parents have started a Web site (shokbikes.org) warning others about the bicycles. The parents do not object to quick-release systems in general. But, the suit alleges that most of the families didn’t receive manuals warning that “correct adjustment of the axle nuts or quick-release levers is vitally important to avoid an accident caused by loose wheels.” The bikes were assembled by untrained Wal-Mart workers, according to the suit, and lacked adequate backup systems to keep front wheels in place. Eric Hjertberg, manager of new technology for Full Speed Ahead, an internationally respected bicycle component-maker, said quick releases on bicycles have generated at least as much litigation over the years as all other bicycle parts combined.

Wal-Mart and Dynacraft knew of problems with the front wheels but continued to sell the bikes, the Marin lawsuit alleges. None of the parents were told that similar accidents had occurred on the bikes imported by Dynacraft, and as a result, some of them accepted small cash settlements for medical costs, according to the suit. For more than two years, Wal-Mart has been reporting defective products under specific rules adopted after the company was accused of failing to report instances in which customers were injured while trying exercise equipment in stores.

The Consumer Product Safety Com-

mission fined Dynacraft \$1.4 million a year ago after accusing the company of failing to report defective forks on the steering column of hundreds of thousands of mountain bikes. Those bikes are not the ones targeted in the lawsuit alleging faulty front-wheel releases. The penalty was assessed after five recalls over the course of 18 months. According to the Commission, Dynacraft continually underreported injuries, including concussions, broken bones, and a blood clot in one rider’s brain, and failed to pull defective bikes from store shelves in a timely manner.

Source: *San Francisco Chronicle*

#### **TINY TOYS REMAIN MAJOR CAUSE OF CHILD DEATHS**

By the time this issue is received, children of all ages around the country will be happily playing with toys received during the Christmas holidays. Unfortunately, some of these toys are too dangerous for small children. Although decades of effort have made toys safer, children still choke on balloons, get strangled by yo-yo water balls, and suffer hearing damage from loud playthings. The annual toy safety survey by the U.S. Public Interest Research Group (U.S. PIRG) is most revealing. The survey noted that the Consumer Product Safety Commission (CPSC) reported the deaths of 16 children in toy-related incidents last year, along with another 210,000 emergency room visits.

Choking on small parts, balls, and balloons remains a leading cause of death and injury in children younger than 15. U.S. PIRG researchers reported that they found toys for sale that violated a federal ban on small parts in toys intended for children younger than three. Others meant for children under six that included small parts lacked required warning labels. The research group recommended parents use a choke testing tube or a cardboard toilet paper roll to test small toys and parts. If any toy or part fits in the tube, then it is too small for children under three or

older children who still put things in their mouths, according to U.S. PIRG.

The group also found that manufacturers continue to market latex balloons to children younger than 8, despite the choking risk. Children that young should never be given balloons to play with, the report recommended. Tuesday’s report singled out yo-yo water balls as a potential strangulation hazard. The liquid-filled balls are attached to stretchy cords that can be used to swing them overhead like a lasso. The group said their sale should be banned. CPSC spokesman Scott Wolfson said the products have not been recalled, but the government recommends that parents cut off the toy’s cord. The U.S. PIRG group also recommended that shoppers avoid buying toys that seem too loud, since children can be even more sensitive to noise than adults. Researchers said they found some noisemaking toys, including toy electric guitars that appeared to exceed voluntary standards. The group recommends taping over the speakers of excessively loud toys or simply removing their batteries to protect a child’s hearing. The report also said that testing revealed that some toys, pacifiers, and other products labeled as “phthalate-free” actually contained the chemicals, which are used to soften plastics but are potentially hazardous. The group has petitioned the Federal Trade Commission to investigate its findings.

Source: *Associated Press*

#### **FORD MOTOR COMPANY SETTLES LAWSUIT OVER PLASTIC PARTS**

Ford Motor Co. has finalized a settlement that requires the automaker to pay at least \$735 each to automobile owners who had to replace an intake manifold. Ford also is extending warranty coverage on the plastic part to seven years to cover vehicle owners who haven’t replaced the manifold. The class-action lawsuit covered a total of 1.8 million vehicle owners. As you know, an intake manifold is a pipe that supplies a

mixture of fuel and air to the engine's cylinders. Vehicles included in the settlement are the Ford Crown Victoria, Mercury Grand Marquis and Lincoln Town Car from the 1996-2001 model years; the Mercury Cougar, Ford Thunderbird and Ford Mustang from 1997; some Mustangs from the 1998-2001 model years; and some Ford Explorers from the 2002 model year.

Plaintiffs claimed the intake manifolds are prone to premature cracking, which could lead to coolant leakage and expensive damage to the engine. Owners who replaced their intake manifolds within the first seven years of ownership can take the vehicles to a dealer and obtain reimbursement whether or not they have a receipt. The vehicle must be brought to a dealer by March 16<sup>th</sup>. This settlement is significant for a number of reasons—one being that individual claims would have been too expensive for a vehicle owner to bring—and that is justification for the class approach.

Source: Detroit Free Press

## XXI. RECALLS UPDATE

### **GENERAL MOTORS CO. RECALLING 425,000 VANS**

General Motors Co. is recalling about 425,000 full-size passenger and cargo vans because of reports that the seat belt buckles will not latch or unlatch. The recall affects the Chevrolet Express and GMC Savana from the 2003-2006 model years. GM, the world's Number One automaker, discovered the problem through an analysis of warranty claims. Consumers reported problems latching the buckle or unlocking it once it was in place. GM spokesman Alan Adler said there have been no reports of injuries. Dealers will inspect the buckles and replace the upper buckle cover. If the restraint isn't working properly, dealers will replace the entire buckle assembly. The Express and Savana passenger vans

have seating for eight people. The cargo version seats two people.

### **CRIBS SOLD AT TOYS R US STORES RECALLED**

The U.S. Consumer Product Safety Commission, in cooperation with Delta Enterprise Corp., of New York, has announced a voluntary recall of the Lov's "Europa" Natural Color Cribs sold at Toys R Us nationwide from July 2004 through August 2005 for about \$200. Manufactured in Indonesia, the crib's paint contains high levels of lead. Lead poisoning in children is associated with behavioral problems, learning disabilities, hearing problems, and growth retardation. The cribs are made of wood and are natural color. Only cribs that are labeled Lov's "Europa" with "Style # 4827-2 M.E.G. No.: W 24088 Date: 22 JUN 2004" are included in the recall. The brand, style, and date code are printed on a label attached to the mattress support platform. According to the CPSC, no injuries from the product have been reported. Consumers should stop using the recalled crib immediately and return to retailer where purchased for a credit or refund. For additional information, contact Delta Enterprise Corp. toll-free at (877) 660-3777 between 9 a.m. and 5 p.m. Monday through Friday, or visit the firm's Web site at [www.deltaenterprise.com](http://www.deltaenterprise.com).

### **GE OVEN RECALL**

The Consumer Product Safety Commission has announced a voluntary recall of 6,000 GE Monogram 36-inch and 48-inch professional gas ovens. The built in ranges have a design flaw that can cause an electrical arc between the wiring and the gas supply tubes posing a fire hazard. The company has received about six reports of fire, but so far no injuries. The ranges were sold at nationwide from February 2004 through November of 2005. There are eight models being recalled: ZDP48N6RH1SS ZDP48L6RH1SS ZDP48N4GH1SS

ZDP48L4GH1SS ZDP48N6DH1SS ZDP48L6DH1SS ZDP36N4DH1SS ZDP36L4DH1SS The recalled ranges have serial numbers starting with DG, FG, GG, HG, LG, MG, RG, SG, TG, VG, ZG, AH, DH, FH, GH, HH, LH, MH, RH, SH. To find the model and serial number, look underneath the top ledge (also called the "bull nose"), above the range controls. If you have one of these ovens, call GE to schedule a free in home repair at 1-866-696-7583. Information on the recall is also included on GE's Recall Information page at <http://GEAppliances.com> and on the CPSC's recall site.

### **DELL RECALLS 22,000 LAPTOP BATTERIES**

Dell has recalled about 22,000 notebook computer batteries. The U.S. Consumer Product Safety Commission reports that the batteries can overheat and pose a fire risk. Dell has received three reports of batteries overheating. The incidents damaged a tabletop, a desktop and other personal effects. No injuries have been reported. The batteries came with several laptop models:

- Latitude D410, D505, D510, D600, D610, D800, D810,
- Inspiron 510M, 600M, 6000, 8600, 9200, 9300
- XPS Gen 2
- Dell Precision M20, M70

The batteries were also sold separately, including as secondary batteries and in response to service calls. "Dell" and "Made in Japan" or "Made in China" are stamped on the batteries. The identification number for each battery appears on a white sticker. Customers should have this number available when they contact Dell to determine if their battery is part of the recall. The computers with these batteries sold for between \$900 and \$2,650, and individual batteries sold for between \$99 and \$179. Customers should contact Dell to determine if their battery is part of this recall. If it is, consumers should immediately stop using the battery as a power

source for their notebook computer. Dell will provide a free replacement battery. For more information, call Dell at (866) 342-0011 between 8 a.m. and 5 p.m. Central time Monday through Friday or go to [DellBatteryProgram.com](http://DellBatteryProgram.com).

#### **FDA WARNS OF BAXTER HEMODIALYSIS DEVICE RECALL**

The Food and Drug Administration has alerted health-care professionals to a recall of a Baxter Healthcare Corp. hemodialysis device used to filter blood in patients with damaged kidneys. The company, a unit of Baxter International Inc., of Deerfield, Illinois, first warned about the problem in September and then again last month. A kink in the blood tubes used with Baxter's Meridian Instrument device has contributed to the death of one patient and serious injury in another, the FDA said. The FDA also said it performed its own testing of the devices and confirmed the problem with blood-line kinking. The company recalled the devices, which it stopped making in 2002. It said in July that it would no longer make any hemodialysis instruments. The FDA said there are about 2,800 units currently in use, with approximately 2,100 devices in the U.S.

## XXII. FIRM ACTIVITIES

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#### **EMPLOYEE SPOTLIGHTS**

Leigh O'Dell And Mike Andrews Become Shareholders

Leigh O'Dell has become a shareholder in the firm. She returned to the firm in April of 2005 and has been working in our Mass Torts Section. Leigh was a lawyer with us from 1994 through 1998. She left in 1998 to take a position with Focus on the Family. Under the leadership of Dr. James C. Dobson, Leigh served Focus on the Family as Director of Women's Ministries. In that capacity, Leigh was responsible for Renewing the Heart, a

nation-wide series of one-day arena events designed to encourage and refresh women through worship and the Word of God. Leigh came back to us in 2000 for a short time before joining AnGeL Ministries, the ministry of Anne Graham Lotz, daughter of Dr. Billy Graham. As Director of Events, Leigh was responsible for the development and execution of Just Give Me Jesus, a nationwide series of two-day arena events devoted to the exaltation of Jesus Christ and designed to revive the Church. We are highly pleased that Leigh has returned to the firm. She is a very good lawyer and is doing an outstanding job. Leigh is currently working on Vioxx cases.

Mike Andrews, a lawyer in the Personal Injury / Product Liability Section of our firm, has also become a shareholder. He graduated cum laude from Thomas Goode Jones Law School in 2001. While attending Jones, Mike served two terms as a member of the Law Review Board, held a position as Senator in the Student Bar Association, was the President of the Kenneth F. Ingram Senate of Delta Theta Phi law fraternity, and was the Chief Justice of the Student Bar Honor Court. Mike, a native of Dothan, was recognized for Best Scholastic Achievement in Contracts and Criminal Law and was also the recipient of the West Publishing Corpus Juris Secundum Award for academic excellence. He is a member of the Alabama Trial Lawyers Association, Montgomery County Trial Lawyers Association, American Bar Association, and the Alabama State Bar. Mike specializes in product liability litigation. He has the technical knowledge required to handle cases of this nature. Mike is a very hard worker and has handled a number of significant cases. He and his wife Carol have three children, a daughter, Shelby, and two sons, David Michael II and Jack. They attend First Baptist Church of Dothan. Mike is a very good lawyer and does an outstanding job for his clients.

Scott Thomas

Scott Thomas, who joined the firm in May of 2003 as Lead Web Developer, has since moved into the position of Director of Technology. In his current position, Scott is charged with establishing, planning, and administration of the overall policies and goals for the information technology department. He analyzes the needs of departments to establish priorities for feasibility studies, systems design, and implementation to develop new information processing systems and/or modify the firm's existing information processing system. Scott manages a team of network administrators, programmers, technicians, and consultants.

Scott is married to Taylor Cook Thomas, who is a subrogation clerk in our Mass Torts Section. Scott has two children—Matthew, 10 and Destiny, 6. He has studied computer programming and graphic design at both Louisiana State University and Auburn University. Over the past ten years, Scott has had the opportunity to develop skills such as HTML, PHP, JavaScript, Flash, and Visual Basic programming. He has certifications in Web Developer (CIW Associate), Web Developer (CIW Professional) and IWA Certified Web Professional. Scott, who is doing an outstanding job for the firm, has a very important role and we are most fortunate to have him with us.

## XXIII. SPECIAL RECOGNITIONS

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#### **LITIGATORS OF THE YEAR**

Each year a lawyer in our firm is honored as "Litigator of the Year." The award is based on performance during the year. Andy Birchfield and Paul Sizemore were chosen for 2005. This is the first time that the balloting for this honor ended in a tie. As a result, we have two honorees for 2005. Each of these fine lawyers certainly deserves to

be so honored. Therefore, the firm is honoring two excellent lawyers as the cream of the crop from the firm. Both Andy and Paul handle complex mass torts litigation and have done an outstanding job for our clients. They have worked very hard in 2005 on Vioxx, Celebrex and Bextra cases. We are pleased to honor them in this way. They have set the bar very high for next year's winner.

#### **JACK VENABLE WAS A "GIANT" IN THE HOUSE OF REPRESENTATIVES**

Jack Venable, a long time member of the Alabama House of Representatives, died in November. Jack Venable, who was my longtime friend, was truly a "giant" in the Alabama Legislature. He was highly respected by Democrats and Republicans alike, which has become very difficult. Jack was fair, honest, smart, thoughtful, and respected. The Tallassee native served in the House of Representatives from 1974 until his death, representing District 31, which includes parts of Elmore and Coosa Counties. Jack chaired the agenda-setting House Rules Committee. Jack was editor and publisher of *The Tallassee Tribune*, and was an Auburn University trustee from 1989 to 2004. The veteran lawmaker served with honor in the House for 31 years. Jack is survived by his wife of 41 years, Josephine, and their children, Cameron Venable Dean and Ben Venable. Jack Venable will be missed by his many friends. He will certainly be extremely hard to replace in the Legislature. We need more folks like Jack Venable in government.

#### **A WORTHY ENDEAVOR**

Workplace Fairness is a four year old non-profit organization that strives to make workplaces fair—not just for individuals—but for all working people through advocacy and education. Such things as a living wage, affordable health care, a secure retirement, equal opportunity, a work/life balance, healthy and

safe workplaces, reasonable privacy, the right to organize, and access to justice in the courtroom are what Fairness is all about. My friend, Bob Childs, a very good lawyer from Birmingham, brought this group to my attention. The group has published a workers rights book and a journal of employee rights and employment. If you want additional information, go to their website [www.workplacefairness.org](http://www.workplacefairness.org). In my opinion, this is a most worthwhile endeavor and, in my opinion, will prove invaluable to working men and women in the U.S.

#### **82 RACING FOR 2006**

All of us are looking forward to a great year for the Beasley Allen race cars. Grant Enfinger and his crew are building a new car that will be ready for the circuit 2005. Grant, Heath Holcomb and Logan Hall and Floyd Enfinger (who is known at the tracks as the "God Father") worked extremely hard to get the new car ready. The 82 Racing Team has set high goals for the New Year. We are looking forward to a great year with two good cars ready to go. All of us who have been involved with 82 Racing are excited over the prospects for the team 2005.

## **XXIV. SOME PARTING WORDS**

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As we approach 2006, one of my prayers will be that we can find a way to bring some reason and sanity to our federal government in all of its branches. Over the years, we have seen the vast power of Corporate America exert an influence—which in recent years has amounted to almost total dominance—over the affairs of our federal government. In fact, over the last five years, nothing has happened in Washington of any consequence that didn't have the overt blessings of the powerful

lobbyists representing industries such as automobile manufacturers, giant oil, pharmaceutical, chemical, insurance and tobacco. In addition, Corporate America has been successful in placing its agents in key government jobs that are filled by appointment. We have also witnessed unprecedented attacks on our judicial system and those attacks have not let up. Hundreds of millions of dollars have been spent pushing the myth of tort reform. As a result of all of this, the rights and privileges of ordinary folks are being slowly taken away, with no apparent regrets by many of our political leaders. In my opinion, all of this could eventually lead to the ultimate demise of our nation as a world power. One President, who obviously had tremendous wisdom and foresight, had this to say:

*I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country...corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.*

*President Abraham Lincoln,  
November 21, 1864*

We are also witnessing an unprecedented moral decline in our nation that in the opinion of many is just as dangerous as anything we have ever faced. Young people are being constantly bombarded with continuous episodes of filth on a daily basis by way of television programming and movie content. Sexual content, violence, vulgar language and gross conduct every description have become standard fare with very little opposition from our elected officials and unfortunately from many of our churches. We have become accustomed to watching acts of extreme violence on the evening newscasts,

including shootings in the workplace, in malls and even in our schools. We also witness on many of these newscasts corporate executives—in handcuffs—having been arrested and charged with major crimes connected to their companies. We no longer can trust Wall Street to protect our investments and retirement funds. Little children find themselves in danger of being assaulted and even killed by child molesters. Illegal drug use by adults and young people appears to be at an all time high and that is believed to be responsible for a high percentage of the crime in the U.S. Who would have ever expected this sort of thing to be going on in a nation like the United States with no apparent slowing down in sight?

In addition to our domestic problems, we are currently bogged down in a war in Iraq that most likely should never have been brought—or at the least, not for the official reasons given by our government—and that's something that can't be undone. As a result, we have lost far too many American lives and have expended hundreds of billions of American dollars—with no end in sight. The war was easily won, but the occupation phase has been a virtual nightmare. Ironically, any person who questions this war or the prolonged occupation in any manner is labeled by the Bush White House as being unpatriotic. Clearly, we have to finish what was started in Iraq and for that reason we

simply can't pack up and walk away. To do so, would further weaken our nation's influence on the world stage. However, I am convinced that we must find a way to get our troops out of Iraq in an acceptable manner without losing face. Unfortunately, that will be most difficult, if not impossible. So it appears we are in Iraq for the long haul.

Another real concern for our elected officials in Washington is the very real military threat from other foreign countries—that have the capability—unlike Iraq—to do great harm to the U.S. at home and abroad. Compared to countries such as Iran and North Korea, Iraq was like a toothless tiger, and that is a tragic fact. Hopefully and prayerfully, we won't find our country engaged in military conflicts with any of those countries. The worldwide threat of terrorism, which is of great concern, is a fact of life and is something that must be dealt with.

Finally, we also must be greatly concerned—from an economic perspective—about countries such as China and India. Those countries are developing the technical ability to take over many of the markets that our country has claimed a major portion of in the past. When you consider that the U.S. has virtually become a debtor nation with a record deficit, and a terrible trade imbalance, this economic threat is very scary. Simply put, things on the global front are not too promising.

Having said all of this, where can we turn for strength and get the capacity to overcome all of the massive problems our nation currently faces. There can be but one answer in my opinion. As we enter the New Year, we must depend on God to make our paths safe and secure. As a nation, we can't continue to be disobedient to our Creator in so many ways and still exist as a powerful nation. I am convinced that faith in God and total obedience to Him has to be the first order of business for all of us in 2006. That has to be our focus on a daily basis. We should learn from the lessons of our past and figure out where things have gone wrong. Our focus must be on God and we must trust in His faithfulness so as to put things in order in our personal lives and ultimately in our country. We can no longer afford to compromise our beliefs on matters of spiritual importance. In spite of all the problems and threats facing us, there is great hope for our country and I am confident that we will survive and become even stronger. In fact, I am most optimistic as we go into 2006. Consider this passage and carry it with you for the New Year:

*Commit your way to the Lord,  
Trust also in Him, and He shall  
bring it to pass.*

*Psalms 37:5*

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please visit our Website: [www.BeasleyAllen.com](http://www.BeasleyAllen.com)*